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Wills

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The subject of Wills, as heretofore, comprehends the topics of Descent and Distribution, Wills, and Administration of Estates. To a degree these areas overlap with Property, and some cases which involve interpretation of wills are to be found in the survey of Property.

Descent and Distribution — Inheritance by Slayer

A case of more than usual interest, in terms both of the law and of the facts involved, is *Legette v. Smith.*[1] This case has already been made the subject of a case note in the *South Carolina Law Quarterly,*[2] but some additional comment is necessary, particularly since this writer does not entirely agree with the conclusions of the writer of the note. The facts briefly were that a husband, intending to kill the rival for his wife's affections, killed the wife instead. He was acquitted, and the sole question was whether these facts would bar the husband from taking as an heir of the wife. Since the slayer was acquitted, the provisions of Section 19-5 of the 1952 Code did not apply, that section making a *conviction* determinative of forfeiture.

The trial judge set aside the verdict of the jury in favor of the husband, and decreed that the husband should be debarred from participating in his wife's estate, on the ground that the wife had been killed in the husband's commission of an unlawful act. The Supreme Court agreed that the evidence showed conclusively that the husband was engaged in committing an unlawful act which would have warranted his conviction of murder or voluntary manslaughter on the criminal side of the court, but disagreed with the conclusion that that fact alone required forfeiture. On the basis of the earlier decisions of *Smith v. Todd*[3] and *Keels v. Atlantic Coast Line Ry. Co.*,[4] the court reiterated that the principle which in a given case prevented the slayer from taking was the maxim that no man shall profit by his own wrong, and that it extended to depriving the wrongdoer from taking under the Statute of Descent and Distribu-

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1. 85 S.E. 2d 576 (S.C. 1955).
2. 7 S.C.L.Q. 475 (Spring 1955).
3. 155 S.C. 323, 152 S.E. 506, 70 A.L.R. 1529 (1930).
4. 159 S.C. 520, 157 S.E. 834 (1931).

tion. In thus declaring that the common law maxim was engrafted upon, or operated despite, the statute, the court follows minority doctrine. But the court refused to apply the rule under the facts here, saying:

> But we know of no decision in the courts of America or England denying to one who in the course of an unlawful assault upon one person kills another to whom he bears no malice and to whom his criminal intent is not directed, the right to inherit from the person so killed. Nor do the principles of the common law or considerations of justice, morality or public policy so require.

The fact that there are no English or American cases that deny a killer the right to take under the circumstances mentioned does not mean that there are English or American cases that give him the right:[4a] the point is simply a novel one, on which the court takes an original stand. And why, it may be asked, do not considerations of justice, morality, or public policy require that the slayer be barred of the right? Here one may well differ from the court in its conception of what is sound public policy. It seems to the writer that the policy against such a view as the court adopts is already implicit in Section 19-5, which, while it may not be utilized where there is acquittal, provides "no person who shall be convicted in any court of competent jurisdiction of *unlawfully* (italics supplied) killing another person shall receive any benefit from the death of the person *unlawfully* (italics supplied) killed, except in cases of involuntary manslaughter, whether by way of intestate succession, will, vested or contingent remainder or otherwise . . . ." If the purpose of the statute is, as the court has indicated in *Smith v. Todd*,[5] "not to abrogate or delimit the common-law rule . . . but to add to and extend that rule in an important particular not covered by the common

4a. While there is sympathetic dicta in some of the cases that such a killing should not deprive the slayer of the right to take, only one case — which is cited by the Court: In re Wolf, 88 Misc. 433, 150 N.Y.S. 738 (1914), a Surrogate Court case — deals factually with the same kind of situation. In it, as in this case, the slayer, intending to kill his wife's paramour, killed the wife instead. Averting to this fact, but relying principally on the ground that the motive was not to "influence the succession" — that is, to profit by the death — the court found for the husband. The Wolf case has been disapproved in later New York cases insofar as the principal ground is concerned. The rule is fairly universal that forfeiture does not depend upon an intention to acquire benefit by the killing. Van Alstyne v. Tuffy, 103 Misc., 169 N.Y.S. 173 (1918); In re Sparks' Estate, 172 Misc. 642, 15 N.Y.S. 2d 926 (1939); In re Sergillio's Estate, 206 Misc. 75, 134 N.Y.S. 2d 800 (1954). That this is so is indicated by Smith v. Todd, in the text, where the slayer immediately after the slaying committed suicide.

5. Note 3 *supra* at 337.

law," (making the conviction in and of itself determinative of forfeiture) the statute itself is a recognition of *unlawful* killing, without regard to the intent as to the person who is the victim of the wrongful act, as the basis for withholding benefits from the wrongdoer. The facts being the same whether trial is in a civil or a criminal case, it is paradoxical, to say the least, that if the slayer had been convicted in this case he should not be allowed to take, but having been acquitted he should be so allowed. In its exception of involuntary manslaughter from the terms of the statute, the legislature evidently drew the line between death as the result of a wilful act or of an intent to kill and death as a result of negligence. Perhaps that should be the true distinction: not whether in intending to kill one person the assailant killed another, but whether the killing was the result of an intent to kill as distinguished from negligent killing.[6]

Every rule, or nearly every rule, has or should have its exceptions. The rule that no man should profit by his own wrong, as applied in the simplest cases of this kind, brands the killing as the wrong, the acquisition on death as the profit — the profit is the very fruit of the wrong. In the facts of this case, the wrong having produced the benefit, should that benefit fall outside the rule? The solution does not lie in a preliminary statement of the court that "The commission of a crime does not in itself work a forfeiture of the criminal's right to inherit. A may murder B, a stranger, without impairment of A's right to inherit from A's father." In this hypothesis A has done a wrong, but the wrong has brought him no benefit. The rule is completely foreign to such facts. The court then puts a pair of supposititious questions as analogies. The first is:

> Let us suppose that in the present case Edna Smith's son, Henry, had become involved in a quarrel with a stranger outside the store, and had fired his pistol at the stranger under such circumstances that, had the stranger been killed, Henry would have been guilty of voluntary manslaughter, but that the bullet had missed its mark and had gone through a window and killed Henry's mother. Should he, in such a case, regardless of the fact that he had not the slightest intention of killing his mother, be held to have forfeited his rights as her heir?

The answer to that question in part is that if son Henry had been convicted of manslaughter or murder, he would, under the statute, lose his rights as an heir. If the exception has to be made for Henry

6. THE RESTATEMENT, RESTITUTION § 187 limits forfeiture to *murder* and excludes manslaughter. The cases on the whole justify this conclusion. The South Carolina statute embraces all homicides except involuntary manslaughter.

if he were acquitted or never tried, does the exception have to apply to a case of the sort under discussion? Let us suppose that son A intends to poison his father B, and by mistake his mother C drinks the poison and dies. Should A take as C's heir or legatee or insurance beneficiary? A revulsion to A's taking would be natural — a revulsion not merely personal but legal as well. Or suppose A, an otherwise well-disposed person, should in a state of exhilarated drunkenness fire a pistol indiscriminately and in so doing kill his mother B. Whether he was convicted of murder or not, ought he to be allowed nevertheless to take as his mother's heir or under her will or as an insurance beneficiary because civilly there was no malice towards her and no intent to harm her?

The second question which the Court puts is:

> Or should a wife, who, while driving with her husband in the family car, was negligent or reckless in its operation and thereby caused a wreck and her husband's death be debarred from inheriting from him or receiving the proceeds of a policy of insurance on his life, despite the total absence of any intent to harm him?

The court's response is "we think not". But another answer is that under the statute, if she were *convicted* of *reckless homicide* she would be barred. (It may be legislative oversight that when the offense of reckless homicide was made a part of the law in 1937[7] it was not included as an exception along with involuntary manslaughter under Section 19-5, which had been enacted in 1924.[8] The possibility is as great, however, that the omission was deliberate in view of the difference in the degree of negligence involved in the two types of homicide.) Aside from that feature, is the analogy a proper one? The difference between a killing which is the result of an intent to kill, although it is an intent to kill another than the person actually killed, and a killing through negligence is obvious; and, except for a possible legislative inadvertence, death caused by the latter means may fall within a not so severe condemnation, just as with involuntary manslaughter. If A kills B through negligence, that is an accident; if A, intending to kill B, kills C, that too is an accident. But the two accidents should not be treated alike, and one would not seriously speak of A as negligent in the second case, however much he did not intend to bring about the unforeseen result.

7. 40 STAT. 522.
8. 33 STAT. 1188.

Bastardy Statutes

In *Peoples National Bank v. Manos Bros., Inc.*,[9] a case largely devoted to questions of divorce and legitimacy, the provisions of the Bastardy Statutes,[10] (making gifts to bastard children or a mistress voidable as to the excess over one-fourth of the donor's estate as against lawful wife and children) were successfully invoked by a child of a testator who had excluded the child from his will. The testator had been married to a woman living in Greece (where she remained). She had a child which the testator refused to acknowledge as his child. (The issue as to whether the child was the testator's was resolved in this case in the child's favor.) The testator obtained a divorce in Georgia, and thereafter he remarried. He gave a life estate in extensive properties to his second wife. In this proceeding the principal issue was the validity of the Georgia divorce. It was held under the facts to be invalid. On that account the earlier marriage still subsisted, and the wife was held entitled to dower. This result would have followed, of course, without regard to the Bastardy Statutes. The child of the earlier marriage was held entitled to avoid the gift to the second wife as to the excess over one-fourth. The net result was that the avoided excess passed as intestate property to the child, subject to his mother's right of dower.[11]

The only item worthy of comment is that in this case the penalty fell upon an innocent person — the second wife who, according to the findings, married the testator in good faith and believing him free to marry. The Bastardy Statutes are directed against gifts to "the woman with whom he lives in adultery" — an unkind, if technically correct, description of the person involved here. In the light of the otherwise unhampered right of a testator to make dispositions of his property as foolishly, arbitrarily and unjustly as he wishes, it seems regrettable that the people of the State should continue to be saddled with this statutory anachronism — which the court, as here, is bound to follow.

Wills — Lapse and Residue

The question of lapse and its relation to a residuary clause was posed in *Nash v. Gardner*,[12] in which the facts were substantially

9. 226 S.C. 257, 84 S.E. 2d 857 (1954).
10. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 19-238 and 57-10.
11. Having accepted dower, she could not also take as an heir. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 19-151, 19-57; Buist v. Dawes, 3 Richardson's Equity 281 (S.C. 1851).
12. 226 S.C. 165, 84 S.E. 2d 375 (1954).

these: Testator by item 6 of his will gave his son A his homeplace. In a subsequent clause (the 14th) he provided "if there is any money or property real or personal remaining or belonging to my estate I give and bequeath to my four youngest sons, namely" A, B, C and D. The last clause (the 15th) provided that "if any of my children mentioned in this will shall die without having any lawful heirs their part of my estate shall revert back and belong to my heirs then living". The son A died unmarried and childless before the testator. The plaintiff had bought up the interests of all the heirs except the defendant, who was one of nine surviving children of the testator. There were three possibilities: (1) that the plaintiff had complete ownership; (2) that the defendant had a one-ninth interest; (3) that the defendant owned a one-ninth of a one-fourth interest — this last possibility being brought into play only on appeal.

The lower court determined that the 15th clause charted the course of the otherwise lapsed gift to A, and that A having died without lawful heirs — construed as children — his devise passed to the testator's heirs (his surviving nine children), and accordingly that the defendant took a one-ninth share. The Supreme Court did not accept this view. It held, in the first place, that the gift lapsed by reason of A's death and passed into the 14th clause, which it construed to be a general, rather than a restricted, one. Although the court cited no authorities on the scope of residuary clauses, it clearly had in mind the principle that the extent to which such a clause may be general or limited depends on the testator's intention, and that general residuary clauses — designed to prevent intestacies — embrace not only property not specifically disposed of but property that turns out to have been ineffectually disposed of or to have lapsed. And the court apparently assumed, without discussion, that this was true although the specific devisee was one of the residuary devisees.[13]

13. The cases are in conflict as to whether a gift to one who is a specific devisee and also a residuary devisee, and who dies before the testator, passes as intestate property or passes into the residuary clause. See PAGE ON WILLS (3d ed.) § 1431; 69 C.J. 1075; 57 Am. Jur. 978; 44 L.R.A. (n.s.) 814. A reason given for denying its falling into the residue is that "to hold in such case that the testator intended the lapsed legacy to fall into the residuum was said in Craighead v. Givens, 10 Serg. & R. (Pa.) 351, to hold that the testator intended to bequeath to one who died a portion of the residue happening in consequence of his death — a consequence which could never be supposed." Dickenson v. Belden, 268 Ill. 105, 108 N.E. 1011 (1915).

The point seems never to have been raised in South Carolina, although there are many cases in which a general or specific beneficiary was also a residuary donee, and on his death the subject matter of the gift was disposed of under the residuary clause. The typical case, which is easily differentiated from the case under discussion, is that of a gift to A for life with contingent remainder, and residuary disposition in favor of A, and the contingency not occurring on

Having thus ordained the falling of the devise into the residuary clause, the court concluded that the one-fourth residuary interest of A embraced in the lapsed devise passed as intestate property, the other three-fourths passing to B, C and D. The contention that the residuary disposition was a class gift was denied, the court treating the gift as one to individuals.[14]

In reaching these conclusions, the Supreme Court held the lower court in error in treating the 15th clause as a substitutional gift. The language was construed, in the light of the rule that a will speaks as of the time of death, as having reference to the death of a beneficiary *after* his interest had vested. Since the devisee A had died before the testator, it was held not to be an alternative or substitutional gift which would avert a lapse.[15]

A's death: the reversion is in A as residuary taker. Here there is no lapse — it is a case of an undisposed of reversion. Williams v. Kibler, 10 S.C. 414 (1877); Wingate v. Parnell, 214 S.C. 540, 53 S.E. 2d 653 (1949). See also, McDonald v. Fagan, 118 S.C. 510, 111 S.E. 793 (1921) where testator gave estate to wife for life and directed his executors on her death to sell and pay specific amounts out of proceeds to named legatees, but made no disposition of surplus after payment to the legatees. The surplus was held to fall into the residue of which the wife was the beneficiary. Or there may be a direction in the terms of the specific gift that upon the death of the beneficiary the subject matter shall fall into the residue, in which the same beneficiary is to share. Lopez v. Lopez, 23 S.C. 258 (1885). For an example of a restricted residue into which on the death of a legatee who was also a residuary beneficiary the lapsed share did not fall, see Torre v. Chesnut, 159 S.C. 282, 156 S.E. 906 (1931).

14. Since the gift in the 14th clause was to A, B, C, and D, and not to A, B, C, and D "in equal shares," or "to be equally divided," or as tenants in common, or specifying any division between them, it may well be argued that, although a class gift was not created, a joint tenancy was created. Joint tenancies have not been abolished, the statute affecting them eliminating only the incident of survivorship. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-55. The cases held that the statute applies only to vested interests, and that in a gift to joint tenants, if one dies before the testator, the survivors takes. Herbemont v. Thomas, Cheves Equity 21 (S.C. 1839); Ball v. Deas, 2 Strobhart Equity 24 (S.C. 1848). If this construction were adopted, the lapsed share of A would pass to B, C, and D, assuming, of course, that the residue was a general one.

15. The victory gained by the plaintiff on the construction of this clause was an immediate but not necessarily a lasting or certain one. Instead of acquiring indefeasible interests, the children of the testator, including B, C and D who took the lapsed share under the 14th clause, took interests which might be divested by their dying without having lawful heirs. The meaning of "without having any lawful heirs" — whether embracing only children or descendants or on the other hand heirs generally, and whether referring to the birth of heirs or to the birth and survival of heirs — may yet have to be determined. Similarly the meaning of "the heirs then living" will have to be learned in terms of the time to which the words refer. Not to be overlooked, although remote, is the possibility that there may be a gift by implication to the children of B, C and D on their respective deaths. Of course the plaintiff acquired only what his sellers could give him. These doubts, however shadowy, attach as well to all the other gifts under the will affected by the 15th clause.

Wills — Declaratory Judgment

The scope of an action for declaratory judgment in connection with the construction of a will was dealt with in *Foster v. Foster*.[16] The plaintiffs brought the action for declaratory judgment with respect to rights and estates created by a will under which they claimed. A demurrer was interposed on the ground that the facts stated were not sufficient to constitute a cause of action. The lower court overruled the demurrer, and the Supreme Court affirmed. The court held that the action was authorized under the pertinent section of the Uniform Declaratory Judgment Act.[17] The existence of a controversy, actual or potential, is enough:

> The test of sufficiency of such a complaint is not whether it shows that the plaintiff is entitled to a declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all. Even though the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled by the court under the Declaratory Judgment Law, he has stated a cause of action.

Contracts to Make Wills

Litigation of this type is frequently before the Supreme Court, and the period under survey is no exception. The usual case involves action by the disappointed promisee after the promisor has died. In *Harmon v. Aughtry*,[18] the action was unusual in that it was brought by the promisee during the promisor's lifetime. The complaint alleged that in consideration of a loan made by plaintiff to defendant, the latter agreed to execute a will bequeathing to plaintiff's wife $6,000, and if the wife predeceased the defendant the money was to go to plaintiff. The wife had died. The allegation further was that in breach of contract the defendant had failed to make the will as agreed. The plaintiff being put to an election of remedies proceeded upon a cause of action for damages. A demurrer on the ground that the complaint failed to state a cause of action was sustained, the court concluding that the action was prematurely brought. Leave was given to amend the complaint, and an amended complaint was served, containing similar factual allegations but asking for rescis-

16. 226 S.C. 130, 83 S.E. 2d 752 (1954).

17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2003: ". . . any person interested under a deed, will . . . may have determined any question of construction or validity under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder."

18. 85 S.E. 2d 284 (S.C. 1955). This case is noted in 7 S.C.L.Q. 656 (Summer 1955).

sion and restitution. A second demurrer was also sustained, on the ground that suit had been brought before the time for performance. The action of the court below was affirmed on appeal.

The substance of the opinion of the Supreme Court was that the defendant could perform at any time during her life, and that there being no breach or repudiation the plaintiff was not entitled to rescission and restitution. "A will in accordance with the contractual obligation may be made at any time during the life of the promisor." Nor is there any implication that where no time is agreed upon within which the will is to be executed the law will imply a reasonable time. (In this case six years had elapsed.) But the court recognized the possibility of relief during the promisor's lifetime:

> . . . if in his lifetime the promisor repudiates the agreement, or puts it out of his power to perform, as by a conveyance of the property involved to a third person, such conduct may be treated as an anticipatory breach and an action for immediate relief may be immediately maintained by the promisee against the promisor.[19]

The court suggested that if the promisor had agreed to execute a will forthwith or at or within a specific time, the result would be different. If that had been the case, further interesting questions would arise. A will being a revocable instrument, would the failure to execute it at or within the time create liability for nominal damages only? Would the time factor be so vital that failure to execute it at the time would be so material a breach as to justify rescission?

State's Claim Against Estate of Mentally Ill Patient or Trainee

The scope and effect of the Mental Health Act[20] on the liability to the State of estates of mentally ill patients and trainees is dealt with in *South Carolina Mental Health Commission v. May*.[21] The defendant's intestate had been admitted to the South Carolina State

19. As pointed out in the case note mentioned in note 18, *supra*, while an action for damages for anticipatory breach would lie on repudiation, the doctrine is inoperative in unilateral contracts not conditioned on future performance by the promisee and in contracts originally bilateral that have become unilateral by performance on one side. The contract here was unilateral because of the completed loan of money. RESTATEMENT, CONTRACTS § 318. As to rescission and restitution, however, there seems to be no such limitation on renunciation of a unilateral contract, except perhaps where the repudiated duty is to pay a liquidated debt. RESTATEMENT, CONTRACTS § 350. From the point of view of the exception, the promise to bequeath money loaned is hardly anything more than a promise to pay a debt in a certain way, and even restitution might not in such a case be available.

20. 48 STAT. 2042, §§ 32-892 *et seq.*, CODE OF LAWS OF SOUTH CAROLINA, 1952 (Cum. Supp. 1954).

21. 226 S.C. 108, 83 S.E. 2d 713 (1954).

Hospital in 1911 and remained as a patient there until his death in July 1952. The defendant, administrator, refused to pay a claim filed by the Mental Health Commission for care and treatment for the whole period, contending that the Mental Health Act cut off all claims in favor of the State prior to its passage, in that the Act superseded the statutes creating such liability. The lower court decreed that liabilities created by the former acts were not eliminated by the passage of the Mental Health Act, but that recovery was restricted by the statute of limitations to services rendered during the preceding six years.

The Supreme Court affirmed the holding of the lower court as to the continued existence of claims arising prior to the Mental Health Act, but reversed as to the statute of limitations, holding that the six-year statute of limitations[22] did not apply. The lower court's action was based on the language of the Statute which provides: "The commission shall present a claim for the amount due and the claim shall be allowed and paid as other lawful claims against the estate,"[23] the view being adopted that these words should be literally construed and should be taken as barring claims more than six years old just as with other claims barred by the passage of that time. The Supreme Court's attitude was that such directions related to procedural matters such as the distribution of assets, and were not intended to be affected by the statute of limitations. The conclusion that the six-year statute was not operative was based on the language of the statutes relating to filing of claims for services rendered the patient and on general considerations involving limitations against the State.[24]

22. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-143.

23. Now Section 39-950.23, CODE OF LAWS OF SOUTH CAROLINA, 1952 (Supp. 1954).

24. The matter of limitations is taken care of to some extent by an amendment in 1954 to Section 10-150 of the Code, the amendment being embraced in the 1954 partial re-draft of the Mental Health Act (Act No. 680, 48 Stat. 1732, 1741): "Provided, however, that limitations against claims for charges for care, training, maintenance or treatment heretofore or hereafter received by any patient or trainee from the South Carolina State Hospital, any State Training School, or any State Mental Health Facility, shall commence to run against the State, its boards, commissions or agencies charged with the operation of the above institutions only from the last date upon which the care, training, maintenance or treatment was furnished to any such patient or trainee." Section 10-150, above referred to, is part of the Article on limitations of actions other than for recovery of real property, and provides that "The limitations presented by this article shall apply to actions brought in the name of the State or for its benefit in the same manner as to actions by private parties."

By both the 1952 Act (47 STAT. 2063) and the 1954 Act [46 STAT. 1741; § 39-950.25, CODE OF LAWS OF SOUTH CAROLINA, 1952 (Supp. 1954)] a lien is created upon the real and personal property of a person receiving care and treatment in a State mental health facility. The enforceability of the lien is limited to one year after the patient or trainee's death.

Assigning the same reasons as in the case just discussed, the Supreme Court in like manner disposed of another case under similar facts which reached it about the same time.[25]

Action for Accounting — Venue

In *Irby v. Kidder*[26] the question of the proper county in which to maintain an action for accounting against the representative of the deceased executrix of a testate estate was presented under a rather complex set of facts. A testatrix whose will was probated in Charleston County named her two daughters executrices. They were also beneficiaries of income in equal shares, and as executrices they were directed to invest and pay income to themselves in equal shares, and upon the death of one without children the whole income was to be paid to the survivor, and upon the death of both, if only one had children, the children should take the entire estate. The assets were liquidated and thereafter each executrix took one-half of the estate to invest. One of them died thereafter, survived by an adopted daughter and her husband, the named defendant. Her will was admitted to probate in Beaufort County with her husband qualifying as executor. The present action was brought in Richland County by the children of the surviving executrix, who was a resident of that county, the plaintiff's alleging that they were sole remainderman under the will of the first testatrix and that the named defendant was commingling funds of his wife's estate with those of the estate under which they claimed. Added as co-defendants were the adopted daughter of the deceased executrix, the surviving executrix (mother of plaintiffs and the only resident of Richland County in the suit) and a corporation some of whose stock was involved. The prayer was for accounting, for construction of the will, and for an injunction against disposal of assets.

The defendant demurred on the ground of improper joinder of causes of action and was rebuffed by the lower court. The Supreme Court reversed, holding that while the causes of action might be united insofar as they arose out of the same transaction, the causes of action required different places of trial.[27]

Although an action to construe the will might have been brought in Richland County, the action for accounting could not be, under

25. South Carolina Mental Health Commission v. Smith, 226 S.C. 175, 84 S.E. 2d 375 (1954).
26. 85 S.E. 2d 405 (S.C. 1955).
27. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-701.

Section 19-551 of the 1952 Code: "All proceedings in relation to the settlement of the estate of any person deceased shall be had in the probate court of the county in which his will was proved or the administration of his estate was granted"; and under Section 15-445 of the 1952 Code: "When any probate court shall have first taken cognizance of the settlement of the estate of a deceased person, such court shall have jurisdiction of the disposition and settlement of all the personal estate of such deceased person to the exclusion of all other probate courts." These two sections were relied on in *French v. Way*[28] as requiring an action for an accounting against the representative of a deceased executor to be brought in the county of the estate's administration, and not in the county of the defendant's residence. The court in the present case held *French v. Way* to be controlling, and applicable despite the fact that in that case the proceedings were in the Probate Court, since the Court of Common Pleas had concurrent jurisdiction.[29] The substance of the court's holding is that "An action for an accounting against an executor or administrator concerns the settlement of the estate and has to be brought in the County in which the estate is being administered upon."[30]

28. 93 S.C. 522, 76 S.E. 617 (1912).

29. French v. Way was followed in a Common Pleas action in Smith v. Heyward, 107 S.C. 542, 93 S.E. 195 (1917).

30. Although all parties and the court apparently treat the accounting as involving the settlement of the estate, it is possible to regard the functions of the executrices, after paying debts and dividing the fund between themselves for purposes of investment, as not executorial, but as purely trust functions. In other words, they might after a point be regarded as trustees rather than as executors. The use of the terms "trustees" and "executors" is not controlling as to their capacities: the test is as to the duties imposed; and of course the same persons may occupy both offices separately and distinctly. As to executorial and trust functions, see Desaussure v. Lyon, 9 S.C. 492 (1877); Mordecai v. Schirmer, 38 S.C. 294, 16 S.E. 889 (1892). Treating the executrices as trustees after the division of the funds between them, subsequent proceedings involving their conduct would not be proceedings involving the settlement of a testate or intestate estate. The residence of the defendant would control. See Cone v. Cone, 61 S.C. 512, 39 S.E. 748 (1901). On the death of the executrix-trustee title to the fund would pass neither in whole nor in part to the deceased's husband, her executor, but to the surviving executrix-trustee, who would be the proper person to sue the deceased trustee's representative for an accounting. Andrews v. U. S. F. & G., 154 S.C. 456, 153 S.E. 745 (1929); RESTATEMENT, TRUSTS § 200. On the failure of the trustee to act or sue, the beneficiaries may sue in equity, joining the delinquent trustee and the person against whom the claim is made. Fogg v. Middleton, 2 Hill Equity 591 (S.C. 1837); Bailes v. Southern Ry. Co., 87 S.E. 2d 481 (S.C. 1955). In their complaint the plaintiffs alleged that the surviving executrix had failed to protect the interests of the plaintiffs; in their brief they state that the case does not involve a trust estate. *Quaere:* If the estate is a trust estate and the trustee refuses to sue, and the beneficiaries sue the recreant trustee, who resides in one county, and the person liable to the estate, who resides in another county, what should be the venue?

Survival of Actions — Filing of Claims — Parties

The case of *Dubuque Fire and Marine Ins. Co. v. Wilson*,[31] tried in the Fourth Circuit Court of Appeals, and originating in the Eastern District of South Carolina, presents several interesting and important features in the subject under survey.

The action was brought by the insurance company to recover damages because of loss suffered by the company through issuance by a local agent and a general agent of policies in violation of its instructions against writing such insurance. The company had been held liable to the insured in state court litigation which culminated in an unsuccessful appeal.[32] The two agents involved had died before the inception of this action and administration had been had on their estates, and this action was brought against the beneficiaries of the estates. The District Judge dismissed the complaint on the grounds (1) that the decision of the South Carolina Supreme Court disposed of the issues raised by this case; (2) that the action was in tort and did not survive; and (3) that the claim had not been asserted against the estates of the deceased agents.

The Circuit Court reversed all three of the holdings. As to the first, it was held that while the state court action adjudicated the liability of the insurance company, it did not pass upon the liability of the agents to the company.

The defense that the action lay only in tort was held to be untenable. Although according to the court the facts justified an action in tort, the essence of the plaintiff's cause of action was the violation of a contractual obligation, and the contract right survived.[33]

The third defense which the Circuit Court likewise held untenable raises a more serious and debatable question and the court's position on this score deserves repeating in full:

> The contention of the defendant that the insurance company lost the right of recovery because it failed to assert claims against the estates of Carl A. Wilson and William R. Timmons is not supported by the decisions of the South Carolina Courts. We had occasion to examine this question in *Muckenfuss v. Mar-*

31. 213 Fed. 2d 115 (1954).

32. Dubuque Fire and Marine Ins. Co. v. Miller, 219 S.C. 17, 64 S.E. 2d 8 (1951).

33. The common law rule that tort causes of action die with the person has not been entirely abrogated in South Carolina by the Survival Act. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-209. Only torts involving injuries to the person or property are saved by the statute from the operation of the common law rule. Page v. Lewis, 203 S.C. 190, 23 S.E. 2d 1569 (1943). As a tort the cause of action here, not involving injury to person or property, would not be spared by the statute.

chant, 4 Cir., 105 F. 2d 469, and reached the conclusion that in South Carolina the primary source to which a creditor of an estate must look for payment is the personal estate of the deceased in the hands of his personal representative; but that after the distribution of the estate a creditor who has failed to file his claim may collect from the heirs or distributees of the estate to the extent that they have received assets therefrom. The statutes requiring the representatives of an estate to give notice to creditors are designed for the personal protection of executors and administrators, and do not bar a creditor who fails to comply with the statute from enforcing his claim against the persons into whose possession the assets of the estate have come. See *McNair v. Howle,* 123 S.C. 252, 264, 269, 116 S.E. 279; *Columbia Theological Seminary v. Arnette,* 162 S.C. 272, 278, 168 S.E. 465; S. C. Code 1952 §§ 19-473 to 19-475 and notes.

There is a fatal weakness in this position supported as it may *seem* to be by the authorities cited. All the cases relied on, including the *Muckenfuss* case, were decided prior to 1943, when Section 19-474[34] was enacted; and undeniably in their construction of the statutes then in force (Sections 19-473 and 19-475) and relying on earlier cases they *were* correct. The two sections on which these cases are based go back to 1789 and had received interpretation many times.[35] In short, these two statutes were not and are not nonclaim statutes.[36] But the 1943 Act (Section 19-474) clearly is such a statute; and if it is not to be given such a construction, it is meaningless and purposeless. There is no conflict between the statutes: the representative is still protected if he makes a distribution in ignorance

34. 43 STAT. 260. § 19-474 reads: "All claims of creditors of such estate shall upon the expiration of eleven months after the first publication of the notice prescribed in § 19-473 be forever barred unless before the expiration of such period an account thereof, duly attested, shall have been filed with such executor or administrator or with the judge of probate of the county in which such estate is being administered. But the provisions of this section shall not apply to obligations secured by mortgages or other liens which have been duly recorded prior to the expiration of such period."

35. Ford v. Rouse, Rice 219, 222 (S.C. 1839): "The object of this provision in relation to notice to creditors is to protect an executor or administrator from a personal liability for a debt not rendered in. If there still remain an abundance of assets in the hands of the executor or administrator, it would be no objection to the plaintiff's recovery to say 'you had the legal notice but failed to give me a statement of your debt;' for the executor or administrator would not be called on to make the same good." Knotts v. Butler, 10 Richardson Equity 143, 145 (S.C. 1858): "The notice to creditors required by our Act of 1789 is intended for the protection of an administrator who proceeds to make regular distribution of the estate in ignorance of some dormant debts of his estate . . . ."

36. See Columbia Theological Seminary v. Arnette, 168 S.C. 262, 278, 168 S.E. 465 (1932).

of claims, but the claim to be an enforceable one against assets must be filed within the stated eleven-months period. To the extent that the cases *ante* 1943 deal with the immunity of the representative in not paying claims of which he has no notice they are still law; to the extent that they declare non-assertion of the claims within a given time immaterial, they no longer have validity.

One may speculate upon the reasons for the court's failure to acknowledge the plain provisions of Section 19-474. The change of decision-law by statute is no new phenomenon. What may be responsible, in part, is an editorial slip-up in the 1952 Code. The two earlier sections appeared in the 1942 Code as Sections 8993 and 8994. The Act of 1943 was inserted as an amendment to Section 8993. In the 1952 Code under Section 19-474 there follows the usual list of statutory and code antecedents, and the list contains the same references as the old Section 8993, plus a reference to the 1943 enactment. The list is, of course, inaccurate except for the 1943 reference and could easily have misled the court into the assumption that the section had received construction under the earlier cases. In the excerpt hereinabove quoted from the case there is reference to "S. C. Code 1952 §§ 19-473 to 19-475 and notes". There are profuse notes under Sections 19-473 and 19-475; and under Section 19-474 there appears this note: "This section is designed for the personal protection of the executor and does not bar a creditor who fails to comply with the statute from enforcing his claim against the distributees of the estate. *Muckenfuss v. Marchant,* 105 F. 2d 469 (1939)." Obviously the note is in error, since a 1939 decision cannot construe a 1943 Act, but it may have played a part in misleading the court.

Since the decision is in a federal appellate case not involving a federal question, but construing state law, it of course is lacking in binding authority; and it can hardly be persuasive in the light of its patent error.

If the statute is, as has been demonstrated, a nonclaim statute, the further question nevertheless would arise whether the statute applies to claims of the kind in suit. The scope of the statute in terms of the kinds of claims affected by it has not as yet been determined. Both of the agents involved in the present suit were dead before the adjudication by the South Carolina Supreme Court of the insurance company's liability. One had died before the beginning af the litigation; the other died shortly after it had begun; and the Supreme Court's decision was handed down long after the commencement of administration of the respective estates. The contractual breach by

the agents occurred when the instructions to the agents were violated; the liability in the sense of the responsibility to answer for the damages caused was established, or the groundwork laid for it, after the period of the statute. Could the claim be regarded as a contingent liability as to which, perhaps, the statute might not be operative?

A third feature is of minor concern — the necessity of joinder of the personal representative with the beneficiaries. Such a joinder ordinarily is not only proper but necessary.[37] Two of the beneficiaries — defendants, were also the representatives of their respective estates. The Court stated that in view of the remand of the case for further proceedings they could be brought in as defendants in their representative capacity by amendment to the complaint.

LEGISLATION

Descent and Distribution

The Statute of Descent and Distribution[38] was amended by Act approved April 29, 1955[38a] by the addition of the following subsection:

> (10) If any person shall die without leaving any spouse, child or other lineal descendant, father, mother, brother or sister of the whole blood, or their children, brother or sister of the half blood, lineal ancestor or next of kin but shall leave surviving a stepchild or stepchildren then such stepchild or stepchildren shall inherit from the decedent the whole of the real and personal estate as tenants in common.

The amendment is designed to prevent an escheat where the intestate is not survived by a spouse or blood kin but does leave a stepchild or stepchildren. In thus providing for stepchildren, a nonconsanguineous relationship, the statute is virtually unique.

The apparent simplicity of the amendment may be marred by some rather troublesome possibilities. One involves a possible omission in drafting. The term "next of kin" as used in the unamended statute has a special meaning, and appears first in sub-section 6 of Section 19-52. "Next of kin" as thus employed embraces blood kin *after* other kindred are specially provided for. Among those provided for ahead of "next of kin" are uncles and aunts and children of predeceased uncles and aunts; and the same sub-section 6 provides: "If there be no uncle, aunt or child of a deceased uncle or aunt then the

37. McNair v. Howle, 123 S.C. 252, 116 S.E. 279 (1922); Columbia Theological Seminary v. Arnette, note 36, *supra*.
38. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-52.
38a. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 214, p. 309.

estate shall descend to the next of kin." The added sub-section (10) makes no reference to uncles, aunts and their children, and the term "next of kin" as used there is presumably intended to embrace them, and would probably be so construed. In a contest between an uncle and a stepchild, the latter might plausibly and troublesomely argue that he was preferred because of the failure to mention uncles, aunts and their children in the amendment and that "next of kin" would have to be given the same exclusionary and restricted meaning in the amendment as in the statute itself. The possibilities arising out of the omission can of course be obviated by supplying by amendment the terms left out.

A second possibility of difficulty is more fundamental. It is not a question of the wisdom of the legislation, since the legislature has the last and only word on that. The situation which the legislation obviously envisions is that of a widow with young children who marries again. She dies and later the husband, who has neither adopted the children nor provided for them by will, dies intestate without blood kin. Of course, if an old man marries an elderly woman who has grown children and there is the same sequence of events these grown stepchildren will also be provided for. Still, it may be better, in order that the deserving may benefit, that the non-deserving shall benefit also. The fundamental problem that arises is: when, if ever, does a stepchild cease to be a stepchild? The related question is, was it the intention of the legislature to provide for every possible stepchild?

The complexity of the question arises in the consideration of the fact that the stepchild relationship is one of affinity, just as much as the in-law relationship, and may not survive the dissolution by death or divorce of the marriage,[39] a matter apparently not passed on as yet in this State.[40] Does a stepchild cease to be a stepchild when the natural parent dies or is divorced? Some questions stemming from this problem are posed by these supposititious cases:

39. See 26 Am. Jur. 631; 1912B Ann. Cas. 1028; 2 C.J. 377.

40. In one respect State law seems to assume that the dissolution of marriage does not alter the condition of affinity. Under CODE OF LAWS OF SOUTH CAROLINA, 1952 § 20-1, among marriages forbidden is that of a man and his stepmother. If his father were living and undivorced, the marriage to the stepmother could not take place; hence it must refer to marriage after the father's death or divorce from the stepmother. Similarly, under the same section no woman shall marry her husband's son — obviously the reference is to marriage after the death or divorce of the husband. See Tyson v. Weatherly, 214 S.C. 336, 52 S.E. 2d 410 (1949).

The question of whether the relation of affinity is terminated by the dissolution of the marriage that created it may arise in connection with matters of incest (Section 16-402), disqualification of jurors and judges by reason of relationship within prohibited degrees of relationship by consanguinity and affinity, rights of beneficiaries under policies of insurance, and so on. As to insurance, see 99 A.L.R. 593.

1. A, a bachelor, marries B, a widow with children X and Y. X and Y become, of course, A's stepchildren. B dies. Are they then A's stepchildren? The amendment apparently assumes that they are.

2. A, a bachelor, marries B, a divorcee with children X and Y. The children remain with their father, the ex-husband of B. B dies. A dies without blood kin. Do X and Y take?

3. A, a bachelor, marries B, a widow with children X and Y. A and B are thereafter divorced. A dies without blood kin. Do X and Y take?

4. A, a bachelor, marries B, a widow with children X and Y. A and B are later divorced. Thereafter A marries C, a widow with children R and S. Later A and C are divorced. A dies without blood kin. Do X, Y, R and S take, or do only R and S, or none of them?

There are variations of the above questions, but the questions and the variations all point up the nagging issues that the amendment may raise. The amendment may create more problems than it solves.

Non-resident Executors and Administrators

By Act approved May 11, 1955,[41] § 10-433 and 19-591, relating to the appointment of agents for service upon non-resident executors and administrators, were amended in ways designed to clarify the original statutes. The amendment to Section 10-433 inserts code references omitted from the section. The amendment to Section 19-591 provides for service upon the Judge of Probate or Clerk of Court when the agent appointed at the outset dies, removes from the State, resigns, or for any reason cannot be served. Although the original act mentions these contingencies, it stopped short of furnishing the substitute agent.

Filing of Wills

A new section to be known as Section 19-264.1 was adopted by Act approved April 14, 1955:[42]

> Section 19-264.1. When any last will or testament is filed with the Probate Court having jurisdiction a certified copy of same shall likewise be filed with the Judge of Probate of every county of the state where the deceased owned real estate. Provided, that the legal representative of the estate shall not be discharged until showing is made to the satisfaction of the Court that the provisions of this section have been complied with.

41. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 236, p. 456.
42. S. C. ACTS AND JOINT RESOLUTIONS 1955, No. 143, p. 191.