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Wills and Trusts

Coleman Karesh
University of South Carolina

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Coleman Karesh*

A. Appointment of Administrator

In the period under survey two cases involve the eligibility of an applicant for appointment as administrator of an intestate estate. In one of them, *In re Greenfield's Estate*,[1] application for letters of administration was filed by the alleged widow of the intestate. The petition was resisted by members of the decedent's family on the ground that the applicant was not the decedent's lawful wife. The judge of probate issued letters to the applicant on a finding that she was the lawful wife of the intestate. The circuit court affirmed, and it in turn was affirmed by the South Carolina Supreme Court. The case does not involve any particular principle of the law of administration, but it is interesting, and important, as it deals with the facts and the applicable legal principles which impelled the three courts to conclude that a common-law marriage existed. Its significance lies almost entirely in the field of family law.

In the case of *In re McClam's Estate*,[2] the novel question was presented whether the committee of an intestate, otherwise entitled to appointment as in a preferred class, was eligible, in view of his committeeship, to become administrator. The applicant for letters of administration was one of several brothers and sisters of the decedent and was acting as her duly appointed committee at the time of her death. The application was resisted by some of the brothers and sisters. The judge of probate overrode their objections and appointed the applicant administrator. On appeal, the circuit court reversed, vacated the appointment, and designated a bank administrator.

The circuit court's view was that the applicant was disqualified to become administrator of his sister's estate because, without regard to his character or competency, he would be,

> required to account to the personal representative of the estate, and to turn over to the personal representative . . . the assets of her estate. He will be called on to make an accounting for his acts and doings with reference to her estate, and this presents a conflict of interests, and is a sound

* Professor of Law, University of South Carolina.

1. 245 S.C. 595, 141 S.E.2d 916 (1965).
2. 245 S.C. 315, 140 S.E.2d 478 (1965).

> reason why he should not be appointed as her administrator . . . . His disqualification to act arises out of his relationship to the business and affairs of the intestate which he conducted as her committee.[3]

The South Carolina Supreme Court affirmed the circuit court, using the same authorities as those relied upon by the latter, but it held that the appointment of the bank as administrator was premature and improper, in that the other brothers and sisters were, in the order of statutory preference,[4] entitled to consideration for possible appointment ahead of the bank.

The South Carolina precedents relied upon by the circuit court and by the supreme court clearly take the position that the right to letters of administration is not automatic and absolute merely because the applicant is in a preferred order, and that an applicant otherwise entitled to appointment by virtue of priority or equality may be rejected on the basis of facts showing him to be unfit or unsuitable for the office.[5] Principal reliance was had upon *Ex parte Tolbert*[6] (where the applicant for letters, brother of the decedent, was a surviving partner) in which this language was used:

> One may, however, be disqualified to act as administrator for some good reason arising out of his relation to the business and affairs of the intestate. This principle was recognized in the case of *Rowell v. Adams*[7] . . . where it was stated that a surviving partner of a decedent as a general rule could not be appointed administrator of the estate, nor ought one interested against the heirs or the estate be appointed . . . . [I]t is apparent that the appellant will be called on to make an accounting for his acts and doings with reference to the estate of his deceased brother, and this conflict of interests is a sound reason why he should be held disqualified to act as administrator.[8]

It is to be noted that the concluding language is virtually the same as that used by the circuit court in stating the reason for

3. *Id.* at 318, 140 S.E.2d at 479.

4. S.C. CODE ANN. § 19-403 (1962).

5. *Ex parte* Tolbert, 206 S.C. 300, 34 S.E.2d 49 (1945); Rowell v. Adams, 83 S.C. 124, 65 S.E. 207 (1909); *Ex parte* Small, 69 S.C. 43, 48 S.E. 40 (1904) (in which the widow was denied letters of administration because of unfitness and partiality).

6. 206 S.C. 300, 34 S.E.2d 49 (1945).

7. 83 S.C. 124, 65 S.E. 207 (1909).

8. *Ex parte* Tolbert, 206 S.C. 300, 305, 34 S.E.2d 49, 51 (1945).

disqualification; but there is also the reference in *Tolbert* to interests adverse to the heirs or estate, which perhaps may be regarded as stating an inclusive general principle embracing conflict of interest. It was this element of accountability by a fiduciary acting in a dual capacity that prompted the court in the present case to follow the precedent of the partnership cases. The binding authority of the partnership cases can hardly be questioned now, but elsewhere there is no consensus that a surviving partner is not eligible for appointment as administrator.[9]

Despite the common element of accountability in the partnership cases and in a case like the present, the analogy to the unsuitable surviving partner upon which the decision here rested is not, it may be urged, an altogether fitting one, since, although the surviving partner owes fiduciary duties and accountability to the estate of the deceased partner, he also has an individual interest as partner which may produce a conflict of interest between personal claims and fiduciary obligations. With the committee-administrator, who acts in capacities which are official and by appointment, there is no conflict of private and official claims and rights.

It is arguable that a guardian or committee is not, by the mere fact of his office, placed in a position of conflict of interest, nor that he has such an adverse interest as should render him incompetent to act as administrator. At least he is in no more such adverse or conflicting position than others who are allowed to

9. See, 21 AM. JUR. *Ex'r & Adm'r* § 93 (1939): "Generally, the courts do not regard one whose personal interests are so adverse to the interests of a decedent's estate and of those entitled to its distribution that both cannot be fairly represented by the same person as a proper person to administer the estate. For this reason it has been decided that the surviving partner of an intestate ought not to be appointed administrator of the estate of such intestate." On the other hand, see 68 C.J.S. *Partnership*, § 286 (1950): "Unless prohibited by statute the survivor may act as representative of the deceased partner, in which case he acts in a dual capacity, and his duties and liabilities for liquidation of the firm are unaffected."

The truth of the matter is that the notion that a surviving partner may not act as administrator—as far as states other than South Carolina are concerned—is based almost entirely upon statutes which make him ineligible to administer, and not because of any non-statutory principle based on the incompatibility of holding two offices, although such incompatibility, if there is any, may have led to the enactment of the statutes. Such statutes exist in Arizona, California (if application is objected to), Idaho, Montana, Nevada (if application is objected to), and Utah. There may be others. In Alaska, the surviving partner may act if he has the qualifications of a general administrator. The North Dakota statute specifically provides that he may act. In a case from Illinois, Howard v. Slagle, 52 Ill. 336 (1869), although it seems not directly in issue, appointment of a surviving partner as administrator was criticized by the supreme court, which said that the appointment should not have been made in view of the fact that the surviving partner would have to account to himself. But notice the Illinois statute mentioned in note 15, *infra*.

assume the office of administrator. The fact that as guardian or committee he would be compelled to account to himself as administrator—if indeed it is technically possible for one to account to one's self—and to surrender to himself in the latter capacity the assets of his ward's estate,[10] does not shut off his ultimate accountability to the beneficiaries, nor to the judge of probate, who may compel the production of, and must examine, his accounts. It may be suggested that where one serves in several dependent or successive relationships, the true accounting is not by himself to himself, but to those whose interests he represents. Moreover, in terms of practicality, so far as the committee-administrator is concerned, his obligation of faithful and proper performance is secured by his bond, which he must separately furnish in both capacities.

In comparing the seeming conflict of interest between guardian (or committee) and administrator with other relationships involved in the administration of estates, it may be pointed out that there are other apparently adverse and conflicting interests which are sanctioned and which tend to dilute the assumption that a conflict of interests is an inevitable ground for disqualification. One of several heirs who has been appointed administrator must occupy a position, in relation to the other heirs, as adverse as, if not more so than, that occupied by a person holding two representative positions. And, in the statute itself prescribing the order of priority of appointment, creditors may be appointed to the office[11]—and their interests can be hardly re-

10. The personal assets would probably pass to him by operation of law. Burnside v. Robertson, 28 S.C. 583, 6 S.E. 843 (1888); Coleman v. Smith, 14 S.C. 511 (1880); *Ex parte* Witherspoon, 3 Rich. Eq. 13 (S.C. 1850). These are cases in which an administrator was appointed guardian of an infant distributee.

11. He is included in the least preferred category. S.C. CODE ANN. § 19-403(6): "In default of such to the greatest creditor or creditors or such other person as the court shall appoint." Obviously if he falls within the preceding five favored categories mentioning distributees, he would not be disqualified by reason of his being a creditor. (*But see,* WOERNER, ADMINISTRATION § 242 (3d ed. 1923) where applicant is to be selected from members of class, he should not be appointed in preference to other applicants in class where he is both next of kin and creditor.) If a distributee-creditor were appointed administrator, there would be double accountability to himself—as distributee and as creditor.

Nor is a debtor, who perforce has an adverse interest, perhaps greater than that of a creditor, ineligible for appointment on that account. Annot., 18 A.L.R. 2d 633 (1951). Though the issue of eligibility in this respect has not been raised in this state, there are many cases in which there is the fact that a debtor has been appointed administrator, just as there are cases in which a debtor has been named executor. *E.g.,* Donnan v. Watts, 22 S.C. 430 (1884); Twitty v. Houser, 7 S.C. 153 (1875); Clowney v. Cathcart, 2 S.C. 395 (1870); Schnell

garded as anything other than adverse; although it must be admitted that if the legislature specifically permits creditors or others to act, there is no obstacle to their doing so regardless of inherent conflict of interest. In fact, the whole order of priority of appointment is based upon the conception of the largest beneficial or individual interest, and it is only in the rarer case that a person or institution completely disinterested is appointed.

Granted that considerations of fitness and suitability, and particularly of adverse interest, fade in the nomination of an executor—as distinguished from the appointment of an administrator—one of the most common examples of a fiduciary's occupying two offices, in one of which he must account to himself in the other (if that is technically possible) is the testamentary appointment of the same person as executor and trustee. As executor he receives the personal estate, and as such he transmits to himself, either directly or by operation of law,[12] the residue of the personal estate constituting the trust assets. If the committee-adminstrator affords an instance of conflict of interest or adverse interest, then the executor-trustee must also afford it; yet there seems never to have been a prevailing impression, judicial or otherwise, that the executor-trustee is tinged with disabling adverseness or conflict of interest.

There are clearly many cases, which require no citation of authority, presenting the aspect of the same person acting in several fiduciary capacities or acting in a fiduciary and in an individual capacity, and which are obviously inconsistent with any notion that he cannot later act as a fiduciary on that account. The executor-trustee has already been noted. In terms of accounting, the fact that there is a requirement of accounting to one's self—if, again, that technically is possible—does not seem to have evoked a rule that that possibility forbids one to occupy those respective positions. The creditor who has been appointed administrator must seemingly account in his representative capacity to himself as an individual. Similarly the heir who has been named administrator must seemingly account as representative to himself individually. If the matter is carried to its logical conclusion—that supposed accountability to one's self is a disqualifying conflict of interest—a temporary admin-

v. Schroder, Bailey's Eq. 335 (S.C. 1831). The dilemma that he cannot sue himself, nor combine in himself the dual character of creditor and debtor, is resolved, to a degree, by the fiction that he has paid himself and must account as if he had actually received the funds. See the cases just cited.

12. See Anderson v. Earle, 9 S.C. 460 (1877).

istrator should not be appointed permanent administrator; nor should ancillary letters be granted to a domiciliary representative.[13]

The denial to a guardian or committee to act as administrator, as affirmed by the court in this case, on the ground that the two relationships produce a conflict of interest, appears not to have any clear precedent in this country except, perhaps, for one case[14] in which it was held that letters of administration should not be denied an applying guardian who had long before settled his accounts. This can hardly be a holding, nor did the court there say that it was, that the fact of guardianship alone disqualifies the guardian to act as administrator. It may be of some significance that although in all of the states there are, in the eligibility statutes, negative provisions of one sort or another—stating who are not qualified for appointment—none of the statutes appears to contain an express prohibition against the appointment of a guardian, conservator or committee of a deceased ward to administer the ward's estate. On the contrary, several states either impose the duty upon or permit the guardian, conservator or committee to administer the deceased ward's estate, some as a separate administration and others as a continuation of administration, although the representative may not otherwise be in a preferred class.[15]

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13. The same person may act in both capacities. Hamilton v. Levy, 41 S.C. 374, 19 S.E. 610 (1894).

14. Ballou v. Ballou, 30 R.I. 331, 75 Atl. 97 (1910).

15. In Georgia the guardian or committee is specifically authorized to distribute the deceased ward's estate as if he had been appointed administrator. GA. CODE ANN. §§ 49-316 to -618 (1937). In Colorado the conservator is permitted to continue administration of the deceased ward's estate. COLO. REV. STAT. ANN. § 152-9-12 (1953). In Illinois the guardian or conservator of a deceased ward has powers of an administrator to collect, and within thirty days or such further time as the court may allow after ward's death, he may be granted letters of administration unless petition for letters has been filed and granted. ILL. ANN. STAT. § 3322 (Smith-Hurd 1961). In Oklahoma, when a ward dies intestate leaving personal property, and the total estate does not exceed $3000, the guardian can proceed with liquidation of the estate as if he had been appointed administrator. OKLA. STAT. § 58-95 (1961).

The Model Probate Code follows substantially the Illinois statute. MODEL PROBATE CODE § 234 (1946) and note thereto, pp. 616-624, listing other states. The list has not been updated, and it may be that it has been either lengthened or shortened.

While these statutes, in the main, provide for a continuation of administration rather than a succeeding separate administration, neither they nor other statutes carry an implication that the guardian cannot, if the decedent's estate is separately administered, be appointed administrator.

As to guardian acting in another capacity, see 39 C.J.S. *Guardian & Ward* § 196 (1944). As to executor or administrator acting in another capacity, see 34 C.J.S. *Ex'r & Adm'r* §§ 832, 955 (1942).

Looking at the matter broadly, the question may nonetheless be asked: Should the fact of the supposed accountability of a committee or guardian to himself as administrator, without regard to other facts, be a solid objection to his appointment as administrator? He is generally the one most familiar with the business and property of his ward; after all, he represents the ward alive: why should he not be allowed to represent him dead? Although the opinion in the present case does not disclose it, the record shows that the real and underlying reason for the resistance to the committee's petition for appointment was dissatisfaction with his handling of his ward's estate. The parties' contentions have all the color of a family dispute not only as to the ward's estate but as to another estate in which they were all interested. The antagonism of the concerned persons presents a case of conflict between parties if not, or perhaps in addition to, a theoretical conflict of interest. The actual conflict, an actual adverseness of interest, might well justify the result in this case, especially when coupled with a duty to account.

At any rate, *McClam* has established the clear precedent that the committee of a deceased incompetent—and, inferentially, the guardian of a deceased minor—is ineligible for appointment as administrator.[16] To what extent the case will be accepted as precedent elsewhere remains to be seen.

16. There are probably many cases, appealed and unappealed, in which a person who might be disqualified for conflict of interest has been appointed in the absence of objection. See Gee v. Humphries, 49 S.C. 253, 27 S.E. 101 (1896) (surviving partner). There are probably many cases also in which appointment was made of a person already owing a representative duty to the estate which he was further appointed to represent. See Cauthen v. Cauthen, 70 S.C. 167, 49 S.E. 321 (1904) (committee appointed administrator); *Ex parte* Witherspoon, *supra* note 10 (administrator of estate of which minor was distributee appointed guardian). The administrator appointed guardian of an infant distributee appears frequently in cases involving liability of sureties for the respective administrations. Burnside v. Robertson, *supra* note 10; Todd v. Davenport, 22 S.C. 147 (1884); Coleman v. Smith, *supra* note 10; O'Neall v. Herbert, Dudley's Eq. 30 (S.C. 1837). The statute itself prescribes that letters of administration shall be granted, in the absence of or non-application by a surviving spouse, to the "legal representatives" of a child or children of the intestate. S.C. CODE ANN. § 19-403(2) (1962). *Ex parte* Frierson, 96 S.C. 34, 79 S.E. 791 (1913) (in which such an appointment was made of a guardian). It is obvious that in a case like this—as in others—the administrator would have to account to himself as guardian. See Annot., 135 A.L.R. 585 (1941).

Whether the probate judge has the power or the duty, on his own motion, to deny administration without regard to whether objection is made in cases of disqualification, such as surviving partner, or now, guardian or committee, is a matter of some uncertainty. Since an administrator is a deputy of the probate judge, it would seem logical that the probate judge has the power, if not the duty, to withhold letters even if there is no objection to the petition for appointment. The writer is informed by the judge of probate for Richland County that following the holding in *McClam* he has refused letters of administration to an applying committee, even though there was no opposition.

B. Recovery of Assets by Representative

The question whether a probate court has power to compel, at the instance of the personal representative of a decedent, the discovery and surrender of assets is presented in *Greenfield v. Greenfield.*[17] The plaintiff, temporary administratrix of her deceased husband's estate, brought suit in the probate court, alleging that the defendants, brothers and a sister of the decedent, had taken possession of and assumed control of many, undescribed books, papers, records, personal effects and other property of the intestate, and that they had refused to surrender them to her. She asked the probate court to compel the defendants to disclose and surrender the withheld property, and for an order restraining their disposition. The probate court granted the petition over the objection of the defendants that it had no jurisdiction to grant such relief. Its view was that the statutes relating to the jurisdiction of probate courts were extensive enough to confer the power to take the sought-for action.

On appeal the circuit court reversed, stating that the issue raised was whether "Probate Courts have jurisdiction to determine ownership and/or possession and order its transfer by summary proceeding,"[18] and it held that those courts had no such jurisdiction.

The South Carolina Supreme Court reversed the circuit court, stating that in the first place the circuit court had misconceived the nature of the issue, since, as the record disclosed, the defendants admitted that they had certain property of the deceased and they alleged no title in themselves. The supreme court declared that the primary question was,

> Whether the probate court has the jurisdiction and power to compel relatives of a decedent to surrender the records of the decedent, which are essential to the administration of the estate, said relatives asserting no facts which would entitle them to the possession thereof. Stated inversely, the issue is, can such relatives, without any claim of title or the assertion of facts which would entitle them to the possession of such records, thwart or indefinitely delay the adminis-

17. 245 S.C. 604, 141 S.E.2d 920 (1965). The case is a companion to *In re* Greenfield's Estate, 245 S.C. 595, 141 S.E.2d 196 (1965), heretofore discussed under Section A, *Appointment of Administrator.* The plaintiff in the present case was suing as temporary administratrix; in the other case she was held entitled, after her temporary appointment, to permanent letters of administration.

18. Greenfield v. Greenfield, 245 S.C. 604, 607, 141 S.E.2d 920, 922 (1965).

tration of the estate by withholding such records and compelling the administratrix to go into a court other than the probate court in a claim and delivery action, or possibly a series of such actions in various counties, to gain possession thereof.[19]

The initial observation by the court on the powers of probate courts in this state was that they are courts of limited jurisdiction and have only such powers as are conferred upon them by statute—either in express terms or necessarily incident to the execution of powers expressly granted. The inquiry, therefore, was whether existent statutes either expressly or by necessary implication granted probate courts authority to issue such orders as that issued here—namely, in substance, to compel a disclosure and delivery of personal property of the estate to an administrator by those having possession but having no title nor asserting a title or individual right of possession.

The supreme court concluded that two statutes—one which it said carried the power by implication and the other which expressly granted it—justified the action that the probate court had taken. Looking into the history of the probate courts, the supreme court pointed first to the fact that the constitution of 1868 (article IV, section 20) had called for the formation of probate courts, which were to have jurisdiction, among other things, "in all matters . . . of administration."[20] Further, the court noted the repetition of this quoted provision in the constitution of 1895 (article V, section 19),[21] and the statute follow-

19. *Id.* at 609, 141 S.E.2d at 923.

20. S.C. CONST. art. IV, § 20 (1868) as quoted in Greenfield v. Greenfield, 245 S.C. 604, 609, 141 S.E.2d 920, 923 (1965).

21. The S.C. CONST. (1868) provided that "A Court of Probate shall be established in each County, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors, and the allotment of dower, in cases of lunacy and persons *non compotes mentis*." In another section—S.C. CONST. art. IV, § 1 (1868)—the constitution included probate courts as among the courts invested by it with judicial power. S.C. CONST. art. V, § 1 (1895), declared the judicial power but did not include probate courts as did the earlier constitution,, but, after directing the establishment of circuit courts, provided that the "General Assembly may also establish County Courts, Municipal Courts, and such courts in any and all the Counties of this State as may be necessary." It also provided—S.C. CONST. art. V, § 19 (1895): "The Court of Probate shall remain as now established in the County of Charleston. In all other Counties of the State jurisdiction in all matters testamentary and of administration, in business appertaining to minors, and the allotment of dower, and persons non compos mentis, shall be vested as the General Assembly may provide, and until such jurisdiction shall remain in the Court of Probate as now established." It is to be noted that it was not provided, as in the earlier constitution, that probate courts should be established; and it has been held, accordingly, that, except for the Charleston court, probate courts are not consti-

ing the mandate of the constitution, which used this same language.[22]

As to the scope and meaning of the term "all matters of administration", the court looked to the case of *McNamee v. Waterbury*,[23] decided shortly after adoption of the constitution of 1868. There it was determined that probate courts had power, by implication from the quoted language, to order sale of real estate in aid of assets. (It dealt with no other factual situation, and it made no reference, among possible powers, to the power involved in this suit.) Among the statements in that case quoted by the court in *Greenfield*, appears the following, which apparently weighed heavily in forcing the conclusion that by necessary implication the controversial power existed:

> Jurisdiction, in matters of administration means power to do what a court ought to do in the matter of administration.
>
> The Constitution furnishes a Court on which the administrator may lean, and which can supplement his legal powers by its process . . . .
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> The expression "all" imports an intent to clothe the Probate Court with full powers in matters of administration. That it was the intention of the Constitution to clothe that Court with full efficiency as it regards matters of administration, is evident from the nature of the Court, as established by Sections 1 and 20, Article IV, of the Constitution.[24]

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tutional courts and have only such powers as the general assembly may provide. Bradford v. Richardson, 111 S.C. 215, 97 S.E. 58 (1918). The relevant section of the 1895 Constitution was amended in the general elections of 1964, followed by ratification by the general assembly in its 1965 session. S.C. ACTS & J. RES. 1965, p. 52. S.C. CONST. art. V, § 19, (1895), now provides: "Jurisdiction in matters testamentary and of administration, in matters appertaining to minors and to persons mentally incompetent, shall be vested as the General Assembly may provide; and until such provision such jurisdiction shall remain as now provided by law." *Quaere,* whether the omission of "all" before matters "testamentary and of administration" is of significance in view of the stress placed upon "all" in McNamee v. Waterbury, 4 S.C. 156 (1873), see note 23 *infra* and accompanying text.

22. S.C. CODE ANN. § 15-444 (1962). In full it reads: "Every judge of probate, in his county, shall have jurisdiction in all matters testamentary and of administration, in business appertaining to minors, in the allotment of dower, and in cases of mental incompetency." The statute will probably undergo a change by elimination of the provision as to dower in the light of the recent change in the constitution of 1895 mentioned in the last note. Will it, or must it, also undergo a change with respect to "all" to conform to the new language of the constitution?" See note 21 *supra.*

23. 4 S.C. 156 (1873).

24. McNamee v. Waterbury, 4 S.C. 156, 165 (1873), as quoted in Greenfield v. Greenfield, 245 S.C. 604, 611, 141 S.E.2d 920, 924 (1965).

In the present case the court observed that "without the books, papers or records of the decedent, neither the administratrix nor the probate court could proceed effectively with the matters of administration," and it concluded, "under the circumstances we think it clear that the probate court had the power to order such delivered by intermeddlers who had no title or right thereto. This power, we think, is one which is of necessity incident to the jurisdiction expressly granted the probate court over all matters of administration."[25] The court went on to state the particular applicability to the facts of this case: "To hold that under such circumstances the probate court cannot proceed and that the administratrix is required to first go into some court through a claim and delivery proceeding, as contended by defendant, would render the probate court ineffective to exercise the jurisdiction expressly granted it. Such a holding would completely defeat the administration of the estate."[26]

The holding that the futility or inconvenience of resorting to one or more claim and delivery actions is reason for proceeding in the probate court offers the unusual feature of a probate court acting because of the absence of an adequate remedy at law—thus turning that court into a sort of special court of equity, the general powers of which it does not have.[27] In view of the possibly unsatisfactory and bothersome nature of the claim and delivery actions, the nature of the property (particularly books and records), its identity, and its value, a relevant inquiry at this point might be whether equity would have been a proper forum for obtaining discovery and delivery of the property,[28] and if that were so, whether any justification existed for

25. Greenfield v. Greenfield, 245 S.C. 604, 611, 141 S.E.2d 920, 924 (1965).
26. *Ibid.*
27. Mack v. Stanley, 190 S.C. 300, 2 S.E.2d 292 (1939)—holding that a probate court was without power to authorize an executor to mortgage land, as being a distinct ground of equitable relief "not included in the general grant of jurisdiction."
28. For the proposition that equity will entertain a suit for the delivery of unique personal property wrongfully withheld, see Hull v. James, 1 S.C. 186 (1869)—holding that specific performance of contract will not lie with respect to ordinary chattels, but will lie for articles having no ascertainable or market value, and delivery will be compelled where the value is "neither intrinsic or commercial but merely representative, as in the case of deeds or other evidences of right."; Snoddy v. Finch, 9 Rich. Eq. 355 (S.C. 1857)—holding that equity will decree delivery of title deeds wrongfully withheld, although an action for trover or detinue would lie; Young v. Burton, McMul. Eq. 255 (S.C. 1844)—same as to slaves; Wamburzee v. Kennedy, 4 DeSaus. Eq. 474 (S.C. 1814). It would seem, too, that equity, in a proper case, could entertain a suit for discovery and relief. 30 C.J.S. *Equity* § 29 (1965). See Floyd v. White, Dudley's Eq. 40 (S.C. 1837); Wamburzee v. Kennedy, *supra*. *Quaere*, whether sections 26-501, *et seq.*, of the South Carolina Code, relating to discovery, would preclude this. Of course, these sections would be qualified and inapplicable if other statutes specifically, or by implication, permitted discovery.

proceeding in the probate court. A relevant inquiry also would be whether, narrowing the matter to one of administration of estates, equity would order discovery and restoration of assets on the plea of the representative—the indication generally being that it would.[29] Admittedly, however, even if process at law or in equity were available for discovery and restitution of assets, the statutory right to move in the probate court would, in itself, justify the use of that right, particularly if it were less cumbersome and time-consuming than the processes of the law and equity courts.[30] The jurisdiction of the latter courts is, in many cases, concurrent with that of the probate court, and *McNamee v. Waterbury*,[31] already mentioned, is authority enough for the proposition that—the fact that an equitable remedy exists does not preclude probate court action, since, although the court there held that the probate court may order land sold in aid of assets, equity both before and after that decision has had similar authority. But the point to all this is that the rationale, concluding that there must be read into the words "all matters of administration" a right to discovery and delivery of assets because of insufficiency and inadequacy of proceedings elsewhere, does not seem wholly justified.

It appears to be fairly well established throughout the country that, in order to obtain discovery, or discovery and return of assets, or simply return of assets, or recovery of their value, the action must be brought in courts of law or equity, and that in order for probate courts to entertain such proceedings, summary in their nature, statutory sanction must be given.[32] From their very nature in their historical setting, probate courts have had powers relating to the probate of wills and the administration of estates. In creating or recognizing such courts, by whatever

29. See Floyd v. White *supra* note 28; 33 C.J.S. *Ex'r & Adm'r* § 153 (1942); 21 AM. JR. *Ex'r & Adm'r* § 905 (1939); SCHOULER, WILLS, EXECUTORS & ADMINISTRATORS §§ 2181-82 (6th ed. 1923).

30. As to time, this is at least in one respect debatable. In terms of ultimate appeal to the state supreme court, proceedings originating in the circuit court would entail only one appeal; proceedings in the probate court would necessitate two appeals: one to the circuit court and a second from that court to the supreme court. That was the case here.

31. 4 S.C. 156 (1873).

32. 33 C.J.S. *Ex'r & Adm'r* § 153 (1942); 21 AM. JUR. *Ex'r & Adm'r* § 906 (1939); ATKINSON, WILLS § 117 (2d ed. 1953); MODEL PROBATE CODE § 130 (1946) and note, and statutory note at p. 321—listing states which authorize probate court disclosure proceedings, some being limited to disclosure, others in addition requiring surrender of property or determination of title. South Carolina is not included in the list. All statutes appear to be specific and to the point; none are given as impliedly authorizing.

name, the various legislatures have undoubtedly conferred general powers in the customary sense; yet, it has been deemed necessary to enact special statutes to permit summary proceedings of the kind involved to be had in the probate courts. The South Carolina Constitution of 1868, which is reflected in the statute,[33] naturally did not simply pronounce the establishment of probate courts and stop there; it reasonably added "in all matters testamentary and of administration." In fact, it was virtually imperative that these words should follow, since there was also added jurisdiction which the predecessor courts of Ordinary did not have—allotment of dower and supervision of the persons and estates of persons of unsound mind.[34]

As stated earlier, the court in this case found additional reason for upholding the claim of the administratrix in a statute which it construed as expressly giving her the right to seek the relief which she asked. An oddity in the case is that the statute so relied on was not made the basis of consideration or decision on either the probate court or circuit court level, but appeared for the first time in the exceptions to the decree of the circuit court reversing the probate court. The statute is an old one, enacted in 1839,[35] and since then it has reappeared in all the general and revised statutes, and in all the codes, including the present one. Because of the crucial character of the present statute, it is set out in full:

> The judge of probate of the county in which a deceased person may have died may, either of his own accord or at the instance of any creditor or other person interested in the estate of the deceased cite before him such person as neither being appointed executor nor having obtained administration of the effects of such deceased person, shall nevertheless possess himself of the goods, chattels, rights and credits of such person deceased and, upon such person being cited as aforesaid, the judge of probate shall require of him a discovery and account of all and singular the goods, chattels, rights and credits of the deceased and shall proceed to decree

33. S.C. CODE ANN. § 15-444 (1962).

34. As to persons of unsound mind, see Walker v. Russell, 10 S.C. 82 (1877); *Ex parte* Richards, 2 Brevard 375 (S.C. 1810); as to dower, Stewart v. Blease, 4 S.C. 37 (1872) As to minors, the court of Ordinary seems to have had power to name guardians without specific statutes authorizing. Howard v. Faber, 2 McCord's Eq. 446 (S.C. 1827).

35. See 11 Stat. 63. This act was borrowed from an earlier statute, 5 Stat. 112 (1789).

against him for the value of the estate and effects of the deceased which he may have wasted or which he may have been lost by his illegal interference, charging him as executors of their own wrong are made liable at common law, as far as assets shall have come into his hands.[36]

The statute appears to have been mentioned in only a few cases, and in only two of them is the central issue of the applicability of the statute raised. In one, *Haley v. Thomas*,[37] distributees of an intestate brought action in the probate court against other distributees in possession of estate assets, asking for discovery and account under the statute. The court held, however, that the statute could be invoked only if administration had been obtained. There is a fairly clear inference that the probate court could, in a proper case, order not only a discovery but also a delivery of assets. In the second case, *Ex parte Davega*,[38] action was brought in the probate court by an administrator against a mortgagee of the intestate's chattels, who had sold the property and applied the surplus after sale to the payment of debts of the decedent. The basic question was whether the defendant was an executor de son tort, but the probate court decreed not only a discovery and accounting but also a *delivery* of the remaining funds to the administrator. This course was approved by the supreme court, reversing the circuit court. On neither the circuit court level nor above was any direct issue made as to the power of the probate court to compel a delivery. The issue of delivery became an important one in the present case because the defendants argued that the word "account" did not mean "deliver" or a like term. The court construed "account" as meaning delivery, concluding that the language of the statute is clear and reflects an intention by the legislature to authorize the probate court to require an executor de son tort to account for assets not wasted or lost by delivering the same to the administratrix.[39]

36. S.C. CODE ANN. § 19-612 (1962).

37. 30 S.C. 270, 9 S.E. 110 (1889).

38. 31 S.C. 413, 10 S.E. 72 (1889).

39. The statute in question can only be described as a "sleeper." What may account for its not being listed in the Model Probate Code as one of the discovery statutes is its reference to executors de son tort, under which heading it appears in the codes. See note 32 *supra*.

As indicated, *supra* note 35, the statute is borrowed from a 1789 statute. The latter provided that persons having possession of the personal assets of a deceased without having received letters "shall be liable to be cited by any persons having right or claim to the property of the deceased, or creditors, by process

The defendants also contended that the probate judge could not require a discovery and account because, it appeared, he did not interrogate the defendants as the statute, in their contention, called for. The court held that it was unnecessary to interrogate them under oath, since their answers admitted possession of certain assets. There was the further argument that the only judgment the probate court could issue was for the value of the property, but the court held that the provision for judgment for value of the property was as to assets wasted or lost by the defendants, not those which they still held.

C. Representative's Commissions

An interesting and novel case, as far as this state is concerned, is *In re Ouzts' Estate*,[40] involving the allowance of executor's commissions. The facts and the issues were simple; the resolution not quite so easy. The testator had purchased stocks on margin, which were held by various brokers under the customary arrangements. The stocks were registered in the names of the brokers, dividends were credited on the buyer's account, the stocks were voted by the brokers at the order of the buyer, and sales of stocks were made from time to time at the buyer's direction. On the testator's death there were a large number of stocks held in the margin accounts. These were inventoried in the testator's estate and appraised at 1,280,872 dollars and thirty-three cents. As against this, there was an indebtedness of 602,881 dollars and twelve cents. At the direction of the executor the stocks were sold by the brokers, who remitted to the executor the net of 677,991 dollars and twenty-one cents over the indebtedness. The executor died thereafter and administrators d.b.n.c.t.a. were appointed. The administrators claimed that the commissions to which they, as successors of the executor, were entitled were to be calculated on the gross value of the stock, namely, 1,280,822 dollars and thirty-three cents. The contention in opposition to this claim was that the representatives were entitled only to commissions on the money actually received from the brokers, namely, 677,999

from the county courts, where there are county courts established, or ordinary of the districts where there are no county courts or courts of chancery, to make discovery and give account of all and singular the goods and chattels . . ." of the deceased. Whether the legislature in 1839 intended to treat "account", as used in the 1839 act, along with other words, in the same or in a different sense as "give account", is a matter of speculation. There is a different flavor, although not necessarily a different meaning, in requiring a person to "give account" as compared to requiring an "account" from him.

40. 245 S.C. 150, 139 S.E.2d 465 (1964).

dollars and twenty-one cents. Those opposing contentions pose the issue.

The matter was heard in both the probate court and circuit court, and in each it was held that commissions were allowable only on the money remitted to the executor, and not on the gross or aggregate value of the stocks. The South Carolina Supreme Court affirmed.

The solution of the question of course rested upon the language of the statute relating to representatives' commissions. That statute provides that the representative shall receive "a sum not exceeding the sum of two dollars and fifty cents for every hundred dollars appraised value of all personal assets which he shall receive and the sum of two dollars and fifty cents for every hundred dollars appraised value of all personal assets which he shall pay away . . . ."[41] Prior to 1943, the statute, which has a long history, allowed commissions of two dollars and fifty cents (two and one-half percent) "for every hundred dollars which he . . . shall receive" and the same amount "for every hundred dollars which he . . . shall pay away . . . ."[42] In that year the statute was amended by inserting "appraised value of all personal assets."[43] Before the amendment it had been held repeatedly that the receipt and delivery in kind of personalty did not earn commissions for the representative, and that only the receipt and paying over of *money* entitled him to commissions. The court in this case cites as authority *Turnipseed v. Sirrine*,[44] which is one of many cases to the same effect.[45] But with the 1943 amend-

41. S.C. CODE ANN. § 19-534 (1962).

42. S.C. CODE ANN. § 9017 (1942) (now S.C. CODE ANN. § 19-534 (1962).

43. S.C. ACTS & J. RES. 1943, p. 34.

44. 60 S.C. 272, 38 S.E. 423 (1900).

45. *E.g.*, Herndon v. Caine, 106 S.C. 230, 91 S.E. 1 (1916); DeLoach v. Sarratt, 58 S.C. 117, 36 S.E. 522 (1900); Jones v. Jones, 39 S.C. 247, 17 S.E. 587 (1892); College of Charleston v. Willingham, 13 Rich. Eq. 195 (S.C. 1867); Gist v. Gist, 2 McCord's Eq. 473 (S.C. 1827); Kiddle v. Harmon, Harper's Eq., 223 (S.C. 1824); Deas v. Spann, Harper's Eq. 176 (S.C. 1824); Ruff v. Summers, 4 DeSaus. Eq. 529 (S.C. 1814); Rutledge v. Williamson, 1 DeSaus. Eq. 159 (S.C. 1789). However, in *Deas* and *Gist,* executors who sold property of the estate and received bonds in payment, which they delivered to the legatee, were held entitled to commissions, the bonds being treated as equivalent to money under the circumstances, although if they had originally been received as part of the estate, they would not be, as in *Rutledge.* In *Kiddle,* the executors were held entitled to commissions as for money received where they sold estate property which was purchased by a creditor who credited his debt on the purchase price. In *College of Charleston v. Willingham,* it was stated that if the will directs payment of money to a legatee who takes by agreement a security or other property instead, the property or security is treated as money and commissions allowed. In *Turnipseed v. Sirrine, supra* note 44, commissions were allowed on stocks delivered to legatees, where the will directed payment of so

ment commissions became, and are now, allowable not only on money but on all the personal property of the estate on the basis of its appraisal value. The key word in the amended statute, as in the original, is "receive"; similarly the words "pay away". The court lays down—indeed professes to follow—the rule that to be entitled to commissions the representative "must actually receive the money or other personal property, and pay away the money or distribute the personal assets in kind."[46] It concluded, as the basis of its affirmance, that there was no such receipt of the stocks—only the receipt of the net after satisfying the indebtedness to the brokers.

In reaching the result, the court depended upon cases from Missouri and New York[47] in which, as here, the decedent had purchased stock on margin, and a North Carolina case[48] also dealing with a brokerage transaction in which there were credits and offsets. Without going into the rationale of these cases, it is sufficient to say that the representatives were not deemed to have received the securities on which the claim for commissions was made.

Turning closer home, the court found two South Carolina cases justifying the result reached. In one of them, *Buerhaus v. DeSaussure*,[49] executors sold a lot of land for 16,000 dollars, the purchaser assuming a mortgage for 9,000 dollars and paying the

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much money, the stock being treated as money. In *DeLoach*, where administrators received an insurance check and endorsed and delivered it over to a trustee in insolvency of the intestate, administrators were held not entitled to commissions, although it is suggested that if they had deposited the check to their credit or instructions had been given the trustee to deposit to their credit, the fund would have been treated as money received and paid away. See also Lanier v. Brunson, 21 S.C. 41 (1883), involving commissions allowable to a trustee (whose compensation is governed by the statute affecting representatives) who recovered judgment against third parties and joined with beneficiary in releasing one defendant and assigning judgment to him, assignee paying a portion of the judgment directly to beneficiary—trustee allowed commissions as for receiving and paying away so much money.

It is obvious from these cases that despite the insistence on "actual receipt", constructive receipt and constructive paying away are sufficient, on one theory or another, in some cases.

46. *In re* Ouzts' Estate, 245 S.C. 150, 155, 139 S.E.2d 465, 469 (1964).

47. Hitchcock v. Mosher, 136 Mo. 578, 17 S.W. 638 (1891); *In re* Mercantile Trust Co., 210 N.Y. 83, 103 N.E. 884 (1913). For a collection of cases, including the above, see Annot., 46 A.L.R. 239 (1927). See also on whole subject of commissions on property subject to lien, pledge, etc., 21 AM. JUR. *Ex'r & Adm'r* § 521 (1939). New York has consistently followed the rule. *In re* Post's Estate, 193 N.Y.S.2d 200 (Surr. Ct. 1959)—citing earlier cases and in which it is said that the principal reasons given in New York for the rule are that the securities have never come into possession of the representative or that the disposition by him was a transaction in form only.

48. *In re* Ledbetter, 235 N.C. 642, 70 S.E.2d 667 (1952).

49. 41 S.C. 457, 19 S.E. 926 (1894).

executors the balance. Commissions were allowed only on the latter sum, the court saying: "This sum, therefore, was the only amount that passed through the hands of the executors, and upon this sum alone are the executors entitled to commissions."[50] In the second case, *Spartanburg County v. Arthur*,[51] which involved commissions due the receivers of a closed bank (whose compensation is governed by analogy by the statute here under consideration), it was held that the receivers were not entitled to commissions upon collections made and applied by secured creditors, the gist of the holding being that they had not actually received the funds. The *Arthur* case had pointed out, the court said, that "our Court has steadfastly adhered to an exact definition of the word 'received' and has denied to a fiduciary any commissions unless it could fairly be said that such fiduciary had actually 'received' into his possession funds of the estate."[52] The court, continuing that steadfast adherence, concluded again that there had never been any such actual receipt as would justify allowance of commissions.[53]

In an opinion in which he concurred in the result in *Ouzts' Estate*, Mr. Justice Brailsford's position was that, under the terms of the brokerage agreement, the executor had no title to the stocks nor actual or constructive possession, nor did he have the right to control their disposition. Furthermore the brokers were not obligated to hold specific certificates for the testator, and upon the testator's death they were authorized to liquidate the margin accounts. It was his view that "under this state of facts, it may plausibly be put forward that the true assets of the estate were choses in action against the brokers, rather than

50. Buerhaus v. De Saussure, 41 S.C. 457, 497-98, 19 S.E. 926, 962 (1894). See Ball v. Brown, Bailey's Eq. 374 (S.C. 1831)—where land having been sold by a master in equity in foreclosure action against executors and the land was bid in by mortgagee for less than the debt, the executors were not entitled to commissions, the court saying it could not perceive "how these moneys can be regarded in any shape, actually or constructively, as having been received, or paid away, by the executors." The executors were of course not entitled to commissions on the land, but their argument was that the sale produced money which was in turn paid away.

51. 180 S.C. 81, 185 S.E. 486 (1935).

52. *In re* Ouzts' Estate, 245 S.C. 150, 159, 139 S.E.2d 465, 473 (1965).

53. *But see* Griffin v. Bonham, 9 Rich. Eq. 71 (S.C. 1856), in which an executor who was indebted to the estate was allowed commissions on the amount of the debt although he never actually paid to himself as executor, on the basis of the rule that a debt of the representative to the estate, not barred by the statute of limitations at the time of his qualification, is regarded as paid and as so much money in hand. However, the executor, who was also a creditor of the estate, was allowed commissions only on the amount of his debt after setoff of his claim against it.

specific shares of stock.[54] In any event, these stocks were never received by the executor nor paid away by him within any permissible construction of the relevant statute."[55]

In a long and forceful dissenting opinion, Mr. Justice Bussey took the position, principally, that the stocks were in the constructive possession of the executor and that this was the equivalent of the receiving demanded by the statute. He disputed the applicability and appropriateness of the authorities relied upon by the majority and cited a Maryland case[56] as a contrary, and applicable, holding. On an extended review of the history of the statute, his view was that the 1943 amendment extending commissions to the appraised value of all the personal property, as distinguished from the earlier limitation to money, rendered the prior South Carolina decisions on which the majority relied no longer controlling. As he saw it, the legislative intention was that "an executor need receive the personal assets of the estate, properly included in the appraisal thereof, only to the extent of being in control thereof and responsible for the proper handling thereof in order to entitle him to commissions thereupon."[57] Since, as he regarded it, the executor had control of and responsibility for the stocks, the test for commissions was met. That the executor had control or the right to control the stocks and responsibility for them seems indisputable, but it is difficult to reach a reasoned belief that the legislature intended by the simple insertion of the words "appraised value of all personal assets" to disturb the settled meaning of "receive" as earlier used, or that it intended to establish a criterion for the receipt of personal property besides money different from that governing the receipt of money. Instead, it is more reasonable to assume that the legislature intended a single criterion for both types of assets and that actual receipt was necessary in both cases, as "actual" had been previously defined.

Mr. Justice Bussey expresses an appropriate concern for the implications of the present case. So far as the result in the present case is involved, despite his dissent, it is an appealing one

54. But would not a chose in action constitute an asset? Even a bank deposit is only a chose in action—a debt of the bank. Debts of other kinds are also choses in action and are assets, but if they cannot be collected they cannot be charged against the representative, even though originally appraised at their face value. He would hardly be allowed commissions if he did not actually collect them, whether because of inability or because of neglect.

55. *In re* Ouzts' Estate, 245 S.C. 150, 160, 139 S.E.2d 465, 470 (1964).

56. York v. Maryland Trust Co., 150 Md. 354, 133 Atl. 128 (1926).

57. See note 55 *supra*.

from the view of logic—particularly in the light of the authorities—and justice. But the dissent points out, if the receipt and possession here were not constructive, inconsistency would result in cases, for example, where a merchant had goods in a store or in a warehouse, or a farmer had farm equipment, etc.,—the representative seldom, if ever, taking actual physical possession. He analogizes these cases to the margin accounts. Whether the analogy is a correct one or not, there are serious questions which may arise. Surprisingly, up to the present case there has been no appeal litigation concerning the application of the 1943 amendment. One can only speculate—a speculation that could be answered only by tedious review of the probate court records—as to what allowances of commissions have been asked for or awarded since that time in the many administrations of estates. Suppose that in the present case the executor had paid the 600,000 dollars due on the stocks, and had actually received them, would he be entitled to commissions for their receipt? Seemingly he would, if actual receipt is the test, but, paradoxically, he would be getting commissions on the stocks for their receipt and also on the money for its receipt—which he had used to acquire the stocks. Can the stocks, under these circumstances, be said to have been received, when the stocks can be acquired only by the use of money for the receipt of which the executor is already entitled to commissions? (He is of course entitled to commissions for paying out the money to acquire the stocks, but he would receive such commissions for paying out the same money in the payment of other debts or in distribution.) Suppose that the stocks, instead of being held on margin, were pledged to a bank. Would he be entitled to commissions on the stock on redeeming and recovering them? Or suppose he did not redeem but the bank sold the stock without producing a surplus. Suppose he held chattels on which there were mortgages. Would he be entitled to commissions on the appraised value of the chattels, or on the difference between the amount of the mortgage debts and the appraised value—keeping in mind that he is already entitled to commissions on the money which he may use to pay the mortgages? What would be the result if, instead of having chattels which were security for mortgage liens, he had chattels which were subject to genuine conditional sale contracts? Would he be entitled to commissions on those chattels? Other questions in this vein might be suggested, and while undoubtedly authorities elsewhere can be found, the questions are asked to point up the problem that the dissenting justice has raised.

D. Construction of Will—Ambiguity

The case of *Shelley v. Shelley*[58] is an admirable one for its exposition of many of the rules for the construction of wills and of the rules relating to the introduction of extrinsic evidence to aid in their interpretation. The action was one to construe a will so as to determine the dividing line between two tracts, part of a larger tract, devised separately to two children of the testator.

The will gave a life estate to the testator's wife and then made provision for the remainder estates, including the following:

> The home place . . . is to be divided between Bevin Shelley and Lanneau Shelley: Bevin Shelley to have the southern part, same to include the filling station site, one tenant house and two tobacco barns; Lanneau to have the northern part which includes the house where he lives, the home house, three tobacco barns and two small houses now on the land also porkhouse and stalls.[59]

The master in equity to whom the case was referred construed the language to mean that the testator intended that the land should be equally divided in acreage between the two sons. The circuit court substantially agreed with the master and appointed commissioners to make a division of the property based on equality of acreage. The South Carolina Supreme Court reversed.

As a preliminary to a recital of further facts the supreme court marshalled most of the familiar rules of construction and with them as a guide concluded, contrary to the findings below, that there was nothing in the will showing an intention that the property should be equally divided, and that if an equal division in acreage were to be made it would manifestly distort the description in the will, particularly in view of the delineation of the buildings which were to go to the respective devisees. Considering the number and locations of the buildings, it was evident that an equal division was not intended.

A group of the facts that impelled the lower court to order an equal division, or perhaps to bolster an already formed opinion that such a division was intended, related to the tobacco barns on the farm, their number and condition both before and after the making of the will. At the time of the execution of the will the testator had five barns, which were numbered in the

58. 244 S.C. 598, 137 S.E.2d 851 (1964).
59. Shelley v. Shelley, 244 S.C. 598, 600, 137 S.E.2d 851, 852 (1964).

record 1, 3, 4, 5 and 6. Barn number 1 was at the extreme northern portion of the tract; barn number 3 was at about the center, barn number 4 somewhat south of the center, and barns numbers 5 and 6 near the southern end. It would appear, the opinion stated, that, considering the facts existing at the time the will was made, the land embracing barns numbers 1, 3 and 4 was to pass to the devisee of the northern portion, and the land embracing barns numbers 5 and 6 to the devisee of the southern portion. A complicating fact, however, was that two years after the execution of the will the testator had built a new barn, numbered 2 in the record, to the north of barn number 3, and north of the center. Barn number 5, near the southern end, was much older and much less valuable than the other barns. Quoting from the opinion:

> The master concluded that the testator had the construction of tobacco barn number 2 in contemplation at the time he made his will, and that after the construction thereof, due to the age of tobacco barn number five, testator was possessed of only five good tobacco barns, of which he intended Bevin to have two. He, therefore, reasoned that the testator intended Bevin to have tobacco barn number 4 in lieu of tobacco barn number 5.[60]

The legal reasoning of the master, which was adopted by the circuit court, was that the will spoke as of the death of the testator, and that as there were only five barns of any value at the time of his death, the line should be drawn so as to allocate barn number 4 to Bevin in place of the supposedly valueless barn number 5. Commissioners appointed by the circuit court drew a meandering line to encompass barn number 4, and also to embrace an equal acreage, for the benefit of the devisee of the southern portion. Of this disposition the supreme court bluntly concluded: "We see nothing in the will or the evidence which would indicate that the testator intended any such results."[61] The court agreed that a will speaks as of the testator's death, but stated that it speaks "of what was in the mind of the testator at the date when the will was signed and has to be construed in the light of the factual circumstances at the time of the signing of the will."[62]

60. *Id.* at 604, 137 S.E.2d at 856.
61. *Id.* at 605, 137 S.E.2d at 856.
62. *Ibid.*, citing Charleston Library Society v. Citizen's & So. Nat'l Bank, 200 S.C. 96, 20 S.E.2d 623 (1942). The master in equity had cited as supporting his position First Nat'l Bank v. Bennett, 206 S.C. 402, 34 S.E.2d 678 (1944). There is no conflict in these cases. It is essentially a matter of what the testator

In considering the will the court stated that it was apparent that "when the language of the will is applied to the property involved, a latent ambiguity, equivocation or uncertainty arises as to where the testator intended the line to be."[63] On the other hand, the circuit judge had concluded that there was no ambiguity in the will, either patent or latent, and that it was improper to resort to extrinsic evidence, although, as the opinion points out, both the master and the circuit judge must have gone outside the will to reach their conclusions. With the premise that the will did contain a latent ambiguity, the court held that the refusal of the lower court to permit resort to extrinsic evidence designed to show the testator's intention as to the dividing line was in error. It quoted apt language from an old much-cited case, *McCall v. McCall*:[64]

> In ascertaining the subject of a testator's disposition the court may inquire into the situation of his estate, and into every material fact which is auxiliary to the just interpretation of the words, for the purpose of identifying the thing intended by the words employed.
>
> Any evidence is admissible which merely intends to explain and apply what the testator has written; and no evidence can be admitted which merely shows what he intended to write.[65]

It is familiar law that latent ambiguities may be resolved by extrinsic evidence,[66] and in this respect the expressions of the court are not novel or significant. But what is significant is the attitude of the court towards the question of the admissibility of the testator's declarations as to his intention, a matter on which there is not completely uniform opinion. The subject is a complex one. The whole field of admissibility of extrinsic evidence, with

intends. Cases dealing with the principle are numerous, *e.g.*, Stanton v. David, 193 S.C. 108, 7 S.E.2d 852 (1940); Beckwith v. McAlister, 165 S.C. 1, 162 S.E. 623 (1932); Landrum v. Branyon, 161 S.C. 235, 159 S.E. 546 (1939); Scaife v. Thomson, 15 S.C. 337 (1880); Garrett v. Garrett, 2 Strob. Eq. 272 (S.C. 1848); Long v. Wier, 2 Rich. Eq. 283 (S.C. 1846).

63. Shelley v. Shelley, 244 S.C. 598, 603, 137 S.E.2d 851, 855 (1964).

64. 4 Rich. Eq. 447 (S.C. 1852).

65. Shelley v. Shelley, *supra* note 63 quoting McCall v. McCall *supra* note 64 at 455.

66. The cases are almost too numerous for mention, see, but *e.g., Ex parte* King, 132 S.C. 63, 128 S.E. 850 (1925); Jennings v. Talbert, 77 S.C. 454, 58 S.E. 420 (1907)—perhaps the most frequently cited as touching upon patent and latent ambiguities; Sherman v. Angel, Bailey's Eq. 351 (S.C. 1831); Donald v. Dendy, 2 McMul. 123 (S.C. 1841); Patterson v. Leith, 2 Hill's Eq. 15 (S.C. 1834).

particular focus upon the issue of the testator's declarations, has recently been surveyed, and attention given notably to *Shelley*.[67] It is not necessary, therefore, to go over all of the same ground. It is sufficient to point out that the court in the present case has opened the door (if indeed it was ever closed) to direct evidence of the testator's intentions—namely his statements of his intentions—such as, though not limited to, his oral or written instructions. It does not appear from the report of the case what the testator's utterances of intention were but the record does contain them. How the declarations should be treated appears from the following:

> Since some of the testimony offered in this case dealt with declarations by the testator himself, we think it well to point out that while declarations of intention on the part of a testator are ordinarily excluded from consideration, they are, nevertheless, according to the great weight of authority, receivable to assist in interpreting an equivocation, or latent ambiguity. The prohibitory exception is based on the risk of allowing an extrinsic utterance of intent to come into competition with the terms of the document on the same subject and perhaps to prevail against them. In the case of an equivocation, or latent ambiguity, this risk does not exist. There can be no competition with the words of the document by declarations which merely expound and make more specific the words used in the document. See Wigmore on Evidence, Section 2472.[68]

As indicated, the quoted language is a paraphrase from Wigmore. The rule thus announced by the court would be simple of application except for two things: (1) it is not clear whether the expression "equivocation, or latent ambiguity," (note the setting off by commas) means (a) "equivocation, that is, latent ambiguity," (b) equivocation as a species of latent ambiguity, (c) either equivocation or latent ambiguity, or (d) equivocation or other latent ambiguity; (2) "equivocation" has been variously defined, so much so that the term itself is an equivocation. The suggested lack of clarity is not entirely the court's doing: Wigmore's heading of the section referred to is "§ 2472. Same (1) Exception for Equivocation, or Latent Ambiguity." In his *Code of Evidence*, keyed to this particular edition of his

67. See Note, *Admissibility of Testator's Declarations of Intention*, 17 S.C.L. REV. 276 (1965).
68. Shelley v. Shelley, *supra* note 63 at 606, 137 S.E.2d at 857.

work, his heading for the corresponding section or article is "Art. 2. Same. Exception for Equivocation (or Latent Ambiguity)."[69] It should be noted too, as already set out, that elsewhere in the present case the court says that "when the language of the will is applied to the property involved, a latent ambiguity, equivocation or uncertainty arises as to where the testator intended the line to be."[70] In the immediate setting in which these words appear, they do not have relevance to the issue of declarations of the testator's intention, but it is inferable that the terms "equivocation" and "latent ambiguity" as used here have the same connotation as where they are used in the later language just discussed.

For further expansion of the problem the reader is referred to Wigmore[71] and to the previously mentioned note on the subject.[72] At any rate, it is sufficient, and important, to note again that in some cases evidence of the testator's declarations of intention is permissible. What these cases are is of course another matter, and the pronouncement of the court in the present case is not to be taken as approval of the testator's declarations of intention in every instance of ambiguous language—particularly as to estates created, limitations, etc.—nor as overruling by implication any of the cases in which such declarations have been excluded.[73] On the other hand, if the statement is to be accepted as a holding that *any* latent ambiguity may be resolved through the use of direct evidence of intention, it would go beyond and enlarge the scope of the cases in which the resolution has been made to depend upon, among other things, the utterances and conduct of the testator which were indirect evidences of his intention,[74] and to permit direct evidence as well. Furthermore,

69. WIGMORE, CODE OF EVIDENCE §§ 2737-38 (3d ed. 1942).

70. See note 63 *supra*.

71. WIGMORE, EVIDENCE §§ 2470-77 (3d ed. 1940).

72. *Supra* note 67.

73. *E.g.*, Capps v. Richardson, 215 S.C. 34, 53 S.E.2d 876 (1949); Peoples Nat'l Bank v. Harrison, 198 S.C. 457, 18 S.E.2d 1 (1941); Beckwith v. McAlister, *supra* note 62; Smith v. Heyward, 115 S.C. 145, 104 S.E. 473 (1920); Clark v. Clarke, 46 S.C. 230, 24 S.E. 202, (1895); McAllister v. Tate, 11 Rich. 509 (S.C. 1858); Coffin v. Elliott, 9 Rich. Eq. 244 (S.C. 1857); Hall v. Hall, 8 Rich. 407 (S.C. 1852); Pell v. Ball, Speer's Eq. 48 (S.C. 1843); Rothmahler v. Myers, 4 DeSaus. Eq. 215 (S.C. 1827). A fortiori such declarations will not be permitted for filling up blanks or supplying ommissions. McDonald v. Fagan, 118 S.C. 510, 111 S.E. 793 (1921); Rosborough v. Hemphill, 5 Rich. Eq. 95 (S.C. 1852).

74. *E.g.*, Wells v. Salvation Army, 190 S.C. 484, 3 S.E.2d 601 (1939); *In re* Robb's Estate, 37 S.C. 19, 16 S.E. 241 (1891); Powers v. McEachern, 7 S.C. 290 (1876); Donald v. Dendy, *supra* note 66.

if misdescription of persons or things creates a latent ambiguity,[75] and if, as just stated, direct evidence of intention is permitted for all types of latent ambiguities, then errors in description can more readily be removed by the inclusion or additional use of such evidence when it is available.[76] These conclusions are, of course, assumptions on assumptions; and whether in the future the court will actually follow this train of consequences or will select among the various conflicting authorities cannot be foretold.

E. Trusts—Trustee's Acquisition of Interest

The case of *Byrd v. King*[77] was an action to set aside a deed made by the life beneficiary of a trust conveying his interest to the wife of one of the trustees. A secondary action in the case was a demand against a surviving trustee and the representatives of a deceased trustee for an accounting to which the plaintiff claimed he was entitled by reason of an earlier transfer of his interest for a term of years.

The record is very voluminous and displays a great array of conflicting assertions of fact which the report of the case reduces to much smaller proportions. Briefly, the plaintiff, life beneficiary under a trust, in 1950 transferred his beneficial interest to the wife of one of the trustees. She died testate in 1954, leaving the interest thus acquired to her husband. Her estate was duly closed out. The husband died testate in 1956, and the interest passed to his children. The administration of his estate was completed in due course. This action to set aside the deed was instituted in 1960.

The other branch of the action was based on a transfer in 1945 of the beneficial interest for a period of ten years—overlapping the 1950 transfer—to the trustees, two in number, who had been

75. That misdescription is so treated: Smith v. Coxe, 183 S.C. 509, 191 S.E. 402 (1936); *Ex parte* King, *supra* note 66.

76. WIGMORE, EVIDENCE § 2474 (3d ed. 1940) discusses the question of whether the rule for exception for equivocation applies to erroneous descriptions. He favors its use, although he admits there are cases to the contrary. See also ATKINSON, WILLS § 60 (2d ed. 1953). Numerous South Carolina cases have dealt with misdescription, applying the *falsa demonstratio* doctrine to clear up the mistake. In none of them does there appear any issue as to whether direct evidence was permissible, the solution being reached from the circumstances. *E.g.*, Foreign Mission Board v. Gaines, 42 F. Supp. 85 (E.D.S.C. 1941); Wells v. Salvation Army, *supra* note 74; *Ex parte* King, *supra* note 66; Smith v. Heyward, *supra* note 73; McCall v. McCall, *supra*, note 64.

77. 245 S.C. 247, 140 S.E.2d 158 (1965).

appointed in 1940 to succeed original trustees. An accounting was demanded from the last stated date.

The basic contention of the plaintiff with respect to both aspects of the case was the alleged impropriety of the two transactions. As to the first, the contention was—quoting from the case—"that a purchase of trust property by the wife of a trustee is improper and voidable by the cestui que trust even though the transaction is free from actual fraud and supported by a fair consideration."[78]

Both the master in equity and the circuit court found that the transaction was a fair one,

> that there was no market for the sale of such an interest, that the appellant had time to secure independent advice, that he was familiar with his legal rights, that no material facts were withheld from him, that Mrs. McCown [the wife] was an independent agent, that the appellant had not explained his delay in bringing this suit, that parties and witnesses were not available and their estates had been administered and that the appellant had consented to the transaction.[79]

The South Carolina Supreme Court affirmed, holding that in the light of the concurrent findings of the master and the circuit court, it would not disturb those findings, which, it concluded after review of the record, were not without evidentiary support or against the clear weight of the evidence. Thus acceding to the found facts, the court affirmed, applying what it deemed the applicable rules of law. It also concurred in the holding below that in any event the suit was barred by laches and the statute of limitations.

The main legal principle on which the appellant relied, as has been noted, was that, in itself, a transfer by a trustee to his wife is voidable without regard to fairness. The case cited in support was *Scottish-American Mortgage Co. v. Clowney*,[80] in which a sale by a trustee to his wife was held to be voidable. The court differentiated that case on the ground that there had been no consent by the beneficiary to the transfer, as there was here. The court relied upon the rules laid down in the *Restatement of*

78. Byrd v. King, 245 S.C. 247, 256, 140 S.E.2d 158, 164 (1965).

79. *Ibid.*

80. 70 S.C. 229, 49 S.E. 569 (1904).

Trusts[81] as governing the case, as apparently did also the master and the circuit court. In these rules (set out in the last numbered footnote) that governing the adverse interest is specifically applicable. It is pointed out in the comment to this rule, in both the original version of the *Restatement* and its revision, that this rule is in addition to the other requirements. It would appear that, in the court's view, this additional requirement of fair and reasonable consideration, as well as the other requirements, was met.

Although the law condemns a fiduciary's self-dealing, direct or indirect, yet here if the facts were as the court found them, or as it accepted them from the master and the circuit court, the result would clearly be correct, not only from the rules of the *Restatement* but from the holdings of the South Carolina cases as well. Starting with "A, trustee for B," the cases fall generally into these factual types: (1) A, trustee for B, sells to A; (2) A sells to A, trustee for B; (3) B sells his interest to A. In the first two situations, the cases are consistent to the point that, without regard to fairness and adequacy of consideration, the beneficiary has the right to avoid the transaction,[82] leaving aside the ques-

81. RESTATEMENT, TRUSTS § 216 (1935). The reference is to the earlier version of the Restatement, 1935. The excerpt quoted by the court is: "Sec. 216—Consent of Beneficiary. (1) Except as stated in Subsection (2) and as limited by Secs. 255 and 242(2), a beneficiary cannot hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary prior to or at the time of the act or omission consented to it. (2) The consent of the beneficiary does not preclude him from holding the trustee liable for breach of trust, if (a) the beneficiary was under an incapacity at the time of such consent, or of such act or omission; or (b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or (c) the consent of the beneficiary was induced by improper conduct of the trustee; or (d) the beneficiary was not of competent age or understanding; or (e) the trustee had an adverse interest in the transaction, and the transaction to which the beneficiary consented involved a bargain which was not fair and reasonable."

In the present version of the Restatement—RESTATEMENT (SECOND), TRUSTS § 216 (1959)—the language is somewhat different although the substance is the same. The important relevant language of the revision is "(2). Where the trustee has an adverse interest in the transaction, the consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust not only under the circumstances stated in Subsection (1) [incapacity, lack of disclosure, improper conduct by the trustee], but also if the transaction to which the beneficiary consented was not fair and reasonable." See also RESTATEMENT, TRUSTS § 170 comment *w.*; RESTATEMENT (SECOND), TRUSTS § 170 comment *w.*

82. As to sale by the trustee to himself individually, among the many cases are these which are particularly forceful: Farrar v. Farley, 3 S.C. 11 (1871); Clarke v. DeVeaux, 1 S.C. 172 (1869); Sollee v. Croft, 7 Rich. Eq. 34 (S.C. 1854); Zimmerman v. Harmon, 4 Rich. Eq. 165 (S.C. 1851); *Ex parte* Wiggins, 1 Hill's Eq. 353 (S.C. 1834). The rule applies where the sale is made by the trustee to his wife. Scottish-American Mortgage Co. v. Clowney, *supra* note 80, relied upon by the appellant and distinguished by the court.

tions of consent and laches. In the third type of cases, the transaction is not voidable at the option of the beneficiary, but the burden is on the purchasing fiduciary to show good faith, full disclosure, adequacy of consideration, and so on.[83] The present case is treated apparently by the court as falling into the first group of cases in which voidability is afforded, and which would have been available to the beneficiary here but for his consent and delay. The case would more precisely seem to fall into the third group—a transfer by the beneficiary to the trustee—which does not in itself give rise to the privilege of avoidance. Since the criteria for preclusion are the same in both cases—that is to say, whether there is consent to the transfer by the trustee to himself, or whether there is transfer by the beneficiary to the trustee—the result would not be different in the present case whether it was put in on category or the other.

The court also cites as supporting its conclusion a case relied upon by the master in equity, *Hamer v. David*,[84] in which the beneficiary of a trust, after assigning his interest (not to the trustee, but to one with whom he was apparently acting in connivance) and subsequently ratifying it by receiving yearly benefits thereunder, and delaying bringing action thereon for more than five years, was barred from asserting a claim that assignment had been fraudulently procured.[85] That ratification or affirmance after the act or omission of the trustee may bar subsequent assertion of breach of trust is a principle accepted by the *Restatement*,[86] subject to the same rules as for consent, and is also accepted in the South Carolina cases, none of which other than

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Under extraordinary circumstances the rule of voidability may not be applied against the purchasing trustee. Honeywell v. Dominick, 223 S.C. 365, 75 S.E.2d 59 (1963). Purchases by executors and administrators from themselves are governed by statute. S.C. CODE ANN. §§ 19-519 to -520 (1962).

Cases in which the trustee as an individual sells to the trust are not so numerous. Pritchard v. Gage, 29 F. Supp. 290 (E.D.S.C. 1939)—which is a case involving alleged sale to the trust by a corporate trustee, purchase by trust department of securities held by another department of the trustee bank; McCants v. McBee, 1 McCord's Eq. 383 (S.C. 1826). *Cf.* Blankenship v. Zimmerman, 188 S.C. 413, 199 S.E. 527 (1938). In Thomson v. Peake, 38 S.C. 440, 17 S.E. 45 (1892), a trustee managing a farm rented to himself as trustee mules for use on the farm; he was held entitled to pay for their hire only because the beneficiary consented.

83. See, *e.g., Ex parte* Gadsden, 89 S.C. 352, 71 S.E. 952 (1911); Tindall v. Sublet, 82 S.C. 199, 63 S.E. 960 (1908) (transfer to fiduciary's wife); Waldrop v. Leaman, 30 S.C. 428, 9 S.E. 446 (1888); Gregg v. Harllee, Dudley's Eq. 42 (S.C. 1837); Poag v. Poag, 1 Hill's Eq. 285 (S.C. 1833); McCants v. McBee, *supra* note 82; Butler v. Haskell, 4 DeSaus. Eq. 651 (S.C. 1817).

84. 138 S.C. 491, 136 S.E. 744 (1927).

85. *Ibid.*

86. RESTATEMENT (SECOND), TRUSTS § 218 (1959).

Hamer, involves a condition of adverse interest on the part of the trustee.[87] The *Restatement* view, however, with respect to affirmance, is that even though the beneficiary may be precluded by affirmance unless he was under incapacity, or was unaware of his rights, or unless the affirmance was induced by improper conduct by the trustee, he—the beneficiary—is not precluded if the transaction involved a bargain with the trustee which was not fair and reasonable.[88] In other words, in a transaction involving a bargain with the trustee ratification is not by itself enough—in addition to capacity, disclosure and so on, the bargain must be fair and reasonable—an element which would not be necessary for effective ratification if adverse interest was not involved. However, although the court did not concern itself with this area of the *Restatement*, the result would have been the same, since, if it were a matter of ratification as distinguished from advance consent, the requisite of a fair and reasonable transaction was present.

This observation—of ratification—is particularly relevant as it may concern the other transaction complained of by the plaintiff—the transfer by him for a term of years to the trustees at a stated return. It was found here also that the transaction was a fair one and freed from any disabling qualities. That transaction can be tested by the same standards as those employed in the transfer to the trustee's wife; and the same comments—especially concerning the distinction between a transfer by a trustee to himself with the consent of the beneficiary and the transfer by the beneficiary to the trustee—are applicable.

The court found that in the period between 1940, when the trustees were appointed, and 1945, the accounting made by the trustees was proper, and that the beneficiary's life interest having been properly surrendered to the trustee's wife in 1950 he was not entitled in any event to demand an accounting after that date.

F. Legislation—Jurisdiction of Probate Matters—Constitutional Amendment

Attention has already been called in another part of this survey—and reference to it should be made[89]—to a change in the South Carolina Constitution of 1895 relating to jurisdiction per-

87. Pickett v. Geer, 156 S.C. 346, 153 S.E. 349 (1930); Farr v. Gilreath, 23 S.C. 502 (1885)—both involving improper sale by trustee to third person.

88. RESTATEMENT (SECOND), TRUSTS § 218(d), comment *e*(1959).

89. *Supra* note 21.

taining to probate matters. The pendency of the proposed amendment was commented upon in an earlier survey article in the *South Carolina Law Review*.[90] As noted there, the principal change is to take from the Charleston County probate court its special constitutional status and to make it subject to legislative power to the same degree as other probate courts. The purpose of this change was to prepare the way for a probate code of statewide application. The proposed probate code has since been introduced in the house of representatives[91] and is now in the hands of its judiciary committee.

In addition to the change just mentioned, there is a change in the description of persons of unsound mind—"persons mentally incompetent"; and there is deletion of the earlier provision relating to dower. The elimination of the dower provision also looks to the proposed probate code, which abolishes dower[92] and in substitution makes the surviving husband or wife a forced heir—*i.e.*, privileged to dissent from the will of the other and take a stated share.[93]

G. Investment Statutes

The law governing investments by fiduciaries has been subjected to radical change by the general assembly in a brief, but comprehensive act,[94] striking out certain then existing statutes and substituting a new measure of standards. Because of their importance the substituted sections are set out here in full.

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90. 17 S.C.L. REV. 190 (1964).

91. H. 1748 (1965).

92. Proposed Probate Code § 173.

93. *Id.* §§ 174-82.

94. S.C. ACTS & J. RES. 1965, p. 298 (now designated as S.C. CODE ANN. §§ 67-58 to -61 (Supp. 1965). The title of the act is "An Act To Amend Sections 67-58, 67-59, 67-60 and 67-61, Code of Laws of South Carolina, 1962, Relating To Investment by Fiduciaries, So As To Adopt The Uniform 'Prudent man Investment Act'." There is no reference in the body of the statute to this so-called uniform act. In reality there is no such "uniform" act—at least not one promulgated by the National Conference of Commissioners on Uniform State Laws, from which uniform laws are regarded as emanating—and it may therefore be inaccurate to state that a uniform act is being adopted. It may properly be said, if at all, that it is an act commonly or popularly known as the "prudent man investment act." Although the statute is not an adoption of a uniform law, it is a copy of a model or widely used statute which, alone or coupled with other provisions, has been enacted in many states. The same language, with minor variations in some cases, appears as, or is included in, the investment statutes of at least nineteen states. See BOGERT, TRUSTS & TRUSTEES §§ 616-63 (2d ed. 1959 and Supp. 1964). Professor Bogert refers to these statutes as embodying the "prudent investor" rule: BOGERT, *op. cit.* § 613.

Section 1. Section 67-58 amended—care required of fiduciary. Section 67-58, Code of Laws of South Carolina, 1962, is amended by striking it in its entirety and inserting in lieu thereof the following:

Section 67-58. In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limits of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, specifically including but not by way of limitation, bonds, debentures and other corporate obligations, and stocks, preferred or common, and within the limitations of the foregoing standard a fiduciary may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

Section 2. Section 67-59 amended—meaning of certain terms. Section 67-59, Code of South Carolina, 1962, is amended by striking it in its entirety and inserting in lieu thereof the following:

Section 67-59. The provisions of sections 67-58, 67-60 and 67-61 shall not be construed as authorizing any departure from, or variation of, the express terms or limitations set forth in any will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers, but the term "legal investment" or "authorized investment" or words of similar import, as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of section 67-58.

Section 3. Section 67-60 amended—certain powers of courts not to be affected. Section 67-60, Code of Laws, South Carolina, 1962, is amended by striking it in its entirety and inserting in lieu thereof the following:

Section 67-60. The provisions of sections 67-58, 67-59 and 67-61 shall not be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate

from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

Section 4. Section 67-61 amended—sections to govern certain fiduciaries. Section 67-61, Code of Laws of South Carolina, 1962, is amended by striking it in its entirety and inserting in lieu thereof the following:

Section 67-61. The provisions of sections 67-58, 67-59 and 67-60 shall govern fiduciaries acting under wills, agreements, court orders and other instruments now existing or hereafter made.

In rewording section 67-58 by the substitution of the prudent man rule, the new statute reconstructs the principal investment statute which contained a lengthy list of approved investments. Inadvertently perhaps there is failure to repeal section 67-58.1, which permits investments in federal farm loan bonds, federal farm mortgage corporation bonds, federal intermediate credit bank debentures, and central bank for cooperatives debentures. These four types of securities were included in section 67-58, and section 67-58.1 was repetitive in this respect.

Until the passage of the first of the investment statutes, in 1918,[95] which authorized investment in federal farm loan bonds, the applicable rule for investments was the same as that prescribing the standard of care for fiduciaries generally. In *Mayer v. Mordecai*,[96] which is typical of several cases, it was said:

> When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment, our cases hold that his discretion must be exercised with the same diligence and care that a prudent man would bestow on his own concerns.
>
> It is not to be understood by this that, wherever loss ensues from the investment of the trustee, he will be excused by showing that persons of care and prudence, in the management of their own affairs, made investments of the same character and were disappointed in the results. A prudent man, dealing with his own means, might employ them in speculations promising large gains, or loan them on personal security, or invest in the stocks of railroad companies or other private corporations. If a trustee should, however, so

95. S.C. ACTS & J. RES. 1918, p. 763.
96. 1 S.C. 383 (1869).

loan, or engage in such enterprises, at the expense of the interests committed to his charge, he could not claim excuse by pointing to the course of individuals, noted for their prudence, by whose example he had been misled.[97]

Except for the reference to stocks in the passage quoted, the rule stated there is substantially the same in general terms as the rule of prudence prescribed in the new section 67-58.[98] If there had been, or were, no investment statutes, the prudent man rule would still obtain, although there might be, as has been the case, modification of decisional views as to whether particular types of investments met the requirements of the rule. It is obvious that the first investment statute of 1918, authorizing a particular investment, was not designed to restrict investments to the single type thus authorized, and that the prudent man rule continued. With new statutes added over the years, and existing statutes enlarged, culminating principally in section 67-58 of the 1962 Code, there may have been ground for assumption that despite the phrase "may be invested" in that section, as in its earlier versions, the statute was mandatory, rather than permissive, and restricted the fiduciary to the investments there mentioned,[99]

97. Mayer v. Mordecai, *supra* note 96, at 383. See also Wannamaker v. State Bank, 176 S.C. 133, 155, 179 S.E. 896 (1935); Hutchinson v. Daniel, 170 S.C. 459, 171 S.E. 13 (1933); Oakes' Estate v. Oakes, 170 S.C. 167, 169 S.E. 890 (1933); *In re* Willcox, 162 S.C. 133, 160 S.E. 260 (1931); O'Dell v. Young, McMul. Eq. 155 (S.C. 1829).

98. The critical central language adopted by the new section is not new. It goes back to the classic Massachusetts case of Harvard College v. Amory, 26 Mass. 446, 461 (1831), which declares: "He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." If it is correct to say that the quoted South Carolina expression from Mayer v. Mordecai, *supra* note 96, is basically the same as the opening language of the new § 67-58, then since that language is the language of *Amory*, the South Carolina rule has always been the same as the Massachusetts rule—which is commonly regarded as the typical expression, if not the genesis, of the prudent man rule vis-a-vis investments. Of course, what one court professing to follow the prudent man rule may regard as a proper investment in a particular case may not find assent in another court professing to follow the same rule. For example, many courts adhering to the rule have allowed investment in stocks; others, including South Carolina (except as changed by statute) have not. As to stocks, more later. Even in the same state—and this true of South Carolina—while the broad rule of prudence remains, specific applications may change.

99. There does not seem to be any definitive judicial statement in this state on the point. Professor Bogert's interpretation of the earlier South Carolina statute is: "The following states have adopted a limited or modified version of the prudent man rule . . . South Carolina." BOGERT, *supra* note 94, § 612 n. 19. On the other hand, in LORING, A TRUSTEE'S HANDBOOK App. II, 372, 378 (Farr Rev. 1962), South Carolina is listed as one of the states falling into the following classification: "The following states cannot be said to follow the prudent man rule of investment in whole or in part. . . ." One may independent-

except where elsewhere in the statutes there appeared specific sanction for other securities. From time to time, with the advent of new security—issuing governmental or government-related agencies, the legislature has authorized fiduciary investment in the securities of such bodies. Some of those statutes were included in the old section 67-58, others still remain on the statute books[100] and have not been purged or stricken by the new section 67-58 as specifically sanctioned investments—an inconsistency at once apparent in the submerging of the investments specifically authorized in the old section into the prudent man rule. The accretion of these specifically authorized investments would tend to fortify a belief that the old section 67-58 and the additional statutes created a legal list. At any rate, the prudent man rule now governs without question by virtue of the new section 67-58; but the extent to which the cases stating what investments were or were not acceptable under the prudent man rule will control as to those investments is a matter of some conjecture. For example, the cases prior to 1947—when a great enlargement of permissible investments, including stocks, took place in the statutes[101]—investment in stocks of private corporations was regarded as improper unless authorized expressly or impliedly by the trust instrument.[102] If stocks were not specifically mentioned in the new statute, would an investment in them be proper in the light of the cases condemning them as unsuitable for acquisition by a prudent man acting as fiduciary? The same kind of question might more precisely be asked concerning investments not specifically mentioned in the new statute: would such unmentioned investments be governed by the local cases, as, for

ly conclude that the South Carolina legislature formulated the older § 67-58, and other specific investment statutes, as its expression of what a prudent man in the role of fiduciary could or ought to do.

100. Fiduciaries are expressly permitted to invest in: State Highway bonds and certificates of indebtedness S.C. CODE ANN. § 33-263 (1962); bonds of state agricultural marketing commission—§ 3-229; bonds of Greenville County Marketing Commission—§ 3-300.6; state school bonds—§ 21-988; housing authority bonds—§ 36-163; mortgages insured by the federal housing administrator, debentures issued by him, and securities issued by national mortgage associations—§ 36-602; bonds of Home Owners Loan Corporation—§ 36-604. The list is partial. For fuller list see *Investments* in the Index of the S.C. CODE ANN. (1962).

Common trust funds are permitted and regulated by S.C. CODE ANN. §§ 8-587 to -599.7, as amended in S.C. ACTS & J. RES. 1965, p. 608 (now S.C. CODE ANN. §§ 8-587 to -599.3 (Supp. 1965).

101. S.C. ACTS & J. RES., 1947, p. 558. It is basically the old Section 67-58.

102. Beacham v. Ross, 187 S.C. 398, 197 S.E. 369 (1938); Mayer v. Mordecai, *supra* note 96; Nance v. Nance, 1 S.C. 209 (1869); Allen v. Gaillard, 1 S.C. 279 (1869) (the last two forbidding investment in railroad stocks and bonds); Lesesne v. Cheves, 105 S.C. 432, 90 S.E. 37 (1916).

example, an investment in land—as distinguished from an obligation reinforced by the security of land?[103]

It may reasonably be assumed that, in the abrogation of the old section 67-58, it was not intended that the list of approved investments it contained would no longer be permissible. As tested by the prudent man rule they would seem to be proper and since they represent a legislative conception of the investments a prudent man might make, there can sensibly be the further conclusion that that conception—with regard to those particular investments—has not changed. On the other hand in expressly authorizing investment in stocks, bonds and debentures, the older statute imposed severe restrictions as to the kinds of corporate obligations and stocks—their record, etc.—and the amount of trust funds that could be used in their purchase. This limitation has now disappeared, and with it any legislative opinion that the restrictions were such as a prudent man would, on his own, observe. It was these restrictions on stock and other corporate obligation investments that probably furnished the greatest stimulus to the advocates of the new legislation to press for its passage and thereby remove the restrictions. Similarly, there was a limitation with respect to the percentage amount (sixty percent) that could be loaned on real estate mortgages. Is the disappearance of this limitation, as with the disappearance of any mention of real estate mortgages, to be taken as authorizing a mortgage investment where the equity of the owner is less?[104]

The older section 67-58 contained severe prohibitions against

103. Gulick v. Slaten, 169 S.C. 244, 168 S.E. 697 (1932); Smith v. Moore, 109 S.C. 196, 95 S.E. 351 (1917); Morton v. Adams, 1 Strob. Eq. 172 (S.C. 1846) (all holding investment in land improper). It is held generally. BOGERT, *supra* note 94, § 678; 3 SCOTT, TRUSTS § 227.6 (2d ed. 1956). *Quaere*; whether the phrase "every kind of property" in the new S.C. CODE ANN. § 67-58 authorizes investment in land.

104. Before any statutory mention was made of real estate mortgages, it was held or stated that a mortgage on unencumbered real estate was proper. Hutchinson v. Daniel, *supra* note 97 (suggesting that loan should not be made in excess of two-thirds of value); Leaphart v. National Surety Co., 167 S.C. 327, 166 S.E. 415 (1932); Nance v. Nance, *supra* note 102; Spear v. Wood, 9 Rich. Eq. 184 (S.C. 1857). Note that the old S.C. CODE ANN. § 67-58 limits to sixty percent. With the sixty percent limitation expunged, will prudence be governed by *Hutchinson*, which professedly adheres to the prudent man rule?

In Singleton v. Lowndes, 9 S.C. 465 (1877), the court sanctioned an investment in a mortgage on property subject to prior lien, and also held that personal security was in some cases sufficient. On this last point, while the earlier cases *e.g.*, Glover v. Glover, McMul. Eq. 153 (S.C. 1841)—sanctioned such investments if otherwise prudent on the ground that other investments were difficult to find; the practice was criticized in Nance v. Nance, *supra* note 102, and seems to have been definitely discountenanced in Pope v. Matthews, 18 S.C. 444 (1882), except for investments made before the decision in *Nance*.

self-dealing, direct and indirect, specifying disqualifying degrees of relationship between the fiduciary and others, and limitations on adverse interest.[105] With these safeguards gone from the statute, and not replaced by similar restrictions, what, if any, limitations now exist in the area of self-dealing? The older section dealt with two things: the duty of care, and the duty of loyalty. The new section deals only with the duty of care, but the deletion of the old section in its entirety removes all reference to the duty of loyalty. Were or were not the statutory limitations on self-dealing desirable? If they were, should they not have been retained—or at least detached?

How liberating the new statute will be remains to be seen. The chances statistically are that a great many trusts, particularly large ones, are governed by a non-statutory prudent man rule because of their instrument—granted authority to go outside the statutes. The new statute, however, may not be an unmixed blessing. The earlier statute, while it restrained the fiduciary, also protected him: so long as he followed it, he was absolved from liability, if he obeyed the terms of the trust and otherwise exercised reasonable care. He had sharply defined and restricted standards to follow—especially as to stocks and other corporate obligations; although he now has flexibility, the line between the proper and the improper expressed in the general terms of the hypothetical prudent man may be indistinct if not invisible. Persons of superior skill—investment counsellors, trust officers and men of business acumen—may not need the confining shelter of the old statute; but the non-professional, the non-expert, can easily go astray if he has only general outlines to guide him.[106]

105. S.C. CODE ANN. § 67-58(5) (1962). It forbids investment in any security of the corporate fiduciary; in any security or obligation in which any corporation, management type investment company or investment trust in which the fiduciary or other person related to him in the third degree is a director, officer or employee; in securities or obligations of the same kinds or organizations in which the fiduciary or any person related in the third degree holds by pledge or otherwise more than five percent of the outstanding capital stock of the corporation or more than five percent of the shares of the management type investment company or investment trust; or in any obligation, corporate or otherwise, secured by a mortgage of real estate is owned in whole or in part by the individual fiduciary or any person related to him in the third degree, or where the fiduciary, individual or corporate, is owner by pledge or otherwise of more than five per cent of the outstanding capital stock of a corporate mortgagor.

106. Of course, although the new section 67-58 does not say so, the person of superior skill, actual or represented—in which classification corporate trustees and their functionaries fall—is held to a higher standard than that of the ordinary prudent man. One cannot go below the level of the man of ordinary prudence even though he in fact does not possess that prudence, but another may have

Section 67-59, which is replaced by the newer section of the same number, has to do with the sanctioning of investments in shares of federally insured building or savings and loan associations. The newer section deals with an entirely different matter —the impermissibility of deviation from the terms of the trust. Presumably such savings investments, though specifically expunged, may be sanctioned under the prudent man test laid down in the new section 67-58; and the striking out of the old section 67-59 may reasonably be regarded as not disapproving the same kind of investments. The older section 67-59, while more precise in speaking in terms of shares in savings associations, is practically duplicated in the earlier section 67-58, which speaks of deposits in insured institutions and also speaks elsewhere of shares; and, as has been pointed out, it is not unreasonable to assume that there is no legislative intention to treat the securities there mentioned as no longer proper.

In stating that a fiduciary is not permitted to depart from the terms of the trust, the new section 67-59 follows the general common law rule. The fiduciary who deviates from the terms of the trust cannot escape liability for loss by showing that he acted as a prudent man and in good faith.[107] Particularly is this so where the trust directs how or what investments are to be made and the trustee invests otherwise.[108]

The earlier section 67-60, replaced by a section with the same number, deals with obligations of the International Bank for Reconstruction and Development. The new section 67-60 deals with the matter of court authorization of deviation. The remarks with respect to the investments mentioned in the older section 67-59 are appropriate as to the International Bank obligations.

In permitting court-authorized deviation, the new section 67-60 again follows an equity principle: that in order to subserve the

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to rise above it. RESTATEMENT (SECOND), TRUSTS § 227, comment *c*; § 174 (1959). See Epworth Orphanage v. Long, 207 S.C. 384, 36 S.E.2d 37 (1945), in which the trustee assessed for loss was a highly competent business man.

107. Cothran v. South Carolina Nat'l Bank, 242 S.C. 80, 130 S.E.2d 177 (1963); Rodgers v. Herron, 226 S.C. 317, 85 S.E.2d 104 (1954); Beacham v. Ross, *supra* note 102; Dickerson v. Smith, 17 S.C. 289 (1881); Feemster v. Good, 12 S.C. 573 (1879).

108. Rivers v. Stephenson, 169 S.C. 422, 169 S.E. 135 (1932); Bass v. Adams, 163 S.C. 381, 161 S.E. 697 (1931); Crayton v. Fowler, 140 S.C. 517, 139 S.E. 161 (1927); Klugh v. Seminole Sec. Co., 103 S.C. 120, 87 S.E. 644 (1915); Sanders v. Rodgers, 1 S.C. 452 (1869); Womack v. Austin, 1 S.C. 421 (1869); Mayer v. Mordecai, *supra* note 96; Snelling v. McCreary, 14 Rich. Eq. 291 (S.C. 1868).

interests of the trust, the court will permit deviation under suitable circumstances.[109]

The older section 67-61, also replaced by a section with the same number, permits a fiduciary to retain unauthorized investments received by him as original corpus. The new section 67-61 deals with different matter: the applicability of the statute to existing as well as to future trusts. The older section, in permitting retention of unauthorized investments, changed earlier nonstatutory law which enjoined upon the fiduciary the duty of disposing, as expeditiously as possible, of assets received by him of a kind in which he as fiduciary could not invest,[110] subject, of course, to a contrary manifestation in the instrument creating the trust. By making express reference to retention, the new section 67-58 preserves the rule of the older section 67-61.

As indicated, the new section 67-61 makes the substituting act applicable to both future and existing trusts. Even without such a provision it is generally held that statutory changes in investment laws are retrospective, and that the propriety of an investment is controlled by the law in force at the time it is made and not at the time of the creation of the trust.[111] Since the act expressly makes its aplication retrospective, no question as to the legislative intent as to the effective time arises. The constitutional question is, of course, inferentially answered in the rule just stated, but the cases dealing specifically with the question where the statute involved has provided for its retrospective operation have sustained its constitutionality in that respect, holding that it does not impair the obligations of a contract or alter vested rights.[112]

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109. The cases are too numerous for listing, but see, *e.g.*, Weston v. Weston, 210 S.C. 1, 41 S.E.2d 372 (1947); Wingard v. Hennessee, 206 S.C. 159, 33 S.E.2d 390 (1945); Hood v. Cannon, 178 S.C. 94, 182 S.E. 306 (1935); Bass v. Adams, *supra* note 108.

110. Beacham v. Ross, 187 S.C. 398, 197 S.E. 369 (1938); Beacham v. Ross, 190 S.C. 219, 2 S.E.2d 690 (1939) (fiduciary improperly retained stock, then an unauthorized investment). See Annot., 37 A.L.R. 559 (1925); RESTATEMENT (SECOND), TRUSTS § 230 (1959).

Permission to retain unauthorized investments was first given by statute in 1929, 36 Stat. 143, the predecessor of the old S.C. CODE ANN. § 67-58.

111. 3 SCOTT, TRUSTS § 227.13 (2d ed. 1956); Annot., 35 A.L.R.2d 991 (1954). See *In re* Willcox, *supra* note 97 in which a guardian appointed in 1918 held liable for failing after 1920 to follow requirements of investment statute passed in that year.

112. Annot. 35 A.L.R.2d 991, 992 (1954). Later cases in the supplement also support this view.

H. Control of Trustee

By an act entitled "An Act To Limit The Liability Of A Fiduciary Under Certain Circumstances" the South Carolina General Assembly has undertaken to relieve fiduciaries from loss where investments are made under the reserved or vested direction of others. The act reads:

> Whenever a trust instrument reserves unto the trustor or vests in an advisory or investment committee or in any other person or persons, including a co-trustee, to the exclusion of the trustee or to the exclusion of one or more of several trustees, authority to direct the making or retention of investments or of any investment, the excluded trustee or co-trustee shall be liable, if at all, only as a ministerial agent and not be liable as trustee or co-trustee from any loss resulting from the making of any investment pursuant to such authorized direction.[113]

It will be seen that the quoted language ties in, more or less directly, with the new investment statute discussed in the last topic, and in a sense is a qualification of it. It is of course well established that a trustee's powers, either generally or in a particular respect, may be made subject by the trust to the control, consent or veto of another, whether co-trustee, trustor, beneficiary or other person, as the trust may prescribe;[114] and, narrowly, his investment powers may be so controlled.[115] The statute purports to grant him immunity from liability for loss if he acts under the authorized direction of the person who holds the power of control. To an extent it would seem that the statute is a statement of existing law, despite the characterization of ministerial agent—that is, that he is under no liability to the beneficiary if in a "directory" or "direction" trust he complies with the direction of the power-holder and may be under liability if he fails to do so.[116] However, even with existing law there seem to be important qualifications. Much depends on whether the power-holder holds for his sole benefit or whether he holds only for

113. S.C. ACTS & J. RES. 1965, p. 231, (now designated as S.C. CODE ANN. § 67-63.1 (Supp. 1965).

114. RESTATEMENT (SECOND), TRUSTS § 185 (1959); 2 SCOTT, TRUSTS § 185 (2d ed. 1956); Neeley v. Peoples Bank, 133 S.C. 43, 130 S.E. 550 (1925); Best v. Deason, 126 S.C. 116, 119 S.E. 509 (1923).

115. 90 C.J.S. *Trusts* § 325 (1955); Parkins v. Parkins, 128 S.C. 463, 122 S.E. 492 (1924); Best v. Deason, *supra* note 114; Mayer v. Mordecai, *supra* note 96.

116. RESTATEMENT (SECOND), TRUSTS § 185 (1959); 2 SCOTT *supra* note 114.

others or for himself and others. "If the power is for the sole benefit of the person holding the power, the only duty of the trustee is to ascertain whether the attempted exercise of the power is or is not within the terms of the trust and act accordingly."[117] On the other hand, "if the power is for the benefit of someone other than the holder of the power, the holder of the power is subject to a fiduciary duty in the exercise of the power."[118] This means of course that where the power is held for the benefit of others the holder is subject to fiduciary duties, failure to exercise which subjects him to liability; and it would follow that an advisory or investment committee, or other person holding power of control other than for his sole benefit, could be subjected to liability for violation of duty—which is the same duty as that of fiduciaries generally, including the duty of loyalty and the duty of prudence and care.

But the statute under consideration is directed not to the protection of the holder of the power but to the protection of the trustee. Independently of statute, the rule seems to be that a trustee is not absolutely exonerated in following the instructions of the holder of the power.

> He is liable if he *should know* of the violation of duty. He is ordinarily under a duty to make reasonable inquiry and investigation in order to determine whether the holder of the power is violating his duty. Thus, if it is provided that the trustee shall make such investments as a third person shall direct, it is ordinarily the duty of the trustee to make some investigation into the propriety of the investment, and if as a result he believes that the holder of the power is abusing the discretion conferred upon him in directing the investment, he should inform him of this, and if the holder of the power still insists upon his making the investment, the trustee should apply to the court for instructions. (emphasis added.)[119]

It is not likely, if an instrument which subjected the trustee to the directions of another also contained an exculpatory clause, that the trustee would be absolved of liability in every case in which he followed the directions of the person having the power

117. RESTATEMENT (SECOND), TRUSTS § 185, comment *d* (1959).

118. *Id.* at comment *e*.

119. 2 SCOTT, TRUSTS § 185 (2d ed. 1956). See also Brennan, *Trustee and Investment Adviser,* 100 TRUSTS & ESTATES 243 (1961); Cronin, *Effectiveness of Exculpatory Clauses in Directory Trusts,* 98 TRUSTS & ESTATES 1147 (1959).

to give them.[120] In this respect there would seem to be no corollary of departure from the rule that while such immunity clauses, or limitations of liability, in the trust instrument are valid, they are not absolutely so and will not relieve the trustee from breaches of trust committed "in bad faith or intentionally or with reckless indifference to the interest of the beneficiary."[121]

The preclusion from the exculpating provision of breaches of trust committed in bad faith, and so on, are based on considerations of public policy. The crucial question is whether the present statute has created a public policy which will excuse or eliminate these exceptions. It is obvious that the statute is an exculpatory statute, but the extent to which it will give immunity to the trustee who has made investments at the direction of another becomes a question of ascertaining the legislative intent. It may reasonably be assumed that acts done in bad faith will not be condoned, but it is not quite so clear whether the statute will hold blameless the trustee who is grossly negligent or recklessly indifferent. Inferentially, just as with an exculpatory clause in a trust instrument, errors of judgment or failure to exercise ordinary care and prudence will not penalize the trustee, but it cannot be said with confidence that the statute will excuse in all other cases, despite the use of the term "ministerial agent". The present statute follows in time and also in identical language statutes in Florida[122] and Georgia,[123] which so far appear not to have been construed. Light from these sources has not yet come.

It may be argued that the statute declares a policy reversing the implicit public policy restricting the effect of exculpatory clauses, and that if this were not so the statute would be pointless. On the other hand, it may be argued that the statute does not change policy in the area of third-party control but defines and clarifies existing policy and that its purpose, in the field of investments, is to afford automatic immunity without the necessity of an exculpating clause—but subject to the same limitations that such a clause would have.

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120. See Cronin *supra* note 119.

121. RESTATEMENT (SECOND), TRUSTS § 222 (1959). As to exculpatory provisions generally, see 2 SCOTT TRUSTS § 222 (2d ed. 1956); BOGERT, *supra* note 94, § 542; 90 C.J.S. *Trusts*, §§ 253b, 335 (1955); 54 AM. JUR. *Trusts* § 301 (1945); Annot., 83 A.L.R. 616 (1933); Annot., 158 A.L.R. 276 (1945). There seem to be no South Carolina cases.

122. FLA. STAT. ANN. § 691.04(8) (1943) as inserted by Fla. Laws 1961, Act, 61-74 at 106.

123. GA. SESS. LAWS 1964, Act. 732, at 258.

Even though the excluded trustee is, under the statute, decribed as a "ministerial agent", the term itself may require definition. "Ministerial" may be clear enough as meaning not calling for the exercise of judgment or discretion,[124] and accordingly such an agent, albeit a trustee, would be one not required to exercise judgment or discretion as a trustee must in meeting the standard of reasonable care and prudence. The question must be asked also whether "agent" is used in the context of "principal and agent," and if it is so used, for whom is the excluded trustee the agent—the directing party, the settlor (which would be impossible if he were dead, or where the trust was created by will), or the beneficiary. The reasonable probability is, in this assumed relationship, that he would be the agent of the holder of the power. If the holder of the power, as principal, directs the trustee, as agent, to make or retain an investment which clearly is grossly improper,—as the trustee-agent knows, has reason to know or should know—would he not, in making or retaining such an investment, be committing a wrongful act for which he would be liable just as any agent committing a wrongful act at the direction of his principal is liable? He does not go free because what he did was by order of his superior. If he is liable on an agency theory, rather than as a trustee, would the measure of liability be the same?

If the excluded trustee is not to be regarded as an agent in the usual sense, then the term "ministerial agent" must mean only that he is acting in a ministerial capacity. Even so, if the direction by the holder of the power—held by him as a fiduciary because it is for the benefit of others—is on his part a clear breach of trust which would subject him to liability, would not the making or retention of the investment pursuant to the direction constitute participation in a breach of trust, and render the "agent" liable for any loss caused by that breach?[125]

124. Blalock v. Johnston, 180 S.C. 40, 185 S.E. 41 (1936) (defining "ministerial" in another context).

125. RESTATEMENT (SECOND), TRUSTS § 326 (1959). By analogy, comment *a*: "Similarly, if the trustee purchases through a stockbroker securities which it is a breach of trust for him to purchase and the broker knows that the purchase is in breach of trust, the broker is liable for participation in the breach of trust."

The common instance of participation in breach of trust, for which citation of authority is unnecessary, is the transfer by a trustee in breach of trust to one who cannot qualify as a bona fide purchaser for value without notice, the transferee becoming a constructive trustee. Another instance is that of misapplication by a trustee of payments made to him by a purchaser who knows or ought to know of the intended misapplication, *e.g.,* Salinas v. Pearsall, 24 S.C. 179 (1885). Cases of possible participation in breach of trust are common in connection with deposits of trust funds where the bank may be held liable

Turning to the co-trustee who may have sole power to direct investments, it has already been seen that the trust instrument may properly confer the power upon him. Its effect is to relieve the other trustee or trustees from activity in which he or they would otherwise be under a duty to engage and which he or they could not ordinarily delegate to the co-trustee.[126] The fact, however, that a co-trustee, rather than another, is given the power does not alter the fiduciary character of his possession of the power—in fact it is strengthened—nor does that fact render the responsibility of the excluded trustee any different from what it would be if the holder of the power were not a co-trustee. Ordinarily a trustee is not liable for a breach of trust committed by a co-trustee, but the exceptions are numerous: where he,

> (a) participates in a breach of trust committed by his co-trustee; or (b) improperly delegates the administration of the trust to his co-trustee; or (c) approves or acquiesces in or conceals a breach of trust committed by his co-trustee; or (d) by his failure to exercise reasonable care in the administration of the trust has enabled his co-trustee to commit a breach of trust; or (e) neglects to take proper steps to compel his co-trustee to redress a breach of trust.[127]

for withdrawal or misapplication of funds where there is knowledge of intended breach of trust, *e.g.*, Bourne v. Maryland Casualty Co., 185 S.C. 1, 192 S.E. 605 (1937); Spartanburg County v. Arthur, 169 S.C. 456, 169 S.E. 235 (1932); Charleston Paint Co. v. Exchange Bank, 129 S.C. 290, 123 S.E. 830 (1924). Until the passage of the Uniform Act for Simplification of Fiduciary Security Transfers (S.C. CODE ANN. §§ 62-451 to -462 (1962)) corporations might be liable for participation in breach of trust in the transfer of stock registered in a fiduciary's name even without knowledge of the intended breach), *e.g.*, Magwood v. Railroad Bank, 5 S.C. 379 (1874).

126. RESTATEMENT (SECOND), TRUSTS § 171 (1959). See, in particular, comment *j*, and, as to investments, comment *h*. See also § 184—Duty with Respect to Co-Trustees: to participate in administration of trust, to use reasonable care to prevent co-trustee's breach of trust, to compel co-trustee to redress breach of trust; exception for participation where trust provides otherwise. See also § 194—Several Trustees—requirement of unanimous exercise of power except where otherwise provided by trust.

127. RESTATEMENT (SECOND), TRUSTS, § 224 (1959). The South Carolina cases are substantially in accord, and are generally to the effect that a trustee is not liable for the improper acts of his co-trustee unless he participated in them or made them possible. Gibert v. Green, 159 S.C. 135, 156 S.E. 325 (1930); Andrews v. United States Fid. & Guar. Co., 154 S.C. 456, 153 S.E. 745 (1929); Broome v. Mordecai, 117 S.C. 195, 108 S.E. 147 (1920); Miller v. Sligh, 10 Rich. Eq. 247 (S.C. 1858); Motte v. Schult, 1 Hill's Eq. 146 (S.C. 1833). See also Epworth Orphanage v. Long, *supra* note 106, in which wife of settlor and another were named co-trustees, loss assessed only against latter. The rule as to co-executors and co-administrators is the same, as to which there are many cases, *e.g.*, Smith v. Heyward, 115 S.C. 145, 167, 104 S.E. 473, 487 (1920) in which the following, equally applicable to trustees, is said: "One executor will not be held liable for the default of another, unless he contributes to it in some way, by such negligent acts or omission as will warrant the inference that he countenances, connived at, or acquiesced in, or negligently failed to take steps to prevent it, after knowledge of the danger of it."

Of course, as has been seen, there is no problem of delegation if the trust vests sole power in a co-trustee. If, in addition, the trust instrument contains an exculpatory provision, there might be excuse for failure to use reasonable care, which enabled the co-trustee to commit a breach of trust, but which would not excuse him, for reasons already seen, for bad faith or reckless indifference to the interests of the beneficiary.[128] As with other persons holding power of control, a co-trustee is given exculpatory protection by the statute, and the questions raised as to the extent and circumstances of that protection are the same, it would appear, as the questions already raised as they relate to those others.

I. Jointly Owned Securities

The treatment of stock owned jointly by two or more persons is dealt with in an act which provides:

> A corporation may treat as absolute owner of shares or other securities the survivor or survivors of persons to whom the same have been or may be issued with the words "as joint tenants with right of survivorship" or "as joint tenants with right of survivorship and not as tenants in common" following their names, upon the death of one or more of such persons.[129]

The act deals with the question of ownership from the point of view of the corporation and is quite plainly designed to afford protection to the corporation in dealing with the survivor or survivors. It does not indicate that the survivor (or survivors) is, as related to the estate of the deceased co-owner, to be regarded as the real owner. In this respect there arises the same question that occurred in connection with the statutes[130] protecting banks and savings institutions in payment to the survivor of the payees of a joint account. In the light of the consideration of these statutes by the cases of *Hawkins v. Thackston*,[131] and *Austin v. Summers*,[132] one may reasonably, if not inevitably, conclude that, even without the present statute, the corporation would be justi-

128. See Matter of Langdon, 154 Misc. 252, 277 N.Y.S. 581 (1935); Cronin, *op. cit. supra* note 119.

129. S.C. ACTS & J. RES. 1965, p. 243, (now designated as S.C. CODE ANN. § 12-16.28 (Supp. 1965)).

130. S.C. CODE ANN. §§ 8-171, 8-602 (1962).

131. 224 S.C. 445, 79 S.E.2d 714 (1954).

132. 237 S.C. 613, 118 S.E.2d 684 (1961); see 14 S.C.L.Q. 228 (1962).

fied in dealing with the survivor as sole owner and that the survivor would in reality become the sole beneficial owner. The statute sets at rest, however, any lingering doubt as to the corporation's position, and to that extent is useful. The cited cases—particularly *Austin*, in which a savings account ran to A, B or C, "as joint tenants with right of survivorship"—would seem to indicate that the survivor or survivors would be entitled not only to receive the securities issued in the mode mentioned by the statute but to retain them beneficially.

Although, as has been noted, the present statute does not purport to define the ultimate rights of the named shareholders, it is valuable also as tending to reinforce the inference which may be gathered from *Austin*—if not a clear-cut holding—that despite the statute[133] abolishing the incident of survivorship in joint tenancies, a joint tenancy *and* survivorship may nevertheless be created by appropriate language.[134]

133. S.C. CODE ANN. § 19-55 (1962).
134. See 14 S.C.L.Q. 228 (1962).