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Property

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Adverse Possession and Estoppel in pais

In *Southern Railway—Carolina Division v. Horne Investment Company*[1], it was held that the evidence warranted a verdict that plaintiff had lost title to a portion of its statutory right of way both by adverse possession and by estoppel. The Court pointed out that the necessary notice to a railway company of an adverse claim to its right of way may be implied or inferred from the claimant's construction and maintenance of permanent buildings on the right of way. On the evidence the defenses of adverse possession and estoppel were found not to be inconsistent.

Dedication of, and Prescription for, Public Ways

Woodside Mills v. United States of America[2] was a suit for an income tax refund. Basis of plaintiff's claim was an alleged gift to Greenville County in 1950 of certain streets, sidewalks and alleys in a mill village. The ways in question had been opened in 1902, and thereafter were used as public ways. The evidence established that for many years plaintiff had not claimed them. In 1950, when about to sell the mill village, plaintiff recorded a plat showing the ways in question, and executed and delivered a deed of them to Greenville County.

The Circuit Court of Appeals agreed with the District Court that long prior to 1950 plaintiff had "parted with the title" to the ways, either by dedication or by prescription. Nor did the conveyance, whenever made, qualify as a donation for public purposes within the meaning of § 26 (q) of the Internal Revenue Code of 1939.[3]

Disregarding the tax question the evidence warrants the conclusion that the public acquired an interest in the ways prior to 1950. However, unless conveyed by the deed of 1950 it appears that the fee would remain in the taxpayer, subject

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1. 233 S. C. 440, 105 S. E. 2d 527 (1958).
2. 260 F. 2d 935 (4th Cir. 1958).
3. 26 U. S. C. A. (I. R. C. 1939) § 26(q).

only to the public easement for highway purposes. Among other cases, see *Edgefield County v. Georgia Carolina Power Company*,[4] cited by the Court. The Court's citation of South Carolina Code § 10-2421[5] is inappropriate, since that section deals with the acquisition by adverse possession of a corporeal interest in land, and does not pertain to the acquisition by prescription of an incorporeal interest, such as is an easement for a public way.

Fee Simple Determinable Estate—Estoppel by Deed

Purvis v. McElveen[6] recognizes the existence in South Carolina of the fee simple determinable estate. The facts were that land had been conveyed to school trustees in fee simple, subject to the following clause: "Provided ... that ... should ... a ... school ... fail ... to be maintained ... for ... three consecutive years, then the said premises, without improvements thereon, shall be considered abandoned and the same shall revert back to [grantor]." The tract having ceased to be used for school purposes after the grantor's death, a subsequent grantee from the grantor claimed the tract as against the grantor's heirs at law. The Court interpreted the deed as creating a fee simple determinable estate rather than a fee simple subject to a right of entry for breach of a condition subsequent. The interpretation is questionable[7]. If the deed had been found to create an estate on condition subsequent there is authority that the grantor's attempted alienation of the right of entry destroyed the same and made the estate of the school trustees an indefeasible one[8]. However, the question is undecided in South Carolina[9], and more recent authority indicates that even though an attempted assignment is ineffectual, the right of entry is not thereby destroyed[10].

The Court correctly concluded that when imposed on a fee both the right of entry and the possibility of reverter have

4. 104 S. C. 311, 88 S. E. 801 (1916).
5. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2421.
6. 234 S. C. 94, 106 S. E. 2d 913 (1959).
7. White v. Britton, 75 S. C. 428, 56 S. E. 232 (1906); RESTATEMENT, PROPERTY § 45 comment *m* and illustration 9.
8. Rice v. Boston and Worcester R. R. Corp., 12 Allen 141 (Mass. 1866); Annot. 109 A. L. R. 1148 (1937); 117 A. L. R. 563 (1938); 53 A. L. R. 2d 225 (1957).
9. First Presbyterian Church v. Elliott, 65 S. C. 251, 43 S. E. 674 (1903), holds only that an assignee of the right of entry cannot enter for breach of condition.
10. SIMES AND SMITH, FUTURE INTERESTS § 1862; RESTATEMENT, PROPERTY 1948 Supplement, modifying § 160 comment *c*.

been held inalienable either by deed or will in South Carolina. However, the further unqualified assertion that estoppel by deed is not available against a claimant under a possibility of reverter is subject to criticism. It appears not unreasonable to hold as the Court did, that the heirs of the grantor were not estopped by their ancestor's deed since their claim under the possibility of reverter was by representation and not by descent. However, the further holding that one of the heirs, A. H. McElveen, was not estopped by his own deed seems erroneous. The authorities cited are to the effect that a conveyance contrary to the pubilc policy does not operate as an estoppel. But application of this principle likewise would prevent the conveyance by estoppel of an expectancy, which undoubtedly can thus be conveyed in South Carolina[11]. In like manner a general warranty deed operates to convey a contingent remainder in jurisdictions in which such remainders are inalienable interests.[12] The Kentucky case[13] cited is inapposite since it is opposed to South Carolina authority. The correct rule would seem to be that possibilities of reverter are alienable by estoppel.[14]

Judicial Representation of Unborn Remaindermen

In *Caine v. Griffin*[15] plaintiff sought a declaration that an earlier suit which had decreed an exchange of lands was without defect which beclouded the title to the land in issue. A question raised was whether the interest in remainder of a class, no member of which had been born, could be transferred from the subject land to the land exchanged therefor. In affirming the sufficiency of the prior suit the Court held that a representation of the class by a guardian ad litem was proper. All other necessary parties were found to have been properly before the Court, either individually or as class members, and a sufficient showing of reasonable necessity for the exchange of the land had been made.

11. Blackwell v. Harrelson, 99 S. C. 264, 84 S. E. 233 (1914).
12. SIMES AND SMITH, FUTURE INTERESTS § 1855.
13. Consolidation Coal Co. v. Riddle, 198 Ky. 256, 284 S. W. 530 (1923), holding that a deed with covenants given by an heir apparent as a conveyance of his expectancy will not operate by estoppel to pass the after acquired title. The case is *contra* to Blackwell v. Harrison, note 11 *supra*, and the prevailing American view. See SIMES AND SMITH, FUTURE INTERESTS § 395.
14. Pure Oil Co. v. Miller McFarland Drilling Co., 376 Ill. 486, 35 N. E. 2d 854, 135 A. L. R. 567 (1941); SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 109 (1951).
15. 232 S. C. 562, 103 S. E. 2d 37 (1958).

Judicial Sales

In *Spillers v. Clay*[16], petitioner, attorney for certain defendants in a partition suit, sought to enjoin the closing of a judicial sale of land and to reopen the bidding on the ground that when the sale was closed he was under a reasonable misapprehension that his was the high bid. The testimony established that the property was worth more than twice the amount of the high bid; that plaintiff had been instructed to bid much higher and failed to do so only because he thought the prevailing bid was his; that immediately after the property was knocked down plaintiff had requested he be allowed to rebid. The Court found the County Judge had not abused his discretion in granting plaintiff the relief he sought.

Life Tenant with Power to Sell Remainderman's Interest in Land

In *Thomason v. Hellams*[17] a testator devised to his wife ". . . for and during the term of her natural life, all of my real estate; unless it becomes necessary for her support and comfort, in which case, and she to be the whole judge of the necessity, she has full power to sell any part or the entire real estate holdings without the order of any court and is hereby empowered to execute good fee simple title to the same or any part thereof. If at the time of death of my wife there is remaining any of my real estate it is my desire and I so direct that the same go to my nephew . . . in fee simple forever." The remainderman sued for a construction of the will and alleged that the widow was about to sell the land to one of her kinsman for much less than its value. The relief sought was that if the will be construed to give the widow a power of sale, "the proceeds should be stamped with a trust in favor of plaintiff and kept separate and distinct from other personal property and that any unused portion for her support and comfort should belong to plaintiff." Plaintiff further sought the right of first refusal at the same price the property had been offered to third persons.

On appeal the Court affirmed an order sustaining the widow's demurrer to the complaint. The will was plain and unambiguous, and conferred a life estate upon the widow,

16. 233 S. C. 99, 103 S. E. 2d 759 (1958).
17. 233 S. C. 11, 103 S. E. 2d 324 (1958).

with power in her sole discretion to dispose of the remainder interest for her support and comfort; nor did the complaint allege fraud (the allegation of an intended sale to a relative for less than the market value was not so construed). Since there had been no sale, plaintiff's prayer that the proceeds of any sale be kept separate and apart from the other personal property was premature and made no justiciable issue. Plaintiff's third prayer that he be accorded the right of first refusal was one that he was not entitled to since the testator had not so provided.

The Thomason case is an excellent illustration of the litigation breeding characteristics and lurking injustices inherent in the legal life estate with power to consume remainder type of limitation.

Recording—Priority Between Mortgage and Judgment

In *Prudential Insurance Company v. Wadford*[18] the question was one of priority between the lien of a judgment and that of a mortgage of land. The mortgage had been given on May 21 as security for an obligation of the same date, but was not recorded until June 21. In the meantime, judgment against the mortgagor was entered on May 24, pursuant to an action on an account for merchandise purchased before May 21, the date of the mortgage. In a foreclosure action the mortgage lien was accorded priority, which was affirmed on appeal, the Court adhering to the rule earlier established in *Carraway v. Carraway*[19]. Rationale of the result is that since the debt on which the judgment is based was incurred before the mortgage indebtedness, the judgment creditor is a prior rather than a subsequent creditor, and the recording act thus affords him no protection.

One dictum in *Wadford* is noteworthy. In South Carolina a debatable question is whether or not a subsequent creditor claiming the protection of the recording act against a prior unrecorded lien must show that he advanced credit in reliance upon the debtor's apparently unincumbered interest in the land. While no cases involving liens upon land have been found, as regards personal property the cases are in conflict,

18. 232 S. C. 476, 102 S. E. 2d 889 (1958).
19. 27 S. C. 576, 5 S. E. 157 (1888).

some[20] stating that the creditor need not have relied upon the debtor's apparent interest in the chattel, while others[21] are to the effect that unless credit was extended in reliance upon the creditor's ostensible interest in the chattel, the subsequent creditor is not entitled to protection of the recording act. In *Wadford* the Court states "that the recording statute was intended to protect, against the lien of an unrecorded mortgage, persons, who, without notice of it, subsequent to its execution might reasonably have extended credit to the mortgagor, or purchased the mortgaged property, *in reliance upon his apparently unencumbered ownership,*" (italics added) citing *Carroll v. Cash Mills.*[21a] The inference of this dictum is that a subsequent creditor will be protected only if credit was extended in reliance upon the debtor's apparent interest in the land.

Rule in Shelley's Case

Woodle v. Tilghman[22] presents a knotty constructional problem of a type which fortunately is increasingly rare since the Act of 1924 abolishing the Rule in Shelley's Case[23]. The testator died in 1889, devising land "to Della . . . for life only and then unto the lawful issue of her body, and if she should die without children then to Robert Harper's children, share and share alike . . . " The question, did Della take a fee simple conditional estate by operation of the Rule in Shelley's case, or a life estate only, with remainder to her children in fee simple? If Della acquired a fee simple conditional the plaintiffs, her surviving children, were barred by her conveyance by deed in fee simple made after the birth of issue; if Della acquired a life estate only, her children were entitled as against the defendant claiming under the conveyance by Della.

20. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004 (1906). See Fidelity Trust and Mfg. Co. v. Davis, 158 S. C. 400, 155 S. E. 622 (1930). *Cf. In re* Smith, 48 F. Supp. 866 (E. D. S. C. 1943), discussed in note 153, *infra*. *Cf.* Andrews v. Hurst, 163 S. C. 86, 161 S. E. 331 (1931), to the effect that a tax being a debt due the State, the State is a creditor entitled to the protection of the bailment statute (CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-308). See Stephens v. Hendricks, 226 S. C. 79, 83 S. E. 2d 634 (1954). In this situation it seems that the State need not establish reliance upon the taxpayer's ostensible ownership.

21. Carroll v. Cash Mills, 125 S. C. 332, 118 S. E. 290 (1923). See Finance Corporation of America v. McGhee, 142 S. C. 380, 140 S. E. 691 (1927).

21a. Note 21, *supra*.

22. 234 S. C. 123, 107 S. E. 2d 4 (1959).

23. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-2. The Act is inapplicable to instruments executed before October 1, 1924.

On appeal, the circuit judge's conclusion that the Rule in Shelley's Case did not apply was reversed by a unanimous court. The added phrase, "if she should die without children," was found not to so qualify "lawful issue of her body" as to make the latter phrase words of purchase instead of limitation; therefore, the Rule applied to give Della a fee simple conditional. The Court's careful opinion reviews many cases and recognizes that all are not in harmony. The Woodle Case is important as a considered reaffirmance that in construing limitations to which the Act of 1924 is inapplicable the Court has no mind, even in close cases, to abandon precedent and the interpretive process in favor of a *post 1924* presumption against the applicability of the rule.

Tax Sales

Two cases[24] involved claims of remaindermen against purchasers at tax sales of lands sold for taxes assessed in the name of the estates of deceased testators. Both were decided in favor of the remaindermen, on the theory that a life tenant's breach of his duty to return the land for taxation in his name after the testator's death does not prejudice a remainderman's right to possession at the death of the life tenant. The same result follows despite the fact that the sale in part was for taxes assessed during the life of the testator, since the remaindermen's interest will not be affected when it was not subjected to the lien of all the taxes for which the land was sold[25]. Nor can adverse possession run against the remaindermen in favor of the purchaser at the tax sale before the death of the life tenant.[26]

Time of Determination of Testator's Heirs

In *Dean v. Lancaster*[27] a testator devised land "to my son Alfred . . . and his wife Gertrude . . . for and during the life of the survivor of them and at and after their death to go to their children and if they should die without leaving children then the same shall go to my Estate and become a part thereof and shall be divided among my heirs according to the Statute

24. Stamper v. Avant, 233 S. C. 359, 104 S. E. 2d 565 (1958); Taylor v. Jennings, 233 S. C. 600, 106 S. E. 2d 391 (1958).
25. Taylor v. Jennings, *supra* note 24.
26. Stamper v. Avant, *supra* note 24.
27. 233 S. C. 530, 105 S. E. 2d 675 (1958).

of Distribution . . . . " At the testator's death his heirs were his five children. Thereafter Alfred died childless, survived by Gertrude, who was alive during pendency of the suit. In a suit to construe the will the question was whether the heirs who would take at Gertrude's death were to be determined as of the date of the death of the testator, of Alfred, or of Gertrude. The result would be the same if the heirs were determined either at the testator's death or at Alfred's death. The lower court determined the heirs as of Alfred's death, which decision was affirmed on appeal.

The Court recognized the general rule that where a testator makes a postponed gift of land to his heirs, the heirs will be determined as of the time of the testator's death in the absence of a manifested contrary intent.[28] While doubting the existence of such contrary intent, the court reasoned that even assuming such intent was manifested, certainly the testator did not intend to postpone ascertainment of his heirs beyond the time when the interest limited to them could become a vested remainder by reason of Alfred's death without children. While the court correctly distinguishes the present facts from those in *Jones v. Holland*[29] the opinion may indicate that in future cases a requirement of survivorship will not so readily be implied as was done in the Holland Case. If this be true, the Court's view is now in accord with the better American authority.[30]

Cases Omitted

Two cases more appropriately treated in other sections of the annual survey are here omitted. *Montague v. S. C. Tax Commission*,[31] which is discussed in the taxation section, primarily is concerned with the tax consequences under state law of a deceased donee's failure to exercise a general testamentary power of appointment. *Allen Brothers Milling Co. v. Addams*,[32] an action to enjoin defendants from damming back the water flowing on their land from plaintiff's land, is dis-

28. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 323 (1951); RESTATEMENT, PROPERTY § 308.
29. 223 S. C. 500, 77 S. E. 2d 202 (1953).
30. RESTATEMENT, PROPERTY §§ 260, 261 and comment *a*; SIMES AND SMITH, FUTURE INTERESTS § 655. See 7 S. C. L. Q. 163 (1954), discussing Jones v. Holland, note 29, *supra*.
31. 233 S. C. 110, 103 S. E. 2d 769 (1958).
32. 233 S. C. 416, 105 S. E. 2d 257 (1958).

cussed in the practice and procedure section. A third case,[33] an equitable action to determine a boundary, raises no questions of interest.

Legislation

No property legislation was enacted during the survey period.

33. James v. Hyman, 233 S. C. 283, 104 S. E. 2d 353 (1958).