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Property

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PROPERTY

I. DECEDENTS' ESTATES

In *Moultis v. Degen*,[1] the South Carolina Supreme Court held that tort victims are required to follow the notice of claim provisions within section 21-15-640[2] in the event their tortfeasor dies. The court also took advantage of *Moultis* as its first opportunity to denominate section 21-15-640, a nonclaim statute.[3] The significance of that appellation will depend on whether the court, in future decisions, recognizes a distinction between nonclaim statutes and statutes of limitation. The *Moultis* decision was not arrived at without difficulty, however. The majority's original opinion was not only accompanied by a vigorous dissent,[4] but was also deemed worthy of a second look by the court. The appellant was granted a rehearing after the initial opinion was filed July 29, 1982.[5] While the original holding was not changed in its second opinion, handed down March 24, 1983, the court added obitur dictum not found in its first effort.[6] According to this dictum tardy claimants of a decedent may pursue the undistributed assets of the decedent's estate despite the strictures of section 21-15-640.[7]

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1. ___ S.C. ___, 301 S.E.2d 554 (1983).

2. S.C. CODE ANN. § 21-15-640 (1976) reads:

> All claims of creditors of such estate shall upon the expiration of five months after the first publication of the notice prescribed in § 21-15-630 be forever barred unless, before the expiration of such period, an account thereof, duly attested, shall have been filed with such executor or administrator or with the judge of probate of the county in which such estate is being administered. But the provisions of this section shall not apply to obligations secured by mortgages or other liens which have been duly recorded prior to the expiration of such period.

3. ___ S.C. at ___, 301 S.E.2d at 556. Nonclaim statutes "generally provide that 'all claims' should be presented to the executor or administrator, or filed in the court, and if not so presented or filed within a stated period, they shall forever be barred." Annot., 22 ALR3d 493, 496 (1968)(footnotes omitted).

4. The dissent by Justice Ness was joined by Chief Justice Lewis. Moultis v. Degan, No. 21770, 24 Smith Advance Sheet 9, 11 (1982).

5. Moultis v. Degan, No. 21770, 26 Smith Advance Sheet (reh'g granted) (1982).

6. ___ S.C. at ___, 301 S.E.2d at 558. *See infra* note 47.

7. *Id.* at ___, 301 S.E.2d at 558.

In *Moultis*, the appellant was administratrix of the estate of Carol A. Wludyka. Ms. Wludyka succumbed to an illness on July 9, 1973, after she had received treatment from several physicians.[8] Shortly thereafter, Dr. J.M. Davis, one of the doctors who had attended Ms. Wludyka, also died. In 1979, appellant brought wrongful death[9] and survival[10] actions against the doctors involved in Ms. Wludyka's unsuccessful treatment.[11] Among the named defendants were the executors of Dr. Davis' estate, including the doctor's widow, who was also named individually as sole beneficiary of the estate.[12] Mrs. Davis interposed a demurrer on the ground that section 21-15-640 bars tort claims against the assets of an estate if such claims are not filed within the five month period described by the statute. The trial judge sustained the demurrer.[13] Appellant claimed that this decision was error, insisting that neither tort victims nor their representatives are "creditors" and that a cause of action in tort is not a "claim" within the meaning of section 21-15-640.[14]

The South Carolina Supreme Court rejected appellant's interpretation of the statute. For the proposition that a "claim" in the context of the statute includes tort claims, the court cited an article in *American Law Reports, Third Edition*, which said that nonclaim statutes using the words "claim" or "all claims" have generally been held to include tort claims within their meaning, although some jurisdictions hold otherwise.[15] The majority characterized this passage as stating a general rule, which rule it proceeded to adopt.[16] In its analysis of "creditor," the court cited to *Corpus Juris Secundum* which states that the term "creditor" has generally been held to include tort claimants in the context of remedial statutes.[17] The court also quoted from the opinion of an Ohio Court of Common Pleas which broadly defined "creditor" as including, inter alia, a tort claimant.[18]

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8. *Id.* at ___, 301 S.E.2d at 558.
9. S.C. CODE ANN. § 15-51-10 (1976).
10. *Id.* at §§ 15-5-80, -90 (1976).
11. ___ S.C. at ___, 301 S.E.2d at 557.
12. *Id.* at ___, 301 S.E.2d at 557.
13. *Id.* at ___, 301 S.E.2d at 557; Record at 38.
14. ___ S.C. at ___, 301 S.E.2d at 557; Record at 40.
15. ___ S.C. at ___, 301 S.E.2d at 557 (quoting Annot., 22 ALR 3d 493, 496 (1968)).
16. ___ S.C. at ___, 301 S.E.2d at 557.
17. *Id.* at ___, 301 S.E.2d at 557 (citing 21 C.J.S. *Creditor* at 1050 (1940)).
18. ___ S.C. at ___, 301 S.E.2d at 557 (citing Coronet Mfg. Corp. v. May Furniture

To further bolster the notion that tort victims are "creditors," the court recalled its recent decision in *Bonsall v. Piggly Wiggly Helms, Inc.*[19] In that case the plaintiff was the victim of a slip and fall accident in defendant's grocery store. The plaintiff discussed the accident with a store employee the same day and later with an adjuster of defendant's insurance company.[20] Not long after the accident took place, the defendant instituted corporate dissolution proceedings. Section 33-21-60(b) of the South Carolina Code required the defendant to notify all "known creditors" of its intention to dissolve.[21] Plaintiff was not notified of the dissolution and did not file a cause of action on her tort claim until more than two years had passed.[22] Defendant attempted to quash service on the theory that plaintiff's claim was barred by the two year limitation section 33-21-220 erects against claimants of dissolved companies.[23] The South Carolina Supreme Court unanimously held that plaintiff was a "known creditor" of defendant by virtue of her tort claim and the corporation's knowledge of that claim.[24] Her claim was

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Co., 31 Ohio Misc. 131, 282 N.E.2d 588 (1971)).

The dissent in *Moultis* asserts that the word "creditor" has a narrower meaning. In construing the term "creditor" as used within § 21-15-640, the dissent urges that a party cannot be a creditor of an estate unless a debt can be identified. Justice Ness cites Wallace v. Timmons, 232 S.C. 311, 101 S.E.2d 844 (1958), and, quoting that case, said: "[T]his Court stated that § 19-474 (1956) recodified as § 21-15-640, Code of Laws of South Carolina (1976), refers to 'claims of creditors, and relate(s) to *debts* of the testator payable from his estate.' " ___ S.C. at ___, 301 S.E.2d at 559 (emphasis added Ness, J., dissenting). The dissent also argued that a tort claim does not create a debt in the wrongdoer unless and until the tort victim adjudicates the claim in court and a judgment is returned for payment in favor of the victim. *Id.* at ___, 301 S.E.2d at 559.

19. Bonsall v. Piggly Wiggly Helms, Inc., 275 S.C. 593, 274 S.E.2d 298 (1981).

20. *Id.* at 595, 274 S.E.2d at 299.

21. S.C. CODE ANN. § 33-21-60(g)(1976).

22. 275 S.C. at 594-95, 247 S.E.2d at 298-99.

23. S.C. CODE ANN. § 33-21-22 (1976).

24. 275 S.C. at 596, 274 S.E.2d at 299. Justice Ness claims that the court's interpretation of the term "known creditor" in *Bonsall* is of no moment when one attempts to discover the scope of "creditor" in § 21-15-640. He points out that not only are there two different statutes involved but that each statute has "patently dissimilar . . . objectives." ___ S.C. at ___, 301 S.E.2d at 560 (Ness, J., dissenting).

The objectives behind § 21-15-640 and those behind § 33-21-60, while not identical, do not appear to be dissimilar. The former seeks to wind up the affairs of decedents, while the latter seeks to wind up the affairs of corporations. Nevertheless, the fact that no debt was owed by the defendant to plaintiff in *Bonsall* does not trouble Justice Ness as it does in *Moultis*. *See supra* note 18. Apparently, he believes one can be a creditor without a debt in some cases but not in others.

therefore still valid against the corporation because she did not receive the notice to which she was entitled under section 33-21-60(b).[25]

Additionally, the court in *Moultis* observed that section 21-15-640 contained exemptions for specified claims. It then reasoned that any claims not specifically exempted were intended by the legislature to fall within the ambit of the statute, and that "[a]ny further exemptions must be legislative determinations."[26] Thus, through its interpretation of the statute's intended scope as well as its construction of the statute's wording, the court concluded that tort victims are subject to the notice of claim provisions mandated by section 21-15-640.

In addition to concluding that section 21-15-640 applies to tort claimants, the supreme court held that this provision is a nonclaim statute. While its resolution of the former issue is susceptible to debate, the court's latter determination is unquestionably accurate. The basic provisions of section 21-15-640 were initially added to the 1942 version of the South Carolina Code in 1943.[27] Prior to that enactment, the South Carolina Supreme Court had interpreted South Carolina law as protecting only the personal representatives of estates against the untimely filing of creditors' claims[28] and had ruled that South Carolina did not have a nonclaim statute.[29] The Fourth Circuit apparently relying on these pre-1943 decisions misinterpreted 21-15-640's predecessor in *Dubuque Fire & Marine Insurance Co. v. Wilson*,[30] and the Supreme Court of South Carolina utilized *Moultis* to set the

25. 275 S.C. at 596, 274 S.E.2d at 299.

26. ___ S.C. at ___, 301 S.E.2d at 557.

27. With some differences the provision was amended as subsection (b) to § 8993 of the 1942 South Carolina Code. In 1952, § 8993(G) was recodified as § 19-474 of the Code. For an excellent analysis of the history of § 21-14-640, see Judge Blatt's opinion in Federal Deposit Ins. Corp. v. Fagan, 459 F. Supp. 933, 935, 939 (D.S.C. 1978). *See also* 1964 Op. Att'y Gen. No. 1777 at 297; Karesh, *Wills—Survey of South Carolina Law*, 8 S.C.L.Q. 150, 162 (1955).

28. ___ S.C. at ___, 301 S.E.2d at 556. The court cites two cases that interpreted South Carolina law (specifically the predecessor of S.C. CODE ANN. § 21-15-640 (1976)) as extending protection only to the personal representatives of estates. When a tardy creditor sought redress against the estate, he could still pursue the identifiable assets of the estate in the hands of distributees. The two cases cited by the court are McNair v. Howle, 123 S.C. 252, 116 S.E. 279 (1923), and Columbia Theological Seminary v. Arnette, 168 S.C. 272, 167 S.E. 465 (1932).

29. ___ S.C. at ___, 301 S.E.2d at 556 (citing *McNair*, 116 S.E. at 285).

30. Dubuque Fire and Marine Ins. Co. v. Wilson, 213 F.2d 115 (4th Cir. 1954).

record straight.[31] In doing so, the court agreed with the late Professor Coleman Karesh[32] and the South Carolina Attorney General[33] "that the legislature has expressed its intent that this state should have a nonclaim provision."[34]

While it is worth noting that the South Carolina Supreme Court has determined it was the legislature's intention to provide South Carolina with a nonclaim provision, the extent to which a nonclaim provision differs from a statute of limitations in South Carolina is a question that can only be answered through future litigation. In many jurisdictions, important distinctions are made between the two.[35] For instance, a nonclaim statute is said to create a condition precedent to the enforcement of a right of action, for if the claim is not filed within the specified time period it is forever barred.[36] Thus, if a nonclaim statute bars a claim, it deprives an otherwise appropriate court of its jurisdiction to adjudicate the matter.[37] Additionally, it is

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31. ___ S.C. at ___, 301 S.E.2d at 557 n.2. The court discusses Judge Blatt's critical analysis of the *Dubuque* decision in *Fagan, supra* note 27 and Professor Karesh's early criticism of the same case in 8 S.C.L.Q. 162 (1955). The *Dubuque* court was apparently misled by an annotator's error in the 1952 S.C. Code which mistakenly associated the *McNair* and *Columbia Theological Seminary* decisions with the 1952 version of § 21-15-640. The decisions allowed tardy creditors to recover against distributed assets of an estate, and the *Dubuque* court's opinion was consistent with their holdings. That court apparently did not realize it was construing 1943 code provisions with cases decided in 1923 and 1932. *Fagen*, 459 F. Supp. at 937; Karesh, 8 S.C.L.Q. at 164.

32. *See supra* notes 27, 31.

33. *See supra* notes 27, 31.

34. ___ S.C. at ___, 301 S.E.2d at 556.

35. For a concise and illuminating discussion of the topic, see Comment, *Executors and Administrators—Comparison of Nonclaim Statutes and General Statutes of Limitations*, 36 MICH. L. REV. 973 (1938).

36. Estate of Daigle, 634 P.2d 71, 75 (Colo. 1981); Chicago & North Western Ry. v. City of Osage, 176 N.W.2d 788, 791 (Iowa 1970); Beacon Mut. Indem. Co. v. Stalder, 120 N.E.2d 743, 745 (Ohio 1954); Estate of Minton v. Markham, 625 S.W.2d 260, 265 (Tenn. 1981)(Brock, J., dissenting). *See also* Turner v. Estate of Lo Shee Pang, 631 P.2d 1010, 1011 (Wash. Ct. App. 1981)(noting that "compliance with [the nonclaim statute's] requirements is essential for recovery").

37. Williams v. Phillips Petroleum Co., 453 F. Supp. 967, 976 (S.D. Ala. 1978); Russell v. United States, 260 F. Supp. 493, 498 (N.D.I. 1966); *Daigle*, 634 P.2d at 75; State v. Hall, 358 S.W.2d 845, 848, 849 (Mo. 1962); Clark v. Organ, 329 S.W.2d 670, 675 (Mo. 1959); *Beacon Mut. Indem. Co.*, 120 N.E.2d at 745. *See also* Greyhound Lines v. Lexington State Bank and Trust, 604 F.2d 1151, 1156 (8th Cir. 1979)(a claims barring statute, since repealed, operated as jurisdictional limitation on state courts, though not federal); In Re Brown's Estate, 117 So.2d 478, 481 (Fla. 1960)("where no exemption from the provisions of a statute [of nonclaim] exist the court is powerless to create one."); 31 AM. JUR. 2d *Executors and Administrators* §§ 270, 291, 293 (1967).

beyond anyone's power either to waive[38] the provision's effect or toll it.[39] By contrast, a statute of limitations can be voluntarily waived or tolled,[40] and in many jurisdictions the defense which such a statute provides is considered waived by the defendant if not affirmatively pled.[41]

The *Moultis* case very nearly presented an issue which would have allowed the court to hear arguments regarding such distinctions. The trial court sustained Mrs. Davis' demurrer on the ground that section 21-15-640 barred plaintiff's claim against her as the sole beneficiary of her husband's estate.[42] In a footnote, the supreme court observed that "the claims barring statute is an affirmative defense to be pled by way of answer, and hence is not a ground for a demurrer."[43] The court went on to say that because the point was not raised on appeal it would not be considered.[44] Is it clear, however, that the defendant must assert a nonclaim statute as an affirmative defense when the plaintiff has been deprived of his right of action by not complying with the requirements of the statute? If a nonclaim statute does create a condition precedent to a right of action, and if, when that condition is not met, the statute operates to deprive a court of its jurisdiction over the matter, then it would appear that a demurrer is an appropriate response to the complaint which asserts a barred claim.[45] Indeed, the very purpose of the statute is

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38. *Daigle*, 634 P.2d at 75; *Hall*, 358 S.W.2d at 849; *Beacon Mut. Indem. Co.*, 120 N.E.2d at 745; *Turner*, 631 P.2d at 1011; Estate of Lecic v. Lane Co., 104 Wis. 2d 592, 603, 312 N.W.2d 773, 778 (1981).

39. *Daigle*, 634 P.2d at 75.

40. *Id.*

41. *Id. See also Estate of Minton*, 625 S.W.2d at 265 (Brock, J., dissenting).

42. ___ S.C. at ___, 301 S.E.2d at 557.

43. *Id.* at ___, 301 S.E.2d at 557 n.3. For this proposition the court cited Ellett Bros. v. Manos, 269 S.C. 581, 239 S.E.2d 75 (1977). In *Ellett Bros.*, the South Carolina Supreme Court reversed a lower court's decision to sustain the defendant's demurrer. The supreme court observed that it must review the allegations stated in the complaint and assume them to be true when deciding if sufficient facts were asserted in the complaint to constitute a cause of action. The court then added that it would not consider any affirmative defenses that the respondent might have been able to assert. The court did not make clear which, if any, affirmative defenses the respondent was not entitled to have considered. *Id.* at 583, 239 S.E.2d at 75.

44. ___ S.C. at ___, 301 S.E.2d at 551 n.3.

45. In *Moultis*, the respondent listed 12 grounds to support her amended demurrer, one of which asserted the bar raised by § 21-15-640. Record at 29-30. In South Carolina a defendant may demur when it appears on the face of the complaint that, *inter alia*, "[T]he court has no jurisdiction of the person of the defendant or the subject of the

to "forever bar" those claims proscribed by its terms, and it is this finality which primarily distinguishes a nonclaim statute from a statute of limitations.

In holding that section 21-15-640 is a nonclaim statute and that tort claimants are subject to its provisions, the supreme court resolved the controversy presented by *Moultis*. Yet, in contradiction to the underlying reasoning of its holdings, the court added dictum which states that although the court holds tardy tort claims barred by the statute, "this holding does not apply to undistributed assets. . . ."[46] The clear purpose of this dictum[47] is to allow tort victims to reach, via suits against administrators de bonis non, the liability insurance coverage of the deceased.[48] The court reasoned that since "it is appropriate to petition the probate court to reopen the estate in order that after-discovered assets may be accumulated and distributed . . ."[49] and since "a liability insurance policy . . . [is] an undistributed asset of the estate,"[50] a tort claimant who did not com-

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action." S.C. CODE ANN. § 15-13-320 (1976). The appellant's amended complaint recited that Dr. Davis was deceased, that the assets of his estate had been distributed, that the estate had been closed, and that the executors had been discharged. Record at 5-6. Thus, without the additional assertion that appellant had complied with the condition precedent required by § 21-15-640 (filing her attested claim in the prescribed manner), it would appear from the face of the complaint that the court lacked jurisdiction to hear the cause of action, or alternatively, that insufficient facts were asserted to state a cause of action. S.C. CODE ANN. § 15-13-320(6)(1976).

See also Donnally v. Montgomery County Welfare Board, 92 A.2d 354 (Md. 1952), in which the court said that "[w] hile it is generally held that a statute of limitations must be specially pleaded . . . the reason for the rule is inapplicable to a non-claim statute." *Id.* at 357.

46. ___ S.C. at ___, 301 S.E.2d at 558.

47. The court's approach in allowing late creditors to pursue the undistributed assets of a deceased must be considered dictum. As the court itself points out, the "ruling does not comfort this particular appellant." ___ S.C. at ___, 301 S.E.2d at 539.

48. *Id.* at ___, 301 S.E.2d at 539. This result appears to be the sole policy objective of the court although its reasoning would produce broader results. *See infra* note 53 and accompanying text.

49. ___ S.C. at ___, 301 S.E.2d at 558 (citing Anderson v. Bowers, 117 F. Supp. 584 (D.S.C. 1954); McNair v. Howle, 123 S.C. 252, 116 S.E. 279 (1923)). The *Anderson* court was concerned with the reopening of an estate in a tax case. The discharged executrix had received an excessive commission from the estate before it was closed and there was a question of whether she was obliged to return the funds to the estate. No tardy creditor was involved, and § 21-15-640 was not mentioned.

McNair, as the court itself noted elsewhere in the opinion, was decided long before § 21-15-640 came into existence. *See supra* note 30-31 and accompanying text.

50. ___ S.C. at ___, 301 S.E.2d at 558 (citing In re Miles Estate, 262 N.C. 647, 138 S.E.2d 487 (1964); Belancsik v. Overlake Memorial Hosp., 80 Wash. 2d 111, 492 P.2d 219

ply with the nonclaim statute should be able to petition the probate court to appoint an administrator de bonis non, thereby giving the tort claimant a party to sue.[51] The next step in the court's suggested procedure requires the administrator de bonis non to involve the insurance company so that it may "afford the protection for which a premium was paid."[52]

The court's reasoning permits not only late tort claimants but noncomplying contract creditors to avail themselves of this procedure.[53] Such an opportunity would present itself if the undistributed asset turned out to be something other than a liability insurance policy. Thus, potential distributees who wish to

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(1971)). In *Miles*, the court considered the constitutionality of a North Carolina statute that specifically precluded tardy claimants from pursuing assets paid out by an administrator. Undistributed assets were therefore exempt from the statute's operation. 262 N.C. at 654-55, 138 S.E.2d at 492-93.

The *Belancsik* court was also dealing with a statutory scheme different from South Carolina's. In that decision, the court was asked to decide if the following statutory language denied equal protection: "The four-month time limitation for serving and filing of claims [against an estate] shall not accrue to the benefit of any liability or casualty insurer as to claims against the deceased. . . ." 80 Wash. 2d at 113, 492 P.2d at 220. The question was not one of judicially creating an exemption to a nonclaim statute, but whether a legislatively created exemption was constitutional. The court held that it was.

51. ___ S.C. at ___, 301 S.E.2d at 558 (quoting Williams v. Grossman, 409 Mich. 67, 293 N.W.2d 315 (1980)). The *Williams* court was also dealing with a statutory scheme significantly different from South Carolina's because the statute in question lacked the "forever barred" language of typical nonclaim statutes. MICH. COMP. LAWS ANN. § 700.732 (1980). The Michigan court, however, termed the statute in question a nonclaim provision. 409 Mich. at 86, 293 N.W.2d at 321. The court in *Williams* concluded that the Michigan statutory scheme merely precludes tardy creditors from filing claims against an estate, but allows claims to be made directly against a decedent's personal representative to reach a liability insurance policy, which the court found not to be part of the probated estate. *Id.* at 83-85, 293 N.W.2d at 320.

52. ___ S.C. at ___, 301 S.E.3d at 558. The insured's purpose in obtaining coverage and paying the associated premiums is most likely to be the protection of his assets against liability claims. The *Moultis* case illustrates an instance in which the purpose behind the premiums being paid no longer existed, for the assets were out of reach. While the court's view of the premium's purpose may differ from that of the insured, it is those who are insured who must pay the increased premiums that result when the court extends liability.

At least one court, when faced with a situation and statute similar to that in *Moultis*, has declined to adopt the procedures embraced by the South Carolina Supreme Court. In Swan v. Estate of Monette, 265 F. Supp. 362 (N.D. Ark. 1967), *aff'd per curiam*, 400 F.2d 274 (8th Cir. 1968), the court said that "neither the plaintiffs nor anyone else may proceed against the liability carrier of a deceased until they have complied with the nonclaim statutes." 265 F. Supp. at 366.

53. Because the court has subsumed tort claimants under the term "creditor," it follows that any procedures open to tardy tort claimants are equally applicable to contract creditors who have not filed within the required period of time.

have after-discovered assets[54] administered run the risk of competing with tardy contract creditors (as well as "barred" tort claimants) if they petition the probate court to reopen the estate.

When the court found the appellant in *Moultis* to be within the ambit of 21-15-640, it observed that only the legislature could create further exemptions to the statute's bar. The court's deference to the legislature proved to be short-lived. Its assertion that creditors whose claims are barred by 21-15-640 might nevertheless pursue the undistributed assets of an estate is in obvious contradiction to the statute's language. The nonclaim provision clearly states that noncomplying creditors are *forever barred* from raising their claims and no distinction is made among the assets of the deceased. Furthermore, the statute's bar does not act upon the assets of the estate, it acts upon the claims of noncomplying creditors. It is no more within the court's purview to say that certain classifications of a deceased's assets are unaffected by 21-15-640 than it is within its authority to exempt particular categories of creditors. The statute is a nonclaim provision, as the court emphatically recognized, and the bar it erects may not properly be dismantled by the court, unless it finds constitutional grounds to do so.

The court's opinion in *Moultis* is important in several respects. First, it recognized 21-15-640 as a nonclaim statute. The full importance of this holding will ultimately depend on the extent a nonclaim statute is distinguished from statutes of limitations in future decisions. Second, the court held that tort victims are creditors within the meaning of 21-15-640. This is an issue on which other jurisdictions have divided[55] and one which sepa-

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54. The question of what constitutes an undistributed asset is also raised. It is clear that the court would like tort victims to be able to reach the liability insurance policies of their tortfeasor without the hindrance of § 21-15-640. But the court's statement is broader; it permits the "aggrieved plaintiff to pursue the insurance policy *and other undistributed assets.*" ___ S.C. at ___, 301 S.E.2d at 558 (emphasis supplied). Certainly the court is not suggesting that while an estate is being administered and assets have yet to be distributed, tardy creditors may attempt to satisfy their claims out of these assets. That approach would effectively eviscerate § 21-15-640. It is apparent the court intended only that assets which are discovered after the estate has been closed be vulnerable to these claims. The court does not explain the basis on which it distinguishes these assets from those that were known during the estate's administration, nor how any distinction might serve to resuscitate a theretofor expired claim.

55. *See, e.g.*, Moore v. Stephens, 84 So. 2d 752, 760 (Ala. 1956); Spencer v. Marshall,

rated members of the *Moultis* court as well. Given the persuasive arguments and policies found on both sides of the question, the supreme court could have supported either position. In deciding as it did the court simply exercised its authority to interpret ambiguous statutory language.

The court should have stopped there, as indeed it had in its original opinion of July 1982. But it did not, and on the basis of cases decided against different statutory backgrounds the court went on, in dictum, to circumvent 21-15-640's strict requirements. It did so, one must believe, because of reservations held among its members in allowing insurance companies to benefit while tort victims went uncompensated. The scheme it devised, or at least the intended result, is not unique.[56] What is unusual is its implementation by judicial decision rather than through legislative action.

Marquard H. Lund, III

II. Fee Simple Absolute in Granting Clause Controls Estate Conveyed

In *Shealy v. South Carolina Electric & Gas Co.*,[57] the South Carolina Supreme Court, following the South Carolina rule on construction of deeds, held that if the granting clause of a deed conveys a fee simple absolute title, limitations in the following paragraph that diminish the interest granted are void. South Carolina continues to adhere to this technical rule, which is followed by a very small minority of jurisdictions.[58] The court in *Shealy* also ruled that the heirs of the grantor, who had actual and constructive notice of the deed, were not entitled to equitable compensation for improvements made on the land after the deed was executed.[59]

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218 A.2d 387, 388 (Conn. 1965). *See generally*, Annot., 22 ALR 3d 493, 499 (1968), *but cf. Id.* at 501 (which discusses nonclaim statutes in which "claim" and "all claims" have been held not to include tort victims).

56. *See, e.g.*, Ind. Code Ann. § 29-1-14-1(f)(Burns Cum. Supp. 1983); Uniform Probate Code § 3-803(c)(2)(1969).

57. 278 S.C. 132, 293 S.E.2d 306 (1982).

58. *See generally*, Annot., 58 A.L.R. 2d 1378 (1958). For cases supporting the majority rule, see, *e.g.*, Swearingen v. McGee, 303 Ky. 825, 198 S.W.2d 805 (1946); Hutchinson v. Board, 194 Tenn. 223, 250 S.W.2d 82 (1952).

59. 278 S.C. at 137, 293 S.E.2d at 308.

In 1927 Frank Shealy conveyed a tract of land to Lexington Water and Power Company, South Carolina Electric & Gas Company's predecessor in interest.[60] The first paragraph of the deed effectively created a fee simple absolute estate, and was followed by a description of the property. After the property description and preceding the habendum and warranty clauses, a series of four paragraphs reserved to the grantor certain rights pertaining to the property, including the right of the grantor, his heirs and assigns to possession and control until possession was required for the "purpose" of the grantee, its successors and assigns.[61]

The Shealy family moved onto the property in 1928 and made various improvements to it over the years.[62] When the Shealys unsuccessfully attempted to claim title to the land by adverse possession in 1969, South Carolina Electric & Gas Company claimed it needed the land for its "purpose." The lower court construed the term "purpose" to mean the impounding of water for hydroelectric development, a necessity which had not yet arisen, and allowed the Shealys to maintain possession and control of the land.[63] On appeal, however, the supreme court reversed on the grounds that the "purpose" clause retaining possession and control of the property in the grantor was void, and that the grantee had held a fee simple absolute title to the property since 1927.[64]

South Carolina follows the technical rule of construction of a deed that "[w]here the granting clause in a deed purports to convey a fee simple absolute title, subsequent provisions of the deed *cannot* diminish that granted or deprive the grantee of the incidents of ownership in the property."[65] The court in *Shealy*

60. *Id.* at 134, 293 S.E.2d at 307. In 1943 South Carolina Electric and Gas Company (S.C.E.&G.) acquired Lexington Water and Power Company's rights in the property through a merger. Record at 120.

61. Record at 96-99.

62. 278 S.C. at 135, 293 S.E.2d at 308. At least one member of the Shealy family lived on the land and controlled it until the court's decision in 1982. *Id.*, 293 S.E.2d at 308. The improvements included an airplane runway, an airplane hanger, chicken houses, and a causeway from the main property to an adjacent island. Record at 174.

63. Record at 181-82.

64. 278 S.C. at 136, 293 S.E.2d at 308-09.

65. *Id.* at 135, 293 S.E.2d at 308 (emphasis by court). This rule has long been followed in South Carolina. *See, e.g.*, Ingram v. Porter, 7 S.C. Eq. (4 McCord Eq.) 198, 200 (1827).

did not elaborate on the reasons for this rule, but merely applied it as it had in similar cases in the past.[66]

The original purpose of the habendum clause was to define the interest granted.[67] The premises clause of the deed, which is defined as all that is contained in the deed before the habendum,[68] gradually took over the habendum's function by specifying the estate granted in addition to naming the grantor and grantee and describing the property. Thus, the habendum became redundant. The courts developed the rule that when the terms of the habendum were repugnant to or irreconcilably in conflict with the grant already made in the premises, the habendum was void.[69] In the early South Carolina decisions applying this rule, the court used the term "premises."[70] Gradually, however, the name given in South Carolina to that part of a deed which precedes the habendum changes from the "premises" to the "granting clause."[71]

In *Shealy*, the "purpose" clause retaining possession and control of the land in the grantor preceded the habendum. Thus, according to the traditional definition of premises, the "purpose" clause appeared in the premises. In view of the reason behind the rule of construction—to resolve conflicts between the premises and the habendum—the *Shealy* deed did not present an appropriate circumstance in which to apply it because the apparent conflict in that deed was contained in the premises alone.[72]

The court's application of the rule in *Shealy* and other cases

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66. *See, e.g.*, County of Abbeville v. Knox, 267 S.C. 38, 225 S.E.2d 863 (1976); Stylecraft, Inc. v. Thomas, 250 S.C. 495, 159 S.E.2d 46 (1968).

67. 4 J. KENT, COMMENTARIES ON AMERICAN LAW 468; R. NORTON, A TREATISE ON DEEDS 306-07; (R. MORRISON & H. GOOLDEN (2d ed. 1981)).

68. R. DEVLIN, A TREATISE ON THE LAW OF DEEDS § 176 (1887); R. NORTON, *supra* note 53, at 306.

69. 4 J. KENT, *supra* note 53, at 468; *See* Ratliff v. Marrs, 87 Ky. 26, 7 S.W. 395 (1888).

70. *See, e.g.*, Ingram v. Porter, 7 S.C. Eq. (4 McCord Eq.) 198, 200 (1827).

71. To support its application of the rule in Wilson v. Poston, 129 S.C. 345, 123 S.E. 849 (1924), the court cited numerous authorities, some of which had used the terms "granting clause" and "premises" interchangeably. *See also* Rhodes v. Black, 170 S.C. 193, 202, 170 S.E. 158, 161 (1933); Glasgow v. Glasgow, 222 S.C. 322, 327, 70 S.E.2d 432, 433-34 (1952)("premises" and "granting clause" used interchangeably).

72. *But see, e.g.*, Stylecraft, Inc. v. Thomas, 250 S.C. 495, 159 S.E.2d 46 (1968)(deed structure similar to Shealy deed; restricting clause appearing before the habendum, but held ineffectual).

in which the conflict is found solely within the premises may be grounded on other reasoning. One explanation is that the court may consider the actual granting clause to be only a part of the premises.[73] This technical rule of construction could then apply to conflicts between the granting clause and any subsequent part of the deed, which could include another part of the premises. Another explanation is that this South Carolina rule was adopted not because of the changing nature of the premises and the habendum, but arose instead from the rule that in solving conflicts within a deed, that which comes first prevails over that which comes later.[74] If either of these explanations is accurate, then the rule was correctly applied in *Shealy*.

When the technical rule is applied to resolve apparent conflicts among different parts of a deed, the deed is broken down into its formal or technical parts and the granting clause controls its interpretation. The majority of jurisdictions, however, follow the modern rule and resolve apparent conflicts in a deed by considering the entire document as a whole to determine the grantor's intent.[75] An application of the modern rule is more likely to give effect to the agreement that the parties intended to make than is an application of the technical rule.[76] If, for example, it is clear from the entire deed that the grantor intended a term in the habendum to prevail over a seemingly conflicting term in the granting clause, an application of the modern rule would fulfill this intention while adherence to the technical rule would defeat it.[77] The technical rule is an arbitrary rule of construction[78] and should only be applied when the grantor's intentions cannot be determined from the instrument as a whole.[79]

Besides defeating the grantor's intention, an application of the technical rule is often inequitable. In the present case, as in many cases where this rule is applied, the grantee received an interest not bargained for and the grantor was deprived of an

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73. This reasoning would make it difficult to explain the court's use of the two terms interchangeably.

74. *See* Crawford v. Atlantic Coast Lumber Co., 79 S.C. 166, 169, 60 S.E. 445, 446 (1907). If this were true, there would be no need for the "granting clause" rule.

75. *See supra* note 44.

76. Pike v. Menz, 358 Mo. 1035, 1043, 218 S.W.2d 575, 579 (1949).

77. *See* Seawell v. Hall, 185 N.C. 80, 83, 116 S.E. 189, 191 (1923).

78. Bronstein v. Bronstein, 83 So.2d 669, 700 (Fla. 1955).

79. *See* Robinson v. Payne, 58 Miss. 690, 709 (1881).

interest expressly reserved.[80] If the modern rule had been applied in this case, the Shealys would have remained in possession and control of the property until it was needed by the grantee for its "purpose," which is what the parties intended when the deed was drafted.

Despite the problems associated with the technical rule, it has a long history of support in South Carolina. Given the rule's history and its reaffirmance in *Shealy*, the court is unlikely to abandon it in the near future. The practitioner must be aware of the rule and avoid this problem when drafting deeds.[81]

The court in *Shealy* also held that the heirs of the grantor were not entitled to equitable compensation for improvements to the land after the deed was recorded. In denying compensation, the court reasoned that the Shealys had both actual and constructive knowledge of South Carolina Electric & Gas's deed; they admitted that they knew of the 1927 deed from Frank Shealy, and the deed was properly recorded. The Shealys, therefore, could have no bona fide belief that they were true owners of the property, a prerequisite to the equitable right to compensation for improvements.[82]

The court clearly ruled correctly on this issue. It should be pointed out, however, that while the Shealys were not entitled to the enhanced value of the property due to their improvements, they might have been allowed to take those improvements that were readily removable.[83] This conclusion is supported by the fact that the deed expressly reserved that right to them.[84]

Shealy offers no real surprises to the South Carolina practitioner. It does, however, serve as a reminder that the South Car-

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80. Carter Oil v. Weil, 209 Ark. 653, 657, 192 S.W.2d 215, 219 (1946).

81. One solution to the problem is to use a deed-back. *A* conveys to *B* a fee simple absolute. *B* conveys back to *A* a defeasible fee in a subsequent deed. In the present case, Lexington Water and Power Company would have conveyed to Shealy a fee simple subject to the condition subsequent that if the land was needed for the impounding of water, the title reverted to Lexington Water and Power Company.

82. 278 S.C. at 136, 293 S.E.2d at 308-09. Nor could the South Carolina betterments statute, S.C. CODE ANN. § 27-27-10 (1976) have aided the Shealys in their argument because it also requires a good faith belief on the part of the improver that he had good title to the property. Moreover, the betterments statute is designed to compensate a defendant who does not prevail in a dispute over title to land rather than plaintiffs like the Shealys.

83. *See generally* 41 AM. JUR. 2d *Improvements* § 3 (1968).

84. Record at 99.

olina Supreme Court continues to adhere to an extremely technical rule of deed construction, justifying their decisions by relying on precedent without examining the reasons behind that precedent. Until the court indicates that it is willing to reconsider its position, the practitioner should strictly observe the established deed formulas.

Lawrence J. Scott

III. MORTGAGES: THIRD PARTY INTERESTS SUBJECT TO PRIOR PURCHASE MONEY MORTGAGE

In *McElveen v. Brunson*,[85] the South Carolina Supreme Court held that a building erected on mortgaged land by a conditional vendor at the request of the mortgagor was subject to the purchase money mortgage on the land, notwithstanding an attempt by the vendor to retain title to the building by an agreement with the mortgagor.[86] Under *McElveen*, title retention agreements between conditional vendors and mortgagors are ineffective against a prior mortgage on the land unless the mortgagee consents to the agreement.

McElveen conveyed a tract of land to Brunson, who made a down payment and granted a purchase money mortgage to McElveen to secure the balance of the purchase price. The mortgage, which was recorded, covered the "land with any and all improvements thereon. . . ."[87] Subsequently, Brunson asked Stanley Smith & Sons, Inc. (Smith) to construct a building on the land. Smith secured the purchase price of the building with a mechanic's lien and an agreement with Brunson stating that title to the building would be retained by Smith as a mortgagee of personal property.[88]

When Brunson defaulted on both obligations, McElveen instituted foreclosure proceedings on the land and the building. Smith also claimed entitlement to the building.[89] The master found that the building was "permanent in nature"[90] and sub-

85. 277 S.C. 414, 289 S.E.2d 152 (1982).
86. *Id.* at 415, 289 S.E.2d at 152-53.
87. Record at 5.
88. 277 S.C. at 415, 289 S.E.2d at 152.
89. *Id.* at 415, 289 S.E.2d at 152.
90. Record at 91.

ject to McElveen's mortgage.[91] The circuit court disagreed, holding that the agreement between Smith and Brunson controlled.[92] The South Carolina Supreme Court reversed, finding no consent by McElveen to the agreement between Smith and Brunson, and that the building was subject to McElveen's prior mortgage.[93]

The supreme court cited *Gilbert v. Easterling*[94] for the general rule that "where improvements, which become a part of the freehold are put upon the mortgaged premises, either by the mortgagor or a purchaser from him, such improvements become subject to the lien of the mortgage, and constitute a part of the security for the mortgage debt."[95] The court noted that the general rule did not apply in *Easterling* because the mortgagee consented to an agreement between the mortgagor and his licensee to remove an after-acquired building from the mortgaged land in the event of foreclosure. The lack of any similar consent, notice, or agreement in *McElveen* was fatal to Smith's claim to the building.[96]

The supreme court's analysis of *Easterling* may have been somewhat superficial. Rather than premising its decision solely upon a finding that the mortgagee consented to the third party agreement, as suggested by the *McElveen* opinion, the *Easterling* court also considered two factors as significant. First, the licensee in *Easterling* placed the building on the land with intent to remove it in the event of foreclosure. Second, removal of the building did not impair the mortgage security. The combination of these circumstances precluded application of the general rule.[97]

Easterling thus does not mandate application of the general rule in *McElveen* upon the sole finding that the mortgagor did not consent to the third-party agreement.[98] Smith's intent to re-

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91. *Id.* at 95.

92. *Id.* at 107-08, 111.

93. 277 S.C. at 416, 289 S.E.2d at 153.

94. 217 S.C. 267, 60 S.E.2d 595 (1950).

95. 277 S.C. at 415, 289 S.E.2d at 152-53 (quoting Gilbert v. Easterling, 217 S.C. 267, 273, 60 S.E.2d 595, 597 (1950)).

96. 277 S.C. at 416, 289 S.E.2d at 153.

97. 217 S.C. at 276, 60 S.E.2d at 599.

98. *See also* Carroll v. Britt, 227 S.C. 9, 86 S.E.2d 612 (1955)(quoting 22 Am. Jur. *Fixtures* § 63 (1939))("Whether or not a building erected on lands is a fixture depends, as in other cases generally, upon the mode of attachment or annexation, the character of the structure, the intention of the person making the annexation, and the relationship of

tain title to the building and to remove it if the purchase price was not paid is evident in his agreement with Brunson.[99] Furthermore, the trial court heard evidence regarding Smith's ability to remove the building without physically impairing the land.[100] This evidence could provide some basis for determining whether removal would impair the mortgage security. A more thorough evaluation of these facts in *McElveen* similar to that undertaken in *Easterling* could have resulted in a different conclusion.

Two lines of authority exist on the issue of whether a conditional vendor of an object attached to the land prevails over a prior mortgagee when both claim the right to the object. The minority rule, which South Carolina law recognizes, grants priority to the prior mortgagee on the theory that the mortgagee holds a lien on the land by a legal title and, therefore, is entitled to any additions that become a part of the land.[101] The rule is based on the reasoning that the mortgagor cannot give a third party the right to anything attached to the land which, as between the mortgagor and the mortgagee, would become part of the realty.[102] Jurisdictions that adhere to this rule have attached no significance to the possibility of removal of the object without damage to the property. By ignoring this factor, however, the courts also ignore the possibility of windfalls to the mortgagee.[103]

The majority rule, known as the New Jersey rule, grants priority to the conditional vendor if removal of the attached ob-

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the parties.") *Accord* Creative Displays, Inc. v. South Carolina Highway Dep't, 272 S.C 68, 248 S.E.2d 916 (1978); City of Greenville v. Washington American League Baseball Club, 205 S.C. 495, 32 S.E.2d 777 (1945); De Laine v. Alderman, 31 S.C. 267, 9 S.E. 950 (1889).

99. Record at 12.

100. *Id.* at 68-71, 74-75. The building was a preengineered, prefabricated metal-wall structure, 25' x 80', anchored by bolts to a concrete slab. *Id.* at 83-84. It contained electrical wiring and plumbing and was connected to a septic line and tank. *Id.* at 43-44.

101. Des Moines Imp. Co. v. Holland Furnace Co., 204 Iowa 274, 212 N.W. 551 (1927); Clary v. Owen, 81 Mass. (15 Gray) 522 (1860); Gaunt v. Allen-Lane Co., 128 Me. 41, 145 A. 255 (1929); Heath v. Haile, 45 S.C. 642, 24 S.E. 300 (1896).

102. Clary v Owen, 81 Mass. (15 Gray) 522, 525 (1860) (after-acquired fixtures are said to "feed" the mortgage by accession); Tifft v. Horton, 53 N.Y. 377 (1873).

103. Some courts, including the South Carolina Supreme Court in *Easterling*, avoid this result by asserting the objects are not fixtures or finding other reasons to circumvent the rule. *See, e.g.*, Medford Trust Co. v. Priggen Steel Garage Co., 273 Mass. 349, 174 N.E. 126 (1930)(sheet metal garages erected on concrete pillars and floors found not to be fixtures).

ject will not materially injure the property.[104] This approach is premised on the notion that it is fair to allow the conditional vendor to remove the object if doing so will not impair the original security upon which the mortgagee relied in making his loan.[105] Some courts reason that the conditional sales contract prevents the object from becoming part of the realty,[106] while others contend that the agreement simply gives the vendor the right to remove it.[107]

Under either rule the use of legal terminology—"fixture," "improvement," or "title"—obscures the basic policy question intrinsic to these cases: whether a prior lender's claim should take priority over a later lender's claim with respect to value added by the later lender. Resolution of this issue requires reasoned consideration of the aggregate facts and circumstances that give rise to conflicting claims.

The supreme court applied a general rule in *McElveen* and resolved the priority issue merely on the basis of the chronological attachment of the encumbrances. *McElveen* thus dictates that a conditional vendor acquire the real estate mortgagee's consent prior to the attachment of an object to the property, irrespective of the existence of other circumstances that could arguably obviate the need for such consent.

Steven M. Rudisill

IV. TENANT IN POSSESSION ESTOPPED FROM ATTACKING LESSOR'S TITLE

In *Lund v. Gray Line Water Tours, Inc.*,[108] the South Carolina Supreme Court held that a tenant was estopped from attacking the title of a landlord so long as the tenant was in possession of the leased premises. The court ordered the tenant to vacate the premises and pay the landlord the fair rental value for the time spent in wrongful possession. In this opinion, the

104. Campbell v. Roddy, 42 N.J. Eq. 244, 14 A. 279 (1888). If the detachment would result in some damage to the land, "the depreciation must first be made whole to the real estate mortgagee before the chattel mortgagee can be recognized." *Id.* at 252, 14 A. at 284.

105. *Id.* at 251, 14 A. at 283.

106. *E.g.*, Wurlitzer Co. v. Cohen, 156 Md. 368, 144 A. 641 (1929).

107. *E.g.*, Town of Camden v. Fairbanks, Morse & Co., 204 Ala. 112, 86 So. 8 (1920).

108. 277 S.C. 447, 289 S.E.2d 404 (1982).

court continues to follow the majority rule.

The dispute arose when Gray Line, a tour and charter boat business, refused to vacate or pay rent on a dock and water lot after expiration of a written lease with its landlord,[109] an unincorporated association. Two members of the association brought a class action[110] against Gray Line to recover possession and rent. Gray Line maintained that the association was not entitled to relief because its title was flawed.[111]

A master in equity made the initial finding of estoppel.[112] The trial court adopted the Master's Report including the order that the tenant vacate and pay double the fair rental value for the time of wrongful possession.[113] The supreme court affirmed the order to vacate,[114] but reduced the amount that the tenant owed to fair rental value.[115]

The supreme court reasoned that a landlord-tenant relationship had existed between the parties since 1934, mandating application of the rule that "a tenant is estopped from attacking the title of the landlord so long as the tenant is in possession of the premises."[116] The court relied on *Frady v. Ivester*,[117] which held that a tenant's claim to possession under a lease is subordinate to that of the landlord; the tenant must surrender possession if he wishes to contest the landlord's title.[118]

The court then reduced the award to double the fair rental value.[119] The court reasoned that while such an amount is recoverable under section 27-35-170 of the Code of Laws of South Carolina,[120] that statute is penal, and a landlord must plead it to

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109. *Id.* at 449, 289 S.E.2d at 405.

110. *Id.*, 289 S.E.2d at 405. The complaint alleged a class of property owners claiming ownership in common. Record at 7.

111. 277 S.C. at 449, 289 S.E.2d at 405. Gray Line contended that title was vested in the state because the landlord lacked a provable proprietary grant. *Id.* at 450, 289 S.E.2d at 406.

112. Record at 27.

113. 277 S.C. at 450, 289 S.E.2d at 406.

114. *Id.*, 289 S.E.2d at 405.

115. *Id.* at 451, 289 S.E.2d at 406.

116. *Id.* at 450, 289 S.E.2d at 406.

117. 118 S.C. 195, 110 S.E. 135 (1921).

118. 277 S.C. at 450, 289 S.E.2d at 406.

119. *Id.*, 289 S.E.2d at 406.

120. S.C. CODE ANN. § 27-35-170 (1976). The statute's operation is not restricted to disputes in which the holdover tenant is in wrongful possession for a period of at least two years, as the court's opinion implies. 277 S.C. at 451, 289 S.E.2d at 406. The court

recover the escalated sum.[121] Since the plaintiffs did not plead the statute, the court modified the award to the fair rental value.[122]

In landlord-tenant title disputes, a majority of jurisdictions,[123] including South Carolina,[124] have repeatedly applied the estoppel rule. This decision, however, does break almost eighty years of silence by the South Carolina Supreme Court on the penalty statute[125] with a concise analysis of its applicability. Many states have similar statutes,[126] and it is now clear that the South Carolina court strictly interprets the provision: the statute is penal and for recovery of the escalated sum, the landlord must plead the statute.[127] While some states reserve the penalty for willful holdovers,[128] South Carolina does not make that distinction.

When the penalty statute is not pled, the court follows the practice in most states[129] of awarding the landlord the fair rental value for the holdover period.[130] South Carolina provides for this recovery by statute.[131] In contrast to the penalty statute, how-

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apparently adopted the master's language, and the master was combining the statutory language with Gray Line's actual two year holdover. Record at 42.

121. 277 S.C. at 451, 289 S.E.2d at 406.

122. *Id.* at 451, 289 S.E.2d at 406.

123. *E.g.*, Amberger and Wohlfarth, Inc. v. District of Columbia, 300 A.2d 460 (D.C. App. 1973); Freed v. Young, 21 Ill. App. 3d 64, 315 N.E.2d 72 (1974); Kentucky-West Virginia Gas Co. v. Browning, 521 S.W.2d 516 (Ky. 1975).

124. Calhoun v. Currie, 173 S.C. 429, 176 S.E. 324 (1934); Stewart-Jones Co. v. Shehan, 127 S.C. 451, 121 S.E. 374 (1924); Frady v. Ivester, 118 S.C. 195, 110 S.E. 135 (1921).

125. The court last interpreted this statute in Newton v. Odom, 67 S.C. 1, 45 S.E. 105 (1903).

126. *E.g.*, FLA. STAT. ANN. § 83.06 (West 1976)(double the rental value for tenants holding over after giving notice and for willful holdovers); MISS. CODE ANN. § 89-7-25 (1972)(double the rent).

127. 277 S.C. at 451, 289 S.E.2d at 406.

128. *E.g.*, Lesser-Goldman Cotton Co. v. Fletcher, 153 Ark. 17, 239 S.W. 742 (1922); Moore v. Kuljis, 207 So.2d 604 (Miss. 1967).

129. *E.g.*, Lonergan v. Connecticut Foot Store, Inc., 168 Conn. 122, 357 A.2d 910 (1975)(reasonable rental and fair rental value used interchangeably); Nelson v. Growers Ford Tractor Co., 282 So. 2d 664 (Fla. App. 1973)(reasonable rental value); Tuteur v. P. & F. Enterprises, Inc., 21 Ohio App. 2d 122, 255 N.E.2d 284 (1970)(reasonable value of the use and occupation).

130. 277 S.C. at 451, 289 S.E.2d at 406-07.

131. S.C. CODE ANN. § 27-35-40 (1976)(reasonable rental for the use and occupation). For application of this statute, *see* Gheen v. Gheen, 276 S.C. 404, 279 S.E.2d 361 (1981); Townsend v. Singleton, 257 S.C. 1, 183 S.E.2d 893 (1971).

ever, the landlord apparently need not plead the fair rental value statute specifically; he may merely pay, as did the plaintiffs in *Lund*,[132] for such rent as the court believes the landlord is entitled.

Lund v. Gray Line Water Tours, Inc. reiterates the rule that a tenant in possession of the premises is estopped from attacking a landlord's title. It further warns landlords that fair rental value alone will be awarded in holdover situations unless the penalty statute is specifically pled.

D'Anne Haydel

V. Implied Warranty of Fitness Extended to Nondwelling House Improvements

In *Brown v. Sandwood Development Corp.*,[133] the South Carolina Supreme Court held a vendor-subdivider of real property subject to tort liability for an alleged breach of an implied warranty of fitness arising from the construction of non-dwelling house improvements. While a majority of jurisdictions recognize an implied warranty of fitness in sales of real property,[134] South Carolina appears to be the first to extend the warranty to nondwelling house improvements.[135] *Brown* also provides a basis for tort actions arising from the breach of that contractual duty.

The defendant, Sandwood Development Corporation, was the original vendor-subdivider of a housing development. In this capacity, it sold a number of lots[136] located around a pond upon which a dam and spillway were located. In 1976 the dam collapsed causing property damage to those who owned lots around the pond. In 1977 several of these property owners brought a tort action against Sandwood, alleging negligent construction of

132. Record at 10.

133. 277 S.C. 581, 291 S.E.2d 375 (1982).

134. *See* Cochran v. Keeton, 287 Ala. 439, 252 So.2d 313 (1971); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969); Brown v. Elton Chalk, Inc., 358 So.2d 721 (Miss. 1978); Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 Real Est. L.J. 291, 303-06 (1908).

135. *See, e.g.*, Hannavan v. Dye, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972); Tibbs v. National Homes Construction Corp., 6 Ohio App. 3d 300, 369 N.E.2d 1218 (1977); Tavares v. Hastman, 547 P.2d 1275 (Wyo. 1975).

136. The defendant sold property directly to only six of the plaintiffs. 277 S.C. at 583, 291 S.E.2d at 376. The other plaintiffs bought property in the development from third parties. Brief for Respondent Sandwood Development Corp. at 18.

the spillway.[137] The trial court granted the defendant's motion for an involuntary nonsuit with prejudice.[138] The South Carolina Supreme Court reversed and remanded the case for a full trial on the merits.[139]

On appeal, the supreme court held that the doctrine of caveat emptor[140] did not apply to the transactions between the homeowners and Sandwood Development Corporation.[141] The court characterized the dam and spillway as improved realty. An implied warranty of fitness thus arose from the sale to the plaintiffs of the dam, spillway, and pond. Given this implied warranty of fitness, the court concluded that caveat venditor[142] rather than caveat emptor was applicable and remanded the case for a trial of the plaintiffs' tort claim.[143]

The supreme court in *Brown* relied upon its earlier application of the implied warranty of fitness in *Lane v. Trenholm Building Company*.[144] In *Lane*, the court extended the implied warranty of fitness[145] to include nonbuilder vendors of real property such as the defendant in *Brown*. Until *Brown*, however, the implied warranty in South Carolina only covered dwelling houses.[146]

With *Brown*, the definition of improved realty to which the implied warranty attaches has been extended to include non-

137. 277 S.C. at 583, 291 S.E.2d at 376.

138. Record at 2. The trial court found: (1) that the statute of limitations barred recovery, (2) that the evidence of negligence was insufficient, (3) that the plaintiffs were contributorily negligent as a matter of law for failure to inspect the dam and spillway, and (4) that the doctrine of caveat emptor precluded an action for negligence against the defendant. 277 S.C. at 584, 291 S.E.2d at 376-77.

139. 277 S.C. at 585, 291 S.E.2d at 377.

140. "Let the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

141. 277 S.C. at 585, 291 S.E.2d at 377. The court also (1) applied the discovery rule whereby the statute of limitations does not begin to run until discovery of the defect, (2) found the plaintiffs' evidence sufficient to warrant a full trial on the merits, and (3) held that the trial judge erred in finding the plaintiffs contributorily negligent as a matter of law. *Id.*, 291 S.E.2d at 376-77.

142. "Let the seller beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

143. 277 S.C. at 585, 291 S.E.2d at 376-77.

144. 267 S.C. 497, 229 S.E.2d 728 (1976).

145. The implied warranty of fitness in real estate was first recognized in South Carolina in Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970). For a general discussion of the theory of implied warranty in South Carolina, *see Contracts, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 33, 37-39 (1981).

146. *See, e.g.*, Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970).

dwelling house structures with latent defects.[147] This extension is consistent with the reasoning behind South Carolina's recognition of the implied warranty of fitness as expressed in *Rutledge v. Dodenhoff*.[148] There, the court acknowledged the difficulty that the average home buyer faces in making a knowledgeable inspection of a new home and the fact that the new home buyer is forced to rely on the builder's expertise.[149] This rationale appears equally applicable to the sale of a dam and spillway which presents the prospective buyer with similar problems of inspection and defect detection.

The court in *Brown* also cited *Rogers v. Scyphers*[150] as support for its application of an implied warranty of fitness.[151] In *Rogers*, the court recognized three theories under which a purchaser could recover against a builder-vendor for damages caused by construction defects in a house: (1) implied warranty, (2) a dangerous condition caused by negligent construction, and (3) failure to disclose a known construction defect.[152] The plaintiff in *Rogers* did not assert an implied warranty, but prevailed on the basis of the remaining two theories.[153] The *Brown* court, however, apparently relying on the dicta of *Rogers*,[154] invoked the contractual doctrine of implied warranty[155] to allow the plaintiffs' tort action to proceed.

The use of a contractual doctrine as the basis for tort recovery in *Brown* represents a step toward a change in the law of South Carolina. In *Sheppard v. Nienow*,[156] the court held that a plaintiff could not recover in negligence for the breach of a contractual duty.[157] *Brown* appears to abandon the strict dichotomy between actions *ex contractu* and actions *ex delicto*, at least

147. It appears that the rule of caveat emptor now remains in force only for the sale of raw, unimproved real property. *See, e.g.*, Jackson v. River Pines, Inc., 276 S.C. 29, 274 S.E.2d 912 (1981).

148. 254 S.C. 407, 175 S.E.2d 792 (1970).

149. *Id.* at 413-14, 175 S.E.2d at 795.

150. 251 S.C. 128, 161 S.E.2d 81 (1968).

151. 277 S.C. at 585, 291 S.E.2d at 377.

152. 251 S.C. at 133, 161 S.E.2d at 83.

153. *Id.* at 134-37, 161 S.E.2d at 83-85.

154. *Id.* at 133-34, 161 S.E.2d at 83.

155. "[A] warranty is a contract either express or implied." Hoover v. Utah Nursery Co., 79 Utah 12, 20, 7 P.2d 270, 274 (1932).

156. 254 S.C. 44, 173 S.E.2d 343 (1970).

157. *Id.* at 49, 173 S.E.2d at 345.

when recovery for property damage is sought.

Brown v. Sandwood Development Corp. demonstrates an apparent willingness on the part of the supreme court to invoke a contractual principle to allow tort recovery. This decision should serve to warn vendors of improved realty that they are now subject to tort liability for the breach of an implied warranty of fitness for all improvements to real property.

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