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Wills and Trusts

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WILLS AND TRUSTS

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The subject matter of Wills embraces, as heretofore, the substantive law of Wills and of Descent and Distribution, and the adjective law of Administration. Because of the intimacy of much of trust law with the law of wills, it has been deemed advisable to treat them together. There are, however, for the period of the survey no trust cases as such, although trust principles and problems are apparent in some of the cases involving wills and administration.

Construction

In *Shevlin v. Old Colony Lutheran Church*[1] the court was faced with the determination of whether the will of a testator gave his wife an absolute estate or one for life with power to consume,[2] and with the problem of precatory language. The pertinent portions of the will read:

> I will, devise, and bequeath unto my beloved wife, Dora Dominick Shevlin, all real estate of every nature and description of which I may die seized and possessed, and also all my personal property of every nature and description and choses in action and money, that is to say to the said Dora Dominick Shevlin all my property of every nature and description, both real and personal, to use for her comfort, maintenance and support, to sell and dispose of same in any manner she may deem best, and to invest same in such manner as she may see fit, and if there be any of my estate or the proceeds thereof left at her death, I desire to go as follows [then follow gifts to charities].

The clause appointing the wife executrix gave her full power to "handle" the estate, "to sell and convey, make deeds and acquittances and to dispose of my said property, both real and personal as she may deem best or to hold and keep some for her own uses and purposes as she chooses."

The testator and his wife were killed in a common disaster, the wife dying a few minutes before the husband. The husband's heirs claimed the property on the grounds (1) that the wife had been given

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1. 227 S.C. 598, 88 S.E. 2d 674 (1955).
2. On the broad property questions which this case involves see discussion of it under Property.

an absolute estate, and that the gift had lapsed by reason of her death before her husband's; (2) that in any event the provision over as to the charities was precatory.

For the purposes of the subject under review the case is an interesting display of the rules in the construction of wills. Justice Oxner, writing the opinion, approaches the matter in the direct fashion that has characterized his treatment of wills construction. "We approach the construction of this will . . . by first undertaking to ascertain the intention of the testator without reference to any rules of construction. If we but let the will speak for itself, the meaning is clear." (Is not this itself a rule of construction?) His immediate conclusion was that the wife had been given a life estate with power to consume and that the charities took what was unconsumed — in this case the whole estate. Nevertheless the rules of construction are then called into play and are used to bolster the conclusion thus reached. There is the resort to axiomatic propositions: that the will must be read as a whole and not piecemeal; that effect must be given to every part; that all clauses must be harmonized with each other and with the will as a whole. It is pointed out that to have given the wife an absolute estate would be a disregard of language. It was not so disregarded because " 'only a very strong reason can justify the treatment of any of the testator's words in his last will and testament as surplusage.' " Moreover, the will having been drawn by a lawyer of long experience, " 'this is an added reason why some effect should be given to the superadded words.' "

The testator's heirs, claiming that in the first part of the will an absolute estate had been given, invoked the "well established rule that when a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate cannot be cut down or qualified by words of doubtful import found in subsequent clauses." The court while recognizing the rule denied the words were doubtful and gave them a qualifying effect, on the broad ground of ascertainment of the testator's clear intention.

Of perhaps greater importance, because of a certain element of novelty, is the weighing of factors to determine whether the word "desire", which is intrinsically precatory, was used in the will in that sense. Of course the term may, in its context, retain its natural meaning or it may be mandatory, but — and this is what is apparently a fresh factor — "Ordinarily where the word is used in expressing a desire for an act to be done by some person named by the testator it is merely precatory, but no such presumption arises when

the word is used to express the intention and will of the testator." Since the will did not express a desire or recommendation that the wife apply the property, and the testator made the disposition himself, the meaning given the term was mandatory. The problem of whether words are imperative or precatory is an underlying one in the law of trusts, and the addition here of another factor to be considered in the use of terms makes the sources of interpretation more abundant and helpful.

Joint Will as Evidence of Contract

Does a joint will in itself constitute evidence of a contract? Answer in the negative was given in *Ellisor v. Watts*,[3] which involved the joint will of a husband and wife in which a daughter was given real estate owned by the testators as tenants in common. The husband died first and the will was probated. Before the probate the wife conveyed her interest in the property to her son. The wife thereafter died and the will was again admitted to probate as her will. In action for partition brought by the son against the daughter, the daughter alleged full ownership in herself, on the ground that the joint will represented a contract in her favor which became unalterable on the death of the father. There was no evidence *dehors* the will that there was a contract, but the special referee concluded that as a matter of law the will itself constituted sufficient evidence of a contract. The referee was reversed by the circuit court, which in turn was upheld by the Supreme Court. In so doing, the court, while acknowledging conflict in the cases, followed the apparent majority view — "According to those authorities it does not follow merely because a husband and a wife sign a will, that the same was made in pursuance of a contract between the spouses or that the devises contained therein are irrevocable." Since there were no reciprocal provisions in the will the court did not find it necessary to determine whether the presence of such provisions in a joint will would indicate the existence of a contract.

Filing of Will as Notice

The effect of the filing and probate of a will in a county other than that in which land passing under it is located is considered in *Davis v. Sellers*.[4] The will in question had been probated in 1912 in Calhoun County, the residence of the testatrix. It gave a life estate to a son, with remainder to his children, in real property in Lexington

3. 227 S.C. 411, 88 S.E. 2d 351 (1955). This case is reviewed in 8 S.C.L.Q. 386 (Spring 1956).
4. 229 S.C. 81, 91 S.E. 2d 885 (1956).

County. The son assumed full control of the property and later gave a mortgage which contained no recital of limitation of ownership or title. The mortgage was thereafter foreclosed and by successive conveyances the land reached the defendant. A certified copy of the will was filed in Lexington County some years after the defendant became purchaser. In 1952 the life tenant died, and this action was brought by the remaindermen to recover the property. The defense was that failure to file the will in Lexington County made the defendant an innocent purchaser without notice entitled to protection. There was an additional defense of estoppel as against the remaindermen. A lower court holding adverse to the defendant on both counts was sustained. The will having been filed in the county of residence was properly filed[5] and constituted notice.[6] The 1955 act requiring the filing of the will in every county in which the decedent owned real estate was held inapplicable because of time considerations and the court declined to comment upon its meaning.[7] Nor do the general recording acts[8] apply to wills. The defense of estoppel in the case was held to be without merit.

Requirement of Bond in Sale by Representative to Self

The question of the responsibility of a Probate Judge for failure to exact a bond from an executor selling to himself is posed in *Ballentine v. National Surety Corp.*[9] Section 19-520 of the 1952 Code pro-

5. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 19-401, 19-264, cited by the court.

6. For other cases in which the plea of innocent purchaser was denied, on the ground that the will having been filed in the proper office third persons were charged with notice of its contents: McLarin v. Cunningham, 6 S.C. 23 (1874); Ellis v. Woods, 6 Richardson's Equity 19 (S.C. 1856); Kilgore v. Kirkland, 69 S.C. 78, 48 S.E. 44 (1903); Wood v. Lea, 219 S.C. 409, 65 S.E. 2d 669 (1951). None of these cases, however, involves a situation where the will, probated in one county, affected land in another.

7. Acts 1955, No. 143, page 191, now in CODE OF LAWS OF SOUTH CAROLINA, 1952 and Supp., § 19-264.1. The act reads: "When any last will or testament is filed with the probate court having jurisdiction a certified copy of same shall likewise be filed with the judge of probate of every county of the state where the deceased own real estate. Provided, that the legal representative of the estate shall not be discharged until showing is made to the satisfaction of the Court that provisions of this section have been complied with." It is doubtful, to say the least, whether this is a recording statute or whether it does more than impede the granting of a discharge for failure to file.

8. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 60-101 to 60-109 inclusive, cited by the court. But by statute delay in probate of a will may protect the interests of subsequent parties. "Every last will and testament, including any codicil or codicils thereto, shall be null and void as to subsequent purchasers or encumbrances for value without notice of property devised or bequeathed by the will unless the same be filed for probate in one of the modes allowed by law within one year after the death of the testator or testatrix." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-266. This is clearly a recording statute.

9. 228 S.C. 1, 88 S.E. 2d 772 (1955).

vides that "If any executor or executrix shall purchase any property at the sales of the estate of his or her testator, he or she shall give bond, with surety, to the Judge of Probate of the county, conditioned to account for the purchase money of the said property." An executor with power of sale purchased property of the estate after conducting a sale following advertisement of such purpose. The executor paid partly with his own funds, borrowed money for the remainder of the purchase and gave a note and mortgage for three-fourths of the purchase price to his lender. The funds realized from the sale were dissipated by the executor. The beneficiaries under the will sued the administratrix of the deceased Judge of Probate and his surety on the ground that the judge was guilty of nonfeasance or misfeasance in not requiring a bond from the executor under the provisions of the quoted section. The lower court, reviewing extensively the history of the section and companion statutes, held that no duty had been violated by the Probate Judge. The order was found to be without error, without supplementing opinion. The requirement for bond is held not to impose an affirmative duty on the part of the Probate Judge, neither the language of the statute nor the practicalities of the situation demanding it. Failure to give bond is violation of a duty by the executor, but no violation of a duty by the Probate Judge. From the practical aspect it is pointed out that "Depending upon the power contained in the will, such a sale may be either public or private, and upon such terms as the executor sees fit to impose. It would be a manifest impossibility for a Judge of Probate to follow and police every such sale, in order to determine whether the executor becomes his own purchaser and must therefore furnish bond."

Opinion was withheld as to the operation of the statute in a case where an executor's sale might be conducted by or under order of the Probate Court, it being pointed out that no such facts were present in this case.

Compromise of Action Under Lord Campbell's Act Right of Beneficiary on Representative's Refusal to Sue

The case of *Bailes v. Southern Ry.*[10] offers features of more than usual interest in connection with the "Wrongful Death Statute" (Lord Campbell's Act).[11] The plaintiff alleged that she was sister of a man killed as a result of the negligence of the railway company; that she had procured appointment as administratrix in order to

10. 227 S.C. 176, 87 S.E. 2d 481 (1955).
11. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-1951 to 10-1956 inclusive.

bring action for wrongful death, but that she had been supplanted as such representative by the person who had furnished funeral services who claimed such right as a creditor; that in his capacity as administrator he had effected an improper settlement with the company through the Probate Court; that the administrator, who was a co-defendant with the company, had refused to bring an action for wrongful death, and that on that account the plaintiff as beneficiary was bringing the action. The lower court sustained a demurrer on the ground that the plaintiff did not have capacity to sue, because only the administrator could maintain the action. The Supreme Court reversed.

Although the Probate Court has statutory authority to effect compromises of actions under Lord Campbell's Act,[12] its authority is confined to compromises whose effectuation would be in keeping with the scope and purposes of the Act. The settlement at the behest of the creditor-administrator, the purpose of which was to pay his claim, was improper, since proceeds of a recovery under Lord Campbell's Act do not constitute a part of the estate and are not subject to the payment of debts and claims against the estate. The court points out what is by now familiar law that although the action for wrongful death " 'shall be brought by or in the name of the executor or administrators', such cause of action is vested in him not as representative of the estate of the deceased person or for the benefit of the creditors of the estate, but as the representative of the statutory beneficiaries, for whom he is, by virtue of the statute a trustee."[13]

12. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-482. It extends also to actions for wrongful death under the Federal Employers' Liability Act (45 U.S.C.A. § 51-59), and to surviving causes of action for conscious pain and suffering. The statute in its original form is an old one (XIV Stat. 313, 1870) authorizing Probate Court sanction of compromises of claims or debts due an estate. In Ellenburg v. Arthur, 178 S.C. 490, 183 S.E. 306 (1935) it was held that the statute did not confer authority on the Probate Court to effect settlement of a claim under Lord Campbell's Act. The statute was amended thereafter from time to time to give to the Probate Court authority to effect compromises under Lord Campbell's Act and in other respects as now set out.

13. Citing Bennett v. Ry. Co., 97 S.C. 27, 81 S.E. 189 (1913). Because he is treated as a trustee rather than as a true personal representative, it is generally held that a foreign representative may sue in the jurisdiction in which the cause of action arose without ancillary appointment. See annotation 65 A.L.R. 563, RESTATEMENT OF CONFLICTS, §§ 394, 396, and RESTATEMENT OF TRUSTS, § 6, Comm. L., as stating this view. Despite the concession that he is a trustee, the South Carolina cases attribute the representative's authority to his appointment in the state in which the appointment is had and limit it accordingly, denying him the right to sue, without taking out ancillary letters, under Lord Campbell's Act and similar statutes. Southern Ry. Co. v. Moore, 158 S.C. 446, 155 S.E. 740, 73 A.L.R. 593 (1930), reversed on merits 284 U.S. 581, 76 L. Ed. 503 (1931); Heath v. Smyther, 19 F. Supp. 1020 (E.D. S.C. 1937); Coburn v. Coleman, 75 F. Supp. 107 (W.D. S.C. 1947).

Although proceeds of a recovery under the Wrongful Death Act are not a

The crucial issue raised by the demurrer was disposed of by the court's holding that, under the circumstances, the plaintiff had the right to sue, using the trust analogy to apply. "If a trustee refuses, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In so doing, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust (citing authorities). And compare *Fogg v. Middleton,* 2 Hill Eq. 591.[14] The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a course of action for wrongful death." Hence, it may be said that where an executor or administrator refuses, on demand, to sue the wrongdoer on a cause of action for wrongful death, the beneficiary may institute the action, joining the delinquent trustee as a party defendant. It would appear as a corollary that in other cases, not involving wrongful death, in which a duty rested upon an executor or administrator to sue on behalf of the estate, the beneficiaries could on refusal or perhaps neglect of the representative — a quasi-trustee — maintain the action against the third party and the representative.[15]

Descent and Distribution — Legitimation

One of the several recent statutes liberalizing the law of legitimacy of children received construction in *Schumacher v. Chapin.*[16] The case is essentially one of statutory construction and from this point

part of the decedent's estate, the bond of an administrator must respond for his misuse of any funds so realized. Boyd v. Richie, 159 S.C. 55, 155 S.E. 844 (1930).

14. Fogg v. Middleton (1837) was an action in equity by a trust beneficiary against a bond obligor and the obligee-trustee who had failed to sue the obligor. To the objection that the *cestui* had no standing to sue, the court stated: "Without going further than [the trustee] the plaintiffs have a right to come here to compel him to perform his trusts. But if he is liable, it results that he may be compelled, also, to surrender to his *cestui que trusts* all the legal remedies he possesses. And this puts the plaintiffs in possession of the bond, to all intents and purposes, as if it had been drawn to them as obligees, or assigned to them. If the Court, in this case, travels beyond the case of the trustee and *cestui que trusts,* and takes cognizance of the liabilities of the obligor, it is at the instance of the defendants, who insisted on his being made a party. Being here, at his own instance, the Court will, *to prevent circuity of action,* decree against him what he would have been liable to pay to the defaulting trustee, or what the plaintiffs could recover, if the bond had been assigned to them."

15. 21 Am. Jur. 940, Executors and Administrators § 1003.

16. 228 S.C. 77, 88 S.E. 2d 874 (1955). Also under the name of Crawford v. Crawford.

of view is treated elsewhere. The statute in question was originally enacted in 1951[17] and then read: ". . when either of the contracting parties enters 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." The act appears in the 1952 Code[18] in a slightly different version, in that, principally, "enters" became "entered" in the revision. The plaintiff's father, whose legitimate heir the plaintiff claimed to be under the statute, died intestate on November 2, 1952. He was survived by his wife and daughter, the defendant, a child of their lawful marriage which took place in 1906. The plaintiff was born in 1924, the child of the intestate and her mother, who had married in good faith. The 1952 Code as a body of general law became effective on its approval by the Governor on November 19, 1952, but the act declaring the Compilation, Collection and Revision of the General Statute Law of the state *as of January 8, 1952,* was ratified on March 8, 1952. Without elaborating upon the method of statutory construction, it is sufficient to say that the court concluded that the act both in its original form and in its code version was not retrospective. Even if the code version by reason largely of its use of a word in the past tense should be regarded as retroactive, it could not disturb rights which had vested in the lawful heirs on the death of the intestate, which had occurred prior to the approval of the act. The result of this appraisal of the meaning and effect of the legislation in question was to hold against the claim of the plaintiff as an heir.

The court did not touch upon the relevance of an amendment in 1954 to the statute in controversy, perhaps deliberately so since it could not affect the outcome, although it was mentioned in the briefs and in the exceptions in the record. Obviously out of a desire to clarify the operation date of the original act of 1951, the legislature inserted such a date, so that the statute[19] now reads: "Section 20-6.1. 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* (italicized words inserted by amendment), and in ignorance of the incapacity of the other party, any children born of the marriage shall be deemed legitimate and have the same rights as a child born in lawful wedlock." Certainly the statute in its amended form is retrospective to April 13,

17. Acts 1951, No. 109, page 150.
18. CODE OF LAWS OF SOUTH CAROLINA. 1952 § 20-6.1.
19. Acts 1954, No. 705, page 1770, § 20-6.1, 1954 Supplement.

1951 (which is the date of the approval of the original act), so that the children of any such marriage on or after that time would be legitimate; but in the light of the case under discussion such children could not participate with or to the exclusion of others inheriting if the father died before the passage of the 1954 amendment.

LEGISLATION

The 1956 session of the General Assembly made many drastic and far-reaching changes in the field of wills and administration of estates. Most of the legislation is in a "package" bill[20] of sixteen sections, of which the last two are repealer and effective date provisions. The principal purpose of most of the portions of this omnibus act is to shorten and facilitate the administration of both testate and intestate estates. The act will first be taken up by sections (but not in the act's order) and followed by other legislation of lesser importance. The practitioner can judge for himself the wisdom of the legislation, but in any event he must be aware of the vital changes the principal act makes in his probate practice.

Estates Affected

Under Section 13 of the principal act it is provided that "This act shall not apply to any estate in process of administration on April 1, 1956." Hence it is only as to estates where administration is commenced after that date that the act applies.

Executors' and Administrators' Commissions

By Section 1 the general act for compensation of executors and administrators (§ 19-534) is amended by adding the following: "The same commissions herein provided shall be paid to executors or administrators for the sale of real estate when directed by will or proper court order, *provided,* however, that when the executor or administrator is the purchaser at such a sale that in such instances a commission shall not be allowed."

The amendment at least clarifies the law with respect to commissions on proceeds of the sale of real estate. There has been no certainty that, except perhaps for a direction to convert real estate followed by actual conversion by sale, the proceeds of sale are regarded as personal estate or to what extent.[21] The legislation leaves no

20. Acts 1956, No. 767, page 1785, approved March 23, 1956.

21. Some of the cases indicate that the representative is entitled to commissions on the sale of land: Huson v. Wallace, 1 Richardson's Equity 1 (S.C. 1844); Buerhaus v. DeSasussure, 41 S.C. 457, 19 S.E. 926 (1893); Herndon v. Caine, 106 S.C. 230, 91 S.E. 1 (1916).

doubt that upon a proper sale the proceeds are out-and-out personal property for purposes of commissions.

Whatever may have been the practice as to the representative's right to commissions on a purchase made by himself, the present proviso denying him commissions on estate real property which he may purchase is perhaps ungenerous and inconsistent with the situation in sales of personal property. It has been held that in a sale by an administrator of personal property to himself he is entitled to commissions on the proceeds,[22] and apparently it has been similarly held on a purchase of real estate.[23]

Time for Distribution

Section 2 amends § 19-553 of the 1952 Code to read: "Section 19-553. No distribution of the goods of any person dying intestate shall be made until after six months be fully expired after the intestate's death." Previously the section had prescribed one year as the period to elapse before distribution. Since, as will be noticed, the dominant purpose of the 1956 act is to shorten the administrative period to approximately six months, or half the prior period, the amendment here, as in other sections, is in line with this purpose.[24]

Time for Commencement of Actions Against Executors and Administrators

Section 3 amends § 19-554 of the 1952 Code to read as follows: "Section 19-554. No action shall be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate until six months after such testator's or intestator's death, except that when a claim has been filed and disallowed, an action shall be brought to enforce such claim within six months after written

22. Vance v. Gary, Rice's Equity 2 (S.C. 1838). The matter is largely academic as to personal property since even if the property is not sold the representative, under § 19-534, is entitled to commissions on its appraised value. The matter would assume importance if the representative bought for himself at a price in excess of the appraised value.

23. Huson v. Wallace, 1 Richardson's Equity 1 (S.C. 1844).

24. There is no similar statute forbidding an executor to make a distribution within any given period. However, since legacies are subject to debts, an executor who delivers or pays a legacy before debts are paid does so at his peril, and it would seem that in this respect an executor is on the same footing as an administrator. He should not assent to a legacy before the expiration of six months, and even then only if debts have been paid. See Thompson v. Schmidt, 3 Hill 156 (S.C. 1836). The statute is an innocuous one in any event, since if the administrator makes a distribution before the expiration of the period and there are no debts or he has received enough to pay debts, no one can complain and no penalty is affixed; if he makes a distribution after six months without having first paid proved debts, he violates his duty. The same of course is true of an executor.

notice of disallowance to the claimant or the attorney filing the claim, or else be thereafter barred."

The amended statute is a combination of the original § 19-554 and the substance of § 19-483 of the 1952 Code which by Section 12 of the act is expressly repealed. Up to the word "except" the amendment is a restatement of § 19-554, with the exception of "six months", which is substituted for "twelve months" in the original. The six-months period is of course commensurate with the shortened period of administration. The original statute goes back to 1789.[25] The purpose is to assure the orderly administration of the estate. "At common law, executors or administrators are liable to be sued so soon as they take upon themselves their representative character, and in such a case, a judgment recovered before the executor or administrator had notice of any other outstanding debts due by the deceased, might sweep away the whole estate."[26] ". . . This latter act [of 1789] was intended for the benefit of estates, to allow the executors and administrators time to look into the affairs of the estate, and to collect debts which may be due, so as to prevent unnecessary sacrifice of property . . . ."[27]

The elimination of Section 19-483 as it appeared in the 1952 Code is commendable in view of numerous obscurities and uncertainties which it involved. The purpose, however, of the statute is retained in its new guise: to compel a rejected claimant to sue within the specified period or be barred. It is in effect a short statute of limitations. Since it is attached as an exception rather than as a proviso to § 19-554, it would appear that a claimant whose claim had been disallowed under the circumstances mentioned could sue within the six-months period. Seemingly, if a claimant filed his claim one week after a first notice to creditors which had been given a few days after a testator's death, he could sue immediately on its disallowance. While the provision has the virtue, from the representative's point of view, of cutting short the period of suit, it precipitates the very harassment that the statute, in its main part, is designed to prevent. The representative could of course forestall this — at the risk of protraction of the period of limitations — either by failing to pay without an express act of disallowance, or by postponing the rejection and notification of it until near the end of the administration period.

An element of uncertainty lurks in the term "claim", which appears

25. 5 Stat. 106. Originally the period was nine months.
26. Chambers v. Davison, 1 Hill 50 (S.C. 1833).
27. Moses v. Jones, 2 Nott & McCord 259 (S.C. 1820).

three times in the excepting clause of the amended act. The question is whether the word is used synonymously with "debts", which appears in the forepart. It has been held that not all claims are affected by the provisions forbidding suit within the period, and that only *debts* are thus involved. It has been held, for example, that tort claims are not covered, and that a tort claimant may sue within the proscribed period,[28] and since he may sue during that time the period is not added to the period of the statute of limitations which controls his cause of action.[29] If the term "claims" is not limited to "debts", a tort claimant whose claim has been rejected must sue within six months after notice of disallowance. If the term is *ejusdem generis* with *debts,* and confined therefore to debts, a tort claimant whose claim had been disallowed would not be forced into suit within the six-months period after notice. The writer professes no opinion as to these matters.

Change of Domicile or Absence of Representative

Sections 4 and 5 amend § 19-597 and § 19-599 of the 1952 Code which deal with the change by the representative of his domicile to outside the state or his absence from the state. The period of absence which authorizes citation against him and revocation of letters is reduced from ten months in the original statutes to five months. Otherwise there is no change.

Time for Filing Claims

Sections 6 and 7 are the most vital of the amendments. Section 6 amends § 19-473 of the 1952 Code by reducing from twelve months to *six* months the period allowed the representative to ascertain debts of the deceased. Section 7 amends § 19-474 by reducing the period within which claims must be filed from eleven months following the first notice to creditors to *five* months.

Practically all other sections relating to time are built around these two sections, whose import is to reduce the period of administration of simple estates to approximately six months, exclusive of the time required for citation in intestate estates and of the period for notice of application for discharge.

The passage of these sections was attended with considerable debate, which on one side arrayed the desirability of early settlement of an estate to the mutual advantage of beneficiaries and creditors

28. Newman v. Lemmon, 149 S.C. 417, 147 S.E. 439 (1928); Bourne v. Maryland Cas. Co., 185 S.C. 1, 192 S.E. 605 (1937).
29. Newman v. Lemmon, note 28 *supra.*

against on the other side the possibly too brief period for the presentation of claims — taking into account the possibility of creditors' not learning of the debtor's death until after time for filing might have expired. The debate was resolved against the latter prospect. One difficulty, arising out of the personal obligation for property taxes, nevertheless remains, and it may not be the only one. Other tax questions may present their own special problems. Liability of an estate for property taxes may not be capable of ascertainment until later in the calendar year. In an estate which is in process of administration at the close of the year, or near thereto, taxes may without difficulty be paid by the representative as a debt of the estate, thereby exonerating specific items of property passing to beneficiaries. If administration is begun, say, in January, with possibility of closing the estate in July or August, tax liabilities may not be taken care of. Whether county, municipal or other tax officials are charged with the duty of presenting claims, at the risk of being barred by the non-claim statute, or whether the representative must take notice of them, ascertained or not, is something on which there appears to be no local authority. Liens of course will not be affected, but payment of the tax by the estate as distinguished from discharge of the liens by beneficiaries is quite another matter.

Time for Making Returns

Section 8 changes the time for filing accounts or returns as prescribed in § 19-531 of the 1952 Code. In the unamended version a first return is required at the end of eleven months following the grant of letters, and other returns are to be made every twelve months thereafter. The amendment pulls back the first return to *five* months following appointment of the representative and calls for returns every *six* months thereafter. The requirement for the first return at five months is of course consistent with the abridged period of ordinary administration, but it is difficult to justify on any such basis a requirement for semi-annual returns. The administration of an estate which may require a considerable length of time is not facilitated by compelling returns twice a year. One is almost impelled to the conclusion that the legislative process was automatically to change twelve months to six months wherever the former words appeared in the probate law.

Administration by Judge of Probate

Section 9 carries as its caption "Judge of Probate — administer certain estates without formal administration." It reads in full as

follows: "When any person within this state shall die intestate leaving an estate in personal property, money or choses in action of the value of one thousand dollars or less the probate judge shall receive such estate and pay such creditors as may present their duly attested claims in accordance with Section 19-473, and pay such claims in the priority set forth in Section 19-476, and the residue, if any, to the distributee or distributees of such estate without the requirement of an administration. If any legal representative shall be under age, payment to the parent or other person with whom such child is a bona fide resident, this to be established to the satisfaction of the probate judge before he pays out such share, shall be a sufficient compliance with the provisions of this Section, and if such child is over fourteen payment direct to such child shall be sufficient compliance with this section."

Although Section 9 does not employ any amendatory or repealing provisions, it actually supersedes § 19-555 of the 1952 Code and must be given repealing effect by implication through the general repealer clause (Section 15). The earlier statute is limited to estates of five hundred dollars and provides only for the payment of funeral expenses and expenses of last illness, followed by a direction for payment of the residue to distributees. There are thus two fundamental changes: one is the increase in amount, which, in inflationary terms, is not actually much greater than the $500.00 mentioned in the original act adopted in 1925,[30] although admittedly it became twice as much the moment after the bill became law as the moment before; the second is the provision for the payment of *all* creditors in accordance with § 19-473 and § 19-476 of the 1952 Code. The second change was probably dictated by the holding in *Mitchell v. Dreher*,[31] construing the language of the 1925 act. It was there held that the act applied only to "untrammeled assets" — *i. e.* estates free of debt — since there was no reference in the act to payment to creditors, the inference of course being that the Probate Judge could not act if there were debts. The situation was partly taken care of by insertion subsequently of provision for the payment of funeral expenses and expenses of the last illness;[32] but clearly if there were debts other than these items of liability the Probate Judge could not handle the estate. Since there was the uncertainty, if not impossibility, of ascertaining whether an estate was debt-free, other than for funeral and medical expenses, a Probate Judge in taking charge of an estate

30. 34 Stat. 93.
31. 150 S.C. 125, 147 S.E. 646 (1929).
32. 41 Stat. 327 (1939).

would be assuming that there were no other creditors besides the funeral director, the doctor and so on, without using the customary administration proceeding for finding out the true state of affairs.

Although the act states that the Probate Judge may collect and pay "without the requirement of an administration", the caption speaks of the Probate Judge's power to "administer certain estates without formal administration." The caption is nearer to the truth than the body, since the duties imposed are virtually the same as those of an ordinary administrator. Only procedural features can be regarded as different, and in substance the Probate Judge becomes a species of Public Administrator.[32a]

The chief question of difficulty that the act may give rise to is whether the Probate Judge has the exclusive right to administer upon these thousand-dollar-and-less estates. The language is in itself mandatory — "shall" —, and it seemed to have been assumed, though not decided, in *Mitchell v. Dreher*[33] that with an estate of the kind only the Probate Judge could undertake its administration, but with room for an estoppel if the parties interested acquiesced in an ordinary administration. The earlier language of the superseded act in its

32a. In an order signed July 12, 1956, Circuit Judge G. Duncan Bellinger, in the Richland County Court of Common Pleas case of S. C. Mental Health Commission, et al. v. A. Ray Hinnant, Judge of Probate for Richland County, declares that "Section 9 . . constitutes the Judge of Probate of South Carolina as Public Administrator of the persons who die intestate having a personal estate of One Thousand Dollars or less and prescribes how they shall carry out the duties of that office." The order overruled a demurrer to a rule to show cause why a writ of mandamus should not issue to compel the Judge of Probate to accept a sum of money left in the hands of the Superintendent of the South Carolina State Hospital by a deceased patient. The substance of the demurrer was that § 19-555 of the 1952 Code and Act No. 281 of the 1955 Acts (requiring the superintendent of the State Hospital to pay over funds of deceased patients, after paying funeral expenses and indebtedness to the hospital, to the Judge of Probate of the county from which the patient was admitted) applied only to estates free of debt. The court declared that with the passage of Section 9 the objection noted in the demurrer had been met and the questions had become moot. A more difficult question is not solved by the case: Can *any debtor* owing a decedent less than a thousand dollars compel the Judge of Probate to receive it and force an administration upon him under Section 9? The fact of his owing less than a thousand dollars is not evidence that the estate does not exceed that amount, which is the maximum for purposes of jurisdiction. Would a showing by such a debtor of the essential amount be in any event acceptable? If the Judge of Probate chose to receive it for the purpose, presumably it would be on a determination by him that the estate did not exceed one thousand dollars. This naturally leads to the difficult question of the effect in a given case of a Judge of Probate's undertaking administration on a showing or investigation disclosing at the outset that the estate was a thousand dollars or less but thereafter it appeared that the estate was greater. Would the prima facie showing in the first place continue despite its being contrary to the fact? Or would the administration be void from the beginning? Or would it simply be subject to termination at the instance of interested parties?

33. Note 31, *supra.*

original and amended form (1939) and in its codified version in the 1932 and 1942 Codes[34] is that "it shall be the duty of the Judge of Probate to —." In the codification of 1952 (§ 19-555) the quoted words are replaced by "the Judge of Probate shall", clearly as a matter of editorial simplification and not for the purpose of changing the meaning.[34a] Nothing is said in any version of the act — especially under Section 9 — that the Probate Judge shall act in the event administration is not otherwise had, as is the case with the Clerk of Court's acting as Public Administrator,[35] or with the application of the Tax Commission for the appointment of an administrator.[36]

In the light of context and purpose, it is hard to see how the language of the act can be regarded as permissive rather than mandatory, that is, making it depend on the option and will of interested parties or on the choice of the Judge of Probate whether the Judge of Probate shall assume the administration or not. The problem, in some of its aspects, may be crystalized in this form: Suppose an interested party — distributee or creditor — makes a prima facie showing of exclusively personal assets of $1,000.00 or less and asks the Judge of Probate to administer the estate. Does the judge have the privilege of refusing? Or suppose that an interested party makes a similar prima facie showing and applies for letters for himself or for another. May the judge reject the application on the ground that the law has preempted the administration for his office? If the act should be viewed as permissive and making the Judge of Probate's assumption of duties dependent upon the request of interested parties, the question then would be whether any party interested could confer the right on the Judge of Probate as against other persons who might be entitled secondarily to act as administrator under the applicable statute.[37] For example, if a surviving wife, who is first entitled to letters under the statute, should ask the Judge of Probate to administer, could this be done if a child, who is next entitled, should not concur, or if even a creditor should insist on being appointed administrator himself? A person renounc-

34. § 9028, 1932 Code; § 9028, 1942 Code.

34a. For instances of the transformation from "it shall be the duty of the Probate Judge to" to "the Probate Judge shall", see § 19-406 of the 1952 Code, revising § 8978 of the 1942 Code; § 60-158 of the 1952 Code, revising Acts 1948/1971; § 26-104 of the 1952 Code, revising § 410 of the 1942 Code. There are undoubtedly many other such instances.

35. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-581.

36. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-404.

37. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-403, which contains six successively alternative categories of persons entitled, the last being "the greatest creditor or creditors or such other person as the court shall appoint."

ing the right to appointment cannot control the appointment by designating another to the exclusion of one who is in better right and who may wish it for himself.[38] Or an even stronger case: a child of the intestate asks the Probate Judge to act. Can the widow object and demand administration for herself?

In terms of time and money, the act is commendable, whether the language is mandatory or permissive. The object of course is to avoid the burden of costs, fees and expenses that could seriously deplete any small estate. The time that is saved would be represented by the time for publication of the citation to kindred and creditors[39] (assuming the act dispenses with it), and the time for publication of the notice of application for discharge.[40] The time saved, however, is not substantial — certainly not as much as in the earlier version — since apparently the Judge of Probate must advertise for creditors, the section calling for the payment of claims "in accordance with Section 19-473" [as amended]. That section requires advertisement for creditors and must be considered in conjunction with § 19-474, as amended, although no reference to the latter section is made. Hence at least five months, and perhaps six, must elapse before there can be distribution. The principal items of money savings are obvious: attorney's fees; bond premiums (unless the sureties are gratuitous); larger commissions (where not waived); and in some instances advertising costs and filing fees. The compensation of the Probate Judge is modest.[41] The one surprising feature attending the passage of this legislation is the gracious and generous yielding of the lawyers in giving up a source of income; a tribute to their willingness to permit needy beneficiaries and worthy creditors to obtain the most out of limited estates.

There is no requirement — at least to cover the case specifically — for formal accounting, and technically the Probate Judge cannot account to himself. There is not the necessity, as perhaps there should be, of accounting to a higher authority, as the Probate Judge is called upon to do in his capacity as Public Guardian.[42]

The concluding provision authorizing payment to one other than a guardian for an infant distributee is somewhat broader than a general

38. Ex Parte Ostendorff, 17 S.C. 22 (1881).
39. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-409.
40. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 15-461.
41. "The probate judge shall receive compensation of five per cent on the first two hundred dollars and one per cent on all over that amount for receiving and paying out the proceeds of such estate . . ." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-557, referring to § 19-555.
42. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 31-108.

statute[43] authorizing payments similarly to an infant or his parent where the amount involved is $500 or less. In practical terms the pertinent provision is hardly more than co-extensive because of the unlikelihood that residual payments will amount to as much as $500.-00 after payment of debts, particularly if the infant is not the sole distributee.

Release of Bond of Foreign Executors

Section 10 amends § 19-593 of the 1952 Code which permits the surety on the bond of a non-resident executor to be released, under prescribed conditions, at the expiration of twelve months from the commencement of administration. The amendment reduces the period from twelve months to six months. Otherwise there is no change.

Failure to Qualify by Non-Resident Executor as Renunciation

Section 11 amends § 19-596 of the 1952 Code which treats the failure of a non-resident executor to qualify within twelve months from the date of admission of the will to probate as a renunciation of the right to act. The amendment reduces the time from twelve months to six months. There is no other change.

In this connection a paradox of sorts should be noted. The act in both its unamended and amended forms speaks of renunciation flowing from a failure to qualify within the specified period following the admission of the will to probate. Theoretically it is not possible, under an applicable statute to probate the will without seeking and obtaining letters testamentary. Section 19-405 of the 1952 Code provides: "A probate judge shall not admit any will to probate unless an application for letters testamentary or for letters of administration, cum testamento annexo, has been filed and the executor or administrator duly appointed . . ." Following this out, it would appear that if a Judge of Probate had done his duty under the statute just quoted, the will would not have been admitted to probate in the first place if appointment had not simultaneously been sought and obtained. With co-executors, of course, there is a different possibility if one of them qualifies. The statute, according to prevalent

43. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2551. This permits the payment to be made to the minor or his parent or some other person only if there is no general or testamentary guardian and the expense of having one appointed would be unwarranted. Presumably a Judge of Probate acting under § 9 would pay only to a guardian if there were one, as a matter of precaution if not of legal requirement. An ordinary administrator has no such freedom of choice as is allowed the Judge of Probate, but he could proceed under § 10-2551.

information, is as much honored in the breach as in the observance.[44] Another statute[45] permits and requires the *filing* of a will with the Judge of Probate, but in its context it is differentiated from probating. Whether, to make the amended section sensible, the probate referred to is the filing mentioned in the statute just noted is a matter that awaits judicial construction. Any argument, however, to support this view would be weakened by the fact that the original statute dealing with renunciation by the non-resident executor was enacted in 1902,[46] ten years before the enactment of the statute dealing with filing.[47]

Time for Contest of Will

Section 14 is a critical amendment to § 19-255 of the 1952 Code. That section in its unamended form allows a will which has been admitted to probate in common form to be proved in solemn form within twelve months following its admission to probate. The proceeding in solemn form is of course in this state the method of attacking or contesting a will, and the effect of restricting the proceeding to the time specified is to create a statute of limitations on contest. Section 14 reduces the period for contest from twelve months to *six* months. In other respects the law is unchanged. Whether the period for attack is too brief, particularly in view of the *ex parte* character of common form proceedings and the lack of notoriety or notice, is a matter of debate involving the same considerations as those concerning the shortening of the period for the filing of claims. The paramount concern for the orderly and early settlement of estates may perhaps be justification for tolerating the certainly rare incidence of individual injustices or hardships.

The foregoing material has all been concerned with Act No. 767. Other acts are next dealt with.

Conclusiveness of Intermediate Accounting

Act No. 660 is a new, and not an amending, statute. It permits

44. Yet according to an old case, following the then English practice, probate consists of the following: "1st. Proof of the genuineness of the will by the oath of the executor. 2d. His acceptance of the trust; and 3rd. The sanction or grant of the Ordinary allowing it." In re *Drayton's Will*, 4 McCord 46 (1826), the syllabus adding: "To constitute probate letters testamentary must be granted on the will." The quoted words are repeated with approval in Counts v. Wilson, 45 S.C. 571, 23 S.E. 942 (1895).

45. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-264.

46. 23 Stat. 1064.

47. 27 Stat. 765 (1912).

any fiduciary whose duty it is to account to the Probate Court to file an application for adjudication of any account required to be filed by him. Such an adjudication can be had only after giving notice in the manner required for the granting of a discharge under § 15-461 of the 1952 Code. It is further provided that approval by the court of the account shall relieve the fiduciary and his sureties of all liability, up to that time, to the beneficiaries made parties to the application. The court may disapprove the account. The account may not be reopened "unless it later appears that it is incorrect because of fraud or mistake." And, further, "Court approval or disapproval of accounts adjudicated as provided in this act shall be considered final judgments insofar as the right of appeal is concerned."

It will be seen that the purpose and effect of the act in permitting adjudication of intermediate accounts, under the procedure governing final accountings, is to give finality to such accounts and to render them not subject to review on the final accounting, subject to reopening for fraud and mistake.[48]

Claims for Old Age Assistance

Part II, Section II, of the General Appropriations Act (No. 813, 1956 Acts), at page 1947, provides as permanent legislation that a claim shall arise in favor of the State *against the estate* of any deceased person who has received Old Age Assistance, to the total amount of such assistance paid to the recipient after July 1, 1956. Further provision is made that the State Department of Public Welfare shall file the claim with the legal representative of the estate of the recipient, or with the Judge of Probate of the county in which the estate is administered, within *one year* after the death of the recipient. In what amounts to a modification of § 19-476 of the 1952 Code, which states the priority of claims in decedents' estates, the act provides that such claims shall have priority over all claims except "(1) Funeral and other expenses of the last sickness, charges of probate and letters of administration; (2) Debts due to the public; (3) Judgments, mortgages and executions — the oldest first, and (4) Rent, and such preferred claims shall be payable prior to the payment of bonds, debts by specialty, and debts by simple contract. *Provided,* however, that mortgages shall not be entitled to priority over such

48. As to impeaching the validity of a final account, see McDow v. Brown, 2 S.C. 95 (1870); Harris v. Stilwell, 4 S.C. (1872); McNair v. Howle, 123 S.C. 252, 116 S.E. 279 (1922); Anderson v. Bowers, 170 Fed. 2d 676 (C.C.A. 4 Cir. — E.D. S.C. — 1948).

preferred claims except as to the particular parts of the estate affected by the liens of such mortgages."[49]

Further provision is made that no action can be maintained to enforce such claims within one year after death of the recipient, nor more than ten years from the last day for which assistance is paid. It should be noted that the act does not create a lien as does the Mental Health Act,[50] and at best it creates a personal obligation maturing only upon the death of the recipient. Transfers or mortgages by recipients of property which might be subjected to payment of claims on death are apparently not affected adversely by the act, and it would seem that only the law of fraudulent conveyances would be applicable in such cases.

It should also be noted that claims may be filed within *a year* following death of the recipient of the assistance. This provision should be contrasted with the requirement of Section 7 of Act No. 767, 1956 Acts, amending § 19-474 of the 1952 Code, for filing of claims by creditors, previously discussed. Whether there is a conflict in these provisions or whether they can be reconciled by treating the assistance claims provisions as either an exception or standing by themselves is a matter yet to be determined. Unless the general non-claim statute (§ 19-474 as amended) can be regarded as overriding these assistance provisions (and here it should be noted in opposition that Act No. 813 was approved on March 28, 1956, *after* the approval of Act No. 767, approved March 23, 1956), it would follow that estates of assistance recipients may not enjoy the same brevity of administration as other estates. An early filing of claims, however, by the State Department of Public Welfare would of course facilitate an early closing of the estate in line with the general policy of the amendatory administration acts. It is possible, assuming that the assistance claims statute is to be given literal effect, that an estate might be closed in the ordinary course of administration and thereafter reopened as a *d. b. n.* estate for the presentation and prosecution of assistance claims.

49. Section 19-476 of the 1952 Code reads the same as the quoted language through part "(4) Rent", and then follows part (5) — "Bonds, debts by specialty and debts by simple contract." The effect of the preference of these assistance claims is to create an additional part: (4½). It is singular that the legislature did not choose to allow these claims to fall into part (2) — claims due to the public, a classification which has been held to embrace every type of obligation owing to the State or its subdivisions. Baxter v. Baxter, 23 S.C. 114 (1884), surety on County Treasurer's bond; Lockwood v. Lockwood, 68 S.C. 328, 47 S.E. 441 (1903), public deposit in unincorporated bank; Purdy v. Strother, 184 S.C. 210, 192 S.E. 159 (1937), taxes.

50. Section 18, Act No. 836, Acts 1952, as amended by Act No. 629, Acts 1956.

Another contradictory feature is the prohibition against suits to enforce claims within a year following death. No advantage is discerned either to the estate or to the State in compelling a holding off for that period.

Donation of Eyes

Act No. 755 is an interesting one, providing generally for donations or gifts of eyes and dealing with the establishment of "eye banks". A donor may make such a gift by a "written instrument declaring such gift, or by his or her last will and testament, as provided in Section 6 hereof." Section 6 provides: "Persons may, by their last will and testament or codicil thereto, bequeath their eyes for eyesight restoration purposes and any such provision in any last will and testament or codicil shall become effective immediately upon death of the testator." The legal effectiveness of such a bequest is to be viewed in relation to the effectiveness of a testamentary disposition by a person of his dead body — as to which there is conflict in the authorities[51] and no direct South Carolina law. The local material on the nature of a dead body is confined to holding that a corpse is not property, nor a part of the deceased's estate, and not subject to the control of the executor or administrator in his official capacity;[52] but that the corpse is "*quasi*-property over which the relatives of the deceased have some right."[53] Whether the negation of a corpse as property would likewise entail the discountenancing of a testamentary disposition is problematic.[54] In any event it would seem that whatever may be the solution of the broader problem of disposition of the dead body, the legislature has given efficacy to a testamentary gift of a part of it. Whether the duty is imposed principally upon the executor or upon the relative or other person having custody of the

51. See Page on Wills (Lifetime Ed.) § 213; 15 Am. Jur., Dead Bodies, §§ 6, 12; 68 C. J., Wills, § 121. For an elaborate discussion of the matter, see In re Johnson's Estate, 169 Misc. (N.Y.) 215, 7 N.Y.S. 2d 81 (1938).

52. Griffith v. Southern Ry. Co., 23 S.C. 25, 55 Am. Rep. 1 (1884); Ex Parte McCall, 68 S.C. 489, 47 S.E. 974 (1903); Osteen v. Southern Ry. Co., 101 S.C. 532, 86 S.E. 30, L.R.A. 1916A 565, Ann. Cas. 1917C 565 (1915); Simpkins v. Lumbermen's Mutual Casualty Co., 200 S.C. 228, 20 S.E. 2d 733 (1942).

53. Simpkins v. Lumbermen's Mutual Casualty Co., note 52, *supra.*

54. See the statement in Simpkins v. Lumbermen's Mutual Casualty Co., note 52, *supra,* at p. 234 of 200 S.C.: "It is generally conceded by text writers on the subject that the surviving spouse has a primary right to the possession of the body and to control the burial thereof, *unless the decedent has by will or otherwise made a different disposition* (italics supplied)." The case involved an alleged wrongful autopsy on the body of the plaintiff's husband and it was held that the wife, in preference to others, could maintain the action for wrongful mutilation. No question arose under any will, and the italicized quoted words are *dicta,* but entitled to some weight.

corpse, and what the consequences of failing to carry out the duty would be, are matters of interesting speculation. One thing would appear to be certain: Considering the nature of the subject of the gift and the use to which it is to be put, removal and transfer of the eyes would not have to await probate of the will.[55]

55. In a communication to the American Bar Association Journal in the August, 1955, issue (41 A.B.A. Jnl. 742) an official of "Eye-Bank for Restoration, Inc.", an organization devoted to education for the restoration of sight through cornea transplants, requests members of the bar to establish contact with the organization to learn its aims and the practical and legal aspects of donations of eyes. Offices are at 210 E. 64 St., New York City.