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CASE NOTES

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DEEDS—Cancellation by the Parties.—Grantor executed and delivered a deed to the husband alone which was recorded. Because his wife had furnished part of the consideration, the husband requested grantor to make a second deed to them jointly, which grantor executed and delivered. It was recorded with the notation that it was a correction deed, substituted for the former one. Plaintiffs, devisees of the wife, relying on the second deed, sued for partition and an accounting by defendant, who claimed under the first deed as sole heir at law of the husband. The Circuit Court found that plaintiffs held an undivided half interest in fee simple, reversing the master's finding for defendant, and thus giving effect to the mutual intention of the parties to cancel and rescind the prior deed because of mistake. On appeal, HELD: Affirmed. *Cox v. Tanner,* 229 S. C. 568, 93 S. E. 2d 905 (1956).

Delivery of the deed vests title in the grantee. *Watson v. Cox,* 117 S. C. 24, 108 S. E. 168 (1921); *McCants v. McConnell,* 1 Mill Const. 190 (S. C. 1817). Most courts hold that the grantee will not be divested of his title by a cancellation of the deed which the parties attempt by re-delivery to the grantor or by destroying it, even though they intend so to divest his title and revest it in the grantor. *Sally v. Sandifer,* 2 Mill Const. 445, 12 Am. Dec. 687 (S. C. 1818); *Turnipseed v. Busby,* 1 McCord 279 (S. C. 1821); accord, *Booker v. Stivender,* 13 Rich. 85 (S. C. 1860). However, some jurisdictions have held that such cancellation revests the equitable title in the grantor if the deed was not recorded; *Happ v. Happ,* 156 Ill. 183, 41 N. E. 39 (1895); *Russell v. Meyer,* 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637 (1898); or even if it was recorded. *Mauldin v. Howell,* 212 Ark. 268, 205 S. W. 2d 446 (1947). Other courts have reached the result that such cancellation of an unrecorded deed revests title in the grantor as a practical matter for one of the following reasons: (1) Because the grantee is estopped from introducing parol or secondary evidence of his deed, since he has voluntarily surrendered or destroyed the evidence of his title; *Thompson v. Thompson,* 9 Ind. 323, 68 Am. Dec. 638 (1857); *Mussey v. Holt,* 24 N. H. 248, 55 Am. Dec. 234 (1851); (2)

Because the cancellation together with other circumstances estops him from asserting title or from denying that the grantor has title; *Bates v. Hall,* 305 Ky. 467, 204 S. W. 2d 487 (1947); *Emerson-Brantingham Implement Co. v. Cook,* 165 Minn. 198, 206 N. W. 170, 43 A. L. R. 41 (1925); (3) Or because the jurisdiction holds that title does not pass until the deed is recorded and it is cancelled before registration. *Austin v. King,* 91 N. C. 286 (1884); accord, *Respass v. Jones,* 102 N. C. 5, 8 S. E. 770 (1889).

At law, the grantor completely divests himself of title by executing and delivering a deed to the grantee; hence, he cannot possibly convey any interest by a subsequent deed. *King v. McDuffie,* 144 Ga. 318, 87 S. E. 22 (1915). But despite the legal theory, most courts hold that unless the rights of third persons intervene under the first deed, the grantee's acceptance of a subsequent inconsistent conveyance from the grantor will have the effect of cancelling the first deed. *Reeves v. Walker,* 219 Ky. 615, 294 S. W. 183 (1927); *People v. Tompkins-Kiel Marble Co.,* 269 N. Y. 77, 199 N. E. 10 (1935). The court may hold the second deed the operative conveyance and the first one cancelled by mutual consent of the parties on a theory of novation; *Hall v. Wright,* 137 Ky. 39, 138 Ky. 71, 127 S. W. 516 (1910); *Redding v. Vogt,* 140 N. C. 562, 53 S. E. 337 (1906); or on the theory that whenever a court of equity would have power to cancel or reform a deed, the parties can do it themselves by agreement without the aid of a court. *Reid v. Reid,* 230 Ky. 835, 20 S.W. 2d 1015 (1929); *Cales v. Ford,* 126 W. Va. 158, 28 S. E. 2d 429, 150 A. L. R. 398 (1943). Thus, on a theory of reformation, the second deed has been held operative and the first one cancelled by mutual agreement of the parties for failure of consideration; *Cales v. Ford, supra*; or for mistake, *Reid v. Reid, supra.*

This seems to be a case where law and equity conflict. The legal theory is that execution and delivery of a deed completely divest the grantor's title, and consequently, he has none to convey by a second deed. But the modern trend of the cases is to give effect to the intention of the parties despite the legal theory and hold a cancellation attempted by the parties themselves effective on equitable principles, especially when the grantee has accepted a second inconsistent deed. Such a holding illustrates the historical function

of Courts of Equity to break through the legal forms in order to give substantial justice according to the equities of the case. In the instant case the Court undoubtedly reached the correct result in accordance with the equities of the situation and the modern trend of the cases.

HENRY SUMMERALL, JR.

JURIES — VOIR DIRE EXAMINATION — Propriety of Questions Concerning Racial Prejudice. — Defendant, a Negro, was prosecuted for rape of a white woman. On the voir dire examination, counsel for defendant sought to inquire of each prospective juror whether he had any prejudice against a Negro which would make him require less evidence to convict a Negro of the crime of rape than to convict a white man. Also, counsel sought to inquire whether the juror would be less inclined to believe a Negro witness than a white witness. All questions pertaining to racial prejudice were excluded by the court. The jury returned a verdict of guilty and defendant appealed. HELD: Error. New trial granted. The rulings were an abuse of the court's discretion denying defendant his rights under a statute providing that "either party may examine each juror as to his qualifications to sit." *State v. Higgs,* 143 Conn. 138, 120 A. 2d 152 (1956).

It is fundamental that fairness and an unprejudiced mind are necessary qualifications of a juror called upon to try one accused of crime. *People v. Reyes,* 5 Cal. 347 (1855); *Withers v. State,* 30 Tex. App. 383, 17 S. W. 936 (1891). The voir dire examination is directed toward determining the state of mind of the prospective juror and is said to have a dual purpose: 1) to reveal grounds for challenge for cause, and 2) to furnish information enabling the party to determine the advisability of exercising the right of peremptory challenge. *Kizer v. State,* 67 Okla. Crim. 16, 93 P. 2d 58 (1939); *State v. Tharp,* 42 Wash. 2d 494, 256 P. 2d 482 (1953). The scope of the examination is largely within the discretion of the trial court. *State v. King,* 158 S. C. 251, 155 S. E. 409 (1930); *State v. Stonestreet,* 112 W. Va. 668, 166 S. E. 378 (1932). Such discretion will not be disturbed unless it is clearly abused and the party complaining has been prejudiced thereby. *State v. Lytle,* 177 Kan. 408, 280 P. 2d 924 (1955); *Strong v. State,*

106 Neb. 339, 183 N. W. 559 (1921). When it is found that a juror has a racial prejudice against a Negro defendant or his lawyer which may influence his verdict, the juror is properly excused *for cause. People v. Decker,* 157 N. Y. 186, 51 N. E. 1018 (1898); *State v. Sanders,* 103 S. C. 216, 88 S. E. 10 (1915); *State v. Dean,* 134 W. Va. 257, 58 S. E. 2d 860 (1950). The mere existence of some racial prejudice against the race as a whole of a social nature or which takes the form of a feeling that the Negro race is inferior, may not be sufficient in itself to technically disqualify a juror. *Johnson v. State,* 88 Neb. 565, 130 N. W. 282 (1911); *Bass v. State,* 59 Tex. Crim. 186, 127 S. W. 1020 (1910). However, questioning concerning racial prejudice has been recognized for its usefulness in divulging pertinent information for the intelligent use of *peremptory challenges. Hill v. State,* 112 Miss. 260, 72 So. 1003 (1916); *Fendrick v. State,* 39 Tex. Crim. 147, 45 S. W. 589 (1898). When questions provided by statute to be used for the interrogation of jurors to determine their competency have been satisfactorily answered, it is generally held that any further examination is within the discretion of the court. *Commonwealth v. Cero,* 264 Mass. 264, 162 N. E. 349 (1928); *State v. Bethune,* 93 S. C. 195, 75 S. E. 281 (1912). Thus, if a juror has once denied consciousness of any bias or prejudice against a defendant in answer to a general statutory question, it has been held that a specific question concerning racial prejudice may properly be excluded. *Commonwealth v. Lee,* 324 Mass. 714, 88 N. E. 2d 713 (1949); *State v. Bethune, supra.* Some courts have refused to permit questioning of jurors with regard to racial prejudice which might influence their acceptance of the testimony of Negro witnesses. *Jenkins v. State,* 31 Fla. 196, 12 So. 677 (1893); *State v. Dyer,* 154 La. 379, 97 So. 563 (1923). However, this type of question has often been used on voir dire examinations, see e. g., *Burrage v. State,* 101 Miss. 598, 58 So. 217 (1912); *Moore v. State,* 52 Tex. Crim. 336, 107 S. W. 540 (1908), and the great weight of authority has held that the court's refusal to permit questions directed toward disclosing whether the prospective juror is so prejudiced against the Negro race that it would take less evidence for him to convict a Negro than a white person, constitutes reversible error. *Aldridge v. United States,* 283 U. S. 308, 73 A. L. R. 1203 (1931); *Pinder v. State,* 27 Fla. 370, 8 So. 837 (1891); *Hill v. State,* 112 Miss. 260, 72 So. 1003 (1916).

The decision in the principal case is eminently sound. Though the courts have been cautious to prevent questioning on voir dire examinations calculated to embarrass or harass the juror, it would seem to be the prevailing view that the scope of the examination should not be so restricted as to prevent disclosure of the personal prejudices of the individual jurors which might sway their judgment. Despite the fact that the courts have laid considerable emphasis on the degree of racial prejudice entertained by the juror in deciding upon his competency, those jurisdictions that have been faced with the problem, including South Carolina, agree on the proposition that a juror who appears to have such racial prejudice as will preclude his rendering a fair verdict, should not be considered qualified. Since the effects of racial prejudice are recognized by the courts, it would seem only reasonable that they should allow the most beneficial use to be made of the only practical method of uncovering it. Distinctions that have been made between questions concerning the credibility of Negro witnesses and those designed to elicit racial prejudice against a Negro defendant which will distort the juror's view of the law and evidence, can hardly be justified when considered in light of the ultimate goal of assuring the defendant a fair trial. The absence of any such distinction in the principal case is in keeping with the recognition by the court of the necessity in a criminal prosecution of procuring a body of jurors who are able to judge the guilt or innocence of the accused objectively.

CHARLES E. BAKER.

REVOCATION OF LICENSE—Disparaging Remarks of One Physician About Another as Basis for Disciplinary Proceedings.—Petitioner, a physician, sought prohibition to restrain proceedings before The Board of Medical Examiners to revoke his license. The statute conferred upon it authority to suspend temporarily or permanently the license of a physician guilty of "unprofessional conduct," which was defined by the statute as "conduct unbecoming a person licensed to practice medicine or which is detrimental to the best interest of the public." The physician had in private conversation criticized harshly three other physicians in the county and

the entire medical profession. HELD: Prohibition granted. A physician's slanderous language alone did not warrant revocation of his license. *Boswell v. Board of Medical Examiners*, ___ Nev. ___, 293 P. 2d 424 (1956).

It was recognized in England 300 years ago and has been the law in this country ever since that one of the rights reserved to the states is to determine the qualifications for office and the conditions upon which citizens may exercise various callings and pursuits within limits. The *Bonham* case, 8 Coke 1142 (1861). There is no distinction between refusing to grant a license and revoking a license already granted. Both are an exercise of police power, the object of which is to exclude incompetent persons from the practice of medicine. *State Medical Bd. v. McCrary*, 95 Ark. 511, 130 S. W. 544, 30 L. R. A. (N. S.) 783 (1910); *Kennedy v. State Bd. of Registry, etc.*, 145 Mich. 241, 108 N. W. 730 (1906); *State ex rel Chapman v. So. Medical Examiners*, 34 Minn. 387, 26 N. W. 123 (1885). Since a license is not a contract, and gives the holder no right to practice in the future unrestricted, it follows that any license may be revoked and such revocation alone is not a taking without due process. *State v. Webster*, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. (N. S.) 212 (1898); *Meffert v. State Bd. of Medical Examiners, etc.*, 66 Kan. 710, 72 Pac. 247 (1903), affirmed in 195 U. S. 625 (1904). However, the right to practice is a valuable property right entitled to protection of due process of law; thus the practitioner is entitled to notice and an opportunity to be heard in defense of his right to practice. *State v. State Medical Examining Bd.*, 32 Minn. 324, 20 N. W. 238 (1884); *Gage v. Censors of N. H. Electric Medical Soc.*, 63 N. H. 92, 50 Am. Rep. 492 (1884). The legislature has power to invest an officer, board, or department with power and duty to hear, investigate, and determine a charge against a person holding a license or certificate to practice medicine, drugless healing, dentistry, or optometry in the state; *Shivson v. Schafer*, 354 Pa. 458, 47 A. 2d 665 (1946); *Buhl v. Univ. of State of N. Y.*, 50 N. Y. S. 2d 392, 182 Misc. 786 (1944); *Francisco v. Bd. of Dental Examiners*, Civ. App., 149 S. W. 2d 619 (Tex. Civ. App. 1941), and to revoke his license or certificate. *Fich v. Siverston*, 208 Minn. 102, 292 N.W. 758 (1940); *State ex rel Munch v. Davis*, 143 Fla. 236, 196 So. 491 (1940). The boards have broad discretionary powers and if no appeal is pro-

vided for and the exercise of these powers is not unreasonable and is free from fraud and oppression, the courts will not disturb it; the findings of fact will be conclusive on the courts to which the actions are brought for review. *Iowa Electrical Medical College Assn. v. Shroudes,* 87 Iowa 659, 55 N. W. 24 (1893); *Allan v. Burrows,* 69 Kan. 812, 77 Pac. 555 (1904); *Munk v. Frink,* 81 Mo. 631, 116 N. W. 525 (1908). The legislature may declare acts or conduct for which a license may be revoked, but the acts or conduct should be designated with certainty and definiteness, *Green v. Blanchard,* 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84 (1919); *Hewitt v. State Bd. of Medical Examiners,* 148 Cal. 590, 84 Pac. 39 (1906), and be such as affect the safety and morals of the public. *Hewitt v. State Bd. of Medical Examiners, supra; Ex parte McNulty,* 77 Cal. 164, 11 Am. St. Rep. 257 (1888). Statutes providing for revocation of a physician's or dentist's license in some jurisdictions are considered remedial for the protection of the public; *Ramsey v. Shelton,* 327 Ill. 432, 160 N. E. 769 (1928); *Richardson v. Simpson,* 88 Kan. 684, 129 Pac. 1128 (1913); but in other jurisdictions such statutes are regarded as highly penal and fall within the rule requiring strict construction of penal statutes. *Abrams v. Jones,* 35 Idaho 532, 207 Pac. 724 (1922); *State v. Clark,* 288 Mo. 649, 232 S. W. 1031 (1921); *McPheeters v. Bd. of Medical Examiners of Calif.,* 103 Cal. App. 297, 284 Pac. 938 (1930). The performing of or aiding or abetting in the performance of a criminal abortion, *Mo. ex rel Hurwitz v. North,* 271 U. S. 40 (1926); *Munk v. Frink,* 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 587 (1908), and the practice of medicine or any of its branches under a false or assumed name, *Grisso v. Medical Examiners,* 75 Cal. App. 385, 242 Pac. 912 (1925); *People v. Appelbauns,* 251 Ill. 18, 95 N. E. 995 (1911), are grounds for revocation usually expressly provided in the statutes. The most common statutory grounds for revocation are "unprofessional", "dishonorable", or "immoral" conduct. The courts are in substantial agreement that these quoted words are construed to mean that which by common understanding is considered grossly immoral, disreputable, and dishonorable in connection with the practice of medicine, *Piton v. Medical Examiners,* 13 Ariz. 354, 114 Pac. 962 (1911); *State ex rel Larentine v. State Bd. of Health,* 334 Mo. 220, 65 S. W. 2d 943 (1933), but are not construed to warrant revocation for mere breach of generally accepted

ethics of the profession. *Chenoweth v. State Medical Examiners,* 32 Minn. 324, 20 N. W. 238 (1884). Particular matters held to be within such statutory grounds include drunkenness, *Crabb v. Kan. State Bd. of Dental Examiners,* 118 Kan. 513, 235 Pac. 829 (1925); *Senior v. State Bd. of Health,* 32 R. I. 484, 96 A. 340 (1916), writing illegal liquor prescriptions, *State v. Hiller,* 260 Mo. 242, 180 S.W. 538 (1915), obtaining a license by fraud or misrepresentation, *People v. Reid,* 151 App. Div. 324, 136 N. Y. S. 428 (1912); *State Bd. of Health v. Ray,* 22 R. I. 538, 48 A. 802 (1901), inducing a person to submit to treatment by a person who is not a physician by representing him to be such, *Dillard v. State Bd. of Medical Examiners,* 69 Colo. 575, 196 Pac. 866 (1921); *Davis v. Bd. of Registration,* 251 Mass. 283, 146 N. E. 708 (1925), prescribing drugs for addicts without any attempt or purpose to cure them, *Knoop v. State Bd. of Health,* 41 R. I. 283, 103 A. 904 (1913) and paying commissions to a lay solicitor of patients, *Bell v. Bd. of Regents of Univ. of State of N. Y.,* 295 N. Y. 101, 65 N. E. 2d 184, 163 A. L. R. 900 (1946). Libelous matters published and printed by a chiropractor attacking a hospital and the Veterans Bureau for purpose of gain was held to be sufficient grounds for revocation of his license. *State Bd. of Medical Examiners v. Spears,* 79 Colo. 588, 247 Pac. 563 (1926). However, the court in the principal case distinguished this from the situation before it in which slanderous remarks were made in private conversations with persons who had a professional interest in the conditions described and with no purpose of personal gain.

The board in the principal case contended that the acts done would cause the patients of the physicians criticized to lose trust in them, and also that the acts demonstrate a person of such character that the practice of medicine by him would be detrimental to the public. Neither argument, however, is sound, for in our society harsh criticism is a frequent occurrence, and "a toughening of mental hide" is the answer for it. As for the acts being a demonstration of bad character, surely this stamp could not be put on people prone to speak their mind, for, if so, many people in the medical profession would be regarded as having bad character. As the court said in the principal case, "the common sense and sound judgment of the public in reaction to unwarranted criticism affords better protection than that sought by the board." The test is whether the effect of these acts upon

public health, safety, and morals is of such a serious nature as to warrant the ultimate penalty of revocation. There has been very little litigation in South Carolina concerning the revocation of a physician's license. The acts complained of in the principal case are not specified as a ground in the South Carolina statute. "Immoral conduct" is the general or "catch-all" ground in the South Carolina statute, and the courts would be stretching this to the utmost to include within it harsh and critical language such as that complained of in the principal case.

EDWARD W. MULLINS.

TORTS—HUSBAND AND WIFE—Wife's Right of Action for Loss of Consortium Due to Negligent Injury of Husband.—Plaintiff brought an action for loss of the consortium of her husband, specifically companionship and sexual relations, occasioned by the defendant bus company's negligence resulting in the total permanent disability of the plaintiff's husband. Defendant appealed from a judgment of $25,000 in favor of the plaintiff, asserting that an action of this kind was not authorized by statute or the common law. HELD: Affirmed on the condition that $10,000 remittitur be entered. Any interference with the right of either spouse to the enjoyment of the other is a violation of natural right as well as a legal right arising out of the marriage relation. Even in the absence of a specific statute giving the wife a cause of action for loss of consortium, reason and justice dictated that recovery should be allowed. *Missouri Pacific Transportation Company v. Miller*, __ Ark. __, 299 S. W. 2d 41 (1957).

The traditional rule is that the wife may not recover for the loss of consortium resulting from the negligent injury of her husband. *Brown v. Kistleman*, 177 Ind. 692, 98 N. E. 631 (1912); *Feneff v. N. Y. Central and H. R. Co.*, 203 Mass. 278, 89 N. E. 436 (1909). The only decisions attempting to deviate from this weight of authority, *Hipp v. E. I. DuPont de Nemours & Co.*, 182 N. C. 9, 108 S. E. 318 (1921); *Griffen v. Cincinnati Realty Co.*, 27 Ohio Dec. 585 (Super. Ct. 1913), were overruled at the earliest opportunity. *Hinnant v. Tide Water Power Co.*, 189 N. C. 120, 126 S. E. 307 (1925); *Smith*

v. Nicholas Building Co., 93 Ohio St. 101, 112 N. E. 204 (1915). This traditional denial of recovery to the wife had its foundation in the common law conception that the husband and wife were one person; that person being the husband, he alone could recover for the intentional or negligent invasions of his right to the consortium of his wife. See *Feneff v. N. Y. Central and H. R. Co.*, 203 Mass. 278, 89 N. E. 436, 437 (1909). But with the passage of the several Married Women's Acts, and the recognition of conjugal rights in the wife, the majority of courts extended a right of recovery for *intentional* interferences with *her* right of consortium. *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102 (1912) (selling morphine to husband after wife forbade such sale); *Messervy v. Messervy*, 82 S. C. 559, 64 S. E. 753 (1909) (alienation of affections). But in the absence of a statute conferring the right, see *Ellis v. Fallert*, ___ Ore. ___, 307 Pac. 2d 283, 284 (1957), the courts have uniformly denied any recovery to the wife for the loss of consortium resulting from *negligent* injury, *Feneff v. N. Y. Central and H. R. Co., supra*, creating new reasons for their holding since the old disability of coverture no longer applied. One theory of denial is that where a *negligent* injury is involved, the prayer of recovery is predominantly for the loss of *services*, and since a wife is due no services from her husband, she cannot recover, *Boden v. Del-Mar Garage*, 205 Ind. 59, 185 N. E. 860 (1933), but where an *intentional* interference is shown, recovery is allowed for injury to the *sentimental* element of consortium on the theory that the wrongdoer should be punished. *Flandermeyer v. Cooper, supra.* A few states have resolved this inconsistency by denying recovery to either spouse in an action based on negligent injury, on the theory that the husband is no longer entitled to his wife's *services* due to the Married Women's Acts. *Bolger v. Boston Elevated R. Co.*, 205 Mass. 420, 91 N. E. 389 (1910). *But cf. Cook v. Atlantic Coast Line R. Co. et al.*, 196 S. C. 230, 13 S. E. 2d 1 (1941) (Husband's right to wife's services remain despite the Married Women's Acts). Other courts, recognizing injury to the *sentimental* elements of consortium in a *negligent* invasion, nevertheless deny the wife recovery, concluding: in negligence cases the purpose of recovery is compensation for the direct consequences of the wrong, and the injury to the wife is too indirect and remote to be admeasurable, *Maloy v. Foster*, 169

Misc. 964, 8 N. Y. S. 2d 608 (1938); fear of double recovery, *Goldman v. Cohen,* 30 Misc. 336, 63 N. Y. S. 459 (1900); Married Women's Acts created no new substantive right, only removed procedural disability, *Bernhardt v. Perry,* 276 Mo. 612, 208 S. W. 462 (1918). However, in recent decisions, a minority of the courts have considered the logic and reasoning of the majority as specious and fallacious, and in the light of reason and justice, granted the wife recovery for the loss of consortium due to negligent injury of the husband. *Hitaffer v. Argonne Co.,* 183 F. 2d 811 (D. C. Cir. 1950), cert. denied, 340 U. S. 852 (1950), 23 A. L. R. 2d 1366, followed by *Cooney v. Moomaw,* 109 F. Supp. 448 (D. Neb. 1953) (guessing at Neb. law); *Brown v. Georgia-Tennessee Coaches,* 88 Ga. App. 519, 77 S. E. 2d 24 (1953); *Acuff v. Schmidt,* 78 N. W. 2d 480 (Iowa, 1956) and the *principal* case. See *Gist v. French,* 136 Cal. 2d 247, 288 Pac. 2d 1003 (1955) (dictum); *Burk v. Anderson, et al.,* 109 N. E. 2d 407 (Ind., 1952) (dictum). In spite of the sound logic presented in the cases allowing recovery, most courts have followed the majority opinion, contending that any change in the well-established rule must come from the legislative body. *Ripley, et al. v. Ewell,* 61 So. 2d 420 (Fla., 1952); *Nickel v. Hardware Mutual Casualty Co.,* 269 Wis. 647, 70 N. W. 2d 205 (1955); *cf. Lurie, et al. v. Mammone, et al.,* 200 Misc. 320, 107 N. Y. S. 2d 182 (1951) (change must come from appellate court).

The situation at the present time is that the husband and wife may recover for intentional interferences with their marital rights, the husband may recover for negligent invasion of his marital rights, but the wife may not recover for the same type injury to her husband. The courts have accomplished this obvious inconsistency by an effective, if illogical, transition of the historical common law disability of coverture. But, there can be no doubt that today the husband and wife are considered to have mutual rights and obligations in the marriage relation. For example, where there is a negligent injury to the wife which extinguishes the sexual relations in the marriage, the husband can recover, but where the situation is reversed, the wife is denied recovery. This inconsistency would seem to have as its gravamen that any children of a marriage are more important to the husband than to the wife. Whereas in divorce proceedings, in the normal situation, the wife is the favored party in granting

custody of any children. Some courts have resolved the inconsistency by denying the right of recovery in a tort action to both parties, but if consortium includes the comfort, companionship, and affection of one spouse to the other, as it is generally recognized, then denying both parties recovery does no more than to make the law symmetrical, rather than to afford protection of a legal right. Without any legislative action the courts seized the initiative in granting the wife recovery for *intentional* interferences with her marital rights, and there is no logic or reason why the courts, not the legislature, should not exercise their judicial function in remedying a situation in which the reason for the rule has ceased to exist, but the rule dominates the exercise of reason and justice.

CHARLES M. GIBSON.

TRUSTS—Revocation—Effectiveness.— Settlor conveyed property in trust to a bank under an *inter vivos* trust indenture which provided for revocation of trust by settlor at any time during her life by written instrument executed and probated as required by the laws of South Carolina for recording deeds. It was also provided that "upon the elapse (sic) of sixty days from delivery to the trustee by the grantor of such deed or other instrument this trust indenture shall be deemed to have been revoked." Settlor delivered an instrument of revocation in proper form to the trustee but died before the expiration of the sixty day period. HELD: The trust was effectively revoked, since such period was merely for the trustee's benefit, and especially in the absence of a provision that the grantor must be alive at the end of the sixty-day period after executing the revocation. *Peoples National Bank of Greenville v. Peden,* 229 S. C. 167, 92 S. E. 2d 163 (1956).

It is a general rule that where a valid and effective voluntary trust has been created without reservation of power to revoke, the trust is irrevocable. *Alderman v. Alderman,* 178 S. C. 9, 181 S. E. 897 (1934); *McElveen v. Adams,* 108 S. C. 437, 94 S. E. 733 (1917). The settlor may, however, by express terms reserve in himself a power to revoke or cancel the trust. *Downs v. Security Trust Co.,* 175 Ky. 789, 194

S. W. 1041 (1917); *Alderman v. Alderman, supra.* Such a power of revocation is entirely consistent with the creation of a valid trust. *Bear v. Millikin Trust Co.,* 336 Ill. 366, 168 N. E. 349 (1929); *Stone v. Hackett,* 12 Gray 227 (Mass. 1858). If the settlor does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust. *Landbin v. Dantzebecker,* 169 Md. 240, 181 A. 353 (1935); *Lipic v. Wheeler,* 362 Mo. 499, 242 S. W. 2d 43 (1951). But it is well established as a general proposition, that where the settlor reserves a power to revoke the trust in a particular manner, it can be revoked only in that manner. *Downs v. Security Trust Co., supra*; *Brown v. Fidelity Trust Co.,* 126 Md. 175, 94 A. 523 (1915). It has also been held that a "substantial compliance" with the terms of the trust instrument is insufficient. *Richardson v. Stevenson,* 193 Wis. 89, 213 N. W. 673 (1927). Thus, if a settlor reserves the power to revoke by deed, there exists no power to revoke by will. *Carpenter v. Cook,* 132 Cal. 621, 64 P. 997 (1901). If with the requirement of such deed, he also requires notice to be given to the trustee, there cannot be a revocation without such notice. *Brown v. Fidelity Trust Co., supra.* But it has also been held with some degree of consistency that such provisions for notice are for the sole benefit of the trustee, and if waived by the trustee, the settlor may revoke without complying with such mode of revocation. *Merchants National Bank of Mobile v. Cowley,* 89 So. 2d 616 (Ala. 1956); *St. Louis Union Trust Co. v. Dudley,* 162 S. W. 2d 290 (Mo. App. 1942); *Miller v. Exchange National Bank of Tulsa,* 183 Okla. 114, 80 P. 2d 209 (1938). A liberal construction should be given to the statements in the instrument as to the methods of revocation, 4 BOGERT, TRUSTS AND TRUSTEES, Sec. 996 (1948). In *Hackley Union National Bank v. Farmer,* 252 Mich. 674, 234 N.W. 135 (1935), a power to revoke by an instrument delivered to the trustee was validly exercised even though the settlor died before the instrument reached the trustee, and he had mailed a certified copy of the instrument instead. Here the court reasoned that the provision for delivery was to avoid fraudulent claims after the settlor's death, and that the purpose was fully achieved by the settlor's unequivocal act in mailing a certified copy of the revocation during her lifetime. Mere formal difficulties should not be allowed to

invalidate the effect of substantial compliance. *Vincent v. Bishop of Sodor*, 137 Eng. Rep. 764 (1849); *Burdett v. Spillman*, 8 Eng. Rep. 722 (1842).

The decision reached in this case is chiefly of interest in that it is one of the few reported cases which sustains the position that under certain circumstances courts will relax the general rule of meticulous strictness where a particular mode of revocation has been specified in the trust indenture. The decision is both logical and correct in the light of existing case law, although this case on close analysis would seem to expand those prior decisions to their reasonable bounds. It was contended by respondents, and on sound legal footing, that a notice requirement in the trust indenture is for the benefit of the trustee and may be waived by him. In the instant case the provision for the sixty-day period was unquestionably for the benefit of the trustee, but there was no waiver of the provision by the trustee. A waiver under the circumstances of this case would have been, for example, a return of the corpus of the trust to the settlor before the expiration of the sixty-day period. No such action was taken. A second basis of the court's decision is that the settlor had done all that was required of her to revoke the trust. It must be remembered, however, that the settlor may prescribe whatever conditions precedent to revocation he desires to set, and these must be observed before the trust can be deemed to be revoked. Thus, a settlor can unquestionably incorporate whatever fortuitous future events he specifies into the event of revocation, and the fact that it is beyond his control or that the settlor has complied with all other requirements for revocation would hardly seem to be a basis for allowing the courts to disregard the provision. A third emphasis is placed on the absence of any provision in the trust indenture that the settlor had to be alive at the expiration of the sixty-day period. This fact alone adds considerable weight to the holding of the case. The expression "during her life" as contained in the trust indenture was given the logical explanation that the settlor could not revoke by will, but, not to mean that the settlor must be alive at the time the revocation of the trust became effective and complete. Thus, problematically the question arises as to when the trust was to be considered revoked—at the time of delivery to the trustee or at the lapse of the sixty-day period. The court did not rule on this precise

point. It could, perhaps, be implied that the trust was effectively revoked on delivery, and this is the interpretation that Bogert in his work, TRUSTS AND TRUSTEES, has given to the case. However, it would seem to be just as reasonable to hold the trust revoked at the end of the sixty-day period in view of the express language of the trust indenture declaring the trust revoked on the termination of such period, and the absence of any provision that the settlor should be alive. It would appear that the trust would be revoked by its own terms sixty days after delivery of the instrument of revocation to the trustee; and a consideration of such factors as waiver by the trustee and the fact that the settlor had done all that was required of her to revoke the trust would seem unimportant or secondary. On the whole, it would seem that because of the factual dissimilarity, the court could not rest its decision squarely on the holdings of prior cases dealing with the same general problem of notice. Rather it employs the over-all reasoning of these prior cases to justify the liberal consideration of the notice requirement.

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