South Carolina Law Review

Volume 15
Issue 1 *Survey of South Carolina Law: April 1961--March 1962*

Article 16

1963

Property

David H. Means
University of South Carolina School of Law

PROPERTY

DAVID H. MEANS*

Extinguishment of Restrictive Covenants on Land

Dunlap v. Beaty[1] was an action seeking a declaratory judgment that a restrictive covenant on land was no longer in effect and should be nullified. In 1935 defendant, who had extensive holdings of land in and near the City of Rock Hill, sold and conveyed to plaintiff a 3.67 acre lot in the city, subject to the following covenant, among others: "It is also covenanted and agreed that no building on said premises shall ever be used as a store or for the conduct of mercantile business . . ."

The lot was part of a tract of 133 acres which, at the time of the sale to plaintiff, defendant was using primarily as a farm. Later defendant developed a part of the tract as a residential subdivision. Another portion of 6 acres lying to the east of plaintiff's lot and separated therefrom by a 42 foot street defendant conveyed for use as a shopping center to a corporation she controlled.

Plaintiff thereafter sued to extinguish the covenant upon the grounds: (1) that it was not imposed as part of a general scheme of improvement, and (2) that since execution of the deed there had been such a radical change in the character of the neighborhood as to destroy the essential object and purpose of the restriction. Individuals owning lots in several nearby subdivisions developed by defendant were made parties defendant as class representatives of other lot owners in these subdivisions.

As summarized by the Court, the referee to whom the case was referred:

> . . . concluded that the covenant in controversy was not imposed as a part of a general scheme of improvement; that it was a covenant personal to the grantor; and that because of the radical change in the character of the neighborhood, to which Mrs. Beaty had contributed, the essential object and purpose of the restriction had been defeated and that it should now be extinguished.

*Professor of Law, University of South Carolina.

1. 239 S. C. 196, 122 S. E. 2d 9 (1961).

The circuit judge confirmed the referee's report and on appeal the circuit decree was affirmed. After a detailed review of the evidence the Court concluded that the concurrent fact findings of referee and circuit judge should not be disturbed. Even after the facts were settled, however, several questions of law remained.

One of these was the extent of the area to be considered in determining whether there had been a radical change in the character of the neighborhood. In answer the Court stated:

> We do not agree with [defendants] that in determining whether there has been a radical change in conditions, the Court is restricted to the area within the tract conveyed to plaintiff and cannot consider the area surrounding her property. We do not think *Martin v. Cantrell,*[2] . . . cited by [defendant] requires such a strict limitation. The principles there laid down do not apply to a single lot or parcel of land but to the general development and division of a larger tract of land . . . .

The Court recognized that the lack of a general scheme of development alone would not prevent the defendant's enforcement of the covenant:

> She had a right to impose restrictions on a portion of her property without creating any obligation to restrict the remainder . . . . The fact that she did not develop the immedate area around plaintiff's property in accordance with a general scheme does not affect any right she may have to enforce the restrictions against plaintiff. This is true even if, as found by the Referee, the covenant was personal to her.

The most troublesome question, theretofore undecided in South Carolina,[3] was whether changed conditions could be invoked as a ground for affirmative relief against a restrictive covenant prior to a breach thereof, as well as by answer

2. 225 S. C. 140, 81 S. E. 2d 37 (1954), in which the Court cited authorities to the effect that a change of conditions without the area of a restricted subdivision does not affect the validity of the restrictions.

3. An action for affirmative relief against restrictive covenants had been brought in Martin v. Cantrell, 225 S. C. 140, 81 S. E. 2d 37 (1954), but as stated by the Court in Dunlap, note 1, *supra*, ". . . the right to do so was not questioned by the defendants." Moreover, in that case the Court concluded that there had been no change of conditions which would warrant the relief sought.

to a suit seeking its equitable enforcement after breach. After reviewing the authorities, the Court concluded:

> [T]he great weight of modern authority is that in an action under the declaratory judgment statute or one to remove cloud on title, affirmative relief may be granted against a restrictive covenant where there is such a change in the character of the neighborhood as to render the enforcement of the covenant valueless to the covenantee and oppressive and unreasonable as to the covenantor. In other words, the later cases hold that a change of conditions can serve not only as a shield, but also as a sword.

Considering whether the defendant covenantee would be entitled to damages should the covenant be extinguished by decree, the Court recognized that "[i]n some jurisdictions permitting affirmative relief from a restriction, it is held that such relief should only be granted upon the condition that the covenantee is paid any damages sustained by him." In view of the existent circumstances, however, the Court found the defendant was not entitled to damages.

Defendant argued that if plaintiff were allowed to use her land for commercial purposes in violation of the covenant, the commercial value of defendant's shopping center would be materially injured. In reply the Court observed that:

> . . . the overwhelming weight of the evidence shows that the purpose of this restriction was to preserve this area as a residential section. It was not designed to protect Mrs. Beaty against commercial competition. This being so, it cannot now be used to enable her to obtain a monopoly with respect to the business enterprises that might be introduced into the area.

Nuisance — Accumulation of Surface Water

In *Bowlin v. George*,[4] a residence owner sued to recover damages resulting from the maintenance of an adjacent automobile junk yard and to enjoin the continuance thereof. The complaint alleged that stagnant water accumulated in the wrecked automobile parts, and that mosquitoes bred therein and were harbored in the weeds growing on the premises.

A demurrer to the complaint for failure to state a cause of action was overruled, which disposition was affirmed on

4. 239 S. C. 429, 123 S. E. 2d 528 (1962).

appeal. Despite defendant's contention that the accumulation of surface water cannot constitute a nuisance *per accidens*, the complaint was found to state a cause of action for such a nuisance.

In *Baltzeger v. Carolina-Midland Railway Co.*,[5] it was said:

> The only exception to the rule that surface water being a common enemy, every landowner has the right to deal with it in such manner as he sees fit, is that it is subject to the general law in regard to nuisances, if its accumulation has become a nuisance *per se*, as for example, whenever it has become dangerous at all times and under all circumstances to life, health or property.

Certainly this dictum, repeated in several later cases,[6] would seem to support defendant's position. In fact, however, the Court, without expressly overruling the stated proposition, at least on one occasion has parried its thrust.[7] In the instant case the proposition was found inapplicable because ". . . this case does not involve the obstruction of the flow of surface water or the right of an owner to deal with it, and we fail to see how the law relating to the handling of surface water has any application."

Since plaintiff's alleged cause of action was bottomed at least in part upon defendant's accumulation (albeit unintended rather than through design) of surface water, it is difficult to understand why the law relative to the handling of such water was not applicable.[8] A more suitable ration-

5. 54 S. C. 242, 247, 32 S. E. 358, 71 Am. St. Rep. 789 (1899).

6. Among other cases to this effect, see Touchberry v. Northwestern R.R. Co., 87 S. C. 415, 423, 424, 69 S. E. 877 (1911); Rivenbark v. Atlantic Coast Line Ry., 124 S. C. 136, 141, 117 S. E. 206 (1922); Deason v. Atlantic Coast Line Ry. 142 S. C. 328, 333, 140 S. E. 575 (1927); Garmany v. Southern Ry., 152 S. C. 205, 220, 149 S. E. 765 (1929) (dissenting opinion); Fairey v. Southern Ry., 162 S. C. 129, 132-133, 160 S. E. 274 (1931). In Fairey, Justice Cothran stated (162 S. C. at p. 132) ". . . [T]his Court [has] held that a person dealing with surface water on his own land is not required to exercise even reasonable care with regard to the rights of other landowners . . . ." See also, discussion of Baltzeger in Crosby v. Southern Ry., 221 S. C. 135, 138, 69 S. E. 2d 209 (1952).

Of course the South Carolina cases recognize that it is an actionable wrong for one to cast surface water on another's land in concentrated form. See Rivenbark v. Atlantic Coast Line Ry., *supra;* Garmany v. Southern Ry., *supra*. In this instant case such basis of liability was not present, however.

7. Deason v. Atlantic Coast Line Ry., *supra* note 3. See discussion of this case in Kinyo & McClure, *Interference With Surface Waters*, 24 Minn. Law Review 891, 933 note 200 (1940.) See also Judge Parker's comment, quoted in note 12, *infra*.

8. Of course it may be that the Court considered the growth of weeds to constitute a nuisance, quite aside from the accumulation of surface

alization of this very proper decision[9] might have been a frank repudiation of the *Baltzeger* dictum and recognition of the fact that in his disposition of surface water a landowner should enjoy no exemption from the rules applied under the rubric, "nuisance *per accidens*," to other kinds of unreasonable conduct in the use of land.[10]

In an appraisal of the South Carolina law of surface water two leading scholars stated:

> In South Carolina it is said that the common enemy rule is in force, subject to the qualification that a possessor of land is not privileged by altering the flow of surface water, to create a "nuisance" or a "nuisance *per se*." The general acceptance of this proposition seems to have been brought about through the reiteration of a dictum from a relatively early case. Whatever its source, however, the proposition is relatively meaningless, and its principle effect has been to throw the South Carolina law of surface waters into confusion.[11]

Whether *Bowlin* has wholly dispelled this confusion is doubtful.

A further matter discussed was ". . . the general rule that an individual can neither abate, nor recover damages for, a public nuisance, unless he can show that he has sustained therefrom damage of a special character, distinct and different from the injuries suffered by the public generally." It was defendant's contention that even if his accumulation of rain water be considered a nuisance *per se* public in character, the complaint failed to state a cause of action since it alleged no special damage sustained by plaintiff. However, the Court found ample precedent to support its conclusion that quite

---

water. If this be true, however, the quoted statement is less than adequate explanation. As to whether non encroaching vegetation is a private nuisance, see Annot. 83 A.L.R. 2d 936 (1962). See also Annot. 84 A.L.R. 2d 653 (1962), which collects the cases dealing with the question whether an automobile wrecking yard constitutes a nuisance.

9. To the effect that conditions which breed or tend to breed mosquitoes constitute a nuisance, see Annot. 61 A.L.R. 1145 (1929).

10. See PROSSER, TORTS 415, 416 (2d ed. 1955); Kinyon & McClure, *Interference With Surface Waters*, 24 MINN. LAW REVIEW 891, 933 note 200.

11. Kinyon & McClure, *Interference With Surface Waters*, 24 MINN. LAW REVIEW 891, 933 (1940). The authors' footnotes, which analyze certain of the South Carolina cases, are omitted. The dictum referred to is the quoted passage from Baltzeger v. Carolina Midland Ry. Co., note 5 *supra*.

aside from any injury to the public, as to plaintiff it was a private nuisance for which he had a private remedy.[12]

Defendant's further argument that the alleged damages were not direct but consequential, the Court found to be without merit, as "[t]he damages complained of flow directly from the alleged improper maintenance and operation of this junk yard."

Obstruction of a Watercourse

Johnson v. Williams,[13] was a suit between adjoining landowners in which plaintiff recovered nominal damages for the flooding of her land, caused by defendant's construction of a dam which obstructed a ditch through which water from plaintiff's land drained across that of defendant. A mandatory injunction ordering removal of the dam also was granted.

On appeal the judgment of the trial court was affirmed. "The basic issue," said the Court:

> Was whether or not the drainway across the lands of respondent and appellant was a natural watercourse . . . . The obstruction of the flow of surface water is generally not actionable, while the obstruction of the flow of a natural watercourse, if it results in damage to an adjoining landowner, is actionable . . . . [T]here is ample evidence upon which to base the findings of the jury that [defendant] obstructed a natural watercourse.

The opinion discusses in detail the distinction between surface water and the water of a natural watercourse as, well as the law applicable to obstructions of such waters.

Plaintiff's action was maintainable without proof of actual monetary loss, since damage would be presumed from the wrongful flooding of her land. Moreover, the possibility that defendant's creation of a permanent drainage obstruction under claim of right might ripen into a prescriptive interest was sufficient injury to sustain plaintiff's action.

12. Among other cases, the Court referred to Sullivan v. American Mfg. Co., 33 F. 2d 690 (4th Cir. 1929) wherein Judge Parker concluded (at p. 694): "So far as the Baltzegar Case [note 5 *supra*] may be said to hold that the ponding of water which creates a public nuisance is not actionable at the instance of an individual whose property is damaged thereby, it is inconsistent with the later case of Deason v. Sou. Ry. Co. [note 6, *supra*] . . . and to the extent of the inconsistency must be held to be overruled by it."

13. 238 S. C. 623, 121 S. E. 2d 223 (1961).

Defendant contended that in view of his substantial investment to develop the drainage upon his farm, a mandatory injunction should not issue, relying upon the following passage from *Forest Land Co. v. Black*:[14]

> In cases where a mandatory injunction is sought, the general rule in this country . . . is that the court will balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damages as seem most consistent with justice and equity under the circumstances of the case.

In reply the Court stated:

> With the foregoing doctrine we agree in general, but as stated in 28 Am. Jur., Injunctions, Section 55: "Certainly, the doctrine does not mean that substantial, certain, and irreparable damages to the complaining party, which might be prevented by injunction, are to be left without remedy because of the fact that greater damages would result to the defendant, a wrongdoer, by issuing the injunction."[15]
>
> The granting of injunctive relief rests in the discretion of the trial court, and we think that it was properly exercised in this case.

14. 216 S. C. 255, 266, 57 S. E. 2d 420 (1950).

15. If the flooding of plantiff's land be considered a private nuisance [see PROSSER, TORTS 406 (2d ed 1955), 55 AM. JUR., *Waters* § 18], earlier South Carolina cases would indicate that a court has no discretion to withhold injunctive relief. Thus in Williams v. Haile Goldmining Co., 85 S. C. 1, 6, 66 S. E. 117, reh. den. 85 S. C. 1, 66 S. E. 1057 (1910), the Court said: "Whatever may be the doctrine in other States, under the provisions of the Constitution of this State, that private property shall not be taken for private use without the consent of the owner, the Court could not have considered, in deciding whether to grant or refuse the injunction, the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream. That question would be pertinent only in an application addressed to the Legislature to give such corporations the power of condemnation." See also Davis v. Palmetto Quarries Co., 212 S. C. 496, 500, 48 S. E. 2d 329 (1948). The wisdom of the rule declared in these cases is doubtful. See Nicholson, *The Trend — To balance the Injuries*, 4 S.C.L.Q. 540 (1952); RESTATEMENT, TORTS § 941 (1939). The instant case, it would seem, is properly explainable as one not calling for a balancing of the injuries, rather than one denying the existence of such power. The Court's final statement that "[t]the granting of injunctive relief rests in the discretion of the Trial Court . . ." would indicate that at this date it entertains no doubt of its injuries.

Rule against Perpetuities

A will contest, *Black v. Gettys*,[16] posed interesting questions, not only in the law of property, but also in the field of trusts and of specific performance of contracts. Only the property questions are considered in this section of the survey.

The testator was survived by his wife, 4 children (only one of whom was of age), and 2 grandchildren. As amended by codicil, item 6 of his will provided:

> I give, bequeath and devise to my Trustee . . . to have and to hold the same upon the trusts following, namely: To pay the income thereof, after expenses and taxes, to my wife, for a period of ten (10) years after my death, or for so long during ten (10) years after my death as she shall remain unmarried, in quarterly, semi-annual or annual installments, as may be convenient to my Trustee, and, thereafter, for a period of twenty (20) years, to pay the income thereof, after expenses and taxes, in convenient quarterly, semi-annual or annual payments, as follows: One-half (½) to my wife, Ola, for so long during said period as she shall remain unmarried, and one-half (½), or such part of said income not paid to my wife, to my children, Nancy Jean Lovick, Anna, John and Betty *(per stirpes)*, share and share alike, and then at the expiration of thirty-six (36) years after my death, my Trustee shall deliver my trust estate to my aforesaid children, *(per stirpes)*, in such form as it may then exist, or in kind or money, share and share alike, *(per stirpes)*, in full ownership, and the trust thereon shall thereupon terminate.

Subsequent to probate of the will in common form,[17] the widow and adult child sued to obtain, among other things,[18] a declaration that item 6 as amended was violative of the rule against perpetuities, and that the property named there-

16. 238 S. C. 167, 119 S. E. 2d 660 (1961).
17. Record, p. 1.
18. Plaintiff also sought an adjudication that item 5 was violative of the rule against perpertuities as well as the removal of the executor and trustee on the ground of extreme hostility and prejudice against the widow. In turn the executor and trustee filed a cross petition in which he asked that the widow be required to perform the terms of a stock option contract entered into between her and her husband. Plaintiffs did not appeal adverse rulings on the two matters first mentioned, but did successfully appeal from the circuit decree ordering performance of the stock option contract.

in must pass under the residuary clause to the widow free of trust.

Plaintiff's argument that item 6 was violative of the rule was bottomed upon the contention that the persons to take at the termination of the trust were determinable not within lives in being, but only at the expiration of a 36-year period in gross.[19] This was true, it was alleged, because the gift in remainder "to my aforesaid children, *(per stirpes)*" was a gift to a class whose membership was not determinable until the time for distribution, since the testator's use of *per stirpes* evidenced his intention that only the children then surviving and the issue of deceased children should share in the gift. The scheme of the will, it was said, showed the testator's intention to benefit his descendants rather than the heirs, next of kin, or legatees of his children. Furthermore, the "divide and pay over" rule was applicable, in that the testator's intention to postpone vesting of the interest in remainder was manifested by his direction that "at the expiration of 36 years after my death, my Trustee shall deliver my trust estate to my aforesaid children, *(per stirpes)*. . . ."

The Supreme Court agreed with both the special master and the circuit judge that the provisions of item 6 were not violative of the rule against perpetuities. The familiar preference in doubtful cases, for a vested rather than contingent construction, was invoked. The gift "to the aforesaid children" was a gift to named individuals rather than one to a class, since just prior thereto in the same item there had been a gift to the children as named individuals.[20]

Nor did the Court give to *per stirpes* the technical meaning assigned it by plaintiffs.

> . . . When this phrase is considered in connection with its use in other portions of the will, we do not think it implies a requirement of survival; rather, it was used in

19. After noting ". . . the question of whether public policy requires that an indestructible private trust be limited in duration even though all interests are vested," the Court declared ". . . this interesting question need not now be decided and we intimate no opinion thereabout. No attack is made on the duration of the trust as violative of public policy. Here appellants have invoked only the common law rule against perpetuities."

20. Cf. Note 61 A.L.R. 2d 212, 245 (1958): "The conclusion that a gift to the 'children' of the testator so designated and not named in the language of gift, was made to them merely as individuals, may rest wholly or in part upon the circumstance that the testator had already named his children, since in such a case the later words, 'my children,' may have been used merely to avoid an unnecessary repetition of names."

> elaboration of the phrase "share and share alike" to indicate that the corpus of the trust was to be divided among the named children in equal shares . . . .
>
> It is argued that this will was drawn by an attorney who must have known the technical meaning of the words *"per stirpes"* and used them to imply that to take, a child must survive the termination of the trust. But it may just as plausibly be said that if this was the meaning intended, he would have used express words of survivorship or inserted a substitutionary clause.
>
> We conclude that the words *"per stirpes"* were not used in this Item to imply survivorship, nor does the phrase designate alternative takers . . . .[21]

The Court found a number of ". . . circumstances [to] fully rebut any inference under the divide and pay over rule that the beneficiaries must survive the termination of the trust." 1. The gift in issue was to named individuals and not to a class. Earlier South Carolina cases cited as stating the rule involved class gifts, and many courts limit application of the rule to such gifts. In the few jurisdictions which apply it to gifts to individuals, ". . . the force of the rule is given much less effect." 2. The gift here involved was found to come within two exceptions to the rule:

> (1) The purpose of postponing the division of the corpus of the trust was primarily to provide an income to the widow and not to let in additional members of a class.
>
> (2) The children after the expiration of ten years share in the distribution of the income and for their benefit the trustee is authorized under certain circumstances to invade the corpus.

3. "[T]he direction to the trustee," said the Court, "is not technically to divide and pay over, but simply to 'deliver' the corpus to the remainderman." 4. The rule ". . . is only a rule of contruction. It does not itself create the requirement of survival, but at times is of value in the determination of whether such requirement was intended by the language of the gift."

21. Plaintiffs had cited 3 RESTATEMENT, PROPERTY § 285, comment k (1944) in support of the view that the limitation's inclusion of *per stirpes* broadened the meaning of "aforesaid children" to include grandchildren, but the court found the comment to be applicable only to class gifts, whereas the gift in issue was construed as one to named individuals.

Having concluded that no part of the provisions of item 6 were violative of the rule against perpetutities, the Court found it unnecessary ". . . to determine whether if the rule were violated, the trust created should be allowed to stand for the period fixed by the rule."

A further contention that the trust created by item 6 was void because of indefiniteness of beneficiary in the event of certain contingencies, was found to be without merit.

Time of Vesting — Extent of Beneficiary's Interest

In *Leathers v. Leathers*,[22] a suit to construe a testamentary trust, the testator directed that his assets be held in trust for the support of his widow for life, and at her death that the trust should continue until Hudson, one of his two sons, should reach the age of 30 years:

> . . . at which time I direct my said Trustee to divide my said trust estate into two equal parts, one part to be forthwith transferred to my son, Hudson, freed and discharged of all trusts; the other one-half of my trust estate to be continued as a trust fund for the sole benefit and use of my son, John, the entire income, after the payment of expenses of said trust, to be paid to my said son, John, at least twice a year. Should John's business ability ripen and mature to such an extent as . . . should warrant the turning over to him of . . . the trust fund herein created for his benefit . . . my said Trustee is hereby authorized, empowered and directed to pay over to my said son, John, . . . the trust fund . . . freed and discharged of all trusts.
>
> * * * *
>
> Should either of my sons die before the time for the distribution of my estate as hereinabove fixed, leaving a child or children surviving him, then, and in that event, such child or children shall receive the part of my estate to which their father would have been entitled. Should either of my sons die without leaving a child or children surviving him but leaving a widow, then, and in that event, his share shall go one-half to his widow and one-half to his surviving brother under the terms of the trust hereinabove created, and in the event either of my sons should die without leaving either a widow or

22. 239 S. C. 94, 121 S. E. 2d 354 (1961).

> child or children surviving him, then his share shall go to his surviving brother under the terms of the trust hereinabove created.

At the time of suit the widow was dead and one-half the assets had been distributed to Hudson, who had attained the age of 30. It was conceded that John's business ability had not ripened and matured to such an extent as would require the trustee to turn over to him any part of the trust corpus.

The question presented was whether Hudson had any interest in the undistributed part of the trust fund, he contending that he had a contingent interest which would entitle him to share in any undistributed corpus should John predecease him leaving no children.

The Court agreed with the circuit judge that the entire beneficial interest in the undistributed corpus was indefeasibly vested in John. The provision for a gift over in the event either son should "die before the time for distribution of my estate as hereinabove fixed," had reference to the time fixed for distribution of the estate between the two sons when Hudson attained the age of 30, and not to the time when John's share of the corpus was to be paid him. This, the Court said, was "[t]he only reasonable construction," and since both sons had survived Hudson's attainment of 30, the provision therefore was inapplicable.

Nor did the fact that John's interest was to be held in trust after distribution of Hudson's share indicate that John's interest was limited to and for his lifetime. In such a case the inference is that the testator intended to treat all the objects of his bounty alike,[23] absent a gift over to indicate that a different treatment was intended.[24] Furthermore, "[a] gift of the income of a fund without a limitation as to time is a gift in perpetuity and carries the fund itself . . . ."[25]

It was contended for Hudson that the interest of John could not be more than an equitable life estate since the testator ". . . intended to and did create a spendthrift trust

23. Quoting 1 SCOTT, TRUSTS § 128.2 p. 669 (1939) to this effect.
24. Quoting RESTATEMENT (SECOND), TRUSTS § 128 Comment (c) (1959) to this effect.
25. The quoted language is part of a lengthy passage from Millard's Appeal, 87 Pa 457 (1878). To the same effect is McFadden v. Hefley, 28 S. C. 317, 324, 5 S. E. 812, 13 Am. St. Rep. 675 (1888). For additional cases, see Note, 174 A.L.R. 319 (1948).

to protect his son . . . ."[26] Finding it unnecessary to reach this question, the Court stated, "We intimate no opinion as to whether a creditor of John could reach the corpus, nor whether it could be transferred or encumbered by him."

Partition Sale Set Aside for Failure to Appoint Guardian Ad Litem for Mentally Incompetent Parties

Lister v. Gossett[27] was an action to set aside a partition sale on the ground that two mentally incompetent persons owning an interest in the land had not been represented by a guardian *ad litem*. Affirming the circuit decree, the Court held that the sale was properly set aside when the plaintiffs in the original action, although aware of the mental condition of the incompetents, failed to apply for the appointment of a guardian *ad litem*, as required by statute.[28]

Setting Aside Deed Obtained by Fraud

In *Watson v. Wall*,[29] wherein the executrix of a deceased grantor sought to set aside a deed on the grounds that it had been procured by fraud, the Court agreed with the circuit judge (who had reversed a special referee) that the evidence established that the grantor, although of subnormal mentality, fully understood the transaction whereby he sold his interest to his brother, a capable businessman, and did not show that the brother defrauded the grantor or took undue advantage of him. The case is further discussed in the Survey of Evidence.

Cases Omitted

A number of cases which are discussed in detail in other sections of the annual survey have been omitted from the property section. One[30] which is discussed in the Wills and

26. Appellant's Brief p. 6, which cited Spann v. Carson, 123 S. C. 368, 116 S. E. 7 (1923); Lynch v. Lynch, 161 S. C. 170, 159 S. E. 26 (1931); and Albergotti v. Summers 203 S. C. 137, 26 S. E. 2d 395 (1943) for the proposition that the interest of the beneficiary of a spendthrift trust cannot exceed an equitable life estate. Statements to this effect in the above cases are *obiter dicta*, and the modern weight of authority is *contra*. See SCOTT, TRUSTS § 153 p. 1075 (2d ed. 1956). Restatement (Second), Trusts § 153 (1954) (modifying the first RESTATEMENT, TRUSTS).

27. 239 S. C. 22, 121 S. E. 2d 235 (1961).

28. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-236, as amended 47 Stat. 2042 (1952).

29. 239 S. C. 109, 121 S. E. 2d 427 (1961).

30. Furman University v. McLeod, 238 S. C. 475, 120 S. E. 2d 865 (1961).

Trusts section, is the latest of several suits[31] involving the title to the old campus of Furman University, acquired under deeds made by Vardy McBee more than a century ago. *Brunson v. Sports*,[32] a suit by the beneficiaries of an estate against a grantee from the administratrix, who herself had taken title to land in satisfaction of a debt due the estate, raised questions of adverse possession and of bona fide purchase of the legal title. This case also is included in Wills and Trusts.

Walter J. Klein Co. v. Kneece,[33] a suit by a judgment creditor to set aside an allegedly fraudulent conveyance of realty by the judgment debtor, is discussed under Miscellaneous, and under Pleading.

Discussion of three cases[34] involving the Motor Vehicle Title Law[35] will be found in Security Transactions.

LEGISLATION

Amendment of the Bailment Statute

Discussion of the 1962 Amendment to the Bailment Statute[36] will be found in Security Transactions.

Horizontal Property Act

Act No. 750[37] provides for South Carolina Horizontal Property (Condominium) legislation comparable to that enacted in Puerto Rico[38] and a number of states.[39] Generally speaking, the purpose of such legislation is to allow ownership[40]

31. Prior cases are Ex parte Trustees of Greenville Academies, 7 Rich Eq. 471 (S. C. 1854); McMannaway v. Clapp, 150 S. C. 249, 148 S. E. 18 (1929); Furman University v. Glover, 226 S. C. 1, 83 S. E. 2d 559 (1954).

32. 239 S. C. 58, 121 S. E. 2d 294 (1961).

33. 239 S. C. 478, 123 S. E. 2d 870 (1962).

34. Clanton's Auto Auction Sales, Inc. v. Harvin, 238 S. C. 352, 120 S. E. 2d 237 (1961); Ex Parte Dart, 238 S. C. 506, 121 S. E. 2d 1 (1961); Clanton's Auto Auction Sales, Inc. v. Young, 239 S. C. 250; 122 S. E. 2d 640 (1961).

35. 50 Stat. 594 (1957), as amended 51 Stat. 1730 (1960).

36. 52 Stat. 2158 (1962) amending CODE OF LAWS OF SOUTH CAROLINA § 57-308 (1952).

37. 52 Stat. 1866, approved March 16, 1962.

38. A Condominium bibliography compiled in September 1962 by Ernest Henry Breuer, State Law Library, New York State Library, describes Puerto Rico as ". . . the leader in the use of Condominium."

39. The Breuer Bibliography, note 38, *supra*, while noting that the listing may be incomplete, states that Arizona, Arkansas, Hawaii, Kentucky, South Carolina and Virginia have Condominium Statutes, and that such legislation has been proposed in the District of Columbia, Massachusetts, New Jersey, New York, Oklahoma and Oregon.

40. Section 6 of the South Carolina Act, note 37, *supra*, provides: "Any apartment may be held and owned by more than one person as *joint*

of individual apartments in a building just as if each were entirely independent of the other apartments, together with a shared ownership of such general common elements as the land, foundations, main walls, stairways, halls, elevators, roofs, etc. Since 1961, the purchaser of a fee interest or a long-term leasehold interest in one of these apartments can qualify for a federally insured loan,[41] and existence of this loan provision has furthered enactment of Condominium legislation.[42]

As the property section of the annual survey of South Carolina law is not appropriate for a detailed study of Condominium legislation, an analysis of the South Carolina Act must be made in some later article.

Renunciation of Dower

Last year the Legislature enacted a statute[43] which struck out the general section[44] dealing with renunciation of dower and substituted therefor a short section intended, as indicated by the act's title, "to simplify the provisions relating to renunication of dower." Prior to amendment of the section there was an express provision that renunciations taken by a notary public within the State were valid despite the failure of the notary to affix his official seal to the certificate of renunciation, and omission of the seal was common practice. However, the substituted section,[45] without making an excep-

tenants, as tenants in common, as *tenants by the entirety* or in any other real estate tenancy relationship recognized under the law of this State." (italics added)

The provision for the ownership of an apartment by tenants by the entirety would appear to be inadvertent, as it has been held that such tenancy as a common law estate no longer exists in South Carolina. Davis v. Davis 223 S. C. 182; 75 S. E. 2d 46 (1953). It is unlikely that the Legislature intended by indirection to make a statutory restoration of the estate solely in the area of Condominium apartments. Also, the provision for ownership of an apartment by joint tenants must be read in the light of Code Section 19-55.

Probably the inclusion of both provisions was unintentional, and explained by the Act's importation from another state. Cf. Code § 52-12 (2) of the Uniform Partnership Act, which similarly makes mention of joint tenancy and tenancy by the entirety. See comment thereon in KARESH, *Partnership Law and the Uniform Partnership Act in South Carolina*, 3 S.C.L.Q. 231, note 126 (1951). It will be noted that the Davis Case, *supra*, is subsequent to the enactment of the Uniform Partnership Act.

41. National Housing Act, § 234, added by 75 Stat. 160, 12 U.S.C.A. § 1715y (Supp. 1961).

42. See, for example, Section 1 of the South Carolina Act, note 37 *supra*.

43. 52 Stat. 416, approved May 4, 1961.

44. CODE OF LAWS OF SOUTH CAROLINA § 19-111 (1952).

45. *Supra*, note 43.

tion in the case of renunciations taken within the State, provided in part: "The officer shall append to the writing his certificate in the form prescribed by Section 19-114 [which details the form of the renunciation], and affix his official seal,[46] if any." In view of the mandatory form of the quoted language, it may be that renunciations taken within the State during the effective period of the substituted statute[47] were defective unless the notary's official seal was affixed.[48]

This year the Legislature acted[49] to remove the requirement of a notarial seal by amending the statute to read as follows:

> Section 19-111. Any woman who has an inchoate right of dower in any lands in this State, whether she be of lawful age or minor, may renounce and relinquish her right of dower by acknowledging it in writing before any officer of this State, or of the state in which the renunciation is executed, or of the United States, who is authorized by law to administer oaths. The officer shall append to the writing his certificate in the form prescribed by Section 19-114. No renunciation of the right of dower, heretofore or hereafter made, shall be held invalid because of the absence of the official seal of the person administering the oath.
>
> When recorded in the county where the real estate is located, the renunciation shall be effective to convey away, bar and terminate the dower right of the woman,

46. CODE OF LAWS OF SOUTH CAROLINA § 49-6 (1952) provides: "Each notary public shall have a seal of office, which shall be affixed to his instruments of publication and to his protestations. But the absence of such seal shall not render his acts invalid if his official title be affixed thereto." Should the question be litigated, it, of course, is possible that the Court may construe § 49-6 in *pari materia* with 52 Stat. 416 (1961). See Bratton v. Burris, 51 S. C. 45, 50, 28 S. E. 13 (1897). Cf. First Presbyterian Church of York v. York Depository, 203 S. C. 410, 422, 27 S. E. 2d 573 (1943). If this is done, renunciations not under the official seal of the notary taken since May 4, 1961, are valid because of the second sentence of § 49-6, *supra*.

47. The substituted statute (52 Stat. 416) was approved May 4, 1961, and continued in effect until Febraury 9, 1962, the date of approval of the 1962 amendment, note 49, *infra*.

48. See Bratton v. Burris, note 46, *supra*, wherein the Court, construing an earlier text of the dower renunciation statute, held that omission of the notary's seal was a fatal defect, and that the invalid certificate did not estop the wife from obtaining dower. See also 39 AM. JUR., *Notary Public* §§ 34, 35 (1942). But see the second sentence of CODE OF LAWS OF SOUTH CAROLINA § 49-6 (1952) set out in note 46, *supra*.

49. 52 Stat. 1689, approved, February 9, 1962, amending CODE OF LAWS OF SOUTH CAROLINA, § 19-111 (1952), as amended 52 Stat. 416 (1961).

although she has executed no deed of conveyance for that purpose.

It will be noted that the 1962 amendment in part provides that "No renunciation of the right of dower, heretofore or hereafter made, shall be held invalid because of the absence of the official seal of the person administering the oath." Insofar as the amendment undertakes to validate renunciations taken prior to its enactment,[50] it seems that it may operate retrospectively to cure a defect (assuming that such exists) arising because of omission of the notary's seal after May 4, 1961 and before passage of the 1962 amendment, provided that the grantor is alive on the effective date of the amendment (Febuary 9, 1962).[51] However, in the event that the grantor did not survive until enactment of the 1962 amendment, since the dower interest of the wife would have become consumate rather than inchoate, it is doubtful that the amendment could operate to defeat her vested interest.[52]

One further provision of the 1962 amendment is worthy of comment. Prior to the amendments of 1961 and 1962, the dower renunciation statute[53] had required, as to renunciations taken without the State, either the affixation of the notary's seal or an attestation of his official character by a clerk of a court of record in the county in which the notary resided. However, the amendment of 1962, without imposing any requirements of attestation of a foreign notary's official character, has removed the requirement of affixation of his official seal. That this was the legislative intent may be doubted, and still further amendment of the dower renunciation statute is not unlikely.

50. The amendment of 1922 (32 Stat. 936) in part undertook to validate dower renunciations not under official seal of the notary taken within the State before the amendment. [This provision of the amendment is one of several provisions now embodied in CODE OF LAWS OF SOUTH CAROLINA § 19-116 (1952).] No case considering the amendment has been found.

51. See Note, 20 A.L.R. 1330 (1922); 17A AM. JUR., *Dower* § 9 (1957).

52. See Note, 20 A.L.R. 1330, 1333 (1922); 17A AM. JUR., *Dower* § 10 (1957).

53. CODE OF LAWS OF SOUTH CAROLINA § 19-111 (1952). Section 1899 of The Revised Statutes of 1893 had expressly required as to renunciations taken without the State, both the affixation of the notary's seal and a certificate attesting his official character. However, the amendment of 1909 (26 Stat. 40) removed the requirement of attestation of the notary's official character. Thereafter, the amendment of 1918 (30 Stat. 807) provided that if the notary failed to affix his official seal attestation of his official character was essential. By the amendment of 1922 (32 Stat. 936) it was expressly provided that renunciations taken by notaries within the State were exempted both from the requirement of affixation of the official seal and the requirement of attestation of official character.