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Property Law

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PROPERTY LAW

I. LEGAL TITLE HOLDERS' PRESUMPTION OF POSSESSION REBUTTED ONLY BY ADVERSE POSSESSION

In *Catawba Indian Tribe v. South Carolina*[1] the Fourth Circuit Court of Appeals held that any person who held land adversely for ten years between 1962 and 1980, without tacking except by inheritance, could bar the Catawba Indian Tribe's (Tribe) claim to that part of the disputed 144,000 acres of land. The court also held that South Carolina's ten year statute of limitations[2] for the recovery of real property did not bar the Tribe's claim against any other person.[3] The Fourth Circuit reasoned that only proof of adverse possession could rebut the presumption of possession that South Carolina Code section 15-67-210 gives to a legal title holder such as the Tribe. Thus, the Tribe's admission that it had not possessed the land for 140 years did not rebut the presumption.[4]

In 1980 the Tribe sued the State of South Carolina and various parties who represent over 27,000 landowners to recover possession of 144,000 acres in northwestern South Carolina. In the 1760s the Tribe had relinquished its aboriginal lands in South Carolina to Great Britain in exchange for a permanent resettlement on the fifteen square mile tract of land that is in issue.[5] In the 1840 Treaty of Nation Ford, the Tribe transferred its interest in the fifteen square mile tract to the State of South Carolina. Because the United States government did not participate in the 1840 treaty,[6] the United States Supreme Court ruled that the 1840 conveyance to South Carolina was void under the Indian Nonintercourse Act,[7] which requires federal approval of all

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1. 865 F.2d 1444 (4th Cir.), *cert. denied*, 109 S. Ct. 3190 (1989).
2. S.C. CODE ANN. § 15-3-340 (Law. Co-op. Supp. 1989).
3. *Catawba Indian Tribe*, 865 F.2d at 1452-54.
4. *See id.* (the Tribe had not possessed the land since 1840).
5. The Catawbas transferred the land in the 1760 Treaty of Pine Hill and the 1763 Treaty of Augusta.
6. *Catawba Indian Tribe*, 865 F.2d at 1446.
7. 25 U.S.C. § 177 (1988) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Id.

transfers of Indian lands.[8] Furthermore, the Supreme Court held that the South Carolina statute of limitations did not apply to the Tribe's claim until Congress revoked the Catawba Constitution in 1962 and lifted federal protection.[9] The Supreme Court then remanded the case to the Fourth Circuit for it to determine the effect of the South Carolina statute of limitations on the Tribe's claim after 1962.[10]

First, the Fourth Circuit held that the Catawba Act[11] did not revoke the Tribe's right to invoke federal jurisdiction even though it removed the Tribe's federal protection. The court also noted that federal jurisdiction was appropriate under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (commerce issue), and 28 U.S.C. § 1362 (which accords federal jurisdiction to Indians in cases that involve federal law).[12]

Second, the court held that the statutes of limitations that pertain to parties under a disability,[13] did not apply to the Tribe, because American Indians were not an expressly listed class in the statutes.[14]

Third, the court held that the absence of a recorded title in the Registry of Mesne Conveyances did not defeat the Catawba's claim. The court reasoned that legal title was not exclusively based on record title. Instead, the court held that a survey of the land in the South Carolina Secretary of State's office was sufficient to support the Tribe's claim to the title.[15]

The defendants argued that Indian title was only equitable title and not legal title. The court ruled that Indian title was legal title for recovery purposes and, thereby, afforded the Tribe the presumption of possession under South Carolina Code section 15-67-210.[16] The court made this decision for two reasons. First, under Indian title the right of occupancy was good against all but the sovereign. If Indian title and fee simple title co-existed, the Indian title was the superior title. Second, to hold that Indian title precluded the presumption of possession would conflict with the United States' policy and the Indian Nonintercourse Act,[17] which were intended to protect the Indians'

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8. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 500 (1986).

9. *See* 476 U.S. at 504-08.

10. *See Catawba Indian Tribe*, 865 F.2d at 1444.

11. 25 U.S.C. §§ 931-38 (1988).

12. *See Catawba Indian Tribe*, 865 F.2d at 1455-56.

13. S.C. CODE ANN. §§ 15-3-40, -370 (Law. Co-op. Supp. 1990).

14. *Catawba Indian Tribe*, 865 F.2d at 1447. The state argued that the Tribe was a disabled plaintiff from 1840 to 1962 so that when Congress lifted the disability in 1962 the Tribe only had 10 years to bring its suit. *Id.*

15. *Id.* at 1448-50.

16. *Id.* at 1451-52.

17. 25 U.S.C. § 177 (1988) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138).

possession.[18]

Once the Fourth Circuit determined that the Catawbas held legal title to the land in dispute, it addressed the application of the South Carolina statute of limitations on the recovery of real property to the Tribe's claim.[19] The Code does not allow actions to recover real property if the plaintiff has not possessed the land within ten years prior to the commencement of the suit.[20] The Code, however, presumes that a legal title holder is in possession of the property during the previous ten years.[21] The defendants argued that even if the Tribe had legal title, the Tribe's admission that they had not been in possession for 140 years rebutted the legal title holder's statutory presumption of possession. The Fourth Circuit ruled, however, that only adverse possession rebutted the presumption.[22] Thus, the court ruled that the Tribe could not recover from landowners who had adversely possessed the property between 1962 (the year the Catawba Constitution was revoked) and 1980 (the year the Tribe filed suit). For purposes of adverse possession claims, the court did not allow the plaintiffs to tack except by inheritance.[23]

The Fourth Circuit's opinion is the first explanation of how a party can rebut the presumption of possession under South Carolina law. In dissent Judge Widener argued that the Tribe's judicial admission that they did not possess the land for 140 years should rebut the presumption.[24] Under Widener's theory a defendant in an action to recover real property does not need to establish adverse possession to defeat the plaintiff's claim. Instead, the defendant can rebut a legal title holder's presumption of possession if he demonstrates that the title holder was not actually in possession of the property.

The *Catawba* majority position that adverse possession is the only manner to rebut this presumption is supported by South Carolina Code section 15-67-210, which states that the person with legal title is presumed in possession "unless it appear[s] that such premises have been held and possessed adversely . . . ."[25] The statute explicitly allows for rebuttal by adverse possession. Rebuttal by any other manner must be inferred from the language of the statute, which does not support such an inference.

If Judge Widener's dissent were adopted, a plaintiff with legal title

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18. *See Catawba Indian Tribe*, 865 F.2d at 1451.
19. *See* S.C. CODE ANN. § 15-3-340 (Law. Co-op. Supp. 1990).
20. *Id.*
21. *See id.* § 15-67-210 (Law. Co-op. 1976).
22. *See Catawba Indian Tribe*, 865 F.2d at 1452-54.
23. *Id.* at 1456.
24. *Id.* at 1457 (Widener, J., dissenting).
25. S.C. CODE ANN. § 15-67-210 (Law. Co-op. 1976).

could be barred from claiming possession because of a lack of actual physical possession within ten years. The defendant in possession may not have clearly established title in himself through adverse possession, leaving ultimate ownership in an uncertain state. The majority view avoids such uncertainty by not requiring the plaintiff holding legal title also to be in physical possession.

Judge Widener, however, implies that fairness to all parties involved is more important than certainty. His dissent stated, "The majority's approach . . . defeats the very purpose of South Carolina's statute of limitations by allowing a state claim. If South Carolina had intended to give parties who could establish 'legal title' *no* time limit to file suit, it could have done so instead of merely creating a presumption of possession."[26]

The majority's position implies that the statute of limitations does not apply to a plaintiff once he establishes legal title. Judge Widener points out that this approach allows the validation of stale claims. Judge Widener's argument has merit in this case because the claim is 140 years old. He implies that a claim may be so stale and have such a potentially great impact on landowners that it should not be allowed even though disallowing the claim might contradict statutory law. Because of the effect this decision will have on over 27,000 landowners, Judge Widener's argument should have been given more consideration in *Catawba Indian Tribe.*

Weston Adams, III

II. Intent Determines Which Party Can Enforce a Condition in Real Estate Sales Contracts

In *Ehlke v. Nemec Construction Co.*[27] the South Carolina Court of Appeals held that the "question as to who may enforce or take advantage of a condition in a contract of sale depends on the intention of the parties as to . . . whose benefit it was inserted."[28] The parties to a contract for the sale and purchase of real property "may make it subject to such conditions and provisos as they may see fit, except such as are illegal or contrary to public policy."[29] These contracts frequently provide that the sale is contingent upon the sale of real estate which

26. *Catawba Indian Tribe*, 865 F.2d at 1457 (Widener, J., dissenting) (emphasis in original).

27. 298 S.C. 477, 381 S.E.2d 508 (Ct. App. 1989).

28. *Id.* at 480, 381 S.E.2d at 510 (quoting 91 C.J.S. *Vendor & Purchaser* § 110(c) (1955)).

29. 91 C.J.S. *Vendor & Purchaser* § 110(a) (1955).

belongs to the purchaser. If the purchaser fails to sell his property, the issue becomes whether the buyer or seller, or both, may enforce or take advantage of this condition. The South Carolina Court of Appeals addressed this question for the first time in *Ehlke*.

The Ehlkes and Nemec Construction Company (Nemec) entered into a written contract whereby the Ehlkes would purchase a lot and Nemec would build a home for them. The contract contained several conditions. One condition stated that the property was being sold contingent upon the sale of the Ehlke's current home by November 1, 1986.[30] The Ehlkes did not sell their home by November 1, 1986; Nemec refused to begin construction on the Ehlkes new house and declared the contract void and unenforceable. The Ehlkes filed an action to recover damages for Nemec's alleged breach of the land sale contract and claimed that the condition was not enforceable at the option of the construction company.[31]

The *Ehlke* decision addressed a novel issue in South Carolina.

> In recent years, it has been increasingly important to identify the beneficiary of the contingency and the person who may waive the exercise of the contingency. Generally, the party who can waive the contingency is also the beneficiary of it. Nonetheless, the identity of the contingency's beneficiary may be unclear.[32]

The court of appeals, applying the general rules for construction of contracts for the purchase and sale of land, attempted to clarify this issue. The court of appeals held that "a condition inserted solely for the benefit of one [party] . . . cannot be taken advantage of by the other party" in a real estate contract.[33] The *Ehlke* decision established the test in South Carolina for determining the parties' intent. Courts should deduce intent from the language used in the contract, the surrounding circumstances at the time of contract execution, and the intended purpose of the contract provision.[34]

The court of appeals applied its new intent test to the findings of fact that the trial judge had determined. The evidence indicated that the sale contingency provision was "presented by Seller's agent to buyers as an optional provision, to be inserted or not, as the Buyers

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30. *Ehlke*, 298 S.C. at 478, 381 S.E.2d at 509.

31. *Id.* at 477-79, 381 S.E.2d at 508-09. Nemec's agent stated that "if [Ehlke] wanted the house built, [Ehlke] would have to come up with another $4,500." *Id.* at 479, 381 S.E.2d at 509.

32. Yzenbaard, *Drafting the Residential Contract of Sale*, 9 WM. MITCHELL L. REV. 37, 56 (1984).

33. *Ehlke*, 298 S.C. at 480, 381 S.E.2d at 510 (citing 91 C.J.S. *Vendor & Purchaser* § 110(c) (1955)).

34. *Id.*

chose."[35] Contracts for the sale of real property typically contain this type of provision to assure buyers of the funds needed to purchase the new home and relieve them of the obligation of simultaneously paying for two homes.[36] The Ehlke's informed Nemec two months before the "deadline" for the sale of the buyers' present home that they were waiving the condition.[37] The court found these facts conclusive and decided that the condition was a condition for the benefit of the Ehlke's. Consequently, Nemec could not claim the nonoccurrence of the condition was a forfeiture, and the contract was binding on Nemec.[38] The Ehlkes, however, had the option to cancel the sales contract if the condition went unfulfilled.

The court's holding in *Ehlke* agrees with the majority of courts in other jurisdictions that have ruled on the status of similar conditions contained in contracts for the sale of property. The condition at issue in *Ehlke* was a condition precedent to the obligation of the Ehlkes to buy. It was not a condition precedent to the obligation of Nemec to perform. The *Ehlke* opinion adds strength to the argument that a condition in a sales contract that makes the sale contingent upon the sale of the purchaser's present home is not a condition precedent to the existence of a contract between buyer and seller, but performance of the condition is a condition precedent to further obligations under the contract.[39] The *Ehlke* test determines whether this condition allows the buyer or seller, or both, to enforce the performance of the contract.

The court of appeals applied the *Ehlke* test four months later in

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35. *Id.* at 479, 381 S.E.2d at 509.

36. Yzenbaard, *supra* note 32, at 64. The trial court in *Ehlke* dismissed the seller's argument that the parties also inserted the condition for the seller's benefit:

> Defendant argues that it would not have undertaken the construction of such a home unless and until plaintiffs sold their present home. Having carefully reconsidered the evidence on this point, I remain unpersuaded . . . . [D]efendant offered no evidence to show that the buyers would have been unable to purchase the new home without selling their old one. On the contrary, the evidence is that the buyers could have performed without selling their present home. More to the point, there is no credible evidence that the defendant doubted, or had cause to doubt, plaintiffs' ability to perform, with or without the sale of their present home. The evidence is that mortgage financing was generally available for a high percentage of the purchase price.

Ehlke, 298 S.C. at 479-80, 381 S.E.2d at 509-10.

37. *Ehlke*, 298 S.C. at 479, 381 S.E.2d at 509. "The party for whose benefit a condition is inserted may, at his option, waive it . . . . When a condition attached to a contract of sale is waived the sale is thereby rendered absolute." 91 C.J.S. *Vendor & Purchaser* § 110(e) (1955).

38. *Ehlke*, 298 S.C. at 481, 381 S.E.2d at 510.

39. M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 1.5, at 94. (3d ed. 1975). "A contract does not lack mutuality because of any such condition." *Id.*

Century 21 Horton Real Estate, Inc. v. Sokcevic.[40] In *Sokcevic* the court ruled on a similar condition which made the sale contingent upon the buyer's ability to sell his present home by the closing date of June 15, 1986.[41] The buyer was unable to sell his present home within the initial period of the contract, and the parties agreed that if the sellers could find another purchaser before the buyer sold his house, then the sellers could sell the house to another purchaser. The issue before the court was whether the seller could enforce the condition and terminate the contract as of June 15, or whether the buyer was the only party allowed to take advantage of the condition.[42]

The court of appeals, relying on *Ehlke* stated that "[w]hether a contingency such as the one between the Buyer and the Sellers in this case is enforceable at the option of a buyer . . . depends upon the intention of the parties as to the person or persons for whose benefit the contingency was inserted in the contract of sale."[43] The evidence supported the finding that the sellers and the buyer entered into a contract of sale that was binding upon the sellers subject to the contingency of the buyer selling his present house. The sellers could avoid the sale to the buyer only if the sellers found another purchaser before the buyer fulfilled the contingency. The contingency, therefore, was probably for the benefit of the buyer.[44] The court apparently considered the language of the contract, the surrounding circumstances at the time of contract execution, and the purpose of the provision.[45] After the "deadline" date passed, the buyer, not the sellers, had the option to enforce the condition and terminate the contract. The buyer chose not to enforce the condition. Therefore, the contract remained binding upon the sellers and was enforceable if the buyer was able to find a purchaser for his present house before the sellers found a purchaser for

40. 300 S.C. 8, 386 S.E.2d 270 (Ct. App. 1989).

41. *Id.* at 9, 386 S.E.2d at 271. If the sale of the buyer's present home did not take place by the deadline date of June 15, 1986, "The contract stated [that the] 'closing may have to be extended.' The Buyer testified that the extension applied 'if I was unable to sell my house in Anderson.' " *Id.*

42. The *Sokcevic* court also addressed two other issues. First, whether an effective sale of the subject property took place at the time the parties entered into the contract of sale even though the final closing on the property did not take place until a later date assuming that the original contract was still binding on the parties after the "deadline" date. *Id.* at 11, 386 S.E.2d at 272-73. Second, whether Century 21 Horton Real Estate, the listing agent, was entitled to a commission even though the parties signed the contract of sale prior to the listing agreement between seller and realtor. *Id.* at 12, 386 S.E.2d at 272-73.

43. *Id.* at 10-11, 386 S.E.2d at 272.

44. *See id.* at 11, 386 S.E.2d at 272.

45. *See id.* at 11-12, 386 S.E.2d at 272-73 (outlined elements of the *Ehlke* test).

their house.[46]

Although courts on occasion have held that similar contract conditions were for the benefit of both parties,[47] the standard provisions that relate to the ability of the purchaser to sell his present house in contracts for the sale of property allow the purchaser, not the seller, to rescind the contract if he is not able to sell the house.[48] The seller, however, is not completely at the mercy of the buyer in this instance. A contract of sale that is conditioned on the purchaser's ability to sell the purchaser's house requires the purchaser to make reasonable efforts to sell the house.[49] The court noted this restriction on the buyer in *Sokcevic*.[50]

In the majority of residential real estate transactions, property is sold and purchased through a real estate broker, and in most situations, the real estate broker will prepare the agreement of sale. Even so, counsel may guard against the problems addressed by the court of appeals in *Ehlke* and *Sokcevic*.[51] In light of these two decisions, it is

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46. The jury, having determined that the original contract still bound the sellers, concluded under the second issue that "the contract of sale entered into between the Sellers and the Buyer was tantamount to a sale of the subject property . . . ." *Id.* at 11, 386 S.E.2d at 273. Finally, the court concluded that Century 21 Horton Real Estate was not entitled to a commission because "the evidence [was] clear that the property was submitted to and purchased by the Buyer prior to the term of the contract between the Sellers and the Realtor." *Id.* at 12, 386 S.E.2d at 273.

47. *See* Rodgers v. Baughman, 382 N.W.2d 714, 717-18 (Iowa Ct. App. 1985) (a contract of sale conditioned on purchaser's sale of his property was for the benefit of both parties because the sale was necessary for purchasers to obtain financing); Hodorowicz v. Szulc, 16 Ill. App. 2d 317, 320-21, 147 N.E.2d 887, 889 (1958) (condition that sale was subject to purchasers selling their house).

48. *See* Cox v. Funk, 42 N.C. App. 32, 55, 255 S.E.2d 600, 602 (1979).

49. *See* Allison v. Lee, 333 So. 2d 149, 151 (Ala. Civ. App. 1976) (purchasers must attempt to sell their present home within a reasonable time); Dodson v. Nink, 72 Ill. App. 3d 59, 64, 390 N.E.2d 546, 550 (1979) (purchaser required to make reasonable efforts).

> Where a contract for the sale of realty requires a party to perform, or obtain compliance with, a condition therein, he is bound to exercise good faith and make a reasonable effort to perform or obtain compliance, and he will not be relieved from liability under the contract where he fails to do so.

91 C.J.S. *Vendor & Purchaser* § 110(d) (1955).

50. *See* 300 S.C. at 9, 386 S.E.2d at 272.

51. Taylor, *Some Agreement of Sale Basics*, 4 THE PRAC. REAL EST. LAW. 69 (1988) (discussion of items that counsel should check or change in sales agreement).

> Obviously, a contingency should be clearly drafted. Express time limits for the waiver or exercise of the contingency should be included. While the contingency is in effect, the seller typically has the property off the market. If the delay is long, a seller might miss several potential buyers. The seller's attorney therefore should consider one or more of the following drafting alternatives. First, a reasonable time period should be established for exercise or waiver of the contingency . . . . Obviously, mutually agreed upon written extensions are

imperative that the contract expressly indicate the identity of the contingency's beneficiary. This express identification will protect either the buyer or the seller, or both, in the long run.

Robert H. Mozingo

III. Trial Courts Possess Inherent Authority to Appoint Commissioners to Partition Property

In *Anderson v. Anderson*[52] the South Carolina Supreme Court held that trial courts have the inherent authority to appoint commissioners to aid the courts in partitioning property. This holding renews a prior statutory practice in South Carolina which was repealed by the South Carolina Rules of Civil Procedure.[53]

In *Anderson* a dispute arose between three brothers who disagreed about the disposition of real property which they had inherited from their parents. One son had a one-half interest; the other two each had a one-fourth interest. One of the brothers who had a one-fourth interest operated a dairy farm on the property, which he had previously run with his father. He maintained barns, sheds, and pastures on the property and had purchased additional property nearby for his home.[54]

The other two sons sued their brother for partition of the property and requested a judicial sale of the land with the sale proceeds to be distributed according to each owner's interest. The brother who farmed requested an allotment of the property that would take into account both his proportion of ownership in the property and his substantial

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always an alternative. Second, the seller's attorney should consider the possibility of continuing to list the property for sale. The contract of sale could provide that the buyer has a stated period of time, for example, forty-eight hours after receipt of notice from the seller of another bona fide offer, in which the buyer must either waive the contingency or terminate the contract. Alternatively, the contract of sale could permit the seller to continue showing the property and accept other offers as long as the later offers are contingent on the failure of the first offer to close.

Adequate provisions should be included for notice of exercise or waiver of the contingency. The format of the notice should be specified, for example, in writing delivered by mail to the seller. The contract should also state the consequences of lack of receipt of notice by the given date. Typically, failure to give notice results in waiver of the contingency.

Yzenbaard, *supra* note 32, at 55-56.

52. 299 S.C. 110, 382 S.E.2d 897 (1989).

53. S.C. Code Ann. §§ 15-61-60 to -90 (Law. Co-op. 1976 and Supp. 1988) (former statutory provision which was repealed in 1985).

54. 299 S.C. at 111-12, 382 S.E.2d at 898.

improvements to the property.[55]

The circuit court ordered an in-kind partition without making findings regarding the value of the property or the structures located on it. The lower court's order did not state the method for dividing the property. It also failed to find damages for the destruction of the farming brother's business as a result of an outright sale. The non-farming brothers appealed claiming that the trial court erred in ordering an in-kind partition without valuing the various portions of the property and in failing to set out a clear method for making the partition.[56]

The supreme court initially noted that the law favors a partition in-kind when it can be made without injury to the parties but it also recognized the "somewhat confused state of the law in this area."[57] Previously a South Carolina statute mandated the appointment of a commissioner in cases such as this to appraise the disputed property and determine whether a partition in-kind would be fair.[58] The enactment of the South Carolina Rules of Civil Procedure, however, repealed this statute.[59] The new Rules of Civil Procedure did not replace the repealed procedure.[60]

The supreme court ruled that courts should still use the repealed procedure and held that a circuit court "has the inherent authority to appoint commissioners to aid it in effectuating a partition."[61] The court, therefore, filled a gap left by the legislature with this holding.

The court also ruled that probate courts have exclusive original jurisdiction over disputes relating to the estates of decedents.[62] The brothers, therefore, should not have brought their claims in the circuit court since it did not have subject matter jurisdiction to determine the issues. The court dismissed the claims against the estate without prejudice.[63]

Stephen Edward Spelman

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55. *Id.* at 112, 382 S.E.2d at 898.

56. *Id.* at 112-113, 382 S.E.2d at 898

57. *Id.* at 114, 382 S.E.2d at 899.

58. *See* S.C. CODE ANN. §§ 15-61-60 to -90 (Law. Co-op. 1976 and Supp. 1988) (former statutory provision which was repealed in 1985).

59. *Id.* (editor's note).

60. The court refers to rules 17 and 71, which address procedure in partition actions without specifically addressing how to actually effect a partition. *Anderson*, 299 S.C. at 114, 382 S.E.2d at 899.

61. *Id.* at 115, 382 S.E.2d at 900.

62. *Id.*; *see* S.C. CODE ANN. § 62-1-302 (Law. Co-op. 1987).

63. *Anderson*, 299 S.C. at 115, 382 S.E.2d at 900.