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Wills and Trusts

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Descent and Distribution — Half Bloods

The question of who should take in an intestate estate as between kindred of the whole blood and kindred of the half blood arose in *Bynum v. Bynum.*[1] The intestate was survived by a sister of the whole blood, two sisters of the half blood and children of a predeceased sister of the half blood. In this action to determine the distribution of the estate, the master and the lower court concluded that the sisters of the half blood and the children of the deceased sister of the half blood were not excluded by the sister of the whole blood, and that the participation should be in fourths. The issue called for the interpretation of § 19-52 (3) of the 1952 Code: "If the intestate shall not leave lineal descendant, father or mother, but shall leave a widow and brothers or sisters or a brother or sister of the whole blood the widow shall be entitled to one moiety of the estate and the brothers and sisters or brother or sister to the other moiety as tenants in common. The children of a deceased brother or sister shall take among them the share which their respective ancestors would have been entitled had they survived the intestate." The concurrent judgments of master and judge were that since, in the concluding part of the first sentence, the words were "and the brothers and sisters or brother or sister to the other moiety thereof", and not "and the brothers and sisters or brother or sister of the whole blood", no discrimination should be made between those of the whole blood and those of the half blood. Reliance in support of this result was had upon the comparatively recent case of *Kinard v. Moore,*[2] in which it was held that first cousins of the whole blood and first cousins of the half blood of the intestate participated alike, because the term "first cousins" in the statute in itself called for no discrimination between those of the whole blood and those of the half blood. The chief obstacle to the result reached below was *Hagermeyer v. City Council,*[3] in which two sisters of the whole blood were held to exclude two sisters of

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1. 236 S. C. 185, 113 S. E. 2d 748 (1960).
2. 220 S. C. 376, 68 S. E. 2d 321 (1951).
3. Riley Eq. 117 (S. C. 1837).

the half blood and the children of a predeceased sister of the half blood — a factual situation almost identical with that in the case under discussion. The master and the lower court held this case inapplicable on the ground that the statute then in force was different in verbiage from the statute in its present form.

The Supreme Court reversed, deciding after a review of the history of the Statute of Descent and Distribution with its many amendments that, in that light and in the context of the statute, brothers and sisters of the half blood were postponed to those of the whole blood, and that the sister of the whole blood was entitled exclusively to the estate. Contrary to the holding below, the *Hagermeyer* case was held applicable, the Supreme Court concluding that Section 19-52 (3) was identical with the relevant portion of the Statute of Descent and Distribution in force at the time of that case.

Descent and Distribution — Illegitimates

An attempt to raise a question as to the constitutionality of the South Carolina law denying inheritance by an illegitimate child from the father[3a] was presented in a federal appeal originating in the Western District of South Carolina. In *Walker v. Walker*,[4] the plaintiff, after unsuccessful claiming in state litigation that he was a legitimate child by virtue of an alleged common-law marriage between his mother and his putative father, brought action in the Federal District Court claiming, along with his mother, to be entitled to property left by the deceased alleged husband and father. The district judge sustained a motion to dismiss on the grounds of want of jurisdiction of the subject matter, no diversity of citizenship and pendency of action in the state court. To justify his standing in the federal court, the plaintiff "somewhat inconsistently" — to use the language of the Court of Appeals — argued that, despite the absence of diversity, there existed the question of the constitutionality of the state law denying the right of an illegitimate child to inherit from the father, which he attacked as a denial to illegitimate persons

3a. At common law an illegitimate child could not inherit from either the father or the mother, a rule not changed by the adoption of the Statute of Descent and Distribution in 1791. Barwick v. Miller, 4 DeSau. Eq. 434 (1814). Statutory changes in the law enabling the illegitimate child to inherit do not include inheritance from the father. CODE OF LAWS OF SOUTH CAROLINA, § 19-53 (1952).

4. 274 F. 2d 425 (1960).

of the equal protection of the law. The contention was dispersed of summarily and the appeal dismissed, the Court stating: "The contention is so manifestly without merit that in our view the complaint presents no substantial federal question."

Descent and Distribution — Divorce

The case of *Jannino v. Jannino*[4a] was one in which a claimant asserted in Common Pleas that she was the lawful wife, and hence an heir, of an intestate whose estate was being administered by another woman claiming to be his lawful wife. The solution depended upon the effect to be given a divorce obtained by the intestate from the claimant. Since the question is essentially one of Domestic Relations, it is more fully treated under that topic in this Survey. The claimant had been married to the intestate. He obtained a North Carolina divorce from her and thereafter remarried. Following his death, the second wife administered the estate in behalf of herself and her children by the intestate. The divorced wife had taken no steps during her former husband's lifetime to impeach the divorce. After the husband's death she filed a claim with the administratrix as a common creditor; only after three years did she institute this action claiming heirship, basing her claim on the contention that the North Carolina divorce was invalid. The master, to whom the matter was referred, held that the plaintiff was validly divorced; that she was estopped under the circumstances to assert the invalidity of the divorce, and that she was barred by laches. The Circuit Court reversed the master in all three respects. It in turn was reversed by the Supreme Court, which deemed it unnecessary to pass upon the validity of the divorce, but declared that the plaintiff was barred by her laches, recognizing that in the exercises of equitable powers, particularly insofar as property rights are concerned, a court may, on the basis of estoppel or laches or both, forbid an attack on the validity of a divorce.[4b]

4a. 234 S. C. 352, 108 S. E. 2d 572 (1959).

4b. In this case the plaintiff was the party barred by laches. The problem might have become complicated if other possible heirs — here the sister and brother of the intestate, who were made parties to the suit — had not taken the side of the second wife and her children by renouncing any interest and asserting that the second wife and the children were the lawful heirs. If they had not done so, the interesting question would arise whether estoppel or laches of the first wife would operate against them. Most probably they would not, although, of course, their own conduct under the

Wills — Revocation by Marriage

Two cases in the period under review present the problem of revocation of a will by subsequent marriage under the provisions of the applicable South Carolina statute.[5] Both cases deal fundamentally with questions of Domestic Relations and from that point of view are treated more substantially elsewhere in this Survey. The determination of whether in fact a testator has married after he has made his will, and whether if it has taken place the marriage is a valid one, of course produces the ultimate decision of whether the will has or has not been revoked.

In *Campbell v. Christian*,[6] the fact question was whether the testator (whose will was made in 1947) had a common-law wife at the time he entered into a ceremonial marriage with the woman who claimed to be his widow and who asserted that the will had been revoked by that marriage. The testator had engaged in a long series of marital and extra-marital relationships, productive of numerous progeny. His first child, for whom he provided by the will in controversy, was born to him by a woman to whom he was not married. He thereafter married, but while married he had illicit relations with a girl named Beulah, by whom he had a child. This was in 1921. His wife died and he then married his wife's niece, by whom he had a child, whom he also provided for in the will. In the meantime, during this marriage, he continued his relationship with Beulah, by whom he had two more children. In 1927 he divorced his wife. Shortly afterwards Beulah came into the testator's home, lived with him for 24 years, and bore him five more children. In 1954 the

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circumstances might have led to their preclusion. Aside from this consideration, there is the possibility that the collateral heirs might be precluded substitutionally by the estoppel of the husband to question the validity of the divorce he had obtained, Way v. Way, 132 S. C. 288, 128 S. E. 705 (1925); whether the estoppel would extend to and affect them would depend, however, upon all the facts and equities of the case. Watson v. Watson, 172 S. C. 362, 174 S. E. 33 (1933) (estopped); *Ex parte* Nimmer, 212 S. C. 311, 47 S. E. 2d 716 (1948) (not estopped); Peoples Nat. Bank v. Manos, 226 S. C. 257, 84 S. E. 2d 857, 45 A. L. R. 2d 1070 (1954) (not estopped); 17 AM. JUR. *Divorce and Separation* § 540, at 635 (1957).

5. CODE OF LAWS OF SOUTH CAROLINA § 19-222 (1952): "If any person making a will shall afterward marry and die leaving his widow or leaving issue of such marriage, unless the will shall have been made in contemplation of marriage expressed on its face and shall contain provision for future wife and children, if any, such marriage shall be deemed and taken to be a revocation of such will to all intents and purposes."

6. 235 S. C. 102, 110 S. E. 2d 1 (1959).

testator abandoned Beulah. Later that year the testator entered into the ceremonial marriage referred to.

The probate judge concluded that the ceremonial marriage was invalid because at the time it took place Beulah was the common-law wife of the testator, the testator was on that account not free to marry, and the will, therefore, was not revoked. Although the relationship between Beulah and the testator was illicit at the outset, the relationship became a lawful marital one through agreement of the parties after the testator had been freed by divorce. The circuit judge considered the matter on appeal upon the transcript, by consent, and affirmed the probate court's holding. The Supreme Court affirmed the circuit court's decree, pointing out that the case was at law, and that the review of the circuit decree was "limited to determination of whether or not there was evidence to support." Finding such evidence, the Court sustained the holding below.

The circuit court also held that the children of Beulah and the testator were legitimate, and from this holding also the alleged widow appealed. The Supreme Court pointed out that no question was raised "as to the court's authority to adjudicate this issue on appeal in a proceeding for probate in due form of law; the parties apparently consented that it should do so." (Obviously, raising the issue in such an action would be improper, unless consented to.) The Supreme Court pointed out that the determination of the invalidity of the appellant's marriage "has foreclosed whatever remediable interest she may have had with respect to the legitimacy of Beulah's children;" but that aside from that factor, the circuit judge was correct in holding the children legitimate, because even though they may have been illegitimate at birth they became legitimate by reason of the subsequent marriage — albeit common-law — of their parents, under the applicable South Carolina statute.[7]

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7. CODE OF LAWS OF SOUTH CAROLINA § 20-5.1 (1952): "If the parents of an illegitimate child subsequently marry, the child shall become legitimate as if born in lawful wedlock, and as to the child so legitimated, all limitations imposed by law upon the amount of property that may be given by deed, will, inheritance or otherwise shall be renounced. The provisions of this section shall be retroactive to the extent that they shall apply in all cases in which prior to May 2, 1951, the parents of an illegitimate child shall have married and the father and such child shall have been living on said date."

The circuit court decree in respect to the legitimacy of the children was not based upon the statute but upon a finding that the children were born

In *Johnson v. Johnson*,[8] the second of the cases, the result was revocation based on finding of a marriage subsequent to the making of the will. The vital question was whether the alleged widow was married to the testator before the will was made or afterwards. Admittedly she had been living with the testator and had borne him a child before the will's execution. If a common-law marriage had come into existence before the making of the will, the will of course would not be revoked; if it came into existence afterwards, or if, absent such a marriage, there was a subsequent ceremonial marriage, revocation would take place. The probate judge found for the will on the ground that the alleged wife was not free to marry and that any marriage she entered into was invalid, because a previous marriage was undissolved at the time. The case was tried de novo before the circuit judge, without a jury, and apparently the capacity of the woman and of the man to marry was conceded. The circuit judge concluded that the parties were not married before the will's execution, but that the husband-wife relationship commenced only afterwards. It is not quite clear whether the result was reached on the basis of the ceremonial marriage only or of a common-law marriage; but in any event the finding that the parties were not married before the will was made but were married afterwards would produce the same result whether the marriage was one or the other or both. The Supreme Court, noting the conflict in the evidence, but concluding that there was evidence reasonably warranting the circuit judge's finding, affirmed, since the case was one at law, citing *Campbell v. Christian*, just discussed.

Will Contest — Time

In *Wooten v. Wooten*,[9] a contestant, who was chief beneficiary under an earlier will, sought to have the later will from which he was excluded proved in solemn form. The will

after the common-law marriage had arisen — a conclusion hardly possible as to the children born before the 1927 divorce.

The circuit court decree, which, by consent, went beyond the mere determination of the invalidity of the will and adjudicated the rights of the parties in the estate, struck down the gift to the illegitimate child born of the testator's first alliance, to the extent of the excess of one-fourth of the estate, in accordance with the terms of the Bastardy Statutes. See CODE OF LAWS OF SOUTH CAROLINA §§ 57-310, 19-238 (1952). There was no appeal on this score.

8. 235 S. C. 542, 112 S. E. 2d 647 (1960).

9. 235 S. C. 228, 110 S. E. 2d 922 (1959).

under attack was proved in common form on March 8, 1957, and the petition to have the will proved in solemn form was filed on January 27, 1958. The statute[10] limiting the time for institution of proceedings to prove a will in solemn form prescribes a period of six months from the date of probate in common form. The probate court dismissed the petition. On appeal to the circuit court the petitioner alleged that the witnesses to the will had not signed in the presence of each other, that the will was the result of fraud and undue influence, and that it had been made in violation of a contract to make a will in contestant's favor. It was stipulated for the purposes of the appeal only that if the witnesses to the will were allowed to testify, they would testify that they did not sign in each other's presence. The circuit court dismissed the appeal, and the Supreme Court affirmed, holding that the statute forbade the challenge of a will after six months from probate in common form; that the Legislature had the power to set the time for contest; and that if no attack is made within the time specified the probate in common form becomes conclusive of all matters touching the validity of the will. The authorities cited by the Court,[11] as well as many others that might be referred to, make the conclusion plain.[12]

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10. CODE OF LAWS OF SOUTH CAROLINA § 19-255, as amended (1952).

11. Wilkinson v. Wilkinson, 178 S. C. 194, 180 S. E. 640 (1935); Davis v. Davis, 214 S. C. 247, 52 S. E. 2d 192 (1949).

12. The record of the case shows that the contestant's explanation and justification for the late assault upon the will were that the facts which would invalidate the will were learned after the probate of the will, and that the case would be governed by § 10-143(7) — a part of the general statute of limitations — permitting commencement of action within six years following discovery of fraud. The Supreme Court did not discuss this contention, and in view of the fairly positive language of the probate statute and the clarity of the decisions it was hardly necessary. There was no approach to the problem by inquiry as to whether the Probate Court had such inherent power and control over its decrees as to be able to correct mistakes, and to rectify fraud practiced upon it, discovered after the permitted time for contest had elapsed. See 2 PAGE, WILLS §§ 674, 677 (3d ed. 1941). The statute and the cases would seem to forbid such a course. The matter is more complex if equitable intervention is sought, and some early cases permitted Equity to take a hand directly by compelling the executor and persons benefiting by the will to consent to revocation of the will and allow the heirs to litigate. M'Dowall v. Peyton, 2 DeSau. Eq. 313 (S. C. 1805); Palmer v. Mikell, 2 DeSau. Eq. 342 (S. C. 1806). With the passage of the Act of 1839, 7 Stat. 56, the original of the present statute, that course would appear to have become unavailable. See Myers v. O'Hanlon, 12 Rich. Eq. 196 (S. C. 1861). Whether a constructive trust could be impressed, as distinguished from a direct attack, and the statute of limitations given a starting point from the time of the discovery of the facts, is also an aspect that has been discussed from time to time. See Reporter's notes to Palmer v. Mikell, *supra* and Myers v. O'Hanlon, *supra* in Annot., 52 A. L. R. 779. Since this would amount to a collateral attack

Will Contest — Procedure

In *Mahaffey v. Mahaffey*,[12a] a case in which a will was attacked for alleged lack of mental capacity and undue influence, the question on appeal was whether the issues submitted to the jury were in proper sequence. The trial judge, after charging on the substantive law, instructed the jury to answer the questions set out in this order: 1. Is the will good? 2. Was there lack of mental capacity? 3. Was there undue influence? In his charge the trial judge stated that the order had no significance, that if the contestants failed to prove the lack of capacity or undue influence, the answer to the first question should be "Yes", without anything further; and if the jury decided the will not to be valid, to answer the latter two questions. The jury answered the first question "Yes". The appeal was upon the ground that the order of the questions was improper, and that the first question should have been last, the ingenious argument being that by placing the question of the validity of the will first the jury was required simultaneously, and not separately, to consider the questions of capacity and undue influence, and that placing the first question in that place "had a psychological effect on the jury and had them in turn answer that question before they took up the points separately of whether there was undue influence or lack of mental capacity." The Supreme Court dismissed the appeal, holding that the order of the questions was immaterial; that although the last two questions were not answered, the affirmative answer to the first carried a necessary negative answer to the other two; and that in the absence of statute prescribing otherwise,

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on validity of the will itself, this course of action would seem to be precluded.

It may be noted that one of the grounds advanced by the contestant in his challenge of the will was that it had been made in violation of a contract of the testator to make a will (and impliedly not to revoke) in the contestant's favor. The general view is that remedy for enforcement of such a contract is not on probate, nor in the probate court — a will made pursuant to contract but revoked is not entitled to probate, and a will made in violation of contract cannot be denied probate, since probate deals only with the question of whether the offered will is *the* will of the testator in terms of validity. ATKINSON, WILLS § 48 (2d ed. 1953). The remedy lies elsewhere and the starting point for action — usually for specific performance — is the death of the testator, although there may be alternatively an earlier point if there has been repudiation. See Harmon v. Aughtry, 226 S. C. 371, 85 S. E. 2d 284 (1955). Obviously § 19-255 which deals with probate has no application in such a case, and the critical lapse of time would be governed by the nature of the action.

12a. 236 S. C. 64, 113 S. E. 2d 22 (1960).

"the number and form of questions to be submitted to the jury in cases of this kind are left to the discretion of the trial judge, the only requirements being: (1) that they must be confined to factual issues, and (2) that they must be presented in simple form, conducive to their proper answering by the jury." The fact that other reported cases showed a reverse order of questions was held to be inconsequential, since no issues were raised or disposed of on that point.[13]

Wills — Construction

In the period under review several cases involved the construction of wills. Since they deal with the types of estates created they are treated either principally or entirely in this Survey under the heading of Property.[14] Some of these cases, however, are relevant here because of their statements, or restatements, of rules of construction. Thus, it is stated that "a testator's intention, as expressed in his will, will govern in the construction of it if not in conflict with law or public policy: and it will be ascertained upon consideration of the entire will. However, 'in looking for this intention we must be guided by the words which the testator has used, reading them in the light of established principles of law.' "[15] In another case it is stated that "when a will contains apparently conflicting provisions, they must be reconciled if it can be done by any reasonable construction which comports with the intent which appears from consideration of the will as a

13. Although it seems to be an ancient and orthodox practice to submit to the jury not only specific questions of fact which have been put in issue — capacity, proper execution, undue influence, and so on — but the general question, based on the answers to these questions, whether the will is valid the general question seems to be a pointless and needless one. It is at best no more than an ultimate conclusion which can be reached only after reaching an answer to the specific questions. It has opened the door to controversy not only in the case under discussion, where the answer to the general question carried an inferential answer to the specific questions, but in another case (cited by counsel) in which the specific question was answered but the general question was not, and the Court held that where the jury answered that the testatrix did not have mental capacity it was not required to answer the general question, since that was a necessary conclusion that the answer would be in the negative. Keller v. Keller, 198 S. C. 499, 20 S. E. 2d 104 (1952).

14. Croft v. McKie, 235 S. C. 231, 111 S. E. 2d 210 (1959); Peoples National Bank v. Barlow, 235 S. C. 488, 112 S. E. 2d 396 (1960); Woodward v. Cagle, 235 S. C. 527, 112 S. E. 2d 480 (1960); Gist v. Brown, 236 S. C. 31, 113 S. E. 2d 75 (1960). Another case is dealt with principally under Taxation. Myers v. Sinkler, 236 S. C. 31, 113 S. E. 2d 25 (1960).

15. Gist v. Brown, *supra* note 14.

whole . . ."[16] And in another case[17] there is a restatement in substance of the familiar principle that the cardinal rule of construction is to ascertain the intention of the testator, and that in arriving at that intention the will is to be read as a whole.

In *Baird v. Privette*[18] the administratrix *c. t. a.* of an estate, suing individually and as personal representative, sought construction of the will and instructions as to the disposition of certain personal property of the estate. The crucial provision gave "the rest, residue and remainder of my personal property . . . to my said five nieces [naming them], to be divided among them in accordance with a written memorandum bearing even date herewith and signed by me, which I shall leave with this will." The memorandum could not be found. The husband of the testatrix contended that intestacy resulted from the non-production of the memorandum; and he also claimed absolute ownership of the personal property. The constructional problem the lower court disposed of by holding that, although the contents of the memorandum were not known, no intestacy resulted. For this holding there was no appeal.[19] The issue of ownership of the personal property

16. Peoples National Bank v. Barlow, *supra* note 14. A procedural question arose in this case which deserves noting here. The question arose as to the right of the court to adjudicate the existence or nonexistence of the rights of unborn children represented by a guardian *ad litem*. After holding that such a representation was proper and effective, the court said: "There is no question of the validity of the will which has been construed in this action, but suppose it had been attacked by the heirs at law of the testatrix for defective execution or some other legal infirmity. The unborn, contended to be beneficiaries of the will, would be barred by the judgment of the court admitting or refusing probate of the will in solemn form, although unrepresented except by the executor. Thompson v. Anderson, 208 S. C. 208, 37 S. E. 2d 581 (1946); Campbell v. Hughes, 69 Misc. 433, 126 N. Y. Supp. 147 (1910). This is of persuasive influence in the conclusion we have reached." The statement as to representation of beneficiaries by the executor is undoubtedly true as a general proposition — Thompson v. Anderson, *supra* — but equally conducive to such a conclusion in this state is the fact that in proceedings to prove a will in solemn form the applicable statute — CODE OF LAWS OF SOUTH CAROLINA § 19-255 (1952) — directs only that there shall be summoned to answer the petition "all such persons as would have been entitled to distribution of the estate if the deceased had died intestate." It was on the basis of this statutory language that the Court, in Muldrow v. Jeffords, 144 S. C. 509, 142 S. E. 602 (1927), followed in Thompson v. Anderson, *supra* held that persons taking under a will were represented by the executor and were not required to be made parties in a solemn form proceeding.

17. Woodward v. Cagle, *supra* note 14.

18. 235 S. C. 119, 110 S. E. 2d 17 (1959). This case was consolidated with Privette v. Garrison, discussed hereafter.

19. The transcript of record shows that the circuit judge held "The memorandum referred to relates only as to the method or proportion of division between the nieces; it has nothing to do with the actual bequest to

was decided by the trial court, which concluded that certain items were owned by the husband, some by the wife, and others by them as co-owners. On appeal, the Supreme Court refused to disturb the finding, because the issue being one at law and its "factual review of that order [being] limited to determination of whether there was any evidence to support it" it could not be said, from the record, that there was no such evidence.

Spendthrift Trust

In *Gist v. Brown*,[20] which is discussed in detail under the heading of Property, the question whether the interest created under a will was vested or contingent was affected by the presence of a provision against debts. The language was: "The disposition as above indicated is for the benefit of the wife and children of the said A. J. McCaughlin, and in no case to be subjected to his debts." The contention of the claimants who asserted that the particular interest was contingent was that, as a matter of construction, the presence of the clause quoted made it so, relying on the authority of

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the nieces, which was accomplished by item IV of the will independently and irrespective of any memorandum. The bequest is clear, definite and explicit as to the property bequested and the persons who should receive the same. The only effect of the inability to find the memorandum is that the will is silent, in the absence of the memorandum, as to the proportions in which the property should be divided among the nieces and it will, therefore, be divided equally."

For want of appeal the interesting question of an attempted incorporation by reference of an unavailable document was not presented. It seems a fair inference, as the trial court held, that the memorandum undertook only to allocate specific articles to each of the nieces; but it is not entirely removed from conjecture, and there is the possibility, if not the probability, that the memorandum contained conditions attached to the gift. What the trial court undertook to do was, in effect, to expunge the words relating to the memorandum, on the broad ground that invalidity of a particular provision does not necessarily affect the whole — a generality which is true if the provision is separable. But the effect of such a striking out is to alter the meaning of the remaining words — very much like a testator's changing the meaning of words by striking out others. Stevens v. Royall, 223 S. C. 510, 77 S. E. 2d 198 (1953). See 1 PAGE, WILLS §§ 260, 261 (3d ed. 1941). The case of a nonexistent or unproducible memorandum would not seem to be different from that of a memorandum made after the execution of the will and on that account not subject to incorporation, even though its terms were known. Johnson v. Clarkson, 3 Rich. Eq. 305 (S. C. 1851); Richardson v. Byrd, 166 S. C. 251, 164 S. E. 643 (1932). Suppose that in the present case the memorandum had been produced but that it had been made after the execution of the will. It would be as much of a nullity as if it did not exist. Would the beneficiaries take in such a case, or would the whole disposition fail for uncertainty? *Cf.* Johnson v. Clarkson, *supra*.

20. See note 14 *supra*.

Albergotti v. Summers.[21] That case held the interest there involved to be a contingent one as a result of the presence of a spendthrift trust, and of other language, indicating as a whole an intention to create a contingent interest. The assimilation of the present case to the *Albergotti* case was denied, below and on appeal. The restraint against debts, the Supreme Court pointed out, was not a spendthrift trust — no trust being created — and was concededly invalid. Hence it could not, as in the *Albergotti* case, influence the finding of intention, particularly when that intention was further assisted by other features of the trust. The Court's view of the *Albergotti* case was, "The bedrock of the decision that the remainders were not vested in the children of testatrix during the trust period was the existence of the spendthrift trust. It was held that a vested remainder would be inconsistent with the whole scheme and purpose of the spendthrift trust."[22]

Purchase Among Resulting Trust

In *Privette v. Garrison*[23] the plaintiff sought to have a resulting trust established as to land disposed of by his wife's will, made in 1948, under which he was a life beneficiary and the remainder given to five nieces of the wife. His claim was

21. 205 S. C. 179, 31 S. E. 2d 129 (1944).

22. The quoted language and the discussion in *Albergotti, supra* note 21, are certainly not to be taken as holding that because a spendthrift trust is created, interests that might otherwise be vested necessarily become contingent. It manifestly is not true where the remainder or principal interest under a trust is given to a third person, following a spendthrift provision controlling an income or life beneficiary. Nor does it follow that where the same person is both income beneficiary under a spendthrift trust and principal beneficiary, must his principal interest be a contingent one. It is possible, in the latter as in the former case, to alienate, or reach, the principal interest without affecting the income interest — although the shift in ownership of the remainder interest may disturb the practical operation of the trust. See Perabo v. Gallagher, 241 Mass. 207, 135 N. E. 113 (1922), in which income was payable to a beneficiary for ten years, subject to a spendthrift provision, and then the principal was payable to her, and it was held that the principal interest could be reached by her creditors.

In Albergotti v. Summers, *supra* note 21, creditors of the contingent principal beneficiary were not allowed to reach his interest. This is not a holding that in no case can a contingent interest under a trust be reached by creditors. In Brown v. Postell, 4 Rich. Eq. 71 (S. C. 1851), cited by the Court, such an interest was not reached. On the other hand, creditors were able to get at contingent interests in the cases of Tupper v. Fuller, 7 Rich. Eq. 170 (S. C. 1855), and Rivers v. Thayer, 7 Rich. Eq. (S. C. 1855). See RESTATEMENT, TRUSTS 2d § 162 (1959).

23. 235 S. C. 119, 110 S. E. 2d 117 (1959), consolidated with Baird v. Privette, *supra* note 18.

based on the allegation that in 1930 he and his father had given mortgages on the land; that in 1931 the mortgage had been foreclosed and the property bought in by the mortgagee; that the plaintiff had arranged to buy back the land from the mortgagee, paying one-tenth of the purchase price in cash and the balance, secured by purchase-money mortgage, payable over twenty years; that because there were judgments against the plaintiff, conveyance would not be made to the plaintiff; and that it was arranged that title should be taken in plaintiff's wife's name and the mortgage given by her. The plaintiff further alleged that the wife agreed to hold the property in trust for him and convey to him when the judgments were paid or on his demand, and that he had paid off the mortgage debt. The proof was that the debt had been paid, and that all the judgments which constituted the obstacle to plaintiff's taking title had been paid off more than twenty years prior to the wife's death in 1958.

The trial judge found the facts to be as the plaintiff alleged and that he had met the requirements necessary to establish a purchase money resulting trust; the evidence, to the judge's mind, being clear and convincing that he had paid the purchase money and, in rebuttal to the presumption that the transaction was intended as a gift to the wife, that a trust was intended and agreed upon. The trial judge further held that the circumstances did not give rise to laches which would bar the plaintiff's right.

On appeal the Supreme Court reversed, on the ground that under the facts the plaintiff was guilty of laches sufficient to bar him from asserting his claim, pointing particularly to the twenty-year lapse between the time the judgments were paid off and the wife's death, and noting that there was no evidence of discord or disagreement between the husband and the wife that would impel her to do an injustice to him. The Court concluded by saying: "The difficulty, if not impossibility, in these circumstances, of arriving at a safe and certain conclusion as to the truth of the matter in controversy, and thus doing justice between the parties, calls for the application of the equitable doctrine."[24]

24. *Quaere* whether the statute of limitations would apply. In South Carolina, while express trusts are not subject to the statute unless and until there has been a repudiation or disavowal of the trust brought home to the beneficiary — Presbyterian Church v. Pendarvis, 227 S. C. 50, 86 S. E. 2d 740 (1955) — trusts implied in law, constructive and resulting, seem not to be immune to it, Joyce v. Gunnels, 2 Rich. Eq. 259 (S. C. 1846);

The Supreme Court did not determine that there was or was not, in the first instance, a resulting trust. It laid down these principles: "While a resulting trust may be proven by parol, the evidence to establish it must be clear, definite and convincing. And where the claim to such a trust is based upon payment of the purchase money or some definite portion of it by the beneficiary, such payment must be clearly and unmistakably shown to have been so made at or before the time of the purchase. But an express trust, in realty, as distinguished from a resulting trust, may not be proven by parol . . ."[25] The Court, however, went on to say: "In the

Buchan v. James, Speers Eq. 375 (S. C. 1843). The ultimate result is not greatly different in either case since in the implied trust the statute does not begin to run until the facts showing adverse holding or repudiation are brought home to the beneficiary. Miller v. Saxton, 75 S. C. 237, 55 S. E. 310 (1906), purchase-money resulting trust, in which it was held that the statute had not run its course since it did not commence to run until disavowal, and in addition that there was no laches. In Billings v. Clinton, 6 S. C. 90 (1874), in an action to establish a purchase-money resulting trust, the defense of the statute was raised but not disposed of, the holding nevertheless being against the alleged beneficiary on the ground of laches. Would the statute of limitations begin to run in this case against the husband from the time of the alleged duty to convey to him — when the judgments were paid off?

25. These statements are, in their isolated position, unexceptionable, but are subject to qualification. The necessity of clear and convincing evidence to establish a purchase-money resulting trust is spelled out in the more frequently stated, and more precise, rule that the fact of payment by the alleged beneficiary must be shown by clear and convincing proof. The South Carolina cases are too numerous for full citation. In addition to Rogers v. Rogers, 52 S. C. 388, 29 S. E. 812 (1897), cited by the Court, the necessity for plain proof of payment is declared, among other cases, in *ex parte* Trenholm, 19 S. C. 126 (1882); Brown v. Cave, 23 S. C. 251 (1885); Gaines v. Drakeford, 51 S. C. 37, 27 S. E. 960 (1897); Larisey v. Larisey, 93 S. C. 450, 77 S. E. 129 (1912); Richardson v. Day, 20 S. C. 412 (1888); Jones v. Hughey, 46 S. C. 193, 24 S. E. 178 (1895); Crawford v. Crawford, 77 S. C. 205, 57 S. E. 837 (1907); Miller v. Saxton, 75 S. C. 237, 55 S. E. 310 (1906); Surasky v. Weintraub, 90 S. C. 522, 73 S. E. 1029 (1911).

In the present case the plaintiff had a double burden — that of proving the payment of the purchase price by him by the required kind of evidence, and also by clear evidence that of disproving the presumption of a gift to his wife. Although dealt with by the trial court as a major issue, the Supreme Court, probably because it did not feel it necessary, did not refer to the rule laid down in many South Carolina cases that where a husband pays the purchase price and title is taken in the wife's name, the presumption of a gift to the wife is created, which may be controlled by evidence of a contrary intention. Bridgers v. Howell, 27 S. C. 425, 3 S. E. 790 (1887); Fallaw v. Oswald, 194 S. C. 387, 9 S. E. 2d 793 (1940); Caulk v. Caulk, 211 S. C. 257, 43 S. E. 2d 600 (1947); Bates v. Bates, 213 S. C. 26, 48 S. E. 2d 599 (1948); Legendre v. S. C. Tax Comm., 215 S. C. 514, 56 S. E. 2d 336 (1949). See also RESTATEMENT, TRUSTS 2d, §§ 442, 443 (1959); and as to burden and nature of proof, *id.* § 458.

It is true that, as the Court states, the payment of the purchase price must have been made at or before the time of conveyance; and many South Carolina cases, in addition to that mentioned by the Court — Hutto v. Hutto, 187 S. C. 36, 196 S. E. 369 (1938) — say the same thing. See the cases cited in the first paragraph of this note. This seems to be the

case at bar we find it unnecessary to determine whether the evidence, taken as a whole, meets the rigid test required for

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general rule. RESTATEMENT, TRUSTS 2d § 457 (1959); 4 SCOTT, TRUSTS § 457 (2d ed. 1956). Since in the present case admittedly at least nine-tenths of the purchase price (plus interest) was paid *after* the conveyance to the wife, the rule, if operating without exception, would defeat a resulting trust except perhaps as to the down payment at the time of transfer; and on this ground alone the trial court would have been in error and that would have been enough in itself to justify reversal. But the decree of the trial court, set out in the record, quoting from Hutto v. Hutto, *supra*, as to the need of proving payment at or before the time of conveyance, contains a further quotation from that case: "Mr. Pomeroy says (3 POM. EQ. JUR., § 1037) that, in order for a resulting trust to arise, 'it is absolutely indispensable that the payment should be actually made by the beneficiary, *or that an absolute obligation to pay should be incurred* (emphasis supplied), at or before the time of the conveyance; subsequent and entirely independent conduct, intervention or payment on his part would not raise any resulting trust.'" It could have been only in the strength of the emphasized words that the trial court could have concluded, with the other facts found, that a resulting trust arose. It does not appear clearly from the many South Carolina cases in which the rule as to the time relationship to the conveyance is stated whether, when payments, if any, were made after the conveyance, they were made as, or as a part of, a new and independent transaction following the conveyance, or pursuant to an agreement or obligation by the alleged beneficiary prior to it. At any rate, the question of whether it is indispensable, without qualification, that the purchase price be paid by the alleged beneficiary at or before the time of conveyance needs re-examination. There is ample authority that while as a general rule the statement as to time holds good, nevertheless payment made after the conveyance in accordance with an agreement made prior to the conveyance is sufficient. The theory here is that just as a resulting trust arises where the grantee takes title from a seller as security for a loan he has made to the buyer — RESTATEMENT, TRUSTS 2d § 448 (1959); also treated as an equitable mortgage, Young v. Krell, 147 S. C. 1, 144 S. E. 512 (1928) — a trust similarly arises where the purchase is on the credit of the grantee with an agreement on the part of the other party to pay the grantee's debt: in the first case the grantee has loaned the money, in the other he has loaned his credit. RESTATEMENT, TRUSTS 2d § 456, comment *d.* (1959); 4 SCOTT, TRUSTS § 456.2 (2d ed. 1956). In § 457, RESTATEMENT, TRUSTS 2d (1959), it is said: "A resulting trust does not arise from the payment of the purchase price unless at the time of the purchase the other person pays the purchase price *or agrees to pay it* (emphasis supplied). A person who subsequent to the purchase pays the purchase price is entitled, however, to be subrogated to such lien as the vendor may have for the payment of the purchase price." (This last approach was not followed in the present case; and the question cannot be regarded as settled in South Carolina, although something akin to it is to be found in Surasky v. Weintraub, *supra.* The reference to the agreement to pay is a restatement of rules stated in § 456, RESTATEMENT, TRUSTS 2d (1959): "Purchase on Credit. Where a transfer of property is made to one person, and another person at the time of the transfer undertakes an obligation to pay the purchase price, a resulting trust arises in favor of the latter person, unless he manifests an intention that no resulting trust should arise." And in comment *d*: "The rule . . . is applicable where the transferee undertakes an obligation to the vendor to pay the purchase price, but another person at the time of the purchase agrees with the transferee to pay the purchase price to the vendor." And from 4 SCOTT, TRUSTS § 456 (2d ed. 1956): "A resulting trust may arise not only where property is purchased for cash but also where it is purchased on credit. It may arise where property is transferred to one person and at the time of the transfer another person assumes an obligation to pay the purchase price. The agreement to pay the purchase price may be made with the vendor

proof of a resulting trust, or whether it points rather to an express trust upon condition,[26] for proof of which parol evidence is not acceptable." It then decided for the defendants, as already indicated, on the ground of laches.

Constructive Trust

The case of *Singleton v. Mullins Lumber Co.*[27] had as its central issue the question of the propriety of an independent equitable action seeking to set aside a decree of foreclosure alleged to have been improperly granted because of alleged defects in the proceedings, and to impress on the ground of fraud a trust on the land in the hands of ultimate transferees from the purchaser at the judicial sale. That principal issue is discussed elsewhere in the Survey. Concluding

or it may be made with the grantee. Thus the vendor may transfer the land to B, receiving the note of A for the purchase price; or he may receive the note of B which A has promised B to pay. The note given to the vendor may be unsecured or it may be secured by a purchase-money mortgage on the land." These statements are supported by many citations of authority. See also 89 C. J. S. *Trusts* § 120, at 974, 975 (1955).

The concluding statement that an express trust of land may not be proved by parol is, in view of the Statute of Frauds — CODE OF LAWS OF SOUTH CAROLINA § 67-1 (1952), certainly correct. This statement apparently is a next step after the stated rule as to time which would negative a resulting trust — that is, with a resulting trust out of the way because of subsequent payment the only proof of the claimant would be the express trust which, because of the Statute, could not be shown. But if the subsequent payment had no such effect, parol evidence would be admissible, not to enforce the express trust, but, using the same agreement, to rebut the presumption of a gift to the wife. Caulk v. Caulk, 211 S. C. 257, 43 S. E. 2d 600 (1947); RESTATEMENT, TRUSTS 2d § 443 (1959). The situation is not different from that where prima facie a resulting trust is established by a showing of payment and the grantee attempts to rebut the presumption of a trust by showing a gift or some other facts which would defeat it: the beneficiary may show the terms of the express agreement to support the resulting trust. Brown v. Cave, 23 S. C. 251 (1885); Larisey v. Larisey, 93 S. C. 450, 77 S. E. 129 (1912); RESTATEMENT, TRUSTS § 441 comment *j* (1959); 4 SCOTT, TRUSTS § 441.2 (2d ed. 1956).

26. The "condition" the Court refers to is the payment of the judgments, which, alternatively with demand, was to mark the time for conveyance by the wife to the husband. Whether that fact, designed for the husband's protection, was a true condition or simply a stated time for performance is open to question. Counsel for the nieces argued that in any event the express agreement would not be provable to support the claim of a resulting trust, since the attachment of a condition would show an "agreement beyond what the law would imply", and the rule is that where the express agreement is of such a character it is not admissible. Bell v. Edwards, 78 S. C. 490, 59 S. E. 535 (1906); Surasky v. Weintraub, 90 S. C. 522, 73 S. E. 1029 (1911). But since a resulting trust may be rebutted in whole or in part — Larisey v. Larisey, *supra* — it would seem that where the intention was that the payor was not to have the absolute estate but a lesser estate or one subject to a condition, that would not be *beyond* what the law would imply but less than the implication; and in fact the authorities so indicate. RESTATEMENT, TRUSTS 2d § 441, comment *g*, and § 443, comment *e* (1959); 4 SCOTT, TRUSTS §§ 441.3, 443 (2d ed. 1956).

27. 234 S. C. 330, 108 S. E. 2d 414 (1959).

that the attack could be made in the form taken because of allegation of fraud in procurement of the decree, the Court, after review of the evidence, held that the high degree of proof requisite to the establishment of a constructive trust had not been met, relying on the oft-quoted South Carolina case of *All v. Prillaman*.[28]

Apportionment — Probate Estate and Trust Estate

The problem of apportionment of inheritance and estate taxes between a residuary probate estate and a trust estate is presented in *Myers v. Sinkler*,[29] a case which will no doubt constitute an important one in the field of Taxation. It is discussed in this Survey under that topic in some detail. From the point of view of wills, the inquiry, which is pertinent here, was whether the will disclosed an intention to thrust upon the residuary assets the burden of the taxes against the two estates included in the gross estate. The testatrix in 1936 had created an irrevocable *inter vivos* trust of land with herself as life beneficiary and remainder to others. The crucial clause in the will provided: "Item II. I direct that all inheritance, transfer and estate taxes, State and Federal, imposed against my estate or upon any of the legatees or beneficiaries under this Will, shall be paid out of my residuary estate as an expense of administration, in order that all legacies and bequests made by my will shall be free from the same." The testatrix had not overlooked the trust estate, since in another clause she directed that a sum which she had expended in capital improvements on the trust property be collected by her executors from the trust beneficiaries and added to the residue under her will.

The circuit judge resolved the ultimate issue in favor of apportionment. A portion of the exceptions attacked the ruling on the ground that the will itself cast the burden of all the taxes upon the residuary estate. The Supreme Court, affirming, concluded on this phase of the matter that the will did not evince an intent either to require or to prohibit apportionment of taxes. In holding in opposition to an urged construction of the will against apportionment, the Court stated that to do so would require an assumption — which it would not make — that by the words "against my estate"

28. 200 S. C. 279, 20 S. E. 2d 741, 750, 159 A. L. R. 981 (1942).
29. 235 S. C. 162, 110 S. E. 2d 241 (1959).

the testatrix referred not only to her probate estate but to the trust estate over which she had no power of disposition. Great weight was accorded to the concluding words "in order that all legacies and bequests made by my will shall be free from the same," since similar language has been held in other jurisdictions to limit "the extent of exoneration to the testamentary gifts, and as not permitting apportionment of estate taxes against non-probate assets." Having thus decided the matter of construction, the Court then adopted the rule of equitable apportionment. In so holding the Court held that its decision was not in conflict with *Gaither v. U. S. Trust Co.*,[30] which declined to adopt a rule of apportionment, so as to favor residuary beneficiaries, pointing out that in that case no non-probate estate was involved.

Tort Liability — Charitable Trusts

The case of *Eisenhardt v. State Agricultural & Mech. Soc. of S. C.*[31] deals with the question of liability in tort of charitable corporations and is fully treated in this Survey under the heading of Torts. The case marks a retreat from the principle of total immunity and holds that immunity should not be extended to a charitable corporation in a situation where the activity out of which the wrong arose was primarily commercial in character and wholly unconnected with the charitable purpose for which the corporation was organized. Since the bases of immunity or liability, whether total or partial, are the same with respect to both charitable corporations and to charitable trusts, it may well be assumed that the restriction of immunity stated as to charitable corporations will govern in the same way and under the same circumstances where the charity takes the form of a trust.[32]

Legislation

A sizable amount of legislation affecting wills and trusts was enacted by the 1960 General Assembly. The major portion was the result of a rather extensive pruning or editing of existing legislation; a lesser, though no less important portion, was not expressly amendatory or repealing.

30. 230 S. C. 568, 97 S. E. 2d 241 (1957).
31. 235 S. C. 305, 111 S. E. 2d 568 (1959).
32. 4 SCOTT, TRUSTS § 402.2 (2d ed. 1956). All the South Carolina cases on the subject up to this point have involved charitable corporations.

WILLS

Notices

Section 10-1307 of the 1952 Code, which dispenses with newspaper notices and citations relating to probate court proceedings in estates not exceeding five hundred dollars and permitting instead posting on the courthouse door of the county in which "such estate may be situated", was amended by an act[33] substituting the county "in which the probate proceeding is filed." Although "probate proceeding" normally refers only to a testate estate, the obvious reference embraces proceedings involving both testate and intestate estates.[34] The change is consistent with the provisions of the statute,[35] prescribing the form and manner of citation on application for letters of administration, which directs posting of the citation on the courthouse door of the county in which the probate court to which the application has been made is located.

Probate Court Compromises

Section 19-482 of the 1952 Code is amended[36] by broadening the scope of the actions and causes of actions in or of which the probate court may authorize compromises. Prior to amendment the statute permitted the Judge of Probate to approve, among other settlements, compromises of actions arising or asserted under specified statutes: §§ 10-1951 to 10-1956 (actions for wrongful death); § 10-209 (actions for conscious pain and suffering — the Survival Act); §§ 58-1231 to 58-1239 (actions for wrongful death of employees of common carrier); §§ 51 to 59, 45 U. S. C. A. (actions for wrongful death — Federal Employees' Liability Act).[37] The

33. Act No. 771, 1960.
34. "In popular language probate includes both technical probate and administration." ATKINSON, WILLS § 1 (2d ed. 1953).
35. CODE OF LAWS OF SOUTH CAROLINA § 19-409 (1952).
36. Act No. 721, 1960.
37. The original of § 19-482 was enacted in 1870 (14 STAT. 313) and was limited to this language (which is still retained): "All administrators and executors may, by and with the consent of the Probate Judge, compromise all demands coming into their hands as such, where the same are appraised doubtful or worthless; and where such compromises are made, the same shall be fully shown in their annual returns." The statute was held merely permissive in Geigers v. Kaigler, 9 S. C. 401 (1877), and not to impair the otherwise inherent right of the personal representative to effect compromises. In Ellenburg v. Arthur, 178 S. C. 490, 183 S. E. 306 (1935) it was held that the statute did not authorize the Probate Court, nor did that court otherwise have the authority, to sanction a compromise of a claim arising under the wrongful death acts (now § 10-195 *et seq.*),

restriction to the claims thus specified is removed by the following general language, which will embrace, as a matter of construction, not only those specified but others falling within its description: "All claims and actions for wrongful death, pain and suffering, or both, and all claims and actions based on causes of action surviving, to such administrators and executors, arising, asserted or brought under the virtue of any statute or act of the State of South Carolina or of the United States."

Non-Resident Executors — Bond

Section 19-591 of the 1952 Code relating to the requirements for the qualification of non-resident individual executors is amended[38] in an important respect. The previous version of the statute provided that "No letters testamentary or of administration shall be granted to any nonresident individual by any probate judge or court of common pleas of of this State unless such applicant for such appointment as executor or administrator shall first enter into and file an approved fiduciary bond in the same manner, upon the same conditions, in the same sum and with like surety as required by the law with respect to *resident executors* and administrators." (Emphasis supplied.) Since resident executors are not required to furnish bond,[39] a natural construction might be that non-resident executors are likewise not required to furnish bond.[40] This construction, however, might not be entirely justified in the light of the history of the statute and of the fact that a succeeding section (§ 19-593), drawn from the act in its earlier form, deals with release of the sureties on a non-resident executor's bond, having reference to the bond required by non-resident executors by the act in the form it took prior to the adoption of the 1952 Code. As originally enacted in 1902[41] the requirement was that non-resi-

since the statute had reference only to assets of the estate. The decision undoubtedly led to the amendment of the original act in 1937 (40 STAT. 110) permitting Probate Court compromises under the wrongful death statutes. Further amendment was had in 1938 (40 STAT. 1543) enlarging the scope of the actions or claims to the extent present in § 19-482 just prior to its 1960 Amendment.

38. Act No. 720, 1960.

39. Wolfe v. Bank of Anderson, 128 S. C. 174, 122 S. E. 592 (1924); Evans v. Evans, 180 S. C. 214, 185 S. E. 57 (1936); Ballentine v. Nat. Surety Corp., 228 S. C. 1, 88 S. E. 2d 772 (1955).

40. See Opinions Atty. Gen. (S. C.), 1958, 241.

41. 23 STAT. 1064.

dent executors must furnish the same bond as an administrator *c. t. a.* This requirement remained through the Codes of 1912 (§ 3591), 1922 (§ 5368), and 1932 (§ 8952). An amendment of 1933 (38 Stat. 200) added non-resident administrators, guardians and trustees, with a requirement applicable to them as well as to non-resident executors that they furnish the same bond as required of resident administrators, guardians and trustees. This was the form of the act in the 1942 Code (§ 8952). In the codification of 1952 guardians and trustees were placed in separate sections, and by some sort of editorial liberty or magic the requirement of bond for non-resident executors and administrators was made the same as that of resident executors and administrators. It is to be noted that up to this point no mention had been made of resident executors, since the statute would be pointless if non-resident executors were required to furnish the same bond as resident executors, who were not required to give any. That pointlessness has been apparent in the 1952 Code until the 1960 amendment, which calls for the giving of a bond by a non-resident individual executor in the same amount, etc., "as is required by law with respect to *resident administrators.*" (Emphasis supplied.) Hence, the law is now plain enough and is restored to its original meaningful intent, unmarred by inappropriate codification.

Affidavit of Publication of Notice to Creditors

Section 19-473 of the 1952 Code, dealing with publication of notice to creditors, is amended by an act[42] adding the proviso that an affidavit of publication of the notice must be filed within two weeks after the final publication of the notice. No such requirement has specifically been called for before, although the practice of furnishing an affidavit by the publisher is not uncommon.

Time of Distribution of Estate

Section 19-553 of the 1952 Code, which provided that "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," has been amended[43] so as to make the statute applicable also to testate estates. The title of the

42. Act No. 716, 1960.
43. Act No. 715, 1960.

1960 amending Act reads: "An Act to amend Section 19-553 . . . relating to the distribution of estates, so as to make the provision applicable to testate estates"; and the statute in its new form provides: "No distribution of the goods of any deceased person shall be made until six months has expired."

Unlike the earlier version, the amended version does not state the time or event from which the six-months period is to run, but in view of the title's stated object—simply to put testate estates on a parity with intestate estates—the starting event is undoubtedly as in the unamended statute, namely, the time of the death of the decedent whose estate is being administered. In any event the omission should hereafter be supplied.

The purpose of uniform application against premature distribution is of course a logical one, since the same background of the representative's duty is present with respect to both executors and administrators.[44]

Reduction of Bond

An act[45] which will have the effect of amending by implication many statutes prescribing the amount of the bond required in the administration of the various kinds of estates under the jurisdiction of the Probate Courts was passed by the General Assembly, designed obviously to reduce the cost of recurring periodic premiums on such bonds. The act provides:

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44. The statute is an ancient English one, made of force here in 1712. 2 STAT. 524. The original period of one year from the intestate's death remained until 1956, when it was reduced to six months. 49 STAT. 1785. The footnote comments made in the 1956 Survey of South Carolina Law (9 S. C. L. Q. 169) on the subject of the 1956 amendment bear repeating: "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 attached; 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."

The observations in the two concluding sentences are equally valid with the 1960 amendment embracing the executor. Since the consequences of premature distribution are not expressed in the statute, either in its original or amended form, the statute is at best only a rule of caution.

45. Act No. 678, 1960.

"Any executor, administrator, guardian, or committee may, upon filing an accounting and an ex parte petition, request a probate court to reduce his bond then in effect to an amount required by law on the corpus then remaining and the court may upon a proper showing order the reduced bond. Nothing in this section, however, shall in any way alter the liability on the bond before reduction."

It becomes possible under this act, as the principal of the estate is diminished by payment of debts and other items and by distribution, to reduce the amount of the bond correspondingly. Whether it imposes a duty upon the fiduciary to seek such a reduction when it has become possible is not quite clear; but it would appear that the fiduciary would be remiss in his obligation if he should permit the incurring of unnecessary or excessive premiums in the face of an opportunity to curtail them.

Stock in Domestic Manufacturing Corporations

A pair of extraordinary statutes which have been on the books since 1901,[46] defining or declaring stock in manufacturing companies chartered in South Carolina to be real property, have at long last been removed. Section 12-75, which states that such stock is realty, is repealed, and a new section, Section 12-17, is enacted: "The shares of the capital stock of such corporations shall be deemed personal property or estate."[47] Meeting the same fate by repeal[48] is Section 12-203 of the 1952 Code, which, while also declaring such stock to be realty, permits transfer of the stock by the same means as for the transfer of stock of other corporations and states that such stock is not subject to dower and is distributable on death of an intestate owner as if it were personal property. Since it is of importance in the law of decedents' estates to determine the character of particular assets as real or personal property, the implications in this area (probably ignored over the years) have been serious. As such the statutes have not been construed, and the only reference to them seems to be in a concurring opinion in the case of *Rice v. Coleman*[49] in which there is a statement to the effect that a direction in a will to executors to sell real estate would include factory

46. 23 STAT. 712.
47. Act No. 760, 1960.
48. Act No. 759, 1960.
49. 87 S. C. 342, 347, 69 S. E. 516 (1910).

stock. With the repeal of these statutes, there is no longer need to worry over such questions as: To whom would the title to such stock pass on death of the owner—to the personal representative, or to the heir or devisee? Would the stock as realty constitute a secondary fund for the payment of debts, or a primary fund as in the case of acknowledged personal property? What interpretation would be placed on a provision in a will giving all real property to one person, and all personal property to another, such stock being included in the estate's assets? What status would be given to a gift of such stock with respect to abatement: Would it be treated as a specific devise abating after specific legacies, or would it abate ratably with them?

TRUSTS

Non-Resident Trustees—Bond

Section 67-53 of the 1952 Code has been amended by an act[50] changing the requirements of the bond of a non-resident trustee. The section in its unamended form read in part: "No letters of appointment of a trustee shall be granted or issued to any non-resident individual by the probate judge or courts of common pleas unless such applicant for such appointment as trustee shall first enter into and file an approved fiduciary bond in the same manner, upon the same conditions and with like surety as is required by law with respect to *resident trustees.*" (Emphasis supplied.) The amendment substitutes for *resident trustees* the words "non-resident executors and administrators".

The purpose of the change is, plainly, to make the same sort of change, and for the same reason, as in the amendment to Section 19-591, previously discussed. Since, as noted, to require non-resident executors to furnish the same bond as resident executors would in reality be no requirement—as non-resident executors need not furnish bond—by the same token to require non-resident trustees to furnish the same bond as resident trustees, who are under no duty to furnish it, would be equally pointless. Hence the intent is to compel the furnishing of bond by the non-resident trustee by requiring him to give the same bond as a non-resident executor or administrator—thus relating this section to Section 19-591.

50. Act No. 714, 1960.

The statute in both its amended and unamended forms still presents some difficulties and ambiguities. The attempt to equate a trustee with an executor is not altogether appropriate. The reference to "letters of appointment" of the trustee can have significance only as it may relate to an order of appointment by the court to fill a vacancy in the trusteeship (failure to name a trustee, disclaimer, resignation, removal, death or incapacity), since in an inter vivos trust the trustee derives his title and powers solely from the trust transfer, and in a testamentary trust not only is the derivation solely from the will but there is no requirement for appointment or qualification by the Probate Court or other court. Particularly there is no provision, by statute or otherwise, for the issuance of letters of trusteeship as there is for letters testamentary. This is not to say that legislation may not be enacted to provide that, as a condition of entering upon his trust, a testamentary trustee, if he is a non-resident, must furnish bond; but since the statute, unamended and amended, speaks of *appointment* by the court, and no appointment is necessary as to an original trustee named in the will, no impediment seems to be placed in the way of such an original trustee's accepting the office without furnishing bond or taking the other steps that are mentioned in other parts of the statute. The difficulties that lie in the question of the trustee's seeming duty to provide bond appear to stem from the lumping together of the trustee with other fiduciaries in a larger statute[51] from which the present section was detached in the 1952 Code—fiduciaries who receive letters or are appointed in the first instance by the Probate Court.

Nor is the requirement of a bond corresponding to that of a non-resident executor or administrator altogether efficacious. The amount of the bond demanded of the personal representative is based upon the value of the estate's personal property only.[52] Thus, only to the extent that the trust embraces personal property will bond be required (although that may not have been the legislative intent), and the value of the real estate, if any, need not be taken into account. If

51. CODE OF LAWS OF SOUTH CAROLINA § 8952 (1942), incorporating addition of amendment in 1933 of act originally limited to non-resident executors. 38 STAT. 200.

52. CODE OF LAWS OF SOUTH CAROLINA § 19-433 (1952) (bond of administrator), which controls the bond of a non-resident executor under § 19-591 as amended 1960. This is the principal statute affecting bonds; there are others, but all are pitched on personal property.

the trust estate consisted only of real estate, the consequence would be, if the major premise is correct, that no bond would be required and it would seem that rents or income in the hands of the trustees derived from the real estate should not be treated as personal property.

In two respects, then, it would appear—at least it is arguable—that the statute falls short of what may have been intended: it does not affect original trustees, and applies only to trustees appointed by the court; it does not extend the bond to real estate embraced in the trust.

It may be pointed out, however, that the decisions (before enactment of the original statutes requiring bond of trustees) provide safeguards that perhaps render the statute unnecessary except insofar as it calls for designation of a person upon whom service of papers may be made. Whether the statute is exclusive is another matter. It has been held that in the court appointment or substitution of even a resident as trustee bond should be furnished except in extraordinary cases, and no distinction seems to be drawn as to real or personal property which is the subject of the trust—the amount of the bond apparently being left to the court's discretion.[53] And it has been held that a non-resident will not be appointed as a substitute trustee without furnishing security amendable to the Court's jurisdiction.[54] Where a trustee removes from the State, the Court may, in its discretion, require security;[55] and there is a statute which ambiguously and doubtfully deals with the authority of the Probate Court to remove a trustee who has left the State or has been absent from it for ten consecutive months.[56]

Pension and Similar Trusts

Pension, profit sharing, stock benefit and annuity trusts established by employers for the benefit of their employees are declared by an act[57] of the General Assembly not to be invalid by reason of violating any law or rules against per-

53. Gibbes v. Guignard, 1 S. C. 359 (1869).
54. *Ex parte* Robert, 2 STROB. EQ. (S. C. 1848).
55. Carr v. Bredenburg, 50 S. C. 471, 25 S. E. 925 (1897). Where there are funds of a *cestui* in this State and the trustees are foreign trustees the court will not permit the transfer to the trustees unless there is at least security in the jurisdiction in which they are. Cochran v. Fillans, 20 S. C. 237 (1883). Section 67-53 of the 1952 Code permits an executor to pay over a legacy to a foreign trustee without requirement of bond.
56. CODE OF LAWS OF SOUTH CAROLINA §§ 67-56, 57 (1952).
57. Act No. 677, 1960.

petuities or rules against restraint on alienation. The act is a duplicate of statutes enacted in many other states.[58]

Investments

Section 67-58 of the 1952 Code dealing with investments of fiduciaries is amended by an act[59] inserting in the list of permissible investments, obligations secured by first mortgages on real estate in any State of the United States. The insertion was designed to correct an unintended omission in a 1959 amendment[60] which enlarged the scope of legal investments. In restating the section in amended form, the 1959 act failed to include first mortgage obligations in the enumeration of permitted investments, although it was apparent from the new language, which purported to regulate first mortgage investments that such were permitted. At most, the omission—which was admittedly unintentional—presented an ambiguity, which the 1960 act corrects.

Trust Deeds of Chattels

A 1960 act[61] repeals 67.5 of the 1952 Code which in its entirety provided: "All deeds of gift of goods and chattels in trust to the use of the person or persons that made the same shall be void and of no effect." The statute is a very old one, enacted first in England,[62] and made of force here in 1712.[63] It was clearly designed for the protection of creditors, the preamble to the act stating: "That where often times deeds of gifts and chattels have been made, to the intent to defraud the creditors of their duties, and the person or persons that maketh said deed of gift, goeth to sanctuary or other places privileged, and occupieth and liveth with said goods and chattels, their creditors being unpaid . . ." That this is the purpose is reflected in the cases.[64] In view of this clear purpose, the question has arisen whether such a transfer in trust for the grantor is void *ab initio* or merely voidable at the instance of creditors. A literal rendering of

58. See 2 SCOTT, TRUSTS § 112 (2d ed. 1956) for partial list, and reasons for enactment of these statutes.
59. Act No. 655, 1960.
60. 51 STAT. 378.
61. Act No. 815, 1960.
62. 3 Henry 7, C. 4 (1486).
63. 2 STAT. 453.
64. Wilson v. Chesire, 1 McC. EQ. 233 (S. C. 1826); Broome v. Mordecai, 117 S. C. 195, 201, 108 S. E. 407 (1920).

void would indicate the transfer and the trust to be a nullity from the outset, as to all persons, but a contrary position seems to have been taken—that is, that the trust is good but subject to avoidance by creditors.[65]

In any event, the elimination of the statute is beneficial. Trusts for the benefit of the settlor are common, and it would be unjust, if not strange, to strike them down out of hand without regard to the persons who might be affected.[66] The statute is not necessary to protect creditors, since it only embodies a principle that exists independently. "The owner of property can properly create a trust under which a third person takes a beneficial interest, and the creditors of the settlor cannot reach this interest unless the creation of the trust was a fraudulent conveyance. To the extent to which the settlor himself takes an interest under the trust, however, that interest is subject to the claims of his creditors even though the creation of the trust was not a fraudulent conveyance. It is against public policy to create for his own benefit an interest in that property which cannot be reached by creditors."[67] Moreover, there is no valid basis for discriminating between trusts of personal property and trusts of real property. No such statute as that repealed exists as to real property, nor has any such statute been deemed necessary. In either case, creditors of the settlor—beneficiary can reach his interest. It may be, however, that the method of reaching the settlor's interest is changed by repeal of the statute. If, under the statute, either initially or through the choice of the moving creditor, the transfer was or became a nullity, the interest might be reached at law by execution or other legal process. If, since the repeal of the statute, the transfer is not to be treated as a nullity but the interest can be reached, it would seem that it could be

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65. Wilson v. Chesire *supra* note 27.

66. For a discussion of the meaning and effect of the original statute and its American counterparts, see 2 SCOTT, TRUSTS § 156 (2d ed. 1956) and RESTATEMENT, TRUSTS 2d § 114 comment *c*, and § 156, comment *b* (1959). See also Herd v. Chambers, 158 Kan. 614, 149 P. 2d 583 (1944). The statute has been interpreted as applying only where the trust is solely for the benefit of the settlor. See the authorities just cited.

67. 2 SCOTT, TRUSTS § 156 (2d ed. 1956). See Ford v. Caldwell, 3 Hill Law 248, (S. C. 1837); Millen v. McAlliley, 2 MCMUL. L. 499 (S. C. 1836). The principle is applicable *a fortiori* to secret trusts with respect to both existing and subsequent creditors. Miller v. Furse, BAIL. EQ. 187 (S. C. 1831); Winsmith v. Winsmith, 15 S. C. 611 (1880).

reached only by creditor's bill as in the case of other equitable interest.[68]

WILLS AND TRUSTS

Fiduciary Security Transfers

The 1960 General Assembly has adopted[69] the Uniform Act for Simplification of Fiduciary Security Transfers. The Act was approved by the National Conference of Commissioners of Uniform State Laws in 1958 and has since met with widespread adoption in the United States. The Act is designed to relieve corporations and transfer agents of the responsibility to inquire into the propriety of transfers by fiduciaries of stock purportedly held by them. The prefatory Note to the Uniform Act[70] explains the intent of the Act:

"This Act does not deal with transfer on a forged or unauthorized transfer, as to which the issuer (corporation, association or trust) acts at its peril both at common law and under the Uniform Commercial Code. Where signatures are valid, this Act deals with transfers by fiduciaries, as to which American decisions have imposed a duty of diligent inquiry on an issuer which has notice that securities are held in trust."

"To avoid any question as to the intended meaning, this Act provides expressly against any duty to inquire in several situations in which, under present law, the duty may exist. In particular the corporation and transfer agent may assume without inquiry that a transfer is within the authority of the fiduciary and is not in breach of fiduciary duty, even though the transfer is to the fiduciary himself or to his nominee. They may assume that the fiduciary has complied with any controlling instruments, and with the law, and they are not charged with notice of court records or other documents even though in their possession.

"Thus the corporation and transfer agent are protected in transferring securities registered in the name of a trustee, and if they make sure that the trustee's signature is genuine,

68. Wylie v. White, 10 RICH. EQ. 294 (S. C. 1858). *Quaere* as to the applicability to equitable interests of statutes providing for proceedings supplementary to execution — CODE OF LAWS OF SOUTH CAROLINA §§ 10-1721 (1952) — and also as to applicability of § 10-1752, subjecting certain trust interests to execution.

69. Act No. 706, 1960.

70. 1958 Handbook of Commissioners, 232.

that they have received no written notice that the trustee has ceased to act as such and no notification of a claim of beneficial intent adverse to the transfer, and that the tax laws have been complied with, where the assignment is made by a fiduciary who is not the registered owner the corporation and transfer agent must in addition obtain specific evidence of appointment or incumbency."

The purposes indicated are implemented in detail in the Act. As stated in the Prefatory Note, the Act marks a vital change in American law. At common law failure to make inquiry suggested by the fact of the trust has been regarded as participation in the breach of trust if the fiduciary's transfer is actually such a breach.[71] That has been the South Carolina law[72] and the Act therefore makes an important reversal of it.

71. See Annot., 56 A. L. R. 1199. See also RESTATEMENT, TRUSTS 2d § 325 (1959) and the Reporter's Note: "By the weight of authority, in the absence of a statute otherwise providing, it is held that where the shares of a corporation are registered on its books in the name of a trustee as such, the corporation, before permitting a transfer of the shares, is bound to inquire whether the trustee is empowered to make the transfer."

72. Magwood v. Railroad Bank, 5 S. C. 379 (1874) (stock in name of trustee); Witsell v. Charleston, 7 S. C. 88 (1875) (trustee); Webb v. Mnfg. Co., 11 S. C. 396 (1878) (guardian); Chapman v. Charleston, 28 S. C. 373, 9 S. E. 591 (1887) (executors).