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Landlord and Tenant in South Carolina

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LANDLORD AND TENANT IN SOUTH CAROLINA

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Any law not based on reason must ultimately perish.[1]

A hundred years ago or more, this state was largely agricultural. Hence, to prevent tenant farmers from eviction just prior to the harvesting of their crops in the fall, there became firmly embedded in our law the rule which made certain tenancies, where a termination date was not specified, annual

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1. "The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it." I Cooley's Blackstone, pp. 55, 56 (4th Ed.)

ones—running from January to December, both inclusive, of each year.

Since the state is no longer predominantly agricultural, the reason for this rule has vanished. Thus, in the spring of 1946 the legislature changed the rule to provide that tenancies of unspecified duration should be monthly and not annual ones.[2] The new law, after providing for thirty days' notice of termination of a monthly tenancy, says, ". . . *provided,* that no tenancy shall ripen into a tenancy from year to year." S. C. CODE, §8806-11 (Supp. 1946). Agricultural lands were exempted from this law so that as to them the old rule of annual tenancies still exists.[3]

Some criticisms of the bill were expressed on the ground that it was helpful to landlords.[4] But such criticisms ignore the true point of the change, which is that the reason for the annual tenancy rule is no longer applicable. In 1870 Judge Willard of the Supreme Court of South Carolina, in the important case of *Coogan v. Parker,* 2 S. C. 255 (1870), in order to show that a rule of common law was based on reason, drew a distinction between the property leased and the subject matter of the lease. He said at page 275:

> "It has long been felt that the application of the common law ought to yield results more in accordance with the habits and ideas of the people . . . . "

(This case is discussed more fully on page 145).

The annual tenancy rule was thus an outworn relic of the Old South. Aside from this, however, any statement that the act is of primary benefit to landlords overlooks the fact that

2. Act No. 873; 44 S. C. Stat. at Large, pp. 2584 *et seq.,* approved April 3, 1946.

3. The new law repealed most of the provisions of the old law. It is specifically not applicable to leases of timber, easements, property used for electric power, telephone, telegraph, water or gas lines as well as agricultural lands. The repeal and the exemptions from the new statute leave few statutory provisions applicable to exempted contracts.

4. In voting against the bill, Representative John D. Long said, "It (the act) is another bill to help the rich at the expense of the poor and defenseless." (*1946 House Journal* p. 1518.) It is true that a change from annual tenancies to monthly tenancies helps landlords in times when there is a "landlord's market"; however, when there are more places for rent than there are renters such a change will benefit tenants, because the annual tenancy is as binding on tenants as on landlords.

an annual tenancy so imposed was equally binding on the landlord and on the tenant. *Hart v. Finney & Jones*, 1 Strob. 250 (1847). The court there said at page 254:

> "It is a condition of such tenancy that neither party can determine it before the end of the year; nor then without reasonable notice; . . . Godard v. Rail Road Co., 2 Rich., 346. Whenever the tenant enters upon a new year, he is bound for that year, and so on, as long as he may occupy. Dod v. Monger, 6 Mod., 215; Martin v. Watts, 7 Term R., 83; 6 Term R., 296."

The purpose of the writer is to offer some reflections on the statutory change and to review the subject generally.

APPLICATION

At the threshold of our discussion we must come to grips with the question of the application of the new statute. All situations where there is a question of application fall into these three groups:

(1) *Where the tenancy or lease was created and terminated prior to the enactment of the new statute but the litigation resulting therefrom arose afterwards.*[5] In this situation it seems to be unanimously agreed that the new law does not apply. Thus in *Croft v. Faust*, 209 S. C. 477, 40 S. E. 2d 80 (1947), the lease was made before the new law was enacted but the litigation on eviction was begun afterwards, in the summer of 1946. However, it was agreed by all parties that the new law did not apply. The court said at page 481:

> "We have determined the issues in this case without reference to the terms of Act No. 873 of the Acts of the

5. In this state a distinction is made between tenancies, which imply occupancy, and leases or agreements of tenancies, which do not require occupancy, *Simon v. Kirkpatrick*, 141 S. C. 251, 139 S. E. 614 (1927). The court said at page 256:

> "His honor inadvertently fell into two errors in his statements in the order he made. He refers to the relationship between Simon and Kirkpatrick as being that of 'landlord and tenant'; *as a matter of fact*, Kirkpatrick, the lessee, never went into possession of the premises, and notified Simon that he did not intend to do so; *as a matter of law*, therefore, the relation was that of lessor and lessee, under a written contract of lease."

General Assembly, 44 St. at L., page 2584. The parties apparently concede that their rights are governed by the law as it existed prior to the passage of the above Act."

(2) *Where the tenancy was created after the enactment.* Here, if it is clear that the agreement of tenancy was made subsequent to the enactment of the statute, that law would unquestionably apply. However, this is not true where the "new" agreement of tenancy is made pursuant to an option in an old agreement, or under a lease provision that the tenancy continues unless notice of termination be given. By the law of this state such a provision is a continuance of the original lease until the term as so extended is ended. *Hampton Park Terrace v. Sottile,* 102 S. C. 372, 86 S. E. 1066 (1915). An option to renew continues the old agreement even though the rent is not provided for. *Rainwater v. Hobeika,* 208 S. C. 433, 38 S. E. 2d 495 (1946). Thus if the original agreement was made prior to April 3, 1946, the time of enactment of the new statute, the old law continues applicable so long as the original agreement continues by automatic extensions or by renewals pursuant to option.

(3) *Where the tenancy was created prior to the enactment of the statute but not terminated prior thereto.* It is elementary that a law in effect at the time of the making of a lease continues until the termination thereof. *Ogden v. Saunders,* 12 Wheat. 213 (U. S. 1827); *McCracken v. Hayward,* 2 How. 608 (U. S. 1843); *Home Building & Loan Association v. Blaisdell,* 290 U. S. 398 (1933). This, of course, would apply to leases made before the date of the new law even where occupancy occurs later. An agreement cannot be changed by subsequent legislation if it purports to deprive the party of a vested interest. *Dartmouth College v. Woodward,* 4 Wheat. 518 (U. S. 1816). Legislation which must be interpreted to apply to existing relationships or agreements, and to cut off or impair existing right or obligation is unconstitutional. *First Presbyterian Church of York v. York Depository,* 203 S. C. 410, 27 S. E. 2d 573 (1943), at page 423:

> " . . . I do not think a retroactive provision would be valid which affected vested interest in property."

We must then assume that the statute will not be construed to be retroactive. Therefore an annual tenancy in ef-

fect prior to April 3, 1946, would be subject to the old law until the tenancy was terminated. Termination, it would seem, is automatic if "reasonable notice" is given. On April 3, 1946, the statute was enacted which expressly says that "no tenancy shall ripen into a tenancy from year to year". This was certainly "notice," and it would also be "reasonable" since it was enacted almost nine months prior to December 31, 1946. (The tenant could obviously have had no vested interest in a continuance after that time, since the tenancy could be terminated by reasonable notice).

However, the question may properly be raised as to whether the statute could give "notice" if the tenancy was a prolongation of the original lease, and not a new lease for the calendar year. While the statement is frequently made judicially and otherwise that the annual tenancy continues from year to year unless reasonable notice of termination is given, the actual decisions would seem to indicate that, without reasonable notice, a new tenancy is created on January 1 of each year. See *Maynard v. Campbell,* 115 S. C. 226, 105 S. E. 351 (1920); *McNulty v. Windham,* 182 S. C. 462, 189 S. E. 754 (1937). In *Hampton Park Terrace v. Sottile, supra,* it was held that a lease for one year, which would thereafter be continued automatically unless notice of termination was given, had to be written and recorded; since, until the termination notice was given, it was merely a prolongation of the original lease and as a result was a lease for more than one year. As the annual tenancy is almost always oral and practically never recorded, and since it was not an express exception to the Statute of Frauds or to the statute requiring recordation, it must be considered as only a one year's lease, beginning afresh on each January 1. This being so the statute would operate to notify all tenants under annual tenancies that at the conclusion of their present annual tenancy on December 31, 1946, a continued occupancy by them would be from month to month and not from year to year.

It might also be contended that since the tenant (in some cases) was protected from evictions by the federal rent control law, the law cannot be changed as to him. It is true that under that law a tenant would not be evicted (except for certain stated reasons) during the continuance of that law. However, upon notice an annual tenancy could be terminated and the tenancy would become a statutory one, and the tenant

would be entitled to retain possession only by reason of the federal statute. Under these circumstances it has been held that the tenant had no vested right thereto. *Parker v. Porter*, 154 F. 2d 830 (Em. App. 1946). A tenant could be evicted if the landlord proved that he wanted possession of the leased property for his own, or his immediate family's occupancy. *Beaufort v. Rubin*, 206 S. C. 293, 33 S. E. 2d 891 (1945); *Bruce v. Lynch*, 210 S. C. 538, 43 S. E. 2d 477 (1947).

REPAIRS

In the absence of a covenant otherwise, it may be stated generally that the landlord owes no duty to the tenant to keep the premises in reasonable repair.[6]

Where there is no duty there could be no responsibility, and therefore if the leased property becomes untenantable because of disrepair there could be no constructive eviction and the tenant would remain liable for the rent.

A leading case in this state on the subject of the landlord's

6. The clearest statement of the common law rule is found in the North Carolina case of *Smithfield Improvement Co. v. Coley-Bardin*, 156 N. C. 255, 72 S. E. 312 (1911). There the court said:

> "Without express stipulation in a lease, the law implies a covenant of quiet enjoyment upon the part of the landlord, and if the tenant be rightfully evicted by another, he may recover damages, and this covenant extends to water and sewage connections existing at date of lease. Huggins v. Waters, 154 N. C. 444, 70 S. E. 842.
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> "Under the civil law, in case of tenancies for short terms, the landlord was under implied obligation, without special agreement, to keep the premises in repair. 4 Kent, Com. 110; Felton v. Cincinnati, 95 Fed. 336, 37 C. C. A. 88; Viterbo v. Friedlander, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776. But under the common law it is well settled that, in the absence of any agreement between the parties, the landlord was under no obligation to his tenant to keep the demised premises in repair.
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> "The common law considers such a lease as the one in evidence as the grant of an estate for years, to which the lessee takes title. The lessee is bound to pay the stipulated rent notwithstanding injury by flood, fire, or other external cause. It required a statute of the state to relieve the lessee where the property is destroyed by fire. By the common law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are rented. 3 Kent, Com. 465; Brown, Leg. Max. (3d Ed.) 213, 214; Fowler v. Bott, 6 Mass. 63; Doupe v. Genin, 45 N. Y. 119, 6 Am. Rep. 47; 2 McAdam on Landlord & Ten. §383; 1 Taylor on

duty to repair in the absence of an express provision therefor is *Mallard v. Duke,* 131 S. C. 175, 126 S. E. 525 (1925). There an action was brought by the landlord to recover the balance on rent due from the date of the tenant's surrender of the premises to the end of the term of the lease, less the amount received by the landlord from releting the premises during such period. The tenant defended by claiming a rescission of the lease based on the landlord's misrepresentations prior to the completion of the building, the subject of the lease, and that there was a constructive eviction. The court held that there was no evidence to support the contention that the landlord had made misrepresentations as to the condition of the completed building prior to the completion thereof; and, further, that any defect in the construction of the building had been waived by the tenant's long occupancy, so that there could not have been a constructive eviction. Moreover, the

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Landlord & Ten. §327; Viterbo v. Friedlander, supra. Chancellor Kent states the distinction between the civil and common law as follows: 'The Roman law made some compensation to the lessee for the shortness of his five-year lease, for it gave him a claim upon the lessor for reimbursement for his reasonable improvements. The landlord was bound to repair, and the tenant was discharged from the rent if he was prevented from reaping and enjoying the crops by an extraordinary and unavoidable calamity, as tempests, fire, or enemies. In these respects the Roman lessee had the advantage of the English tenant, for, if there be no agreement or statute applicable to the case, the English landlord is not bound to repair, or to allow the tenant for repairs made without his authority; and the tenant is bound to pay the rent, and to repair at his own expense, to avoid the charge of permissive waste.' 'The rule of caveat emptor applies to leases,' says the Encyclopaedia, 'and the landlord is not even under an implied obligation to remedy defects in the demised premises existing at the time of the demise. It follows therefore in the absence of any agreement on the part of the landlord to repair, a tenant cannot recover from the landlord the cost of repairs made by him,' etc. 18 Am. & Eng. p. 215. In regard to waterworks, it has been held in New York that, when water pipes are arranged for an entire building occupied by different tenants, it is the duty of the landlord to keep the pipes in repair, or the failure to repair may amount to a constructive evictment. Bank v. Newton, 76 N. Y. 616. But the Massachusetts court holds that a landlord is under no implied obligation to keep in repair water pipes used exclusively in carrying water to the part of the building demised to the tenant, and therefore is not liable to such tenant for leakage from such pipes. McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389."

court said there was no implied obligation by the landlord that he would keep the premises in repair or that the premises would be suitable for the tenant's needs.

There is similarly no obligation on the part of the tenant to keep the demised property in reasonable repair, except of course that he may be responsible to the landlord for "permissive waste" if he permits the property to get in a serious condition of disrepair.[7]

The failure of a landlord to repair, even where he has covenanted to do so, may not be grounds for refusal by the tenant to pay rent. A covenant to pay rent creates a fixed liability and is a separate thing from the contingent liability created by a covenant to repair. See *Ripley v. Wightman*, 4 McC. 447 (1828). Nor does the failure to repair give the tenant grounds upon which to terminate and vacate unless the property has become so uninhabitable that there is a constructive eviction. *Mallard v. Duke, supra;* see *Rowland & Sons, Inc. v. Bock*, 150 S. C. 490, 148 S. E. 549 (1929).

Where the landlord has promised to repair but does not do so, the tenant should either move or make the repair himself. But he is justified in moving only if the disrepair is serious enough to amount to a constructive eviction. *Mallard v. Duke, supra.* If he makes the repair himself, he can recover the expense of the repair in a separate action, or, possibly, deduct it from the rent payable. In *Cantrell v. Fowler*, 32 S. C. 589, 10 S. E. 934 (1890), in a suit by the landlord to recover rent in arrears, from the tenant, the defense was that the landlord had covenanted to repair a leaking roof, and because of the landlord's failure to do so the goods of the tenant had been damaged and the tenant had been forced to move. A direction to the jury was approved which said that under a covenant to repair the landlord's failure to repair required

7. As a practical matter, the tenant for any length of time will keep the property in reasonable repair since he is occupying the property and presumably does not wish to let it get in a disreputable condition. This also applies in the case of disrepair occasioned by outside force, other than normal wear and tear. In other words, if a fire or a flood did damage to the demised property, there is no obligation on the part of the landlord to repair the damage but the tenant remains liable for the rent agreed upon, even though part of the premises is untenantable. This seems somewhat unfair to the tenant as the rent, at least, should be abated as to the part of the leased property which cannot be used by the tenant.

the tenant either to move or to make the repair himself and deduct it from the rent. Since the jury found for the landlord, evidently they found there was no oral covenant to repair.

But a breach by a landlord of an obligation to repair does not give rise in this state to a tort liability to the tenant, his family or invitees. In *Pendarvis v. Wannamaker*, 173 S. C. 299, 175 S. E. 531 (1934), and in *Timmons v. Williams Wood Products Co.*, 164 S. C. 361, 162 S. E. 329 (1932), it was held that neither the plaintiff-tenant nor his family could recover for personal injuries sustained by reason of defects which the landlord had promised to repair.

Some criticism can be leveled at these decisions on the grounds that where an injury can reasonably be forseen if the repair is not made, the landlord should be responsible therefor so long as he has covenanted to make the repair. The courts of this state, however, take the view that, if the landlord does not make the repair, the tenant should do so and recover against the landlord, either by an action alleging breach of contract or, if the tenant is willing to take a chance on eviction, by deducting the expense of repair from the rent.[8]

Nevertheless, this state does enforce liability against a

8. While it has never been expressly held in this state that expense for repairs ordered by the tenant can be deducted from the rent payable, some cases have said that this could be done, while others have said that it could not be done. In the *Timmons* case *supra* the court expressly stated that the tenant could "make repairs himself and deduct the expense thereof from the rent." The court said by way of dictum at page 374:

> "Because the question for determination is one of novel impression in this jurisdiction, this opinion has perhaps been unduly prolonged, but a careful and exhaustive study convinces us that, with rare exceptions, all of the cases which permit recovery for personal injuries to the tenant or to a member of his family are bottomed (1) upon breach of a statutory duty; (2) where injury results from a defective condition known to the landlord and concealed by him from the tenant; (3) where injury is occasioned by a defect in a portion of the premises reserved by the landlord for the common use of all his tenants; (4) where injury occurs from the defective condition of premises furnished by the landlord for use of the public generally, as theaters, docks, etc.; (5) when the covenant is to keep the premises safe during the term; or (6) where the lessor actually undertakes to make the needed repairs and negligently does so—where there is misfeasance as distinguished from nonfeasance."

landlord where the injury is caused by the disrepair of property under the landlord's control or dominion.[9] In *Binnicker v. Adden,* 204 S. C. 487, 30 S. E. 2d 142 (1944), the plaintiff was injured by stepping in a hole in a cement walkway leading to a grocery store which was owned by the defendants but leased by them to others. Judge Gaston held that the action could not be maintained since the owner-landlord was under no duty to the tenant to repair the walk. On appeal this was reversed on the grounds that the evidence showed that the walk, upon which the plaintiff was injured, was not part of the leased property. The court said at page 491:

> "The tenant alone might be liable for the negligent repair alleged if the walkway in this case was included in the rental agreement, but if the landlords retained control and possession of it, the complaint states a cause of action against them. Such, in effect, was said by Acting Associate Justice J. Henry Johnson in his excellent opin-

9. In this respect, this state follows the common law rule which is generally accepted. In a leading W. Va. case, *Charlow v. Blankenship,* 80 W. Va. 200, 92 S. E. 318 (1917) a tenant brought an action against a landlord for damages resulting from the roof of the building leaking and the tenant's goods, stored therein, being damaged by the water. The landlord contended that there was no responsibility on his part to repair, and that there was no implied covenant that the property was suitable for the purpose for which it was leased. The court confirmed this, but held that the landlord had the exclusive control over the roof and that he was obligated to keep it in repair. The court said:

> "Because the injury is suffered by a party who is his tenant does not relieve him from the obligation to pay the damages which result from his negligence. The tenant cannot prevent his landlord from using the part of the premises of which he retains the control as he pleases. He has no authority to go upon them and make any repairs that may be needed to prevent injury to his property, and to say that the landlord in such case is not liable for an injury occasioned by the defective condition of that part of the property remaining under his exclusive control, which he negligently refuses to correct, would be to say that a landlord in a case like this may ruin his tenant by his negligence without any obligation to make reparation." (p. 320 S. E.)

"In Underhill on Landlord and Tenant, §485, it is said:

> 'It is a general rule that the landlord must keep in reasonable repair those portions of the demised premises which he retains in his possession and control. His obligation in this respect is not based on contract, but arises from the responsibility of an owner of real

ion for this court in *Timmons v. Williams Corp.*, 164 S. C. 361, 162 S. E. 329, 333, as follows: 'Because possession and control are reserved unto the lessor, the law implies an obligation, creates a legal duty, to keep the same in repair, and to operate it properly. This is in accord with the general rule that there is an implied duty on the part of the landlord to keep in repair all portions of demised premises of which he reserves possession and control for the common use of several tenants, and is peculiarly applicable to halls, stairways, elevators, and other approaches of which no particular tenant has exclusive possession and control. 36 C. J., 212, 213.' "

It would be quite impracticable to require all repairs to be made by the landlord. The landlord has no right to inspect the demised property, nor has he the privilege of looking over the leased property to determine what, if any, repairs should be made at any given time. He has no control over the leased property and is powerless to take steps which he may feel should be taken to minimize the repairs that may be necessary. Accordingly, most leases provide that repairs should be made by the tenant, and that there shall be an abatement in rent if any part of the demised premises are rendered uninhabitable by circumstances beyond the tenant's control.[10]

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estate to persons who, by his invitation expressed or implied, are permitted to enter upon his property.' "

In *Smithfield Improvement Company v. Coley-Bardin*, 156 N. C. 255, 72 S. E. 312 (1911), proceedings were brought by the landlord to evict the tenant and recover unpaid rent. The defense was that the rent had not been paid because the water pipes were broken. Judgment was given for the defendant's (tenant) responsibility to keep the plumbing in repair. In affirming the lower court the Supreme Court said:

"We have examined the written lease with care, and are unable to find any covenant in it by which the landlord binds himself to keep the property or the waterworks during the lease in repair. Whether the tenant obligated himself to do it is immaterial." (p. 313 S. E.)

10. The usual lease provision requiring the landlord to repair fire damage except for a total destruction, has never been interpreted by the courts of this state; but in the recent case of *Leone v. Russo*, 76 N. Y. Sup. 2d 347 (1948), the fire clause in a lease provided for a termination of the lease in case of fire "if the damage is so extensive as to amount practically to the total destruction of the leased premises or of

Theoretically, this solution would appear satisfactory, but some difficulties arise in the determination of a repair as distinct from an improvement. It is, of course, impossible to consider in this brief discussion all matters which may arise, but in general it may be said that anything that does not change or alter the existing improvements is a repair, and anything else is an improvement. However, even if we follow this rule, we obtain results that are wrong. For example, replacing a roof on a structure is considered an improvement and not a repair, although this certainly does not alter or change the existing structure. In many instances it is purely a matter of degree, and this question is a very difficult one to answer. Aside from raising a problem in the case of landlord and tenant, it is an acute question in taxation; in accounting by trustees between life tenants and remaindermen; in public utility, telephone, and railroad companies as to whether the charge is a proper one to expenses or should be added to their rate base.

Improvements, Alterations and Additions

The Statute expressly forbids a tenant to "alter" the rented structure without written permission. S. C. Code, §8815 (1942). There is, of course, no statutory or other obligation on the part of the tenant to make any additional improvements on the demised premises. On the other hand, it is clear that if the tenant does make any alteration or improvement, it would

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the building." In all other cases, if the fire occurred without fault of the tenant, the landlord was required to repair within a reasonable time, and, if the premises were rendered untenantable to apportion the rent until the premises were repaired. A fire having occurred which rendered the premises untenantable, the tenant demanded that the landlord repair. The landlord contended that the damages were so extensive as to terminate the lease. An action was brought for a declaratory judgment in which the only issue was the construction of the fire clause and its application to the particular facts. The court held that the language used was equivalent to the use of words "total destruction" and that in determining whether there was "total destruction," the rule to be followed was that applied with respect to "total loss" in marine cases. That rule, applied to the case of fire in a building is, that if the cost of restoration of the building as it was immediately preceding the fire, is more than one-half of the value of the building at the time of the fire, then there is a "total destruction." Applying this rule to the facts in the case the court held that there had not been a "total destruction", and gave judgment for the plaintiff.

belong to the landlord at the termination of the tenancy. *City of Greenville v. Washington American League Baseball Club*, 205 S. C. 495, 32 S. E. 2d 777 (1945). There the tenant erected upon the leased property grandstands, bleachers, fences, poles, reflectors and lights. Thereafter, with the consent of the landlord, the lease was assigned, and upon its termination, the assignee claimed he was entitled to remove the additions under the common law rule that while a lessee could not remove any additions or improvements to leased property, he could remove, as an exception to the rule, trade fixtures. The court held that the property in question was not trade fixtures and could not be removed. In the opinion the court said at page 511:

> "An important exception to the general rule of the common law, that whatever is once annexed to the freehold becomes part of it and cannot afterward be removed except by him who is entitled to the inheritance, exists in the case of structures erected or chattels annexed for the purpose of trade or manufacture. It has been said that the underlying reason why property placed on leased premises by the tenant for purposes of trade is regarded as personal rather than real is based upon the rule that the law implies an agreement that it shall remain personal property from the fact that the lessor contributed nothing thereto and should not be enriched at the expense of his tenant when it was placed upon the real estate of the landlord with his consent. The question whether particular structures or articles are removable as trade fixtures depends solely upon whether they are designed for the purpose of trade; and this turns on the intention with which they were affixed to the realty; and not upon the character or mode of the physical annexation to the realty."

However, if the improvements add to the rental value of the property, are made with the consent and knowledge of the owner, and with no intention by the tenant to make a gift of the improvements to the owner, the tenant may be entitled to reimbursement. *Coggins v. McKinney*, 112 S. C. 270, 99 S. E. 844 (1919).

WASTE

It is elementary that the tenant may not commit waste on the demised premises and may not permit others to commit

such waste. But as to what constitutes such waste, the law is not as clear. Of course, any demolition of improvements on the demised property would constitute waste, and probably removal of soil or manure, or cutting of timber, [*Hill v. Burgess*, 37 S. C. 604, 15 S. E. 963 (1892), *Roberts v. Jones*, 71 S. C. 404, 51 S. E. 240 (1905)], or any alteration or defacement of improvements. What one man thinks is an improvement, another man may think is a disfigurement. It is always a good idea to leave leased property strictly alone unless the landlord consents to the change.

Duty of Tenant to Pay Rent

An option to renew the existing lease even where no rent is agreed on, is nevertheless effective, as in *Rainwater v. Hobeika*, 208 S. C. 433, 38 S. E. 2d 495 (1946).

The duty of the tenant to pay rent ends when the lease is terminated by the landlord, or when the tenant is evicted by the landlord. *Simon v. Kirkpatrick*, 141 S. C. 251, 139 S. E. 614 (1927); See *Mallard v. Duke*, 131 S. C. 175, 126 S. E. 525 (1925); See *Gentry v. Recreation, Inc.*, 192 S. C. 429, 7 S. E. 2d 63 (1940). If the landlord thereafter relets the demised property, he cannot hold the tenant for loss in rent, nor is he required to pay the old tenant any increase in rent paid by the new tenant over that which the old tenant contracts to pay. Of course, if the lease provides for a continuation of the tenant's obligations despite a default in rent payments, or if the tenant abandons or surrenders the leased property and the landlord relets for the old tenant's account and does not terminate or cancel the lease, the old tenant remains responsible for any loss in rent, and he is entitled to any increase.[11]

In *Simon v. Kirkpatrick, supra*, the lessor in an agreement of lease exercised an option thereunder and after two months default in rent notified the defendant lessee who had never gone into possession that he had no further "right or benefit thereunder." At the time of this termination, three months

11. Where the landlord abrogates the lease and attempts to hold the tenant for the rent until the end of the term, under the rule of mitigation of damages, he is required to make reasonable efforts to lease the property at a fair rental. See *Mallard v. Duke*, 131 S. C. 175, 126 S. E. 525 (1925); See *Gentry v. Recreation, Inc.*, 192 S. C. 429, 7 S. E. 2d 63 (1940).

rent was due. Subsequently, the plaintiff (lessor) sued for three months' rent, due at termination, and ten months' rent thereafter accrued; but it was held that he could recover only the rent due up to the date of termination. The court said at page 262:

> "The rule, as we understand it, is that the termination of a lease does not absolve the lessee from obligations incurred up to the date of termination, but it does absolve him from future obligations, unless the lease shall provide that, notwithstanding the termination for causes by the lessor, the lessee shall not be relieved of such future obligations. 36 C. J. 335."

While many decisions have said, loosely, that a breach of condition by the tenant terminates the lease, what is meant is that such a breach gives the landlord the *right to terminate.* In *Simon v. Kirkpatrick, supra,* the Court said at page 260:

> "Eviction and re-entry by the lessor are not the only methods of terminating a lease—an estate for years. It may be determined by the expiration of the term, by the surrender of the term by the lessee with the consent of the lessor, by a merger of the term in the fee, or upon the breach by the lessee of certain covenants or stipulations in the lease, as upon the death of a certain person, or the lessee's insolvency, or the non-payment of rent, and many other causes; in any of which last-named events the lessor has the right upon notice to terminate the lease. See 1 Tiffany R. P., §52."

At common law, failure to pay the rent agreed upon, as we have said, would not automatically terminate the lease, but would give the lessor the *option* to terminate. That was true in this state prior to the enactment of the new statute. However, S. C. CODE, §8806-12 (Supp. 1946) provides that the failure to pay rent shall automatically terminate any lease:

> "FAILURE PAY RENT ON DEMAND. Failure to pay the rent agreed upon when due, or a reasonable rent for use and occupation when demanded shall terminate all tenancies for term, for years, from month to month, and at will; and the tenant shall forthwith vacate the premises without notice".

This apparently absolute provision is somewhat modified by a later section. Section 8806-14 of the new law provides:

> "DEFAULT IN PAYMENT OF RENT. Default in payment of rent shall terminate any lease unless otherwise agreed upon".

Apparently the "otherwise agreed upon" clause means such a provision in the lease itself. Otherwise, it would apply only after the default and would then be too late to avoid terminating the lease.

In *Simon v. Kirkpatrick, supra,* the major reason given for releasing the lessee from further liability by reason of the lessor's termination is that it would be unfair to hold the lessee to a liability when he had no chance to protect himself by subletting or occupying the leased premises, as stated thus at page 261:

> "If Simon [the lessor] thereafter [after termination] had the undisturbed control of the lot, to place it in the hands of a real estate man to sell or rent, which he did, certainly, Kirkpatrick [the lessee] could not have had the same right at the same time, and if Kirkpatrick had endeavored to protect himself against the liability sought to be imposed by the plaintiff, he would have been powerless to do so. Is it fair, then, to Kirkpatrick, to hold him to a liability against which he could not have protected himself, and the consideration of which he had been withdrawn by Simon who was enjoying it for his own benefit?"

Under this reasoning an automatic termination of the lease would relieve the tenant from further liability under the lease. It would seem therefore that under the statute a failure by the lessee to pay rent would automatically terminate the lease and relieve the tenant from further liability. However, it is contrary to all recognized rules of contract law to permit a breach of contract to relieve the defaulting party from the liability for which he has contracted. Thus it is likely that S. C. CODE, §8806-12 (Supp. 1946) and 8806-14, *supra,* will be interpreted to give the landlord the *option* to terminate rather than that the failure to pay rent will *automatically* terminate.

A somewhat similar problem arises from the abandonment

of the premises by the tenant. S. C. CODE, §8806-47 (Supp. 1946) provides:

> "When a tenant abandons premises theretofore occupied by him the landlord may enter and take possession thereof, making distraint, as herein provided of any property found thereon, including the property exempt from distress by the provisions of section 8806-34; and the term of a tenant abandoning premises used and occupied by him as such shall be deemed ended by such abandonment, absence from the property for fifteen days after default in the payment of rent shall be construed as abandonment."

Normally abandonment of property by the tenant would give the landlord an option to terminate, but by not so terminating he could continue to hold the tenant for any rent due until the end of the term. However, the above section seems to call for an automatic termination or abandonment which would relieve the tenant of further obligation to pay the rent. As in the case of a default in the payment of rent, it is felt that the provision will be interpreted to give the landlord an *option* to terminate.

SUBLETTING

There is no statutory or other legal restriction on the right of the tenant to sublet the premises or assign the lease therefor. A distinction must be made between subletting the premises and assigning the lease. A sublet is a release by the tenant of only a portion of his term, but an assignment of the lease conveys the full term of the tenant's right to the property leased.

The statute, however, does provide that any assignment of the lease or subletting of the property shall be of no effect as against the landlord, and the original tenant remains liable to the landlord. S. C. CODE, §8806-44 (Supp. 1946). There is also absolute freedom on the part of the tenant to use the demised property for any purpose he desires, so long as its use does not offend the criminal laws or is not a use restrainable in any other manner. This is necessarily tied in closely with the freedom to assign the lease or sublet the property, since a restriction on the use would considerably restrict the freedom to assign the lease or to sublet the property. Also the

provision as to use is important in this state, since the court will permit cancellation of the lease by the tenant if the *use*, as distinguished from the *property leased*, is destroyed by enemy or act of God. This subject is discussed fully at page 145, *infra*.

Of course, if the property is sublet or the lease assigned, the landlord, as a practical matter, loses one of the remedies available to him for collection of past due rent, which is the right to distrain against the tenant's property in or on the leased premises. Since the sublease is wholly ineffective as far as the landlord is concerned, he would not have the right to distrain against property of a subtenant with whom he has no contractual relationship. The landlord, of course, would retain his remedy of ejectment; and, therefore, unless the tenant pays the rent due and also complies with all of the other covenants between them, the landlord would have the right to terminate the tenancy and eject the subtenant, even though the subtenant has breached no covenant and owes no rent to his landlord, who is the original landlord's tenant.

THE NECESSITY OF WRITING

The question of the legal effect of an oral lease has presented some interesting questions. The statute now provides:

> "A tenancy for not to exceed one year may be created by oral agreement". S. C. CODE, §8806-5 (Supp. 1946).

> "Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing". S. C. CODE, §8806-6 (Supp. 1946).

The statute of frauds also is applicable and, in so far as it is pertinent here, provides:

> "All estates, interests of freehold, or terms of years, or any uncertain interests of, in, to, or out of any lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized, by writing, shall have the force and effect of estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any

former law or usage, to the contrary notwithstanding, except leases not exceeding the term of one year from the time of entry . . . " S. C. CODE, §7042 (1942).

Prior to the 1946 law, the statute provided: "No parol lease shall give a tenant a right of possession for a longer term than twelve months from the time of entering on the premises; and all such leases shall be understood to be for one year, unless it be stipulated to be for a shorter term." S. C. CODE, §8806 (1942). Under this statute, it was held that an oral lease for more than one year was effective for one year only and thereafter continued on a month to month lease basis (unless, of course, it ripened into a tenancy from year to year). *Hillhouse v. Jennings*, 60 S. C. 373, 38 S. E. 599 (1901); *McNulty v. Windham*, 182 S. C. 462, 189 S. E. 754 (1936). However, it should be noted that the new statute provides that a lease for more than one year, and not in writing, shall be "void." This means that it shall be a nullity, of no effect.

In *Wright v. Ritz Theater Co., et al*, 211 S. C. 161, 44 S. E. 2d 308 (1947), it was contended by the appellant that under the new law an oral lease for one year was prohibited, unless the tenant was in possession of the property or allowed to take possession under the lease. In other words, by providing for "a tenancy," the legislature, following the Supreme Court's decision in *Simon v. Kirkpatrick, supra*, intended to exclude an agreement and cover only an occupancy. This contention was rejected by a majority of the court, although Chief Justice Baker and Justice Stukes stated that they agreed with it. The rejection was on the ground, primarily, that S. C. CODE, §8806-5 (Supp. 1946) also used the word "created," which implies the lack of any previous relationship. The court also considered the question from the practical point of view and said that the instances where a landlord would permit a tenant to enter into possession without some form of prior agreement would be very rare indeed. At page 166:

> "The practical side of the problem has influenced the construction arrived at by the majority of the court. It is common knowledge that most leases of real estate take effect in the future. In only rare cases does the lessee take possession simultaneously with the making of the lease. It is unfair to infer that the legislature, with knowledge of these facts, intended to make a parol lease for a term

> of one year enforceable only in the event that the lessee was permitted by the landlord to enter into possession. It would be almost like putting salt on a bird's tail in order to capture it."

Since leases for one year or less, which give the tenant a renewal option, or which provide for continuance until notice of termination is given, make the term one for more than one year, they are considered leases for more than one year and must be in writing. *Hampton Park Terrace v. Sottile, supra,* and see *Rainwater v. Hobeika, supra.*

It seems to be well established that an oral lease for one year or less does not have to be in writing even though it is to commence in the future. *Hillhouse v. Jennings, supra.*

In the case of *Nat'l Bank of S. C. v. Peoples Groc. Co.,* 153 S. C. 118, 150 S. E. 478 (1929), it was held that the Statute of Frauds provided that an oral lease agreement shall be ineffective except for leases of less than the term of one year from the time of entry. Thus, the decisions in this state conform with the statutory provisions. It has been contended that entry and rent payments are sufficient part performance to take the case out of the Statute, but this question has never been adjudicated in this state.

A covenant to repair need not be written, even though the lease is in writing. It has several times been held that if a written lease is silent on the subject, an oral agreement to repair, or even to make alterations, will nevertheless be enforced, notwithstanding that a contemporaneous written lease was also entered into. *Williams v. Salmond,* 79 S. C. 459, 61 S. E. 79 (1908). At page 460:

> "The parties may incorporate such contract to put in repair or build new houses in the instrument that imbodies the lease contract, but it is not necessary for them to do so."

Reardon v. Averbuck, 92 S. C. 569, 75 S. E. 959 (1912), at page 571:

> ". . . , it is true, as defendant contends, that a lease silent on the subject of repairs implies no obligations on the part of either lessor or lessee to repair; and as the written lease in this case made no reference to repairs, it was no obstacle to setting up and proving a distinct and separate

agreement by Reardon, the plaintiff, to put the house in repair." (Citing *Williams v. Salmond, supra.*)

In *Mallard v. Duke, supra,* it was contended that the leased property became untentable by reason of the landlord's failure to repair or to improve the property, pursuant to the oral agreement, and that this "untenantability" constituted a constructive eviction. The court found that as a matter of fact there was no agreement to repair or improve, but if there had been, or if the property had become untenantable, there might have been a constructive eviction, as the tenant was actually in possession. *Simon v. Kirkpatrick, supra; Port Utilities Commission of Charleston v. Marine Oil Co.,* 173 S. C. 346, 175 S. E. 818 (1934).

RECORDING

The necessity for recording a lease for more than one year of occupancy is illustrated by the old case of *Page v. Street,* Speers Eq. 159 (1843). There, certain persons acquired a site and erected a hotel. They incorporated the project under the name of Charleston Hotel Co.; Mr. Page, under a written but unrecorded lease, was to manage and operate the hotel for a share in the profits. The very day that Mr. Page took over, the famous Charleston fire occurred and the building was destroyed by fire. Upon its being rebuilt, a new agreement was made with Mr. Page. In order to finance the rebuilding, it was necessary for the owners to borrow the money, which they secured by giving a mortgage on the building and the furnishings. Subsequently the enterprise failed, and the mortgagees sought to foreclose and oust Mr. Page, and he attempted to enjoin the foreclosure and the ouster.

On the first hearing, Chancellor Harper held that he knew of no requirement that Mr. Page record his lease agreement, and since the mortgagee should have known that the hotel was to be operated by someone, their claims were subordinate to the rights of Mr. Page. However, on rehearing, the Chancellor found that he had been mistaken and gave judgment for the mortgagee, saying at page 211:

> "I am satisfied that the decree was erroneous, from the circumstance of my having overlooked the Act of Assembly of 1817, which provides, in very explicit terms, 'that all leases or contracts in writing, hereafter to be

made between the landlord and tenant, for a longer term than twelve months, shall not be valid in law, against the rights and claims of third persons, unless the same shall have been recorded in the office of Mesne Conveyances, at least within three months from the time of the execution thereof'."

Since that time, the law has been clear: a lease for more than one year must be recorded. But "a lease for less than a year need not be recorded." *Ruff v. Columbia Railway Gas & Electric Co.*, 109 S. C. 312, 96 S. E. 183 (1918). As to what constitutes a lease for more than one year, we can probably be guided by whether or not the lease needs be in writing. A safe rule to follow is that if the law requires a lease to be written, that lease should also be recorded.

But what about leases that are written but are not required by law so to be?

S. C. CODE, §8806-48 (Supp. 1946) provides that:

> "In order to give notice to third persons any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate."

However, in the *Wright* case, *supra*, it was held that a written lease for one year did not have to be recorded, and one of the convincing arguments used in reaching that conclusion was that an oral agreement for one year was valid and, of course, could not be recorded. As previously pointed out, in this state an oral lease or agreement of lease for one year or less is perfectly valid even though there is no contemporaneous occupancy. *Wright v. Ritz Theater Co., supra; Hillhouse v. Jennings, supra; National Bank of South Carolina v. Peoples Grocery Co., supra.* Obviously, such a lease cannot be recorded.[12]

In the case of *Barksdale v. Hinson*, 212 S. C. 1, 46 S. E. 2d 170 (1948), the defendant on February 8, 1947, made an oral lease with the landlord's agent for a period of one year. Subsequently, on February 15th, 1947, the property was sold, and shortly thereafter proceedings were brought by the purchaser to eject the defendant. The plaintiff contended that he

12. Record means to copy in an official county record book or to take a picture of the document and file it in the official county records. See S. C. CODE, §8893-2, 8893-2A (Supp. 1946).

had no notice of the tenancy and could not be bound thereby. The court held that, since an oral agreement of lease for one year was valid, then the above quoted S. C. CODE, §8806-48 (Supp. 1946) contemplated only written leases for more than one year. Thus the court reconciled the above with S. C. CODE, §8875 (1942), which was not repealed. The question might well arise whether a written lease for one year should be recorded in order to give the purchaser notice, but the court's discussion of the hardships that may result from permitting ejection by purchasers without notice would indicate that such lease need not be recorded. The court said at page 4:

> "Respondent's contention is that the validity of a parol lease does not extend to a 'third person' without notice, but this is unreasonable in view of the ancient and almost universal practice in this State of the creation by parol of tenancies not exceeding one year of farm, residential and business properties, which, of course, need not be recorded in order to bind all persons dealing with the property. *Ruff v. Columbia Ry., Gas & Electric Co.*, 109 S. C. 312, 96 S. E. 183. It is well known that this practice is particularly prevalent in the case of farm tenancies. Under respondent's contention a tenant-farmer under a verbal lease for one year might be ejected in the midst of the crop growing season unless he were able to prove actual notice of his right to a purchaser of the farm. The custom is engrafted in the ways of our people by reason of the validity from the earliest times of oral leases for a year or less and there has naturally been no statutory requirement of the recording such a lease. Code, Sec. 8875 is expressly to the contrary of such requirement. See the interesting first application in a reported case of the statute relating to leases, enacted 1817, in *Page v. Street*, Speers Eq. 159. Apparently before that there was no authorization for the recording of a lease, however long its term.
>
> "Surely if it had been the legislative intent to upset this long-established practice by the enactment of 1946 it would have been clearly and unmistakably expressed and the applicable provision of the general recording statute, Section 8875 of the Code of 1942, would have been directly repealed. Reading the latter with the pertinent

> sections of the Act of 1946, which have been cited, it appears the recording of a lease or contract between landlord and tenant for a period not exceeding one year is still unnecessary in order to bind a subsequent purchaser of the property without notice, simply because it need not be in writing."

In a concurring opinion, Justice Oxner said that possession alone is sufficient to put the purchaser on notice, and that the purchaser would have found, upon inquiring, that the tenant was in possession under an oral lease for one year. He said that the question should be left open as to whether a purchaser for value would be entitled to recover possession if, at the time of the purchase, the tenant had not been in possession of the demised property. This would affect oral leases for one year with possession to be given in the future.[13]

What is a "third person" within the meaning of the statute? In *First Presbyterian Church of York v. York Depository*, 203 S. C. 410, 27 S. E. 2d 573 (1943), it was held that the term should be construed with S. C. CODE, §8875 (1942) so as to include only "subsequent creditors and purchasers for valuable consideration without notice" and that it did not include devisees. In *Gentry v. Recreation Inc., supra*, it was held that an unrecorded lease was not effective against a subsequent chattel mortgagee.

What about a lease for one year, which is to continue from year to year unless notice of termination is given? Since this provision of continuance is quite customary, it would be expected that this question has been decided. And so it has. In *Hampton Park Terrace, Inc. v. Sottile, supra*, it was held that such a lease is one for more than a year and needs to be written and recorded. At page 376:

> "This lease provides for a lease for one year which is to continue from year to year unless either landlord or tenant shall give six months' notice of an intention to terminate it. If the lease had provided for a renewal at

13. Of course we are discussing only the effect on Landlord and Tenant by failure to record a lease. While a lease for one year or less would not have to be recorded and would not permit eviction of the tenant, such a lease would probably be a breach of warranty, if no notice of it were given, permitting a purchaser to rescind a purchase of property which he desired and contracted for immediate occupancy.

the end of the year by the act of the parties, then it might have been contended, with much force, that the lease expired by its own limitation at the end of the year, and, therefore, the notice required was an agreement to make a new contract on the same terms. This lease required notice to terminate it, and without the intervention of the acts of the parties, the lease should continue indefinitely from year to year, and the parties would act under it, not by virtue of a renewal, but by the continued obligations of the original lease. The lease is, therefore, a lease for more than a year. It was such a lease as is required by law to be recorded, and not being recorded is void as to the excess over the year, as to the subsequent purchaser for value."

This case also held that a lease agreement which should be recorded was nevertheless effective as a one year lease. Also at page 376:

"The lease was not absolutely void for all purposes. It was good as a parol lease for one year."

REMEDIES

The statute provides for the eviction of the tenant for failing to pay rent, S. C. CODE, §8806-14 (Supp. 1946), or upon termination of the tenancy, S. C. CODE, §8806-10 (Supp. 1946). The statute also provides that if the tenant is "wrongfully dispossessed" he may recover damages from landlord. These sections read:

"The tenant may be ejected upon application of the landlord or his agent when such tenant fails or refuses to pay the rent when demanded, or when the term of tenancy or occupancy has ended, or when the terms or conditions of the lease have been violated." S. C. CODE, §8806-17 (Supp. 1946).

"In case any tenant is wrongfully dispossessed, he, she or they may have action for damages against the landlord." S. C. CODE, §8806-29 (Supp. 1946).

In *Williams v. Columbia Mills Co.*, 100 S. C. 363, 85 S. E. 160 (1915), an action was brought under S. C. CODE, §3509 (1912) for actual and punitive damages by a tenant who

claimed that he had been "wrongfully dispossessed" by the defendant-landlord. The landlord defended on the grounds that he had proceeded under the statute to evict the plaintiff and had obtained an order from the local magistrate. It was held that the tenant was estopped to claim that he had been "wrongfully dispossessed" so long as the landlord acted under an order of the magistrate's court. In effect, the decision prevents the matter from being tried *de novo*. The court said at page 370:

> "The findings of the magistrate in ejectment proceedings is a judgment in those proceedings, and it cannot be attacked collaterally in this or any other case. Of course this does not refer to an abuse of process after judgment, but those facts that would have prevented the issuance of the warrant of ejectment should have been set up in those proceedings. The respondent in this case is bound as long as those proceedings stand."

In *Trakas v. Mitchell*, 111 S. C. 160, 97 S. E. 245 (1918), it was held that an eviction could not be enjoined. Although the court did not so state, apparently one reason for its decision was that an action to recover damages for eviction could be maintained.

Since the action cannot be brought as long as an order of the magistrate permits the eviction, and since legal eviction can only be brought in the Magistrate's Court, presumably the statute will permit such an action only where all of the following circumstances exist: (a) the tenant is dispossessed by an order of the magistrate; (b) the order is appealed by the tenant; (c) the tenant does not stay the eviction pending the appeal, and is actually evicted; and (d) the eviction order of the magistrate is reversed on the appeal.

While the statute does not give an action for a wrongful distraint, apparently a suit for conversion will lie. In *Salley v. Parker*, 112 S. C. 109, 98 S. E. 847 (1917), the landlord issued a distraint for rent in arrears, although in fact the rent had been paid to date. Under the distraint the landlord seized and sold a stove belonging to the tenant. He was held liable to the tenant for the conversion of the stove.

Under the new statute, a distraint is issued by the magistrate, upon the filing of an affidavit by the landlord that the rent is in arrears. Presumably, since no statutory appeal is

allowed, an unlawful or improper distraint could be the subject of an action, as in the *Salley* case, *supra,* even though it is issued by the magistrate instead of by the landlord.

DESTRUCTION OF SUBJECT MATTER OF LEASE

What happens when there is a complete or partial destruction of the subject matter of the lease? At common law, apparently, the destruction of the leased property was just the tenant's hard luck. He had to continue to pay rent until the end of the year. Civil law was more favorable to the tenant, and there was an apportionment of the rent between the period when the tenant could enjoy the use of the property and the period when he could not.

In this state, one of the earliest cases involving the principle was *Bacot v. Parnell,* 2 Bail. 424 (1831), where a slave who had been rented died during the period when he was under the lease contract. It was held that the rent should not continue after his death, as that was an act of God. In *Bayly v. Lawrence,* 1 Bay 499 (1792), the defendant had rented a shipyard from the plaintiff for ten years. In an action to recover unpaid rent, the defense was that the property had been held by the British during the War of 1776. In holding for the defendant, the court said at page 499:

> "That the defendant ought to pay for the time he peaceably enjoyed the premises, but not for any time he was prevented by the casualties of war."

In *Ripley v. Wightman,* 4 McC. 447 (1828), it was held that a tenant was relieved from paying the entire rent by the destruction of the leased residence by storm. At page 449:

> "If a man leases a house for a year, and during the term it is rendered untenantable by a storm the rent ought to be apportioned according to the time it was occupied".

There the purpose of the leasehold, which was to provide the tenant with a residence, had been destroyed by the destruction of the building.

As a result of these decisions it was generally stated that this state followed the civil law instead of the common law in this respect. However, in the leading case of *Coogan v. Parker,* 2 S. C. 255, 16 Am. Rep. 659 (1870), all statements

that this state followed civil instead of the common law were expressly repudiated. There the court fully discussed all of the cases which had theretofore been decided at common law on this question. To explain the common law cases in other jurisdictions, which seemingly were inconsistent with prior South Carolina decisions, the court drew a distinction between loss of the leased property and loss of the subject matter of the lease. The court also carefully distinguished between loss of the subject matter of the lease by reason of fire, and loss by the reason of an act of God or action of the enemy. It was said that loss by fire should be excluded as grounds for cancellation of the lease for two primary reasons: (a) it is an "ordinary risk that may fairly have been considered within the contemplations of the parties," and (b) "an unscrupulous tenant, with a hard bargain, would find himself tempted to destroy the premises secretly in order to escape the payment of rent." The distinction between a physical destruction of the leased property and a destruction of the subject matter of the lease was needed to explain the many English and other common law states' decisions. Also it enabled the court to distinguish between leases in cities and towns, and leases in the country: that is, where the land was an important part of the lease and where it was not. The court said that if a tenant leases a building for a dwelling house in a city, it would be unfair to require him to continue to pay rent if the house is destroyed because "a few feet of barren land" remains. On the other hand, the dwelling house is not so important in a country lease. The court said at page 275:

> "If parties contract with reference to the occupation of a dwelling house, the destruction of that dwelling house is clearly the destruction of that which they had in view, and was the basis and consideration of their contract. To say that the few feet of barren land on which it stood, incapable of any production worthy of consideration, is sufficient to answer the intention of the parties, to satisfy the justice and equity of the contract, as well as its terms, is to say what no jurist has yet ventured broadly to affirm. The only difference between leases in compactly built cities and in the country is, that, in the one case, the principle is more clear and evident in its application than in the other. The ground of distinction must be the fact that the structure bears such relation, in point of fitness

and value for the use contemplated by the lease, as to give rise to the conclusion that the buildings were the main element of the consideration on which the agreement to pay rent was based."

The decision is of vast importance in this state; not only for giving vigor to the doctrine of impossibility of performance, but even more in indicating a liberal tendency in permitting the rescission of leases which, because of circumstances beyond the control of the tenant, make the lease burdensome to him. The court made this important statement also on page 275:

> "It has long been felt that the application of the common law ought to yield results more in accordance with the habits and ideas of the people, in this respect, and it is apprehended that, if approached in a constructive as well as a critical spirit, its doctrine and principles will be found, in all respects, compatible with the growth and tendencies of the civilization which has been fostered by it."

The principle also was applied in the case of *Huguenin v. Courtenay*, 21 S. C. 403 (1884). There, the plaintiff sued for specific performance of a contract for the sale of a leasehold of land. A heavy storm had washed away about one-half of the lot formerly, and, at the time of the contract of sale, a part of the leasehold. In holding for the defendant, the court announced that in this state where there is a substantial destruction of the subject matter in a lease for years, by an act of God or the public enemy, the tenant or purchaser may elect to rescind and shall be discharged from the payment of rent or fulfillment of the contract.

There are many situations where a "destruction of the subject matter of the lease" may occur without a physical destruction of the leased property. Thus, in the *Coogan* case, *supra*, the property leased was a store building which was to be used as a restaurant. The building was not destroyed, but it was in the area occupied by Federal troops and the tenant could not operate the restaurant there for some time. An exception to the doctrine of impossibility of performance is that the other party to the contract must not contribute to the cause of the impossibility. Indeed, some cases have gone even further and have required the other party to cooperate; how-

ever, where it is held that there is a "duty to cooperate," apparently no affirmative action is required. In the famous case of *Lansdowne v. Reihmann*, 124 S. W. 353 (Ky. App. 1910), it was held that the lessor-owner was not required to sign a petition to permit the leased property to be operated as a saloon, although he knew at the time of the lease that the tenant intended to use the property as a saloon and that it would be necessary for him to obtain the requisite number of signatures on the petition.

The essence of the doctrine of impossibility of performance is an absolute destruction of the subject matter of the lease for the term. In the *Lansdowne* case, *supra*, the property could be used for a saloon upon obtaining the necessary signatures to a petition. If property should be leased for a swimming pool and subsequently the water should, without fault of the tenant, become irremediably contaminated, it would seem grounds for rescission would exist.

There are apparently no decisions on the question of whether grounds for rescission exist when the condition creating the impossibility is caused by an ordinance or a health or a safety rule, and could be removed by a substantial alteration in the leased property. The amount required to be spent for such alteration might be greater than what the property is worth to the landlord or tenant. Could the one who by law is required to make the alteration, avoid doing so by cancelling the lease? There is no decision on this question, but the opinion of the Supreme Court in *Coogan v. Parker, supra*, would indicate that under such circumstances the lease could be cancelled.

Another essential for invoking the doctrine is the lack of knowledge, actual or constructive, by the parties of the fact or circumstances creating the impossibility. Thus, if the destruction of the subject matter of the lease is caused by a restriction of record, a zoning restriction, or ordinance regarding health, safety or fire, or any other matter in existence, or so within the realm of possibility that it should have been thought of by reasonable men when the lease was made, it would not give grounds for cancellation or rescission.

Conclusion

This state in the past decade has changed from a predominantly agricultural one to a predominantly industrial and

commercial one. Thus the reason for the old annual tenancy rule has vanished. The legislative change in this respect was therefore essential. While the change in the law would undoubtedly have evolved under the principle of the decision in *Coogan v. Parker, supra,* nevertheless the principle had become so firmly embedded in our law that the change by the judiciary would probably have been slow and gradual. For this reason it was much better that the rule be changed by the legislature than wait for the judiciary to act. But in all other respects, except purely formal requirements such as that a lease for more than one year must be in writing and that a lease must be recorded, etc., the necessary change can be brought about through the judiciary. *Coogan v. Parker* permits judicial recognition of changed conditions and permits a rule of law based upon reason.