

Rule 70 SCRPC

The Rarely Used & Often Forgotten Rule

A

I. Introduction

Equity courts in South Carolina, although considered a division of the circuit courts, provide a plaintiff an opportunity to seek just and equitable outcomes when the traditional courts of law offer no relief.¹ South Carolina's adoption of equitable remedies does not stand alone as other states, and even the United States Supreme Court, have recognized the benefit of granting a discretionary equitable remedy when no adequate remedy at law exists. For instance, in *Willard v. Tayloe* the Supreme Court concluded that courts have wide discretion to fashion relief in cases of equity holding that "...relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case."² In fashioning this relief, the *Willard* Court relied upon its equitable authority to compel specific performance of a contract for the sale of property when a party refused to perform a specific act.³ Rule 70 of the South Carolina Rules of Civil Procedure grants state courts similar discretion to extend the power of equity to the transfer of real property. The rule reads:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the

¹ S.C. Code Ann. §14-11-15.

² 75 U.S. 557, 565 (1869).

³ Fed. R. Civ. P. 70

party entitled to performance, the court may issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.⁴

Thus, when a party fails to comply or perform acts required by such a judgment, courts of equity are empowered with the ability to remedy such defiance by invoking five different methods for enforcement, some are enumerated judgments and others have been implied:⁵

- (1) The court may issue a writ of attachment or sequestration against the property of the disobedient party.
- (2) The court may find the disobedient party in contempt.
- (3) The court may issue a writ of execution or assistance if the judgment deals in the delivery or possession of the property.
- (4) The court may direct the doing of the act required by the judgment by some other person appointed by the court, and
- (5) The court at its discretion may enter a judgment having the effect of a conveyance as to the real or personal property within South Carolina divesting the title of any party and vesting it in others.

⁴ S.C. R. Civ. P Rule 70

⁵ 25 S.C. Jur. Rules of Civil Procedure, s 70.2 (Mar. 2012).

Despite these five methods, South Carolina state courts have been curiously silent in invoking this rule or if utilized do not cite to it as a basis for their authority. A search of South Carolina cases yields but one case citing to Rule 70 rule. In 1884, *Dilling, Baker & Co. v. Foster*, addressed the appointment and power of receivers to sell property interests and specifically cited to “Rule 70 of the Circuit Court” in its opinion.⁶ There appears to be no other recorded cases that cite to SCRCF Rule 70 at the state level. It is difficult to believe that a rule that allows courts in equity such broad discretionary power fails to be cited. Notably, however, as recent as last year, the South Carolina District Court cited to the federal counterpart of SCRCF 70. In *Braunstein v. Pickens*, the court relied upon FRCP 70 in addressing whether a party should be required to perform an act pursuant to a judgment.⁷

Despite South Carolina’s apparent lack of recognition for Rule 70, it has been utilized by the courts notwithstanding the failure to cite to the rule as the basis for decisions in equity. The remainder of this paper specifically addresses some of the various methods available to a court under the rule for a party’s refusal to perform an act and the lack of use by courts of such a broad inherent equitable power.

II. Writ of Sequestration

Courts of equity have the inherent power to issue writs of sequestration in certain types of actions for the purpose of preserving property pending a hearing and to enforce compliance with orders and judgments which the court may deem to be necessary, even without statutory authority.⁸ A party may apply to obtain a writ of sequestration for the performance of an act, and the clerk will then issue a writ of sequestration against the defendant’s property compelling his obedience. Moreover, the possible destruction or equitable waste of the property may compel a

⁶ 21 S.C. 334, 341 (1884).

⁷ 274 F.R.D. 568 (D.S.C. 2011).

⁸ 70 Am. Jur. 2d Sequestration § 25.

writ of sequestration. For example, it has been held that a defendant's disposal, ill treatment, waste or destruction of property, or the immediate danger of such, may provide a sufficient basis for the issuance of a writ of sequestration in favor of a plaintiff as the purported owner of or the person holding a security interest in the property involved in the litigation.⁹

In *Murphy v. Murphy*, involving a domestic divorce the Supreme Court of South Carolina held that the lower court had the inherent power to issue a writ of sequestration to sequester an investment account and appoint a sequester to take control and review withdrawals for past years.¹⁰ Although the decision and affirmation clearly rely on the equity court's powers granted in Rule 70 to issue the writ of sequestration, neither the lower court nor the Supreme Court cite to the rule in their decisions. More importantly, however, *Murphy* is one of the very few South Carolina cases to even utilize the method of writ of sequestration. The only other cases to address writ of sequestration date from the 1800's.¹¹

III. Writ of Attachment

The writ of attachment can and is used in various situations in judicial proceedings to accomplish a number of objectives. However, the remedy stated in South Carolina Rules of Civil Procedure Rule 70 does not stand alone and hardly goes unspoken as it also exists in South Carolina's statutory scheme as § 15-19-10, entitled Civil remedies and procedures. In court of law (verses equity) the writ of attachment is issued to accomplish a number of objectives which include:

In any action: (1) for the recovery of money; (2) for the recovery of property, whether real or persona, or damages for the wrongful conversion and detention of

⁹ 70 Am. Jur. 2d Sequestration §12 (John R. Kennel, J.D., of the National Legal Research Group. Inc) citing *Mitchell v. W.T. Grant, Co.*, 416 U.S. 600 (1974) (upholding a Louisiana sequestration statute); *Edmonds v. Hall*, 236 N.C. 153 (1952).

¹⁰ 461 S.E. 2d 39 (S.C. 1995).

¹¹ *See e.g.*, *Blake v. Heyward*, 8 S.C. Eq. 208 (Bail. Eq.) (1831).

personal property; (3) for the recovery of damages for injury done to either person or property; (4) against a corporation created by or under the laws of any other state, government, or country; (5) against a defendant who is not a resident of this State; (6) against the master, captain or agent of any sailing vessel entering any of the ports of this State for pilotage services rendered such vessel; (7) against a defendant who has absconded or concealed himself; or (8) when any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of or secreted or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter....¹²

These rules, however, also intertwine to accomplish the same goals in courts of equity.

“The general purposes of an attachment are to induce the appearance of the defendant to furnish security for the satisfaction of any judgment that may be rendered.”¹³ The court’s ability to require attachment to real or personal property gives both the plaintiff and the judge the power to ensure that not only are plaintiff’s legal claims protected but also her equitable claims from a nonconforming defendant.

Additionally, other courts have stated that “the purpose of attachment is generally to take a defendant’s property into legal custody so that it may be applied to the plaintiff’s debt, when established.”¹⁴ In courts of equity, where one is seeking foreclosure relief, issuing a writ of attachment to real property will ensure that the original collateral offered in exchange for value is noticed to both the plaintiff and the defendant to offer relief that the plaintiff is seeking.

¹² S.C. Code Ann. 1976 § 15-19-10.

¹³ Harrison v. Morris, 370 F. Supp. 142 (1974).

¹⁴ Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc. 361 S.C. 117 (S.C. 2004).

In terms of protecting a defendant, “the purpose of attachment is to conserve the property of the defendant debtor for eventual execution after the execution shall prove proceeded to judgment, unless the debtor procures its release in the manner provided by the law.”¹⁵ This ensures, the property remains apart from the defendant, while at the same time in the custody of someone capable of preserving its status and maintaining its integrity. This is a benefit for both a defendant and the successful plaintiff.

Although the statute states the numerous objectives that the courts can use this rule to accomplish, it is the fact that it can be used in both a court of law and a court of equity that gives it its most power. Apart from judicial application of the law, courts of equity can use the writ of attachment through judicial discretion in the courts of equity whenever the facts and circumstances allow its use to accomplish any goal of the court. This judicial discretion puts the writ of attachment at the fingertips of any judge needing a rule to offer the same type of purpose and protections underlying SCRCF Rule 70. Although not needing to cite to it, the power is there and also outlined in a separate state statute, which invariably leaves this power to the judge in any court of law. One of the reasons that it may not be cited to as SCRCF Rule 70 is because it is normally used pursuant to its companion statute.

VI. Contempt

Contempt is one of, if not the strongest inherent power that the courts both in law and in equity hold. Generally courts of equity have the inherent power to punish for contempt, exercising it to punish direct or criminal contempt and enforce obedience to their orders or judgments.¹⁶ Willful disregard or disobedience of the court’s equitable judgment or an equitable order opens the door to contempt. This power is the same inherent power bestowed on courts of

¹⁵ Lester v. Fox Film Corp. 114 S.C. 414 (S.C. 1920).

¹⁶ 17 C.J.S. Contempt §80.

law allowing for civil, criminal, compensatory and direct or indirect contempt. Civil contempt orders are issued by the court to bring a party “in line” with a prior order. If the party complies the order may be abatable. Criminal contempt is designed to punish a person for a fixed period of time and is not abatable. Compensatory contempt allows for money to be awarded to the plaintiff when the defendant has injured the plaintiff by violating a previous order. Lastly, direct contempt takes place either before a judge and indirect contempt is conduct outside the presence of a judge. Although contempt is used more often than other methods under Rule 70 to enforce a specific act or equitable order, the absence of South Carolina courts citation to Rule 70 cannot be overlooked. For instance, in *Browning v. Browning*, a husband's failure to comply with a property settlement agreement warranted a finding of contempt. The husband was required to pay the former wife her share of equity in the marital residence within 30 days from when the former wife vacated the residence; however, the husband did not pay until approximately seven months after deadline and was therefore found in contempt.¹⁷ Although the lower court in *Browning* found the husband in contempt and the Supreme Court affirmed this finding, neither court cited to Rule 70 in exercising this authority over the husband. Perhaps the inherent nature of the power precludes citation to a rule. Alternatively, perhaps it is because the South Carolina Code provides that a master in equity has the power to punish for any contempt that accounts for the courts omission to cite to Rule 70 when exercising their contempt power.¹⁸ Regardless, cases finding for contempt do not cite to Rule 70 as the basis for exercising this power in South Carolina.

¹⁷ 366 S.C. 255, 621 S.E.2d 389 (S.C.App.2005)

¹⁸ S.C. Code Ann. § 14-11-130

V. Divesting of Title

Rule 70 grants courts in equity the permission to divest one party of its title and vesting it in another. The Rule states:

If real or personal property is within the state, the court, in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect to a conveyance executed in due form of law.¹⁹

According to Black's Law Dictionary, divestment means: 1) the cutting short of an interest in property before its normal termination; 2) the complete or partial loss of an interest in an asset, such as land or stock.²⁰ While the rule is available as an equitable remedy, it has rarely been cited in South Carolina court opinions, even when the court's decisions are analogous to the remedy granted by the rule.

The Rule and its offered equitable remedies, however, have been employed and cited in other jurisdictions. In *Lapitskiy v. Furmanov*, the Washington Court of Appeals found that by committing waste, "the appellants had allowed the property to deteriorate, adversely affecting its market value. Respondents' only hope of preserving the value of their claim was to take possession of the property. . . ."²¹ The court stated that when equity has jurisdiction, "the wronged party is entitled to have the maximum protection of his rights which a court of equity can give him."²² Washington's Superior Court Civil Rule 70 is virtually identical to FRCP 70 and here the Court of Appeals cited to it as the basis for its reasoning of its decision.

¹⁹ S.C. Code Ann. §14-11-15.

²⁰ BLACK'S LAW DICTIONARY, 219 (3rd Pocket ed., 1996).

²¹ *Lapitskiy v. Furmanov*, 1999 WL 730908 (Wash. App. Div. 1) 6.

²² *Id.* at 6.

In *Buzzell v. Edward H. Everett Company* the matter before the United States District Court concerned compelling an Ohio company to execute a quitclaim deed of Vermont property to the plaintiffs. In looking at Vermont's state statute, 12 V.S.A §4565, the court determined it to be equivalent to FRCP 70 and found that, "[T]he impossibility of enforcing a direction to the defendant to execute a conveyance makes it desirable to dispense with that preliminary. Therefore, a judgment decree will be issued pursuant to Rule 70. . . ." ²³

Like Vermont, South Carolina's SCRCF 70 is virtually identical to the corresponding FRCP 70. Further, it appears that the courts have employed the Rule and utilized its equitable remedies, however, it has rarely been cited to as the authority for a court's decisions. The issue in a recent Calhoun County case involved the waste of property conveyed to a life-tenant. ²⁴ Here, the court found that "a life-tenant has a duty to maintain the property in favor of the remainderman" ²⁵ and if "the life-tenant committed waste, he shall be liable for damages." ²⁶ Moreover, the court determined the defendant, as life-tenant, had abandoned the property and as a result it had suffered deterioration and been burglarized on numerous occasions. Additionally, the life-tenant failed to pay any of the taxes and insurance, leaving the remainderman to personally settle these expenses. The court believed that the best course of action, to prevent further decline in the property thereby protecting the remainderman's interest, and to preclude the plaintiff from incurring additional damages, was to provide him equitable relief on the issue of waste. To accomplish this, the court divested the life-tenant of her title. In its reasoning, the court discussed Blackstone's third book and statutes of Gloucester, however, in looking to the provisions of the Rule itself as well as case law from other jurisdictions that have cited FRCP 70

²³ *Buzzell v. Edward H. Everett Co.*, 180 F. Supp. 902-903 (D. Vt. 1960).

²⁴ As presented by Judge Martin Banks in Prof. Spitz's Equity class, Charleston School of Law, February 21, 2012.

²⁵ *Brooks v. Brooks*, 12 SC 422 (1879).

²⁶ *McDodrill v. Curtin*, 21 S.E. 878 (W. Va. 1895).

and their state counterparts, it could be argued that SCRPC 70 was the underlying basis for this court's equitable decision.

VI. Conclusion

Accordingly, South Carolina Rule 70 affords a court in equity numerous methods to employ when dealing with recalcitrant parties who refuse to perform acts required by a court order or judgment. It appears however, that the rule is more often than not forgotten by courts of this state. Moreover, even when the court acts under the various methods available under the rule rarely do they cite to Rule 70 as the basis for their authority. Although the federal courts tend to cite to the rule more often it still is notably absent from opinions issued at both the state and federal levels.