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Coleman Karesh
University of South Carolina

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WILLS AND TRUSTS

COLEMAN KARESH

CONSTRUCTION—ORIGINAL OR SUBSTITUTIONAL GIFT

In *Dozier v. Able*,[1] the issue in the construction of a will was whether an alternative gift was original or substitutional. The pertinent language of the will was:

> I will . . . all the rest and residue of my estate . . . unto all of my first cousins and my aunt, Mrs. Connie Crisp, the children of the said Connie Crisp not to share in the distribution and not to have any part of my estate, the same to be divided among my first cousins other than the children of the said Connie Crisp, and the said Mrs. Connie Crisp, equally and share and share alike. And in case of the death of any of said devisees, before my death, then and in that event the child or children of such deceased devisee to take the portion the parent would have taken if living at my death.

The testator had fifty-four first cousins. Of these twenty-two survived him. Twenty-three first cousins died prior to the making of the will, most of them leaving children. Seven first cousins died after the making of the will and before the testator's death, as did the aunt, Connie Crisp. All left children.

The issue was whether the children of the first cousins who had died prior to the making of the will were entitled to share. In an elaborate decree, ranging widely among the authorities, the trial judge concluded that the alternative gift was original and direct, and not substitutional. The result was reached primarily on what the court discerned to be the testator's intention in the light of what it concluded was the better and preponderant view: that as a rule of construction a gift to the issue of a class by way of alternative was original and would thus include the issue of a member of a class dead at the making of the will. The trial judge treated several South Carolina cases as tending to support the rule.[2] Accordingly, the decree held that the issue of first

1. 241 S.C. 358, 128 S.E.2d 682 (1963).

2. Citing in particular, Britton v. Johnson, 2 Hill Equity 430 (1836); Duncan v. Harper, 4 S.C. 76 (1872). Britton v. Johnson was cited, the judge pointed out, in AMERICAN LAW OF PROPERTY, Vol. V, 405-408 (1952), as supporting the original gift construction. The author of the text himself justified this position in this way: "Thus, in the absence of factors pointing to a contrary result, it should always be assumed that in making an alternative gift in favor of the issue of any deceased person, otherwise within the class, the

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cousins dead when the will was made would take together with surviving first cousins and the issue of first cousins dying between the date of the will's making and the testator's death. In addition, it was held that the children of the aunt, who predeceased the testator, would take under the provisional clause.

On appeal the Supreme Court reversed as to the issue of first cousins who had died before the making of the will. The court noted that there is sometimes ambiguity as to whether the testator intended to benefit the issue of beneficiaries dead before the will, and it recognized the two lines of authority on the subject: that favoring the original gift concept, and the other adopting the substitutional view. The court's position was that there was no South Carolina commitment to either of the rules,[3] but it stated that it was relieved of the necessity of accepting one rule or the other because of what it regarded as the unmistakable and unambiguous intention of the testator. This intention was found in the words of the alternative provision "said devisees" and "of such deceased devisee." The respondents, the court said "simply do not meet the description of the class of children entitled to the alternative or substitutional clauses, whichever it may be termed. They are children of deceased *devisees*. . . . Patently, *deceased devisee* and *deceased first cousin* are not synonymous terms, as they must be read if respondents are to be included in the description of the class. To so construe them thwarts testator's deliberate choice of the words *devisees* and *devisee* to express their ordinary meaning."

DISQUALIFICATION OF EXECUTOR

In *Grant v. Osgood*,[5] the novel question arose whether a probate judge could refuse to qualify and grant letters testamentary to an executor on the ground of unfitness. The question, while raised and disposed of by the probate court and by the circuit court, was treated on appeal as moot and speculative in the light of developed facts, here later mentioned.

Briefly, the facts in the case were that the plaintiff and the defendant, children of the testatrix, were named executrix and exe-

object of the testator is to assure equal division among the branches of his relations designated, and the branch represented by the issue of a class member dead when the will was executed is just as important to the testator as the issue of any other class member who dies later."

3. This would rule out Britton v. Johnson, note 2 *supra*, as being definitive on the question of which line of authority was followed.

4. 241 S.C. 104, 127 S.E.2d 202 (1962).

5. Transcript of Record, particularly order of probate judge, pp. 112-116.

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cutor of the will in which they were named life beneficiaries. They were also named trustees. The plaintiff filed the will for probate in common form, together with a caveat and petition seeking a disqualification by the probate court of her brother as co-executor on the ground of his unfitness. The defendant, answering the petition, denied the power and jurisdiction of the probate court to disqualify him. The probate judge overruled the jurisdictional objection and took testimony as to the alleged unfitness, concluded that the defendant was unfit, and denied him the right to qualify. According to the record, the unsuitability of the defendant to act was demonstrated by a history of dissoluteness, non-support of a former wife on account of which he has been arrested, indictments for failure to pay federal taxes and to make returns, and financial irresponsibility. The probate judge's basic position was that his right to disqualify an executor and to deny him letters was co-equal with his right to refuse letters of administration on an intestate estate to an applicant for that office. The trial judge reversed the probate judge, holding that the latter possessed no power to deny letters to the person named as executor by the testator if the nominee was not incompetent by reason of minority[6] or insanity.

An appeal followed. The appellant proposed to include in the record of the case a statement to the effect that shortly after the rendition of the decree the respondent had filed a petition to have the will proved in solemn form, the petitioner asserting his status to be that of a "person interested to invalidate such alleged will." The trial judge refused to order the requested inclusion, and this action on his part was alleged to be error. To this position the Supreme Court agreed and reversed the lower court.

The Supreme Court pointed out that the only issue raised by the principal appeal was whether the probate court had the authority to refuse letters testamentary to the person named in the will as executor, but it concluded that under the facts relating to the attempt to invalidate the will the question of this authority had become "speculative, if not moot, at the present time." Its reason for so deciding was that the respondent executor, whose oath on qualifying required him to state that the instrument to be propounded was the will of the decedent and that he, as executor,

6. A minor is specifically denied by statute the right to act as executor. S.C. CODE § 19-417 (1962).

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would "well and truly execute the same,"[7] was violating his oath and trust in attacking the will. The court declared: "It is inconceivable that one should be allowed to accept a trust, take a solemn oath to execute the same, and, in the same breath and at the same time, attack the instrument which created the trust, as being invalid." The court thereupon, following the lead of authorities elsewhere, stated the rule to be that an attack upon the validity of a will by the executor amounted to a renunciation of the office, and that so long as the respondent was opposing the will refusal to qualify him was justified. It declined, in the state of the record, to pass upon the question whether the renunciation could be retracted. The court concluded that the respondent, by his attack upon the will, had rendered the decree of the circuit judge inoperative, and that "it is, to say the least, speculative as to whether any judgment on the part of this court at the present time, either affirming or reversing the circuit judge in this particular, could ever be finally effective or operative." The court then declared that it left undecided the issue raised by the appeal and reversed the trial judge in his settling of the case for appeal, and remanded for further proceedings.[8]

7. Quoting from S.C. CODE § 19-432 (1952). The same language is in the same numbered statute in the 1962 Code.

8. Since the Supreme Court did not, for the reasons it stated, pass upon the principal issue raised by the appeal, any discussion of this moot or speculative issue would take on the same character. It might not be amiss, however, to point out that the probate judge's assumption of authority to refuse to qualify a named executor was a breaking of new ground and without local precedent. His justification was that he had the same right to refuse letters to an unfit executor as he had to an unfit applicant for letters of administration. However, it is easily discernible that, unlike an administrator, an executor does not derive his authority solely from the probate court, nor is he a deputy or officer of that court, as is the former. The cases cited by the probate judge to support his position were three: in two of them, Ex Parte Small, 69 S.C. 43, 48 S.E. 40 (1903), and Ex Parte Talbert, 206 S.C. 300, 34 S.E.2d 49 (1944), it was held that the right to *letters of administration* on an intestate estate was not absolute. (See, also, to same effect, Rowell v. Adams, 83 S.C. 124, 65 S.E. 207 (1909). The third of the cases, Stairley v. Rabe, McMullan Equity 22 (1840), was one in which the court of equity held that it could, and would, appoint a *receiver* of the testate estate involved where the executrix was married, a second time, to a husband whose circumstances were necessitous and who was mismanaging the estate. It is to be noted that in the last case, the question was not one of refusing to qualify the executor, but of deprivation of the power to act—and in this respect the court did not vacate the office and remove the representative but appointed a receiver to assume control of the estate. It does not follow logically, or by analogy, as the probate court stated, that these cases justify refusal to qualify in the first instance. It must be admitted that there is some judicial approval of a principle that if the probate court can revoke letters of administration it can deny them at the outset. See Ex Parte Small, supra, where it is said: "It would be a curious rule which would allow the revocation of administration for cause and would not allow its denial for like cause." But this presupposes that, in the case of a will, the probate court has power to revoke letters testamentary for cause.

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CONCLUSIVENESS OF FOREIGN PROBATE

A case of far-reaching importance on the question of the conclusiveness in this state of the probate of a will probated at the testator's domicile is *Tripp v. Tripp*.[9] The decedent was domiciled in Ohio. He had left a will in which his wife was named sole beneficiary and executrix. A few days after making the will the testator conveyed to his wife real estate in Spartanburg County, South Carolina, which comprised the bulk of his property. He owned, at the time of his death, personal property in Ohio and South Carolina. The wife probated the will in Ohio. The appellant in this case was the only child of the decedent by a former marriage and resided in Michigan. In the probate proceedings

That is not the case. In fact, not only does the probate court not have the power to *remove* an executor, except under a few narrowly confined statutes (§§ 19-597, 19-598, 19-599—change of domicile outside of state or absence for five months [provided as equivalent of a renunciation]; § 19-532—Failure to make returns; §§ 19-452, 19-453—failure to file proper petition and inventory), but the court of equity likewise lacks the power to remove. The court of equity can, however, accomplish the same thing—i.e., prevent an unfit representative from acting—by the appointment of a receiver. Osborne v. Black, Speers Equity 431 (1844); Ex parte Galluchat, 1 Hill Equity 148 (1833); Stairley v. Rabe, supra; Harman v. Wagener, 33 S.C. 487, 12 S.E. 98 (1890); Griffith v. Frazer, 8 Cranch 9, 3 L.Ed. 471 (1814). See, also, Edmonds v. Cranshaw, Harper Equity 225 (1824); Anderson v. Butler, 31 S.C. 183, 9 S.E. 797 (1889); Campbell v. Bank of Charleston, 3 S.C. 384 (1871); Witherspoon v. Watts, 18 S.C. 396 (1882); Higginson v. Fabre, 3 DeSaussure 89 (1810); Smith v. Heyward, 115 S.C. 145, 104 S.E. 473 (1920). It is not quite so clear whether, there is a *co-executor* guilty of mismanagement, a receiver would be appointed who would supplant both executors; or whether the properly acting executor would himself be appointed receiver; or whether the unsuitable co-executor would simply be restrained from interfering with sole control and management by the other. See Smith v. Heyward, supra.

The weight of authority elsewhere is clearly opposed to sanction in the absence of statute, to a probate court to refuse letters testamentary to an executor who, in his judgment, is unsuitable for the office. 95 A.L.R. 828; ATKINSON ON WILLS, § 108, p. 604 (2d ed., 1953).

In his order the judge of probate also denied the respondent "the right to qualify as Testamentary Trustee thereof [the will.]," Transcript of Record, p. 116. Appeal was also made against this portion of the order. In view of the Supreme Court's treatment of the case, this issue seems also to have become moot, but the interesting question arises whether the probate judge was within his authority in this action. Since, unlike an administrator or an executor, a testamentary trustee receives no letters of trusteeship or similar letters, it is difficult to see how the order could have any effect in this regard. Whether, by renouncing by operation of law his executorship by contesting the will, the executor-trustee also renounced his trusteeship is a question that may yet have to be resolved in the case. In the ordinary case, the renunciation voluntarily of one office is not a renunciation of the other. Ashe v. Ashe, Richardson's Equity Cases 380 (1832); Mordecai v. Schrimer, 38 S.C. 294, 16 S.E. 889 (1892). It would seem, in any event, however, that even if the renunciation of the executorship would not carry with it a similar renunciation of the trusteeship, a court of equity could for cause *remove* the trustee—that is, cause, if the facts alleged by the co-executor-trustee were true, which would warrant removal.

9. 240 S.C. 334, 126 S.E.2d 9 (1962).

pursuant to Ohio law the appellant was not given formal notice of the proceeding but had actual notice of its pendency. He made no appearance. The time for attacking the will under Ohio law lapsed. Thereafter the appellant had an exemplified copy of the will filed in Spartanburg County, following refusal by the executrix of his request that she do so. Thus exemplified the will was admitted to probate in common form, and within the statutory period allowed for instituting proceedings in solemn form he initiated such proceedings. The respondent, the wife, made a special appearance to object to the authority of the probate court to entertain the proceedings, on the ground that the lapse of time barring an attack upon the will in Ohio was sufficient to render conclusive the validity of the will. The probate court acceded to this contention but declared that ancillary jurisdiction would be retained. In this holding it was sustained by the circuit court. The Supreme Court affirmed.

The principal issue was whether Section 19-286 of the 1952 Code (the same in 1962) precluded an attack upon the will.[10] The respondent's contention was that the language of the proviso in the statute relating to proof in solemn form was to be taken literally, and that since no such proceedings were had in Ohio he was not debarred from contesting the will. The opposing contention, in which there was judicial concurrence at all levels, was that the will could be attacked in this state only so long as it was open to attack in the foreign state. In affirming the lower court, the Supreme Court pointed out that Ohio does not have a solemn form proceeding and that there was no reason to discriminate between states having such proceedings as a form of contest and those that did not. It further pointed out that in South Carolina immunity from attack resulted not only where the will had been subjected to contest in solemn form and had been upheld but also where no solemn form proceedings were brought within the time permitted by statute.[11] The court's conclusion on this pivotal issue was that "Since any other interpre-

10. The statute reads: "If a will be regularly proved in any foreign court an exemplification of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of probate and the exemplification shall also be evidence of the devise of lands in this State when the title of lands comes in question; provided, that if the will be not proved in solemn form the parties interested against the will shall not be concluded by such probate but may examine witnesses as to the sanity of the testator or as to any fraud or imposition practiced upon him in obtaining the will and the other side may apply for an order to perpetuate testimony in support of the will."

11. S.C. CODE § 19-255 (1952—also 1962).

tation would lead to an unreasonable result, it would seem that by the use of the words 'solemn form' in the proviso to Section 19-286 the legislature intended reference to the point at which by the laws of the foreign state the will should attain immunity from attack, rather than to the means by which such point of finality should be reached."[12]

The appellant also claimed a violation of constitutional due process in the Ohio probate proceedings, but, without going here into the constitutional ramifications, the court upheld the validity of the proceedings. It further observed that as a matter of comity, reflected in the statute itself, it would respect the uncontested decree of probate by the Ohio court.

Finally, the court disposed of the appellant's contention that the lower court improperly held that the decedent owned no real estate in South Carolina at his death, "thereby ignoring or prejudging the action pending by the appellant against the respondent to set aside for mental incapacity and undue influence decedent's deed, executed shortly before his death, purporting to convey to her his South Carolina real estate." The court held that nothing in the proceedings in either the probate or circuit

12. The original of the statute goes back to 1759, 4 STAT. 102, and its purpose was to dispense with the production of the original will, where land was involved, and to permit in its place an exemplified copy of the will probated in the foreign jurisdiction. It contained a proviso that the heir at law might contest the will for insanity, fraud or imposition. No mention was made of proof in solemn form. Nor was such mention then necessary, since with respect to lands the proof of the will in either common or solemn form in the eccelesiastical or similar court established its validity only as to personal property. In South Carolina this was true until 1858 when a statute was enacted providing that no devise of real estate should be admitted in evidence in any case until after probate in one of the two forms, and that the probate should be "good, sufficient and effectual in law" as if the will were exclusively of personalty. 22 STAT. 701; S.C. CODE § 19-408 (1962). Even though a will of real and personal property had been admitted to probate, yet in an action concerning the real estate the will had to be proved de novo. Brown v. Gibson, 1 Nott & McCord 326 (1818). And where a will had been admitted in common or solemn form, and in the latter case thus immune to attack, the immunity extended only to personal property and did not bind the heir. Tygart v. Peeples, 9 Richardson's Equity 46 (1856).

The present form of the statute is verbatim with the language of the General and Revised Statutes of the 1870's in which mention of solemn form proceedings by way of proviso is first made—which is understandable in the light of the previously enacted legislation of 1858. It is debatable whether, from the history of the statute, it is intended to cover cases of dispositions other than devises. The contrary seems to be held, however,—i.e., that the statute also applies to personal property—in Collins v. Collins, 219 S.C. 1, 63 S.E.2d 811 (1951). With all due respect to the logic of the court in this case it is open to argument whether, when the legislature used "solemn form" it did not mean just that—the full dress proceeding that called in the parties and the witnesses to the will and made the will sacred if the proponent prevailed, and not the unassailable common-form-proved-will which attained that status by inaction and lapse of time.

court warranted that conclusion, and that the deed, although under attack, was to be regarded as valid until adjudged otherwise; that the circuit court's statement that the decedent was not seized of real estate in South Carolina was correct but did not have the effect of prejudging the action. It is not clear, at least to the writer, how the respondent could attack the deed, since, until the will was set aside, the real estate conveyed was not a part of the decedent's estate, unless it was so by relation back in the double event of a successful attack upon the will and a similarly successful attack by the son as an heir at law.

Since, while not prejudging the outcome of the action concerning the deed, there was holding that the real estate was not owned by the decedent at his death, it becomes uncertain whether the scope of the Supreme Court's decision extends to forbidding attack on a foreign will, no longer open to contest in the domiciliary state for lack of suit within the proper time (or, for that matter, if the will had been unsuccessfully contested), insofar as real estate in this state is concerned. The reasonable conclusion, however, which the case compels is that once a will is admitted to probate in the domicile of the testator and has been unsuccessfully contested there or cannot, because of the passage of time, be contested, its probate is conclusive as to both personalty and real estate.

TRUSTS—PRINCIPAL OR INCOME

In *Cothran v. South Carolina National Bank*,[13] the court was faced with the problem of whether stock dividends and profits realized by a trustee from the sale of stock were to be treated as principal or as subject to apportionment as between principal and income. The case is a significant one, but its impact is considerably lessened—except as to the parties involved—by the passage of legislation hereafter noted under Legislation.

The case dealt with a will which created a trust under which the trustees were directed to pay "all the net income" to two life beneficiaries, and upon the death of one "all the net income" was to be paid to the survivor for life. Much of the case was involved with pleading and procedural skirmishes, but on the substance of the case both the lower court and the Supreme Court held that stock dividends paid to the trustee and profits realized by it on the sale of stock did not go as principal but were subject to apportionment.

13. 242 S.C. 80, 130 S.E.2d 177 (1963).

The Supreme Court noted the three basic rules with respect to the allotment of dividends: (1) the Massachusetts rule, (2) the Pennsylvania rule, and (3) the Kentucky rule. Both the lower court and the Supreme Court determined, on the basis of earlier South Carolina decisions,[14] that the Pennsylvania, or apportionment, rule applied, the Supreme Court characterizing the rule as follows:

> Under the so-called Pennsylvania rule, or apportionment rule, it is the source of the stock benefit, and not its form, which determines to what extent it shall be treated as income or corpus of the estate. This rule treats all declared dividends whether in cash or stock, as income to the life beneficiaries to the extent that the earnings from which the dividend is declared accumulated since the acquisition of the stock by the trustee.

As to the sale of stock by the trustee, the court declared that the Pennsylvania rule

> also treats either profits from the sale of stock by the trustee during the life tenancy, or profits from the liquidation of the stock by the corporation during such period, as apportionable between the life tenant and the remaindermen, if the profit was due to accumulation of earnings by the corporation. The foregoing rule is based on maintaining the 'intact value' of the stock as part of the corpus for the remainderman and giving the accretion to the life tenant.[15]

The South Carolina authority on which the court chiefly relied was *Wallace v. Wallace*,[16] in which the words of payment to life tenant were "interest, income or profits." There, as in the present case, stock of the trust which had considerably increased in value because of accumulation of earnings "represented in part by extra shares declared as stock dividends and in part by increase in book value of the shares," was sold by the trustee after the life tenant's death. The ruling there of the circuit judge,

14. Cobb v. Fant, 36 S.C. 1, 14 S.E. 959 (1891); Wallace v. Wallace, 90 S.C. 61, 72 S.E. 553 (1911); Gist v. Craig, 142 S.C. 407, 141 S.E. 26 (1927).

15. It has been pointed out that "by the weight of authority, even in states which follow the Pennsylvania rule as to extraordinary dividends, there is no apportionment of the proceeds of a sale of the shares by the trustee, although the proceeds are greater than they would have been if the corporation had not retained earnings accruing since the creation of the trust." SCOTT ON TRUSTS § 236.12 (2d ed. 1956).

16. Note 14 *Supra.*

which was approved on appeal, noted that while there was conflict in the authorities it was his opinion that

> the strongest consideration of reason and justice support the rule which apportions such dividends or earnings between life tenant and remaindermen according to the time when the earnings were made, and not according to the chance action of corporate officers in withholding or declaring dividends; and I think that upon the sale of the stock, as here, in which the funds of the life estate have been invested, the increment in value due to the undivided profits or surplus earned and to the credit of the stock, though not declared by the corporation as dividends should be awarded to the life tenant.

This approved ruling was based not only on what was thought to be the desirable attitude in such a situation but upon a holding in *Cobb v. Fant*,[17] in which profits received by the trustee upon liquidation of the corporation whose stocks were in the trust were held to be income, restricted to profits accruing after the execution of the trust deed. In addition, in *Cobb* the circuit court was held to have been correct in holding that "cash dividends, extra dividends, or bonuses, declared from the earnings of a corporation are income and go to the *cestui que* trust." In *Gist v. Craig*,[18] which followed *Wallace* in time, the court reviewed these earlier South Carolina authorities and stated the principles they were supposed to have laid down. The court listed four classes of accretion cases: (1) declaration of stock dividends; (2) liquidation and distribution of assets; (3) sale by the trustee, or by the life tenant in corporation with the remainderman, and conversion into cash; (4) "Where the corporation has not converted its accretions into a stock dividend, or declared a dividend in cash representing them, or is not in the process of liquidation, but is a going concern, holding among its assets such surplus and undivided profits, and where there has been no sale of the stock by the trustee or the life beneficiary and the remainderman."

Of this classification the court in *Gist* said: "We may concede (though not to be understood as doing so) that under the first three classes, the life tenant would be entitled to the benefit of the accretions, without in the slightest degree affecting our position to the rights under the fourth class." The court put into the

17. Note 14 *Supra.*
18. Note 14 *Supra.*

fourth class a number of shares of stock which, at time of the testator's death had a book value of $102, and at the life tenant's death had a book value of $240. These shares had not been sold. It was held that the shares in their increased state passed as principal.[19] Other shares which had been redeemed by the corporation during the life tenant's life were treated differently: the increase going to the life tenant. Although the life and remainder interests were not in trust, but were legal estates, the same principles were held to apply.

There were other features in the present case, principally assertions by the appellant that the parties did not understand or intend, and that the testator did not intend, the accretions to be treated as income. On this score the court held that under the authorities the language of the will was unambiguous and must have been understood in the light of the antecedent authorities, particularly since the will was drawn by "an attorney experienced in trust matters," and that any departure from the terms of the trust by the trustee on the basis of what it regarded as its powers and duties could not vary the terms of the trust or absolve that trustee of its responsibilities. There was also assertion that the surviving life tenant was estopped by certain conduct on her part, but, without going into the facts here, it was held that the elements of estoppel were not present.

LEGISLATION

The only significant legislation in the area of Wills and Trusts enacted by the 1963 General Assembly is directly related to the problems in the case just discussed. It is the Revised Uniform Principal and Income Act, which was approved on June 3, 1963.[20] Although the act is a revised Uniform Act, the original act was not adopted in this state, and the revised act is the first act on the subject. In the case just discussed, the court points out that the Uniform Act (not the revised act), if it had been in force before creation of the trust, might have compelled a different result. With respect to the particular features involved in the litigation, the revised act makes no change in the original act—

19. The writer confesses that he cannot understand why if the securities in specie were turned over to the remainderman he could keep them, as increased in value, but that if the trustee sold them the accretion would go to the life tenant, or at least be apportioned. If a legal life tenant were given a power of sale and sold property and with proceeds bought other property, which he thereafter sold at a profit, a retention of the profit by him would hardly seem in order.

20. Act No. 269, 53 STAT. 297.

that is to say, as to the treatment of stock dividends and the proceeds of sale of stock. Both are treated as principal. Section 3(b)(4) includes under principal "stock dividends, receipts on liquidation of a corporation, x x." Section 3(b)(1) includes under principal "consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a replacement or change in the form of principal."

The quoted sections are but a small part of the whole area. The revised act, as is suggested by the fact that it is a revision, takes into account new practices in the corporate field since the enactment of the original act and innovations in the field of investments. It also is designed to remove uncertainties and unsatisfactory features of the older act. The act is too extensive in its scope to justify discussion in these pages, but trust officers and their lawyers and estate planners are by now familiar with its provisions. The prime virtue of the act in South Carolina is that it fills in many of the gaps that have heretofore existed. It will, of course, change the law where in conflict, as in *Cothran*, although it will not change the result there.

Of major importance are the provisions of Section 14: "Except as specifically provided in the trust instrument or the will or in this act, this act shall apply to any receipt or expense received or incurred after the effective date of this act by any trust or decedent's estate whether established before or after the effective date of this act and whether the asset involved was acquired by the trustee before or after the effective date of this act." It will thus be seen that the act is retroactive in the sense that it applies to trusts created prior to its effective date, but it does not apply to receipts before that time. There is, of course, a constitutional question, but the view of the Conference of Commissioners on Uniform State Laws, concurring in that of the draftsman of the act and the committee for the act, was that it would stand the constitutional test. This position is based largely on the decisions in *In re Catherwood's Trust*,[21] and *In re Allis' Will*.[22] (As applied to *Cothran*, the act would affect receipts and expenses not yet received or incurred by the trustee.)

The original Principal and Income Act dealt with both legal life interests and equitable life interests. The revised act deals almost exclusively with life interests under a trust. Except for Section 5, which deals with probate income—income during ad-

21. 405 Pa. 61, 173 A.2d (1961).
22. 6 Misc.2d 1, 94 N.W.2d 226, 69 A.L.R. 2d 1128 (1959).

ministration—and expenses during that period, the revised act is limited to life interests under a trust. It should be kept in mind, therefore, that the various rules for determining income and principal, as prescribed by the act, do not govern where the life interest is a legal one. Hence, it is possible that, because of the statutory change, a different set of rules will apply to a legal life estate than, under the act, will apply to an equitable life estate. In South Carolina, apparently, under *Gist*, the same rules for allocation were applicable to both types of estates. This will no longer be true. The writer understands that there is under consideration by the Conference of Commissioners of Uniform State Laws a uniform act to cover legal life estates. Until such an act or a similarly local one is promulgated and made law, South Carolina practitioners must be cautious not to treat legal life estates and trust life estates as subject to the same rules.