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I. INTRODUCTION

Significant landlord-tenant legislation was last enacted in South Carolina in 1946.[1] Even at that time, at least one legislator felt more fundamental reform was needed.[2] Since that date, major changes in landlord-tenant law have been made nationally, with great strides taken to equalize the landlord-tenant relationship.[3] The major impetus for the changes has been a different perspective in viewing the lease. No longer looking upon the lease as merely a conveyance with no duty on the part of the landlord to make the premises habitable or maintain repair, courts have more recently viewed the lease as a contract, and have allocated responsibilities to the parties accordingly.[4]

Although other jurisdictions have been dynamic in their changes, South Carolina landlord-tenant law has slumbered in

1. 1946 S.C. Acts 873.

2. As John D. Long put it, "I am voting against the so-called landlord-tenant bill because I consider the measure unfair and provocative of injustice. It is another bill to help the rich at the expense of the poor and defenseless." 1946 HOUSE JOURNAL H. 194, 1518.

3. For example, in many jurisdictions a landlord is unable to evict a tenant as a retaliatory measure. *See, e.g.*, Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968). A tenant is permitted to treat the landlord's conduct as a constructive eviction if the landlord allows conditions within the leasehold to deteriorate to such a degree that it is unfit for the purpose for which it was rented. *See* C.E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 130, 163 N.E.2d 4, 8 (1959). Similarly, an implied warranty of habitability in residential leases is now a fact of life in over forty jurisdictions. *See, e.g.*, Pugh v. Holmes, 486 Pa. 272, 281, n.2, 405 A.2d 897, 901, n.2 (1979). *See also*, Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970), which permits tenants the new remedy of repair and deduct.

4. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

virtual hibernation since 1946. This Article poses the question of whether it is now time to awaken from that slumber and reform landlord-tenant law in South Carolina.

Because of the breadth of the topic, the scope of this Article is limited to landlord remedies for a tenant's breach of a lease. Three such remedies exist: ejectment, the action for rent, and distraint. Each remedy poses its own peculiar problems and inconsistancies; all three, it is submitted, are due for a revamping to bring South Carolina landlord-tenant law into the 1980's.

II. EJECTMENT

A. Introduction to the Remedy

The South Carolina legislature enacted the state's first landlord-tenant ejectment statute in 1866.[5] In 1878, the South Carolina Supreme Court stated that ejectment was designed to be "summary [in] character" and "expeditious" in nature.[6] That statement remains accurate today.

The modern South Carolina ejectment statute provides that a landlord is entitled to possession of the premises (1) upon a tenant's failure or refusal to pay rent when due or demanded; (2) upon the expiration of the term of tenancy; or (3) upon a breach of the terms and conditions of the lease.[7] An action for ejectment is commenced, upon the application of a landlord, by the issuing of a Rule to Show Cause to the tenant.[8] The tenant then has ten days to respond, either by vacating the premises or by appearing before a magistrate to show why he should not be ejected.[9] If the tenant fails to answer within ten days, the magistrate will issue a warrant of ejectment, and the tenant will be ejected.[10] If necessary, a warrant of possession will follow.[11]

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5. 13 THE STATUTES AT LARGE OF SOUTH CAROLINA No. 4790 (1866)[hereinafter cited as 1866 statute].

6. State *ex rel.* O'Neale v. Fickling, 10 S.C. 301 (1878).

7. *See* S.C. CODE ANN. § 27-37-10 (1976).

8. S.C. CODE ANN. § 27-37-20 (1976). The action may be commenced in magistrate's court, circuit court, or county court. *Id.* at § 27-33-40 (1976).

9. *Id.* at § 27-37-20 (1976).

10. *Id.* at § 27-37-40 (1976). The warrant must be written. Thompson v. Rutland, 225 S.C. 485, 83 S.E.2d 163 (1954).

11. S. Spitz, Landlord-Tenant Remedies Under South Carolina Law, Appendix, form 3 (June 19, 1981)(Continuing Legal Education lecture).

The current ejectment statute differs from the 1866 statute in several ways. Jury trials are permitted under the current statute, yet were not allowed in 1866.[12] The current statute provides ten days for the tenant to respond to the Rule to Show Cause, while only three days were allowed in 1866.[13] More importantly, the current statute greatly expands the scope of ejectment proceedings: the 1866 statute limited ejectment to tenancies of domestic servants and tenants at will;[14] the current statute applies to all landlord-tenant relationships.[15] Significantly, a fundamental requirement of the 1866 statute remains unchanged. As was required in 1866, the modern plaintiff in ejectment must demonstrate that a landlord-tenant relationship exists between himself and the defendant.[16]

B. Defining the Landlord-Tenant Relationship

1. South Carolina Definitions

When does a landlord-tenant relationship exist? At various times, the South Carolina Supreme Court has held that such a relationship can exist only when (1) a contract between the would-be landlord and tenant contains the essential elements of a lease,[17] (2) a tenant has actually entered onto the leased premises,[18] or (3) an owner transfers possession and control of his property to another.[19] A fourth definition is provided by the South Carolina Code, which defines the terms "landlord" and "tenant."[20]

The first and most commonly used definition requires a formal contract containing the essential elements of a lease.[21] This

12. *Compare* S.C. CODE ANN. § 27-37-80 (1976) *with* 1866 statute, *supra* note 5.

13. *Compare* S.C. CODE ANN. § 27-37-20 (1976) *with* 1866 statute, *supra* note 5.

14. *See* 1866 statute, *supra* note 5.

15. *See* S.C. CODE ANN. § 27-37-20 (1976).

16. Baldwin v. Baldwin, 224 S.C. 429, 79 S.E.2d 459 (1954); *Ex Parte* Associated Hotels, 144 S.C. 483, 142 S.E. 600 (1928).

17. *See, e.g.* B-L-S Constr. Co. v. St. Stephen Knitwear, Inc., 276 S.C. 612, 281 S.E.2d 129 (1981); *Ex Parte* Associated Hotels, 144 S.C. 483, 142 S.E. 600 (1928).

18. *See, e.g.*, Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927); Wilcox v. Bostick, 57 S.C. 151, 35 S.E. 496 (1900).

19. *See, e.g., Ex Parte* Associated Hotels, 144 S.C. 483, 142 S.E. 600 (1928).

20. *See* S.C. CODE ANN. § 27-33-10(7),(8)(1976).

21. *See* B-L-S Constr. Co. v. St. Stephen Knitwear, Inc., 276 S.C. 612, 281 S.E.2d 129 (1981); *Ex Parte* Associated Hotels, 144 S.C. 483, 142 S.E. 600 (1928); Stewart-Jones

definition evolved out of the South Carolina Supreme Court's decision in *Stewart-Jones Co. v. Shehan*,[22] in which the court held that "a contract, express or implied, must be shown between the parties" before ejectment would be ordered.[23] The court added the "essential elements" requirement with its decision in *Columbia Ry. Gas & Electric Co. v. Jones*,[24] in which it held that the essential elements of a lease necessarily included (1) a grant of possession and exclusive use and enjoyment of the property; (2) definite consideration or rent; and (3) a certain term or duration of the leasehold.[25] In the most recent application of this definition, *B-L-S Const. v. St. Stephens Knitwear, Inc.*,[26] the South Carolina Supreme Court considered the validity of an alleged oral lease. Finding that a contract containing essential elements of a lease had been proved, the court held that a proper landlord-tenant relationship existed.[27]

Two problems exist with the contract-essential element definition. First, the court has not been consistent in deciding what constitutes an essential element of a lease. For example, in both *Columbia Gas & Electric* and *St. Stephens Knitwear*, the court stated that a lease must include terms establishing "a definite consideration" and a "certain term."[28] Yet, in *Ryan v. Marsh's Administrator*,[29] the court found that a lease had been created notwithstanding the lack of rent or other definite consideration within the agreement.[30] Similarly, in *Wilcox v. Bostick*,[31] the court, in dictum, fully approved a lease which contained no definite ending date.[32]

A second difficulty with the contract-essential element definition is even more fundamental: it has been far from the sole criterion the court has used in defining a landlord-tenant rela-

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Co. v. Shehan, 127 S.C. 451, 121 S.E. 374 (1924); Columbia Ry. Gas & Elec. Co. v. Jones, 119 S.C. 480, 112 S.E. 267 (1922).

22. 127 S.C. 451, 121 S.E. 374 (1924).
23. *Id.* at 457, 121 S.E. at 376.
24. 119 S.C. 480, 112 S.E. 267 (1922).
25. *Id.* at 490-91, 112 S.E. at 271.
26. 276 S.C. 612, 281 S.E.2d 129 (1981).
27. *Id.* at 614, 281 S.E.2d at 130.
28. *Id.*; 119 S.C. at 490-91, 112 S.E. at 271.
29. 11 S.C.L. (2 Nott & McC.) 156 (1819).
30. *Id.* at 157-58.
31. 57 S.C. 151, 35 S.E. 496 (1900).
32. *Id.* at 154, 35 S.E. at 496-97.

tionship. On occasion, the court has concluded that no landlord-tenant relationship can exist unless the tenant has actually entered the leasehold.[33] In *Wilcox v. Bostick*, for example, the court acknowledged that the parties had entered into an agreement which contained the standard terms and conditions of a lease.[34] The court further recognized that within the agreement the parties referred to themselves as lessor and lessee.[35] Nevertheless, the court found no landlord-tenant relationship could exist,[36] reasoning that a tenant must actually enter onto the leased premises[37] for a landlord-tenant relationship to start.[38]

The entry requirement, whatever may be said in favor of it,[39] seems to defy common sense. In essence, it is a test which determines whether a landlord-tenant relationship exists by ignoring all evidence that the parties *actually intended* to be landlord and tenant. If, as was certain in *Wilcox*,[40] the parties *intend* to be landlord and tenant, why not give effect to that intent?

A third definiton of landlord and tenant stems from the South Carolina Supreme Court's decision in *Rakestraw v. Floyd*.[41] In *Rakestraw*, the question was whether a laborer, hired to grow cotton on another's property, had entered into a tenancy or was merely an employee of the defendant. The laborer, claiming a tenancy existed, sublet the premises without his employer's knowledge or permission. Both the employer and the alleged subtenant claimed ownership of cotton grown on the premises.[42] The employer based his claim on an employment contract with his employee. He denied that a lease ever existed, and also denied all knowledge of the subtenancy, arguing that since the employee was not a tenant, there was no power to sublet.[43] The

33. *See, e.g.*, Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927); Wilcox v. Bostick, 57 S.C. 151, 35 S.E. 496 (1900).

34. 57 S.C. at 154, 35 S.E. at 496-97.

35. *Id.* at 154, 35 S.E. at 496.

36. *Id.* at 154-55, 35 S.E. at 497.

37. *Id.*

38. *Id.*

39. The entry requirement is really only a part of the *interesse termini* doctrine, discussed *infra* at notes 154-84 and accompanying text.

40. *See* 57 S.C. at 154, 35 S.E. at 496-97.

41. 54 S.C. 288, 32 S.E. 419 (1898).

42. *Id.* at 289, 32 S.E. at 419-20.

43. *Id.* at 289, 32 S.E. at 420.

subtenant argued that the employment agreement was a lease and based his claim of ownership in the cotton on a tenant's right to sublet leased property without the owner's consent or knowledge.[44]

The court reviewed the agreement between the employee and employer, noting that the parties to the agreement had not referred to themselves as landlord and tenant, and that "expressions appropriate to the creation of the relation[ship] of employer and laborer" existed within the agreement.[45] Choosing not to give conclusive effect to the words used by the parties, the court focused on the question of which party "had the right to the possession and control of the land for the period mentioned in the writing."[46] Finding that under the agreement the employee had right to both possession and control, the court concluded that the agreement was a lease.[47]

To its credit, the approach in *Rakestraw* does more than merely search for the terms of a lease. By considering not only the words used but the acts performed by the parties, the *Rakestraw* approach parallels section 1.2 of the Restatement Second of Property, which suggests that a landlord-tenant relationship exists when a transfer of possession occurs.[48]

A final approach to defining the landlord-tenant relationship is statutory.[49] The South Carolina Code defines "landlord" as "a person in possession or entitled to possession of the real estate used or occupied by the tenant as well as the employer of farm laborers and domestic servants."[50] "Tenant at will" is defined as "every person . . . using or occupying real estate without an agreement, either oral or in writing."[51] Seemingly, the language of the statute that permits a person to be a tenant without an agreement has invalidated, to some extent, the necessity of a contract and perhaps even the necessity of the tenant's

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44. *Id.* at 289, 32 S.E. at 419-20.

45. *Id.* at 293, 32 S.E. at 421.

46. *Id.*

47. *Id.* at 292-93, 32 S.E. at 421.

48. "[A] landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property." RESTATEMENT (SECOND) OF PROPERTY § 1.2 (1977). The reporter's notes to section 1.2 note that "the key question is that of control." *Id.* at 13.

49. *See* S.C. CODE ANN. § 27-33-10 (1976).

50. *Id.*

51. *Id.*

entry, as discussed earlier.[52]

The extent to which the statutory definitions have displaced the prior definitions for determining a landlord-tenant relationship remains unclear. For example, the statute provides that "tenant" is "construed to include sharecropper."[53] Yet sixteen years after the statute was enacted, the South Carolina Supreme Court held, in *Green v. Turbeville*,[54] that a sharecropper may be either a tenant or a partner, depending upon the facts of the particular case.[55] Under the facts of *Turbeville*, no landlord-tenant relationship existed because none was intended by the parties.[56] This result appears to be sound; if the parties actually intended not to be landlord and tenant, they should be allowed the freedom to enter into some other relationship. Unfortunately, even given the apparent soundness of the *Turbeville* result, it does not lessen the confusion created by the various definitions of landlord and tenant that exist in South Carolina.

2. *Definition for Purposes of Ejectment*

The multiple definitions of landlord-tenant in South Carolina create a question as to what the word "landlord" means as it is used in the ejectment statute. *Heydon's Case*,[57] a classic English case decided over three-hundred-fifty years ago, suggests a partial answer. In *Heydon's Case*, the court stated that to provide "for the sure and true . . . interpretation of all statutes . . . the office of all the Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy . . . according to the true intent of the makers of the Act."[58] Thus, in defining the term landlord as used in the eject-

52. *See supra* notes 21-40 and accompanying text.

53. *See* S.C. CODE ANN. § 27-33-10(8)(1976).

54. 263 S.C. 456, 210 S.E.2d 743 (1974).

55. *Id.* at 459, 210 S.E.2d at 744.

56. *See id.* at 458, 210 S.E.2d at 743.

57. 76 Eng. Rep. 637 (1584). *See also* Willis, *Statute Interpretation In a Nutshell*, 16 CAN. BAR. REV. 114 (1938) ("Heydon's Case lays down a special rule for the interpretation of statutes and insists that you cannot interpret a statute properly until you know the social policy it was passed to effect. Before you look at the words of the Act you have to discover why the Act was passed; then, with that knowledge in your mind, you must give the words under interpretation the meaning which best accomplishes the social purposes of the Act").

58. 76 Eng. Rep. at 638.

ment statute, both the purpose to be advanced by ejectment and the mischief to be avoided are relevant inquiries.

The South Carolina ejectment statute of 1866 was designed to provide a "summary" and "expeditious" alternative to the existing methods of regaining possession of leased premises.[59] Prior to 1866, a landlord could regain possession from a tenant only by invoking the uncertain remedy of self-help[60] or incurring the lengthy delay of a title action. For obvious reasons, neither alternative was attractive. Owners of real property likely hoped that the ejectment statute would alleviate the "mischief" of delay and advance the "remedy" of regaining leased premises.

In ejectment, the fundamental question seems to be whether possession of the premises was transferred. If it was, then calling the owner a landlord arguably operates to advance the remedy and suppress the mischief of the statute, even though for purposes other than ejectment, the owner may well *not* be a landlord. The case of *Ex Parte Associated Hotels*[61] illustrates this approach and suggests how existing law might be changed.

The plaintiff in *Associated Hotels*, believing that he was a landlord, commenced ejectment proceedings. The defendant moved to dismiss on the grounds that no landlord-tenant relationship existed.[62] In examining the written agreement between the parties, the court was apparently concerned only with a search for the essential elements of a lease. Finding such elements missing, the court concluded that the agreement established the relationship of principal and agent, or perhaps a partnership, but not a landlord-tenant relationship.[63] Dismissal of ejectment proceedings was therefore ordered.

Another result is possible. The court ignored the defendant's agreement to "operate [the plaintiff's] property for a period of six months."[64] The court also apparently overlooked lan-

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59. O'Neal v. Fickling, 10 S.C. 301 (1878).

60. *See* Laurens Telephone Co. v. Enterprise Bank, 90 S.C. 50, 72 S.E. 378 (1911); Rush v. Aiken Mfg. Co., 58 S.C. 145, 36 S.E. 497 (1900) in which the right to self help is generally recognized. The leading South Carolina case actually applying the self help rule is Barbee v. Winnsboro Granite Corp., 190 S.C. 245, 2 S.E.2d 737 (1939).

61. 144 S.C. 483, 142 S.E. 600 (1928).

62. *Id.* at 489, 142 S.E. at 601.

63. *Id.* at 489, 142 S.E. at 602.

64. *Id.* at 485, 142 S.E. at 601.

guage in the agreement providing that "[the defendants] understand that it is impossible for [the plaintiff] to guarantee [the defendant's] *continued possession* of the hotel."[65] Although a transfer of possession and control of the premises took place without the parties calling themselves landlord and tenant and without a formal grant of possession, the transfer clearly took place. Under *Heydon's Case*, *Rakestraw*, and the Restatement Second of Property, such a transfer of possession and control would create a landlord-tenant relationship.

Of course, it might be argued that the court in *Associated Hotels* was concerned solely with the intent of the parties, reasoning that, when intent to create a landlord-tenant relationship is unclear, no relationship should exist. Such a rationale appears meritorious in nonejectment situations, as little policy justification exists in not giving full legal effect to an agreement in which the parties have intended to create a lease and have included all of the essential elements of a lease in their agreement.[66] Conversely, when the facts clearly demonstrate that the parties did *not* intend a landlord-tenant relationship, little justification exists for ignoring the intent.[67]

Different considerations surface in ejectment situations, however. The problem cases are likely to be those in which the intent of the parties to create a landlord-tenant relationship is uncertain or disputed. When intent cannot be ascertained, the question of whether possession and control of the premises has been transferred should become the central issue. Focusing on that issue instead of intent to determine the existence of a landlord-tenant relationship appears more practicable—and ultimately more consistent—than the numerous methods currently in use.

Regardless of whether the South Carolina Supreme Court

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65. *Id.* (emphasis added).

66. Under this analysis, the *Wilcox* decision, discussed *supra* at notes 31-38 and accompanying text, in which the court found no landlord-tenant relationship solely because of the tenant's lack of entry, is clearly questionable. Indeed, the doctrine relied upon by the *Wilcox* court—*interesse termini*—is itself based on uncertain ground. *See infra* notes 154-84.

67. Under this analysis the court's conclusion in *Green v. Turbeville*, discussed *supra* at notes 54-56, would be acceptable. Notwithstanding the statutory definitions, in non-ejectment cases the parties should be allowed to determine their legal status as they see fit.

adopts a definition of landlord-tenant which looks not only to the intent of the parties but to the acts of transfer of possession and control as well, it is doubtful that all confusion in defining the landlord-tenant relationship would be resolved. If the past may serve as a guide to the future, the only certainty in this area is that some degree of uncertainty will persist. Nevertheless, more consistant application of a more practicable definition of the landlord-tenant relationship can only serve to quell some of the confusion.

C. Lack of Tenant Defenses

"Possession," Lord Mansfield once wrote, "is very strong, rather more than nine points of the law."[68] He was not writing about a tenant's possession of leased premises in South Carolina, however. A South Carolina landlord can eject a tenant in an "exceedingly summary" manner,[69] and the tenant's defenses to ejectment are very limited.

South Carolina appears to follow the common law rule that landlord and tenant covenants are independent of each other. This means that the failure of the landlord to perform his covenants cannot excuse a tenant from performing his own covenants. Thus, under the independent covenant rule, a tenant cannot justify his nonpayment of rent by pointing to the landlord's breach of covenant. This rule, in disfavor elsewhere, apparently remains in force in South Carolina and is applied in ejectment proceedings.

The independent covenant rule can be particularly harsh in its application, as was demonstrated in *Wright v. Player*.[70] The tenants, a husband and wife, held a life tenancy in a farm. Their lease, executed in 1951, provided that rent was due each October for the coming calendar year. In 1956 the owner sold the farm to another, and the new owner sent written notice to the tenants, demanding that they relinquish possession on January 1, 1957. The notice also directed the tenants to make future rent payments directly to the new owner's attorney.[71] The tenants, who

68. Corporation of Kingston-upon-Hull v. Horner, 98 Eng. Rep. 807, 815 (1774).
69. S.C. CODE ANN. § 27-37-10 to -150 (1976).
70. 233 S.C. 223, 104 S.E.2d 289 (1958).
71. *Id.* at 224-25, 104 S.E.2d at 289.

easily could have been confused by the notice,[72] chose to ignore it and declined to either vacate the premises or pay the coming year's rent. On January 8, 1957, the new owner commenced ejectment proceedings, whereupon the tenants immediately tendered the year's rent.[73] The tenants argued that the late payment of rent was properly excused by the new owner's wrongful act of demanding possession.[74]

The court made two holdings: first, that the ejectment was proper and the new owner was not obligated to accept the late tender of rent,[75] and second, that the new owner's demand to relinquish possession did not affect the tenants' obligation to pay rent.[76] The first holding, presumably based on section 27-35-150 of the South Carolina Code,[77] permits a landlord to accept a late rent payment and still proceed with ejectment; the second holding reaffirms the independent covenant rule in South Carolina.

The validity of the independent covenant rule has been questioned in other jurisdictions, and many states have abolished it.[78] Even in South Carolina, although the rule has not been expressly abolished, it may have been significantly undercut by the 1979 case of *Anderson v. Marion.*[79] In *Anderson*, two married couples owned equal shares of stock in a corporation. One couple loaned money to the corporation. By agreement, the other couple promised to repay the loan or forfeit their own stock in the corporation if they failed to make repayment.[80] On the last day for repayment, the debtor couple tendered a check,

72. The demand to relinquish possession was wrongful because the tenants had committed no default. *Id.* Furthermore, confusion could have resulted from the fact that the demand to relinquish possession was clearly inconsistant with the directions to pay future rent to the owner's attorney.

73. *Id.* at 225, 104 S.E.2d at 289.

74. *Id.*

75. *Id.* at 225, 104 S.E.2d at 290.

76. *Id.*

77. S.C. CODE ANN. § 27-35-150 (1976).

78. *E.g.*, Pole Realty Co. v. Sorrells, 78 Ill. App.3d 361, 397 N.E.2d 539 (1978); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); CAL. CIV. CODE § 1942 (West. Supp. 1982); MASS. GEN. LAWS ANN., ch. 111, § 1271 (West. Supp. 1981); N.D. CENT. CODE, § 47-16-13 (1978). *See also*, MODEL RESIDENTIAL LANDLORD-TENANT CODE, § 2-102(2)(Tent. Draft 1969)(proposing that all material covenants in a rental agreement be dependent).

79. 274 S.C. 40, 260 S.E.2d 715 (1979).

80. *Id.* at 41-42, 260 S.E.2d at 715-16.

which was returned for insufficient funds. A subsequent cash tender was refused by the creditor couple on the ground that it was made too late.[81] The lower court found the cash tender untimely, and ordered transfer of the stock.[82] The South Carolina Supreme Court reversed, holding that the late payment was excused.[83] Writing for a unanimous court, Justice Littlejohn quoted with approval language from *Lane v. New York City Life*,[84] that "in equity the harsh remedy of forfeiture will be forced to yield to compensation when fair dealing and good conscience seem to require it."[85] Although *Anderson* dealt with forfeiture of possession and title to stock and ejectment deals only with loss of possession, an adverse ruling in an ejectment proceeding could be more immediately devastating for a tenant than the mere loss of stock in *Anderson*. If equity permitted and excused late payment in *Anderson*, it follows that similar results should be reached in ejectment cases involving late payment of rent.

Even if a landlord's breach does not excuse a tenant's performance, a strong argument exists that certain equitable defenses should be permitted in ejectment proceedings. In *Wallace v. Wannamaker*,[86] the court recognized that the ejectment statute should be strictly construed because it works a "forfeiture or inflicts a penalty."[87] Certainly the forfeiture of a life tenancy in *Wright* for failure to timely make a rent payment is as harsh as the forfeiture in *Anderson*. The equitable defense permitted in *Anderson* should also have prevailed in *Wright*.

Furthermore, the language of section 27-37-60 of the South Carolina Code, that ejectment "should be determined as other civil cases,"[88] when read together with sections 15-1-80 and 15-15-40 of the Code, arguably changes the purely legal nature of ejectment in South Carolina. Section 15-1-80 provides that there is only "one form of action for the enforcement or protection of

81. *Id.*
82. *Id.* at 42, 260 S.E.2d at 716.
83. *Id.* at 43, 260 S.E.2d at 716.
84. 147 S.C. 333, 145 S.E. 196 (1927).
85. 274 S.C. at 43, 260 S.E.2d at 716.
86. 231 S.C. 158, 97 S.E.2d 502 (1957).
87. *Id.* at 163, 97 S.E.2d at 505.
88. S.C. CODE ANN. § 27-37-60 (1976).

private rights and the redress of private wrongs."[89] Section 15-15-40 provides that "the defendant may set forth by answer as many defenses and counterclaims as he may have whether . . . legal or equitable or both."[90] Read together, these statutes seemingly would permit equitable and other defenses in ejectment as well as in other civil actions.

Indeed, even without considering the statutes, dictum from *Sheppard v. Nienow*[91] arguably permits equitable and other defenses in ejectment proceedings already. The court in *Sheppard* confronted a tenant's claim against her landlord for injuries suffered by one of her children while playing on the premises.[92] Although the court found that under the facts of *Sheppard* the tenant had no claim,[93] it acknowledged that under different circumstances a tenant would have affirmative defenses and counterclaims against a landlord.[94] The court suggested that when a landlord promises to make repairs but fails to keep his promise, a tenant may: (1) rescind the contract and abandon the premises; (2) make the repairs himself and deduct the expenses through a counterclaim in an action for rent; (3) occupy without repair and counterclaim to recoup damages for lack of repair in the landlord's action for rent; or (4) sue for damages for breach of contract.[95]

This doctrine in *Sheppard* opens the door for a variety of affirmative defenses in ejectment proceedings. If ejectment is sought on the ground of nonpayment of rent and if there is a valid legal reason permitting the tenant not to make such rent payment, it seems a paradox to permit ejectment proceedings without also considering that rent is not due when repairs or other landlord covenants are not performed. In fact, this argument has already been offered and accepted in other jurisdictions.[96]

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89. *Id.* at § 15-1-80 (1976).
90. *Id.* at § 15-15-40 (1976).
91. 254 S.C. 44, 173 S.E.2d 343 (1970).
92. *Id.* at 46-47, 173 S.E.2d at 343-44.
93. *Id.* at 49, 173 S.E.2d at 345.
94. *Id.*
95. *Id.*
96. *E.g.*, Jack Springs Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

D. A Constitutional Question of Procedure

After the fourth circuit decision of *Joy v. Daniels*[97] in 1973, it was widely assumed that ejectment procedure in South Carolina was constitutionally sound under the fourteenth amendment. In *Joy*, the court held that the ejectment procedure met due process standards because the landlord must actually prove his allegations concerning the lease in court, and because either party is entitled to request that such proof be made to a jury.[98] Accordingly, after 1973, no reported South Carolina case questioned ejectment on due process grounds, and the issue appeared to be foreclosed and fully settled. The 1982 United States Supreme Court decision of *Greene v. Lindsey*[99] reopened the issue, however.

In *Greene*, the Supreme Court examined a Kentucky statute similar but not identical to section 27-37-30 of the South Carolina Code. Under the Kentucky statute,[100] an ejectment action could be commenced by "posting" a notice "in a conspicuous place on the premises" if personal service could not be obtained on the tenant or a member of the tenant's family over the age of sixteen.[101] The named class representatives in *Greene* claimed that they never saw the posted summons left on the doors of their apartments, and learned of the eviction proceedings only after default judgments had been entered against them.[102] Relying on the due process standard enunciated in *Mullane v. Central Hanover Bank and Trust Co.*,[103] the Court found the Kentucky statute unconstitutional because "merely

97. 479 F.2d 1236 (4th Cir. 1973).

98. *Id.* at 1242-43.

99. 102 S. Ct. 1874 (1982).

100. KY. REV. STAT. § 454.030 (1975). This statute provides:

> If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

101. *Id.*

102. 102 S. Ct. at 1876.

103. 339 U.S. 306 (1949). That standard requires "notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action." *Id.* at 314.

posting notice on an apartment door does not satisfy minimum standards of due process."[104]

In reaching the decision in *Greene*, the Court found that service by mail was distinctly superior to service by posting when personal service could not be obtained.[105] Relating that finding to the parties in *Greene*, the Court noted that children in the housing units sometimes removed the posted notices before the tenants could receive the notices. Thus, "in a significant number of instances reliance on posting . . . results in a failure to provide actual notice to the tenant concerned."[106] More generally, the Court found notice by mail to be inexpensive and efficient, and that when personal service is ineffectual, "notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings."[107]

In a portion of its opinion that reflects somewhat on the South Carolina ejectment procedure, the Court rejected the argument that the posting of notice under the Kentucky statute was only service as a "last resort" after other methods had failed.[108] The defendants in *Greene* noted that the statute directed the process server first to attempt personal service on the tenant, and failing that, to attempt personal service on a suitable member of the tenant's family. Only after both of these methods failed did the statute authorize service by posting. The defendants argued that this constituted posting as a last resort, and even if it was not preferable to mailing, it was nonetheless constitutional under the circumstances.[109] The Court disagreed, finding that posting was not a last resort under the statute.[110] The question of whether posting would be constitutional in a true "last resort" situation was thus not determined in *Greene*.

The last resort question may arise in South Carolina. Like the Kentucky statute, section 27-37-30 of the South Carolina

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104. 102 S. Ct. at 1879.

105. *Id.* at 1880-81.

106. *Id.* at 1879.

107. *Id.* at 1880-81.

108. *Id.* at 1880.

109. *Id.*

110. The Court rejected the argument because under the statute, posting could occur on the process server's first visit to the tenant's apartment. *See id.* at 1880. The statute did not require a second visit in a further attempt at personal service. *Id.*

Code first directs that notice be personally served.[111] Unlike the Kentucky statute, however, section 27-37-30 provides that when personal service service is not possible, service can be made "in the same manner as . . . provided . . . for the service of . . . summons . . . in the court of common pleas."[112] This latter authorization permits service on "any person of discretion residing at the residence or employed at the place of business of the defendant."[113] If personal service is still not possible, posting is permitted only after the "premises have been unoccupied for fifteen days or more."[114] The South Carolina statute thus presents a situation in which posting is much more of a last resort, requiring at least a second visit to the leased premises before posting is allowed.

The differences between the Kentucky and South Carolina statutes may not mean much, however. Much of the *Greene* decision suggests that the posting of a notice is constitutionally insufficient, regardless of whether in a last resort situation or not. Due process mandates that a person is entitled to proper notice before being deprived of life, liberty, or property. Notwithstanding the fifteen-day abandonment requirement of the South Carolina statute, a tenant's extended vacation or similar absence might exceed the statutory fifteen day period, yet not be intended as abandonment of the leasehold. Under such circumstances, notice by posting, although statutorily proper, could nonetheless severely prejudice the tenant's right to due process. Moreover, during such an absence, a tenant could receive actual notice by mail if he had left a forwarding address with the Post Office.

The cost of mailing is relatively inexpensive—in many cases less than the cost of sending a process server to determine if premises are unoccupied. Yet beyond the cost, the potential fairness to the tenant and the enhanced certainty of the notice should be considered. These considerations suggest that, even if section 27-37-30 is valid after *Greene* by virtue of its differences from the Kentucky statute, an amendment requiring notice by mailing may be sound legislation even if not constitutionally

111. S.C. CODE ANN. § 27-37-30 (1976).
112. *Id.*
113. *Id.* at § 15-9-520 (1976).
114. *Id.* at § 27-37-30 (1976).

compelled.

III. Action for Rent

A. *Introduction to the Remedy*

From the landlord's viewpoint, a lease creates both the loss and gain of an important right. The landlord's loss is possession of the premises; the landlord's gain is the right to recover rent payments.[115]

Ejectment deals only with the landlord's loss. Although it does dispossess the tenant, thus restoring possession of the premises to the landlord, ejectment is a limited remedy which offers less than complete relief, restoring what has been lost but failing to enforce what might have been gained. The only way a landlord may seek the full benefit of his bargain with the tenant is through an action for rent.

B. *Elements of an Action for Rent*

Early South Carolina case law stated that, in order to maintain an action for rent, a landlord must allege an express or implied contract with a tenant.[116] This is no longer accurate. In *Townsend v. Singleton*,[117] the South Carolina Supreme Court acknowledged that rent can be due even though no agreement exists between landlord and tenant. The basis for the *Townsend* decision is found in the South Carolina Code.

Section 27-35-40 of the Code provides that a person who enters or uses real property of another without the permission of

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115. The question of whether, under South Carolina law, a landlord is ever entitled to *both* possession *and* rent is uncertain, since the two remedies are mutually inconsistent. *See* Gentry v. Recreation, Inc., 192 S.C. 429, 436, 7 S.E.2d 63, 66 (1940). Yet *Gentry* relies upon *Simon v. Kirkpatrick*, 141 S.C. 251, 139 S.E. 614 (1927), which contains dictum stating that "the termination of a lease does not absolve the lessee from obligations, *unless the lease shall provide that, notwithstanding the termination for cause by the lessor, the lessee shall not be relieved of such future obligations. Id.* at 262, 139 S.E. at 618 (emphasis added).

116. Cathcart v. Matthews, 105 S.C. 329, 89 S.E. 1021 (1916) (dictum); Ryan v. Marsh, 11 S.C.L. (2 Nott & McC.) 156 (1819); *See also* Lee v. Sumter Pine & Cypress Co., 113 S.C. 190, 203, 102 S.E. 2, 6 (1915), in which the court held that a judgment for unpaid rent could not be sustained when the landlord failed to allege a contract, and its breach, by the tenant.

117. 257 S.C. 1, 183 S.E.2d 893 (1971).

the owner can be treated at the owner's election as either a trespasser or a tenant at will.[118] If the owner elects to treat the occupier as a tenant at will, the section further provides that "the landlord shall have and be entitled to a reasonable rental for the use and occupation of such premises . . . ."[119] Thus, the first element of the landlord's action for rent is the tenant's use of the landlord's property.

The second requirement is that rent be shown to be due and owing. At common law, rent was due and owing only *after* the tenant's term.[120] Legislation has changed this in South Carolina. The South Carolina Code now provides that "unless otherwise agreed upon rents shall be payable monthly and at the end of each calendar month, excepting rents for farm lands."[121] Thus, questions as to when rent is due and owing should arise infrequently under the Code.

C. Mitigation of Damages

By contrast, questions as to whether a landlord has fully and properly performed the duty to mitigate damages may arise frequently.[122] The duty of a landlord to mitigate damages has been a subject of frequent commentary.[123] For years, a lease was viewed solely as a conveyance under the rationale that the execution of the lease transferred an estate, and the lessee became the "owner" of the estate for the term of the lease.[124] Accord-

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118. S.C. CODE ANN. § 27-35-40 (1976). "Tenant at will" is defined as "[e]very person other than the owner of real estate, excepting a domestic servant and farm laborer, using or occupying real estate without an agreement, either oral or in writing, ..." *Id.* at § 27-33-10(3)(1976).

119. *Id.* at § 27-35-40 (1976).

120. *See* Brown's Administrators v. Bragg, 22 Ind. 122 (1864).

121. S.C. CODE ANN. § 27-35-90 (1976). The special rule for farm tenancies is found in § 27-35-100.

122. *See, e.g.*, Richman v. Jaray Corp., 192 F.2d 660 (4th Cir. 1951)(mitigation successful and landlord held to the difference between the agreed rental and rental received from new tenant); E & S Inv. Corp. v. Richland Bowl, Inc., 264 S.C. 582, 216 S.E.2d 522 (1975)(landlord sought to mitigate by remodelling); Camden Inv. Co. v. Gibson, 204 S.C. 513, 30 S.E.2d 305 (1944) (landlord recovered damages for commission paid to rental agent to find new tenant and amount of rent he would have received from original tenant for two months' vacancy before new tenant was found).

123. 1 AM. LAW OF PROPERTY, § 3.99 (A. Casner ed. 1952); 2 R. POWELL, POWELL ON REAL PROPERTY, § 221 (1968).

124. 2 R. POWELL, POWELL ON REAL PROPERTY, § 221 (1968).

ingly, the lessor's ownership of the property ceased for the length of the term, requiring the lessor to avoid acts of dominion over the premises for that time. This "conveyance theory" left no place for a landlord duty to mitigate. Having conveyed all rights in the property for the term of the lease, the landlord could do nothing if the tenant prematurely abandoned the premises.[125]

Since *Burkhalter v. Townsend*,[126] decided in 1927, South Carolina has rejected the conveyance theory and has imposed an affirmative duty upon landlords to mitigate damages. This duty requires landlords to take reasonable steps to relet the premises and, if successful, to apply any rent received toward the original tenant's rental obligation. Perhaps the clearest statement of the duty to mitigate can be found in the following jury charge:

> If [the landlord] can by reasonable diligence, get a tenant and put a tenant there, and minimize [his] damages, the law says [he] must do it; make [his] damages as light as [he] can. If he fails to do that, the law will not compensate him for his failure or refusal to minimize his own damages, but it will compensate him for what he could not minimize, even though he tries and fails, if he did try and fail.[127]

Ample justification exists for the mitigation duty. As many commentators have recognized and courts have increasingly held,[128] leases contain elements of conveyance and elements of contract. Once it is concluded that a lease is a contract, the duty to mitigate follows from the principle that damages from a breached contract cannot be recovered for losses a party could have reasonably avoided.[129] The Uniform Commercial Code also

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125. *In re* Dant and Dant, 39 F. Supp. 753 (D.C.W.D. Ky. 1941); Wright v. Baughman, 239 Or. 410, 398 P.2d 119 (1965); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY (2d ed. 1975).

126. 139 S.C. 324, 138 S.E. 34 (1927).

127. National Bank of South Carolina v. People's Gro. Co., 153 S.C. 118, 124, 150 S.E. 478, 480 (1929).

128. Javins v. First Nat'l Realty Co., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (1976); Parkwood Realty v. Marcano, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (1974).

129. J. CALAMARI AND J. PERILLO, THE LAW OF CONTRACTS, §§ 202-36 (1970); 5 A. CORBIN, CORBIN ON CONTRACTS § 1039 (1964).

adopts this principle.[130] In holding that a landlord of abandoned leased property could not allow the property to stand idle, one court noted that this rule exists on a policy level to prevent a party from "passively suffering economic loss which could be avoided by reasonable efforts."[131] Although neither *Burkhalter* nor *National Bank* fully explain the reasons for imposing mitigation, the fact remains that the duty to mitigate damages is a fixed star for landlords in South Carolina. Therefore the difficulties in its application must be confronted.

The existing law is unclear as to what the duty to mitigate entails. In *Burkhalter*, the court held that mitigation is an issue of fact, and that a denial by the tenant of the reasonableness of the landlord's efforts "necessarily put[s] [the landlord] to proof"[132] of the question. Subsequent cases, however, are of little help in explaining what proof is necessary. The court has said only that such proof must show "reasonable diligence."[133]

"Reasonable diligence" is an imprecise term, and courts in South Carolina and other states have not agreed on its meaning. For example, advertising the availability of property is often cited as a factor indicating a reasonable effort,[134] yet failure to advertise or list the property has been held as not necessarily unreasonable, if other reasonable attempts to relet are made.[135] Similarly, placing a "for rent" sign on the premises may suffice,[136] but at least one court has held this a minimal act and insufficient to establish reasonable diligence.[137]

Some courts have focused on the length of the vacancy between abandonment and reletting as useful in determining reasonableness, but this factor has proven difficult to apply. Several cases have held that reasonable attempts to mitigate can be shown, even though a replacement tenant is never found.[138] Yet, a vacancy of seventeen months was held unreasonable in *Lefrak*

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130. The applicable UCC provisions, as adopted by South Carolina, are found at S.C. CODE ANN. §§ 36-2-704, -706, -709, -711, -712, and -715 (1976).

131. Wright v. Baughman, 239 Or. 420, 414, 398 P.2d 119, 121 (1935).

132. 139 S.C. at 332, 138 S.E. at 37.

133. Nat'l Bank of South Carolina v. People's Gro. Co., 153 S.C. at 124, 150 S.E. at 480.

134. *In re* Garment Center, 93 F.2d 667 (2d Cir. 1938).

135. Friedman v. Colonial Oil Co., 236 Iowa 140, 18 N.W.2d 196 (1945).

136. Parkwood Realty Co. v. Marcano, 77 Misc. 2d at 693, 353 N.Y.S.2d at 626.

137. Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968).

138. *Parkwood Realty*, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (1974).

v. Lambert,[139] despite the fact that the property was placed on an availability list and advertised in major newspapers.[140] Moreover, at least one court has held that rental closely following the expiration of a lease is an indication of lack of due diligence in finding a new tenant during the term of the lease.[141]

The confusion over what is "reasonable" extends to the lease terms offered the replacement tenant. No South Carolina case exists on this point. Out of state cases suggest several equally plausible but inconsistent positions. Some courts have held that landlords are under no obligation to alter the terms of the original lease for the new tenant,[142] even when the new tenant proposes to lease the premises for a period exceeding the original term at the original rental rate.[143] Other courts have held that landlords may make necessary and ordinary repairs and alterations to the premises to accommodate a new tenant, then charge the cost of these changes to the original tenant.[144] Conversely, some courts have found that major repairs are not only unnecessary and not chargeable to the original tenant,[145] but may constitute implied acceptance of the original tenant's offer to surrender, thereby terminating the original tenant's obligation to pay rent.[146]

Courts also are divided over which party must bear the burden of proof on mitigation of damages.[147] Those courts placing the burden on the tenant note that under contract law, the breaching party should prove that the aggrieved landlord could have prevented or minimized losses suffered.[148] Several commentators agree.[149] Conversely, placing the burden on landlords has

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139. 89 Misc. 2d 197, 390 N.Y.S.2d 959 (1976).

140. *Id.*

141. *Vawter*, 159 N.W.2d 538 (Iowa 1968).

142. *E.g.*, Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966).

143. *E.g.*, Woodbury v. Sparrell Print, 198 Mass. 1, 84 N.E. 441 (1908); Robinson Seed Plant v. Hexter and Kramer, 167 S.W. 749 (Tex. Civ. App. 1914).

144. Baskin v. Thomas, 12 F.2d 845 (D.C. Cir. 1926); Banks v. Berliner, 95 N.J. 267, 113 A. 321 (1921).

145. Ross v. Smigelski, 42 Wis. 2d 185, 166 N.W.2d 243 (1969).

146. Buford-Claimont, Inc. v. Jacob's Pharm. Co., 131 Ga. App. 643, 206 S.E.2d 674 (1974); Pinkerton's, Inc. v. Palmer, Inc., 113 Ga. App. 859, 149 S.E.2d 859 (1966).

147. 21 A.L.R. 3d 577 (1968).

148. *See* Parkwood Realty Co. v. Marcano, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (1974).

149. C. McCormick, Handbook on the Law of Damages, § 33 (1935); Comment, *Landlord-Tenant Legislation: Revising an Old Common Law Relationship*, 2 Pac. L.J.

been justified on the basis of the landlord's greater access to evidence of mitigation and the landlord's superior financial position.[150]

Neither a landlord nor a tenant can be certain what a jury or court will conclude is "reasonable" when confronted with a particular set of facts. It does not follow, however, that the task of clarifying and defining the mitigation duty should be a hopeless one. One solution to the problem might be found by including the actual scope of the landlord's duty to mitigate directly within the lease agreement. This part of the lease, which might be called a mitigation clause, would set forth the steps the landlord must take to mitigate. A mitigation clause thus could serve the same purpose as a liquidated damages clause in a contract.

D. Mitigation Clause

Liquidated damages clauses in contracts are commonplace. If drafted properly, they are recognized as legitimate covenants which permit the parties to a contract the right to set their own measure of damages and to agree upon a reasonable sum to be paid by the breaching party.[151] A liquidated damages clause thus permits the parties to make certain and definite what otherwise would be difficult to prove and hard to quantify. However, as with any rule, there are limitations. The amount set must bear evidence of a fair estimate of anticipated damages and cannot be a penalty for or coercive deterrent to a breach.[152]

In leases, a similar clause could serve a similar purpose. Like a liquidated damages provision, the purpose of a mitigation clause would be to let both parties set the rules to govern mitigation, and would make certain and definite the landlord's duty to mitigate. Several advantages exist in such a clause. First, if the tenant prematurely terminated the lease, both parties would be aware of the landlord's duties of mitigation. Thus, instead of an uncertain, subjective question of reasonableness, one could simply look to the lease to see whether the landlord did those

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259, 269 (1971); James, *Burdens of Proof*, 47 VA. L. REV. 51, 60 (1961).

150. *See* Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (1976).

151. 22 AM. JUR. 2D, *Damages* §§ 221-35 (1980); 5 A. CORBIN, CORBIN ON CONTRACTS § 1054 (1964).

152. 5 A. CORBIN, CORBIN ON CONTRACTS § 1063 (1964).

things to mitigate that he covenanted to do. Second, in many cases a mitigation clause would probably avoid full scale trials in many cases. Instead of a complex question necessarily calling for inference and debate, the issue often would be suitable for summary judgment. Of course, as in liquidated damages clauses, the court must require that a mitigation clause be *reasonable*, and that it reflect a good faith effort by a landlord to reduce damages. Drafting a clause to accomplish these purposes would not, however, be difficult.[153] In appropriate situations, a mitigation clause might also include the terms of a substitute lease or the price reductions, if any, which the landlord may offer a substitute tenant.

The disadvantages to a mitigation clause seem few. If the clause is not given conclusive effect on the mitigation question, the landlord still may be entitled to argue that acting pursuant to the clause is at least some evidence of reasonableness. Moreover, even if the clause is disregarded in its entirety, the landlord is merely returned to the common law standard of reasonableness, and is in no worse a position. On the other hand, if the clause is found to be valid, the steps taken under it almost surely will be approved. In short, there appears much to be gained and little to be lost by routinely including such clauses within a lease.

E. Interesse Termini

1. The Doctrine Generally

Normally, a tenant's breach of a lease or abandonment of the premises entitles a landlord to an action for rent, assuming a proper attempt to mitigate damages has been made. However, if the jurisdiction recognizes the doctrine of *interesse termini*, an action for rent is not available.[154] Instead, the landlord is entitled only to the difference in value between the rent owed and the fair market value of the lease.[155] This difference in value is normally much more difficult to prove and is generally smaller in

153. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, § 12.1, Comment i (1977).

154. M. FRIEDMAN, FRIEDMAN ON LEASES § 34.5 (1978) [hereinafter cited as FRIEDMAN].

155. 85 A.L.R. 3d 514 (1968).

amount than the rent owed.[156]

The *interesse termini* doctrine applies in two distinct situations: (1) when a tenant has an immediate right to possession but has not entered onto the premises, and (2) when the lease is to begin in the future and the right to possession is postponed until that time.[157] In both situations the doctrine states that without an entry a landlord-tenant relationship simply does not exist.[158] Until an entry takes place, only a future contract right exists because no present estate has been granted.[159] Thus, the doctrine holds, since no lease has been created, no rent is owed.[160] As one Maryland court has noted, the *interesse termini* rule thus presents "the uncommon issue of when a lease is not a lease."[161]

The consequences of the rule can be unbelievably harsh. In the South Carolina decision of *Wilcox v. Bostick*,[162] for example, a tenant sued a landlord for possession of the premises. The court found that the tenant had a valid lease, that the landlord had repudiated the lease without justification before the tenant's entry and that the tenant's failure to enter was due to the landlord's refusal to permit entry.[163] Nonetheless, applying the *interesse termini* rule, the court denied the tenant possession of the premises. In giving its reasons for this result, the court said:

> The lessee must enter into possession in order to acquire an estate in the land. . . . Until entry of the lessee, the lessor remains in possession, and cannot be said to have deprived the lessee of that which he never had. Therefore, in an action by the lessee to recover possession of the lessor, the lessee must allege an entry under the lease; otherwise, having no estate in the land, he cannot compel the owner in possession to deliver him the possession. *There are other remedies for a mere breach of contract to give him possession.*[164]

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156. FRIEDMAN, *supra* note 154, at § 34.5.

157. *Id.*; 1 H. TIFFANY, THE LAW OF LANDLORD AND TENANT § 37 (1910); *See also* Note, *Is Interesse Termini Necessary?*, 18 COLUM. L. REV. 595 (1918).

158. 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 86 (3d. ed. 1939).

159. 1 AM. LAW OF PROPERTY § 3.22 (A. Casner ed. 1952).

160. 85 A.L.R. 3d 514 (1968).

161. Arthur Treacher's Fish and Chips, Inc. v. Chillum Terrace Ltd., 272 Md. 720, 721, 327 A.2d 282, 283 (1974).

162. 57 S.C. 151, 35 S.E. 496 (1900).

163. *See id.*

164. *Id.* at 154-55, 35 S.E. at 497 (emphasis added).

The rule can produce equally harsh results when applied to landlords. In the Maryland case of *Arthur Treacher's Fish & Chips of Fairfax, Inc. v. Chillum Terrace Ltd.*,[165] the tenant repudiated a 10-year lease shortly after signing it and before entry onto the premises, but not before the landlord had undertaken expensive renovations to accommodate the tenant's restaurant business. Applying the *interesse termini* doctrine, the court concluded that no lease had been created,[166] that under the circumstances the landlord's claim for rent must be denied,[167] and that the landlord was only entitled to the excess of the rent reserved under the lease agreement over the reasonable rental value of the premises at the time of the breach.[168]

Two comments concerning the results in *Wilcox* and *Arthur Treacher's Fish & Chips* are in order. First, the *interesse termini* doctrine was applied in these cases only at the expense of a conflicting, well settled rule of law. In *Wilcox*, the South Carolina Supreme Court failed to apply the rule that specific performance is routinely granted when the subject matter of a contract is unique.[169] This rule fits the facts of *Wilcox*, in which the subject matter was real estate, but the court, in applying *interesse termini* failed to follow it. Similarly, in *Arthur Treacher's Fish & Chips*, the intent of the parties was to create a lease, yet the Maryland court refused to apply the normal rule of law that the clear intent of the parties to a contract will govern the document.

The second comment is that neither decision cited or considered the historical reasons for the *interesse termini* rule. However, commentators who have traced the origin and history of the rule have uniformly criticized it. One commentator has asserted that the rule is "all a mistake."[170] Another has stated that "it is clear that from a time prior to the Statute of Uses, and certainly since that statute, there has been no reason to apply the doctrine."[171] A third found the rule "difficult to comprehend" and added:

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165. 272 Md. 720, 327 A.2d 282 (1974).
166. *Id.* at 729, 327 A.2d at 287.
167. *Id.*
168. *Id.* at 731, 327 A.2d at 288.
169. 5 A. CORBIN, CORBIN ON CONTRACTS § 1142 (1964).
170. 2 W. WALSH, COMMENTARIES ON THE LAW OF PROPERTY § 139 n.10 (1947).
171. 1 AM. LAW OF PROPERTY § 3.22 (A. Casner ed. 1952).

> That one who has not entered is not a tenant is readily comprehensible, but that one who has an immediate right of exclusive possession and control for a term of years should not have an estate for years, merely because he has not entered upon the land, seems to involve a subversion of the conception of an estate which has ordinarily prevailed since the abolition of the requirement of livery of seisin. A statutory conveyance of an estate in fee simple without doubt vests an estate in the grantee before entry, and it is difficult to see why a common law conveyance of an estate for years should have any less effect.[172]

The most powerful criticism of the rule comes from a recent treatise on landlord-tenant law, in which the author argues that the *interesse termini* rule can be waived by merely adding the formality to a lease that the parties agree the lease will take effect without an actual entry.[173] If this argument is as sound as it appears, the doctrine functions only as a trap for the unwary, and no longer serves a useful purpose.

2. *The Doctrine in South Carolina*

The leading South Carolina case applying the *interesse termini* doctrine to landlords is *Simon v. Kirkpatrick*.[174] In *Simon*, the tenant signed a three-year lease but failed to take possession or pay rent. After waiting unsuccessfully for several months for the tenant to start the tenancy, the landlord exercised a right under the lease to terminate the tenancy for failure to pay rent. About a year later, unable to find a substitute tenant, the landlord brought an action for rent owed and not paid, as well as an action for breach of contract.[175] The court found that "as a matter of fact, Kirkpatrick, the lessee, never went into possession of the premises"[176] and concluded that "as a matter of law, therefore, the relation of the landlord and tenant was never consummated."[177]

Normally, of course, this finding would permit a landlord

172. 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 86 (3d ed. 1939).
173. FRIEDMAN, *supra* note 154, at § 34.5.
174. 141 S.C. 251, 139 S.E. 614 (1927).
175. *Id.* at 253-55, 139 S.E. at 615-16.
176. *Id.* at 256, 139 S.E. at 616.
177. *Id.*

only a contract remedy. The general rule is:

> [t]he measure of damages applied to a breach is the same measure which is applied to a breach of contract to lease. Landlord has but one cause of action for damages, and not a series of claims for installments of rent as the rent accrues. The amount of damages for breach of contract is much less, and is much more difficult to prove, than under a lease.[178]

However, the court in *Simon* ignored the rule that *interesse termini* limits a landlord to a contract remedy, and suggested instead that any of three remedies were available. The court first suggested the landlord could bring an immediate suit for damages. Under this alternative, the tenant would be liable for "the full amount of damages present and prospective which were the necessary and direct result of the violation of the contract."[179] The proper measure of damages would be "the difference between the rent fixed in the lease and the rental value of the premises for the entire term, at the time of the breach, together with such special damages as [the landlord] may plead and prove . . . ."[180]

The second alternative suggested by the court was a breach of contract suit brought simultaneously with the landlord's termination of the lease, if the lease so provided. The court said:

> [t]he 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 cause by the lessor, the lessee shall not be relieved of such future obligations.[181]

Finally, the court suggested that the landlord might wait for the term to expire, and then sue for the difference between the agreed rental and any rent he might have received in mitigating his damages.[182]

The doctrine of *interesse termini* is designed to create only one remedy for landlords. Thus, it is ironic that the South Caro-

178. FRIEDMAN, *supra* note 154, § 34.5 at 1201.
179. 141 S.C. at 259, 139 S.E. at 617.
180. *Id.*
181. *Id.* at 262, 139 S.E. at 618.
182. *Id.* at 259, 139 S.E. at 617.

lina Supreme Court would create three distinct remedies in *Simon* while purporting to follow the doctrine. Further irony surfaces when it is recognized that despite the right to three different remedies, the landlord in *Simon* was entitled to only two months rent because of an election of remedy problem.[183] Notwithstanding the irony, however, the critical point in *Simon* is the court's recognition of three separate remedies. It is not important that the court, purporting to apply the traditional *interesse termini* rule, actually applied something very different. It is important that the rule they did apply is a much better rule and should be expanded upon.

Leases are both contracts and estates.[184] It therefore seems fundamentally sound to give a landlord whose lease has been broken an election between contract and property remedies. Such an election would serve several purposes. It would permit an immediate suit, if the landlord so elected, when a tenant breached. Yet, at the same time, if the landlord chooses to wait for accrued rent and mitigate his damages, that option should be available to him.

Even if the remedies granted in *Simon* are not expanded upon, the decision should not be ignored. Whatever else the South Carolina Supreme Court did in *Simon*, it did *not* follow the traditional *interesse termini* rule, and that in itself is worth noting. Little justification remains for the doctrine. It lacks support from commentators; it is inconsistent with other rules concerning intent and specific performance; and it gives one who is not a true landlord more remedies than one who is. If *interesse termini* disappears from South Carolina law, it will not be missed by anyone.

IV. DISTRAINT

A. Introduction to the Remedy

Distraint, also known as distress, is the common law right of a landlord to employ selfhelp by seizing a tenant's personal property as security for payment of delinquent rent.[185] Initially

183. *Id.*

184. 2 R. POWELL, POWELL ON REAL PROPERTY § 221 (1968).

185. 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §

the remedy permitted a landlord to hold but not sell tenant property. In 1869, however, an English statute empowered landlords to sell tenants' property at public auction and apply the proceeds to the rent due.[186]

The remedy of distraint has been described as harsh.[187] The Model Residential Landlord-Tenant Code and the Uniform Residential Landlord and Tenant Act have recommended its abolition,[188] and many states have repealed distraint by statute[189] or found it unconstitutional in court decisions.[190] Critics of distraint have argued that it survives today only as a "feudal prerogative, adopted when no rights amounted to much of anything except those of the owner of the land and when personal property was not so much prized as at the present.[191] Nonetheless, this "relic of the old feudal system"[192] still exists in a number of jurisdictions,[193] including South Carolina.[194]

B. Distraint in South Carolina

Distraint has had a checkered history in South Carolina.

1305 (1981); 2 AM. LAW OF PROPERTY § 9.47 (A. Casner ed. 1952); 2 H. TIFFANY, THE LAW OF LANDLORD AND TENANT § 325 (1910).

186. 2 W. & M., ch. 5, § 1 (1689).

187. *See* Bagwell v. Jamison, 25 S.C.L. (Chev.) 249 (1840), in which the court stated "[t]he remedy of distress is a rigorous proceeding, often harsh in its operation, not congenial to the spirit of our institutions and government, and not to be extended beyond the clear and settled limits, except by express enactments of the Legislature." *Id.* at 253. *See also*, 2 R. POWELL, POWELL ON REAL PROPERTY 305 (1968).

188. MODEL RESIDENTIAL LANDLORD-TENANT CODE § 3-403 (1969); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.205(b)(1972).

189. *See, e.g.*, ALASKA STAT. § 34.03.250 (1975); DEL. CODE ANN. tit. 25, § 6301 (1974); MINN. STAT. ANN. § 504.01 (West 1947). For a list of states which have adopted the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, *see* 7A U.L.A. 297 (Supp. 1981).

190. The decisions finding distraint unconstitutional have principally been based on the omission of prior notice and hearing, as required by Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972). *See, e.g.*, Stroemer v. Shevin, 399 F. Supp. 993 (S.D. Fla. 1973); Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972).

Contra, Hitchcock v. Allison, 572 P.2d 982 (Okla. 1977) (landlord's seizure of tenant's property in mobile home under landlord's lien statute did not constitute state action and statute was constitutional when tested by fourteenth amendment).

191. Annot., 62 A.L.R. 1106, 1107 (1929).

192. *See* Youngblood v. Lowry, 13 S.C.L. (2 McCord) 39, 39 (1822).

193. *See, e.g.*, MD. REAL PROP. CODE ANN. §§ 8-301 to -332 (1974); MO. ANN. STAT. §§ 441.240-.260 (Vernon 1952); VA. CODE §§ 55-227 to -238 (1981).

194. S.C. CODE ANN. §§ 27-39-210 to -290 (1976 & Cum. Supp. 1981).

Originally established with the adoption of a 1712 statute,[195] distraint was abolished in 1868 by the state legislature,[196] only to be reenacted ten years later.[197] Since then it has undergone further modifications.[198]

1. *Prima Facie Cases*

The necessary elements for distraint were enumerated in the 1930 case of *Fidelity Trust & Manufacturing Co. v. Davis*.[199] The court in *Davis* drew upon requirements found in prior cases and held that, in order for distraint to be proper, (1) the relationship of landlord and tenant must exist; (2) the rent reserved must be a sum certain; (3) rent must be in arrears; and (4) the landlord's claim must be for rent only.[200] The court has twice reaffirmed these elements since *Davis*.[201]

The requirement that a landlord-tenant relationship exist for distraint to be proper presents two interesting questions. First, what happens to the right of distraint when either the landlord or the tenant assigns or sublets their interest in the premises? Second, what happens to the right of distraint when a tenant dies owing unpaid rent to the landlord?

The right of distraint after an assignment has been considered in three very old South Carolina cases. In *Ragsdale v. Estis*,[202] the court held that after a tenant assigned his lease to another, he had no power of distraint over his assignee.[203] By

195. 1712 S.C. Acts. 547.

196. 1868 S.C. Acts 106.

197. 1878 S.C. Acts 511. *See* Mobley v. Dent, 10 S.C. 417 (1878).

198. *See* Fidelity Trust & Mfg. Co. v. Davis, 158 S.C. 400, 404-07, 155 S.E. 622, 624-25 (1930), which traces the statutory development of distraint in South Carolina. The 1946 and 1973 amendments to the distraint statute are probably the most important changes of recent years. *See* 1946 S.C. Acts 2584 and 1973 S.C. Acts 384.

199. 158 S.C. 400, 155 S.E. 622 (1930).

200. *Id.* at 407, 155 S.E. at 625. The court also mentioned a fifth condition, "when the property belongs to the tenant in his own right." *Id.* This condition was probably voided by the adoption of S.C. CODE ANN. § 27-39-260 (Supp. 1982), which provides that a landlord may distrain property subject to a security interest under certain conditions. *See also* § 27-39-250, which provides that "*all* property upon premises is subject to distress . . . ." (emphasis added).

201. Frady v. Smith, 247 S.C. 353, 357, 147 S.E.2d 412, 414 (1966); Burnett v. Boukedes, 240 S.C. 144, 153, 125 S.E.2d 10, 15 (1962).

202. 42 S.C.L. (8 Rich.) 429 (1832).

203. *Id.* at 430.

contrast, in *Stewart v. Gregg*[204] the court held that after a landlord assigned his interest in a lease, the assignee became the purchaser of the landlord's title and assumed the landlord's right to rent payments under the lease. The assignee therefore was entitled to distraint for unpaid rent. In the most recent of the three decisions, *Staton v. Guillebeaux*,[205] the court qualified its holding in *Stewart* by holding that the "mere assignment of the rent unpaid does not carry the right to distrain."[206]

At one level the three cases are sound and consistent. In each case the court appears to rest its decision on whether the party seeking distraint has a landlord's reversion in the leased premises. Thus, in *Ragsdale*, in which the tenant sought distraint against his assignee, the court concluded that lack of privity[207] between the parties barred distraint. Similarly, in *Staton*, the party seeking distraint had no reversion. The landlord's reversion was transferred in *Stewart*, however, the only case allowing distraint by the assignee. Thus, a tenant may be able to distrain a subtenant's property. Although no South Carolina case has expressly addressed this issue, it is well known that when a tenant sublets to another, he "grants an interest . . . less than his own, and retains for himself a reversion."[208] Furthermore, the South Carolina Code provides that "the sublessor, . . . shall be deemed the landlord and the sublessee the tenant under him."[209]

At another level, however, the three cases are neither as sound nor as consistent as they first appear. The three decisions rest on the technical distinction between assignment and sublease. The utility of drawing such a distinction has been questioned, however, and at least one non-South Carolina case has expressly recognized that the common law distinction between assignments and subleases is arbitrary and unjust.[210]

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204. 42 S.C. 392, 20 S.E. 193 (1893).

205. 123 S.C. 363, 116 S.E. 443 (1922).

206. *Id.* at 368, 116 S.E. at 444.

207. Privity of estate is generally defined as "that which exists between lessor and lessee, tenant for life and remainderman or reversioner, etc. . . ." BLACK'S LAW DICTIONARY, 1362 (4th ed. 1968).

208. Fischer, *Legal Aspects of Farm Tenancy and Sharecropping in South Carolina*, 9 S.C.L.Q. 299, 345 (1957).

209. S.C. CODE ANN. § 27-35-60 (1976).

210. *See* Jaber v. Miller, 219 Ark. 59, 60, 239 S.W.2d 760, 761 (1951).

The South Carolina Supreme Court has determined that, when a tenant dies, a landlord cannot execute a distress warrant against the tenant's property, even though the warrant was issued and rent was due while the tenant was still living.[211] Similarly, the court has held that if the landlord dies before the distraint warrant is executed, the landlord's personal representative has no authority to distrain for rent accrued before the landlord's death.[212] In contrast to these cases, the court concluded in *Taluande v. Cripps*[213] that a tenant's renewal of his lease for a second year would not prevent the landlord from distraining for rent due from the previous year.[214] Apparently the court felt that the landlord-tenant relationship continued, even though the old lease had expired and a new lease existed.[215]

Can the death cases be reconciled with the renewal case? Leases can be drafted by the parties with the intent to survive, even if the landlord or tenant dies. It is common for devisees or heirs to step into a deceased tenant's shoes and continue the lease. If a tenant's interest can continue, the landlord's rights—including the right to distraint—should continue as well.[216] Indeed, an argument exists that the interests continuing after death are more closely related to the initial landlord-tenant relationship than in the case of a lease renewal, because the new party taking the deceased party's place actually fulfills the original lease.[217]

The second element of distraint enunciated by the court in *Davis*—that rent be for a sum certain—has been easier to apply than the landlord-tenant relationship requirement. Perhaps the most interesting case under this requirement is *Reeves v. McKenzie*,[218] in which the court held that once rent is stated as a sum certain in a lease, subject to the performance by the tenant

211. Salvo & Wade v. Schmidt, 29 S.C.L. (2 Speers) 512, 517 (1844).

212. Bagnell v. Jamison, 25 S.C.L. (Chev.) 249, 252 (1840).

213. 14 S.C.L. (3 McCord) 147 (1825).

214. *Id.*

215. *Id.*

216. *See* 15 Am. Dec. 584, 585 (1825) *and* 52 C.J.S. *Landlord & Tenant* § 677 (1968) for a discussion of distress for rent.

217. Stewart v. Gregg, 42 S.C. 392, 398, 20 S.E. 193, 196 (1893); Marshall v. Giles, 5 S.C.L. (3 Brev.) 488, 489 (1814); Benoist & Dumouche v. Sollee, 3 S.C.L. (1 Brev.) 251, 252 (1803); Smith v. Sheriff, 1 S.C.L. (1 Bay) 443, 444 (1795); Jacks v. Smith, 1 S.C.L. (1 Bay) 315 (1793).

218. 17 S.C.L. (1 Bail.) 497 (1830).

of some condition, the landlord may distrain for rent due despite the condition unless the tenant proves performance.[219]

The third requirement from *Davis* is that the rent must be due and unpaid at the time of the distress action. Accordingly, a landlord may not distrain until the day after the rent becomes due. *Gentry v. Recreation, Inc.*[220] established the rule that rent cannot be "deemed in arrears merely by virtue of a clause in the lease attempting to accelerate the future and unearned rent," upon the tenant's abandoning the premises.[221] Thus, a landlord may not distrain for rent not yet earned or accrued even though the lease contains an acceleration clause.

Finally, distraint may be for rent only, precluding recovery of other payments or promises owed to the landlord.[222] An 1851 South Carolina case, *Fraser v. Davie*,[223] commented on the form of rent payments for purposes of distraint. In *Fraser*, rent was payable in a crop—cotton—and the court held that distraint was proper, since "anything susceptible of valuation is the subject of distress . . . ."[224]

2. *South Carolina Statutory Procedure*

Distress for rent is strictly regulated by statute in South Carolina.[225] There are four basic statutory steps: (1) commencement of the distraint action and service of process;[226] (2) holding a predistress hearing and issuing a distress warrant;[227] (3) enforcing the distress warrant;[228] and (4) the tenant's bond and

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219. *Id.*

220. 192 S.C. 429, 17 S.E.2d 63 (1939).

221. *Id.* at 438, 17 S.E.2d at 67.

222. Apparently, no South Carolina case before *Davis* ever specifically stated this limitation. In *Davis*, the court cited the old *Ruling Case Law* series as authority for its position that distress is available for rent only. 158 S.C. at 407, 155 S.E. at 625. Other jurisdictions have indicated similar limitations: interest on rent due, attorney fees incurred by the landlord, and enforcement of any covenant or condition specified in the lease are inappropriate items for distraint. *See, e.g.*, 49 AM. JUR. 2D. *Landlord and Tenant* § 732 (1970); 32 C.J.S. *Landlord and Tenant* § 676 (1968).

223. 39 S.C.L. (5 Rich.) 59 (1851). *See also* Huff v. Latimer, 33 S.C. 255, 11 S.E. 758 (1890).

224. 39 S.C.L. (5 Rich.) at 61.

225. S.C. CODE ANN. § 27-39-210 to -360 (1976).

226. *Id.* at § 27-39-210 (1976).

227. *Id.* at § 27-39-220 (1976).

228. *Id.* at § 27-39-240 (1976).

the property sale.[229] To properly address the existing problems with distraint, a brief description of each of these steps is warranted.

The first step is the commencement of the distraint action and service of process. A landlord begins the distraint process by filing an affidavit with the magistrate in the district in which the leased premises are occupied. The affidavit should state the amount of rent due and the time and place for the predistress hearing. Court costs can also be included. Notice of this hearing together with the affidavit, is served on the tenant by the sheriff or constable.[230]

The second step in the procedure is the holding of the predistress hearing and issuance of a distress warrant.[231] The predistress hearing, which cannot be held until five days after service of process, is designed "to protect the tenant's use and possession of property from arbitrary encroachment and to prevent unfair or mistaken deprivation of property."[232] After the predistress hearing, the magistrate is empowered to issue a distress warrant only if he determines that the landlord's right to distress is valid and the tenant has no overriding right to continue in possession of the property subject to distraint.[233] If a distress warrant is issued, it must specify the amount of rent due.[234] The warrant is delivered like the notice and affidavit to an officer for enforcement.[235]

The third step in the procedure is enforcing the distress warrant.[236] Under the South Carolina Code, the officer to whom the warrant is delivered must immediately demand payment of the rent with costs from the tenant.[237] If the tenant pays the amount as requested, the officer is instructed by the statute to return the warrant with the sum collected to the magistrate, who then settles with the landlord. However, if the tenant fails or refuses to pay the requested amount, the officer "shall distrain"

229. *Id.* at §§ 27-39-310, -320 (1976).
230. *Id.* at § 27-39-210 (1976).
231. *Id.* at §§ 27-39-210, -220 (1976).
232. *Id.* at § 27-39-220 (1976).
233. *Id.*
234. *Id.*
235. *Id.*, directing that the warrant be delivered as set forth in § 27-39-210.
236. *Id.* at § 27-39-240 (1976).
237. *Id.*

a reasonable quantity of the tenant's property which equals in value the amount of rent due plus costs.[238] When the officer seizes the tenant's property, he is required to supply the tenant with a written list of the distrained property and a copy of the distress warrant.[239]

The final step in the procedure is the posting of a bond by the tenant[240] or the sale of the distrained property by the officer.[241] Within five days after the distraint of the tenant's property, the tenant can reclaim the property by posting a bond payable to the landlord in double the amount set forth in the distress warrant. The tenant must also supply sufficient surety as approved by the court. In the event the tenant posts bond with an approved surety, a hearing is held in the magistrate's court.

If the tenant fails to give bond within the prescribed time period, the officer may sell the distrained property at a public auction to the highest cash bidder. Notice of the designated place and time of sale must be posted upon the premises and at two other public places in the county for five days prior to the sale.[242] The "landlord or any other person" may be a purchaser at this sale,[243] but all purchasers take the property subject to any tax liens existing against it.[244] The amount of rent due is paid to the landlord from the proceeds of this sale; the tenant is paid any surplus proceeds that may remain.[245]

C. Problems With Distraint

1. Request and Refusal

No remedy is effective if it cannot be enforced. According to a 1979 South Carolina Attorney General Opinion[246] and the 1980 South Carolina Benchbook for Magistrates, a distress warrant,

238. *Id.*
239. *Id.*
240. *Id.* at § 27-39-310 (1976).
241. *Id.* at § 27-39-320 (1976).
242. *Id.*
243. *Id.* at § 27-39-340 (1976).
244. *Id.* at § 27-39-330 (1976).
245. *Id.* at § 27-39-350 (1976).
246. 1979 Op. Att'y Gen. 13.

even after a proper predistress hearing, is enforceable only when a sheriff can gain peaceable entry onto the leased premises. The Benchbook states that when an officer attempts to enforce a distress warrant but is refused entry by the tenant, he must retreat and return the warrant not served.[247] The Attorney General Opinion provides that "[a] sheriff or his deputy does not have the authority to break and enter a house, after request and refusal, to distrain sufficient property upon the rented premises to pay rent and costs under the authority of a distress warrant."[248] Thus, a tenant apparently can bar the remedy of distraint by refusing an officer's request for entry. The Benchbook cites only the Attorney General Opinion for authority; that Opinion, in turn, rests its conclusion almost exclusively on two South Carolina cases, *State v. Christensen*[249] and *Jones v. Parker*.[250]

State v. Christensen, a 1940 case, is the more recent decision. The case contains language that the levying of a distress warrant must be accomplished without "break[ing] the house."[251] That language, however, is mere dictum. The person charged with the taking of the tenant's property in this case was not a sheriff, but a private individual who had not obtained a distress warrant from a magistrate authorizing the seizure. Thus, while *Christensen* may have been rightly decided, it cannot support the rule that a *sheriff* with a proper *distress warrant*, cannot use force in levying on tenant's property.

Jones v. Parker is more on point. There, a sheriff with a distress warrant was levying on a tenant's property. The court approved a jury charge which stated that "one having a distress warrant properly issued, for past due debt for rent, must get peaceable possession of the property."[252] Although this charge supports the Attorney General's Opinion, the facts in *Jones* raise some doubts.

The sheriff in *Jones* was charged with committing an assault and battery on the tenant's wife while in the process of distraining the tenant's property, thereby causing her to mis-

247. SOUTH CAROLINA BENCHBOOK FOR MAGISTRATES, II-95 (1980).
248. 1979 Op. Att'y Gen. 13.
249. 194 S.C. 131, 9 S.E.2d 555 (1940).
250. 81 S.C. 214, 62 S.E. 261 (1908).
251. 194 S.C. at 139, 9 S.E.2d at 559.
252. 81 S.C. at 220, 61 S.E. at 266.

carry. The court makes it unmistakably clear that the "action is not for damages arising out of the levy, but for assault and battery.[253] Thus, while *Jones* can be read to support a rule that distress in a high-handed manner with excessive force is illegal and wrongful, a reading totally prohibiting any force whatsoever in enforcing a distress warrant is less certain. Assuming, however, that all force is barred for purposes of enforcing the distress warrant on the ground that the sheriff would thereby be guilty of "invasion of the rights of the tenant unwarranted in law,"[254] it does not necessarily follow that the landlord is left remediless or that the tenant is free to follow the Attorney General Opinion without potential difficulty.

While the Benchbook and Attorney General Opinion unequivocally provide that a warrant of distress does not carry sufficient authority to permit forcible entry, a tenant who chooses to refuse an officer's request may be committing a criminal offense under the South Carolina Code.[255] In this truly difficult situation, a tenant has only the choice of being distrained against or exercising rights found in the Attorney General Opinion, the Benchbook, and *Jones v. Parker* at the risk of being fined and/or imprisoned under the obstruction of justice statute.

Moreover, a landlord may have a remedy even when an officer is refused peaceful entry—claim and delivery. Apparently, although force cannot be used in distraint, it can be used in claim and delivery.[256] Under that statute, an officer is authorized to enter any dwelling after request and refusal to seize the tenant's property,[257] provided the officer has process requiring the seizure of such property.[258] Furthermore, it appears that it is proper for a landlord to initiate a claim and delivery action at the same time a distraint affidavit is submitted to a magistrate.[259] Providing claim and delivery as an alternative to dis-

253. *Id.*

254. *Christensen*, 194 S.C. at 139, 9 S.E.2d at 559.

255. *See* S.C. CODE ANN. § 16-9-320(a)(Cum. Supp. 1982), which makes it a misdemeanor to oppose or resist any law enforcement officer who is serving, executing, or attempting to serve or execute any legal writ or process. A warrant of distraint arguably would be such a writ.

256. *See id.* at §§ 22-3-1310 to -1480 (1976) for claim and delivery.

257. *Id.* at § 22-3-1420 (1976).

258. *Id.* at § 22-3-1410 (1976).

259. *See* SOUTH CAROLINA BENCHBOOK FOR MAGISTRATES, II-95 (1980).

traint undercuts whatever policy reasons exist for not permitting some force to be used with distraint. Certainly, it is inconsistent with the court's decision in *Jones* to alleviate the potentially tense landlord-tenant problem of paying past due rent.[260]

2. *The Tenant's Double Bond*

If property is distrained, the tenant is entitled to have the property returned by giving a bond payable to the landlord "in double the amount claimed."[261] This raises a constitutional question of whether the double bond requirement violates the equal protection clause in light of the United States Supreme Court decision in *Lindsey v. Normet*.[262]

In *Lindsey*, a group of Oregon citizens filed a class action suit seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer Statute[263] was unconstitutional on its face.[264] The statute in question required tenants found guilty of failing or refusing to pay rent within the specified time[265] to pay twice the rental value of the premises to secure a stay of execution pending appeal.[266] The court found that the double bond provision violated the equal protection clause,[267] and that it "heavily burden[ed] the statutory right . . . of [the] defendants to appeal" since the bond was "unrelated to the actual rent accrued or to specific damages sustained by the landlord."[268] Because the double bond in effect "doubled the stakes" of appealing and did not serve the goal of weeding out frivolous appeals, the Court concluded obvious discrimination existed against poor lessees who could pay rent pending appeal but

260. *See* 81 S.C. 214, 62 S.E. 261 (1908).

261. S.C. CODE ANN. § 27-39-310 (1976).

262. 405 U.S. 56 (1972).

263. OR. REV. STAT. §§ 105.105-.160 (1953). *See* 405 U.S. at 59 for the relevant provisions of this statute.

264. 405 U.S. at 58-60.

265. OR. REV. STAT. § 105.115(1)(1953). The failure or refusal to pay rent is the first of the causes of "unlawful holding by force." The second cause is remaining in possession after notice to quit, holding contrary to any clause in the lease, or holding in possession without any written lease or agreement. OR. REV. STAT. § 105.115(2)(1953). *See* 405 U.S. at 59.

266. OR. REV. STAT. § 105.160 (1953)(Repealed 1977).

267. 405 U.S. at 79.

268. *Id.* at 77.

could not afford to post a double bond.

Thus, a clear United States Supreme Court mandate exists against double bond provisions. If the South Carolina double bond distraint provision is challenged, it may be found unconstitutional after *Lindsey v. Normet.*

Whether the landlords' remedy of distraint should continue is ultimately a question for the legislature to answer. The double bond provision, the lack of an enforcement mechanism in the face of request and refusal of entry, and conflicts with the current obstruction of justice statute need clarification. If distraint is deemed desirable by the legislature, these problems will need to be resolved, for as the statutes now stand, distraint creates more problems than it alleviates.

V. CONCLUSION

To answer the question posed at the beginning of this Article, it *is* time to reform landlord-tenant law in South Carolina. Doctrines such as the independent covenant rule and *interesse termini* have outlived their usefulness and should be replaced by laws which more adequately address contemporary concerns. Confusion as to when a landlord-tenant relationship exists for ejectment purposes, or when a landlord has been reasonably diligent in mitigating his damages, or whether an officer bearing a distraint warrant can enter a tenant's home should be clarified.

Because the scope of this Article has been limited to an examination of landlord remedies, proposals for reform from this author must necessarily be limited in scope as well. Accordingly, the following suggestions are offered:

In ejectment, a more practicable definition of the landlord-tenant relationship is needed, perhaps one using the transfer of possession and control of the premises as a criterion.[269] Furthermore, tenants should be allowed certain equitable defenses in ejectment proceedings.[270] Finally, an amendment to the ejectment statute providing for service by mail when personal service fails would be more effective and more cost efficient than the current posting statute.[271]

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269. *See supra* notes 61-67 and accompanying text.
270. *See supra* notes 68-96 and accompanying text.
271. *See supra* notes 97-114 and accompanying text.

In the landlords' action for rent, the use of mitigation clauses in leases would alleviate the courts' dilemma of trying to determine when a landlord's efforts at mitigation have been reasonable.[272] Second, although the South Carolina Supreme Court purported to use the *interesse termini* doctrine in *Simon v. Kirkpatrick* decision, the rule it applied was different, allowing alternative remedies to the landlord.[273] The court should follow its own lead and abolish the doctrine of *interesse termini.*

Finally, in distraint, if the remedy is to continue, the legislature should consider making the distraint statutes more enforceable in the face of the request and refusal problem.[274] The legislature should also reexamine the tenant's double bond provision in light of the United States Supreme Court's decision in *Lindsey v. Normet.*[275]

These suggestions are by no means exhaustive. They do present a beginning, however. If used, they can serve as a starting point from which the legislature and the courts can bring South Carolina landlord-tenant law more in line with that of sister states, and abolish the outmoded, archaic doctrines which are better left to history books.

272. *See supra* notes 122-153 and accompanying text.
273. *See supra* notes 174-184 and accompanying text.
274. *See supra* notes 246-260 and accompanying text.
275. *See supra* notes 261-268 and accompanying text.