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Wills and Trusts

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WILLS AND TRUSTS

I. Proof and Contest of a Will

Henry v. Cottingham[1] involved an action brought under the Uniform Declaratory Judgments Act[2] for the construction of a will and a determination of the rights of the parties thereunder. The question presented was whether the action, which was brought in the court of common pleas, could continue even though a previously instituted proceeding in solemn form was pending in the probate court.

Mrs. Jennie M. Cottingham died on January 11, 1968, and her purported will was admitted to probate in common form on March 30, 1968, with Jennie C. Henry and John A. Henry qualified as executrix and executor. In the instrument Mrs. Cottingham devised a farm to her daughter, Jennie C. Henry, and her son, John C. Cottingham, to share and share alike, but gave Jennie the option to buy her brother's half for a sum which was considerably less than the present market value of the land.

Jennie C. Henry and John A. Henry brought this action for declaratory judgment on August 28, 1968, for construction of the will and a determination of the parties' rights in regard to the farm. However, prior to this time, on April 27, 1968, the defendants had filed with the probate court a petition to prove the will in solemn or due form of law. The trial court denied the defendant's motion to stay the proceedings pending the outcome of the probate court's decision. The supreme court, reversing, remarked somewhat admonishingly that the trial court had permitted a collateral attack upon the probate court's decision. By refusing to stay the action and by requiring the defendants to question the validity of the will in the trial court, the court allowed a prohibited collateral attack upon a will which had been admitted to probate in common form by the probate court.

Under section 19-255 of the South Carolina Code of Laws of 1962, the probate of a will is conclusive as to the validity of the instrument, unless within six months a petition to have the will proved in solemn or due form of law is filed with the probate court.[3] Only through this *direct* proceeding can the validity of

1. 253 S.C. 286, 170 S.E.2d 387 (1969).
2. S.C. Code Ann. § 10-2001 to -2014 (1962).
3. Wooten v. Wooten, 235 S.C. 228, 110 S.E.2d 922 (1959); Wilkinson v. Wilkinson, 178 S.C. 194, 182 S.E. 640 (1935).

the will be attacked. The decree of the probate court admitting a will to probate is not subject to *collateral* attack, the court being one of competent jurisdiction.[4] Once the validity of the instrument has been determined, questions as to the validity or effect of any particular clause of the will are not within the jurisdiction of the probate court, but are matters of construction to be determined by the court of common pleas.[5]

The court noted that in *Rikard v. Miller*[6] the court held that an action to construe the meaning, effect, and intent of a will could properly be brought under our Declaratory Judgments Act. The act itself states that any question of the validity or construction of such an instrument can properly be brought thereunder. The court reasoned, however, that, once a will has been admitted to probate, there remains no issue as to the validity of the will to be determined under the Uniform Declaratory Judgments Act. In rejecting the plaintiffs' contention that the present question was the proper subject of action for declaratory judgment, the court quoted from a statement by the Supreme Court of North Carolina, a state whose Declaratory Judgments Act is similar to that of South Carolina:

> The Declaratory Judgment Act, G.S. Ch. 1, art. 26, is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. *Nor is it a substitute or alternate method of contesting the validity of wills.*[7]

The South Carolina Supreme Court's opinion appears to be in accord with the general rule in other jurisdictions that have adopted the Uniform Declaratory Judgments Act.[8] The rule has been stated:

4. Wilkinson v. Wilkinson, 178 S.C. 194, 182 S.E. 640 (1935).
5. Hembree v. Bolton, 132 S.C. 136, 128 S.E. 841 (1925); Burkett v. Whittemore, 36 S.C. 428, 15 S.E. 616 (1891).
6. 231 S.C. 98, 97 S.E.2d 257 (1957).
7. 253 S.C. at 293, 170 S.E.2d at 391, *quoting from* Yount v. Yount, 258 N.C. 236, 128 S.E.2d 613 (1962) (emphasis added).
8. The Uniform Declaratory Judgments Act, which was first introduced in 1922, has been adopted by a majority of the states with slight modifications. The Act provides that courts have the power to declare legal rights whether or not further relief could be claimed, that no action shall be open to the objection that a declaratory judgment or decree is prayed for, that the declaration may be either negative or affirmative, and that such declarations shall have the force and effect of a final judgment. 22 AM. JUR. 2D *Declaratory Judgments* § 4 (1965).

> Since the remedy of a declaratory judgment is not a substitute for established and available remedies, . . . such remedy is unavailable where the question involving a will on which an adjudication is sought is already before the appropriate court under a prescribed statutory procedure. Statutes relating to such actions are not designed to enable other courts to supersede the functions of a probate court in the probate of wills.[9]

II. CONSTRUCTION OF A WILL: ADMISSION OF EXTRINSIC EVIDENCE

In 1964, in *Shelley v. Shelley*[10] the South Carolina Supreme Court rendered a significant opinion regarding the admissibility of extrinsic evidence, particularly the testator's declarations of intention, to resolve an "equivocation, or latent ambiguity"[11] contained in a will. The testator, M.B. Shelley, devised his estate "to be divided between" his two sons. The "southern part" of his estate was to go to his son, Bevin, and the "northern part" to his other son, Lanneau. Although the provision named particular buildings to be included in each son's part, there was no specific dividing line established between the two estates.

The master in equity construed the instrument's language to mean that the testator intended for the sons to receive equal acreage; the trial court adopted this construction of the will. The supreme court, in reversing, found that there was nothing in the will to indicate an intention that the property should be equally divided and remanded the case for a factual determination of the dividing line. The court also ruled that extrinsic evidence, including direct evidence of the declaration of the testator as to his intention, could properly be received in making the determination. Upon remand, the master in equity ruled favorably for the defendant, Bevin Shelley; but the trial court entered a decree ordering a division of the property along the lines proposed by the plaintiff, Lanneau Shelley, which division

9. 26 C.J.S. *Declaratory Judgments* § 100 (1956).

10. 244 S.C. 598, 137 S.E.2d 851 (1964). *See* Karesh, *Wills and Trusts, 1964-1965 Survey of South Carolina Law,* 18 S.C.L. REV. 165, 185 (1965), and Note, *Admissibility of Testator's Declaration of Intention,* 17 S.C.L. REV. 276, 283 (1965) for a full and scholarly discussion of the principles enunciated in the *Shelley* Case.

11. *Id.* at 606, 137 S.E.2d at 855. The court, in using these particular words, failed to distinguish between their relative significance in regard to the context in which they were used. This is subsequently commented on in this article.

the court felt conformed more nearly with the testator's intention. The trial court's decision was based primarily on the testimony received from the scrivner of the will and the testator's widow relating to declarations of the testator's intentions.

On the second appeal, in 1969, where the supreme court affirmed the decision of the trial court,[12] the only issue raised by the parties related to the factual determination as to the proper dividing line, which restricted the court to a review for errors of law. The court, on its own initiative, however, raised and affirmed its earlier decision that parol evidence, including declarations of the testator's intent, was admissible. Although admitting that there was now some disagreement among the members of the court as to whether the will contained an equivocation which could properly be resolved by such evidence, the court pointed out that a majority was of the view that there was no error in the previous opinion.

The general rule is that *indirect* extrinsic evidence may be admitted to resolve a *latent ambiguity* which arises when the words of the will are applied to the person or thing which they describe.[13] This is justified on the ground that the evidence is received only to explain or resolve the meaning of the words used by the testator.[14] *Direct* evidence of the testator's declarations of intention, however, is generally not admissible in such a case, unless there is an *equivocation* appearing in the will, the logic being that the danger of such declarations competing and overthrowing the words of the instrument is reduced by the presence of the equivocation.[15] An equivocation has been defined as existing where a description applies *exactly* to two or more persons or things.[16] An equivocation has also been defined as existing where the description applies *equally* and *partially* to two or more persons or things.[17] Under either view, an equivocation is more strictly defined than an ambiguity, which only involves a description that *could* apply to two or more persons or things.

12. Shelley v. Shelley, 253 S.C. 238, 169 S.E.2d 764 (1969).
13. Foreign Mission Bd. of So. Baptist Convention v. Gaines, 42 F. Supp. 85 (E.D.S.C. 1942); Perry v. Morgan, 1 Strob. Eq. 8 (S.C. 1846); Pell v. Ball, Speer's Eq. 48 (S.C. 1843).
14. Note, *Admissibility of Testator's Declarations of Intention*, 17 S.C.L. REV. 276, 279 (1965).
15. 9 WIGMORE, CODE OF EVIDENCE § 2472 (3d ed. 1940).
16. 4 PAGE, WILLS § 32.9 (3d ed. 1961).
17. *Id.*; WIGMORE, *supra* note 15.

The importance of the court's opinion, as given on the first appeal and affirmed on the second appeal, lies in the language used to describe the situation in which *direct* evidence of the testator's intention is admissible:

> 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.[18]

Although the language in Mr. Shelley's will would appear to present an equivocation which could properly be resolved by testimony as to the testator's intention, the court, in using the words "equivocation, or latent ambiguity," does not indicate whether it is ruling that such direct evidence is admissible where equivocations *or* latent ambiguities exist or whether it is admissible only where an equivocation, a type of latent ambiguity, is present. The court failed to make clear whether its ruling applied to situations where equivocations or latent ambiguities exist, or whether it was using the term, "latent ambiguity," only to describe the more restrictive term, "equivocation."[19]

III. CONSTRUCTION OF A WILL: GENERAL RULES

In *King v. South Carolina Tax Commission*[20] the court applied general rules of construction in determining that the estate devised to the widow of the decedent was a life estate and not a fee simple as the devisee had contended. Mrs. King brought an action for declaratory judgment to establish the tax liability of the estate after the tax commission refused to allow her claim for the marital deduction provided for by South

18. 244 S.C. at 606, 137 S.E.2d at 857 (emphasis added).
19. *See also* Wells v. Salvation Army, 190 S.C. 484, 3 S.E.2d 241 (1939).
20. 173 S.E.2d 92 (S.C. 1970).

Carolina law;[21] this deduction is granted where the estate devised is one in fee simple.

The will provided as follows:

> Item 1. We hereby direct the executor or executrix of the estate of us to pay all of our just debts and funeral expenses out of the first moneys coming into their respective hands, and to erect markers on our graves.
> Item 2. We hereby give, devise and bequeath all of the rest, residue and remainder of our property of every sort and description and wheresoever situate unto the survivor of us.
> Item 3. Upon the death of the survivor of us, we hereby give, devise and bequeath such rest, residue and remainder of our property as follows . . . [thereafter naming a number of persons to whom the remainder should go.][22]

The trial court found that Item 2 was a devise in fee simple to Mrs. King; the court further found that Item 3 applied only if the survivor failed to execute a new will prior to death or in the event that both the testators died simultaneously. In reversing, the supreme court found that the provisions of Item 3 "are clear and unequivocal and show the intent of the testator to devise the remainder, at the death of the survivor, to the beneficiaries named."[23]

Although the court acknowledged that, under section 19-232 of the Code of Laws of South Carolina,[24] Item 2, if construed alone, would have the effect of devising a fee simple to the survivor, the court determined that such a result was not possible when the will was considered as a whole. The general rule is that all the parts of a will should be given effect, if under a reasonable interpretation they can be harmonized with each other and the will as a whole.[25] With this in mind the court simply followed the basic rule governing construction of a will: the intent of the testator, as expressed by the words he uses, must

21. S.C. CODE ANN. § 65-455 (1962).
22. 173 S.E.2d at 93.
23. *Id.* at 94.
24. S.C. CODE ANN. § 19-232 (1962) provides:
> No words of limitation shall be necessary to convey an estate in fee simple by devise but every gift of land by devise shall be considered as a gift in fee simple unless such a construction be inconsistent with the will of the testator, express or implied.
25. Shevlin v. Colony Lutheran Church, 227 S.C. 598, 88 S.E.2d 674 (1955).

be given effect unless such contravenes a settled rule of law or public policy.[26]

In *Lee v. Citizens & Southern National Bank*,[27] an action for specific performance of a contract for the sale of land, the court reiterated several basic rules as to the construction and interpretation of a will. Robert A. Smyth left a will which included the following as Item XVII:

> I give, bequeath and devise to my nephew, W. Loring Lee, Jr., of Sumter, South Carolina, for life, all of my right, title and interest in Cedar Grove Plantation, near St. Paul, Clarendon County, South Carolina; along with all of my right, title and interest in the land with improvements thereon at St. Paul, South Carolina, the same consisting of a store and filling station now occupied by the Texas Company; and my two-thirds (2/3) interest in the telephone line from St. Paul, South Carolina, to Summerton, South Carolina; with the remainder, in fee simple, to his son and my grandnephew, Richard Smyth Lee. Should my nephew, W. Loring Lee, Jr., predecease me, then I give, bequeath and devise to his wife, Elizabeth Smyth Lee, the said property for her lifetime, with the remainder to Richard Smyth Lee. Should Richard Smyth Lee predecease me and both of his parents, then the remainder interest in the properties above shall go, in fee simple, to his brother, W. Loring Lee, III.[28]

This action arose when the defendant refused to accept the deed to the Cedar Grove Plantation on the premise that the plaintiff, representing the purported owner of the land, could not convey good title because Richard Smyth Lee did not have a vested remainder in the devised property, but had instead a contingent remainder which could not be conveyed. The trial court, rejecting the defendant's contention that it was necessary for Richard to survive the testator and both of his parents before the interest could vest in him, held that the word, "and," was to be construed literally and noted that it would have been illogical for the testator to require Richard to survive all three persons. The supreme court, affirming, adopted the decree of the trial court as its opinion.

26. Rogers v. Rogers, 221 S.C. 360, 70 S.E.2d 637 (1952); McDonald v. Fagan, 118 S.C. 510, 111 S.E. 793 (1921).
27. 253 S.C. 556, 172 S.E.2d 114 (1970).
28. *Id.* at 559, 172 S.E.2d at 115.

The court stated that, as a first rule of construction, the testator's intent should be ascertained and given effect. Interpreting the first sentence of Item XVII of the will as clearly establishing the testator's intention, the court noted the following rule as established in *Walker v. Alverson*:[29]

> When a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate given should not be cut down or qualified by words of doubtful import found in a subsequent clause.[30]

Once an intention has been so established and does not violate any established rule of law, arbitrary or technical rules of construction should not be permitted to defeat the effect of such an intention.[31] The court also alluded to the general rule that the law favors remainders which vest at the earliest possible time consistent with the intention of the testator.[32] Applying these rules the court determined that the remainder vested at the death of the testator, since Richard Smyth Lee and W. Loring Lee, Jr., were both alive at that time. The court viewed the remaining sentences in Item XVII as surplusage only.

IV. Administration of a Will

A. *Doctrine of Relation Back*

Glenn v. E.I. Dupont De Nemours & Co.[33] presented the South Carolina Supreme Court with the novel question of whether the "doctrine of relation back" would apply to the probate court's appointment of the plaintiff as administratrix *de bonis non* to validate a previously instituted action initiated by the plaintiff without proper standing as administratrix. The action was brought within the six year statute of limitations, but Mrs. Glenn was not reinstated as administratrix until after the period had run.

Dorothy R. Glenn initiated the suit to recover damages for the wrongful death of her husband, Carl Glenn, from whose estate she had been duly discharged as administratrix on February 19, 1962. The trial judge held that an order of the probate court reinstating Mrs. Glenn as the administratrix *nunc pro*

29. 87 S.C. 55, 68 S.E. 966 (1910).
30. *Id.* at 60, 68 S.E. at 968.
31. Albergotti v. Summers, 205 S.C. 179, 31 S.E.2d 129 (1944).
32. *See, e.g.*, Wannamaker v. South Carolina State Bank, 176 S.C. 133, 179 S.E. 896 (1934); Walker v. Alverson, 87 S.C. 55, 68 S.E. 966 (1910).
33. 174 S.E.2d 155 (S.C. 1970).

tunc was ineffective, but that the fact that she was discharged as administratrix when the action was brought was not fatal to the complaint. On his own motion, the trial judge allowed an amendment to the complaint making her administratrix *de bonis non.*

The supreme court, in a three-two decision, rejected the trial court's position that the "doctrine of relation back" applied. The application of this doctrine would have given the complaint validity by substituting an administratrix *de bonis non* after the action was brought.[34] After emphasizing that an action under the Wrongful Death Statute[35] can be brought only by a legally appointed administrator or executor of the estate of the deceased, the court likened the status of Mrs. Glenn, as administratrix at the time of bringing the action, unto that of a non-existing party.

> It is well settled that where an action is brought in the name of a non-existing plaintiff, an amendment of complaint by substituting the proper party will be regarded as the institution of a new action as regards the statute of limitations.[36]

The majority's opinion was supported by an Iowa Supreme Court case, *Pearson v. Anthony.*[37] In *Pearson* the court refused to allow an action to be brought by a decedent's wife who had expected to be appointed administratrix of his estate, but had not been so appointed at the time the suit was brought because of a lack of funds. The court held that a purported institution of an action by an individual pretending to act as administratrix was not effective to commence the action and avoid the bar of the statute of limitations.

In *Graves v. Welborn*[38] the North Carolina Supreme Court, applying the "relation back doctrine," permitted a similar action by a plaintiff who believed herself to be the administratrix of the decedent's estate at the time of the institution of

34. In preventing the statute of limitations from barring an action brought by an administrator prior to his official appointment, the doctrine of relation back is implemented to give the administrator standing to bring such a suit from the time of the decedent's death. Very closely related to this is the practice of allowing the pleadings to be amended to assert the complainant's capacity as administrator without bringing a new action. *See* Annot., 3 A.L.R.3D 1235 (1965).
35. S.C. CODE ANN. § 10-1951, *et seq.* (1962).
36. 174 S.E.2d at 158, *quoting from* Annot., 8 A.L.R.2d 6, 57 (1949).
37. 218 Iowa 697, 254 N.W. 10 (1934).
38. 260 N.C. 688, 133 S.E.2d 761 (1963).

the action. The South Carolina Supreme Court pointed out, however, that in *Graves* the plaintiff had actually taken steps to secure her position as administratrix prior to bringing the suit, whereas Mrs. Glenn, in the present action, had taken no such steps. As the North Carolina Court clarified its holding:

> [W]e must not be understood as holding that one who has never applied for letters or who, having applied, had no reasonable grounds for believing that he had been duly appointed, can institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by subsequent appointment. We think that the Iowa Court correctly dealt with a pretender.[39]

Deciding that Mrs. Glenn had no grounds upon which to believe that she was duly appointed as administratrix at the time the action was brought, the majority concluded that the action was a nullity and could not be sustained under the "doctrine of relation back."

The dissent pointed out that the defendant, by demurring to the complaint early in the proceedings on the ground of improper joinder and, thus, from the beginning of the action, admitting knowledge of the discharge of Mrs. Glenn as administratrix, was estopped from subsequently challenging her legal status as administratrix. The majority's position was also attacked on the basis that the "relation back doctrine" is applicable to a situation such as the one presented and is supported in principle by South Carolina authority.[40] Significant was the attention drawn to the majority view:

> In the great majority of cases that have considered the doctrine of relation back of the appointment of an administrator as it might affect the running of the statute of limitations, it has been held that such an appointment made after the statute has run against a claim will relate back to validate actions taken on the claim within the statutory period by the person subsequently appointed administratrix, thus barring reliance upon the defense of limitations by the party against

39. 174 S.E.2d at 159, *quoting from* Graves v. Welborn, 260 N.C. 688, 694, 133 S.E.2d 761, 767 (1963).

40. *See* Martin v. Fowler, 51 S.C. 164, 28 S.E. 312 (1897); Cook v. Cook, 24 S.C. 204 (1885); Haselden v. Whitesides, 2 Strob. 353 (S.C. 1848); Walker v. May, 2 Hill Eq. 22 (S.C. 1834); Witt v. Elmore, 2 Bailey 595 (S.C. 1832).

> whom the claim is asserted on behalf of the estate. Such result has been reached in wrongful death actions as well as in other types of actions.[41]

The liberal attitude of the majority of courts in allowing the substitution of a proper plaintiff for an improper one has been explained in the following manner:

> It is submitted, although the courts do not expressly state so, that the underlying reasons for the application of the doctrine of relation back as a mean of defeating the defense of the running of the statute of limitations is the desire of the courts not to have valid claims avoided by legal technicalities provided the administrator acted in good faith and had some reasonable grounds for believing that he had been duly appointed.[42]

When the majority view allowing such substitution and the absence of a showing of bad faith on the part of the plaintiff in the present action are considered, there would appear to be considerable merit in the dissent's position. As the dissent pointed out:

> [T]he real issue . . . is, simply stated, whether, under the circumstances, the defendant by its procedures and motions may be allowed to force the plaintiff in this action into position where a new action will have to be commenced, to which the defendant may assert the defense of the six year statute of limitations.[43]

B. *Venue of Corporate Executor*

In *Keller v. The Bank of Orangeburg*,[44] the supreme court passed upon a novel question in this state; the question presented was whether a corporate executor has an official residence for purposes of venue in transitory actions. The plaintiff, as executor of the estate of a Calhoun County resident, Mrs. Hittie M. Fairey, brought an action in the Court of Common Pleas for Calhoun County against the Bank of Orangeburg, executor of the estate of James A. Moss, a resident and attorney of Orangeburg County. The complaint alleged that Mr. Moss was retained by the plaintiff to handle all the legal matters connected with Mrs. Fairey's estate, but that at the time of his death the greater

41. 174 S.E.2d at 162 (dissenting opinion), *quoting from* Annot., 3 A.L.R.3d 1235, 1237 (1965).
42. Annot., 3 A.L.R.3d 1235, 1237 (1965).
43. 174 S.E.2d at 159 (dissenting opinion).
44. 253 S.C. 66, 169 S.E.2d 99 (1970).

number of the legal problems surrounding the estate remained to be solved. The recovery sought was a refund of $55,000.00 of the $75,000.00 paid in advance to Mr. Moss for his services.

The defendant bank, a corporation with offices in both Calhoun County and Orangeburg County, made a motion for a change of venue on the ground that the residence of the bank should be considered as being only in the county where it was appointed and qualified as executor. The trial court denied the motion, and the bank appealed. The South Carolina Supreme Court, affirming, refused to hold that the corporate fiduciary's residence is restricted to the county of its appointment and qualification.

The majority rule as to venue in transitory actions brought against an executor or administrator has been stated as follows:

> Under general statutes with respect to venue, and in the absence of some special statute to the contrary, a personal representative, such as an executor or administrator, may be sued in the county in which he resides, regardless of where the estate is pending settlement or where a decedent might have been sued, and he is entitled to have the suit brought in the county where he resides and was served.[45]

Upon review of the authorities in other states, the court pointed out that, while at common law the executor was sued at the place of his residence, some jurisdictions have adopted mandatory statutes fixing venue only in the county of appointment and qualification, and others, like South Carolina,[46] have adopted permissive statutes which allow, but do not require, that the action be brought in the county of qualification. Aside from those states having such a mandatory statute, the court could find but one state, West Virginia, where the court had adopted a broadly stated rule that the fiduciary has an official residence to which venue in a transitory action is restricted.

The defendant contended that, if the court refused to adopt a rule establishing such an official residence, a testator in

45. 92 C.J.S. *Venue* § 58 (1955).
46. S.C. CODE ANN. § 10-303 (1962) provides in part: "In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action." S.C. CODE ANN. § 10-304 (1962) provides in part: "Any executor or executrix may likewise be sued in the county where the testator's will has been proved or admitted to probate."

choosing a corporate executor, would subject his estate to suit in as many counties as the corporation has offices. In reply, the court pointed to the protection afforded by the provisions of section 10-310 of the South Carolina Code of Laws,[47] which provides for a change of venue in proper cases where harsh or unjust results would occur. This section is available where an inequitable situation arises because one of the parties is a multi-branch corporation.

VI. TRUSTS: EQUITABLE NATURE OF A FIDUCIARY RELATIONSHIP

In *Davis v. Greenwood Telephone Co.*,[48] an action involving a fiduciary relationship, a conflict arose as to whether the relationship should be characterized as equitable which would make the action subject to mandatory reference as provided by South Carolina Law.[49] McFarland Davis, on behalf of himself and the taxpayers of the City of Greenwood brought an action against the Greenwood United Telephone Company, Inc., and the Commission of Public Works to hold the Commission accountable for the money allegedly due from the telephone company for use of the Commission's utility poles. The complaint alleged that the Commission of Public Works acted in bad faith in managing the property of the taxpayers of Greenwood and permitted, "in violation of trust," the telephone company to use the property held in trust for the taxpayers for twenty years without cost. Upon a decree of the trial court ordering a general reference, the plaintiff appealed to the South Carolina Supreme Court. The supreme court, affirming, decided that the lower court was correct in granting the decree referring the cause to the master in equity.

The court concluded that the relationship between the plaintiff and the Commission of Public Works, as presented in the complaint, was clearly one based upon fiduciary responsibility. The court recited that all trusts fall within the jurisdiction of

47. S.C. CODE ANN. § 10-310 (1962) provides that the court may change the place of trial in the following circumstances:
(1) When the county designated for that purpose in the complaint is not the proper county;
(2) When there is reason to believe that a fair and impartial trial cannot be had therein; and
(3) When the convenience of witnesses and the ends of justice would be promoted by the change.

48. 253 S.C. 318, 170 S.E.2d 384 (1969).

49. S.C. CODE ANN. § 1402 (1962) provides that compulsory reference may be ordered by the court in all equitable actions and for all equitable issues involved in actions at law.

equity[50]; the fact that the plaintiff was seeking recovery in monetary damages was not necessarily decisive as to a determination of such jurisdiction.[51] Apart from this relationship, which provides equity jurisdiction, the court pointed to an additional reason for the equitable classification of the action. In *Jefferies v. Harvey*[52] the court held that, in an action involving intricate and complicated accounting, it would be impractical for an ordinary jury to attempt to comprehend and decide the issues involved correctly. The court pointed to the defendants' affidavits as evidence of the complexity of the account between the plaintiff and the defendants and noted the difficulty of an accounting implicit in the recovery requested by the complaint.

Quoting from *Coleman v. Coleman*,[53] the court reviewed the scope of the mandatory order of reference in regard to equity in our state:

> [T]he rule, now settled in this state is that a compulsory order of reference should be granted not only in all equitable cases, but also in action at law where equitable issues are involved; and that equitable issues are involved within this rule whenever the trial of the action will involve a complicated, intricate, and long accounting that it would be impracticable for a jury to properly examine and adjust, or where it would be impracticable for a jury to make the necessary computations and adjustments necessary to ascertain the truth and to do justice between the parties. *And this rule is given special emphasis* in cases where the relationship between the litigants *is of a fiduciary character* or *involves an alleged breach of trust.*[54]

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50. 253 S.C. at 322, 170 S.E.2d at 385, *citing* Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1871) and Winn v. Harby, 171 S.C. 301, 172 S.E. 135 (1933).
51. 253 S.C. at 322, 170 S.E.2d at 385, *citing* I POMEROY'S EQUITY JURISPRUDENCE § 158 (5th ed. 1941).
52. 206 S.C. 245, 33 S.E.2d 513 (1945).
53. 208 S.C. 103, 37 S.E.2d 305 (1946).
54. 253 S.C. at 323, 170 S.E.2d at 386, *quoting from* Coleman v. Coleman, 208 S.C. 103, 37 S.E.2d 305 (1946) (emphasis added).