

The Law Commission

(LAW COM. No. 194)

LANDLORD AND TENANT

DISTRESS FOR RENT

*Laid before Parliament by the Lord High Chancellor pursuant to section 3(2)
of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
4 February 1991*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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DISTRESS FOR RENT

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THE LAW COMMISSION

Item 3 of the Fourth Programme: The Law of Landlord and Tenant

DISTRESS FOR RENT

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1 Distress for rent is one of the means by which a landlord can recover rent arrears. It is an ancient remedy¹ which generally gives the landlord a right as soon as rent is overdue to enter the tenanted property and to seize and hold goods found there, irrespective of who owns them, until the rent is paid. Since 1689² the landlord has also been entitled to sell the goods to recoup the rent due. Distress is almost always available to the landlord of premises when rent is in arrears as it is an automatic right arising from the obligation to pay rent.

1.2 Any short description of distress for rent is bound to be deceptively simple because the landlord who chooses to use the remedy has to comply with a complex and sometimes anachronistic set of rules³ developed over the centuries in a haphazard fashion to meet contemporary demands. Its use is on the whole not subject to prior judicial control.⁴

Background

1.3 The Commission first considered distress for rent in 1966⁵ under Item VIII of its First Programme. It found that at that time the use of distress for rent was extremely limited and that this supported a case for the immediate abolition of distress, but it took the view that the real demand was for a general review of the remedies for non-payment of rent and the provision of an effective machinery for debt collection. The Commission considered that pending such review distress should be retained, but that the county court's prior leave should be required before levy in the case of all residential lettings. That leave should entitle the landlord to distrain not only for arrears outstanding at the date of his application but also for further arrears⁶ accrued between that date and the date of the order. The recommendations have not been implemented.

1.4 Debt enforcement machinery was at that time under consideration by the Payne Committee, which subsequently made proposals,⁷ including the abolition of distress, as part of a package of proposals on debt enforcement.⁸ None of the relevant proposals was implemented and there has been no significant change in the law relating to distress for rent.⁹ After a lapse of some 15 years following the publication of the Payne Report, we decided to return to the subject.

1.5 In May 1986, we published a working paper¹⁰ expressing the provisional view

¹ "From whencesoever the name or . . . the notion came, the remedy obtained so early in our law, that we have no memorial of its original with us;": *Gilbert The Law and Practice of Distresses and Replevin* (3rd ed., 1794), p.2.

² Distress for Rent Act 1689, s.1.

³ See Part II below and Appendix D.

⁴ See Part II, para. 2.5 below and Appendix D, paras. 2.28-2.29.

⁵ Interim Report on Distress for Rent (1966), Law Com. No. 5.

⁶ *Ibid.*, para. 26.

⁷ Report of the Committee on the Enforcement of Judgment Debts (1969), Cmnd. 3909.

⁸ *Ibid.*, Summary of Main Conclusions, paras. 38-45, especially para. 41(1).

⁹ The Distress for Rent Rules 1988 (S.I. 1988, No. 2050) made under the Law of Distress Amendment Act 1888, s.8 and the Law of Distress Amendment Act 1895, s.3 made limited changes including the imposition of further restrictions on the issue of certificates to bailiffs and the introduction of a procedure for complaints about bailiffs' conduct. The Courts and Legal Services Act 1990, s.15(2) widens the range of goods which are absolutely privileged from distress: see Part III, n. 21 below.

¹⁰ Distress for Rent (1986), Working Paper No. 97.

that distress for rent should be abolished, while also seeking views as to how, in the alternative, it might be reformed. The five options put forward in the Paper¹¹ were:

- (a) the restatement of the existing law in a single, modern statute;
- (b) amendment and reform of the main areas of concern only;
- (c) fundamental reform of the remedy as a whole;
- (d) partial abolition (i.e. in relation to residential or agricultural tenancies, or in relation only to private sector lettings);
- (e) complete abolition.

Scope of this report

1.6 In this report we consider the case for and against abolition of distress for rent and conclude that it should be abolished. We also consider what alternative methods of dealing with the recovery of rent arrears would be available to the landlord in the event of abolition and whether any new legislation would be required to improve the existing alternatives or to create a new remedy. We suggest that implementation of our recommendation should await the improvements to the court system now being introduced to make fully effective the alternative remedies for recovery of rent.

1.7 The scope of this report is confined to the landlord's right to distrain for arrears of rent and other related payments.¹² It does not examine other forms of distress which are available outside the landlord and tenant relationship, such as the right to distrain for payment of the community charge, the non-domestic rate, income tax and corporation tax, value added tax and fines. They are expressly authorised by statute¹³ for specified purposes, in cases where public authorities are charged with enforcing particular payments.

1.8 Further, the report does not extend to studying other extra-judicial remedies. One of them which is in many ways akin to the power of the landlord to distrain is the power of a mortgagee under a floating charge¹⁴ to execute on goods of a company mortgagor.¹⁵ The charge gives the mortgagee the opportunity to seize the debtor's goods which are subject to his charge to satisfy the debt without prior judicial intervention. The mortgagee's powers extend to goods which happen to be subject to the charge when it crystallises; they may not have been acquired by the debtor or even in existence when the charge was created.

1.9 Extra-judicial seizure and sale of goods to enforce payment of a debt is therefore a feature which distress for rent and the enforcement of a floating charge have in common. However, although this aspect of distress has been criticised,¹⁶ floating charges make a valuable contribution to commercial dealings¹⁷ and we are not aware of

¹¹ See Part IV.

¹² In this, we include a rentcharge owner's power to distrain and other powers to distrain given by certain statutes: see Part IV, paras. 4.2–4.4 below.

¹³ Community charge: the Community Charges (Administration and Enforcement) Regulations 1989 (S.I. 1989 No. 438, r.39) made under Local Government Finance Act 1988, s.22, Sched. 4, para. 7; non-domestic rate: the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (S.I. 1989, No. 1058, r.14) made under Local Government Finance Act 1988, s.62, Sched. 9; fines: Magistrates Court Act 1980, s.76; income tax and corporation tax: Taxes Management Act 1970, s.61; and value added tax: the Value Added Tax (General) Regulations 1985 (S.I. 1985, No. 886, r.65), made under the Value Added Tax Act 1983, s.38, Sched. 7, para. 6(4). A court's authority is required except in distress for taxes. In their Report, the Keith Committee concluded that distress for taxes should not be abolished and recommended a few amendments to the statutory provisions: Report of the Committee on Enforcement Powers of the Revenue Departments (1983), Cmnd. 8822, paras. 24.2.29–24.2.32.

¹⁴ A floating charge has been defined as "a form of charge over one or more classes of assets of a company which gives the company freedom to deal with the assets during the ordinary course of its business until an event happens which causes the charge to "crystallise" and become a fixed charge preventing any further dealing": G. Lightman and G. Moss, *The Law of Receivers of Companies* (1st ed., 1986), p.1.

¹⁵ Another purely financial self-help remedy is the lien. The lien generally only confers a right of retention but there are many exceptions conferred by usage, statute and contract: *Halsbury's Laws of England* (4th ed., 1979), vol. 28, p.242, para. 545.

¹⁶ See Part III, paras. 3.2, 3.13 and 3.14.

¹⁷ See the Department of Trade and Industry's Report entitled "A Review of Security Interests in Property" by Professor A. L. Diamond (1989), paras. 16.1–16.14. The Report recommends that all businesses whether incorporated or not should be able to create a proposed form of security which would be the new equivalent to the floating charge.

any objections to their use. This may be because floating charges are entered into by those running commercial companies, who appreciate that enforcement must be the ultimate result of default in servicing or repaying their borrowing. The right to distrain, by contrast, is an incident of the landlord and tenant relationship which arises automatically. The landlord enjoys that right, generally without its being expressly referred to and often without the tenant (or even both parties) being aware of it when the lease is granted. Distress is a means of collecting instalments of a recurring debt which can be used repeatedly. By contrast, a sale after the crystallisation of a floating charge is a final enforcement action, ending the relationship between borrower and lender.

1.10 Floating charges are beyond the scope of this report. It may nevertheless be helpful to list briefly the points of similarity and difference between them and distress for rent.

- (a) The circumstances of the exercise of the power of execution under the floating charge are normally controlled in advance by express provisions in the charge.¹⁸ The charge is entered into with deliberation and the possibility of the realisation of the security is fully understood because it is central to the transaction. The use of distress for rent is not controlled in advance by express provisions in the lease.
- (b) It is possible for any creditor of a company to secure his loan by a floating charge. Distress for rent is only available to landlords.
- (c) Floating charges are confined to those of the debtor's chattels which are identified as being subject to the charge; but distress for rent can extend to goods belonging to third parties, who are not party to the lease and may not be aware that their property is at risk.¹⁹
- (d) Floating charges must be recorded on public registers, to ensure that other creditors and potential creditors are informed. There is no equivalent publicity for leases under which distress may later be levied.²⁰
- (e) The enforcement of a floating charge involves crystallisation, attaching a fixed charge to the property the debtor owns at that time. The debt is then normally discharged or insolvency proceedings are instituted. Distress can be repeated for successive arrears of rent.
- (f) Registration allows the debt secured by a floating charge to have a priority deriving from the time of its creation. Any priority for distress relates to the time of its levy.²¹
- (g) Enforcement of a charge by the appointment of a receiver involves a further registration, so that others affected can obtain information. The levy of distress involves no publicity.

The consultation

1.11 A list of those who responded to the working paper is set out in Appendix C to this report. We are most grateful to them. We are also especially grateful to Sir Wilfrid Bourne, K.C.B., Q.C., for the considerable help he has given us in analysing the responses.

1.12 We received over 250 responses to the working paper. Most of the responses concentrated on the question whether distress should be abolished but they did not reveal any significant points to be added to the case for and against distress for rent outlined in the working paper.²² A large majority of those who responded were opposed to the total abolition of distress. However, there was appreciable support for abolishing

¹⁸ See the Report of the Review Committee on Insolvency Law and Practice (1982), Cmnd. 8558, para. 434.

¹⁹ See Part II, para. 2.7 below.

²⁰ From 3 December 1990 information about leases registered at the Land Registry has been available, to all those who wish to inspect the register. However, many leases are not registered, and those granted for no more than 21 years are not generally capable of registration.

²¹ The exception is the priority given to the landlord by distress for rent over another creditor executing a judgment. The judgment creditor is not permitted to take goods under execution until rent arrears of not more than a year are paid (see Part III, para. 3.5 below).

²² Paras. 3.6–3.18.

it for residential tenancies only. The other options in the working paper suggesting reforms to the existing law, attracted little support. Contrary to our assumption in the paper,²³ which reflected the evidence received in relation to the 1966 Report,²⁴ the responses did indicate that the use of distress has considerably increased.²⁵ The reasons for this increase and its implications for our recommendations are matters we consider below.²⁶

1.13 We took all the responses to our consultation into account and considered the arguments in favour of and against distress for rent which they contained. However, having weighed up the arguments, they did not deflect us from our view that distress for rent should be abolished as a matter of principle. In reaching our decision we took into consideration that the composition of those who responded to the consultation did not accurately reflect the balance of landlords and tenants in the property market; the number of tenants as a whole must exceed the number of landlords, but the overwhelming majority of those who responded to us were landlords.

Structure of the report

1.14 Part II of the report briefly summarises the present law. A detailed statement from the working paper is set out in Appendix D. Our principal recommendation is contained in Part III and ancillary matters are considered in Part IV. We examine the effect of this recommendation in Part V. In Part VI we summarise all our recommendations. A draft Bill to implement our proposals, with explanatory notes, follows in Appendix A. A draft clause to implement our recommendation in Part V regarding arrears of rent accrued from the date of issue of proceedings to judgment is contained in Appendix B.

²³ Paras. 3.2–3.5 and 5.2.

²⁴ Interim Report on Distress for Rent (1966), Law Com. No. 5, para. 11. It also reflected the comments of Lord Denning M.R. in *Abingdon R.D.C. v. O’Gorman* [1968] 2 Q.B. 811, 819 that “it is an archaic remedy which has largely fallen into disuse”.

²⁵ An accurate estimate of the extent of the overall rise in use cannot be obtained from the figures supplied by the respondents to the consultation.

²⁶ Paras. 5.1, 5.12–5.14 and 5.21–5.24 below.

PART II

THE PRESENT LAW

Introduction

2.1 The law of distress is extremely complex and its various obscurities cannot be adequately dealt with in a brief summary and they can obscure the questions of principle which must be considered. We have therefore set out in Appendix D the statement of the law contained in the working paper. This was not criticised in the responses to the consultation and there have been no significant changes in the law since it was written.¹ In this Part of the report we highlight some of the main points of the law and identify some of the fundamental criticisms.

Main points of the law

2.2 The five principal points to be taken into account when defining the remedy of distress are:

- (a) whether or not the tenant's overdue payment is "distrainable rent" due under a current tenancy;
- (b) the means by which distress is to be levied;
- (c) the goods which can be taken;
- (d) the landlord's duties relating to the sale of the goods;
- (e) the remedies available to the landlord in the event of problems and the ways in which the tenant or a third party can challenge his actions.

(a) *Rent*²

2.3 Distress is only available to enforce an obligation to pay rent reserved in a lease or tenancy.³ Leases often define payments such as service charge as rent, or provide that they are to be treated as or recoverable as rent. It is unclear whether or not the inherent right to distrain attaches to all payments described as rent, or whether a contractual right equivalent to distress attaches to them.⁴ It is also unclear whether or not the amount of rent which the landlord can recover by way of distress should be reduced by the amount of a claim which the tenant may have against the landlord.⁵

(b) *The levy of distress*

2.4 The landlord who is an individual may either ask a certificated bailiff to levy the distress or levy it himself. A company or other corporate landlord has to use a certificated bailiff.⁶ If the bailiff levies the distress he must comply with additional rules including a requirement to give the tenant notice that distress has taken place.⁷

2.5 No matter who levies distress, there are circumstances when the court's prior leave is required.⁸ The application for leave not only gives the tenant advance warning

¹ The changes made in the Distress for Rent Rules 1988 (S.I. 1988, No. 2050) and the Courts and Legal Services Act 1990, s.15(2) are not substantial: n.9 (Part I) above.

² Appendix D, paras. 2.13–2.19.

³ It can extend to payments reserved on the creation of a rentcharge: Part IV para. 4.3.

⁴ See *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, 947.

⁵ See the comments of Forbes J. in *British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd.* [1980] Q.B. 137, 151, cited in Appendix D, para. 2.18.

⁶ Appendix D, paras. 2.7–2.11. In the working paper we remarked upon the shortcomings of the system for certifying bailiffs. Since the publication of the Paper limited changes have been made to the procedures for the certification and control of bailiffs: n.1 above.

⁷ The Distress for Rent Rules 1988 (S.I. 1988, No. 2050, r.12(2)) impose the requirement and prescribe the form of notice to be used. It is separate from the statutory requirement for all distrainers, to give notice of distress to tenants, before selling the goods: Appendix D, para. 2.55.

⁸ Appendix D, paras. 2.28–2.30.

of distress but also an opportunity to prevent it being levied.⁹ Leave is required where:—

- (i) the tenant is a company which is being wound up by the court;¹⁰
- (ii) the tenant has been called up or volunteered to perform service in the armed forces;¹¹
- (iii) the premises are let on a protected tenancy, are subject to a statutory tenancy under the Rent Act 1977 or are let on an assured tenancy within the meaning of the Housing Act 1988, Part I;¹²
- (iv) the premises are subject to a protected occupancy or statutory tenancy within the meaning of the Rent (Agriculture) Act 1976.¹³

Landlords do not often apply for leave to distrain but when they do their requests are frequently refused.¹⁴

2.6 The levy of distress is not allowed on a Sunday and it must take place between sunrise and sunset. The levy consists of three legal stages known as entry, seizure and impounding. Entry onto the demised premises must not be by force but the rules relating to what constitutes forcible entry are difficult to ascertain. The distinction between seizure and impounding is unclear. Seizure would appear to be the process of identifying the goods to be taken and impounding is transferring them into the landlord's control either on or off the premises where they are seized.¹⁵ When goods are impounded they are recognised as being in the custody of the law. Walking possession agreements leave the goods in the tenant's physical possession but transfer legal possession to the landlord on the tenant undertaking not to disturb or dispose of them. It is not clear whether they operate as a form of impounding.

(c) *The goods which may be taken*¹⁶

2.7 The general rule is that the landlord may take any goods from the tenanted property regardless of who owns them. However, this rule is subject to numerous exceptions. Some goods are absolutely privileged from distress which means that they cannot be taken in any circumstances. Others only have qualified privilege which means they are not to be taken if there are sufficient unprivileged goods on the property. The list of goods attracting the different privileges is lengthy and it may be difficult for the landlord or bailiff to determine whether a particular item does attract a privilege.

(d) *The sale*¹⁷

2.8 The landlord will generally have the power to sell the goods after five days from the time of impounding. He has a duty to obtain the best net price for them. He may recoup the arrears which had accrued at the time of the levy of the distress from the proceeds of sale but has to hand back any surplus to the tenant even if further arrears have accrued.

2.9 Providing that the distress is not illegal the buyer of the goods from the landlord will receive good title to them. There can be difficulties in assessing whether or not a distress is "illegal, irregular or excessive".¹⁸ An illegal distress is generally one which is unlawful from the beginning, for example, where the landlord distrains when there are no rent arrears. It is irregular where the seizure was legal but the distress is then subsequently improperly conducted. An excessive distress occurs where the value of the goods taken is obviously disproportionate to the outstanding rent. The assessment of

⁹ *Ibid.*, para. 2.29.

¹⁰ Insolvency Act 1986, s.130.

¹¹ Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s.2.

¹² Sect. 147 of the 1977 Act and Sect. 19 of the 1988 Act. The 1988 Act provision extends to assured agricultural occupancies, as defined by that Act: Housing Act 1988, s.24(3).

¹³ Sect. 8.

¹⁴ Out of the 285 applications for leave under the Rent Act 1977 during 1989, well under half were granted, and in 1988 just over half of the 191 applications for leave were granted, see Judicial Statistics Annual Report (1989), Cm. 1154, Table 4.8.

¹⁵ See Appendix D, paras. 2.50–2.51 for the full meaning of seizure and impounding.

¹⁶ Appendix D, paras. 2.32–2.45.

¹⁷ *Ibid.*, paras. 2.56–2.59.

¹⁸ Appendix D, paras. 2.66–2.70.

value is made by the landlord or bailiff unless the tenant has requested a valuation or growing crops are distrained.¹⁹

(e) *The remedies*²⁰

(i) *The tenant's remedies*

2.10 The remedies available to the tenant vary according to the nature of the impropriety. Where the distress is illegal the tenant has a choice of several remedies. Before impounding, the tenant can retake the goods himself without taking court proceedings. If the goods are unsold he may "replevy". Replevin involves two separate stages.²¹ First, an application is made to the county court for an order for the return of the goods which is usually granted on the tenant giving security for the outstanding rent and costs and undertaking to commence an action for replevin without delay. Secondly, the tenant brings the action to challenge the legality of the distress and if it is successful, he retains the goods and may recover damages and costs.

2.11 The tenant may alternatively claim damages or, if appropriate, apply for an order for delivery of the goods for the tort of wrongful interference with his goods.²² If no rent is in arrears and the goods have been sold the amount of damages awarded is double the value of the goods.²³ It may also be possible to obtain an injunction to stop a sale pursuant to an illegal distress.

2.12 When the distress is irregular or excessive the tenant's choice of remedy is limited to a claim for damages and perhaps to obtaining an injunction to stop the sale of the goods.²⁴

(ii) *Remedies of the third party*

2.13 A third party may be able to stop the landlord distraining upon his goods by claiming privilege and serving the declaration and inventory specified in the Law of Distress Amendment Act 1908.²⁵ If the distrainor receives these documents but nevertheless proceeds to distrain, the distress will be illegal and the third party may be able to obtain an order for the goods to be restored to him.²⁶ As we pointed out in the working paper not every third party has the protection of the 1908 Act.²⁷ Although a third party does have the tenant's remedies of replevin and claiming damages he generally faces more practical problems in pursuing his remedies than the tenant.²⁸

(iii) *The landlord's remedies*

2.14 The landlord's remedies are designed to protect his right to distrain by imposing sanctions on the tenant who secretly removes his goods to prevent distress or who retakes them after seizure. Where the tenant fraudulently and clandestinely transfers his goods from the tenanted property to avoid distress the landlord can follow the goods and distrain on them at their new location within thirty days of their removal.²⁹ He may be able to enter the premises by force³⁰ and he is entitled to claim double the value of the goods from the tenant and anyone who wilfully assisted him.³¹

¹⁹ *Ibid.*, para. 2.56.

²⁰ *Ibid.*, paras. 2.20–2.24 and 2.61–2.72.

²¹ *Ibid.*, para. 2.20.

²² Torts (Interference with Goods) Act 1977, ss.1 and 3. As an illegal distress is void *ab initio* the landlord or bailiff may commit trespass to goods and a purchaser of the goods may be guilty of conversion as he receives no title to the goods. Sect. 4 of the 1977 Act makes provision for interlocutory relief to be granted which may be useful to the tenant, if the goods are unsold: Appendix D, para. 2.23.

²³ Distress for Rent Act 1689, s.4.

²⁴ Appendix D, paras. 2.66 and 2.67.

²⁵ Sect. 1.

²⁶ *Ibid.*, s.2.

²⁷ Appendix D, para. 2.45.

²⁸ *Ibid.*, para. 2.72.

²⁹ Distress for Rent Act 1737, s.1.

³⁰ *Ibid.*, s.7.

³¹ *Ibid.*, s.3.

2.15 Where the torts of 'rescous' or 'poundbreach'³² have been committed the landlord can either recapture the goods or claim treble damages against the offender.³³ Rescous is the retaking of the goods before impounding providing the distress was not illegal. Poundbreach is retaking them after impounding. Landlords frequently used to place the goods in a pound and as the name suggests poundbreach was committed if the pound was broken, but impounding is now less formal.³⁴ In addition to being a tort, poundbreach is an indictable offence at common law as retaking goods after impounding is regarded as removing them out of the custody of the law. The punishment is a fine and imprisonment. It is uncertain whether or not rescous is also an indictable offence.³⁵

2.16 The other remedies available to a landlord when rent is in arrears may be affected by distress, for example, an unproductive distress may debar forfeiture for non-payment of rent, because distraining reaffirms the existence of the lease and therefore waives any right to forfeit.³⁶

The major criticisms of the law³⁷

2.17 Our working paper identified twenty four criticisms of the law of distress. The following major criticisms are all evident from our brief summary of the existing law:—

- (a) The law is ancient and attempts at reform have been piecemeal. As a result the rules arise from a variety of different sources, are difficult to find and are subject to numerous exceptions. Age is not a problem in itself, but it is largely responsible for the obscurity and an approach towards debt enforcement which is alien to modern attitudes. Some of the main concepts designed to suit recovery of rent arrears at the time of their creation are unclear particularly when they are put into practice today. For example, the term rent is now used to describe a variety of payments to be made by the tenant pursuant to the terms of the lease.
- (b) Many of the rules are arbitrary and artificial. The three stages of the levy of the distress provide an illustration: they determine the remedies available to the tenant. They do not purport to have the flexibility to enable minor adjustments to be made to suit specific cases and to avoid undue severity.
- (c) The opportunity for judicial consideration of the issues before distress takes place is primarily limited to cases where leave is required. A number of tenants are still unable to put forward a defence to the claim of non-payment of rent or cross-claim until after the distress has been levied. There is therefore little scope for the harshness of the arbitrary rules to be alleviated.
- (d) No one controls the action of the landlord when he is distraining in person and controls on bailiffs are limited. The availability of distress is not automatically made known to the tenant before he enters into a tenancy. Its use can therefore be totally unexpected: to a lay person distress upon personal goods may well not appear to be a natural result of non-payment of rent. Tenants are, not surprisingly, generally unfamiliar with the rules which a person levying distress should comply with and when the distrainer is a bailiff they may mistakenly regard him as a court official. In this situation, the rules regulating the conduct of a bailiff may not prevent objectionable behaviour.³⁸
- (e) The rule that all goods on the tenanted premises are distrainable is subject to a multitude of exceptions. The rules of privilege are ambiguous, out of date and permit third party goods to be taken. The Distress for Rent Amendment Act 1908 does not give sufficient protection to third parties because no obligation

³² Appendix D, para. 2.63.

³³ A claim may be made against the owner of the distrained goods where they have come into his possession, see Distress for Rent Act 1689, s.3.

³⁴ See Working Paper, para. 4.30.

³⁵ *Ibid.*, para. 4.32, n.26.

³⁶ Appendix D, para. 2.65.

³⁷ *Ibid.*, para. 2.73.

³⁸ One of the responses to our consultation cited bailiffs breaking down a front door and using abusive language. In another example, bailiffs were said regularly to transport goods unreasonably far before selling them, inflating the expenses of sale.

is imposed on either the landlord or tenant to report the seizure of goods to their owners.

- (f) There is only a short time for the tenant or third party to endeavour to stop a sale of the goods. As a purchaser normally receives good title to the goods the sale is final. There are circumstances when the sale is a sanction disproportionate to the tenant's breach of contract in not paying rent, as the goods can be difficult and expensive to replace.
- (g) The tenant's remedies for wrongful distress are often available too late and are artificially restricted by the form of impropriety in the distress. Remedies other than retrieval of the goods do not always provide adequate compensation. There is little incentive for the tenant to replevy as he has to provide security for rent arrears and the cost of the action before he commences proceedings even though he may not be at fault. The provisions for penal damages are out of place in our modern legal system and it seems wholly inappropriate that rescous and poundbreach should be indictable offences given that they occur in the context of rent arrears.

2.18 Only a minority of those who responded to the consultation commented on particular areas of the law in detail. From that we may reasonably infer that in general the criticisms of particular features of the law highlighted in the working paper were not disputed. However, some features such as the obscurity of the rules and the lack of judicial consideration of the issues were often interpreted as advantages for the landlord who levies distress, rather than subjects of criticism.

2.19 Most of the comments on the law related to third party goods, bailiffs and whether leave of the court should be a necessary preliminary to distress. There was general support for a greater measure of protection for third party goods and for measures imposing higher standards on bailiffs with greater accountability.

2.20 The respondents to the consultation appeared to have some difficulty in finding acceptable ways of amending the current rules. A rule exempting third party goods from distress instead of granting them privilege was on the whole thought to cause formidable practical difficulties. A requirement to give prior notice of distress could lead to the remedy becoming ineffective, because goods could be removed in advance. Any new machinery to give effect to genuine cross-claims was also thought to raise practical problems. These views gave support to the Commission's provisional conclusion in the working paper³⁹ that the problems of distress could not realistically be solved by amendments to the existing law.

³⁹ Para. 5.1(3).

PART III
THE CASE FOR REFORM

Introduction

3.1 We consider that distress for rent is wrong in principle. No response to our consultation suggested any justification for its retention which met the fundamental objections to it. Accordingly, our view that distress for rent should be abolished has not changed.

3.2 We see distress for rent as wrong in principle because it offers an extra-judicial debt enforcement remedy in circumstances which are, because of its intrinsic nature, the way in which it arises and the manner of its exercise, unjust to the debtors, to other creditors and to third parties. The characteristics of distress for rent which contribute to this are:—

- (a) priority given to landlords over other creditors;
- (b) vulnerability of third parties' goods;
- (c) harshness which is caused by the limited opportunity for the tenant to challenge the landlord's claim, the scope for the rules of distress to be abused, the unexpected intrusion into the tenant's property and the possibility of the sale of the goods at an undervalue;
- (d) disregard of the tenants' circumstances which demonstrates its general lack of recognition of a modern approach to debt enforcement.

3.3 One distinguished commentator has said: "As for distress for rent, I would repeat the call of the Payne Report¹ that this remedy should be abolished. Distress for rent is an archaic, feudal survival, which has no place in a mature legal system. It is encrusted with technicalities, and the law relating to it 'constitutes a veritable jungle of rules and exceptions'. It is discriminatory in giving the landlord rights which other creditors do not enjoy, and in placing the tenant in greater peril than other debtors. It is an arbitrary, high-handed and summary process, unless as in the case of residential tenancies the leave of the court must first be obtained. Its very existence as a legal remedy besmirches the fabric of English civil justice."² No reform of the law of distress can remove these attributes without changing the nature of the remedy and perhaps rendering it ineffective.

3.4 We now turn to examine the individual characteristics which contribute to distress for rent being wrong in principle. We also consider whether or not distress for rent could be partially retained and review the situation in other countries.

Characteristics of distress

(a) *Priority given to landlords over other creditors*

3.5 Distress puts the landlord in a more advantageous position than many of the tenant's other creditors. The threat of distress can be sufficient to induce a tenant to pay rent before other debts even though they have been outstanding for longer.³ In addition, the landlord is protected from losing priority to another creditor executing a judgment because the judgment creditor is not permitted to take goods under execution until rent arrears of not more than a year are paid.⁴

¹ Report of the Committee on the Enforcement of Judgment Debts (1969), Cmnd. 3909, paras. 912-927 and 932.

² Sir Jack Jacob, *The Fabric of English Civil Justice* (1987), p.179.

³ The National Consumer Council wrote in their response to the working paper, "Tenants in difficulty with rent arrears will normally have other debts . . . Often a threat to use distress will only produce payment by diverting money which tenants were planning to use towards other bills". The Report of the Review Body on Civil Justice (1988), Cm. 394, para. 685 states that 39% of defendants in rent and mortgage payment arrear cases "said they had other debt problems".

⁴ Landlord and Tenant Act 1709, s.1. This section permits the sheriff or other officer to levy the execution for the rent arrears of not more than 1 year's rent and the execution money: Part IV, para. 4.16(a). This section does not apply to executions under process of a county court, to which the provisions of County Courts Act 1984, s.102 apply. That section permits the landlord to claim arrears of up to 4 weeks' rent where premises are let by the week, the rent of two terms of payment where the premises are let for any other term less than a year and one year's rent where premises are let for a term of a year or more.

3.6 When a tenant owes both rent and other debts, distress gives the landlord an opportunity to obtain payment before other creditors by distraining promptly while they are still waiting to obtain judgments for their debts. The insolvency of the tenant does place restrictions on the right to distrain. However, it does not completely remove the priority it gives to the landlord over other unsecured creditors. For example, the judgment creditor seeking to enforce his judgment by execution loses the right to execute if it is not completed before the commencement of bankruptcy.⁵ The right to distrain is limited but not lost.⁶ Other ordinary creditors can only prove for the debt.

3.7 We do not accept that the landlord's position is unique and therefore justifies this preferential treatment. Certainly, a landlord cannot easily regain possession of the property and withdraw the accommodation he provides for the tenant as soon as rent is in arrear, to prevent more arrears accruing, but there are other creditors in a similar position of not being able to withdraw their services. The owner of goods on hire purchase may not be able to find the goods to repossess them and any repossession will be subject to statutory restrictions.⁷ Even if he overcomes these hurdles there is a serious risk that the condition of the goods will make them worth less than the outstanding debt. The recovery of the goods will not be satisfactory unless they can be resold or rehire, which may be impractical. Other creditors may not in practice feel able to withdraw the service they are providing for fear of losing business; for example, a small supplier is unlikely to stop supplying a large manufacturer who is unjustifiably withholding payment unless he is on the brink of insolvency.

3.8 Rent payments were formerly considered *sui generis*, payment being enforced whatever contrary claim might exist. That view is no longer accepted,⁸ and a tenant may set off sums which are due to him from the landlord. It has therefore become inappropriate for a landlord to recover his rent in full where a deduction would be justified, but, when he chooses this particular sanction, this is what distress still permits him to do. The landlord's claim is preferred above other creditors even where, on the balance of the account between the landlord and the tenant, it is not all due.

(b) *Prejudice to third parties*

3.9 Distress for rent can prejudice third parties who are not concerned with the letting of the property. This is because the landlord is permitted to distrain on some goods belonging to third parties even although the third party in question owes nothing to the landlord.⁹ Absolute privilege may be available to protect some third party goods, but their owner may nevertheless in practice be unable to protect them from seizure and sale because there is no requirement to inform him of the distress. That lack of knowledge can also result in his missing the opportunity to protect goods which could be privileged by the Law of Distress Amendment Act 1908, because, not knowing what has happened, he fails to follow the procedure prescribed by the Act.¹⁰ There is no justification for a means of debt enforcement which permits the taking of one person's goods without prior authority to satisfy another's debt.¹¹

(c) *Harshness*

3.10 Very few of those who responded disputed that distress was harsh. To many this was a virtue: distress, they suggested, would not be effective if it was not harsh.

⁵ Insolvency Act 1986, s.346(1).

⁶ Prior to adjudication, the landlord's right to distrain is limited to 6 months' rent accrued due before the commencement of bankruptcy (Insolvency Act 1986, s.347(1) and (2)); any more arrears can be proved for (1986 Act, s.347(10)). After adjudication, the landlord can distrain for all rent accrued without leave of the court providing the trustee in bankruptcy does not disclaim the tenancy; in the case of a company tenant the landlord must obtain the court's leave to distrain if the company is being wound up (Insolvency Act 1986, ss.128(1) and 130(2)); a distress levied but not completed by sale before commencement of the winding up of a company may, but in practice will not, be restrained in the absence of special reasons rendering it inequitable for the distress to be completed (*Re Roundwood Colliery Co.* [1897] 1 Ch. 373 and *Herbert Berry Associates Ltd. v. C.I.R.* [1977] 1 W.L.R. 1437).

⁷ Consumer Credit Act 1974, s.90.

⁸ See, e.g. *British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd.* [1980] Q.B. 137 and *Melville v. Grapelodge Developments* (1980) 39 P. & C.R. 179.

⁹ See Appendix D, para. 2.45.

¹⁰ *Ibid.*, paras. 2.71 and 2.72.

¹¹ *Ibid.*, para. 2.45.

Reliable statistics are not available to prove its effectiveness, but such figures as are available suggest that distress seems to be highly effective.¹² In the large majority of cases the mere threat of its use intimidates the tenant into paying without the need for the landlord to resort to the levy of distress.¹³

3.11 We do not consider that the decision whether to retain a remedy should be made solely on its results. Although the sole purpose of a remedy is to ensure that legal obligations are complied with, and the results must therefore be a major consideration, the means of achieving those results cannot be ignored. The following factors contribute to the harshness of distress:—

(i) *Lack of opportunity to challenge*

3.12 Within seven days of the landlord deciding to distrain the distress can be completed. Normally the bailiff levies distress within about 48 hours of being instructed and generally a further five days must elapse before the goods can be sold.¹⁴ This is quick, which is eminently satisfactory for landlords. But the speed means the process necessarily lacks the protection given to both parties to a dispute by the prescribed waiting periods of the court system during which each is entitled to consider and answer the other's case. In distress, the tenant has hardly any opportunity before the levy to challenge the validity of the landlord's claim for rent.

(ii) *Scope for the rules of distress to be abused*

3.13 The law of distress is unclear to many if not most lawyers and bailiffs but for laymen, it must be almost impossible to understand. The levy of distress is not judicially controlled and it is not authorised or controlled in advance by express provisions of the lease.¹⁵ The existence of the remedy of distress is not even referred to in the lease. Nothing in the process of distress encourages the tenant to take legal advice (even were there time to do so) and he is unlikely to recognise those cases in which the landlord has broken the law so that his actions are open to challenge. The tenant may even believe that the bailiff is an official acting with court approval.¹⁶

3.14 The law's obscurity, the tenant's ignorance of it and the lack of supervision and control of the levy of distress give the landlord and bailiff scope for not adhering to the rules. One county court registrar suggested that "distress seems not to be a 'legal' process in the sense of being carried out 'according to the rules'". It is possible for bailiffs deliberately to manipulate the rules to their own advantage, in the knowledge that most tenants do not understand the position.¹⁷

(iii) *Intrusiveness*

3.15 Distress is, of its nature, intrusive: in almost every case the goods are seized on the tenant's premises. The landlord has a right of peaceable entry, although its extent and basis are obscure.¹⁸ Although forcible entries are not permitted, they do nevertheless occur.¹⁹ The tenant therefore experiences an often unexpected intrusion, whether into his house or his business premises, in a manner which may be intended to

¹² The Certificated Bailiffs' Association for England and Wales said only 2% of warrants actually lead to removals and sale, the implication being that the money due was forthcoming before this. The Chartered Institute of Public Finance and Accountancy said of cases in which warrants were issued only 3½% resulted in removal of goods.

¹³ The Chartered Institute of Public Finance and Accountancy said that the threat of distress alone is sufficient to make tenants pay in about 90% of cases of arrears where the local authorities use distress.

¹⁴ See Appendix D, para. 2.56 for the circumstances when the tenant can ask for this period to be extended. The consultation did not reveal any evidence that the tenants are normally aware of the possibility of asking for an extension of time before the goods are sold.

¹⁵ We consider that an extra-judicial remedy which is controlled in advance by express contractual provisions and available to any creditor can be unobjectionable: see Part 1, para. 1.10.

¹⁶ This suggestion was substantiated by some of the responses to the consultation.

¹⁷ An example of the way in which the rule that the landlord cannot distrain for things in actual use could be exploited was given by one bailiff who boasted that if he entered a home where the television set was on, he would ask for it to be turned off to make conversation easier. He then seized the set, as it was no longer in actual use and therefore privileged from distress.

¹⁸ Appendix D, paras. 2.48–2.49.

¹⁹ Working Paper, para. 3.14.

cause maximum inconvenience and unpleasantness. The effect of the intrusion is likely to be made worse by the tenant's probably scant understanding of the legal powers the landlord is exercising. He cannot but feel at a severe disadvantage.

(iv) *Sale of the goods at an undervalue*

3.16 There are two aspects of the sale of the goods which the respondents to the consultation highlighted as being harsh. First, even if the landlord complies with his duty to sell at the best possible price, the amount realised is often far less than the value of the goods to the tenant. Instructions to rent arrears officers at Balham Citizens Advice Bureau make the point that "an item with a purchased value of several hundred pounds, when seized and sold, raises less than a sixth of its original cost".²⁰ It is in the nature of the second-hand trade that goods are sold to dealers for considerably less than the tenant would have to pay to replace them. Often the tenant may not even be able to find second-hand replacements. Necessarily, no account is taken of sentimental value or the tenant's convenience.

3.17 Secondly, the removal of the goods can cause or contribute to the tenant's insolvency. The goods may be essential to the tenant's business even though the privileged classes of goods may not go far enough to protect them.²¹ The tenant may increase his borrowing to avoid distress or to replace the goods, and thereby exacerbate the financial difficulties which led to the original rent arrears. A tenant in straitened circumstances will always have difficulties in meeting all his obligations, but the inflexibility of distress with the absence of any court exercised discretion, is most likely to make matters worse.

(d) *Debt enforcement*

3.18 In today's society it is widely recognised that a debt enforcement process which subjects the debtor to coercion, fear, shock and humiliation is not socially acceptable,²² even in those cases where tenants are merely using the landlord as a cheap source of finance.

3.19 It was suggested to us that the main reason why tenants particularly in the residential cases do not pay rent is because they are unable, as distinct from unwilling, to pay.²³ The people who are likely to be less able to pay are often those who require most protection from the law, such as single parent families and families facing redundancy and illness.²⁴

3.20 Where residential property is let under an assured, protected or statutory tenancy and the landlord seeks possession because the tenant is in arrear with the rent, the court generally has a wide discretion to delay or postpone the order of possession.²⁵ On adjourning or postponing the proceedings, the court must impose conditions relating to the payment of rent arrear unless it considers that to do so would "cause exceptional hardship to the tenant or would otherwise be unreasonable".²⁶ The exercise

²⁰ This evidence was included in the response submitted by the National Association of Citizens Advice Bureaux.

²¹ Tools and implements of trade have absolute privilege up to £150 (Protection from Execution (Prescribed Value) Order 1980 (S.I. 1980, No. 26)), otherwise they have qualified privilege only: see Appendix D, paras. 2.37(i) and 2.40(vi). The Courts and Legal Services Act 1990, s.15(2), extends absolute privilege to such tools, books, vehicles and other items of equipment as are necessary to the tenant for use personally by him in his employment, business or vocation. Absolute privilege is also extended in residential cases to goods such as furniture and household equipment which are necessary for satisfying the basic domestic needs of the tenant and his family.

²² See Part V, para. 5.4 and Part 4 of the National Consumer Council's Report entitled "Private Bailiffs: their role in domestic debt collection" (1990).

²³ This was contained in the evidence submitted to us by organisations such as the National Consumer Council and Shelter in response to the working paper.

²⁴ The Family Welfare Association emphasised the vulnerability of the families who were subjected to distress and suggested that it was therefore no longer an appropriate way of dealing with residential property.

²⁵ Rent Act 1977, s.100 and Housing Act, 1988, s.9.

²⁶ See the 1977 Act, s.100(3) and 1988 Act, s.9(3); where the rent is payable monthly, quarterly or yearly, rent arrears covering at least three months owing on an assured tenancy give a landlord a mandatory ground for possession: Housing Act 1988, Sched. 2, Ground 8. Where rent is payable weekly or fortnightly at least 13 weeks' rent must be unpaid before the landlord is given this ground of possession.

of this discretion allows the debtor time during which he may be able to resolve his financial difficulties. Distress for rent does not require the landlord to take account of the tenant's circumstances.

Should there be exceptions from the abolition of distress for rent?

3.21 Distress for rent is available to landlords of all types of property, but because of differences in the rules its use is concentrated on particular types of case. Leave of the court is sometimes required before the landlord can distrain, and in those cases landlords only infrequently resort to distress to recover rent.²⁷ Prior leave to distrain has to be obtained in relation to certain agricultural tenancies.²⁸ However, responses to our consultation suggested that distress is rarely used in relation to agricultural tenancies even where no leave is required. With regard to residential tenancies, the leave requirement²⁹ imposed on many private sector landlords means that in practice the use of distress is largely restricted to cases where the landlord is a local authority or housing association or to other cases where the tenancy is not protected or statutory under the Rent Act 1977 or assured under the Housing Act 1988.³⁰ In relation to business tenancies leave to distrain is only required in the case of a company tenant being wound up by the court. Our consultation suggested that distress is often used to recover arrears of rent from business tenants.

3.22 Accordingly, there are two areas in which distress is actively used, commercial lettings and public sector residential tenancies. We examine each in turn to consider the case for retaining distress on a limited basis.

3.23 Many of those who responded to the consultation suggested that distress for rent should be permitted for business tenancies only. These respondents were generally those who were concerned as, or on behalf of, landlords of commercial property. They argued that the social consequences and harshness of distress were not as great in respect of business tenancies as in residential tenancies.³¹ As far as the personal anguish which distress can cause is concerned, this will generally be right. However, examining the characteristics of distress for rent which contribute to it being wrong in principle,³² there are other concerns. It is clear, e.g., that the priority given to landlords over other creditors and the prejudice to third parties contribute as much to violation of principle when distress is used against business tenants as they do when it is used against residential tenants.

3.24 Business people are generally expected to have easier access to legal advice and greater awareness of the implications of breaching the terms of a tenancy agreement than residential tenants. Nevertheless, there are certainly commercial tenants who know nothing of distress when they take a lease, and as we have pointed out there is nothing in the operation of distress for rent to encourage them to obtain legal advice regarding its rules.³³ There is just as great scope for abuse of the rules caused by obscurity of the law and lack of control of the levy of distress when distress is used against a business tenant. He may be more willing to challenge the landlord's actions than a residential tenant but he does not have any greater rights to do so.³⁴ The landlord's intrusion into business premises is not as abhorrent as the intrusion into a person's home but the intrusion can nevertheless have a disproportionate effect on the tenant's business reputation and goodwill. Seizure and sale of goods at an undervalue can contribute to the insolvency of the business,³⁵ so that the landlord exacerbates the tenant's financial problems to the prejudice of the other creditors.

3.25 Some of those who responded to the consultation advocated an alternative limited use of distress. They thought that local authority landlords alone should

²⁷ See Part II, n.14.

²⁸ *Ibid.*, para. 2.5 (iv) and n.12.

²⁹ *Ibid.*, para. 2.5 (iii).

³⁰ See the 1977 Act, ss.4-16A and the 1988 Act, s.1, Sched. 1, Part 1.

³¹ Many of those who responded to the consultation were concerned that tenants did have the ability to pay but chose not to do so to exploit the landlord's position.

³² See paras. 3.5-3.20 above.

³³ See para. 3.13 above.

³⁴ See Part II, paras. 2.10-2.12.

³⁵ See para. 3.17 above.

continue to be allowed to distrain for rent. In assessing this suggestion it must be borne in mind that some local authorities rely heavily on distress to enforce the payment of rent, although, in contrast, there are others which never use it. Local authority landlords were said to be in an unusual position as possession proceedings relating to housing accommodation were not always a realistic method of dealing with rent arrears due to the authority's duty to house the homeless.³⁶ However, it must be appreciated that this duty has limitations. For example, the duty to provide permanent housing only extends to people in priority need (principally families with children) and even then does not extend to people who have intentionally made themselves homeless.³⁷ Any constraint which local authority landlords may be under because of their statutory duty to house the homeless is also balanced by the benefits they receive from the system of housing benefit. As opponents of distress pointed out, the tenant receives that benefit after rent has been deducted by the Department of Social Security and paid direct to the Housing Department.³⁸ It must also be recognised that much of the alternative accommodation which local authorities have available to offer the homeless is extremely unattractive and probably constitutes an effective deterrent against running up avoidable arrears of rent.

3.26 An alternative argument for retaining a local authority's power to distrain rested on their status as public authorities which can be relied upon to act reasonably and with consideration. No doubt this is generally the case, although any organisation will occasionally fall below the standards it sets itself. However, this resolves itself into a question of principle. Should any landlord—and local authorities own all types of property—be accorded special treatment by the law in collecting debts which rank equally with what is owed to others? We do not believe that any sufficient case for such privilege has been made out.

3.27 As we have pointed out,³⁹ distress for rent is an extra remedy available only to a limited class of creditor who have at their disposal all the other general remedies for the recovery of debts. A strong case would have to be made out to justify retaining this position. To suggest that distress should continue for some landlords and not others is tantamount to singling out that class for particular privilege. We do not consider that there is evidence that any one class of landlord is specially vulnerable, so there is no justification for offering any special treatment.

3.28 In conclusion, we can find no justification for leaving distress available for one type of tenancy or one class of landlord. The violation of principle⁴⁰ occurs no matter what type of tenancy gives rise to distress and irrespective of the identity of the landlord.

The situation in other common law jurisdictions

3.29 Abolition of distress for rent in England and Wales would follow a trend in other common law jurisdictions. From the evidence we have been able to obtain it seems that abolition has been either implemented or considered throughout the common law world, and that where the remedy is still in existence its use is either restricted or uncommon.

³⁶ Housing Act 1985, Part III.

³⁷ *Ibid.*, ss.58–60. A person who wilfully and persistently refuses to pay rent can be regarded as having become homeless intentionally: Housing (Homeless Persons) Act 1977, Code of Guidance England and Wales, 2nd ed., 1983, para. 2.15.

³⁸ Housing benefit, which is payable under the Social Security Act 1986, s.28, is administered by housing and local authorities. In the case of rent payable to a housing authority, it takes the form of a "rent rebate" which may be implemented by way of reduction in the amount payable by way of rent: Social Security Act 1989, s.14. In other cases, it takes the form of a "rent allowance", which is normally payable to the tenant. There are circumstances where it must however, be paid to the landlord. For example, where an amount of income support payable to the tenant or his partner is already being paid to the landlord. In certain other cases the local authority has a discretion whether or not to pay it to the landlord, for example, where it is in the tenant's interests and that of his family that it should be so paid: Housing Benefit (General) Regulations 1987 (S.I. 1987, No. 1971), rr.93 and 94. Many private sector landlords, however, will not even be aware that their tenant is claiming housing benefit, let alone that there are provisions for direct payment to the landlord.

³⁹ See para. 3.5 above.

⁴⁰ See para. 3.2 above.

3.30 Distress for rent has been wholly abolished in Northern Ireland,⁴¹ four Australian jurisdictions,⁴² and in some American States.⁴³ Elsewhere it has also been abolished only in relation to residential tenancies. For example, South Australia,⁴⁴ Northern Territory,⁴⁵ Australian Capital Territory,⁴⁶ and British Columbia⁴⁷ have all restricted distress to commercial tenancies.

3.31 Law reform bodies in South Australia,⁴⁸ and New Zealand⁴⁹ have recommended complete abolition of distress for rent. Tasmania abolished it for a limited period in relation to residential tenancies but its revival does not seem to have been a deliberate act.⁵⁰ Abolition for residential tenancies has been recommended.⁵¹ In British Columbia, the Law Reform Commission recommended retention for commercial cases until a new security mechanism has been introduced.⁵² Restrictions have been imposed or recommended on the use of distress in other common law jurisdictions.⁵³

⁴¹ The Judgments Enforcement (Northern Ireland) Order 1981 (No. 226) (N.I. 6), Article 143 made under the Northern Ireland Act 1974, s.1(3), Sched. 1, para. 1.

⁴² New South Wales: Landlord and Tenant Amendment (Distress Abolition) Act 1930, s.2, Western Australia: Distress for Rent Abolition Act 1936, s.2, Victoria: Landlord and Tenant Act 1958, s.12 and Queensland: Property Law Act 1974, s.103.

⁴³ e.g. we understand that it has been abolished in Alaska and Wisconsin.

⁴⁴ Residential Tenancies Act 1978, s.41.

⁴⁵ Tenancy Act 1978, s.53.

⁴⁶ Landlord and Tenant Ordinance 1949, s.40.

⁴⁷ Residential Tenancy Act 1979, s.48(1).

⁴⁸ The Sixty-Sixth Report of the Law Reform Committee of South Australia relating to the Reform of the Law of Distress (1983).

⁴⁹ The Property Law and Equity Reform Committee Final Report on Legislation relating to Landlord and Tenant, New Zealand (1986). The Committee concluded that the abolition of the right of distress should be without prejudice to any other form of recognised security for unpaid rent which may be agreed to by the parties (para. 100).

⁵⁰ The Landlord and Tenant Act 1949, s.77 abolished distress for residential tenancies. The Act was part of a temporary rent restriction package. When the Act expired, ending rent restriction, on 30th June 1950 (Landlord and Tenant Act 1949, s.88), distress, as part of the status quo ante, revived. There is no evidence that any thought was given to the revival of distress.

⁵¹ The Report and Recommendations on the Common Law and Statute Law in Tasmania relating to Residential and Landlord and Tenant Law (1978).

⁵² The British Columbia Law Reform Commission Report No. 53 on Distress for Rent (1981). The British Columbia Personal Property Security Act 1989 makes provision for the security mechanism but to our knowledge it is not yet in force.

⁵³ In Ontario, the Residential Tenancies Act 1980, s.31 provides for a prior order of the court or residential tenancy commission to be obtained before distraining.

PART IV

IMPLEMENTATION OF REFORM

Introduction

4.1 In Part III we concluded that distress for rent should be abolished. In this Part of the report we consider matters relating to its implementation. These include the extent of our recommendation and the ancillary matters necessary to bring it into effect.

Should all forms of distress for rent be abolished?

4.2 We recommend that all forms of distress for rent including rent payable under a rentcharge should be abolished.

4.3 Although a rentcharge is the charge of the payment of an annual or periodic sum on freehold land,¹ the payment is analogous to rent and we can find no justification for exempting the right to distrain for rentcharges from the abolition of distress. A rentcharge is different from rent in that it is payable to someone who is not entitled to the reversion in the land charged with the payment. Its separate existence appears to have arisen in feudal times.² The right to distrain may be granted expressly in the instrument creating the rentcharge, but if it is not the right will be conferred by statute.³

4.4 There are cases where the common law right to distrain is extended by agreement or statute and we consider that distress in these cases should also be abolished.⁴ The two principal situations where this occurs are when the right to distrain is given to enforce payments which are not strictly speaking rent and where indemnities are given in relation to non-payment of rent.

(a) *Other payments*

4.5 Distress may be applied by a lease or some other agreement to payments which are not strictly rent, e.g. service charges and the cost of repairs carried out by the landlord when the tenant fails to do them.⁵ The right to distrain so conferred appears to be effective and similar to distress for rent at common law. There are, however, differences although the extent of them is uncertain as they will largely depend on the construction of the particular agreement. One obvious difference is that third parties' goods cannot be at risk when the third parties in question are not parties to the agreement.⁶

(b) *Indemnities for non-payment of rent*

4.6 When the whole of premises demised by a lease or of freehold property subject to a rentcharge is sold, the buyer sometimes gives the seller a power to distrain for any payment which the seller later might have to make to the landlord or owner of the rentcharge as a result of the buyer's default. This right is ancillary to an indemnity

¹ The Rentcharges Act 1977 restricted the type of rentcharge which could be created after it came into force.

² See Report on Rentcharges (1975), Law Com. No. 68, para. 9.

³ There are two statutory provisions: the Landlord and Tenant Act 1730, s.5 which applies to rentcharges created before 1832 if there is no express provision to distrain and allows the rentcharge owner to distrain on land as soon as the rent or any part of it is in arrear and the Law of Property Act 1925, s.121(2) applicable to those created after 1881. Subject to any contrary intention, it permits distress as soon as the rent or any part of it is 21 days in arrears.

⁴ To ensure that the abolition of distress applies to these cases we have adopted a wide definition of rent set out in the Law of Property Act 1925, s.205(1)(xxiii) in the draft Bill and have specifically referred to distress for payments other than rent in the draft Bill: see clause 1 of the draft Bill in Appendix A below.

⁵ Where provision is included in a lease or other agreement attaching a right of distress to a payment going outside the scope of ordinary leases or agreements between landlord and tenant the provision will be a bill of sale for the purposes of the Bills of Sale Acts: *Halsbury's Laws of England* (4th ed., 1973), vol. 4, p.256, para. 628 (but those Acts only apply to individuals: *N.V. Slavenburg's Bank v. Intercontinental Natural Resources Ltd.* [1980] 1 W.L.R. 1076).

⁶ Appendix D, para. 2.15.

which the buyer gives to the seller, against the consequences of his failure to comply with the covenants and conditions in the lease or rentcharge.⁷

4.7 Where part only of the premises subject to a lease or rentcharge is sold, the amounts of rent paid will normally be apportioned between the two parts of the property. If the landlord or the owner of the rentcharge does not consent to the apportionment agreed between the buyer and seller,⁸ so that it is informal or equitable,⁹ statute gives each party a right to distrain against the other. This is because the landlord or rentcharge owner can still recover the whole of the rent from the owner of one part of the land, and it allows the party who pays more than was agreed to claim the appropriate contribution.

Contracting out

4.8 We recommend that once distress for rent has been abolished, it should not be open to people to contract to adopt an equivalent remedy. We propose abolition as a matter of principle, having identified distress as unsatisfactory and unacceptable in modern circumstances, and it would not therefore be appropriate to allow people to revert to a practice which has been identified as unjust. Clause 1 of the draft Law of Property (Distress) Bill,¹⁰ would implement this recommendation. The clause does not specifically refer to contracting out of the abolition of distress for rent and other payments specified in the clause; but were a contract to purport to confer a right to distrain or, without express reference to distress, a right substantially the same as a right to distrain,¹¹ the exercise of the right would either be distress—and thus ineffective in accordance with clause 1—or the contract would create security over chattels and be regulated by the law relating to such security.¹²

4.9 We have given careful consideration to the possibility of permitting people to contract to adopt a revised form of distress for rent. There would necessarily have to be a statutory formulation of the rules for this new distress so as to exclude the more objectionable features of the existing remedy, such as the seizure and sale of goods belonging to third parties. The exercise of the new distress would have to be authorised in advance by express contractual provisions¹³ and at least some of the other factors contributing to distress for rent being wrong in principle would be removed.¹⁴ However, apart from practical problems in formulating the definition of a new distress to make it free from all of the problems of the current form,¹⁵ there is one insuperable difficulty in the way of making it acceptable in principle. Any form of distress would still give landlords a remedy which was not available to other creditors and we do not consider that there is any justification for the law to single out landlords to give them an additional remedy.¹⁶

Commencement

4.10 We think that it is important that landlords should be allowed time to familiarise themselves with the provisions of the Bill and to consider changes in their

⁷ Law of Property Act 1925, s.77(1) and Sched. 2, Parts VII and IX, and the Land Registration Act 1925, s.24. There is a need for the indemnity and power to distrain because the original tenant and original owner of the rentcharge are liable to perform and observe the covenants and conditions in the lease or instrument creating the rentcharge throughout the term of the lease or duration of the rentcharge.

⁸ The result of this is that there is only an equitable apportionment binding as between assignor and assignee: see Law of Property Act 1925, s.190(1) and (3), but the landlord or rentcharge owner can enforce payment against any part of the land.

⁹ Sect. 190(2) and (4).

¹⁰ Appendix A.

¹¹ This would not include a floating charge in favour of a landlord over the tenant's goods which is not objectionable and is not ruled out by the Bill.

¹² For the tenant who is an individual the provision will be a bill of sale; for the company tenant the security will have to be registered under Part XII of the Companies Act 1985 which will be amended by Part IV of the Companies Act 1989 when it comes into force.

¹³ See Part I, para. 1.10(a).

¹⁴ See Part III, paras. 3.5–3.20.

¹⁵ See Part II, para. 2.20.

¹⁶ See Part III, paras. 3.5–3.7 and Part V, para. 5.21.

rent collection practices. We accordingly recommend that the Act should come into force six months after Royal Assent. This would have the additional advantage, as indicated below,¹⁷ of avoiding difficulties with cases already before the courts.

Transitional provisions

4.11 There will be cases in which landlords are in the middle of distraining when the Act abolishing distress for rent comes into force. We consider that once the process is under way there is a point at which it is better to allow it to continue than to attempt to reverse it. Provisions preserving the existing law for these cases will therefore be needed.

4.12 We recommend¹⁸ that the existing law should apply to any goods which:—

- (a) have, in the levy or purported levy of distress, been removed from the premises before the Act comes into effect; or
- (b) are, immediately before the Act comes into effect, subject to a walking possession agreement.

4.13 This last recommendation is intended to avoid any incentive to landlords in the run up to abolition to remove goods from the tenants' premises, instead of entering into walking possession agreements. That could occur if the removal of goods—which might seem a clearer demarcation—were the only stage which permitted a pending distress to continue.

4.14 We recommend no transitional provision to save the right to distrain in cases where the court had before Royal Assent adjourned an application for leave until a date after commencement or granted leave subject to stay of execution until a date after commencement. The proposed long period between Royal Assent and commencement is likely in practice to prevent this situation occurring. But in the isolated case in which it does, we have concluded that it would be preferable not to allow fresh levies of distress after the new Act comes into force.

Crown application

4.15 We recommend that the Bill should bind the Crown, although we have not consulted specifically on this point. It nevertheless seems to us that the same undesirable consequences will be suffered by tenants whoever is their landlord.

Consequential amendments

4.16 The Schedule to the draft Bill in Appendix A sets out the amendments to other legislation required as a consequence of the abolition of distress for rent. For the most part, they are self-explanatory, but a few require special comment:

- (a) Section 1 of the Landlord and Tenant Act 1709 provides that a judgment creditor who wishes to issue execution in respect of goods on leased premises must first pay off any arrears of rent (up to a limit of a year's rent).¹⁹ The officer levying execution is then authorised to levy for the rent so paid in addition to the amount of the judgment. This section is limited to High Court process. The repeal of this section is not, strictly speaking, a necessary consequence of the abolition of distress for rent. We nevertheless recommend that it be repealed, together with the corresponding provision for county court process, County Courts Act 1984 section 102, because it is a provision directly giving the landlord a preference as creditor and it is clearly designed to reflect the landlord's right to distrain.
- (b) Under the Improvement of Land Act 1864 rentcharges could be created in relation to various land improvement works. Section 64 provides for interest to be payable in respect of arrears of rentcharge, but the period for which interest is payable is limited to six months. That period is, however, extended

¹⁷ See para. 4.14 below.

¹⁸ The provisions are contained in Clause 5 of the Draft Bill in Appendix A.

¹⁹ See Part III, para. 3.5 above.

indefinitely if, at the end of that period, there is insufficient distress on the land to meet the arrears. As the effect of this provision is to allow for interest to run indefinitely where there is insufficient distress, it seems appropriate that, following the abolition of distress, that section should have effect simply to provide for interest to run until payment of the arrears, without limitation as to period.

PART V
THE EFFECT OF ABOLITION

Introduction

5.1 It would be unrealistic for us to recommend the abolition of one of the remedies for recovery of rent arrears in current use without considering the effect of abolition and the question whether there is a need for replacement. This Part of the report is concerned with these issues. The responses to the consultation gave the inefficiency of the court system as the main reason for the increased use of distress for rent. The effects of this inefficiency could be exacerbated when distress is abolished because the remaining remedies to recover rent arrears involve use of the court system. However, major initiatives to reform the court system are under way and if they are successful, it should be possible to accommodate the effective recovery of rent within the system. The central feature of this study is therefore the current programme of improvement and rationalisation of the court system.¹

The programme of improvement to the court system

5.2 The terms of reference of the Civil Justice Review² which was set up in 1985 were “to improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration and in particular, to reduce delay, cost and complexity”. Following detailed factual studies, six consultation papers were issued by the Review Body in 1986 and 1987 and its findings and conclusions were published in 1988.

5.3 When considering the effect of the abolition of distress for rent, we have borne in mind the findings of the Review Body. Some of these findings are in line with many of the responses to our own consultation.³ In relation to civil justice generally, the Review Body said that two of the main deficiencies were delay and cost.⁴ Examples of the findings relating to debt enforcement were that some 15 to 18 months after commencement of proceedings more than half the judgment debts in the High Court and county court samples were wholly or partly unpaid and the majority of creditors who had used enforcement procedures considered that they had not helped them to recover payment.⁵ The reluctance of potential litigants to use the court process was evident from the study of housing cases⁶ and the rent action was considered to be inadequate and little used.⁷

5.4 The Review Body made many recommendations.⁸ Most of them are relevant to the collection of rent arrears because the handling of these arrears will only be possible if the court system as a whole is operating efficiently. The principal recommendations of direct relevance to recovering rent arrears were:—

(a) The aims of a debt recovery system

The following considerations are amongst those which should form the basis of any system of debt recovery through the courts.⁹

- “(i) The system should aim to recover as much as possible of the debt, quickly, cheaply and simply.
- “(ii) Creditors should be able to obtain adequate information about a debtors’ circumstances. . . .

¹ See paras. 5.2–5.6 below.

² (1988), Cm. 394.

³ See paras. 5.11–5.15 below.

⁴ The Report of the Review Body on Civil Justice (1988), Cm. 394, para. 48.

⁵ *Ibid.*, para. 589, (iv) and (v).

⁶ *Ibid.*, para. 714 (ii).

⁷ The Review Body Report (at para. 732) said that “it takes as long as the better known possession procedure and costs as much, since every rent action case involves a court hearing. What is needed is cheap, speedy progress to judgment, coupled with the opportunity for the tenant to offer a realistic rate of repayment or to enter a defence or counterclaim”.

⁸ *Ibid.*, paras. (1)–(91).

⁹ *Ibid.*, para. 620.

- “(iv) There should be machinery for bringing together multiple debts. . . .
- “(vi) Debtors and their families should not be subjected to unwarranted hardship, fear or humiliation.”

While distress can be described as quick, cheap and simple,¹⁰ the objectionable features which the recommendations suggest should be avoided and which we also would wish to eliminate from the debt enforcement process, are the very ones which are often present in distress.

(b) *The introduction of a new form of rent action*

A new form of proceedings to recover rent arrears is to be introduced. The details of the proposed new rent action were set out in the Review Body Report.¹¹ The most significant features were:—

- (i) In the absence of a defence or counterclaim, judgment in default of defence should be obtained after 15 days and there should be no court hearing.
- (ii) The tenant should have the opportunity to put forward a defence within fourteen days from the date of service of the summons. If he does contest the claim or enters a counterclaim the case should be dealt with in the same manner as a defence or counterclaim to a small claim. If the tenant admits the debt and offers payment, the Registrar should consider the form of order and have a discretion to have a hearing in difficult cases. He should also take into account details of the tenant’s circumstances when determining the rate of repayment.
- (iii) A list of advice agencies should be given to the tenant at the time of service of the summons.

5.5 In April 1989,¹² following the Civil Justice Review the Lord Chancellor announced a programme of improvements to the administration of civil justice to be phased over five years, forming part of a general overhaul of the legal system as a whole. The four proposals which have particular relevance to the issues raised in this Part of the report are:—

- (a) better distribution of business between the High Court and the county court and related procedural changes to improve the handling of cases and reduce delay;
- (b) rationalisation and computerisation of arrangements for handling debt enforcement;
- (c) reforms to improve the system of managing court bailiffs and the small claims procedure;
- (d) simplification of the procedures for recovering rent arrears without recourse to a full possession procedure.

5.6 Implementation of the programme has begun. The Courts and Legal Services Act 1990 is the first legislative step in the overall programme. One of the changes provided for in the Act¹³ is the redistribution of business from the High Court to the county court. Court rules have already been made to provide for a number of changes including the establishment of a computerised summons production centre in December 1989 to deal with bulk requests from plaintiffs for issues of summonses¹⁴ and the extension of county courts’ powers to grant summary judgment to plaintiffs where no real defence is put forward.¹⁵

¹⁰ In operation, if not in the rules which govern it.

¹¹ Paras. 732 and 733. The Law Society has been critical of the current proposals to implement the Review Body’s recommendations relating to the new form of rent action: see “Rent Actions: Unpopular with Landlords and Unfair to Tenants” (1990) 140 N.L.J. 1684.

¹² *Hansard* (H.L.), 6 April 1989, vol. 505, cols. 1293–1295.

¹³ Sect. 1.

¹⁴ The County Court (Amendment No. 3) Rules (S.I. 1989, No. 1838, rr.54 and 55). When the issue of the summons is complete, the rest of the action is dealt with by the appropriate county court.

¹⁵ The County Court (Amendment No. 4) Rules (S.I. 1989, No. 2426, rr.15 and 16).

The effects of abolition

(a) *The landlord's other remedies*

5.7 Once distress for rent is abolished, the three principal remaining methods of recovering rent arrears would be forfeiture, money judgments (e.g. by means of a default action or rent action)¹⁶ and in certain cases by using the insolvency procedure.¹⁷ With the abolition of distress the use of these remedies is bound to increase.

5.8 In forfeiture proceedings the landlord claims to bring the lease to an end, but such proceedings are frequently taken when the landlord does not necessarily expect to obtain possession or even want it. They are used because the possibility of losing the accommodation may prove the greatest inducement to the tenant to pay the rent.¹⁸ The tenant will often be able to obtain relief against forfeiture on paying the arrears either immediately or by instalments.¹⁹ We have previously recommended that the existing law of forfeiture should be replaced by a new scheme for termination of tenancies by landlords.²⁰ That reform would sweep away many of the technical hazards which now surround and inhibit the exercise of the remedy of forfeiture. The proposal is linked to the recommendation in this report in the sense that they both form part of the wider picture of remedies for landlords but each proposal can be justified without reference to the other.

5.9 The effectiveness of default actions or rent actions²¹ depends on the efficiency of the court system. At the moment, many litigants do not see them as an attractive option.²² Rent actions appear to be seldom used because, as the Civil Justice Review Body suggested in its Report, they do not provide what is needed.²³ The reluctance to use either form of action is probably due partly to general dissatisfaction with the court system and partly also to the fact that judgments cannot at present²⁴ deal adequately with the problem of recurrent rent arrears. The proposed new form of rent action may well be more attractive.²⁵

5.10 The criteria for use of the insolvency procedure are set out in the Insolvency Act 1986,²⁶ and the procedure can be used to recover rent arrears. The threat of insolvency proceedings applies pressure on the tenant to pay the rent. However, to take even preliminary steps in the insolvency procedure as an instrument of arrears enforcement may be seen as heavy-handed and inappropriate.

(b) *The court system*

5.11 The extent of any effect on the court system of abolishing distress would depend

¹⁶ See para. 5.9 below.

¹⁷ If the tenant is an individual, the landlord can apply to make him bankrupt without the need to first obtain a judgment providing the conditions of the Insolvency Act 1986, ss.267–270 are complied with. The main conditions are that the outstanding debt has to be at least £750 and is a debt which the tenant is either unable to pay or has no reasonable prospect of being able to pay. Where the tenant is a company the landlord is able to apply to wind up the company on the ground that the company is unable to pay its debts: Insolvency Act 1986 ss.122 and 123.

¹⁸ The Review Body on Civil Justice mentioned this problem for consultation and suggested introducing a new arrears action. This would be a form of default action which could lead to eviction if appropriate. The idea was rejected after consultation primarily due to criticisms such as the ineffectiveness of the action against defaulting tenants and the fact that it would not take into account arrears accrued up to the date of the hearing: Report of the Civil Justice Review Body (1988), Cm. 394, para. 717 (ix). See also para. 5.5(d) above.

¹⁹ Common Law Procedure Act 1852, s.212; County Courts Act 1984, s.138(3).

²⁰ Report on Forfeiture of Tenancies (1985), Law Com. No. 142.

²¹ Rent actions were introduced in 1971 for landlords to recover rent only where the tenant was still in occupation of the land (now, County Court Rules, Order 24, rules 8–11). The difference between a rent action and a default action is that the landlord should be able to obtain a hearing more quickly by using a rent action. In 1988, 3225 actions commenced with 1972 orders made and in 1989, 3630 actions were commenced with 2625 orders made: Judicial Statistics Annual Report (1989) Cm. 1154, Table 4.7.

²² The respondents to the consultation who were against abolition of distress were generally dissatisfied with default actions: see further paras. 5.11–5.15 below.

²³ See para. 5.3, n.7 above.

²⁴ See paras. 5.25–5.28 below.

²⁵ See para. 5.4 above.

²⁶ Para. 5.7, n.17 above.

on the amount of the resulting increase of the courts' workload and on their ability to deal with it. The level of increase is difficult to judge with any accuracy, in particular, we have been unable to assess precisely the extent of the current use of distress²⁷ nor can we forecast the tenants' reaction in the face of an efficient court system or the landlord's likely use of preventive measures.²⁸

5.12 Most of the respondents to the consultation, commenting at the end of 1986, suggested that the courts would be unable to cope with the work generated by abolition and this was one of the main reasons they gave for supporting the retention of distress. Indeed, they felt the courts were not coping adequately with the demands then being placed on them and there was widespread criticism of their failure to provide an effective remedy against defaulting tenants.

5.13 The complaints about the courts as they then operated centred on the expense, delay, ineffectiveness and uncertainty of court proceedings. Landlords said that even if they got an order for costs, they were heavily out of pocket as a result of taking proceedings.²⁹ Many commercial landlords and property managers pointed out that by the time judgment for one quarter's rent was obtained and the rent paid, the next quarter's rent would already be overdue. The general slowness of the procedure made landlords fear that an increased workload would escalate delays to the point of paralysing the court system. Further, execution by the courts³⁰ and the long wait for possession and payment when forfeiture proceedings³¹ were used were also said to be unsatisfactory. In addition, respondents to the consultation complained of the courts being biased towards tenants.³² This gave scope for the experienced tenant to manipulate the system in order to maximise the delay.³³

5.14 As a result of the number of complaints we decided to carry out some enquiries of our own primarily about delays in the court system. We sent a questionnaire to a number of solicitors, commercial landlords and courts. They confirmed that delay is a serious problem. In an undefended rent action it may ordinarily take as long as 67 days before the sale of the tenant's goods by the county court bailiff.³⁴ If the waiting periods imposed by court rules were the only periods which elapsed before the parties took the next step the procedure before the sale would take only 48 days. The responses also indicated that the main cause of delay³⁵ was that the court system was overburdened. The wish of some tenants to postpone the inevitable contributed to delay in some cases. The problem of recurring arrears was also referred to.

5.15 The criticisms of the court system which we have received in response to the consultation and to our enquiries are similar to the information given to the Civil Justice Review Body. It is clear that landlords do have a genuine grievance about the court system and that it is failing to provide them with an adequate means of recovering rent arrears. The Civil Justice Review gives hope for improvement, but it cannot yet be said whether or when this aim will be achieved.

²⁷ Para. 1.12, n.25.

²⁸ Paras. 5.16–5.18 below.

²⁹ Respondents indicated that the cost of levying distress to recover a debt of £1000 was about £50 whereas court proceedings may cost hundreds, even thousands, of pounds with a real risk of nothing or little being recovered from the defendant.

³⁰ It was said by those who were against the abolition of distress that the process of execution through the courts particularly the county courts, results too often in judgments not being satisfied.

³¹ This is caused by the court's powers to postpone orders for possession, order payment by instalments and grant relief from forfeiture.

³² The responses concerning a pro-tenant bias were difficult to analyse as the views were necessarily subjective. However, its presence was substantiated in para. 616 of the Report of the Review Body on Civil Justice (1988) Cm. 394 which states "Although just over half the County Court creditors considered proceedings had been fair 1 in 5 said that proceedings were biased in favour of the debtor, were slow or had not led to payment".

³³ Landlords complained that a skilful tenant who knows how to "play" the county court system can "put off the evil day" by raising plausible but unfounded defences, by procuring a succession of adjournments and by other devices.

³⁴ Our enquiries showed that the return date for a rent action hearing was commonly at last 3 to 4 weeks ahead but in some courts was as high as 10–12 weeks ahead. The period of 67 days is arrived at by taking 4 weeks as typical and on the assumptions that the defendant puts up no defence and that the landlord takes every necessary step with maximum speed.

³⁵ I.e. the time taken to recover rent being 40% longer than the 48 day period.

(c) *Precautionary measures against rent default*

5.16 Another effect of abolishing distress could be that landlords will of their own volition increasingly take precautions to protect themselves from the problems of rent arrears. These steps are sometimes taken now, when distress is available, and even if the court system were more efficient landlords could still take the view that prevention was better than cure. In our view, landlords should be encouraged to act with proper prudence but this does not obviate the need for an effective form of legal redress to recover rent arrears.

5.17 Apart from choosing the tenant with care, the options open to landlords include requiring a guarantee from a third party for payment of rent or a rent deposit. Guarantees for payment of rent are already widely used.³⁶ Rent deposits are payments to the landlord at the beginning of a tenancy held to cover any later default in paying rent.³⁷

5.18 Landlords could consider using rent deposits more often, as they do in other countries.³⁸ On the tenant's default a deposit gives the landlord many of the advantages of distress, such as speed and cheapness of reimbursement, while the tenant is relieved of the harshness of distress. However, deposits can cause difficulties for the tenant.³⁹ The tenant is at a disadvantage if he contests the amount claimed, because he may be obliged to initiate proceedings; but that position is temporary, lasting only until the amount of the deposit is exhausted. In addition, depending on the terms of the agreement the tenant may lose interest on his money while it is deposited and the money could be at risk if the landlord becomes insolvent.⁴⁰ The possibility of legislative intervention to counteract these disadvantages is considered below.⁴¹

(d) *The Property Market*

5.19 Some respondents to our consultation considered that if distress were not available landlords would justifiably exercise greater caution in choosing a tenant than they find it necessary to exercise at the moment and forecast significant effects on the market. They felt that abolishing distress would deter investors from acquiring freehold investment property at the lower end of the market. Some local authority landlords who use distress against their residential tenants foresaw a possible need to increase rents to compensate. In the opinion of some of those who responded to the consultation the overall effect would be a slowing down of the property market and a shortage of business premises, especially for new businesses in deprived areas, with unacceptable implications for the economy and employment.

5.20 It is difficult for us to assess what effect, if any, abolition would have on the property market, but we think those forebodings may well be exaggerated. It is hard to believe that many landlords now wish to let to a tenant who is only likely to pay rent if threatened with distress, and even harder to believe that money is at present committed

³⁶ They are particularly used in relation to commercial lettings, where lettings to insubstantial trading companies are often supported by guarantees from directors or parent companies.

³⁷ Although deposits are particularly common in the case of residential furnished tenancies, where they frequently also cover breaches of other tenancy terms, they are also used in some commercial lettings.

³⁸ As a Canadian law reform body reported, referring to the position in the United States, "in jurisdictions where distress has been done away with by statute, such as the state of New York since 1846, the security deposit is thought of as one means of assuring the landlord that the tenant will discharge his obligations" (Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies, Ontario Law Reform Commission (1968), p.21).

³⁹ A Report by the National Consumer Council entitled *Rental Deposits, Resolving Disputes between Landlords and Tenants* (February, 1990), highlights the problems of rent deposits. It recommends that an independent statutory authority should provide tenants and landlords with a number of services including an effective and independent custodial service for rental bond monies and make reasonable adjustments for inflation in the level of deposits refunded. One of the demands of the Private Tenants' Manifesto published in 1990 by Shelter and the National Houses in Multiple Occupation Group is for local Rental Deposit Boards to be set up.

⁴⁰ Whether the money forms part of the landlord's estate on his insolvency will depend on the terms on which the deposit is taken, but little formality is required to impress it with a trust which will save it from forming part of that estate: *Re Chelsea Cloisters Ltd. (in liquidation)* (1981) 41 P. & C.R. 98.

⁴¹ Paras. 5.36-5.39 below.

to investment in new buildings for letting on that basis. Local authority landlords may not have the same opportunity to refuse to let to a tenant. However, many authorities do not use distress⁴² and the level of their rent arrears cannot only be attributed to their failure to do so.⁴³ The abolition of distress should promote the development of good housing management practices which are able to avoid or mitigate the problems of rent arrears. If when distress is abolished effective court-based remedies are available to recover rent arrears, it seems most likely that the commercial and public sector residential rents will be unaffected.

Improvements to existing remedies and practice

5.21 We do not consider that it would be appropriate to introduce a completely new remedy to replace distress for rent. On the assumption the court system is made to operate satisfactorily and to offer several remedies, a strong case would have to be made out for an additional sanction. The nature of any innovation could cause problems. Any self help remedy would be likely to have many of the problems of distress; any court-based remedy other than one proceeding straight to judgment⁴⁴ would be very similar to existing remedies especially to the proposed new form of rent action.⁴⁵

5.22 Nevertheless, every creditor has the right to have an effective method of legal redress. As we have seen from the information supplied to us the remaining remedies to recover rent arrears do not always now provide this. Landlords should have an efficient means of enforcing payment of rent arrears, but the remedies fall short of the ideal primarily because the court machinery within which they operate is overburdened and no longer permits them to function properly.

5.23 We therefore do not recommend the removal of distress until the court machinery is improved and landlords' reasonable expectations of a court-based remedy are fulfilled. It is our view that this stage will be reached when the new rent action has been introduced in satisfactory form, provision has been made for the special difficulties of recurring debt and the court system offers landlords an efficient service which can process claims largely in accordance with the pace set by the Court Rules. At this point, it will be reasonable for landlords to rely upon the courts and the threat of the use of a court orientated remedy would be credible and carry the weight which a threat to distrain now does.

5.24 Many of the problems of the court system have already been recognised by those responsible for providing an effective machinery. We have seen that an overhaul of the civil justice system is being carried out.⁴⁶ A review of the whole system and detailed recommendations for improvement is beyond the scope of this report, and it has in any event recently been done.⁴⁷ However, we hope that the implementation of the following recommendation together with the adoption of practices which will reduce rent arrears and the number of claims coming before the courts, will speed the arrival of an efficient court-based rent recovery sanction.

(a) Arrears at date of judgment

5.25 One of the current drawbacks of rent actions and default actions is that the judgment does not extend to sums which have accrued between the date when the

⁴² See Part III, para. 3.25 and the Working Paper, para. 3.3.

⁴³ The level of rent arrears of local authorities can be influenced by a number of factors—one of which is an authority's method of collecting rent arrears. Other factors include computer problems and staffing difficulties: see the Audit Commission's Information Paper Number 1 entitled Survey of Local Authority Housing Rent Arrears (November, 1989), para. 17.

⁴⁴ This would have some of the hallmarks of distress as it would not provide time for the tenant to put forward a defence and it would not take notice of the considerations which the Review Body on Civil Justice recommended should form the basis of any debt enforcement system: see para. 5.4 above.

⁴⁵ Para. 5.4 above.

⁴⁶ See para. 5.5 above.

⁴⁷ See paras. 5.2–5.6 above.

proceedings were started and the date of judgment.⁴⁸ The court has no power to include these rent arrears as they give rise to a new cause of action and court rules⁴⁹ regarding the amendment of pleadings have generally been construed as not permitting new causes of action to be added without the consent of the parties.⁵⁰

5.26 The problem of rent arrears accrued after the date of issue of proceedings was referred to by the respondents to our consultation.⁵¹ It leads to a proliferation of actions or, more probably, deters the landlords from using the action at all. Once the court is seised of the matter, the tenant has all the safeguards which that implies and we see no reason why the court should not be able to order the payment of those additional arrears. The landlord will not have to start fresh proceedings and some court work will be saved. There are, of course, other creditors owed recurring debts as well as landlords, which this type of power could help, but we are currently concerned with enforcing rent payments.

5.27 We therefore suggest that the court should have power to include in a judgment further rent arrears accrued to the date of judgment providing, of course, it is satisfied they are due. A claim for these arrears would have to be specifically pleaded, to ensure that the tenant was aware of the extent of the claim. One way to achieve this would be for the court to be able to grant leave to amend a pleading to include a claim for these further arrears. It is arguable that existing rules do not give this power of amendment to the court, and a new court rule relating to this might be necessary.⁵²

5.28 After consultation with the Lord Chancellor's Department, we have come to the conclusion that this recommendation should be implemented by legislation. We consider that it involves a major policy change and it is not therefore appropriate to be left to court rules. We therefore recommend that a landlord claiming rent arrears should be able to claim any further arrears which accrued due between the date of commencement of the proceedings and the date of judgment: the court should be able to give judgment for the further arrears whether or not it gives judgment for the arrears due when the proceedings commenced. We see no need to delay the implementation of this recommendation until the implementation of our principal recommendation to abolish distress for rent. A draft provision to give effect to it is accordingly contained in Appendix B to this report and is not included in the draft Bill in Appendix A to this report.

(b) *Future payment orders*

5.29 A separate complaint about rent actions is that no provision is made for arrears accruing *after* judgment. Again, landlords are faced with the prospect of having to start a whole series of actions, some of those with tenants who are persistently late in paying rent can feel that the courts do not fully tackle their problems. A possible approach to this complaint could be to give the court a discretion to make a future payment order. This order would convert the tenant's contractual obligation to pay rent into a court order to pay which could then be enforced by any one of the usual methods in the event of default.⁵³ The workload of the courts would be eased because, when the tenant next failed to pay his rent, the landlord could immediately proceed to enforcing the judgment without the need to start further proceedings. However, a future payment order could be unduly harsh on the tenant and would need to be strictly controlled, because it would relate to a payment which is not yet due and may never become due.⁵⁴ We are not convinced that the complaints put forward a sufficient case for us to make a recommendation that future payment orders should be introduced.

⁴⁸ In a forfeiture action rent can be claimed from the date of issue of proceedings to the date of service (see *Canas Property Co. Ltd. v. K.L. Television Services Ltd.* (1970) 2 Q.B. 433).

⁴⁹ R.S.C., O. 20, rr.3-5 and 8, County Courts Act 1984, s.76 and C.C.R., O. 15, rr.1 and 2.

⁵⁰ See *Eshelby v. Federated European Bank Ltd.* [1932] 1 K.B. 254.

⁵¹ Para. 5.13 above.

⁵² Following the passing of legislation implementing our recommendation, the courts may construe R.S.C. O. 20, r.8 and C.C.R., O. 15, r.1 as permitting them to give leave to amend a pleading in this way but this is uncertain. See n.49 and 50 above.

⁵³ The proposal to introduce these Orders could apply to all creditors of periodical payments.

⁵⁴ It would also be harsh because the tenant who had defaulted once would be left with the burden of a judgment and the consequent implications for his credit worthiness and a tenant may be unable to put forward a genuine counterclaim.

5.30 If future payment orders were to be introduced the circumstances in which the court could make them would have to be restricted to ensure that they were only used in appropriate cases. We envisage that restrictions might take the form of only giving power to make the order where:

- (i) the tenant had persistently⁵⁵ defaulted in paying rent and
- (ii) the tenant's past conduct justified the conclusion that he was likely to default again and
- (iii) a minimum amount of rent (as a percentage of annual rent) was in arrear.

To ensure that the tenant would have an opportunity to counter or defend the claim he could be given a right to apply to the court at any time to vary or terminate the order. It does not seem unreasonable for the tenant to initiate the application in such a case; it would be one of the deterrents against being declared a persistent defaulter.

5.31 The conversion of a contractual obligation into a court order is rare in our legal system, but the principle has already been accepted.⁵⁶ Time orders made under the Consumer Credit Act 1974⁵⁷ are similar to what we propose. These are orders which reschedule payments to be made under an agreement and which allow creditors to enforce immediately when the debtor defaults. In family law, orders for maintenance payments convert the common law and statutory obligation to maintain one's family into a judgment which can be enforced as and when there is default.⁵⁸ In addition, there is legislation awaiting implementation for the recognition and enforcement in the United Kingdom of authenticated instruments made in other European States.⁵⁹ These instruments are contracts made in the presence of a notary which can be automatically enforced without first obtaining a judgment.

5.32 Nevertheless, we are not persuaded that a need for future payment orders has yet been demonstrated and we do not therefore recommend their introduction.

(c) *Interest*

5.33 A statutory obligation for payment of interest on rent arrears may improve the landlord's position and may deter the tenant from defaulting. At present the court has a discretion to award interest on debts.⁶⁰ In the absence of an express or statutory provision to pay interest, the tenant who decides to pay arrears before proceedings commence can avoid the obligation to pay interest.

5.34 The Commission previously considered the question of interest on debts.⁶¹ Although we then recommended that there should be a general rule that contract debts should carry the right to interest at a statutory rate, we decided that rent ought to be an

⁵⁵ "Persistent" is a term which is already applied in landlord and tenant legislation to rent arrears, e.g. Landlord and Tenant Act 1954 Part II, s.30(1)(b) and Housing Act 1988, Sched. 2, Part II, ground 11.

⁵⁶ The first two examples given below do, however, address different situations, being designed to alleviate a debtor's difficulty or help family relationships. The extension to landlord and tenant cases, to help creditors with debt enforcement, would therefore be a departure.

⁵⁷ Sect. 129.

⁵⁸ Matrimonial Causes Act 1973, ss.23-27; Domestic Proceedings and Magistrates Courts Act 1978, s.2.

⁵⁹ Civil Jurisdiction and Judgments Act 1982, s.13. The provision only relates to European states which are parties to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters dated 27th September 1968 as amended by the 1978 and 1982 Accession Conventions and set out in Schedule 1 of the 1982 Act as amended by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1989, S.I. 1989, No. 1346. Before a document could be enforced here it would have to be registered with the appropriate court.

⁶⁰ The High Court and county court have a discretionary power to award simple interest on debt (which includes rent) or damages in respect of the period between the date when the cause of action arose normally the date when rent is due and either the date of payment (if made before judgment) or the date of judgment (see Supreme Court Act 1981, s.35A and County Courts Act 1984, s.69). In the High Court where the sum claimed is a debt or liquidated demand the plaintiff is entitled to interest as of right (R.S.C., O. 13, r.2). In both courts a claim for interest must be specially pleaded.

⁶¹ Report on Interest (1978), Law Com. No. 88.

exception but that it could be considered at a later date. We reached this conclusion because rent is not always payable under a contract and the proposed scheme of interest related to contractual debts only.⁶² In addition, as we pointed out in the report, “there are special social policies involved in the rules as to the payment and recovery of rent which are at present either embodied in the general law of landlord and tenant or . . . are effected by statutory intervention in the landlord-tenant relationship. This intervention has been particularly extensive in relation to residential tenancies: one of its objects has been to strike a balance between the interests of both parties. A provision that rent should carry statutory interest might well upset this balance.”⁶³ The general recommendation for payment of interest has not been implemented.⁶⁴

5.35 We do not see any advantage in changing our previous recommendation now. The reasons for our previous rejection of the proposal largely still apply. The merits of a statutory obligation to pay interest are outweighed by the fact that there is no benefit in increasing the size of the debt when the tenant may often have no money. In cases where landlords believe that interest should be paid they are free to provide for it in the lease, and this is now not uncommon in leases of commercial and industrial premises.

(d) *Rent deposits*

5.36 Rent deposits are not suited to all types of tenancies and circumstances,⁶⁵ so it does not seem appropriate to interfere with the freedom of contract of landlords and tenants by making them compulsory. Indeed, they might often be unsuitable or unnecessary. However, their use in suitable cases could be encouraged by legislation which would offer safeguards to remove suspicion of unfair dealing.⁶⁶

5.37 A ceiling could be imposed on the amount of any deposit, the maximum being determined in relation to the amount of the contractual rent. In other countries maxima range from two months’ rent,⁶⁷ to one month’s⁶⁸ or only half a month’s.⁶⁹ A statutory maximum could vary depending on the circumstances, e.g. the purposes for which the property was let, and consideration would need to be given to topping up a deposit when the rent was increased on review.

5.38 A tenant who is required to deposit a large sum, may feel that he should be paid or credited with interest, and this could usefully be made mandatory, although landlords could argue that any benefit they receive will be taken into account in fixing the rent. Many overseas jurisdictions do require interest to be paid and specify the rate. Sometimes payment can be restricted to cases where the deposit is held for longer than a specified period,⁷⁰ where a landlord holds deposits from at least a minimum number of tenants,⁷¹ or where the deposit exceeds a stated sum.⁷²

⁶² *Ibid.*, paras. 56–61. The Commission was concerned that the inclusion of statutory tenancies would make it particularly difficult to recommend payment of interest on rent in the context of the proposals of the report, e.g. once a fair rent was registered pursuant to the Rent Act 1977 the tenant could not be made to pay an additional sum.

⁶³ *Ibid.*, para. 59. Our conclusion was supported by the Law Reform Commission of Hong Kong in its Report on Interest on Debt and Damages (1990), paras. 5.29–5.33.

⁶⁴ The Interest on Debts Bill introduced by Mr. Michael Mates M.P. on 20th December 1989 attempted to implement part of the recommendation but excepted rent; it did not make progress.

⁶⁵ See paras. 5.17–5.18 above.

⁶⁶ See n.39 above.

⁶⁷ e.g., for residential tenancies in Pennsylvania (Purdon’s Pennsylvania Statutes Annotated Titles 68–70, s.250.11a(a) and (b)).

⁶⁸ e.g., Alberta (Landlord and Tenant Act, Revised Statutes of Alberta, 1980, s.37), Ontario, (The Landlord and Tenant Act, Revised Statutes of Ontario 1980, s.84(1)) and New South Wales where 4 weeks’ rent is required for unfurnished tenancies and 6 weeks’ for furnished property (Landlord and Tenant (Rental Bonds) Act 1977, s.9).

⁶⁹ e.g., Manitoba (Landlord and Tenant act, Revised Statutes of Manitoba 1981, s.81(1)).

⁷⁰ e.g., We understand that this is the position in Florida, Illinois (6 months); Massachusetts (one year); Virginia (13 months).

⁷¹ e.g., As far as we are aware Illinois (25 tenants) and New York (6 tenants) have this requirement.

⁷² e.g., In Maryland, we understand the deposit must exceed \$50.

5.39 Tenants need to be assured that repayment of any unused deposit is guaranteed at the end of the tenancy. The greatest security is given by a requirement that the money be lodged with a reliable third party,⁷³ but this does increase the administrative burden of the scheme. The deposit can be largely protected from the consequences of the landlord's insolvency either by the creation of a trust,⁷⁴ or by legislation expressly giving priority over other creditors.⁷⁵ We consider it necessary to ensure that where a landlord's successor in title has received the deposit he is bound to make the repayment.⁷⁶

The effect of abolition in other common law jurisdictions

5.40 Distress for rent has been abolished in other common law jurisdictions.⁷⁷ We have not been successful in tracing information relating to the effect of abolition in these areas. The impact of abolition may have been slight because distress had not been widely used or because the other available methods for recovering rent arrears were able to absorb the additional work without difficulty.⁷⁸ Many common law jurisdictions, particularly in Australia and the United States, have established relatively informal landlord and tenant tribunals or housing courts,⁷⁹ which may have alleviated the effect of abolition by emphasising mediation and speedy resolution to reduce disputes. Rent deposits appear to be more common than here and this may also be a contributory factor.⁸⁰

5.41 There are a few examples of alternative remedies being introduced when distress was abolished. In 1936 a procedure was introduced in Western Australia enabling the landlord to terminate the lease on two days' written notice when rent was seven days in arrear.⁸¹ In Canada, the British Columbian Law Reform Commission recommended retention of distress for rent only until a new security mechanism could satisfactorily replace it.⁸²

Conclusion

5.42 Other than our recommendation for the recovery of arrears from the date of issue of proceedings to judgment⁸³ we do not consider that it is necessary to make statutory provision for new enforcement steps to be available to the landlord. Distress for rent should be abolished when improvements to the court system make the other remedies effective. At that time the reforms to court procedure will offer a good prospect of the court system being able to cope efficiently with the extra work.

5.43 We have considered various improvements and innovations which could facilitate implementation of our recommendation to abolish distress for rent. The one improvement which we recommend is the introduction of provisions to permit arrears of rent accrued since the date of issue of the writ to be included in the judgment. In principle, this recommendation ought to be introduced in analogous cases of recurring debt but each case would need to be studied separately because there may be other factors, such as controls on hire purchase agreements, which would make its introduction inappropriate. We make no recommendations in relation to the other matters discussed as we are unable to forecast accurately whether or not they will be needed when the other remedies are operating effectively.

⁷³ In New South Wales it must be lodged with the Rental Bond Board, in South Australia with the Residential Tenancies Tribunal. See also n.39 above.

⁷⁴ *Re Chelsea Cloisters Ltd. (in liquidation)* (1981) 41 P. & C.R. 98, see n.40 above.

⁷⁵ e.g., California (West's Annotated California Codes Civil Code, s.1950.5(c)). We understand that the trustee in bankruptcy has priority over the tenant.

⁷⁶ *Hua Chiao Commercial Bank Ltd. v. Chiaphua Industries Ltd.* [1987] A.C. 99.

⁷⁷ Part III, paras. 3.29-3.31 above.

⁷⁸ No major recommendations for changing the system were made in a report of the Australian Law Reform Commission entitled *Debt Recovery and Insolvency*, No. 36.

⁷⁹ The Report of the Review Body on Civil Justice (1988), Cm. 394 gave consideration to the establishment of a separate housing court or tribunal in England and Wales and concluded at para. 723 that there should be no separate housing court but the systematic handling of housing cases should be encouraged.

⁸⁰ Paras. 5.17-5.18 above.

⁸¹ The Distress for Rent Abolition Act, 1936 (W.A.), s.2.

⁸² Part III, para. 3.31 above. This mechanism would make it easier for the lessor to get security against non payment of rent.

⁸³ Paras. 5.25-5.28 above.

5.44 However, we consider that the situation following abolition should be monitored. If difficulties are encountered, the measures discussed in this Part of the report can be reviewed in the light of the situation then existing, with a view to further action.

PART VI

SUMMARY OF RECOMMENDATIONS

6.1 In this Part we summarise our conclusions and recommendations reached earlier in this report. Where appropriate, we identify, the relevant clauses in the draft Law of Property (Distress) Bill (contained in Appendix A to this report) to give effect to particular recommendations.

6.2 We recommend that distress for rent should be abolished (para. 3.1; clause 1(1)(a)).

6.3 Our recommendations relating to the application of the new legislation are:

- (i) There should be no exception to the abolition of distress for rent for any type of landlord or tenancy (para. 3.28; clause 1(1)(a)).
- (ii) All forms of distress for rent should be abolished including rent payable under a rentcharge (paras. 4.2 and 4.3; clause 1(1)(b) and (3)).
- (iii) Distress in cases where the common law right to distrain for rent has been extended by agreement or statute should also be abolished (para. 4.4; clause 1).
- (iv) Once distress for rent has been abolished it should not be open to people to contract to adopt distress (para. 4.8; clause 1).
- (v) The Act implementing these recommendations should not come into force until six months after Royal Assent to allow landlords time to familiarise themselves with provisions and to consider changes in rent collection practices (para. 4.10; clause 5(1)).
- (vi) Where the process of distress for rent has begun at the date of commencement of the new legislation, the landlord should be permitted to continue it if goods have been removed from the premises or are subject to a walking possession agreement (para. 4.12; clause 5(2)).
- (vii) The Bill should bind the Crown (para. 4.15 clause 4).

6.4 Our recommendation to abolish distress for rent should be implemented when improvements to the court system make the other remedies available to landlords effective alternatives to distress (paras. 5.23 and 5.42).

6.5 We also recommend that a landlord claiming rent arrears should be able to claim any further arrears which accrued due between the date of commencement of the proceedings and the date of judgment. The court should be able to give judgment for the further arrears whether or not it gives judgment for the arrears due when the proceedings commenced. Implementation of this recommendation need not be delayed until the implementation of the recommendation to abolish distress for rent. The clause in Appendix B gives effect to this recommendation (paras. 5.25–5.28 and 5.42).

6.6 In Part V of the report, we consider the effect of abolition of distress and whether a replacement remedy is required. We also consider possible improvement to the existing remedies. For the reasons given there, however, we make no recommendations on these matters other than the recommendation referred to in paragraph 6.5 above (para. 5.44).

(Signed) PETER GIBSON, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
14 December 1990

APPENDIX A

Law of Property (Distress) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Abolition of distress for rent etc.
2. Repeal of enactments giving landlords special rights on execution.
3. Amendment and repeals.
4. Money due to Crown.
5. Commencement and transitional.
6. Short title and extent.

SCHEDULE:—

Repeals.

DRAFT

OF A

B I L L

INTITLED

An Act to abolish the remedy of distress in respect of arrears of rent and certain other payments; to repeal section 1 of the Landlord and Tenant Act 1709 and section 102 of the County Courts Act 1984; and for connected purposes. A.D. 1991.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

- 5 1.—(1) A person shall not after the commencement of this Act have a right to distrain—
- (a) for arrears of rent or other payments due under a lease or an agreement collateral to a lease;
- (b) for arrears due under an instrument creating a rentcharge; or
- 10 (c) for payments due in respect of the breach of a covenant or condition contained—
- (i) in a lease or an instrument creating a rentcharge; or
- (ii) in an agreement collateral to a lease or to such an instrument.
- 15 (2) For the purposes of this section a sum payable in accordance with an indemnity in respect of a payment of a description mentioned in subsection (1) above is to be treated as if it were such a payment.
- (3) In this section—
- 20 “lease” includes an original or derivative under-lease and an agreement for a lease where the lessee has become entitled to have his lease granted; and
- “rent”, in relation to a lease, and “rentcharge” have the same meanings as in the Law of Property Act 1925.
- Abolition of distress for rent etc.
- 1925 c.20.

EXPLANATORY NOTES

Clause 1

1. This clause implements the central recommendation of the report in paragraphs 3.1 and 3.2. It abolishes the right to distrain on goods to recover arrears of rent and certain other payments relating to land. The different types of payment in relation to which the right to distrain is abolished are set out in paragraphs (a) to (c) of subsection (1).

Subsection (1)

2. Paragraph (a) deals with the principal case of rent and other payments under a lease, such as service charges, to which the right to distrain may be applied by agreement - for example by way of a provision in a lease to the effect that service charges are recoverable as rent. In addition, in order to prevent attempts to avoid the effect of abolition by putting the payment obligation into a separate agreement, abolition is expressly extended to payments due under an agreement collateral to a lease.

3. Distress may also be levied in relation to payments due under a rentcharge (see paragraph 4.3 of the report). Paragraph (b) of this subsection extends the abolition of distress to such payments in accordance with the recommendation in that paragraph. No reference is made here to a collateral agreement because a payment obligation is of the essence of a rentcharge and it would not, therefore, be possible to remove that obligation altogether to another agreement. If, however, in an effort to avoid abolition, an additional, separate agreement were made to back up the obligation to pay the sum due under the rentcharge (for example, an indemnity in respect of breaches of obligations arising under the instrument creating the rentcharge), it would be caught by paragraph (c).

4. In addition, distress may be available to enforce liability for breach of covenants or conditions (apart from the rent, service charge or basic rentcharge provisions themselves) contained in leases or instruments creating rentcharges - for example, for the costs of remedying breaches of a covenant to repair - (see paragraph 4.5 of the report). Paragraph (c) abolishes the right to distrain for such payments, in accordance with the recommendation in paragraph 4.4 of the report. Again, in order to prevent avoidance, collateral agreements are expressly dealt with.

5. Paragraph 4.8 of the report recommends that it should not be possible to create by contract a remedy equivalent to distress (but it is not proposed to prevent the creation of charges over chattels subject to the law governing the creation of such security). As explained in that paragraph, this subsection achieves that result by banning distress *simpliciter*.

Subsection (2)

6. This subsection abolishes the right to distrain for payments due under indemnities relating to liability for payments such as rent and other lease payments, sums due under rentcharges, or damages for breach of covenants or conditions affecting land. Such indemnities are commonly implied or expressly given on the sale or assignment of the whole or part of freehold or leasehold land - for example, to protect the assignor of a lease, or of land subject to a rentcharge, from liability for subsequent failure by the assignee to pay the rent or the sum due under the rentcharge. This subsection implements the recommendation in paragraph 4.4 of the report that distress should also be abolished in relation to liability under such indemnities.

Subsection (3)

7. This subsection provides definitions of the words "lease", "rent" and "rentcharge" for the purposes of Clause 1. The definition of "lease" is a common form of definition designed to ensure that distress is abolished in respect of rent arising not merely under headleases but all underleases, and in respect of "equitable" leases arising under agreements to create a lease. In accordance with paragraph 4.4, footnote 4, the Bill adopts the definition of "rent" in the Law of Property Act 1925, in order to give it an appropriately wide meaning so as to ensure that distress is abolished in relation to all forms of payment in the nature of rent in the broadest accepted sense of that word. Similarly, it is appropriate that "rentcharge" should have the same meaning in the Bill as it has in the principal Act relating to the law of property.

8. The relevant definitions in section 205 (xxiii) of the Law of Property Act 1925 are: "'Rent" includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land, but does not include mortgage interest;" and "'rentcharge" includes a fee farm rent;".

Law of Property (Distress)

Repeal of enactments giving landlords special rights on execution.

1709 c.18.
1984 c.28.

2. Section 1 of the Landlord and Tenant Act 1709 and section 102 of the County Courts Act 1984 (special rights of landlords on execution in High Court and county court) shall cease to have effect.

Amendment and repeals.
1887 c.43.

3.—(1) In section 7 of the Stannaries Act 1887 (orders for payment of mining wages made by justices to have priority) for the words “are by law” there shall be substituted the words “but for the Law of Property (Distress) Act 1991 would have been”. 5

(2) The enactments mentioned in the Schedule to this Act are repealed to the extent specified in the third column of that Schedule.

Money due to Crown.

4. This Act has effect in relation to money due to the Crown. 10

Commencement and transitional.

5.—(1) This Act shall come into force at the end of the period of six months beginning with the day on which it is passed.

(2) This Act does not have effect—

(a) where goods have been removed from premises before the commencement of this Act in the exercise of a right to distrain; or

(b) where at the commencement of this Act goods are subject to a walking possession agreement.

Short title and extent.

6.—(1) This Act may be cited as the Law of Property (Distress) Act 1991. 20

(2) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 2

9. This section repeals section 1 of the Landlord and Tenant Act 1709, and section 102 of the County Courts Act 1984. Section 1 of the 1709 Act provides that a judgment creditor levying execution in respect of goods on leased premises must first pay off any arrears of rent (up to a limit of one year's rent), and that the officer levying execution may then also levy execution for the rent so paid. The repeal of section 1 of the 1709 Act, although not strictly necessary as part of the abolition of distress, is recommended in paragraph 4.16(a) of the Report because of the way it gives preference to landlords and reflects the right to distrain. Section 102 of the 1984 Act substitutes alternative, similar provisions in relation to execution under process of the county court, and its repeal is appropriate for the same reasons.

Clause 3

10. Subsection (1) makes a consequential amendment to section 7 of the Stannaries Act 1887. Under that section, distress is available to enforce magistrates' orders for the payment of miners' wages. The distress may be levied in respect of "such mining effects ... as are by law liable to be distrained for rent.". Distress for miners' wages is outside the scope of this Report and is accordingly not abolished by the Bill, but the abolition of distress for rent requires the amendment of that section so that it refers to the law of distress as it was in force before abolition.

11. Subsection (2) introduces the repeals affecting other enactments set out in the Schedule, all of which are purely consequential on the abolition of distress for rent and other payments falling within Clause 1.

Clause 4

12. This clause provides that the Bill should bind the Crown, as recommended in paragraph 4.15 of the report.

Clause 5

13. Subsection (1) provides that the Act should come into force six months after it is passed. As explained in paragraph 4.10 of the report, a reasonably long period has been provided for in order to allow landlords time to familiarise themselves with the provisions of the Act, and to consider changes in their rent collection practices. A period of this length also makes it unnecessary to make special provision to deal with pending court cases relating to distress (for example, applications for leave to levy distress under the Rent Act 1977 or the Housing Act 1988) by giving adequate advance warning of impending abolition (see paragraph 4.14 of the report).

14. Subsection (2) provides for the existing law to continue to apply to cases in which, at the date of abolition of distress, goods have already been removed from the premises or in which they are subject to a walking possession agreement: paragraphs 4.11 and 4.12 of the report.

SCHEDULE

Section 3.

REPEALS

Chapter	Short title	Extent of repeal
2 Will. & 5 Mar. c.5 8 Anne. c.18	Distress for Rent Act 1689 Landlord and Tenant Act 1709	The whole Act. Section 1. Section 6.
4 Geo.2 c.28	Landlord and Tenant Act 1730	Section 5.
10 11 Geo.2 c.19	Distress for Rent Act 1737	Sections 1 to 10. In section 16, the words "so as no sufficient distress can be had to countervail the arrears of rent" and "or there shall not be sufficient distress upon the premisses".
15		Sections 19 and 20.
20 56 Geo.3 c.50	Sale of Farming Stock Act 1816	Section 6.
57 Geo.3 c.52	Deserted Tenements Act 1817	In section 1, the words "so as no sufficient distress can be had to countervail the arrears of rent".
25 3 & 4 Will.4 c.74	Fines and Recoveries Act 1833	In section 67, the words from "or may distrain" to "recovering of rent in arrear".
30 6 & 7 Will.4 c.71	Tithe Act 1836	Section 81. In section 82, the words "and there shall be no sufficient distress on the premises liable to the payment thereof".
35		In section 85, the words "distrained upon or", "such distress is taken or" and "distrained or".
40 2 & 3 Vict. c.84	Metropolitan Police Courts Act 1840	In section 13, the words "and that there is not sufficient distress upon the premises".
45 5 & 6 Vict. c.54	Tithe Act 1842	In section 17, the words "or of any notice to distrain". Section 19.

Law of Property (Distress)

SCH.

Chapter	Short title	Extent of repeal
6 & 7 Vict. c.40	Hosiery Act 1843	In section 18, the words "for rent or" and "the rent be due or". In section 19, the words "landlord or other" in each place where they occur, and the words "for rent in arrear".
8 & 9 Vict. c.18	Lands Clauses Consolidation Act 1845	In section 11, the words from "or it shall be lawful" to the end.
8 & 9 Vict. c.118	Inclosure Act 1845	In section 75, the words "shall not distress on the occupiers of such gardens, but the person so entitled". In section 112, the words "by distress and otherwise".
10 & 11 Vict. c.14	Markets and Fairs Clauses Act 1847	In section 38, the words "stallage, rent or", in both places where they occur. In section 39, the words "stallage, rent or".
14 & 15 Vict. c.25	Landlord and Tenant Act 1851	Section 2.
15 & 16 Vict. c.76	Common Law Procedure Act 1852	In section 210, the words from "and that no sufficient" to "arrears then due".
23 & 24 Vict. c.93	Tithe Act 1860	Section 19. Section 24. Sections 29 and 30.
27 & 28 Vict. c.114	Improvement of Land Act 1864	In section 64, the words from "such", in the first place where it occurs, to "but" and "for any period not exceeding six months" and the proviso.
35 & 36 Vict. c.50	Railway Rolling Stock Protection Act 1872	The whole Act.
45 & 46 Vict. c.43	Bills of Sale Act (1878) Amend- ment Act 1882	In section 7(2), the word "rent".
51 & 52 Vict. c.21	Law of Distress Amendment Act 1888	The whole Act.

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Law of Property (Distress)

SCH.

Chapter	Short title	Extent of repeal
58 & 59 Vict. c.24	Law of Distress Amendment Act 1895	The whole Act.
5 8 Edw.7 c.53	Law of Distress Amendment Act 1908	Sections 1 and 2. In section 3, the words "under such an under- taking as aforesaid, or" and "(other than the tenant for whose rent the distress is levied or authorised to be levied)".
10		Sections 4 and 4A. Section 109(3). Section 121(2). In section 150(5), the words "distress or". Section 189(1). In section 190(2) and (4), the words from "distrain" to "also" and "distress and".
15 & 16 15 Geo.5 c.20	Law of Property Act 1925	Section 26.
20		In section 8(7), the word "rent,". In section 35(2), the words "or to the landlord's remedy for rent". In section 15(3), the word "distress". In section 85(d), the words "or a distress for rent". In Schedule 4, in Part I, paragraph 5. Section 8.
15 & 16 Geo.5 c.23	Administration of Estates Act 1925	
25 18 & 19 Geo.5 c.43	Agricultural Credits Act 1928	
8 & 9 Geo.6 c.42	Water Act 1945	
30 1967 c.88	Leasehold Reform Act 1967	
1970 c.40	Agriculture Act 1970	
1974 c.39	Consumer Credit Act 1974	
35 1976 c.80	Rent (Agriculture) Act 1976	
1977 c.42	Rent Act 1977	
40 1980 c.58	Limitation Act 1980	
45		Section 147. In section 19, the words "or distress made,". In section 38(7), the words "rentcharges and" and "rent or". Section 102. Section 116. In section 139(1), paragraph (c) and the word "and" immediately preceding it. In Schedule 1, in paragraphs 2(2)(a)(i), 2(3)(b) and 3(3)(b)(ii), the words
1984 c.28	County Courts Act 1984	
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Law of Property (Distress)

SCH.

Chapter	Short title	Extent of repeal
1984 c.28— <i>cont.</i>	County Courts Act 1984— <i>cont.</i>	“rent or”.
1986 c.5	Agricultural Holdings Act 1986	Sections 16 to 18. Section 19(1)(a). 5
1986 c.45	Insolvency Act 1986	In section 347, subsections (1) and (2) and (5) to (7), in subsection (8), the words “otherwise than for rent” and the words 10
1988 c.50	Housing Act 1988	and subsection (10). Section 19.

APPENDIX B

- Court's power to order payment of arrears of rent to date of judgment.
- (1) Where in any proceedings a landlord claims arrears of rent, he may claim, in addition to arrears accrued when he commences proceedings, any further arrears which have accrued when judgment is given.
- (2) The court may give judgment for the further arrears whether or not it gives judgment for the arrears due when the proceedings commenced.
- (3) In this section “rent” has the same meaning as in the Law of Property Act 1925.

EXPLANATORY NOTES

1. This clause implements our recommendation in paragraphs 5.25–5.28 of the report.

Subsection (1)

2. This subsection gives effect to the first part of the recommendation in paragraph 5.28 of the report that a landlord claiming rent arrears should be able to claim any further arrears which accrued due between the date of commencement of the proceedings and the date of judgment.

Subsection (2)

3. This subsection implements the second part of the recommendation in paragraph 5.28 of the report that the court's power to give judgment for the further arrears does not depend on judgment being given for the arrears due when the proceedings commenced.

Subsection (3)

4. This subsection adopts the definition of "rent" in the Law of Property Act 1925, section 205(xxiii).

APPENDIX C

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Association of District Councils, Northamptonshire Branch
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British Legal Association
British Property Federation
British Railways Board
British Retailers Association
British Telecom
Brixton Estate plc
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C & J Clark Retail Properties Limited
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Central Association of Agricultural Valuers

Certificated Bailiffs Association of England and Wales
Chancery Bar Association
Borough of Charnwood
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Consumer Credit Trade Association
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Hearn & Partners Management Limited
Helder Roberts & Co, solicitors
Hillier Parker, chartered surveyors
Hilton Layland, surveyors
Holborn Law Society
Hollins Murray Group Limited
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Howlett & Clarke, solicitors
Incorporated Society of Valuers and Auctioneers
Inland Revenue
Institute of Chartered Accountants in England and Wales
Institute of Legal Executives
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Josiah Hincks Son & Bullough, solicitors
Judge & Priestley, solicitors
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Kindale Limited
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Knight & Co
Lancaster Holdings Limited
Last & Coyne, chartered surveyors
Law Centre Federation
Law Society
Leak Almond & Parkinson, solicitors
Legal Action Group
Legal & General Assurance Society Limited
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Manufacturers Life Insurance Group
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Max Bitel, Greene & Co, solicitors
Metestates
Mid Wales Development
Midland Oak Construction Limited
Ministry of Agriculture, Fisheries and Food
Mr J. Muir Watt
National Association of Citizens Advice Bureaux
National Association of Local Councils
National Chamber of Trade
National Consumer Council
National Council for One Parent Families
National Television Rental Association Limited
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Prudential Portfolio Managers Limited
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Rexington Limited
Richardson, certificated bailiffs
Rigby & Co, Limited
Rights Against Homelessness
Roger Hannah & Co, chartered surveyors
Rosan Heims Limited, certificated bailiffs
Mr A. M. Rose, certificated bailiff
Rossendale C.B. Limited, certificated bailiffs
Royal Institution of Chartered Surveyors
Royal Insurance plc
Rugby Securities Limited
Mr P. A. Russell, chartered surveyor
Salvation Army
Sapcote Construction and Development
Senate of the Inns of Court and the Bar
Shelter
Sherwins, solicitors
Skillion plc
Slough Estates plc
Small Landlords Association
Social Democratic Lawyers Association
South Hams District Council
St Modwen Properties plc
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Suffolk Coastal District Council
Sun Alliance Insurance Group
Sussex County Freeholds Limited
Tarnlan Limited
Tenant Farmers' Association
Tesco
Tewkesbury Borough Council
The Pryors Limited
Thomson Snell & Passmore, solicitors
Thorn EMI
Town & City Properties Management Limited
Treasury Solicitor
Vincent Whatley, Lane & Co, solicitors
Walker, Harris & Company, solicitors
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The Honourable Sir Raymond Walton
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Washington Development Corporation
Welsh Development Agency
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Wheelhouse Warehousing Limited
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APPENDIX D

Part II of Working Paper No. 97 entitled Distress for Rent is reproduced in this Appendix. It contains an account of the law relating to distress for rent as it was on 13 May 1986.

PART II

THE PRESENT LAW AND SOME CRITICISMS OF IT

2.1 The essence of the law of distress for rent can be expressed with deceptive simplicity. It enables a landlord who is owed rent to take goods from the demised premises and sell them, retaining for himself sufficient of the proceeds of sale to satisfy the arrears of rent, plus the cost of using the remedy. Despite the apparent simplicity of that statement, each part of it must be qualified. There are complex bodies of rules, to be found scattered through centuries¹ of case law and statute books, governing the conditions for exercise and every step of the procedure, such as who may exercise the remedy, to recover what amount of rent, upon which goods, when and how the distrainer may act, and so on. The present law is summarised below together with some illustration of the existing defects and difficulties. Even a short outline suffices to demonstrate the intricacy and inadequacy of the law on distress, although it is not possible, in a brief summary, to draw attention to all the difficulties which have arisen or which could arise.

The Landlord

2.2 The remedy is only available to owners of physical premises. This excludes landowners who grant other rights over their land, such as licences to occupy or use land, and rights of way and other incorporeal rights. It also excludes owners whose premises had been let, under tenancies which have come to an end. Thus, the landlord who determines the lease, or grants a new one, may not thereafter distrain for rent which accrued due under the original tenancy.² Although he is still the tenant's landlord of the same premises, his landlord status is no longer derived from the tenancy under which the arrears were payable.

2.3 There is one statutory exception, which enables landlords to distrain for arrears within the period of six months after any termination, other than a forfeiture, if the tenant continues in possession.³ The exception only applies where the tenant is "holding over" and does not apply if a new tenancy has been granted,⁴ or the landlord has elected to treat the tenant as a trespasser.⁵ At common law, a tenant holding over in possession after the determination of the contractual tenancy would not necessarily be a trespasser.⁶ He could be continuing in possession as a tenant at sufferance (i.e. without the landlord's consent) or as a tenant at will (i.e. with the landlord's consent) or pursuant to a new grant, express or implied.

2.4 The present century has brought the introduction and growth of statutory security of tenure, so that tenants will now often "hold over" pursuant to their statutory

¹ Numerous cases on distress were decided and reported in previous centuries. It does not necessarily follow from the dearth of recent reported decisions that no difficulties arise when the remedy is exercised today. There are other possible reasons. The remedy is not in very common use, and it may be that those participating are simply not aware that acts done during the course of a distress have been unlawful or of dubious validity. Alternatively, it may be that disputes do come before the courts but are rarely reported because they are heard in the County Court.

² *Wilkinson v. Peel* [1895] 1 Q.B. 516.

³ Landlord and Tenant Act 1709, s.6.

⁴ *Wilkinson v. Peel* [1895] 1 Q.B. 516.

⁵ *Bridges v. Smyth* (1829) 5 Bing. 410.

⁶ The tenant "holding" over is in some circumstances liable to an action for double value or for double rent; see Landlord and Tenant Act 1730, s.1 and Landlord and Tenant Act 1737, s.18. Double value cannot be distrained for.

rights. It has not been made clear what effect the statutory modifications of the landlord and tenant relationship will have on a landlord's right to distrain for previously accrued arrears. Whether that right will lapse immediately, or after six months, or whether it will continue unaltered by the effect of the statute, must depend on the wording by which that statute confers security. Several, wholly distinct methods are in current use. A statute may continue the tenancy, regardless of the ending of the contractual term, until determination in accordance with special statutory provisions.⁷ It may entitle the tenant to demand a new tenancy or an extension to the existing tenancy;⁸ it may create new statutory rights similar to those of a tenancy,⁹ prolong the period specified in a notice to quit,¹⁰ or give the courts power to make suspended possession orders.¹¹ It may be assumed that the distress rights exercisable by a landlord of business premises would continue unaffected during the statutory continuation of the contractual tenancy,¹² and might continue for six months if the tenant stayed in the premises after an effective termination, but would certainly be lost if the landlord granted a new tenancy, whether or not pursuant to an order of the court. That loss would not, of course, affect his right to distrain for such arrears as might arise under the new tenancy.

2.5 Security of tenure in private residential premises generally takes a completely different form, which does not purport to prolong the contractual term. Upon the termination of a Rent Act protected tenancy, the tenant may have statutory rights, including a right of occupation as a "statutory tenant"; but the statutory tenancy is not a true "tenancy" in the common law sense, because the "tenant" has no estate or interest in the land.¹³ It is clear from the wording of the Rent Act that landlords do have powers of distress during the currency of a statutory tenancy,¹⁴ but it is not clear whether the landlord to a statutory tenancy can distrain for arrears which accrued due during the preceding protected stage of the tenancy.

2.6 The landlord loses his right to distrain for accrued arrears when he assigns the reversion, but the assignee can distrain for those arrears. Personal representatives of the reversioner can distrain for arrears accrued due before his death,¹⁵ and, in some circumstances, the landlord's mortgagee may exercise the remedy.¹⁶

The Bailiff

2.7 The landlord can exercise the remedy in person, or he may employ the services of a certificated bailiff. Thus an incorporated body, which cannot act in person, must employ a bailiff.¹⁷ It is an offence to act as a bailiff levying rent distress without certification by the County Court.¹⁸ No certificate can be granted to any court officer. The certificates are either special certificates limited to a particular operation or general certificates issued for periods of up to a year authorising levy anywhere in England or Wales. Security must be provided, and the court has power to cancel any certificate issued and to order forfeiture of the security.

2.8 An application for a certificate must be made to the County Court in whose district the applicant resides or carries on his business, and must be in the prescribed form, which requires the applicant to give information as to his previous applications

⁷ Variations of this device are used in the Landlord and Tenant Act 1954, Part I for long private residential tenancies and Part II for business tenancies; in the Agricultural Holdings Act 1948 for tenancies of agricultural holdings; the Housing Act 1980, Part II for assured tenancies, in the private residential sector; and Part IV of the Housing Act 1985 for public sector "secure tenancies".

⁸ Variations of this device are used in the Landlord and Tenant Act 1954, Part II for business tenancies; the Leasehold Reform Act 1967 for long private residential tenancies where an extended lease is demanded; and the Housing Act 1985, Part V for public sector residential tenancies of flats, where there is a "right to buy" a long lease.

⁹ e.g. by Part I of the Rent Act 1977 for Rent Act "protected" tenancies.

¹⁰ e.g. under the Agricultural Holdings Act 1986, and for "restricted contracts" granted before November 1980, see Rent Act 1977, Part VIII.

¹¹ See especially Rent Act 1977, ss.100, 106A.

¹² If the court determines an interim rent under s.24A of the Landlord and Tenant Act 1954, that interim rent is deemed to be the rent payable under the tenancy.

¹³ *Jessamine Investment Co. v. Schwartz* [1978] Q.B. 264.

¹⁴ S. 147.

¹⁵ Administration of Estates Act 1925, s.26(4).

¹⁶ *Moss v. Gallimore* (1779) 1 Doug. K.B. 279.

¹⁷ *Hogarth v. Jennings* [1892] 1 Q.B. 907.

¹⁸ Law of Distress Amendment Act 1888, s.7; and Distress for Rent Rules 1983/1917.

and certificates, judgments against him and convictions. The rules require this statement to be verified on oath, but do not call for the personal attendance of the applicant. It is of course open to the court to do so. The court is not required to check the veracity of the information provided, and there is no body designated to marshal objections to applications or to put reported complaints against certificated bailiffs to the court. Nor is there any central register¹⁹ of the applications and matters pertinent to them, even though a general certificate granted by any County Court authorises the bailiff to levy distress anywhere in England or Wales. The application may be refused on the ground that the applicant is not a fit and proper person to hold a certificate, or that he carries on the business of buying debts.

2.9 There are no further rules for the conduct of applications, and none for consideration of complaints. False statements in applications and contraventions of the statutory rules are obvious potential grounds for refusing or cancelling certificates. It may reasonably be thought that some conduct which does not, strictly, contravene any rule, such as drunkenness or an oppressive manner in the course of distraining, ought to be ground for cancellation or refusal of a certificate. Such conduct may seem a more compelling ground than minor technical infringements which cause no anxiety and no hint of prejudice or oppression. While it would be undesirable to place fetters on the judges' discretion, we understand that the absence of guidelines as to procedure and factors to be taken into account (for both complaints and ordinary applications) has already caused divergence in the practices used in different County Courts.²⁰

2.10 The opportunities for a bailiff to abuse his position are obvious. His duties regularly involve the handling of cash and valuables, and the entry onto private premises, including residential premises and unattended property. Tenants are not likely to be aware of the limitations of his powers, and they are quite likely to regard him as some sort of court official. The controls appear to be seriously inadequate, both as regards assessment of applicants' suitability as bailiffs, and the superintendence of their conduct of levies.²¹ The certificate does, after all, authorise a bailiff to offer distraining services for hire. Yet applicants for bailiffs' certificates do not have to claim, let alone prove, any knowledge of the relevant rules and principles, and there is no prescribed complaints procedure. It is true that the tenant, or other aggrieved party, can take advice as to whether there was an impropriety for which he may have a civil remedy; but there is no encouragement, nor indeed any obvious facility, to draw the certificating court's attention to any misconduct of bailiffs.

2.11 No doubt the introduction and maintenance of any more stringent control procedure would add very significantly to the cost of certification, and there must be reservations about making that extra cost a burden on the public purse. On the other hand, if the cost were to be paid by those making use of the certification process, i.e. bailiffs directly, and landlords indirectly, then distress might well lose one of its main attractions, namely that it is inexpensive. Self-regulation by bailiffs might prove less expensive than public regulation, but, however efficient, is less likely to inspire public confidence. Self-regulation by professional bodies seems now more likely to be phased out than increased.²²

Distraint by landlords acting in person

2.12 There can still be minor differences between distress levied by landlords

¹⁹ Some records of certificates granted, refused or cancelled are kept. A central register of County Court judgments is maintained pursuant to s.73 of the County Courts Act 1984. The Register of County Court Judgments Regulations 1985/1807 have permitted the contracting out of responsibility from the Lord Chancellor's Department to a body corporate known as Registry Trust Ltd.

²⁰ e.g. one judge may require the personal attendance of the applicant, while another may not. One application was refused recently when it became apparent that the applicant misunderstood the scope of certification. He believed it would enable him to execute County Court warrants in the same manner as a County Court bailiff. The misunderstanding might not have come to light so soon if the judge had not required the applicant to attend an interview with the Registrar and to be present when the judge considered the application.

²¹ We would not suggest that each individual levy should be overseen. Only that the system should encourage bailiffs to act as if they all were, so that loose practices were discouraged.

²² See, for instance, the new controls over estate agents introduced by the Estate Agents Act 1979 and over insolvency practitioners by the Insolvency Act 1985.

personally, and distraint by bailiffs. For instance, a bailiff is always required to serve notice of distress in a prescribed form, which does not apply to landlords. The reason is simply that the present statutory rules regulating bailiffs' distressing²³ are made under a statutory power which is specific to bailiffs and therefore cannot be used to regulate the conduct of landlords distressing in person. We do not know how many distressing landlords do act in person. It may be thought incongruous that the safeguards considered necessary for regulating bailiffs' distress should not also apply to landlords choosing to distress in person. Apart from the added expense of bailiffs' fees, there is no essential difference in the nature of the levy, or the effect on the tenant. Going one step further, it could be argued that it is undesirable to allow a landlord to distress unless he holds a bailiff's certificate. That argument would be reinforced if bailiffs faced stricter requirements for certification. On the other hand, it might be said that the landlord's liberty to distress would be unfairly curbed by such restrictions. Moreover, tenants might also suffer if the result were to force landlords to use unnecessarily more expensive procedures.

The Rent

2.13 The remedy of distress for rent is only exercisable to enforce an obligation to pay rent reserved by a lease or tenancy.²⁴ When the remedy was first exercised, the rent obligation was more often an obligation to perform services, such as knight service or agricultural services, than to pay money, but for centuries past the obligation has been a monetary one.²⁵ There seems to be no reason why rent should not be reserved in a foreign currency,²⁶ but it is not apparent how distress for arrears would operate.²⁷

2.14 Until fairly recently, there would have been little difficulty in ascertaining which sums payable to the landlord qualified as rent and could therefore be distrained for. As recently as 1979, Templeman L.J. said, in *T. & E. Homes Ltd. v. Robinson* [1979] 1 W.L.R. 452, 459:

“Of course, in order to be a rent, a receipt by a landlord must be a payment made to him in consideration of the enjoyment by a tenant of land belonging to the landlord . . .”

If that is an essential feature of “rent” in all contexts, doubt may be cast upon the efficacy of the modern practice whereby other payments, most commonly service charges, and reimbursements of insurance premiums, are defined in leases as rent.²⁸ The tenant's continued enjoyment of the land may in practice depend on payment of such sums, but they are more directly attributable to something other than enjoyment of land. Similarly, landlords commonly reserve the right, when tenants are in default in performing their obligations, such as an obligation to repair, to carry out the required acts themselves, and charge the costs to the tenants. Such costs are sometimes described as rent, and quite often are expressly made recoverable as if they were rent. The answer is probably that the term “rent” can have different meanings in different contexts. The concept of “distrainable rent” may have quite narrow limitations.

2.15 The inherent right to distress for rent (which applies without any express

²³ i.e. the Distress for Rent Rules 1983 S.I. 1983/1917 made under s.8 of the Law of Distress Amendment Act 1888.

²⁴ In theory, the remedy is also available for the recovery of rentcharges, whose already diminished importance will be yet further diminished as the extinguishment provisions of the Rentcharges Act 1977 take effect, but estate rentcharges may well survive permanently subject to the implementation of our recommendations in *The Law of Positive and Restrictive Covenants* (1983), Law Com. No. 127, which proposes the introduction of an entirely new system of land obligations; see especially paras. 24.39–24.45.

²⁵ Rendering of services can still constitute rent, but that is exceptional, see *Barnes v. Barratt* [1970] 2 Q.B. 657.

²⁶ In *Multiservice Bookbinding Ltd. v. Marden* [1979] Ch. 84, Brown-Wilkinson J. held that it was not contrary to public policy to link mortgage payments in sterling to the rate of exchange between sterling and a foreign currency, and in *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443, the House of Lords held that an English court was entitled to give judgment for a sum of money expressed in foreign currency. It may be deduced from these decisions that there is no principle which would invalidate a reservation of rent in a foreign currency.

²⁷ The main difficulty would be in determining the date upon which the rate of exchange ought to be fixed.

²⁸ N.B. that under the Rent Act 1977, s.5(4) insurance rent, and service charges etc., are disregarded for the purpose of ascertaining whether the tenancy is at a low rent, but only if they are described as payable in respect of rates, services, etc. It has been held that rent which includes an element for the use of furniture is distrainable: see *Rousou v. Photi* [1940] 2 K.B. 379.

mention) does not necessarily attach to all sums described in the lease as “rent”. It is true that contracting parties, whether or not landlord and tenant, can stipulate in their agreement that sums due may be recovered by distress, and it seems that the practice was once quite common.²⁹ However, those contractual rights of distress clearly fall short of the rights enjoyed by landlords in distraining for rent. For instance, unlike distress for rent, the contractual distress could not affect the rights of strangers upon whose goods a landlord can distrain for rent,³⁰ and the parties probably could not use any of the court procedures peculiar to rent distress, such as rescous and poundbreach, although some near equivalents for the civil remedies might be framed in contract. It follows that a landlord could reserve rights closely analogous to rent distress for “rents” otherwise not distrainable. It may not follow, however, that the court would infer such an intention merely from the description of such sums as rent.

2.16 Other sums which might fail to qualify as distrainable rent, are rent balances made payable retrospectively after an upward rent review. This can happen when, although an increased rent is made payable as from a certain date, the amount of the increase has not been fixed in time for payment on that date. It has been suggested that such increases do not meet the requirement of certainty on the date fixed for payment, so as to qualify as distrainable rent.³¹ At the same time it was acknowledged that as rent can be payable retrospectively in such circumstances, it is anomalous that the remedy of distress may not be available.³²

Deductions from rent

2.17 Traditionally, the tenant was not entitled to make any deductions from rent before he paid, and the landlord could distrain for any unpaid part of the sum reserved. Some deductions have been expressly authorised by statute, such as some amounts which may be paid by the tenant to meet the landlord’s liability to pay rates or taxes on the demised premises.³³ There are certain other payments which the tenant can make, and which should be taken into account as whole or part satisfaction of rent due, in any rent enforcement proceedings, including distress. These payments include rentcharges and rents payable under superior leases. The landlord implicitly authorises the tenant to make the payments and to treat them as satisfaction pro tanto of the rent due.³⁴ It is, however, quite common to specify in the covenant that payment of rent shall be made without any deductions,³⁵ and some leases now provide that payment shall be made without any set-off.³⁶

2.18 It has recently been recognised that a tenant may cross claim against a landlord who sues for rent arrears, where the equity of the cross-claim goes to the foundation of the landlord’s claim for rent. The cross-claim must at least arise under the lease itself or directly from the relationship of landlord and tenant created by the lease, but it is not necessary for the cross-claim to be for a liquidated amount.³⁷ Although not called upon to decide whether a cross-claim could be an answer to a distress, Forbes J. commented that “today, even in replevin cases, the anachronism of the special remedy of distress would or should not inhibit a court from applying” similar equitable principles. In an earlier case³⁸ Megarry V.-C. said:

“If a landlord had a claim for £1,000 against a tenant, and the tenant had a claim for £1,000 against the landlord for breach of the repair obligations, it would be remarkable if the landlord could recover his £1,000 in full from the tenant under Order 14, and leave the tenant to claim his £1,000 against the landlord and recover, not £1,000 but, by reason of the landlord’s insolvency, say a mere 10p in the £. The insolvency of the landlord seemed to raise important issues.”

²⁹ See e.g. *Re Willis, ex parte Kennedy* (1888) 21 Q.B.D. 384.

³⁰ See post, para. 2.32 et seq.

³¹ *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904.

³² See *ibid.*, especially at pp. 935, 947.

³³ See General Rate Act 1967, s.58.

³⁴ *Graham v. Allsopp* (1848) 3 Exch. 186.

³⁵ See *Bradbury v. Wright* (1781) 2 Doug. K.B. 264.

³⁶ See post, para. 2.19.

³⁷ *British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd.* [1980] Q.B. 137.

³⁸ *Asco Developments Ltd. v. Gordon* (1978) 248 E.G. 683, 685.

2.19 It would be just as remarkable if the tenant were able to use his £1,000 cross-claim to resist the landlord's court action for rent but not to resist distress by the landlord. Today's courts might uphold cross-claims against rent distress but, unless and until they are asked to do so, the point is uncertain. The effects of covenants to pay rent without set-off, referred to above, is also uncertain. There is no special procedure for setting up such a cross-claim. The tenant would presumably have to start a replevin action or seek an injunction, but this is not wholly satisfactory.

Ways to test cross-claims

2.20 Replevin is a special procedure available initially in the County Court only,³⁹ to tenants and others who allege that their goods have been illegally distrained or otherwise taken from them. It is only when distress is illegal⁴⁰ that the tenant or other owner of goods may use the remedy. Replevin is a two-stage process whereby the person who claims to be owner of the goods obtains an order from the County Court for the return of his goods, on his providing alternative security, and then proceeds (as he must undertake to do) in an action to prove the illegality of the distress, and his right to the goods. The security must be sufficient to cover the alleged rent arrears and probable costs of the replevin action. The court has no discretion as to the security requirements, except as to the amount of it. The distrainer must always allow five clear days for replevin after taking distress, unless that period is shortened by consent or extended to up to fifteen days at the request of the person taking the action (giving security for any additional cost).

2.21 The courts have been reluctant to grant injunctions to interfere with the legal process of distress and have tended to grant interlocutory injunctions only on terms equivalent to those which are mandatory in replevin, i.e. by requiring payment into court of the amount claimed.⁴¹ The injunction is undoubtedly a more flexible remedy than replevin, under which the court *must* require whatever security it considers sufficient to cover the whole amount claimed plus costs, however weak the claim may seem. But while the court abides by the same principles, the advantages of the full discretion in injunction proceedings would not be realised.

2.22 While only a court can adjudicate satisfactorily on a cross-claim set up against a distress, the procedure must in the first instance be summary. Were it otherwise, the nature of the remedy of distress would be lost. Summary remedies and procedures are usually designed to meet cases where there is no arguable defence to the claim, and they are not ideally suited to cases where there are bona fide cross claims. As the remedy of replevin stands, the replevisor is never permitted to raise any issue against the distrainer unless he effectively guarantees payment of the distrainer's highest (albeit fanciful) claim for rent due. This highlights the difficulty of admitting cross-claims against distress. If court proceedings go beyond a summary stage, a substantial period may be involved. If the goods remain seized, or full security has to be given, the burden on an ultimately successful tenant is severe, and greater than he suffers if the landlord opts for any other procedure. However, if the goods are released without security, the landlord completely loses the benefit of distress. While the remedy is available, a successful landlord could justifiably be aggrieved at that outcome.

2.23 An aggrieved tenant or other owner who is able to allege "wrongful interference" with his goods, within the meaning of the Torts (Interference with Goods) Act 1977, could apply for interlocutory relief under section 4 of that Act. The torts included are conversion of goods, trespass to goods, and negligence and other torts resulting in damage to goods or an interest in goods. The court can order delivery of the goods to the plaintiff on such terms and conditions as it thinks fit. However, attempts to use that procedure are likely to raise some similar questions to those which would arise in replevin, e.g. whether the plaintiff's allegations of wrong are sufficient to bring him within the section, whose object is, not so much to produce an order restraining a party from seizing goods, but rather to produce a positive order for the delivery up of those goods.

³⁹ See County Courts Act 1984, s.144, Sch. 1.

⁴⁰ As opposed to irregular or excessive. The distinction is explained *infra*, para. 2.66 et seq.

⁴¹ See *Sanxter v. Foster* (1841) Cr. & Ph. 302, and *Carter v. Salmon* (1880) 43 L.T. 490.

2.24 Another aspect which further makes replevin a particularly inappropriate remedy when the issue between the parties is a cross-claim, (especially an unliquidated cross-claim) is that replevin only lies against illegal distress. Not all wrongful distresses are illegal as some are classified as irregular and some as merely excessive.⁴² The distinguishing rules are not easy or obvious, and would provide yet another unnecessary hurdle to a tenant attempting to use replevin to set up his cross-claim. A distress does not become illegal by reason only that an excessive amount is claimed. Moreover, the tenant's remedies for merely excessive distress are somewhat limited and are not designed to provide a very persuasive deterrent.⁴³ On the other hand the distress *is* illegal if no rent is owed, and the effect of admitting cross-claims in some cases is that the cross-claim would neutralise the rent claim so that no rent was owed. This would make the distress illegal. Yet the distraining landlord might be unaware of the existence of the cross-claim.

The Arrears

2.25 The landlord may distrain for any arrears of rent accrued due under the current lease during the period of six years ending on the day before levy.⁴⁴ For agricultural holdings, the period is one year,⁴⁵ and, if the tenant is adjudicated bankrupt, the landlord cannot distrain for arrears accrued due more than six months before the adjudication order.⁴⁶ It makes no difference whether the rent is payable in advance, or in arrear. The landlord cannot usually distrain more than once for the same arrears unless insufficient goods were found on the premises at the first attempt.⁴⁷ He cannot use any proceeds of sale to satisfy rent accrued due after the levy has been made. While landlords should obviously not be encouraged to seize goods beyond the value immediately needed, it does seem futile to require the landlord to hand over surplus proceeds to a tenant who has already fallen into arrear again, thus exposing him to a new distress with more costs. A principal justification for the special remedy of distress is the vulnerability of the landlord as a creditor where the debt keeps recurring, and this aspect of the procedure seems to ignore rent's repetitive nature.

Preliminaries

2.26 Under the common law, once the power of distraint has become exercisable, the landlord may proceed straight to the levy without any advance notice to the tenant and without observing any other preliminary formality. There are now some instances where statute specifically prohibits distress without the leave of the court,⁴⁸ but otherwise, the rule is still that no notice need be given. A distraining bailiff must, of course, have the landlord's authority to act, which is usually given in the form of a written warrant, but there is no requirement in law for written authority.

2.27 One of the severest social criticisms, which has for many years been levelled at rent distress, is the absence (in most cases) of any advance warning to the tenant, let alone any preliminary check on the validity of the claim.⁴⁹ An obvious early justification was that forewarned tenants might simply move their goods away. That justification still has force, but perhaps diminished force where tenants find that their statutory security of tenure is more valuable than the goods at risk, or that the inconvenience of voluntary removal is greater than the risk of distress. The arguments in favour of requiring notice are also potent. As distress is a legal remedy, which does not need to be reserved, or even mentioned in the lease or tenancy agreement, many tenants may be unaware that there is such a remedy which can be used against them.⁵⁰ Some may believe that distress for rent is so archaic that it is extinct. One answer could be to make express reservation a prerequisite to the exercise of distress, but there must

⁴² See post, para. 2.66 et seq.

⁴³ See post, para. 2.66.

⁴⁴ Limitation Act 1980, s.19.

⁴⁵ Agricultural Holdings Act 1986, s.16.

⁴⁶ Bankruptcy Act 1914, s.35(1).

⁴⁷ *Wallis v. Savill* (1701) 2 Lut. 1532. There are other exceptions, such as where there has been a reasonable mistake in value, or failure to realise full market value.

⁴⁸ See infra, para. 2.28.

⁴⁹ The absence of any advance notice requirement is not a defect in any legal sense.

⁵⁰ A defendant to court proceedings will almost always learn of jeopardy before execution.

be some doubt as to whether tenants would thereby be more enlightened. Advance notice of distress is far more likely to register, and to send uninformed tenants in search of information. It could well be that notice of intended distress would be sufficient in many cases to hasten payment. If so, much expense could be avoided. The notice would certainly be cheaper, and might be just as effective as sending in the bailiffs to induce defaulters to clear their arrears. Notice would also give tenants the opportunity to seek advice and to take avoiding steps where there are genuine doubts or disputes as to the arrears or the right to distrain. While the coercive effect of notices might be used to harass tenants, that practice would be subject to the existing controls over harassment of debtors.⁵¹

The Court

2.28 Leave to distrain is required if the tenant is a company which is being wound up by the court,⁵² or if the tenant has been called up to perform a service in the armed forces.⁵³ Leave is also required where the premises are let on a protected tenancy, or are subject to a statutory tenancy under the Rent Act 1977,⁵⁴ and where they are subject to a protected occupancy or statutory tenancy within the meaning of the Rent (Agriculture) Act 1976.⁵⁵ Applications for leave are made *inter partes*.

2.29 The leave of the court, now required for distress against Rent Act tenants,⁵⁶ ensures that most private residential tenants are given both advance notice and an opportunity to prevent the distress on the ground of its invalidity or on other grounds, such as financial hardship. Out of only one hundred and twenty-six applications for leave in 1984, about a third were granted. We understand that many landlords who are *prima facie* entitled to distrain are deterred by the costs and delays of court applications, perhaps linked with pessimistic assumptions as to likely outcome. It may be that in some cases the mere threat of an application is effective in encouraging payment, so that no application follows.

2.30 In our 1966 Interim Report⁵⁷ one immediate reform recommended was the extension of the leave requirement to all residential lettings, but the recommendation has not been implemented. In several other common law jurisdictions distress on residential premises is prohibited.⁵⁸ Although local authority housing tenants do now have other rights⁵⁹ similar to those enjoyed by private residential tenants, a proposal to give them similar protection from distress was rejected.⁶⁰ Thus, in the majority of tenancies, excluding Rent Act tenancies, the landlord is still entitled to make use of the element of surprise, which in some cases may serve to avoid defeat of the remedy by absconding tenants. Nevertheless, it may well be thought that the element of surprise, which is still available in a large proportion of rent arrears cases, is one of the main factors contributing to the opprobrium with which distress for rent is regarded in some quarters.

2.31 The effect of distraining has some similarity to the effect of a *Mareva* injunction,⁶¹ namely that the creditor can rapidly ensure that assets available to satisfy his debt shall not be dissipated. But the *Mareva* applicant must satisfy the court that there is reason to suppose that the assets would no longer be available when judgment was entered. A *Mareva* injunction might be an appropriate substitute for distress in some cases, but in others it would be wholly inappropriate. For instance, it might be seen as using a sledgehammer to crack a nut if used against a residential tenant of modest premises who would not deliberately remove assets to avoid judgment but might be under pressure from other creditors. The *Mareva* injunction does not actually give the creditor a priority claim over the preserved assets.

⁵¹ Administration of Justice Act 1970, s.40.

⁵² Companies Act 1985, ss.525, 607.

⁵³ Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s.2.

⁵⁴ Rent Act 1977, s.147.

⁵⁵ Rent (Agriculture) Act 1976, s.8.

⁵⁶ But not tenants under restricted contracts.

⁵⁷ Interim Report on Distress for Rent (1966), Law Com. No. 5.

⁵⁸ e.g. New Zealand (1952), Ontario (1970), British Columbia (1970), Manitoba (1970) and Prince Edward Island (1972).

⁵⁹ See the provisions of the Housing Act 1985.

⁶⁰ See *Hansard* (H.L.), 30 June 1980, vol. 411, cols. 205-210.

⁶¹ R.S.C., O. 29, r.1. See *P.C.W. (Underwriting Agencies) Ltd. v. Dixon* [1983] 2 All E.R. 158.

The Goods

2.32 The basic rule at common law is that any article physically situate on the premises for which rent is due, is liable to be taken by the distraining landlord. Thus, the distrainer may distress on goods which belong to third parties, even when he knows that those goods are not the property of the tenant.⁶² In several other jurisdictions, the distress remedy is now limited to the goods of the tenant.⁶³ There are, however, numerous exceptions to the basic rule, some of which relate exclusively to third party goods, while others can or must relate to the tenant's own goods. The basic rule has the merit of simplicity, in that the distrainer can rely on his own inspection on site to judge whether goods are prima facie available for distraint. This is in sharp contrast to the other instances where a debtor's goods are seized and sold to meet his debts.

The location of the goods

2.33 Distress can be levied on goods and chattels found anywhere on the demised premises. Although the rule is straightforward, it is not always easy to decide whether or not goods are within the premises which have been let. This is usually because the extent of the premises has not been precisely defined in the tenancy agreement. In the absence of a clear plan it may not be apparent whether land outside the main building or unit is included in the letting, and that can cause practical difficulties in distress: very often a motor car parked outside the premises may be the most valuable and most marketable asset belonging to the tenant.⁶⁴ Sometimes, however, the position may be uncertain because the terms of the tenancy allow the tenant to use some land in a particular way, perhaps in common with others—an obvious example being the use of the car park. It does not appear to have been decided whether such land can be regarded as part of the demised premises in the context of distress.⁶⁵

2.34 In some circumstances, the distrainer is permitted to take goods from other premises, e.g. premises to which the tenant has removed his goods in order to avoid distress,⁶⁶ or common land where his cattle are grazing,⁶⁷ but these are not perhaps true exceptions to the general rule that only goods situate on the demised premises are liable to be taken for rent distress.

The quantity of goods

2.35 It does not follow, of course, that because a range of goods is available for distress, the distrainer may take them all. It is up to the distrainer to assess the value of the goods so that he distrains upon the right amount to cover the arrears plus recoverable costs. In the absence of a specific request by the tenant, there is no requirement for an independent valuation.⁶⁸

⁶² Cf. the rules governing execution of money judgments, which allow only the debtor's own goods to be taken; see *Glasspoole v. Young* (1829) 9 B. & C. 696 and County Courts Act 1984, s.89, and the rules governing distress for rates or taxes. The test in those cases is usually whether the goods are the property of the debtor, which may not be apparent on inspection, so that it is necessary to make provision governing cases where the seizer is misled, or otherwise makes a reasonable mistake as to ownership. Likewise a third party's goods are not taken in satisfaction of another's debt in bankruptcy and companies' winding up, other than in exceptional circumstances.

⁶³ The approaches are by no means uniform. In many of the United States of America the remedy is limited to the tenant's own chattels, but in New Zealand it extends to the goods of other persons "in possession" (which, confusingly, seems to include a company of which the tenant is a major shareholder, but not a lodger). In several Canadian provinces, only the goods of the "tenant" may be taken, but the definition of "tenant" is variously extended to include e.g. subtenants, and others in "actual occupation".

⁶⁴ The general presumption that the owner of land adjoining a road is the owner of the soil of one half of the road may sometimes apply, at least in relation to private roads. The presumption was applied in an isolated case, to allow distraint on a vehicle left on the highway bounding the demised premises, even though the Statute of Marlborough 1267 generally prohibits distress on the highway; see *Hodges v. Lawrance* (1854) 18 J.P. 347. Because of changes in the highway law, it cannot be stated with absolute confidence whether or not that situation could occur again.

⁶⁵ The extent of the demised premises could then depend on whether a designated parking space had been let to the tenant, or whether he was simply entitled to use space within a care parking area.

⁶⁶ Distress for Rent Act 1737, s.1.

⁶⁷ Distress for Rent Act 1737, s.8.

⁶⁸ For the provisions as to appraisalment, see *infra*, para. 2.56.

The Privileges

2.36 While the basic rule in distress that all goods may be taken is straightforward, the multiplicity of exceptions is a major complication.⁶⁹ The diversity and number of the exemptions or privileges are such that considerable uncertainty must abound. Many of the exemptions have utterly logical bases (some no longer apparent on first sight) but others have survived beyond the conditions which gave rise to and justified them. The exemptions of privileges can, fairly conveniently, be divided into three categories.

Qualified privilege

2.37 The narrowest category is that of qualified privilege. This category includes goods and chattels which are privileged because they are items (often some form of livestock) within a particular description. They can only be taken if, without them, there would not be sufficient distrainable goods on the premises to raise the sum required. The privilege does not usually depend on the ownership of the items. Within this category are:

- (i) all the tools and implements of a man's trade⁷⁰ (not necessarily the tenant's own property);
- (ii) sheep and beasts which "gain" the land (which seems to mean beasts of the plough);⁷¹
- (iii) agisted animals,⁷² i.e. animals which belong to third parties and have been taken in commercially by the tenant to be fed; and
- (iv) growing crops which have already been seized and sold in execution.⁷³

2.38 Except for the first, all the above privileges apply only in an agricultural context. These agricultural privileges are consistent with an objective of preventing distress from interfering with good husbandry. The piecemeal growth of distress law is nicely illustrated by the law requiring the distrainor to separate the sheep from the cows, but apparently remaining silent as to whether he must separate the sheep from the goats.

2.39 The special category of qualified privilege, while perhaps logical in origin, has not developed in a useful manner. It confers limited protection on narrow classes of property, and the onus of proof that insufficient other property can be found lies on the distrainor; but the tenant is given no choice as to which, if any, of the privileged items should be left.⁷⁴ Moreover the items with qualified privilege are only distinguished at the levy stage. Once they have been distrained on, the distrainor is under no obligation to keep them back to see whether the other goods taken will yield sufficient proceeds to cover the debt and costs. The importance of qualified privilege is much reduced today, especially as several of the categories are partially duplicated. For instance, the qualified privilege for tools of a trade is partly duplicated by another rule which confers absolute privilege on tools up to a certain value.⁷⁵ The whole concept of qualified privilege appears now to be either unnecessary or unnecessarily elaborate.

Absolute privilege

2.40 The second, most diverse, category covers goods which are exempt from seizure, and whose exemption could be anticipated as a matter of common sense. Again, ownership is not the essential criterion; the privileged articles will sometimes, but not necessarily, be the property of the tenant. This category includes:

⁶⁹ For a summary of the exceptions, see *infra*, paras. 2.37–2.44. The various classes overlap: the tools of a man's trade, for example, might be capable of qualifying for exemption under three totally different heads, and more if they are not his own property.

⁷⁰ *Nargett v. Nias* (1859) 1 E. & E. 439.

⁷¹ Statutes of the Exchequer (Temp. incert.), see *Simpson v. Hartopp* (1744) Willes 512.

⁷² Agricultural Holdings Act 1986, s.18.

⁷³ Landlord and Tenant Act 1851, s.2.

⁷⁴ Cf. Scottish "hypothec" which gives the tenant a choice, up to a certain value.

⁷⁵ See *infra*, para. 2.40(vi).

- (i) *Wild animals*⁷⁶ which, by definition, do not belong to anyone, unless they are domesticated or kept in captivity.
- (ii) *Perishable articles*,⁷⁷ and other articles which cannot be restored to the tenant in the same condition as they were taken.
- (iii) *Fixtures*,⁷⁸ which are the landlord's own property anyway, even if they are within the category commonly described as "tenant's fixtures".
- (iv) *Money*, unless it is in a closed purse or bag,⁷⁹ because it cannot be guaranteed that loose coins and notes will remain distinguishable from others in the distrainer's possession, so that the same ones can be returned to the tenant.
- (v) *Things in actual use*⁸⁰ at the time when the landlord seeks to distrain, such as the vehicle or horse being ridden by the tenant, the tools he is using, and the clothes he is wearing. This privilege only lasts as long as the use, so that goods can, apparently, be taken as soon as there is a pause in the use, e.g. when clothes are taken off at night.
- (vi) *Wearing apparel and bedding* of the tenant and his family,⁸¹ up to the value of £100, and *tools* and implements of his trade up to £150. This privilege is directly linked to the statutory exemption of such goods from seizure in execution. The privileged values are varied from time to time by order and were last increased in 1980.
- (vii) *Goods already in the custody of the law*,⁸² for instance because they have been seized in execution and not abandoned. Although such goods are privileged from distress, the landlord's claim for arrears is by statute sometimes given some priority, and the officer enforcing an execution may be called upon to levy distress for rent arrears.

2.41 The rules exempting perishable articles, fixtures and loose money all originated before there was any power to sell distrained goods. Until 1689,⁸³ the scheme of rent distress was the landlord would seize goods and hold them as a pledge until the tenant performed his rental obligations. Thus it was logical that the remedy should be limited to goods which could be returned to the premises in the same condition as they were taken. The exemption of loose money was logically sensible when distress was only a form of pledge, but it has now become nonsensical. It is true that the landlord cannot guarantee to restore the coins and notes actually taken, e.g. if there is replevin, but there is really no reason why he should do so. The whole purpose of the exercise is to obtain cash to meet a debt, and if there is cash available (avoiding the extra expense of storing and selling goods) there is no reason why that cash should be not applied directly and immediately to the outstanding debt. The privilege for perishable goods still makes practical sense, if only because some days must pass before the distrainer is permitted to sell, and there is a real risk that perishable goods would deteriorate in that time. Their value would then be reduced, whether they were ultimately restored to the owner, or sold at a price reflecting the deterioration. There is, however, no equivalent protection for goods whose removal from the premises, or separation from other goods on the premises, may have adverse effects on value, such as things whose value is enhanced by their setting, or sets whose value lies in their completeness. Nor is there any protection for goods whose removal may adversely affect the condition or value of those left behind, such as appliances designed to keep other things at a steady temperature, whether warm or cold. Such appliances might sometimes qualify for a wholly different privilege, such as that attaching to things in actual use, but they would not inevitably do so.

⁷⁶ Co. Litt. 47a.

⁷⁷ e.g. *Morley v. Pincombe* (1848) 2 Exch. 101.

⁷⁸ *Pitt v. Shew* (1821) 4 B. & Ald. 206.

⁷⁹ *East India Co. v. Skinner* (1695) 1 Botts P.L. 259.

⁸⁰ *Bissett v. Caldwell* (1791) Peake 35.

⁸¹ Law of Distress Amendment Act 1888, s.4; County Courts Act 1984, s.89(1); Administration of Justice Act 1956, s.37(2); and Protection from Execution (Prescribed Value) Order 1980/26.

⁸² Landlord and Tenant Act 1709, s.1; Execution Act 1844, s.67; County Courts Act 1984, s.102; Bankruptcy Act 1914, ss.35, 41; and Landlord and Tenant Act 1851, s.2.

⁸³ Distress for Rent Act 1689, which first gave landlords power to sell distress.

2.42 The treatment of so-called tenant's fixtures reveals something of an anomaly. These fixtures are particular kinds of personal chattels, such as petrol pumps,⁸⁴ window blinds,⁸⁵ and public house fittings,⁸⁶ which the tenant has affixed to the premises. They become part of the premises, so that the landlord has legal title, but the tenant has power to determine that title, by severing and removing the fixtures before (or sometimes within a reasonable time after) termination of the lease. Thus, while the tenant may elect during the term to treat those fixtures as the tenant's own personal chattels, the distraining landlord may never do so.

2.43 The privilege for things in actual use also had a very sound and practical basis. It was intended to avoid breaches of the peace provoked by attempts to wrest away from someone items which he was, for instance, handling or wearing. However, it was never expressed as exempting only those things whose removal might prove to be provocation, and its ambit is no longer clear. Modern technology has outstripped the rule, leaving uncertainty as to whether articles "in use" in ordinary parlance, such as electrical and gas appliances, or even mechanical devices, should be regarded as privileged.

Absolute privilege for third party goods

2.44 The third category, which has the widest practical effect, comprises a range of third party goods which are absolutely privileged. Here, ownership is the essential criterion. Almost all of these privileges are conferred by statute, attaching to goods by virtue of the identity of the owner, and several of them are also restricted to goods of a particular kind. There is no such restriction affecting the most recent and undoubtedly the most significant privilege, which can attach to the goods of undertenants, lodgers and other strangers to the tenancy.⁸⁷ As their privileged nature is not always apparent on inspection, it is inevitable that privileged goods may sometimes be taken although, strictly, they are not distrainable. Several of the statutes conferring privilege also provide a special procedure whereby the owner can seek restoration of his wrongly seized property. The privileges within the third category are:

- (i) *Public trade privilege*, which applies to things which have been delivered to a person exercising a public trade, for the purpose of having something done to them in the course of that trade, such as repair, carriage, sale, or storage. The privilege is evidently founded on public policy for the support of trade and commerce. The extent of this privilege is far from clear, not least because of the uncertainty as to whether a particular tradesman has been carrying out a public trade. Although the reported cases provide some illustrations, they were decided when social and trade conditions were very different from today's. The assistance to be derived from them now is obviously limited. Thus, for instance, furniture deposited in a tenant's warehouse for storage is privileged,⁸⁸ as is wine taken to the tenant for bottling, but wine left with him to be matured in proper bins at the proper temperature has been held to be not privileged.⁸⁹ A carriage standing at livery is distrainable,⁹⁰ whereas one put on show with a view to sale is not.⁹¹
- (ii) *Constitutional immunity*. The immunity of the Crown⁹² and of persons accorded diplomatic status⁹³ from suit and legal process, also predictably renders their property immune from distress.
- (iii) Privilege for *machinery* and other things used in connection with *agriculture* and particular *trades*. Most materials and machinery used in textile

⁸⁴ *Smith v. City Petroleum Co. Ltd.* [1940] 1 All E.R. 260.

⁸⁵ *Colegrave v. Dias Santos* (1823) 2 B. & C. 76.

⁸⁶ *Elliot v. Bishop* (1854) 10 Exch. 496.

⁸⁷ Under the Law of Distress Amendment Act 1908; see post, sub-para. (v).

⁸⁸ *Miles v. Furber* (1873) L.R. 8 Q.B. 77.

⁸⁹ *Re Russell* (1870) 18 W.R. 753.

⁹⁰ *Francis v. Wyatt* (1764) 3 Burr. 1498.

⁹¹ *Findon v. M'Laren* (1845) 6 Q.B. 891.

⁹² *Secretary of State for War v. Wynne* [1905] 2 K.B. 845.

⁹³ Diplomatic Privileges Act 1964, s.2, Sch. 1.

industries,⁹⁴ machinery and breeding stock on agricultural holdings,⁹⁵ and also railway rolling stock⁹⁶ (if the ownership is clearly indicated) cannot be distrained upon unless they are the property of the tenant. The trade machinery privileges are quite narrow and specific, evidently owing their origins to the demands of the industrial revolution. It is clearly anomalous now to give special treatment to the tools of agriculture and a few unrepresentative manufacturing processes.

- (iv) Privilege for the *equipment of the principal statutory undertakers*. Fittings, including meters, pipes, wires and appliances owned by the statutory gas,⁹⁷ electricity,⁹⁸ and water⁹⁹ undertakers are absolutely privileged provided that they are clearly marked with an indication that the undertaker is the owner. These privileges may be regarded as exemplifying the special position of the statutory corporations of the nineteenth century. The continued application of the privileges is in part to be justified on the grounds of public interest, especially safety, in so far as the removal of supply conduits by landlords could be severely disruptive and even downright dangerous. However, the safety justification could equally well be applied to many things which are not now, and never have been, privileged, such as appliances which have been connected to gas or electricity supplies without becoming fixtures, and telephone wires and equipment whose inexpert removal could cause danger. In any event it is more difficult to justify the present privileges where there can be no safety element, and the effect is merely to discriminate between statutory undertakers (whether or not privatised) and their private competitors, e.g. in hiring out appliances.
- (v) Privilege for the *goods of undertenants, lodgers and strangers*. Goods belonging to undertenants who pay rent (higher than the rateable value), quarterly or more often, or belonging to lodgers or to other persons not beneficially interested in any tenancy of the premises, are privileged under the Law of Distress Amendment Act 1908. The privilege is absolute in the sense that it does not depend on there being sufficient other goods on the premises. It is conditional in the sense that it depends on some positive steps being taken by the owner of the goods. The Act does not apply to protect the goods until the owner has served on the distrainer a declaration in writing to the effect that he owns specified goods in which the tenant has no property. If the owner is an undertenant or lodger, he must also give details of his own rent and undertake to make future payments to the distrainer until the relevant arrears are cleared. Although the Act has encroached enormously on the original basic rule that ownership was irrelevant, there are still third party goods which are not protected, either because they do not fall within the statutory definition at all, or because they are expressly excepted. Goods which could not fall within the definition would be those belonging to an undertenant paying rent less often than quarterly (e.g. annually or half-yearly) or at a low rate.¹⁰⁰

Eleven categories of goods and chattels are specifically excluded from the privilege.¹⁰¹ They are, for the most part, goods belonging to persons connected with the tenant, but also include goods in his reputed ownership, and some goods in his possession under hire purchase or other credit agreements.¹⁰²

⁹⁴ Hosiery Act 1843, s.18.

⁹⁵ Agricultural Holdings Act 1986, s.18.

⁹⁶ Railway Rolling Stock Protection Act 1872, ss.3, 5.

⁹⁷ Gas Act 1948, Sch. 3, para. 38.

⁹⁸ Electric Lighting Act 1882, s.25; Electric Lighting Act 1909, s.16; and Electricity Act 1947, s.57, Sch. IV.

⁹⁹ Water Act 1945, s.35.

¹⁰⁰ s.1. Presumably these undertenants are not included because their undertakings to pay rent direct to the distraining landlord would be of less practical value to him.

¹⁰¹ By s.4. The 1908 Act repealed its predecessor, the Lodgers' Goods Protection Act 1871, only "wherever and so far as" the new Act applied, which may mean that some lodgers' goods which would have been privileged under the old Act can still be privileged even where they appear to be excluded from privilege by s.4 of the new Act.

¹⁰² See s.4A of the 1908 Act, added by the Consumer Credit Act 1974, s.192, Sch. 4. This recent modification further complicates an already difficult area.

2.45 A particular handful of third parties are wholly disqualified from claiming the privilege for their goods.¹⁰³ Some may consider it appropriate that the property of the tenant's spouse,¹⁰⁴ and of persons connected with him in business, should not be distinguished from his own property even though that distinction is most firmly drawn in other contexts such as execution and bankruptcy. In the context of rent distress, such persons may be regarded as deriving some benefit from the tenant's lease, sharing occupation personally, or at least through their goods being on the premises; further, the property of such persons and of the tenant is likely to be mixed or shared, increasing the incidence and complexity of ownership disputes, while property arrangements or devices to avoid distress might be encouraged. Nevertheless, in no other context are such arguments regarded as justification for taking the goods of one to satisfy the liability of another. The same arguments cannot, in any event, be applied to the goods of those underlessees who fail to qualify for privilege, or to goods held on various consumer credit terms. There, the relationship between the owner and the tenant is likely to be a commercial one, wholly at arm's length. Also the concept of reputed ownership may have yielded practical results when a man's possession of goods would normally have justified an inference of ownership,¹⁰⁵ but hire purchase agreements (and retention of title clauses¹⁰⁶) are now so prevalent, that the inference should rarely be drawn.

The Time

2.46 Distress can be levied on the day after the rent falls due, even if the rent is payable in advance. It can only be done in the hours of daylight between sunrise and sunset.¹⁰⁷ Those time restrictions stem from the centuries before the introduction of efficient artificial lighting systems. Today, however, hours outside some of the prescribed hours may sometimes be considered to be as reasonable and even more reasonable for distraining than the prescribed hours of daylight. For instance, a business which operates only during the night, or in the evening, is likely to be unattended during the day, and normal business hours for offices and shops are regulated by the clock rather than the sun. Even in the context of residential premises, a dawn attendance in midsummer would probably now be regarded as more unreasonable than a mid-afternoon arrival on a dark winter's day. A test of reasonableness would be more apt than fixed hours now, even though reasonableness and unreasonableness are less absolute values than are daylight hours, and could give rise to more disputes. Distress must not be levied on a Sunday.¹⁰⁸

The Taking

2.47 The process of distraining consists of three stages, the entry into the premises, and then the seizure, followed by the impounding of the distrained goods. In practice, the seizure and impounding may be barely distinguishable, but they are both still essential parts of distraining. Thus if goods are seized without being impounded, the distress is incomplete. The landlord has not put the goods into the custody of the law, and he has no power to sell them. The technical distinction between the two stages also has consequences related to the ancient remedies of rescous and poundbreach and to the effect of a tenant tendering the rent due, but its survival must be questioned.¹⁰⁹ It is not helpful in answering the essential practical question of when the goods have been distrained upon.

¹⁰³ i.e. Those excluded by the Law of Distress Amendment Act 1908 (as amended), ss.4, 4A.

¹⁰⁴ At present, the law excludes the spouse's property from the privilege whether or not the spouse is living with the tenant, but does not exclude other relations or persons who may derive as much (or even more) benefit from the demised premises as a resident spouse. We can see no reason for differentiating between the spouse and other persons who are, or who are treated as, members of the tenant's family, or who are otherwise in occupation under a domestic arrangement. The distinction seems to have been made originally because "unhappily, the very happy relationship of marriage had been made a shocking instrument of fraud against creditors"; see *Hansard* (H.C.), 3 July 1908, vol. 191, col. 1104.

¹⁰⁵ See *Re Fox, ex parte The Oundle and Thrapston R.D.C. v. Trustee* [1948] Ch. 407, 414.

¹⁰⁶ As in e.g. *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 W.L.R. 676.

¹⁰⁷ *Tutton v. Darke* (1860) 5 H. & N. 647.

¹⁰⁸ *Werth v. London and Westminster Loan and Discount Co.* (1889) 5 T.L.R. 521.

¹⁰⁹ See *infra*, paras. 2.54 and 2.63.

(a) *The entry*

2.48 There is no doubt that the landlord is, in some circumstances, entitled to enter the demised premises for the purpose of distraining, and that once he has achieved a lawful entry, he cannot be treated as a trespasser and cannot be ejected. Yet the law gives him no right to enter by force.¹¹⁰ The source of the landlord's authority to enter the premises is obscure, but it is quite independent of the usual reservation of a right of reentry in the context of forfeiture. It has been suggested that there is an inherent right to enter for distress, alternatively that there is an implied consent on the part of the tenant. Neither explanation is wholly convincing. The "inherent right" cannot be exercised against a tenant who secures the premises against entry, and that process of securing would also operate as the withdrawal of any implied consent. The suggested principles are not really consistent with the cases, e.g. it is not realistic to suppose that the tenant implicitly agrees to an entry achieved by climbing over the garden wall and through a window left slightly open for ventilation.¹¹¹ Also, an inherent right which the tenant could, apparently, frustrate at will, is a strange right of limited utility. The present position is unsatisfactory because there are no fundamental principles underlying the cases, and, although there are numerous reported cases decided on more and less unusual facts, it is impossible to tell from them what decision would be made on the next unusual set of facts.

2.49 Under no circumstances is the landlord permitted to make his initial entry¹¹² by force, but the rules as to what may constitute forcible entry are somewhat disordered. The distrainer must not break open the outer door, but he may enter by it if it is open or capable of being opened by normal means from outside.¹¹³ He can enter through a window or skylight if it is only slightly open,¹¹⁴ or apparently by removing a partition between the demised premises and other premises.¹¹⁵ Once inside, he can break down internal doors and partitions.¹¹⁶ For a building such as a block of flats, or converted house, the "outer" door or doors of the demised premises will commonly be inside. However, the effect of the entry rules in the common modern context of buildings in multiple occupation has yet to be fully explored by the English courts.¹¹⁷ Neither does there appear to be any authority as to whether a landlord would be permitted to effect entry by using a key kept in his possession, with or without the tenant's knowledge or his specific instruction as to when the key could be used (e.g. for emergency use only). The absence of any properly defined right of entry is a major defect in the system, as it makes the effectiveness of the remedy dependent on the co-operation or (more probably) the ignorance of the tenant. One way to ensure entry, but limit it to reasonable circumstances, would be to give the courts power to authorise it. While it may be thought logical that the court's assistance should not be available to those using extra-judicial remedies, it should be borne in mind (i) that the extra-judicial nature of the remedy does not prevent the distrainer from calling on the court's assistance in other stages of the process,¹¹⁸ and (ii) that the officer seizing goods in execution, after (or as part of) judicial progress, is faced with a similar absence of absolute right to enter.¹¹⁹

¹¹⁰ Cf. distress for taxes, where there is a power to make forcible entry. The Keith Committee, (1983) Cmnd. 8822, recommended the retention of that power, but that it should only be used under authority of a magistrate's warrant. At present, the warrant of a general commissioner, or collector of customs and excise, suffices.

¹¹¹ Cf. *Long v. Clarke* [1894] 1 Q.B. 119 and *Southam v. Smout* [1964] 1 Q.B. 308.

¹¹² Although he can break back in, if excluded after a lawful entry, and can sometimes break into other premises. See *Eldridge v. Stacey* (1863) 15 C.B.N.S. 458 and post, para. 2.62.

¹¹³ *Ryan v. Shilcock* (1851) 7 Exch. 72.

¹¹⁴ *Crabtree v. Robinson* (1885) 15 Q.B.D. 312.

¹¹⁵ *Gould v. Bradstock* (1812) 4 Taunt. 562.

¹¹⁶ *Browning v. Dann* (1735) Buller's N.P. (7th ed.) 81c.

¹¹⁷ But see *Lee v. Gansel* (1774) 1 Cowp. 1, and the Canadian case *Welch v. Kracovsky* [1919] 3 W.W.R.

¹¹⁸ e.g. when the tenant moves his goods to avoid distress, see para. 2.62 infra, and for the cases where the court's leave is prerequisite, see para. 2.28 supra.

¹¹⁹ *Vaughan v. McKenzie* [1969] 1 Q.B. 557. In other contexts, the courts have recently overcome the absence of rights of entry by ordering defendants to permit plaintiffs to enter, as in the form of injunction known as an "Anton Piller" order from *Anton Piller (K.G.) v. Manufacturing Processes Ltd.* [1976] Ch. 55. If the order is not obeyed, the defendant is in contempt of court, but no entry may be forced. This approach has not been applied to execution or distress.

(b) *The seizure*

2.50 There can be actual seizure, when the landlord expressly declares that he is distaining on particular goods, which he may identify by touching, or constructive seizure when his intention is apparent from his actions. Once there has been impounding, prior seizure can be inferred.¹²⁰ But seizure does not imply that an impounding follows.

(c) *The impounding*

2.51 The impounding can take a number of different forms. The goods may be physically taken away to a pound for storage pending sale or earlier redemption. They may be collected up and secured in a part of the premises.¹²¹ They may be put in close possession, which means that they are left where they are with a representative of the landlord to guard them against removal.

(d) *Walking possession*

2.52 Probably the most common solution is a walking possession agreement whereby the goods are left undisturbed on the tenant's undertaking not to remove or dispose of them. The form of walking possession agreement for use by bailiffs is prescribed by statutory instrument.¹²² The general acceptance of walking possession shows a complete reversal in the workings of rent distress. The effectiveness of the early distress remedy depended on inconveniencing the tenant by removing goods from his possession to induce him to meet his rental obligation. Now the power to sell distrained goods means that the landlord does not need to induce the tenant to pay his rent. They both know that the landlord can use the goods to raise the money. Accordingly, there is little point in inconveniencing the tenant pending the sale or payment by removing the goods, unless it is apparent that a walking possession agreement is likely to be broken.

2.53 It is not clear whether a walking possession agreement operates as a form of, or as a convenient substitute for, impounding. This uncertainty makes the consequences of a breach of the agreement unclear. In *Abingdon R.D.C. v. O'Gorman*¹²³ the owner of a television set hired to the tenant took back his property without knowing that the tenant had entered into a walking possession agreement with the landlord's bailiff. The landlord claimed treble damages against the owner, for poundbreach.¹²⁴ Lord Denning M.R. was prepared to hold that, as against strangers, goods were not validly impounded unless they were secured in such a way that it was manifest that they should not be taken away. He said that walking possession might be sufficient against the tenant who agreed to it, but not as against a stranger who knew nothing of it. Davies L.J. thought that the true analysis was that there had been no actual impounding (which, technically, would preclude poundbreach), but that the agreement prevented the tenant from saying so. Russell L. J., however, was firmly of the view that walking possession did amount to an impounding on the premises, even though a stranger ignorant of that impounding would not be guilty of poundbreach.

2.54 The distinction between the analyses has a particular significance in distress for rent, which does not arise in other contexts where walking possession is used. It goes to the root of the remedy, as it may affect the landlord's ability to pass good title on sale. In execution, the goods are taken into the custody of the law as soon as they are seized by the bailiff, or other executing officer, who represents the court. There is no requirement for impounding or any equivalent intermediate stage. Thus walking possession is just one of the forms of possession in which the officer may hold the goods after seizure and pending either redemption or sale.¹²⁵ In distress, however, if there is no impounding,

¹²⁰ *Swann v. Falmouth* (1828) 8 B. & C. 456.

¹²¹ Since the Distress for Rent Act 1737, s.10. Previously goods could only be impounded on the premises with the tenant's consent.

¹²² Distress for Rent Rules 1983, S.I. 1983/1917. Appendix II, Form 6.

¹²³ [1968] 2 Q.B. 811.

¹²⁴ See *infra*, para. 2.63.

¹²⁵ *National Commercial Bank of Scotland Ltd. v. Arcam Demolition and Construction Ltd.* [1966] 2 Q.B. 593.

there is probably no completed distress, and therefore no power to sell or pass title to the goods in question. The laconically expressed statutory power¹²⁶ permits sale of goods which have been distrained, and impounding has always been regarded as a necessary part of a legal distress. Thus, if walking possession does not amount to a form of impounding, the distrainer's position may be much weakened. He has no power to sell, or pass good title. If he proceeds notwithstanding tender of the rent due, his distress becomes illegal,¹²⁷ which has much more serious consequences than disregarding a post-impounding tender.¹²⁸ Further, an owner is probably entitled to take back his own unimpounded goods, and is certainly not liable in poundbreach if he does so without notice of the walking possession agreement. It may be possible to achieve results nearly equivalent to impounding on the basis of estoppels. The present state of uncertainty is most unsatisfactory, and the differences between the judgments in *Abingdon R.D.C. v. O'Gorman* indicate that the courts will find it difficult, if not impossible, to reach an authoritative resolution of the status of walking possession in the context of distress for rent.

(e) *The notice*

2.55 Bailiffs are required by the rules¹²⁹ to deliver or leave notice of distress in prescribed form setting out the amounts for which distress is levied, an inventory of goods distrained on, and the authorised scales and charges for costs etc. By a separate statutory requirement¹³⁰ all distrainers, i.e. both bailiffs and landlords acting in person, must give notice of the distress to the tenants, before selling the goods. It appears that the requirement to provide an inventory is satisfied, without a list, by a description such as "all the goods on the premises" from which it can be said (by the tenant or the distrainer) of any item, whether or not it is included.¹³¹ That formula has become popular although its use must often amount to impounding excessive distress.¹³² It may be that the formula applies, by implication, only to distrainable goods, so that it does not embrace privileged goods (other than those for which privilege could be but has not been claimed under the 1908 Act). Even if that is correct, there can be few landlords or tenants who could say with certainty whether or not the formula included goods with qualified privilege. It is arguable that the "all goods" formula, although regarded as slapdash by some, is acceptable to tenants because, in practice, it avoids the need to take an inventory, and so causes no real inconvenience (especially if there is walking possession), and unnecessary costs are avoided.

The Sale

2.56 The landlord is not under any compulsion to sell distrained goods,¹³³ but will normally use his statutory power to do so. He can sell after the prescribed waiting period of five clear days, during which the tenant is entitled to commence replevin proceedings, has elapsed without either replevy or acceptable arrangements for payment. The replevin period may be extended from five to up to fifteen days if the tenant so requests, on his giving security for any extra expenses occasioned by the extension.¹³⁴ Formerly, expert "appraisal" (valuation) of distrained goods was obligatory before sale, but the requirement now only applies if the tenant requests appraisal at his own expense¹³⁵ or if growing crops have been distrained.¹³⁶ There

¹²⁶ Distress for Rent Act 1689, c. II, which provides that after appraisal, the person distraining "shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same", without expanding on the meaning of "distrained" or the extent of the seller's powers relating to the title of goods.

¹²⁷ *Vertue v. Beasley* (1831) 1 Mood. & R. 21.

¹²⁸ *Allen v. Bayley* (1698) 2 Lut. App. 1594 and see para. 2.70 post.

¹²⁹ Distress for Rent Rules 1983, r. 12(2).

¹³⁰ Distress for Rent Act 1689, s.11.

¹³¹ *Davies v. Property & Reversionary Investments Corporation Ltd.* [1929] 2 K.B. 222.

¹³² See *infra*, para. 2.66.

¹³³ *Philpott v. Lehain* (1876) 35 L.T. 855.

¹³⁴ Law of Distress Amendment Act 1888, s.6.

¹³⁵ Law of Distress Amendment Act 1888, s.5.

¹³⁶ Distress for Rent Act 1737, s.8.

are no rules prescribing any particular mode, place¹³⁷ or formality of sale, but there is a duty to sell at the best price available.¹³⁸ This seems to mean the best net proceeds rather than the highest selling price,¹³⁹ so the distrainor ought not to select an expensive method of sale unless the extra expense is more than compensated by enhancement of the sale price. The landlord, being the seller exercising a statutory power of sale, has no power to purchase any of the distrained goods even if he offers a higher price than any other purchaser.¹⁴⁰

2.57 The sale may be held on the demised premises, but the tenant is entitled to require the goods to be removed for sale to a public auction room or some other specified fit and proper place, upon his bearing the extra costs and any damage resulting from the removal.¹⁴¹ Any overplus proceeds should strictly be left in the hands of the sheriff or constable, but the overplus is, in practice, usually paid direct to the tenant. In distress, unlike mortgage law, there is no priority for other creditors; thus, even if the overplus represents proceeds of sale of a third party's unprivileged goods, that owner appears to have no special claim against the fund.

2.58 It has never been doubted that the landlord's statutory power of sale enables him to confer good title on a purchaser of distrained goods. The only qualification is that the goods sold must have been distrained on, so that the power does not apply if the purported distress was illegal, and therefore a nullity. Mere irregularities, or excessive distresses, do not invalidate sales.¹⁴² Sale under distress is an unusual exception to the rule that *nemo dat quod non habet* (no-one can pass title to property which he does not own) in that the exception was created, and still stands, by implication from the bare words conferring the power of sale. At the time when the power was conferred, landlords were entitled to distrain on all goods found on the demised premises, whether they belonged to the tenant or to a stranger. Thus, it followed that when power was given to sell, there must be power to pass title not only to distrained goods which belonged to the tenant but also to strangers' goods.

2.59 There have been surprisingly few reported cases concerning matters of title at this stage of distress, but the few cases which have reached the reports show that that is not because this aspect of distress is straightforward. For instance, it appears that if the landlord sells distrained goods before the expiry of the *replevin* period, the tenant has no cause of action even for irregularity unless actual damage has been suffered, but the sale is a nullity and the distress illegal as against a third party owner, who is deprived by the premature sale of his full opportunity to protect the goods under the 1908 Act.¹⁴³ Neither does it appear from the cases that the deprived owner would necessarily have any cause of action against the tenant, whose debt has swallowed up the goods, as each case will depend upon its facts.

The Cost

2.60 The fees, charges and expenses in and incidental to distress for rent are regulated by statutory rules. The effect of the present rules¹⁴⁴ is that the distrainor cannot recover fees against the tenant for acts done unless they are shown on the table of permitted fees or otherwise authorised by the rules. For particular stages in the distress he cannot charge more than the fixed rates. These restrictions probably cannot be circumvented by including in the lease a covenant on the part of the tenant to pay higher rates of distress expenses, or by providing that such sums should be payable as rent. When a bailiff levies distress, he must set out the fees, charges and expenses

¹³⁷ The provisions of the Statute of Marlborough 1267, c.4, prohibiting the driving of distress out of the county where it was taken, have not been repealed. The effect seems, however, to have been taken as limited to the driving of cattle.

¹³⁸ Distress for Rent Act 1689 s.11.

¹³⁹ In a recent unreported County Court case, bailiffs were criticised for making it almost standard practice to bring distrained goods to London from all over England, as they did not satisfy the court that hither prices in London outweighed the increase in removal costs.

¹⁴⁰ *King v. England* (1864) 4 B. & S. 782.

¹⁴¹ Distress for Rent Act 1737, s.10.

¹⁴² Distress for Rent Act 1737, s.19.

¹⁴³ *Sharp v. Fowle* (1884) 12 Q.B.D. 385 (decided under the repealed Lodgers' Goods Protection Act 1871, which was replaced by the 1908 Act. See *supra* n. 101).

¹⁴⁴ Distress for Rent Rules 1983/1917.

authorised by the rules, in the notice which has to be left on the premises or served on the tenant. The County Court Registrar has power to settle differences by taxation. There is now no limit on the amount which a bailiff may charge a landlord.¹⁴⁵ As the fees chargeable to the tenant are set at low levels, it is common for bailiffs to charge additional fees to the landlord.

The Remedies

2.61 The remaining, and by no means least complex, area of distress law concerns the remedies available to those who become involved in the exercise of a distress, and have cause to complain about another's conduct.

The landlord's remedies

2.62 The landlord cannot call upon the assistance of the court if the tenant has used lawful means to avoid distress, such as by securing the demised premises against entry, or by restricting the value of the goods kept there. If, however, the tenant removes his goods from the premises after the rent is due, with the intention of avoiding distress, the landlord can follow the goods and distrain on them within thirty days after their removal. He can even make a forced entry into other premises, after swearing an oath, before a Justice of the Peace, of a reasonable ground for believing that the goods are there.¹⁴⁶ He can claim double value of the removed goods against the tenant *and* every person wilfully assisting. The statute conferring that power of forcible entry does not state whether the landlord has to specify or prove the reasonable ground, nor whether the magistrate has power to veto the landlord's proposed entry.

2.63 If the tenant or any other person takes back the goods after they have been seized by the distrainor, but before they have been impounded, the landlord's remedy depends on the correctness of his own acts. If his distraining was illegal, then the rescue of the goods before impounding is a lawful act.¹⁴⁷ Where the distress was not illegal, even if it was irregular or excessive, then the pre-impounding rescue, or "rescous", is both a civil wrong, for which the landlord can recover treble damages, and a criminal offence.¹⁴⁸ Once the goods have been validly impounded, even if they have been distrained without cause, no person is entitled to remove them out of the custody of the law. A person who takes them then, commits the offence and the civil wrong of poundbreach and, again, treble damages can be claimed.¹⁴⁹ It had been thought that rescous and poundbreach were offences of strict liability, and could therefore be committed unwittingly, but that now seems unlikely.¹⁵⁰

2.64 Under the general law, exemplary or punitive damages will now only be awarded in tort where the plaintiff's injury has been aggravated by the manner in which the defendant has acted, as when there has been oppressive action by Government servants, or the defendant's conduct in cynical disregard of the plaintiff's rights has been calculated to secure for himself a gain greater than the plaintiff's compensatable loss.¹⁵¹ Punitive damages are not awarded in contract. There are a few cases where statute requires the award of penal, multiple damages, and these cases seem all to be found in the field of landlord and tenant, and all but one in the context of distress.¹⁵² In these cases, the penal multiple award is prescribed whatever the circumstances, giving the court no discretion to award a lesser sum. These provisions are clearly out of step with the modern approach to penal damages generally.

¹⁴⁵ Although the previous rules had been construed as restricting the fees chargeable to landlords, as well as those chargeable to tenants, see *Day v. Davies* [1938] 2 Q.B. 74.

¹⁴⁶ Distress for Rent Act 1737, s.1.

¹⁴⁷ *Bevil's Case* (1585) 4 Co. Rep. 6a.

¹⁴⁸ Distress for Rent Act 1689, s.IV.

¹⁴⁹ Distress for Rent Act 1689, s.IV.

¹⁵⁰ i.e. in face of the views expressed in *Abingdon R.D.C. v. O'Gorman* *supra*, but it is still remotely possible that a person unwittingly interfering with formally impounded goods could be liable.

¹⁵¹ *Rookes v. Barnard* [1964] A.C. 1129.

¹⁵² See Distress for Rent Act 1689 and Distress for Rent Act 1737, s.18 (double rent where the tenant gives notice to quit but fails to vacate).

Relationship to other remedies

2.65 A landlord who has distrained for rent, cannot sue for any part of the same rent until the distress has been completed, whereupon he may sue for any shortfall. He cannot distrain for any rent in respect of which he has already obtained a judgment.¹⁵³ Distress cannot be levied after forfeiture, and it may be that even an unproductive distress for rent payable in advance would debar forfeiture for non-payment of that rent.¹⁵⁴

The tenant's remedies

2.66 The remedies available to an aggrieved tenant depend upon whether the distress is unlawful, in which case it is void ab initio, or irregular, or excessive. If the distress was excessive, the tenant's only remedy at law is an action against the landlord or the bailiff for damages.¹⁵⁵ He may recover damages for the temporary deprivation of his goods,¹⁵⁶ but if the goods have been sold, the measure will be the value of the goods, after deducting the rent and proper expenses, which seems to add little to the tenant's right to receive the overplus.¹⁵⁷ Presumably an injunction would be granted before sale in a suitable case.

2.67 If the distress is irregular, i.e. conducted irregularly after an initially lawful levy, again the tenant's only legal remedy¹⁵⁸ is a claim for the special damage suffered,¹⁵⁹ with the possibility of an injunction, where appropriate.

2.68 The distress will be illegal if the landlord (or other person) was not entitled to distrain at all, e.g. where there were no arrears, or there had been a valid tender, or if there has been some irregularity at the onset, e.g. where there has been a forced entry, or privileged goods have been taken. In such a case, the distrainer is a trespasser, and several remedies may be available to the tenant or other owner of seized goods.¹⁶⁰ The tenant, or other owner, is entitled to rescue the goods at any time before impounding;¹⁶¹ thus there would be no criminal or civil liability for rescous. He can replevy.¹⁶² There is a potential claim for damages, in respect of the period of deprivation and/or the full value of the goods, in trespass or conversion without any deduction for rent.¹⁶³ As the distress is void ab initio, the distrainer can pass no title on sale, and the owner can proceed against the purchaser in conversion.¹⁶⁴ If no rent was in arrear, the tenant can recover double the value of his sold goods.¹⁶⁵ The effect of a tenant's cross-claim, discussed earlier,¹⁶⁶ obviously may be crucial in this context.

2.69 The distinction between illegal and merely irregular distresses is somewhat artificial, as it does not depend at all on the seriousness of the landlord's or bailiff's infringement. Instead, subject to minor exceptions, the effect depends upon whether

¹⁵³ *Chancellor v. Webster* (1893) 9 T.L.R. 568.

¹⁵⁴ See *Windmill Investments (London) Ltd. v. Milano Restaurant Ltd.* [1962] 2 Q.B. 373, but see also *Segal Securities Ltd. v. Thoseby* [1963] 1 Q.B. 887.

¹⁵⁵ There is a special summary procedure whereby magistrates can order payment of the goods' value to the tenant or the return of unsold distress when there has been wrongful distress within the Metropolitan Police District. There are limitations, however, such as the Limitation of compensation payable in default of compliance with the court's order to £15, which render the special procedure obsolete in practice. See Metropolitan Police Courts Act 1839, s.39.

¹⁵⁶ *Baylis v. Usher* (1830) 4 M. & P. 790.

¹⁵⁷ *Wells v. Moody* (1835) 7 C. & P. 59.

¹⁵⁸ See supra, n. 155.

¹⁵⁹ Distress for Rent Act 1737, s.19 and *Lucas v. Tarleton* (1858) 3 H. & N. 116.

¹⁶⁰ Special remedies are available under the Law of Distress Amendment Act 1895, s.4 (restoration or compensation when goods privileged under s.4 of the 1888 Act have been taken) and the Law of Distress Amendment Act 1908, s.2 (restoration of third party goods privileged under the Act).

¹⁶¹ *Bevil's Case* (1585) 4 Co. Rep. 6a.

¹⁶² See supra, para. 2.20.

¹⁶³ *Attack v. Bramwell* (1863) 3 B. & S. 520.

¹⁶⁴ *Mennie v. Blake* (1856) 6 E. & B. 842.

¹⁶⁵ Distress for Rent Act 1689, s.V. There are very few reported decisions under the section, whose wording does not appear to prevent the tenant from recovering the goods from the purchaser as well as recovering double value from the distrainer.

¹⁶⁶ See supra, para. 2.18.

the landlord was entitled to distrain and proceeded without any irregularity at the outset. The exceptions are (i) that proceeding with distress of goods which are the subject of a declaration under the Law of Distress (Amendment) Act 1908¹⁶⁷ renders that distress illegal, although it may have been perfectly lawful at the outset and until the declaration was served, and (ii) that certain actions done during the distress and purporting to be part of the process may be illegal because they are, in fact, outside the process, e.g. where the distrainer sells goods which were not impounded, or which were not included in the inventory.

2.70 The distinction between illegal and irregular distress was first made by section 19 of the Distress for Rent Act 1737. It was introduced to avoid the apparent hardship to landlords whose distresses were invalidated, at common law, by minor irregularities during the process. The practical result is much confused, however, requiring scarcely logical distinctions to be made. Thus, if the distrainer proceeds after a valid tender of the arrears, his act is illegal if the distress was begun after the tender,¹⁶⁸ but may be only irregular if the tender was made after seizure.¹⁶⁹ Likewise a second distress for the same rent is usually illegal and therefore void, but the second attempt is not invalid if the first attempt was illegal and therefore of no effect. Replevin procedure is only available to stay an illegal distress.

Remedies of the third party

2.71 A third party aggrieved in a distress has only slightly more extensive remedies than the tenant. If the distrainer takes, or threatens to take, his goods which are eligible for privilege under the Law of Distress Amendment Act 1908, he can activate the privilege by serving the appropriate declaration and inventory.¹⁷⁰ If the distrainer then levies, or proceeds with the distress, on those goods, the distress is illegal, and the owner may apply to a justice of the peace for restoration of those goods.¹⁷¹ In addition, the owner of goods, or any person having the enjoyment and use of them, can claim damages, or proceed in replevin, wherever the tenant could have done so as the owner of the goods.

2.72 One obvious defect, from the point of view of the third party owner, is that he has no remedy against a distrainer who has sold his goods with a strong suspicion or even full knowledge of the true ownership. He may have a remedy against the tenant, but the existence of such a remedy will not be a certainty. That will depend upon the circumstances under which the goods are left on the demised premises. A third party owner is also under practical disadvantages not usually shared by the tenant. Neither landlord nor tenant is normally under any duty to notify him that his goods have been, or are under threat of being, taken. Thus, he may be deprived of an opportunity to claim privilege under the 1908 Act, or to prevent his otherwise privileged goods from being seized and sold without trace. He will rarely be in as good a position as the tenant to detect and prove illegalities or irregularities which could entitle him to intervene, or at least claim compensation.

Summary

2.73 It will be useful briefly to list those aspects of rent distress which appear to be unsatisfactory either because they are now unfair or inappropriate, or because they are defective in law.

- (1) It is not clear how far the landlord's right to distrain is affected when the tenant stays in possession enjoying statutory security of tenure.
(paragraphs 2.4–2.5)
- (2) The present rules on certification of bailiffs provide inadequate control over the authorisation and conduct of distraining bailiffs, and no procedure for complaints.
(paragraphs 2.8–2.11)

¹⁶⁷ See *supra*, para. 2.44(v).

¹⁶⁸ *Bennett v. Bayes* (1860) 5 H. & N. 391.

¹⁶⁹ *Vertue v. Beasley* (1831) 1 Mood. & R. 21.

¹⁷⁰ S.1.

¹⁷¹ *Ibid.*, s.2.

- (3) It is not clear whether there is any restriction as to the liabilities which the landlord can call "rent", so that he can distrain to enforce them.
(paragraphs 2.14–2.16)
- (4) Modern recognition that an obligation to pay rent can be met by a tenant's cross-claim has not provided any indication whether the cross-claim can cancel out the rent claim or otherwise be used by the tenant to inhibit or halt the distress process.
(paragraphs 2.17–2.19)
- (5) The distinctions between illegal, irregular and excessive distress tend to be difficult to understand, and to justify.
(paragraphs 2.66–2.70)
- (6) Replevin is an inflexible remedy, available only when it is alleged that the distress is illegal, and always requiring full security pending trial, regardless of merits or background.
(paragraphs 2.20–2.22 and 2.24)
- (7) It is unhelpful to prohibit the application of surplus proceeds of sale to meet any arrears accruing after the levy.
(paragraph 2.25)
- (8) The remedy may often be exercised against tenants who are not even aware of its existence, let alone its detailed rules.
(paragraph 2.27)
- (9) A landlord can usually levy distress without giving any advance warning to the tenant; even when advance warning would not prejudice the effectiveness of the remedy.
(paragraph 2.27)
- (10) With some exceptions, the remedy can be used without there being any prior judicial consideration of the validity of the claim, or of any other merits.
(paragraph 2.27)
- (11) There is doubt whether vehicles parked in a private street or car park by a tenanted building are properly available for distress.
(paragraph 2.33)
- (12) It may be questioned whether a landlord should be able to take a third party's goods, even knowingly, to satisfy a debt owed by the tenant.
(paragraph 2.32)
- (13) The privilege for third party goods under the Distress for Rent Amendment Act 1908 is subject to exceptions which may be considered inappropriate. It demands positive actions from the affected owner, while not obliging either landlord or tenant to report the jeopardy of his goods.
(paragraphs 2.44(v), 2.45)
- (14) Generally, there are so many exceptions to the basic rule allowing all goods on the premises to be seized, that certainty will often not be achieved.
(paragraphs 2.36–2.45)
- (15) Many of the rules exempting goods from distress either conditionally or absolutely contain ambiguities and uncertainties.
(paragraphs 2.36–2.45)
- (16) Many of them are seriously out-of-date, either because they are inherently inappropriate to modern conditions or because they have not been modified to maintain their original purposes.
(paragraphs 2.36–2.45)
- (17) The hours during which distress may be levied are not necessarily the most reasonable.
(paragraph 2.46)
- (18) The rules governing lawful entry by the landlord are very numerous without illustrating any underlying principle.
(paragraphs 2.48–2.49)

- (19) As there seems to be no power to override the tenant's refusal of entry, the remedy could be reduced, in practice, to one exercisable only with the tenant's consent.
(paragraph 2.49)
- (20) Walking possession agreements undoubtedly minimise the inconvenience of distresses, but as things stand they may impair the landlord's power to sell distrained goods.
(paragraphs 2.53–2.54)
- (21) The requirement to attach an inventory to a notice of distress is apparently satisfied by vague, general descriptions which probably serve little useful purpose but instead effectively encourage excessive distraining.
(paragraph 2.55)
- (22) The landlord's power to confer title to distrained goods on a purchaser is created almost by default and is insufficiently defined.
(paragraph 2.59)
- (23) There is little point in retaining rescous and poundbreach as separate wrongs in civil or criminal law.
(paragraph 2.63)
- (24) Prescribing penal damages in respect of those wrongs, without any element of discretion, does not conform with modern practice.
(paragraph 2.64)

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