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Property

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Construction of Limitations

Four cases[1] decided during the period under review raise constructional questions which point up the difficulty of drafting limitations free from ambiguity.

In *Peoples Nat'l Bank v. Barlow*,[2] a testatrix bequeathed the bulk of her considerable personal property in trust, to be divided into fifteen equal shares which were to be conveyed "freed and discharged of all trusts" to designated beneficiaries (children of her nieces and nephews) as each attained the age of twenty-one, the income on a beneficiary's share to be paid him or her until attainment of that age. The will provided for payment at the death of the testatrix of the shares of two beneficiaries who had attained twenty-one during the testatrix's life, "as well as that given to any other beneficiary . . . who shall have attained the age of twenty-one (21) years at the time of my death . . . ." However, a further clause provided: "If any of the above-named beneficiaries should predecease me, his or her share shall be equally divided among the surviving beneficiaries; if any child or children should be born *at any time hereafter* to [designated persons whose then existing children were beneficiaries of the trust], such child or children shall take a share of the income and corpus equal to the share of each of the other beneficiaries in the same manner as if said child or children had been named therein." (emphasis supplied)

After the testatrix's death, the executor and trustee sought instruction as to whether the provision for later born beneficiaries prevented any immediate distribution to those beneficiaries already twenty-one years of age. The Record disclosed (pp. 13, 14) that at the time of the suit the persons who could be the parents of later born beneficiaries were a man forty-six years of age, and two women aged forty-eight and fifty-two years.

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1. Croft v. McKie, 235 S. C. 231, 111 S. E. 2d 210 (1959); People's Nat'l 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).

2. See note 1 *supra*.

Two problems confronted the Court. The first was whether or not a decree binding on children who might be born after the testatrix's death could be rendered, since no such child having been born, there could be no representation by a class member in esse, and the interests of any after born children would be adverse to those of the living beneficiaries. The second problem was at what time should distribution of the fund be made, in view of the apparent conflict between the direction for payment at twenty-one and the further provision that children born at any time hereafter should be equally entitled.

The circuit judge held that the unborn children were properly represented by a guardian ad litem and would be bound by the decree, and that distribution of the share of each beneficiary should be made when he became twenty-one. No conflict in the directions as to time of payment was found. This was because the provision made for children "born at any time hereafter" was construed to be limited to children born after the making of the will but before the death of the testatrix. This interpretation of the phrase was compelled, the circuit judge concluded, by the clearly expressed intention that beneficiaries who were twenty-one at the execution of the will as well as those who thereafter attained that age either before or after the testatrix's death, should immediately be paid their respective shares "freed and discharged of all trusts." Importance also was attached to the context (the entire sentence is quoted above) in which "born at any time hereafter" was used. The fact that only a semicolon separated it from a clause dealing with the death of a beneficiary during the testatrix's life was regarded as further evidence that "born at any time hereafter" meant born before the death of the testatrix.

On appeal the circuit court decree was affirmed. Considering the sufficiency of the representation of the unborn children by a guardian ad litem, the opinion of the Supreme Court reviews some of the many South Carolina cases, commencing with *Bofil v. Fisher*[3] and ending with *Caine v. Griffin*.[4] The latter case, decided in 1958, determined that representation by a guardian ad litem is sufficient when the interest in land of an unborn class is sought to be transferred

3. 3 Rich. Eq. 1 (1850).
4. 232 S. C. 562, 103 S. E. 2d 37 (1958).

from the original land to another tract exchanged therefor. The *Caine* case[5] was regarded as controlling since, as stated in the opinion, ". . . if the title or interest of an unborn may be ascertained and disposed of . . . it logically follows that it can be adjudicated, after due inquiry, that the unborn has no interest. . . ."

In the Restatement of the Law of Property,[6] the American Law Institute recognizes that property interests of unborn persons are sufficiently represented by a guardian ad litem appointed for that purpose pursuant to statutory authority. However, the Institute further ". . . takes no position as to . . . the general power of equity . . . apart from statute . . ." to authorize such a procedure.[7] This position of the Institute the Court acknowledged, but then concluded that the general power of equity was sufficient apart from statute, citing *Caine v. Griffin*.[8]

The Court agreed with the circuit judge's conclusion that the provision made for children born at any time hereafter must be limited to those born after the making of the will but within the testatrix's lifetime, and found that such a construction harmonized the pertinent clauses of the will. Although the point is a close one, the interpretation is justifiable as a not unreasonable application of the class gift rule of convenience.[9]

If, however, the testatrix unmistakably had expressed an intention to include children born after her death, a further question would need to be answered, namely, to what extent if at all could distribution be made to persons already twenty-one years of age. Relative to this further problem the Court stated *arguendo* that if after-born children were included, ". . . the trust fund could not be distributed, or certainly all

5. See note 4 *supra*.
6. RESTATEMENT, PROPERTY § 182 (1936).
7. *Id.* at § 182, comment *e caveat*.
8. See note 4 *supra*.
9. See generally 5 AMERICAN LAW OF PROPERTY § 20.40 *et seq.* (Casner ed. 1952); SIMES & SMITH, FUTURE INTERESTS § 634 *et seq.* (1956); RESTATEMENT, PROPERTY §§ 294, 295 (1936). Since several children were twenty-one at the testatrix's death, it seems that the gift is governed by the rule applicable to an immediate gift of an aggregate sum to a class. RESTATEMENT, *op. cit. supra* § 295, at 1592. To the effect that such a gift to the children of A "now born or who hereafter may be born" (or wording of similar import) includes children born after the testator's death, see RESTATEMENT, *op. cit. supra* § 294 comment *p*. *Cf.* SIMES, *op. cit. supra* § 636, at 74. In the instant case it is noteworthy that at the time of the suit there were no after born claimants, nor did it appear likely that any would thereafter be born.

of it, until the deaths of the above named persons . . .", citing *Dobson v. Smith.*[10]

The Court's reference to a partial distribution with a portion of the fund withheld to assure payment of after-born class members finds support in a relatively early English case.[11] An alternative solution would be an immediate distribution of his indicated share to a beneficiary who had attained twenty-one, conditioned upon his furnishing security to assure the refunding of a portion of the share paid him in the event that additional beneficiaries should later be born.[12]

Of primary interest, however, is the dictum that all of the fund could not be distributed until the deaths of the persons whose after-born children would be beneficiaries of the trust. In such a situation it has been suggested[13] that if it can be shown that because of the age or physical condition of the indicated parents, they are in fact incapable of thereafter having children (in the instant case the Record makes no such showing), distribution of the entire fund might be made to the living beneficiaries, subject only to the power of any later born beneficiary to demand a redistribution from those to whom payment was made. Although the Court cited *Dobson v. Smith*[14] in disapproval of such a solution, an earlier South Carolina case[15] would seem thus to have handled a

10. 213 S. C. 15, 48 S. E. 2d 607 (1948), discussed note 11 *infra.*

11. Defflis v. Goldschmidt, 1 Mer. 417, 35 Eng. Rep. 727 (1816). Defflis is discussed in detail in the very fine brief for appellants.

12. This was the procedure recommended by the Supreme Court of North Carolina in Shull v. Johnson, 55 N. C. 208 (1855). And see the English cases collected in 67 A. L. R. 538, 545 (1930), in which cases payment was made to the living beneficiaries on their recognizance to refund in the event of other children being born.

13. SIMES & SMITH, FUTURE INTERESTS § 777, at 255 (2d ed. 1956). *Cf.* RESTATEMENT, PROPERTY § 274 (1936). Although there is much supporting English authority, the majority of the American cases are opposed to such a solution of problems involving other than tax matters. The English and American cases are collected in Annot., 67 A. L. R. 538 (1930), S. 146 A. L. R. 794 (1943).

14. 213 S. C. 15, 48 S. E. 2d 607 (1948), wherein the Court reversed a judgment decreeing specific performance of a sales contract of land on the ground that a subsequent birth of children to the vendors (unmarried women aged 64, 54, and 49 years respectively) would operate by way of executory devise to defeat the interests of the vendees.

15. Magrath v. Magrath, 184 S. C. 243, 192 S. E. 273 (1937), where in view of the fact that the indicated parents (who also were beneficiaries) were unmarried women over sixty years of age, the Court permitted the termination of a trust and the distribution of the assets despite the fact that the interests of the living beneficiaries would be divested by the later birth of children who should outlive their parents. The opinion implies that the distribution decreed would not extinguish the interest of a later born child.

closely analogous situation. In view of the finding that the testatrix did not intend to include children born after her death, no adjustment of the correlative rights of the living and those who might be born was necessary, however.

Woodward v. Cagle,[16] a suit to construe a will, involves a determination of the time at which a remainder in land became indefeasibly vested. The testator was survived by three sons. By paragraph five of his will he devised the land concerned to his son, Alexander, "for and during the term of his natural life and at his death to his widow for life and at her death to his children absolutely per stirpes. In default of such children the same shall vest in my executors to be disposed of as provided in paragraph six." In substance, paragraph six provided that the executors should hold other land in trust for certain income beneficiaries until the death of the last survivor of the testator's three sons and until the attainment of twenty-one by the testator's youngest grandchild, after which the executors were to sell the land and "divide the proceeds per stirpes among the children of my said three sons, the child or children of a deceased child to take the parent's share."

Alexander died without ever having had a child, but was survived by a widow. At the death of the testator's last son there were four living grandchildren, all of whom were twenty-one years of age. The question raised was whether a purchaser of the interests of these four grandchildren would acquire an indefeasible title, subject only to a life interest in Alexander's widow. Against this construction it was argued that the testator intended the trust to continue during the life of Alexander's widow, and that only after her death was the land to be sold, and the proceeds divided among the beneficiaries then in being.[17]

16. 235 S. C. 527, 112 S. E. 2d 480 (1960).

17. As pointed out in the circuit decree (Record, p. 43), should the latter construction be adopted, it would seem that the limitation is an "unborn widow" one which (insofar as a substituted gift to children of the testator's grandchildren is provided) violates the rule against perpetuities. See SIMES & SMITH, FUTURE INTERESTS § 1228 (1956). Where a limitation is fairly susceptible of two different constructions, one of which complies with the rule against perpetuities while the other is violative thereof, the well settled rule is in favor of the construction which conforms to the requirements of the perpetuities rule. GRAY, THE RULE AGAINST PERPETUITIES § 633 (4th ed. 1942); SIMES & SMITH, op. cit. *supra* note 9 § 1288; RESTATEMENT, PROPERTY § 243, comment *n.* (1936). In the instant case, application of this principle favors the construction adopted by the Court.

The Court held that the trust of the interest in remainder terminated at the death of the survivor of the testator's three sons, and that the four then living grandchildren (all of whom already were twenty-one years of age) had indefeasible interests and could convey good title to the property, subject only to the life estate of Alexander's widow.

In *Croft v. McKie*[18] the will gave the entire estate of the testator to his widow for life, and subject thereto, to each of his seven children a tract of land for his or her "sole and separate use." It was further provided that if any of the children should die childless, "her or their share shall revert to my estate for division among the survivors." Another portion of the will provided, "It is my will and desire that in case of the death of anyone of these my before mentioned children without lawful issue of his or her body the bequests herein made shall revert to my estate for division among the survivors."

In an action to quiet title to one of the tracts it was held that the estate given to each of the children was not a life estate, but an estate in fee simple defeasible on the contingency of the death of such child without issue. The Court further held that the word "survivors" did not mean those who survived the testator, but referred to those who survived a child dying without issue. Nor did "survivors" include the issue of a child already dead when a devisee died without issue. "[T]he clear intention of the testator," stated the Court, "was that upon the death of a child without issue the property devised to him was to be divided among his brothers and sisters then living."

The trial judge concluded that the executory interests of the surviving children in the tracts of those who died without issue were nontransmissible and inalienable (Record, p. 35) prior to the death of a child without issue. Notwithstanding this conclusion, however, he ruled that a deed with special warranty which the surviving children as part of a voluntary partition had given to a child who thereafter died without issue, would estop the grantors from claiming the tract devised the deceased child, thus permitting the land to pass under the will of the deceased child. Since certain parties did not appeal from the circuit decree, it was unnecessary for the Supreme Court to pass on this ruling.

18. 235 S. C. 231, 111 S. E. 2d 210 (1959).

In *Gist v. Brown*[19] the testator devised land as follows:

> I give, bequeath and devise my 'Dairy Farm' house and buildings, and one hundred acres of land with the house, (the land to be selected by my son, S. J. McCaughrin) with such of the outfit on said place as I may own to my said son, S. J. McCaughrin, his wife, and his son, Robert, and such other child or children as may be born to the said S. J. McCaughrin, for and during the term of his natural life, and at his death, one-third of said place to the wife of S. J. McCaughrin surviving him, and remaining two-thirds, to be equally divided among his children, the child or children of a predeceased child taking the share his or their parent would have taken. The disposition of this place as above indicated is for the benefit of the wife and children of the said S. J. McCaughrin, and is in no case to be subjected to his debts. In case he should leave no wife surviving him, then the whole place is to be divided among his children as above indicated."

Robert survived the testator but died intestate during the life of his father, and the issue raised was whether Robert's interest was transmissible to his heirs (his father and mother), or whether it was nontransmissible by reason of being contingent upon Robert's survival of his father. The Court found nothing in the limitation which indicated an intention to make Robert's interest nontransmissible. The opinion cites a number of South Carolina cases, including *Albergotti v. Summers*.[20] The *Gist* case is discussed in more detail in the review of Wills and Trusts, where consideration is given to the Court's remarks anent *Albergotti*.

Dedication—Municipal Control of Dedicated Streets

In *Sloan v. City of Greenville*[21] the Court thus framed the issue before it:

> The question for determination upon this appeal is whether the City of Greenville, which holds title to the streets in question, in trust, for the public for street purposes only, has authority to permit the area above such streets to be used for private purposes.

19. 236 S. C. 31, 113 S. E. 2d 75 (1960).
20. 205 S. C. 179, 31 S. E. 2d 129 (1944).
21. 235 S. C. 277, 111 S. E. 2d 573 (1959).

As applied to the facts, it was held that the defendant city had no power to authorize the construction of a privately owned parking garage overhanging two streets which had been dedicated to the public for street purposes only. The proposed garage would have overhung the streets in question a maximum distance of eight feet at a minimum height of twelve feet.[22]

The dedicator of the streets had been dead for over two hundred years, and suit was brought not by one claiming the fee through him,[23] but by a private citizen suing as a taxpayer, resident, and user of the streets. The act complained of being an encroachment upon an interest of the public, the City argued that plaintiff had no standing to sue in the absence of an allegation of special and peculiar damage to himself, different in kind and degree from that of the public. The Court refused to consider the objection, however, on the ground that not having been raised by demurrer, it had been waived. Thus the strength of the defense remains to be tested in some later suit.[24]

The opinion in *Sloan* quotes *Grady v. City of Greenville*[25] as follows:

> If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public. 18 C. J. 127; McCormac v. Evans, 107 S. C. 39, 42, 92 S. E. 19 (1917).

To the hasty reader this quotation might indicate that the Court doubted the power of the Legislature to authorize the

22. The Record (pp. 14, 16) discloses that the overhang would extend over the sidewalk area but not over the area for vehicular travel.

23. It appears that the fee to the streets in question was in the abutting property owners. See Chapman v. Greenville Chamber of Commerce, 127 S. C. 173, 184, 120 S. E. 548 (1923). The abutting lot on which the garage was to be built was under lease to the persons seeking the building permit in issue (Record, p. 19).

24. That the defense is meritorious, see MCQUILLIN, MUNICIPAL CORPORATIONS § 30.145 (3rd ed. 1950), and the cases there cited.

25. 129 S. C. 89, 95, 123 S. E. 495 (1924). Source of the quoted passage is 18 C. J. 127, and the next sentence reads: "This can only be done under the right of eminent domain." The context in Corpus Juris limits the applicability of the quoted passage to situations where the interest of the dedicator or his successor is asserted, or that of a property owner with special interest, such as an abutting lot owner.

erection of the proposed building. However, a later passage in the opinion distinguishes *Chapman v. Greenville Chamber of Commerce*[26] on the ground that the encroachment there complained of was authorized by a legislative enactment, while in the instant case "[t]here is no act of the Legislature granting to the City Council of Greenville the authority to permit the encroachments here involved." Certainly the holding and opinion in *Chapman* make clear that the Legislature has power to authorize such an encroachment as against all but the owner of the fee or other person showing an injury to a property interest.[27]

Since the rationale of *Sloan* seems equally applicable to overhanging advertising signs and marquees, further judicial clarification may be necessary. The case is also discussed in the Survey of Public Corporations.

Tenancy in Common — Compensation to Improving Tenant

Shumaker v. Shumaker,[28] a partition suit, involves the right of a tenant in common to compensation for improvements made by him on the undivided premises. The facts were that the cotenants in remainder had joined in a sale of the timber on the land to raise funds for the repair of a dwelling thereon which was occupied by their mother, the life tenant. When the funds so raised proved insufficient (it was necessary to tear down the dwelling and rebuild), the one cotenant who resided with the life tenant, without the consent of his cotenants but to the knowledge of some of them, used his own money and furnished his labor to complete the project. When sued in partition by his cotenants after the death of the life tenant, the improving tenant sought reimbursement for the sums advanced by him and for the value of his labor.

The Supreme Court affirmed the circuit decree, which had found the improving tenant to be entitled to share in any enhanced value of the land which was attributable to the dwelling, in the proportion that his contribution bore to the entire cost of construction, but not to exceed the sum of his contributions of money and labor.[29] The opinion is a common

26. 127 S. C. 173, 120 S. E. 548 (1923).
27. See 127 S. C. 173, 180, 184, 120 S. E. 584 (1923).
28. 234 S. C. 421, 108 S. E. 2d 682 (1959).
29. The rule as usually stated is that the measure of compensation to the improving tenant is the amount by which the improvement has enhanced the value of the land. Among other cases, see Buck v. Martin, 21

sense one which does much to clarify the South Carolina rule in the area of law in question.[30] Also to be noted is the somewhat unusual factual situation in that the improvements were made by a cotenant in remainder rather than a cotenant of the present freehold.

Vendor and Purchaser

In *Douglass v. Threadgill*[31] the purchaser of land had accepted a deed subject by its terms to a recorded easement of way across the conveyed land. Thereafter he sued the seller for breach of the sales contract, which had provided for a conveyance free from encumbrance. In his answer the seller alleged that plaintiff having accepted the deed with actual, constructive and imputed knowledge of the existence of the easement, he was now estopped to maintain the action. The evidence established that prior to his purchase plaintiff knew that persons were driving across the land, but believed their use was permissive only, he having been so informed by the real estate broker of the defendant. Prior to consummation of the sale the attorney who examined title for the purchaser (and who also drew the deed for the seller) mentioned to the purchaser the existence of the way, but did not explain its legal significance.

On appeal a verdict for plaintiff was set aside and a new trial ordered on the ground that the pleadings and evidence made a jury issue as to whether plaintiff had accepted the deed with knowledge of the existence of the driveway and of defendant's inability to convey free of such easement. If so, said the Court, plaintiff would be estopped to maintain the action.

The trial judge had refused to consider defendant's contention that the terms of the contract of sale had been merged

S. C. 590, 53 Am. Rep. 702 (1884). And see 14 AM. JUR. *Cotenancy*, § 49, at 117 (1938), which is quoted by the court. The further qualification that the compensation is not to exceed the cost of the improvement is in the circuit decree (p. 55 of the Record), though not mentioned in the opinion of the Supreme Court. Obviously the qualified rule will result in a smaller compensation than that otherwise obtainable in a case where the enhancement in value exceeds the cost of the improvement. If reimbursement is limited to less than the value of the improvement, it would seem that interest should be allowed the improving tenant. Consider White v. Smith, 70 N. J. Eq. 418, 62 Atl. 560 (1906). *But cf.* Talbot v. Todd, 7 J. J. Marsh 456 (Ky. 1832).

30. See note 11 S. C. L. Q. 520, 521 (1959) for a discussion of earlier South Carolina cases.

31. 235 S. C. 110, 110 S. E. 2d 169 (1959).

in the subsequent deed, on the ground that the matter had not been pleaded. Without commenting on the merits of the defense, the court stated that since there must be a new trial, the defendant by amendment could remove any doubt as to the sufficiency of its pleading.

Miscellaneous

Smith v. DuRant,[32] a boundary dispute case, raises questions as to the admissibility of evidence and the effect of a prior action as an estoppel by judgment. These matters are more appropriately treated in other Survey articles. The Court recognized the general rule that when construing a description in a deed, ordinarily the calls for boundaries will control in case such calls are in conflict with the calls for distances. However, under the facts presented the ordinary rule was found not to be controlling. Nor did the facts relied on by the defendant establish an estoppel of the plaintiff to assert her legal title to the land in dispute.

Gallant v. Todd[33] considers the effect of a written instrument entered into between a landowner and a firm of real estate brokers. The Court concluded that the instrument was a mere brokerage contract of employment which did not confer upon the brokers power to execute a contract of sale enforceable by a purchaser against the owner. The case is more fully discussed in the surveys of Agency and of Contracts.

Legislation

An Act[34] approved May 24, 1960, provides a method whereby a person owning land on which is situated an abandoned cemetery or burying ground may secure the removal of the graves if, in the opinion of the governing body of the county or municipality in which the land is situated, such removal is necessary and expedient. For purposes of the Act, a conveyance of the land without reservation of the cemetery or burial ground is made evidence of abandonment.[35]

32. 236 S. C. 80, 113 S. E. 2d 349 (1960).
33. 235 S. C. 428, 111 S. E. 2d 779 (1960).
34. Act No. 805 (1960).
35. Prior to the statute, only a removal of the remains would constitute an abandonment of a burying place. Frost v. Columbia Clay Co., 130 S. C. 72, 124 S. E. 767 (1925).