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Wills

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The subject of Wills in this review of case law comprehends the same topics as the law school course of the same name: Wills, Intestate Succession and Administration of Estates. It does not deal with the nature of estates created by will. This is left to Property.

Although the total number of decided cases in the Wills field during the period of review is not large, the cases of interest and significance are in more than the usual ratio. They fall into several categories. Some of them overlap with other subjects and may be repeated in the treatment of those subjects in this review.

Revocation

The case of *Stevens v. Royalls*[1] presents a wills problem that does not often arise: *partial* revocation by act done to the instrument. The applicable statute[2] covering revocation permits partial or *pro tanto* revocation by act done to the instrument, the words "or any clause thereof" in the statute lending themselves to this interpretation.[3] In this case, the testator devised residual and other property to his wife "until 1956, at which time Drome Johnson will become 21 years of age," when the land should pass to Drome Johnson on certain limitations. The Johnson named was the son of an adopted son of the testator. When the will was found after testator's death, the quoted and subsequent words appeared stricken through with pen, but entirely legible. On the margin of the will there appeared these words:

> I do hereby cancel a portion of this will. Droom Johnson is to have $200.00 cash Dec. (1958) Given him no land no other property other items herein not cancelled

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1. 223 S.C. 510, 77 S.E. 2d 198 (1953).
2. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-221, as amended by S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 683, p. 1745, which now reads as follows: "No will or testament, in writing, of any real or personal property or any clause thereof, shall be revocable but by some other will or codicil in writing, . . . or by destroying or obliterating the same . . . ."
3. Brown v. Brown, 91 S.C. 101, 74 S.E. 135 (1911).

> in this will shall be permanent. The land herein of my estate described in item 4 not sold shall be the property of my wife all and singler this 2d July 1948 W. D. Stevens (L.S.)/Witness W. A. Royals.

The marginal writing was, of course, ineffectual either as a revocation or as a new disposition, for want of proper attestation. The cancellation and the marginal writing were intended both to work a revocation of the gift to Johnson and to enlarge the estate of the wife. It was held that neither act—the obliteration or the writing—could serve to create a new disposition in favor of the wife and that the attempted revocation did not operate to withdraw the gift from Johnson. It is axiomatic, the Court points out, that obliteration may be used *to revoke* but not to create a different estate. The case harks back to the celebrated case of *Pringle v. McPherson.*[4] There, in substance, the testator made a gift in one clause of his will "to my daughter Elizabeth 300 acres part of my Newton tract of land." In another clause he gave to his two daughters Susan and Nancy all his Pon Pon Plantations "except the 300 acres before devised to Elizabeth." On the testator's death the will showed a cancellation of the devise to Elizabeth. The words "except the 300 acres devised to Elizabeth" were likewise stricken through. The striking of the exception was held, naturally, to be inoperative, because it would amount to a new devise—that is, giving the two daughters 300 acres more than the will originally gave them. The other question then was as to the effect of the cancellation of the clause containing the gift to Elizabeth. The Court reached the conclusion that there was no revocation, not because it could not take place as a result of the form it took, but because the revocation of the gift to Elizabeth was conditioned upon the efficacy of the attempted enlargement of the gift to Susan and Nancy, the Court resorting to *Onions v. Tyrer*[5] and its doctrine of dependent relative revocation to restore the cancelled gift to Elizabeth.

Since *Pringle v. McPherson, supra,* recognized the propriety of giving effect to an intended revocation—which in itself did not make the new devise although coupled with other acts which did—there would seem to be at least the possibility that in the instant case the obliteration which annulled the gift to

4. 2 Brev. 279, 3 Am. Dec. 713 (1809).
5. 1 P. Wms. 345 (1717).

Johnson might have been given the intended effect, while the intended enlargement by the striking out of "until 1956" would be denied effect. In other words, so far as expunging would make a new gift, it would be disregarded; so far as other expunging only took away, it should be respected. If the testator, as in *Pringle v. McPherson, supra,* had revoked the gift to Johnson conditioned upon the efficacy of the substituted gift to his wife, there would have been a dependent relative revocation which would have restored the cancelled gift. Here there was manifest an opposite intent—in view particularly of the marginal writing—and the result could have been, it is submitted, an absolute revocation of the ultimate gift to Johnson, without, however, increasing the estate of the wife. Her estate still would have been a term for years, the reversion passing as intestate property.

Survival of Causes of Action

Where an insurer fraudulently cancels a policy of life insurance, the wrong done to the insured is not such as to survive his death and hence there is no cause of action to pass to his personal representative. That has long been the law, such a wrong not involving physical injury to person or property falling within the salvage provisions of the Survival Act.[6] But, in *Babb v. Paul Revere Life Insurance Co.*,[7] decided on June 22, 1953, it was held that while an action for fraud and deceit as a wrong done to the insured will not survive, the fraudulent cancellation of the policy is a wrong as well to the beneficiary, and that while the beneficiary, if he has no vested right, cannot sue therefor during the insured's lifetime, he can sue after the insured's death. Such an action falls outside the possibilities of the Survival Act, because the wrong sued upon is the wrong done to the beneficiary, and not to the insured. The decision is amply bolstered by the Court with authorities, both local and general. For all practical purposes, the concern with non-survival of the action for fraud and deceit upon the insured ceases to have significance: the beneficiary sues in his own behalf for the invasion of his, and not the insured's, rights.

6. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-209; Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E. 2d 117 (1941).
7. 224 S.C. 1, 77 S.E. 2d 267 (1953).

Contracts to Make Wills

Cases of this kind fall within many areas of the law: Equity, Property, Wills, Contracts, etc. They are frequent visitors to the South Carolina courts. Two of them were before the Supreme Court in the period under survey. They are *Kirkpatrick v. Kirkpatrick*,[8] and *McLauchlin v. Gressette*.[9] Both were actions for specific performance of alleged oral contracts to make wills, and in each the plaintiff satisfied the Court through the "clear and convincing testimony" required in such cases that the alleged contracts were in fact made. The part performance necessary to remove the cases from the Statute of Frauds was also found to have taken place. No new law of any significance has appeared in this type of case for many years, and the quest in them has been principally one of determining the facts. In sifting the facts, the Court, in *McLauchlin v. Gressette, supra,* was confronted with the contract problem that so often arises in cases of this kind: were the statements made by the alleged promisor simply expressions of intention or promises made with contractual purpose? The line is hard to draw, but, like other fact questions, is resolved from a consideration of the whole picture of the case.[10]

Joint Deposits

In *Hawkins v. Thackston*,[11] the Supreme Court has given a definitive and welcome answer to this question: Where one person deposits money in a bank or building and loan (or federal savings and loan) association, and the account is payable to himself or another, or to either or the survivor, and the depositor dies first, is the survivor entitled to receive and retain the money deposited? The answer which the Court gives is in favor of the survivor, provided the depositor had a donative intent. Prior to this decision, the law was not entirely clear. In *Sawyer v. Mabus*,[12] it was held that a certificate of deposit payable to *A* or Mrs. *A*, but purchased by *A* and retained by him, belonged to the administrator of *A's* estate and not to Mrs. *A*. The Court treated the transaction as an imperfect gift, and also as an invalid testamentary disposition.

8. 223 S.C. 357, 75 S.E. 2d 876 (1953).
9. 224 S.C. 296, 79 S.E. 2d 149 (1953).
10. See Callum v. Rice, 35 S.C. 551, 15 S.E. 268 (1891); Bruce v. Green, 118 S.C. 27, 110 S.E. 77 (1921).
11. 224 S.C. 445, 79 S.E. 2d 714 (1954).
12. 107 S.C. 369, 92 S.E. 1029 (1916).

The decision was held controlling later in *Smith v. Planters Bank*,[13] which involved also a certificate of deposit payable likewise to *A* or *B*. *A*, the depositor, having died, the bank paid over to *B*, and the administrator of *A's* estate sued *the bank* and recovered. The majority of the Court treated the deposit, in the form made, as creating a revocable agency which terminated on the death of the depositor. A concurring opinion denied validity to the attempted posthumous ownership on the further grounds that there was no contract between the depositor and the alternative payee, imperfectness of the gift, no trust, and invalidity as a testamentary disposition.

The rigors of the *Smith* case were ameliorated by the passage of an act in 1935, amended in 1944, protecting the depository, bank or building and loan association in paying over to the survivor. These Acts are embodied in the 1952 Code.[14]

Although these statutes undertake to absolve the bank or association in paying to the survivor, they say nothing of the ultimate rights of the survivor, and standing alone they cannot be regarded as changing the basic law of the *Sawyer* and *Smith* cases so far as the rights of the survivor are concerned. Yet in a dictum in a case involving the creation of survivorship or joint estates in land,[15] it was stated, in sympathetic consideration for the survivor: "There is nothing vicious about the right of survivorship. Indeed, it was recognized by our General Assembly in the enactment of the statute relating to bank deposits. Section 7851 of the 1942 Code." (Secs. 8-171, 8-602, 1952 Code.)

13. 124 S.C. 100, 117 S.E. 312 (1922).

14. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 8-171. Payment of Deposits Made in Name of Two Persons. When any deposit has been made in any bank, banking institution or depository transacting business in this state in the names of two persons, payable to either or payable to either or the survivor, such deposit or any part thereof may be paid to either of such persons, whether the other be living or not and the receipt or acquittance of the person paid shall be valid and sufficient release and discharge for any or all payments so made. The term deposit shall include a certificate of deposit.

CODE OF LAWS OF SOUTH CAROLINA, 1952 § 8-602. Shares Issued to Two Persons. When any certificate or share of stock has been issued by any building and loan association or Federal savings and loan association transacting business in this state in the names of two persons, redeemable or payable to either, or payable to or redeemable by the survivor, such share or certificate may be paid to or redeemed by either of such persons, whether one be living or not, and the receipt or acquittance of such association by the person so paid or the person who redeemed such share or certificate shall be valid and sufficient release or discharge for any and all such payments, redemptions or repurchases made of such share or certificate of stock.

15. Davis v. Davis, 223 S.C. 182, 75 S.E. 2d 46 (1953).

In *Hawkins v. Thackston*, the deposit was an investment in the shares of a federal savings and loan association, the passbook showing the issuance of shares to the depositor or his niece, the plaintiff. The passbook was kept by the uncle. The decision of the Court recognizes the impropriety of the transaction as a gift, as a trust, or as a testamentary disposition, but it upholds the right of the survivor to retain the deposit, not only on the basis of the statutes but on the principal ground that such an arrangement is a contract for the benefit of a third party: i.e., the bank is the promisor, the depositor the promisee, and the designated alternative payee the third party donee beneficiary. In this respect, the Court states that the transaction resembles a policy of life insurance, where the beneficiary—not himself a party to the contract—is the third party beneficiary. The Court disposes of the contrary holdings in the *Sawyer* and *Smith* cases by declaring that they had failed to take notice of the contract character of the transaction. For all practical purposes, so far as the earlier cases denied validity to the gift-contract, they are no longer law.

Presumptively, the fact that a deposit is made in the form designated by the statutes indicates an intention to make the survivor the beneficial owner of the deposits. It is made plain in the *Hawkins* case that the presumption may be negatived by showing a lack of donative intent. Much of the testimony in the case is directed to an attempt by those resisting the survivor's claim to eliminate the presumption through proof of an agency—that the deposit was made in the particular form for the convenience of the uncle. The attempt was not successful. It is apparent that claims of survivors to such accounts may be attacked on the ground of terminable agency—and in this respect the *Sawyer* and *Smith* cases may still stand as the law if, in fact, there was agency. To guard against this possibility, if there is a donative intent, the designation of the deposit or share account as payable to either *or the survivor*, rather than only to either, is recommended: the depositor would hardly contemplate an agency after his death, if indeed such a thing is possible. Such a designation would nullify agency and fortify the gift presumption.

LEGISLATION

Revocation of Wills

The 1942 Code Section dealing with revocation of wills followed quite faithfully the original Statute of Frauds (Section VI) affecting revocation of devises. Since 1824—when the formalities for the revocation of wills of real and personal property were put on a parity—the language of the revocation statute remained virtually unchanged, and it appeared in the 1942 Code (Sec. 8921) as follows:

> No will or testament, in writing, of any real or personal property, or any clause thereof, shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as aforesaid, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his directions and consent.

In a spirit of fine editorial endeavor, the revisers of the Code changed the foregoing section to read as follows in the 1952 Code (Sec. 19-221):

> No will or testament of any real or personal property or any clause thereof shall be revocable but by some other will or codicil in writing or other writing declaring the same, attested and subscribed by three witnesses as required by Section 19-205, or by the testator himself or some other person in his presence and by his direction and consent destroying and obliterating the same.

The principal objection to the 1952 version—aside from the question of the necessity of overhauling a statute that had received a settled interpretation over a very long period—was the substitution of "and" for "or" between the words "destroying" and "obliterating." Taking the word "and" in its primary sense, the statute would require both destruction *and* obliteration, something which could be accomplished only in reverse order—that is, first obliterate and then destroy. Moreover, the meaning given to the word "destroying" is "burning, cancelling, tearing"—any of these.[16] Accordingly, the requirements of the 1952 Code would be "burning, cancelling, tearing *and* obliterating." To have the *animus revocandi* manifested in these several conjunctive ways would call for

16. Johnson v. Brailsford, 2 N. & McC. 272 (1820).

a calculated frenzy that would certainly make it plain that the testator intended to revoke — and no mistake about it. These dire possibilities have been removed by the restoration by the 1954 General Assembly of the language of the 1942 Code in substance, with the rightful reinstatement of "or" at the crucial spot:

> No will or testament, in writing, of any real or personal property, or any clause thereof, shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as required by Section 19-205, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his directions and consent.

Adoption

The 1954 General Assembly enacted the following statute,[17] approved March 26, 1954:

> SECTION 1. Whenever a child has been legally adopted, such child shall inherit from the adopting parents, and from each of them, and the adopting parents and each or either of them shall inherit from the adopted child, to the same extent as if he were a natural child of the adopting parents. For all inheritance purposes without exception the adopted child shall be considered a natural child of the adopting parents and in the event of the death of such adopted child, his estate shall ascend, descend and be distributed as is otherwise provided by law for natural born children of the same family, to the exclusion of the natural or blood parents of such child, *provided,* however, where one of the natural parents be united in bonds of matrimony to the other adopting parent then in such event the rules of inheritance as above set out shall attach as if said child were the natural child of both such parents, *provided,* further, a natural child shall inherit from an adopted child and an adopted child shall inherit from a natural child as if they were natural children of the adopting parent or parents, and in like manner adopted children of the same family shall inherit from each other.

Prior to the enactment of this legislation, adoption conferred only the right to the adopted child to inherit from the

17. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 698, p. 1763.

adopting parent. There was no reciprocal right, and no right to inherit by or from collaterals. The 1954 Act plainly creates a reciprocal right in the adopting parent. It is also plain that the natural or blood parents are cut off by the adoption. It is further reasonably plain that once there is an adoption, the adopted child becomes as much a member of the family as if he had been born into it—that is, to the extent that natural and other adopted children inherit from the adopted child and he from them. But what is not clear is what is meant by the language "For all inheritance purposes *without exception* the adopted child shall be considered a natural child of the adopting parents and in the event of the death of such adopted child, his estate shall ascend, descend and otherwise be distributed to the exclusion of the natural or blood parents of such child, . . ." (Italics supplied.)

If the adopted child is to be treated *without exception* as a natural child for purposes of inheritance, then much of what is specially provided for is unnecessary. What answers would be given to these questions: If the natural parent or other natural kin of the adopted child should die, can he inherit from him or them or is he now so completely channeled into the new family as to break all ties with his blood kin? If the adopted child dies intestate, survived neither by his adopting parents nor by any new brothers or sisters under the statute, would kin of the adopting parent—strangers in blood—take? Or if a collateral kinsman of the adopting parent died intestate, would the adopted child take from him? For example, the adopting parent has died, and a brother of his subsequently dies: would the adopted child take as a nephew?

The statute is perhaps too ambitious in scope. Certainly it is ambiguous. It is to be hoped that no practical complications will arise before a chance to clarify it by amendment comes around.

Legitimation

In 1951, the General Assembly enacted the following statute —re-enacted as follows into the 1952 Code:

> Sec. 20-6.1. When either of the contracting parties to a marriage that is void under the provisions of Sec. 20-6 entered into the marriage contract in good faith and in ignorance of the incapacity of the other party, any children born of the marriage shall be deemed legitimate and

have the same legal rights as a child born in lawful wedlock.

By Act approved March 26, 1954, the General Assembly amended Sec. 20-6.1 by causing to be inserted between the words "faith" and "and" the words "on or after April 13, 1951," so that the statute now reads:

> When either of the contracting parties to a marriage that is void under the provisions of Section 20-6 entered into the marriage contract in good faith on or after April 13, 1951, and in ignorance of the incapacity of the other party, any children born of the marriage shall be deemed legitimate and have the same legal rights as a child born in lawful wedlock.

Presumably, the addition of the words "on or after April 13, 1951," was intended to indicate a legislative purpose that the statute should have a prospective and not a retrospective operation—April 13, 1951, being the date on which the Act was originally approved. In terms of inheritance, it would be immaterial as to rights which had vested in estates created on deaths prior to April 13, 1951, whether the statute was prospective or retrospective—since such rights having previously vested could not be disturbed. It would be a matter of statutory construction and constitutional law—not within the scope of this subject—to determine whether the Legislature, having decreed the legitimacy of children born under the circumstances mentioned, without using terms of futurity, and thereby possibly legitimating children born of invalid marriages contracted prior to the approval date, could lawfully thereafter make the legislation only prospective. To do so might result in a legislative bastardization of children previously declared legitimate. While it may be true that the Lord giveth and the Lord taketh away, it is doubtful that such power resides in the General Assembly.