

Fall 9-1-1949

Probate Court Jurisdiction Over Testamentary Trusts

Coleman Karesh

University of South Carolina

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Coleman Karesh, Probate Court Jurisdiction Over Testamentary Trusts, 2 S.C.L.R. 13. (1949).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE SOUTH CAROLINA LAW QUARTERLY

REVIEW SECTION

PROBATE COURT JURISDICTION OVER TESTAMENTARY TRUSTS

COLEMAN KARESH *

Probate Court jurisdiction in South Carolina is an ill-defined thing, even in those fields in which that Court has immemorially operated—either as the old Court of Ordinary or as its modern successor. The jurisdiction of the Probate Court over testamentary trusts is even more shadowy. That court does not have inherent jurisdiction over trusts—testamentary or other—and whatever jurisdiction it may have is solely the result of statutory action. The statutes, however, create the problem of jurisdiction, rather than fix or settle it. It is this jurisdiction, and the problems thrown up by legislation concerning it, that are the subject of this article.

When we check our first source of authority—after the statutes themselves—namely, the reported cases, we find, frankly, no satisfactory solution: the cases seem, instead of resolving the difficulty, to compound it.

A second source of enlightenment is the opinions of those lawyers who, in fact or by reputation, qualify as experts in Probate Court practice. It must be said, after a digesting of their views, that their opinions, for the most part, mirror the uncertainties of the law, that none of their judgments approach the positive, and that they are, in truth, undisguised confessions of doubt and open admissions of incomprehension.

A third avenue of search might prove enlightening: inquiries directed to the Probate Judges themselves, to learn what their experience has been with, and what they think about, trusts created by will. The inquiries thus made are the principal subject of this piece, and the endeavor has been

* Professor of Law, University of South Carolina.

built around a questionnaire directed to the Probate Judges of the forty-six counties of this state. Obtaining replies has been a long and arduous task, not altogether successful, but the results may, at least, point up the problem, emphasize the difficulties it presents, and, perhaps, bring home to some persons the need for clarification or reform of the law. Replies to the questionnaire were received from Probate Judges of twenty-two counties: Aiken, Barnwell, Beaufort, Chester, Clarendon, Darlington, Dillon, Edgefield, Fairfield, Georgetown, Kershaw, Lancaster, Laurens, Lee, Marion, Marlboro, McCormick, Richland, Spartanburg, Union, Williamsburg, York. To these obliging public servants is due a considerable measure of congratulation and thanks—for essaying a difficult and time consuming task.¹

The silence of the twenty-four Probate Judges who did not respond may be attributed to one or more of the following factors: (a) inertia; (b) unobligingness; (c) the chores of office—and, in some cases, running for it—and the consequent limitations of time; (d) the honored American tradition of prompt consignment of bills, advertising matter, requests for contributions, notices of lodge meetings, and questionnaires, to the wastebasket; (e) the judicial prerogative—or duty—of refusing to pass on questions in the abstract; (f) the constitutional privilege against self-incrimination; (g) uncertainty. The writer, without any charitable leaning, is inclined to the belief that the last factor—uncertainty—is the factor chiefly responsible for the reticence of these twenty-four,—an uncertainty not innate in the person, but induced by the uncertainty of and in the law itself. If this is the chief element, it is an item of considerable importance and highly significant in itself. Perhaps one given to more scientific ap-

1. The study encompassed by this article was undertaken initially—more than a year ago—, at the instance of the writer, by Mr. Gasper L. Toole, III, then a senior law student. Before Mr. Toole received even so much as a handful of replies to the questionnaire which he had mailed out, he graduated from the law school and was admitted to the bar. After his departure the filled-in questionnaires arrived in such a slow trickle that the endeavor took on the character of a long-term project. Student tenure being what it is, compared to the relative longevity of the teacher, the writer undertook to carry on where his eager student, called to more practical—and perhaps more useful—enterprises, left off. The writer acknowledges his debt to Mr. Toole for the start that he gave to this work.

praisal might say that the unanswered questionnaires should be broken down into the same proportions and given the same relative evaluation as the answered questionnaires; but since it can pretty well be taken for granted that people who have positive, easily-stated views are not chary with them, a more reasonable assumption is that answers have been withheld because they cannot definitively be given. This, to repeat, is not due to individual deficiencies, but to the fact that the state of the law does not lend itself to easy solution. These statements may smack of being professorially superior or patronizing, but the writer denies that they are intended to be so, since, if he had ever succeeded in getting a clear picture in the first place, he would not have undertaken this experiment in frustration.

It will be noted that conspicuously absent from the list of those answering are several of the more populous and wealthy counties, in which—it is a fact—many large trust estates are being administered and in which corporate trustees do an extensive business. Their absence diminishes somewhat the representative character of the list, but it is not believed that, on the whole, the conclusions to be drawn will be materially affected thereby.

Before setting out the questions submitted, and the answers and comments, some preliminary, and rather extended, observations on the Probate Court are in order.

The old Court of Ordinary gave way to the Probate Court under the provisions of the Constitution of 1868. By Article IV, Section I, it was provided:

“The Judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: a Court of Common Pleas, having civil jurisdiction, and a Court of General Sessions, with criminal jurisdiction only, in Probate Courts, and in Justices of the Peace. The General Assembly may establish such municipal and other inferior Courts as may be deemed necessary.”

By Article IV, Section 20, it was provided:

“A Court of Probate shall be established in each County, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy, and persons *non compotes mentis*. * *”

The effect of the two quoted sections was to make the Probate Court a Constitutional court and constitutionally to define and limit its powers. Thus, it was held in *Davenport v. Caldwell*,² that an Act³ conferring jurisdiction on the Probate Court to effect partitions was unconstitutional, as being in excess of the powers prescribed in the Constitution, because: "The jurisdiction thus defined and specified in the Constitution can be neither enlarged nor diminished by the legislative power of the State, which is itself the creature of the Constitution, and controlled by the provisions of that instrument, which constitutes the fundamental law." This decision was approved and followed in *Herndon v. Moore*,⁴ but there the court decided that, in order to protect titles derived through Probate Court decrees in partition—sought and issued on the common assumption that the power existed in that court—it would give force to the maxim *communis error facit jus*—a common error makes the law—and leave undisturbed those partitions effected prior to the decision in the *Davenport* case.

A similar striking down of legislative action, because opposed to the constitutional definition and limitation of Probate Court powers, occurred in *Thomas v. Poole*,⁵ in which, while following the *Herndon* decision as to partitions effected before the statement of the law in the *Davenport* case, the Supreme Court declared—affirming in part a lower court decree—that the Probate Court was without power to appoint a trustee to succeed one who had died. The lower court decree, thus in part affirmed, stated: "The Court of Probate has no power to appoint a trustee, the act of the legislature giving this power being void for the same reason that it could not confer jurisdiction in partition."

The status of the Probate Court was materially changed by the Constitution of 1895. By Article V, Section I, it is provided, in part:

"The judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. The

2. 10 S. C. 317 (1877).

3. 14 Stat. 77; Rev. Stat. 1873, 573, Code Civ. Proc., Sec. 40.

4. 18 S. C. 339 (1882).

5. 19 S. C. 323 (1882).

General Assembly may also establish County Courts, municipal Courts and such Courts in any or all of the Counties of this State as may be necessary. * *”

It will thus be seen that the Probate Court is omitted from this delineation of constitutional courts and ceases to have the stature that it had under the Constitution of 1868. By Article V, Section 19, it is further provided:

“The Court of Probate shall remain as now established in the County of Charleston. In all other Counties of the State the jurisdiction in all matters testamentary and of administration, in business appertaining to minors, and the allotment of dower, and persons *non compos mentis*, shall be vested as the General Assembly may provide, and until such provision such jurisdiction shall remain in the Court of Probate as now established.”⁶

6. The reason for the singling out of the Charleston Probate Court is difficult to ascertain. As will be seen from *Bradford v. Richardson*, 111 S. C. 205, 97 S. E. 58 (1918), hereafter discussed in the text in detail, the effect of this isolation was to make the Charleston Probate Court a Constitutional court, putting it into the mere select company of courts mentioned in Section I of the same Article. Neither the Journal of the Convention nor the newspaper accounts of the proceedings throw any light on the Convention's action in this particular, nor has the writer been able to discover from other sources what prompted the Convention to give this special treatment to a single county of the state. It may be surmised that the Convention's act was a tangible recognition of a pre-eminence based on reasons more substantial than antiquity, and that it was a merited tribute to a prestige not enjoyed by the courts of the other counties. As to the continued deservedness of that signal and superlative distinction, the writer is not in a position to judge.

But a second look into this selective provision may reveal something else. Whatever the motives for this special attention on the part of the Convention—and in whatever ways the Charleston Probate Court in 1895 may have operated differently from the courts in other counties, if at all—the effect of the provision may not, after all, be so gratifying to the denizens and friends of Charleston. If the Charleston court is a Constitutional court and must remain—under the mandate of the Constitution of 1895—precisely as it was in 1895, then, presumably, it was to continue in a rigid form—that is, under the then existing law. That law was embodied in the decisions based on the Constitution of 1868. See the cases cited in notes 2, 4 and 5 *supra*. The result of treating the Charleston court as a Constitutional court, and the absence of the words used with reference to the courts of the other counties—“shall be vested as the General Assembly may provide”—may show an intent to “freeze” the powers of the Charleston court

The impact of these sections is stated in *Bradford v. Richardson*,⁷ a case dealing with the validity of the so-called Quart-a-Month law,⁸ which authorized the various Probate Judges to issue permits for the importation from other states of intoxicating liquors, limited to a quart a month. The Act was attacked, among other reasons, on the ground that the Probate Court was a constitutional court, with powers not capable of enlargement by the legislature, and that the power conferred upon the Probate Judges by the Act was in excess of the defined constitutional limits. The Supreme Court denied the force of this contention, saying (after reference to the provisions of Article V, Section 19, and after noting the special mention of Charleston County):

“But that section expressly provides that in all other counties the jurisdiction that formerly belonged to the Probate Court ‘shall be vested as the General Assembly may provide.’ It follows that the Probate Court is not

and put them beyond the reach of the legislature. The Charleston Probate Court is thus enclosed within a circle of *constitutional* power which can neither contract nor expand. The legislature, it is true, cannot abolish the Charleston court—as it is suggested in *Bradford v. Richardson* that it may do with the Probate Courts of the other counties. Nor can the legislature subtract from the powers that the Charleston court possessed in 1895. But, by the same token, it cannot add to them. As a practical matter, since the legislature will hardly undertake to abolish Probate Courts anywhere, or drastically to curtail their powers, the net effect is to make the Charleston court one of even more limited jurisdiction than the courts of the other counties. To be specific—in terms of the matters embraced in this article—and if the Charleston Court had no jurisdiction over testamentary trusts in 1895, the cases of *Poole v. Brown*, note 10 *supra*, and *Thomas v. Poole*, note 5 *supra*, and the dominant one of *Davenport v. Caldwell*, note 2 *supra*, seem to indicate that no Probate Court had such jurisdiction—it would follow that the Charleston Probate Court has had no such jurisdiction since 1895; that it can do no more, with or without legislative sanction, in the years since 1895 than it could do in the years prior. There is more than mere plausibility in the argument that the Charleston court, despite statutes referring to testamentary trustees, has no authority at all over them.

7. Note 6 *supra*.

8. 30 Stat. 69 (1917). This Act went into a coma with the adoption of the Eighteenth Amendment to the Constitution of the United States. It was revived with that amendment's repeal, and it later expired with—or it may have found a more glorious after-life in—the present state liquor laws.

a constitutional court in any county except Charleston and that in any or all the other counties the legislature may vest the jurisdiction formerly exercised by the Probate Court, in other Courts, as it may deem expedient. This power necessarily includes the power to abolish the Court entirely, and consequently the power to invest it with such jurisdiction as the legislature may see fit, not inconsistent with the provisions of the Constitution."

After thus sustaining this grant of judicial power, the court supplements its conclusion by treating the act to be done as a ministerial, rather than a judicial, act—the conduct of the Probate Judge in the issuance of the permit being done by him personally and not as a court, and putting the furnishing of permits in the same category as the issuance of a marriage license,⁹ one of the more common tasks of Probate Judges in South Carolina.

It seems to the writer that the latter justification for the course the court took is sounder than the first. In the quoted language of the court, there is an important elision: the constitutional section in question provides, not that jurisdiction shall be vested as the General Assembly may provide, but that *in matters testamentary*, etc., it shall be so vested. It may very plausibly be argued that it was the intention of the Constitutional Convention to permit Probate Courts to have only such powers as the legislature might confer, whether more or less extensive than they previously had, but in any event limited to matters testamentary, etc., as detailed

9. The Probate Judge performs a variety of functions in addition to those usually associated with his office: in some counties he acts as Master in Equity; he issues marriage licenses—Sec. 8588, S. C. Code of Laws 1942; he disburses Confederate pensions—Sec. 4981, *id.*; in some counties he presides over Children's Courts, which is made a part of his court—Sec. 255, *id.* In one county—Clarendon—the *office* of the Judge of Probate was abolished and the functions pertaining to the Probate Court devolved upon the Clerk of Court. Acts 1931 (37 Stat.) 13. See *Ridgill v. Clarendon County*, 188 S. C. 460, 199 S. E. 783 (1938).

Under *Bradford v. Richardson*, note 6 *supra*, these various acts, authorized by the legislature, whether judicial or ministerial in their nature, can properly be performed. A dreadful thought occurs: what about the issuance of marriage licenses in Charleston, if the Probate Court of that county did not issue them before 1895? But there is no cause for alarm: (1) the issuance of a marriage license is a ministerial, not a judicial, act; (2) common law marriage exists in South Carolina; (3) *communis error facit jus*.

in Section 19. If this is a tenable construction, it would follow that legislation conferring jurisdiction on Probate Courts over trusts—which are not, as will be seen hereafter,¹⁰ matters testamentary or of administration—would be invalid, as it was held to be prior to 1895. But—*ita lex scripta est*—thus is the law written—, and the case of *Beatty v. National Surety Co.*,¹¹ although dealing with a subject unrelated to that in the *Bradford* case, seems to echo the views of that case. If it be concluded that the legislature can confer *any* power on the Probate Court, whether or not germane to those matters specifically set out in Article V, Section 19, it follows that it can invest that court with as ample authority over trusts as it sees fit; and the question would then be—has the legislature invested the Probate Court with jurisdiction over testamentary trusts, and, if so, to what extent?

Probate Courts are, under the Constitution and statutes, and by their very nature, inferior courts, but this should be taken to mean that they are inferior only in their relative standing in the hierarchy of courts, and that they are not inferior in respect to matters clearly within their special jurisdiction, nor with respect to the dignity of their records.¹² And, of course, Probate Courts are courts of record.¹³ Their decrees, generally, are not subject to collateral attack.¹⁴ In

10. See *Thomas v. Poole*, note 5 *supra*. And see *Poole v. Brown*, 12 S. C. 556 (1879), and the discussion of this case under the comment in Question I of the questionnaire.

11. 132 S. C. 45, 128 S. E. 40 (1925).

12. *Thomas v. Poole*, note 5 *supra*; *Turner v. Malone*, 24 S. C. 398 (1885); *State ex rel. Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787 (1890); *Ex Parte White*, 38 S. C. 41, 16 S. E. 286 (1892); *Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010 (1900); *Norwood v. Ry Co.*, 203 S. C. 456, 27 S. E. (2d) 803 (1943).

13. Sec. 206, S. C. Code of Laws, 1942; *Thomas v. Poole*, note 5 *supra*; *Turner v. Malone*, note 12 *supra*; *State ex rel. Burnett v. Burnside*, note 12 *supra*; *Hendrix v. Holden*, note 12 *supra*; *In re Willcox*, 162 S. C. 133, 160 S. E. 260 (1931); *Truesdale v. Bellinger*, 172 S. C. 80, 172 S. E. 384 (1933); *Williams v. Ins. Co.*, 187 S. C. 103, 190 S. E. 519 (1938); *Norwood v. Ry Co.*, note 12 *supra*.

14. The cases on this point are too numerous for full citation; but see, *Ward v. Glenn*, 9 Richardson's Law 127 (1855); *Ex Parte White*, note 12 *supra*; *Hankinson v. R. R. Co.*, 41 S. C. 1, 19 S. E. 206 (1893); *Hartley v. Glover*, 56 S. C. 69, 33 S. E. 796 (1899); *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279 (1922); *Hendrix v. Holden*, note 12 *supra*; *Mitchell v. Dreher*, 150 S. C. 125, 147 S. E. 646 (1929); *Wilkinson v. Wilkinson*, 178 S. C. 194, 182 S. E. 640 (1935); *Thompson v. Anderson*, 208

any event, however, it must be remembered that they are courts of limited jurisdiction,¹⁵ and, since the Constitution of 1895, and under the law as stated in *Bradford v. Richardson*,¹⁶ they have only such powers as are conferred by statute.

Of controlling importance, moreover, is the fact that the jurisdiction of the Probate Courts is not exclusive, and that the Courts of Common Pleas, especially in their equity branch, have concurrent jurisdiction.¹⁷ Qualifying this rule is the

S. C. 208, 37 S. E. (2d) 581 (1946); *Weinberg v. Weinberg*, 208 S. C. 157, 37 S. E. (2d) 507 (1946); *Sisk v. Pressley*, 81 Fed. Supp. 16 (E.D.S.C. —1948); *Davis v. Davis*, 214 S. C. 247, 52 S. E. (2d) 192 (1949). See, also, Sec. 221, S. C. Code of Laws 1942.

15. *Walker v. Russell*, 10 S. C. 82 (1877); *Davenport v. Caldwell*, note 2 *supra*; *Herndon v. Moore*, note 4 *supra*; *Turner v. Malone*, note 12 *supra*; *Whitesides v. Barnes*, 24 S. C. 373 (1885); *Ex Parte White*, note 12 *supra*; *State ex rel. Burnett v. Burnside*, note 12 *supra*; *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667 (1902); *Bradford v. Richardson*, note 6 *supra*; *Beatty v. National Surety Co.*, note 11 *supra*; *Beckwith v. McAllister*, 165 S. C. 1, 162 S. E. 623 (1923); *Beacham v. Ross*, 187 S. C. 398, 197 S. E. 369 (1938); *Mack v. Stanley*, 190 S. C. 300, 2 S. E. (2d) 792 (1939); *Norwood v. Ry. Co.*, note 12 *supra*; *Davis v. Davis*, note 14 *supra*.

16. Note 6 *supra*.

17. *Walker v. Russell*, note 15 *supra*; *Jordan v. Moses*, 10 S. C. 431 (1878); *Witte v. Clark*, 17 S. C. 313 (1881); *McKibben v. Salinas*, 41 S. C. 105, 15 S. E. 208 (1893); *Fogle v. St. Michael Church*, 48 S. C. 86, 26 S. E. 99 (1896); *Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217 (1909); *Hand v. Kelly*, 102 S. C. 151, 86 S. E. 382 (1915); *Lucas Bank, In re Fleming*, 125 S. C. 446, 119 S. E. 118 (1923); *Chapman v. Smith*, 133 S. C. 122, 130 S. E. 212 (1925); *Beatty v. National Surety Co.*, note 11 *supra*; *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331 (1926); *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602 (1927); *Bailey v. Cooley*, 153 S. C. 78, 150 S. E. 473 (1929); *American Surety Co. v. Muckenfuss*, 172 S. C. 169, 173 S. E. 290 (1933); *Carolina Life Insurance Co. v. Arrowsmith*, 174 S. C. 161, 176 S. E. 128 (1934); *Morris v. Maryland Cas. Co.*, 187 S. C. 150, 197 S. E. 505 (1938); *Davis v. Davis*, note 14 *supra*.

The statement that the Court of Common Pleas has concurrent jurisdiction is true only as a generalization. Prior to 1895, the Probate Court was held to have exclusive jurisdiction in some cases, and the Common Pleas jurisdiction was there only appellate. See *Ex Parte White*, note 12 *supra*. Moreover, it is a common principle that where a right is created by statute and the tribunal to enforce it is designated, that tribunal has exclusive jurisdiction. See *Ex Parte Lewie*, 17 S. C. 153 (1881). In that case the court was considering an application for assignment of homestead which had been directed to the Court of Common Pleas in the face of a then current statute (since modified) that application for homestead should be addressed to the Probate

principle that where courts have concurrent jurisdiction, the doctrine of comity will permit that one which has first assumed jurisdiction of the subject matter to pursue it to the end, without interference or parallel action by the other.¹⁸ The principle is thus stated in *Witte v. Clarke*:¹⁹ "Where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject matter must adjudicate, and neither can be forced into another jurisdiction." The comity rule here has a dual operation: if the Probate Court has "first obtained possession of the subject matter", the Court of Common Pleas must decline to entertain jurisdiction, except on appeal; if the Court of Common Pleas has

Judge. The court held that resort to the Probate Judge was exclusive, saying "The Court of Common Pleas is the general fountain of justice, and when the rights of a citizen, either derived from the common law or the statutes, are invaded, and the power to protect is conferred upon no special jurisdiction, he may seek redress in that court. But where rights are created by statutes, to be obtained and corrected in a special manner specified in the act and by a special tribunal, no other court can assume jurisdiction. On the contrary, parties interested must pursue the course prescribed, and must seek the aid of the tribunal upon which the power to grant or protect has been conferred." More recently, in *American Surety Company v. Muckenfuss*, *supra*, the court held that a surety who sought to be relieved as a matter of course under the provisions of a statute authorizing the release of sureties on bonds required by the Probate Court (Sec. 8977, S. C. Code of Laws, 1932, 1942) could not properly direct its application to the Court of Common Pleas, but that it was limited to the Probate Court, upon which the right to grant relief was conferred by the statute which had created the right.

The principle of Common Pleas concurrence with the Probate Court runs the scale of the latter's jurisdiction, including the probate of wills (at least in solemn form), accountings, sale of land in aid of assets, allotment of dower, matters touching upon minors and lunatics and the administration of their estates. It is doubtful, however, if the Court of Common Pleas could, or would, admit a will to probate in common form, grant letters testamentary or of administration, revoke letters, receive returns in the absence of litigation, or do many of the routine acts of administration devolving upon the Probate Judge. In this connection see the dissenting opinion of Justice Blease in *Muldrow v. Jeffords*, *supra*.

18. *Jordan v. Moses*, note 17 *supra*; *Witte v. Clark*, note 17 *supra*; *Dyson v. Jones*, note 15 *supra*; *Beatty v. National Surety Co.*, note 11 *supra*; *Bailey v. Cooley*, note 17 *supra*; *American Surety Co. v. Muckenfuss*, note 17 *supra*; *Davis v. Davis*, note 14 *supra*.

19. Note 17 *supra*.

first assumed it, there can be no resort to the Probate Court.²⁰ The pertinent, and practical, significance of these interlocking principles, as applied to testamentary trusts, is that, if the legislature has vested either limited or total trust jurisdiction in the Probate Courts, such jurisdiction is not exclusive but may concurrently be exercised by the Court of Common Pleas as a court of equity; and, further, that if, and to the extent that, the latter has assumed control of the subject matter, the Probate Court is deprived of it. As a matter of fact, the prevailing practice is to have recourse to the Court of Common Pleas rather than to the Probate Court; and even those lawyers who admit to the existence of trust jurisdiction in the Probate Court, or who may doubt its powers without actually denying them, justify that course of higher-up procedure by pointing out that, in any event, the Court of Common Pleas has concurrent jurisdiction. The justification is, of course, stronger with those who doubt; and, naturally, with those who deny such powers the only consistent course is to seek out the Court of Common Pleas. A number of the Probate Judges themselves, aware of the shakiness of their position, suggest utilization of the Court of Common Pleas and the avoidance of their own tribunals.

Even in those matters in which the Probate Court undoubtedly has competence, the jurisdiction is not all-embracing. The Probate Court certainly has jurisdiction, for example, over executors, but not every act done, or sought to be done, by an executor is properly within its surveillance; nor is every remedy against an executor to be sought in that court. It has been held that, with respect to fiduciaries answerable to the Probate Court, it cannot act where the remedy sought constitutes a "distinct ground of equitable relief." Thus, in *Caldwell v. Little*,²¹ an attempt in the Probate Court to show collusion between representatives of the estate administered and those of another estate indebted to it was held to be a matter of equitable cognizance and not within the scope of "matters testamentary or of administration", although personal representatives were involved. In *Beckwith v. McAllister*,²² an authorization by the Probate Court to an

20. For instances of both situations, see the cases mentioned in note 18 *supra*.

21. 15 S. C. 236 (1880).

22. Note 15 *supra*.

executrix to cancel a mortgage which she had given to her testate and to give in its place another mortgage, which was to be junior to another which she individually was to give to a third person, was held not to be within the power of that court. (It is to be doubted whether even a circuit court could effectuate such a design.) In *Mack v. Stanley*,²³ the Probate Court was held to be without power to authorize an executor to give a mortgage, although, undoubtedly, it is within the power of a court of equity to authorize such an act.²⁴ And, where an account has been stated and settled in the Probate Court between the fiduciary and the beneficiaries, that court has been held not to have the power to reopen it; but resort must be had in equity to falsify or surcharge the account.²⁵ Instances may be multiplied to show the lack of co-extensiveness of Probate Court power with that of a court of equity in those fields in which the former may operate, but they all merely substantiate the basic statement that equitable powers as such are not available to Probate Courts.

We now proceed to the topics embraced in the questionnaire, with the answers to the questions submitted, and, for what they are worth, the writer's comments. (In putting the questions beginning "Have you construed * * or do you now interpret" the Probate Judges were asked to indicate whether the answers were based on actual cases before them, or merely on opinion. In most instances, there was a failure on their part to specify. In any event, the answers can, in every case, be taken as the expression of opinion.)

I

Section 208 of the South Carolina Code of Laws of 1942 provides as follows:

"Every judge of probate, in his county, shall have jurisdiction in all matters testamentary and of adminis-

23. 190 S. C. 300, 2 S. E. (2d) 792 (1939).

24. *Spencer v. Godfrey*, Bailey's Equity 478 (1831); *Spencer v. Gibbes*, Dudley's Equity 174 (1838); *McDavid v. McDavid*, 187 S. C. 127, 191 S. E. 204 (1938).

25. *Harris v. Stilwell*, 4 S. C. 19 (1872). See *Anderson v. Bowers*, 170 Fed. (2d) 676 (C.C.A. 4—E. D. S. C.—1948).

tration, in business appertaining to minors, and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis*."

Is it your opinion that this section gives you general jurisdiction over testamentary trustees to the same extent that jurisdiction is conferred over executors and administrators?

17 Probate Judges answered yes; 5 answered no.

Of those answering in the affirmative, 2 stated that their jurisdiction under this section extended to everything except the removal and naming of trustees; 1 remarked that "possibly" he had such co-extensive jurisdiction; 1 stated that he had such jurisdiction in a "limited" sense; 1 stated that the Probate Court was the only court that had jurisdiction over trust estates.

Comment: It is to be noted that the quoted section is repetitive in part of Article V, Section 19, of the Constitution of 1895, and of Article IV, Section 20, of the Constitution of 1868. This may seem superficially to be merely an affirmation or restatement of the power conferred by the constitutions to legislate in these fields, but the provision, it is reasonably clear, is itself an extensive and plenary grant of power to the Probate Courts, carrying with it the ancillary power to do those things necessary and incident to the customary functions of that court in matters testamentary and of administration, as developed and crystallized in the Courts of Ordinary. Those incidents are, however, controlled by enactments scattered throughout the statutes, and the historic powers of the Ordinary are shaped and modified by these various provisions.

To justify an affirmative answer to the question asked, there would, in effect, have to be the addition of the word "trustees" wherever the words "executors" or "administrators" appear in the various statutes, and the interpolation of "trustees" in decisions treating of executors and administrators. Such a premise would be extreme indeed.

But the major question is whether the language used in the section can be construed as embracing testamentary trusts. The answer was given in 1879, in *Poole v. Brown*.²⁶ In that case, the plaintiffs, beneficiaries under a testamentary trust,

26. Note 10 *supra*.

brought suit in the Probate Court against the defendants, who were executors and trustees under a will, for an accounting, which involved, substantially, the conduct of the defendants as trustees. The Probate Court refused the application of the plaintiffs, not on the ground of lack of jurisdiction, but on the ground that there had been full payment. The circuit court decree was an affirmation. The Supreme Court reversed on the jurisdictional ground, although that point was not raised in the court below. The Court said: "The question then arises, whether the Probate Court had jurisdiction of a petition in the nature of a bill in equity by a *cestui que trust*, alleging a breach of trust." The court, after referring to Article IV, Section 20, of the Constitution of 1868, declared further:

"Unless the matter of the present suit can be regarded as a 'matter testamentary', it cannot be brought within the terms of the grant of jurisdiction. A trust, even though testamentary, is not necessarily a 'matter testamentary' in the sense of the Constitution. An action to enforce the trust is based upon the liability of a trustee and not that of an executor, and matters testamentary are such as grow out of the liability of an executor."

Thus, by this case, matters of trusteeship are divorced from the term "matters testamentary"; and no other words in the section can be said to be related to trusts.

In *Thomas v. Poole*,²⁷ as has already been pointed out, the Probate Court, in an action for partition, appointed a trustee in the place of one who had died. The circuit court decree, which upset the appointment, placed its position on the ground of "the act of the Legislature giving this power being void for the same reason that it could not confer jurisdiction in partition." The particular act thus vitiated is not set out anywhere in the case. It may have been the provision of what is now Section 209 of the Code of 1942, set out in Question II, hereafter. The Supreme Court affirmed this portion of the decree, but gave it as its opinion that the beneficiary, having sought the appointment of the trustee, might be estopped. No citation of case or statute is given by the appellate court. In any event, it must be observed that no at-

27. Note 5 *supra*.

tempt was made to justify the Probate Court's appointment as referable to any "matter testamentary".

These early judicial repudiations of an attempt to fit testamentary trusts into the broad framework of "matters testamentary" are clearly supportable. If the term "matters testamentary" could embrace testamentary trusts simply because such trusts are created by will, then the term might as sensibly touch upon every title derived through a will and every relationship produced by a will; and thus the term could be spun out into absurdity.

II

Section 209 of the Code provides as follows:

"The judge of probate shall have jurisdiction in relation to the appointment and removal of guardians of minors, insane and idiotic persons, and persons *non compos mentis*, and in relation to the duties imposed by law on such guardians, and the management and disposition of the estates of their wards. *He shall exercise original jurisdiction in relation to trustees appointed by will.*"

(1) *Have you construed this Section in actual cases before you, or do you now interpret it, as giving the Probate Court the same general powers with respect to testamentary trustees as over executors and administrators?*

18 answered yes; 4 answered no. Of those answering yes, 4 stated that they had relied on the section in actual cases before them. 1 stated that he had such power over trusts, under this section, except as to substituting trustees; another said he had jurisdiction under this section except as to naming or removing trustees.

Comment: The words "He shall exercise original jurisdiction in relation to trustees appointed by will" are, of course, the words of concern. They appear first in "An Act to Define the Jurisdiction and Regulate the Practice of Probate Courts", adopted in 1868, and stated in the preamble to be pursuant to the provisions of Article IV, Section 20, of the Constitution of 1868.²⁸ In the original Act from which Section 209 is drawn the words are: "He shall exercise origi-

28. 14 Stat. 76 (Sec. 5). The Act was incorporated into the 1870 Code of Procedure, 14 Stat. 431.

nal jurisdiction in relation to trustees appointed by will in cases prescribed by law." The identical language as to guardians appears in both the original Act and the present section. It will be observed, in the first place, that the words "in all cases prescribed by law" do not appear in Section 209. These words remain, following the original enactment, in the Revised Statutes of 1873.²⁹ They were eliminated in the General Statutes of 1882,³⁰ and have never reappeared since. What the significance of these omitted words was, and what motivated their removal—whether they were regarded as superfluous or as unduly restrictive—does not anywhere appear. In the second place, this all-important sentence, both in its original and in its present form, follows, as will be seen, a provision devoted entirely to guardians; and the captions or titles to the section in the original Act, and in the various compiled statutes and codes since, say merely "In relation to guardians". One may be allowed to speculate whether it was not intended to limit the term "trustees appointed by will" to trustees of minors or to testamentary guardians, in view of the juxtaposition of these words with the general provision as to guardians.

It is singular, indeed, that a provision with such formidable potentialities should be so obscurely placed. Its meaning, too, is, to say the least, somewhat unclear, but it would be straining credulity to suggest that the statute confers *plenary* powers upon the Probate Court; and to make the words "original jurisdiction" read "general jurisdiction" would be a remarkable feat of legal translation. If such an extensive grant were actually made, it would be conferring equitable powers with a vengeance upon an inferior court. A more reasonable view is that the provision is a vesting of jurisdiction subject to legislative definition and delimitation appearing elsewhere.

It hardly seems possible that, prior to 1895, this provision as to testamentary trustees could be regarded as anything but unconstitutional, under the cases of *Davenport v. Caldwell*,³¹ *Poole v. Brown*,³² and *Thomas v. Poole*.³³ If it

29. Rev. Stat. 1873, 573, Code Civ. Proc., Sec. 39.

30. Gen. Stat. 1882, Code Civ. Proc., Tit. 4, Sec. 38.

31. Note 2 *supra*.

32. Note 10 *supra*.

33. Note 5 *supra*.

had been constitutional, the last two cases (which are discussed under Question I) would have taken a different turn, by drawing upon that section. Since 1895, however, it may be that the provision, although enacted prior thereto, is no longer ineffectual if we accept *Bradford v. Richardson*³⁴ as permitting the legislature to confer powers upon the Probate Court in fields not related to matters testamentary, etc.

Of more than ordinary interest is the fact that, except perhaps for *Thomas v. Poole*³⁵—in which that part of the section with which we are here concerned may or may not have been the one the court had in mind—there appears to be no construction of, or reference to, it in any case; and we are thus without any judicial light on its meaning and scope.

In order to parallel testamentary trustees with executors and administrators under this section, it would virtually be necessary to use "trustee" interchangeably with "executor" and "administrator" whenever these latter terms appear in the statute. In view of the differences of functions between the offices, such a process is hardly reasonable or likely; and the same deduction should be arrived at even where the duties of personal representatives, or the Probate Court's powers over them, are formulated as a matter of common law.

If it is necessary to find plenary power in order to raise Probate Court jurisdiction over trustees to the level of its authority over executors and administrators, the process will, paradoxically, give that court even more extensive authority and a more constant and enduring supervision over trustees than over personal representatives. Administrators take no title to real estate, although it is their duty to report and inventory it; and, in case of a deficiency of personal assets to subject it to sale; but, with the real estate as such, he has nothing to do and nothing to account for. He does not collect or account for rents, nor can he maintain actions against third persons—for the heirs have the title. Executors have no title to real estate either, except when, infrequently, it is devised directly to them; and they have no concern with or control over the testator's realty except to report and inventory it and to resort to it to pay debts when personal

34. Note 6 *supra*.

35. Note 5 *supra*.

property is insufficient, or where they are given a power of sale. The title being in the devisees, they do not, just as their counterparts in intestacy, collect or account for rents, or maintain actions against third persons. Thus, the Probate Court's supervisory powers are confined to the extent that the executor or administrator is limited by the nature of the property. But the usual trust being one of real as well as of personal property, the trustee has title to both; or, in a given case it may be a trust of one or the other. In any event, if it is a trust of real property, the Probate Court—if it has jurisdiction—would supervise the conduct of the holder of that legal title. Compared to the duties of the trustee, the duties of an executor or administrator are simple indeed: their functions are limited to collection, payment, and distribution, while those of the trustee usually go far on beyond such items. Too, the period of the administration of the decedent's estate, unless it is heavily involved in debt, is usually of brief duration; but the trust takes up where the administration leaves off in the case of personal property; it starts at once with real property; and whether it is of one or the other or both, its duration is usually measured in terms of lives in being plus.

An even more paradoxical situation develops if we ascribe plenary powers to the Probate Court: it will actually have a firmer grasp on the testamentary trustee than the court of equity itself. If we assume that, in a given case, on the probate of a will the Probate Court assumes jurisdiction of the trustee named in the will—as it does over the personal representative on the inception of the administration of an estate; and, or, if we assume that the trustee must periodically account to that court, then from that moment the trustee is *in court* and subject at all times thereafter to that tribunal's authority. The point is, that a trustee is subject to the control and supervision of a court of equity, but, unless that court has actually appointed him, he may never appear before, have contact with, or account to, it unless he is brought into it by litigation; and when that is concluded, the court has nothing further to do with him until perhaps another court action. The trustee, merely because he is a trustee, does not fall within the working control of the court of equity, and, in fact, the court may never hear of him. But with the probate of a will in which a trustee is named—if we

accept the analogy to the personal representative—the machinery of that court is at once set in motion to handle the trustee then and until the termination of the trust: a continuous and unbroken contract to the end.

One last question about Section 209 may be asked here: Is there significance in the fact that the language is “jurisdiction over *trustees*”, and not over *trusts*? Is it possible that it was intended that the Probate Court should confine itself to supervising the *conduct* of trustees and should have no control over the trust property—in other words, that the trustee should account for his acts under the trust, and with this aspect alone should the Probate Court concern itself? The writer does not suggest an answer, but the question does offer some interesting angles, which are discussed later. See the comment under 2 (a) and 2 (d) of Question II.

(2) *Have you construed this Section in actual cases before you, or do you now interpret it, as giving the Probate Court power to:*

(a) *Appoint a trustee where the will creates a trust, but no trustee is named, or the trustee named cannot or will not act? (Such an appointment would be similar to the designation of an administrator c. t. a.).*

17 answered yes; 5 answered no. Of those answering yes, 3 stated that they had so acted in reliance upon this section.

Comment: The power of the Probate Court to appoint administrators *c. t. a.* is regulated by statute³⁶, but the power itself is probably inherent in the nature of the general duties of the Probate Judge. The import of the statute is to prescribe the method by which the appointment is to be made, and the circumstances under which it is to be had. Of course, no attempt can be made to fit the incapacitated or unwilling trustee, or the unnamed or nonexistent one, into the statute.

The power of the court of equity to name a trustee where none is named, or where the one named cannot or will not accept the trust, is elemental—under the familiar maxim that

36. Sec. 8951, S. C. Code of Laws 1942.

equity will not permit a trust to fail for want of a trustee.³⁷ A testamentary trust is no exception. But, for a Probate Court to undertake to carry out this important prerogative, it would be necessary that Section 209 be construed to confer upon that court as full and ample power as that possessed by the court of equity. Such a belief is hardly to be entertained seriously. And the absence of any specific statutory provision dealing with the situation is not without significance, since it seems improbable that if the legislature intended to give this particular power to Probate Courts, it would not have made express provision for it.

Whether the jurisdiction conferred by the words of the section in question is limited or unlimited, the words themselves may prevent the Probate Court from naming a trustee where none is named or where the one named renounces the trust or cannot accept it. The language is "jurisdiction in relation to trustees *appointed by will*" (italics supplied). The language is not "trusts created by will", which might cover the case. If no trustee is appointed by will, there is no one over whom the Probate Judge is to take jurisdiction; and if he undertakes to name one, that person is not one who has been appointed by will. If the person named in the will does not or cannot accept, it is as if no trustee had been named, and, certainly, over that non-accepting person the Probate Judge would have no authority; and, likewise if the judge appointed someone, the appointee would be his own and not the one named in the will. True, a court of equity can name a trustee in these cases, but that court has jurisdiction over *trusts*—the property, the fiduciary, and the relationship.

(b) *Accept the resignation of a testamentary trustee?*

17 answered yes; 5 answered no. Of those answering yes, 2 stated that they had accepted resignations, justifying it under Section 209.

Comment: According to the weight of authority, a Probate Court is not, in the absence of the statute, authorized to accept the resignation of either an administrator or execu-

37. Restatement of Trusts, Secs. 33, 101; *Ex Parte Mayrant*, Richardson's Equity Cases 1 (1831); *Withers v. Jenkins*, 6 S. C. 122 (1874); *Leaphart v. Harmon*, 186 S. C. 362, 195 S. E. 628 (1938).

tor.³⁸ This seems to be the law in South Carolina, except as changed by statute, as hereinafter noted. There are no cases involving an administrator's resignation, but the authorities elsewhere generally indicate that no distinction is to be made in this regard between administrators and executors. Of this latter class, the South Carolina cases make it plain that neither the Probate Court nor the court of equity has power to consider the proffered resignation of that representative.³⁹ These cases all antedate the passage of the following amendment to the statute dealing with administrators *c. t. a.*:⁴⁰

"The Probate Judge may accept the resignation of the executors when in his opinion such resignation will not be injurious to the estate, and in such cases he shall appoint an administrator or administrators with the will annexed as in case of failure to qualify."

Thus, executors are, by this enactment, permitted to resign. Whether the same power can be exercised concurrently by the court of common pleas is questionable. No similar provision is to be found in the statutes covering the resignation of administrators, and the law, presumably, continues to be that such representatives may not resign. Since the matter has not been definitely passed upon in the state, the writer is not committing himself to a flat assertion that the Probate Court—which appoints administrators—may not accept their resignation. It may be, too, that the offer of an administrator to resign would, if refused, work an injury to the estate which he represents, in that he would be an unwilling—and hence an unsuitable—administrator; and that such a tender of resignation ought to be treated as a removal to be made by the Probate Court.

Of trustees, testamentary and otherwise, the law is different. The cases, generally, support the view that the court of equity has the inherent power to act upon and accept the resignation of a trustee, and this without regard to whether

38. 23 C.J. 1014; 21 Am. Jur. 457; 91 A.L.R. 712.

39. Haigood v. Wells, 1 Hill's Equity 59 (1833); Osborn v. Black, Speers' Equity 431 (1844); Campbell v. Bank of Charleston, 3 S. C. 348 (1871); Chapman v. City Council, 30 S. C. 549, 9 S. E. 591, 3 L.R.A. 311 (1888).

40. 29 Stat. 701 (1916), now in Sec. 8951, S. C. Code of Laws 1942.

or not the beneficiaries consent.⁴¹ Of course, the trustee, as a condition of the acceptance of his resignation, must properly account. The South Carolina cases put the matter this way:

"A trustee once invested with the duties of his office can only be released in one of three ways: 1. By assent of all his *cestuis que* trust, capable of consent; 2. By means of some special power creating the trust; 3. By an application to the Court of Chancery."⁴²

Some doubt has been present in South Carolina, however, since an early date as to the inherent capacity of a court of equity to discharge a trustee upon his resignation. The matter was supposedly resolved, in 1796, by the passage of an Act,⁴³ the preamble of which is as follows: "Whereas, doubts exist whether the Court of Equity have power to permit trustees to resign their trusts with the consent of the parties entitled to the use of the trust estate, and to substitute other persons to support the trust". The Act, as well as its present successor, provides, in substance, that where the beneficiaries are willing to have a trustee substituted for the trustee who is acting, the "Court of Equity" (the present Code section uses the term "Court of Common Pleas") shall have the power to substitute a trustee, and by operation of law the new trustee shall be vested with the title and powers of the old one. There is a proviso that a memorandum of the change shall be made on the record of the deed of trust or with the will, as the case may be. Whether this mode of court action—acceptance of resignation and substitution—is limited to cases where the beneficiaries are willing for the change, and whether the method of resignation marked out by the section is exclusive, is open to some question.⁴⁴ Suffice it to say, the resignation statute, if it does not merely declare the law, does at least afford recourse to a court of equity for the submission of a resignation by a trustee.

41. 65 C. J. 612; 54 Am. Jur. 111; Bogert on Trusts and Trustees, Sec. 514; Scott on Trusts, Secs. 106, 106.1; Restatement of Trusts, Sec. 106.

42. *DuRant v. DuRant*, 36 S. C. 49, 14 S. E. 391 (1891); *Nobles v. Hogg*, 36 S. C. 322, 15 S. E. 359 (1891); *Kolb v. Booth*, 80 S. C. 501, 61 S. E. 942 (1908).

43. 5 Stat. 277, now Sec. 9046, S. C. Code of Laws 1942.

44. See *Morrow v. Odom*, 14 S. C. 623 (1880).

There is no statute specifically giving the Probate Judge the power to act upon the resignation of a testamentary trustee. The only statute—and it has been discussed—which speaks of the resignation of a trustee states that application shall be made to the Court of Common Pleas. Unless, again, the Probate Court, under Section 209, is vested with all the powers of a court of chancery, it is difficult to support a conclusion that it can act upon a resignation. And even if, improbably, the Probate Court is so vested, and if the exclusive method to effect the resignation is that described by the Act of 1796, just adverted to, that course is limited to the Court of Common Pleas and can be pursued nowhere else.

(c) *Remove a testamentary trustee for misconduct?*

17 answered yes; 5 answered no. None of those answering yes had actually removed a trustee for misconduct under the section in question.

Comment: Here, again, we must compare the power of the Probate Court to remove administrators and executors, on the one hand, with the power of a court of equity to remove a trustee, on the other. When we inquire into the Probate Court's power to remove the personal representative, we enter into a vast area of doubt, and on this score the writer's remarks must be treated as far from dogmatic. The texts generally state that the Probate Court has exclusive jurisdiction to revoke letters testamentary and of administration, whether because improvidently issued in the first place or because the representative has committed such acts after undertaking the administration as would justify his removal: incompetence, neglect, mismanagement, failure to file returns, dishonesty, hostility, adverse interest, removal from the state, and so on.⁴⁵ This jurisdiction to revoke letters in the one case or the other is predicated upon the fact that, as it was the Probate Court which granted letters at the outset, only that court can revoke them.

There are statutes which, in cases specified, authorize the Probate Judge to revoke the letters of the administrator or

45. 33 C. J. S. 1016; 33 C. J. S. 1030, 1040; 23 C. J. 1110, 1119; 138 Am. St. Rep. 525; Ann. Cas. 1915D 284.

executor: Sections 9015 and 9016 of 1942 Code provide that if an administrator or an executor changes his domicile or is absent for ten consecutive months, he shall be cited by the Probate Judge, and if he fails to disprove the fact of change of domicile or absence, "in case of an administrator, the letters of administration shall be revoked; and (in) the case of an executor such failure shall be received as a formal renunciation of the office, notwithstanding his previous acceptance." (Similar provision is made as to trustees: This will be discussed later.) Section 9013 provides that in the event of failure of the administrator or executor to make annual returns he shall be cited to do so, and in default shall be adjudged in contempt and a fine of \$20 imposed for every day the default continues, "and in case of such recusant administrator or executor, he may further revoke the letters of administration or testamentary as the case may be." Section 2488 of the Code, a part of the inheritance tax laws, provides that failure to file an inventory within a prescribed time shall subject the delinquent administrator or executor to a penalty, and, after notice and hearing, "the Probate Court * * may remove said executor or administrator". Whether these statutes furnish the exclusive warrant for removal or whether they are supplemental to existing powers or are declaratory in part of existing law, is a question that has yet to be answered; but the writer ventures the opinion that these statutes are not exclusive in the sense that the personal representative cannot be removed unless he has committed one of the acts specified in the statutes.

The cases are numerous which hold that the Probate Judge has power to revoke letters—testamentary or of administration—which have been improperly obtained or improvidently issued. Thus, where letters of administration have been issued to one who the Judge of Probate afterwards duly concludes was not entitled to them, he may recall those letters.⁴⁶ And where letters of administration have been issued on a supposedly intestate estate but which is actually a testate one, the later probating of the will will have the effect, and

46. *Thompson v. Hockett*, 2 Hill's Law 347 (1834); *Smith v. Wingo*, Rice's Law 287 (1839); *Ex Parte Crafts*, 28 S. C. 281, 5 S. E. 718 (1887); *Ex Parte White*, note 12 *supra*; *Ex Parte Jones*, 102 S. C. 110, 86 S. E. 203 (1915); *Ellenberg v. Arthur*, 178 S. C. 490, 183 S. E. 306, 103 A.L.R. 437 (1935).

the Probate Judge may so declare, of voiding the first administration and nullifying the prior grant of letters.⁴⁷ Similarly, where letters testamentary are issued in conjunction with the probate of a will, and a later revoking will is thereafter probated, the effect of the later probate is to void the first and to carry with it the annulment of the earlier letters, which the Probate Judge may evidence by a formal revocation.⁴⁸ And, without citing authorities, where a will is set aside, in a contest attacking its validity, the effect is to destroy the probate and the grant of letters testamentary.

Strictly speaking, all these are cases of *revocation* and not of *removal*, the former term being generally employed to denote the voiding based on facts attendant to the original grant of letters; whereas, in removal, the action is based on facts growing out of the conduct of the representative after he has qualified. In the first situation the court's act is based on the determination that letters should not have been given in the beginning; in the other, the determination is that while the letters may have properly been issued, the representative, by his later conduct, should not be allowed to keep them.

In the case of administrators, the law seems to be that the Probate Court, from which that representative derives his authority may, for cause, remove;⁴⁹ and the rationale of this power of removal by the Probate Court is to be found in the source of the administrator's authority—which, as it can appoint, ought to be allowed to remove. But with respect to the *removal* of executors, the law is not so clear, at least in this state. While, as has been noted,⁵⁰ the authorities as a whole sustain the proposition that the Probate Court may remove an executor, just as it may remove an administrator, there is a surprising dearth of South Carolina authorities on the point. In fact, there is no clear-cut case, so far as this writer is able to discover, that squarely puts the

47. *Benson v. Rice*, 2 Nott & McCord 577 (1820); *Foster v. Brown*, 1 Bailey's Law 221, 19 Am. Dec. 672 (1829); *Price v. Nesbitt*, 1 Hill's Equity 445 (1834); *In re Mears*, 75 S. C. 482, 56 S. E. 7, 9 Ann. Cas. 960 (1906).

48. *Vance v. Davenport*, 11 Richardson's Law 517 (1858).

49. *McLaurin v. Thompson*, Dudley's Law 335 (1838); *Norton v. Wallace*, 1 Richardson's Law 507 (1845).

50. See note 45 *supra*.

point in issue. But there is one case, decided by the United States Supreme Court, in which Chief Justice Marshall wrote the opinion, involving a South Carolina will, which may throw light on the subject. In *Griffith v. Frazer*,⁵¹ the court was dealing with a will probated in South Carolina by an executor who qualified but who thereafter left the state; the Ordinary then granted letters of administration to another. The court held the latter grant void, saying:

"The letters testamentary, when once granted, are not revocable by the Ordinary. He cannot annul them, or transfer the legal interest of the executor to any other person. His rights are beyond the reach of the Ordinary."⁵²

The *Griffith* case has not received any adverse criticism in any subsequent South Carolina case, and it was cited with approval in *Blakeley v. Frazier*.⁵³ There, a testator appointed his son executor and provided that if he should fail to qualify, his two sons-in-law should act. The son qualified as executor, and thereafter the Probate Judge granted letters testamentary to one of the sons-in-law. The court disapproved, saying:

"No doubt the Probate Court has 'jurisdiction in letters testamentary and of administration'; and no doubt this includes the appointment of administrators in case of intestacy, and the granting of letters testamentary in cases of testacy. * * *

"So, too, the Probate Court has jurisdiction to grant letters testamentary, but this is not an unlimited power. He has no authority or jurisdiction to nominate and appoint an executor. This power belongs alone to the testator. The Probate Court has the power to clothe the executor appointed by the will with legal authority to act; but to allow him to disregard the nomination

51. 8 Cranch 9, 3 L. Ed. 471 (1814).

52. The court bases its opinion in part on the South Carolina case of *Ford v. Travis*, a MS. decision of the South Carolina Court of Appeals, dealing apparently with a similar set of facts. The writer has not been able to locate this unreported case.

The right to remove an executor or administrator who, after qualifying, removes from the state is now given to the Probate Court by Secs. 9015, 9016, S. C. Code of Laws 1942.

53. 20 S. C. 144 (1883).

in the will, and upon a new motion make a new appointment would be monstrous; and wherever he attempts to do such a thing, it should be utterly disregarded as an unwarranted assumption of power."

The language just quoted may furnish the basis for the drawing of a distinction between the power to remove an administrator in the one case and a possible denial of the power to remove an executor in the other; since, in the first, the administrator derives his authority solely from the Probate Court, and, in the second, the executor derives his authority from the will, and the naming of an administrator *d. b. n. c. t. a.* would amount to the naming of an executor by someone other than the testator.

No without significance are two statutes which have been previously mentioned: Section 8951 dealing with the resignation of the executor, which speaks of the appointment of an administrator *c. t. a.* "as in case of failure to qualify"; and Section 9016, dealing with absent fiduciaries, calling for revocation of letters of administration in intestacy, and in the case of an executor, "such failure shall be received as a formal renunciation of his office." These statutes may reveal a thinking along the line that letters testamentary cannot be revoked, and that a pre-qualification status—*i.e.*, renunciation—must be resorted to as a substitute.

There are many cases, it is true, in which the removal of an executor is mentioned and discussed, but they are cases in equity. It was early held that a court of equity did not have the power to remove an executor, but that it could appoint a receiver for the estate.⁵⁴ There may be an inference here that the reason for equity's declination of that power is the presence of that power exclusively in some other court—in the Court of Ordinary or Probate Court; but there is never a specific statement to that effect. It is singular that if the Court of Ordinary, or the Probate Court, had the power to remove an executor, recourse was not had to that court; but that, on the contrary, the intervention of equity should, in so many cases, be sought. There are passages in these equity cases that speak of the removal by the court of equity of an executor for misconduct, but none of the orders of the court

⁵⁴ *Haigood v. Wells*, note 39 *supra*; *Ex Parte Galluchat*, 1 Hill's Equity 148 (1833).

undertook actually to *remove* the executor; what actually happened was that a receiver was appointed, who did not oust the executor from his office but prevented his exercise of it.⁵⁵ The explanation is thus given in *Gadsden v. Whaley*:⁵⁶

“An executor holds his letters testamentary from the Judge of Probate, an officer of the law, but his appointment is by the testator himself. It seems that under the Act of 1869 * * * the Judge of Probate, under certain circumstances, may discharge an executor upon his own application; but we think it has always been held in this state that the court of equity has not the power to remove an executor by the appointment of a receiver or otherwise * * *.

“In a proper case the court will appoint a receiver who is an executive officer—the hand of the court—to administer the assets of the estate under the direction of the court, which may, for the purpose of preserving the property, restrain the executor from meddling with the management of the estate, and compel him to give up the control of it to the receiver; but such appointment and administration do not remove the executor or destroy his character as the legal representative of the estate. * * *

Except, then, as the statutes specifically authorize the removal of an executor—and these have been noted—the competence of the Probate Court to remove that representative is extremely doubtful; and the power of a court of equity to remove is not admissible except through the equally, and perhaps more, efficacious medium of the appointment of a receiver.

These extended, and confessedly extraneous, observations on the removal power of a Probate Court over administrators and executors serve, nevertheless, to point up the nebulous character of that court's authority and to suggest the com-

55. *Edmonds v. Cranshaw*, Harper's Equity 224 (1824); *Stanley v. Rabe*, McMullan's Equity 22 (1840); *Witherspoon v. Watts*, 18 S. C. 396 (1882); *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166 (1889); *Harman v. Wagner*, 33 S. C. 487, 12 S. E. 98 (1890); *Smith v. Heyward*, 115 S. C. 145, 105 S. E. 275 (1920). But see *Tindall v. Sublett*, 82 S. C. 199, 63 S. E. 960 (1908).

56. 14 S. C. 210 (1880).

plexities that would entangle an effort to equate the removal of trustees with the removal of administrators and executors.

The innate power of a court of equity to remove a trustee, testamentary or otherwise, is not to be denied. Its exercise needs no support from statutes, and the general authorities and local cases abundantly support equity's power to remove the miscreant trustee⁵⁷. To give this sweeping power of removal to the Probate Court—a power more extensive and certain than that which that court has in the exercise of its traditional functions—would call, again, for an assumption that Section 209 gives plenary power. Without that assumption the authority, of course, cannot be asserted. The grounds for removal—predicated on injury to the trust estate—are varied and numerous. Is it to be concluded that even without statutes expressly giving the power to remove on general or stated grounds,⁵⁸ the Probate Court is to be clothed with an all embracing power to remove, capable of being invoked in a multitude of situations?

(d) Appoint a successor trustee in the event of the death, resignation or removal of a testamentary trustee?

17 answered yes; 5 answered no. Of those answering yes, one stated that he had actually made such an appointment.

Comment: The process of the Probate Court in the filling of a vacancy caused by the death, removal or resignation of an administrator or executor is the appointment of an administrator *d. b. n.* or an administrator *d. b. n. c. t. a.* The matter is covered in part by Section 8971 of the Code of 1942, which authorizes the grant of letters of administration *d. b. n.*: "where a sole surviving executor or administrator shall die, the estate in his hands not having been fully administered." This statute has been held not to be exclusive for the circumstances under which such an administration

57. 65 C. J. 614; 54 Am. Jur. 111, 440; Restatement of Trusts, Sec. 107; Scott on Trusts, Sec. 107; Bogert on Trusts and Trustees, Sec. 519; Cooper v. Day, 1 Richardson's Equity 26 (1844); Gibbes v. Smith, 2 Richardson's Equity 131 (1846); Dickerson v. Smith, 17 S. C. 289 (1881); Tindall v. Sublett, note 55 *supra*; Smith v. Heyward, note 55 *supra*; Crayton v. Fowler, 140 S. C. 517, 139 S. E. 161 (1927).

58. There are some, it is true—and they will be discussed hereafter—but they are extremely limited in scope. Secs. 2488, 9015, 9016, S. C. Code of Laws 1942.

is to be had. In *McNair v. Howle*,⁵⁹ an estate which had been closed by the discharge of the administrator was reopened with the grant of letters *d. b. n.*, in the face of an objection that, only in the event of the death of the representative before completion of administration, could such renewing administration be had. The court, referring to what is now Section 8971, declared:

"The duty thus expressly imposed upon the Probate Court in the case of the death of the executor or administrator does not, as we apprehend, deprive that court of its plenary jurisdiction, under the broad constitutional and statutory powers conferred upon it * * * to appoint an administrator *de bonis non*, if otherwise proper, whenever the vacancy occurs in the official representation of a decedent's estate, whether due to death, revocation of letters, discharge, or other cause."

Obviously, the substitution by the Probate Court of a trustee in place of one named in a will cannot be ingested into the *de bonis non* processes of the Probate Court. If the power to substitute trustees can be exercised, it can only be by reason of a transfer of equity powers to that court; and that, it is clear, can take place only if plenary powers are conferred—as to which, again, the writer expresses his skepticism. The power of substitution by a court of equity is, of course, a commonplace, no matter what the cause for the vacancy: death,⁶⁰ removal,⁶¹ or resignation⁶².

In *Thomas v. Poole*,⁶³ previously discussed, it will be recalled that it was held that the appointment by the Probate Judge of a trustee to succeed one who had died was improper, but the decision was on constitutional grounds. Of course, at the time of the decision the holding was manifestly correct; but today, if the question is not one of constitutionality, but of the scope of existing statutes, the authority of that case has no vitality.

59. Note 14 *supra*.

60. Among others, *Ex Parte Knust*, Bailey's Equity 489 (1831); *Reynolds v. Reynolds*, 61 S. C. 243, 39 S. E. 391 (1901); *Cone v. Cone*, 61 S. C. 512, 39 S. E. 748 (1901).

61. See authorities in note 57 *supra*.

62. See authorities in note 42 *supra*, and Sec. 9046, S. C. Code of Laws 1942.

63. Note 5 *supra*, and text to note 27 *supra*.

The same observation may be made here as was made in the concluding portion of the comment in sub-question 2 (a). If a vacancy occurs in the trusteeship and the Probate Judge appoints a substitute, can that substitute be one of the "trustees appointed by will" over whom Probate Judge is given jurisdiction? The same possible objection can be interposed: the trustee whom the Probate Judge names is not the one appointed by the will, and it is only over the latter that the section purports to confer authority. This may seem to be running literalism and logic into the ground, but the purpose of all this discussion is as much to point out incongruities, ambiguities and strange possibilities as it is to argue on policy and meaning and probable intent.

(e) *Construe a will in order to determine the powers and duties of the testamentary trustee?*

14 answered yes; 7 answered no; 1 did not answer. In answering no, 1 judge stated that he could construe the will to determine whether a trust had been created in order to pass on the propriety of the executor's transferring property over to the alleged trustee.

Comment: It is a familiar statement that the Probate Court is not a court of construction. The proposition, however, is not exactly accurate. What is meant and must be taken as correct, is that, *on probate*, the court is not a court of construction. In determining whether a will ought to be admitted to probate, what the court is concerned with is not what the effect, operation, or meaning of the provisions of the will may be,⁶⁴ but only whether the instrument propounded is the voluntarily and properly executed will of a competent testator, aware of its contents. Conversely, when a will, having been proved, is before a court—Probate or other—in a matter calling for construction, inquiries touching on the validity of the will are precluded, since such considerations have been concluded on probate and to raise them would be in

64. *Tygart v. Peeples*, 9 Richardson's Equity 46 (1856); *Jolliffe v. Fanning*, 10 Richardson's Law 186 (1856); *Craig v. Beatty*, 11 S. C. 375 (1878); *Prater v. Whittle*, 16 S. C. 40 (1881); *Burkett v. Whittemore*, 36 S. C. 428, 15 S. E. 616 (1891); *Ex Parte King*, 132 S. C. 63; 128 S. E. 850 (1925); *Hembree v. Bolton*, 132 S. C. 136, 128 S. E. 841 (1925); *Davis v. Davis*, note 14 *supra*.

the nature of a collateral attack.⁶⁵ But the duty of a Probate Judge does not stop with the probating of the will: he is charged with the duty of supervising the administration of the estate; and he must, therefore, in order to determine whether the executor is carrying out his duties properly, read and construe the will. To that extent, can he, as an incident to his general jurisdiction over administration, construe a will.⁶⁶ While he can pass on the propriety of the executor's acts after that fiduciary has performed them, the Probate Judge cannot, it seems, undertake to advise and instruct an executor beforehand as to his powers and duties. That prerogative is given to a court of equity.⁶⁷

It is elemental that a court of equity may construe a will, not merely for the guidance of the executor, but to determine the rights and interests of the parties taking under the will—not as an abstract matter in the latter case, but to settle any controversy; and, in fact construction may be involved in actions at law.⁶⁸ Moreover, both under the old Declaratory Judgment Statute⁶⁹ and the present Uniform Declaratory Judgment Act,⁷⁰ a declaratory judgment, taking the form of construction, may be had.

The jurisdiction of a court of equity to construe wills in which a trust has been created is clear, not only under the declaratory judgment acts referred to, but as an inherent element in the pattern of its operation. This is particularly true when the trustee seeks guidance and instruction where

65. *Rosborough v. Hemphill*, 5 Richardson's Equity 95 (1852); *Hembree v. Bolton*, note 64 *supra*; *Wilkinson v. Wilkinson*, note 14 *supra*.

66. 69 C. J. 860; 34 C. J. S. 969. *Cf. Youmans v. West*, 203 S. C. 480, 28 S. E. (2d) 47 (1943).

67. *Black v. Blakely*, 2 McCord's Equity 1 (1827); *James v. Spann*, 35 S. C. 614, 14 S. E. 955 (1891); *Smith v. Heyward*, 110 S. C. 148, 96 S. E. 389 (1918); *Wingard v. Hennessee*, 206 S. C. 159, 33 S. E. (2d) 390 (1944); *Page on Wills* (5th Ed.) Sec. 1603. And, it seems, in some cases he is under a duty to apply to a court for instructions. *Beacham v. Ross*, note 15 *supra*.

68. *Page on Wills* (5th Ed.) Sec. 1602.

69. Sec. 660, S. C. Code of Laws 1942. For a proceeding under this statute involving a will, see *Wilkinson v. Wilkinson*, note 14 *supra*.

70. Acts 1948 (45 Stat.) 2014.

he is reasonably in doubt as to his duties and powers.⁷¹ The Uniform Declaratory Judgment Act⁷² specifically covers the case of the trustee seeking instructions, but it does not assign the court to which application is to be made, referring only to "courts of record within their respective jurisdictions."

If jurisdiction over testamentary trustees is devolved upon the Probate Court, it would follow that that court would inherit the broad equitable power of advising the trustee before he has acted,—a power which it cannot exercise at the behest of a personal representative. But even if the jurisdiction is a limited one—confined to scrutiny of the trustee's administration, principally the rendering of accounts—the consequence would be that the Probate Judge, in order to determine the nature and extent of the trustee's duties, must construe the will just as he must incidentally do with respect to an executor's duties. One of the Probate Judges, in answering yes to this question, gave as his reason, "because the conduct of the trustee would be subject to my approval." The answer is unassailable, if it is once assumed that the trustee's acts are subject to the discipline of the Probate Court.

All trusts are not complicated, but there are many problems in them—and they are not unusual—that a Probate Judge does not encounter in his supervision of executors. It is true that many wills present difficult problems of construction where no trust has been created, and some of these problems are duplicates of trust problems, but their place will usually be found in devises of land, with which the executor usually has nothing to do—and because of which, correspondingly, the Probate Judge has a restricted range of construction. But with a trust of personalty or of land—with which if he has any jurisdiction at all he must contend—he may be faced with features and problems like these: the duration of the trust; the active or passive character of the trust; the Rule Against Perpetuities; conditions and contingencies attached to the vesting or enjoyment of the trust property; the various types of trusts—discretionary, blended, spend-

71. Restatement of Trusts, Sec. 259; 65 C. J. 680; *Boggs v. Reid*, 3 Richardson's Law 450 (1829); *Snelling v. McCreary*, 14 Richardson's Equity 291 (1868); *Fraser v. Davie*, 11 S. C. 56 (1878); *O'Cain v. O'Cain*, 51 S. C. 348, 29 S. E. 68 (1897); *Lemmon v. Wilson*, 205 S. C. 297, 31 S. E. (2d) 745 (1944); *Wingard v. Hennessee*, note 67 *supra*.

72. Note 70 *supra*.

thrift, trusts for education, for support, etc.; the allocation of receipts and expenditures to income or principal; the rights of beneficiaries *inter se*; the duties, powers, and liabilities of trustees; the distinction between the exercise of powers by a sole trustee, on the one hand, and co-trustees, on the other. A construction of any of these things must be preceded by a determination whether there was a trust at all: whether the language used is precatory or mandatory; whether, when the same person is named both executor and trustee, the nature of the duties imposed is such that a true trust is created. And if the trust is a charitable trust, he will have a new set of problems to grapple with and, at times, different rules. The contemplation of the Probate Judge poring over the will to resolve these matters—at once both ponderous and gossamer—is awesome and forbidding, more to the judge than to anyone else. But if he has jurisdiction, then it is his business to attend to it, and he shall have to do the best he can.

III

Section 9015 of the Code provides as follows:

“When any executor or administrator has since the grant of letters testamentary or of administration, or any *trustee*, guardian of minors, committee of lunatics and persons *non compos mentis*, changed his domicile to a place beyond the limits of this State, or has been absent from the State for ten consecutive months then last past, and such change or absence is made to appear to the satisfaction of the Judge of Probate of the county wherein the letters were granted or appointment made, it shall be the duty of such Judge of Probate to cite such executor or administrator, *trustee*, guardian of minors, committee of lunatics and persons *non compos mentis*, to account in person before him on a day named in the citation, which shall not be less than sixty days from the date thereof, and such citation shall be served upon such absent executor or administrator, *trustee*, guardian of minors, committee of lunatics and persons *non compos mentis*, by publication forthwith, once a week for four weeks, in the newspaper in which the said Judge of Probate publishes his official advertisements, and a copy shall be mailed to such absent executor or administrator,

trustee, guardian of minors, committee of lunatics and persons non compos mentis, at his or her or their place of residence, if it is known or can with reasonable diligence be ascertained."

Section 9016 of the Code provides as follows:

"If, upon such citation, such absent executor or administrator, *trustee, guardian of minors, committee of lunatics and persons non compos mentis*, fail to appear upon the day named and render a return of his administration up to date, or, appearing by attorney, fail to disprove a change of domicile and continuous absence for ten months next preceding the date of citation, in the case of an administrator, the letter of administration shall be revoked; and the case of an executor, such failure shall be received as a formal renunciation of the office, notwithstanding his previous acceptance; and in case of any *trustee, committee, or guardian*, the appointment shall be revoked and annulled."

(1) *Have you ever removed a testamentary trustee under these two Sections?*

22 answered no; but 1 said he "is getting ready to do it".

(2) *If you have not removed a testamentary trustee, is it your present opinion that you can properly remove him under these Sections?*

22 answered yes; 1 stated he would remove only if his court had appointed the trustee.

Comment: In the two statutes set out above, we have a specific act of the trustee mentioned as a cause for Probate Court action. Presumably the trustee referred to is a testamentary trustee, although the word in itself is capable of a larger meaning—another example of the lack of precision that appears throughout. The unanimity of negative answers in (1) is a tribute to—or, at least, a token of—the permanence and immobility of resident trustees.

The two sections were enacted in 1878,⁷³ and their present language is virtually identical with that in the original act. A similar provision is to be found in the 1942 Code, in

73. 16 Stat. 700.

Sections 8617 and 8618, in which the language is the same, except that it omits executors and administrators; but the word "trustee" is repeated there. Actually, it is the same Act of 1878, transplanted in modified form to the Article dealing with guardians.

The wording of these statutes demands close analysis. It is stated that when "such change or absence is made to appear to the satisfaction of the Judge of Probate of a county wherein the letters are granted or appointment made," etc. One may easily determine where letters are granted, and where guardians and committees are appointed, but with testamentary trustees, where is the appointment made? The Probate Judge does not make the appointment; the testator makes it. In a given case a Circuit Judge may make an appointment, and the county of appointment is thus made known; but it is doubtful, to say the least, that this is the appointment referred to. There may have been a misconception in the mind of the particular legislator who proposed or prepared the legislation, which was concurred in by the legislature in this enactment; and, if so, it is a formal public perpetuation of error; but the error or assumption does not make it the law that a Probate Court appoints a testamentary trustee, even though that court has authority in "matters testamentary". The Probate Judge no more makes the appointment of a testamentary trustee by acceptance of the will for probate than, in the case of an *inter vivos* trust represented by deed, the Clerk of Court or Register of Mesne Conveyance appoints the trustee on recording the deed. One may object that there is a vital difference: in the one case there is a *judge*, in the other, a mere *clerk*—that the admission of a will to probate is a judicial act, the recording of a deed a ministerial one. But we may go up to the level of the Probate Judge, and say that the admission of the will to probate is no more an appointment than the entertaining of an action by or against the trustee of an *inter vivos* or testamentary trust in the Court of Common Pleas constitutes an appointment by that court.

The only statute that confers upon the Probate Court the power to appoint a trustee is one which deals with the divestment of the dower of an insane married woman;⁷⁴ and

74. Sec. 8598, S. C. Code of Laws 1942.

such a trustee is, manifestly, not a testamentary trustee.

The concluding clause of Section 9016 declares: "and in case of any trustee, committee, or guardian, the appointment shall be revoked and annulled." It will be observed that with respect to an administrator, it is provided elsewhere that his letters shall be revoked; as to an executor, he is to be treated as if he had renounced his office; as to guardians and committees their appointment shall be revoked and annulled. In every one of these situations the penalizing provisions make sense. Each of them presupposes a prior act by the Probate Court, which is now being undone. But with a trustee, it is impossible to conceive of the unmaking of an appointment that has never been made; and it is hardly open to suggestion that the testator's designation of the trustee is the appointment referred to.

There is no provision in the Code, nor is it case law, that a trustee must take an oath before the Probate Court or any other court to qualify or to enter upon his duties. These requirements are present with the other fiduciaries who are answerable to the Probate Court. Nor is there to be found anywhere a provision calling for the issuance of letters of trusteeship, corresponding to the letters of administration, testamentary, or of guardianship—as in those cases it is either expressly provided for by statute or is assumed as an incident of the traditional powers of the Probate Judge. Any issuance of "letters of trusteeship" would be an officious, not an official, act.

The case of *Carr v. Bredenburg*,⁷⁵ decided in 1897, nearly twenty years after the enactment of the two sections we are here dealing with, points up the inutility and insignificance of their provisions. In that case the trust had been created under a will of a testator who had died in 1868. The surviving trustee of the will at some later time moved out of the state and had long been absent from it when this suit was started in 1896. In the litigation the trust property was sold. One of the questions which arose was whether the trust proceeds should be transferred to the now non-resident trustee, and, effectually, whether she should not be removed because of her non-residence. The Supreme Court held that the fact that the trustee had left the state was not in itself sufficient to

75. 50 S. C. 471, 27 S. E. 925 (1897).

forbid the transfer of the trust money to her; that to refuse such payment was "practically to remove the trustee from office." The court concluded that, in order to protect the fund, the trustee should furnish bond with local sureties, conditioned upon the proper discharge of her duties and against removal of the fund from the jurisdiction. Now, if this case means anything, (and it was decided after 1895—so that the constitutional feature of the question is academic), it is that, as a matter of law, removal of a testamentary trustee from the state is not an automatic cause for ouster. (Can it be possible that in Charleston county, in which the case arose and in which the trust was administered, there can be a reconciliation of the statute and the decision, if we accept the view that the Charleston Probate Court has no jurisdiction over trustees? See the discussion in footnote 6.) Yet at the time this decision was rendered, the statute calling for annulment of the appointment of absent or domicile-changing fiduciaries had been on the books for two decades. The statute, it will be noted, calls for a removal by the Probate Judge on the bare showing of the pertinent facts, and he is not invested with discretion to annul or not to annul. The conflict between the statute, if it applies to testamentary trustees, and the decision in the case, is plain. The case nowhere mentions the statute. It would be extraordinary, indeed, if the court had overlooked it. The probability is that the court knew of it and chose to ignore it. If the statute were, in reality, applicable, the Probate Court could, even after the decision, have ousted the absent trustee. It is doubtful that the Probate Judge had the temerity to take this step. If we accept the *Carr* case and note the impossibility of applying the section when it speaks of *annulling the appointment* of the trustee, we must conclude that the statute cannot reasonably be said to affect the testamentary trustee. The presence, side by side, of a statute declaring positively that the Probate Judge shall remove a trustee who has left the state and a Supreme Court decision that the Chancellor shall not remove the trustee in such a case, creates an optical illusion that is bad for the eyes and worse for the brain.

These statutes that we have been discussing are an unfortunate example of throwing in a term for good measure. Another instance of the heedless dumping of the trustee into the fiduciary pot is to be found in Section 2488 of the

Code of 1942, which has already been mentioned.⁷⁶ This statute is a part of the inheritance tax laws, and its purpose is to have the representative of a decedent's estate furnish an ample detailing of the assets of the estate. It provides that the administrator or executor shall file at the time of his appointment a detailed statement of prescribed items. Then there appear these words: "The statement shall also show the name, residence, and post office address of each executor, administrator and trustee." The word "trustee" appears here for the first time. Then there is a provision for the filing of an inventory in the Probate Court by "the executor, administrator or trustee within one month after his appointment." This is followed by a heavy penalty provision against the "executor, administrator, or trustee," and it is provided that the official bond of an "executor, administrator, or trustee" shall be liable. There is a further provision that the Probate Court may remove the executor or administrator (nothing is said about the trustee) and appoint another representative, and then the Probate Judge "shall notify the South Carolina Tax Commission * * of the failure of any executor, administrator or trustee to file such inventory in his office." So, again, we have the imbroglio of the "trustee's appointment". Why, for the purposes of tax, the trustee should file an inventory, when the executor does, or is supposed to do, it, baffles the judgment. Furthermore, the words "executor, administrator or trustee" are in the alternative. Only one of three persons is contemplated. The will is not proved by the trustee but by the executor; the executor must file the inventory; therefore, once the executor files, the requisite is complied with and no duty rests upon the trustee.

Pursuing this matter of the inventory further, if the trustee is to file, will he file an inventory of the whole estate, or merely of the trust estate? If it is the latter (and the filing must take place within a month after appointment), how can it reasonably be determined within that time what the trust estate consists of? Unless it is a trust of specific real property, chattels, or funds, the trust estate cannot be ascertained until after the executor has carried out his executorial duties. Certainly that would be true if the trust estate was

76. See the discussion under 2 (c) in the text.

of the residue; and even if the whole estate was left in trust, it would only be what remained after the payment of debts.

There are further references to the "trustee" in the section, but to discuss them would simply result in further entanglement.

This sort of indelicate legislative treatment to which the trustee is subjected makes one almost cry out a plea that to every trustee there ought to be fastened a tag with the words **HANDLE WITH CARE**.

IV

Section 9047 of the Code provides as follows:

"It shall be the duty of every trustee appointed by the court to make an annual return of the estate in his possession, setting out all the items of money received and paid out, with the proper vouchers. The Judge of Probate shall set apart certain days for the examination of such accounts, and give notice thereof to all trustees whose duty it shall be to account before him."

(1) *Have you in actual cases before you interpreted this Section, or do you now interpret it, as compelling testamentary trustees to account to the Probate Court in the same manner and at the same time as required of executors and administrators?*

22 answered yes; there were no negatives. 1 stated that he compelled annual returns but doubted his power to do so. 5 stated that in actual cases they had *compelled* the making of returns.

Comment: The section in question, which seems to be the mandate upon which trustees who file returns proceed, (there is no other section requiring trustees to account) is derived from a comprehensive statute enacted in 1824,⁷⁷ in which the pertinent language is "and it shall be the duty of every trustee or guardian appointed by the court, to make an annual return of the estate in his possession, setting out all the items of money received and paid out, with the proper vouchers; and it shall be the duty of the master and commissioners to set apart certain days for a reference of such

⁷⁷ 7 Stat. 327.

account, to give notice thereof to all guardians and trustees whose duty it shall be to account before them." The original statute then goes on to penalize, not the trustees, but the master or commissioner for failing to make reports to the court if the beneficiary should have suffered loss by reason of the neglect of the trustee or guardian to account annually.

The Act of 1824 was amended by the Revised Statutes of 1873⁷⁸ to read as it now does, except that the words "and guardian" appear there after the words "every trustee". The language "appointed by the court" of the original Act is retained, but the important change is the requirement to account to the Probate Judge instead of to the master or commissioner in equity as theretofore.

The words *appointed by the court* are not meaningless, and they are of vital importance. Their significance was explained in the case of *Ex Parte Mayrant*,⁷⁹ decided in 1831. There, a trustee, who succeeded, by court appointment, one who had resigned, contended that he was not required to make returns. The court denied the validity of the contention, saying that a return was not required of an original trustee, but that a trustee appointed by the court was compelled—under the Act—to make returns. The court's observations deserve setting out:

"There was reason why the original trustee appointed by the party should not be included in the Act. First, the donor or creator of the trust has thought proper to repose confidence in the trustee of his own appointment, and he had a right to annex what terms he pleased to the trust. But the creator of the trust has nothing to do with the substitution under the Act. * * * Though it is said that a court has a general superintendence of trustees, yet it does not interfere with a trustee appointed by deed or will until he is brought before the court by suit. When that is done, however, it will superintend the entire execution of the trust and may provide by its decree or order for the trustee's accounting periodically to the Master. * * * When the trustee is appointed by the court it is then aware of his existence and the object of the Act was to render him amenable to the court,

78. Rev. Stat. 1873, 467, Sec. 11.

79. Note 37 *supra*.

and to compel the court to superintend his conduct without the necessity of any suit for that purpose.”

It is clear, from this language, and from the background of the statute, that only those trustees *appointed by the court* were required to do the act called for by the statute. The court in the *Mayrant* case cites the instances in which such appointment may occur: the settlor's failure to name a trustee; the death of the trustee; his resignation; his removal for misconduct. Now, it has already been shown that a testamentary trustee is appointed by the settlor and not by any court, Probate or other. It must be pointed out, too, that in the phrase “trustee appointed by the court”, the “court” referred to is not the Probate Court, because it is the duty of the Probate Court to report to another court. The reference, in the light of the history of the statute and its interpretation, is to the court of equity. The Probate Court appoints guardians, and the relevance of that court with respect to requiring returns from guardians is manifest—although, now, that is taken care of by other statutes. It may be that the statute, in requiring trustees appointed by the court, to report annually to the Probate Court, in effect constitutes the judge of that court a *quasi*-Master, or, at least, designates him to serve the same functions. But it is sufficient to say that the language of the statute as it has been interpreted, cannot be ignored; and we must conclude that a trustee named in a will—who is *not* court-appointed—is under no original duty to make periodic returns to the Probate Court, or to any other court for that matter—at least, as to the latter, in the absence of litigation.

Of course, the court of equity may, at the instance of the beneficiary, compel the trustee to account; and, also, the account may be brought in issue in any case involving the replacement of a trustee. And it seems to be the law that, independently of statute, the court-appointed trustee may be required at any time to make an accounting. In *Vincent v. McMillan*,⁸⁰ a trustee who was appointed by the circuit court, as a sort of stake-holder, in a contest between the administrator of a deceased ward and the guardian, questioned the authority of the court to compel him to make an accounting, asserting that “it was not necessary or proper for the

80. 149 S. C. 229, 146 S. E. 869 (1928).

information of the court before judgment or for any other purpose." The trustee had made no reports to the Master. The court spurned this contention, saying: "The trustee appointed by the court was subject to the order of the court. It was his duty to account to the Presiding Judge, or to the Master, on direction of the Presiding Judge, when required to do so. The court had the right to inquire into the acts and doings of the trustees appointed by it at any time it was deemed proper." No mention was made in the case in Section 9047.

No cases since the amendment of the Act in 1873 actually construe the statute, although, undoubtedly, whether properly or mistakenly, returns are made under it.

In *Strauss v. U. S. F. & G. Co.*⁸¹—an action touching upon the liability by the directors of a corporate trustee to the trustee's surety which had made good losses to the trust estate—the contention was made by the directors that, so far as the surety was concerned, it was precluded by the returns that the trustee had made to the Probate Court from questioning the trustee's acts, on the ground that the surety had notice through the returns of the trustee's conduct. The court declared that such returns were not notice to the surety. In this case the court makes bare mention of Section 9047, speaking of it as "requiring" filing of returns. But no question of its applicability was brought before the Court. The corporate trustee was, in fact, a trustee appointed by the court—and not the Probate Court—as a substitute, and the status of the trustee could very well fit into the language of the statute.

All in all, the section in question borders on the unintelligible; but if this be strong language, let us say, more benevolently, that it is rather confusing. The statute itself provides no penalty—and there is no supplementing statute for that purpose—for the failure to make a return. It is significant that there are no punitive statutes for testamentary trustees who fail to make returns as there are for delinquent executors and administrators,⁸² and guardians⁸³. The consequence of failing to make any such return does not appear

81. 63 Fed. (2d) 174 (C. C. A. 4—E. D. S. C.—1933).

82. Secs. 9012, as amended Acts 1943 (43 Stat.) 182; 9013, S. C. Code of Laws 1942.

83. Sec. 8613, S. C. Code of Laws 1942.

in the statutes, nor is there any case reported in which the failure by a trustee to make report to the Probate Court is touched upon.

One last question may relevantly be asked here: are trustees of charitable trusts created by the will affected by the statute and required to make periodic returns? There is nothing in the books on the subject but it does not take much imagination to envision the complexities of such accountings. The charity may last forever: must the trustees make returns in perpetuity?

The dangling character of the statute is accentuated by the fact that the statute does not exclude, by its terms, trustees appointed by the court in existing *inter vivos* trusts, nor trustees appointed by the court in litigation where funds are to be protected by payment to a trustee. To give a Probate Court jurisdiction over testamentary trustees—whom it does not appoint—and *inter vivos* trustees, is a large and baffling order. For the legislature that concocted such an unappetizing legal dish one might well call down a small plague on both its houses.

(2) *So far as you know, is it the practice of the bar of your county, in the representation of testamentary trustees, to have them periodically account and make returns to your court?*

19 answered yes; 3 answered no.

Comment: The proportion of affirmative answers indicates the belief, apparently, on the part of the legal community that annual returns on the part of trustees are necessary. The practice is not to be condemned, although its necessity, as it has been argued, is questionable. It may be however, that, instead of actually regarding such returns to be required by law, the lawyers who file them are merely playing safe, and, certainly, no harm can be done by the filing. Or the state of mind may be that there is nothing to hide and the return may as well, on that account, be made. Or it may denote a passion for regularity—a salutary prescription in all things.

It is the fact that corporate trustees—taking them as a whole—make annual reports to the Probate Court. Having, as they do, some of the most competent legal counsel

in the state, this may reflect a conviction on the part of these eminent probate practitioners that the filing of a return is compulsory; but, again, such advice may be based on more practical considerations—principally caution.

Actually, a trustee has nothing to lose and nothing much to gain by making returns. He loses no commission, nor must he pay any fine, when he fails to file; and, if he does file an *ex parte* return, which is the customary practice, the beneficiaries (as is the case with all persons affected by the administration of estates in the Probate Court) are not bound by it, even though the items as submitted to, and approved by, the Probate Court are *prima facie* correct.⁸⁴

In any event, just what would happen if such returns are not filed is a question that cannot be precisely answered. There is not, as has been pointed out, any forfeiture of commissions or imposition of a fine in the case of executors, administrators and guardians. In *Muckenfuss v. Heath*,⁸⁵ the claim for commissions of a trustee named in a deed was resisted on the ground that the making of regular returns by the trustee to the Secretary of State's office was a condition precedent to his allowance of commissions. The court denied this contention, saying:

"By the executor's law, it is expressly provided, that *executors or administrators* who fail to make returns, shall forfeit their commission. But there is no such provision in the Act we are considering * * no penalty or disability is imposed on a * * trustee who shall fail to return his accounts. Perhaps, if it appeared that the estate had suffered injury from his neglect it might be within the competency of the Court to deprive him of commissions as a punishment. But in the present case, it appears that the estate has been managed skillfully

84. *Neville v. Robinson*, 1 Bailey's Law, 361 (1830); *Miller v. Anderson*, 1 Hill's Equity 25 (1833); *Riddle v. Riddle*, 5 Richardson's Equity 31 (1852); *Renwick v. Smith*, 11 S. C. 294 (1877); *Roberts v. Johns*, 24 S. C. 580 (1885); *Buerhaus v. DeSaussure*, 41 S. C. 457, 20 S. E. 64 (1893); *Bagwell v. Hinton*, 205 S. C. 377, 32 S. E. (2d) 147 (1944).

85. 1 Hill's Equity 182 (1833).

and faithfully; and satisfactory accounts kept and not returned.”⁸⁶

Aside from the questionable applicability of the section itself to trustees, the failure to comply with it—if the trustee has otherwise properly performed his trusts—is of no material significance and cannot visit upon the trustee any statutory punishment or judicial censure on the part either of the Probate Court or the court of equity.

V

Section 9048 of the Code provides:

“Trustees shall be allowed the same commissions for the execution of their trusts as are allowed by law to executors and administrators.”

Have you in actual cases before you interpreted, or do you now interpret, it, as giving power to the Probate Court to allow or deny commissions claimed by testamentary trustees?

22 answered yes; there were no negatives. Of the 22, 8 stated that they had allowed commissions to trustees in actual cases. This last statistic does not tally with Question IV (2), since if, in 19 counties, trustees customarily file periodic accounts, they are stating items of commissions in their account, which must be approved or disapproved by the Probate Court. This discrepancy must be due to oversight in failing to specify between actual cases and mere interpretation.

Comment: The answer to this question depends upon the necessity of filing returns, as discussed in the preceding question. If such returns are necessary, the Probate Judge—unless he is a mere custodian of the report—must pass upon all items, including those for commissions.

If the Probate Judge does have the power to allow or deny

86. The court is referring to the Act of 1745 (3 Stat. 666) which provided that guardians and trustees of minors should render accounts to the Secretary of State every three years. The Act further fixed the Commissions of executors and administrators and provided that failure to file accounts should result in forfeiture of commissions; it provided for commissions to trustees, but prescribed no forfeiture for failure to file.

commissions, he is, with testamentary trustees, confronted with criteria which are considerably different from those applied to executors and administrators. His work is fairly well charted for him with the personal representative, but no such clear course of assessment is his with the trustee.

The statutes regulating the commissions of executors and administrators—which, to an extent, control the commissions of trustees—are Sections 9017, 9018, 9019, 9020, of the Code of 1942. Section 9017 fixes the rate of compensation; Section 9018 provides for additional compensation, and the mode of obtaining it for extraordinary services; Section 9019 calls for division of commissions according to services performed where there are co-representatives; Section 9020 provides for compensation to the estate of a deceased representative.

Prior to 1943, when Section 9017 was amended,⁸⁷ that section allowed 2½ per cent. on moneys received, and 2½ per cent. on moneys disbursed, with a virtual 10 per cent. on income received on invested funds. Prior to the 1943 amendment the statute read “two dollars and fifty cents for every hundred dollars which he * * shall receive, and the sum of two dollars and fifty cents for every hundred dollars which he * * shall pay away.” This language was construed in many cases to permit commissions only on *money*, and not to allow commissions on personal property, whether chattels or choses in action, held in specie, nor unless it could be said that the fiduciary had actually “received” funds for the estate;⁸⁸ and the same principle was applied to trustees.⁸⁹ But, in 1943, the section was amended by the insertion of the words “appraised value of all personal assets” after the words “hundred dollars” in both places; so that the pertinent portion now reads “two dollars and fifty cents for every hundred dollars appraised value of all personal assets * * which he shall receive, and the sum of two dollars and fifty cents for every

87. 43 Stat. 35.

88. *Rutledge v. Williamson*, 1 DeSaussure 159 (1789); *Ruff v. Summers*, 4 DeSaussure 529 (1814); *Ball v. Brown*, *Bailey's Equity* 374 (1831); *Jones v. Jones*, 39 S. C. 247, 17 S. E. 587, (1892); *Buerhaus v. DeSaussure*, note 84 *supra*; *DeLoach v. Surratt*, 58 S. C. 117, 36 S. E. 532 (1900); *Turnipseed v. Sirrine*, 60 S. C. 272, 38 S. E. 423 (1900); *Herndon v. Caine*, 106 S. C. 230, 91 S. E. 1 (1916); *Spartanburg County v. Arthur*, 180 S. C. 81, 185 S. E. 486 (1935), receiver.

89. *College of Charleston v. Willingham*, 13 Richardson's Equity 195 (1867); *Lanier v. Brunson*, 21 S. C. 41 (1883).

hundred dollars appraised value of all personal assets * * which he shall pay away.”

It is easy to see that this change in the base for computation of commissions is vital and far-reaching. Thus, where, before the amendment, an executor or administrator received or collected \$5,000 in money, and chattels and securities appraised at \$100,000 which he did not thereafter sell, he was entitled to commissions only on \$5,000, receiving and disbursing. Since 1943—at least as to estates whose administration originated following the enactment date (the effect on estates created before that time but continuing thereafter is open to question)—the representative would be entitled to commissions on the total of money and property—\$105,000—although he may have acted, for all practical purposes, only as a custodian of the property other than the cash.

The writer does not here concern himself with the fairness or unfairness of this change in the law that so greatly augments the compensation of the executor or administrator; but there is cause for concern in the undoubted complication that besets trust estates by the amendment. An appraisal of all property, real and personal, is called for by statute as an incident of the administration of all decedents' estates.⁹⁰ With this appraisal there is at hand a base for computation of commissions for an executor or administrator; but the appraisal is on the decedent's estate and not on the trust estate, and is for the purpose of fixing the representative's liability and furnishing a tentative base for the calculation of inheritance taxes. It is difficult to see how the trustee's commission can be based on an appraisal made for a different purpose. There is no provision for appraisal of the estate held by the trustee, and an attempt to tax the trust estate, or measure the trustee's liability, on the basis of an appraisal which the law does not require of the trustee, may result in grave injustice to the trust estate. Furthermore, if, in a testamentary trust, we accept the appraisal made through the executor, how long is that appraisal to endure? Let us say that a trustee received from the executor personal property appraised as of the time of the death of the testator at \$25,000. At the time of the trustee's taking over of the property, it is worth, by increase, \$35,000, and at the time of the trustee's

90. Secs. 8987 *et seq.*, Sec. 2488, S. C. Code of Laws 1942.

delivery thereof to the beneficiary—say, on reaching his 21st birthday, ten years later—the property has increased in value to \$50,000. There has been only a single appraisal—that made through the executor. Is this appraisal to remain constant throughout? Or, is the trustee entitled to have an appraisal made at any subsequent time—particularly at the date of the delivery of the property to the beneficiary—to carry the upward value? Will it work in reverse: as where the property originally appraised at \$25,000 is actually worth at the time of delivery to the beneficiary, through depreciation, only \$5,000? Can the trustee claim the benefits of the original appraisal, or must he be carried along on the fluctuating value of the property?

A further complication is introduced by the amendment as it may affect trustees: they are entitled to commissions whether the trust is testamentary or *inter vivos*, since the statute does not limit commissions to trusts created by wills.⁹¹ In fact, a large part of the corporate trustee's work is in the field of living trusts. Of course, the trust instrument may fix the compensation and the mode or base for determining it;⁹² but, in the absence of such provision, what, in an *inter vivos* trust, is the so-called "appraised value" which is to be used? Here we do not have even the fortuitous appraisal made through the executor by which the testamentary trustee may—perhaps—be guided. This obviously unperfected attempt to increase fiduciaries' commissions, and the complicated and unanswered questions it presents in trusts—these are comment enough in themselves on a bad legislative job.

The standards for the allowance of commissions to the

91. *Muckenfuss v. Heath*, note 85 *supra*; *College of Charleston v. Willingham*, note 89 *supra*; *Lanier v. Brunson*, note 89 *supra*; *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959 (1891); *Singleton v. Lowndes*, 9 S. C. 465 (1877); *Cunningham v. Cunningham*, 81 S. C. 506, 62 S. E. 845 (1908); *Sartor v. Newberry Land Co.*, 104 S. C. 184, 88 S. E. 467 (1915); *Neeley v. Peoples Bank*, 133 S. C. 43, 130 S. E. 550 (1925).

92. *College of Charleston v. Willingham*, note 89 *supra*; *In re Norris' Estate*, 153 S. C. 203, 150 S. E. 693 (1929). The same is true where there is no trust, in a will fixing the compensation of the executor: *Rothmahler v. Meyer*, 4 DeSaussure 215, 6 Am. Dec. 613 (1812); *McCaw v. Blewitt*, 2 McCord's Equity 90 (1827); *Esswein v. Seigling*, 2 Hill's Equity 600, *Riley's Equity* 200 (1827); *Finklea v. Jordon*, 14 Richardson's Equity 160 (1868); *In re Norris' Estate*, *supra*.

executor or administrator, on the one hand, and to the testamentary trustee, on the other, are sufficiently different in each case to present the Probate Court with a serious set of problems, and to bring to the front the question again of whether he has the power, at all, to pass on claims for commissions. The Probate Judge is quite precisely hedged in with respect to his allowance of commissions to executors and administrators. Their conduct in the management of the estate—whether it has resulted in a loss to the estate or not—is no test of their right to commissions. They are entitled, willy nilly, to commissions, except when the reasons for forfeiture *prescribed by statute* are present. That forfeiture occurs only when the representative neglects to render an annual account within the time prescribed;⁹³ and, unless he can show good cause to the Probate Court for his delay or failure, he forfeits his commissions, according to the cases, *only* for the years in which he has failed to make such accounting.⁹⁴ Thus, if an executor or administrator seasonably filed a return for his first year, he would be entitled, come what might, to commissions on everything which he had received—embracing the personal corpus of the estate, and what he had collected and what he had paid out; but in the succeeding years, the failure to file accounts would not affect his right to the commission earned the first year, which would be a minimum of 2½ per cent. on the corpus which he had received, plus the same percentage on what he had paid out during that year. And, even where he has failed to make returns in a given year and thus forfeited his commissions for that year, he is still allowed commissions on the balance remaining in his hands which he is compelled to,

93. Sec. 9012, S. C. Code of Laws 1942, as amended by Acts 1943 (43 Stat.) 182.

94. The cases on this point are too numerous for citation. Some of the more recent ones are *Blackmon v. Blackmon*, 113 S. C. 478, 101 S. E. 827 (1919); *In re Norris' Estate*, note 91 *supra*; *Hutchison v. Daniel*, 170 S. C. 459, 171 S. E. 13 (1932); *Brannan v. Woodward*, 175 S. C. 1, 178 S. E. 249 (1934); *Beacham v. Ross*, note 15 *supra*; *Beacham v. Ross*, 190 S. C. 219, 2 S. E. (2d) 690 (1939); *Lazenby v. Mackey*, 196 S. C. 507, 14 S. E. (2d) 12 (1941). In *Black v. Blakely*, note 67 *supra*, the court denied commissions where the returns filed were "irregular, imperfect, and unintelligible", calling them, "altogether illusory".

and does, pay over to those entitled.⁹⁵

From the foregoing, it will be seen that seldom, if ever, can an executor or an administrator be deprived altogether of his commissions; although, of course, he may actually receive, or be entitled to, nothing if the losses caused by his breaches of trust exceed the commissions to which he is entitled. But, with a trustee, the conditions for forfeiture are different. There is no statute—as has already been pointed out—that specifies the deprivation of commissions for any act; and it has already been shown that the failure to file a return under a statute which called for it, but which did not carry a forfeiture provision, would not entail a loss of compensation.⁹⁶ The guiding principle for the compensation of the trustee is the proper management by him of the estate; his maladministration may cause him to lose *all* his commissions.⁹⁷ Thus, the court of equity may deny him, for cause, the right to receive any commissions; and while he may be in a more favorable position than an executor and administrator if he does not file a return, he is decidedly in a less advantageous position on the whole.

It is difficult to see how a Probate Judge, in the ordinary course of receiving returns in which commissions are claimed by a testamentary trustee, can properly evaluate the propriety of those claims. Whether commissions should be allowed would depend on an over-all survey of the administration of the trust estate; and how the matter can be determined on the basis of annual returns is hard to understand. Yet, if and as the Probate Judge receives a return, with claimed items of commissions, he must—if the return is regular on its face—allow commissions. Once having allowed them, could he, on application for a discharge (see Question VI *post*), disallow them?

There are—surprisingly or not surprisingly, depending

95. *Gee v. Hicks*, Richardson's Equity Cases 5 (1831); *Davidson v. Moore*, 14 S. C. 251 (1880); *Epperson v. Jackson*, note 17 *supra*; *Sherwood v. McLaurin*, 103 S. C. 330, 88 S. E. 363 (1915); *Blackmon v. Blackmon*, note 94 *supra*; *Hutchison v. Daniel*, note 94 *supra*; *Branman v. Woodward*, note 94 *supra*.

96. *Muckenfuss v. Heath*, note 85 *supra*, and text.

97. *Muckenfuss v. Heath*, note 85 *supra*; *Singleton v. Lowndes*, note 91 *supra*; *Cobb v. Fant*, note 91 *supra*. In *Neeley v. Peoples Bank*, note 91 *supra*, the court refused commissions only for those years in which breaches of trust took place.

on the point of view—no cases reported in which the allowance or disallowance by the Probate Judge of commissions to a testamentary trustee has been put in issue. One case, however, touches barely upon it. In *In re Norris' Estate*,⁹⁸ a Probate Judge's adjudication on commissions of an executor-trustee was passed on, the issue being whether the fiduciary whose commissions in both capacities were fixed by the will was entitled to two sets of commissions. It was properly held that the terms of the will should control, and only one set of commissions was allowed—the calculation being made on the fiduciary's services as executor.

The point to this extended discussion of the different criteria for commissions of personal representatives and those of the trustee is that the Probate Judge cannot use the same yardstick for both situations, and that in testamentary trusts he would be exercising a function that the machinery of his court is ill adapted to.

VI

Section 213 of the Code provides as follows:

"It shall not be lawful for any judge of probate in this State to grant a final discharge to any executor, administrator, trustee, guardian, or committee, unless such executor, administrator, trustee, guardian, or committee shall have finally accounted for the estate in his hands, and have given notice in a newspaper of the county (if there be no newspaper in the county, then in some newspaper having the greatest circulation therein) for the space of at least one month, that on a day certain application will be made to the said judge of probate for final discharge. No such discharge shall affect any distributee, legatee, *cestui que trust*, ward or lunatic, who has not been made a party to such application, either by personal service of the notice, or by publication in the mode provided for absent defendants."

(1) *Have you in actual cases before you construed this Section, or do you now interpret it, as making it necessary that every testamentary trustee apply to the Probate Court for a discharge in order to be relieved of liability to the trust beneficiaries?*

98. Note 92 *supra*.

21 answered yes; 1 answered no. 2 of those answering yes stated that the trustee *must* apply to the Probate Court to be relieved of the liability to the beneficiaries; 1 stated that, only if the trustee had been appointed by the Probate Court must he make application to that court for his discharge.

Comment: The statute from which the section in question is taken was enacted in 1869,⁹⁹ and is practically verbatim with the section except for the proviso as to the making of parties to the proceeding those affected by it. This last proviso seems to have been inserted by the Revised Statutes of 1893.¹⁰⁰ The discharge statute was not the origin of the practice of obtaining discharges by fiduciaries answerable to the Probate Court, but was designed solely to regulate the granting of discharges by an additional requirement of newspaper notice. This was decided in *Roberts v. Johns*,¹⁰¹ which held that publication of notice was a condition precedent, but that it did not dispense with the long standing requirement of making interested persons parties. The proviso now in the section was, no doubt, inserted to make this admonition effective; and the cases hold that a discharge granted without the service of a notice of application for discharge—in addition to newspaper notice—is not binding.¹⁰²

The effect of a discharge properly granted is stated in *McNair v. Howle*:¹⁰³

“Executors or administrators who have been duly discharged can no longer exercise the functions of their office, nor can they be required to make further accounting in the absence of fraud or error in the entry of the decree discharging them.” * * *

“If the order of discharge abrogates the powers and discharges the liabilities of the administrator, it is equiv-

99. 14 Stat. 263.

100. Rev. Stat. 1893, Code Civ. Proc., Sec. 41.

101. 16 S. C. 171 (1881).

102. *McNair v. Howle*, note 14 *supra*; *Beatty v. National Surety Co.*, note 7 *supra*; *Chamberlain v. Nat. Bank*, 202 S. C. 115, 24 S. E. (2d) 158 (1943); *First Nat. Bank v. U. S. F. & G. Co.*, 207 S. C. 17, 35 S. E. (2d) 47 (1945).

103. Note 14 *supra*. See, also, *Ward v. Parker*, 19 S. C. 603 (1883); *Quick v. Campbell*, 44 S. C. 386, 22 S. E. 479 (1895); *Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592 (1905).

alent to a judgment vacating the office of administrator.
 * * * When an administrator has full and faithfully administered the estate in his hands * * * and, after due service of personal notice of those entitled thereto, has obtained an order of discharge from the Probate Court, such decree should protect him from further liability again to take up the burden of the trust by reason of after-discovered claims or assets."

It was held in this case, however, that such an order of discharge "does not entail extending to it the force of a final adjudication that the estate has been fully administered", and that, accordingly, although the general administrator had previously been discharged, the estate might be reopened for *de bonis non* administration to deal with claims not previously presented.¹⁰⁴

The proceeding for the obtaining of a final discharge is, in reality, a proceeding for a final accounting, the moving party being the fiduciary rather than the beneficiary. When a trustee's accountings are approved in a court of equity, in a suit instituted either by the beneficiary or by the trustee, the effect of the approval is to work a discharge. Of course, prior to the enactment of the statute in 1869, accountings between a testamentary trustee and the beneficiary in the Court of Ordinary would not take place. The introduction of the trustee into the discharge statute alongside those fiduciaries customarily amenable to the Probate Court is, obviously, an innovation. Under the Constitution of 1868, the Probate Court does not entertain such jurisdiction, because of its restriction to "matters testamentary".¹⁰⁵

104. The chances of an estate's being reopened through *de bonis non* administration to take care of claims not previously submitted have been considerably lessened by the transformation of the statute dealing with presentation of claims into a non-claim statute, requiring the filing of claims by creditors—with certain exceptions—within eleven months of the publication of the first notice to creditors; failure to file resulting in a barring of the claim. Section 8993, S. C. Code of Laws 1942, as amended by Acts 1943 (43 Stat.) 260.

Further as to the possibility of reopening an estate after discharge of the administrator, see *Lucas v. Southern Ry. Co.*, 156 S. C. 529, 153 S. E. 638 (1930).

105. See *Poole v. Brown*, note 10 *supra*, and discussion of this case under Question I.

If, since the Constitution of 1895, the legislature has authority to confer jurisdiction over trusts to the Probate Court, the question of the mechanics of the granting of the discharge to a testamentary trustee comes to the front. Does, or can, a Probate Judge grant "letters dismissory", as he does with the other fiduciaries in his charge? Such letters practically presuppose the prior grant of letters; and, as has been seen, there are no letters issued to a trustee. Does a Probate Judge, after granting a discharge to a trustee, have the power to reopen the trust estate and reinstate administration? If a beneficiary or a creditor of the trust estate objects to the granting of a discharge, what procedure must the Probate Judge employ to ascertain whether the trustee has properly administered? And—so far as the Probate Court is concerned—what is the status of creditors of the trust estate—not those of the deceased settlor whose debts are handled in the principal administration, but those contracted by the trustee for the benefit of the trust estate? The remedies of such creditors against the trust estate are made available only in equity, through subrogation to the trustee's right of indemnity or exoneration.¹⁰⁶ Can the Probate Court pass upon these matters, which are of equitable cognizance?

Even if the jurisdiction of the Probate Court to release the trustee from his office may be subjected to a constitutional attack, yet, if the *cestui que trust*, being competent, has been properly served, and defaults, or if he appears and does not object to the jurisdiction, he may thereafter be precluded from assailing the court's action on jurisdictional grounds. A case, however, is yet to be reported in which the issue of that court's jurisdiction appears. As a matter of fact, there are no reported cases, since 1895, in which any question of a Probate Court's action either on intermediate accounts or on the final account and discharge has been presented. This is indicative either of a remarkably uniform degree of regularity in trustees' accountings in that Court (and, necessarily

106. *Magwood v. Patterson*, 1 Hill's Equity 228 (1833); *Guerrey v. Capers*, Bailey's Equity 159 (1830); *McKelvey v. Tate*, 3 Richardson's Law 339 (1832); *Welsh v. Davis*, 3 S. C. 110, 16 Am. Rep. 690 (1871); *Neal v. Bleckly*, 51 S. C. 506, 29 S. E. 249 (1897). Actually, in such cases, the creditors are not creditors of the trust estate but are creditors of the trustee, and their rights are, as indicated in the text, fundamentally derivative.

of the trustees' integrity), or of a genuine dearth of such accounting there at all. Actually, if a trustee faithfully performs, the trust will terminate without the grant of a discharge;¹⁰⁷ and the trustee needs no discharge, from a Probate Court or any other court, to relieve him of liability; even though it may be admitted that, clothed with an order of discharge properly granted, he may quite safely rely upon it as a shield to action thereafter by the beneficiary.

(2) *If application for discharge is made to your Court for discharge by a testamentary trustee, do you require the same prior and final accountings as are required of executors and administrators?*

22 answered yes; there were no negatives. 1 stated that he accepts a final return or accounting made in the Court of Common Pleas as a sufficient account.

Comment: The course adopted by the Probate Judges is prudent and logical, and it would be strange if they followed a different one. But the question may well be asked: if a trustee has filed no return, intermediate or final, and seeks a discharge, having given the required newspaper notice and having properly served the parties in interest, and no appearance is made in opposition to the application, can the Probate Judge lawfully withhold the discharge?

VII

(1) *Have you ever authorized a testamentary trustee to sell, mortgage, or pledge real or personal property belonging to the trust estate?*

6 answered yes; 16 answered no.

While only a yes or no answer was called for, in a few cases comments were added which are interesting. One judge who answered no said he believed, "It might be done in case of a minor's ownership of farm land on the agricultural loan Act for minor's benefit." Another: "The practice in the Probate Court for _____ County is that real estate is sold under a marshalling of the estate in aid of assets to pay

107. Cf. *Leaphart v. National Surety Corp.*, 167 S. C. 327, 166 S. E. 415 (1932).

indebtedness. However, I believe that under proper petition and appraisal under oath of three or four disinterested witnesses that all property held in trust could be sold unless prohibited by will." Another states simply: "Have authorized him to sell property."

(2) *If you have, what do you regard as your authority for such permission?*

Sources of authority cited: by 1, Sections 208 and 209 of the Code; by 2, Section 208. Other answers: "I have advised litigants to proceed in the Probate Court and to also at the same time bring an identical action in the Court of Common Pleas, thus closing the door for exception as to jurisdiction." "Authority vested in me as a Probate Judge. I feel that my office, considering its scope in its entirety, gives me authority." "When it is properly shown to the Probate Court that the best interest of the trust will be served." "Have *original* jurisdiction over trusts."

(3) *If you have not, do you now think that you have such authority?*

2 answered yes unqualifiedly; 7 answered no; 2 made no comment. 5 gave qualified affirmative answers, as follows: 1 said "only if given by will"; 1 said "if trust instrument authorizes it"; 2 said they would allow a sale "in aid of assets"; 1 said he would permit mortgage under Sections 8660 *et seq.* of the Code.¹⁰⁸

Comment: The question of selling, mortgaging and pledging is, of course, limited to cases where the trust instrument does not authorize the particular act. If it did, the consent of no court would be necessary, unless, improbably, the instrument provided that the trustee should sell, mortgage or pledge only upon the prior assent of the Probate, or some other, Court.

The evident coupling of the trustee with the executor and

108. These sections authorize the guardians of infants and persons *non compotes mentis* to borrow money for their wards and mortgage their property as security. The *Court of Common Pleas* is given jurisdiction by these statutes. No reference is made to the Probate Court nor is there any mention of trustees.

administrator in some of the answers of the Probate Judges makes it desirable to compare the powers of these fiduciaries, and to compare the authority of the court of equity with that of the Probate Court in respect to the acts under discussion.

It has already been pointed out that an administrator has no title to the land of his intestate, and that the land passes immediately on death of the owner to his heirs at law. Accordingly, the administrator cannot sell the land or enter into contracts in reference to it.¹⁰⁹ Since the land is subject to debts, he may—and, in fact, it is his duty to—bring an action to subject it to sale when there is an insufficiency of personal property. For these purposes, and these purposes alone, the Probate Court may, in a properly brought action, direct the sale of the intestate's real estate.¹¹⁰ The authority of the Court of Common Pleas, as a court of equity, is undeniable.

It follows, inescapably, from the administrator's lack of title to real estate, that he cannot mortgage it; but he can seek the aid of the court of equity and obtain its consent to a mortgaging of the interests of the heirs at law in a necessary case, the heirs being made parties.¹¹¹ The Probate Court has no such power, since that power is distinctly equitable.¹¹²

Like the administrator, the executor takes no title to real estate, which passes on the testator's death to his devisees; and any sale or contract that he should make of, or concern-

109. *Allan v. Bruton*, 1 McMullan's Law 249 (1841); *Perry v. Brown*, 1 Bailey's Law 45; *Bank v. Inglesby*, Speers' Equity 399 (1844); *Wiley v. Johnsey*, 6 Richardson's Law 355 (1853); *Thompson v. Hudgens*, 161 S. C. 450, 159 S. E. 807 (1931). There are numerous cases, not necessary to be cited here, in which, on this principle, a surety for an administrator has been held not liable for rents collected by the administrator.

110. The cases on this point are plentiful. The power to direct a sale in aid of assets, as an incident to the supervision of administration of estates, was firmly established in *McNamee v. Waterbury*, 4 S. C. 156 (1872). The practice is regulated by statute: Secs. 9001-9011, S. C. Code of Laws 1942.

111. *Spencer v. Godfrey*, note 24 *supra*; *Spencer v. Gibbes*, note 24 *supra*.

112. *Mack v. Stanley*, note 23 *supra*. This case involves an executor, but the principle is the same in both cases.

ing, it would be ineffectual.¹¹³ The testator may, however, devise the land directly to the executor for the purposes of sale, or he may merely give the power to sell; and, in both these cases, obviously, a sale could properly be made. The mere authority itself, though, does not give the executor the title—although that is what the purchaser from him will get; and the executor, on that account, has nothing else to do with the land and cannot maintain action against third parties for trespass upon, or injury, to the property.¹¹⁴ Where the will neither gives the executor title for purposes of sale, nor gives the power to sell, the executor is powerless to sell even for the purpose of paying debts; but since, as in intestacy, the land is subject to the decedent's obligations, the executor may, and should, effect a sale through court action, when there is a deficiency of personal assets. The power of the Probate Court to direct a sale in aid of assets is the same power which he exercises at the behest of the administrator.¹¹⁵ The equitable powers of the Court of Common Pleas are, of course, ample warrant for the authority to sell, in order to pay debts.

Since the executor has no title and cannot sell, the corollary is that he cannot mortgage real estate, unless the will authorizes it. The power to sell which may be given to an executor by will does not embrace the power to mortgage.¹¹⁶ The executor may obtain the consent of a court of equity to

113. *Crosland v. Murdock*, 4 McCord's Law 217 (1827); *Finley v. Burgoyne*, Dudley's Equity 133 (1838); *Kinsler v. Holmes*, 2 S. C. 483 (871); *Hunter v. Hunter*, 58 S. C. 382, 38 S. E. 734 (1900). The lack of inherent power to sell real estate is implicit in the many cases in which the court has had to determine, in construing wills, whether the executor had been given a power to sell by implication. For a typical case, see *Allworden v. Lemon*, 183 S. C. 421, 191 S. E. 215 (1937).

114. *Haskell v. House*, 1 Treadway 106, 3 Brevard 242 (1812); *King v. Ferguson*, 2 Nott & McCord 588 (1820); *Ware v. Murph*, Rice's Law 54, 33 Am. Dec. 97 (1838); *Thomson v. Gaillard*, 3 Richardson's Law 418, 45 Am. Dec. 778 (1846); *Baldwin v. Cooley*, 1 S. C. 256 (1869); *Reeves v. Brayton*, 36 S. C. 384, 15 S. E. 658 (1891). But see *Barbot v. Thompson*, 94 S. C. 3, 77 S. E. 716 (1912).

115. *Shaw v. Barksdale*, 25 S. C. 204 (1886). The practice for sale of testate property in the Probate Court, in aid of assets, is the same as for an intestate estate. Secs. 9001-9011, S. C. Code of Laws 1942.

116. *Graham v. Jones*, 24 S. C. 241 (1885); *Allen v. Ruddell*, 51 S. C. 266, 29 S. E. 198 (1897); 92 A.L.R. 882. But see *McDavid v. McDavid*, note 24 *supra*.

a mortgage of real estate;¹¹⁷ actually, what is mortgaged in such a proceeding is the acquired interests of the devisee. But the Probate Court has no power to authorize an executor to mortgage land.¹¹⁸

Coming now to the status of the representative, as to personal property: the law is familiar that he takes title to that kind of property. At common law, the administrator and the executor had virtually absolute dominion over the personal property of the decedent, and neither of them needed a court order or testamentary authorization to sell, mortgage, or pledge. One case puts it this way: "At the common law, the assets of the deceased person, in the absence of fraud, might be disposed of absolutely by his executor or administrator and could not be followed by creditors, legatees, or next of kin, into the hands of the alienee."¹¹⁹ That common law right, however, was long ago restricted by statutes, and neither an administrator nor an executor (unless he is given power to sell by the will) can dispose of personal property of the estate without prior authorization by the Probate Court.¹²⁰ The purpose of these statutes is not so much to confer authority upon the Probate Court as to place a curb upon the representative's hitherto unlimited power. The statutes have been held to apply to "personal chattels or visible effects", and not to apply to choses in action: as to the latter the common law power of the representative to dispose of them seems to be unchanged.¹²¹

Since, at common law, the dominion of the personal representative over personal property was complete, it would follow that he could properly exercise the lesser power of mortgage or pledge; and one case plainly states that there might be "a valid alienation by way either of sale or pledge"

117. *McDavid v. McDavid*, note 24 *supra*, general principle. The cases cited under note 111 *supra* are comprehensive enough to embrace the executor.

118. *Mack v. Stanley*, note 23 *supra*.

119. *Rhame v. Lewis*, 13 Richardson's Equity 269 (1867). To the same effect: *Magwood ads. Legge*, Harper's Law 116 (1824); *Seabrook ads. Williams*, 3 McCord's Law 371 (1825).

120. Secs. 9059, as amended by Acts 1947 (45 Stat.) 44; 9060; 9061, S. C. Code of Laws 1942.

121. *Rhame v. Lewis*, note 119 *supra*; *Reynolds v. Rees*, 23 S. C. 438 (1885); *Chapman v. City Council*, note 39 *supra*.

(italics supplied).¹²² Carrying out this premise, the court, in that case, having declared that the representative's power over choses in action remained as at common law, held that a pledge of choses in action was permissible without the necessity of consent of Probate Court. If the power to sell chattels (as distinguished from choses in action) has been restricted by statute, it would seem, logically, that the power to mortgage or pledge them has likewise been curtailed; since the ultimate effect of a security transaction may be an involuntary alienation through loss of the property at a forced sale. Whether the Probate Court, having the power to authorize a sale of chattels, might authorize a mortgage or pledge of them, has not, so far as this writer has been able to find, been passed upon—although the case last discussed, through inferences, may be seeming authority for such action.

Comparing the trustee to the executor and the administrator, we find that the trustee has title to the trust property, real and personal. But, unlike the personal representative in one respect and like him in another, he has no inherent power of sale as to any species of property which he holds in trust. It is elemental law that, unless the trust instrument, specifically or by necessary implication, confers a power of sale, the trustee cannot properly sell.¹²³ The power of a court of equity to authorize a sale, in order to subserve the interests of trust beneficiaries, is clear and has been utilized in many cases.¹²⁴ So extensive is this power that, in furtherance of the dominant objects of the trust, the court may authorize the trustee to dispose of property even where the instrument forbids the sale.¹²⁵

122. *Rhame v. Lewis*, note 119 *supra*. See 21 Am. Jur. 510, stating common law rule in accord.

123. Restatement of Trusts, Sec. 190; *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45 (1892); *Calvary Baptist Church v. Dart*, 68 S. C. 221, 48 S. E. 66 (1903); *Prince v. Matthews*, 159 S. C. 526, 157 S. E. 836 (1930); *Turbeville v. Morris*, 203 S. C. 287, 26 S. E. (2d) 821 (1943).

124. Restatement of Trusts, Secs. 167, 190; *Boggs v. Reid*, note 71 *supra*; *Farr v. Gilreath*, 23 S. C. 502 (1885); *Mauldin v. Mauldin*, 101 S. C. 1, 85 S. E. 60 (1915); *Patton v. First Presbyterian Church*, 129 S. C. 15, 123 S. E. 493 (1924); *Kirton v. Howard*, 137 S. C. 11, 134 S. E. 859 (1926); *S. C. Nat'l Bank v. Bates*, 175 S. C. 169, 178 S. E. 611 (1934).

125. Restatement of Trusts, Sec. 167, comm. a; 77 A. L. R. 971; *Hendley v. Payne*, 200 S. C. 31, 20 S. E. (2d) 401 (1942); *Wingard v. Hennessee*, note 67 *supra*.

Paralleling the inability of the trustee to sell is the incapacity to mortgage or pledge, unless the trust instrument, specifically or by implication, confers it.¹²⁶ Nor does a power of sale in the trust instrument embrace the power to mortgage,¹²⁷ a principle already noted in the power of sale given by will to the executors. But a court of equity may, undoubtedly, authorize a mortgage.¹²⁸

The crux of these comparisons between the power of the personal representative and those of the trustee, and between the jurisdiction of the Probate Court over the personal representative and the jurisdiction of the court of equity over the trustee, is that, just as the inherent powers of the fiduciaries differ, so does the authority of the respective courts having control of them; and the Probate Court, if it does have jurisdiction over testamentary trustees, is to be guided, not by the law of executors and administrators, but by the law of trusts.

If the Probate Court is to have the power to authorize a trustee to sell, mortgage, and pledge, it can only be by virtue of a general transfer of equity powers to that court by the provisions of Section 209. No statute specifically grants the authority to act in any of these matters. To speak, as two of the Probate Judges did, of selling trust property "in aid of assets", is to employ a language foreign to trusts but native to the administration of decedents' estates. To refer to Section 208 as the source of authority is to give to the term "matters testamentary" a meaning that has already been judicially discountenanced. If we attribute to Section 209 the

126. Restatement of Trusts, Sec. 191; *Matthews v. Heyward*, 2 S. C. 239 (1870); *Bomar v. Gist*, 25 S. C. 340 (1886); *Chapman v. Williams*, 112 S. C. 402, 100 S. E. 360 (1919). But where the mortgage given by a trustee is a part of the transaction creating the trust, such a mortgage is valid. *Barrett v. Cochran*, 8 S. C. 48 (1875); *Elliott v. Mackereoll*, 19 S. C. 238 (1882); *Cohen v. Goldberg*, 144 S. C. 70, 142 S. E. 36 (1927).

127. Restatement of Trusts, Sec. 191, comm. b; *Sheffield v. Gregg*, 105 S. C. 219, 89 S. E. 664 (1916); *Pickett v. Geer*, 156 S. C. 346, 153 S. E. 349 (1930); 92 A. L. R. 882. And, it seems, the power to mortgage conferred by the trust instrument does not include the power to give a *negotiable* promissory note. *Ballou v. Young*, 42 S. C. 170, 20 S. E. 84 (1894).

128. Restatement of Trusts, Secs. 167, 191; *Fraser v. Fishburne*, 4 S. C. 314 (1873); *Chapman v. Williams*, note 126 *supra*; *McDavid v. McDavid*, note 24 *supra*.

grant of plenary power, then there is the striking paradox that the Probate Judge will be able to deal more extensively with trustees than he can with executors and administrators. If this were so, for example, he could authorize a trustee to mortgage real property, but he could not authorize an executor or administrator to do so. And, while he could not entertain an action by an executor or administrator to sell land except in aid of assets upon a deficiency of personal property, he would be able to authorize a trustee to sell land for *any* purpose serving the paramount interests of the beneficiaries. As the writer does not subscribe to the belief that Section 209 is a plenary grant, he does not see in the Probate Court the power to authorize a trustee to sell, mortgage, or pledge.

There are no reported cases, to the writer's knowledge, touching on the jurisdiction of the Probate Court in these respects. In one case, however, the question arose as to necessary parties in a proceeding to sell, brought in the Probate Court. In *State ex rel. Daniel v. Strong*,¹²⁹ trustees of a charitable testamentary trust sought and obtained the approval of the Probate Court to sell shares of stock. The will authorized the trustees to sell; and why the trustees sought the approval of the Probate Court in the first place is difficult to comprehend, unless the trustees felt that they needed judicial forearming. The application was *ex parte*; and the proceeding was held defective on this score—although the sale itself was sanctioned as being proper under the terms of the will. The conclusion of the Master, to whom the case had been referred, was accepted by the Supreme Court. The Master stated:

"I cannot regard an order on an *ex parte* proceeding in the Probate Court as final and binding on the beneficiaries of a trust, particularly if they are minors, unless they are brought before the Court. To preclude any inquiry into the *bona fides* of a transaction the parties must all have been before the Court in the original hearing."

Inasmuch as the question of jurisdiction was not raised, this case should not be taken as even a silent approval of the

129. 185 S. C. 27, 192 S. E. 641 (1937).

Probate Court's jurisdiction, and it must be confined to the matter of parties. A collateral question might, even so, be asked: who are the beneficiaries to be brought before the court where the trust is a charity? But that is another subject, and one should not, hastily, answer—the Attorney General.

VIII

(1) *Have you ever issued an order or decree permitting a testamentary trustee to deviate from the terms of the trust, as in the case of an emergency?*

22 answered no; there were no affirmatives.

Comment: It is to be admitted that this question could have been better worded. The last phrase "as in the case of emergency" is misleading as perhaps indicating that deviation can properly be authorized only in an emergency. The phrase was intended only to be illustrative. Question VII—authority to sell, mortgage, pledge—actually involves deviation, since, if the trust instrument does not specifically or impliedly authorize the doing of any of those acts, the court's sanction to their being done is a permission to the trustee to deviate. Hence, while all 22 answered no to this question, 6 of the judges have actually committed deviations in authorizing the trustee to sell, mortgage or pledge. See Question VI (1).

(2) *If you have, what do you regard as your authority to take such action?*

Since none answered yes to (1), there were no answers to this question, except a couple obviously intended to be under sub-question (3).

(3) *If you have not, do you now think that you have such authority?*

5 answered yes; 10 answered no; 3 were "doubtful"; 1 said that he construed his authority from the instrument (?); 3 made no comment.

Comment: There is hardly any room for a Probate Judge to allow the executor to deviate from the terms of the will.

Clearly, in some cases, the court of equity may permit him to do so, to preserve the estate.¹³⁰

In its broad native jurisdiction over trusts the court of equity, undeniably, has the power to permit deviation by a trustee where necessary to give effect to the paramount purpose of the settlor.¹³¹ And the power extends to sanctioning a deviation previously committed by the trustee, where the circumstances are such that, if application had been made to the court in the first instance for permission thus to depart from the terms of the trust, the court would have approved.¹³² Any departure from the specific terms of the trust, or any turning away from the duties or powers imposed or given by law, comes within this extensive authority of the court to sanction before the act is done or to approve after it is done—the authority, of course, being exercised for the furtherance or preservation of the trust and not for its destruction.

A typical instance of the power to permit, or subsequently to approve, deviation, is to be found in the field of investments by a fiduciary. Circumstances may make it necessary to invest in a way not prescribed by the terms of the trust,

130. *Harris v. Harris*, 86 S. C. 409, 68 S. E. 328 (1910).

131. Restatement of Trusts, Sec. 167; *Wannamaker v. S. C. State Bank*, 176 S. C. 133, 179 S. E. 896 (1935); *Weston v. Weston*, 210 S. C. 1, 41 S. E. (2d) 372 (1947). The point has already been demonstrated in those cases permitting sales and mortgages.

132. Restatement of Trusts, Sec. 167 (2), (3); *Boggs v. Reid*, note 71 *supra*; *Bacot v. Heyward*, 5 S. C. 441 (1874); *Pool v. Dial*, 10 S. C. 440 (1878); *Neeley v. Peoples Bank*, note 91 *supra*; *Pickett v. Geer*, note 127 *supra*; *Epworth Orphanage v. Long*, 207 S. C. 384, 36 S. E. (2d) 37 (1946). The principle is applied to other beneficiaries. See *Hammasopoulo v. Hammasopoulo*, 134 S. C. 54, 131 S. E. 319 (1925), and other cases cited there. See, also, *Ryan v Bull*, 3 Strobhart's Equity 86 (1849), where the rule is stated: "What the court, on application, would have ordered to be done, it will sanction when done by the parties voluntarily." The so-called "first instance" rule must, however, be accepted with some reserve, and should be applied only when there has been no unfavorable change of circumstances between the time of deviation from the trust and the application for its confirmation by the court. See Restatement of Trusts, Sec. 167 (2), (3), and comm. e.

and where necessary, the court will initially permit, or subsequently approve, it.¹³³

No cases dealing with the jurisdictional aspects of the Probate Court's consent to deviation appears in the reports, but in *Hood v. Cannon*,¹³⁴ the Supreme Court had before it the propriety of a Probate Court's approval of an exchange of bank stock, forming the corpus of the trust, for other stock of a bank formed by merger and consolidation with the bank whose stock was thus held. The Supreme Court struck down the Probate Judge's order of sale, on the ground that the proceedings were *ex parte*, and that the beneficiaries, not being parties, were not bound. Since no jurisdictional issue was raised, this case can hardly be regarded as even a tacit admission that the Probate Court had jurisdiction for the purposes sought.

A related problem of deviation is that of the trustee's power to effect a compromise of claims against third persons, and the consequential question of the Probate Court's authority in respect to it. Executors and administrators have inherent power, by virtue of their full title to choses in action, to compromise claims,¹³⁵ but any compromise must, of course, be honestly and reasonably made. There is a statute¹³⁶ which provides, in part, "all administrators and executors may, by and with the consent of the Probate Judge, compromise all demands coming into their hands as such, when the same are appraised doubtful or worthless." The statute has been construed to be permissive only, leaving unimpaired the common law right of the representative, and it is not to be treated as requiring the prior consent of the Probate Court as a condition precedent.¹³⁷

On the other hand, trustees do not have inherent power to compromise claims but a compromise honestly and prudently made without the prior approval of a court of equity

133. *Patton v. First Presbyterian Church*, note 124 *supra*; *Kirton v. Howard*, note 124 *supra*; *Wannamaker v. S. C. State Bank*, note 131 *supra*.

134. 178 S. C. 94, 182 S. E. 306 (1935).

135. *Verdier v. Simons*, 2 McCord's Equity 385 (1827); *Smith v. Prothro*, 2 S. C. 371 (1870); *Roberts v. Johns*, note 84 *supra*; 85 A. L. R. 176.

136. Sec. 8999, S. C. Code of Laws 1942.

137. *Geigers v. Kaigler*, 9 S. C. 401 (1877).

will be sustained on the "first instance" principle.¹³⁸

No case has been reported in which the authority of the Probate Court to direct a compromise by a trustee has been put in issue. But, in *Epworth Orphanage v. Long*,¹³⁹ a testamentary trustee sought and obtained, on *ex parte* application, Probate Court authorization for the acceptance of certificates in the reorganization of an insolvent bank in which the trust funds were deposited, the certificates calling for repayment of a percentage representing a considerable diminution in the amount of the deposit debt. The certificates were, in effect, to be exchanged for the deposit. The Supreme Court refused to uphold this Probate Court's authorization, but on the ground that the beneficiaries were not made parties, basing its opinion on *Hood v. Cannon*.¹⁴⁰ Again, as in the *Hood* case, the jurisdictional question was not raised, and the instant case cannot seriously be looked upon as inferring that no jurisdictional difficulty can arise in this type of proceeding. The answer to the question put here must, as in the previous ones, depend upon the interpretation of Section 209. Without finding there a plenary grant, the jurisdiction of the Probate Court in the matters under discussion is manifestly subject to doubt, if not actually to be denied.

IX

(1) *Have you ever issued an order or decree, at the instance of a testamentary trustee and/or the beneficiaries, directing the termination of the trust?*

22 answered no; there were no affirmatives.

(2) *If you have, what do you regard as your authority for taking such action?*

Since there were no affirmative answers, there were no responses to this question.

138. *Bacot v. Heyward*, note 132 *supra*; *Pool v. Dial*, note 132 *supra*; *Epworth Orphanage v. Long*, note 132 *supra*. Cf. Restatement of Trusts, Sec. 192, which states that the trustee has the power. Actually, the test of the propriety of the compromise is, not so much whether the trustee does or does not have the power to begin with, but whether the compromise as made is intrinsically reasonable.

139. Note 132 *supra*.

140. Note 134 *supra*.

(3) *If you have not, do you now think that you have such authority?*

4 answered yes; 11 answered no; 2 were "doubtful"; 1 said he "construed authority from the instrument" (?); 4 did not answer.

Comment: The "termination" referred to in this question is not the termination of a trust by its own terms, as where the period for the duration of the trust has expired and all the acts called for have been done¹⁴¹; nor does it involve those cases in which there is a merger, as where the trustee acquires the beneficial interest or the beneficiary acquires the trustee's title.¹⁴² In these cases no court decree is necessary to bring about the termination of the trust: either the trust is self-terminated, or the parties in interest bring it about. The termination that is involved here is the putting an end to the trust by the court—and not a mere judicial declaration that it has come to an end.

The termination of a trust by the court of equity does not mean a destruction of the trust, annihilating the interests of the trust beneficiaries. For all practical purposes, such a court termination amounts to an acceleration of the conclusion of the trust; and the general rule seems to be that *all* the beneficiaries of the trust, being *sui juris*, may compel a termination of the trust even though the trustee may be unwilling.¹⁴³ But, where the termination of the trust would defeat a material purpose of the settlor in his creation of the trust, the court will not permit its being brought to an end merely because the beneficiaries are willing that this be done.¹⁴⁴ It must be stressed, at all events, that where there are contingent beneficiaries or beneficiaries incapable of giving

141. Restatement of Trusts, Sec. 334. See *Leaphart v. National Surety Corp.*, note 107 *supra*.

142. Restatement of Trusts, Secs. 341, 343.

143. Restatement of Trusts, Sec. 337 (1); 45 A. L. R. 743, supplemented in 123 A. L. R. 1427 and 163 A. L. R. 163; *Kennedy v. Badgett*, 19 S. C. 591 (1883); *Magrath v. Magrath*, 184 S. C. 243, 192 S. E. 273 (1937).

144. Restatement of Trusts, Sec. 337 (2); and see the annotations in A. L. R. set out in note 143 *supra*; *Mauldin v. Mauldin*, note 124 *supra*; *Dumas v. Carroll*, 112 S. C. 284, 99 S. E. 801 (1919).

consent, the trust cannot be terminated—since that would really be a perversion of the trust.¹⁴⁵

A lesser, included, situation—or, perhaps, an analogous one—is that presented in the anticipation of corpus or principal. Thus, where income is to be paid to one for life or for a lesser period and the principal is then paid to another, or where the income is to be paid to one for a period and then the corpus is to be delivered to him, the question of hastening the payment or delivery of the corpus may arise. The matter is too complex and lengthy to be discussed here, but it may, nevertheless, be pointed out that a case may arise where a court may be asked to consent to, or direct, a trustee's turning over the principal to the beneficiary of the corpus at a time prior to the date directed by the trust instrument, and thereby work the trust's earlier termination.¹⁴⁶ If the trustee is willing, and, at the direction of the sole beneficiary, he turns over the corpus to the beneficiary, even though by the terms of the trust the enjoyment is postponed to a later time, it seems that the trust is thereby terminated; and the court's approval of the transfer would only be a recognition of an existing fact.¹⁴⁷

The power of a court of equity to terminate a trust—not to defeat it—under circumstances that do not work injury to the beneficiaries or frustrate a material purpose of the settlor, appears to be quite firmly established. Whether a Probate Court can exercise the same function will depend, again, on the scope of the authority implied under Section 209; and, absent a plenary grant of power, such a prerogative is hardly to be assumed as vested in that court.

In *Beasley v. Newell*,¹⁴⁸ a testamentary trust was created for the testator's widow for life, and at her death the remainder was to be divided among the testator's and her children. The widow filed a petition in the Probate Court asking

145. *Mauldin v. Mauldin*, note 124 *supra*; *Dumas v. Carroll*, note 144 *supra*; *Piegler v. Jefferies*, 128 S. C. 254, 121 S. E. 783 (1923); *Bettis v. Harrison*, 186 S. C. 352, 195 S. E. 835 (1938). The court, of course, in furtherance of the objects of the trust, permits deviation, authorizes change in investment, etc. These matters have already been touched on. In such cases there is an alteration of the subject matter, but no destruction of the trust.

146. See Restatement of Trusts, Secs. 337, 338.

147. Restatement of Trusts, Sec. 342 (1) and comm. e.

148. 40 S. C. 16, 18 S. E. 224 (1893).

that the trustee be allowed to pay over to such children as had become of age their respective shares, and to pay over shares to the other children as they became of age; and for that purpose she was willing to surrender progressively her life interest. A decree of the Probate Judge so ordering was obtained, and the trustee paid over to the children who were of age their shares of the trust fund. Thereafter, when the other children came of age, a petition was filed by the widow and those children, alleging that the trustee had failed to pay over either the accumulated income to her or the remaining shares of the corpus to the children, and asking that the trustee be compelled to make such payments. The Probate Judge rendered a decree against the trustee. The trustee did not pay, and this action was brought, not against the trustee, but against a surety for the trustee. One of the defenses was that "the Probate Court had no jurisdiction, either to call the trustee to account, or to pass the order authorizing or requiring him to anticipate the payment of the corpus of the trust estate." Of this contention the Supreme Court said:

"Next, as to the question of the jurisdiction of the Court of Probate. Under the facts as found in this case, we do not deem it necessary to inquire into that question; for the trustee * * * having submitted himself to the jurisdiction of that court, and having acted under the judgment first rendered, by paying over to such of the children as were then of age their shares of the trust fund, as directed by the decree of the Judge of Probate, and having acquiesced in the second decree by not raising the question of jurisdiction or appealing from the decree, is now estopped from disputing the jurisdiction of the Court of Probate * * * ; and the defendant, who claims under him and is only entitled to his right in the premises, would likewise be estopped."

Thus, while a clear issue of Probate Court jurisdiction was presented, the court decided the case on other grounds. It would not be worthwhile to speculate on what the outcome would have been if the jurisdictional issue had been raised at a proper time and under appropriate circumstances; and, even if the case had been concluded on a jurisdictional note, its authority might be questioned as having arisen under a set of facts governed by the Constitution of 1868.

X

Please make such comments as you may wish on the general subject under discussion, particularly giving your criticisms as to existing laws and your suggestions for clarification and improvement.

11 made no comment; the comments of the others include the following statements:

"Jurisdiction should be enlarged to include the construction of wills."

"The law as it exists is indefinite—a chapter in the Code should be devoted exclusively to testamentary trustees creating new sections clarifying these matters."

"I think there is a great need for improvement in most of the laws covering Probate Court."

"The existing laws of South Carolina covering testamentary trusts should be by all means clarified * * * The Probate Court and attorneys of South Carolina alike agree that all trust matters should be handled in the Court of Common Pleas."

"Where there are contradictions, such as the removal and the naming of trustees, clarify these."

"Laws about trusts are very vague and need clarifying."

"My experience has been that most trusteeships are very broad and in most instances vague and rather of a personal nature—a sort of man to man relationship, not impersonal. I believe that the trustee should be required to give bond and render accounting as do other fiduciary relationships whether individual or by a bank or other corporations clothed with the care of trust (funds) belonging to some person or persons."

"I feel that in many instances direct authority of the Probate Court in many matters that come before it are vague, ambiguous and indefinite."

"I think that our law as relating to testamentary trustees is not clear enough for us to know what is to be done * * . To me the matter of trusts is more confusing than any other law

we have relative to estates. I feel that we need a well written trust law that would enable everyone to know how they should be handled."

"In my opinion the Probate Court has very little jurisdiction over testamentary trustees. Yet, in order to determine just what jurisdiction it does have requires considerable time, effort and study on the part of the members of the bar. It seems to me this situation could easily be remedied by the General Assembly. Let it take away from the Probate Courts all jurisdiction in regard to testamentary trustees, substituted trustees, or trustees appointed by the court where the one appointed by the will refuses to act, or else enact legislation giving the Probate Courts general and broad powers over such trustees, and defining clearly and concisely and specifically the powers so conferred."

Comment and Conclusions—

The comments of the Probate Judges quoted above, and the lack of comment from half of those who returned their questionnaire, make it clear enough that, in the minds of the Probate Judges—who have to decide these things if and when they are brought to their attention—their jurisdiction over testamentary trusts and trustees is shrouded in doubt. The twenty-four Probate Judges who did not answer, by their silence, furnish a commentary that can pretty well fall into the same classification. The question-by-question analysis of the various statutes, and the scrutiny of particular acts of the testamentary trustee, reveal not merely an innate difficulty in the law, but the answers of the various Judges disclose fundamental clashes of opinion which go beyond the judges themselves: for these opinions are, no doubt, based to a very considerable degree on the judgments of lawyers upon whom the judges rely, and in that sense they represent a cleavage among the members of the bar.

So far as the writer is concerned, and despite the unauthoritative nature of his opinions, his summary of the whole legal problem is as follows:

It is highly questionable, notwithstanding the correctness of the result of *Bradford v. Richardson*,¹⁴⁹ that the legislature

149. Note 6 *supra*. See the discussion in the text to which notes 7, 8, 9, and 10 *supra* are appended.

can confer jurisdiction upon the Probate Court over trusts or trustees, since these are not "matters testamentary", the writer basing his opinion on the belief that the legislature can grant Probate Courts power to deal only with "matters testamentary" and those other matters mentioned in Article V, Section 19, of the Constitution of 1895. But, taking the *Bradford* case literally and assuming that the legislature can confer such jurisdiction, that jurisdiction can be referred—save when there are special statutes—only to Section 209 of the Code, which, in itself, is ambiguous, and which is not to be taken as a plenary grant of power, unless we assume a legislative bounty which is beyond all reason. If plenary power is denied the Probate Courts, they have no power, then, to name trustees or to replace trustees, construe wills for the purpose of advising trustees, authorize sales, mortgages, or pledges, permit other deviations, or perform any of the numerous functions resident in a court of equity. But the great and baffling question is: How far does Section 209 go? So long as there is not an authoritative answer to that question, the whole area of jurisdiction is without form or substance. And when we come to the specific statutes which have been discussed, every one of them which couples the trustee with other fiduciaries accountable to the Probate Court, or which seems to give the Probate Court jurisdiction, is a jumble of conflict and uncertainty. As to the special status of the Charleston Probate Court, to attempt to find its particular place in this whole discussion would be only to draw the noose of confusion tighter. (See footnote 6.) Charleston is, as usual, *sui generis*—the legal euphemism for "in a class by itself"—which is itself a euphemism.

Taking into account all these things: the contradictions, ambiguities, and uncertainties in the law, the varying opinions of the Probate Judges and the lawyers, the reluctance to disclose views—all these add up to a very definite need for reform. It is no answer to say that the "safe thing" to do is to go to the Court of Common Pleas, where jurisdiction is unequivocally present; nor is it consoling to point to the absence of litigation in these various problems as indicative of the lack of need for greater precision. The law needs clarity no matter what past experience may have demonstrated, and it is particularly unsatisfactory that any attempt should be made to justify inaction on the ground that, while the oppor-

tunity to raise the jurisdictional question has arisen in so many cases, the issue has been avoided or glossed over. The answer to that question is that estoppel, waiver, and ratification—while they may close mouths, and while they may settle the rights of the parties—do not settle the law or establish precedent. We are not warranted in assuming that jurisdiction is present in a given case because the court does not take the trouble to make mention of it.

There are three choices. The first is to let the law stand and await the day when the courts make the law clear. If past experience is any guide, that time is far off, and the chances are that judicial clarification will only be fragmentary and piecemeal. The policy of "playing safe" by resorting to the Court of Common Pleas, while it may be the practical and advisable thing to do, is really only a demonstration of that fear which, in Hamlet's words, "puzzles the will and makes us rather bear those ills we have than fly to others we know not of." The law, as it is now written, is worse than no law.

The second choice is to grant the Probate Courts the *plenary* power to control trusts—with every incident of supervision and enforcement and permissible conduct that a court of equity has; to make, in other words, the power of the Probate Court as full, complete, effective, and pervading as that which a court of equity has. But we must face reality. To confer in this fashion a power of such magnitude would be, effectually, to bestow a large segment of equity jurisdiction on inferior courts and thereby to create 46 little chancellors.¹⁵⁰ There is no requirement in the law that Probate Judges be lawyers or learned in the law; but, being sensible laymen, they would hardly desire to become the heirs of the sovereigns of equity, with the delicate and heavy responsibilities of that high estate.

The writer has been given the explanation by many of his former students whom he sent out to high-pressure Probate Judges into answering the questionnaires that the reason for their refusal, in some cases, and their reluctance, in others, to answer the questions was due to their feeling that as laymen they did not—nor could they be expected to—know about such intricate matters. That feeling of self-doubt is cause

150. The writer is not unmindful that in many counties of the state the Probate Judge is also Master in Equity.

for sympathetic understanding, and a reason for extenuation, but from those very admissions the lesson emerges that such refined matters are not to be intrusted to jurists who unhesitatingly admit their equitable shortcomings. The writer is tempted to subscribe to the sentiments of a Circuit Judge expressed in the case of *Thomas v. Poole*:¹⁵¹

"It is not consistent with public policy that the estates, and especially real estates, of married women, minors and absent defendants, shall be subjected in the almost private way in which these proceedings are taken in the Probate Court, to the judgment of officers who, though of high integrity, have, for many reasons, very little experience in adjusting the very delicate and very often very difficult questions which arise in these causes."

But the writer will not entirely yield to that temptation because, on the point in issue which provoked these sentiments, the learned judge was told by the Supreme Court that he was wrong. It may seem surprising that Probate Judges—the vast majority of them not educated formally in the law—are so infrequently reversed. That they seldom stray into error is due, in part, to their reliance on their own research and industry, in part to their own instinct for the truth, and in part to the disinterested guidance of members of the local bars. The writer knows a few, and has heard of some others, whose reliance upon the last ingredient is virtually negligible. In this category it must be pointed out that there are a few who happen also to be lawyers. This is not to be taken, however, as an inference that the lawyer-judges are infallible.

The last, and remaining, choice is to strip the Probate Courts of every vestige of trust jurisdiction, and to excise every statutory provision which might now be taken to confer that jurisdiction. The volume of trust administrations processed through the Probate Courts is, actually, so slender that to cut it off altogether would cause only the slightest financial pain. But even if considerations of fees should enter into the picture, it must be remembered that "Public offices are created for the benefit of the commonwealth, and not to give persons employment or furnish positions to people. Incumbents have no contract or property right in them or their unearned

151. Note 5 *supra*.

remuneration.”¹⁵² The writer, however, does not feel that any such gross considerations would affect the judgment of Probate Judges as to whether they should be allowed to retain, or whether they should be shorn of, trust jurisdiction. On the contrary, the detachment of trust jurisdiction from the Probate Court would be welcomed with relief by a great majority of the Probate Judges, who are well content with the ordinary and customary functions of their office. That it would be welcomed even more by the bar is hardly open to dispute.¹⁵³

152. *Parker v. Brown*, 195 S. C. 35, 10 S. E. (2d) 625 (1940).

153. The writer feels considerably less reproachful towards the 24 silent members of the probate judiciary as he finishes writing this piece than he felt when he started it. He has just remembered that he sent questionnaires to 43 colleagues, Professors of the Law of Trusts, in law schools over the country, asking about Probate Court jurisdiction over testamentary trusts in their respective states. He received 21 replies.