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THIRD-PARTY LESSORS AND BAILORS BEWARE: SOUTH CAROLINA DISTRAINT STATUTE THREATENS DUE PROCESS

I. INTRODUCTION

In *Tolemac, Inc. v. United Trading, Inc.*[1] the South Carolina Supreme Court held that third-party property is subject to landlord distraint and implicitly confirmed that section 27-39-250 of the South Carolina Code does not violate substantive due process.[2] Distraint is "[t]he inchoate right and interest which a landlord has in the property of a tenant located on the demised premises."[3] A distraint proceeding begins when a landlord files an affidavit with the magistrate in the district where the leased premises are located.[4] The affidavit should state the alleged amount of rent due and the time and place of the predistress hearing.[5] A predistress hearing is held to determine the validity of the landlord's distraint claim and to assess the tenant's right to maintain possession of the property.[6] If the landlord's claim is valid and the tenant fails to pay rent or post bond, the property is sold at public auction.[7]

Section 27-39-250 directly addresses the presence of third-party property on leased premises and provides that "[e]ven though property of the tenant must be first applied to payment of the rent and costs, *all property upon the rented premises is subject to distress.*"[8] This language clearly allows distraint of third-party property

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1. 326 S.C. 103, 484 S.E.2d 593 (1997).
2. *Id.* at 106, 484 S.E.2d at 595.
3. BLACK'S LAW DICTIONARY 474 (6th ed. 1990).
4. *See* S.C. CODE ANN. § 27-39-210 (Law. Co-op. 1991).
5. *Id.*
6. S.C. CODE ANN. § 27-39-220 (Law. Co-op. 1991) ("The purpose of the predistress hearing is to protect the tenant's use and possession of property from arbitrary encroachment and to prevent unfair or mistaken deprivation of property.").
7. S.C. CODE ANN. §§ 27-39-310 to -320 (Law. Co-op. 1991).
8. S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991) (emphasis added). The section reads as follows:

> If any property so distrained is not the property of the tenant, the tenant shall immediately name the owner thereof and inform the officer of the ownership and the officer shall distrain sufficient other property of the tenant to pay the rent and costs. Even though property of the tenant must be first applied to payment of the rent and costs, all property upon the rented premises is subject to distress as herein provided, except property mentioned in § 27-39-230. If at any time prior to sale as provided in § 27-39-320, the landlord is given or receives written notice

when a delinquent tenant's property does not cover outstanding rent and costs. Section 27-39-250 also provides procedural protection for third parties by requiring notice and an opportunity to be heard prior to the sale of distrained property.[9] However, the protection conferred by the statute is limited and arguably violates the due process rights of affected third parties.

This Note discusses the impact of *Tolemac* on the due process rights of third-party distrainees. Part II of this Note charts the evolution of South Carolina's distraint statute and discusses the *Tolemac* decision. Part III begins a critical analysis of the opposing viewpoints on distraint of third-party property and calls for a legislative response. Part IV concludes the analysis and suggests other practical alternatives to the South Carolina distraint statute.

II. BACKGROUND

A. The Evolution of Distraint

The ancient remedy of distress originated in feudal England when barons began discharging military service due from their vassals in exchange for rent on their land.[10] The penalty for non-payment of rent was forfeiture of the vassal's tenement; however, the lord would often seize or distrain the tenant's chattels instead.[11] The lord could hold the goods until he received payment.[12] Because the lord's right to distrain was absolute, no consent from the tenant was needed.[13]

Today, the right to distrain property is generally conveyed by statute[14] and "exists irrespective of whether distress is reserved in the lease contract."[15] In South Carolina, distraint first appeared in 1712 with the adoption of a 1670 English statute that allowed landlords to sell property seized from a tenant to the highest bidder and use the proceeds to satisfy the rent due.[16] The General Assembly expressly abolished the right of distraint in 1868,[17] but resurrected it ten years later stating that "no property shall be seized under a distress warrant for rent except such as belongs to the tenant in his own right."[18] The distraint statute remained largely the same until

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> containing facts substantiating ownership that some of the distrained property is owned by a third party, the third party must receive notice, as provided in § 27-39-210, and an opportunity to be heard, as provided in § 27-39-220, before the distrained property of the third party is subject to sale pursuant to § 27-39-320.

Id.

9. *Id.*
10. JOHN EMERSON BENNETT, LAW OF LANDLORD AND TENANT § 157, at 238 n.a (1939).
11. *Id.*
12. *Id.*
13. *Id.* at 238.
14. *Id.* at 239.
15. *Id.*
16. Act of Dec. 12, 1712, No. 322, 2 S.C. Stat. 401, 530 (adopting a series of English statutes).
17. Act of Sept. 24, 1868, No. 52, § 20, 14 S.C. Stat. 102, 106.
18. Act of Mar. 18, 1878, No. 474, 16 S.C. Stat. 511, 511.

1946 when the property "in his own right" language was deleted and replaced with "all property upon the rented premises shall be subject to distress."[19]

In 1976 the General Assembly enacted section 27-39-250,[20] which was virtually identical to its predecessor, section 41-154.[21] In 1984 U.S. District Judge Clyde Hamilton found that section 27-39-250 violated procedural due process.[22] In response, the General Assembly amended the section to include notice and hearing provisions for third parties.[23] The South Carolina distraint statute has not changed since that amendment.

B. Tolemac, Inc. v. United Trading, Inc.

In *Tolemac* a landlord commenced an action for collection of past due rent by distraint.[24] Tolemac, Inc., as the landlord, subleased a warehouse in York County, South Carolina, to United Trading, Inc.[25] The tenant defaulted on its rental payments.[26] The presiding judge for the Sixteenth Circuit issued a Notice of Predistress Hearing instructing all interested parties[27] to appear before the Master-in-Equity for York County for a hearing on September 15, 1993, to "[show] why [their] property on the premises should not be seized in order to satisfy the debt owed to plaintiff for rent."[28] TRP Cotton, Inc. filed a motion for release of its personal property alleging ownership of certain property under distraint by the landlord.[29]

TRP and other interested parties appeared at the predistress hearing to defend their property rights.[30] Tolemac's motion to distrain and TRP's motion for release of personal property were argued, and the Master listened to the testimony of several witnesses.[31] TRP argued that "(1) a landlord has no right to distrain property" owned by third parties and (2) a statute that permits distraint of third-party property violates substantive due process.[32] TRP established itself as the owner of

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19. Act of Apr. 3, 1946, No. 873, 1946 S.C. Acts 2584, 2589 (codified at S.C. CODE ANN. § 41-154 (Michie 1952) (superseded by S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991)).

20. S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991).

21. S.C. CODE ANN. § 41-154 (Michie 1962) (superseded by S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991).

22. Pettigrew v. Womble, 589 F. Supp. 242, 250 (D.S.C. 1984).

23. Act of May 13, 1985, No. 85, 1985 S.C. Acts 194, 195 (codified at S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991)).

24. Tolemac, Inc. v. United Trading, Inc., 326 S.C. 103, 104, 484 S.E.2d 593, 594 (1997).

25. *Id.*

26. *Id.*

27. Interested parties included the sublessees and all other parties that may have had an ownership or security interest in the subject property. Record on Appeal at 9.

28. *Id.*

29. *Id.* at 30-31.

30. *Id.* at 3.

31. *Id.* at 4.

32. Tolemac, Inc. v. United Trading, Inc., 326 S.C. 103, 105, 484 S.E.2d 593, 594 (1997).

record of a cotton bale press located on the premises that TRP had leased to Cotton Traders International, Inc.[33] Accordingly, the Master issued an Order which held that "title to [the bale press] is vested in TPR [sic] Cotton, Inc.,"[34] and that "TPR [sic] Cotton, Inc. . . . [is] entitled to immediate possession of [its] property."[35]

The Master based his ruling on the 1966 case of *Frady v. Smith*.[36] According to *Frady*, the landlord's right "to distrain is subject to the following conditions: (1) distress must be for rent only; (2) when the relation of landlord and tenant exists; (3) when the rent reserved is certain; (4) when the rent is in arrears; and (5) *when the property belongs to the tenant in his own right.*"[37] Clearly, Tolemac did not satisfy the final condition as neither sublessee owned the property "in his own right." While the Master empathized with Tolemac's argument that *Frady* was decided prior to the present statute, he noted that "the language in Section 27-39-250 is almost identical to the previous Statutes which were in effect at the time of the *Frady* decision."[38] Basing his decision solely on statutory construction and *Frady*, the Master never reached the constitutional questions raised by TRP.[39] In response to the Master's ruling, Tolemac filed a motion to reconsider.[40] The court denied the motion,[41] and Tolemac appealed.[42] Subsequently, the tenant filed a Chapter 7 petition in the United States Bankruptcy Court for the District of South Carolina.[43] The bankruptcy court invoked an automatic stay pursuant to § 362(a) of the Bankruptcy Code on any proceedings concerning the tenant until February 1, 1996.[44]

The South Carolina Supreme Court, in an opinion written by Justice Moore, held that section 27-39-250 enables a landlord to distrain third-party property.[45] The court emphasized that "[t]he master based his construction of § 27-39-250 on dicta from *Frady v. Smith* . . . , which states that distraint is proper only 'when the property belongs to the tenant in his own right.'"[46] In distinguishing *Frady*, the court noted that *Frady* involved "earlier case law interpreting a statutory scheme" that limited a landlord's right of distraint to property belonging to the tenant in his own right.[47] Although the court did not explicitly state that section 27-39-250

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33. Record on Appeal at 64-65.
34. *Id.* at 4.
35. *Id.* at 6.
36. 247 S.C. 353, 147 S.E.2d 412 (1966).
37. *Id.* at 357, 147 S.E.2d at 414 (emphasis added).
38. Record on Appeal at 6.
39. *Id.* at 3-6.
40. *Id.* at 36-38.
41. *Id.* at 7.
42. Tolemac, Inc. v. United Trading, Inc., 326 S.C. 103, 105, 484 S.E.2d 593, 594 (1997).
43. Final Brief of Appellant at 3.
44. Final Brief of Respondent at 3-4.
45. *Tolemac*, 326 S.C. at 106, 484 S.E.2d at 595.
46. *Id.* (citation omitted) (quoting Frady v. Smith, 247 S.C. 353, 357, 147 S.E.2d 412, 414 (1966)).
47. *Id.* (footnote omitted).

passed constitutional muster, Justice Moore asserted that "the statute currently provides that notice and an opportunity to be heard is required 'before the distrained property of the third party is subject to sale.'"[48] Thus, the court implicitly affirmed that the amended statute did not violate procedural due process.[49] Although the court may have implicitly addressed the procedural due process issue, it did not address the argument that the statute violates the substantive due process rights of third parties.

III. ANALYSIS

A citizen's right to due process from the states derives from the Fourteenth Amendment, which in relevant part provides that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or *property*, without due process of law."[50] The right to due process has two components: procedural due process and substantive due process. Procedural due process protects a person's right to notice and a right to be heard when an adjudication affecting a person's right to life, liberty, or property is initiated.[51] Substantive due process requires state action to be fair and reasonable in content and application and not merely arbitrary or capricious.[52] In *Pelle v. Diners Club*[53] a Florida appellate court asserted that "[i]t is fundamental that the constitutional guarantee of due process, which extends into every proceeding, requires that the opportunity to be heard be full and fair, not merely colorable or illusive."[54]

The *Frady* language relied upon by the Master-in-Equity was taken from *Burnett v. Boukedes*, 240 S.C. 144, 125 S.E.2d 10 (1962), which in turn relied upon *Fidelity Trust & Mortgage Co. v. Davis*, 158 S.C. 400, 155 S.E. 622 (1930). *Davis* involved section 5285 of the 1922 South Carolina Code, which expressly prohibited distraint of third-party property. *Davis*, 158 S.C. at 407, 155 S.E. at 625. In essence, the *Frady* court merely reproduced parts of prior opinions without taking into account the 1946 amendments allowing third-party distraint.

48. *Tolemac*, 326 S.C. at 106, 484 S.E.2d at 595 (quoting S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991)).

49. Prior to the 1985 amendment to section 27-39-250 of the South Carolina Code, the United States District Court for the District of South Carolina found that section 27-39-250 violated the procedural due process rights of third parties because it did not provide adequate notice or hearing provisions. Pettigrew v. Womble, 589 F. Supp. 242, 250 (D.S.C. 1984); *see also infra* notes 59-64 and accompanying text. Because the South Carolina Supreme Court did not specifically find the amendment unconstitutional, the court implicitly approved the notice and hearing provisions.

50. U.S. CONST. amend. XIV, § 1 (emphasis added).

51. Fuentes v. Shevin, 407 U.S. 67 (1972). In *Fuentes* purchasers of household goods challenged the constitutionality of Florida and Pennsylvania replevin statutes allowing seizure of property without a prior hearing. *Id.* at 71. The Court held the prehearing seizure unconstitutional. *Id.* at 96.

52. *See* Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 3-4 (7th Cir. 1974) ("'[S]ubstantive due process' means . . . that state action which deprives [a person] of life, liberty, or property must have a rational basis—that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.'").

53. 287 So. 2d 737 (Fla. Dist. Ct. App. 1974).

54. *Id.* at 738.

A. The Parties' Arguments

The South Carolina Supreme Court's holding in *Tolemac* essentially renders the predistress hearing illusory and meaningless. Although, TRP was given an opportunity to be heard, it never had an opportunity to change the outcome of the proceeding. TRP's appearance at the predistress hearing was nominal because it could do nothing to stop the sale of its property. Under the court's interpretation of section 27-39-250, a hearing is required by law, but innocent third parties have no meaningful remedies at that hearing.

Tolemac argued in its Final Reply Brief that third parties can "raise any defenses which the tenant might have against the landlord for the unpaid rent" and that third-party creditors with a perfected security interest can establish priority.[55] While this may protect secured creditors, the rights afforded tenants do not grant innocent third parties any protection. Tenants may only argue either that no rent is due or that the amount is overstated. During the proceedings before the Master, counsel for Tolemac was asked whether a third party's appearance at the hearing could have any bearing on the disposition of its property.[56] The Master was troubled by the illusory nature of the hearing and concluded that, under Tolemac's interpretation of the statute, a third party's property would be distrained and sold regardless of whether or not the party appeared at the predistress hearing.[57]

While Tolemac argued on appeal that one of the purposes of the hearing is "to determine whether there is a mortgage debt or security interest which must be satisfied before the distrained property is subject to sale,"[58] this argument does not account for the innocent bailor or lessor who merely fails to perfect a security interest. For example, in *Pettigrew v. Womble*[59] the United States District Court for the District of South Carolina found that section 27-39-250 of the South Carolina Code, as then written, was unconstitutional because "it denie[d] a third party who own[ed] property found on the tenant's premises any notice or opportunity to be heard whatsoever, either prior [to] or subsequent [to] the actual seizure."[60] In *Pettigrew* a landlord attempted to sell a stereo that had been seized pursuant to a distress warrant.[61] The stereo had been loaned to the tenant by his sister.[62] The sister came forward with proof of ownership, but the court denied return of her property.[63] The court asserted that the statute did not "provide at *any time* a right for a third party to be heard as to its ownership rights."[64] The third party in *Pettigrew* was an

55. Final Reply Brief of Appellant at 14.
56. Record on Appeal at 84-85.
57. *Id.* at 84.
58. Final Reply Brief of Appellant at 14.
59. 589 F. Supp. 242 (D.S.C. 1984).
60. *Id.* at 250.
61. *Id.* at 245-46.
62. *Id.* at 245.
63. *Id.* at 245-46.
64. *Id.* at 249.

innocent third-party bailor who did not file a security interest. Even under the current distraint statute that provides third parties with notice and an opportunity to be heard, the tenant's sister in *Pettigrew* would still have lost her property under the supreme court's holding in *Tolemac* because of the illusory nature of the hearing.

Although several courts have declared distraint statutes unconstitutional because they authorize seizure of property without a hearing,[65] the *Pettigrew* court noted that "its research revealed no decisions holding third party distraint violative of substantive due process."[66] Several reasons may explain this lack of case law. First, the issue is novel and no third party may have challenged the substantive nature of a predistress hearing. Second, as in *Pettigrew* and *Tolemac*, courts may have never reached the substantive arguments because the courts decided the cases on other grounds. Finally, predistress hearings in other jurisdictions may allow third parties to recover their property upon conclusive proof of ownership.[67] Although the *Pettigrew* court could not find a case holding third-party distraint unconstitutional, neither Tolemac nor the supreme court cited any case which specifically held that a predistress hearing depriving a third party of its property was constitutional.[68] The South Carolina Supreme Court had the occasion to render final judgment on the merits, but instead decided the issue on narrower grounds.[69]

Tolemac argued on appeal that a 1985 amendment[70] to section 27-39-250 answered all questions raised by *Pettigrew*, as the amendment addressed the specific problems of the statute. The *Pettigrew* court noted that "[h]aving held the statute unconstitutional on the ground of procedural due process, the court need not reach the equal protection or substantive due process arguments asserted by the plaintiff, [or] the claim made under Article I Section 13 of the South Carolina Constitution."[71] These same constitutional issues were raised by TRP at trial and on appeal, but were never addressed by the *Tolemac* court.[72] In 1985, the General Assembly addressed the procedural problems of distraint proceedings by amending section 27-39-250 to include notice and hearing provisions for third parties.[73] However, it is unclear whether the procedural safeguards enacted by the General

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65. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Van Ness Indus. v. Claremont Painting & Decorating Co., 324 A.2d 102 (N.J. Super. Ct. Ch. Div. 1974).

66. *Pettigrew*, 589 F. Supp. at 250 n.7.

67. For example, Florida allows a third party to sue to recover property distrained by a landlord. FLA. STAT. ANN. § 83.15 (West 1987).

68. *See supra* note 66 and accompanying text.

69. *See* Tolemac, Inc. v. United Trading, Inc., 326 S.C.103, 106, 484 S.E.2d 593, 595 (1997) (holding that the plain language of section 27-39-250 of the South Carolina Code allows distraint of third-party property).

70. Act of May 13, 1985, No. 85, 1985 S.C. Acts 194, 195 (codified at S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991)).

71. *Pettigrew*, 589 F. Supp. at 250 n.7.

72. *See* Final Brief of Respondent at 15-20.

73. Act of May 13, 1985, No. 85, 1985 S.C. Acts 194, 195 (codified at S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991)).

Assembly materially cure any defects in substantive due process.

If the provisions of section 27-39-250 do not allow third parties a reasonable, meaningful opportunity to voice their claims, then the statute violates substantive due process by refusing rightful owners an opportunity to claim their property. As Judge David Norton of the U.S. District Court in the District of South Carolina has noted:

> Substantive due process demands that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have some relation to the object sought to be attained. In other words, a deprivation of life, liberty, or property is constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation reasonably applied.[74]

The purpose of the South Carolina distraint statute is to aid a landlord in the collection of past-due rent.[75] Accordingly, a distraint statute that allows the seizure of a tenant's property for unpaid rent is rationally related to that purpose and is, therefore, constitutional. In amending section 27-39-250, the South Carolina General Assembly apparently sought to remedy the due process problems raised by *Pettigrew*.[76] However, the distraint statute may still violate substantive due process if the right to a predistress hearing is illusory.

As counsel for TRP argued in its brief on appeal, "[A] statute which permits a landlord to seize third-party property in satisfaction of a tenant's unpaid rent bears no rational relationship to the statute's intended purpose, and is overly broad in its application."[77] Taking property definitively determined to be owned by a third party does not comport with the purpose of collecting past-due rent because the third party and the landlord have no contractual relationship. The statute is overinclusive in its application because it extends the rights of the landlord beyond the bounds of privity.

B. The Allocation of Burdens

The taking of a third-party's property amounts to a windfall for the landlord and an unreasonable burden for the true owner. Landlords may argue that they are not receiving a windfall because they are only receiving money owed to them. However, this argument fails to take into account the allocation of risk at the time of the rental agreement. The rental agreement was between the landlord and the tenant, not between the landlord and innocent third parties. The third party has no

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74. McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 547-548 (D.S.C. 1994) (citation omitted).

75. Burnett v. Boukedes, 240 S.C. 144, 153, 125 S.E.2d 10, 14-15 (1962).

76. *See supra* notes 22-23 and accompanying text.

77. Final Brief of Respondent at 19-20.

way to assure payment of rent by the tenant and cannot protect its property from a landlord's taking. A landlord should not be able to profit from the mere fortitude of finding a third party's property on the premises.

The *Tolemac* decision imposes a duty on third-party lessors and bailors to monitor tenants. The burden of monitoring placed upon innocent third parties surpasses the burden on landlords to relinquish property upon proof of ownership. For example, to ensure its property is protected, a third-party bailor must continually observe the rental status of a tenant. In contrast, the landlord would simply have to turn over property mistakenly seized in distraint. Although the original motivation for allowing distraint of *all* goods found on the premises was to prevent "fraud which might be perpetrated by the tenant,"[78] proof of ownership alleviates this problem. While landlords should be free from the burden of proving that the distrained goods found on the premises belong to the tenant, they should be required to return property that is conclusively proven to be that of a third party.

Landlords may argue that third-party bailors should secure a remedy from the lessee who negligently subjected their property to distraint. However, a lessee unable to pay rent will also be unable to reimburse the third party for the distrained property. In addition, an innocent third-party bailor must expend time and money to retrieve its own property. Alternatively, the landlord would incur very little extra expense, if at all, in determining ownership of the property because the statute already mandates a predistress hearing. As a result, the most efficient and just remedy is for landlords to return any property that rightfully belongs to innocent third-party bailors.

C. Distraint Statutes

States are divided on the issue of distraint. Currently, at least twenty-six states do not have provisions for distress or have expressly abolished distress for certain kinds of leases.[79] Seven of these states have abolished distress for rent completely,[80] and five have abolished distress for residential tenancies.[81] While this trend does not address the issue of third-party distraint, it indicates that many states disfavor distraint as a remedy for landlords. Additionally, both the Uniform Residential

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78. 49 AM. JUR. 2D *Landlord and Tenant* § 984 (1995).

79. *See, e.g.*, ALASKA STAT. § 34.03.250 (Michie 1996) (expressly abolishing distraint); DEL. CODE ANN. tit. 25, § 6301 (1989) (abolishing distraint in residential leases).

80. ALASKA STAT. § 34.03.250 (Michie 1996); ARIZ. REV. STAT. ANN. § 33-1372(B) (West 1990); CONN. GEN STAT. ANN. § 47a-4(a)(6) (West 1958); IOWA CODE ANN. § 562A.31(2) (West 1992); KAN. STAT. ANN. § 58-2567(b) (1994); MINN. STAT. ANN. § 504.01 (West 1990); WIS. STAT. ANN. § 704.11 (West 1981). For a complete list of states abolishing distraint, see RESTATEMENT (SECOND) OF PROPERTY § 12.1, stat. note 5 (1977).

81. DEL. CODE ANN. tit. 25, § 6301(a) (1989); FLA. STAT. ANN. § 713.691(3) (West 1988); NEB. REV. STAT. § 76-1434(2) (1996), OR. REV. STAT. § 98.420 (1990); WASH. REV. CODE ANN. § 59.18.230(4) (West 1990).

Landlord and Tenant Act[82] and the tentative draft of the Model Residential Landlord-Tenant Code[83] also expressly abolish distraint.[84] Critics insist that distraint endures 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 present."[85] Nevertheless, this feudal relic still exists in South Carolina.

D. A Legislative Proposal

The South Carolina General Assembly should amend the current law to include an innocent, third-party owner exception to protect the substantive due process rights of third parties. While this provision may be a novel solution to the third-party distraint debate, it furnishes a middle ground between the two extremes of abolishing distraint and allowing the wrongful taking of third-party property. The General Assembly can draw from previously enacted laws protecting innocent owners of property seized in drug forfeitures.[86] In such situations, courts have the discretion to return seized property if the owner proves by a preponderance of the evidence that the owner did not consent to, or have knowledge of, the property being used for illegal purposes.[87] In *Ducworth v. Neely*[88] the South Carolina Court of Appeals held that a standard of actual knowledge must be used to determine whether an owner knew or consented to the illegal activity.[89] The General Assembly could apply similar reasoning to property seized in distraint by requiring the third-party owner to conclusively prove ownership by a preponderance of the evidence. Ownership could be established by providing the court with a receipt, bill of sale, or lease agreement. Although a conclusive ownership standard would not protect all innocent bailors, it would allow some recourse for rightful owners without abridging the rights of landlords.

Landlords may argue that an innocent owner provision would encourage fraud by tenants; however, the benefits of such a provision would outweigh any detrimental effect to the landlord. Even with the implementation of an innocent

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82. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.205(b), 7B U.L.A. 497 (1985).

83. *See* MODEL RESIDENTIAL LANDLORD-TENANT CODE § 3-403 (Tentative Draft 1969).

84. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 6.55, at 368-69 (1984).

85. Annotation, *Goods Owned by Stranger or Subject to an Encumbrance in His Favor as Subject to Distraint for Rent*, 62 A.L.R. 1106, 1107 (1929).

86. *See* S.C. CODE ANN. § 44-53-586(a) (Law. Co-op. Supp. 1997). This statute allows an innocent owner to "apply to the court . . . for the return of any item seized under the [forfeiture] provisions." *Id.*

87. *Id.* § 44-53-586(b)(1).

88. 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995).

89. *Id.* at 165, 459 S.E.2d at 900. The trial court in *Ducworth* found that the owners of a store who had unknowingly leased the store to drug dealers were not innocent owners because they should have known of the drug activity near the store. *Id.* at 159, 459 S.E.2d at 897. The appellate court remanded with instructions to apply the actual knowledge standard. *Id.* at 165, 459 S.E.2d at 900.

owner provision, the landlord would still receive a windfall from third-party property owners that cannot conclusively prove ownership. The rights of innocent bailors and lessors should be no less protected than the rights of persons that rent or loan property to drug dealers. The South Carolina General Assembly has a duty to protect the Fourteenth Amendment right of substantive due process by amending the distraint statute to include an innocent owner provision.

IV. CONCLUSION

The South Carolina Supreme Court's decision in *Tolemac* infringes upon the substantive due process rights of third-party bailors because the procedural safeguards endorsed by the court are illusory and fictional. The predistress hearing granted by section 27-39-250 of the South Carolina Code does not adequately protect the substantive rights of third parties because it does not furnish them with a meaningful prospect of affecting the outcome of the proceeding. The statute is "unreasonable, arbitrary, capricious,"[90] overly broad in its scope, and not rationally related to its intended purpose. Furthermore, the decision results in a windfall to the landlord and imposes a burden upon third-party property owners to monitor the lessee's rental status.

At the very least, South Carolina should protect the rights of innocent third-party distrainees through an innocent owner provision. This would allow the courts equitable discretion to mitigate the harsh effect on third parties by returning goods to those that can conclusively prove ownership. Alternatively, South Carolina could join the ranks of those states that completely ban distraint as a remedy or ban it in the context of residential landlord-tenant relationships. Whatever the remedy for its harsh results, South Carolina should seek a solution to the current distraint statute to cure its procedural defects.

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90. McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 547 (D.S.C. 1994).