CHAPTER 5

Estates and Construction of Documents Creating Estates

**SECTION 27‑5‑10.** Tenure of lands in State.

The only tenure of lands in this State is that of free and common socage.

HISTORY: 1962 Code Section 57‑1; 1952 Code Section 57‑1; 1942 Code Section 8680; 1932 Code Section 8680; Civ. C. ‘22 Section 5202; Civ. C. ‘12 Section 3439; Civ. C. ‘02 Section 2353; G. S. 1761; R. S. 1872; 1712 (2) 413.

Library References

Property 8.

Westlaw Topic No. 315.

C.J.S. Property Sections 62 to 64.

RESEARCH REFERENCES

Forms

Am. Jur. Pl. & Pr. Forms Estates Section 1 , Introductory Comments.

LAW REVIEW AND JOURNAL COMMENTARIES

The Effect of a Conflict Between the Granting and Habendum Clauses in Deeds in South Carolina. 10 SC LQ 431.

**SECTION 27‑5‑20.** Rule in Shelley’s Case.

The rule of law known as the rule in Shelley’s Case is hereby abolished in the following particulars, to wit: When, by deed or will or by any instrument in writing, a remainder in lands, tenements, hereditaments or other real estate shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall take as purchasers in fee simple, by virtue of the remainder so limited to them. The provisions of this section shall not affect wills, deeds and other instruments in writing executed prior to October 1, 1924 or the construction of such wills, deeds and other instruments in writing.

HISTORY: 1962 Code Section 57‑2; 1952 Code Section 57‑2; 1942 Code Section 8802; 1932 Code Section 8802; 1924 (33) 1140.

Library References

Deeds 128.

Westlaw Topic No. 120.

C.J.S. Deeds Section 263.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 30.1, Rule in Shelley’s Case.

Restatement (3d) Property (Wills & Don. Trans.) Section 16.2, Rule in Shelley’s Case Not Recognized.

Restatement (3d) Property (Wills & Don. Trans.) Section 16.2 TD 4, Rule in Shelley’s Case Repudiated.

LAW REVIEW AND JOURNAL COMMENTARIES

The Fee Simple Conditional in South Carolina. 18 S.C. L. Rev. 476.

NOTES OF DECISIONS

In general 1

1. In general

No application to will executed before October 1, 1924. United States v 15,883.55 Acres of Land (1942, DC SC) 44 F Supp 544. Jarecky v Jarecky (1940) 194 SC 456, 9 SE2d 922. United States v 15,883.55 Acres of Land (1944, DC SC) 54 F Supp 849. Woodle v Tilghman (1959) 234 SC 123, 107 SE2d 4.

While it is true that prior to the adoption of this section, the rule in Shelley’s Case was still binding authority in South Carolina; however, when it appears that the words “heirs,” “heirs of the body,” or “issue” are so qualified by additional words in the will as to evince an intention that they are not to be taken as descriptive of an indefinite line of descent, but are used to indicate a new stock of inheritance, the rule in Shelley’s Case does not apply. Hydrick v. Greene (S.C. 1967) 249 S.C. 382, 154 S.E.2d 565.

No application to deed executed prior to that date. Smoak v. McClure (S.C. 1960) 236 S.C. 548, 115 S.E.2d 55.

The enactment of this section was prompted by the fact that the application of the rule frequently defeated the intention of the testator. Woodle v. Tilghman (S.C. 1959) 234 S.C. 123, 107 S.E.2d 4.

Cited in Green v. Green (S.C. 1947) 210 S.C. 391, 42 S.E.2d 884.

Applied in Blume v. Pearcy (S.C. 1944) 204 S.C. 409, 29 S.E.2d 673.

**SECTION 27‑5‑30.** Construction of terms “failure of issue” and the like.

Whenever in any deed or other instrument in writing, not testamentary, or in any will of a testator, an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body, issue or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but failure at the time of the death of such person.

HISTORY: 1962 Code Section 57‑3; 1952 Code Section 57‑3; 1942 Code Section 8871; 1932 Code Section 8871; Civ. C. ‘22 Section 5323; Civ. C. ‘12 Section 3551; Civ. C. ‘02 Section 2464; G. S. 1682; R. S. 1976; 1853 (12) 298.

Library References

Deeds 125.

Wills 11, 722, 723.

Westlaw Topic Nos. 120, 409.

C.J.S. Deeds Section 246.

C.J.S. Wills Sections 76 to 87, 381, 1614 to 1616.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 26.8, Meaning of “Death Without Issue”.

Restatement (3d) Property (Wills & Don. Trans.) Section 26.8 TD 6, Meaning of “Death Without Issue”.

LAW REVIEW AND JOURNAL COMMENTARIES

“The Creation of Estates by Implication,” 11 SC LQ 352 (1959).

The Effect of a Conflict Between the Granting and Habendum Clauses in Deeds in South Carolina. 10 SC LQ 431.

NOTES OF DECISIONS

In general 1

Devise with reversion to testator’s heirs if devisee dies without issue as creating defeasible fee 3

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1. In general

Section does not abolish rule in Shelley’s Case. Fields v Watson (1885) 23 SC 42. Bethea v Bethea (1897) 48 SC 440, 26 SE 716. Woodle v Tilghman (1959) 234 SC 123, 107 SE2d 4.

Section applies only to instruments taking effect since its date. Blum v Evans (1878) 10 SC 56. Graham v Moore (1880) 13 SC 115. Mendenhall v Mower (1881) 16 SC 303. Powers v Bullwinkle (1890) 33 SC 293, 11 SE 971. Selman v Robertson (1896) 46 SC 262, 24 SE 187. Bradford v Griffin (1894) 40 SC 468, 19 SE 76.

Cited in Murchison Nat. Bank v McInnis (1929) 153 SC 382, 150 SE 895. Mattison v Mattison (1903) 65 SC 345, 43 SE 874. Scarborough v. Scarborough (S.C. 1965) 246 S.C. 51, 142 S.E.2d 706.

Applied in Monk v. Geddes (S.C. 1930) 159 S.C. 86, 156 S.E. 175.

“Heirs” is not mentioned in this section in express terms, but the section clearly shows that it was intended to embrace words other than “heirs of the body,” “issue,” or “issue of the body.” Otherwise, it would not have said “or other equivalent words.” In fact, we are unable to conceive of any other equivalent words, except “heirs,” that would render necessary a resort to the provisions of this section in order to prevent a limitation from taking effect upon the death of a person on the ground that it was too remote. Owings v. Wood (S.C. 1916) 105 S.C. 176, 89 S.E. 667.

2. Limitation over on death of remainderman without issue as creating defeasible fee

A testator gave all of his real and personal property to his wife for life and after her death to be divided equally between their children, share and share alike, and provided in a following clause that, if any of the children should die and not leave any issue living, his or her share should be equally divided between the children “then living” or their issue. In construing such will in connection with this section, the children took a fee defeasible on their death at any time without issue living at the time of the death, since “then” means “at that time,” referring to a time specified, either past or future, and has no power itself to fix a time, but simply refers to a time already fixed. Bischoff v. Atlantic Realty Corp. (S.C. 1913) 95 S.C. 276, 78 S.E. 988.

3. Devise with reversion to testator’s heirs if devisee dies without issue as creating defeasible fee

Under a will devising land to a son and providing that if the son should die without issue, the land should revert back to the heirs of testator’s body, the son’s children took no estate, directly or by implication, and the son took a defeasible fee under this section which did not become indefeasible on the birth of his children. Drummond v. Drummond (S.C. 1928) 146 S.C. 194, 143 S.E. 818.

4. View that devise to one and “issues” of his body is not void for remoteness

Under this section a devise to one and “the lawful issues of his body,” and if he “should die without lawful issues,” then over, must be read as “without leaving lawful issues living at the time of his death,” and is not void for remoteness. Bethea v. Bethea (S.C. 1897) 48 S.C. 440, 26 S.E. 716. Wills 601(10)

5. Provision insufficient to create fee conditional

Under this section, a grant to a child, followed by a provision that if grantee dies without lawful heirs, the property must return to the grantor’s estate, was held not sufficient to create a fee conditional. Wilson v. Poston (S.C. 1922) 119 S.C. 67, 111 S.E. 873.

6. Provision sufficient to create fee conditional

In Mazyck v Vanderhorst (1828) 8 SC Eq 48, cited in Strother v Folk (1922) 123 SC 127, 115 SE 605, the devise was to A. and to the heirs of her body forever, but if she should die leaving no lawful heir or heirs of her body, then over. It was held that A. took a fee conditional, and that the limitation over was too remote as indicating an indefinite line of succession. Mazyck v Vanderhorst (1828) 8 SC Eq 48, cited in Strother v Folk (1922) 123 SC 127, 115 SE 605.

Where testator devised certain land to his wife for her life, and at her death to his daughter‑in‑law for and during her life, and, in case of her death without issue, then to certain named heirs, such devise was a conveyance of a fee conditional to such daughter‑in‑law by implication under this section, such daughter‑in‑law then having a son alive who has since died. Harkey v. Neville (S.C. 1904) 70 S.C. 125, 49 S.E. 218. Wills 602(3)

**SECTION 27‑5‑40.** Feoffment with livery of seizin shall not defeat remainder.

No estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seizin.

HISTORY: 1962 Code Section 57‑4; 1952 Code Section 57‑4; 1942 Code Section 8872; 1932 Code Section 8872; Civ. C. ‘22 Section 5324; Civ. C. ‘12 Section 3552; Civ. C. ‘02 Section 2465; R. S. 1977; 1883 (18) 430.

NOTES OF DECISIONS

In general 1

1. In general

Related cases, as to contingent remaindermen, see Hunt v Gower (1908) 80 SC 80, 61 SE 218; as to effect of deed in ordinary form, see Young v McNeill (1907) 78 SC 143, 59 SE 986; as to vacating deed of infant contingent remainderman after vesting of interest after majority, see Steele v Poe (1908) 79 SC 407, 60 SE 951.

Cited in Charleston & W. C. R. Co. v Reynolds (1904) 69 SC 581, 48 SE 476. Peoples Loan & Exchange Bank v Garlington (1899) 54 SC 413, 32 SE 513. Bowen v Humphreys (1884) 24 SC 452.

Under this section a life tenant cannot destroy contingent remainders, and there is no peril of destruction that requires a trustee to protect same. Spann v. Carson (S.C. 1923) 123 S.C. 371, 116 S.E. 427.

The court cannot extend this section beyond its plain meaning, thus, it can have no effect to defeat a right acquired by merger before its enactment. McCreary v. Coggeshall (S.C. 1906) 74 S.C. 42, 53 S.E. 978.

**SECTION 27‑5‑50.** Warranties by life tenants; collateral warranties.

All warranties which shall be made by any tenant for life of any lands, tenements or hereditaments descending or coming to any person in reversion or remainder shall be void and of no effect.

All collateral warranties which shall be made of any lands, tenements or hereditaments by any ancestor who has no estate of inheritance in possession in them shall be void against his heir.

HISTORY: 1962 Code Section 57‑5; 1952 Code Section 57‑5; 1942 Code Section 8801; 1932 Code Section 8801; Civ. C. ‘22 Section 5268; Civ. C. ‘12 Section 3498; Civ. C. ‘02 Section 2412; G. S. 1809; R. S. 1928; 1712 (2) 437.

**SECTION 27‑5‑60.** Feoffments made by person wrongfully in possession.

If any person after such entry as is mentioned in Section 15‑67‑430 into lands or tenements holden with force make a feoffment or other discontinuance to any person to have maintenance or to take away and defraud the possessor of his recovery in any wise and afterwards in an action thereof to be taken or pursued before magistrates by due inquiry thereof such feoffments and discontinuances are duly proved to be made for maintenance as aforesaid then such feoffments or other discontinuances shall be void, frustrate and of no effect.

HISTORY: 1962 Code Section 57‑6; 1952 Code Section 57‑6; 1942 Code Section 888; 1932 Code Section 888; Civ. P. ‘22 Section 836; Civ. C. ‘12 Section 4067; Civ. C. ‘02 Section 2966; G. S. 2293; R. S. 2426; 1712 (2) 444.

**SECTION 27‑5‑80.** Certain pension plans, annuity trusts, and the like of employers exempt from laws against perpetuities.

Pension, profit sharing, stock bonus and annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities or restraints on the power of alienation of title to property; but such trust may continue for such period of time as may be required by the provisions thereof to accomplish the purposes for which they are established.

HISTORY: 1962 Code Section 57‑7.1; 1960 (51) 1630.

CROSS REFERENCES

Business trusts not being affected by rule against perpetuities, see Section 33‑53‑30.

Retirement systems, generally, see Section 9‑1‑10 et seq.

Uniform Statutory Rule Against Perpetuities, see Section 27‑6‑10 et seq., and in particular see Section 27‑6‑50.

Library References

Perpetuities 4(15.1).

Westlaw Topic No. 298.

C.J.S. Perpetuities Sections 2, 12, 40.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 342, The Rule Against Remoteness of Vesting.

**SECTION 27‑5‑90.** Effect of descent cast.

The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

HISTORY: 1962 Code Section 57‑8; 1952 Code Section 57‑8; 1942 Code Section 383; 1932 Code Section 383; Civ. P. ‘22 Section 326; Civ. P. ‘12 Section 132; Civ. P. ‘02 Section 107; 1870 (14) Section 110.

NOTES OF DECISIONS

In general 1

1. In general

The common‑law doctrine that the transmitted possession of the heirs at law is presumed to be rightful is abrogated by the enactment of this section. Powers v Rawles (1922) 119 SC 134, 112 SE 78. Geiger v Kaigler (1881) 15 SC 262. Powers v Rawles (1922) 119 SC 134, 112 SE 78.

This section permits uniting possession of heirs to that of their ancestors. Duren v Kee (1887) 26 SC 219, 2 SE 4. Burnett v Crawford (1897) 50 SC 161, 27 SE 645. Turpin v Sudduth (1898) 53 SC 295, 31 SE 245. Epperson v Stansill (1902) 64 SC 485, 42 SE 426. Kilgore v Kirkland (1904) 69 SC 78, 48 SE 44.

It really does not conflict with the common‑law doctrine that the possession of the ancestor and heir, which are really the same, may be united in making out title under the statute of limitations, but provides that “the right” shall remain against the heir, precisely as it existed against the ancestor before his death. Duren v Kee (1887) 26 SC 219, 2 SE 4. Except where possession of ancestor is interrupted or ended. Congdon v Morgan (1881) 14 SC 587. See also, Johnson v Cobb (1888) 29 SC 372, 7 SE 601.

In action involving validity of father’s deed to sons as against validity of father’s subsequent deed to third party, in which there was no issue of adverse possession, refusal to charge that on death of third party his possession passed instantly to defendants as his heirs at law, whether they were actually and physically on the land or not, was held not error in view of instruction that when two parties are in constructive possession of land, he who had the oldest possession and the best title must prevail in view of this section. Powers v. Rawles (S.C. 1922) 119 S.C. 134, 112 S.E. 78. Trial 260(5)

At common law, the possession of the heir was placed higher than that of the ancestor, who, being a mere trespasser, could be evicted by mere entry. But when the possession of the trespasser was transmitted to the heir, the owner was driven to his action of ejectment, for the law presumed that the possession which was transmitted from ancestor to heir was a rightful possession until the contrary was shown. Therefore, the mere entry of him who had the right would not evict the heir. Duren v. Kee (S.C. 1887) 26 S.C. 219, 2 S.E. 4.

**SECTION 27‑5‑100.** Right of entry of lawful owner or heirs against heirs of disseizor.

The dying of any disseizor seized of or in any lands, tenements or other hereditaments, having no right or title therein, shall not be taken or deemed any such descent as to take away the entry of any such person or persons, or their heirs, as, at the time of such descent, had good and lawful title of entry into such lands, tenements or hereditaments unless such disseizor has had the peaceable possession of such lands, tenements or hereditaments for the space of ten years next after the disseizin therein by him committed, without entry or continual claim by or of such person or persons as had lawful title thereunto.

HISTORY: 1962 Code Section 57‑9; 1952 Code Section 57‑9; 1942 Code Section 877; 1932 Code Section 877; Civ. P. ‘22 Section 825; Civ. C. ‘12 Section 4063; Civ. C. ‘02 Section 2962; G. S. 2282; R. S. 2422; 1712 (2) 474.

Library References

Adverse Possession 40.

Descent and Distribution 11.

Forcible Entry and Detainer 1.

Westlaw Topic Nos. 124, 179, 20.

C.J.S. Adverse Possession Sections 201 to 204.

C.J.S. Descent and Distribution Sections 14 to 15, 18 to 19.

C.J.S. Forcible Entry and Detainer Sections 3 to 4.

**SECTION 27‑5‑110.** Entry on land.

No person shall make any entry into any lands and tenements but in case entry is given by law; and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner.

HISTORY: 1962 Code Section 57‑10; 1952 Code Section 57‑10; 1942 Code Section 885; 1932 Code Section 885; Civ. P. ‘22 Section 833; Civ. C. ‘12 Section 4064; Civ. C. ‘02 Section 2963; G. S. 2290; R. S. 2423; 1712 (2) 442.

Library References

Forcible Entry and Detainer 1.

Westlaw Topic No. 179.

C.J.S. Forcible Entry and Detainer Sections 3 to 4.

NOTES OF DECISIONS

In general 1

Multitude of people 3

Unlawful or forceable entry 2

1. In general

Cited in Brown v Southern R. Co. (1925) 136 SC 214, 131 SE 681. State v Speirin (1802) 3 SCL 119; State v Huntington (1813) 5 SCL 111.

One enjoying an easement is, under this section, entitled to enjoy it free from molestation just as if he held a fee simple. Vance v. Ferguson (S.C. 1915) 101 S.C. 125, 85 S.E. 241.

Possession of lands and tenements must be actual and not constructive in order to come under the provisions of this section. Burt v. State (S.C. 1814) 2 Tread. 489, 3 Brev. 413, 5 S.C.L. 413, 7 S.C.L. 489, 1814 WL 468.

2. Unlawful or forceable entry

Forcible entry under this section must be accompanied with circumstances tending to excite terror in the occupant and to prevent him from maintaining his rights. An entry which has no other force than such as is implied in every trespass is not within this section. Barbee v Winnsboro Granite Corp. (1939) 190 SC 245, 2 SE2d 737. Galloway v General Motors Acceptance Corp. (1939, CA4 SC) 106 F2d 466.

An entry of the defendant over the protest of the plaintiff on premises abandoned by the plaintiff’s tenant, made to remove furniture bought from the defendant by tenant but not paid for, constitutes an unlawful entry, even though there was no breach of the peace. Lark v Cooper Furniture Co. (1920) 114 SC 37, 102 SE 786. Lyda v Cooper (1933) 169 SC 451, 169 SE 236.

Under this section, one who enters and takes land from the possession of another is guilty of forcible entry and detainer if the entry is not given by law, even though he has legal title to the land, since this section protects possession and not title. State v Bates (1911) 87 SC 527, 70 SE 170. See also, Vance v Ferguson (1915) 101 SC 125, 85 SE 241.

Entry and burial in a cemetery lot containing the dead of another constitutes an unlawful entry under this section. Vance v. Ferguson (S.C. 1915) 101 S.C. 125, 85 S.E. 241.

The plaintiff does not have to have actual possession of a cemetery lot in order for there to be an unlawful entry into it by another, since the possession of the keeper of the cemetery is that of the plaintiff. Vance v. Ferguson (S.C. 1915) 101 S.C. 125, 85 S.E. 241.

3. Multitude of people

It has been held under this section that it is not actually necessary, in order to have an unlawful entry, that it be made by multitude. Any actual unlawful taking possession is such an entry. Burt v. State (S.C. 1814) 2 Tread. 489, 3 Brev. 413, 5 S.C.L. 413, 7 S.C.L. 489, 1814 WL 468.

**SECTION 27‑5‑120.** Posthumous child shall take under will or settlement.

A posthumous child shall take under any will or settlement as though born in the lifetime of the father and shall not be liable to be defeated on the ground that the remainder was contingent and did not vest at the instant that the prior estate terminated and that there was no trustee to preserve the contingent remainder.

HISTORY: Former 1976 Code Section 21‑1‑30 [1962 Code Section 19‑3; 1952 Code Section 19‑3; 1942 Code Section 8873; 1932 Code Section 8873; Civ. C. ‘22 Section 5325; Civ. C. ‘12 Section 3553; Civ. C. ‘02 Section 2466; G. S. 1846; R. S. 1978; 1712 (2) 542] redesignated 27‑5‑120 by 1986 Act No. 539, Section 2.

Library References

Wills 497(7).

Westlaw Topic No. 409.

C.J.S. Wills Sections 926 to 928, 932.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 26.1, Gifts Immediate in Form to a Class‑When Class Closes to After‑Conceived and After‑Adopted Persons.

**SECTION 27‑5‑130.** Deeds of real estate to pass entire estate; conveyance of fee simple absolute; construction of conflicting language.

(A) Every deed of real estate executed after December 31, 1993, passes to the grantee the entire interest of the grantor in the property described in the deed, unless provided to the contrary in the deed.

(B) Words of inheritance or succession are unnecessary to convey property in fee simple absolute.

(C) This section modifies the common law and only applies to deeds executed after December 31, 1993.

(D) In the event of a discrepancy between a deed and any addendum or attachment thereto where the words of inheritance or succession are contained in one of the documents, but not in all documents, or where conflicting language exists as to whether or not the grantor intended to convey a fee simple or a life estate interest in the real property, it is presumed rebuttable by clear and convincing evidence that the grantor intended to convey a fee simple absolute interest in the real property if he owned such an interest or his entire interest in the property if he did not own it in fee simple.

HISTORY: 1993 Act No. 51, Section 1.

Library References

Deeds 124(0.5), 124(1).

Westlaw Topic No. 120.

C.J.S. Deeds Section 245.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 24.2, Fee Simple Absolute; Absolute Ownership.

Restatement (3d) Property (Wills & Don. Trans.) Section 24.2 TD 6, Fee Simple Absolute; Absolute Ownership.