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Wills and Trusts

Coleman Karesh
University of South Carolina School of Law

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WILLS AND TRUSTS

COLEMAN KARESH*

Descent and Distribution — Common Law Marriage

In *Walker v. Walker*,¹ a Fourth Circuit Court of Appeals case, arising on appeal from the Western District of South Carolina, jurisdiction of the District Court was asserted on two grounds, "(1) diversity of citizenship, and (2) unconstitutionality of the laws of the State of South Carolina which, in effect, deny to the child of an alleged common-law marriage the right to inherit from the father." The Court noted that substantially the same questions had been involved in earlier litigation² between the same parties and had been disposed of adversely to the plaintiff, and for the same reasons as there it sustained the District Court's dismissal in this case. In reality, however, in the earlier case the attack was made on the constitutionality of the statute which confines inheritance by an illegitimate to taking from the mother³ and from the mother's side, while here the assertion was that unconstitutionality resided in denial "to the child of an alleged common-law marriage the right to inherit from the father." Whether this is only the plaintiff's view of South Carolina law, or whether it is also the Court's, the proposition is novel and also incorrect. The statute, already noted, limiting inheritance from the mother speaks of an illegitimate child, which presupposes no marriage or an invalid marriage.⁴ It nowhere declares, nor is there any other statute declaring, that the child of a common-law marriage cannot inherit from both parents. It hardly requires a search of authority to be aware that the child of a common-law marriage, which is as valid in South Carolina as a ceremonial marriage, is legitimate and entitled as such to inherit from mother and father.⁵

*Professor of Law, University of South Carolina.

1. 295 F. 2d 35 (1961).

2. 274 F. 2d 425 (1960), reviewed in 1959-1960 Survey of South Carolina Law, 13 S.C.L.Q. 97.

3. CODE OF LAWS OF SOUTH CAROLINA § 19-53 (1952).

4. By statute, in some cases, the offspring of an invalid marriage may nevertheless be legitimate. See CODE OF LAWS OF SOUTH CAROLINA §§ 20-5 and 20-6.1 (1952).

5. See Common-Law Marriage, 12 S.C.L.Q. 355 (1960). See, also, *Campbell v. Christian*, 235 S. C. 102, 110 S. E. 2d 1 (1959); *Mitchell v. Smyser*, 236 S. C. 332, 114 S. E. 2d 226 (1960).

Descent and Distribution — Legitimacy

The report of the case of *Edwards v. Edwards*⁶ describes the action as having been brought by the plaintiff "to have himself declared the natural child of W. S. Edwards and therefore an heir of James M. Edwards." The action actually was to recover a share of the intestate estate of James M. Edwards (who died in 1958), a brother of W. S. Edwards, who had died in 1953. The ultimate question was as to the legitimacy of the plaintiff, who alleged himself to be a child of W. S. Edwards. The appeal concerned itself solely with the question of whether the plaintiff was actually the child of W. S. Edwards, and was disposed of solely on that point, the Supreme Court sustaining the jury's finding that the plaintiff was the natural child of the alleged father. The principal issue was one of evidence — namely, the admissibility of the United States census report for 1920 listing W. S. Edwards and the plaintiff's mother as husband and wife, and the plaintiff as one of their children.

The resolution of the paternity of the plaintiff was important because admittedly the mother of the plaintiff was not married to W. S. Edwards at the time of the plaintiff's birth. The marriage took place in 1915, when the plaintiff was four years old. Prior to 1950 the subsequent marriage of the parents of a child born out of wedlock would not legitimate the child,⁷ but legislation enacted in that year and in 1951 provides that the subsequent marriage of the parents of a child born out of wedlock legitimates the child, and that the legislation is retroactive to the extent that it applies "in all cases in which prior to May 2, 1951, the parents of an illegitimate child shall have married and the father and such child have been living on said date."⁸ If the plaintiff was in fact the child of W. S. Edwards, he would, by virtue of his father's marriage to his mother in 1915, in the view of the statute, be legitimate. If he were not in fact the natural child, the statute of course would not apply. The question of law — the applicability of the statute to the facts in the case — was reserved by the lower court. What its ultimate disposition has been is not disclosed by subsequent reported litigation, and there is no judicial ascertainment

6. 239 S. C. 85, 121 S. E. 2d 432 (1961).

7. *Foster v. Roland*, 205 S. C. 457, 32 S. E. 2d 375 (1944).

8. CODE OF LAWS OF SOUTH CAROLINA § 20-5.1 (1952), applied in *Campbell v. Christian*, note 5, *supra*.

so far on the question of whether legitimation under the circumstances would extend to inheritance not merely from the father but by representation through him — although it would logically seem that the legitimation would be operative in all phases of inheritance.

Executors and Administrators — Claim Against Estate

The problem of the applicability of the statute relieving lands bona fide aliened by heirs or devisees from claims of creditors⁹ is posed in *Harwell v. Scott*,¹⁰ which was an action by a creditor to set aside a conveyance made by a sole heir at law of an intestate and to have the land sold in aid of assets. The named defendant was the heir, and the administratrix of the estate, of her father, who died in 1956. In January, 1958, the plaintiff in this action had brought suit to foreclose a mortgage on another piece of property owned by the decedent and filed a *lis pendens* in connection with the suit. In her complaint she waived judgment for any deficiency, but in January, 1959, she amended her complaint to ask for such a judgment. The mortgaged property was thereafter sold with a resultant deficiency judgment, and it was this debt which was the basis of the plaintiff's claim in the present action. Before the complaint's amendment, the defendant, in June, 1958, conveyed the property in suit to a realty company (which was joined as a defendant in this action) for a recited consideration of \$100 and the satisfaction of a claim for \$670 held by the grantee against the estate. It was this conveyance — made more than six months after the intestate's death, for a valuable consideration, and before any action brought on the debt to the plaintiff — which the plaintiff sought to set aside.

The lower court, affirming the report of the master, dismissed the action on the ground that the transfer was a bona fide alienation for valuable consideration within the meaning of § 19-704 of the Code. The exceptions raised only the point that the consideration was nominal and grossly inadequate. The Supreme Court affirmed the lower court.

9. CODE OF LAWS OF SOUTH CAROLINA § 19-704 (1952). The statute defines a bona fide alienation as an alienation "based upon valuable consideration between the parties thereto and made before action brought and after the expiration of six months following the death of the ancestor or testator." See *Floyd Mortuary, Inc. v. Newman*, 222 S. C. 421, 73 S. E. 2d 444 (1953), for construction of this language.

10. 238 S. C. 267, 120 S. E. 2d 106 (1961).

The Court pointed out that at the time of the conveyance, the plaintiff, having elected to look solely to her security by waiver of the deficiency, was no longer in the position of a general creditor of the estate, and she could therefore not complain of the conveyance which had been made; and that her subsequent amendment to recover a deficiency judgment and obtaining it could not restore her to her original position as a creditor having both a security and a debt — at least not as to the intervening rights of the grantee. In any view of the case, it would be difficult to conceive of fraud or impropriety committed through the conveyance, whatever may have been the motive and however slight the consideration, if at the time of the conveyance there was no general obligation of the estate to the plaintiff. The Court further declared that the defendant did not have to invoke § 19-704 of the Code as protection against the plaintiff's claim, and that the plaintiff's only ground of attack could be that of fraud, which she had not made out.¹¹

Wills — Construction

In *Citizens & Southern Nat'l Bank v. Roach*,¹² the question was whether certain language in the will in suit indicated a future, rather than a present, testamentary intent. The will was drawn by the testator himself, a layman — a factor to which the court called attention. It gave a sum of money in trust to the testator's foster son on condition that he not marry a certain woman, and in the event he did so marry "his part will then go to Frank G. Roach" (the named defendant). The trust was to pay the foster son a stated sum of money until he reached the age of 35, when the corpus and accumulations were to be paid over to him. It was then, in the same item, provided "In case of the death of T. J. Blackwood [the foster son] any amount left will be willed to Frank G. Roach, my brother."

The legatee, T. J. Blackwood, died before the testator, without having married. The contention on the part of

11. The grantee realty company, however, to protect its title to the land, would have to rely upon the statute. It would seem, under the facts, that by waiving her judgment, the plaintiff may also have foregone the right to look to the grantor-heir for what had been received for the conveyance or for the land's value. The statute, while it relieves the land from debts, does not relieve the heir who has sold it. He remains liable for the value of the land he has sold. CODE OF LAWS OF SOUTH CAROLINA § 19-703 (1952).

12. 239 S. C. 281, 122 S. E. 2d 644 (1961).

those resisting the claim of Frank G. Roach was that the words "will be willed" denoted an intent on the part of the testator to make only a future disposition of the fund, which would negative an effective disposition of the fund in favor of the brother, with a consequent intestacy — there being no residuary clause. The contention of the brother was that he was an alternative legatee, taking by the will itself. To this position both the lower court and the Supreme Court agreed. The issue to which the Court addressed itself and the governing principles were thus stated:

Did he [the testator] intend to thereby designate Frank G. Roach as substitute legatee in the event of the death of the primary legatee, T. J. Blackwood, or did he merely express an intention to do so in some future instrument? To constitute a valid bequest to Frank G. Roach, the language must have been used in a dispositive sense at the time of the execution of the will. If the provision refers to something which the testator intended to do in the future, as opposed to something then being done by him, it does not constitute a testamentary disposition.

The Court, in reaching its conclusion, attended to the rule that the will was to be read as a whole and the language of the controversial item not to be read in isolation. The appellants' contention was that the words "will be willed" were "unambiguous language of futurity" and did not show the necessary testamentary intent. The Court remarked that "If the foregoing language is isolated from the other provisions of the will, the contention of the appellants would probably be correct." There were fifteen bequests in the will, and in each there were alternative bequests. The language was varied: "will be willed"; "shall be paid over," "will then go," "this money goes," and "is to go." The Court's view was that these expressions were all used in the same sense — namely, to indicate a presently made disposition by way of substitution. Nothing else in the will indicated the contrary, and the interpretation given by the lower court was the reasonable one which effected the intention of the testator and gave force to every part of the will.

There can hardly be dissent from the result reached by the Court and the reasoning used to arrive at it. One may, however, differ with the Court's observation that if the words "will be willed" were "isolated from the other provi-

sions of the will, the contention of the appellants would probably be correct." If the will consisted of a single dispositive item bequeathing the entire estate in the same fashion, it would be, it is submitted, improbable and implausible, rather than the converse, that the testator intended to perform some future act to bring the second gift into operation.

Although the words were "unambiguously" in the future tense, the sense or meaning of the words would not necessarily be limited to future conduct by the testator. The words "will be willed" can carry the imputation of adding to them the words "by this will," rather than the imputed addition of "by me." Taking into account the presumption against intestacy, it could well be argued that the words pointed unambiguously to a present disposition, or at least that they presented a patent ambiguity which could be resolved from the will itself.¹³

In two other cases in the survey period involving construction of wills the Court makes mention of and resorts to some familiar rules of construction. The cases, *Black v. Gettys*,¹⁴ and *Leathers v. Leathers*,¹⁵ are dealt with in detail under the heading of Property, since they deal with the nature of estates created, but they are relevant here for their consideration of the rules of construction. Both make the point that the cardinal rule of construction is to ascertain and effectuate the testator's intention, unless it contravenes some well settled rule of law or public policy, and that each portion of the will must be considered in relation to the other portions. These propositions have already been noted in *Citizens & Southern Nat'l Bank v. Roach*, discussed just previously under this topic. In addition, in *Leathers v. Leathers*, the Court, in dealing with a testamentary trust, utilizes the presumption against intestacy, and extends it similarly against intestacy as to any part of the corpus of a testamentary trust.

In *Dial v. Ridgewood Tuberculosis Sanatorium*,¹⁶ the constructional question was whether a direction in the testatrix's will that all estate and inheritance taxes be paid from the residuary estate was intended to charge the residue solely as

13. See *Jennings v. Tabert*, 77 S. C. 454, 58 S. E. 420 (1907); *Rogers v. Morrell*, 82 S. C. 402, 64 S. E. 143 (1908).

14. 238 S. C. 167, 119 S. E. 2d 660 (1961).

15. 239 S. C. 94, 121 S. E. 2d 354 (1961).

16. 240 S. C. 64, 124 S. E. 2d 598 (1962).

against property which was appointed by the testatrix under a power contained in her late husband's will. The lower court held that there should be an equitable apportionment among the residuary beneficiaries and the beneficiaries of the appointed property. The Supreme Court reversed. Perhaps the principal factor that led the Court to the determination of the testatrix's intent that the residuary estate alone should bear the burden of the taxes was her use throughout of the terms "give, devise and bequeath" with respect to not only her individual property but the property which she disposed of by appointment. Other language in her will gave rise to the same conclusion. Also influential was the fact that the testatrix had been advised by her counsel, who had estimated the value of her estate, that it included the property subject to the power of appointment.

The lower court had relied upon *Myers v. Sinkler*,¹⁷ in which there had been a holding of apportionability, but the Supreme Court noted essential differences in the two cases, pointing out that there the taxable estate consisted of "two separate entities" — the probate estate and the assets of an irrevocable inter vivos trust over which the testatrix had no power of testamentary disposition — and that the will did not indicate an intention to charge the residuary probate estate "with the burden of the taxes generated by the non-probate estate." In *Myers*, the Court said, the testatrix was not aware that the assets of the non-probate trust were part of the taxable estate; in this case the testatrix knew that the property subject to appointment comprised a part of that estate; and while the property passed to the appointees by virtue of the power created by her husband's will the power to dispose of it by her will "was as absolute as if she had owned it personally."

Resulting Trust — Constructive Trust — Laches

In *Ramantanin v. Poulos*,¹⁸ an attempt on the part of the plaintiff to establish a resulting or constructive trust in real estate, the title to which had been taken by his deceased father, was defeated because of laches. The basic contention of the plaintiff was that funds derived from the sale of property owned by his father as life tenant and himself

17. 235 S. C. 162, 110 S. E. 2d 241 (1960).

18. 240 S. C. 13, 124 S. E. 2d 611 (1962).

as remainderman had been invested by the father in the purchase of the real estate in suit in the father's sole name, in violation of a written agreement between them that the funds so realized should be held in the same interests and when they were invested the investment was to be owned in the same way. The master and the circuit judge concurred in finding that the evidence fell short of "that clear, definite and unequivocal proof required in the establishment of either a resulting or constructive trust," and that even if a trust relationship had been proved the plaintiff was barred by his laches. The Supreme Court found it unnecessary to decide whether the alleged trust met the standard required, or whether the trust was resulting or constructive,¹⁹ and upheld the conclusions below as to laches. A significant factor leading to the result was that the plaintiff knew in 1947 that title to the property purchased was in the father's sole name (the purchase had been made two years earlier), and the further fact that a demand had been made by the plaintiff upon his father in that year for a correction of the title according to the agreement, followed by a refusal by the father, and without later prosecution of a suit by the plaintiff to enforce his demand. The father died in 1959, and this suit was not commenced until 1960. Applying the tests for laches — "laches connotes not only undue lapse of time, but also negligence and opportunity to have acted sooner, and all these three factors must be satisfactorily shown before the bar in equity is complete"²⁰ — the Court concluded that from the facts all these elements were present and were therefore sufficient to bar the plaintiff's assertion of his rights.²¹

19. As to the difference between a purchase-money resulting trust and a constructive trust where the funds of another person are used in the acquisition of property, see the 1960-1961 Survey of South Carolina Law, 14 S.C.L.Q. 264, n. 84 (1962). The facts showed that the father had bought the land with his own money. The controversy actually revolved about the funds used in erecting improvements upon it. If the trust funds were used in improvements, the remedy would seem to be an equitable lien, rather than a resulting or constructive trust. RESTATEMENT, RESTITUTION, § 206 (1937); RESTATEMENT (SECOND), TRUSTS § 202, comm. f. (1959). See *Brazel v. Fair*, 26 S. C. 370, 2 S. E. 293 (1886).

20. The quotation is from *Babb v. Sullivan*, 43 S. C. 236, 21 S. E. 279 (1894).

21. It would seem that the father's known repudiation of the trust in 1947 would start the Statute of Limitations running and would bar the action without regard to the elements appropriate for laches. See *Jones v. Goodwin*, 10 Rich. Eq. 226 (S. C. 1858), constructive trust; *Beard v. Stanton*, 15 S. C. 164 (1880), constructive trust; *Miller v. Saxton*, 75 S. C. 237, 55 S. E. 310 (1906), purchase-money resulting trust; 45 A.L.R. 2d

The vital issue of lapse of time also arose in another case, *Brunson v. Sports*.²² There were in addition, however, important issues as to the nature of the trust created, the status of a purchaser from the alleged trustee, and the outcome of an accounting. The action was one to impress a trust upon land to which one of the defendants had legal title. The facts began with administration of an estate in 1929 and a debtor's conveyance of land to the administratrix in her individual name in consideration of the surrender of a note given by the debtor to the intestate. The administratrix was an heir — a sister of the decedent — and the other beneficiaries were a niece and nephews, children of a predeceased sister. The grantee's purpose in accepting the conveyance was to hold the land for the benefit of herself and the other heirs — a fact which in part was demonstrated by a petition signed by her, addressed to the probate judge, declaring that she held in trust for those entitled to the property of the estate she represented. The petition sought the Probate Court's approval of the transaction, but only a prepared but unsigned order was found. The grantee occupied the land until 1951 when she sold it to one R. A. Dukes, one of the defendants. The aunt died in 1955, and this action was begun in 1956.

The lower court held that the land was subject to a trust in favor of the niece and nephews as to one-half the property, that the right was not barred by lapse of time, and that the holder of the legal title had to account. The Supreme Court affirmed except as to the amount due on the accounting.

The holding both below and on appeal was that in effect the administratrix had in good faith taken title to property with fiduciary funds and that thereupon a resulting trust arose in favor of the heirs, other than herself, as to one-half.²³ Both courts held that the administratrix's subsequent

382 (1956); 55 A.L.R. 2d 220 (1957). See also, *Brunson v. Sports*, note 22, *infra*, discussed in this Survey.

22. 239 S. C. 58, 121 S. E. 2d 294 (1961).

23. Relying on *Kirton v. Howard*, 137 S. C. 11, 134 S. E. 859 (1926); *Haynsworth v. Bischoff*, 6 S. C. 159 (1874); *Walker v. Taylor*, 104 S. C. 1, 88 S. E. 300 (1916). Whether a resulting trust as distinguished from a constructive trust arises where a fiduciary uses funds of his estate to acquire property in his individual name seems, in South Carolina, to depend upon whether there was good faith in the use of the funds: resulting trust if there was, constructive trust if there was not. *Green v. Green*, 56 S. C. 193, 34 S. E. 249 (1899). But see *Palmetto Lumber Co. v. Risley*, 25 S. C. 309 (1886), where the president of a company satisfied a debt of the

conduct — *i.e.*, after obtaining title — indicated her good faith and revealed the facts from which the alleged beneficiaries' rights arose. The Supreme Court's statement is that "It, in substance, placed her in the same relationship to the property and to the *cestui que trust* as that of an express trustee."²⁴ Both courts rejected the defense of laches, which was based on two grounds: (1) that the original grantee

company in consideration of the transfer to him individually of real estate, the lower court terming the trust constructive, and the Supreme Court calling it resulting. See, also, *McNeill v. Morrow*, Rich. Eq. Cases 172 (S. C. 1832), where a guardian satisfied a debt to his estate by taking a transfer of slaves to himself; the trust was termed resulting. In some cases there has been no description of the trust other than as a trust. *Brazel v. Fair*, 26 S. C. 370, 2 S. E. 293 (1886); *Sparks v. McCraw*, 112 S. C. 519, 100 S. E. 161 (1919); *Richardson v. Day*, 20 S. C. 412 (1883). On the whole, however, the cases in South Carolina have been fairly consistent in treating the trust created in good faith obtaining of title by the fiduciary as resulting. *Phillips v. Yon*, 61 S. C. 246, 39 S. E. 618 (1901); *Ex Parte Johnson*, 145 S. C. 259, 288, 145 S. E. 113 (1928). The inclusion in the catalogue of resulting trusts of the trust arising from use of trust funds seems to stem from the classification of resulting trusts employed by PERRY TRUSTS § 38 (3d ed. 1882), cited in *Rogers v. Rogers*, 52 S. C. 388, 29 S. E. 812 (1897), and followed frequently thereafter. The RESTATEMENT (SECOND), TRUSTS (1959) does not include acquisition of property by a fiduciary in its list of situations producing a resulting trust — Introductory Note preceding § 404. It seems to be treated by the Restatement as a constructive trust — § 202. A related type of case is where the transfer is to a person not intended, treated in the RESTATEMENT, RESTITUTION, § 165 (1937), as a constructive trust. A pair of South Carolina cases with facts of this kind designate the relationship arising as a trust but do not otherwise describe it. *Watson v. Child*, 9 Rich. Eq. 129 (S. C. 1856); *Roberts v. Smith*, 21 S. C. 455 (1883).

For most purposes the distinction between the resulting and the constructive trust is not important, since in either event the holder of the legal title holds in trust for others. It is important, however, in a situation where the fiduciary has used both trust funds and individual funds in the purchase of property in his name. If in good faith, the beneficiary has only an equitable lien; if in bad faith the beneficiary has a choice between a constructive trust and an equitable lien — *Mathews v. Heyward*, 2 S. C. 239 (1870); *Green v. Green*, *ante*; *Buist v. Williams*, 88 S. C. 252, 70 S. E. 817 (1911); *Ogilvie v. Smith*, 215 S. C. 300, 54 S. E. 2d 860 (1949). This is the view of the RESTATEMENT, RESTITUTION — § 210 (1937). The distinction between the two trusts may also be of importance with regard to the running of the Statute of Limitations — when it begins to operate. The resulting trust is presumably in keeping with the intention of the parties; the constructive trust is not and is usually hostile. A disavowal of the former would, if brought home, start the statute's running; knowledge of the facts giving rise to the constructive trust would seem to be the starting point for the statute.

24. It might plausibly be argued that the trust was in reality an express one, since the intention of the administratrix in taking title was to take it as trustee. Her subsequent signed petition to the Probate Court would constitute a sufficient memorandum to satisfy the Statute of Frauds. CODE OF LAWS OF SOUTH CAROLINA § 67-1 (1952). The result, in terms of the Statute of Limitations, would be the same. *Presbyterian Church v. Pendarvis*, 227 S. C. 50, 86 S. E. 2d 740 (1955) — express trust; *Miller v. Saxton*, note 21 *supra* — resulting trust. In both cases disavowal or repudiation to the knowledge of the beneficiaries would give currency to the statute. See RESTATEMENT (SECOND), TRUSTS, § 409 (1959).

was guilty of fraud, a fact disclosed more than six years²⁵ prior to the beginning of the action, (2) lapse of 27 years from the time of the deed into the administratrix to the time of the action, and more than 20 years from the attainment of age 21 by the youngest of the parties. The defense was rejected because, according to the Court, the holding by the original grantee was not adverse, and could not become so unless and until there had been an open repudiation of the trust by the trustee, the possession of the trustee being the possession of the beneficiaries. It would appear that while the holding of the last grantee was adverse — he was claiming the land as his own, not as trustee — the action was within time so far as that holding was concerned.

The defendant grantee claimed also as a bona fide purchaser for value without notice, relying largely upon his attorney's examination of and report on title. According to the Court, however, the facts showed that the holder of the legal title had actual notice of the respondents' equity, and the circumstances of his reliance upon counsel's advice based on the record title would not protect him against the respondents' equity.

In the accounting the lower court charged the appellant with the rental value of the land not only for the period of his holding but also the period of holding by his predecessor in title. The Supreme Court held this to be error so far as it charged the appellant with rents received by the appellant's grantor prior to her conveyance. The Court noted that the rents had been collected and consumed by the predecessor in title with the consent of the respondents; but whether this consent was the determinative factor is not made to appear. The respondents' contention also was that "the entire corpus of the trust" [does this mean the whole of the land?] for both periods of ownership was subject to their claim for rent because their aunt "had agreed to account from the proceeds of her part of the land." The Court held, on this score, that to charge the land with accrued income would amount to enforcement of an oral agreement, in violation of the Statute

25. Why six years? Probably referable to CODE OF LAWS OF SOUTH CAROLINA § 10-143 (1952). Would the period perhaps be ten years under CODE OF LAWS OF SOUTH CAROLINA §§ 10-124, 10-2403 (1952), relating to actions for recovery of real property and adverse possession (although an action to impress a trust is not an action for the recovery of real property, *Bramlett v. Young*, 229 S. C. 519, 93 S. E. 2d 853 (1956)), or perhaps under a catch-all ten-year statute, § 10-148?

of Frauds.²⁶ The Court also scaled down the annual amount determined by the lower court as rental value, namely, \$200 per year. This was reduced to \$125 per year, based on the evidence that the aunt had received as rent that amount for three years prior to her conveyance, and there was no testimony tending to show the rental value to be different from the amount of rent actually received.

Trusts — Construction

Two cases²⁷ involving the construction of wills which created testamentary trusts have already been noted as falling under the heading of Property. Whatever distinct trust principles there may be in these cases, they are mentioned in the cases' treatment under Property and are subordinate to the consideration of the kinds of equitable estates created.

Discretionary Trusts — Jurisdiction

The case of *Collins v. Collins*²⁸ was principally one involving divorce, but it also was concerned with important questions of trusts. The action was brought by a wife against her husband to obtain a divorce, and for support of herself and their minor child. Joined as defendants were the two trustees of a living trust which had been created for the husband by his parents, and it was sought to compel the trustees to make payment from the trust assets of the amounts which might be decreed for the benefit of the wife and child. On the merits the lower court's findings were in favor of the plaintiff wife with a resultant decree of divorce. It contained provision for stated payments to be made to the wife for the benefit of herself and the child, and the trustees were directed to pay these sums out of the trust assets.

A jurisdictional question was presented in that one of the two trustees resided in North Carolina and the trust assets were in that state. The non-resident trustee was sought to be served by the mailing to him of the summons and complaint; the papers were served personally upon the trustee resident in South Carolina. The resident trustee demurred on the grounds: that the complaint showed that

26. CODE OF LAWS OF SOUTH CAROLINA § 67-1 (1952).

27. *Black v. Gettys*, note 14 *supra*; *Leathers v. Leathers*, note 15, *supra*.

28. 239 S. C. 170, 122 S. E. 2d 1 (1961).

the plaintiff had no recourse against the trust estate, under the terms of the trust; that there was no allegation showing the trust assets to be within the court's jurisdiction; that a defect of parties appeared, in that the non-resident trustee was not subject to the court's jurisdiction. The non-resident trustee, appearing specially, moved to set aside the service upon him on the ground of want of jurisdiction. The lower court overruled the demurrer, referring to it as the demurrer of the two trustees, and did not expressly pass upon the motion of the non-resident trustee. In the order overruling the demurrer, the court held that it had jurisdiction of the trust estate, and it directed that in the event of the husband's failure to make the ordered payments that the trustees should make the payments out of the income or corpus of the trust estate.

The Supreme Court reversed the lower court both on the jurisdictional question and on the substance as to the availability of the trust assets to the demands of the wife.^{28a} On the jurisdictional phase, the Court held that the motion of the non-resident trustee to quash should have been granted, stating: "The action was not in rem against the trust assets, and manifestly could not be sustained as such because they were not within the court's jurisdiction. As an action in personam it could reach [the non-resident trustee] only by service of the summons upon him within

28a. The question of what law would control — North Carolina or South Carolina — in the construction of the trust instrument was not raised. The trust instrument itself provided that it should be construed as to its administration by the laws of South Carolina regardless of the domicile or residence of the settlor or of the situs of the trust property. It is to be noted that the court assumed jurisdiction at least to the extent of construing and determining the operation of the trust instrument. Although, as the Court held, there was no jurisdiction in personam over the non-resident trustee, and although the trust assets were in another state, there is no discussion of the pressing problem posed by the fact that one of the trustees was in the state. If neither was in the state, and the trust fund was also out of the state, the case against any assumption of jurisdiction would be fairly clear; but with the trust created in South Carolina by South Carolina parties, with South Carolina beneficiaries, with the original trustee in South Carolina, and, of major importance, one of the substitute trustees residing in South Carolina, there would at least be strong argument that the South Carolina court would have jurisdiction of all matters concerning the trust and that it could compel the resident trustee — whose right and control over the trust res were coequal with that of the non-resident trustee — to resort to the trust property to satisfy the demands of the claimants. See 15 A.L.R. (2) 610; RESTATEMENT, CONFLICT OF LAWS, § 297 (1934). Of course with the holding on the merits — that the trust assets could not be reached — the matter would be academic in any event.

the jurisdiction or by his general appearance. Neither of these events took place.”²⁹

In dealing with the resident trustee’s demurrer, the Supreme Court, in deciding that it should have been sustained, did so on the single ground that the complaint showed that by the terms of the trust instrument, the trust assets could not be reached; and it declared that having disposed of the demurrer on this ground, there was no need to explore the other grounds. To reach the conclusion that there could be no resort to the trust assets, the Court determined that the trust was a discretionary trust, which, from its very nature, conferred immunity against transferees and creditors of the beneficiary.

The trust instrument directed the trustee (originally there was only one) to invest the trust fund during the beneficiary’s minority, and then provided:

After Charles Collins attains age twenty-one years the trustee is authorized in her sole discretion to pay to the said Charles Andrew Collins or to apply for his benefit or to pay over and deliver to him discharged of all trust the whole or any part of the income or principal of the trust estate to the extent that she shall determine that he has habits of sobriety, thrift and economy and the trustee is satisfied as to his ability to manage and control such property at the time of payment or distribution.

There was further provision that after the beneficiary reached age twenty-eight he was to receive one-half of the net income and that the trustee was to have the same discretionary power to make additional payments as in the initial period. Upon reaching age thirty-three the trust was to terminate and the entire trust estate remaining was to be paid over to the beneficiary free of trust. There were other provisions with respect to the disposition of the estate in the event of the beneficiary’s death before the termination of the trust.

The beneficiary at the time of the Court’s opinion was twenty-six years old. The Court said:

During the next six years if he lives so long, he will by the express terms of the trust be entitled to only so

29. Legislation was enacted in the 1962 Session of the General Assembly, probably in the light, or as a result, of this holding, to confer jurisdiction in situations of this kind. The statute is set out hereafter under the heading of Legislation.

much of the income or principal as the trustees in their sole discretion shall see fit to give him. During that period he cannot compel the trustees to pay any part of the trust fund; and his creditors, who are in no better position, cannot reach it.

In support of this conclusion the Court cites Restatement of Trusts (2d), § 155(1), and Scott on Trusts (2d Ed.) § 155. The language of the Restatement — § 155(1) — is:

Except as stated in § 156 [trusts for benefit of Settlor] if by the terms of the trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor cannot compel the trustee to pay any part of the income or principal.

If the trust here was with certainty a discretionary one then the result would as certainly be correct.³⁰ But the discretion necessary to produce such a trust is an uncontrolled discretion; and in the same section of the Restatement upon which the Court relies it is stated (*comment c*):

The rule stated in this section is applicable only where the trustee may in his absolute discretion refuse to make any payment to the beneficiary or to apply any of the trust property for his benefit. It is not applicable where the trustee has discretion merely as to the time of payment, and where the beneficiary is entitled to the whole or part of the trust property.

The same principle is stated in Scott on Trusts (2d Ed.) § 155, a section also relied upon by the Court. After stating that "If the beneficiary cannot compel the trustee to pay over any part of the trust fund, his assignee and his creditors are in no better position," the section proceeds:

The result is different, however, where the trust is not purely discretionary. The trust is purely discretionary

30. See the dictum in *Heath v. Bishop*, 4 Rich. Eq. 46, (S. C. 1851): "If a trust be created with the view of providing against the improvidence of the beneficiary, and it be directed that the rent and profits be paid to him from time to time at the *pure and absolute discretion* of the trustee, or as some other appointor to uses, may at his discretion appoint and direct, with a limitation or power to appoint over, to other uses, such a vague, undefined and uncertain interest in the beneficiary could not be made subject to his debts; because such an interest does not amount to property vested in him."

where the trustee may withhold the income and principal altogether, but not where he has discretion only as to the time or method of making payment to the beneficiary or applying the trust fund for his benefit. If the trustee has not discretion to withhold the income and principal altogether from the beneficiary, but merely has discretion to determine the manner or method of making payment, the beneficiary can assign his interest and his creditors can reach it, unless there was a valid restraint upon alienation, or unless the trustee was to pay or apply so much of the income or principal as should be necessary for the support of the beneficiary. But the very fact that a trust is discretionary is an indication that the testator intended to impose a restraint on alienation, and to the extent to which such a restraint is valid the beneficiary cannot assign his interest and his creditors cannot reach it.

It is apparent that the trustees in this case did not have the absolute, pure or uncontrolled discretion that the rule applicable to discretionary trusts calls for. The adjective "sole" modifying "discretion" is hardly to be taken as synonymous with absolute or uncontrolled, a consideration borne out by the limitation of the discretion in making payment to the existence or condition of the beneficiary's capacity to manage his affairs and of his exemplary and suitable character and habits. If in fact the beneficiary did possess the requisite ability and character, a withholding arbitrarily of income would be an abuse of discretion. Moreover, ultimately — except as to the beneficiary's death before the time for distribution — all accumulated income and the corpus had to be paid to him. As to this there was no discretion. Even if there were withholding — as there was — the only effect was to prevent immediate payment, but not to defeat payment at the various times set for distribution and termination. Since, however, the trust was designed to protect against the beneficiary's improvidence, it might be regarded as an attempted restraint on alienation. How effective it would be would depend upon the extent to which the law recognizes the restraint. No forfeiture provision being attached, the restraint, if any was intended, would present an attempt to create a spendthrift trust. Under the present state of the law, the restraint as an effective one

seems to be limited to equitable income or life interests.³¹ Even so, if in this case the trust were to be regarded as a spendthrift trust,³² there might still be the possibility that the wife and children could fall into an excepted and special class of claimants who, despite the spendthrift character, might be able to reach the trust assets, both income and principal.³³

Trusts — Consideration

The case of *Black v. Gettys*,³⁴ previously noted as dealing principally with the nature of the estate created by a trust, also concerns an independent problem arising under a separate instrument designated "Stock Option Contract." The question on this score was whether specific performance of this so-called contract or option should be granted. The instrument was under seal³⁵ and was signed by one John

31. *Spann v. Carson*, 123 S. C. 371, 116 S. E. 427 (1922); *Lynch v. Lynch*, 161, S. C. 170, 159 S. E. 26 (1931); *Albergotti v. Summers*, 203 S. C. 137, 26 S. E. 2d 395 (1943). The statements of the Court in the first two of these cases are largely dicta because in the first a legal fee simple was involved; in the second a legal life estate to which a cessor was attached. In the last case spendthrift trusts as such were specifically upheld and made the basis for denying to the creditors of the beneficiary recourse to the income interest, although the trust there would seem to be more in the nature of a blended or inseparable trust. Here, however, the Court was dealing with an income, not a principal interest, and its remarks concerning the restriction on valid spendthrift trusts to equitable life interests may also be, or border on, dicta. There are no clear-cut cases in which the court has had to deal with an unmistakable attempt to impose a restraint on the alienation of a beneficiary's right to principal or fee. See the reservation of the Court in *Leathers v. Leathers*, note 15, *supra*, as to whether a restraint on alienation of principal is effective. (This case is discussed on this and other aspects in the subject of Property.) The trend of the cases elsewhere, as is the view of the Restatement, is to uphold restraints upon alienation of trust principal. RESTATEMENT (SECOND), TRUSTS § 153 (1959); SCOTT TRUSTS § 153 (2d ed. 1956).

32. That no particular form of words is necessary to impose a restraint on alienation, see RESTATEMENT (SECOND), TRUSTS § 152, comment c (1959); *Heath v. Bishop*, note 30, *supra*; *Albergotti v. Summers*, note 31, *supra*.

33. See RESTATEMENT (SECOND), TRUSTS § 157 (1959), especially comment b, referring to claims of dependents of the beneficiary. See, also, SCOTT TRUSTS §§ 157, 157.1 (2 ed. 1956). See also 52 A.L.R. 1259 (1928); 104 A.L.R. 780 (1936). There are no South Carolina cases on the point.

Since the ultimate right of the beneficiary was contingent upon his being alive at the periods for distribution and termination it may well be that, treating it as a contingent interest of a particular character, it could not be reached on that account. Contingent interests may or may not be reached depending upon the particular circumstances. RESTATEMENT (SECOND), TRUSTS § 162 (1959). For discussion of South Carolina law, see 13 S.C.L.Q. 106, 107, and notes (1960).

34. Note 14, *supra*.

35. The Record (p. 29) does not show that a seal was attached to the paper, nor were the signatures of the parties followed by the terms "Seal"

A. Black and his wife, Ola S. Black. It recited that Mrs. Black was the owner of 53 shares in a Rock Hill bank and that the parties were "in agreement that should said John A. Black predecease his wife, Ola S. Black, then and in that event, the interests of the said Ola S. Black and the children of Ola S. Black would best be served if Ola S. Black should place the aforesaid shares of stock in trust for the benefit of herself and her children." Quoting from the case:

Mrs. Black then agreed, "in consideration of \$5.00, love and affection, and other valuable consideration," that within four months after the death of her husband, should he predecease her, she would sell and transfer to Tom S. Gettys said bank stock at the price of \$1 per share in trust to hold and manage said property and pay the net income to her for life, and after her death to pay the net income in equal shares to their four children.³⁶

The husband died, and in this action the wife resisted attempt by the trustee named in the instrument to enforce the contract specifically. The attack by her was based on several grounds, but the lower court denied all of them; on appeal the only ground argued was that this instrument was without actual consideration. On this point the lower court had held that since the seal imported consideration, lack of consideration, in the absence of fraud, could not be shown; and it accordingly decreed specific performance. In the decree it was stated that by the sealed instrument

or "L.S." or any symbol or scroll which might denote a seal. The paper, however, did have a recital "In witness whereof we have hereunto set our hands and seals." This is sufficient by statute to make the instrument a sealed one. CODE OF LAWS OF SOUTH CAROLINA §§ 11-1, 57-253 (1952). Without statute a mere recital of sealing would be insufficient. *O'Cain v. O'Cain* 1 Strob. 402 (S. C. 1847).

36. Although styled "stock option contract," the instrument is far from being a typical option. Other than in its heading the paper does not use the word "option." It might, however, properly be called an option because it provides that the owner of the stock will transfer *on demand*, at the rate of \$1.00 per share, within four months of the husband's death; and it might further be treated as an option because of its unilateral character — binding, or purporting to bind, the optioner but not the optionee. *McMahan v McMahan*, 122 S. C. 336, 115 S. E. 293 (1922). Whether the "demand" would bring into existence a main bilateral contract or whether the main contract would become unilateral on tender or payment of \$1.00 a share is an interesting question but, in view of the outcome of the case, not an important one. The instrument is unusual too in that both the husband and the wife joined in its execution, pursuant to the recital that the agreement was made between them, but the husband bound himself to nothing — there was no promise or covenant on his part. The so-called agreement between him and his wife that her interests and those of their children would be served was at best only an understanding.

Mrs. Black had acknowledged that it promoted her interests and those of her children and that she had acknowledged receipt of \$5.00 and other valuable consideration, and love and affection. In her hearing before the referee, testimony was received, subject to objection, tending to show that there was no actual consideration involved; this the lower court refused to consider.

The Supreme Court held the lower court to be in error in refusing to consider the evidence as to lack of consideration, and went further by saying that the instrument in question patently disclosed that the wife's promise was gratuitous. Conceding that a writing under seal cannot be attacked for want of consideration, the Court noted, and held, however, that Equity will not grant specific performance of a promise without valuable consideration, even though the promise is represented by a writing under seal.³⁷ The issue that is raised

37. Citing as authority 49 AM. JUR., *Specific Performance*, § 17 (1943); 81 C.J.S.; *Specific Performance*, § 39 (1953); 3 POMEROY'S EQUITY JURISPRUDENCE, § 1293 (4th ed. 1918), where it is said: "Equity will never enforce an executory agreement unless there was an actual valuable consideration, and, unlike the common law, it does not permit a seal to supply the place of a real consideration." See also to same effect, WILLISTON CONTRACTS (3rd ed. 1961) § 217, where it is stated: "Equity will not specifically enforce or otherwise aid the covenant of a voluntary covenant, but will leave him to his remedy at law, except in a few cases, thus enumerated by a learned writer [citing POUND, CONSIDERATION IN EQUITY, 13 ILL. L. REV. 667, 668 (1919)]: (6) Options under seal." The meaning here is that the presence of the seal, without more, makes the option binding in the sense of an irrevocable offer — See, RESTATEMENT CONTRACTS, 24 (1932). But whether the contract which arises upon the exercise of the option will be specifically enforced depends upon whether there is valuable and more than nominal consideration for the proposed transfer. The nominal or formal consideration for the option is not important; the consideration for the transfer is important, and if it is adequate, or at least not grossly inadequate, the contract arising from the exercise of the option will be specifically enforced. CORBIN CONTRACTS, § 48 (1950), states the problem as follows: "Some courts have thought that the absence of a consideration for an option is a sufficient reason for refusing specific enforcement, sealing and delivery not having the meritorious appeal that consideration has. It is believed that this is erroneous; the better decisions held otherwise. In such cases, the decree is not one that compels the offeror to give something for nothing. Even though it is only a seal that makes the offer irrevocable, there is an agreed exchange that the offeree will be compelled to make in return for the land. The promise to convey is conditional upon the giving of this return performance. If it is not so grossly inadequate as to shock the Chancellor's conscience, specific enforcement seems to be equitable and just." To the same effect see SIMPSON CONTRACTS, § 44 (1954). If there is an implication from the case reviewed that there must be real consideration to make an option binding, and that it must be more than nominal, the implication is an unfortunate one. The question is not how much is given — and if under seal whether anything is given — for the option, but what the optionee is to pay for what he is to receive. In this case, if the agreement is really an option, specific performance should be denied because only \$1.00 a share was to be paid for the stock. If the agreement is not really an option

in this connection is principally one of Contracts and Equity — although it is discussed at length in the last footnote — and its impact in Trusts is not so great. Nonetheless it must be noted, in this area, that while a trust can be created with-

— and there are equally as strong reasons for saying that it is not as for saying that it is — the consequence is that it would be only a gratuitous sealed promise, which equity would not specifically enforce.

There seem to be no South Carolina cases precisely in point, either with respect to the binding character of options under seal or for nominal consideration (though probably judicial notice would be taken of the fact that customarily options are given for nominal sums) or with respect to specific enforcement in equity of gratuitous sealed promises. There are indications, however, in some cases that denial of specific performance will occur where the covenant (the promise under seal) is voluntary. See *Clarke v. DeVeaux*, 1 S. C. 172 (1869); *Way v. Insurance Co.*, 61 S. C. 501, 510, 39 S. E. 742 (1901); *Steinmyer v. Steinmyer*, 55 S. C. 9, 31, 33 S. E. 15 (1898). The refusal of equity to reform deeds in favor of volunteers also indicates the disregard of the seal despite its import of or substitution for consideration. See *Gowdy v. Kelly*, 185 S. C. 415, 194 S. E. 456 (1937). But there seems to be recognition of an exception to the rule that equity will not aid a volunteer, that it looks at the substance and not the form, in voluntary covenants in favor of a wife or children. See *Williams v. Caldwell*, *Bailey Equity* 175 (S. C. 1831); *Kennedy v. Gramling*, 33 S. C. 367, 379, 11 S. E. 1081 (1890). Whether a gratuitous covenant by a wife in favor of children would be similarly enforced is open to question. Even in equity, sometimes, a gratuitous promise under seal has been enforced. In *Fogg v. Middleton*, 2 Hill Equity 591 (S. C. 1837), the defendant gave a bond to pay money to a trustee for the benefit of members of his family. The bond was voluntary but the court professed to find consideration in a desire by the obligor to prevent family discord, terming the consideration "meritorious," if not valuable (p. 598). The effect of the seal is not mentioned, although as a bond the instrument was sealed. The proceeding was in equity because it was brought by the beneficiaries, who, where the trustee does not sue his obligor, may sue in equity to avoid circuity of action. The "meritorious" consideration depended upon here may be the justification for the premise in *Williams v. Caldwell*, and *Kennedy v. Gramling*.

Although specific enforcement in equity would not be granted, the question still remains whether there was a remedy at law. The general statement of the applicable principle is that while the gratuitous sealed promise is the subject of remedy *at law*, it is not so in equity. See, again, the statement of Williston previously quoted. A voluntary promise under seal to pay a sum of money gives the promisee the right to sue at law for the money. *Carter v. King*, 11 Richardson Law 125 (S. C. 1875); *Godbold v. Vance*, 14 S. C. 458 (1880). It is not apprehended that a covenant to do something other than to pay money is to be treated differently, and on principle it would seem that the breach of the promise would give rise to an action for damages. In the instant case, although there is equitable denial, there would logically seem to be no reason to shut off recourse to law.

The "stock option contract" contained virtually the same trust provisions as the will of the husband; and it is apparent that the parties intended to create a trust fund, comprised of two distinct trusts, based on a common scheme. It might have been alleged that the real consideration for the contract was the husband's making of his will, bargained for and carried into effect. This position is weakened by the fact that the contract was made some time after the making of the will, and unless it was made pursuant to an agreement before or at the making of the will, the will could not be regarded as consideration for the contract, except as past consideration — which would be no consideration. Still, if the consideration was past, the seal nevertheless would give validity to the promise — Mur-

out consideration either by transfer or by declaration,³⁸ a promise to create a trust must, like other promises, have consideration and these promises are tested from that vantage, by the law of Contracts;³⁹ and to the extent that a promise under seal, without real consideration, can be enforced at law or in Equity, a promise made to a trustee — either of a trust already in existence, or of a trust created by the promise — can likewise be enforced.

Charitable Trust — Deviation — Parties

The latest in a long line of cases dealing with the title to the various properties owned by Furman University is *Furman Univ. v. McLeod, Attorney Gen.*⁴⁰ It will serve no useful purpose even to summarize the long history of litigation — and incidentally, legislation — or to depict the chain of title. It is enough to point to the basic instruments whose construction was involved. The suit here involved the property of Furman University known as the Women's Campus, in Greenville. The University, desiring to remove from the congested area in which its campuses were located

rell v. Greenland, 1 DeSaussure 332 (S. C. 1793); Wilson v. Ferguson, Cheves Law 190 (S. C. 1840) — except perhaps to the extent that equity might not enforce it because the promisee did not rely, or change his position in reliance, upon the promise. Of course it might also be argued that the contract was made in consideration of the husband's not revoking his will. But in all these suppositions it would have to be determined whether in fact these things were bargained for and exchanged for the promise.

38. RESTATEMENT (SECOND), TRUSTS §§ 28, 29 (1959). Fogg v. Middleton, note 37 *Supra*, Clarke v. DeVeaux, note 37 *Supra*; Yancey v. Stone, 7 Richardson Equity 16 (S. C. 1854); Reilly v. Whipple, 2 S. C. 277 (1870); Withers v. Jenkins, 6 S. C. 122 (1874); Gadsden v. Whaley, 14 S. C. 210 (1880). The obvious case of gratuitous trust transfers is the trust created by will.

39. RESTATEMENT (SECOND), TRUSTS § 26, (1959), Comm. *m, n*; § 30. In comment *b* of the latter section, it is said: "Whether a promise made by the owner of property to become trustee thereof in the future or to transfer the property in the future to another person in trust creates in the promisee a right to recover damages for breach of the promise is determined by the law governing Contracts." In § 26, comm. *m*, it is stated: "A promise to create a trust in the future is enforceable if, but only if, the requirements for an enforceable contract are complied with. Whether a promise to transfer property in trust or to become trustee creates in the promisee a right to recover damages for the breach of the promise, and whether such a promise is specifically enforceable, are determined by the law governing contracts." One of the methods of creating a trust is, as stated in RESTATEMENT (SECOND), TRUSTS, § 17 (e) (1959), by "a promise by one person to another person where rights thereunder are to be held in trust for another person." As already indicated, the promise must be enforceable. The first two sections include as enforceable promises those made under seal in states where the common law retains the seal's effect.

40. 238 S. C. 475, 120 S. E. 2d 865 (1961).

to a more suitable location outside the city, sought to determine in this action the nature of its title and to obtain a decree that it could sell the Women's Campus, or otherwise utilize it, to aid in the relocation and development of its new site. The only defendant was the Attorney General.

The original deed — in 1820 — from one Vardry McBee to the predecessor of Furman University conveyed the property in question, with other property, in trust, for the stated consideration "of having a male and female academy established *near Greenville Court House* (italics supplied) and in consideration of \$1.00 to me in hand paid by the trustees of the said Academy for and on account of the same." The habendum was "to have and to hold in trust for the use of the said academy." In 1854 the land, less a portion previously conveyed away, was transferred by the trustees, who had been subsequently incorporated, to Furman University "upon the following conditions and trusts" that it should "in all time to come keep and maintain a male and female school *in the village of Greenville* (italics supplied) and shall strictly carry out all the trusts in the said deed of Vardry McBee." The greater part of the land was sold by Furman University in 1869, except about five acres retained as a campus site. In 1910 these five acres were conveyed by Furman University to The State Convention of the Baptist Denomination in South Carolina, the consideration being stated as "in all time to come, keeping up and maintaining *in the City of Greenville* (italics supplied) a school." The habendum declared that the conveyance was "upon the trust and condition" to maintain a school for males and females *in the City of Greenville*. Later, in 1937, with the consolidation of Furman University and Greenville Woman's College, operated by the Denomination and whose campus was the Women's Campus, the five acres plus other small acreage was conveyed by Greenville Woman's College and the Baptist Convention to Furman University in consideration of its agreement to make provision for the education of young women.

The central question was whether the deeds, with their varying references to *near Greenville* and *in Greenville* imposed a duty upon the grantees as trustees to use the land conveyed as the *site* for educational purposes. At the time of the original deed the property was *near Greenville*; later it

was in Greenville; now it was proposed to move the University outside of Greenville. The Supreme Court, adopting the decree of the lower court, held that it was not the intention of either the original grantor or any of the intermediate grantors that the institutions be limited in their educational operations to the property conveyed, and that "The primary, and in fact the only, concern of the grantors was to have an academy established and maintained somewhere in the vicinity of Greenville." The Court reached this conclusion not only from the language of the deeds themselves, but from the interpretation of some of them in earlier litigation.

The Court went farther, however, and concluded that even if the intention, under a strict construction, was to confine the operation of the schools to the property itself, the Court of Equity had the power to permit a deviation by allowing a sale of the property because of necessity and in order to carry out the terms of the trust.⁴¹

The defendant argued that to permit the requested sale or other disposition would in effect be an application of *cy pres*, which has no standing in South Carolina.⁴² The contention was rejected, it being said that:

the *cy pres* doctrine has no application in the instant case as there is here no diversion of the trust and no transfer of assets to a different charity or a different purpose. If anything there is only a deviation from the strict or technical terms of the trust to enable the same charitable institution to better fulfill the purposes for which it was organized and to carry out to the fullest extent possible, the interest and purposes of the grantors of the property in question.⁴³

41. Citing, among others, SCOTT, TRUSTS § 380 (2 ed. 1956); RESTATEMENT (SECOND), TRUSTS 2d § 381 (1959), comm. d; Frierson v. Porter Academy, 217 S. C. 168, 60 S. E. 2d 82 (1950); McManaway v. Clapp, 150 S. C. 249, 148 S. E. 18 (1928). See, also, Patton v. First Presbyterian Church, 129 S. C. 15, 123 S. E. 493 (1924), in which sale of church property held in trust was authorized on the theory of judicially permissible change of investment. The cases in which a trustee in a private trust has been permitted to deviate, particularly by selling, are too numerous for citation.

42. Citing Mars v. Gibert, 93 S. C. 455, 77 S. E. 131 (1912); City of Columbia v. Monteith, 139 S. C. 262, 137 S. E. 727 (1926); 1 S.C.L.Q. 331 (1949). See, also, Attorney General v. Jolly, 2 Strobbart Equity 379 (S. C. 1848); Pringle v. Dorsey, 3 S. C. 502 (1872); Harter v. Johnson, 122 S. C. 96, 107, 115 S. E. 217 (1922).

43. The statement may be a bit too broad, as the (judicial) *cy pres* doctrine is essentially based on what the settlor presumably intended — that is, if the particular charity or purpose failed the fund should be used

It was also held that there were no conditions attached to the various grants which on non-user or alienation of the property would cause a reverter to any party. The conclusion was based largely on the interpretation of the original deed of Vardry McBee, in litigation to which possible claimants under him were made parties.⁴⁴ The other factor leading to the conclusion was that, as the court construed them, the other deeds created a public trust, with no private rights of reverter or reversion.⁴⁵ Because no private rights were involved, the Court held that the Attorney General was the "only proper and necessary party defendant" to the proceeding, as part of his duty imposed by statute⁴⁶ to enforce the due applica-

for a purpose cognate to the original purpose. That the sale of the trust property which has been used as the site of the charity's operations is not application of *cy pres* but within the scope of the power of the court to control the administration of the trust, see RESTATEMENT (SECOND), TRUSTS, § 399 (1959), comm. *p*. See *Mars v. Gibert*, note 42, *Supra*; *Patton v. First Presbyterian Church*, note 41, *Supra*; 55 A.L.R. 880 (1928).

44. *Furman University v. Glover*, 226 S. C. 1, 83 S. E. 2d 559 (1954), which, while saying the same thing as to the Women's Campus, stated that as to possible rights of others than the heirs of McBee, they were subject to future adjudication. This holding led to the bringing of the instant case.

45. This conclusion was reached despite the words "upon the following conditions (italics supplied) and trust" in the 1854 deed from the trustees of Greenville Academy to Furman University, and "upon the trust and condition" (italics supplied) in the 1910 deed of Furman University to the State Convention of the Baptist Denomination. That even the use of the words "upon condition" does not necessarily create a true condition, see *McManaway v. Clapp*, note 41, *Supra*; RESTATEMENT (SECOND), TRUSTS, § 10 (1959). And see RESTATEMENT (SECOND), TRUSTS, § 401 (1959), comm. *b*: "Where property is given 'upon condition' that it be applied to a certain charitable purpose, a charitable trust is ordinarily created thereby and ordinarily the trust instrument is interpreted as not imposing a condition, in the absence of a provision that upon a failure to apply the property to the designated purpose the property should revert to the settlor or his heirs." If, perchance, a true condition subsequent had been created, there would be a reverter to or right of re-entry in the grantors or their successors — an academic problem in the deed by Furman University, since Furman University is the present owner, but not quite so academic as to the trustees of the Greenville Academy. A true condition or limitation attached to the use of property given for charitable purposes will be given effect. RESTATEMENT (SECOND), TRUSTS, §§ 401, 399, comm. *p* (1959), the latter stating: "The court will not, however, permit the removal of the institution if the settlor provided that the trust should continue only so long as the institution should be maintained on the lands or that the trust should terminate if the institution were not maintained on the land." For an instance of a forfeiture provision in the event of abandonment, attached to a trust for charitable purposes, see *Purvis v. McElveen*, 234 S. C. 94, 106 S. E. 2d 913 (1959). In the absence of a condition or limitation, there is no reverter for breach of trust such as by non-user or diverting to other purposes; the remedy is by action by the Attorney General, or persons having a direct interest, to redress the breach or to compel enforcement of the trust. RESTATEMENT (SECOND), TRUSTS § 401, comm. *a*. (1959).

46. Referring to CODE OF LAWS OF SOUTH CAROLINA § 1-240 (1952). There are similar provisions in CODE OF LAWS OF SOUTH CAROLINA § 67-73 (1952).

tion of funds given to charitable purposes and to prevent breaches of trust; and that as representative of the public, he was the proper party to protect the public interest.⁴⁷ The holding that the Attorney General was the "only proper and necessary party" again raises the question whether the cases have come around to holding that the Attorney General is a *necessary* party not only in actions involving administration of a charitable trust and, as here, the construction of a charitable trust instrument, but in actions to determine the validity of an attempted charitable trust. This case and the earlier case of *Watson v. Wall*⁴⁸ go far towards a view that in all cases in which the public interest may be affected the Attorney General is not only a proper but a necessary party to them.⁴⁹

Although, at the outset of the review of this case, it was stated that the Supreme Court had adopted as its opinion the decree of the lower court, it did not adopt — so the opinion states — a portion of it (referred to as subsection 5 of the last paragraph of the decree). The unadopted section enjoined and barred the Attorney General and his successors in office and all other persons from questioning in any judicial proceeding Furman University's right to "use, sell, convey, develop, mortgage, alien or otherwise dispose of" the lands comprising the Women's Campus or the University's removal and transfer of its operations.⁵⁰

In holding that no private rights were created or reserved by the various deeds, and thereby justifying the proceeding against the Attorney General as the sole defendant, the court rejected the Attorney General's contention that others might have rights under the deeds and that they should be made parties. Exception III, Record, p. 67; Appellant's Brief, pp. 20, 21. *Quaere*, whether possible claimants asserting breach of condition would be precluded from instituting action to determine their rights, conceding that the outcome on the merits would be against them? Cf. *Schroder v. Antipas*, 214 S. C. 87, 51 S. E. 2d 365 (1949).

47. Cf. *Ex Parte Carolina Art Association*, 185 S. C. 132, 193 S. E. 642 (1937). See RESTATEMENT (SECOND), TRUSTS, § 391 (1959) — Who Can Enforce a Charitable Trust.

48. 229 S. C. 500, 93 S. E. 2d 918 (1956).

49. See the discussion of the problem in 10 S.C.L.Q. 151, 156, 157 (1957). In his brief in this case (pp. 17-20) the Attorney General dealt with the broad problem and asked the court to declare that "in all actions where the validity of an attempted charitable trust may be tested or where the court is called upon to construe a public trust instrument and issue instructions for the administration of the trust, the Attorney General is not only a proper party, but, also, a necessary party thereto." Perhaps because the validity of the trusts created by the various instruments was not in question, the court declined to accede to the Attorney General's suggestion — not by rejecting it but in passing it by.

50. Record, p. 66.

This portion of the decree was excepted to by the Attorney General.⁵¹ Although the Court does not specifically deal with the exception, or give its reason for not adopting that portion of the decree, it is clear that its refusal to embrace the decree in this respect amounts to an upholding of the exception.

LEGISLATION

Uniform Testamentary Additions to Trusts Act

The Uniform Testamentary Additions to Trusts Act was adopted by the General Assembly in the 1961 Session,⁵² but in somewhat garbled form due to a printing error. The scope and purpose of the Act, as originally and correctly proposed, and the fact and nature of the error, are discussed in the 1961 Annual Survey.⁵³ In the 1962 Session the error, which was one of omission, has been corrected,⁵⁴ and as corrected conforms to the Uniform Act promulgated by the Commissioners on Uniform Laws.⁵⁵

Inter Vivos Trusts — Service

Probably as a result of the decision in *Collins v. Collins*,⁵⁶ reviewed earlier, legislation was enacted in the 1962 Session of the General Assembly⁵⁷ to make non-resident trustees amenable to the jurisdiction of the South Carolina courts. The Act provides that service on a resident trustee of an inter vivos trust shall constitute service on all other trustees, resident and non-resident, "for the purpose of adjudicating any action or proceeding in a court of this State, involving directly or indirectly, such trust." It is further provided that the resident trustee shall within five days after service upon him notify the other trustees of the action, but that his failure to do so shall not impair the action. A criminal penalty is provided for failure to notify — on conviction,

51. Record, pp. 67, 68. The argument in support of the position was that injunction could not issue against a public official except to permit irreparable injury or where necessary to prevent a multiplicity of suits or vexatious litigation. Appellant's Brief, pp. 25, 26.

52. Act No. 163, 52 Stat. 223 (1961).

53. 14 S.C.L.Q. 281 (1962).

54. Act No. 816, 52 Stat. 1962 (1962).

55. The 1961 Act appears in the 1962 Code of Laws as §§ 19-295 through 19-298. The 1962 change, which is an amendment of the 1961 Act, presumably operates as well as an amendment to the 1962 Code provisions.

56. Note 28, *Supra*.

57. Act No. 810, 52 Stat. 1955 (1962).

a fine of not more than one hundred dollars or imprisonment for not more than thirty days. There is further provision for service upon a non-resident trustee when there is no resident trustee; the non-resident trustee is deemed to have consented to service in connection with proceedings involving the trust through service upon the Secretary of State "when the trust was created under the laws of this State or, in the case of a foreign trust, when part of the trust property is situate in this State."

Presumably, in the light of the events leading to this legislation, the Act is designed to afford jurisdiction not merely in actions by a beneficiary but by third persons seeking to reach the trust estate. The language "involving, directly or indirectly, such trust" would appear to indicate this intention. How efficacious this legislation may be, and to what extent it may affect trusts enacted before its passage, remains to be seen.

The legislation, it will be noted, is limited to inter vivos trusts. Non-resident testamentary trustees are supposedly subject to service and jurisdiction by the provisions of another existing statute, or other statutes.⁵⁸

58. As to this there is confusion. CODE OF LAWS OF SOUTH CAROLINA § 67-53 (1952), as amended, refers to the withholding of "letters of appointment" by the Probate Judge or the Court of Common Pleas from non-residents as trustees unless bond is furnished and there is designation of a person on whom service of process may be had. Since testamentary trustees are not named or appointed by the Probate Court or by the Court of Common Pleas (except by the latter court to fill vacancies), the statute does not have meaning (though perhaps intended to) as to original trustees named by a will. See 13 S.C.L.Q. 119 (1960). There is another Code section, however, § 10-433, amended in 1955 (49 Stat. 456), dealing with service "upon any individual non-resident, executor, administrator, guardian, committee or trustee" by the designation by the fiduciary of a person upon whom service might be had and in the absence of such designated agent, death, etc., service may be had upon the Probate Judge or the Clerk of the Court of Common Pleas of the county "wherein the application of such fiduciary for appointment was made." The statute makes no distinction between inter vivos and testamentary trusts, but it should be noted that it speaks of the county in which application of such fiduciary for appointment was made. Since the trustee of an inter vivos trust does not obtain his appointment through a court (except where there is substitution or addition filled by judicial appointment), the applicability of this statute to original testamentary and inter vivos trustees is as doubtful as § 67-53.