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Wills and Trusts

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Descent and Distribution—Validity of Marriage

In *Mitchell v. Smyser*,[1] which was an action for partition, the issue became one of ownership, dependant upon the determination of which one of two women was the lawful wife of the intestate whose lands were in suit. No novel question appears in the case. The plaintiff, who alleged that she was the legitimate daughter of the intestate through common-law marriage of her mother, was met with a contention by certain of the defendants that they were the only lawful children and heirs of the intestate. The plaintiff did not claim that the resisting defendants were illegitimate. The master's finding was that the defendants' mother was the common law wife of the intestate by an earlier marriage, that she survived him, and that the plaintiff was therefore not a lawful heir. The lower court upheld the master, and it in turn was sustained by the Supreme Court. The Court noted that the issue being one at law, it would not disturb the factual conclusions which had been reached, there being evidence reasonably tending to support them.[2] At all three levels of the case judicial notice was taken of the fact that at all times prior to the intestate's death divorce was not permitted in South Carolina, and, that being so, the survival of the defendants' mother precluded the possibility of the validity of the marriage of the plaintiff's mother.

Executors and Administrators—Claim

In *Galphin v. Wells*,[3] actions were brought in the court of common pleas against the personal representatives of the estates of three sisters and the beneficiaries under their wills

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1. 236 S. C. 332, 114 S. E. 2d 226 (1960).
2. Citing Campbell v. Christian, 235 S. C. 102, 110 S. E. 2d 1 (1959); Johnson v. Johnson, 235 S. C. 542, 110 S. E. 2d 922 (1959), both of which were cases at law, dealing with the factual issue of marriage. Even if the issue in the present case had been equitable because of the generally equitable nature of the partition suit, the result would probably have been the same because of the concurrence of the findings of the master and the trial judge. Large v. Large, 232 S. C. 70, 100 S. E. 2d 825 (1957); Galphin v. Wells, 236 S. C. 606, 115 S. E. 2d 288 (1960), discussed next.
3. 236 S. C. 606, 115 S. E. 2d 288 (1960).

seeking recovery for services allegedly rendered by the plaintiff to the decedents. By consent, the answer in one of the actions was treated as the answer in all three, and the matter was referred, also by consent, to a referee. He filed a report adverse, on the facts, to the plaintiff's claim, and the circuit judge upheld the report. The Supreme Court, observing that the case had been treated by agreement as one in equity, affirmed the lower court on the basis of the concurrent findings below, in view of the rule that "the factual findings will not be disturbed unless such findings are without evidence to support them or are against a clear preponderance thereof."

Construction

The rule that, as a matter of construction, words in a will are to be given their ordinary meaning and technical terms are to be given their technical meaning, unless the contrary appears, is referred to with approval in *Smoak v. McClure.*[4] The case is fully discussed under the heading of Property. Although the instrument therein was a deed, the Supreme Court adverts to the rule as being applicable alike to wills and deeds.

Joint Account—Construction of Will—Validity

The question of the nature, effect and validity of joint bank accounts which are intended, or may operate, to give the survivor the right to the account is treated here in the subject of Wills because of their resemblance to testamentary dispositions. Although possibly regarded in the earlier cases as an attempted, and ineffectual, testamentary disposition insofar as there was intent to create ownership in the donee-survivor,[5] the joint account or deposit was later recognized in *Hawkins v. Thackston*[6] as being non-testamentary and

4. 236 S. C. 548, 115 S. E. 2d 55 (1960).

5. Sawyer v. Mabus, 107 S. C. 369, 92 S. E. 1029 (1917); Smith v. Planters Bank, 124 S. C. 100, 117 S. E. 312 (1922).

6. 224 S. C. 445, 79 S. E. 714 (1954). The term "joint account or deposit" is rather loosely used in connection with this and the two preceding cases, and is not to be taken necessarily as creating a joint tenancy or estate. In both Sawyer v. Mabus and Smith v. Planters Bank the account (certificate of deposit) ran to A or B. A right created in the alternative is several, not joint. Leaving aside the intent to benefit the non-depositing survivor, a joint tenancy or estate could not, with such words, arise. The same could be said to be true of Hawkins v. Thackston, where the account was payable to A or B. Although the survivor was

sustainable on the theory of a third-party beneficiary contract: the survivor was entitled to the fund provided there was donative intent. In *Austin v. Summers*,[7] decided in the period under review, the Supreme Court recognized and sanctioned the application of the contract theory,[8] but the case offered unusual complexities in that the account was created by the depositor not (as ordinarily) in his name and that of another, but in his name and the names of two others. The facts need recounting in some detail.

The original owner of the funds deposited (or became a shareholder to the extent of) approximately $10,000 in a savings and loan association in the names of himself and his wife. Later, he extinguished the account in these names and substituted the names of himself, his wife and his daughter by an earlier marriage (the defendant). The account was entitled "Joseph T. Fry, Janie A. Fry and Irene F. Summers, as joint tenants with the right of survivorship." The deposit or share book contained an entry to the same effect. At the time the book was issued the three parties signed an agreement that they applied for membership in the association "as joint tenants with the right of survivorship and not as tenants in common, and not as tenants by the entirety."[9] The agreement provided, among other things, that the association was directed to pay to any one or more of the joint tenants on their signatures, and "to pay, without any liability for such payment, to any one or the survivor or survivors at any time." It was further provided that any additions made by one should be regarded as a gift to the others to the extent of their pro-rata interest in the account.

The donor also had a savings account and a checking account in a bank in another city, also joint in nature, pay-

allowed to take, there could not be, in this light, a joint tenancy. That an account running to persons in the alternative does not create a joint tenancy, see 7 AM. JUR. *Banks* § 425 (1937); 48 A. L. R. 189, 204 (1927). Nor is it necessary in order to create a right of survivorship that a joint tenancy be established. 66 A. L. R. 189 (1930).

7. 237 S. C. 613, 118 S. E. 2d 684 (1961).

8. In Hawkins v. Thackston *supra*, note 6, the Court likened the contract to a third-party beneficiary contract—rights resembling those of a beneficiary under a policy of life insurance. In the present case the agreement was between the depositor, the donees and the bank. This would not be a third-party beneficiary contract, since, although one person furnished the consideration (made the deposit) the promise ran directly to him and to the donees. Consideration need not be furnished by the promisee. RESTATEMENT (SECOND), CONTRACTS, § 75(2) (1932).

9. This and the provisions which follow are found in the Record ff. 21-28.

able to "J. T. Fry or Mrs. Janie Austin Fry or Mrs. Irene Summers."[10] The total of these accounts was approximately $5,500.

The donor died, leaving a will in which the defendant was named executrix. The will was duly probated. It gave the entire estate, after debts, to his wife

> for and during the term of her natural life to have the full use and enjoyment thereof for her maintenance and support and pleasure, and upon the death of my wife . . . I give . . . all of the remainder of my said property to my daughter . . . to be her absolute property in fee simple. . . . It is my request and I desire that my said daughter . . . take charge of and handle for the pleasure, maintenance and support of my said wife . . . all of said property bequeathed and devised . . . and provide for my said wife such comfortable living as said property will afford.[11]

Shortly after the donor's death the daughter withdrew the $10,000 on deposit in the association and deposited it in a North Carolina institution in her own name. She did not withdraw the bank accounts but included them in her listing of the assets of the estate. A considerable time after the withdrawal of the $10,000, a demand was made by the wife on the defendant for $5,000—, that is, half. It was not granted. Shortly afterwards the wife died, and the plaintiff, administrator of her estate, brought the present action. The complaint sought recovery of the entire $10,000, alleging that the defendant had been added as a payee only for the convenience of her father and his wife, and not as an intended donee. The defendant's answer denied the assertion of her designation as for convenience and contended that the account being in favor of the survivor, she, as the ultimate survivor, was entitled to the whole fund. As a further defense, the defendant asserted that if the plaintiff were entitled to anything, the defendant had a right of set-off for moneys spent by her to pay debts of her father's estate, and for sums advanced to the plaintiff's intestate, and for the payment after her death of debts, burial expenses and expenses of the last illness.

10. See the observations in note 6.
11. Record ff. 41-43.

The plaintiff filed a reply, denying the validity of the set-off or counterclaim, admitted only that Joseph T. Fry had died, and demanded strict proof of the defendant's allegations.

The case was submitted to a special referee. He filed his report, adverse to the defendant in the main (the details follow). The circuit judge's decree (noted in detail hereafter) sustained the defendant's exceptions. The Supreme Court, without comment, declared only that "The Report of the Special Referee correctly disposes of the questions presented and is adopted as the opinion of the Court." It thereby, in effect, reversed the lower court.

The referee found that the addition of the defendant was with donative intent, and not for the convenience of the depositor or as an agency,[12] and that, under the contract theory formulated in *Hawkins v. Thackston*[13] an effective right to take beneficially as a survivor had been created in her. He concluded that "Janie Austin Fry and Irene Summers took said account, as joint owners thereof, with right of survivorship upon the death of Joseph T. Fry." Having thus characterized the nature of the rights created, the referee stated the issue to be whether the defendant had the right as against the wife to withdraw the entire account, and what the effect of the withdrawal and failure to pay over on the wife's demand were. He concluded that there was no such right in the defendant—either to withdraw or to retain—, and that the defendant had committed a "conversion," rendering her liable to the extent of $5,000 to Mrs. Fry, and on her death to her administrator, the plaintiff. The report stated:

12. Although not impossible, an agency is unlikely where the account runs to "A or B or the survivor," or where survivorship is otherwise indicated. Since an agency is terminated by death of the principal (the depositor), and the convenience of the depositor would end with his death, a reasonable inference would be that no agency was intended. There are cases, however, elsewhere in which survivorship was indicated, but there was finding that the joining of the other party by the depositor was for convenience. See CORBIN, CONTRACTS § 914 (1950) Supp. (1961). The agreement between the three parties and the association itself indicates the donative feature of the initial and subsequent deposits. The question may well arise as to what extent parol evidence may be admissible to show a contrary intent. See 48 C. J. S. *Joint Tenancy* § 3 (1955); 2 AMERICAN LAW OF PROPERTY § 6.4 (Casner ed. 1952). Generally as to admissibility of parol evidence relating to joint deposits, see 33 A. L. R. (2) 569 (1924).

13. *Supra*, note 6.

> Janie Austin Fry and Irene Summers had substantial and equal interests in this account following the death of Joseph T. Fry. Neither had contributed the money making up this account which, under several decisions, gives the contributing party greater rights of withdrawal without liability . . . . When it has been established that both parties have substantial interests in a joint account, it follows that neither can appropriate the whole without liability to the other.

The referee proceeded to declare that the deposit contract undoubtedly authorized the defendant to withdraw the entire amount without liability on the part of the savings and loan association, an act sanctioned by § 8-602 of the 1952 Code,[14] but that

> the power to withdraw is one thing and the power or right to destroy a co-interest is another. The removal of this account in full by Irene Summers and redeposit of same in her own name in North Carolina, clearly placed the money, or any part of it, outside the control and possession of Janie Austin Fry and beyond her reach. As a *joint tenant* (italics supplied) having a substantial interest in this account, Janie Austin Fry could have terminated the account by a withdrawal of one-half thereof, or by a voluntary partition or agreement with her co-owner. She was entitled to withdraw one-half of the account without becoming liable in any way to Irene Summers and Irene Summers could have withdrawn her *half share* (italics supplied) in like manner. Had Janie Austin Fry taken no action to sever this account, or to claim any part thereof during her lifetime, it cannot be questioned but that Irene Summers, as the survivor, would have taken the entire account on the death of Janie Austin Fry. . . . Had Janie Austin Fry lived, she could have enforced this demand by a partition action or, if the money had not been removed from the joint account, by merely withdrawing her share. Clearly,

14. The statute referring to savings and building and loan associations makes provision, as does its counterpart relating to banks, CODE OF LAWS OF SOUTH CAROLINA § 8-171 (1952), to accounts in the names of "two persons" and not to two or more. A reasonable interpretation would probably include the latter in the purview of the act. It is arguable, however, that a bank or association under the statutes would be justified only in paying to all the survivors and not to a single one of them. The contract in this case, however, authorized payment to the survivors or survivor.

she wanted her share and was rightfully entitled to same, but she was prevented from obtaining same by the action of Irene Summers in removing the money to an individual account in another State.

(Comment on this phase of the report—by adoption, the opinion of the Supreme Court—will be noted after reference to the lower court's decree).

As to the issues posed in the dealings with the bank accounts and the will of Joseph T. Fry, the referee found that the accounts had been in the names of "J. T. Fry or Mrs. Janie Austin Fry or Mrs. Irene Summers."[15] The deposit card provided "Depositor hereby agrees that funds deposited in this account are owned jointly by the undersigned, subject to withdrawal by either or both, and that at the death of either, the survivor shall take absolute and single ownership of the net balance then remaining." He also found that these accounts had been returned as assets of J. T. Fry's estate and that they had been used in part for payment of his debts; that a portion had been used in making monthly payments totaling $1,800 to Mrs. Fry; and that other amounts had been expended by the defendant for her stepmother's benefit—payment of debts and funeral expenses. The referee concluded that ordinarily the result would be that on J. T. Fry's death the wife and daughter would be entitled individually as survivors to the accounts, but that Janie Austin Fry having acquiesced in the defendant's treatment of the fund as an estate asset—influenced perhaps by the fact that it was used for her (Janie Fry's) benefit—would be estopped (as would those succeeding her) to assert any interest under the fund as created under the original contract of deposit. The defendant similarly, by her conduct, was held to have waived any individual rights in the deposits and in effect to have transferred any such rights into the estate.

A contention by the plaintiff (precisely when it was made does not appear) that the will of J. T. Fry was invalid and not entitled to probate was dismissed by the referee, on the ground that, as an attack on the will, it came too late, that is, after the time for contest prescribed by statute had expired.[16]

15. See comments in footnotes 6 and 10.

16. This conclusion is clearly correct. See the late case of Wooten v. Wooten, 235 S. C. 228, 110 S. E. 2d (1960); Davis v. Davis, 214 S. C. 247, 52 S. E. 2d 192 (1949), cited by the referee; Wilkinson v. Wilkinson,

The defendant had contended that under the will Janie Austin Fry had only a life estate limited to income or interest, and that for that reason any money furnished by the defendant over that amount was an outlay of individual funds entitling her to a corresponding set-off or recoupment. The contention was rejected by the referee. His holding was that the wife's interest was not so limited, but that she was entitled out of the estate to whatever was necessary for her maintenance; and accordingly, that the funds so used were estate funds to which the defendant had no right to reimbursement. With respect, however, to payments made by the defendant to meet obligations of the wife not connected with her maintenance, and for the wife's funeral expenses, it was concluded that they were not covered by the will, and as to them the defendant was entitled to a set-off.[17] A further contention that the wife was not entitled to participate at all because of the precatory character of the words of the will was dismissed, the referee concluding that despite the use of the terms "request" and "desire" the context was not precatory but created an obligation upon the defendant.

To the referee's report both parties excepted. The circuit judge held, as had the referee, that there was donative intent, and that a joint tenancy with right of survivorship had been created; but he differed from the referee with respect to the fate of the fund withdrawn from the association. In substance his determination was that the referee once having concluded that there was a joint tenancy with

178 S. C. 194, 182 S. E. 640 (1935); Hembree v. Bolton, 132 S. C. 136, 128 S. E. 841 (1925). The statute, CODE OF LAWS OF SOUTH CAROLINA § 19-255 (1952), is plain to the point. But of greater relevance is the fact that in this case the contention of invalidity of the willl would be in the nature of a collateral attack and forbidden. Davis v. Davis, *supra;* Wilkinson v. Wilkinson, *supra;* Hembree v. Bolton, *supra;* Hammett v. Hammett, 38 S. C. 50, 16 S. E. 839 (1892); Weinberg v. Weinberg, 208 S. C. 157, 7 S. E. 2d 507 (1946); Thompson v. Thompson, 208 S. C. 208, 37 S. E. 2d 581 (1946). Even if the time for attacking the will had not expired, the question of its validity could not be raised except by direct attack through proceedings in solemn form. See the cases just cited, and in addition Gibson v. Brown, 1 N. & McC. 326 (1818); Davis v. Port, 3 Brev. 197 (1815); Rosborough v. Hemphill, 5 Rich. Eq. 95 (1852); Ward v. Glenn, 9 Rich. L. 127 (1855); Myers v. O'Hanlon, 12 Rich. Eq. 196 (1861).

17. The pertinent provisions of the will touching this issue are set out earlier. See the text noting footnote 11. The language as a whole seems to create a trust, with the defendant as trustee and the wife as beneficiary, limiting the latter's interest to her lifetime but not restricted to income. As to the extent of a beneficiary's interest, see RESTATEMENT (SECOND), TRUSTS § 128, comment *e* (1959). It is there suggested that in a trust for support there is an inference that funeral expenses of the beneficiary are included.

right of survivorship, he was in error in treating in effect the tenancy as one in common—since the referee had held that each party had the right to withdraw an equal portion. As to the defendant's withdrawal of the entire fund, the decree declared that "The fact that the defendant took the funds into her possession after the death of Joseph T. Fry is unimportant and would not change the character of the funds or the ownership thereof."[18] In short, since the defendant outlived the wife, she was entitled to the whole fund, despite the premature withdrawal and appropriation of it. The court did not pass upon the effect of the transaction touching the will, the bank accounts, etc., saying it was not needed because the defendant claimed a set-off only in the event it should be determined that she was under liability to the plaintiff, and since it had been determined there was no liability consideration of the issue was unnecessary.

The plaintiff filed exceptions to, and appealed from, the decree, charging error in failing to hold that the plaintiff was entitled to the whole of the savings and loan deposit, in not holding that the defendant was only a fiduciary or agent as regards the deposit, in failing to hold that there had been a conversion, and in refusing to confirm the referee's report as to the liability of the defendant. There was no exception with respect to the court's refusal to consider the various aspects of the bank accounts, the validity of the will, its construction, the administration, and the right of set-off.[19]

As has been seen, the Supreme Court accepted as correct propositions of law the conclusions of the referee as to the nature and consequences of the savings and loan deposit. The case raises perhaps more serious implications than may

18. The judge's decree is not reported; it is found in the Record ff. 393-428.

19. This presents an odd feature of the case. Ordinarily the failure to appeal would make a decided issue the law of the case. Of course the reason given by the trial judge for not deciding the numerous issues raised concerning bank accounts, the will, etc., was that the decision hinged upon the outcome of the main issue—the disposition of the savings and loan account—which was wholly in favor of the defendant. Obviously the defendant would not, and did not, except to this. In the defendant's brief, however, there was argument on the point. In the reply brief the plaintiff declined to argue the issue, calling attention to the fact that no appeal had been made on that score. Hence the paradox that the Supreme Court adopts as its opinion a referee's report containing findings not adjudicated by the lower court. See Madden v. Madden, 237 S. C. 629, 118 S. E. 2d 443 (1961).

at first appear. The chief point of difference between the referee and the trial judge was that while both characterized the ownership or interest of the three (and later the two) parties as a "joint tenancy with the right of survivorship," the referee concluded that even though the defendant survived she had no right to appropriate the fund and upon its appropriation became liable to the wife to the extent of a half; the trial judge, while seeming to regard the withdrawal as an impropriety, regarded the wife's right—other than equal enjoyment—as contingent upon her survival, which did not occur. In this view, if the defendant had died first, the wife would have been entitled to the whole deposit either in its original or substitute form; and it is a fair guess that if that event had occurred the claim would have been made by her for it, and, without unfairness, equally resisted by the defendant's representatives.

The referee, the Supreme Court (by adoption of his report), and the trial judge accepted the relationship which had been created by the deposit agreement with the savings and loan association as a *joint tenancy, with right of survivorship,* the identical status described in the agreement. Apparently there was acceptance here of the classic common law joint tenancy including survivorship. In this acceptance there was perhaps the unwitting resolution of an unconsidered—and, for this State, novel—problem: the effect of the ancient statute[20] affecting joint tenancies: "When any person shall be, at the time of his death, seized or possessed of any estate in joint tenancy the same shall be adjudged to be severed by the death of the joint tenant and the same shall be distributable as if the same were a tenacy in common." The statute does not abolish joint tenancies, nor does it, as in many states having statutes affecting such tenancies, create a presumption against those tenancies;[21] it abolishes only the incident of survivorship.[22] The critical question is

20. CODE OF LAWS OF SOUTH CAROLINA § 19-55 (1952).

21. See 2 AMERICAN LAW OF PROPERTY, § 6.3 (Casner ed. 1952); 46 A.L.R. (2) 523 (1927).

22. McMeekin v. Brummett, 2 Hill Eq. 638 (1837); Varn v. Varn, 32 S. C. 77, 10 S. E. 829 (1890); Telfair v. Howe, 3 Rich. Eq. 235 (1851); Green v. Cannady, 77 S. C. 193, 51 S. E. 92 (1907); Davis v. Davis, 223 S. C. 182, 75 S. E. 2d 46 (1953). The existence of joint tenancies is implicit in two statutes dealing with partition, both making reference specifically to partition of joint tenancies. CODE OF LAWS OF SOUTH CAROLINA §§ 10-2201, 10-2205 (1952). The statute does not apply to interests which have not vested. Herbemont v. Thomas, Cheves Eq. 21 (1839); Ball v. Deas, 2 Strob. Eq. 24 (1848), in both of which the share of a joint legatee

whether in the light of the statutory elimination of survivorship, a survivorship can by express words be attached to a joint tenancy, which, after all, can be created. There are three possible answers to the question: (1) the joint tenancy is effective, but the survivorship not; or (2) the joint tenancy is not effective, but the survivorship is; or (3) both are effective, in which event the survivorship is not an incident, but a principal.

An approach of sorts was made to the issue in the case of *Davis v. Davis*.[23] There the Court dealt with a deed to A and B, husband and wife, "as tenants by entirety and the survivor of them." It was held that the tenancy by the entirety did not exist in South Carolina, but effect would be given to the intended survivorship by treating the parties as tenants for life with contingent remainder to the survivor, or perhaps as tenants in common in fee simple subject to cross executory limitations between them. The Court would not substitute a joint tenancy, because, it said, none was intended and survivorship is not the sole characteristic of a joint tenancy.[24] The Court observed:

> There is nothing vicious about the right of survivorship. Indeed, it was recognized by our General Assembly in the enactment of the statute relating to bank deposits. Section 7851 of the 1942 Code [§ 8-171, 1952 Code].[25]

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or devisee dying before the testator passed to the survivor or survivors; Free v. Sandifer, 131 S. C. 232, 126 S. E. 521 (1925). Nor does it apply to the joint estates of trustees. *Ex Parte* Knust, 4 Bail. Eq. 489 (1831); Dick v. Harby, 48 S. C. 516, 26 S. E. 900 (1896); Andrews v. U. S. F. & G. Co., 154 S. C. 456, 153 S. E. 745 (1929). See RESTATEMENT (SECOND), TRUSTS § 103 (1959).

23. *Supra*, note 22.

24. The position of the Chief Justice, in dissent, in which one other Justice concurred, was that as the tenancy by the entirety did not exist, the transfer was to the husband and wife as joint tenants (since, the dissenting justices said, although estates by the entirety were non-existent they were a species of or akin to a joint tenancy); and that since a joint tenancy is, by the statute, severed and becomes a tenancy in common by death, there was no right of survivorship. It is to be noted that the Chief Justice refused to give sanction to the express provision for survivorship. The majority opinion took sharp issue with the Chief Justice's view that a joint tenancy had been created, holding that there had not been; and of course the question arises whether if such a tenancy had been provided for in terms, the majority of the court would have nullified the survivorship as the dissent had done.

25. Although the right of survivorship is recognized in the statute mentioned, the statute, by its terms, is designed for the protection of the bank. The other statute (§ 8-602) dealing with building and savings and loan associations contains substantially the same provisions and originally was an amendment to, and part of, the statute relating to banks. CODE OF

> No rule of public policy or rule of law is violated by creating an estate in two or more persons with the right of survivorship. Section 8911 of the Code [§ 19-55, 1952 Code] only abolished survivorship an an incident of the common law estate of joint tenancy, and was never intended to prevent the creation of the right of survivorship when expressly provided for in a will or deed.

It is not clear whether there is a definitive indication in the case that a transfer "to A and B as joint tenants, and the survivor of them," or "to A and B as joint tenants, with right of survivorship" would bring into being both the joint estate and the survivorship, or whether it would create only joint life estates with remainder contingent on survivorship or a tenancy in common subject to an executory limitation in favor of the survivor. In the latter instances, of course, the survivorship would be indestructible. Assuming, however, that the *Davis* case sanctions by implication the joint tenancy and the survivorship by the use of the quoted terms, it cannot be deduced with certainty that the same result would follow if the terms were "to A and B and the survivor of them" or "to A and B with right of survivorship," nor would there be certainty in a deduction to the contrary. Little as it may be realized, and despite judicial attitude unfavorable as a matter of interpretation to joint tenancies, there can be no escape from the inevitability of a joint tenancy where

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LAWS OF SOUTH CAROLINA §§ 8-171, 8-602 (1952). In Hawkins v. Thackston, *supra*, the decision favoring the survivor was based to a large extent on the premise that the statute and the nature of the deposit raised a presumption that the parties intended that the deposit should be paid to the survivor as owner. The history of the legislation throws some doubt on this view. In 1926 the General Assembly enacted legislation providing that if a deposit was made in the names of two persons, payable to either, or to either or the survivor, the persons named were entitled thereto as *joint tenants*, and the bank on payment to either or the survivor would be discharged. 34 Stat. 1939. This was probably a response to the situation produced by the cases of Sawyer v. Mabus, *supra*, and Smith v. Planters Bank, *supra*, in the first of which the survivor was held not entitled, and in the second of which the bank was held liable for paying over to the survivor. In 1930, the 1926 act was repealed by an act which retained the provisions as to the joint tenancy and the acquittance of the bank but limited the amount to $500. It became § 7870 of the 1932 Code. [For its construction as to responsibility of the bank in paying, as affected by the form of the deposit, see Motley v. Forester, 165 S. C. 346, 163 S. E. 828 (1932). The construction there should still hold good. See, also, Johnson v. Bank, 213 S. C. 458, 50 S. E. 2d 177 (1948).] In 1935 the present act was passed, omitting mention of a joint ownership. 39 Stat. 236. It contained no express repeal of § 7870. By deleting the reference to the nature of the ownership of the payees, it is reasonably clear that, while there is mention of payment to a survivor, the legislature avoided all characterization of the interest created as between the parties.

a transfer is simply—and without more—"to A and B."[25a] If that is so, it would seem a distortion of logic to say that "to A and B" would create a joint tenancy, but that to add words of survivorship—the "grand incident" of the joint tenancy—would destroy it, substituting for it joint life estates or tenancies in common.[26] The *Davis* case cannot be utterly controlling for purposes of a conclusion, since there the intent was to create a tenancy by the entirety, not a joint tenancy; the former failing, there was no replacement by the latter, nor simply a deletion of "by the entirety" to make the words read only "to A and B and the survivor of them." It is not surprising that the belief may arise, from the statute itself,[27] and from the language and result in the *Davis* case, that an attempt specifically to attach a survivorship to a clearly expressed joint tenancy would fail of the intended purpose, either in rejecting the tenancy or in rejectthe survivorship.[28]

As has been indicated, the whole treatment by the referee (the Supreme Court as well) and the lower court was to recognize the co-existence of the joint tenancy and the survivorship, and thereby, by indirection, to render the statute inapplicable where survivorship is provided for. In this position there is ample concurrence in the authorities elsewhere,[29]

25a. But see Newberry v. Walker, 162 S. C. 478, 161 S. E. 100 (1931), in which, however, the matter was not in issue.

26. For a discussion of the problem, see the opinion in Davis v. Davis, *supra,* and annotation in 69 A.L.R. (2) 1058 (1960), which points out how the issue arises as a result of the statutes affecting joint tenancies and survivorship. See also, 1 A.L.R. (2) 247 (1949).

27. *Supra,* note 20.

28. See Jacobs, *Estates of Co-Tenancies in South Carolina,* 11 S.C.L.Q. 520, 527-529 (1959), which apparently takes the position, from Davis v. Davis, that the survivorship as there described—cross remainder or executory limitation—may exist but not the joint tenancy. On the other hand, see an opinion of the Attorney General, OPS. ATT'Y. GEN. 145 (1953-54):

> In answer to the question . . . concerning the law on survivorship rights, based on the decisions of the South Carolina Supreme Court and various statutes enacted by the Legislature, it would seem to me that survivorship rights cannot be created in South Carolina. The statute (§ 19-55, 1952 CODE OF LAWS OF SOUTH CAROLINA) specifically provides that in the case of joint tenancy on the death of one of the joint tenants, his property passes as if owned by him as tenant in common. Further, the Supreme Court in the case of Green v. Cannady, indicates that tenancy by the entirety would no longer exist in South Carolina. In view of the statute and the decision of the Supreme Court, it is my opinion, therefore, that survivorship rights cannot be created.

This was, of course, before Davis v. Davis.

29. 48 C.J.S., *Joint Tenancy* § 2 (1947).

particularly as related to joint bank accounts.[30] The broader implication, of course, is that despite the statute a joint tenancy with right of survivorship may be created in real and personal property generally; and, if this is true, to take a simple example, a conveyance of land to "A and B as joint tenants, with right of survivorship" would operate precisely as intended. The right of survivorship—the *jus accrescendi*—would be preserved, but it would not be indestructible and could be defeated by an alienation by one of the joint tenants or by one of the other means producing a severance.

It was assumed at all levels of the case that a joint tenancy may be created as to a bank deposit or savings and loan account, and the authorities on the whole are in accord that not only personal property generally but bank deposits in particular may be the subject of joint tenancy.[31] The conclusion having been reached in the present case that a joint tenancy was intended, there is not much point in speculating whether the parties—the depositor particularly—*really* desired it. It may be difficult to believe that the depositor intended to permit the other two parties (while he was alive) to terminate the tenancy by transfer or by compelling a partition, or to deny to himself the right to withdraw and appropriate for his sole use the whole of the fund. It is not an unreasonable conjecture that he did not wish his wife and daughter to have more than the joint ownership during their lives, with the survivor taking the whole.[32]

30. 48 C.J.S., *Joint Tenancy* § 2 (1947); 7 AM. JUR. *Banks* § 425 (1937); 85 A.L.R. 282 (1933).

31. 14 AM. JUR. *Cotenancy* § 10 (1938); 48 C.J.S. *Joint Tenancy* § 3 (1955); 2 AMERICAN LAW OF PROPERTY § 6.4 (Casner ed. 1952). The existence of joint tenancies in personal property is clearly recognized in the statute giving the court of common pleas jurisdiction to partition joint tenancies in real and personal property. CODE OF LAWS OF SOUTH CAROLINA § 10-2205 (1952). The statement has been made that joint tenancy of a bank account can be established only on the basis of gift or trust—with the gift or trust a condition precedent. 48 A. L. R. 189, 203 (1927); 66 A. L. R. 881, 891 (1930); 7 AM. JUR. *Banks* § 435 (1937). If this is true, it might be concluded that since, under Hawkins v. Thackston and the reviewed case, the right of the donee is based on contract, and not upon gift or trust, a joint tenancy could not, in South Carolina, be invented in a bank account. This, of course, is arguing in a vacuum, since in the present case there has been acceptance of both the contract theory and the joint tenancy flowing from its terms.

32. Presumptively, under Hawkins v. Thackston, a deposit by A payable to A or B indicates an intent that the survivor shall take beneficially. But a deposit by A payable to A or B or C presents the question whether A's presumed intent is that on his death first B and C shall take equally as tenants in common without survivorship, or whether the survivorship feature is to continue as between them. The present case does not an-

The referee's report, which has been quoted earlier, shows adherence to the technical aspects of joint tenancy—up to a point. The point is the critical one in which he and the trial judge came into disagreement. The referee treated the appropriation by the defendant, her redeposit in another state, and her refusal of the wife's demand, as a severance and termination of the tenancy; the trial judge did not. Both agreed that withdrawal and appropriation into another, and individual, account did not destroy the joint character of the estate. The referee's holding is that "As a joint tenant having a substantial interest in this account, Janie Austin Fry could have terminated the account by a withdrawal of one-half thereof, or by a voluntary partition or agreement with her co-owner." That the tenancy could be terminated by voluntary partition seems clear; that a transfer by her of her interest would also work a severance seems likewise clear; and it is also reasonably plain that a compulsory partition could have been demanded and, if decreed, would have produced a termination.[33] The authority cited by the referee[34] to support the statement just quoted makes no mention of withdrawal by the co-owner of a bank account, but it would seem on principle that if a transfer of the interest could accomplish a severance, a withdrawal would serve the same purpose.[35]

In view of the concurrence of the referee and the trial judge that the redeposit in the daughter's name did not des-

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swer the question since the agreement was expressed in favor of "survivors or survivor." And, even if, in the three-party case, there might not be a presumption of survivorship as between the two surviving donees, the continuation of the account in their names conceivably might raise it.

33. CODE OF LAWS OF SOUTH CAROLINA § 10-2201 (1952), making partition compellable between joint tenants, and tenants in common, refers to lands only, but even without the statute compulsory partition of personal property may be had between co-tenants, as indeed may real property. See TIFFANY, REAL PROPERTY § 307 (abridged ed. 1940); Holley v. Glover, 36 S. C. 404, 15 S. E. 605 (1892). Another Code section, CODE OF LAWS OF SOUTH CAROLINA § 10-2205 (1952), gives the court of common pleas jurisdiction to make partition "in all cases of real and personal estates held in joint tenancy or in common."

34. 14 AM. JUR. 86.

35. In New York, which recognizes joint tenancies in bank accounts, a withdrawal by a joint tenant of his moiety produces a severance, and if less than his share a severance to that extent. In re Suter's Estate, 258 N. Y. 104, 179 N. E. 310 (1932). But if the whole be withdrawn by one and redeposited in his name without the consent of the other the joint tenancy is not disturbed. Accordingly, if the party withdrawing dies before the other, the latter is entitled to the whole account. See the New York cases collected in 161 A.L.R., beginning at page 78, and also beginning at page 86.

troy the joint tenancy, the question then narrows down to whether the subsequent conduct of the parties produced a severance. To justify the conclusion of severance, the referee places heavy reliance upon the text in 161 A. L. R., pp. 74-75, and in 7 American Jurisprudence (*Banks*), 1959 Supplement, p. 39. It is highly arguable that the cited material does not, as a whole, support the conclusion reached.[36] It is difficult,

36. See 7 AM. JUR., *Banks*, § 426 (Supp. 1961):

> Under the doctrine prevailing in most jurisdictions where the point has been considered the act of a joint tenant or tenant by entirety in withdrawing all the money from the account does not destroy the joint estate, or the estate by the entireties, as the case may be. Accordingly, where by means of creation of a joint bank account a gift of a joint account is made, it is held, in some cases, that the subsequent act of the donee in withdrawing all of the money leaves the joint estate intact. Passing notice may be taken of the fact that under the doctrine that a total withdrawal made by the donee of a joint bank account does not destroy the joint estate, *it may happen that the donee as survivor will succeed to the whole fund notwithstanding he unlawfully withdrew the whole of it during the donor's lifetime* (italics supplied).

The identical language appears in 161 A.L.R. at pages 84 and 85. Language of similar import is to be found in 48 C.J.S. *Joint Tenancy* § 4 (1955):

> A joint tenancy of a bank account may be terminated by the consent or agreement of the parties. It has been held that the joint tenant of a bank account may terminate the joint tenancy by a transfer or conveyance of his interest, and by a withdrawal of his share terminate the joint tenancy as to that sum, but a withdrawal of the entire account without the other's consent does not effect termination of the joint tenancy but only a change in the form of the property, although it has been held that a withdrawal of the entire amount of the account terminates the joint tenancy and makes the fund the personal property of the party withdrawing it.

It has earlier been commented that if the defendant had died first, the wife would probably have claimed—and in all likelihood successfully—the whole of the fund. Most of the cases have been cases of that kind—the withdrawing party dying first, and the other becoming entitled to the entire fund.

In New Jersey the withdrawal alone—and without more—by one joint tenant of the entire fund destroys the joint tenancy and entitles each party to one-half. In the present case it is conceded that the mere withdrawal does not accomplish that result, and the New Jersey decisions on that account cannot be persuasive authority for the present case. For the New Jersey decisions, see 161 A. L. R. 71, 80 (1946).

The annotation in 161 A.L.R. is appended to the case of State v. Gralewski,____ Ore.____, 159 P. 2d 211, 166 A.L.R. 66 (1945), which denies destruction of the joint tenancy by withdrawal of the entire fund by one of the parties. This case was relied upon by the trial judge in the present case. It is true that there appears in the annotation in 161 A.L.R., at page 75 and also in the text in 7 AM. JUR. *Banks* § 426 (Supp. 1959), as noted by the referee, that "where it has been established that both parties have substantial interest in a joint account, it follows that neither can appropriate the whole interest without liability to the other." But the statement has to be qualified by determination of whether the "joint account" was a tenancy in common, whether it created only a right contingent upon survivorship, or a true *joint tenancy*. If the last, then the extent of contributions made by the parties would be of no consequence.

on principle, to justify the conclusion that the removal and redeposit of the fund in another state worked a severance. It might have produced inconvenience but it did not shut off the right to sue in the other state. A redeposit in South Carolina in the defendant's name would be equally placing the money "outside of the control and possession of Janie Austin Fry and beyond her reach", as the referee characterized the North Carolina deposit. Or, to put it another way, it was no more out of her control and reach in North Carolina than if the redeposit had been made in South Carolina. And it is difficult to equate a demand for a share and its refusal with a partition. There was the privilege to both parties of voluntary partition, and the right in each to compel partition, but these are not the same as actual partition. Partition produces severance because it produces the destruction of one of the unities of a joint tenancy—possession. A demand for partition and a refusal should no more serve to destroy a joint tenancy of a bank account than a similar demand and refusal in the case of land. Demand for partition and refusal are not partition.[37] Calling the actions of the defendant a "conversion," if there has been no severance

"Liability" by the withdrawing party to the other party could hardly, in the case of a true joint tenancy, create an immediate affirmative duty to pay over one-half the fund. Of course, there could be demand, followed by a suit, for a division, but that could occur even where there had been no total withdrawal.

37. See 64 A.L.R. (2) 918 (1929), entitled "What acts by one or more joint tenants will sever or terminate the tenancy." It is there indicated that even where a suit for partition has been commenced, there is no severance if there has been no decree of partition. Reference in the annotation to "demand for division" as producing a severance seems limited, if accepted at all, to beneficial joint interests under a trust.

In Harrington v. Emmerman, 186 F. 2d 757 (D.C. Cir. 1950) where an account was carried in two names, the committee of the depositor made demand on the other party for possession of the pass book, but the demand was refused. The committee claimed the whole of the account and sued. The depositor thereafter died and her executors, as plaintiffs in substitution of the committee, sought to recover the account. The defendant claimed she was entitled to the fund as survivor. The court concluded that the true nature of the account could be inquired into; that if there was intent to create only survivorship, with a right in the depositor to withdraw the whole fund, demand destroyed the survivorship; if there was a tenancy in common, the demand entitled the defendant to one-half. The defendant's contention that a joint tenancy existed was, under the facts, denied; she was evidently taking the position that with a joint tenancy a demand would not produce a severance. The court seems to accept the legal principle asserted. "Nor can she justify her conduct by asserting that the terms of the deposit agreement, including its use of the words 'joint owners' created a technical joint tenancy which could not be severed by the mere request of one tenant that the estate be divided. The relation created by the writing was a tenancy in common." 186 F. 2d 757, 760, n. 8.

in the legal sense, can hardly be accepted as justification for reaching a result that only a severance would entail.[38]

It is assumed throughout the discussion of the case under review that the same rules and principles are applicable to building and loan or savings and loan associations accounts as are applicable to bank accounts. The authorities generally so treat them; so does *Hawkins v. Thackston.* The theoretical distinction between a bank depositor as a creditor and a building and loan depositor as a shareholder is seemingly of no consequence; and in any event the promise to pay or redeem to the depositor, member or shareholder creates a debtor-creditor relationship too close to the relationship afforded by a bank deposit to warrant any substantial difference in application to joint accounts whether in bank or association.

Partition—Heir's Claim Against Estate

The question of whether, in an action for partition of land, where the estate has not been settled, an heir may by way of counterclaim or cross-action set up a claim against the estate is presented in *Watson v. Watson.*[39] The case also involves the question of the statutory restriction upon the time within which an action upon a claim may not be brought. The plaintiffs were two of the heirs of their mother, one of them

38. Whether a bank or savings and loan account can be the subject of "conversion" is open to question. See 44 A.L.R. (2) 927 (1926), entitled "Nature of property or rights other than tangible chattels which may be subject to conversion." Money may be the subject of conversion, provided it is specific. Abrahams v. R. R. Co., 1 S. C. 441 (1869). But whether the defendant's conduct be denominated "conversion" or "fraud," the cause of action arising from it as a *tort* would not survive the death of the wife and an action would not lie by her administrator. Chaplin v. Barrett, 12 Rich. Law 284 (1859); but recovery could be had on a quasi-contractual or restitutional basis. Chaplin v. Barrett, *supra;* Caldwell v. Ford, 3 Hill Law 248 (1827); Adams v. Haselden, 112 S. C. 32, 99 S. E. 762 (1919). The Survival Act, CODE OF LAWS OF SOUTH CAROLINA § 10-209 (1952) permits the survival of tort actions only where there has been *actual injury* to personal property. Bemis v. Waters, 170 S. C. 432, 170 S. E. 475 (1933). If there was a right in the wife to follow the fund into its new form, the redeposit, the constructive trust that would thus arise would not be destroyed by her death. As to the right to follow, see 77 A. L. R. 799 (1932); as to the constructive trust, see Harrington v. Emmerman, *supra.* Of course, if the fund could not be traced or identified, the trust aspect would disappear. Want v. Best, 233 S. C. 460, 105 S. E. 2d 678 (1958).

39. 237 S. C. 174, 117 S. E. 2d 145 (1960). The parties to this action were defendants in another partition action involving lands owned by their intestate and the plaintiff. The case, which makes mention of the present case, is discussed in this survey under Property. Mallow v. Watson, 237 S. C. 226, 116 S. E. 2d 689 (1960).

suing individually and as administrator; the defendants were the other heirs, one being sued individually and as co-administrator. The complaint, which was served less than three months from the death of the intestate, asked for partition in kind.[40] All but one of the defendants asked for partition in kind of a portion of the land and for sale of the balance. The remaining defendant also asked for partition in kind of part and sale of the other land (it does not appear whether this defendant and the others were asking for partition in kind and by sale of identical parcels).[41] In her answer this last defendant set up "For a Second Defense and By Way of Counterclaim and Cross Complaint" a claim for services rendered the decedent, and alleged that she had previously filed with the administrators a claim for the amount alleged to be due. Judgment was asked against the administrators and that the judgment "be declared a lien upon the premises described in the complaint." A copy of the claim alleged to have been furnished the administrators was attached to the answer. It was dated two days before the date of answer. The answer, with its counterclaim or cross-claim, was served about three months after the decedent's death.

The plaintiffs demurred to the counterclaim on the grounds (1) that no claim existed in favor of the defendant against the plaintiffs between whom a several judgment might be

40. The complaint is not set out in full in the opinion or in the record. Hence, it does not appear what the allegations were with respect to the joinder of one of the plaintiffs as administrator and one of the defendants in a similar capacity. Presumably it was in view of circuit court rule 54:

> No partition of real estate of a deceased person shall be had unless the legal representative or representatives of such deceased person be made parties to the action and it be made to appear to the Court that the debts of such deceased person are fully paid, or that the personal estate in the hands of the personal representative be sufficient for the payment of the debts of such deceased person, or unless due provision is made for the payment of the debts.

Absent the complaint it cannot be learned from the record whether the personal estate was sufficient for debts. It is apparent, however, that debts had not been fully paid.

41. The defendant did not resist the action as being premature under the twelve-months rule (now probably reduced to six) affecting partition actions. The question was raised by the parties to the present action in opposition to the action in Mallow v. Watson, *supra*. It was decided adversely to them, the Court noting incidentally that they were hardly in a position to raise the issue of prematurity in the light of their having brought this action within such a short time. For a discussion of the rule see Mallow v. Watson as noted under Property. Even if the defendant had objected to the hastiness of the action, the result would have been the same as in the Mallow case because the time consumed by the appeal was enough to render the question moot.

had; (2) that the counterclaim did not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action; (3) that to permit the counterclaim would be to permit the improper uniting of several causes of action; (4) that the counterclaim did not state facts sufficient to constitute a cause of action in that (a) action within six months from a decedent's death to recover a debt of an estate is forbidden by § 19-554 of the 1952 Code; (b) there was no allegation of filing and proving the claim as required by §§ 19-473 and 19-474 of the 1952 Code; (c) the five months allowed for the ascertainment of claims by the administrator under § 19-473 of the 1952 Code had not expired; (5) that the court did not have jurisdiction of the subject of the counterclaim for the same reasons set out in 4 (a), (b), (c); (6) that there was a defect of parties in that the subject of the counterclaim was maintainable only against the personal representatives and not against the heirs. A motion was also made to strike the counterclaim on the same grounds.

The trial judge overruled the demurrer and denied the motion to strike, stating, "This is a proper case to apply the equitable principle that when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue."[42]

On appeal the Supreme Court reversed. After setting out the provisions of the Code relating to counterclaims,[43] the Court declared, "The counterclaim under consideration does not fall within the provisions of the foregoing sections of the Code and may not, therefore, be filed by one of the heirs for services rendered the decedent in a partition action."

It is to be noted that the Court rests its conclusion on only the first and second (and possibly the sixth) grounds of

42. The trial judge's order is not set out in the opinion or otherwise in the report of the case. The quoted language is found in the RECORD, ff. 59-60.

43. CODE OF LAWS OF SOUTH CAROLINA § 10-703 (1952):
The counterclaim mentioned in § 10-652 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; or (2) In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.

demurrer. It does not touch upon the other grounds going largely to substance except to dismiss the assertion (made in the demurrer and motion to strike) that the action on the counterclaim could not be brought within six months from the intestate's death, giving as the reason that the six months had elapsed and the question had become moot.[44]

A fair argument may be made that the provisions of the counterclaim statute, on which the Court based its action, are not a proper reason, or are too narrow a ground, to justify the sustaining of the demurrer. The defendant denominated her pleading a counterclaim but she also termed it a cross-complaint; and while this may appear to be a quibble with words, it has all the appearance of the familiar cross-bill in equity which may put into issue and bring into the suit the rights and equities of the parties relating to the subject matter.[45] It may be true that a several judgment might not be had against all the parties, but a decree affecting the rights of all the parties as precipitated by the cross-complaint could be had. Moreover, a judgment so obtained would not be a judgment against the administrator or administrators personally but one affecting the land in suit—and in that sense also touching the heirs, although they, too, are not personally liable. It does not require extensive reference to authority for the proposition that in order to prevent multiplicity of actions, a court of equity will "reach

44. The prohibition against suit within six months is found in CODE OF LAWS OF SOUTH CAROLINA § 19-554 (1952), as amended by Act No. 767 of 1956. The amendment, among other things, changed the prohibited period from twelve months to six months. Originally the period was nine months. The amendment, among other things, changed the prohibited period from twelve months to six months. Originally the period was nine months. 5 Stat. 106 (1789). As to the purpose of the act, see 9 S. C. L. Q. 169. The act has been before the Court many times but there seem to be no cases in which the action brought within the restricted period was represented by a cross-action, as distinguished from an original one. The proposition that if the time has run during the appeal the question becomes moot and the action can proceed was previously approved in Strickland v. Chaplin, 199 S. C. 203, 18 S. E. 2d 736 (1942), the result being reached on the ground that in the event of premature suit in violation of the statute, the practice is not to dismiss but to stay the proceedings until the time has elapsed. O'Daniel v. Lehre, 2 Strob. Eq. 83 (1848), in which it is also said, "There may be cases when the bill may be entertained, even before the time usually limited; as where it is filed to preserve the estate from imminent danger of loss."

45. See 68 C. J. S. *Partition* § 95 (a) (1950): "A cross-bill or cross-complaint is proper whenever it is necessary in order to do complete justice between the parties and to adjust the equities between them connected with the property sought to be partitioned in the original action." See also, 68 C. J. S. *Partition* § 150 (3) (1950).

out and draw into its consideration and determination the entire subject matter and bring before it the parties interested therein . . ."[46] Here the claiming heir is already a party, and her claim, if substantiated, would allow her to reach the land or its proceeds.[47] If the counterclaim statute is a bar in this case, it would also be a bar—and there has been no suggestion that it is—to a claimed offset for improvements, or rents, or discharge of taxes or an encumbrance. Lienors, whether of undivided interests of the heirs, or of the whole interest through the act of the decedent, have never been impeded by the statute in the assertion of their cross-claims against the parties and the property. It may not be necessary to make them parties but, once they are, they may assert their rights;[48] and this would necessarily take the affirmative form of a cross-action.

Looking to the sixth ground of demurrer (on which the Court may also have proceeded) it would appear that if the defendant could have sued the administrators and the heirs together in order to reach the land for payment of her debt, it would not be objectionable to sue them, so far as the counterclaim statute is concerned, by way of cross-complaint. It is well settled that a judgment against the personal representative, sued alone, on a debt of the estate may reach the land; but that if the heirs or devisees are in actual and exclusive possession, action must be brought against them;[49] but even where an action might be brought against the representative only, or where judgment is asked against him alone, the heirs may be made parties, because of their possible

46. 40 AM. JUR. *Partition* § 65 (1942).

47. The claim, not reduced to judgment, is not strictly a lien; but it differs from the claim against a living debtor in that the decedent's land can be subjected to its payment even though it has reached the hands of a purchaser, if the alienation has not been *bona fide*. It has been termed a "constructive lien," Jones v. Wightman, 2 Hill L. 577, 583 (1835), and an "equity," Hand v. Kelly, 102 S. C. 151, 156, 86 S. E. 382, 384 (1915).

48. 40 AM. JUR. *Partition* § 66 (1942); 126 A. L. R. 414 (1940).

49. Huggins v. Oliver, 21 S. C. 147 (1883); Brock v. Kirkpatrick, 60 S. C. 322, 38 S. E. 779 (1900); McNair v. Howle, 123 S. C. 252, 116 S. E. 229 (1922). If the lands have been partitioned among the heirs, their possession becomes actual and exclusive, so as to preclude recourse to the land by execution under a judgment against the representative, and the land can be reached only by a proceeding against the heirs. D'Urphey v. Nelson, 1 Brev. 476 (1803); Rogers v. Huggins, 6 S. C. 356 (1874); Huggins v. Oliver *supra*; *Ex Parte* Worley, 49 S. C. 41, 26 S. E. 949 (1896); Brock v. Kirkpatrick, *supra*. In the present case, if partition took place, a subsequent action against the administrator and the heirs, and not the administrator alone, would be necessary to reach the land for the payment of the defendant's claim.

interest and to settle questions concerning possession.[50] But aside from these considerations there is room for conclusion that the language in subsection (1) of the statute is broad enough to embrace the cross-action: "A cause of action arising out of the contract or transaction set forth in the complaint as the formation of the plaintiff's claim *or connected with the subject of the action*" (italics supplied). The defendant's attempt to reach the land would seem to be connected with the subject of the action. This is not objectionable as would be the assertion by the defendant of a claim against either of the plaintiffs arising out of a personal obligation or liability unsecured by or unrelated to the descended land. Indeed, it may be questioned whether in any event the counterclaim statute has any application to an equitable action of this character. The defendant was not urging her claim solely against the plaintiff administrator but against her co-defendant administrator as well; and her claim against the estate affected the parties on each side. Her cross-demand was directed not alone to the plaintiffs but to her co-defendants. If the plaintiff administrator had been a defendant, along with his co-administrator, the objection to a counterclaim could not well be advanced; and it would seem of no consequence that he was a plaintiff instead.

But, if it be conceded for argument's sake, that the counterclaim statute does not stand in the way of the cross-claim, a question of substance would remain: whether in an action for partition an heir may insist upon the adjudication of his claim against the estate. The answer generally is that he may not,[51] although if the action were one to marshall assets, with partition as an incident, he could do so.[52] There would

50. Tolbert v. Roark, 126 S. C. 207, 119 S. E. 571 (1923). Similarly, if the heirs alone are sued they may compel joinder of the representative. McNair v. Howle, *supra.*

51. 68 C. J. S. *Partition* § 143 (b) (1950):
> Ordinarily a judgment in partition should not determine and settle claims against the estate that is being partitioned, when such claims are properly cognizable in a court of probate, and a court of equity will not, in a partition suit, determine claims against the estate to be partitioned as to which there is an adequate remedy at law. Nevertheless, it has been held that the court, on partition, may ascertain and provide . . . that provision may be made for the satisfaction of adjudicated claims, or claims enforceable as proper charges or liens against the land.

52. See Galphin v. Wells, 236 S. C. 606, 115 S. E. 2d 288 (1960), dealt with earlier in this survey, but not on this point; Erwin v. Williams, 199 S. C. 38, 18 S. E. 2d 598 (1942). In Sherwood v. McLaurin, 96 S. C. 348, 80 S. E. 609 (1913), executors brought an action against legatees

seem to be some point in objection to the assertion of a claim of an heir in a partition action, not only because of its interference with and delay of that action, but because of its taking the consideration of the claim out of the normal channels of administration and throwing the personal representative into a new arena of action. Since the action is not to marshall assets, in which the validity of claims is passed upon by the master or referee, the question may arise whether the making of a demand for judgment in this action is nothing more than a pure money demand triable by a jury and the subject of an independent action.[53] Even if the defendant were to obtain a judgment for her debt, it might be deprived of its efficacy if assets were not sufficient to pay all debts of the estate. Though reduced to judgment, the priority of a claim is determined by its status at the time of the decedent's death;[54] and a contract claim at the time of death, though represented by a judgment obtained upon it afterwards, ranks only as a contract obligation in the order of priority of payment. Such a debt is prorated with other contract obligations and is last in the order.[55] The dilemma of the personal representative, who is charged with paying debts according to their statutory order, is plain enough; and in a partition suit in which he is a party only because of a rule of court and not to further administration, for him to be confronted with an unliquidated claim, whose validity and priority he would have to determine, heightens his dilemma and makes his task more difficult. It may be a central procedural issue, therefore, whether an action on a claim may properly be

and devisees to construe the will, pay debts, sell land for the purpose, and effect a division of the balance. One of the devisees set up a debt owed her by the testator. It was held that she could do so. It is to be noted that this was primarily an action to marshall assets, and that the devisee having been made a party, in the language of the Court, "it was not only her right but 'her duty to declare her whole mind.' " A similar result was reached in Gaston v. Gaston, 80 S. C. 157, 61 S. E. 393 (1908) which was an action in the probate court to sell land in aid of assets and for division in which an heir was allowed to set up a claim for services furnished to another heir, since deceased. Since actions to marshall assets are essentially proceedings looking to the payment of debts, and since division of surplus follows as a matter of course, there can hardly be a question that the claim of an heir is as provable as that of any other person. The fact that the personal representative is joined as required, as a party plaintiff or defendant, in a partition does not, of course, turn the action into one for marshalling of assets. See Smith v. Pearson, 210 S. C. 524, 43 S. E. 2d 479 (1947).

53. Hand v. Kelley, *supra;* McNair v. Howle, *supra.*

54. Wilson v. McConnell, 9 Rich. Eq. 500 (1857); Maxwell v. Greene, 171 S. C. 253, 172 S. E. 246 (1933); 121 A. L. R. 656 (1939).

55. CODE OF LAWS OF SOUTH CAROLINA § 19-476 (1952).

brought as was attempted to be done in this case. On the other hand, while the settlement of the estate is not a condition precedent to partition,[56] the twelve-months rule[57] and circuit court rule 54[58] evidence the concern of the courts for the protection of creditors; and it might be argued from this that when one of the parties asserts a claim it ought to be heard and that he ought not, with the change in possession brought about by partition, to be compelled to bring another action.[59] This position, for what it is worth, is not weakened by the fact (as the demurring parties urged) that filing the claim with, and disposing of it by, the representative, and his ascertainment of other possible claims, had to precede the defendant's cross-action based upon it. It seems to be fairly well established that the filing of a claim is not a prerequisite to the bringing of suit, and that the commencement of an action is itself considered a sufficient presentation,[60] even though the statute calling for presentation of claims is a non-claim statute.[61]

56. 68 C. J. S. *Partition* § 46 (1950); 40 AM. JUR. *Partition* § 29 (1942); Atkinson v. Jackson, 24 S. C. 594 (1886).

57. *Supra*, note 41.

58. *Supra*, note 40. In several cases applying the rule the Court has permitted the partition to proceed because, the administrator being a party, there was a showing of payment of debts, or sufficiency of personal assets, or provision made for payment in the decree. Atkinson v. Jackson, *supra;* Connor v. McCoy, 83 S. C. 165, 65 S. E. 257 (1909); Green v. Cannady, 77 S. C. 193, 57 S. E. 832 (1907). In the last case a creditor intervened by petition, and, taking account of his claim, the Court ordered due provision made for the payment of his debt. The partition took the form of a sale. If, in the present case, there was not, for all it appears, a sufficiency of personal assets, and the partition was to be in kind, it is difficult to perceive how due provision could be made for payment of debts, particularly when the debts at the time of the suit had not been ascertained and the defendant's claim, unliquidated, was the subject of dispute. It will be recalled that in *Mallow v. Watson* the Court ordered the partition to proceed. It observed concerning the intestate estate there, which is the same here, ". . . the administrators of the estate . . . were made parties to this action as required by Rule 54 of the Circuit Court and it will be assumed that in the partition decree proper provision will be made to protect the creditors, if any, of decedent's estate."

59. *Supra*, note 50.

60. 34 C. J. S. *Executors and Administrators* § 396 (1942); 21 AM. JUR. *Executors and Administrators* § 342 (1939); 34 A. L. R. 362 (1925).

61. 21 AM. JUR. *Executors and Administrators* § 345 (1939). The matter has not been passed upon in this state, but before the present statute, CODE OF LAWS OF SOUTH CAROLINA § 19-474 (1952), became a statute of non-claim in 1943 instances were fairly common of actions on debts without prior filing of claim. McNair v. Howle, *supra;* Columbia Theological Seminary v. Arnette, 168 S. C. 272, 167 S. E. 465 (1932). The language of the present statute does not require filing as a prerequisite to suit, and as a suit may be regarded as equivalent to presentation, there seems to be no reason to suppose in this state a result contrary to

Wills—Revocation and Revival—Jurisdiction

A case involving important questions of revocation and revival of wills is *Madden v. Madden.*[62] The facts are confusing, almost bizarre. The testator, who had a second wife and two children by his first marriage, had executed a will in 1953. He executed a later will, in 1957, which expressly revoked all former wills. In it he gave his wife, "for her life, all my property, real, personal, and mixed, to be used for her benefit and use in whatsoever manner she see fit and, upon her death, all of the remainder to go to my children, Harmon Andrew Madden and Ruby M. Sellers, share and share alike." The will further provided that should one or both of the children predecease his wife leaving child or children, such child or children should take the share the parent would have taken[63] The will, in which the wife was named executrix, was probated in common form in October, 1958, shortly after the testator's death.

In June, 1959, the two children brought the present action in the common pleas court of Greenville County (and thereafter by consent transferred to the county court) against their stepmother, individually and as executrix, and their children, some of whom were minors, individually and as representatives of a class. The complaint stated that the testator had made the 1953 will, under which, so the allegation ran, the homeplace had been given to the wife, in fee simple, and the *remainder of the estate, real and personal,* had been given to the wife and children, one-half to her and one-fourth to each of them (the significance of the italicized

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the prevailing view. The previous statute (*ante* 1943) also referred to filing of claims. The major difference was that under the earlier statute the claims were not barred by failure to present them within the prescribed time, and the present statute bars them. This change does not go to the effect of suit as a form of presentation. Of course as a practical matter the claim will first be presented, rather than suit brought, since the time for presentation is five months after the first publication of notice to creditors, CODE OF LAWS OF S. C. § 19-474 (1952), and, as has been noted, an *action* to recover a debt cannot be brought within six months from the decedent's death. It would appear, however, as has been seen, that even if the action is prematurely brought in the face of the statute, it is not nullified, merely delayed, so that it may be said that the prematurity of the action would not prevent it from operating as a presentation of the claim. The converse, that filing of a claim is the bringing of an action, is not true. Floyd Mortuary v. Newman, 222 S. C. 421, 73 S. E. 2d 444 (1953). § 19-474 has recently (1961) been amended. This is discussed hereafter under *Legislation.*

62. 237 S. C. 629, 118 S. E. 2d 343 (1961).

63. RECORD, ff. 179-181.

words will appear later); and that he had later made the 1957 will. The complaint further alleged that in September, 1958, the testator had expressed a desire in the presence of his wife and children to make a new will under which the wife was to receive a life interest in the home place, the remainder therein to his children, and the residue divided one-half to the wife and one-fourth to each of the children; that the wife objected to the proposed change but stated that she would accept the provisions of the 1953 will, as set out in the complaint. It was then alleged that relying on the wife's promise the testator refrained from revoking his second will, and that it was the agreement of the parties that the testator's property should be divided as under the 1953 will. The further allegation was that the 1957 will had been probated but that the wife had refused to honor her promise to hold the property under the terms of the 1953 will; that this promise had been fraudulently made in order to induce the testator not to change his will; that the wife by her actions had been unjustly enriched. The prayer was that the wife be declared to be trustee of the testator's property for the benefit of herself and the plaintiffs in accord with the provisions of the 1953 will, and that she be compelled to make conveyance to the plaintiffs accordingly.

In her answer the wife admitted the execution of both the 1953 and 1957 wills; she alleged that the testator had retained both wills because he was undecided as to which one to use; she admitted the agreement between the testator, herself and the other parties as to the disposition to be made according to the 1953 will, and that she was ready and willing to carry it out. She then stated that she was willing to have the 1953 will admitted to probate in lieu of the 1957 will already admitted to probate. Instead of joining in the prayer to establish a trust (no mention was made of it) she concluded: "Defendant joins with Plaintiffs in requesting permission to probate the will of M. E. Madden, deceased, dated in 1953, in lieu of the will heretofore offered for probate." The defendant turned the other cheek in making no mention of the allegation of fraud in her promise.

The action, as the Supreme Court saw it, had all the earmarks of a friendly suit, but during the trial the parties seemed to have become better acquainted with the terms of the 1953 will. Instead of its giving the residue of real and

personal estate to the wife and children it gave all the personal estate to the wife and only the residue of the real estate for division among her and the children. The averment, therefore, in the complaint was erroneous. Included in the assets of the estate were real estate mortgages — which are personal property — forming a considerable fraction of the value of the estate. The theretofore friendly suit ceased to be friendly and the plaintiffs, who were now taking a more appreciative view of the 1957 will,[64] sought to have it sustained, but did not altogether abandon the notion of a constructive trust, contending that they were entitled to such a trust not according to the actual terms of the 1953 will but according to the terms they had alleged in the complaint.

The lower court reached the conclusion that the testator prior to the conference in 1958 had not made up his mind as to which of the two wills would constitute his last will, and that he did not intend in making the 1957 will to revoke the earlier one. It thereupon proceeded to utilize in its way the doctrine of revival of wills recognized by the cases of *Taylor v. Taylor*,[65] and *Kollock v. Williams*,[66] under which a will revoked by a later will which is thereafter destroyed or cancelled *animo revocandi* is deemed revived if it has been allowed to exist, and declared that the testator having left the 1953 will intact and having intended to revoke the second will, the 1953 will was revived. The court declared that although the testator did not destroy the 1957 will

64. Precisely what estate was created in the parties by the 1957 will, or what estate they assumed that they had, are unanswered questions. The wife, objecting to the proposed new will giving her a life estate in the home place, may have believed, as may have the children, that because of the power in the 1957 will to use as she saw fit she had a fee. There is the possibility, of course, that she took a fee, but it is more likely that at most she took a life estate with power to consume, with contingent remainder interests in the children and grandchildren. If the 1957 will gave her the full estate, her promise to hold all the testator's property under the terms of the 1953 will would be meaningful, but if she had only a life interest a promise to hold her interest subject to the terms of the 1953 will which made absolute and complete gifts in fee to the takers would be incongruous to say the least. She could not subject the other beneficiaries under the 1957 will, particularly the grandchildren born and to be born, to a trust of property to which she did not have full title. If the testator's children had ever assumed complete ownership to be in the wife they certainly abandoned that view in the course of the trial, because they then fought for the upholding of the 1957 will. If the wife had ever assumed that she had the fee by reason of the 1957 will, she too changed her mind, otherwise she would not seek the reinstatement of the 1953 will, which gave her ownership of less than all the property.

65. 2 N. & McC. Law 482 (1820).

66. 131 S. C. 352, 127 S. E. 444 (1924).

> he did so in effect when he announced a desire and conclusion to use the first . . . will, and not the second . . . will. As stated in the *Taylor* case, it is regarded as a question of intention and may be controlled by other evidence. The plaintiffs, testator's children, by their complaint acknowledged that the testator revoked his second will by expressing, after full discussion, his desire and intent to use the [first] will.[67]

The trial judge in conclusion ordered: "For the reasons above stated this Court is of the opinion that the first will of the testator . . . is and constitutes the last will and testament of the said M. E. Madden and that said will should be probated in lieu of the [1957] will."[68]

The Supreme Court reversed. As to the trust sought by the plaintiffs, the Court declined to review that feature of the case, as the lower court had not passed upon it.[69] The Supreme Court made short shrift of the lower court's holding that there was no intent to have the second will operate initially, and sustained it as both a revoking and a dispositive instrument.[70] The Court pointed out that with the *animus*

67. RECORD, ff. 204.

68. RECORD, ff. 214-215.

69. If, in fact, a promise had been made by the wife, beneficiary under the second will, to use the property for the purposes set out in the first will, she could be held as a constructive trustee and compelled to carry out her promise, even though there was no fraud in the making of it. RESTATEMENT (SECOND) TRUSTS § 55 (1959); 66 A. L. R. 156 (1930); 155 A. L. R. 106 (1945); Towles v. Burton, Rich. Eq. Cases 146 (1832); Stuckey v. Truette, 124 S. C. 122, 117 S. E. 192 (1922) (concurring opinion); Wilkinson v. Wilkinson, 192 S. C. 497, 7 S. E. 2d 447 (1940); Wolfe v. Wolfe, 215 S. C. 530, 56 S. E. 2d 343 (1949). It is inherently improbable that the testator refrained from revoking his second will in reliance upon the promise of the wife to abide by the provisions of the first will. A mere modicum of common sense would dictate simply the destruction or cancellation of the second will. See again the comments in *supra* note 64.

70. The Court pointed out that "Where a document is, upon its face, susceptible of interpretation as either a will or some other type of instrument, extrinsic evidence is generally admitted to show what the maker intended it to be,"—citing Wheeler v. Meray, Bail. Eq. 507 (1831), and Hargroves v. Meray, 2 Hill Eq. 222 (1835), both cases dealing with the same paper, the question being whether the instrument was a deed or will. The paper bore three witnesses. Such a situation would seldom arise, since wills require three witnesses and deeds only two. Prior to 1824, when the Statute of Wills (Frauds) was amended to put wills of personal property on a parity with wills of real property as to execution, 6 Stat. 238, (so as to require the will to be signed, with three witnesses), written wills of personal property did not require witnesses, and an unwitnessed will or one having less than three witnesses was valid. It became difficult at times to determine whether an informal paper, such as a letter, was intended as a will or not, and the inquiry was as to the *animus testandi.* Apparently, if the paper's language was ambiguous,

testandi established, the will on execution became an effective testamentary instrument, ambulatory and revocable, a result which would not be affected by the fact, if it was a fact, that the testator had not made up his mind which will to use, since (in substance) he may always change his mind and his will at any time after execution. The Supreme Court also differed with the lower court's determination that the 1957 will had been revoked by the testator's intention that it should be revoked, calling attention to the fact that a will can be revoked only in one of the ways specified by the revocation statute.[71]

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parol evidence was admissible to show the presence or absence of testamentary intent. McGee v. McCants, 1 McC. L. 517 (1821); Lyles v. Lyles, 2 N. & McC. L. 531 (1820); Witherspoon v. Witherspoon, 2 McC. L. 520 (1823). This does not solve entirely the problem of whether, if the instrument is on its face unambiguously a will and executed as such, it may be shown that it was not intended to operate at all or only conditionally. In *Witherspoon v. Witherspoon, supra*, it was said, as dictum:

> His [testator's] signature is the act by which he seals his sanction to the operation it is intended to have; it precludes the idea that anything more was intended; it is the factum of the thing itself; and in the language of the definition it is a complete and legal declaration of his intention; and in such a case the rule [parol evidence] would operate in full force.

In the present case the Supreme Court felt it unnecessary to pass upon the question of the admissibility of parol evidence on the issue of the *animus testandi* in an instrument unambiguously a will, but stated that if the evidence to show lack of it were admissible it would have to be clear, cogent and convincing; and the evidence here offered to disprove lack of the *animus* fell short of that standard. See anno 21 A. L. R. (2) 319 (1922) cited by the Court. The problem is an acute one where the will is attacked for want of *animus testandi* as a specimen, sham, pretensive, or ritualistic will. The will here is not one of these. It might be argued that the will is a conditional or contingent will, conditioned in terms of initial operation only if a particular event should come to pass: in this case if the testator did not change his mind. Jacks v. Henderson, 1 DeS. Eq. 543 (1797); Capps v. Richardson, 215 S. C. 534, 53 S. E. 2d 876 (1949); 11 A. L. R. 846 (1921); 79 A. L. R. 1168 (1932). The will here is ruled out as a possible conditional will because in order to stand up as one the will on its face must show that it was so intended—here the will was unambiguously unconditional—and parol evidence is not admissible to show that a will absolute on its face was intended to be conditional. ATKINSON, WILLS § 416 (2d ed. 1953). Even if the will in this case had said, "This is my will if (or on condition that) I do not change my mind," this would not make the will conditional, as the language is no more than is implied in the case of every will, which by its nature is ambulatory and revocable.

71. CODE OF LAWS OF SOUTH CAROLINA § 19-221 (1952). The term "destroying" in the statute embraces "burning, cancelling, tearing." Johnson v. Brailsford, 2 N. & McC. L. 272 (1820). It is familiar law that in order to effect revocation there must be both the *animus revocandi* and the act; one without the other is insufficient. An intention to revoke at some future time, even though there are markings on the will indicating proposed changes, is not enough. Brown v. Shand, 1 McC. L. 409 (1821) (declarations by testator of dissatisfaction with will, and intention to change by making new will, not carried out); Means v. Moore, Harper Law 314 (1824) (will marked). And, even if there is present intent,

Turning to the question of the revival of the 1953 will the Supreme Court held, in opposition to the lower court, that the first will had not been revived. The Court affirmed the doctrine of revival as announced in the *Taylor* and *Kollock* cases, but held that the facts in the present case were not similar to the facts in those two cases. The essential point of difference was that in those cases the second-revoking-will had in the one instance been cancelled, and in the other was not produced and hence presumptively (the presumption was not overcome) destroyed *animo revocandi*.[72]

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failure to do one of the requisite acts prevents revocation, Floyd v. Floyd, 3 Strob. L. 44 (1848) (revocation prevented by undue influence). As to act and intent generally see Johnson v. Brailsford, *supra*.

It seems highly unnatural that a testator with two wills in his possession who wished his second will not to stand would be content to exact from his family a promise that the second will should be ineffective and the first effective. Ordinarily he would merely destroy the second will, an act less involved than leaving the second will intact and procuring a promise. See the comments in note 69, *supra*, as to the alleged promise to leave the second will in force but to accept the provisions of the first will. Of course there is a glaring inconsistency between the parties' original position that the wife made a promise in order to induce the testator not to revoke his second will and the later position that it was the understanding of the testator and the family that the second will was revoked. And an equally palpable inconsistency is the wife's actual probating of the will with her assertion that it had been revoked.

72. The misconception of the lower court grew out of the statement in the *Taylor* case that "by the civil law the first is regarded as annihilated by the second; and it requires other evidence than a destruction of the second to revive the first. In both it is regarded as a question of *intention*, and may be controlled by other evidence." The reference is to the contrast between the common law rule, which is followed, and the civil law rule, which is not. Under the civil law rule, originally applicable to personal property, the mere making of the revoking will revoked the first will. Under the common law rule, applicable originally to devises, the making of the revoking will did not by itself produce revocation of the first. Both the making of the revoking will and its continued existence to the time of death brought that about, on the principle that since until death the will, including its revocatory provision, was itself ambulatory and revocable, the revocation itself might be revoked. (In this context, the term "revival" or "revivor" is a misnomer, since the first will, if in existence unmutilated, is not regarded as affected until the testator dies leaving in force his later revoking will. It has not in the meantime been revoked and it therefore needs no reinstatement.) The strict common law principle leaves no room for inquiry into intention. Whether the testator intended to die intestate, or preferred to leave his first will, the first will operated. The less strict common law rule acts to revive the first will unless the testator did not intend that it should be revived—that is, he desired intestacy. The language in the *Taylor* case indicates adherence to the qualified, rather than the strict, common law rule. See 28 A. L. R. 912 (1924); 162 A. L. R. 1072 (1946). The *Kollock* case merely states that the lower court "was clearly right in holding that the courts of this State have adopted the common law rule under *Taylor v. Taylor*. . ." (It is interesting to note that in the A. L. R. annotations just mentioned the *Taylor* and *Kollock* cases are listed as following the strict common law rule, which excludes intention. The South Carolina cases seem to be similarly listed elsewhere. 68 C. J. *Wills* § 567 (1934);

The result of the Supreme Court's decision was to leave unimpaired the probate and efficacy of the second will, to nullify the first will, and to reject any trust or interest incompatible with the dispositions under the second will. The result produces a paradox of sorts in that the plaintiffs, while winning the case on appeal, were left precisely in the same situation they occupied before starting their action. The proceeding ended as a salvage operation for the plaintiffs, and of course for their children, contingent beneficiaries.[73]

Anti-climactically, there is another extraordinary aspect of the case: the failure by both the lower court and the Supreme Court to make mention of (though probably not overlooking) the vital question of the authority or jurisdiction of the lower court to invalidate the second will and to declare entitled to probate the first will. The court was clearly in this respect exercising probate functions. If the view is taken—and it would be a distorted one—that the proceedings were in effect to prove the second or first will, or both, in

2 PAGE, WILLS § 21-54 (Bowe-Parker-Revision 1960); ATKINSON, WILLS § 92, (2d ed. 1953). The *Taylor* case purports to follow the leading English case of Goodright v. Glazer, 4 Burr, 2512, 98 Eng. Reprint 317 (1770); but this case seems not to permit intention to play a part and to hold that revocation of the revoking will *ipso facto* revives the earlier will.) Much of the force of the *Taylor* case is lost in the fact that the second will had been obtained through fraud and was invalid from the start. The intention referred to as controlling the issue of revival is the intention to revive or not to revive the earlier will. To bring revival into play, in any event, there must be revocation of the later will; and if there is no act of revocation, even though the intent is present, the circumstances for revival do not exist. The intent which the lower court evidently had in mind was the intent to revoke the later will. That is not the intent which may play the vital part in revival.

73. As has been noted, the obstacle that derailed the agreement to distribute the testator's property according to the 1953 will was the belated discovery that the terms and nature of the estate were not as the parties had supposed them to be. If they had, the case would not have proceeded beyond the lower court. The reason for going to court in the first place was that the mere agreement of the testator's wife and children could not get rid of the interests of the minor and contingent beneficiaries; and only an action to impose a trust or to vacate the later will would, if the requested relief were given, supersede and vitiate any rights seemingly created by the second will. But for the existence of the contingent rights the mutual promises of the wife and the children to forego their rights under the second will and to substitute the interests created under the first will could be sustained on general contract principles, and, subject to the Statute of Frauds, as an appropriate family settlement. Smith v. Williams, 141 S. C. 265, 139 S. E. 625 (1927); Smith v. Tanner, 32 S. C. 259, 10 S. E. 208 (1889); Huggins v. Price, 96 S. C. 83, 70 S. E. 798 (1913). Where the heirs divide the property according to the provisions of a defective will, they are estopped to deny its validity, Miley v. Deer, 93 S. C. 66, 76 S. E. 27 (1912). By analogy if there had been acceptance of and action under the unprobated, and revoked, 1953 will, there would be an effective estoppel to deny its force.

solemn form, with the permitted bypassing of the probate court[74] the proceeding would have come too late in view of the statute limiting such proceedings to six months following admission to probate in common form.[75] The proceeding was demonstrably one in equity, asking for a trust, although turning later into an attempted impeachment of one will and the validation of another. It certainly seems to be well established that once a will has been admitted to probate by a competent tribunal its validity cannot be questioned collaterally.[76] There was no effort at the trial, nor

74. Muldrow v. Jeffords, 144 S. C. 509, 142 S. E. 602 (1927). If the proceeding were really one to prove the second will in solemn form, the executrix, whose duty it was to uphold the will and who represented all the beneficiaries, *Muldrow v. Jeffords, supra*, would not, consistently, attack it. So far as the first will is concerned, it had not even been probated in common form, and it would be unusual, to say the least, to prove it for the first time in this fashion.

While the county court of Greenville County has unlimited jurisdiction (as regards amount of money or value of property) in equitable actions, Bramlett v. Young, 229 S. C. 519, 93 S. E. 2d 873 (1956), and could have entertained the action to enforce a trust, it is open to question whether it had the jurisdiction to try an issue of "will or no will" in view of the size of the estate, even taking into account the fact that a will contest is at law, and the county court act limits actions at law in terms of money or value to actions to recover money or property, CODE OF LAWS OF SOUTH CAROLINA §§ 15-654, 15-656 (1952 Supp.). The latter section gives the county court power to entertain appeals from the probate court on the issue of will or no will where the estate does not exceed $10,000. It would be a contradiction of sorts if the court were to have the power to deal with the issue where the probate court was bypassed, and not to have it when the proceeding took the form of an appeal from the judgment of the probate court in a solemn form proceeding.

75. CODE OF LAWS OF SOUTH CAROLINA § 19-255 (1952). And see comments on that point in note 16, *supra*.

76. See the cases in note 16, *supra*. "Validity" as here employed means with respect to proper execution, capacity, freedom from undue influence and fraud, knowledge of contents, and necessarily (except for *later* revoking wills) that the will has not been revoked. Probate does not preclude inquiry into the validity and effect of any or all of the provisions of the will. These are contructional or internal matters. Hembree v. Bolton, *supra*. In cases in which the courts say that a will is void for uncertainty or indefinitness of provision, the meaning is not that the will itself is a nullity but that the dispositive provisions cannot be given effect. Complete intestacy may result without affecting the validity of the will itself or its probate. This is a constructional (internal) and not a probate (external) treatment of the will. Before a will can be scrutinized by a court for construction, it must first have been admitted to probate, and the probate cannot be affected by the proceeding. *Compare* Davenport v. Collins, 161 S. C. 387, 159 S. E. 787 (1931); Meier v. Meier, 208 S. C. 520, 38 S. E. 2d 762 (1946); Prater v. Whittle, 16 S. C. 40 (1881). In *Meier v. Meier*, which was an action for specific performance of a contract for the sale of land, the defense was that not only was the language of the probated will under which the plaintiff claimed so vague as to render the instrument ineffectual as to its dispositions but also to negative its existence as a will in the sense of testamentary intent. The Court said "there can be no doubt that the intention of the testator was that this should be his will." The instrument,

in the exceptions, on the part of plaintiffs' counsel or of the guardians-ad-litem for the minor defendants, to assail the inquiry into the validity of the first or second will, but in their brief the counsel called attention to that feature of the case.[77] No notice of it was taken by the Supreme Court.

It would appear, however, that the case was converted entirely into a *direct* attack upon the second will and into a *direct* proceeding to establish the validity of the first. The authority and jurisdiction of the court to perform these clearly probate acts is seriously open to question. The law appears to be well settled generally that a court of equity can neither set aside a will nor order a will admitted to probate.[78] South Carolina authority is fairly explicit in the same vein. In *Myers v. O'Hanlon*,[79] the Court, as a court of equity, refused, on the ground of want of jurisdiction, to set up a will alleged to have been fradulently suppressed and which,

regular in execution, having been admitted to probate some seven or eight years before, it would seem that the probate precluded any inquiry collaterally into testamentary intent. See note 70, *supra*, the cases of *Wheeler v. Meray*, and *Hargrove v. Meray*, where the paper had not been offered for probate.

77. Appellants' brief, f. 12, in these words:

> There is a further point which is here raised with some hesitancy. A will once duly admitted to probate cannot be attacked collaterally, as this will was by the defendant, Mrs. Madden. This point was not raised at the trial, nor was it included in the exceptions. The appellants recognize that they may be prevented from raising this issue now. There are however two minor children represented by guardians ad litem. The interests of these minors are not of necessity consistent with the interests of the appellants. These guardians are not represented by counsel and the appellants feel under an obligation to point out to the Court the existence of this further consideration.

The writer ventures no opinion as to whether the failure to call attention to the collateral character of the inquiry into the wills would deprive the appellants of their right to raise the question thereafter or of the right of the appellate court on its own motion to dispose of it. See the concluding remarks of Justice Blease, in dissent, in Muldrow v. Jeffords, *supra*. In *Hammett v. Hammett*, *supra*, which was an action by executors for instructions, the Supreme Court, after its decision, was presented with a petition for a stay of remittitur on the ground that newly discovered evidence disclosed that the testator was of unsound mind at the time of execution of the will and that the evidence would present "an issue material to a just decision of said cause." The Court declined to hear the petition on the ground that "the evidence is designed to raise an issue of *devisavit vel non*, of which issue neither this Court nor the court of common pleas can now take original jurisdiction."

78. 3 PAGE, WILLS § 26.19 (Bowe-Parker Revision, 1961). "It is generally held that equity cannot interfere in probate matters in absence of statute, either to admit a will to probate, or to set it aside." 57 AM. JUR. *Wills* § 773 (1948): It is stated as a general principle that courts of equity have no jurisdiction of a will contest unless such has been conferred by statute."

79. 12 Rich. Eq. 196 (1861).

it was contended, had revoked an earlier will admitted to probate many years before, and as to which the time for proving in solemn form had expired. While refusing to set up the allegedly suppressed will it also declined to set aside the probated will, as the complainants had also asked. The chief bulwark of the court's position was the fairly positive nature of the Act of 1839 (7 Stat. 56), now embodied in § 19-255 of the 1952 Code, relating to proceedings in solemn form.[80]

The critical question arises whether if a court lacks jurisdiction to assume probate functions but nevertheless undertakes to do so, its judgment is void, and must remain so, despite the failure of a litigant to challenge the jurisdiction. In this case, should the lower court have denied itself the power to pass upon the questions presented, where no objection was made or even where the jurisdiction was consented to? And, more important, since the lower court did not so deny itself, could, or should, the Supreme Court of its own motion pronounce the nullity of the action of the court below?[80a] And, if the judgment below was void and the Supreme Court should not, for one reason or another, declare it to be so, would the appellate judgment itself be subject to future attack as itself being void? Questions of this kind have not gone unnoticed in other cases, but, as they open up a tremendously wide area of consideration, the writer offers no opinion upon them. In this case, the questions are largely academic because, while the case was considered on the merits, the reversal of the lower court left undisturbed the probate of the second will and the absence from probate of the first, the same result that would have followed if the Court had declared that the lower court had no authority to disturb the status of the two wills. Still, it is hoped that the inference will not be drawn from the treatment of the

80. Long before the Act of 1839, the court of equity declined to look into matters of probate. See Irby v. McCrae, 4 DeS. Eq. 422 (1814). Some early cases "permitted Equity to take a hand directly by compelling the executor and persons benefiting by the will to consent to revocation of the will and allow the heirs to litigate. McDowall v. Peyton, 2 DeSau. Eq. 313 (S. C. 1805); Palmer v. Mikell, 2 DeSau. Eq. 342 (S. C. 1806)." (13 S. C. L. Q. 96, 102, n. 12). In *Myers v. O'Hanlon* the Court declared that the Act of 1839 would no longer permit this kind of equitable action: "It results that the Court cannot interfere in this case, either by direct relief, or by decreeing that the executor's consent that the probate of the will . . . be revoked." 12 Rich. Eq. at 204.

80a. The Court, however, has at times taken note of the impropriety of the lower court's allowance of collateral attack and at the same time dealt with the case on its merits. Davis v. Davis, *supra*, note 16.

case on both the trial and appellate levels that the procedure (which was not criticized) is an approved or permitted one.

Purchase Money Resulting Trust

A case that has many facets of the law of purchase money resulting trusts is *Green v. Green.*[81] Although there was conflict in the testimony, the facts were reduced to a fair degree of simplicity by the lower court and the Supreme Court, and the recital of facts here is as they were found by both courts.

The plaintiff and the defendant were married in 1937. The plaintiff was divorced from her husband, the defendant, in 1958. In 1943, the defendant had purchased a house and lot and had title made to himself and his wife. The initial payment for the property and the subsequent payments on the mortgage given by them were all made by the husband. Later, with the coming of a family, the two undertook, in 1950, to buy another lot on which to build a larger house. In order to pay the purchase price, $3,000, they refinanced the mortgage on the property, and derived a net of about $2,800. To this they added an amount drawn from their joint bank account to make up the price of the new lot. It was found as a fact that there had been an agreement that the property should be held jointly, as before, but instead, unknown to the wife, the husband took title in his sole name. Afterwards the first house and lot were sold, the existing mortgage paid off, and a net balance of about $4,900 realized, which was placed in the joint bank account. The funds were used towards the building of the new house, which was otherwise financed by a mortgage loan of $16,000. The mortgage was signed only by the defendant, with the plaintiff renouncing dower.

In 1959 the plaintiff brought this action, setting out substantially these facts, and claiming that as a consequence she was entitled (as the Supreme Court's opinion put it) "to either a joint interest in the new house and lot or [it] entitled her to a judgment for monetary contribution thereto, and also that the Court should decree a resulting trust in her favor." The defendant in his answer asserted sole ownership in himself from the outset, that he was the real owner of the

81. 237 S. C. 424, 117 S. E. 2d 583 (1960).

first property held in the joint names because he had paid for it, and he was also owner of the proceeds of its sale. He denied that there was any agreement to take title jointly to the new lot and building. During the proceeding the lot and building were sold for $25,000, and one-half of the net proceeds after payment of the mortgage, or about $5,600, was deposited in court. The husband was concededly the owner of the other $5,600, and the final scope of the action was to determine whether the plaintiff was entitled to all or any part of the other half in custody of the court. The lower court held that the plaintiff, despite the husband's payment for the first property, was an equal owner with him of it, and also of the fund which it produced on its refinancing and on its sale; and it further held that she was entitled to a resulting trust to the extent of her money which was used in the purchase of the second lot and in the contribution to the building of the house upon it. The lower court, so finding, directed the $5,600 to be disbursed by giving to the wife the total of the two sums advanced by her—about $3,800—and by paying the balance of something over $1,700 to the husband. The husband thus received altogether over $7,300. (It is to be noticed that the lower court did not order a distribution on a proportionate basis, a point which will be discussed later.)

The Supreme Court affirmed the lower court. It went over the same ground as the lower court, but with considerable elaboration of authority and reasoning. Because of the case's possibly considerable impact on the law of resulting trusts, and the conclusions that may be drawn, it will be given detailed analysis.

The first phase of ownership in the case is relatively simple. The husband's contention that because the consideration came from him in the purchase of the original house and lot he was the beneficary of a resulting trust of the interest held in his wife's name as co-owner, was dismissed. The Court stated the familiar general rule:

> . . . when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase price intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. But, when the conveyance is taken to a wife,

> for whom the purchaser is under legal obligation to provide, no such presumption attaches. On the contrary, the presumption in such case is that the purchase was designed as a gift or advancement to the person to whom the conveyance is made. This presumption is one of fact, and not of law, and may be rebutted by parol evidence or circumstances showng a contrary intention.[82]

The second phase of ownership, title in the husband alone, offers some difficulty, not factually but in the application of pertinent principles. The Court, having stated the necessity for "clear, definite and convincing" evidence to establish a resulting trust, concluded that the evidence showing the payment by the wife towards the purchase price, and her contribution to the cost of erection of the building, met the necessary test,[83] and also that the evidence was of a like and satisfactory character with respect to the understanding of the parties as to joint ownership. Being thus satisfied with the proof, the Court found a resulting trust in favor of the wife.[84] The husband's contention that the wife had

82. Citing, among other cases dealing with payment by the husband with title in the wife, Legendre v. S. C. Tax Comm., 215 S. C. 514, 56 S. E. 2d 336 (1949). This case, in which the wife paid the consideration and had the title taken in the name of herself and her husband, also seems to hold that, whatever the relationship, if any, where one party pays the consideration and has title taken in his name and that of another, the inference is of a gift of the fractional interest—relying on RESTATEMENT, TRUSTS § 441, comment *e* (1935). A *fortiori*, when the husband pays the purchase price and takes title in his and his wife's names.

83. The high degree of proof called for by the cases is as to the payment of the purchase money, and not as to corroborative intention, since the fact of payment once proved gives rise to the implied intention.

84. There is room for argument that a constructive, rather than a resulting, trust arose, although for most purposes the difference would not be material. The found fact was, not that the husband agreed to take title in his sole name for the joint benefit of himself and his wife, but that he had agreed, in substance, to take title in the joint names of himself and his wife. They were to be co-owners, without a trust. Instead, he used her money to take title in his name alone. The misuse of the wife's money and the abuse of the confidential relationship would, more plausibly, make the trust constructive. This is the view taken by some of the authorities: 2A BOGERT, TRUSTS AND TRUSTEES § 458 (1953) SCOTT, TRUSTS §§ 440.1, 508.1 (2d. ed. 1956); 3 POMEROY, EQUITY JURISPRUDENCE §1037 (4th ed. 1918). See RESTATEMENT (SECOND), TRUSTS Vol. 2, p. 392 (1959) Introductory note to Topic 4. The cases divide on the characterization of the trust as resulting or constructive where the agreement is that title is to be taken in joint names but instead is taken in only one. See 42 A. L. R. 10, 62 (1906); 135 A. L. R. 232, 241 (1941); 27 A. L. R. (2) 1285, 1300 (1953). See also Picchi v. Picchi, ——— Fla. ———, 100 So. 2d 627 (1958): "Where husband and wife buy realty with the understanding that the title is to be vested in both, and the husband

made a gift to him of the funds was, the Court held, contradicted by the testimony. His argument was essentially that a gift by wife to husband would be presumed; but the Court, while admitting that "a gift from a wife to a husband may be inferred from the circumstances and the marriage relationship is a factor to be considered," declared that "This testimony negates any presumption of such."[85]

Because of the fact that the money contributed by the wife for the construction of the building was advanced *after* the title had been acquired by the husband, the defendant contended that a principal requirement of the purchase money resulting trust had not been met: the purchase money, or a definite portion of it, must have been paid at or before the time of conveyance, and such a trust cannot arise from subsequent transactions. The Court conceded the existence of the rule,[86] but here it took a significant step forward and

has the deed run to himself alone, he may be made constructive trustee for the wife as to a half interest." The South Carolina cases dealing with a party's taking title in his own name without the consent of the other are not precise on the point. In the co-adventurer cases, where no money has as yet been furnished by the party claiming the trust, the purchase by the other party in his own name, in violation of an agreement to purchase in the joint names, has been held to give rise to a constructive trust. Webb. v. Searson, 208 S. C. 453, 38 S. E. 2d 654 (1946) (trust arose); Carmichael v. Huggins, 221 S. C. 278, 70 S. E. 2d 223 (1952) (principle recognized, but proof not sufficient). In Ogilvie v. Smith, 215 S. C. 300, 54 S. E. 2d 860 (1949), plaintiff alleged she had furnished defendant, her fiance, part of the funds to buy a car in their joint names, and defendant bought car in his sole name. It was held that, if the facts were proved, she was entitled either to recovery of the money furnished or to a *constructive trust or equitable lien.* In Goforth v. Goforth, 47 S. C. 126, 25 S. E. 40 (1896), an action for partition, defendant, plaintiff's stepmother, alleged that the purchase price of the land in suit had been paid for by her through her husband, who, in violation of agreement, had taken title in plaintiff's and defendant's names. Held, *resulting* trust for defendant in the interest held by plaintiff. Since the resulting trust is based on the presumed intent of the payor that a trust is to be created in his favor, it would seem that consent of the payor to the transfer would be essential. Without consent, therefore, a resulting trust could hardly arise. See also Richardson v. Day, 20 S. C. 412 (1883).

85. It is submitted that while a gift from wife to husband may be inferred in some circumstances, there is nevertheless a presumption that when a wife pays the purchase price and title is taken in the husband's name, there is no presumption of a gift but rather the presumption of a trust, which the husband has the burden of overcoming. 4 SCOTT, TRUSTS § 442 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 442, comment *a* (1959); 113 A. L. R. 339 (1938). Although the South Carolina cases are not entirely clear, they on the whole seem to accept this view. Linnell v. Hudson, 59 S. C. 283, 37 S. E. 927 (1900); Grantham v. Grantham, 34 S. C. 504, 13 S. E. 675 (1890); Fallaw v. Oswald, 194 S. C. 387, 9 S. E. 2d 793 (1940). In Legendre v. S. C. Tax Comm., *supra,* cited by the Court, there is no definite commitment.

86. Citing Surasky v. Weintraub, 90 S. C. 522, 73 S. E. 1029 (1911), and Hutto v. Hutto, 187 S. C. 36, 196 S. E. 369 (1938). The trust

added a qualification that has general acceptance: that if subsequent payment by the trust claimant is made in fulfillment of a previous obligation, at or before the transfer, to pay, rather than as a new and independent transaction, the payment requirement is met for the trust.[87] The evidence showed that the payment made by the wife was in accordance with an agreement with her husband at or before the time of the transfer to him. It should be noted, however, that the payment made by the wife after her husband had acquired title was for the purpose of aiding in the erection of the house and not for the purpose of acquiring the property. When the title was acquired, the wife had already furnished all of her share of its cost; and upon the vesting of title in the husband, she then and there became the beneficiary of the resulting trust. Much of the argument, therefore, as to the effect upon the creation of the trust by the subsequent payment is unnecessary, if even relevant,[88] but the important and useful fact is that the rule as to payment made under a prior obligation has been adopted. It would appear more realistic to view the improvements made with the plaintiff's money in part as improvements placed on property already owned by her as a co-tenant and as such forming part of the realty. Ordinarily, the improving of another's property, or furnishing the money for improvements does not create a purchase money resulting trust, but it would appear that if the person furnishing the money for improvements already has an equitable ownership as beneficiary of a resulting trust the improvements, as part of the realty, likewise be-

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arises, if at all, when the conveyance is made; hence subsequent transactions cannot affect the prior status. Many South Carolina cases are in the same vein. *Ex Parte* Trenholm, 19 S. C. 126, (1882); Richardson v. Day, *supra;* Brown v. Cave, 23 S. C. 251 (1885); Jones v. Hughey, 46 S. C. 193, 24 S. E. 178 (1895); Gaines v. Drakeford, 51 S. C. 37, 27 S. E. 960 (1897); Larisey v. Larisey, 93 S. C. 450, 77 S. E. 129 (1912). The list is not exclusive.

87. Relying, chiefly, on a dictum in Hutto v. Hutto, *supra,* quoting Pomeroy; and citing, among others, 3 SCOTT, TRUSTS § 457 (1st ed. 1939), and 54 AM. JUR. *Trusts,* § 204 (1945). See also, RESTATEMENT (SECOND), TRUSTS §§ 456, 457 (1959). In the latter section it is said: "A resulting trust does not arise from the payment of the purchase price unless at the time of the purchase the other person pays the purchase price *or agrees to pay it.*" (Italics supplied.) The agreement may be made with the vendor or with the grantee. 4 SCOTT, TRUSTS § 456 (2d. ed. 1956). Here the agreement was made with the grantee. The problem of payment made after transfer is discussed and its resolution foreshadowed in the 1960 Survey. 13 S. C. L. Q. 109-111 (1960).

88. It would have even less relevance if the wife were the beneficiary of a constructive trust. See note 84, *supra.*

come subject to the trust with or without agreement.[89] Moreover, with the real ownership of the property here in both parties, as the husband must have known, and with the understanding that the parties were to own both lot and house as theretofore, as equal co-owners, the improvements placed upon the property, although in major part paid for with the husband's funds, might be deemed a gift to the wife corresponding to her interest as beneficial owner. The placing of improvements on the land of another, without agreement for compensation, and in full knowledge of the other's ownership, would at least create the inference that they were intended as a gift.[90]

This last phase of the discussion was directed to the possibility that the wife may have been entitled to more than a return of her contribution towards the purchase of the lot and the cost of the building. She, however, asked for that return as an alternative, and when it was given her she did not appeal. The Court, holding that the plaintiff was entitled to the recovery of her monetary contribution stated:

> It has been held that where part of the price of the land was paid by one person and the title taken in the name of another, a trust resulted in favor of the other only to

89. 80 C. J. S. *Trusts* § 111 (1953):
> A trust does not result in favor of one paying for improvements on another's land. Since it is the rule that a resulting trust must arise, if at all, from the state of facts existing at the time the legal title to the property is acquired, such a trust cannot be created by a subsequent expenditure of money in improving the property. . .

2A BOGERT, TRUST AND TRUSTEES §§ 455, 456 (1953); 4 SCOTT, TRUSTS § 454.7 (2d ed. 1956): "A resulting trust does not arise in favor of a person who pays no part of the purchase price, although he pays for improvements upon the property." RESTATEMENT (SECOND), TRUSTS § 454 comment *o* (1959). See Caulk v. Caulk, 211 S. C. 57, 43 S. E. 2d 600 (1947); Legendre v. S. C. Tax Comm., *supra*. See also, Four Rivers Mutual Orchard Co. v. Wood, 166 Ark. 233, 266 S. W. 75 (1924): "One not contributing to purchase money cannot, by later furnishing funds for improvements thereon, establish resulting trust." There may be an inference from the quoted exerpts that if the person furnishing the money already has an interest through payment or contribution, the added amount for improvements would be calculable in the extent of the trust, otherwise not.

90. See Caulk v. Caulk, *supra;* Legendre v. S. C. Tax Comm., *supra;* Bates v. Bates, 213 S. C. 525, 50 S. E. 2d 577 (1948); Carroll v. Britt, 227 S. C. 9, 86 S. E. 2d 612 (1955); Clanton v. Clanton, 229 S. C. 356, 92 S. E. 2d 356 (1956). See also, North British & M. Ins. Co. v. Sciandra, 256 Ala. 409, 54 So. 2d 764, 27 A. L. R. (2) 1047 (1951), holding that "One who has only an undivided one-half interest in land, the other one-half interest being owned by his wife, has title only to an undivided one-half interest in a building constructed thereon, although the funds for the building are supplied by the husband alone."

> the extent of the payment. In this case, the trial judge allowed the respondent a resulting trust only to the extent of her contribution to the purchase price of the lot and the construction of a dwelling thereon. We think this holding is correct.

This, apparently, is stating the rule to be that where payment of part of the purchase price is made, the payor is entitled to get, or get back, only what he has put in, and not entitled to an undivided interest in the proportion that the amount contributed bears to the whole purchase price. The Court relies upon *McGee v. Edwards*,[91] which speaks of a resulting trust "to the extent," but it is not certain that that case and other cases using this or similar language mean to limit the trust claimant to an interest no greater in money terms than the amount furnished, which would be practically in the nature of an equitable lien. What these cases, on the whole, seem to indicate is that a person paying only a part of the purchase price is not entitled to a resulting trust as to the entire property furnished, *i.e.*, complete beneficial ownership.[92] On the contrary, there are South Carolina cases that give the payor a proportionate, or pro rata, interest,[93] and this seems by far to be the prevailing rule.[94]

91. 52 S. C. 472, 30 S. E. 602 (1898), mistakenly referred to as McGee v. Edwards but is McGee v. Wells.

92. Mims v. Chandler, 21 S. C. 480 (1884)—"to the extent of payment"; Odom v. Beverly, 32 S. C. 107, 10 S. E. 835 (1889)—"to extent of payment"; Bell v. Edwards, 78 S. C. 490, 59 S. E. 535 (1907)—"to that extent"; Dumas v. Carroll, 112 S. C. 284, 99 S. E. 801 (1919)-"pro tanto."

93. Lord v. Lowry, Bail. Eq. 510 (1831); Miller v. Saxton, 75 S. C. 237, 55 S. E. 310 (1906); Fallaw v. Oswald, *supra*, note 85.

94. 89 C. J. S., *Trusts* § 122 (1955); 4 SCOTT, TRUSTS § 454 (2d ed. 1956); POMEROY, *ibid*, § 1038. In RESTATEMENT (SECOND), TRUSTS § 454 (1959), it is said:

> Where a transfer of property is made to one person and a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made in such proportion as the part paid by him bears to the total purchase price, unless he manifests an intention that no resulting trust should arise or that a resulting trust to that extent should not arise.

This of course, is not only a matter of natural inference, or presumed intention on the part of the payor, but it is the fair and just supposition. Indeed, it would seem that the requirement that, if the whole purchase price is not paid by the claimant, a *definite* part must be, is tied to the notion that unless a definite part is known there can be no known corresponding interest, pro rata, in the property. See, 1 TIFFANY, REAL PROPERTY § 271 (13th ed. 1939). If A pays $1,000 and B pays $1,000 to buy land, title to which is taken in B's name, the reasonable inference, which may be reinforced by showing of actual intent, is that A is to have a one-half interest. If the property increased in value to $5,000, it could not convincingly be argued that A was entitled only to an interest amounting to $1,000; or that when the property was sold at

In the present case there hardly seems a doubt that when the title was acquired by the husband, if a resulting trust did arise, the wife acquired a one-half interest because of the equality of her contribution. More difficulty is experienced with the contribution to the erection of the building; and whether the wife would be entitled to a trust interest proportionate to her share of the entire cost, or limited to a lien in the amount advanced on the share of her husband, is a matter of interesting conjecture and perhaps complicated arithmetic.[95] This assumes, of course, that there is no acceptance of the premise which has been suggested that she was entitled to a one-half interest in both the lot and its improvements. As difficult as the problem may seem to be, it may be worth considering the case merely as one of partition between co-tenants (albeit of equitable ownership) with offsets for improvements.

Another feature of the case needs to be noted, the question of the admissibility of the evidence of the parties' oral agreement as to the joint holding of the property. The defendant objected to the evidence as violative of the Statute of Frauds relating to the proof of express trusts of land,[96] but the objection was overruled by the lower court. This action was sustained by the Supreme Court, which said:

> We think that under the authority of *Brown v. Cave*[97] . . . the evidence as to the agreement was properly admitted and considered by the trial judge, for the reason

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that increased value A could reach only $1,000 of the proceeds. Similarly, if the property declined in value to $1,000, A, if the property were sold at that figure, could not claim the entire $1,000. To fix the interest at $1,000, unchangeably, would be to create an equitable lien rather than a resulting trust. The trust is not a lien, and while in some cases a person may have a choice between a *constructive* trust and an equitable lien, there would not seem to be such a choice between a *resulting* trust and a lien; although, it must be admitted, some South Carolina cases not involving purchase money trusts seem either to cut down (though not in terms) a resulting trust to a lien, Green v. Green, 56 S. C. 193, 34 S. E. 249 (1899), or to give a choice, Walker v. Taylor, 104 S. C. 1, 88 S. E. 300 (1915), in which, however, there was award of a proportionate interest. See also, relying on Green v. Green, Buist v. Williams 88 S. C. 252, 70 S. E. 817 (1910).

95. See also Mayer v. Kane, 69 N. J. Eq. 733, 61 Atl. 374 (1905), in which a husband without his wife's knowledge, used her money and his money to buy property in his name and made improvements at his cost. The wife was allowed a resulting trust of a proportionate interest, but the husband was allowed a lien for the amount he expended for improvements.

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

97. *Supra*, note 86.

> that the testimony showed full performance of the contract on the part of the respondent, which would take the case out of the Statute of Frauds. In the cited case, it is said:
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> "But if there should be any serious difficulty as to the proof to raise a resulting trust, it would seem that there can be no doubt that there was ample proof to take the case out of the Statute of Frauds by part performance. 'It is well settled that the court of equity will enforce specific performance of a contract within the statute when the parol contract has been partly carried into execution . . . .' We think the possession of the parties of their respective shares with the knowledge and consent of [the holder of the legal title], the improvements, and cultivation of the same without notice or warning, considered in connection with all the circumstances, and explicitly the payment of the purchase price were sufficient evidence to take the case out of the statute."

In the case quoted from, title to land was taken by a father whose four sons claimed equitable ownership of a four-fifths interest on account of an alleged oral agreement that the father was to hold the land in trust for his sons and himself, the sons having contributed to the purchase. Because of the requirement that the claimant must show payment of the purchase price *or a definite portion* of it, and because there might, in this case, be difficulty in proving such definite payment—and consequent difficulty in establishing the resulting trust—the Court nevertheless permitted the sons to prove the *express* oral agreement on the basis of part performance. It is to be observed, therefore, that the doctrine of part performance, or full execution, has no relevance, so far as the Statute of Frauds is concerned, in proving a purchase money resulting trust. If full performance by payment of the purchase money could remove an oral express trust of land from the operation of the Statute of Frauds, there would be no need to resort to the doctrine of resulting trusts to establish a trust where the claimant had paid the purchase price pursuant to an oral agreement that the transferee was to hold for the payor's benefit. And, if this were so, the payment could be made after the transfer, and the oral agreement could go beyond what the law would

imply from the fact of payment.[98] It is to be admitted that an express oral trust of land may be removed from the Statute of Frauds by part performance, but the requirements of part performance to establish such a trust in the face of the statute are substantially the same as those to establish a contract for the transfer of an interest in land; and there payment of the consideration alone is not sufficient.[99] And if, with or without the payment of the purchase money, there are other acts of performance by the beneficiary, such as possession and improvements, these acts, as with similar acts in relation to contracts for the sale of an interest in land,[100] will remove an oral express trust from the Statute of Frauds relating to the proof of such trusts.[101]

In the light of these principles, it is difficult to justify, in the case under review, the admission of the evidence of the oral agreement of the parties on the basis of "full performance" on the wife's part; and no pretense is made that her co-occupancy of the premises or furnishing part of the money for improvements were such acts, referable to the trust agreement, as to constitute part performance otherwise. Although the reason advanced by the Court for allowing proof of the agreement may thus be subject to criticism, there is nevertheless no denying that the evidence was prop-

98. The rule in purchase money resulting trusts is that an oral agreement is not admissible to the extent that it goes beyond the implication. For example, if the payor furnished only one-half the purchase price, an oral agreement that the transferee was to hold in trust the whole interest acquired by him would go beyond what the law would imply, a pro rata interest, and therefore could not be shown for that purpose. Bell v. Edwards, *supra*. See also Surasky v. Weintraub, *supra*; 4 SCOTT, TRUSTS § 454.1 (2d ed. 1956).

99. RESTATEMENT (SECOND), TRUSTS § 50 (1959); RESTATEMENT, CONTRACTS § 197 (1932); 1 SCOTT, TRUSTS § 50 (2d ed. 1956); 1 BOGERT, *ibid*, § 92 (1935). The South Carolina cases holding that payment of all or part of the purchase price, without more, is insufficient to remove the oral contract of sale from the statute are numerous. See, among others, Scurry v. Edwards, 232 S. C. 53, 100 S. E. 2d 812 (1957).

100. RESTATEMENT, CONTRACTS § 197 (1932); Aust v. Beard, 230 S. C. 515, 96 S. E. 2d 558 (1957); Scurry v. Edwards, *supra*, note 99.

101. CODE OF LAWS OF SOUTH CAROLINA § 67-1 (1952); RESTATEMENT (SECOND), TRUSTS § 50 (1959); Massey v. McIlwaine, 2 Hill Eq. 421 (1836); Coney v. Timmons, 16 S. C. 378 (1881); Brown v. Cave, *supra*. There has been a tendency on the part of the South Carolina courts in some cases not to discriminate between the Statute of Frauds relating to trusts of land, CODE OF LAWS OF SOUTH CAROLINA § 67-1 (1952), and the general, or 4th section, CODE OF LAWS OF SOUTH CAROLINA § 11-101 (1952), relating to contracts for the transfer of an interest of land, and to treat trust promises as falling under the latter section. See Stuckey v. Truette, 124 S. C. 122, 117 S. E. 192 (1922); McMillan v. King, 193 S. C. 14, 7 S. E. 2d 521 (1940); Scott v. Scott, 216 S. C. 280, 57 S. E. 2d 470 (1950).

erly let in, but for reasons applicable peculiarly to the purchase money trust. The general rule is that an oral express trust is unenforceable as such, but its existence does not negative or defeat the purchase money resulting trust, and the oral trust may be introduced in order to corroborate the resulting trust when the holder of the title denies that it has arisen.[102] For all practical purposes effect is given to the express trust, since the same result is attained. The Statute of Frauds does not stand in the way of establishing the resulting trust, since, by another section[103] trusts arising by "implication or construction of law" (resulting and constructive)[104] may be proved without a writing; and as evidence, including agreements, may be given to rebut the trust in whole or in part, so may it be given to support the trust. South Carolina authority is in accord with the general rule,[105] and the fact that a purchase money resulting trust may be involved is ground alone to permit showing what the agree-

102. RESTATEMENT (SECOND), TRUSTS § 441, comment *j* (1959):
> Where a transfer of property is made to one person and the purchase price is paid by another, the fact that the payor and the transferee made an oral agreement unenforceable under the Statute of Frauds or otherwise that the property should be held under an express trust for the payor does not prevent a resulting trust from arising in favor of the payor. In such a case, although the oral agreement is not enforceable as such, it does not rebut but on the contrary supports the inference that the payor did not intend that the transferee should have the beneficial interest in the property.

To the same effect, see 4 SCOTT, TRUSTS § 441.2 (2d ed. 1956); 2A BOGERT, *ibid*, § 505 (1953); 89 C. J. S. *Trusts*, § 133 (1955); 42 A. L. R. 10, 55 (1926).

103. CODE OF LAWS OF SOUTH CAROLINA § 67-3 (1952).

104. If, as has been suggested earlier, the trust here was a constructive trust, the oral agreement of the parties could be shown. The rationale is the same: not to enforce the express trust but to show the facts giving rise to the constructive trust. See also Webb v. Searson, *supra*, note 84.

105. Brown v. Cave, *supra*, in which proof was allowed, but ultimately resorted to for establishing express trust through part performance (discussed earlier); Feaster v. Kendall, 80 S. C. 30, 61 S. E. 200 (1907), proof allowed but unsatisfactory; Bell v. Edwards, *supra* note; Caulk v. Caulk, *supra* note. A good expression of the principle appears in Larisey v. Larisey, *supra*, at p. 454:
> The trust arises upon the presumed intention of him who pays the purchase money. The presumption, however, may not be in accord with the truth. In other words, the intention which is presumed may not be the actual intention. It follows that the presumption may be rebutted, and the actual intention shown by parol evidence . . . . it follows logically that if the presumption may be wholly rebutted by parol evidence, *it may be strengthened by such evidence. . .*" (Italics supplied.) Similarly, if the presumption is that of gift, it may be rebutted by showing an oral agreement to hold in trust. RESTATEMENT (SECOND), TRUSTS § 443, comment *a* (1959), and the cases just cited.

ment of the parties was, either in rebuttal or confirmation of whatever presumption may have arisen.

Trusts - Merger

An interesting case involving merger and the devolution of a deceased trustee's title is *Deschamps v. Southern Coating and Chemicals Co.*[106] The action was brought by the plaintiff, as vendor, to compel specific performance of a contract to buy land entered into between him and the defendant. The defendant's answer justified its refusal to accept a deed on the ground that the plaintiff was not the owner in fee simple. The plaintiff filed a reply in which he set out these facts: that the plaintiff had purchased the tract in question some years before at a judicial sale and had had the property conveyed by the master to his mother, as trustee; that the reason was that at the time of the execution of the deed he was in South America; that the deed was upon the trust that the trustee should borrow $2,500, to be secured by a mortgage, to be repaid in five years, and "in trust, further, to have, manage and control the said property for the use and benefit of J. Wilcox Deschamps [the plaintiff] and his heirs and assigns, subject to the lien of the mortgage so executed for part of the purchase price"; that in the event of the death, inability or resignation of the trustee, the plaintiff might substitute another person as trustee; that the trustee had died and no substitute trustee had been appointed because there were no duties to perform. The reply concluded with the assertion that the trust had become a passive trust and that the plaintiff had on that account become the holder of the fee simple title.

The case was considered by the trial judge on the pleadings and on the admitted facts, covering substantially the same ground as those set out in the reply, with the additional fact that the mortgage mentioned in the trust had been paid off, and the finding that the trustee having died she was succeeded in title by the plaintiff, her eldest son. The court agreed with the contention of the plaintiff, in his reply, that the trust had become passive and the plaintiff, under the statute of uses,[107] had become the owner in fee simple. The defendant's chief contention was that the provision in the

106. 236 S. C. 420, 114 S. E. 2d 265 (1960).
107. CODE OF LAWS OF SOUTH CAROLINA § 67-8 (1952).

trust that the trustee was to "manage and control" the property rendered the trust active, even after the death of the trustee, and prevented the operation of the statute. To this the lower court responded that the sole purpose of the trust was to facilitate the execution of the purchase money mortgage, and that despite the terms "manage and control" no management or control was necessary. The court also concluded that "substituting a new trustee would accomplish nothing because the trustee has no power of sale and, if the terms of the trust were strictly followed, it would have to continue in perpetuity and the property could never be sold or mortgaged."

On appeal from the decree of the lower court, the defendant excepted on the same ground it had raised below, that the trust was active. The plaintiff-respondent offered an additional sustaining ground, namely, that the plaintiff being the sole beneficiary and having succeeded as his mother's eldest son to her title as trustee, a merger resulted which extinguished the trust.

The Supreme Court, after setting out the substance of the decree below, which has been here summarized and quoted from, affirmed the lower court, and stated:

> There is no appeal from the finding that plaintiff succeeded his mother as trustee by operation of law; therefore, he is trustee for himself and being the beneficiary of the trust is absolute owner of the share of the estate equal to his interest. See *Black v. Harman,* 127 S. C. 359, 120 S. E. 705 [1923], and *Foster v. Glover,* 46 S. C. 522, 24 S. E. 370, 376, [1895] which states:
> ". . . If a person should grant land to A, in fee, trust for A, could any doubt that the grantor intended that A should have the fee? Would it not be equally certain, if he should convey the land in fee to A, in trust for A, B, C, D, and E, that the grantor intended A to have an estate in fee in one-fifth of the land?"
> The interest of the beneficiary being the entire estate for his use and that of his heirs and assigns, we are of opinion that plaintiff has a fee simple title to the premises in question, that all exceptions should be dismissed . . .

It is not precisely clear whether in dismissing the exceptions and affirming, the Court, particularly in the light of

the concluding paragraph, disposed of the case solely on the ground of merger or on the additional ground of the execution of the trust by the statute of uses. In any event, attention should be called to the decree's statement, which may or may not have been accepted by the Supreme Court, that "if the terms of the trust were strictly followed, it would have to continue in perpetuity, and the property could never be sold or mortgaged." It should be pointed out that, aside from the difficulty of creating a private trust to last forever, the plaintiff, as sole beneficiary,[108] had the power to compel termination of the trust at any time;[109] and, unquestionably, as both settlor and beneficiary, not to mention his also being trustee by succession, he would have the power to force termination.[110] The statement that the property could never be sold or mortgaged is true only insofar as it means that the trustee would not have the power to sell or mortgage simply by virtue of his office,[111] but in a proper case a court of equity could authorize a sale or mortgage,[112] and, even without court sanction, consent by the beneficiary or ratification by him would preclude any later attack upon the trustee's act of selling or mortgaging.[113] Even if the trust here did not become passive on the discharge of the purchase money mortgage authorized by the deed, the bene-

108. This, of course, is the reasonable construction. The "heirs" of the beneficiary named would hardly be regarded as beneficiaries also; and "heirs and assigns" are patently used to characterize the fee character of the plaintiff's estate. Presently the plaintiff has no heirs (no man is heir to the living) but it would be interesting to speculate whether, on the plaintiff's death, his heirs might assert an interest on the ground that they were beneficiaries whose rights could not be affected by a proceeding to which they were not parties. If they should, however, the outcome is reasonably predictable.

109. Kennedy v. Badgett, 19 S. C. 591 (1883); RESTATEMENT (SECOND), TRUSTS § 337 (1959); 3 SCOTT, TRUSTS § 337 (2d ed. 1956); 45 A. L. R. 743 (1926); 123 A. L. R. 1427 (1939); 163 A. L. R. 852 (1946).

110. RESTATEMENT (SECOND), TRUSTS § 339 (1959); 3 SCOTT, TRUSTS § 339 (2d ed. 1956). See also Linder v. Nicholson Bank & Trust Co., 170 S. C. 373, 170 S. E. 429 (1933). The settlor-beneficiary may compel termination even though a material purpose of the trust has not been accomplished.

111. The cases are numerous. See Thomson v. Peake, 38 S. C. 440, 17 S. E. 45 (1892) (sale); Turbeville v. Morris, 203 S. C. 287, 26 S. E. 2d 821 (1943) (sale); Chapman v. Williams, 112 S. C. 402, 100 S. E. 360 (1919) (mortgage); Mathews v. Heyward, 2 S. C. 239 (1870) (mortgage).

112. There are many cases to that effect. See Patton v. First Presbyterian Church, 129 S. C. 15, 123 S. E. 493 (1924) (sale); Wingard v. Hennesee, 206 S. C. 159, 33 S. E. 2d 390 (1945) (sale); Fraser v. Fishburne, 4 S. C. 314 (1873) (mortgage).

113. RESTATEMENT (SECOND), TRUSTS § 216 (1959); Pickett v. Geer, 156 S. C. 346, 153 S. E. 349 (1930).

ficiary had it in his power to bring the trust to an end at any time; and since he was trustee also he could, independently of merger, produce the termination of the trust without seeking court compulsion, since the effect of court action would be direction to the trustee to transfer the title or simply to declare the trust at an end with legal title in the beneficiary.

Looking to the issue of extinguishment of the trust by merger, it is to be noted that it had been found as a fact, from which there was no appeal and therefore accepted, that the plaintiff "succeeded his mother as trustee by operation of law" as her oldest son. It is the law, virtually peculiar to South Carolina, that on the death intestate of a trustee of real estate, the legal title to the trust property descends, not under the statute of descent and distributions, but as at common law, with the rule of primogeniture.[114] It does not appear from the record whether the trustee in the present case died intestate or testate. If she died testate, the eldest son might not take, since generally the devisee, rather than the heir, will succeed to the trustee's title, a matter which, however, is in some doubt in this state.[115]

With the legal and equitable title thus in the beneficiary, the inevitable result, as the Court held, was to effect a merger, although, unlike the usual case, the accession of the legal title came about by operation of law. The merger results in a termination of the trust, with absolute ownership in the beneficiary.[116] The case of *Foster v. Glover, supra,*

114. Martin v. Price, 2 Rich. Eq. 412 (1846), the leading case; Kirton v. Howard, 137 S. C. 11, 134 S. E. 859 (1926). See 1 S. C. L. Q. 367, 396 (1949). Generally the rule elsewhere is that the legal title descends to the statutory heirs. RESTATEMENT (SECOND), TRUSTS § 104 (1959); 1 SCOTT, TRUSTS § 104 (2d ed. 1956).

115. See 1 S. C. L. Q. 367, 407 (1949), and the cases there cited; RESTATEMENT (SECOND), TRUSTS § 105 (1959); 1 SCOTT, TRUSTS § 105 (2d ed. 1956).

116. RESTATEMENT (SECOND), TRUSTS § 341 (1959); 3 SCOTT, TRUSTS § 341 (2d ed. 1956) where it is said: "The merger of the equitable and legal interests in the trust property may result where, by operation of law, the entire beneficial interest passes to the trustee, or when by operation of the law the legal title passes to the sole beneficiary of the trust."

It would seem, however, that merger will not take place in all cases. Thus, if A were trustee for his eldest son B, a minor, and A died intestate, it is hardly to be supposed that a merger would take place and the trust terminate. Both interests would reside separately in the son at least until the legal interest was put into a substitute trustee. In a federal case arising from South Carolina, Highland Park Mfg. Co. v. Steele, 232 Fed. 10 (4th Cir. W.D.S.C. 1916), merger which might otherwise take place by operation of law was prevented in order to respect intent and to preserve the interests of other parties. The trust, created by will, in

from which the Court quotes and which it uses as the basis for its holding of merger, is not altogether a satisfactory one in this respect. The case did not involve a sole beneficiary who was also the sole trustee,[117] although its conclusion is based upon the analogy to that situation. The major premise, though not the result, in *Foster v. Glover* is not one that appeals to reason:

> If a person should grant land to A, in fee, in trust for A, could any one doubt that the grantor *intended* that A should have the fee? Would it not be equally certain that if he should convey the land to A, in trust for A, B, C, D, and E, that the grantor *intended* A to have an estate in fee in one-fifth of the land?

(The reference to "fee" is to a legal, rather than an equitable, fee.) The truth would appear to be just the contrary—that he did *not* intend the property to be held absolutely. To give one an absolute legal estate through the medium of a trust, to be defeated by merger, is too circuitous a route to reach a point which could be arrived at by a direct non-trust transfer. If the trust is defeated, it is not because of intention, but in opposition to it and by force of law. The settlor who creates a passive trust of land intends a trust, but the statute of uses makes the trust a nullity. The settlor who makes the sole beneficiary also the sole trustee intends a trust, not an estate free from it, but the law produces the merger. And it would seem almost an absurdity that a settlor,

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substance was to A in trust for B for life and then to convey to B's heirs. B was A's oldest son. A died intestate. It was held that merger did not take place so as to give B the entire estate in fee.

117. There seem to be no cases in South Carolina (other than the present one) in which the situation of sole beneficiary and sole trustee appears. One case of several *beneficiaries* who were also trustees is Industrial Equipment Co. v. Montague, 224 S. C. 510, 80 S. E. 2d 114 (1954), in which the Court held that no trust existed on that account. It is implicit in Board of Directors v. Lowrance, 126 S. C. 89, 119 S. E. 383 (1923), that there is no trust where the beneficiary and trustee are one, because after proceeding on the assumption of no trust in such a case after a recital of many authorities, the Court declared no trust to exist as to one of several beneficiaries who was also the trustee. This was followed in the like situation of a trustee who was one of the beneficiaries in Lynch v. Lynch, 161 S. C. 170, 159 S. E. 26 (1931). On the other hand, in several other cases, merger did not take place where the trustee was a life beneficiary along with other beneficiaries. Hunter v. Hunter, 58 S. C. 382, 36 S. E. 734 (1900); Folk v. Hughes, 100 S. C. 220, 84 S. E. 713 (1914); Black v. Harman, 127 S. C. 359, 120 S. E. 705 (1923), cited by the Court in the present case. RESTATEMENT (SECOND), TRUSTS §§ 99, 115 (1959) [See also, 1 SCOTT, TRUSTS §§ 99, 115, (2d ed. 1956)] states that no trust is created only when the sole beneficiary is also the sole trustee. In all other cases merger does not take place.

as in *Foster v. Glover*, intended, through the creation of a trust, to give the trustee-beneficiary an absolute interest along with other beneficiaries whose interests, if the trust were active, would be equitable. (In this case, the trust was passive as to all the beneficiaries.) Far from giving effect to the real intention, the Court has, in some instances, where the trustee was one of several beneficiaries, disregarded the intention, though, fortunately, not to the harm of others.[118] There should be no merger where others would be adversely affected. For example, if A held in trust for A and B under a trust which authorized A to sell, if there was merger A would hold a one-half interest free of trust and the other half in trust for B. If a judgment had been obtained and entered against A, it would constitute a lien on A's absolute undivided interest, making the title unmarketable, and not only impairing the trust but injuriously affecting the interest of the other beneficiary.

LEGISLATION

Filing of Claims

The statute relating to the filing of claims against a decedent's estate[119] has been amended[120] so as to clearly make the statute one of non-claim. The Act of 1943,[121] the parent act, was plainly in terms a non-claim statute, providing that "all claims of creditors of such estate shall, upon the expiration of eleven months after the first publication of the notice [for creditors] . . . be forever barred unless before the expiration of such period an account thereof shall have been filed . . . ." In 1956, as part of extensive legislation designed to shorten the period of administration, the statute embodying the Act of 1943 was amended[122] to read: "All claims . . . shall not later than the expiration of five months after the publication of the notice [for creditors] . . . be filed, duly attested, with such executor or administrator or with the judge of probate of the county in which such estate is being administered. . . ." Unlike the earlier version there was no specification that failure to present a claim would

118. Board of Directors v. Lowrance, *supra;* Lynch v. Lynch, *supra.*
119. CODE OF LAWS OF SOUTH CAROLINA § 19-474 (1952).
120. Act No. 149 of 1961.
121. 43 Stat. 260, thereafter carried in the CODE OF LAWS OF SOUTH CAROLINA as § 19-474 (1952).
122. 49 Stat. 1787.

bar; and therefore there has been the possibility that, with this omission, the statute had ceased to be one of non-claim and would not prevent action upon a claim not presented within the period, as was the case prior to 1943.[123] The 1961 amendment provides: "All claims of creditors of such estate shall upon the expiration of five months after the first publication of the notice [for creditors] . . . be barred unless before the expiration of such period an account thereof . . . shall have been filed . . . ." The amendment removes any doubt as to the effect of the failure to present a claim within the specified time and with certainty makes the statute one of non-claim.

In the 1943, 1956, and 1961 versions, there is and remains this provision: "But the provisions of this section shall not apply to obligations secured by mortgages or other liens which have been duly recorded prior to the expiration of such period." The proviso is discriminatory and rather pointless. Since recording is designed for the protection of subsequent parties, and none are involved here, the fact of recording, or failure to record, should be of no consequence. As a rule lien creditors are in any event protected as to their liens without presenting their claims;[124] and they should not, because they have recorded their security, be put in a better position as to *general assets* than ordinary unsecured creditors or secured creditors whose liens are not recorded.

Discharge of Fiduciary

The statute relating to the procedure for final discharge of a fiduciary by the probate court[125] has been amended by the 1961 General Assembly[126] in an important respect. Before its amendment the statute provided for one month's published notice of application for discharge, and contained this proviso: "No such discharge shall affect any distributee, legatee, cestui que trust, ward or lunatic who has not been made a party to such application, either by personal service of the notice or by publication in the mode provided for

123. See Karesh, *Wills and Trusts, 1958 Survey of S. C. Law,* 11 S. C. L. Q. 155, 159 (1958). For a typical case applying the law before 1943, see Columbia Theological Seminary v. Arnette, 168 S. C. 272, 167 S. E. 465 (1932); and for a discussion of the 1943 act see 2 S. C. L. Q. 354 (1950).

124. 34 C. J. S. *Execs. & Adms.* § 403 (1942); 78 A. L. R. 1127 (1932). See 2 S. C. L. Q. 354 (1950).

125. CODE OF LAWS OF SOUTH CAROLINA § 15-461 (1952).

126. Act No. 180 of 1961.

absent defendants." The 1961 amendment deletes the words "who has not been made a party to such publication, either by personal service of the notice, or by publication in the mode provided for absent defendants," and in its place are inserted the words "unless the provisions of this section are complied with." The effect of the amendment, therefore, is to make only newspaper notice a condition precedent to the granting of the discharge. Although publication of the application has always taken place, the requirement for personal notice has been, in practice, more honored in the breach than in the observance; and the amendment legitimizes the breach.

Whether the amendment is a wise one will not be subjected to opinion, but it is proper to note that it makes a departure from a mandate, even though unobserved, of long standing. The requirement for newspaper notice was first dictated by statute in 1869.[127] It contained no provision for service of notice on beneficiaries or their representatives. Yet, in 1881, in *Roberts v. Johns*,[128] it was held that the statute made newspaper notice a condition precedent but did not dispense with direct notice to the affected parties; in other words, that the statute only added a new requirement. The Court said:

> Persons, to be bound by the judgment of the probate court upon the final accounts of a fiduciary, must be made parties thereto by proper proceedings and established forms of citations or summons. . . . That legislation would be open to grave objection which would provide that any persons, but especially infants, lunatics and non-residents, may be made parties to an action in court, and be bound by its judgment, by the single publication for one month of a notice in a newspaper requiring them to appear and show cause. Yet this act makes no exception in favor of infants, lunatics, parties under disabilities and non-residents.[129]

127. 14 Stat. 263, re-enacted in Gen. Stat. XXIV, § 4.
128. 16 S. C. 171 (1881).
129. It is to be observed, however, that there is no service of process, only publication and posting of citation, in proceedings on application for appointment of an administrator. CODE OF LAWS OF SOUTH CAROLINA 1952 § 19-409; *Ex parte* White, 38 S. C. 41, 16 S. E. 286 (1892), in which it was held that the fact that an interested party had no knowledge of publication of citation was immaterial. There is not even a requirement for citation or publication in proving a will in common form. CODE OF LAWS OF SOUTH CAROLINA § 19-253 (1952).

> An act will not be so construed as to increase rather than correct an evil intended to be remedied, unless the words of the act, in plain language or by necessary implication, exclude a more reasonable interpretation. . . . The law here is evidently intended as an additional protection to *cestuis que trust,* instead of a deprivation of the protection they already enjoyed against trustees, under well-considered acts of legislation, and under the wise rules by which the practice of our courts were and are and ought to be regulated.

Having thus construed the statute, the Court in this case held that although there had been newspaper notice, the failure to serve the notice of application nullified the discharge granted by the probate court.

In 1893 the proviso for service of notice, in the form identical with that appearing in the statute until amended in 1961, was enacted.[130] In view of what was said and held in *Roberts v. Johns,* the addition of the proviso was no more than a declaration of existing law. It is fairly clear, as already suggested, that the purpose of the 1961 amendment is to dispense with the requirement for personal notice; but, as a matter of statutory construction, whether repealing a statute, or portion of a statute, which was only declaratory of the law before its passage, acts to nullify the previous law or to restore it is a question of interest, but it will not be pursued here.

Uniform Testamentary Additions to Trusts Act

The Uniform Testamentary Additions to Trusts Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1960, was adopted by the South Carolina General Assembly at its 1961 session.[131] As explained by the Committee of the Commissioners for the act,[132] the main feature of the act is that it "permits the pour-over of the property by the will into an existing trust, even though the trust is one which can be revoked or amended." In terms the act provides: "The devise or bequest shall not be invalid because the trust is revocable or amend-

130. Rev. Stat. 1893, Code Civ. Proc., § 41.
131. Act No. 163 of 1961.
132. 1960 Handbook 198.

able, or both, or because the trust was amended after the execution of the will or the death of the testator."

The Uniform Act, as promulgated by the Commissioners, and as submitted to the General Assembly by its sponsors, in the first sentence of the first section reads as follows:

> A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust).[133]

When the proferred act passed through the drafting process, the language quoted was transformed through error into language somewhat different; and through oversight of the sponsors, including this writer, the act was allowed to pass in its altered form. As enacted, the act's first sentence reads:

> A devise or bequest, the validity of which is determinable by law of this State, may be made by a will to the trustee of a trust identified by the testator's will and its terms set forth in a written instrument other than a will executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator, regardless of the existence, size or character of the corpus of the trust and including a funded or unfunded trust even though the trustor has reserved any or all rights of ownership of the insurance contracts.

It will be noticed that the changes are fairly material. The purpose of the act, as originally promulgated, is to extend the pour-over provisions not only to an *inter vivos* trust established by the testator (which is the usual case) but to

133. *Id.* at 199.

trusts created by him and others, and to trusts created by others entirely. The language of the act as adopted may be broad enough, by construction, to embrace all these, but the drafters of the original act were careful to spell out the categories of trusts to which the act applied. In addition, although the context throws light on what is meant by "funded or unfunded trust," the term "life insurance" as a modifier has been omitted. Undoubtedly, for the sake of uniformity, since the act *is* a Uniform Act, and clarity, the act will be amended promptly to embody the language of the National Conference of Commissioners.

The committee for the act points out that the Uniform Act (after the first sentence there are no other changes in the adopted act) will remove uncertainty in those states in which the law is unsettled. Since the law is unsettled in South Carolina, the act performs a most useful service. The problem essentially is whether a pour-over into an amendable trust will follow the trust, as amended after the execution of the will. If the only theory utilized is that of incorporation by reference—that is, incorporating the written trust into the will—it is obvious that the will cannot embrace the trust in its altered form, since the doctrine of incorporation extends only to instruments in existence, or to the existing form of an instrument, at the time of the will's execution.[134] If the matter could be treated as one involving facts of independent significance (and this is the view of the restatement)[135] the trust and its amendments, if any, could be regarded as such facts and the pour-over would follow the trust in any altered form. The courts, on the whole, however, despite the logic of the concept of facts of independent significance, have not accepted it to the extent of permitting the testamentary addition to follow the trust in conformity with the changes made after the will.[136] Since the law is uncertain in South Carolina, it can be seen that there need be no commitment either to the doctrine of incorporation by reference or of facts of independent significance to resolve the problem: the act creates it own doctrine.

Not only does the act permit a testamentary addition to a revocable or amendable trust and the adaptation of the

134. Johnson v. Clarkson, 3 Rich. Eq. 305 (1851); Richardson v. Byrd, 166 S. C. 251, 164 S. E. 251 (1932).
135. RESTATEMENT (SECOND), TRUSTS § 54 (1959).
136. REPORTER'S NOTES, RESTATEMENT (SECOND), TRUSTS § 54 (1959).

pour-over to the altered form of the trust, but as a matter of construction such a pour-over is to be governed, unless the contrary intention is manifested in the will, by the trust as it existed at the testator's death. If, however, the trust to which the addition is made is that of another person, the devised or bequeathed property will be dealt with as it existed at the testator's death, and not afterwards, unless the contrary appears. Care, therefore, should be taken when the trust has been established by others to indicate, if it is so desired, that the bequeathed or devised property may be dealt with after the testator's death in accordance with any changed terms of the trust; otherwise, the property will be "frozen" according to the terms of the trust as they exist at the time of death.

The act further provides that the property added by the will shall not be deemed to be held under a testamentary trust of the testator, but to become part of the trust to which it is added. Thus no new trust is created; there is simply an addition to one already in existence.

Where the trust is revocable and is revoked before the death of the testator, or where the trust otherwise terminates, the act provides that the bequest or devise into it shall lapse.

Business Trusts

The 1961 General Assembly has enacted legislation[137] affecting "business trusts," to fill the need for definitive law on a subject that up to this time has not, in this state, received judicial or legislative attention. Recent favorable tax legislation has stimulated the formation and operation of such trusts, particularly in the form of real estate investment trusts; and the 1961 act is designed to remove, in some degree at least, uncertainty as to their status, and the status of those who are associated in them, and to some extent to regulate such trusts.

The business trust has been characterized as "a form of association in which the associates attempt to secure corporate advantages through the use of the device of the common law trust. The associates are of two kinds, trustees and beneficiaries. The beneficiaries contribute the capital necessary for an enterprise in return for transferable shares

137. Act No. 322 of 1961.

of beneficial interests, entitling the holders to share in profits."[138]

The 1961 legislation is designed principally to remove doubt as to the possible liability of the beneficiaries-shareholders, in view of the holdings in some states that attach partnership liability to such shareholders, and in view of the uncertainty apparent in other courts as to their precise status and the character of the enterprise.[139] In any event the present legislation recognizes the validity of the business trust as something *sui generis*. The act specifically declares that the liability of the trust shall extend to the whole of the trust estate, or so much as may be necessary, to discharge its liabilities, "but the instrument creating such trust may provide that no personal liability will attach to the individual shareholders or trustees of the trust, and such provision shall operate to limit the lability of the individual shareholders and trustees as to the obligations of the trust itself, but provided in all cases the trustees shall be liable for breach of trust."[140]

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138. CRANE, PARTNERSHIP § 33 (2d. ed. 1952). Such a trust is sometimes called a "Massachussets trust," and is also called a "common law trust." Another useful definition is "A business trust is an unincorporated business organization by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or become the holders of transferable certificates evidencing the beneficial interests in the trust estate." 156 A. L. R. 22, 27 (1945).

139. See 156 A. L. R. 22 (1945).

140. It is to be noted that the act relieves the shareholders and the trustees from personal liability if the instrument so provides. What the result would be if the instrument contained no such provision is not certain. It would be logical to assume that the basic law of trusts would control, this being based on the prior assumption that, following the overwhelming majority of cases, the trust would be treated as a trust, rather than as a partnership, corporation, joint stock company or some other form of organization. 156 A. L. R. 22 (1945). Under trust principles the beneficiaries would not be personally responsible for obligations or liabilities incurred by the trustees. RESTATEMENT (SECOND), TRUSTS §§ 274-276 (1959); 156 A. L. R. 22, 104 (1945). In this respect the same result would follow as to liability of shareholders whether provided in the trust instrument or not. The case, however, would seemingly be different as to the trustees if the instrument did not relieve them of liability, since it is clearly the law that, absent a negativing of liability by the trustee in the creation of obligations on behalf of the trust estate, he incurs personal liability. RESTATEMENT (SECOND), TRUSTS §§ 261-263 (1959). The South Carolina cases to the same effect are numerous. See, among others, Moss v. Johnson, 36 S. C. 551, 15 S. E. 709 (1892); Porter v. Jefferies, 40 S. C. 92, 18 S. E. 929 (1893); Law v. Blowers, 175 S. C. 469, 179 S. E. 480 (1935). That this is true as to business trusts, see 156 A. L. R. 22, 82 (1945). The exemption of the trustees by the act, where the instrument so provides, seems to be a special application of the principle that if the terms of the trust provide that liabilities shall be discharged out of the trust estate or that the trustee shall not be

The act further provides that every business trust shall record the trust instrument and amendments in the office of the clerk of court of the county in which it has its principal place of business, and shall also file a certified copy with the Secretary of State. It is further provided that real estate may be acquired, conveyed and mortgaged by the trust in the name used by it. There is also a provision that the trust shall not be affected by any rule against perpetuities.[140a]

The act further personalizes the trust by providing that it may sue and be sued in the name by which it conducts its business, and that service of process may be had upon it in the same manner as upon corporations. By limiting recourse on the trust's obligations to the property of the trust, the near-corporate character of the trust is also reflected. In thus excluding liability on the part of the shareholders and the trustees, restricting to the trust property the claims of third parties, and permitting actions against the trust in its name, *it is believed* that on liabilities incurred by or against the trustees actions at law could be maintained directly against the trust instead of having to proceed in equity against the trust estate through subrogation to the trustees' right of exoneration and indemnity.[141]

liable, recourse may be had directly against the estate, in equity. RESTATEMENT (SECOND), TRUSTS § 270 (1959); 83 A. L. R. 616 (1933).

140a. Precautionary, but probably unnecessary, as least as to duration. See 156 A. L. R. 22, 76 (1945).

141. See Guerry v. Capers, Bail. Eq. 159 (1830). There are several basic requirements in South Carolina for the maintenance in equity of a suit to reach trust property to satisfy obligations created by the trustee: (1) the trustee's act must have been within the powers granted by the trust; (2) it must have conferred a benefit on the trust estate; (3) the trustee must be insolvent, so that direct resort at law against him would be fruitless; (4) he must be in advance, not in default or indebted, to the estate. Guerry v. Capers, *supra;* McKelvey v. Tate, 3 Rich. L. 339 (1832); Welsh v. Davis, 3 S. C. 110 (1871). What effect an agreement negativing the trustee's liability, or a provision in the trust exempting him from it, would have upon the requirements is not clear. *Compare* RESTATEMENT (SECOND), TRUSTS §§ 270, 271 (1959).

The emphasizing of "it is believed" is to indicate that this is merely opinion. The fact that a trust is a business trust does not remove it from the ordinary forms of process applicable to trusts generally: the proceeding is in equity, even though there may be contractual disclaimer of liability or provision in the instrument for it. See 156 A. L. R. 22, 82 (1945). Of course, a statute may provide otherwise; it may do so explicitly by providing that the property of the trust shall be subject to execution, or it may otherwise make it plain that action at law is permitted; or it may be a matter of fair implication that actions at law are allowable. See 156 A. L. R. 22, 83-84 (1945). If an action at law is permitted, some of the equitable requirements listed above would probably not be necessary.

Uniform Gift to Minors Act

The Uniform Act has been adopted by the 1961 General Assembly,[142] to supersede the Model Gift to Minors Act,[143] which is expressly repealed. The Uniform Act, in addition to possessing the virtue of uniformity, makes some useful changes, which are not, however, of major importance.

Estate Tax Law

The enactment by the 1961 General Assembly of the Estate Tax Law,[144] replacing the inheritance tax law, carries with it the repeal of several statutes dealing with certain procedures and incidents of estate administration, previously set out in the inheritance tax chapter of the 1952 Code. The statutes so repealed as part of the larger repeal are, however, in the main re-enacted in substance in the estate tax law sections, and in no case is there any material change in administration procedure or with respect to the ordinary duties of personal representatives.

Indentured Apprentices

Of interest, if not of importance, is the fact that the statutes relating to apprentices have been repealed as obsolete.[145] Included in the statutes repealed are a pair[146] which treat the term of service of an apprentice whose master has died as assets in the hands of the decedent's personal representative and permit the representative to retain the apprentice in his own service or to assign the indenture for the unexpired term of apprenticeship.

142. Act No. 330 of 1961.
143. Act No. 638 of 1956;CODE OF LAWS OF SOUTH CAROLINA §§ 62-501, *et seq.*, (1952).
144. Act No. 382 of 1961.
145. Act No. 95 of 1961, repealing CODE OF LAWS OF SOUTH CAROLINA §§ 40-201 through 40-211 (1952).
146. CODE OF LAWS OF SOUTH CAROLINA §§ 40-210, 40-211 (1952).