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# Trusts

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## *Statute of Frauds*

In *Gardner v. Nash*,[1] the question of the applicability of the Statute of Frauds relating to the establishment of trusts of land[2] was presented in a set of facts involving an oral promise by one person to another to buy in the latter's land for his benefit at a foreclosure sale. The action was brought by the mortgagor to set aside a master's sale and to compel a reconveyance by the defendant who had bought the land at foreclosure, on the ground that fraudulent conduct on the part of the defendant had chilled the bidding. The testimony offered was conflicting, but both below and on appeal the finding of fact was that the defendant had made a promise to the plaintiff to buy in the mortgaged property and hold it for the plaintiff's benefit, and that at the sale, in the presence of the defendant, the plaintiff had let it be known that the defendant was buying on the plaintiff's behalf.[3] As a result competition was discouraged and the property was sold at much less than its value. The court held that the circulation by the plaintiff of the statement in the presence of the defendant was the same as if the defendant himself had made the statement.

On the question of the applicability of the Statute of Frauds, the court, adverting to earlier cases, held that the representation at the sale by the defendant that he was purchasing for the plaintiff was, without regard to whether there was or was not a promise made to the plaintiff, such a fraud resulting in the chilling of the bid as to justify the setting aside of the sale and the decreeing of a reconveyance. The court points out that if there had been no fraud in the sale but merely a promise which had been repudiated the Statute of Frauds would be a bar.[4] Because of the fraud, however, relief

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1. 225 S.C. 123, 82 S.E. 2d 123 (1954).
2. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 67-1.
3. In such a case it is quite clear that a constructive trust comes into existence. All the acts and promises which give rise to it may be shown under the saving provisions of § 67-3 CODE OF LAWS OF SOUTH CAROLINA, 1952, which excepts trusts implied by law from the Statute.
4. The problem of oral promises to buy land for another at a forced sale of the latter's property requires a bit of elaboration. It is quite clear that where there is an oral promise to one who is a stranger to the property to buy it in for him, the promisee gets no relief, unless there is fraud in the making of the promise or perhaps a confidential relationship. This of course applies only to real property; an express trust as to personal property can be established orally. Again, however, if the bidding is chilled, the sale is subject to being set aside, but it is doubtful that the title acquired in the meantime is held

is given even though it may have the same practical effect as enforcing the contract.

*Duties and Liabilities of Trustee*

In *Rodgers v. Herron*[5] the area of a trustee's liability was fully explored in an unusual set of facts. The case has been made the subject of a case note in the *South Carolina Law Quarterly*[6], and reference to it may be had for a complete understanding of the facts and issues involved. In brief, for the purposes of this survey, the facts were that a corporate trustee continued to pay income to a beneficiary (the wife of the deceased settlor) after her right to income had terminated by her remarriage, the trust instrument directing payment of income to her for life or until she remarried. The marriage was not a ceremonial one, and the trustee had no knowledge that the marriage had taken place; but the trustee had received letters from the remaindermen to the effect that their mother, the income beneficiary, had married again. Apparently the trustee did not take these

on a constructive trust for the promisee. If the oral promise is made to the debtor, it is quite clear too, as the court points out, that that fact alone is not enough to warrant equitable intervention. Still, if the promisor does not circulate any statement that he is bidding for the debtor, it is possible for the bidding to be chilled if the debtor, relying on the promise, refrains from bidding. See RESTATEMENT, TRUSTS § 44, comment *ee* (Supp. 1948): "Where the owner of an interest in land which is about to be sold to satisfy a claim against him refrains from preventing the sale or otherwise protecting his interest, because of an oral promise to another to buy in the interest and reconvey it to him, and the agreement is unenforceable because of the Statute of Frauds, and the other buys in the interest and refuses to perform his promise, he holds it upon a constructive trust for the owner." Of course, if the promise is made and there is neither reliance by the debtor upon it nor a circulated representation by the promisor that he is acting for the debtor, there is no room for the establishment of a constructive trust.

Cases of the kind discussed should be differentiated from those in which the promisor buys in the property of the debtor at a forced sale on an oral promise to hold the property as *security* for the repayment of the money advanced as a loan for the purchase price. In such a case title is taken by a person who is lending money, and the transaction is as much a mortgage transaction as if the conveyance had been made by the selling officer to the promisee and the latter had conveyed to the lender. It is no more than a deed absolute intended as a mortgage and the facts can be established orally without a showing of fraud. See Young v. Krell, 147 S.C. 1, 144 S.E. 512 (1928). The facts must, as in other deed-mortgage cases, be established by clear and convincing testimony. See, also, RESTATEMENT, TRUSTS § 448: "Where a transfer of property is made to one person and the purchase price is advanced by him as a loan to another, a resulting trust arises in favor of the latter, but the transferee can hold the property as security for the loan." And comment *c*: "The rule stated in this section is applicable where a person owns property which is about to be sold for non-payment of taxes, or on a foreclosure of a mortgage, or on execution of a judgment, and another person orally agrees to buy in the property on the sale, advancing the purchase price by way of loan to the owner of the property."

5. 226 S.C. 317, 85 S.E. 2d 104 (1955).

6. 7 S.C.L.Q. 675 (Summer 1955).

complaints seriously and continued to make payments. The ultimate decision was in favor of the remainder beneficiaries, the court pitching liability on the failure of the trustee to measure up to the standard of care required of trustees by its neglect to make inquiry as to the state of affairs after virtually being put on notice, and in departing from the terms of the trust. While the court surveys the problem of possible absolute liability in making payment to a person not entitled, reviewing generally the authorities on the subject, it did not find it necessary to dispose of the case on any such principle. The negligence of the trustee in failing to exercise reasonable care and in departing from the trust was sufficient for the purposes of the case. If doubts had been raised in the trustee's mind, as they should have been, as to the propriety of making further payments, the trustee should have applied to a court for instructions. Liability, however, was held not to attach as to income paid from the time the common-law marriage had its inception, but from the time when the first letter from one of the remaindermen warning the trustee was received. As to whether the trustee might have been held to absolute liability if there had been a ceremonial marriage of which it did not know, the court did not find it necessary to make a determination.

### *Rescission of Trust Deed*

In *Koebig v. S. C. National Bank*[7], decided in the Fourth Circuit Court of Appeals and originating in the Eastern District of South Carolina, the action by the plaintiff, a person then of unsound mind, by her guardian ad litem, was to set aside a deed made by her and her husband to a trustee to pay income to the settlors for their joint lives, and to the survivor for life, and thereafter payment to be made from the corpus to named individuals and the remainder to designated charities. The allegation was that the deed had been procured by undue influence of the husband (who had died a few days after the deed was made) and that the wife at the time lacked sufficient mental capacity. The issues were resolved below adversely to the allegations of lack of capacity and the exercise of undue influence. The case on appeal is taken up largely with review of procedural matters, but the findings were affirmed. The applicable substantive law as to mental capacity and undue influence was South Carolina law, and this, the court held, was correctly relied upon by the trial judge.[8]

The factors that warrant rescission or cancellation of trust deeds,

7. 217 F. 2d 713 (1954).
8. Way v. Union Central Life Insurance Co., 61 S.C. 501, 39 S.E. 742 (1901); citing DuBose v. Keel, 90 S.C. 196, 71 S.E. 371 (1911); Hamer v. David, 138 S.C. 491, 136 S.E. 744 (1926).

such as fraud, mistake, undue influence, lack of capacity, and so on, are no different than in the case of deeds under which no trust is created; the problem is not essentially one of trusts.[9]

*Constructive Trust — Procedure*

In *Greenwood Lumber Company v. Cromer*[10], the pivotal question was whether the trial judge was in error in refusing to frame issues for a jury in an action which was entirely equitable. The complaint was essentially one for the establishment of a constructive trust, accompanied by demand for an accounting, and in conjunction seeking the appointment of a receiver and an injunction against the disposal of property. The lower court's refusal to frame issues was held on appeal to be proper, since, while such issues may be framed in purely equitable actions, they are intended solely for the enlightenment of the judge trying the issues. Pertinent here is the aspect that a suit to impress a constructive trust is exclusively equitable.[11]

*Charitable Trusts — Adverse Possession*

The case of *Presbyterian Church of James Island v. Pendarvis*[12] is one of extreme novelty not only in South Carolina but apparently elsewhere. The question it poses is that of the applicability of laches, adverse possession and the statute of limitations as between the trustees of a charitable trust and the beneficiaries or objects of the trust. The case is the subject of a case note elsewhere in this issue of the *Quarterly* and extended discussion here would be out of place. Some additional observations and some repetitive remarks are, however, in order.

The case goes back in its facts to 1713, when a conveyance of 100 acres of land was made by Captain Jonathan Drake, in consideration of 150 pounds paid by the members of the Presbyterian Church on James Island. The conveyance was in trust for the benefit of every Presbyterian minister chosen by the members of the Church as their pastor and in perpetual succession, "to inhabit, possess and enjoy." In 1785 the Church was incorporated. Omitting some of the facts, it appears that so far as the tract's ever being actually used by a minister of the Church that was never done. Up to 1871 the record does not show what use was made of the property. In that year the

9. RESTATEMENT, TRUSTS § 333: "A trust can be rescinded or reformed upon the same grounds upon which a transfer of property not in trust can be rescinded or reformed."
10. 225 S.C. 375, 82 S.E. 2d 527 (1954).
11. See Nelson v. Boston, 202 S.C. 517, 25 S.E. 2d 740 (1943).
12. 86 S.E. 2d 740 (S.C. 1955).

property was leased out by lease of record, in later years other leases were made, and throughout the rent received was applied to general church purposes. In 1939 the Church sold one acre of the tract, and in 1945 it decided to subdivide the remainder of the tract. Over a period of time many lots were sold, the proceeds again being used for general church purposes, including the building of a manse for the pastor. This action was a friendly suit brought against a prospective purchaser, who ostensibly declined to accept the title because of the possible lack of claimed absolute ownership by the Church.

The substance of the holding by the court is that by reason of the long continued assumption of absolute ownership by the Church, without regard to whether on its incorporation it took as a stranger or as a successor trustee[13], its acts beginning in 1871 were equivalent to a repudiation of the trust, and from that time forward its holding was adverse. Concededly its use of the property was a diversion from the purposes of the trust. All these facts, the court concluded, gave rise to a presumption of the extinguishment of the trust and that all necessary steps were taken to give valid title to the Church.

The heart of the court's decision is that

> where a trustee has repudiated his obligations as trustee, which need not be in specific words but may consist of conduct inconsistent with the existence of the trust, and holds adversely, *a beneficiary with knowledge of the repudiation* (italics supplied) can no longer rely upon the trustee's continued performance of duty.

The question must be: Who is the beneficiary? In a charitable trust the theoretical beneficiary — although there may be beneficiaries having a special interest — is the community or the public, a rather vague, amorphous, undefined body lacking the tangible character of the State. And although the Attorney General represents the public in the enforcement of charitable trusts[13a], it can hardly be supposed that he is constructively charged with knowledge of acts constituting repudiation. Even though, despite the unlikely possibility, he per-

13. The incorporation by trustee of a charitable trust hardly, if ever, seems to indicate that by creating a new body the trustees so incorporating intend to treat the corporation as a stranger to the trust. There have been several South Carolina cases in which the question of subsequent incorporation as affecting the trust have arisen. Such incorporation has been held not to have adversely affected the trust or to have terminated it. Wilson v. Presbyterian Church, 2 Richardson's Equity 192 (1846); Ex Parte Trustees of Greenville Academies, 7 Richardson's Equity 471 (1854); Bates v. Taylor, 28 S.C. 476, 6 S.E. 327 (1887).

13a. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 1-240. See, also, §§ 67-71 through 67-75, CODE OF LAWS OF SOUTH CAROLINA, 1952.

sonally knew or was notified by others of the repudiation, he is not himself such a representative of the public that his knowledge could be said to affect prejudicially the interests of the public. The beneficiaries having a special interest — the ministers — are to be generated in perpetuity, and the knowledge gone would not be knowledge of time yet to come. Who can be said therefore to have received as beneficiary the notice that gives currency to adverse possession or the statute of limitations? Certainly there can be adverse possession *against* the trustees by a third person, and such adverse holding would run against the beneficiaries the trustees represent. This, however, is quite a different question from that of an adverse holding by the trustees against the beneficiaries.

What has been said here is admittedly largely repetitive of the case note which has been mentioned. Practically, what the court has done is to cut the Gordian Knot, and to recognize that after all the property belongs to the Church. Still there are elements of danger in the reasons which the court advances. Since charities may exist in perpetuity, the factor of time lapse should not be given much consideration on the question of whether the coals should be raked over in calling trustees of a charity to account. For the sake of repose the courts should not be cluttered with stale demands, but where the subject matter of the trust is known, at least so far as it is still in the hands of the trustees, the trustees ought to be compelled to disgorge. Let it be supposed that A and B are trustees of a perpetual charitable trust for the relief of the poor. The subject matter is rental real estate, the income of which is to be used for the intended purpose. A and B in violation of the trust sell a portion of the real estate to a third person, and they pocket the proceeds for their own use. Everybody in the neighborhood knows of the wrong done by A and B, who, to make matters worse, have let it be known to all and sundry that they are going to sell off the rest of the land and keep the money. Ten years elapse, the trustees retain the income, and over the ten-year period they also occupy part of the property themselves. Admittedly their conduct is hostile and notorious. Could or should they successfully meet a challenge by the Attorney General that they are the owners by adverse possession and that the statute of limitations had begun to run in their favor ten years before? Or if the subject matter is money and securities, will the unconcealed and commonly known depredations of the trustees cut off the right to call the trustees to account after six years from the time their misconduct became a matter of public notoriety? The trouble is that

with charities a member of the public as such has no standing to complain, and everybody's business is nobody's business.

The truth of the whole matter seems to this writer to be that this is one of those cases where the purposes of the original trust became impractical or were originally so — unless there was the notion on the part of the creators of the trust or some article of faith that a tract of a hundred acres of land was just about large enough, or necessary, to give room to the ministers to stroll in proper meditation. Absent the *cy pres* doctrine in this State, should the trust be allowed to fail, or should the matter be treated as one for the change of investment?[14] If the diversion cannot be treated as a change of investment which a court would sanction, will a court permit the trustees of a charitable trust to assert that since the trust cannot be carried out (if it cannot) they are at liberty to keep the property for themselves if enough time has gone by?[15]

## LEGISLATION

### *Investments*

By act approved April 14, 1955,[16] fiduciaries are permitted to invest in obligations issued or unconditionally guaranteed by the International Bank for Reconstruction and Development, "which is an international institution, the members of which are governments of certain nations of the world including the government of the United States, and which was established and is operating under articles of agreements signed by those governments."

By acts approved March 28, 1955,[17] Section 1 of Act No. 744 of the Acts of 1952, and Section 1 (a) of Act No. 745 of the Acts of

14. See Patton v. First Presbyterian Church, 129 S.C. 15, 123 S.E. 493 (1924).

15. There is the possibility that if the trust fails because of impossibility or impracticability, the trustees then hold on a resulting trust for the settlor or his heirs (as of what time? — See Elliott v. Morris, Harper's Equity 281 (1824); Blount v. Walker, 31 S.C. 13, 9 S.E. 804 (1888), and that there can be an adverse holding against him or them — not as beneficiaries of the express trust, because the beneficiary of that trust is the public, but as beneficiaries of the resulting trust. Again, however, it would seem that to give currency to the adverse holding, notice would have to be brought home to those beneficiaries. Miller v. Saxton, 75 S.C. 237, 55 S.E. 310 (1906). See RESTATEMENT, TRUSTS § 409.

The settlor is not necessarily the grantor. Where consideration for the transfer is paid by a third person, he, and not the transferor, is the settlor. RESTATEMENT, TRUSTS § 424; Peigler v. Jeffries, 128 S.C. 254, 264, 121 S.E. 783 (1923). In the present case, Captain Drake, the grantor, was not the settlor; the persons paying the consideration were the settlors.

16. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 147, p. 195.

17. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 110, p. 152; S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 105, p. 147.

1952 (§ 67-58, 1954 Supp. South Carolina Code of Laws 1952) were amended to include as legal investments debentures of the Regional Banks for Cooperatives, organized under the Farm Credit Act of 1933.

A major change in the investment statutes is the authorization by Act approved May 11, 1955,[18] of the establishment and operation of common trust funds by trust institutions. The act is quite detailed and, while not a Uniform Act, follows generally the Uniform Common Trust Fund Act and is closely patterned after similar acts in many other states.

Another major change in the investment laws is the amendment of the general investment statute[18a] with respect to investment in corporate securities. By Act approved March 28, 1955,[19] debentures are authorized as legal investments. In the prior general act there appears the clause authorizing investments in "preferred or common stock of any corporation," followed by requirements in subsections (3) and (4) that when the investment is in corporate stock "there shall have been an unbroken record of dividend payments on such stocks or shares during the period of ten years next preceding the date of purchase," and that the total invested in stocks shall not exceed thirty per cent of the corpus, nor shall investment in the stock of any one corporation exceed ten per cent of the corpus. The 1955 amendment changes the first quoted language to read "debentures preferred or common stock of any corporation;" — the punctuation, or lack of it, being exactly as quoted. No further or other reference is made to debentures, and, particularly, there is no restriction placed upon them as a form of investment. With the term "debentures" thus unqualified, undefined and unrestricted, a hazardous and risky form of investment is made permissible, subject only to the rule of prudence. The term is a variable one and seems to have received no precise definition. Generally speaking, it is on more than an instrument representing a corporate obligation. "A writing or certificate issued as evidence of a debt; spec., any of various instruments (often called debenture bonds) issued by corporations as evidences of debt, sometimes secured by a mortgage or other charge upon property, and sometimes no more than an unsecured promissory note of the issuing corporation."[20]

What the amendment therefore authorizes is the investment in

18. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 267, p. 538.
18a. § 67-58, as amend. 1954 Supp. CODE OF LAWS OF SOUTH CAROLINA, 1952.
19. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 105, p. 147.
20. WEBSTER'S NEW COLLEGIATE DICTIONARY.

*any* written obligation, secured or unsecured, of *any* corporation. When it is considered that already under the act if the investment is in any type of corporate obligation secured by first mortgage of real estate, such obligation must have been outstanding for not less than five years and there must have been no default in the same period, the inconsistency of permitting an investment in debentures without security and without restriction is striking and cannot be justified or explained because the corporate writing is called a debenture instead of a promissory note. It is true that in the general investment statute and in other statutes dealing with investments by banks, insurance companies, and the like, investment in debentures is permitted, but in each case the issuing corporation, a public or quasi-public one, is named.[21] In thus sanctioning specific debentures, the legislature has predetermined the character, worth and advantages of these obligations. Whether the inclusion of debentures without qualification was the result of accident or incomplete exploration, it is manifestly out of line with the usual safeguarding requirements of investment statutes and practices. Because of the lack of definition and in view of possible ambiguity, investing fiduciaries would be well advised to avoid in the meantime investment in debentures of any corporation except those specifically authorized.

*Banks as Trustees of Partnership Interests*

By Act approved May 5, 1955,[22] a new section to be known as § 8-245 is added to the Code:

> Section 8-245. Any banking corporation or trust company authorized to act under this article as fiduciary which acts or is acting as trustee of a partnership interest for minor beneficiaries shall not be liable as a partner except to the extent of the assets in the trust, the provisions of Sections 52-25, 52-27, 52-28, and 52-29 to the contrary notwithstanding. Provided, however, nothing in the Act shall waive, limit or restrict the duty and liability otherwise of the bank as trustee of a partners interest.

The sections cited in the foregoing amendment are provisions of the Uniform Partnership Act creating and defining liability of partners. It is clear that at least to the extent indicated corporate trustees desire and receive protection. But it is not clear why the legis-

21. In the general investment statute, as amended, (Section 67-58) for example, there is authorization of investment in debentures of the Federal Intermediate Credit Bank, the Central Bank for Cooperatives, and Regional Banks for Cooperatives.

22. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 227, p. 321.

lation is limited to corporate trustees, nor why it is limited to trusts of infants' interests. Nothing in the nature of things prevents a trust of a partnership interest — assuming such a trust is permissible — for a person under some other type of disability, or for that matter under no disability. And, while the amendment may create immunity in terms of partnership liability, what of liability in terms of the law of trusts?

The amendment presupposes that a partnership interest — *i. e.*, in a going partnership — may be held in trust. Whether that supposition is correct from the point of view of local law remains to be seen. Whether it is wise as a matter of policy, to the extent that it creates a limited liability, is also to be questioned.