South Carolina Law Review

Volume 10 | Issue 1 Article 21

Fall 1957

Trusts

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Revocation

A case of novel impression is *Peoples National Bank v. Peden*,[1] which involves the effectiveness of an attempted revocation of a trust by the settlor under a power to revoke reserved in the trust deed. The case has already been dealt with as the subject of a case note,[2] and reference should be had to it for a full discussion of the problem. A brief treatment is, however, in order. The settlor executed a trust indenture under which she transferred property for the purposes there designated, the instrument providing that the settlor reserved to herself the right "at any time, and from time to time, during her life, by an instrument executed and probated in the form required by the law of this state for recording a conveyance of real property, to revoke, in whole or in part, this trust indenture or to alter or amend any of the terms and provisions hereof. Upon the elapse of sixty (60) days from delivery to the Trustee by the grantor of such deed or other instrument this trust indenture shall be deemed to have been revoked, altered or amended in the manner or extent therein set forth."

The settlor gave written notice of revocation to the trustee in the form prescribed, but died forty days after its delivery to him. The contention of certain beneficiaries was that the revocation was ineffectual because of the death of the settlor before the expiration of the sixty days — in other words, that the revocation could be effectuated only if the settlor were alive during the whole of the period. Both below and on appeal the contention was decided adversely to the beneficiaries and the revocation held effective. While conceding that a power to revoke may be reserved, and that the exercise of such a power is effective only if the mode prescribed for it is followed,[3] the Court held that the provision for notice was for the benefit of the trustee. The reference "during her life" was not intended, the Court held, to make the revocation

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1. 229 S. C. 167, 92 S. E. 2d 163 (1956).
2. 9 S. C. L. Q. 494 (Spring 1957).
3. Citing numerous authorities, to which may be added Restatement

effective only in the event the settlor was alive, but was intended to indicate that the revocation was not to be effected by will.[4] The Court pointed out that after having given the proper notice the settlor had done all in her power to revoke in the manner prescribed, and that it was nowhere provided in the trust that the settlor should live for the sixty-day period following the delivery of the notice. As suggested in the case note referred to, the fact that the provision was for the benefit of the trustee and the fact that the settlor had done all in her power were of secondary importance — the prime factor was that by its own terms the trust came to an end sixty days after the delivery of notice in the manner specified. This was the condition and the circumstance putting an end to the trust, and neither expressly nor impliedly was continued life a condition precedent to the occurrence.

Rescission of Trust Deed

In *Schenck v. Going*,[5] decided in the Fourth Circuit Court of Appeals and originating in the Eastern District of South Carolina, appeal was from an order of the District Judge sustaining a trust indenture which was attached for undue influence and mental incapacity. A further ground of invalidity was that the trust had been revoked. The last ground was summarily disposed of by the Court's noting that the indenture was not subject to revocation,[5a] and on the questions of fact the Court found nothing in the record to disturb the concurrent findings of the Special Master and the District Judge as to the issues of mental incapacity and undue influence. The principal South Carolina authority relied upon as stating the rule as to mental capacity is the familiar case of *DuBose v. Kell*.[6] Trust deeds do not differ from deeds in which

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of Trusts, Section 330, where, under *comment j*, it is stated: "If the settlor reserves a power to revoke the trust only in a particular manner and under particular circumstances, he can revoke the trust only in that manner or under those circumstances."

4. In Restatement of Trusts, Section 330, *comment j*, it is stated: "If the settlor reserves a power to revoke the trust by a transaction *inter vivos*, as for example, by a notice to the trustee, he cannot revoke the trust by his will."

5. 273 F. 2d 251 (1956).

5a. See Peoples National Bank v. Peden, note 1, *supra*, reviewed above. It is elemental that unless power to revoke is reserved a trust is irrevocable. McElveen v. Adams, 108 S. C. 437, 94 S. E. 733 (1917); Alderman v. Alderman, 178 S. C. 9, 181 S. E. 897 (1934).

6. 90 S. C. 196, 71 S. E. 371 (1911), which is also frequently cited as to undue influence. Coincidentally the only South Carolina cases in recent years attacking the validity of *trust* deeds for undue influence and mental incapacity arose in the federal courts: the one reviewed and

no trust is created so far as they concern attack on grounds of fraud, undue influence, capacity, and so on, and the tests are the same.[7]

Deposit by Trustee

The duty of a trustee with respect to deposits of trust money is set out in *Erwin v. Patterson*,[8] which was an action by a Probate Judge against the principal and sureties on a guardian's bond. The action was one of long delay, instituted in 1931, with numerous substitutions of Probate Judges as plaintiff. The named defendant was appointed guardian of a minor in 1928 and deposited the guardianship funds in a small bank of which he was not only majority stockholder, but also a director and its president, cashier and general manager. The bank failed in 1931. The action on behalf of the ward was based on alleged violation by the guardian of his trust duty in depositing the money in the bank when it was known by the guardian to be insolvent, and in permitting it to remain on deposit under the same circumstance of insolvency. Further allegation was made that the guardian had breached his trust by failing to obtain the approval of the Probate Court in making the deposit.

The assertion of violation of duty in making the deposit without prior approval of the Probate Judge was based upon the provisions of Section 5462 of the 1922 Code, an investment statute which authorized fiduciaries, among other acts, "to deposit same in some savings bank, such investment or deposit, however, to be first approved by the Court having jurisdiction of such fund." Both below and on appeal it was held that although there was no approval in the record, the presumption was that such an order had been issued, and that the burden was on the beneficiary to show affirmatively that no such order was issued — a burden which was not met.[9]

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the case of Koebig v. S. C. National Bank, 217 F. 2d 713 (1954), in which DuBose v. Kell was cited as the authority to justify the upholding of the deed there.

7. Restatement of Trusts, Section 333: "A trust can be rescinded or reformed upon the same grounds upon which a transfer of property not in trust can be rescinded or reformed."

8. 229 S. C. 188, 92 S. E. 2d 464 (1956).

9. The requirement for approval of the court having jurisdiction of the fund before deposit or investment in a savings bank has had a checkered career both judicially and legislatively. This statute later became Section 9050 of the 1932 and 1942 Codes. Another investment statute enacted in 1929, and which became Section 9051 of the 1932 and 1942 Codes, contained a similar provision: "or by depositing same at

The issue of negligence arising out of the other facts — the making of the deposit and its being allowed to remain under the circumstances — was left to a jury, which found for the guardian. The Supreme Court reversed, holding that there should have been a direction of verdict against the guardian, there being, in its view, a plain showing of breach of duty in the fact of the deposit and its continuance, and only one inference to be drawn. The Court followed the rule laid down in *Epworth Orphanage v. Long*,[10] a case involving a similar set of facts, from which this quotation out of a lengthy excerpt is most apposite: "Such a fiduciary is not regarded as an insurer, but he is responsible for any such loss where he deposits such funds, or allows them to remain on deposit, when the bank is not in a sound financial condition and this fact is known to him or might have been known by the exercise of ordinary prudence and diligence." Other references to the *Epworth Orphanage* case appropriately fit this case, particularly those dealing with conflicts of interest.

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current savings bank interest, or in Building and Loan Associations, such deposit, however, to be first approved by the court having jurisdiction of such fund." In a pair of cases construing these two statutes the failure to obtain prior approval was held to fasten liability on the fiduciary on a later failure of the bank. Oakes' Estate v. Oakes, 170 S. C. 167, 169 S. E. 890 (1932); Elliott v. Carroll, 172 S. C. 276, 173 S. E. 908 (1933). But in several other cases the failure to obtain the approval was held not to create liability when the bank thereafter failed, largely on the ground that if application had been made in the first instance to the Probate Judge approval would have been given. In Re Willcox, 162 S. C. 133, 160 S. E. 260 (1931); Bagwell v. Hinton, 205 S. C. 377, 32 S. E. 2d 47 (1944); Barrineau v. Barrineau, 209 S. C. 317, 40 S. E. 2d 41 (1946). So that even if there had been an affirmative showing by the beneficiary that no approval had been obtained, the outcome might have been the same, on the possible ground that the Probate Judge would have given his consent if asked for it. The record in fact shows that the guardian acted largely in reliance on the advice of the Probate Judge. Not every deposit by a fiduciary in a bank required such prior approval, and if the deposit was not an "investment" but was needed for current purposes such as payment of estate debts the statute was held not applicable. Ex Parte Michie, 167 S. C. 1, 165 S. E. 359 (1932), deposit by executor; Brannon v. Woodward, 175 S. C. 1, 178 S. E. 249 (1934), deposit by administrator. In the case under review, it is to be noted that the bank in question was not a savings bank nor, as disclosed by the record, did it have a savings department. Interest however was credited on the account. As a sort of anti-climax, it may be pointed out that Sections 9050 and 9051 have since been repealed, and that neither the general investment statute (Section 67-68 of the 1952 Code) nor the more limited statutes require prior approval of the court having jurisdiction of the fund. The general statute permits trust funds "to be deposited in whole or in part at current savings bank interest rates in any bank which is a member of the Federal Deposit Insurance Corporation." The importance of the question of deposits, whether for safekeeping or investment, has of course declined with the advent of deposit insurance. The matter has become principally one of excessive deposits.

10. 207 S. C. 384, 36 S. E. 2d 37 (1946).

In remanding the Supreme Court held the guardian liable not only for the amount of the trust fund, but for interest at seven per cent from January 1, 1929, the beginning of the calendar year following the creation of the guardianship. The direction to assess interest in this fashion was based on the trial judge's charge to the jury that if it found against the guardian interest should be allowed against him at seven per cent from the date stated, and "there was no exception to this charge on the part of any of the parties and this has become the law of the case."[11]

Action to Impress Trust

The case of *Bramlett v. Young*[11a] is noteworthy principally because of its concern with the law of religious societies and the property rights of members attendant upon a schism in a church. These factors are not properly for consideration in the subject of trusts, except that in a sense all holdings for religious purposes may be deemed affected with a trust. From the vantage of this survey, however, the question is as to the nature of the action brought by the plaintiffs, members "loyal" to the church, against members who had seceded or withdrawn from it and who, all or part of them, had procured a deed of the church property to a corporation which they undertook to control as part of a venture to conduct a separate and unaffiliated church. The action was brought in the Greenville County Court, which has concurrent jurisdiction with the Court of Common Pleas "in all civil cases and spe-

11. The allowance of interest against a trustee or similar fiduciary who has breached his trust in the use of the fund is, as a matter of equity at any rate, largely discretionary. It may result in an allowance at the full legal rate, with compounding in flagrant cases, or interest at some intermediate rate, or no interest at all. See Black v. Blakely, 2 McCord Equity 1 (S. C. 1827); Baker v. LaFitte, 4 Richardson Equity 392 (1852); Huguenin v. Adams, 110 S. C. 407, 96 S. E. 918 (1918); Turnipseed v. Sirrine, 60 S. C. 272, 38 S. E. 423 (1900), intermediate rate; Beacham v. Ross, 187 S. C. 398, 197 S. E. 369 (1938), intermediate rate; Bell v. Mackey, 191 S. C. 105, 3 S. E. 2d 816 (1939), none charged; Lazenby v. Mackey, 196 S. C. 507, 14 S. E. 2d 12 (1941); Glenn v. Worthy, 169 S. C. 263, 168 S. E. 705 (1932), none charged; Bagwell v. Hinton, 205 S. C. 377, 32 S. E. 2d 377 (1944); Epworth Orphanage v. Long, 207 S. C. 384, 36 S. E. 2d 37 (1945), none charged. The Epworth case is especially to be noted, in view of the similarity in facts but differing as to degree of culpability. The case under review was before a master several times and found its way before a jury by consent. The finding for interest at 7%, under the judge's charge, amounted to more than the legal rate over the whole ensuing period, as the legal rate was reduced from 7% to 6% in 1934. 38 Stat. 1243. Since interest would extend over a period of more than twenty-five years, it may readily be seen how vital the matter of interest in fact became.

11a. 229 S. C. 519, 93 S. E. 2d 873 (1956).

cial proceedings, both at law and in equity, except that such jurisdiction shall not extend to actions at law for the recovery of money only when the amount demanded in the complaint exceeds five thousand dollars or for the recovery of specific real and personal property when the value of such property exceeds five thousand dollars."[12] The defendants lost on the merits below, and appeal followed. The jurisdictional question was raised for the first time on appeal, but the Supreme Court held it capable of being heard at the time.

The jurisdictional argument was that the County Court had no jurisdiction in that the action was one for the recovery of real property valued at more than five thousand dollars. On an analysis of the complaint, however, the Supreme Court determined that the action was one to reform a deed, to enjoin the transfer of the property, and to impress a trust upon it. As such it was not an action at law for the recovery of specific real property, but an action solely in equity, because it was an action to reform a deed and because "the question of whether property is impressed with a trust must be determined in equity".[13] The injunctive relief sought was of course one of equitable cognizance. Accordingly, the Supreme Court held the action proper as to forum. On the merits the Court affirmed the judgment below, holding in essence that a "loyal" minority group prevails over a dissident majority group in the use, possession and ownership of church property.

Charitable Trusts

The maxim that charities are favored in the eyes of the law received strong support in *Watson v. Wall*,[14] a case which covers widely the substantive law of charitable trusts and also deals with an important phase of the procedural law of such trusts.

In a suit brought by an administrator *c. t. a.* for construction of the will of his testator and for instructions, the heirs attacked the validity of the following clause:

"Item Tenth: It is my will and I direct that if the income from the fund provided for in Item Third of this will should create a surplus after the provisions of Item Third of this will

12. CODE OF LAWS OF SOUTH CAROLINA, 1952 Section 15-695.
13. Citing particularly Epworth Orphanage v. Long, 199 S. C. 385, 19 S. E. 2d 481 (1942).
14. 229 S. C. 500, 93 S. E. 2d 918 (1956).

have been amply complied with and the duties performed, said surplus may be used to aid the poor and indigent to obtain medical care and hospitalization in the judgment of my executor or executors." The heirs' contention was that a valid charity was not created, on the grounds that the language was precatory, no trustee had been named and the words were too general and indefinite.

Both below and on appeal the validity of the attempted charity was sustained. The Supreme Court declared that the words, in their context, were not precatory but mandatory and as to the assertion that no trustee had been named it called attention to Section 67-51 of the 1952 Code, a general statute dealing with charities, and containing specific provisions as to the event of a vacancy in the trusteeship through failure to name a trustee or otherwise. Although the Court cited *Harter v. Johnson*,[15] a case in which it was held that when a charitable trust was created but no trustees as such were named the estate vested in the executors by implication for the purposes of the trust, the Court did not specifically state that the executors here were trustees by implication, although it is demonstrably plain from the language of Item Ten that they were. As to the substance of the impeaching argument, the Court held that a valid charitable trust was created, reaching the conclusion after a lengthy review of the South Carolina authorities beginning with the celebrated case of *Shields v. Jolly*,[16] and with reliance upon the Act of 1925 recognizing the validity of charitable trusts where the trustee is given discretionary power in the selection of beneficiaries.[16a] One case gave the Court trouble, as it had troubled previous courts which had to explain it away with difficulty or had in effect to compromise with it — *Brennan v. Winkler*.[17] In that case the language was, "after her [life tenant's] death would like the money used for the education of young men for the priesthood, or to educate individual orphan boys or orphan girls", and the Court held the provision insufficient to establish a valid charity on the ground that the purpose was not "indicated with sufficient clearness to enable the court, by means of its settled doctrines, to carry the design into effect", and adding that from the nature of the trust it would

15. 122 S. C. 96, 115 S. E. 217 (1922).
16. 1 Richardson Equity 99 (S. C. 1844).
16a. 24 Stat. 61, in part now Sections 67-6 and 67-51, CODE OF LAWS OF SOUTH CAROLINA, 1952.
17. 37 S. C. 457, 16 S. E. 190 (1892).

not be under the administration of the court at all since the trust was unlimited by "country or latitude".[18] The Court rejected the *Brennan* case, doing so on the ground of its inconsistency with later cases and its incompatibility with Section 67-51, previously noted. In overruling the *Brennan* case, the Court has removed a source of embarrassment and relieved itself and courts to follow of the necessity of future contention with it.

The procedural aspect of the case presents an even more vital problem and requires some elaboration and detailing of facts. The action, as noted, was brought by an administrator *c. t. a.*, who had been appointed on the failure of the executor named — a Masonic lodge — and alternative executors — certain officers of the lodge — to qualify. The will's first two items provided for the testator's burial, erection of a tomb and payment of his debts. The third item directed that after the carrying out of the provisions of the first two items "all remaining portion of my property both real and personal be preserved and held intact" so long as any of the testator's brothers and sisters were living and the income used to preserve the family tombs and to provide a comfortable living for the brothers and sisters, and at the death of the last brother or sister that "all property which is not specifically devised or disposed of or directed to be sold be held in trust by my executor or executors" and the income used to preserve and maintain the family tombs and graves.

Item Four of the will devised a tract of land to the State of South Carolina to be used "as a demonstration or experiment farm"; and Item Five devised a tract of land in Marion County to that county "for a hospital site upon which to erect a general hospital for the sick and wounded", with certain alternative provisions.

The fifth and sixth items of the will added particular personal and real property, either absolutely or contingently, to the trust fund in Item Three.

18. This point of view was rejected in Porcher v. Cappelmann, 187 S. C. 491, 198 S. E. 8 (1938). See Restatement of Trusts, Section 374, *comment i.* Attempted differentiation from Brennan v. Winkler was had in Dye v. Beaver Creek Church, 48 S. C. 444, 26 S. E. 717 (1896) on the grounds that in the former case the language was precatory and no trustee had been named, and the same grounds were used as distinction in Harter v. Johnson, 122 S. C. 96, 115 S. E. 217 (1922), and Porcher v. Cappelmann, *ante*, although, as the Court points out in the case under review, the decision in the Brennan case said nothing about the precatory character of the words used. For that matter, the decision said nothing of the failure to name a trustee.

Item Nine provided: "It is my will and I direct that all the rest and residue of my property both real and personal * * * be sold and the moneys received therefrom and any money and government and municipal securities which I may have at the time of my death be added to the trust fund mentioned in the last paragraph of Item Third of this will to be held and disposed of as provided in said Item Third."

Item Ten has already been set out here.

It was noted in the decision that upon the payment of debts there were enough assets on hand to care for the tombs mentioned and to provide a comfortable living for the brothers and sisters, and that the net remaining assets were sufficient to finance a charitable trust to some extent.

The devise to the State of South Carolina under Item Four was renounced by the General Assembly, and the devise to Marion County was also renounced by the Board of Commissioners of the County, following authorization by the General Assembly. The disposition of these two devises precipitated the critical issue of procedure. At the hearing below the parties "conceded" that the lapsed gifts passed as intestate property, and the circuit judge so adjudged, as the Supreme Court observes, "perfunctorily", apparently on the agreed upon assumption that there was no general residuary clause to catch the failed gifts.[19] Not only did the administrator *c. t. a.* so concede at the hearing, but in his complaint he made the same concession and in his brief on appeal adopted the argument of the heirs. The only appeal was by the heirs, to so much of the decree as declared the attempted charity under Item Ten valid. While the appeal was pending, the Attorney General petitioned the Supreme Court to be allowed to intervene on the ground that the public interest had not been represented in the proceeding. The petition was granted, with leave to the Attorney General to file exceptions to so much of the decree as declared the renounced devises intestate property. The Attorney General filed such exceptions, asserting that the decree was wrong in so adjudging, the error asserted being that the devises fell into the third and tenth items of the will as residuary estate. The Attorney General filed a brief ar-

19. No issue seems to have been made, either in the circuit court or on appeal, as to the nature of the gifts to the State over the County: whether they were absolute, on condition, or in trust. Nor was the question raised as to whether, if the gift were in trust, the trust should nevertheless subsist on renunciation by the trustee. The gifts were obviously regarded as having failed completely.

guing for the validity of the charity under Item Ten and for passage of the renounced gifts into the third and tenth items. The respondent administrator in his brief adopted the argument of the Attorney General as to the validity of the charity but reaffirmed his position taken at the hearing below — that is, that the devises became intestate property.

The Supreme Court decided that the lapsed gifts were not intestate property and passed into the third item and thence as a surplus into the tenth item, both constituting residuary clauses. (Discussion of this aspect of the case is had under the subject of Wills in this survey.)

It was contended on behalf of the heirs that the intervention of the Attorney General came too late, and that the matter was *res judicata,* to the extent at least that the Marion County gift was concerned. The argument was that as to this disposition the public interest was represented by the Board of Commissioners of the county in the proceedings in the circuit court, and that the public interest was barred as to both devises because of the renunciatory resolutions of the General Assembly. The Supreme Court rejected those arguments pointing out that none of those actions had anything to do with the charitable trust created by Item Ten. And, most significantly, the Court added: "Nor was the State or the Attorney General, whose duty it is, under Section 1-240 of the 1952 Code, to 'enforce the due application of funds given or appropriated to public charities within the State', made a party to the cause in the circuit court, or so far as the record shows, apprised of the existence of the residuary surplus until shortly before the application to this court by the Attorney General for leave to intervene." The Board of Commissioners of Marion County was a party defendant to the suit, and designated as Commissioners of the poor, apparently on the assumption that it represented the public, or a limited public interest, the statutes providing that the governing body of each county "shall be overseers of the poor."[19a] Apparently the Board defaulted (Reply brief of Attorney General, f. 4). The Supreme Court obviously did not consider the Board as representative of the public interest despite the statutory designation of its members as "overseers of the poor", a result justified if for no other reason than the fact that the charity cre-

19a. CODE OF LAWS OF SOUTH CAROLINA, 1952 Section 71-150.

ated by Item Ten made no mention of, nor was it limited to, Marion County.

It will be noted that the Attorney General was allowed to intervene after the inception of the appeal. It will be noticed also that his intervention was not directed to enforcement of the trust, unless it can be stated that the attempt to capture the lapsed gifts for the charity was a form of coercive action against a trustee who was not performing his trust. It is to be noted too that the Attorney General not only sought to bring the renounced devises into the charity but argued for the validity of the charity. Concededly, the Attorney General, under Section 1-240 of the 1952 Code, as above quoted by the Court,[20] has the power to enforce a charitable trust and compel its due administration,[21] and he has the same power under a more recent statute.[22] And apparently he may enforce a charitable trust without a statute.[23] The serious question that arises is whether the Attorney General is a *necessary* party in an action to determine *the validity* of an attempted charitable trust or in an action to construe an instrument affecting such a charity. The case under review certainly raises the question if it does not actually and precisely decide it, and there is much in the whole context of the case from which to draw the inference that it so decides. Theoretically, the trustees of a charitable trust represent their beneficiaries, and just as the trustees may sue third persons on behalf of the trust, it may be reasoned that they represent their beneficiaries — in this instance the public — in any action in which third persons assail or claim adversely to the trust. On the other hand, in a suit to enforce a charitable trust or to redress a breach of trust therein, the beneficiary is the public and this the Attorney General speaks for. Yet it seems to be the general rule that in an action to determine the validity

20. The Section also provides that the Attorney General shall "prevent breaches of trust in the administration thereon."

21. State Ex rel. Daniel, Atty. Gen. v. Strong, 185 S. C. 27, 192 S. E. 641 (1937).

22. CODE OF LAWS OF SOUTH CAROLINA, 1952, Supplement, enacted 1953, Section 67-71 *et seq.* 48 Stat. 347. These sections place new duties upon trustees of charitable trusts and give new powers to the Attorney General. Section 67-73 provides: "upon the failure of the trustees to discharge their duties under this Act, or when it appears that the trustees are not properly discharging the duties imposed upon them by the trust, the Attorney General shall bring an action to compel a compliance with this Act or to compel them to discharge the duties imposed upon them by the trust as the case may be."

23. See Attorney General v. Society for Relief of Elderly and Disabled Ministers, 8 Richardson Equity 190 (S. C. 1856).

of a charitable trust the Attorney General is not only a proper but a necessary party.[24] In South Carolina, however, there seems to be no such practice, and in the many cases in which the validity of the charitable trusts involved have been questioned, or instructions or construction sought, the Attorney General has not sued or been made a party.[25] Whether the instant case is or is not a clear holding that the rights of the State or the public are not determined in a proceeding to construe the instrument where the Attorney General is not a party, it at least points up the desirability in the public interest of his being made one — particularly where the trustee is covertly hostile or indifferent to the interests of the *cestui que trust*, or, as here, yielding through — as it turned out — mistaken assumption to the abandonment of the beneficiary's rights. If the decision cannot be taken unequivocally as calling for the necessary presence of the Attorney General in actions where the result might be unfavorable to the public interest, then legislation would manifestly be in order to bring it about.

24. 14 C. J. S. 528 (Section 62, Charities). See also, Bogert, Trusts and Trustees, Section 417: "it would seem that in such a suit, no matter how it arises, the trustee, successors of the settlor and the Attorney General, should all be parties, in order that the pros and cons of the question of validity may well be presented to the Court." And Scott on Trusts, Section 391: "Where a suit is brought by the trustees of a charitable trust for the construction of the instrument creating it, or where a suit is brought by others to invalidate a charitable trust, the Attorney General is a necessary party."

25. In Shields v. Jolly, note 16, *supra*, which is also known as Attorney General v. Jolly, the Attorney General was a party plaintiff. The bill was brought by members of a Methodist Church against the administrator of the estate of a deceased life tenant under her husband's will for an account, the bill alleging a charitable trust under the will and claiming, in substance, that "independently of the statute [Charitable Uses], the State, as *parens patriae*, succeeding to the prerogative of the king, has the disposition of such devise and may make it, by the intervention of the Attorney General, through this court." On the matter of the presence of the Attorney General, the court said: "Another instance is, where trustees are appointed, but the objects are so vague and indefinite, that if the gift were to any other purpose than charity, the court must declare the trust void for uncertainty. To a bill for setting up a charitable use of this sort, I think the Attorney General ought to be a party to aid the court in devising the specific scheme for carrying it out. The third class comes under the general rules applicable to all trusts whatever, whether for charitable or any other purposes. It is the well known and universal rule of the court, that if the object of the trust be lawful, and sufficiently specific and definite to enable our court to execute it, it shall never fail for the want of a trustee. To a bill of this sort the Attorney General is not a necessary party, and the present seems to me to be a case of this sort." It will thus be seen that with all these references to the Attorney General it is not suggested that he is a necessary party in an action to determine whether a purported charity is valid or not.

It is reasonably clear that, with the elimination of the Board of Commissioners of the county, there was no one before the court actually or technically to represent the public as beneficiary until the intervention of the Attorney General. There was in reality a defect of parties, because in the suit there was no beneficiary, no one acting in its behalf, and, as will be seen, no trustee. Even though, as suggested heretofore, the executor might be regarded as trustee under the language of Item Ten, it is clear that not only was the executorship renounced but the trusteeship as well. Although a person who is named both executor and trustee may accept one office and renounce the other,[26] renunciation here took place as to both, with a resultant vacancy in the office of trustee which was not filled by the appointment of the administrator *c. t. a.*[27] The general rule is that powers which are conferred upon an executor as trustee do not pass to an administrator *c. t. a.*[28] Moreover, it is evident that the Probate Court appointment was limited to the filling of the vacancy in the executor's office, since otherwise the Probate Court would be designating the successor to a trustee, or filling a vacancy in the trusteeship — an act manifestly beyond its powers, and, so far as charitable trusts are concerned, in opposition to Section 67-51 of the 1952 Code which provides that in the event of a vacancy in the trusteeship the *Court of Common Pleas* shall appoint a trustee to carry out the trust. Nothing in the will suggests that the testator had provided for the appointment of a substitute trustee, or that the duties of executor and trustee had been so blended as to create only the office of executor;[29] and even if a single office had been created powers conferred as trustee could not, as has already been seen, pass to the administrator *c. t. a.*[30]

26. Mordecai v. Schirmer, 38 S. C. 294, 16 S. E. 88 (1892), renunciation of executorship; Ashe v. Ashe, Richardson Equity Cas. 380 (S. C. 1832), renunciation of trusteeship.

27. See Mordecai v. Schirmer, note 26 *supra*, where wife of testator who was executrix-trustee declined the executorship and an administrator *c. t. a.* was appointed and it was held that trust powers remained in the wife and did not pass to the administrator.

28. 21 Am. Jur. 821 (Sec. 786, Exers. & Adms.)

29. See DeSaussure v. Lyons, 9 S. C. 492 (1877).

30. If these surmises are correct, it is questionable whether the administrator *c. t. a.* can properly perform any other trust function under the will unless he procures an appointment as trustee in the court of equity.