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PROPERTY

I. JOINT BANK ACCOUNTS—INTER VIVOS OWNERSHIP

In *Clinkscales v. Clinkscales*,[1] the South Carolina Supreme Court made its first determination of the *inter vivos* interests of persons named as co-owners of a joint bank account. The court held that when a husband deposits his own funds in a bank account and subsequently converts the account to a joint account in his own name and that of his wife, he is presumed to have made a gift of one-half of the funds so deposited while both are living.[2] This ruling places South Carolina in a small minority of the American jurisdictions that have ruled on this issue[3] and raises questions concerning the ultimate effects of such a decision.

The parties in *Clinkscales* were married in June 1978.[4] During the first week of their marriage, the husband opened a checking account and, within a few days, converted it to a joint account in the names of himself and his wife. Differences soon arose between the couple, and, within three weeks of their marriage, the wife left her husband, withdrawing all funds from the joint account.[5] The husband then initiated an action in family court seeking a legal separation and an order for the return of the funds.[6] The trial judge found that the husband had intended to make a gift of the funds in the account[7] and denied the husband's petition for their return. On appeal, the supreme court held that the husband's donative intent extended to only one-half of the funds and directed that the other half be returned to the husband.[8]

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1. ___ S.C. ___, 270 S.E.2d 715 (1980).
2. *Id.* at ___, 270 S.E.2d at 716.
3. See notes 22-24 and accompanying text *infra*.
4. Brief of Appellant at 7.
5. *Id.* at 8.
6. Appellant sought return of $10,321.18, which was the total of the only two checks written against the account by the wife—one in the amount of $781.19 to satisfy her indebtedness on an automobile, and the other in the amount of $9,539.99 to close out the joint account. *Id.*
7. Record at 129-30.
8. ___ S.C. at ___, 270 S.E.2d at 716.

As a general rule, when money belonging to one person is deposited in an account in the names of the depositor and another, the intent of the depositor is the controlling element in the determination of the relationship created between the parties and the interest of the noncontributing party in the account funds.[9] Previous South Carolina cases have limited the nondepositing party's interest to the right of survivorship[10] and have predicated the transfer of this interest from the depositor to the nondepositor on theories of contract and gift.[11] Under the contract theory, the nondepositing party acquires an interest in the funds through the written deposit agreement between the bank and the parties named on the account and thus stands in the shoes of a third party beneficiary to a contract.[12] Under the gift theory, courts look to the intent of the depositor: if the intent to make a gift is found, that intent is given effect.[13] When applying

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9. Austin v. Summers, 237 S.C. 613, 620, 118 S.E.2d 684, 687 (1961). *Accord,* Murray v. Gadsden, 197 F.2d 194 (D.C. Cir. 1952); O'Hair v. O'Hair, 109 Ariz. 236, 508 P.2d 66 (1973); Flynn v. Hinsley, 142 Conn. 257, 113 A.2d 351 (1955); Maier v. Bean, 189 So. 2d 380 (Fla. Dist. Ct. App. 1966); *In re* Estate of Lewis, 97 Idaho 299, 543 P.2d 852 (1975); *In re* Estate of Hochner, 31 Ill. App. 3d 523, 334 N.E.2d 802 (1975); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943); Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954); *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); *In re* Wszolek Estate, 112 N.H. 310, 295 A.2d 444 (1972); Browne v. Sieg, 55 N.M. 447, 234 P.2d 1045 (1951); Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940); Kelly v. Beers, 194 N.Y. 49, 86 N.E. 980 (1909); Hall v. Hall, 235 N.C. 711, 71 S.E.2d 471 (1952); Held v. Myers, 48 Ohio App. 131, 192 N.E. 540 (1934); *In re* Estate of Chiara, 467 Pa. 586, 359 A.2d 756 (1976); Slepkow v. Robinson, 113 R.I. 550, 324 A.2d 321 (1974); Christensen v. Ogden State Bank, 75 Utah 478, 286 P. 638 (1930); Tucker v. Merchants Bank, 135 Vt. 597, 382 A.2d 212 (1977); Wrenn v. Daniels, 200 Va. 419, 106 S.E.2d 126 (1958); Pfeifer v. Pfeifer, 1 Wis. 2d 609, 85 N.W.2d 370 (1957).

10. *See, e.g.,* Johnson v. Herrin, 272 S.C. 224, 250 S.E.2d 334 (1978); Gilford v. South Carolina Nat'l Bank, 257 S.C. 374, 186 S.E.2d 258 (1972); Austin v. Summers, 237 S.C. 613, 118 S.E.2d 684 (1961); Hawkins v. Thackston, 224 S.C. 445, 79 S.E.2d 714 (1954).

11. The court has used both theories at various times and has avoided the express adoption of one over the other. *See* Johnson v. Herrin, 272 S.C. 224, 250 S.E.2d 334 (1978)(gift theory); Gilford v. South Carolina Nat'l Bank, 257 S.C. 374, 186 S.E.2d 258 (1972) (contract theory); Austin v. Summers, 237 S.C. 613, 118 S.E.2d 684 (1961)(gift and contract theories); Hawkins v. Thackston, 224 S.C. 445, 79 S.E.2d 714 (1954)(contract theory). The only reasonable explanation for this vacillation is that the theory to be applied in a particular case will depend upon the unique facts and circumstances surrounding the transfer of interest to the nondepositing party. *See* 272 S.C. at 228, 250 S.E.2d at 336.

12. Hawkins v. Thackston, 224 S.C. at 451, 79 S.E.2d at 717.

13. *See, e.g.,* White v. Bank of America Nat'l Trust & Sav. Ass'n, 53 Cal. App. 2d 831, 128 P.2d 600 (1942); Chase Fed. Sav. & Loan Ass'n v. Sullivan, 127 So. 2d 112 (Fla.

the gift theory, the court has relied upon section 34-11-10 of the South Carolina Code[14] to determine that the establishment of a joint bank account in conformity with statutory provisions gives rise to a rebuttable presumption that the parties to the account intended the funds to be paid to the survivor as owner.[15]

In *Clinkscales,* the court extended the foregoing presumption to include the intent to create *inter vivos* rights in the nondepositing party when the parties are husband and wife and explained that "[s]ince the statute [section 34-11-10] makes no distinction as to those 'living or not,' the presumption concerning intent equally applies prior to the death of one of the individuals."[16] With the requisite intent thus established, the court concluded that, under the gift theory, the husband's deposit of funds effected an *inter vivos* transfer to his wife. The holding in *Clinkscales,* that the wife received a present interest in the funds deposited in the joint account by her husband, is consistent with results reached in a number of other jurisdictions.[17]

After finding a joint ownership of funds in a joint account,

1960); Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); *In re* Estate of Fanning, 263 Ind. 414, 333 N.E.2d 80 (1975); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943); Corkum v. Salvation Army, 340 Mass. 165, 162 N.E.2d 778 (1959); Wantuck v. United Sav. & Loan Ass'n, 461 S.W.2d 692 (Mo. 1971); Burns v. Nolette, 83 N.H. 489, 144 A. 848 (1929); Cziger v. Berstein, 33 N.J. Super. 404, 110 A.2d 560 (1954); Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940); *In re* Estate of Voegeli, 108 Ohio App. 371, 161 N.E.2d 778 (1959), *appeal dismissed,* 169 Ohio St. 237, 158 N.E.2d 893 (1959); Beach v. Holland, 172 Or. 396, 142 P.2d 990 (1943); Pfeifer v. Pfeifer, 1 Wis. 2d 609, 85 N.W.2d 370 (1957). The traditional gift elements of completed delivery and relinquishment of control are not strictly required for a finding of gift in South Carolina, presumably because such events are inconsistent with joint ownership of funds. *See* Austin v. Summers, 237 S.C. at 622, 118 S.E.2d at 688.

14. The statute provides in pertinent part:

> When any deposit has been made in any bank . . . transacting business in this State in the names of two persons, payable to either or payable to either or the survivor, such deposit or any part thereof may be paid to either of such persons, whether the other be living or not and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge for any and all payments so made.

S.C. CODE ANN. § 34-11-10 (1976).

15. ___ S.C. at ___, 270 S.E.2d at 716.

16. *Id.*

17. *Id.* Other jurisdictions have reached similar results. *See, e.g.,* Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977); Teasley v. Blankenberg, 298 So. 2d 431 (Fla. Dist. Ct. App. 1974); *In re* Estate of McGill, 54 Ill. App. 3d 533, 371 N.E.2d 6 (1977); *In re* Estate of Fanning, 263 Ind. 414, 333 N.E.2d 80 (1975); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943); *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); *In re* Estate of Keeney, 465 Pa. 45, 348 A.2d 108 (1975).

the South Carolina Supreme Court addressed the troublesome question of the extent of the *inter vivos* rights of depositor and nondepositor. Although a number of other courts have held that a nondepositor has a present interest in a joint bank account,[18] no clear majority rule has emerged regarding the extent of that interest.

The question usually arises, as it did in *Clinkscales,* in connection with a determination of the effect of a withdrawal of all or part of the funds by one party. Because most courts hold that the funds are held jointly with a right of survivorship,[19] joint accounts normally are viewed as joint tenancies with rights of survivorship. Nevertheless, treatment of the *inter vivos* rights of the joint tenants varies widely. Some states hold that either joint tenant has a right to withdraw all of the funds with no liability to the other party.[20] Other states have ruled that the joint tenancy follows the withdrawn funds, so that both parties retain their rights of survivorship and can trace those rights into property purchased by the withdrawing party.[21] Two states regard the joint account as a severable joint tenancy, so that a withdrawal of funds by one party constitutes a severance of the joint tenancy.[22] Upon withdrawal by one party, the parties to the account become tenants in common, with each entitled to a moiety (one-half) of the original funds,[23] and the right of survivorship is extinguished. Only New York has carried this reasoning to its logical conclusion with an express ruling that a joint tenant to a bank account who withdraws a sum in excess of his moiety is liable to the other tenant for the excess.[24]

In *Clinkscales,* the South Carolina Supreme Court avoided

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18. *See* note 17 *supra.*

19. See notes 17 & 18 and accompanying text *supra.*

20. In these states, the withdrawal is deemed a dissipation of the joint property. As a result, the co-ownership is not a true joint tenancy. *See generally* Staples v. Berry, 110 Me. 32, 85 A. 303 (1912); Sody v. Sody, 32 Md. App. 644, 363 A.2d 568 (1976); Kranjcec v. Belinak, 114 Mont. 26, 132 P.2d 150 (1942); *In re* Whiteside's Estate, 159 Neb. 362, 67 N.W.2d 141 (1954); Wambeke v. Hopkin, 372 P.2d 470 (Wyo. 1962).

21. *See* American Trust Co. v. Fitzmaurice, 131 Cal. App. 2d 382, 280 P.2d 545 (1955); Ambruster v. Ambruster, 326 Mo. 51, 31 S.W.2d 28 (1930); State v. Gralewski's Estate, 176 Or. 448, 159 P.2d 211 (1945).

22. Goc v. Goc, 134 N.J. Eq. 61, 33 A.2d 870 (1943); Stanger v. Epler, 382 Pa. 411, 115 A.2d 197 (1955).

23. Goc v. Goc, 134 N.J. Eq. 61, 33 A.2d 870 (1943); Bricker v. Krimer, 13 N.Y.2d 22, 191 N.E.2d 795, 241 N.Y.S.2d 413 (1963).

24. *E.g.,* Bricker v. Krimer, 13 N.Y.2d at 27, 191 N.E.2d at 797, 241 N.Y.S.2d at 416.

determining the extent of the parties' *inter vivos* rights in their joint account on the basis of joint tenancy. Instead, it relied on the presumption, recognized in a minority of states, that a husband who deposits his own funds in a bank in his name and that of his wife intends to make a gift to her of one-half of the funds deposited in the account.[25] The adoption of this presumption in *Clinkscales*[26] provided a convenient means by which the husband could recover at least a portion of the funds that he had deposited in the joint account, but it left undetermined the extent of *inter vivos* rights of joint account owners who are not husband and wife.

Although the court has not yet ruled on the precise question of the *inter vivos* rights of depositing and nondepositing parties to funds in joint accounts, South Carolina may follow the small group of states that regards joint accounts as severable joint tenancies with rights of survivorship.[27] In *Austin v. Summers*,[28] a 1961 decision, the South Carolina Supreme Court considered the *inter vivos* rights of two co-owners of a joint account, neither of whom was the depositing party,[29] and held that when "both parties have substantial interests in a joint account, . . . neither can appropriate the whole without liability to the other."[30] Referring

25. *Id.* (citing 41 C.J.S. *Husband & Wife* § 153A (1944)). States that apply a formal husband-and-wife gift presumption are Florida, Illinois, Nebraska, New Jersey, and New York. *See* Williams v. Williams, 177 So. 2d 865 (Fla. Dist. Ct. App. 1965)(gift of the whole); Estate of Fitterer v. Fitterer, 27 Ill. App. 2d 264, 169 N.E.2d 578 (1960)(gift of the whole); Scriven v. Scriven, 153 Neb. 655, 45 N.W.2d 760 (1951)(gift of the whole); Goc v. Goc, 134 N.J. Eq. 61, 33 A.2d 870 (1943)(gift of one-half); Lambert v. Lambert, 42 A.D.2d 903, 347 N.Y.S.2d 463 (1973)(gift of one-half); Susan W. v. Martin W., 89 Misc. 2d 681, 392 N.Y.S.2d 957 (Sup. Ct. 1977)(gift of one-half).

26. South Carolina courts previously have applied a presumption of a gift to conveyances of property from a husband to his wife, but donative intent has not been limited to only half of whatever property was placed in the wife's name. *See* Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965). The supreme court has included language in dictum that may be viewed as a precursor to the express adoption of the new presumption in *Clinkscales*. *See* Langston v. Langston, 250 S.C. 363, 375, 157 S.E.2d 858, 864 (1967).

27. See note 22 *supra*.

28. 237 S.C. 613, 118 S.E.2d 684 (1961).

29. The funds in the joint account in *Austin* were deposited by the original owner in the names of himself, his wife, and his daughter. After the original owner's death, the daughter withdrew all of the funds from the account. After the death of the wife, the administrator of the wife's estate brought suit to recover the funds. The court found that the wife and daughter were joint owners with right of survivorship upon the death of the original owner. *Id.* at 622, 118 S.E.2d at 688.

30. *Id.* at 623, 118 S.E.2d at 688.

to the co-owners as joint tenants, the court stated that either party was entitled to withdraw one-half of the funds without becoming liable to the other and that either could terminate the joint tenancy by withdrawing half of the funds.[31]

In *Clinkscales,* the court ruled that a joint account established with the funds of a party to the account raises the presumption of an intent on the part of the depositor to transfer a present interest and a right of survivorship to the nondepositing party.[32] Therefore, absent evidence sufficient to show a contrary intent by the depositor, both the depositor and the nondepositor should meet the substantial interest standard of *Austin.*[33] Consequently, each would be entitled to half the funds, each would be able to sever the joint tenancy and destroy the right of survivorship by withdrawing his half, and each would be liable to the other for sums withdrawn in excess thereof. It should be noted that, although the court avoided an express adoption of the joint tenancy analysis in *Clinkscales,* it reached the same result by employing a presumption that the donative intent of the husband extended to only one-half of the funds deposited[34] and cited *Austin* for the result.[35] This suggests that the court probably will use the joint tenancy analysis in future cases concerning *inter vivos* rights of joint account owners who are not husband and wife.

The probability that the South Carolina Supreme Court will adopt the joint tenancy analysis raises serious questions regarding the desirability of establishing joint accounts in which all the funds are deposited by one party. Opening such an account then would create a true joint tenancy with the depositor thereby divesting himself of exclusive control over the funds deposited. Once the deposit is made, the depositor would have no greater right to the entire amount than would the nondepositing party.[36] Yet, depositors often establish joint accounts for purposes other than the transfer of present ownership to the nondepositing

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31. *Id.* at 623, 118 S.E.2d at 689.

32. ___ S.C. at ___, 270 S.E.2d at 716.

33. See notes 27-30 and accompanying text *supra.*

34. See note 25 and accompanying text *supra.*

35. ___ S.C. at ___, 270 S.E.2d at 716.

36. In the past, the depositing party has had a preemptive right to the funds, which allowed him to terminate the joint account by withdrawing all the funds or by changing the deposit agreement. *See* Austin v. Summers, 237 S.C. at 623, 118 S.E.2d at 683.

party. If the depositor's primary purpose is to give a right of survivorship to the nondepositor[37] or simply to give the nondepositor access to the funds for the convenience of the depositor,[38] he can ensure the accomplishment of his purpose only by making an express and unambiguous indication of his intent at the time the account is established. Furthermore, a prospective depositor in a joint account that is considered a joint tenancy should recognize that creditors of a nondepositing party may be able to reach that party's share of the funds and should be aware of the possible tax consequences of *Clinkscales*.[39]

II. PROTECTIONS TO PURCHASERS IN HOME SALES

On three separate occasions in 1980, the South Carolina Supreme Court either expressly or impliedly approved and implemented its statement of policy in *Lane v. Trenholm Building Co.*[40] that "the innocent purchaser should be protected from latent defects"[41] in transactions for purchases of homes. Although the statement in *Lane* pertained to the sale of new homes by vendors or vendor-builders, it reflects a public policy that South

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37. *E.g.*, Johnson v. Herrin, 272 S.C. 224, 250 S.E.2d 334 (1978) (account established for primary purpose of facilitating administration of testatrix' estate). Other jurisdictions have recognized a similar purpose. *See, e.g.*, Bachmann v. Reardon, 138 Conn. 665, 88 A.2d 391 (1952); Constance v. Constance, 366 So. 2d 804 (Fla. Dist. Ct. App. 1979).

38. Convenience accounts most often are established by a depositor who is unable to travel to a bank, so that the nondepositing party may make deposits and withdrawals for the depositor. *See, e.g.*, Murray v. Gadsden, 197 F.2d 194 (D.C. Cir. 1952); Lawrence v. Lawrence, 246 Ark. 230, 437 S.W.2d 457 (1969); Josephson v. Kuhner, 139 So. 2d 440 (Fla. Dist. Ct. App. 1962); Estate of Hayes v. Blake, 131 Ill. App. 2d 563, 268 N.E.2d 501 (1971); Miles v. Caples, 362 Mass. 107, 286 N.E.2d 231 (1972); Ison v. Ison, 410 S.W.2d 65 (Mo. 1967); Guilinger v. Guilinger, 433 P.2d 946 (Okla. 1967).

39. Before *Clinkscales*, money deposited in a joint bank account by the donor was not considered a taxable gift until the funds were withdrawn by the donee, because the gift was considered revocable until that time. Treas. Reg. § 25.2511-1(h)(4) (1958). The presumption established in *Clinkscales* that a gift of one-half of the funds is made at the time of deposit could result in a determination by the Internal Revenue Service that a *taxable* gift is made at that time, requiring the filing of a gift tax return under I.R.C. § 6019(a) if the gift exceeds the $3,000 annual exclusion provided for in I.R.C. § 2503(b). This presumption of gift could also have serious effects on the gift and estate tax marital deductions, *see* I.R.C. §§ 2056 and 2523, and on the amount included in gross and taxable estates. *See generally* I.R.C. §§ 2033 and 2053. For further discussion of possible problems concerning joint tenancy bank accounts, *see* Note, *Joint Tenancy Bank Accounts Inter Vivos Rights*, 23 BAYLOR L. REV. 141 (1971).

40. 267 S.C. 497, 229 S.E.2d 728 (1976). For a discussion of this case, see *Property, Annual Survey of South Carolina Law*, 29 S.C.L. REV. 181 (1977).

41. 267 S.C. at 503, 229 S.E.2d at 731.

Carolina courts recognize as applicable to all home sales. As a result, this basic tenet protecting the purchaser has been applied to sales by owner-occupants as well as by vendor-builders, and the supreme court has continued to expand the umbrella of protections afforded to purchasers in cases where latent defects are discovered after purchase.

A. Trend Away From Caveat Emptor Approved and Continued

In *MacFarlane v. Manly*,[42] the supreme court expressly reaffirmed its intention to continue the trend of the law away from the doctrine of *caveat emptor* and to hold the seller to a strict accountability in the sale of residential real estate. *MacFarlane* was an action for fraud and deceit brought by home purchasers against the sellers based on the sellers' failure to disclose termite and water damage. MacFarlane, the buyer, agreed to accept the property "as is,"[43] and, because he was out of town during a large part of the transaction, he relied upon the sellers' real estate agent to have the premises inspected for termite infestation.[44] The exterminator hired by the sellers' agent certified that the property had been "inspected and found to be free of any active termite infestation,"[45] but did not disclose severe termite damage from a prior infestation.[46] Not only were the sellers aware of this, but it was "inescapable" that the exterminators had observed the damage but had failed to mention it in their report.[47] Their letter stated only that no active infestation had been observed and that the house was subject to undisclosed

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42. 274 S.C. 392, 264 S.E.2d 838 (1980).

43. Record at 71.

44. *Id.* at 69.

45. ___ S.C. at ___, 264 S.E.2d at 839. The text of the letter read as follows:

> This is to certify that the property . . . has been inspected and found to be free and clear of any active termite infestation.
>
> This report is not to be construed as a guarantee, but rather is the opinion of a qualified inspector and the building is subject to undisclosed infestation and/or damage.

Id.

46. Plaintiffs alleged in their complaint that many of the sills and joists of the house were so damaged that they would have to be replaced, that a large portion of the subflooring was damaged, and that "a portion of the floor was being held in place and supported by six metal jacks." Record at 2.

47. 274 S.C. at 393, 264 S.E.2d at 839.

infestation or damage.[48]

The trial court granted summary judgment to the sellers, ruling that, because the exterminator was an agent of the buyers as a matter of law, his knowledge of the damage was imputed to the buyers and they could not be deceived regarding the condition of the house.[49] In addition, the trial court found that there was no fraud as a matter of law and that the "as is" clause in the sales contract operated to make applicable the doctrine of *caveat emptor,* which "generally exempts the [d]efendant from liability for defects in the premises existing at the time of conveyance . . . ."[50] The South Carolina Supreme Court reversed and remanded the case for a determination of whether the exterminator, who had been procured and directed by the sellers' real estate agent but who nominally was performing a service for the buyer, was acting as agent for buyer or seller.[51] Should it be ascertained that the exterminator was not the agent of the buyer, the court explained, the trier of fact could find for the buyer upon sufficient proof of the other elements of the cause of action for fraud and deceit.[52] Then, relying on the South Carolina rule that "the doctrine of *caveat emptor* does not apply in cases of fraud,"[53] the court stated that the "as is" clause in the MacFar-

48. *Id. See* note 45 *supra.*

49. 274 S.C. at 394, 264 S.E.2d at 840.

50. Record at 71.

51. 274 S.C. at 395, 264 S.E.2d at 840.

52. The nine elements required to be shown in order to recover for actual fraud are as follows: a representation; falsity of the representation; materiality of the representation; knowledge of the falsity or a reckless disregard of the truth or falsity of the representation; intent that the representation induce action by the hearer; the hearer's ignorance of the falsity; reliance upon the representation; justification for the reliance; and injury resulting from the reliance. Moorhead v. First Piedmont Bank & Trust Co., 273 S.C. 356, 359, 256 S.E.2d 414, 416 (1979)(citing O'Shields v. Southern Fountain Mobile Homes, 262 S.C. 276, 204 S.E.2d 50 (1974); Carter v. Boyd Constr. Co., 255 S.C. 274, 276, 178 S.E.2d 536, 539 (1971); Moye v. Wilson Motors, Inc., 254 S.C. 471, 473, 176 S.E.2d 147, 151 (1970)). The plaintiffs in *MacFarlane* claimed fraud on the basis of failure to disclose a material fact—the termite damage. Therefore, instead of showing a false representation among the elements listed above, they would be required at trial on the merits to show the seller's duty to disclose the fact in question and the failure to disclose. *See* Lawson v. Citizens & Southern Nat'l Bank, 259 S.C. 477, 480, 193 S.E.2d 124, 128 (1972). In a sale of property, if the seller is aware of a latent defect or hidden condition that is not discoverable on reasonable examination, it is his duty to disclose the defect. "[F]ailure to do so may be made the basis of a charge of fraud." *Id.* at 482, 193 S.E.2d at 127 (quoting 37 AM. JUR. 2D, *Fraud & Deceit* § 158 (1968)).

53. 274 S.C. at 395, 264 S.E.2d at 840 (quoting Lawson v. Citizens & Southern Nat'l Bank, 259 S.C. at 486, 193 S.E.2d at 129 (1972)). *See* Rutledge v. Dodenhoff, 254 S.C.

lane contract did not constitute an absolute defense.[54] The court noted with approval the "recent trend at the law . . . to hold the seller to a more strict accountability."[55]

Four years before *MacFarlane,* the South Carolina Supreme Court discussed at length the doctrine of *caveat emptor* in connection with the sale of houses. In *Lane v. Trenholm Building Co.,*[56] the court attacked the application of *caveat emptor* in home purchases in two ways. First, the court characterized the sale of a house as a "sale of a product, similar to the sale of personalty,"[57] because "the essence of the transaction is the sale of a house and not a transfer of a parcel of land."[58] By removing the transaction from the sphere of real property, the court placed it beyond the reach of *caveat emptor,* which is a principle of real property law.[59] The court also stated that the principle should not be applied because "the court in this State has consistently rejected *caveat emptor* and adopted the civil law rule of *caveat venditor* as part of the common law of South Carolina."[60] Stating that "[t]he law should not orphan the purchaser of a house . . . by the operation of the doctrine of *caveat emptor,*"[61] the court intimated that future decisions would continue to protect the purchaser in cases of latent defects in

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407, 175 S.E.2d 792 (1970); Frasher v. Cofer, 251 S.C. 112, 160 S.E.2d 560 (1968).

54. 274 S.C. at 395, 264 S.E.2d at 840.

55. *Id.* at 396, 264 S.E.2d at 840.

56. 267 S.C. at 497, 229 S.E.2d at 728.

57. *Id.* at 501, 229 S.E.2d at 730.

58. *Id.* (citing Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970)).

59. 254 S.C. at 412, 175 S.E.2d at 794. While finding an implied warranty in the sale of a house by a vendor, the court in *Lane* recognized that the application of *caveat venditor* to the sale in question might afford the purchaser more protection than he would have received had the sale of the house actually been a sale of goods, governed by the Uniform Commercial Code (UCC)(S.C. CODE ANN. §§ 36-2-101 to -803 (1976)). The court stated that under the UCC there might be no implied warranty because the seller may not have been a merchant as defined in § 36-2-104 and as required by § 36-2-314 for the existence of implied warranties in the sale of goods. This, however, was found to be of little consequence. Noting that the UCC was adopted in order to provide uniformity in multistate transactions, the court declared that the application of *caveat venditor* was appropriate in sales of homes because they are local transactions and "considerations of nationwide uniformity are of minimal concern." 267 S.C. at 504, 229 S.E.2d at 731.

60. 267 S.C. at 502, 229 S.E.2d at 730. The court cited and discussed the following early cases to support this proposition: Smith v. McCall, 12 S.C.L. (1 McCord) 220 (1821); Misroon & Timmons v. Waldo & Freeman, 11 S.C.L. (2 Nott & McC.) 76 (1819); Champreys v. Johnson, 4 S.C.L. (2 Brev.) 268 (1809); Timrod v. Shoolbred, 1 S.C.L. (1 Bay) 324 (1793).

61. 267 S.C. at 503, 229 S.E.2d at 731.

houses.[62] The decision in *MacFarlane* fulfilled the prophecy of *Lane* by extending protection to the buyer.

B. Seller Held Liable for Misrepresentations of Agent

The South Carolina Supreme Court continued the trend of providing protections to the "innocent purchaser"[63] of a house in *Byrn v. Walker*.[64] In *Byrn*, the court extended the reach of the purchaser's remedies for fraud and deceit by holding that a seller shares liability with his selling agent for the agent's misrepresentations, even if the misrepresentations are outside the scope of the agent's express authority and the seller is unaware of the agent's actions.[65]

The owner of a lakeside home signed a written listing agreement with a realtor who then arranged a sale to the buyer. While showing the house to the buyer, the agent represented to her that the realty company had sold the house before and was well acquainted with the property.[66] He then stated that the house had a particular type of heating system, when, in fact, there was no heating system at all. The agent further claimed that the building was structurally sound, although improper construction had rendered it unsafe and subject to eventual collapse, and misrepresented the condition of the swimming pool and the plumbing in the house.[67] The house was surrounded on three sides by water, with retaining walls constructed to prevent erosion of the land. These walls were represented as being in good condition but later were found to be leaning badly because of improper construction. All of these defects in the house and surrounding property were hidden and were not readily ascertainable by the buyer. The buyer purchased the property in reliance upon the representations made to her by the seller's agent.[68]

The buyer asserted fraud as a counterclaim against the

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62. Although the court based its decision in *Lane* on an implied warranty from a builder-vendor, the discussion of *caveat emptor* applies equally to other types of actions dealing with purchases of houses.

63. 267 S.C. at 503, 229 S.E.2d at 731.

64. ___ S.C. ___, 267 S.E.2d 601 (1980).

65. *Id.* at ___, 267 S.E.2d at 604.

66. *Id.* at ___, 267 S.E.2d at 602.

67. *Id.* at ___, 267 S.E.2d at 603.

68. *Id.* at ___, 267 S.E.2d at 604.

seller and a cross-claim against the agent in the seller's action for foreclosure on the buyer's mortgage. The trial court entered judgment for the seller on the foreclosure and denied the buyer any relief on her claims for fraud.[69] The ruling on the issue of fraud was based upon the trial judge's determination that the buyer was not justified in relying upon the agent's representations[70] and that no showing had been made of the agent's knowledge of their falsity. The buyer appealed that portion of the judgment concerning her claim of fraud.

The supreme court reversed the judgment on the issue of fraud, holding that, "[W]here, as here, the agent asserts special knowledge of the property and makes representations of facts, the truth of which are not reasonably ascertainable to the purchaser due to their latent nature, the purchaser can justifiably rely on those representations."[71] The court relied upon the rule of previous cases that, when representations are made in reckless disregard of the truth, a showing of actual knowledge is not required to establish fraudulent misrepresentation.[72] The court found that the record established reckless disregard on the part of the agent.[73]

Having determined that the agent was personally liable to the buyer for fraud and deceit in the sale of the house, the court then addressed the seller's contention that he should not be held liable for his agent's misrepresentation. The seller argued that the agent had been employed to sell the house under a written listing agreement and the misrepresentations made by the agent were outside the express authority given to him in that agreement.[74] The court rejected this argument, holding that, because the misrepresentations were made in the course of the agent's authorized sale of the house, the seller was responsible for the agent's acts under the general authority given in the written listing agreement.[75] Because the buyer of the house had no knowl-

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69. *Id.* at ___, 267 S.E.2d at 602.

70. *Id.* at ___, 267 S.E.2d at 603.

71. *Id.* at ___, 267 S.E.2d at 604.

72. *Id.* at ___, 267 S.E.2d at 603 (citing Gilbert v. Mid-South Mach. Co., 267 S.C. 211, 227 S.E.2d 189 (1976); Young v. Goodyear Serv. Stores, 244 S.C. 493, 137 S.E.2d 578 (1964)).

73. ___ S.C. at ___, 267 S.E.2d at 603.

74. Record at 10.

75. In so holding, the court relied upon 37 AM. JUR. 2D, *Fraud & Deceit* § 316

edge of the written listing agreement, the court, in determining the liability of the seller for his agent's misrepresentations, held that she was not bound by the agreement.[76]

Although the court in *Byrn* does not discuss the trend of the law toward greater protection of the purchaser, the case clearly is in keeping with the concept of *caveat venditor* discussed in *Lane*.[77] By establishing a rule that the seller is liable for his agent's misrepresentations even when they are outside the agent's express authority, the court, in effect, created a true case of *caveat venditor*—"Let the seller beware."[78] The resulting extension of the buyer's remedies is a further manifestation of the court's belief that "the innocent purchaser should be protected from latent defects."[79]

C. *Implied Warranty in Purchase of Home Extended to Subsequent Purchasers*

In *Terlinde v. Neely*,[80] the South Carolina Supreme Court expressly followed the lead of *Lane* and, for the third time in 1980, increased the protections available to home buyers. In *Terlinde*, the court held that subsequent purchasers of a home could pursue causes of action against the home builder in contract and tort for latent defects during a "reasonable period" af-

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(1968), which states:

> If the representations are made by the agent as a part of the negotiation for the purpose of bringing about the sale, and by means of this it is brought about, the conveyance made, and the proceeds of the sale received, this brings the case within the general rule that a principal is responsible for such acts of his agent as are done within the scope of his authority, whether authorized or not, except by the general authority to do the principal act.

Id. This is a reflection of the general policy that the principal will be held liable for any act done by his agent within the scope of the agent's apparent authority, even if directly contrary to the principal's instruction, unless the third person with whom the agent dealt knew that he was exceeding his express authority. Cook v. Canal Ins. Co., 245 S.C. 238, 241, 140 S.E.2d 166, 170 (1965)(citing Williams v. Philadelphia Life Ins. Co., 105 S.C. 305, 89 S.E. 675 (1916); 3 AM. JUR. 2d, *Agency* § 263 (1968)).

76. ___ S.C. at ___, 267 S.E.2d at 604.

77. 267 S.C. at 502, 229 S.E.2d at 730.

78. BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

79. 267 S.C. at 503, 229 S.E.2d at 731.

80. ___ S.C. ___, 271 S.E.2d 768 (1980). For a more complete discussion of the case, see *Contracts, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 33, 33-43 (1981). See also *Torts, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 159, 180 n.138 (1981).

ter construction of a dwelling.[81]

Plaintiffs in *Terlinde* were second purchasers of a house that had been constructed by defendant builders in 1972 and first sold in 1973. Shortly after the plaintiffs purchased the house in 1976, substantial settlement of the foundation occurred, resulting in extremely severe structural damage.[82] Inspection revealed that the footings of the house were built on fill dirt, and estimates of the cost of repairs ranged from over $5,000 to almost $23,000.[83]

The South Carolina Supreme Court ruled that plaintiffs could maintain an action against the builders for breach of implied warranties of merchantability and of suitability and fitness for intended purpose and for "negligence, recklessness, and wilfulness in the construction of the house."[84] In its continued effort to protect the innocent purchaser from latent defects, the court held that "an implied warranty for latent defects extends to subsequent home purchasers for a reasonable amount of time."[85]

What will be considered by the courts to be a "reasonable amount of time" remains to be seen. The court in *Terlinde* appears to base its requirement of "reasonable" time on the length of time it will take for latent defects to manifest themselves. The court warns against creating a set time limit, preferring to decide the matter on a case-by-case basis.[86]

The court also ruled that the buyers in *Terlinde* were not barred by lack of privity from an action against the builders in tort for negligence. Stating that subsequent buyers were within the class of consumers for which the home was constructed and that the builder owed a duty to those who foreseeably would use his product, the court held that privity between tortfeasor and injured party was not required.[87]

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81. ___ S.C. at ___, 271 S.E.2d at 770.

82. *Id.* at ___, 271 S.E.2d at 768.

83. *Id.* at ___, 271 S.E.2d at 769.

84. *Id.* at ___, 271 S.E.2d at 768.

85. *Id.* at ___, 271 S.E.2d at 770.

86. *Id.* at ___, 271 S.E.2d at 769.

87. *Id.* at ___, 271 S.E.2d at 770.

D. Conclusion

In *MacFarlane, Byrn,* and *Terlinde,* the South Carolina Supreme Court has demonstrated clearly its continued endorsement of the policy of protecting innocent purchasers in home sales.[88] It remains to be seen just how far the court will extend this policy. Current decisions raise the question of what protections will be left to the seller if the present trend continues.

The endorsement in *MacFarlane* of the trend away from *caveat emptor,*[89] considered in connection with *Lane*'s characterization of home sales as sales of personalty,[90] indicates that the court may be willing to provide purchasers of used homes with greater protections than those afforded to purchasers of either land or actual personalty. In purchases of land, the doctrine of *caveat emptor* remains applicable.[91] In the purchase of used goods in a noncommercial setting, there are few protections for buyers,[92] and sales "as is," which protect the seller, are common with personalty.[93]

The holding in *Byrn* that the seller is liable to the buyer for the misrepresentations of the seller's agent, even though they may be outside the scope of the agent's express authority, is consistent with the general principles of agency.[94] However, this provides little help for the individual homeowner who wishes to sell his home. By choosing to list the property with an agent, he assumes the risk of liability for the agent's misrepresentations.[95]

The extension of implied warranties to subsequent purchas-

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88. In *Lane,* the court noted with approval the South Carolina Legislature's positive actions in the promotion of consumer protection, through the codification of both the UCC and § 402A of the RESTATEMENT (SECOND) OF TORTS. 267 S.C. at 504 n.3, 229 S.E.2d at 731 n.3.

89. See note 55 and accompanying text *supra.*

90. See note 57 and accompanying text *supra.*

91. Rutledge v. Dodenhoff, 254 S.C. at 412, 175 S.E.2d at 794.

92. The sale of goods is governed by the UCC. S.C. CODE ANN. § 36-2-102 (1976). The implied warranties of § 36-2-314 do not apply to sales by one who is not a merchant of secondhand goods. S.C. CODE ANN. § 36-2-314, Official Comments 3 & 4 (1976). *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6 at 289 (1972).

93. *See* 6A A. CORBIN, CORBIN ON CONTRACTS § 1516 (1962).

94. See note 75 and accompanying text *supra.*

95. The only readily apparent protections available for the seller in such a case are the inclusion of a clause in the written listing agreement by which the agent would be obligated to indemnify the principal for damages incurred as a result of the agent's misconduct, or an action against the agent for breach of duty.

ers for a reasonable period of time in *Terlinde* places the vendor and the builder-vendor in an uncertain position, because the period of time required for latent defects to become apparent can vary widely from case to case.[96] Thus, a vendor or builder-vendor could be liable for defects which surface long after the original sale of the house.

The court's willingness to extend greater protections to purchasers is perhaps most justified in *Terlinde,* which was truly an instance of protecting an innocent purchaser from a vendor who was better equipped to bear the risk.[97] In cases like *MacFarlane* and *Byrn,* however, where both buyers and sellers are individual nonmerchant parties, mechanical application of the "innocent purchaser" language of *Lane* could work an injustice upon an innocent seller.

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96. See note 85 and accompanying text *supra.*
97. See notes 61 & 62 and accompanying text *supra.*