Cotenancies, Estates of in South Carolina

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A cotenancy is a tenancy that arises when two or more persons become seized of property in such a manner that they have an undivided possession, but several freeholds. One must be entitled to possession of the common property to be a cotenant and the ownership and right to possession must extend to the entire property. At common law there were four distinct estates of cotenancy: (1) joint tenancy; (2) tenancy by the entirety; (3) estates in coparcenary; (4) tenancy in common.

ESTATES IN COPARCENARY

An estate in coparcenary or parcellary arose at common law when, on the death of the owner of an estate of inheritance, it descended to two or more female heirs, in default of a male heir, and likewise...
when, by local custom, land descended to two or more male heirs. Generally in the United States there is no distinction today between this estate and the estate of tenancy in common. Although this estate is mentioned in the South Carolina Code of Laws, South Carolina appears to be in line with the majority in not recognizing it as this writer has been unable to find any cases where such an estate has been construed.

**TENANCY BY THE ENTIRETY**

Tenancy by the entirety is a form of concurrent ownership of husband and wife, which is based upon the common law concept that the husband and wife are one person. The estate can exist only if title to land is acquired jointly by a husband and wife. Each spouse is considered owner of the entire estate because of the common law concept of unity of husband and wife. The South Carolina Supreme Court in *Davis v. Davis* construed the Married Women’s Property Act as abolishing this estate.

**JOINT TENANCY**

**The Estate At Common Law**

At common law joint tenancy was an estate held by two or more persons jointly with equal rights to share in its enjoyment during their lives. It had as its distinguishing feature, the right of survivorship by virtue of which the entire estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance free and exempt from all charges made by his deceased cotenants. A joint tenancy could only be created by grant or devise and never by way of descent or other act of law. Creditors had no recourse against the decedent’s interest in the joint property. Dower did not attach.

The essential elements of a joint tenancy were and still are: (1) unity of interest, (2) unity of title, (3) unity of time, and (4) unity of possession. This means that the tenants must have one and the same interests; the interests must accrue by one and the same conveyance; they must commence at one and the same time; and the property must be held by one and the same undivided possession.

5. § 31-55 (1952).
Tenants are seized of the entire estate for the purposes of tenure and survivorship, but only a particular part or interest for the purpose of immediate alienation.

None but natural persons can take in joint tenancy.\(^\text{10}\)

**The Estate As Modified By Statute**

In 1791 the General Assembly enacted the following statute:\(^\text{11}\)

> When any person shall be, at the time of his death, seized or possessed of any estate in joint tenancy the same shall be adjudged to be severed by the death of the joint tenant and shall be distributable as if the same were a tenancy in common.

This statute is applicable, not only to legal interests, but to equitable ones as well,\(^\text{12}\) but does not apply to trustees.\(^\text{13}\) The purpose of this statute was to abolish the harsh survivorship rule which “in almost every instance defeats the intention”\(^\text{14}\) of the testator or grantor. Unfortunately the abolition was not complete and there remained limited areas which were not affected and the survivorship rule still applied. The Court in *Herbemont v. Thomas*,\(^\text{15}\) in construing this Act and earlier ones which have since disappeared from our statutes, stated that title by joint tenancy is well known to our laws. The Acts “simply regulate and modify its qualities in certain cases; in all of which they contemplate, as a prerequisite to their own operation, that the interest upon which they are to operate shall have actually vested.” (writer’s emphasis)

By applying the “vested” test of *Herbemont v. Thomas* it can be seen from the following limitations that the survivorship rule might still apply in certain areas:

1. **Contingent Remainders** — “A to B for life, remainder to C, and his heirs if he survives B, but if C does not survive B to D and E and their heirs.” What if C were to predecease B but D had died prior to the vesting of the remainder? Since D died before the vesting of the remainder would the survivorship rule apply as to his share?

2. **Executory Interests** — “A to B and his heirs but if B dies without children over to C and D and their heirs.” What if B died without children but C predeceased him? Would the Court construe C’s

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11. Act of 1791 (Code of Laws of South Carolina § 19-55 (1952).)
15. Cheves' Eq. 21 (S. C. 1839).
interest as having vested prior to the defeasance of B’s estate within the meaning of the term as used in Heremont v. Thomas.  

In addition to these possibilities, the Court has specifically held, or by way of dicta intimated, that survivorship would apply or the estate of the disqualified joint tenant would vest in the remaining joint tenants in the following cases:

1. A devise to two parties as joint tenants where one of the devisees predeceases the devisor.

2. A devise to two parties, one of whom did not exist.

3. A conveyance by the grantor to several grantees, one of whom was the grantor (a conveyance by a grantor to himself is void at common law).

It is apparent that in the areas outlined above, in spite of the statutory prohibition of the rule of survivorship as set forth in § 19-55 supra, the common law estate of joint tenancy with its attendant rule of *jus accrescendi* may very well be of importance in South Carolina. It is therefore necessary to consider what language is required to form an estate in joint tenancy.

**NECESSARY PHRASEOLOGY TO FORM THE ESTATE**

Joint tenancy was favored over the tenancy in common by the early common law because the latter estate tended to split up the feudal services and hence disorganize the feudal military system. With the passing of the feudal period and the accompanying social need for such an estate there was a gradual trend of judicial sympathy toward the estate of tenancy in common and away from that of joint tenancy with its harsh survivorship rule.

*Heremont v. Thomas*, supra, laid down the rule that joint tenancy will be admitted only where there are no words that will point to a tenancy in common. The slightest words will be seized upon by the Court to construe a tenancy in common *but there must be some expression of intent in order to support such construction*. The Court in this instance was ruling on a limitation devising and bequeathing

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16. The language of § 19-55 affects the survivorship rule only as to one seized or possessed of any estate in joint tenancy. The term estate is defined in *Balsamite, Law Dictionary*, (2 ed. 1948) as referring, in its primary and technical sense, only to an estate in land. If such a construction were given to it in this instance it would be readily apparent that this statute would not apply to joint tenancies in chattels and that the common law rule of *jus accrescendi* or survivorship would still apply in that area. Apparently, however, the technical construction was not intended by the Legislature because § 19-55 is a section of the Descent and Distribution Statute and in the first section § 19-52, of this Statute the phrase “estate, real and personal” is used.


"the remaining four-tenths to my four nieces", and determined that the nieces held as joint tenants as there was nothing to show any intent not to create a joint tenancy. *Ball v. Deas,*20 in construing a similar limitation, followed the rule laid down in the *Herbenont* case.

The rule of construction in this area was liberalized in *Telfair v. Howe.*21 Though dual grounds were found to hold that no joint tenancy was created, the Court squarely faced the problem of a constructional issue in the following limitation: "I direct my executors to pay over the residue of my estate, or bonds, or money, to the American Bible Society of New York, and to the Missionary Society of New York, to whom I leave or bequeath it." There was no such organization as the Missionary Society of New York, and the remaining devisee, The American Bible Society, claimed the entire estate as the surviving joint tenant. Though admitting the fact that the surviving devisee's right to take both shares of the estate would not be barred by the Act of 179122 if this was joint tenancy, it was found that no joint tenancy was created:

I have before adverted to the tendency, or leaning, (as the phrase is) of courts in modern times, — particularly Courts of Equity, — to avail themselves of any strong equitable circumstances, or of any words employed by the testator in his will, that would imply a severance, to give such a construction, as would make the estate a tenancy in common, and not a joint tenancy. It is always a question of construction, and the object is to get at the intention of the testator; which must, however, be done in conformity with the established rules of interpretation. (writer's emphasis)

In spite of the italicized portion, the established rule of interpretation, that there must be some expression of intent not to create a joint tenancy, as laid down in *Herbenont v. Thomas* and followed in *Ball v. Deas* seems to have been overlooked. The Court, in citing the example of the English courts in not permitting the trustees of an executory trust, when conveying the corpus of the trust, to defeat the intention of the settlor, held that an analogous situation existed and, where the intention was apparent, the Court should mould the construction "so as best to answer the intent of the testator."

A further development of the rule of construction was propounded in *Green v. Cannady.*23 There, one Betsy Maddox conveyed by

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20. 2 Strob. Eq. 24 (S. C. 1848).
23. 77 S. C. 193, 57 S. E. 832 (1907).
deed "unto Thomas Cannady, Jane Cannady, Nancy Maddox and Betsy Maddox their heirs and assigns forever." The issue was, could the grantor, Betsy Maddox, convey to herself and if not, what share did the other grantees take? The Court in quoting from 13 Cyc., 527 which in turn was quoting from Shepherd’s Touchstone, cited the following rule of law:

If a deed be made to one that is incapable and to others that are capable, in this case it shall enure only to him that is capable (And if they were to be joint tenants, the person who is capable shall take the whole; but if they were to be tenants in common, he shall have only his particular share.)

In determining the intention of the grantor the Court went outside the “four corners” of the deed and went into a detailed discussion of the relationship of the parties in order to arrive at a proper construction of the limitation.

It is manifest that the grantor did not intend to convey the whole estate to the parties named other than herself, and that her purpose was to remain owner of some interest in the premises. . . . The circumstances that the house upon the lot was built by the united efforts of all the parties, that after the conveyance they all lived on the premises and used the fruits of their joint labors as one family, all harmonize with a construction which regards the deed as creating a tenancy in common among the grantor and the grantees in equal proportions.

In 1925 the rule of construction in this area was further liberalized in Free v. Sandifer.24 There the Court was construing a devise to Howard B. and Thelma L. Sandifer of tract No. 1 “for and during the term of their natural lives and from and immediately after their death, to their children living and in case they should leave no children living at their death, then the said tract of land to become the property of my other children and grandchildren living at that time.” In construing the estate created by the devise as one of tenancy in common rather than of joint tenancy, the following was said:

It seems perfectly clear from the wording of the will that a joint tenancy with the right of survivorship was never intended by the testatrix. The word "joint", as to ownership, was not mentioned, nor is the word "survivor" to be found in the will. (writer’s emphasis)

After pointing out that both of these words are apt ones to create an estate in joint tenancy, the Court went on to say that even stronger intention was demonstrated by the limitation of the estate after the "falling in of the life estate."

Surely the testatrix did not intend that the children of Howard, should any be born to him, should be compelled to await the death of Thelma before coming into possession of their remainder, if Thelma lived 30 or 40 years after the death of Howard. Her evident intention was that the remainder should vest immediately upon the death of either life tenant.

After further decreasing the vitality of the estate which "presents some of the most artificial rules of subtle distinctions of the ancient common law" by remarking on the absence of such words as "joint" or "survivor" as indicating an absence of intent to create an estate of joint tenancy, the Court by unfortunate dictum, and apparently ignoring the Green and Telfair decisions, remarked that had the limitation in this case not been distinguishable from those in the Herbemont and Ball cases by the addition of the remainder interest, it would have been bound by the precedent established by them.

In spite of this unhappy retrogression by way of dictum, further progress was made in the next case presented to the Court requiring a construction of a similar limitation. In Davis v. Davis there was a devise to James H. Davis, 36 acres; to Elizabeth Jane Davis, 36 acres; to John Q. Davis, 36 acres; and to Drucilla Sarah Davis and Rachael Ann Davis, jointly, the residue of 74 acres.

If any of his children above mentioned should die without children, then their share of said real estate herebefore mentioned should go to the heirs of children of such as at the time may be living, and provided that the real estate as an entirety to descend to his legal grandchildren independent of all claims, and that his legal grandchildren should inherit, after the death of his children, the same as his own children.

Rachael Ann Davis predeceased her father and was unmarried at the time of her death, and Drucilla Sarah Davis died childless after the testator's death. In an action for partition the Court, completely ignoring the word "jointly", cited Free v. Sandifer, supra, as authority for construing the italicized portion of the above limitation as a tenancy in common and held the interest of Rachael had become

26. 144 S. C. 205, 142 S. E. 496 (1927).
interstate property, and, upon the testator's death, vested in the heirs of the testator, while the interest of Drucilla vested, under the terms of the will in the testator's grandchildren in being at the time of her death.

As can be seen from the preceding cases, although the Court still professes to recognize the existence of the estate of joint tenancy, the rule of construction has come the full circle: from there having to be some expression of intent in order to support a construction of a tenancy in common in *Herbemont v. Thomas;* 27 to going outside the instrument and investigating the relationship of the parties immediately preceding the writing of the instrument in *Green v. Canaday;* 28 to remarking on the absence of words such as "joint" and "survivor" as showing a lack of intent to form the estate of joint tenancy in *Free v. Sandifer;* 29 to, when faced with the word "jointly" in the limitation, ignoring it upon a finding of a contrary intention of the testator in *Davis v. Davis.* 30

Although *Herbemont v. Thomas* and *Ball v. Deas* have not been expressly overruled, the Court has refused to construe any estate one of joint tenancy, at least where survivorship affected the outcome of the distribution of the estate, for over one hundred years. If the precise issue presented in these two cases is brought before the Court in the future it is possible that it will hold that the cases discussed above furnish sufficient authority to justify a finding that they have been overruled, thereby foreclosing the possibility of the estate of joint tenancy, with its attendant rule of survivorship, being applied as a matter of law, contrary to the intention of the testator or grantor.

For whatever may have been the causes which led to the origin of this estate, or which recommended it to our rude and warlike ancestors of the feudal period, it is undeniable that, at this day, it has grown into disfavor in English and American Courts . . . . 31

But what if there is an intention, expressed in unequivocal terms, to create such an estate for the purpose of having the survivorship rule apply? If faced with such a limitation as, "to A and B as joint tenants and I intend that the rule of survivorship apply", what construction would the Court place upon it? As pointed out earlier, survivorship is abolished as a feature of joint tenancy by our present

27. Cheves' Eq. 21 (S. C. 1839).
28. 77 S. C. 195, 57 S. E. 832 (1907).
30. 144 S. C. 205, 142 S. E. 496 (1927).
Code Section 19-55. The testator's intention as expressed in the limitation above would be thwarted in all except the isolated areas that are not affected by the statute. In these areas not affected the Court may construe the estate as one of joint tenancy and thereby effectuate the grantor's will or it may choose another method, discussed in the succeeding paragraph, to accomplish the same result. In situations where the interest of the parties was vested and survivorship would come under the proscription of § 19-55, most surely the limitation would not be construed as an estate of joint tenancy for this would defeat, rather than fulfill, the testator's or grantor's wishes.

The Court charted its course for this area inDavis v. Davis.32

There is nothing vicious about the right of survivorship. Indeed, it was recognized by our General Assembly in the enactment of the statute relating to bank deposits. Section 7851 of the 1942 Code. No rule of law is violated by creating an estate in two or more persons with the right of survivorship. Section 891133 of the Code only abolished survivorship as an incident of the common law estate of joint tenancy, and was never intended to prevent the creation of the right of survivorship when expressly provided for in a will or deed.

It then proceeded to hold that where the limitation to be construed had expressly attempted to set up an estate of tenancy by the entirety with attendant survivorship, which was declared abolished in South Carolina, the intention of the testator would be preserved by construing the limitation as creating either a tenancy in common for life with a contingent remainder in fee to the survivor or a tenancy in common in fee simple with an executory limitation in favor of the survivor. With this as precedent in all probability there would be a similar holding if the Court were faced with the hypothetical limitation above had the interests of the cotenants already vested.

As in every case, however, all is not "black and white" and as the exception that proves the rule, there is still one area in which it would be preferable to construe an estate one of joint tenancy rather than of tenancy in common. In the case of an attempted conveyance in fee simple of the interest of one cotenant to another in which no words of inheritance were used, if the estate were one of joint tenancy the fee would pass. If the estate were one of tenancy in common, only a life estate would pass.34 If faced with such a situation where

32. 223 S. C. 182, 75 S. E. 2d 46 (1953).
the grantor's intention would be defeated by an equally antiquated and arbitrary rule of law, the Court might be embarrassed by the progress that it had made in destroying the evil of *jus accrescendi* in the common law estate of joint tenancy. Nevertheless, in weighing the overall benefit to be derived from abolishing the rule as compared with the possible detriment resulting from such an abolition in the limited area of a release between joint tenants, there can be no doubt that the scales tip in favor of the former.

**TENANCY IN COMMON**

Tenants in common hold by several and distinct titles, with unity of possession. There may be an entire disunion of time, interest or title; the cotenants may claim their several titles and interests from entirely different sources; the qualities of their estates may be different; the shares may be unequal; the modes of acquisition of title may be unlike; and they may hold by different tenures. The estate may be formed in an infinite variety of ways. It may be formed by devise, intestate descent, grant, adverse possession, and by product of error or mistake in an attempt to create another form of tenancy such as tenancy by the entirety, to name those that come readily to mind. The only requirement to form the estate is that there be unity of possession.

**OUSTER**

In tenancy in common, each tenant in common with his cotenant has the right to the possession of the premises and the possession of one tenant is the possession of all. This ceases to be true from the moment that such possession by a tenant in common becomes adverse to the co-owners. The problem is, when does such possession become adverse? This may be answered by saying, when there has been an ouster. The next determination that is necessary is clearly then, what constitutes ouster? The Court in *Jeffcoat v. Knotts* described it thus:

It is not necessary to constitute ouster that there should be forcible ejection of the tenant or a forcible hindrance of his entry.

43. 13 Rich. 50 (S. C. 1860).
Refusal of his right, attended by circumstances showing determination of the disseizeor to resort to physical force if necessary, is sufficient proof of ouster.

This rule seems to have been modified by later holdings which fail to mention physical force or readiness to resort to it, but require only that the possession be actual, exclusive, hostile and uninterrupted.44

Even this adds little to the determination of when possession becomes adverse. The only practical method of determination is to attempt to break down and classify the cases in this area.

There seems to be a distinction made between adverse possession and presumption of a grant where continued, uninterrupted possession, with the appropriation of the rents and profits, are the only manifestations of ouster. In situations where possession was for less than twenty years but greater than ten years the Court refused to find adverse possession. On the other hand when possession was for longer than twenty years the Court has found little difficulty in finding a presumption of a grant. In Gray v. Givens45 it was held that mere exclusive possession by one tenant in common for less than twenty years would not bar the cotenants. This rule was strengthened in McGee v. Hall46 by the holding that exclusive receipt and appropriation of the rents and profits by one tenant in common would not constitute an ouster of the cotenants, nor would an ouster be presumed short of twenty years. On the other hand the Court in Powers v. Smith47 and Wells v. Coursey,48 upon a finding that the claimants assumed sole conduct and management of the property and paid taxes for a greater period than twenty years, held that the occupancy was actual, visible, exclusive, hostile and uninterrupted and constituted an ouster from which title vested in the occupants. Continuous possession for a period greater than twenty years with an appropriation of all of the rents and profits, however, creates only a rebuttable presumption of ouster.49

It is clear that the act of grantees taking possession under a deed amounts to an ouster of other tenants and commences the running

44. Wells v. Coursey, supra.
45. 2 Hill's Eq. 511 (S. C. 1837).
46. 26 S. C. 179, 1 S. E. 711 (1887).
47. 80 S. C. 110, 61 S. E. 222 (1908).
48. Note 42, supra.
of the statute. If, however, a grantee takes possession under a deed, fraudulently altered to give himself full title, such possession does not commence the running of the statute until discovery, by the aggrieved party, of the facts constituting the fraud; nor may such possession be tacked to the possession of an innocent grantee in computing the twenty year period necessary to constitute a presumption of a grant.

If the deed vests the grantee with only the undivided interest of some of the tenants in common, and puts him on notice of the interest of the claims of others, on the other hand, his entry is not an ouster of the remaining tenants and he becomes a tenant in common with them.

One area that is not clear is whether there is an ouster where a grantee takes possession under a deed ostensibly conveying the entire fee, but the grantee has knowledge of the true state of the title. By analogy with the case of the fraudulent alteration of a deed, it should not. Even if the grantor conveyed in good faith, the adverse occupancy by the grantee with knowledge that the grantor had no such title to convey would be closely akin to a fraudulent act against the cotenants.

The one distinctive feature of every co-tenancy is the right of each tenant, in common with his co-tenants, to the possession of the premises held in common. An immediate and necessary corollary to this rule is the principle that the possession of one tenant in common is the possession of all. His sole occupancy of the common property is entirely consistent with the existence of the co-tenancy and a full recognition of the rights of his co-tenant to enter and share the possession with him at any time. In the absence, therefore, of facts showing that he holds possession of the premises in opposition to such rights in his co-tenants, his occupancy will be presumed to be that of a tenant in common, recognizing the co-tenancy.

The logic distinguishing the holding that the statute commences to run when a grantee enters under a deed that purports to convey the entire fee, and not permitting it to run where there is fraud, is

expressed in the following quotation from Livingston v. Peru Iron Co.:

'A disseisin, it is said, may commence by force or fraud; an adverse possession may commence by force, but, I apprehend, not by fraud, as, for instance, under a deed obtained by fraud or by forgery. The person guilty of the fraud or forgery cannot rely upon such a deed as conveying a valid title; and the arguments which have gone the greatest length in favor of adverse possession, have proceeded on the ground that the possessor relied on his title, and believed the property which he possessed to be his own. A man may think himself the true owner under claim of title; that is an adverse possession; but if, with a full knowledge that such property belongs to another, a person procures a forged deed, and enters under that, what is the quo animo? Is it an intent to enjoy his own, or to defraud another? And it has been often said and decided that the fact of possession and the quo animo the possession was taken, are the only tests. If the quo animo is a bona fide intention to enjoy his own property, that intent can never exist where the possessor knows the property is not his own. If by the quo animo is meant an intention to appropriate the property to his own use, right or wrong, then, indeed, is the possession of almost all intruders adverse.'

Another area in which occupancy by one tenant has been construed as an ouster of the others is where the property is essentially a unit and incapable of separate occupancy and the occupant uses such property for his individual enterprise.

The ouster of one tenant, however, is not necessarily the ouster of all. It is possible for adverse possession to be obtained against one tenant and not another, as where the possessor held permissively of one cotenant and hostilely to the others. Also where there is a presumption of a grant, the disability of one cotenant will not inure to the benefit of the others. This rule, however, does not apply to adverse possession.

Neither mere declarations nor intent to hold adversely are of any consequence in establishing adverse possession. The character of

55. 9 Wend. 511 (N. Y. 1832). Quoted in the dissenting opinion of Weston v. Morgan, supra.
the possession in itself must be hostile in order that it may be deemed adverse. In fact declarations of hostile possession by the claimant are generally inadmissible into evidence in support of proof of ouster. It is, however, permissible to introduce such declarations in rebuttal to evidence, introduced by the opposing party under the admissions exception to the hearsay rule, of other statements made by the adverse claimant to the effect that his occupation was permissive.

Partition

... partition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise, that each should have his own. The mere difficulty of effecting it is not regarded as a sufficient reason for refusing to grant it.

Under the early common law of England, the right to partition was confined exclusively to lands held in parcernacy. As parcerners acquired title by inheritance only, the right to partition extended only to estates in fee. This remedy was extended under Statutes of 31 and 32 Henry VIII to joint tenancies and tenancies in common of estates of inheritance, of freehold or for years. The Code provisions in §§ 10-2201 through 10-2210 are statutory authority for partition in South Carolina, with § 10-2201 being a recognition of the common law, as modified and extended under the statutes of 31 and 32 Henry VIII.

As a general rule, every cotenant may demand partition as a matter of right if there is a present right to possession. If all of the parties are sui juris, partition can be had at any time that they agree to it without resort to legal action. Where, however, there is disagreement between them or one or more of them are suffering under a disability, then there must be a resort to the law.

The Court of Common Pleas has exclusive jurisdiction over all partition proceedings. Upon the filing of a bill for partition, a writ is issued to the commissioners, who are appointed in conformity

60. Quoted from 1 R. C. L. 704 in the trial court's decree which was approved by the Court in Weston v. Morgan, 162 S. C. 177, 160 S. E. 436 (1931).
64. 21 A.M. & ENG. ENCY. OF LAWS 1145.
65. CODE OF LAWS OF SOUTH CAROLINA (1952).
69. CODE OF LAWS OF SOUTH CAROLINA § 10-2205 (1952).
with § 10-2206,\textsuperscript{70} to determine whether or not the land can be partitioned in kind without prejudice to any of the parties; and if not, to determine whether or not it should be sold at public auction with a division of the proceeds among the parties according to their rights, or to be delivered over to one or more of the parties interested therein upon the payment of a sum of money to be assessed by the commissioners.\textsuperscript{71} The Court is not under obligation to have commissioners appointed, however, where it is apparent from the evidence that there cannot be partition in kind. It may order sale as an expense-saving measure to the cotenants.\textsuperscript{72} But where a sale is made under partition proceedings, it is not a compulsory sale under process of execution and the doctrine of \textit{caveat emptor} does not apply.\textsuperscript{73}

The commissioners have the duty to make known their findings to the Court which “shall proceed to consider and determine same.”\textsuperscript{74} If it is the decision of the commissioners, and the Court so orders, that there should be a delivery of the lands to one or more of the cotenants, title does not vest until the money is paid by them to the other tenants. The order of the Court requiring that the property be turned over to one or more of the cotenants is a judgment on which a \textit{scire facias} may issue, on the return of which execution may be had or an order obtained directing that the land be sold to satisfy the judgment.\textsuperscript{75}

Once, however, the return is made, the Court cannot alter it. There is no course left open to the parties or the Court but to accept it or to have it set aside. A return can be set aside if there is a showing of mistake, fraud, or corruption.\textsuperscript{76} The return of a majority of the commissioners is sufficient,\textsuperscript{77} and there is a rebuttable presumption that the commissioners acted impartially.\textsuperscript{78}

\section{Parties}

All cotenants are necessary parties to partition proceedings and if one or more of them are not made parties, the proceedings are not binding upon them;\textsuperscript{79} but where a cotenant has conveyed his interest

\begin{thebibliography}{99}
\item \text{Code of Laws of South Carolina} (1952).
\item \text{Code of Laws of South Carolina} § 10-2208 (1952).
\item \text{Code of Laws of South Carolina} § 10-2201 (1952).
\item Bolivar v. Ziegler, 9 S. C. 287 (1878).
\item \text{Code of Laws of South Carolina} § 10-2208 (1952).
\item Burris v. Godch, 5 Rich. 1 (S. C. 1851).
\item Buckler v. Farrow, Rich. Eq. Cas. 178 (S. C. 1832).
\item Yates v. Gridley, 16 S. C. 495 (1882).
\item Riley v. Gaines, 14 S. C. 454 (1881).
\item Johnson v. Payne, 1 Hill 111 (S. C. 1833); \text{Code of Laws of South Carolina} § 10-2201 (1952).
\end{thebibliography}
to another, the grantor does not have to be joined in the action as the grantee becomes a cotenant, accruing all rights and title of the grantor. 80

A judgment creditor does not have to be made a party to partition proceedings, 81 but it is the better policy to do so. 82 He can only come in under the distributee whose interest he acquired and since his distributee’s share is subject to the paramount right of partition, title passes to the vendee clear of his claims. 83 The judgment creditor may, by timely application to the Court, however, have his lien protected by an order for the payment to him of the judgment debtor’s distributive share of the price of the land. 84 On the other hand, if the land is sold before any proceeding is had for partition, the purchaser acquires the title and stands in place of the distributee as a cotenant. In such a status he becomes a necessary party to the partition proceedings. 85

Tenants in common may mortgage their undivided interest in realty and a mortgagee of such undivided interest is a necessary party to a partition proceeding. The rationalization of the distinction between making the mortgagee a necessary party and not requiring that a judgment creditor be made one is that whereas a judgment creditor has only a general lien on the property of the debtor, a mortgagee has a specific lien on the undivided share of the property to be partitioned. Though a mortgage does not convey any legal estate to the mortgagee, it does create an equitable interest which should be protected in a partition suit and the only adequate way that this can be done is by making the mortgagee a party. 86

One party cannot convey an easement in the common property without the consent of all cotenants. Any such conveyance will affect only his undivided interest. 87 Entry by the grantee of the easement onto the common property, however, is not a technical trespass, but the grantee is accountable for all damages to the cotenants’ interests caused by such entry. 88 In addition, the owner of the easement is a necessary party to partition proceedings and a failure to make a grantee a party, where his rights are prejudiced thereby, is grounds for opening the judgment. The Court in its de-

82. Ex parte Johnson, 147 S. C. 259, 145 S. E. 113 (1928).
86. Ex parte Johnson, 147 S. C. 259, 145 S. E. 113 (1928).
cree will then require that the grantee be made a party and issue a writ commanding the commissioners to protect, if practical, the interest of such grantee by assigning to the granting tenant that portion of the property burdened with the easement. 89

When a husband acquired title to land as a tenant in common with others his seizin is subject to the paramount right of his cotenants to demand partition and therefore his wife’s dower, attaching to the seizin, is subordinate to such paramount right. If there is an enforced sale under decree of the Court, her inchoate right of dower in the land is defeated even though she was not a party to the action. The same applies where the husband sells his undivided share without a release of dower and the land is subsequently partitioned. Since the wife’s interest is subservient to the paramount right of partition, her right is defeated by the partition because the vendee’s rights were derived from her husband, the vendor, and are subject to the same limitations as to partition. 90 But when partition is partition in kind, then the wife’s dower attaches to the part set off to her husband or to her husband’s grantee. 91

2. WHO MAY DEMAND PARTITION

Obviously cotenants in possession may demand partition. 92 In addition, a judgment creditor or other person purchasing at an execution sale, the debtor’s undivided interest in the land becomes a cotenant in his stead and so acquires his rights to partition. 93 Also the grantee of an easement has the right to force the grantor to have partition made of the lands to protect his grant, 94 but even though partition is ordered at the insistence of the grantee, he is not really the plaintiff and has no right to name the commissioners allocated to the illegal transaction. 95

Partition will not be allowed, however, where the cotenancy relationship arises out of an illegal transaction. 96 In addition, a suit

95. Charleston C. & C. R. Co. v. Leech, supra.
96. In Milhous v. Sally, 43 S. C. 318, 21 S. E. 268 (1895), the children of an insolvent intestate agreed that his lands should be sold under a judgment held by the intestate’s widow as assignee, for the use of the widow for life and then for themselves as a scheme to defraud other creditors and save the land for the family. The bidding was chilled by representing that the land was being purchased for the benefit of the family and as a result it was sold for an amount substantially below its real value, and in fact no money was ever paid to the judgment creditor. The land was taken in the names of several of the children and upon the death of the widow the remainder of
for partition will not be sustained where the testator directs that his estate remain undivided for a reasonable length of time, but § 10-2201 states a rule of public policy and where a limitation sets undue restrictions on partition it will be held void as an unreasonable limitation on the power of alienation.

3. Rights of Remaindermen As To Partition

The rights of remaindermen as to partition have been determined by four cases. To adequately describe and distinguish these cases by words alone needlessly complicates this area by requiring the reader to perform mental gymnastics in attempting to visualize and compare the necessarily lengthy descriptions of the estates involved. In an attempt to alleviate this problem, the diagrammatic form of presentation has been combined with that of the written description. The block represents the fee estate of the property involved. The individual cotenants' undivided holdings are represented by the areas blocked off by the dotted lines. The vertical lines are spaced so as to denote the percentage of the estate owned by each tenant and the horizontal lines separate the possessory estates from the remainder interests. While the vertical lines are scaled to show the proportionate interest of each tenant, for purposes of simplification, no such attempt has been made to indicate by scale the proportionate interests as between possessory tenants and remaindermen but rather the horizontal lines have been placed midway the block merely to indicate the existence of the two interests. The holdings of the petitioners for partition are denoted by the cross-hatched areas.

The question as to rights of remaindermen to demand partition seems first to have arisen in Lorick & Lorraine v. McCreery. In this case there were three tenants in common, two of whom were seized of undivided shares of the fee and the third of whom was seized of a life estate. The holder of the remainder interest of the life estate prayed for partition and this was resisted by the tenants in possession.

36 S. C. 454, 15 S. E. 727 (1892).
98. "All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.
100. 20 S. C. 424 (1884).
The Court, with very little discussion, and no mention of authority, ruled that such action should be carried out if it could be done consistently with the interests of all parties and without detriment to the interests and claims of the life tenant. In other words, the petitioner's interest would still be subject to the life estate with which it was incumbered.

In the case of Cannon v. Lomax the problem again faced the Court. There a common ancestor had leased the property to two of three heirs. Upon the death of the ancestor intestate, the third heir, instituted partition proceedings. It was held that the petitioner, not in possession because of the outstanding lease in the hands of the other cotenants, could not maintain an action for partition until the lease expired.

The Lorick decision was not mentioned and was apparently overlooked when the rule was handed down that "partition is the right to a severance, when there is rightful unity not only of title, but of possession" (writer's emphasis). Though there is a superficial similarity between the relation of the parties here and Lorick supra, it is readily apparent that here the remainderman-petitioner did not possess the remainder interest of a specific undivided share of the possessory estate as he did in the former case.

The next time that the Court had this issue presented was in Varn v. Varn. Here there was a joint tenancy for life with remaindermen holding as tenants in common. The petitioner purchased the interest of some of the remaindermen and after the death of several of the life tenants, he prayed for partition. At this time he was not only the owner of an undivided share of the fee which was incumber-

101. 29 S. C. 369, 7 S. E. 529 (1888).
102. 32 S. C. 77, 10 S. E. 829 (1890).
ed by a life estate but was also an owner of an undivided share of the fee not so incumbered.

This latter interest seems to have brought him within the rule announced in *Cannon v. Lomax* as to the unity of possession, but the Court made no mention of case or statutory authority in arriving at their decision to enforce partition. In the proceedings, however, such portions as the life tenants were entitled to were to be set off for their possession and enjoyment, thereby leaving the remainder interest of these shares undivided until the termination of the life estates.

It was not until the case of *S. C. Savings Bank v. Stansell*\(^ {103} \) that an attempt was made to rationalize the former decisions dealing with the right of a remainderman to demand partition. In this case the petitioner was the owner of the life estate and four of the ten undivided shares of the reversion.

Partition was permitted on the theory that since the petitioner was the owner of the life estate as well as the owner of undivided shares of the fee, it could consent, as owner of the particular estate, to its partition demands as owner of undivided shares of the fee.

It was pointed out that at common law, in the absence of statutory authority, partition cannot be maintained as between life tenants and remaindermen which includes the situation where the petitioner owns a moiety of both the life estate and the reversion. After a detailed discussion of this principle the Court said: "It is clear, from the foregoing general principles, that the plaintiff in this case, in the absence of statutory authorization, could not maintain its action in partition."

\(^ {103} \) 160 S. C. 81, 158 S. E. 131 (1931).
At this point the Court exercised its judicial license by stating that § 10-2201 was long been in existence when the previous cases had been decided "and no doubt the Court had it in mind in reaching the conclusion in each case." By using § 10-2201 as statutory authority for permitting partition by a life tenant or a remainderman and the previous cases as construing the statute, the Court proceeded to analyze each of the preceding cases and to interpret their holdings as a construction of this section. The results were: a remainderman may maintain a suit for partition to have the portion in which he holds the fee severed from the undivided interests not incumbered by the life estate if it can be done without detriment to the interests and claims of the life tenant; a remainderman may not maintain a suit for partition where the entire property is incumbered by a particular estate and the petitioner is not entitled to immediate possession even though the owner of the particular estate has an undivided interest in fee in the property; but a remainderman may maintain a suit for partition where the entire property is incumbered by a particular estate, even though he is not entitled to immediate possession, where the life tenant consents to such partition.

In recapitulation, by comparing the diagrams of each of the four cases, the rule in this area seems to be that where there is a right to

104. CODE OF LAWS OF SOUTH CAROLINA (1952). "All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments."
possession, even though there are remainder interests involved, partition can be had as to the possessory estates. There also appears to be an absolute right to partition vested in both the remainder and life interests where the remainder interest is of a specific undivided share of the estate as in diagram number one. This right to partition extends only to enforcing partition of the undivided interest, consisting of both the possessory and remainder estates, from the remaining portions of the estate and not to partitioning the remainder from the possessory interest. But even if the entire fee is incumbered by a life estate, if the life tenant acquiesces, a remainderman may enforce partition of the remainder interests as in diagram number four.

Once it is determined that a suit for partition can be had it is up to the discretion of the commissioners as to the feasibility of partitioning in kind or of disposing of the property and partitioning the proceeds among the cotenants according to their interests. Where there is a remainder interest and the latter course of action is decided upon by the commissioners, the usual procedure is that the property is sold and the proceeds of the sale are invested and the possessory tenant is paid the income derived therefrom until the termination of the particular estate. But upon consent of all parties, the value of the possessory estate may be computed from the earning power of the proceeds for the term of the estate or of the life expectancy of the life tenant, in the case of a life estate, and from this sum the cash value of the possessory estate is computed. The balance of the proceeds is then divided among the remaindersmen according to their interests.

**Conveyance, Mortgage, and Right to Homestead of an Undivided Share**

As a general rule, a cotenant can only convey or mortgage his undivided share of the land. A conveyance by one of the tenants to a stranger of a definite portion of the common property by metes and bounds, however, is not void, but will not be permitted to operate to the prejudice of the other cotenants. Where such conveyance does not exceed in value or acreage the grantor's share, it will operate as a conveyance of the grantor's undivided interest in the entire estate. Under proceedings for partition of the estate, the portion

105. Separation of the possessory and remainder interests is not partition for the relationship between owners of these interests is not that of cotenants but rather that of life tenant and remainderman. Such a division, therefore, is controlled by the principles applicable to that relationship.

ostensibly conveyed will be allotted to the grantee if this can be done without prejudice to the interests of the other cotenants.\textsuperscript{107} A mortgagee has the same rights to have his mortgage protected where he mistakenly takes a mortgage on a section of undivided realty described by metes and bounds where partition is sought by one or more of the cotenants.\textsuperscript{108}

Where there is a question of homestead, it should not be assigned prior to partitioning the land\textsuperscript{109} nor should proceedings be maintained for partition and homestead at the same time.\textsuperscript{110} Where land is partitioned at the insistence of judgment creditors, the Court has no power to assign a homestead out of an undivided interest in real estate and such attempt is a nullity. But where the interests of the parties can be protected, partition may be ordered as to give to such tenant, for his share, that portion of the land which included the homestead so admeasured.\textsuperscript{111} Where, on the other hand, a judgment creditor demands partition in the lands of a deceased debtor, a homestead in his lands must be assigned to the widow and all of the children, even though the children are emancipated and heads of families of their own and such homestead is subject to immediate partition among the members of the family.\textsuperscript{112}

**Accounting of Rents and Profits**

At common law joint tenants or tenants in common had no remedy against their cotenants for accounting of rents and profits received from the undivided estate. Parliament, with the enactment of 4 and 5 Anne, chapter 16, modified this rule and permitted an action of account against the tenant who had received more than his aliquot share of the proceeds from the estate. Equity restricted this action to cases where rent was received and denied relief in cases of exclusive occupation of the common estate, where there was no actual receipt of rents. South Carolina has broadened the area of relief to include the latter as well as the former.\textsuperscript{113}

By rents and profits, it is not meant the rental value of the land, but only profits made or rents actually received by the occupying tenant from portions of land occupied in excess of his interests.\textsuperscript{114} But rental value of the land may be received in evidence to establish a

\textsuperscript{107} Young v. Edwards, 33 S. C. 404, 11 S. E. 1066 (1890).

\textsuperscript{108} Kennedy v. Boykin, 35 S. C. 61, 14 S. E. 809 (1892).

\textsuperscript{109} Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333 (1888).

\textsuperscript{110} Williams v. Malloy, 33 S. C. 601, 11 S. E. 1066 (1890).

\textsuperscript{111} Mellichamp v. Mellichamp, supra.

\textsuperscript{112} Ex parte Worley, 54 S. C. 208, 32 S. E. 307 (1899).

\textsuperscript{113} Corbett v. Laurens, 5 Rich. Eq. 301 (1853).

\textsuperscript{114} Griffin v. Griffin, 82 S. C. 256, 64 S. E. 160 (1909).
basis of computing a reasonable value to be attributed to rents and profits where there is no evidence as to actual rents or profits available.\textsuperscript{115}

The rule as to rents and profits applies only where the occupying tenant has not committed an ouster of his cotenants. If there has been an ouster, then the occupying tenant has committed a trespass and is liable for the actual rental value of the ousted tenants' shares.\textsuperscript{116}

Of course the above rules do not prevent one tenant in common from becoming the landlord of another by way of lease. Where such contractual relationship exists, the general rules of landlord and tenant apply and the lessor may distrain for his rent.\textsuperscript{117}

Until recently an area of uncertainty existed in assessing rents and profits and prorating each tenant's share in partition where the occupying tenant had improved the undivided premises without the express or implied consent of his cotenants. The general rule is that one man has no right to improve the land of another at the owner's expense.\textsuperscript{118} Originally this rule was construed that as between cotenants, the occupying tenant was liable for the rent of so much of the premises in excess of his undivided portion as was capable of producing rent at the time that he took possession, but he was not liable for rents and profits received from such excess share as was rendered capable by his labor since the non-participating tenant did not have to share in the cost of the improvements.\textsuperscript{119}

This rule was changed by subsequent cases to one holding that an equitable accounting for rents and profits permits the occupying tenant to set-off against such rents and profits charged to him the amount that the value of the premises was increased by such unauthorized improvements, as contrasted with the cost of the improvements to the occupying tenant, and the rents and profits should be regarded as paid and discharged pro tanto by the increased value which may have been imparted to the premises by the improvements.\textsuperscript{120}

In order to qualify for this set-off, however, the tenant had to show that hardship would result from depriving him of the set-off and that such set-off could be made consistently with the equity of the

\textsuperscript{116} Jones v. Massey, 14 S. C. 292 (1880).
\textsuperscript{118} Thompson v. Bostick, McMul. Eq. 75 (S. C. 1840).
\textsuperscript{119} Hancock v. Day, McMul. Eq. 69, 36 Am. Dec. 293 (S. C. 1840).
\textsuperscript{120} Buck v. Martin, 21 S. C. 590, 53 Am. Rep. 702 (1884); Scaife v. Thompson, 15 S. C. 337 (1881).
cotenants. In addition to set-off for rents and profits, this rule applied to partition also. If the occupying tenant's improvements met the above qualifications, the value of the improvements were not considered in computing the value of the land for partition, and, if it could be equitably done, the improving tenant would be awarded the portion of the land that he improved. If no partition could be had, then the improving party would be compensated for the value of the improvements before the cotenants received their proportionate share.

The cases disclose three areas where there was sufficient "hardship" to bring the improving tenant within the exception of the rule: (1) where the occupying tenant made the improvement under the mistaken impression that he was the sole owner of the undivided fee. (Where, however, parties in possession of land, under claim of title, make improvements upon such land after action has been brought against them for the possession of the land, they have no right to the value of the improvements so erected); (2) where the improvements were necessary for the use and enjoyment of all of the cotenants; and (3) where the improvements were made with the implied or express consent of the other cotenants.

In Sutton v. Sutton the Court appeared to discard the necessity of a showing of hardship by the following statement:

It is not claimed that this case falls under any of the exceptions above indicated, but it seems to us when one of the cotenants made improvements which add to the value of the common property, and at the same time is chargeable with rents and profits, that it would be equitable to regard the rents and profits as paid and discharged pro tanto by the increased value which may have been imparted to the premises by the improvements.

Although the quoted portion cites only the charging off of rents and profits pro tanto with the amount that the occupying tenant improved the premises, the point that the Court was dealing with was an exception taken to a ruling by the trial court that in the event of a sale, the tenant was not entitled to the value of his improvements out of the proceeds of the sale, before, distribution to the cotenants. It is therefore apparent that the Court intended to extend this rule,

121. Buck v. Martin, supra.
122. Buck v. Martin, supra.
125. Buck v. Martin, supra.
126. Buck v. Martin, supra.
127. 26 S. C. 33 (1886).
not only to rents and profits, but also to the sale of the premises and
the subsequent division of the proceeds. In addition, further on in
the same paragraph the Court said:

Our courts have enforced the doctrine that, in making partition,
the improved part shall, if practicable, be assigned to the im-
proving tenant.

It is true that the above quotation was dictum but is was used to
demonstrate the logic of extending the rule for not requiring a show-
ing of hardship to cases where there was to be no partition but there
were equitable considerations present for compensating the improv-
ing tenant for the improvements that he made. From the language
it is apparent that the Court meant to eliminate the necessity for
showing hardship in all three areas where the unauthorized improv-
ing tenant was seeking reimbursement for his improvements.

The Court subsequently appeared to abandon the Sutton rule. It
was not, however, at the time faced with the problem where the out-
come of the case hinged only on the finding of hardship within one
of the three previously listed definitions. In Cain v. Cain,128 the
Court enunciated the rule as requiring a showing of hardship but
under the facts of the case "hardship" was present. In Guignard v.
Corley129 the old rule was again cited, but in this instance only by
way of dictum.

In the Bank of Swansea v. Rucker,130 however, in spite of the
factual situation coming within the "hardship" rule the Court seemed
to veer back to the Sutton rule. There the Court was faced with
the rights of a purchaser at a mortgage foreclosure of the improving
tenant's undivided interest where the improving tenant had made
the improvements under the mistaken belief that she owned the un-
divided fee. In holding that the interests of the other cotenants were
not prejudiced by the allotment of the improved portion to the pur-
chaser, the Court had a clear case of hardship under the previous
definition. It did not acknowledge the hardship rule however, but
advanced what was essentially the Sutton rule:

The rule appears well settled in this State that the right of
a cotenant in possession of the common property to be reimbursed
for improvements made by him, or in the partition to have the
portion of the land improved by him allotted to him, is ex-
ceptional, and to maintain it the improving tenant must establish:

129. 147 S. C. 12, 144 S. E. 586 (1928).
130. 156 S. C. 29, 152 S. E. 712 (1930).
(1) That he was in possession under an honest belief of ownership; or (2) that to disallow his claim would be inequitable; and (3) that the allowance would result in no inequity to the interests of his cotenants.

The Sutton rule has recently been again reaffirmed in the case of Shumaker v. Shumaker\(^{131}\) in which there were no factual findings which could bring it within the "hardship" definition. The remaindermen cotenants had consented to the sale of timber on the land for the purpose of constructing a home for their mother, the life tenant. The funds so raised were insufficient for this purpose and one of the cotenants who resided with the life tenant used his own money, as well as furnished his labor, to complete the home without getting consent from the other cotenants. Upon the termination of the life estate, partition proceedings were filed and the improving tenant cross-filed for reimbursement for the value of his labor in building the home plus the money that he expended in its construction.\(^{132}\) In arriving at its holding that the defendant was entitled to reimbursement, the Court did not require any showing of hardship but looked only to the equity of the case:

The betterments or improvements are directly attributable to the proceeds of the sale of timber, contributed by all, together with the defendant's contribution of money and labor, resulting in the enhancement of the value of the property. To deny defendant a proportionate reimbursement will result in his contribution being thrown into the common pot, although improvements, which were useful and necessary to the enjoyment of the property and permanent in nature, were made in good faith without any design to injure or exclude others who were similarly situated. This would result in an inequity in that plaintiffs would be unjustly enriched.

In light of an evaluation of the cases discussed above, the Court seems to have definitely abandoned the need of showing hardship and adopted the Sutton rule, which, in this writer's opinion, is the more equitable one. It completely protects the other cotenants as the improving tenant can: only set-off the amount that his labor increased the value of the property by what rents or profits are acquired because of such increase; be reimbursed the amount that

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132. The acknowledged measure of reimbursement is not the amount expended but rather the amount that the improvements have increased the value of the property. Buck v. Martin, note 119 supra.
the improvements increased the value of the property; or be awarded, as his proportionate share of the unimproved property, the portion containing the improvements, if such can be equitably done. This would leave the cotenants, with at worst, the value of their original unimproved interests. They cannot, by this rule, be "improved" out of their interests and if in fact a disposition cannot be made which will be equitable to the cotenants, and at the same time protect the interest of the improving tenant, then the cotenants' interests will be paramount. In addition there is some degree of protection to the improving tenant which prevents unjust enrichment at his expense and to his injury.

This rule, however, does not apply where a trespasser places improvements on property and subsequently acquires an interest of one of the cotenants. The conveyance does not relate back to the date of the improvements. Such improvements, at the time of erection passes to all of the tenants in common and the subsequent conveyance by one of them passes only his interest in the general estate, augmented by the unwarranted improvements.\textsuperscript{133}  

\textbf{Harold W. Jacobs.}

\textsuperscript{133} Guignard v. Corley, \textit{supra}. 