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# Property

Thomas W. Traxler

# PROPERTY

## I. INHERITANCE RIGHTS OF ILLEGITIMATES

### A. *Intestate Succession by Illegitimates*

In 1977 the United States Supreme Court decided in *Trimble v. Gordon*[1] that an intestate succession statute precluding illegitimates from inheriting from their fathers or the paternal line violated the equal protection clause of the fourteenth amendment.[2] The Illinois statute that was declared unconstitutional was similar to the South Carolina statute on intestate succession by illegitimates;[3] the *Trimble* decision, therefore, may cast serious doubt upon the constitutionality of the South Carolina statute.

The petitioner in *Trimble* was the illegitimate child of the intestate decedent. She and her mother lived with the decedent from 1970 until his death in 1974. In 1973, a county court in Illinois had issued a paternity order which declared the decedent to be the father of the petitioner and required him to pay her support. Upon the death of the father, the mother filed for declaratory relief, letters of administration, and a determination of heirship. Interpreting the Illinois Probate Act,[4] the probate court determined that the heirs were the parents, brothers, and sisters of the decedent, and not the illegitimate daughter.[5] The relevant part of the Illinois act reads:

> An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom the mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents inter-marry and who is acknowledged by the father as the father's child shall be considered legitimate.[6]

The Supreme Court, in a 5-4 decision written by Justice Powell, held that the Illinois statute deprived illegitimates of equal protection of the laws by allowing them to take property

1. 430 U.S. 762 (1977).
2. *Id.* at 776.
3. S.C. CODE ANN. § 21-3-30 (1976).
4. ILL. ANN. STAT. ch. 3, §§ 1-346 (Smith-Hurd 1961 & Supp. 1978).
5. 430 U.S. at 763-64. The decedent's estate consisted of only a 1974 Plymouth automobile which was worth $2500. *Id.*
6. ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961 & Supp. 1978).

through intestacy only from their mothers while permitting legitimate children to take from both their mothers and their fathers.[7] The Court followed *Mathews v. Lucas,*[8] an earlier decision of the Court, by reasserting that illegitimacy is not a "suspect classification" demanding the "strict scrutiny" standard.[9] The Court instead examined the statutory classification to see if it bore some rational relationship to a legitimate state interest.[10]

The appellees, seeking to uphold the Illinois statute, argued that it served a valid state interest by promoting legitimate family relationships. The majority, in rejecting this argument, stated:

> This purpose is not apparent from the statute. Penalizing children as a means of influencing their parents seems inconsistent with the desire of the Illinois Legislature to make the intestate succession law more just to illegitimate children. Moreover, the difference in the rights of illegitimate children in the estates of their mothers and their fathers appears to be unrelated to the purpose of promoting legitimate family relationships.[11]

The Court was more impressed by the penalizing effect of the statute than by its alleged purpose.

The Supreme Court also found that the statute did not bear a rational relationship to the state's legitimate interest in establishing and maintaining an orderly method of intestate distribution of property.[12] It recognized that problems may arise in establishing paternity in certain cases, but pointed out that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[13] The majority also acknowledged

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7. 430 U.S. at 776.

8. 427 U.S. 495 (1976). The Supreme Court upheld a provision of the Social Security Act that presumed dependency of legitimate children, but required illegitimates to prove dependency to qualify for Social Security benefits. The Court found the classification to be reasonable in that a lower correlation probably existed between illegitimates and dependency than with legitimate children.

9. 430 U.S. at 767.

10. *Id.* at 766.

11. *Id.* at 768 n.13.

12. *Id.* at 771.

13. *Id.* at 772. In *Trimble* no doubt existed that the petitioner was the daughter of the decedent. See note 5 and accompanying text *supra.* The Supreme Court did state, however, that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father's estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." 430 U.S. at 770.

that the states have traditionally possessed great latitude in dealing with property law, and the Court expressed a reluctance to interfere with the state's exercise of these powers.[14] Nevertheless, the Court held that the state's prerogative in property law could not be used to deny an individual or a class the equal protection of the law guaranteed them by the Constitution.[15]

The Court's approach in *Trimble* departed substantially from that followed in *Labine v. Vincent,*[16] a similar case decided only six years earlier. In *Labine* the Court had opined that no insurmountable barriers prevented the illegitimate child from sharing in her father's estate.[17] The father could have included his illegitimate daughter in the distribution of his estate if he had so desired by writing a will, by marrying the mother, or by acknowledging the child to be his daughter.[18] In *Trimble,* however, the Court changed tack and found that consideration of these or other alternatives would constitute a "hypothetical reshuffling of facts."[19] The Court characterized the approach taken in *Labine* as an "analytical anomaly"[20] having no place in an equal protection analysis. The Court did not expressly overrule *Labine;*[21] it did, however, indicate that in the future the *Trimble* analysis would be utilized.[22]

The Supreme Court's decision in *Trimble* bears directly on many states' statutes on intestate succession. The South Carolina statute on descent and distribution to illegitimates[23] has the same effect as the Illinois statute and reads in part as follows:

> Any illegitimate child or children whose mother shall die intestate possessed of any real or personal property shall be, so far as such property is concerned, an heir or heirs at law as to such property, notwithstanding any law or usage to the contrary.[24]

14. 430 U.S. at 771.
15. *Id.*
16. 401 U.S. 532 (1971).
17. *Id.* at 539.
18. *Id.*
19. 430 U.S. at 774.
20. *Id.* at 773.
21. *Id.* at 776 n.17.
22. *Id.*
23. S.C. CODE ANN. § 21-3-30 (1976).
24. *Id.* The remainder of the statute provides:
Whenever any illegitimate child shall die in this state leaving property, real or personal, the mother of such child shall have the same right to inherit from such child as she would have if such child had been legitimate. Illegitimate children

The statute does not expressly prevent illegitimates from inheriting from their intestate fathers, but the negative implication of this statute is the same as that of the Illinois statute invalidated in *Trimble*. The South Carolina Supreme Court has never held that the implication actually exists, but the issue did arise in a case decided by the Fourth Circuit Court of Appeals in 1960. In *Walker v. Walker*[25] the court ruled that a contention that the South Carolina statute violated the equal protection rights of illegitimates by preventing them from inheriting from their fathers was "so manifestly without merit"[26] that no substantial federal question was presented in the complaint, and the federal courts had no subject matter jurisdiction over the case.[27] The Fourth Circuit, therefore, certainly assumes that the implied preclusion of illegitimates from inheriting from their fathers is a feature of South Carolina law. If the statute does have this effect, then it is in conflict with the holding of the United States Supreme Court in *Trimble v. Gordon* and therefore, is unconstitutional.

### *B. Legacies and Gifts to Illegitimates*

*Trimble* not only threatens the South Carolina statute on intestate succession by illegitimates, but it also renders uncertain the status of the Bastardy Act,[28] which contains the excess legacies and gifts statutes. Under the excess legacies statute,[29] a per-

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of the same mother shall have the same right to inherit from each other that they would have had had they been legitimate and all children of the same mother, whether legitimate or illegitimate, shall likewise inherit from each other, as to any property, real or personal.[24]

In the event of the death of an illegitimate intestate, leaving no one to take under the statute law of this State regulating the descent of property of intestates as it would exist had this section not been enacted, the property of such illegitimate shall descend to and be distributed among the next of kin of such illegitimate on the mother's side as if such illegitimate child on the mother's side had been born in lawful wedlock. And in the event that the next of kin of such illegitimate on the mother's side die intestate and without leaving anyone to take his property under the statute law of this State regulating the descent of property of intestates as it would exist had this section not been enacted then before such property escheats to the State it shall descend to the child or children of the mother through whom the kinship exists, both legitimate and illegitimate.

*Id.*

25. 274 F.2d 425 (4th Cir. 1960).
26. *Id.* at 426.
27. *Id.*
28. S.C. CODE ANN. §§ 21-7-480, 27-23-100 (1976).
29. *Id.* § 21-7-480. The excess legacies statute provides:

son who has any illegitimate child or a paramour "such person having a wife or lawful children of his own living"[30] may not give by legacy or devise more than one-fourth of his estate to his illegitimate child or his paramour. The excess gifts statute has almost identical provisions.[31]

Before the constitutionality of the Bastardy Act can be fully explored, the implications of the South Carolina Supreme Court's early 1978 decision in *Williford v. Downs*[32] must be examined. Appellant in *Williford* was the widow of the decedent. Respondent was his daughter.[33] Respondent had been born prior to the marriage of the decedent and appellant, who was not respondent's mother. In his will the decedent left appellant a life estate in certain real property, with the remainder over to respondent. Appellant asked the court to partially void the devise to respondent as in excess of the limit imposed by the excess legacies statute.[34]

The supreme court, in an opinion by Chief Justice Lewis, strictly construed the statute and held it inapplicable to the case before it.[35] The question was what point in time was referred to by the phrase "such person having a wife or lawful children of his own living."[36] Appellant argued that the phrase was intended to apply to the time when the devise or gift was made. Under this argument, the excess legacies statute would apply to all illegitimate children of the testator, regardless of when they were born. The court, however, found the phrase modified the immediately preceding clause "[i]f any person . . . shall beget any bastard

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> If any person who is an inhabitant of this State or who has any estate therein shall beget any bastard child or shall live in adultery with a woman, such person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the woman with whom he lives in adultery or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after paying of his debts than one-fourth part thereof, such legacy or devise shall be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate.

*Id.*

30. *Id.*

31. *Id.* § 27-23-100. For the text of this section, along with a discussion of how it may differ in effect from the excess legacies statute, see note 38 *infra.*

32. 270 S.C. 110, 240 S.E.2d 654.

33. *Id.* at 111, 240 S.E.2d at 655. The court found it unnecessary to decide whether or not respondent was legitimate, because its interpretation of the excess legacies statute would allow her to take the full device even if she were illegitimate. *Id.*

34. *Id.*

35. *Id.*

36. S.C. CODE ANN. § 21-7-480 (1976).

child or shall live in adultery with a woman . . . ."[37] The court's interpretation means that the statute applies only when an illegitimate child is born while the testator is married or has lawful children living.[38]

The effect of *Williford* is that a testator may not devise more than one-fourth of his estate to his illegitimate children born during his marriage or while his lawful children are living, but devises of any size may be made if the illegitimates were born before marriage or after the death of the wife and legitimate children. The *Williford* construction may lead to some peculiar results. For instance, if a testator's wife predeceases him, he may not leave more than one-fourth of his estate to illegitimates born during his marriage, even if they are totally dependent upon him and he has no legitimate children living.

The court's interpretation of the statute made unnecessary a discussion of its constitutionality.[39] The Bastardy Act's constitutionality, however, is doubtful. It discriminates against illegitimate children and does not appear to bear a rational relationship to any legitimate state interest. Two possible interests could be

37. *Id.*

38. 270 S.C. at 111, 240 S.E.2d at 655. Despite the court's interpretation of the excess legacies statute, the excess gifts statute may be interpreted to prohibit excess devises, legacies, and other gifts to *any* illegitimate children born of the testator or grantor. The two statutes overlap. The excess gifts statute provides:

> If any person who is an inhabitant of this State or who has estate herein *shall have begotten* any bastard child or shall live in adultery with a woman, such person having a wife or lawful children of his own living, and shall give, settle or convey, either in trust or by direct conveyance, by deed of gift, *legacy or devise* or by any other ways or means whatsoever, for the use and benefit of such woman with whom he lives in adultery or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after payment of his debts, than one-fourth part thereof, such deed of gift, conveyance, legacy or devise, shall be null and void, but only in favor of his wife and legitimate children for so much of the amount or value thereof as shall exceed such fourth part of his real and personal estate.

S.C. CODE ANN. § 27-23-100 (1976) (emphasis added). This statute is worded slightly differently from the excess legacies statute in that the excess legacies statute uses the present tense rather than the future perfect when it refers to begetting bastard children. It states: "If any person . . . *shall beget* any bastard child . . . such person having a wife or lawful children of his own living . . . ." *Id.* § 21-7-480 (emphasis added). The difference between the two statutes may reflect the two positions taken by the contestants of the will in *Williford* and the supreme court. The excess gifts statute may prohibit excess gifts to any illegitimate children of the donor, or to any bastard child the donor "shall have begotten." The excess gifts statute pertains, however, not only to *inter vivos* gifts, but also to legacies and devises. The court in *Williford*, however, made no attempt to differentiate between the two statutes, and this may indicate that the court would not accept the argument outlined above.

39. 270 S.C. 111, 240 S.E.2d at 655.

advanced by proponents of the Act to justify its discriminatory impact; analysis will demonstrate, however, that these interests are not served by the Act, particularly as it is interpreted in *Williford.*

Those wishing to uphold the Bastardy Act against a claim that it violates the equal protection rights of illegitimates might claim that it promotes legitimate family relationships. This interest was the primary one that the respondent in *Trimble* advanced in an effort to uphold the intestate succession law. The United States Supreme Court found that the statute did not serve this interest.[40] Similarly, the Bastardy Act bears very little connection to the promotion of legitimate family relationships. The only way this Act could encourage legitimate relationships is if it somehow deters the commission of adultery and the fathering of illegitimates. A simple reflection upon human nature leads to the conclusion that the Act has no deterrent effect. It therefore does not bear a rational relationship to the legitimate state interest in promoting legitimate family relationships.

A second purpose which could be advanced to uphold the Bastardy Act is the state's interest in preventing the father of a family from diverting from his legitimate family assets necessary for their support and maintenance. The Act, however, does not appear to bear any real relationship to this purpose. A testator in South Carolina is not required by law to leave any property at all to his wife or his children.[41] A testator may leave his entire estate to a total stranger. The surviving widow does have a dower interest in her husband's real property, but this interest can usually be effectively extinguished by the testator if he converts the real property into personalty before his death.[42] Under *Williford,* a testator may lawfully leave all of his property to an illegitimate child born prior to his marriage.[43] Therefore, the only people whose inheritance rights are affected by the Bastardy Act are illegitimate children who are born while the testator is married or while he has legitimate children living. The Act does not protect the family; it merely penalizes illegitimates for the cir-

40. 430 U.S. at 768 n.13.

41. *See* C. KARESH, WILLS 2 (1977). *See also* Braun, *Probate Reform for South Carolina: An Introduction to the Uniform Probate Code,* 29 S.C.L. REV. 397, 406 (1978).

42. Of course, a wife may refuse to relinquish her dower rights and effectively prevent her husband from selling his real property. In most situations, however, the wife will probably automatically relinquish her dower rights without even considering that her husband might be thinking of leaving her out of his will.

43. *See* notes 32 through 38 and accompanying text *supra.*

cumstances of their birth over which they had no control.

The Bastardy Act is an embodiment of the disrepute in which illegitimate children have been held for centuries. *Trimble* appears to have been influenced by the desire of the Court to treat better these unfortunates who have for so long been penalized because of what society has viewed as the transgressions of their parents. If the Bastardy Act is challenged because it violates the equal protection clause of the fourteenth amendment to the United States Constitution, it should be held unconstitutional.[44]

## II. Testamentary Transfers and Estate Administration

The South Carolina Supreme Court dealt with the testamentary capacity of an alleged alcoholic and drug user in *Hellams v. Ross*.[45] The court followed the predominant national approach[46] and focused upon the mental and physical state of the testator at the time of the execution of the will. Despite evidence that the testator continually abused alcohol and drugs, the contestants of the will did not meet the burden of proving that he lacked the

44. The Bastardy Act statutes use masculine pronouns for the testator and refer to the testator's *wife* and the *woman* with whom he lives in adultery. It is uncertain at this time whether the masculine and feminine terms are interchangeable and make excessive gifts and legacies by a wife to her illegitimate children or paramour voidable. *But see* S.C. Code Ann. § 2-7-30 (1976) (masculine and feminine words in an act are interchangeable). The South Carolina Supreme Court may eventually consider the increasing role of the woman as the breadwinner or income contributor and apply the excess gifts and legacies statutes to male and female testators. On the other hand, the court may consider the Bastardy Act to be on the same footing as the dower statute and not consider the terms to be interchangeable.

Aside from its application to illegitimates, another interesting aspect of the excess gifts and legacies statutes is that they prohibit excessive gifts to *women* with whom the donor or testator "shall live in adultery." In a time when the rights of homosexuals are being openly discussed and debated, it is interesting to consider how the South Carolina Supreme Court would treat an otherwise excessive gift or legacy to a homosexual boyfriend by a married bisexual male. If the court continues to interpret the statute strictly as it did in *Williford*, this would result in an interesting anomaly in the law.

45. 268 S.C. 284, 233 S.E.2d 98 (1977).

46. *E.g.*, *In re* Estate of Warner, 166 Cal. App. 2d 677, 333 P.2d 848 (1959); *In re* Estate of Van Horne, 305 So. 2d 46 (Fla. Dist. Ct. App. 1974); Dutton v. Nash, 186 Ga. App. 292, 197 S.E. 637 (1938); *In re* Estate of Cox, 184 Kan. 450, 337 P.2d 632 (1959). *See also In re* Estate of Ross, 204 Cal. App. 2d 82, 22 Cal. Rptr. 135 (1962), where contestants of the will of the decedent produced evidence that the testatrix had attempted suicide several times (eventually succeeding), was addicted to the barbiturate Seconal and had been under its influence the day before the execution of the will, had suffered epileptic fits, had undergone psychiatric treatment, may have suffered brain damage from an overdose of barbiturates, was despondent and erratic, and had demonstrated bad investment judgment on numerous occasions. The court still found testamentary capacity. *Id.* at 96, 22 Cal. Rptr. at 144.

necessary mental capacity to execute the instrument at the moment of signing.[47] In line with the majority of jurisdictions, the court applied a threefold test for determining testamentary capacity. If the contestants of a will can prove either that (1) the testator did not know the nature of his estate, (2) he did not know who the natural objects of his bounty were, or (3) he did not know to whom he wished to give his property, they will succeed in proving that the testator lacked the requisite mental capacity.[48]

Contestants of a will are presented with particularly difficult problems of proof when they base their attack upon the testator's use of alcohol. They must prove either that the testator was intoxicated at the moment of execution of the will or that his habitual use of alcohol had impaired his mental faculties to such a degree that it rendered him incapable of meeting the requirements of the testamentary capacity test even while he was sober.[49] In *Hellams* the court found definite proof that the testator was sober when he signed the will.[50] The crucial issue for the contestants, therefore, was whether the habitual use of alcohol and drugs had affected his mental faculties and rendered him incompetent to make a will.[51]

The attorney who drafted the will and his secretary were the only surviving witnesses to the will. They testified to the mental capacity of the decedent. The contestants of the will presented evidence that revealed that the decedent was a habitual drunkard and that he had acted irrationally on several occasions.[52] The

47. 268 S.C. at 289, 233 S.E.2d at 100.

48. *Id.* at 288, 233 S.E.2d at 100. The language employed by the court in *Hellams* appears to mean that the testator must have actual knowledge of these three facts. *Id.* Under the test as applied in most jurisdictions, however, the contestants must demonstrate that the testator did not have the ability to know. *See* T. ATKINSON, HANDBOOK ON THE LAW OF WILLS 237-38 (2d ed. 1953). In Sumter Trust Co. v. Holman, 134 S.C. 412, 132 S.E. 811 (1926), which was cited by the South Carolina Supreme Court in *Hellams*, the court spoke in terms of the testator having the capacity to know: "The testator's capacity to know his estate, the objects of his affections, and to whom he wishes to give his property, is the test of capacity to make a will." *Id.* at 422, 132 S.E. at 814. If the court is now requiring that the testator have actual knowledge rather than mere capacity to know, a less onerous burden of proof will fall upon the contestants of a will who seek to prove that the testator lacked testamentary capacity. Although the statement by the court in *Hellams* was probably mere imprecision and the court's citation of the *Sumter Trust Co.* decision should indicate that the law in South Carolina on this point remains unchanged, this statement could cause difficulties in a future case.

49. 268 S.C. at 288, 233 S.E.2d at 100.

50. *Id.* at 289, 233 S.E.2d at 100.

51. *Id.*

52. The evidence introduced by the contestants showed that the testator bought two trailers at excessive prices and took the sink and some furniture from his home to put in

supreme court paid scant attention to this evidence, however, because the evidence was insufficient to prove lack of testamentary capacity at the time of the execution of the will. The contestants also attempted to defeat the will by proving the testator did not know the natural objects of his bounty. His entire estate was bequeathed to his church, to the exclusion of his wife, in the belief that such a bequest would ensure him a place in heaven. The court, however, dismissed this evidence as insufficient in itself to establish a lack of capacity: "The fact alone that the testator disposed of property contrary to what others usually consider fair is not sufficient to declare his will void."[53]

The South Carolina Supreme Court's decision in *Hellams* was consistent with legal principles established in this state and in other jurisdictions. Lack of testamentary capacity must be proved by a preponderance of the evidence, and proof that the testator made an unusual or unorthodox disposition of his property is not alone sufficient to invalidate a will.

The supreme court also handed down a decision dealing with the administration of an estate by a bank executor. In *Pruitt v. South Carolina National Bank*[54] the court upheld a lower court's finding of negligence on the part of the bank, as executor, in failing to keep the estate property of the decedent in good repair, in not trying to sell the property to prospective buyers, and in allowing the property to greatly deteriorate.[55] The decedent appointed the bank "to be the Executor of this will, to serve without bond and to have full power of sale."[56] The record showed that after the death of the testator the bank collected the rents due from the property, paid all the insurance premiums, changed the locks, kept the keys to the houses during a three year period, and thereby exercised general control over the property. The bank, however, let the property deteriorate.

The executor maintained that because the provision in the will imposed no legal duty upon the bank to maintain the property or to try to sell it, no negligence could result from the failure of the bank to do so. The court, in an opinion by Justice Gregory, agreed that the will did not impose this duty upon the bank, as

a rental house. Occasionally when intoxicated he would fire a gun into the ceiling and through the windows of his house. *Id.* at 289-90, 233 S.E.2d at 101-01.

53. *Id.* at 290, 233 S.E.2d at 101.

54. 268 S.C. 221, 232 S.E.2d 892 (1977).

55. *Id.*

56. *Id.* at 226, 232 S.E.2d at 894.

executor. The court held, however, that the bank was liable in negligence. The court relied on two factors in its decision. First, the court found that the bank had gratuitously assumed the duty by exercising control over the property. The executor was not required by the will to perform these functions, but the court found that by having done so, it had assumed, albeit gratuitously, the legal duty to exercise due care and to properly manage the estate property.[57]

Second, the court emphasized the heirs' reliance upon the bank's professional experience and control over the property. "Because of the bank's assumption of control over the estate properties, the heirs, untrained in the law, some residing outside of the state, naturally depended on the bank to protect their interests."[58] The court held, therefore, that assumption of control by the executor, and subsequent reliance by the heirs imposed a duty of due care upon the executor despite the absence of an express duty in the will.

The opinion leaves open the quantum of control the executor must assume before a legal duty will arise. The implication of *Pruitt* seems to be that once enough control over the property is assumed to lead the heirs to justifiably rely on the control and care of the executor, the legal duty with the concomitant requirement of due care will attach.

Another question that may arise in the wake of *Pruitt* is whether this duty might be imposed upon any executor. The court in *Pruitt* did not in any way limit the coverage of its holding to corporate executors. Therefore, in a proper case the court would probably hold that an individual executor had assumed a duty to repair and control estate property. The identity of the executor would be relevant, however, to establishing the second factor, reasonable reliance. The court will be more likely to find that the heirs' reliance is reasonable when the executor is a professional rather than an individual.

*Pruitt* has highly significant implications to drafters of wills in South Carolina. The will contained a clause granting the executor the full power of sale, but the court in *Pruitt* did not find within this power an affirmative duty to sell or even to repair.[59] The duty to repair arose only when the bank assumed control over the property and the heirs reasonably relied upon that control.

57. *Id.* at 225, 232 S.E.2d at 894.
58. *Id.*
59. *Id.* at 226, 232 S.E.2d at 894.

When it took steps to sell the property, the affirmative duty arose to exercise reasonable care in the sale. Drafters of wills in South Carolina could, therefore, take one of two steps to impose the duty to sell or repair. First, control or custody over the property could be given to the executor. Second, a provision could be inserted in the will expressing a direct mandate to the executor to sell or to repair. If the will contains neither of these two provisions, a duty of due care will not arise unless the executor gratuitously assumes control of the property and the heirs reasonably rely upon that control.

## III. Eminent Domain

In 1977 the law of eminent domain was considered by the South Carolina Supreme Court in three cases, two of which were decided in favor of the landowner. In all three cases the court was faced with the issue of what constitutes a compensable "taking" of property by the state, and each decision followed the established national trend.

In the one case decided against the landowner, the supreme court held that relocation or closing of a road that may result in a diversion of traffic and loss of frontage on a major traffic artery does not constitute a compensable "taking."[60] In *South Carolina State Highway Department v. Carodale Associates,*[61] the landowner's property fronted on U.S. Highway No. 1 before Interstate 77 was constructed, and he enjoyed the use of that road and the major traffic flow on it. When I-77 was constructed, less than one-half acre of the landowner's property was condemned for use as an exit ramp off the new highway. To provide for an adequate intersection of Highway 1 and the new interstate highway, Highway 1 was relocated several hundred feet away. This relocation resulted in the loss of frontage by the landowner. The part of the old Highway 1 on which the landowner's property fronted was closed and a *cul de sac* was created. An access road from the old highway to the relocated highway was built to provide ready access to the new highway from the landowner's property.

The landowner's appeal of a condemnation award of $14,000 by the Board of Condemnation was based on the argument that the loss of valuable frontage on the old highway resulted in a

60. South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977).

61. *Id.*

"taking" for which he was not justly compensated. He received a jury verdict in the circuit court of $117,000. The South Carolina State Highway Department appealed that judgment to the South Carolina Supreme Court. The supreme court reversed and remanded the case for a determination of the value of the property in accordance with its holding.[62]

In reversing the judgment of the circuit court, the South Carolina Supreme Court followed the majority of jurisdictions[63] and sustained the precedent in this State[64] by holding that "[a] landowner has no vested right in the continuance of a public highway; the abandonment of a highway, without its being closed, is *damnum absque injuria* . . . . Likewise, the State is under no duty to maintain a minimum level of traffic flow."[65] Relocation of a road, then, is distinguished from condemnation of property adjacent to the road. When the landowner loses his frontage on a highway because of its mere relocation, no compensable "taking" occurs. The state can relocate a highway with impunity even though the landowner can no longer profitably use his land for its original purpose. On the other hand, if the state actually condemns a landowner's property which fronts on a highway, the landowner may be able to recover more than the mere value of the land condemned if the condemnation results in unsuitable access to the rest of his property or if the value of the remainder is greatly reduced.[66] In *Carodale,* however, the portion actually condemned was not the strip fronting the highway, but a side strip of land, and therefore this rule was of no aid to the landowner.

Nevertheless, the closing or relocation of a road or street may result in a compensable taking if it creates a *cul de sac* and impairs ready access to the surrounding street system.[67] In *City of Rock Hill v. Cothran*[68] the court awarded compensation to the landowner when the closing of a street by the city created a *cul de sac* and made access to the city streets from the landowner's property more difficult. The court in *Carodale* acknowledged this precedent by stating: "Nevertheless, the vacation of a street or

62. *Id.* at 564, 235 S.E.2d at 130.

63. *See* 4A P. NICHOLS, EMINENT DOMAIN § 14.244[4] (1976 & Supp. 1977).

64. Wilson v. Greenville County, 110 S.C. 321, 96 S.E. 301 (1918).

65. 268 S.C. at 561, 235 S.E.2d at 128.

66. *Id.*

67. City of Rock Hill v. Cothran, 209 S.E. 357, 40 S.E.2d 239 (1946). *See also* South Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970).

68. *Id.*

the creation of a *cul de sac* with the concomitant diversion of traffic and loss of frontage has been held a 'taking' of property."[69] Although the court in *Carodale* did not clearly distinguish the facts before it from those in *Cothran,* the apparent distinction is that in *Cothran* the landowner's personal access to the city streets was substantially impaired, while in *Carodale* the landowner maintained free and uninhibited access to the relocated highway.

The court in *Carodale* held that the trial court committed reversible error by allowing the landowner to introduce testimony on the reduction of property value resulting from the loss of frontage on the old highway.[70] The property owner does not have a property right in the continuation of traffic flow in front of his property. The right to route the traffic and plan the road and highway system is within the police powers of the state.[71]

Appellant also argued that the trial court erred in refusing to charge the "scope of the project test," as set forth by the United States Supreme Court in *United States v. Reynolds.*[72] The Highway Department contended that the value of the strip of land condemned had been enhanced by the development of the Interstate highway, and that this increase in value should not have been awarded to the landowner as compensation. The initiation of a government project normally affects surrounding land values by either enhancing or depressing them. The scope of the project test dictates that the value of surrounding land subsequently taken is to be determined according to whether the land was within the original scope of the project.[73] If the land was included in the project originally, its value is fixed as of the moment of the beginning of the project; but if it was added to the project, its value is to be ascertained at the moment of actual condemnation. The supreme court in *Carodale* did not decide if the "scope of the project test" is the law in South Carolina. It found that although the property condemned was originally within the contemplation of the project,[74] the facts did not disclose "a bifurcated condemnation with an intervening enhancement of property values attributable to the project."[75] Because *Carodale* did not present a situation in which the test would

69. 268 S.C. at 561, 235 S.E.2d at 128.
70. *Id.* at 561, 235 S.E.2d at 129.
71. *Id.*
72. 397 U.S. 14 (1970).
73. *Id.* at 17.
74. 268 S.C. at 563, 235 S.E.2d at 130.
75. *Id.* at 562, 235 S.E.2d at 129.

apply if accepted, the supreme court refrained from deciding whether the *Reynolds* scope of the project test will be accepted into the South Carolina law of eminent domain.[76]

Another case involving the issue of "taking" arose in South Carolina in 1977, but unlike *Carodale* it did not deal with the physical appropriation or invasion of the landowner's property. *Poole v. Combined Utility System of Easley*[77] dealt with a city's violation of an intangible restrictive covenant. The city of Easley purchased two lots in the subdivision where the plaintiffs lived. Not long after the purchase the municipality erected an electric substation on the newly-acquired property. The restrictive covenants covered all of the lots in the subdivision and prohibited the erection of that type of structure. When Easley built the electric substation, the plaintiffs brought the action alleging the taking of property without just compensation.[78] The supreme court held that a violation of a restrictive covenant on property purchased by the city can constitute a compensable taking and affirmed the lower court's order overruling a demurrer to the complaint.

In 1962 the South Carolina Supreme Court held in *School District Number 3 v. Country Club of Charleston*[79] that restrictive covenants are property rights of the holders of dominant estates which cannot be violated without just compensation. A minority of jurisdictions in the United States holds that restrictive covenants are not a property right, and therefore that no compensable taking occurs when a governmental entity acquires property burdened by these covenants and uses it in a manner that violates them.[80] South Carolina, on the other hand, belongs to the majority of jurisdictions that holds that the owner of a dominant estate has an enforceable property interest in that covenant.[81]

The decision in *Poole* will be of significance mainly as a reaffirmation of the stance taken in *Country Club of Charleston,* and these decisions taken in tandem should conclusively establish South Carolina's adherence to the majority position in the United States.

The third case decided by the supreme court in this area involved the physical invasion of the landowner's property by

76. *Id.*
77. 269 S.C. 271, 237 S.E.2d 82 (1977).
78. *Id.* at 273, 237 S.E.2d at 83.
79. 241 S.C. 215, 127 S.E.2d 625 (1962).
80. *See* 2 P. NICHOLS, EMINENT DOMAIN § 5.73 (1976 & Supp. 1977).
81. *Id.*

overflowing raw sewage. The court found in *Moore v. Chesterfield County*[82] that pollution of the property owner's well water could constitute a compensable taking.[83] Defendant county was responsible for the maintenance of the sewer system in a residential subdivision and allegedly failed to properly supervise the operation of the system and to keep it in good repair. The complaint alleged that the system deteriorated and became clogged, allowing untreated effluent to escape from the system and pollute plaintiff's well water.

Before an invasion or damage of this type is compensable as a taking it must have some "degree of permanence."[84] In *Collins v. Greenville,*[85] an earlier decision of the court, the damage to the landowner's property from negligent maintenance of the sewer lacked the permanence required for recovery under the law of eminent domain.[86] Plaintiff in *Moore,* however, claimed that the county had been continuously negligent in its maintenance of the sewer system and that contamination of the water had continued for eight years prior to the filing of the complaint.[87] The court found that these allegations, if proved, would establish the requisite degree of permanence, and, therefore, it upheld the trial court's order overruling defendant's demurrer to the complaint.[88]

The scope of the definition of permanence takes on greater importance when one recognizes that the definition carves the line between a constitutional cause of action for a taking and a tort action for damages, in which attendant problems of governmental immunity will arise. The South Carolina Supreme Court will allow recovery under the South Carolina Constitution even though the property is only damaged and the full title does not go to the State. In *Owens v. South Carolina State Highway Department*[89] the supreme court presented this principle by stating:

82. 268 S.C. 460, 234 S.E.2d 864 (1977).

83. *Id.* at 464, 234 S.E.2d at 865-66; *Accord,* Sheriff v. Easley, 178 S.C. 504, 183 S.E. 311 (1936); Parrish v. Yorkville, 96 S.C. 24, 79 S.E. 635 (1913).

84. 268 S.C. at 464, 234 S.E.2d at 866.

85. 233 S.C. 506, 105 S.E.2d 704 (1958). *Collins* involved sewage damage to the property of plaintiff. The city was negligent in attempting to clear a clogged sewer and a temporary overflow of sewage resulted. *Id.*

86. *Id.* at 512, 105 S.E.2d at 708.

87. 268 S.C. at 463, 234 S.E.2d at 865.

88. *Id.* at 464, 234 S.E.2d at 866.

89. 239 S.C. 44, 121 S.E.2d 240 (1961).

> The Constitution of this State, Article I, Section 17, provides that " . . . private property shall not be taken . . . for public use without just compensation being first made therefor." In the construction of this Article of our Constitution, we do not recognize a distinction between "taking" and "damaging". A deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a "taking" as though the property was actually appropriated.[90]

Despite contrary indications in some cases,[91] however, the South Carolina Supreme Court insists upon permanent damage before it will find a taking. For temporary harm, as in *Collins,* the action must lie in tort, and problems of governmental immunity will plague the landowner seeking to recover from the governmental entity in a tort action.[92]

*Moore* serves as an interesting contrast to *Collins* and reaffirms the court's insistence upon permanence of the invasion or damage. Both involved the invasion of the landowner's property by untreated sewage, and in each case the overflow resulted from the negligent maintenance of the sewer system by the city. In applying the standard set out in *Owens* it is hard to imagine an invasion that is more repulsive and does more to deny the landowner of the ordinary beneficial use and enjoyment of his property. The key to the landowner's success in overcoming the demurrer in *Moore,* however, was the allegations of permanent damage and continuation of the negligent maintenance and overflow.

Other jurisdictions in the United States are split on the issue of compensation for a temporary taking,[93] and there is no clear indication of which position is predominantly favored. One problem that will hamper jurisdictions that permit compensation for a temporary injury is the determination of the amount of compensation. If the damage is not permanent, an award of the highest

90. *Id.* at 52, 121 S.E.2d at 244.

91. *See, e.g.,* South Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970). In *Wilson* the court stated: "We have consistently held that within the purview of this constitutional provision, there is no distinction between taking and damaging and that the least damage to property constitutes a taking within the purview of the Constitution." *Id.* at 366-67, 175 S.E.2d at 395.

92. *See* Graham v. Charleston County School Bd., 262 S.C. 314, 204 S.E.2d 384 (1974).

93. For a list of authorities supporting each position, see 2 P. NICHOLS, EMINENT DOMAIN § 6.11 nn.3-5 (1976).

and best use value of the land would provide a windfall for the landowner. In *Collins* the court would have had difficulty establishing the extent of the damage suffered by the landowner. This problem of damage may be another underlying reason for the court's continued insistence that the injury to the property be permanent.

## IV. DEED CONSTRUCTION

In 1976, the South Carolina Supreme Court was faced in *County of Abbeville v. Knox*[94] with the construction of a deed that contained inconsistent provisions. The granting clause was inconsistent with subsequent provisions of the deed. The granting clause and the habendum were mutually consistent, each conveying a fee simple absolute to the grantee, but subsequent provisions in the description of the property contained language indicating conveyance of either a defeasible fee or an option to repurchase. The court held that the estate conveyed in the granting clause could not be reduced by subsequent provisions if the estate so conveyed was complete and absolute.[95] According to established rules of construction, subsequent provisions in a deed could not reduce the quantum of a complete estate.

In a 1977 case, *Wayburn v. Smith*,[96] the court again was called upon to determine the estate conveyed in a deed. The deed in *Wayburn* differed from that in *Knox* in that the premises, granting clause, and habendum were inconsistent, and the granting clause failed to convey a complete estate. The court relied upon traditional rules of construction to determine the quantum of the estate conveyed and ignored the apparent intent of the grantor.[97]

Plaintiff in *Wayburn* brought an action seeking specific performance of a real estate purchase contract which defendant refused to honor when he learned of the defective deed in plaintiff's chain of title. The deed to a predecessor of plaintiff contained premises that stated: "Know All Men by These Presents, That I W.J. Wooten of Blythewood, S.C. desire to convey to Allie Walker

94. 267 S.C. 38, 225 S.E.2d 863 (1976). For a more detailed analysis, see *Property, Annual Survey of South Carolina Law*, 29 S.C.L. REV. 181, 188 (1977).

95. 267 S.C. at 40, 225 S.E.2d at 864.

96. 270 S.C. 38, 239 S.E.2d 890 (1977).

97. The court conceded "that it appears from a reading of the language in the premises . . . that the grantor may have intended to convey a life estate to Allie Walker with a remainder to the heirs of her body. . . ." 270 S.C. at 43, 239 S.E.2d at 892.

this tract of land (100) acres to have and to hold her natural life, at her death it is to revert to heirs of her body."[98] The granting clause contained no words of inheritance, raising the implication that it conveyed a life estate.[99] The habendum stated: "To Have and To Hold all and singular the premises before mentioned unto the said Allie Walker her Heirs and Assigns forever."[100]

The touchstone principle in the construction of deeds traditionally has been to give effect to the intent of the grantor when it is ascertainable.[101] The various rules of construction are designed to achieve this result when the intention is not readily apparent. The court in *Wayburn,* however, decided that because the granting clause did not contain words of inheritance, resort had to be made to the habendum to ascertain the exact nature of the estate conveyed.[102] The habendum contained the traditional words of inheritance, "heirs and assigns forever," used for conveying an estate in fee simple absolute. The conclusion of the court, therefore, was that the property had been conveyed in fee simple absolute.

The appellant urged the court to consider the deed as a whole and look to the words in the premises for the intent of the grantor. The court ruled that although the premises of the deed might actually reflect the intent of the grantor,[103] it would utilize the established rule of construction that the habendum should be resorted to if the granting clause conveys an incomplete estate

98. *Id.* at 41, 239 S.E.2d at 891-92.

99. *Id.* at 42, 239 S.E.2d at 892 (citing Chavis v. Chavis, 57 S.C. 173, 35 S.E. 507 (1900); McMichael v. McMichael, 51 S.C. 555, 29 S.E. 403 (1898)).

100. *Id.*

101. *Id.*; *accord,* Rhodes v. Black, 170 S.C. 193, 170 S.E. 158 (1933). The court in *Rhodes* stated:

> The paramount and cardinal rule of construction of a deed is to ascertain the intention of the grantor as expressed by him in the deed and then to give effect to that intention if it can be done without violating an established rule of law.
>
> . . . .
>
> " . . . It is not for the Courts to make contracts by construction, but it is their duty to carry out the expressed intention of the parties if it can be done consistently with sound and settled legal principles. . . .
>
> 'When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to. The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law.' " *Pope v. Patterson,* 78 S.C. 334, 58 S.E. 945, 947.

*Id.* at 200-01, 170 S.E. at 161.

102. 270 S.C. at 42, 239 S.E.2d at 892.

103. *Id.* at 43, 239 S.E.2d at 892.

and presume the result to be that intended by the grantor. It quoted its earlier opinion in *Creswell v. Bank of Greenwood:*[104]

> "The conclusion reached by the lower court, which we affirm, with respect to the construction of the deed, is inevitable under our fixed rules of law which leave no room for speculation upon the intent of the grantor. The [intent] is to be achieved in the construction of the writings, if ascertainable therefrom and consistent with applicable legal principles; but intention is unavailing to avoid the [legal principles] where words of settled legal import are used and contrary principles are encountered. In such cases the intention will be conclusively presumed to accord with the established meaning of the words and to conform with the fixed rules of construction. Otherwise, there would be little stability of land titles."[105]

The last sentence of the quote reveals much about the current posture of the supreme court on deed construction. Where the provisions of a deed are inconsistent, the "fixed rules of construction" will be applied, even if the result differs from the apparent intent of the grantor. Stability in land titles is an important concern for the court, and the inflexible application of traditional principles will do the most to ensure stability. The court in *Wayburn* emphasized that the deed in question was very similar to the deed construed in *Zobel v. Little.*[106] *In Zobel,* the granting clause in the deed contained no words of inheritance, and the habendum contained the "heirs and assigns" language. Between the two clauses, however, was the statement: "Said property is conveyed to Edna Hyatt Zobel and is her property during her natural life. At her death it is to become the property of her heirs then living."[107] The court found *Zobel* and *Wayburn* to be essentially the same, despite appellant's argument that *Zobel* was not applicable because the decision there finding fee simple absolute in the grantee was dicta.[108]

The court did not cite *Barrett & Co. v. Still,*[109] in which the court construed a similar deed to convey a life estate to the grantee by focusing upon the apparent intent of the grantor. The deed

104. 210 S.C. 47, 41 S.E.2d 393 (1947).

105. 270 S.C. at 43, 239 S.E.2d at 892-93.

106. 120 S.C. 212, 113 S.E. 68 (1922).

107. *Id.* at 213, 113 S.E. at 68.

108. Brief of Appellant at 22. Appellant contended that *Zobel* was actually controlled by the Rule in Shelley's case. *Id.*

109. 102 S.C. 19, 86 S.E. 204 (1915).

in *Still* contained a granting clause with no words of inheritance and a habendum and warranty with the words "heirs and assigns."[110] Intervening, as in *Zobel,* was the language "to H.D. Still for life, then to M.M. Still, her heirs and assigns forever."[111] *Zobel* and *Still* appear to be irreconcilable, but the court's reliance in *Wayburn* on *Zobel* is another indication of its preference for "fixed rules of construction" when provisions in deeds are inconsistent.

*Thomas W. Traxler*

110. *Id.* at 51, 86 S.E. at 206.
111. *Id.*