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Wills and Trusts

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WILLS AND TRUSTS

I. CONSTRUCTION OF A STATUTE

The court did not cover any new ground in the construction of statutes during the survey period. On the contrary, it made clear in *Scarborough v. Hodge*[1] its intention to adhere to a particular construction which was laid down in 1853.

Cecil Hodge died testate in 1968 but since his sole beneficiary predeceased him, his estate was to pass as intestate property under South Carolina's laws of descent and distribution. Hodge was survived by no mother, father, widow or siblings of the whole blood, but only by one sister of the half blood and one niece and three nephews, the four children of a predeceased brother of the whole blood.

The niece and nephews contended that the five heirs should inherit in equal shares, or one-fifth each, but the half-sister claimed that she inherited a one-half interest and the niece and nephews inherited a one-half interest collectively, or one-eighth for each of them. The lower court and this court agreed with the half-sister. The applicable statute[2] reads in part:

> (4) If the intestate shall leave no child or other lineal descendant, father, mother, brother or sister of the whole blood, but shall leave a widow and brother or sister of the half blood and a child or children of a brother or sister of the whole blood, the widow shall take one moiety of the estate and the other moiety *shall be equally divided between the brothers and sisters of the half blood, and the children of the brothers and sisters of the whole blood, the children of every deceased brother and sister of the whole blood taking among them a share equal to the share of a brother or sister of the half blood* . . . .
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> . . . .
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> (7) *If the intestate shall leave no widow the provisions made for her shall go as the rest of the estate is directed to be distributed in the respective clauses in which the widow is provided for.*

The court admitted that although the argument of the niece and nephews was a forceful one, it would adhere to the interpretation of Section 19-52 as set forth in *Felder v. Felder*[3]

1. 187 S.E.2d 793 (S.C. 1972).

2. S.C. CODE ANN. §19-52 (1962) (emphasis added).

3. 5 Rich. Eq. 509. This case interpreted Act No. 1489, V.S.C. STAT. AT LARGE 162, 1791 which was the predecessor of our present statute.

in 1853. In that case the facts were almost identical except that there were more parties, i.e., three half-brothers and nine children of a deceased brother of the whole blood. The court there said simply that the legislature had expressly given to the nine the share that their parent would have taken and that it was not their province to question the wisdom of the legislature.

That court reasoned as follows: The phrase "the children of every deceased brother and sister of the whole blood taking among them as a share equal to the share of a brother or sister of the half blood," means clearly that each half brother or sister should take a share as large as the share to be distributed among the children, however numerous, of a deceased brother or sister of the whole blood.

While the share of a half brother or sister was not precisely defined, equality of shares was necessarily implied in every direction for division unless inequality was expressly prescribed. Therefore, the half brothers and/or sisters would take shares equal to those of each other, and the children of predeceased whole brothers and/or sisters would take a share among them equal to one of these shares. That court reasoned that the preceding phrase which read "shall be equally divided between the brothers and sisters of the half blood and the children of brothers and sisters of the whole blood" was not inconsistent with the phrase that followed. "Equally divided" did not necessarily import division into equal shares, and from its collocation there must have meant rather to divide upon terms of equality and equity, as evidenced by the language of the preamble to the act. The term "equally divided" means no more than divided upon terms of equal justice to the parties.

In that early case, the children argued that the general purpose of the act was to postpone the half blood to the whole blood and that such a literal interpretation of the words violated this purpose. In other cases it had been argued that, quite to the contrary, the main principle of the act was to call the kindred of the intestate to the succession according to propinquity and not quantity of blood. But the court simply rejected the children's argument saying that there was no evidence of such a purpose to postpone except in the instances enumerated in the act, and that as for principles, there was no uniform principle which could be said to pervade the act.

Concluding, that court stated that the right of kindred to inheritance and succession in estates is not a natural right, but entirely of civil institution. Therefore, the legislature could regulate the area in any way it saw fit and the province of the court was to expound these regulations and not to deflect or overrule them on conceits of symmetry and policy.

In accepting this early construction of the statute, the court stated that the public interest was best served when the law remained permanently settled,[4] especially when property had vested over the years based on a particular construction.

II. CONSTRUCTION AND INTERPRETATON OF A WILL: INTENTION OF TESTATOR

A. *Effect of Superadded Words*

There were three cases during the survey period which involved the construction of wills, and much of the same authority was relied on in the determination of each.

Federal Land Bank of Columbia v. Wood[5] involved the construction of a will in order to ascertain the interest thereunder of certain remaindermen.

The will provided:

> ITEM II. I will and devise all the real estate of which I may die seized and possessed unto my beloved wife, Ida Walker Wood, to be hers for and during the term of her natural life; and upon the death of my said wife I will and devise said real estate unto my two children, Charles Kenneth Wood and Jewell Wood Hall, share and share alike, PROVIDED, HOWEVER, that if either of my said two children should predecease my said wife, without leaving a child or children, of which such child is the natural parent, then and in such event, I will and direct that the share of my said real estate which would have gone to such predeceased child shall go directly to my surviving child, absolutely and in fee; PROVIDED, FURTHER, HOWEVER, that if either of my said children should predecease my wife leaving a child or children of which such child was the natural parent, then and in such event, the share that such child or children would have taken, had such child or children survived my wife, shall go in fee to such natural child or children of either of my children who might predecease my wife. It is my specific intention by the devise of my real estate, as hereinabove set forth and the language used, to express such devise to spe-

4. 187 S.E.2d at 794, *quoting from* Alexander v. Honeycutt, 196 S.C. 364, 13 S.E.2d 630 (1941).

5. 334 F. Supp. 1124 (D.S.C. 1971).

cifically and absolutely eliminate any adopted child or adopted children or step-child or step-children of either of my children from taking any interest in my said real estate, in the event of the happening of the contingencies hereinabove set forth.[6]

In addition to two other liens which existed on the property, the wife and the two named children had given the FHA a mortgage on it and in this foreclosure action it was necessary to determine the interest the children held in remainder in order to apply the same to the debt. Mrs. Wood clearly had a life estate.

The two children contended that the remainder had vested in them in fee, and that the later clauses (following "PROVIDED, HOWEVER") did not cut it down since they were of doubtful import and intended only to insure that any adopted and step-grandchildren would take nothing.

The court disagreed. It held that the state of the title was a life estate in Ida Walker Wood and a vested[7] remainder subject to divestment in Charles Kenneth Wood and Jewell Wood Hall with executory interests in the unborn children as well as Charles Kenneth Wood and Jewell Wood Hall.

The court pointed out that in construing the provisions of a will every effort must be made to determine and carry out the Testator's intentions[8] and that while primary resort must be had to the language used in the instrument[9] if the language was vague or ambiguous the circumstances surrounding its execution could be considered in determining this intention.[10] It noted that at the time of the will's execution the testator's daughter was married to a man with three children whom she was considering adopting, and that the testator appeared to dislike the father as well as the children.

While the testator undoubtedly intended to exclude these children, the court reasoned, the language also expressed an

6. *Id.* at 1126.

7. The court used the test laid down in Faber v. Police, 10 S.C. 376 (1877), to determine whether the remainder was vested subject to divestment or contingent.

8. 334 F. Supp. at 1127, *citing* Citizens and Southern Nat'l. Bank of S. C. v. Cleveland, 200 S.C. 373, 20 S.E.2d 811 (1942).

9. *Id., citing* Shelly v. Shelly, 244 S.C. 598, 137 S.E.2d 851 (1964); White v. White, 241 S.C. 181, 127 S.E.2d 627 (1962).

10. *Id., citing* Citizens and Southern Nat'l. Bank of S. C. v. Cleveland, *supra.*

undeniable intention to keep the property within the blood lines of the family. This intention

> [C]ould be mostly easily defeated by a ruling vesting the property in the life tenant with the declaration that the son and daughter are invested with a remainder in fee. (If that were the case) nothing would prevent the three of them from conveying, or devising to whom they pleased, nor an adopted child of either from inheriting.[11]

The court concluded that the will did not vest an indefeasible remainder in Charles Kenneth Wood and Jewell Wood Hall, and that they could not convey by mortgage any more than they had. Therefore, after the foreclosure sale of the property, only their proportionate share of the proceeds would be applied to their debt.

In *Johnson v. Waldrop*,[12] the dispute was over whether or not certain added words in a will could qualify or limit an estate granted in an earlier clause. The will read as follows:

> This is my last will. I give, bequeath and devise to my wife, Leona J. Waldrop, in complete perfect ownership, all my rights and property of every nature, whether real, personal or mixed, wherever situated, appointing her executrix without bond. Upon the death of my wife, it is to be divided equally between my sister, Mrs. Mamie Waldrop Waldrep and my brother, Ernest L. Waldrop.[13]

The court held that there the second clause did limit the estate granted in the first clause and that therefore testator's wife, Leona J. Waldrop, took a life estate coupled with the power to dispose and consume rather than a fee simple interest, as the appellants contended. It reasoned that this was clearly the intention of testator and therefore, according to the law,[14] that was what should be given effect.

The court said that the test such superadded words must meet in order to be given effect was laid down in *Walker v. Alverson*:[15]

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11. 334 F. Supp. at 1130.

12. 256 S.C. 372, 182 S.E.2d 730 (1971).

13. *Id.* at 374, 182 S.E.2d at 730.

14. *Id.* at 375, 182 S.E.2d at 731, *citing* Rogers v. Rogers, 221 S.C. 360, 70 S.E.2d 637 (1952); Peoples Nat'l. Bank of Greenville v. Harrison, 198 S.C. 457, 18 S.E.2d 1 (1941).

15. 87 S.C. 55, 68 S.E. 966 (1910).

> To have . . . effect, the subsequent words should be at least as clear in expressing (their) intention as the words in which the interest is given.[16]

16. *Id.* at 968.

Since the intent in the second clause to limit the devise given in the first was manifested clearly and unmistakably it was given effect.[17]

B. Implied Revocation By Codicil

A similar problem was presented to the United States District Court in *Starratt v. Morse*[18] and the court relied partly on *Johnson v. Waldrop,* supra, for the solution.

This action involved two sections of a will which disposed of the testator's residuary estate in "clear, precise and unambiguous language" to her husband and son, and a subsequent codicil, executed after the testator had gone blind, which stated, *inter alia*:

> FOUR: I direct that my granddaughter, Elizabeth Fenn Morse, shall be my sole residuary legatee.[19]

The plaintiff's granddaughter contended that this paragraph of the codicil was so wholely inconsistent with the language in the above mentioned sections of the will as to legally revoke and vitiate these sections in their entirety by necessary implication. The district court disagreed and presented a thorough discussion of authority to the contrary.

It noted that generally, under South Carolina law, revocations by implication of provisions of a will are not favored. Only where the provisions in question are absolutely irreconcilable will the latter prevail over the former, and even in

17. Plaintiff-respondent relied on Schroder v. Antipas, 215 S.C. 552, 56 S.E.2d 354 (1949), in which the court had disregarded the second clause, saying it was inconsistent, unclear, meaningless and of doubtful import. In the present case the court said that, very simply, the language met the criteria while it failed to do so in *Schroder*. The will there read as follows (original spelling and punctuation preserved):

> I give devise and bequeath my entire estate real and personal mixed and of every kind and dissciption whatsoever which I may own or be in any wise entitled to at the time of my death unto my wife Emma R. Schroder her heirs executors adminestrators and assignis for ever. I hereby announce constutute and appoint my Said wife Emma R. Schroder Sole executrix of this my last will and testament. During her life time and after her death said estate is to be given to the United Synod of the Southern Evangelical Lutheran Church for aiding worthy Yong men for the Gospel Ministry in said Synod.

18. 332 F. Supp. 1038 (D.S.C. 1972).

19. *Id.* at 1042.

those cases the first provision will not be disturbed any more than is absolutely necessary to give effect to the second.[20]

The court said that its duty here was to construe the will and codicils as a single and entire instrument, as if they had been executed simultaneously, and to harmonize and give meaning to all parts thereof, not allowing a codicil to vary the will unless such was the plain intent of the testator.[21]

In holding that paragraph 4 of the codicil did not revoke the sections of the will in question, the court said:

> The Court finds nothing, either outside of the Will and its Codicils or within the four corners thereof, evincing any special motive, purpose, or intent on the part of the testatrix to effect such a revocation—that is, to have her granddaughter take her entire residuary estate to the exclusion of her husband and only son. If the testatrix had in fact intended such a change, it is reasonable to assume that she would have so indicated, for in every instance in the Codicils where she 'revoked,' 'deleted,' 'eliminated,' or otherwise 'changed' any gift, legacy, bequest or provision of her Will she made direct reference to the paragraph, section, subsection, or even line or word of her Will which she wanted to alter.[22]

The court concluded that:

> It is true (under Section 19-221, Code of Laws of South Carolina, 1962), that, if there is an irreconcilable conflict between the Will and a Codicil the latter must prevail, but the Court finds no irreconcilable conflict between the Will and the Codicils in this case. It is reasonable to infer from all the circumstances . . . that the testatrix (apparently thinking that she may have overlooked particular items in her blindness and wanting her granddaughter to have them) intended the language in paragraph 4 of the first Codicil to create a residuary beneficiary to receive any personal property not specifically bequeathed.[23]

III. ADMINSTRATION OF A WILL

A. *Claims Against the Estate: Attorneys' Fees and Administrators' Commissions*

In *Minter v. State of South Carolina Dept. of Mental Health*,[24] the court dealt with the question of the validity of claims against an estate and the priority of their payment.

20. *Id.* at 1044-45, *citing* Werber v. Moses, 117 S.C. 157, 108 S.E.2d 396 (1920) (and the cases cited therein).

21. 332 F. Supp. at 1045.

22. *Id.*

23. *Id.*

24. 258 S.C. 186, 187 S.E.2d 890 (1972).

Respondent was his mother's sole heir and administrator of her estate. She had died after spending over 30 years in the State Hospital due to her mental illness. The hospital filed a claim for $15,796.81 against the estate for her care and maintenance over these years. In his first and final accounting the respondent, as administrator, proposed disbursements to himself of $546.05 as "commissions on all funds," $500.00 as "fee for origination funds in the estate," as well as $276.00 to his attorney for services rendered in connection with the administration.

The respondent contended that the hospital had contracted with his father, during the life of Mrs. Minter, to accept payment of $7.00 per month as full and complete payment of her past, present and future expenses while in the hospital, and that therefore its claim was erroneous.

The first question for the court was whether the State Hospital could and did validly make such a contract when the established charges for such care and maintenance were $60.00 per month.

The court found that the South Carolina Mental Health Association had the authority to establish the charges for the care of patients in the mental health facilities of the State at $60.00 per month;[25] that the estate of a deceased patient was liable for such State care;[26] that a general lien existed upon the real and personal property of any person who had received such care to the extent of the total expense to the State in providing the care;[27] and that the Commission could contract with persons financially unable to pay the established rate for a lesser amount to be paid,[28] but that such contract could pertain only to the patient's present and future needs and could not reduce any obligation already accumulated. It pointed out that there was no evidence to support respondent's contention that the alleged contract had any reference to the amount already due.

The court reasoned that the question of a contract for the future services need not be settled because there was not even

25. S.C. CODE ANN. §32-1026 (1962).
26. S.C. CODE ANN. §32-1027 (1962).
27. S.C. CODE ANN. §32-1029 (1962).
28. S.C. CODE ANN. §32-1028 (1962).

enough money in the decedent's estate to pay for the past services.

The court concluded that the hospital had a valid claim against the estate in the amount of $7,452.75,[29] that such was a debt due the public[30] within the purview of Section 19-476(2) of the Code, and that the hospital was entitled to payment of such sum in preference to the payment of $500.00 to the respondent for "originating funds" on his mother's behalf during her lifetime.

The second question concerned the administrator's commission. Following Mr. Minter's death, Mrs. Minter was entitled to certain benefits from the Veterans Administration. Pursuant to Section 32-1042 of the Code, these were paid over to the State Hospital as her custodian. When Mrs. Minter died, the hospital paid her funeral expenses of $1,198.29 from these funds and paid over the balance to the respondent. The respondent claimed a commission as administrator on the amount paid by the hospital for the funeral as well as the balance.

The court held that pursuant to Section 19-534 of the Code which controls such matters as well as the authority of *In Re Outz's Estate,*[31] the respondent had no valid basis for the allowance of an administrator's commission on the amount paid by the hospital because he never actually received and paid out the funds for the funeral expenses. He was entitled only to commissions on the balance paid over to him.

The final question was whether the attorney's fees of the respondent should be paid out of the assets of the estate. In his first and final return as administrator the respondent

29. The amount due up to the date of the alleged contract in 1956 was $10,198.75. A charge of $7.00 per month for the period after the alleged contract would amount to $924.00, a total of $11,122.75. Respondent paid the hospital $3,600 in Social Security benefits and Mr. Winter paid $70.00, a total of $3,670.00. Thus, the balance due was $7,452.75.

30. "Debts due to the public" represent all debts of any kind to the state or other governmental body. Baxter v. Baxter, 23 S.C. 114 (1884).

31. 245 S.C. 150, 139 S.E.2d 465, 467 (1964), where the court stated:

> [W]hether the assets of an estate be money, or other personal property, before an executor or administrator is entitled to commissions, he must actually receive the money or other personal property, and pay away the money or distribute the personal assets in kind.

proposed to pay his attorney $276.00 for his services. The appellants accepted this amount, but objected to the payment of $500.00 as recommended by the Master and that of $750.00 as ordered by the trial judge.

The appellants contended that the difference between the amount to which they were entitled and the amount the respondent proposed to pay them lay in respondent's invalid claims against the estate. Therefore, they maintained, the respondent was litigating solely for his own benefit under the guise of administrator and consequently could not charge the estate with the attorney's fees thus incurred.

The court agreed. The $500.00 claimed as an originating fee was a simple debt of the estate and could not take priority over the public debt to the appellants. The commission claimed was $319.99 too high. This total of $819.99 was the exact difference between the sum offered by respondent and the amount claimed by appellants. The respondent was the only person who stood to gain from his victory.

In light of this, the court concluded that the litigation was solely for respondent's own benefit and consequently the estate should not have to pay the expense. The attorney's fee in excess of the original $276.00 should be collected from Mr. Minter individually and not the estate.[32]

B. Conveyances by Executors and Assertion of Title

There were two cases during the survey period which resulted in part from the acts or omissions of the executors. In one, *Judson v. Solomons*,[33] the court affirmed the judgment of the lower court and adopted its opinion, declaring the executors' act valid.

32. The court referred to the cases of *Ex Parte* Landrum, 69 S.C. 136, 48 S.E. 47 (1903), and McClellan v. Hetherington, 10 Rich. Eq. 202 (1856). The principle to be deduced therefrom seems to be that an administrator or executor should be reimbursed from the estate for any expense he incurs, including attorney's fees, in litigation fairly falling upon him in his character as trustee. This applies even though he may have some interest in the suit, but in all cases the several devises and legacies should be charged only with a ratable proportion of the fee according to their values. Conversely, it seems that if the administrator or executor is the only one to benefit from the litigation then its burden should not fall on any other parties who have interests in the estate. And if the other parties' interests consume the estate, the burden rests with the administrator or executor individually.

33. 257 S.C. 343, 185 S.E.2d 821 (1971).

In 1964 Mr. William E. Solomons leased a tract of land to his nephew, S. B. Solomons, for the years 1966 through 1970 with an option to buy the tract from his estate within one year after his death.

In 1965, Mr. Solomons executed his Last Will and Testament wherein he exhaustedly and in great detail disposed of all his real and personal property except for the tract in question to which he did not refer at all. The residue of his estate was to go to his 29 nieces and nephews.

The testator died in 1967 and within one year after his death S. B. Solomons paid the stipulated purchase price to his executors and they conveyed the tract to him. Five of the twenty-nine beneficiaries under the residuary clause of the will brought this action to declare the deed null and void. The rest executed disclaimers in favor of S. B. Solomons.

The first question here concerned the validity of the option. The lower court reasoned that the instrument was not void as being a testamentary directive. The lease instrument had created an immediate right in S. B. Solomons to exercise the option. Therefore, it was only the enjoyment (exercise) of the option which was postponed, not its creation.[34]

Furthermore, in *Lindler v. Adcock*,[35] the rule was stated that the

> [P]urchaser had a valid option to purchase lands of the grantor upon his death even though the instrument creating the option made no provision whatever as to whom the purchase price would be paid or who would execute the deed.[36]

But the court said that it was not necessary to invoke that rule in this case because the instrument provided that the tract would be purchased "from the estate" and this intention could be given effect.

The second question involved the validity of the tender of payment to the executors. The plaintiffs contended that the legal title to the land passed to the 29 residuary beneficiaries upon the testator's death and that therefore the tender should

34. *Id.* at 349, 185 S.E.2d at 824, *citing* Hydrick v. Hydrick, 142 S.C. 531, 551, 144 S.E. 156 (1927).

35. 250 S.C. 383, 158 S.E.2d 192 (1967).

36. 257 S.C. at 349, 185 S.E.2d at 824.

have been made to them, not the executor. The lower court disagreed, saying that since the instrument containing the options specifically provided[37] that the purchase should be from the "estate of the owner," and since the term "estate of" is neither synonymous or equivalent to the "heirs"[38] the word "estate" should be construed in a sense that would accomplish the purpose of the instrument.[39]

Reviewing several pieces of evidence, the lower court said:

> [I]t is obvious that the grantor of this option . . . intended that the purchase price be paid to the executors under his Will as personal representatives of 'the Estate of the Owner,' rather than requiring the purchaser to make tender to each of the twenty-nine nieces and nephews referred to in the residuary clause.[40]

Concluding that the tender was valid and sufficient, the lower court reasoned that it would be inequitable to require more of S. B. Solomons in exercising the option than the grantor intended or than was reasonable under the circumstances.[41]

Wannamaker v. Wannamaker[42] was an action seeking a partition of lands and an accounting for waste. W. W. Wannamaker died testate in 1922. His will provided that the rest and residue of his real estate should go to his children and upon their respective deaths to their lineal descendants. The rest and residue of his personal property of every kind and nature was given to the Home Bank of St. Matthews as trustee to invest, paying the proceeds to his children or their lineal descendants.

37. The principle the court relied on was stated in Richardson v. Cooler, 115 S.C. 102, 107, 104 S.E. 305 (1920):

> [I]n the absence of any provision in the deed to the contrary, the renewal money belongs to him who has the title to the land at the time it accrues and from whose ownership the interest is then created. But here the deeds do contain provisions to the contrary, for they expressly provide that the renewal money shall be paid to respective grantors, ...

38. 257 S.C. at 351, 185 S.E.2d at 825, *citing* Carter v. Wroten, 187 S.C. 432, 198 S.E. 13 (1937).

39. *Id.*, *citing* Cannon v. Ballenger, 222 S.C. 39, 71 S.E.2d 513 (1952).

40. *Id.*

41. *Id.* at 352, 185 S.E.2d at 825, *citing* In Re Hayes Estate, 84 N. Y. Supp. 2d 593 (1948).

42. 258 S.C. 167, 187 S.E.2d 657 (1972).

The personal properties of the testator included two bonds and mortgages covering two tracts of land. The executors of the estate foreclosed on these mortgages although cash was readily available to pay the debts of the estate. The attorney for the executors was the successful bidder at the referee's sale, but no deeds were executed and delivered. The two tracts were subsequently sold in 1931 for taxes in the name of "W. W. Wannamaker Estate" and at the time of trial one rested with Banker's Trust, as trustee, the other with A. S. Smoke, both tracts having changed hands several times.

The plaintiffs here, one remaining son and the grandchildren of W. W. Wannamaker, claimed title to the land as "beneficiaries and devisees under the Last Will and Testament of W. W. Wannamaker, deceased."

The trial judge refused the various motions of both sides but granted a new trial because of the erroneous charges of law to the jury. The plaintiffs and defendants appealed.

The defendants said their motion for nonsuit and directed verdict should have been granted because the plaintiffs had simply failed to prove title to the land in themselves. By bringing the action asserting title and calling for partition the plaintiffs had assumed this burden.

The supreme court agreed and remanded the case to the lower court for entry of judgment for the defendants. It reasoned that no title had vested in plaintiff pursuant to the section of the will regarding real estate because the testator simply did not own the land at his death; he had no title. Without question, it continued, the bonds and mortgages were personalty. Had the trustee procured a deed from the referee after the foreclosure sale, as he was entitled to do, he would have held the lands in lieu of the bonds and mortgages and administered them as part of the trust estate. But he did not do so.

Furthermore, the executors' actions of returning the land for back taxes did not vest title in anyone. They were acting merely as fiduciaries of the trustee. The failure of the executors, their attorney or the trustee to do what they should have done did not vest the title in the plaintiffs.

The court stated:

> We know of no theory under which it can be said that title to the real estate involved in this case came to be vested in the plaintiffs, individually, or as distributees or legatees of the probate estate, or as beneficiaries of the trust estate. The trustee was entitled to a deed. The children and grandchildren of W. W. Wannamaker never had title to the land such as to entitle them partition.[43]

The court did not consider the responsibilities or liabilities of the executors or the trustee.

IV. ADMINISTRATION OF A TRUST

A. *Sale of Property to a Life Beneficiary*

Flowers v. Oakdale Realty and Water Corporation[44] was an action in trespass to try title instituted by the remaindermen against the remote grantees of the life beneficiary of a trust who had purchased the trust property at foreclosure sale and subsequently conveyed it.

S. W. Gee died testate in 1925 and established the trust in his will, devising the property in question to A. B. Flowers:

> To have and to hold in trust nevertheless for the sole use, benefit and behoof of my cousin Mrs. Theo Young Flowers, for and during the term of her natural life; and said A. B. Flowers shall have the control and management of said place for and during the term of the life of Mrs. Theo Young Flowers with the specific understanding that the said Mrs. Theo Young Flowers shall have the right to possess the said premises at all times and receive the net benefits and proceeds arising and accruing therefrom.[45]

After the death of the *cestui que trustent,* the will provided that the property should vest immediately in the legitimate children of the *cestui que trustent,* who are the plaintiffs here.

Prior to his death, the testator had pledged the property in question as security for a loan to pay off a note. When the note was not paid the mortgage was foreclosed and the property was sold at public auction in 1930, Mrs. Flowers being the purchaser. She disposed of it in 1936, and at the date of trial title rested in several remote grantees.

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43. *Id.* at 661.
44. 256 S.C. 591, 183 S.E.2d 513 (1971).
45. *Id.* at 596, 183 S.E.2d at 514.

As the court pointed out, the key to this case was the fact that Mrs. Flowers was not a life tenant at all, but rather the beneficiary of a testamentary trust. A. B. Flowers held an active trust, for he was to farm and manage the property. The plaintiffs had a remainder interest in the property after the death of Mrs. Flowers, but she held no fiduciary relationship to them whatsoever. As the beneficiary (for her life) of the trust

> [S]he had no responsibility to the remaindermen with the possible exception of waste and, therefore, when she purchased the property at the foreclosure sale, having no fiduciary relationship to the remaindermen under the will it was a good and valid purchase as no fraud or conspiracy is alleged.[46]

The court pointed out that every case and each authority used by the plaintiffs dealt with the purchase of property by a life tenant and holder of legal title, and in such cases the life tenant justifiably is not allowed to require title adverse to the remaindermen because he is under a duty to preserve the property for them.

But here Mrs. Flowers did not own the life estate. Legal title to the life estate was held by A. B. Flowers, the trustee, and it was he who owed the remaindermen the duty to preserve their estate. The court stated:

> Since Mrs. Flowers was a mere beneficiary of the Gee trust and had no fiduciary duties under it, she had no duty to perform that which was inconsistent with the character of purchase at a judicially ordered and approved sale.[47]

Anderson v. Butler[48] was cited by the court as containing an applicable principle. In that case the facts were very similar, except that one of the remaindermen had been named executor and trustee, and it was he who bought the property. The court said that the case was "authority for the proposition that in South Carolina such a purchase at a judicial sale, lacking some chilling of the bid, fraud or conspiracy is not invalid.[49]

As there was no fraud, collusion, chilling of or insufficient bid alleged here, the court agreed, *per curiam,* with the

46. *Id.* at 597, 183 S.E.2d at 515.
47. *Id.* at 599, 183 S.E.2d at 516.
48. 31 S.C. 183, 9 S.E. 797 (1889).
49. 256 S.C. at 601, 183 S.E.2d at 517.

circuit court that Mrs. Flowers had acquired valid title to the property through the foreclosure sale, to the exclusion of plaintiffs' interest in remainder.

B. Duties and Liabilities of Trustees

Alderman v. Cooper[50] involved the liability of several trustees for wrongfully delivering trust property to one other than the rightful owner.

The plaintiff, Margaret Alderman, was a remainderman in the will of Mr. John Hughes Cooper, which was admitted to probate in 1945. The defendants were trustees thereunder. Testimony showed that in 1955 and 1959 the plaintiff assigned all of her interests in the Cooper estate to Mr. Charles F. Cooper as security for advances made and to be made to her totaling $35,000.00. In fact the advances totaled over $67,000.00. It was agreed that if the advances were not repaid by 1965 the assignments would become absolute. Within 30 months of the 1959 assignment, the trustees turned over to Mr. Cooper trust funds belonging to the plaintiff valued at more than $170,000.00, without notifying the plaintiff of their actions.

In 1966, without any knowledge whatsoever of this distribution, the plaintiff, pursuant to the 1959 agreement, executed an instrument transferring all of her interest in the trust estate to Mr. Cooper, reciting therein that she had not repaid any of her debt. In setting aside this absolute assignment due to its "fraudulent procurement," the trial judge stated:

> I am completely satisfied that had Margaret Alderman known that the trustees of the estate had made these distributions of money and stock on her behalf she would have been able to arrange for the payment of her debt to Charles F. Cooper. [W]hen Margaret Alderman's money and stock was given by the trustees to Charles F. Cooper, both the Trustees and Charles F. Cooper owed a duty to Margaret Alderman to disclose these facts to her and to tell her what they were doing with her money and stock and why they were doing it.[51]

The court said that these findings at trial, not challenged on appeal, were conclusive and clearly imported such an appropriation by Mr. Cooper of the plaintiff's property as to

50. 257 S.C. 304, 185 S.E.2d 809 (1971).
51. *Id.* at 310, 185 S.E.2d at 811.

amount to a conversion, giving the plaintiff a cause of action against Mr. Cooper for its value.

As for the trustees, the court noted that there were two rules generally applicable to these types of problems. The first was that "[a] trustee must exercise reasonable care, prudence and diligence in the management of his trust and is liable to a beneficiary for loss occasioned by his negligence."[52] Secondly, "it is his duty to make payment or delivery of the trust property to the person or persons entitled to receive it, and, in general, his liability for loss occasioned by his failure to do so is absolute."[53]

The court held that here it was not necessary to discriminate between the trustees' absolute liability and that based on negligence. The circuit court had found that the trustees had breached their duty to the plaintiff by making distributions without notifying her. This, the court held, was conclusive that the trustees failed to exercise due diligence in the management of the trust and therefore, they were liable personally to the plaintiff for any consequent loss.

V. TRUSTS BY OPERATION OF LAW

A. *Constructive Trusts*

An almost hopeless attempt by plaintiffs to establish a constructive trust for a share of stock was illustrated in *Faulkner v. Faulkner*.[54]

The Hilton Head Agricultural Company, a North Carolina corporation, was organized in 1917 to acquire and manage land on Hilton Head Island as a hunting preserve. A few years later, the testator bought one share of stock therein at the going rate of $250.00.

52. *Id.* at 314, 185 S.E.2d at 813. The general rule here is that the trustees should use such diligence as a prudent man would in relation to his own affairs. Epworth Orphanage v. Long, 207 S.C. 384, 36 S.E.2d 37 (1945); Cunningham v. Cunningham, 81 S.C. 506, 62 S.E. 845 (1908).

53. *Id.* The rule here appears to be that when the terms of the trust are clear, a trustee who exceeds his powers or departs from the trust will be liable for any resulting loss notwithstanding the fact that he acted in good faith and as a prudent man would have in relation to his own property. Rodgers v. Herron, 226 S.C. 317, 855 S.E.2d 104 (1954); Crayton v. Fowler, 140 S.C. 517, 139 S.E. 161 (1925).

54. 257 S.C. 172, 184 S.E.2d 718 (1971).

In 1954, the testator, being ill and unable to utilize the club privileges, transferred his share of stock to the defendant, his son, by written assignment, absolute on its face, and defendant became a member of the club. At about the same time, the testator made a rather general distribution of most of his modest assets among his wife and children, including his son.

In 1956 a bridge was constructed connecting the island and mainland and land value on the island skyrocketed. At the time of this suit, the share of stock was worth $100,000. In 1958, the testator executed a new will in which he undertook to devise the stock in question to the defendant "for hunting purposes only" but should the land be sold the stock would go to the plaintiffs and defendant in equal shares.

The plaintiffs, wife and two daughters of the testator, seeking a declaration of a trust, alleged that the transfer of stock to the defendant was in trust for all four of them and that if the corporation should sell them its property or the timber thereon the proceeds would be divided between the four of them, share and share alike. The defendant simply denied all of this and claimed ownership of the stock as the transferee of his father.

Since the evidence was found by the referee and the trial judge to be insufficient to create an express trust, the plaintiffs relied on the doctrine of constructive trust. Their theory was that the purpose of the transfer was solely to make the defendant eligible for membership in the club and they offered evidence to show that the testator did not intend to part with the beneficial ownership of the stock.

Reviewing the substance of the evidence the court stated that since there was no ground for relief it was unnecessary to determine its admissibility. It pointed out that much of this evidence, equivocal at best, need not even be weighed because as it went to establish the retention of beneficial ownership by the testator, it necessarily opposed the theory of constructive trust, which was the basis of the plaintiffs' case. Had they claimed the stock under the 1958 will rather than on a constructive trust, a consideration would have been necessary, the evidence bearing on the testator's intentions.

The court said that the written assignment, absolute on its face, was presumed to be what the words imported, the

transfer of title as well as beneficial ownership of the stock to the defendant. The burden was on the plaintiffs to overcome this presumption by clear and convincing testimony and they simply failed to do so.

The court pointed out that the requirements necessary to establish a constructive trust simply were not met. There was no hint that the defendant induced the transfer by actual or constructive fraud or any sort of wrongdoing, or that any confidential relationship existed which would justify the inference of undue influence.

The court gave its evaluation of the circumstances:

> Mr. Faulkner (testator) apparently had come to fear, with reason, that the pre-bridge gift to his son of a lightly regarded asset would eventually unbalance the distribution of his estate. He regretted having made the absolute assignment and undertook to undo it by his Will. However, he could not bequeath what he no longer owned and, as already stated, plaintiffs do not claim under the will. Nor was the will admissible as evidence of his intention in making the earlier assignment.[55]

B. Resulting Trusts

Ex Parte Stokes[56] involved a resulting trust and estate taxes. When Mr. G. B. Stokes died, his executor listed as assets a one-half interest in two 30 acre tracts of land. The Tax Commission found in the course of its investigation that the record title to the land was in Mr. Stokes' name alone and issued a deficiency for estate taxes in the amount of $4,396.89.

The executor asked for a redetermination of this estate tax liability, contending that even though the title was in the name of the deceased the actual owners were the deceased and his wife as tenants in common due to the operation of a resulting trust at the times of purchase.

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55. *Id.* at 178, 184 S.E.2d at 721, *citing* All v. Prillaman, 200 S.C. 279, 291, 20 S.E.2d 741, 746 (1942) in which the relevant principle was stated:

> We can conceive of no more dangerous doctrine in the law of real estate than that a grantor in a deed can later . . . affirm in his last will that the deed was invalid for lack of consideration or other cause and proceed to devise the property to another who should thereupon lay claim to it and offer as proof such a will and its recitals.

56. 256 S.C. 260, 182 S.E.2d 306 (1971).

The court pointed out that to prove the existence of the resulting trust[57] the petitioner must show that Mrs. Stokes paid a definite portion[58] of the purchase money at the time[59] of the transactions with the intention[60] of creating the trust.

The facts allowed just such a showing. The real estate had been acquired by Mr. Stokes through three separate transactions. In the first he had assumed a mortgage indebtedness of $710 as a portion of the consideration while Mrs. Stokes had issued her personal check for the remainder of $680. The consideration for the second parcel was $925.00 which was paid from joint funds of Mr. and Mrs. Stokes. Similarly, the third parcel was obtained with funds from the couple's joint real estate account.

The best argument the Commission had was that any contribution Mrs. Stokes made was intended as a gift to her husband and therefore no resulting trust existed, but the court rejected this contention by distinguishing the authority on which it was based.

In *Legendre v. S. C. Tax Commission,*[61] the case heavily relied on by the Commission, the court noted that the facts were somewhat different. In that case, Mrs. Legendre had purchased a plantation with money given to her by her father and had had the title made to Mr. and Mrs. Legendre. When Mr. Legendre died, the value of an undivided one-half interest was included in his estate. Mrs. Legendre objected, contending that her husband had held no interest beneficially but rather on a resulting trust for her. That court passed over without deciding the question of whether a presumption of a resulting trust would arise in such a husband and wife situation and based its finding of a gift on the fact that such was clearly

57. The general rule in these circumstances is that when real estate is conveyed to one person and the consideration is paid by another, it is presumed that the person who paid the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. Legendre v. S. C. Tax Comm'n, 215 S.C. 514, 56 S.E.2d 336 (1949); Hutto v. Hutto, 187 S.C. 36, 196 S.E. 369 (1938); RESTATEMENT OF THE LAW OF TRUSTS §441, comment e.

58. 256 S.C. at 263, 182 S.E.2d at 307. *See* Hutto v. Hutto, *supra* note 54.

59. *Id., citing* Green v. Green, 237 S.C. 424, 117 S.E.2d 583 (1960). *See* Hodges v. Hodges, 243 S.C. 299, 133 S.E.2d 816 (1963).

60. *Id.* at 263-64 *citing* Surasky v. Weintraub, 90 S.C. 522, 73 S.C. 1029 (1911).

61. 215 S.C. 514, 56 S.E.2d 336 (1949).

and unmistakably the intention of the parties as shown by the facts.[62]

In the present case, holding that there was no evidence showing any gift intention whatsoever, the court stated:

> Everything connected with the purchase and ownership of the realty definitely indicated that both parties considered the ownership as joint or tenants in common. The evidence is positive that joint funds were used to purchase the property, improve the property and build thereon. Mrs. Stokes contributed her own monies toward the purchase at the time of the purchase. The tax records indicate joint ownership for a period of more than twenty years. Insurance policies also clearly show joint ownership.
>
> Petitioner has definitely established a resulting trust and has an undivided interest in . . . (the) property.[63]

The Tax Commission was ordered to redetermine the estate tax liability of the deceased, excluding one-half the value of the lands in question.

HENRY DARGAN MCMASTER

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62. *Legendre, supra,* at 518 *quoting from* 26 AM. JUR. *Husband and Wife* §103 (1940):

> There is a conflict of authority as to whether a trust or presumption of a trust in favor of a wife, or a gift or presumption of a gift to her husband, exists where property is taken in his name on a consideration from her. Unquestionably, if a payment by a wife is made with the intention of making a gift to her husband, no trust in her favor will arise.

The court pointed out that the underlying legal principle of Legendre, *supra,* was embodied in RESTATEMENT OF THE LAW OF TRUSTS §441, comment e:

> The fact that the payor takes title to property in the name of himself and another jointly is an indication of an intention of the payor to make a beneficial gift of an undivided interest in the property to the other person; and in the absence of evidence of a different intention of the payor, the other person does not hold his interest upon a resulting trust for the payor. This is true whether the transfer was made to the payor and the other person, as joint tenants or as tenants in common.

63. 256 S.C. at 268-69, 182 S.E.2d at 310.