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# RECENT CASES

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**INSURANCE — Joinder of Insurer with Insured — Refusing to Admit in Evidence Amount of Insurance Policy Which is in Excess of Amount Required by Statute.** — Plaintiff brought this action to recover $50,000.00 damages for injuries sustained in a collision with the common carrier truck of defendant. Plaintiff alleged in the complaint that the amount of the policy of insurance carried by defendant was $50,000.00. The defendant insurance company which had been joined as a party defendant moved to strike this allegation from the complaint. The lower court granted this motion by ordering the plaintiff to amend her complaint to show only that the insurance complied with the amount as specified by the Public Service Commission: $5,000.00 for bodily injuries and $1,000.00 for property damages.[1] The plaintiff excepted to this ruling. HELD: On rehearing Affirmed. The required insurance was the amount admissible in the pleadings and in evidence, and an excess amount could not be brought to the attention of the jury. *Dobson v. Randolph and American Indemnity Company,* ..... S.C. ....., 87 S.E. 2d 869 (1955).

In negligence cases the fact that one of the parties is protected by liability insurance may not be divulged to the jury since there is no more effective means of prejudicing the rights of the insured and insurer. *Horsford v. Glass Company,* 92 S.C. 236, 75 S.E. 533 (1912); *Cox v. Employers' Liability Assurance Corp., Limited, London, England,* 191 S.C. 233, 196 S.E. 549 (1937); *Holt v. Oval Mfg. Co.,* 177 N.C. 170, 98 S.E. 369 (1919); *Cosselmon v. Dunfee,* 172 N.Y. 507, 65 N.E. 494 (1902). Even in instances where the jury has been inadvertently informed of the fact that one of the parties has liability insurance, a charge to the jury to disregard such testimony is insufficient, and a mistrial is the only effective remedy. *Haynes v. Graham,* 192 S.C. 382, 6 S.E. 2d 903 (1939). Necessity creates an exception to the general rule in that, although the jurors are not otherwise cognizant of an insurance company's presence in the suit, during the questioning on their *voir dire* they may be interrogated relative to their being agents or employees of the insurance company involved in the specific case. *Pardue v. Pardue,* 167 S.C. 129, 166 S.E. 101 (1932). Section 10-702, CODE OF LAWS OF SOUTH CAROLINA, 1952 provides, and the court in construing this statute per-

1. The Public Service Commission increased the limits for bodily injury to $10,000.00 and for property damages to $5,000.00. Amendment to Section 6, Rule 57 of the Rules and Regulations of CODE OF LAWS OF SOUTH CAROLINA, 1952. Filed July 23, 1953.

mits a joinder of the surety with the principal when, as insurance for performance of a contract or for payment for injuries arising out of tort, an indemnity bond or insurance is required by law. Where there is a joinder of insurer with insured under the permissive provision of the joinder statute, it is impracticable and impossible to prevent the jury from having knowledge of the fact that an insurance company is jointly liable with the insured for the damages sustained. *Scott v. Wells,* 214 S.C. 511, 53 S.E. 2d 400 (1949). When the liability insurer of the common carrier may be joined as a party defendant, but is not joined due to its insolvency, the fact that an insurance company is not to sustain a share of the losses may not be revealed to the jury since this disclosure could have no effect whatsoever on the liability of the carrier to one injured by its negligence. *McCrae v. McCoy et al.,* 214 S.C. 343, 52 S.E. 2d 403 (1949). Where there is a joinder and the amount of damages alleged is greater than the amount of the insurance policy, the jury must be instructed that the liability of the insurer is limited by the terms of its policy, whereas the liability of the insured is limited only by the amount of damages alleged and proved. *Daniel, Adm. v. Tower Trucking Company, Inc. and American Casualty Co., etc.,* 203 S.C. 119, 26 S.E. 2d 406 (1943). In one case, though $5,000.00 was the extent of liability insurance legally required, the fact that defendant common carrier was insured with the defendant casualty companies for a total of $80,000.00 was an allegation to which the defendants did not object and the court did not comment on this specific phase of the allegation. *Kelly v. Driggers,* 214 S.C. 237, 51 S.E. 2d 764 (1949).

A review of the cases wherein one of the parties is protected by liability insurance reveals that the South Carolina Court has heretofore endeavored to permit recovery commensurate only with the damages actually sustained by preventing disclosure to the jury of the insurance company's presence. The court, realizing the inherent dangers in such divulgence, has apparently used all tools at its disposal to prevent the existence of insurance from prejudicing the outcome of the suit. Only in instances of absolute necessity have the courts yielded to permitting disclosure of insurance. The only discord in this harmony of law and reason arose in a case in which there was an allegation of the amount of insurance which was in excess of the amount required by the Public Service Commission but in which the justice made no comment on this point of law. *Kelly v. Driggers, supra.* In spite of this slight deviation, the principal case rectified any misunderstanding that might have arisen from the

*Kelly Case, supra,* by adhering to the principle that the amount of damages awarded must be based on actual damages sustained and proved and not on the amount of insurance carried. If this unavoidable disclosure were accompanied by an explanation that the amount of insurance required by statute is no indication of the amount of damages that plaintiff has suffered, then the respective parties in every conceivable instance would be protected in that all possible prejudices of the jury would be removed.

In the *Dobson Case, supra,* if the court had allowed the amount of insurance policy above the minimum to be disclosed, it would have sanctioned an arbitrary divulgence since no necessity for its presence was shown. The fact that the statute permits joinder of insurer with insured would not be a basis for enlarging the rights of the plaintiff, relative to revealing the amount of insurance to the jury, beyond those existing prior to the passage of the statute. Primarily the legal amount is carried because it is mandatory, for the benefit of the public; all in excess of this amount is principally for the benefit of the insured; therefore, the fact of the existence of this excess amount should be kept from the jury just as in the case of any other non-statutory liability insurance. If the jury is informed of the amount of the policy it is apt to allow a verdict which is commensurate with the amount of insurance, whether it is greater or less than the damages alleged, rather than a verdict truly reflecting the actual damages. If the jury is not told what the amount of the insurance is, and since it is aware of the presence of the insurance company, the risk of prejudicing either the insurer or insured, depending upon the amount of the insurance policy as compared to the amount of damages alleged, is apparent. However, if only the amount of the insurance legally required is revealed, then the jury is inclined to abandon the dream world of the "limitless funds" of the insurance company and to be awakened to its responsibility of granting an equitable recovery.

In a final analysis the Supreme Court has applied to the insurer-insured joinder cases the well-established rule of law that the jury may have cognizance of the amount of insurance only where the necessity for such information exists, thereby sustaining a precedent which is in accord with justice, uniformity, and logic.

WILLIAM F. FAIREY.

**CONTRACTS TO MAKE WILLS — Joint Will as Evidence of Contract.** — This was a partition proceeding wherein plaintiff claimed one-half interest in certain property through a quit-claim deed from his mother. Defendant denied any interest in plaintiff, her brother, alleging that she was sole owner by virtue of a will jointly executed by her father and mother whereby they devised all their interest in said property to plaintiff. The husband died and the wife executed the aforementioned deed to plaintiff, and subsequently died. The lower court ruled for the plaintiff. On appeal, HELD: Affirmed. The mere fact of the execution by husband and wife of a joint will is not alone sufficient to establish a contractual obligation, and wife may transfer or devise her interest in property as she wishes after husband's death. *Ellisor v. Watts,* 227 S.C. 411, 88 S.E. 2d 351 (1955).

There seems to be some confusion in the cases of the use of the terms joint, mutual, and reciprocal wills. Consequently, in any analysis of the cases it is necessary to look beyond the terminology applied by the court and into the substance of the instrument involved. A summary of the distinctions made by the courts may be found in the annotation in 169 A.L.R. 9, at page 12. It seems that where these terms are employed by our Supreme Court they are intended to be understood as follows: a joint will is a single instrument signed by more than one party, whereas mutual wills are two or more instruments executed with a common intention on the part of the testators. Both joint wills and mutual wills may or may not represent a contract on the part of the testators. The term "reciprocal" seems to be used by the South Carolina Court as descriptive of the terms of a will. Thus both joint and mutual wills may or may not contain reciprocal provisions, but the mere presence of such provisions does not necessarily import a contract.

The weight of authority is to the effect that the execution concurrently by two persons of separate wills which are reciprocal in their provisions, or which are identical in their disposition of property to a third party, is not alone and without reference to the terms contained therein, evidence of a contract between the testators. 57 Am. Jur., *Wills,* § 729; 169 A.L.R. 68. Such has been the result in South Carolina where the court has considered this question. *Wilson v. Gordon,* 73 S.C. 155, 53 S.E. 79 (1905); *Dicks v. Cassels,* 100 S.C. 341, 84 S.E. 878 (1914). However, some few jurisdictions have held that the mere execution of nearly identical mutual wills is evidence of a contract, and, coupled with the surrounding circumstances, may constitute proof of such contract. *E. g., Harris v.*

*Morgan,* 157 Tenn. 140, 7 S.W. 2d 53 (1928); *Stevens v. Myres,* 91 Ore. 114, 177 Pac. 37 (1918). Also, apparently the majority of the decisions hold that the mere execution of a joint will is not sufficient in itself to show a contract between the testators, 169 A.L.R. 68; *e. g., Nye v. Bradford,* 144 Tex. 618, 193 S.W. 2d 165, 169 A.L.R. 1 (1946); *Rastetter v. Hoenninger,* 214 N.Y. 66, 108 N.E. 210 (1915), but some of these say that the additional evidence required to establish the contract is much less in the case of a joint will than where mutual wills are concerned. *Rastetter v. Hoenninger, supra.* There is, however, a respectable minority which holds that the execution of a joint will raises a presumption of the existence of a contract; *e. g., In re Edward's Estate,* 3 Ill. 2d 116, 120 N.E. 2d 10 (1954); *Jennings v. McKeen,* 65 N.W. 2d 207 (Iowa 1954); *In re Johnson's Estate,* 233 Ia. 782, 10 N.W. 2d 664 (1943); *Fraizer v. Patterson,* 243 Ill. 80, 90 N.E. 216 (1909); and this was apparently the court's view in the oft-cited early English case of *Dufour v. Pareira,* 1 Dick. 419, 21 Eng. Reports 332 (1769). In the principal case Justice Oxner points out that South Carolina has not previously decided this point, although the case of *Buchanan v. Anderson,* 70 S.C. 454, 50 S.E. 12 (1905), is cited by some as a holding in accord with the majority rule.

It is almost universally held that where the terms of a joint will clearly express the intent of the testators to be obligated by a contract, such contract will be given effect by the court. 57 Am. Jur., *Wills,* § 731; *e. g., Curry v. Cotton,* 356 Ill. 538, 191 N.E. 307 (1934); *Beveridge v. Bailey,* 53 S.D. 98, 220 N.W. 462, 468 (1928). This rule is recognized in the principal case. Thus, in the absence of a clearly stated contractual intention, the problem arises as to what evidence found within the joint will itself will be *prima facie* proof that it was executed pursuant to a contract between the testators. The use of the word "covenant" in a joint will was given great weight in finding a contractual relationship in *Curry v. Cotton, supra.* And in *Rastetter v. Hoenninger, supra,* the court, in finding a contract without the benefit of extrinsic evidence, said that the repetition of the phrase " 'this and this only to be our last mutual and joint will and testament' . . . strongly tends to indicate" a contractual intention. There seem to be no South Carolina cases in which the court has found the terms of a joint will or mutual wills sufficient to constitute a contract without the aid of extrinsic evidence. For that matter, there seem to be no South Carolina cases where the court found such a contract, relying to any measure upon the terms of the wills. However, a contract was found by the lower

court in *Turnipseed v. Sirrine,* 57 S.C. 559, 35 S.E. 757 (1899), a case involving mutual wills with reciprocal provisions. The Supreme Court did not discuss any evidentiary matters on review but approved the lower court's finding of fact and reversed and remanded the case to give effect to such contract. The relationship between the testators as disclosed by the joint will has been said by some courts to furnish evidence of a testamentary contract. *E. g., In re Edward's Estate, supra; Bower v. Daniel,* 198 Mo. 289, 95 S.W. 347, 359 (1906); modified in *Wanger v. Marr,* 257 Mo. 482, 165 S.W. 1027 (1914). However, in *Wilson v. Gordon,* 73 S.C. 155, 53 S.E. 79 (1905), a case involving mutual wills, the South Carolina Court said that the mere fact of blood relationship between the testators was no ground for the inference that either undertook a legal obligation. Courts have also found evidence of a contract in a close relationship between the testators and beneficiaries. *Tutunjian v. Vetzigian,* 64 N.Y.S. 2d 140 (Sup. Ct. 1946); *Schauer v. Schauer,* 43 N.M. 209, 89 P. 2d 521 (1939); *Williams v. Williams,* 123 Va. 643, 96 S.E. 749 (1918). No South Carolina cases directly considering this question have been found. However, in the principal case there was a close blood relationship between the testators and the beneficiary, but the court did not mention the possibility of finding therein evidence of a contract. Rather, it expressly stated that there was no evidence of a contractual obligation to be found in the instrument.

Reciprocal provisions in a will jointly executed by husband and wife have been held to be in themselves evidence that the will was executed pursuant to a contract between the testators. *Re Adkins,* 161 Kan. 239, 167 P. 2d 618 (1946); *Underwood v. Myer,* 107 W.Va. 57, 146 S.E. 896 (1929). In the principal case the court recognized these decisions but expressly reserved opinion on the weight to be given such a factor since in this case no reciprocal provisions were involved.

If the terms of the joint will or the relationship revealed therein do not constitute in themselves sufficient evidence of a contract, these elements may be considered with other evidence and in the light of surrounding circumstances to establish the contract, subject, of course, to the applicable rules relating to the Statute of Frauds. 57 Am. Jur., *Wills,* § 733; *Clement v. Jones,* 166 Ga. 738, 144 S.E. 319 (1928); *Williams v. Williams, supra; Wilson v. Gordon, supra; Turnipseed v. Sirrine, supra.* But the South Carolina Court has repeatedly said that proof of any contract to make a will must be clear and convincing, and a higher degree of proof is required than in other civil cases, because a contract of this nature is not

favored by the law. *Young v. Levy,* 206 S.C. 1, 32 S.E. 2d 889 (1945); *Dicks v. Cassels, supra; Wilson v. Gordon, supra.*

Two other South Carolina cases involving mutual wills have been found, *i. e., Ex parte Hineline,* 166 S.C. 352, 164 S.E. 887 (1932); *Izard v. Middleton,* 1 Desaus. 116 (S.C. 1785), however, neither discuss points involved in this casenote.

The principal case seems to settle three issues hitherto undecided in South Carolina, one expressly and two by implication. First, the court holds, in accord with the weight of authority, that the mere execution of a joint will is not sufficient to evidence a contractual obligation. Secondly, the testators in this case were husband and wife and the court clearly indicates that the mere fact of close relationship between the testators is no evidence of a contract. Thirdly, the beneficiary was the daughter of the testators and likewise the court does not consider this relationship as indicative of a contract. The South Carolina case of *Wilson v. Gordon, supra,* involving mutual wills, foreshadowed the decision in the instant case with reference to the second two issues.

JOHN E. JOHNSTON, JR.

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**PLEADING – Right of a Defendant in Tort Action to Bring in Additional Party as Joint Tort-Feasor of Plaintiff in a Counterclaim.** — Plaintiff sued for damages to person and property resulting from a collision between his automobile and a truck driven by the defendant. The defendant filed a counterclaim against plaintiff and a corporation, alleging that plaintiff was in the employ of the latter and was acting within the scope of his employment at the time of the accident. Upon notice to the plaintiff and the corporation, defendant moved for an order joining the corporation. From the trial court's order granting this motion, plaintiff appealed. HELD: Affirmed. The defendant may interplead the plaintiff's alleged joint tort-feasor in a counterclaim. The rule that he who asserts a cause of action arising out of a joint tort may assert it against one or more or all of the joint tort-feasors applies to a defendant who asserts a cause of action by counterclaim as well as to the plaintiff himself. *Johns v. Castle,* ..... S.C. ....., 91 S.E. 2d 721 (1956).

The bringing in of additional parties is largely within the discretion of the trial court. *Cleveland v. Spartanburg,* 185 S.C. 373, 194 S.E. 128 (1937); *Murray Drug Co. v. Harris,* 77 S.C. 410, 57 S.E. 1109 (1906); *Wait v. Pierce,* 191 Wis. 202, 210 N.W. 822 (1926).

". . . [W]hen a complete determination of the controversy cannot be had without the presence of other parties the court must cause them to be brought in . . . ." *Code of Laws of South Carolina,* 1952 § 10-219. There are similar provisions in other jurisdictions: *E. g., Cal. Code of Civil Proc.,* Deering 1949 § 389; Ill. Revised Statutes, 1951 § 110-148. The statute should not be construed to allow a joinder if it has the effect of overriding and revoking well recognized procedure. *Simon v. Strock,* 209 S.C. 134, 39 S.E. 2d 209 (1951). Some jurisdictions which allow contribution among joint tort-feasors by statute have allowed the defendant to bring in third persons as parties defendants for the purpose of determining their rights as to contribution. *Lottman v. Cuilla,* 288 S.W. 123 (Texas 1926); *Wait v. Pierce,* 191 Wis. 202, 210 N.W. 822 (1926). And the federal rules of civil procedure permit the bringing in of third parties whenever their presence is required for the complete determination of a counterclaim if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action. Fed. R. Civ. P. 13(h). However, it is a well established rule of the common law that the defendant has no right to bring in as parties defendant joint tort-feasors with him who were not made parties by the plaintiff. *Larson v. Cleveland Ry. Co.,* 142 Ohio St. 20, 50 N.E. 2d 162 (1943); *Booth v. Manchester R. Co.,* 73 N.H. 527, 63 Atl. 577 (1906); *Doctor v. Robert Lee Inc.,* 215 S.C. 332, 55 S.E. 2d 68 (1949). The defendant is allowed, in most states, to set forth in his answer new matter constituting a defense or counterclaim, *Code of Laws of South Carolina,* 1952 § 10-652; *Cal. Code of Civ. Proc.,* Deering 1949 § 437; and in a tort action the defendant may plead a similar cause of action against the plaintiff by way of counterclaim if the cause of action of the plaintiff and defendant arose out of the same set of facts. *Code of Laws of South Carolina,* 1952 § 10-705. The counterclaim is such that if brought in another action it would be a separate and independent action, *Republic State Bank v. Bailey Furniture and Lumber Co.,* 102 S.C. 329, 86 S.E. 680 (1915); *Greenville County v. Greenville,* 84 S.C. 410, 66 S.E. 417 (1908); and a defendant who files a counterclaim is in reality a plaintiff with respect to the counterclaim. *O'neill Bros. v. Crowley,* 24 F. Supp. 705 (W.D. S.C. 1938); *American Fruit Growers v. Leroche,* 39 F. 2d 243 (E.D. S.C. 1928). A plaintiff has the prerogative to sue any one of the several joint wrongdoers separately or he may proceed against any number or all of them jointly. *Birmingham v. Hawkins,* 196 Ala. 127, 72 So. 25 (1916); *Standard Phosphate Co. v. Lunn,* 66 Fla. 220, 63 So. 429 (1913); *Bagwell v. Southern Ry. Co.,* 21

F. Supp. 751 (W.D. S.C. 1938); *Halsey v. Minnesota-South Carolina Land and Timber Co.*, 174 S.C. 97, 177 S.E. 29 (1934). The joinder of master and servant in an action by a third person for a tort of the servant is permitted in most jurisdictions. *Moody v. Hardeman*, 44 Ga. App. 676, 162 S.E. 653 (1932); *Jenkins v. Southern Ry. Co.*, 130 S.C. 180, 125 S.E. 912 (1924). However, some jurisdictions are contra. *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918); *French v. Cent. Const. Co.*, 76 Ohio St. 509, 81 N.E. 751 (1907). The liability of master and servant for a tort of the latter is joint and several. *Southern Ry. Co. v. Davenport*, 39 Ga. App. 645, 148 S.E. 171 (1929); *Parker v. Bissonette*, 203 S.C. 155, 26 S.E. 2d 497 (1943); *Newton v. Southern Grocery Stores*, 16 F. Supp. 164 (E.D. S.C. 1936). Therefore the defendant by way of a counterclaim alleging the joint tort of plaintiff and another, not a party to the suit, can cause that party to be brought in as a party defendant. *Griswold v. Morrison*, 53 Cal. App. 93, 200 Pac. 62 (1921); *Johnson v. Moon*, 3 Ill. 2d 561, 121 N.E. 2d 774 (1954); *Walker v. Johnson*, 28 Minn. 147, 9 N.W. 632; *cf. Brown v. Quinn*, 220 S.C. 426, 68 S.E. 2d 326 (1951).

Although the precise question in the instant case had never before been decided in South Carolina, it is not a startling innovation of procedure. However, one seeming anomaly which the court did not discuss is the wording of the counterclaim statute, § 10-703, which states that the counterclaim must exist in favor of a defendant and against a plaintiff. The specification of plaintiff and defendant appears to indicate an intention to restrict a counterclaim to those who have already been made parties to the action by the complaint. This problem arose in *Johnson v. Moon, supra*, in which the court discussing a similar counterclaim statute said, ". . . we cannot accept the view that it should be construed as an isolated text, . . . the several provisions should be construed together in the light and general purpose of the act, so as to give effect to the main intent and purpose of the legislature . . . ." The "several provisions" referred to are the counterclaim statute and the statute which allows the court to bring in additional parties where a complete determination of the controversy cannot be had without their presence. In the present case the court reached the same result confronted with statutes almost identical to the Illinois ones, and it could be assumed that it gave its statutes a similar liberal construction.

The result reached in the instant case does not establish a third party practice in South Carolina but it is one more step away from the rigid common law rules of procedure. Since the state courts

are reluctant to change procedural rules in the absence of legislation, the maximum procedural efficiency will not be reached until the legislature sees fit to adopt rules similar, if not identical, to the federal rules of civil procedure.

WILLIAM E. LONG.

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**REAL PROPERTY — Appointment of Receiver in Partition Action.** — Action for partition of real estate alleged to be owned by plaintiffs and certain defendants as tenants in common. The complaint alleged that the remaining defendant, one Galloway, occupied the house on the above described land and made some claim thereto. Galloway by answer admitted possession of the premises and denied the material allegations of the complaint, claiming title under a contract of sale from a real estate agent purportedly representing plaintiffs and the other defendants. Thereafter motion was made by the plaintiffs to require Galloway to deposit with the Clerk of Court a reasonable sum of money as rental for the premises, past and future, pending the outcome of litigation. The trial court granted the motion and ordered Galloway to deposit thirty dollars per month. Galloway appealed to the Supreme Court. HELD: Reversed and remanded. The complaint was insufficient to justify appointment of a receiver in that there was no allegation that the defendant Galloway was in unlawful possession or insolvent, or committing waste, nor were any affidavits offered to contradict the affirmative defense. Moreover the action, though nominally for partition, was held in reality to contest the right of a defendant in possession under a claim of equitable title. *Turner, et al. v. Byers, et al.,* 226 S. C. 289, 85 S.E. 2d 100 (1954).

It is well recognized that in a suit to partition real property a court of equity is empowered under certain circumstances to appoint a receiver. *Christ Church v. Fishburne,* 83 S.C. 304, 65 S.E. 238 (1938); *Heinze v. Butte & B. Consol. Min. Co.,* 126 F. 1 (9th Cir. 1903) (certiorari den., 195 U.S. 631, 25 Sup. Ct. 788, 49 L.Ed. 353); Annot. 127 A.L.R. 1228, 1234 (1940). The most common ground for the appointment of a receiver in a partition action is the protection and preservation of the property, or the rents and profits thereof, from injury, waste, removal, conversion or destruction, although other circumstances may constitute sufficient grounds for such an appointment. *Smith v. Smith,* 138 N.J. Eq. 463, 48 A. 2d 697 (1941); 68 C.J.S., *Partition,* § 87 (1950). In New York it has

been said, "The power of the court in this respect is only limited by considerations of what is expedient for the interests of the parties concerned." *Pignolet v. Bushe,* 28 Howard's Practice Reports 9 (N.Y. 1864). Other courts have cautioned, however, that in cases involving real estate the power to appoint a receiver is a harsh and dangerous one, and should be exercised with great circumspection. *Kory v. Less,* 180 Ark. 342, 22 S.W. 2d 25 (1929); *Pelzer, Rodgers & Co. v. Hughes,* 27 S.C. 408 (1887). An appointment may be justified in the protection of the property from waste or loss, *Chalta v. Biller,* 212 Cal. 745, 300 Pac. 821 (1931); *Christ Church v. Fishburne, supra;* Annot., 127 A.L.R. 1228, 1235 (1940); or where one of the parties is in exclusive possession and is insolvent. *Hodgin v. Hodgin,* 175 Ind. 157, 93 N.E. 849 (1911); *McCrady v. Jones, McCrady v. Davie,* 36 S.C. 136 (1892). A Michigan court has remarked that where the other tenants not only deny the complainant's title but have endeavored to entangle the whole title, and are not disposed to account for the rents and profits, a receivership is proper. *Duncan v. Campau,* 15 Mich. 415 (1867). On the other hand, a receivership will not be granted in a partition suit where not justified as a protective measure. *Ames v. Ames,* 148 Ill. 321, 36 N.E. 110 (1894); *Tedder v. Tedder,* 109 S.C. 451, 96 S.E. 157 (1918); Annot., 127 A.L.R. 1228, 1237 (1940). Thus uncertainty as to the title of the applicant for a receiver may prevent an appointment. *Patterson v. McCunn,* 46 Howard's Practice Reports 182 (N.Y. 1873); *Richter v. Lindemann,* 166 App. Div. 33, 152 N.Y.S. 784 (1915). Moreover it is stated as a general rule that a receiver will not be appointed unless the record shows a reasonable probability that the plaintiff will ultimately be entitled to a decree or judgment. *Williams v. Southern Cotton Oil Co.,* 45 F. 2d 387 (5th Cir. 1930); *Bushman v. Bushman,* 311 Mo. 551, 279 S.W. 122 (1925); Annot., 109 A.L.R. 1212 (1937). In Oklahoma it has been held that since courts of equity are extremely adverse to any interference with the possession of real estate held under a claim of legal title, the presumptions are all in favor of the defendant in a hearing for the appointment of a receiver *pendente lite* for property so held. *Scott v. Price,* 103 Okla. 150, 229 Pac. 618 (1924); *Wagoner Oil & Gas Co. v. Marlow,* 137 Okla. 116, 278 Pac. 294 (1929). In South Carolina, the court in *Christ Church v. Fishburne, supra,* affirmed the appointment of a receiver in circumstances where claimants were in a "wrangle over the collection of rents" from tenants in possession. In so doing the court pointed out, "It is not the case of appointing a receiver of property which has been in the undisturbed possession

of one who claims both the legal title and the right to possession. Such is the case when an action to recover possession of real estate is brought, or when the proceedings, though nominally for partition, in fact contests the right and title of one who has heretofore been in undisturbed possession. Such is not the present case." In an earlier case action was brought for the recovery of real property. After the defendant had answered denying plaintiff's title and demanding partition of the land, plaintiff moved for appointment of a receiver. It was held that receivership was not warranted where the party in possession denied plaintiff's allegation of insolvency and contested plaintiff's claim of title. The court said, "This certainly does not make a case warranting the appointment of a receiver, depriving the defendant of the possession of the land, and impounding the rents." *DeWalt v. Kinard,* 19 S.C. 286 (1882).

There are no previous South Carolina cases squarely in point with the general factual situation in the instant case. The decision is in line with the weight of authority, however, in requiring a strong showing of necessity in order to warrant appointment of a receiver in a partition suit. The plaintiffs' showing was entirely inadequate in this respect. The case cannot be regarded as definitive, however, with respect to the particular consideration of receivership in partition actions. For, as the court points out, as well as being an action for partition it was also a contest of title and possession. Under these circumstances the decision is strongly supported by the holding of the *DeWalt case.* The court relied on this holding more particularly in regard to the inadequacy of plaintiffs' showing of necessity. The rationale of the *DeWalt case,* however, supports just as firmly the concept that where a contest of title is involved, receivership is improper. This is also enunciated by way of dicta in the *Christ Church case.* Relying on these two cases, the court properly reaffirmed the prevailing view, namely, that where one is in possession under a claim of right a duty arises to proceed with the greatest caution before depriving him of the benefit of his asserted rights through receivership.

HEYWARD MCDONALD.

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**OPTIONS — Lessee's Option to Purchase as Affected by Another's Offer to Purchase a Larger Parcel Including the Leased Parcel.** — Lessee occupied a lot under lease from the lessor, the lease containing a first-refusal-to-purchase option: that if lessor received an offer from a third party for the property and decided to sell, lessee

would be given the option of buying at the price which lessor had been offered. Lessor received an offer from a third party for the demised lot and an adjacent lot, also owned by lessor, for a total price of $18,000.00. Lessee was notified of this offer and informed lessor that he was exercising his option to purchase both lots at the price offered by the third party. Lessor subsequently informed lessee that he was experiencing difficulty in getting out of his agreement with the third party, and that, in the meantime, he had received an offer of $12,000.00 for the demised lot itself from another party. Lessee then exercised his option to purchase the demised lot for $12,000.00. Lessor later sold the adjacent lot to the original third party for $7,500.00. About one and one-half years later, lessee brought action against lessor alleging that lessor had refused to comply with contract to sell both lots to lessee for $18,000.00 and had falsely represented to lessee that an offer of $12,000.00 had been received for the demised lot. Lessee also alleged that since both lots were approximately of the same value, lessee was entitled under his option to purchase the demised lot for one-half the price offered for both lots, which would have been $9,000.00. The lower court ordered a non-suit, but upon reviewing testimony, the trial judge concluded that the case should have gone to the jury and granted lessee's motion for a new trial. Upon lessor's appeal from the order granting a new trial, HELD: Reversed; non-suit re-instated and case dismissed. There was no evidence reasonably warranting an inference of fraud and there could be no recovery on the theory of a simple breach of contract as lessee's option gave him a right to purchase the leased lot only. He had no right to require the lessor to sell the leased premises for one-half of the price offered by a third party for both the demised lot and an adjacent lot. *Smith v. Traxler,* 90 S.E. 2d (S.C. 1955).

Although this question has been before the courts but infrequently, it has been uniformly held since the first case arose in 1922 that a lessee with a first-refusal-to-purchase option can obtain an injunction preventing the lessor from selling a larger parcel of land including the leased parcel. *New Atlantic Garden v. Atlantic Garden Realty Corporation,* 201 App. Div. 404, 194 N.Y.S. 34 (1922), (affirmed without opinion in 237 N.Y. 540, 143 N.E. 734 (1923)); *American Oil Company v. Eastern Market Company,* 60 York Leg. Rec. (Pa.) 33 (1945); *Atlantic Refining Company v. Wyoming National Bank,* 356 Pa. 226, 51 A. 2d 719 (1947). However, the lessee cannot prevent the lessor from selling the larger parcel ex-

clusive of the leased parcel. *Nu-Way Service Station v. Vandenberg Brothers Oil Company,* 283 Mich. 551, 278 N.W. 683 (1937); *American Oil Company v. Eastern Market Company, supra; Atlantic Refining Company v. Wyoming National Bank, supra.* The option does not give the lessee the right to purchase the entire parcel which the lessor desires to sell. *Nu-Way Service Station v. Vandenberg Brothers Oil Company, supra; American Oil Company v. Eastern Market Company, supra; Atlantic Refining Company v. Wyoming National Bank, supra.* As pointed out by counsel in the principal case, a contention that the option can be construed as covering the larger parcel of land violates the Statute of Frauds. *Code of Laws of South Carolina,* 1952, § 11-101(4). Nor can the lessee be required to meet a third party's offer to purchase the larger parcel. *L. E. Wallack, Inc. v. Toll,* 381 Pa. 423, 113 A. 2d 258 (1955). In a case where the lessor was required to convey the larger parcel to lessee, there was evidence that the lessor's notification to lessee of an offer by another party for the entire parcel was intended as a new and independent offer to sell to lessee, was accepted by lessee as such, and lessor had not accepted offer from third party before lessee's acceptance. *First National Exchange Bank of Roanoke v. Roanoke Oil Company,* 169 Va. 99, 192 S.E. 764 (1937). But in the absence of such an intention, notification by a lessor to a lessee of another's offer to purchase a larger parcel does not give the lessee a right to purchase the leased parcel for a sum proportionate to the price offered for the whole parcel. *New Atlantic Garden v. Atlantic Garden Realty Corporation, supra; American Oil Company v. Eastern Market Company, supra.* In a case where lessor sold the entire parcel to a third party without giving lessee notice that he had received an offer, the court ordered lessor to convey to lessee the leased parcel for a sum proportionate to that offered by third party for the entire parcel. *Brenner v. Duncan,* 318 Mich. 1, 27 N.W. 2d 320 (1947).

The rule, as followed by the principal case, that a first refusal-to-purchase option gives the lessee no right to purchase the leased parcel for a sum proportionate to the price offered by another party for the entire parcel, appears to be the better one. Although this rule may sometimes result in an impasse in cases where the lessor desires to sell only the entire parcel and lessee desires to purchase only the leased parcel, there appears to be no other equitable solution. In such cases as the *Brenner Case, supra,* it would appear that the best solution would be to set aside the conveyance to the third party and

allow lessor and lessee to effect some mutually acceptable compromise. Otherwise, a hardship may be imposed on the third party who could find himself in possession of only a portion of the whole parcel when he may have wanted the whole parcel or none at all. If the lessor and lessee cannot effect a compromise, both are still protected in their rights under the option agreement. In any event, as was pointed out by the court in the principal case, it is not for the courts to undertake to apportion the fair value of the leased parcel in proportion to the price offered for the whole parcel.

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