The Law Commission

Working Paper No. 97

Distress for Rent

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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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This Working Paper, completed on 13 May 1986, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 1 December 1986.

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LANDLORD AND TENANT

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Summary

In this Working Paper, the Law Commission examines, as part of its programme for the modernisation and simplification of the law of landlord and tenant, the law relating to distress for rent. The paper presents four possible directions for reform: that the existing law should be restated in a single modern statute; that there should be reform in a limited number of areas, which were causing the most serious concern; that there should be fundamental reform leading to a simple modern statutory code containing all the relevant law; and that the remedy of distress for rent should be abolished. The Law Commission provisionally recommends abolition, but the purpose of the paper is to obtain the widest possible range of views on all aspects of reform.

THE LAW COMMISSION

LANDLORD AND TENANT

DISTRESS FOR RENT

PART I

INTRODUCTION

1.1 Distress for rent is a summary remedy which enables landlords to recover rent arrears, without going to the court, by taking goods from the demised premises and selling them. Rescous, poundbreach and replevin are special remedies pursued in the courts when wrongs are committed in the course of a distress. The landlord's remedy against the tenant, or other person, who wrongfully retakes distrained goods will be either in rescous or poundbreach. Replevin is a procedure available to a person, not necessarily a tenant, who claims that his goods have been illegally distrained or taken. The court orders the return of the goods to him, pending trial of the issues.

1.2 The remedy of distress for rent has survived from an age when the concept of the lease was in its infancy, and the system of civil litigation in the courts had hardly begun to develop. Over the centuries of its existence some changes have been made, at first to increase the powers of a distraining landlord, but

latterly to give some protection to tenants and others affected by rent distress. But the law has not developed in step with the main body of the law. Other remedies are now available against defaulting tenants, and seem to be preferred in the majority of cases. Distress as a remedy offers special advantage to landlords, but is generally regarded as anachronistic, difficult, and even distasteful. The continued existence of distress, with the resulting special position of landlords, is at least questionable in an age when self-help remedies generally are not regarded with favour. Its conversion to a modern remedy would be an enormous task. It could be improved by simplification, or by making it a better instrument of justice, and so more acceptable. The use of distress has already been restricted in some circumstances, and modern attitudes would demand that there be more restrictions. That would mean a greater role for the court, and inexorably bring distress closer to the existing judicial remedies. Continued existence of the remedy even in an improved form may be difficult to justify.

1.3 This paper sets out to examine the defects in the present law relating to those remedies, and the possibilities of reforming them, for the purpose of inviting the views of landlords, tenants and others who may be involved in distress for rent.

1.4 This is the second time that we have considered the possiblity of reforming distress for rent. Item VIII of our First Programme recommends:

> "that an examination be made of the basic law of landlord and tenant with a view to its modernisation and simplification and the codification of such parts as may appear appropriate".

Distress for rent was one of the branches of landlord and tenant law recommended for examination and it was one of the first to be considered, leading to the publication of an interim report in 1966.[1] It was recognised that the law had become unduly complex, having developed over seven centuries[2] and being based on "scores of statutes and a mass of cases".[3] Furthermore, the justification for retaining this self-help remedy under present-day social conditions had been called into question.

1.5 We considered after consultation that there was a case for the immediate abolition of the remedy, but that the real demand was for a review of the remedies for non-payment of rent and the provision of an effective machinery for debt collection. Our recommendation was that, pending such review, the

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

2 There are eleven extant statutes, dated between 1267 and 1908, which relate more or less exclusively to distress. There are also numerous other statutes which contain sections expressly dealing with distress. Many of them were passed in the nineteenth century, but a significant number of them have been introduced during the present century, e.g. the Rent Acts. Most of the relevant case law dates from the nineteenth century or earlier.

3 (1966), Law Com. No. 5, para. 1.

remedy of distress should be retained with two minor modifications.[4] We further concluded that if the remedy of distress for rent were to be retained in the long term, there was a strong case for a codification in modern terms of the ancient and more recent statutes and of the principles laid down in the decided cases. In such a codification the present archaisms and anomalies could be eliminated and adjustments made to bring the law into conformity with present-day needs.

1.6 Enforcement machinery was then under consideration by the Payne Committee, which subsequently made proposals[5] which would have involved the abolition of distress and the establishment of a novel, uniform debt enforcement system. None of the relevant proposals has been implemented, and there has been no significant change in the law of distress for rent. Rescous, poundbreach and replevin were also considered for reform in 1966. We concluded that those remedies were more suitable to be dealt with in the context of distress for rent than as separate matters.

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4 i.e. that the court's leave to distrain should be required in the case of all residential lettings, and that such leave should entitle the landlord to distrain for arrears accrued while his application was pending, see ibid. para. 26.

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

1.7 Other forms of distress have developed from distress for rent but now differ from it in several important ways. There are statutory powers to distrain for rates, for income and value added taxes and for certain payments ordered in magistrates' courts. They are not exercisable in favour of private individuals, only by the public authorities charged with enforcing particular payments. A court's authority is required except in distress for taxes. In their recent report[6] on the enforcement powers of revenue departments, the Keith Committee considered and rejected suggestions that distress for taxes should be abolished, or made subject to judicial overview. They did, however, recommend[7] that the statutory provisions be revised with a view to incorporating more modern terminology and proceedings, as well as providing further safeguards for taxpayers.

1.8 As it is now over 15 years since the Payne Committee reported, we decided to re-open our examination of this area of the law. It is in a most unsatisfactory state. There have been no improvements since that assessment was made in our Interim Report.[8] The minor reforms recommended there have not been implemented,[9] and the opportunity for major reform,

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6 Committee on Enforcement Powers of the Revenue Departments (1983), Cmnd. 8822.

7 At para. 24.2.31.

8 See n. 1.

9 One of the recommended reforms was later proposed as an amendment to a Housing Bill, see post, para. 2.30.

presented by the Payne Report,[10] appears to have lapsed. There were suggestions that there might have been some increase in the use of distress after many years of decline. Complaints were still being voiced about the survival of this antiquated and obscure remedy and about some landlords' oppressive use of it. Distress and its ancillary remedies had not developed to keep up with changes in other areas of law or in social conditions. Meanwhile other remedies, not necessarily exclusive to landlord and tenant, were fast developing and might supersede distress for rent.[11] We concluded that we should follow up our previous study of the law of distress provided it did not demand a disproportionate commitment of time and resources.

1.9 Part II of this paper examines the present law and some of the criticisms levelled at it, with a view to identifying the major areas of concern. We have not separated the comment from the statement of the law as is our more usual practice. One of the paramount criticisms of distress law is that such numerous and diverse technical flaws and blemishes

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10 (1969) Cmnd. 3909.

11 For instance, since the growth of the Mareva injunction, landlords and other creditors can apply to the court for an order freezing assets of the debtor pending trial, where there is reason to believe that he will dispose of his assets, so that they will not be available to satisfy the judgment likely to be made against him, see R.S.C. O. 29, r. 1. Under the Torts (Interference with Goods) Act 1977, the court has been given a specific jurisdiction to order delivery up of goods which are or may become the subject of certain kinds of proceedings.

exist in every corner of the law. We thought that, to reduce the need for cross references, it would be more convenient for the reader to find the criticisms alongside the criticised statements of the law. Part II concentrates on technical defects and shortcomings in the law. Part III explores the social and economic arguments in favour of and against the remedy. In Part IV we consider what measures of reform might be feasible. We concluded that the options available were (i) a modern restatement of the existing law; (ii) reform of selected parts considered to be the most urgently in need of reform; (iii) fundamental reform and (iv) partial or total abolition.

1.10 We would ask consultees to weigh not only the relative merits of the available options, but also the resources which each would demand. In considering the feasibility of reform, one restricting factor is always that resources are limited. Proposals which would make substantial demands on the available resources cannot be implemented unless priority for those demands can be justified. This applies both to the resources required at the stage of reform, i.e. the manpower which must be devoted to working on the detailed reforms required and their statutory expression, and to the resources which would be taken up as a result of the reforms, such as use of court time, and the maintenance of any regulatory bodies set up as part of the reform.

1.11 Distress for rent appears to be a remedy used by only a relatively small minority of those entitled to use it. It has largely fallen into disrepute as well as disuse. It would therefore be difficult to

recommend a reform project which demanded resources unless such reform is likely to increase the use made of the remedy. Thus it is just as important for a reform proposal to meet social criticisms of the remedy, and to remove defects seen to cause injustices, as it is to modernise the remedy in purely legal terms.

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 centuries[1] 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 distrainor 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.

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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.

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

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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.

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 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

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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.

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".

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.

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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.

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]

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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.

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 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

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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.

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 register[19] 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

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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.

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 on his powers, and they are quite likely to regard him as some sort of court official. The controls appear to be seriously

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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.

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

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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.

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 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' distraining[23] are made under a statutory power which is specific to bailiffs and therefore cannot be used to regulate the conduct of landlords distraining in person. We do not know how many distraining 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 distrain 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 distrain 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

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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.

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.

liberty to distrain 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

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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.

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

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26 In Multiservice Bookbinding Ltd. v. Marden [1979] Ch. 84, Browne-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.

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 distrain for rent (which applies without any express 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

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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.

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

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]

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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.

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

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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.

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 case[38] 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."

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 distraint 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

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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.

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 illegal[40] 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 distraint, 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 requirement, except as to the amount of it. The distrainor 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).

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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.

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 distrainor unless he effectively guarantees payment of the distrainor's highest (albeit fanciful)

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

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.

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.

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42 See post, para. 2.66 et seq.

43 See post, para. 2.66.

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.

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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.

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

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48 See infra, para. 2.28.

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

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 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

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

51 Administration of Justice Act 1970, s. 40.

52 Companies Act 1985, ss. 525, 607.

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.

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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.

2.30 In our 1966 Interim Report[57] 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 rights[59] 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

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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.

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.

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 distrainor may distrain 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

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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 seizor 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.

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 distrainor 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

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".

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 a 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 distrainor 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

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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 car parking area.

66 Distress for Rent Act 1737, s. 1.

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 distrainor may take them all. It is up to the distrainor 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]

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

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67 Distress for Rent Act 1737, s. 8.

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

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.

apparent on first sight) but others have survived beyond the conditions which gave rise to and justified them. The exemptions or 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 trade[70] (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

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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.

(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

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73 Landlord and Tenant Act 1851, s. 2.

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

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:

(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.

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75 See infra, para. 2.40(vi).

76 Co. Litt. 47a.

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

(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 distrainor'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.

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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.

(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 that the landlord would seize goods and hold them as a pledge until the tenant

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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.

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 not be 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 distrainor 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.

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.

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

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

86 Elliott v. Bishop (1854) 10 Exch. 496.

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

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

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 Crown[92] and of persons accorded diplomatic status[93] from suit and legal process, also predictably renders their property immune from distress.

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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.

(iii) Privilege for machinery and other things used in connection with agriculture and particular trades. Most materials and machinery used in textile industries,[94] machinery and breeding stock on agricultural holdings,[95] and also railway rolling stock[96] (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 water[99] 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

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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.

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 distrainor 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 distrainor 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

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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.

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]

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

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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.

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.

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 clauses[106]) are now so prevalent, that the inference should rarely be drawn.

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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.

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 artifical 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

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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.

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.

(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

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109 See infra, paras. 2.54 and 2.63.

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.

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 entry[112] by force, but the rules as to what may constitute forcible entry are somewhat disordered. The distrainor must not break

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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.

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

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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. 361.

should be borne in mind (i) that the extra-judicial nature of the remedy does not prevent the distrainor 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 process, is faced with a similiar absence of absolute right to enter.[119]

(b) The seizure

2.50 There can be actual seizure, when the landlord expressly declares that he is distraining 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.

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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.

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

(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

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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.

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.

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123 [1968] 2 Q.B. 811.

124 See infra, para. 2.63.

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, there is probably no completed distress, and therefore no power to sell or pass title to the goods in question. The laconically expressed statutory power[126] 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 distrainor'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

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

126 Distress for Rent Act 1689, c. II, which provides that after appraisement, 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.

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 rules[129] 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 requirement[130] all distrainors, 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 distrainor) of any item, whether or not it is

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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. II.

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

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.

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 "appraisement" (valuation) of distrained goods was obligatory before sale, but the requirement now only applies if the tenant requests appraisement at his own expense[135] or if growing crops have been distrained.[136] There are no rules prescribing any particular mode, place[137] 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]

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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.

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. II.

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 higher prices in London outweighed the increase in removal costs.

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

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

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141 Distress for Rent Act 1737, s. 10.

142 Distress for Rent Act 1737, s. 19.

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.

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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).

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 rules[144] 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 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 the 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

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144 Distress for Rent Rules 1983/1917.

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.

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

146 Distress for Rent Act 1737, s. 1.

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

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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.

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.

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]

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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).

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.

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 remedy[158] is a claim for the

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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.

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 outset, e.g. where there has been a forced entry, or privileged goods have been taken. In such a case, the distrainor 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

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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.

rent.[163] As the distress is void ab initio, the distrainor 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 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 1908[167] 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

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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 distrainor.

166 See supra, para. 2.18.

167 See supra, para. 2.44(v).

because they are, in fact, outside the process, e.g. where the distrainor 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 distrainor 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 distrainor takes, or threatens to take, his goods which are eligible for privilege under the Law of

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

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

Distress Amendment Act 1908, he can activate the privilege by serving the appropriate declaration and inventory.[170] If the distrainor then levies, or proceeds with a 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 distrainor 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.

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170 S. 1.

171 Ibid, s. 2.

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)

(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)

PART III

SOCIAL AND ECONOMIC ARGUMENTS

3.1 The question of whether distress for rent should be modified, or indeed retained at all, has been argued by some on grounds quite separate from its legal intricacies and inadequacies. In view of this debate, we do not consider that the case for law reform can properly be considered on legal grounds in isolation. In this part of the Working Paper we consider the social and economic arguments for and against the continued availability of distress as a remedy for landlords. Elsewhere, we ask for views on changes in the legal rules for technical and practical reasons. Equally, we should welcome comments from readers who favour, or oppose, changes in the law on social and economic grounds.

How Widespread is the Use of Distress?

3.2 To some extent, such recommendations as we may make concerning the reform of distress must depend upon the extent to which it is still used as a remedy. As has been mentioned earlier in this Working Paper,[1] private landlords of residential property make little

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1 See supra, para. 2.29.

actual use of distress. It was suggested to us in the course of consultation during the preparation of our Interim Report on Distress that, because the landlord of a protected tenancy has to get a court order before levying distress,[2] such a landlord is more likely to seek a possession order, a mere order permitting distraint not being worth the trouble and expense of court proceedings.[3] This apparent position may, of course, conceal a much more widespread use of the threat of distress as a means of securing payment.[4] We would welcome views and evidence as to whether or not this is the case.

3.3 Statistics published by the Audit Commission for Local Authorities in England and Wales in their recent report on council house rent arrears[5] indicate that the frequency with which local authorities have resort to distress varies greatly between authorities. Most make negligible use of it, but one London borough[6] used the remedy on 600 occasions in the year surveyed

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2 See Rent Act 1977, s. 147.

3 In practice, the outcome of possession proceedings is frequently effectively an order for payment of arrears and current rent which may or may not be accompanied by a suspended order for possession.

4 See infra, para. 3.17.

5 Bringing Council Tenants' Arrears under Control (H.M.S.O., 1984).

6 The report surveyed all London boroughs and selected authorities outside London. The report did not identify the authorities concerned.

and another on 451 occasions, whilst one metropolitan district used it 1,500 times.[7] Some authorities never use distress, as a matter of principle, but many retain it as an option, and use it in appropriate, if infrequent, cases.[8]

3.4 Much of the discussion concerning the use of distress in respect of residential premises has centred on its use by local authorities, who do not need to obtain a court order before levying distress. Attempts were made to introduce such a requirement into the Bill that became the Housing Act 1980,[9] but were successfully resisted by the Government, who argued that nothing should at that time be done to hamper local authorities in their efforts to reduce council house rent arrears.[10] Since then, the level of arrears has continued to rise and continues to be a major source of concern.[11]

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7 The report does not make it clear whether goods were actually seized and sold.

8 In a telephone survey conducted in 1978, Shelter found that one third of authorities asked used distress: see In Distress over Rent: A Shelter report on distraint (1978). Duncan and Kirby (Preventing Rent Arrears (H.M.S.O., 1983)) found that a lower proportion of their sample authorities (5 out of 30) used distress.

9 A clause to this effect did, however, appear in the Housing Bill 1979, a measure promulgated by the then Labour Government.

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

11 Arrears now stand at 5.7% of total collectable rents: see Hansard (H.C.), 19 February 1986, vol. 92, cols. 221-258.

3.5 We have no firm evidence concerning the frequency of the use of distress against business tenants. We do know, however, that the remedy is regularly used against business tenants, and indeed we have heard complaints of irregularities in such cases. There are at present some 800 certificated bailiffs in England and Wales, and some actively and regularly advertise for the business of landlords of commercial and industrial premises. We are aware that, while it used to be the case that landlords sought forfeiture as their primary remedy, changes in the market for some types of business property have made the recovery of possession unattractive. Landlords have therefore concentrated on the recovery of rent, either by action or distress. We should welcome evidence as to the extent of its use by landlords of this type of property,[12] including details of typical sums for which distress is levied, and particulars of the frequency with which the remedy proves successful (either before or after the sale of the goods seized).

The Case for Distraint

3.6 It has been argued that landlords (whether they be landlords of business or of residential properties) are peculiarly vulnerable creditors and therefore deserve the extra protection afforded by special remedies such as distress.[13] The debts they

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12 It will be appreciated that many local authorities are landlords of business premises.

13 See, e.g., para. 18 of the Interim Report.

are owed - primarily rent - accrue regularly by the mere passage of time. Unlike most other creditors, a landlord cannot easily withhold or withdraw the "service" he is providing, but must undertake possession proceedings to remove the tenant. Not only may such proceedings prove to be costly and protracted but they may also fail to achieve the desired result. Even if the landlord is granted an order for possession and succeeds in enforcing it he may - depending upon the prevailing market conditions - be unable to relet the property and so suffer further financial loss. If the landlord is a local authority, eviction of a residential tenant may make that person "homeless" and so give rise to a duty on the part of the authority to rehouse the former tenant.[14]

3.7 Distress is a fast, simple and effective way to secure the payment of arrears by tenants who have the ability to pay but who wilfully refuse to do so.

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14 See Housing Act 1985, Part III. The Code of Guidance on homelessness issued by the Secretary of State for the Environment states (in para. 2.15) that a person who loses his or her home "because of wilful and persistent refusal to pay rent, would in most cases be regarded as having become homeless intentionally", provided the person in question had full knowledge of the likely consequences of arrears. It goes on to state, however, that rent arrears caused by "real personal or financial difficulties" which lead to the loss of a home should not be treated as cases of intentional homelessness. Local housing authorities are obliged to have regard to the Secretary of State's guidance (s. 71 of the 1985 Act), but they are not bound to follow it in all cases (see De Falco v. Crawley B.C. [1980] Q.B. 460, 477-478, per Lord Denning M.R.).

(a) Speed of relief

3.8 Distress, it is argued, affords fast relief to the landlord: as explained above, no warning need be given to the tenant before goods are seized, and the landlord may proceed to sell the goods after five days. Speed is particularly important if the landlord fears that the tenant is likely to abscond, be declared bankrupt or, in the case of a corporate tenant, go into liquidation. Speed of recovery is also important to the cash-flow of the landlord company.

(b) Simplicity of procedure

3.9 It is simple in terms of procedure and even the law's complexities need not unduly trouble the landlord if a reputable firm of certificated bailiffs is engaged. It is also cheap, particularly if the bailiff is able to recover his costs from the tenant (as he is legally entitled to do). The landlord does not have to devote resources to the preparation of litigation or to appearances in court. In addition, no costs are imposed on the public purse in cases where the landlord is entitled to distrain without a court order.[15]

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15 However, where bailiffs distrain upon essential household items, such as cooking and heating facilities, the tenant may be entitled to supplementary benefit to purchase replacements: see Supplementary Benefits (Single Payments) Regulations 1981, S.I. 1981/1528. Thus, an indirect burden may be placed on public money.

(c) Effectiveness

3.10 Distress is also an effective remedy: often the mere threat of distraint is sufficient to secure payment and even if goods are seized payment is frequently forthcoming before the additional costs entailed in selling them are incurred.[16] It can also prevent the accrual of further arrears, by acting as a deterrent to further default.

3.11 On these grounds, many would argue that distress is an indispensable remedy for landlords. Some would add to this the caveat that adequate control must be maintained over the circumstances and manner in which distress is used.[17]

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16 See the statistics provided by the Association of Certificated Bailiffs quoted in the Interim Report, at p. 20. See also Duncan and Kirby, Preventing Rent Arrears (H.M.S.O., 1983) at para. 5.58.

17 The Association of District Councils has prepared guidelines for the use of distraint in respect of council house tenancies (A.D.C. Circular No. 1980/204). Under the guidelines, the Association recommends that distress should not be used as an early stage, or even a routine stage, in arrears control, but only if it is reasonably clear that the tenant in question has either the ability to pay or has sufficient non-essential goods which may be seized to meet the debt. The guidelines (see note 11) recommend that a council officer accompany bailiffs if there is doubt as to the rectitude of their methods. For judicial control over bailiffs through the certification procedure, see infra, para. 4.40 et seq.

The Case against Distraint

3.12 Some maintain that distress is wrong in principle, arguing that it is a brutal remedy, lacking judicial control and wholly out of place in a modern legal system. A study conducted on behalf of the Department of the Environment[18] reported that some local housing authorities rejected the use of distraint

> "... on principle as an archaic medieval relic, out of place in twentieth century housing management ..."[19]

3.13 A number of arguments have been advanced to support the contention that distress is outdated. First, it is argued, "self-help" remedies should be discouraged as a matter of principle, since it gives the advantage to "might" rather than "right". Other "self-help" remedies have been curtailed: for example, the rights of landowners to evict trespassers were more precisely limited by section 6 of the Criminal Law Act 1977. Second, it is argued that distress does not accord with the modern realization that it is comparatively rare for domestic debt to be caused by extravagance or deliberate non-payment by the debtor, but is usually the result of low income coupled with poor management of scarce resources, or is brought about by financial crises, such as marital breakdown,

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18 Duncan and Kirby, Preventing Rent Arrears (H.M.S.O., 1983).

19 Ibid., para. 5.57.

sickness or unemployment.[20] Third, distress is out of step with modern legislation aimed at protecting tenants and debtors from harassment.[21] Fourth, it gives no opportunity for a judicially sanctioned agreement for the repayment of arrears.[22] The courts also have certain powers to adjourn proceedings or postpone execution where a mortgagee is suing for possession of mortgaged property.[23] Thus it is particularly unfair to the tenant whose financial difficulties are temporary and who, given time, would be able to pay off the arrears.

(a) Intrusiveness

3.14 One argument raised against distress is that the process of entering a person's home and removing, or threatening to remove, personal possessions is, to put it mildly, distasteful, and should not be tolerated in modern society. It is further argued that the

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20 See, for example, Alpren, The Causes of Serious Rent Arrears, published by Housing Centre Trust (1976); Behind with the Rent, National Consumer Council (1976); Duncan and Kirby, Preventing Rent Arrears (H.M.S.O., 1983).

21 See, e.g., Protection from Eviction Act 1977; Administration of Justice Act 1970, s. 40.

22 An example of such an agreement is an administration order made by a County Court judge or Registrar: see County Courts Act 1984, ss. 112-117 and County Court Rules, O. 39.

23 Administration of Justice Act 1970, s. 36.

inherent unpleasantness of the distress process is frequently worsened by outrageous and often illegal behaviour by bailiffs. Shelter reported a case which came to their attention:

> "... a housewife had her house ransacked by bailiffs while she was out. Mrs. Mann was summoned from work by her fourteen year old sister saying that men had broken into her home. When she returned she found her whole house turned upside down and a wall unit wrenched from its fittings. Wall lamps had been smashed in the process and personal ornaments dumped all over the floor. The break-in had been by bailiffs ... instructed by the ... Council. They had picked the front door lock to get in (illegally) and to recover her furniture another £60 was being demanded ... A similar situation arose in Calderdale, where a family who had already cleared off their arrears nevertheless had their furniture taken away by bailiffs who employed a locksmith to break into their house while they were at work. Their furniture will now only be returned if they pay £56 costs. This public action by the bailiffs was very humiliating for the children. The family is now attemptiang to sue, though legal costs are again a deterrent."[24]

Such criticisms apply particularly to the use of distress against residential tenants, but business tenants have been the victims of oppressive behaviour on the part of bailiffs.

3.15 It has also been claimed[25] that landlords are apt to have resort to distraint when the arrears are comparatively low. Indeed, it has been suggested[26]

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24 In Distress over Rent (Shelter, 1978), p. 10.

25 See, e.g., In Distress over Rent (Shelter, 1978).

26 Duncan and Kirby, Preventing Rent Arrears (H.M.S.O., 1983), para. 5.58.

that, for local authorities, it is essential that when distraint is used against residential tenants the arrears be less than £100 because there is little chance of finding goods worth more than that on the premises. Also, it is arguable that it is uneconomic for landlords to pursue small debts through the courts, so their only chance of recovering arrears is through distraint. The problems of recovering small debts are, however, faced by all businesses, and the strength of these arguments would seem to depend upon the arguments outlined above[27] that landlords deserve greater protection than other creditors. We would welcome views as to whether there should be a minimum sum for arrears imposed, below which it would be unlawful to distrain.

(b) Distress causes hardship

3.16 The view has been expressed, even by those who advocate the use of distraint, that the remedy is inappropppriate and, indeed, may be positively harmful in housing management terms in cases where arrears have arisen through a genuine inability to pay.[28] The use of distraint in such cases, it has been argued, merely exacerbates the tenant's financial problems and rarely yields property sufficient to meet the arrears. However, critics of distress argue that, in practice,

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27 See supra, para. 3.6.

28 See, e.g., Murrell, "Rent Arrears: you have to be cruel to be kind", Municipal and Public Services Journal, 9 December 1977, at pp. 1244-1245.

its use has not been confined to wilful non-payers and that distress is often levied in cases of genuine hardship. There is evidence, albeit anecdotal, to support this contention.[29] On this basis it has been argued that the power to levy distress should be completely removed from landlords, at least in respect of residential property.[30]

3.17 Distress, it has further been argued, is objectionable because it effectively allows a landlord to coerce the tenant into payment of arrears without regard to the tenant's means or to the claims of other creditors. It is to be expected that a tenant faced with the prospect of being deprived of his or her personal belongings or the removal of goods necessary to the conduct of his or her business will go to great lengths to prevent their loss. This may include defaulting on other payments (such as gas or electricity bills) or borrowing money, perhaps at punitive interest rates. Distress (or the threat of it) may therefore worsen the tenant's financial position and, by putting pressure on the tenant to settle his or her rent arrears at the expense of other financial commitments, gives the landlord an advantage vis a vis the tenant's other creditors. In cases to which section 147 of the Rent Act 1977 does not apply, there is no judicial check placed upon its exercise and therefore no prior opportunity for the tenant to

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29 See In Distress over Rent (Shelter, 1978).

30 Ibid.

challenge the landlord's claim for arrears which may, for example, have been inflated by clerical error or be the subject of a genuine dispute or misunderstanding between landlord and tenant.

(c) Distress against business tenants

3.18 The social arguments against the levying of distress against business tenants are perhaps weaker than those against distress in a residential context. There is a general feeling that rent arrears, like other business debts, are simply one of the risks run when setting up in business and that a landlord is entitled to protect his own interests as best he can if his tenant defaults. Distress against business tenants can, however, be criticized on the specific ground that the seizure of goods - for example, office machines, machine tools, raw materials, vehicles or stock - could in many situations precipitate the collapse of an enterprise, by denying it the means to continue trading.[31]

31 The same may result from forfeiture.

PART IV

OPTIONS FOR REFORM

4.1 There can be little doubt that the remedy in its present form is wholly unsatisfactory, and that some measure of reform is long overdue. It is not only that so much of the present law is ancient, obscure, and in many ways outmoded. There are fundamental defects, as well as areas where distress law has lagged behind the development of the general law, so that reconciliation between them is difficult, if not impossible.

4.2 Nevertheless, in judging what to do about reforming the law, it is necessary to consider the current importance of distress, and what resources it would be appropriate to devote to a reform project. Necessarily, the first and fundamental question is whether the remedy should continue to be available at all. This is a matter more for social and practical judgment than something dependent on purely legal considerations. We should be interested to have views on whether the remedy should be abolished. However, before those minded to support abolition formulate their views, we hope that they will consider the merits and drawbacks of the other options canvassed below, particularly the possibilities of improvement to the remedy, or discontinuing the use of distress only in classes of cases where it seems particularly inappropriate, or open to abuse.

4.3 We propose to consider, in turn, four reform options:

(1) restatement of the existing law in a single, modern statute;

(2) rectification of the main areas of concern;

(3) fundamental reform of the remedy as a whole;

(4) abolition, complete or partial.

(1) A SINGLE STATUTE

4.4 It would be possible to provide a modern statutory restatement of the whole of the existing law, drawn from and replacing all the former legislation and common law on the subject, but without altering it in any major way. The advantages would be that the law would be easier to find, and the language would be easier to understand, with some minor ambiguities resolved. However, the gravest ambiguities, defects, inconsistencies and uncertainties would only be perpetuated. In view of the resources demanded by an undertaking of this size, it could not in our view be justified.

(2) REFORMING THE MAIN AREAS OF CONCERN

4.5 The second option is to identify the most troublesome imperfections, and make improvements there, without making any changes to other unsatisfactory areas of less immediate concern. The areas of law

which were not reformed would be left untouched: they would continue to be found in ancient statutes and common law. In effect, this is the solution which has been chosen from time to time in the past, resulting in numerous quite short statutes which were introduced to redress the imbalances or check the abuses of the day. A limited reform exercise of this nature would not be as demanding of resources as fundamental reform. It could serve a useful purpose by removing the most extreme practical or social defects, and ease the operation of the remedy. On the other hand, not only would some defects in the law remain, but the rules would also still be hard to find, because the original sources would remain unaltered. This option is designed to be a practical use of such restricted resources for law reform as can reasonably be made available. Necessarily, therefore, it must be restricted to attending to the major blemishes in the current law relating to distress. The patchwork effect achieved by such "first aid" would be less than satisfactory to those looking for fundamental and methodical law reform. We must accept that it is by no means an ideal solution.

4.6 We anticipate a particular, early drawback. Piecemeal reform loses the advantage of economy if it is aimed at areas which are too large or too many. It then becomes an inferior substitute for fundamental reform without necessarily being a much smaller undertaking. The law of distress has so many recognised defects that it may well be difficult to decide which are most urgently in need of attention. Nor would there necessarily be agreement as to what shape any improvements should take.

4.7 We have formed our own provisional views as to which problem areas might sensibly and usefully be tackled in this way. These are:

(i) the protection of third party goods;

(ii) the ascertainment of the sums for which distress can be levied;

(iii) the outmoded complexities of rescous and poundbreach;

(iv) the effect of walking possession agreements; and

(v) the supervision and control of bailiffs.

We set out below some tentative suggestions for possible improvement. For reasons explained later[1] we have not set out any detailed structure for the implementation of the suggestions.

4.8 We suspect that even narrowing the selection down to five areas may prove to be not nearly selective enough. We recognise that others may reach very different conclusions on priorities, and that other branches may be considered strong, or stronger candidates for individual reform. We might expect these to include:

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1 See infra, para. 4.71.

(vi) the complex rules as to which goods (other than strangers' goods) may be taken;

(vii) the inadequacy of the replevin remedy;

(viii) the possibility of process against tenants who do not know that they are vulnerable;

(ix) the right to act without any notice or independent assessment of the merits; and

(x) the special problems of distraining on residential premises.

We have indicated below some directions which improvement could take. The remaining imperfections, while not insignificant, could not in our view be regarded as priority candidates, but we would be interested to learn what differing views there may be.

A. Major Problem Areas

4.9 We now turn to the five areas which we consider to be the most urgently in need of attention.

(i) The Protection of Third Party Goods

4.10 It may be considered that the remedy should not be exercisable against third party goods at all. Why, it may be asked, should third parties suffer because the tenant of the premises on which their goods are has failed to pay his rent? On the other hand, a

landlord may be misled[2] about a tenant's creditworthiness by the quantity of third party goods which are on the premises, and which appear to be the tenant's. When the landlord enters to distrain, he may be unable to distinguish between goods which belong to the tenant and those which do not. Apart from those belonging to other occupiers, the goods may be on loan, leased, on hire purchase or subject to reservation of title. Arguments about ownership, which commonly follow execution,[3] can considerably undermine the simplicity and speed of a summary remedy like distress. Also, vesting ownership of all goods in a trusted associate is a very simple and obvious method of avoidance, which may prove impossible to prevent.[4]

4.11 We find ourselves compelled to accept that the aim of protecting third parties' goods is not compatible with the aim that distrainable goods should be instantly recognisable by the distraining landlord or bailiff. That aim could only be achieved by reverting to the rule that all goods found on the demised premises should be available without exception,

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2 i.e. during the term, and after the crucial assessment of creditworthiness which will usually be made before the grant.

3 Disputes as to the availability of particular goods for execution can be disposed of in interpleader proceedings.

4 Unless caught by s. 172 of the Law of Property Act 1925 (fraudulent conveyances).

or subject to the exception of goods clearly marked as belonging to the third party. As neither rule can be considered acceptable, the aim of instant recognition must be abandoned.

4.12 Although traditionally third parties' goods have been distrainable unless covered by one of the existing privileges, we see no compelling reason why third party goods should continue to be available to a distraining landlord. The arrears of rent are the tenant's debt, and it is his goods only which should be distrainable to satisfy that debt. There may be a case for an exception when the owner has allowed his goods to be used in misleading creditors. That is a very different thing from treating distress in general as a special case where an owner of goods jeopardises them simply by allowing them to be put in a particular place.

Exemption of all third party goods

4.13 If it were decided to exempt all third party goods from distress, it would be quite a simple matter to change the basic rule, but some ancillary rule changes would be called for at the same time. It would be essential to provide some savings, to protect purchasers who, acting in good faith, had mistakenly dealt with third party goods. Without some such protection, the remedy might well fade away for lack of willing purchasers, because purchasers could never be confident of getting any title. A suitable precedent could be found, for instance, in execution in the County Court, where it is provided that the purchaser

acquires good title, and that no person can recover against the official who sold the goods:

> "unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained, that the goods were not the property of the execution debtor".[5]

4.14 That change in the basic rule would result in a major simplification of the law governing the availability of goods for landlords' distress. Some of the miscellaneous exemptions not dependent on third party ownership would remain, but a substantial number of privileges would be made effectively redundant and could therefore be abolished.[6]

(ii) The Sums for which Distress Can Be Levied

4.15 The concept of distraint for rent poses two basic questions. Firstly, for which of the tenant's liabilities should the remedy be available?[7] Should it be available for any payment expressed as rent in the lease, or should it be available only for payments which fall within a statutory definition of distrainable rent? Secondly, how far should the tenant be able to satisfy those liabilities (and so reduce the distrainable amount[8]) otherwise than by making direct cash payments to the landlord? In other words, what deductions should the tenant be allowed to make?

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5 County Courts Act 1984, s. 98(1).

6 i.e. all those outlined in para. 2.44 supra.

7 See supra, paras. 2.13-2.16.

8 See supra, paras. 2.17-2.19.

(a) Liabilities

4.16 The remedy has always been automatically available to enforce payment of rent, in the traditional sense of payment for the use of the demised land. It has now become vital to clarify whether distress is to be automatically available to enforce any other payments which are due under the lease, but are outside the traditional meaning of rent, such as service and insurance "rents". If the remedy is in future to be strictly confined to rent in that traditional sense, it will be necessary to provide an authoritative definition of "*distrainable rent*". The definition would demonstrate that those other sums, whether or not referred to as rent, were outside the definition of distrainable rent, and could not attract the remedy. The definition would also have to resolve the existing doubt as to whether amounts of rent payable retrospectively (as in some rent reviews) should qualify as distrainable rent.[9]

Recurring payments

4.17. The modern reality is that other recurring payments are commonly referred to and regarded as rent for most purposes. It is significant that in many modern leases, the traditional rent is only one of several reserved "rents" and is not necessarily the largest of them. One of the principal justifications of the remedy is that it compensates the landlord for

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9 See supra, para. 2.16.

his inability to withdraw credit. That justification can equally support a right to distrain for other recurring payments. There the landlord may have little, if any, more control over the extension or enlargement of a recurring credit. It will often be impracticable, if not impossible, for a landlord to discontinue providing services when the tenant fails to pay service charges. Likewise, a prudent landlord will, and sometimes must, maintain valid insurance notwithstanding the tenant's failure to reimburse him. The provision of a summary remedy in these cases is no less appropriate than in the case of traditional rent, so there is a cogent argument for attaching the distress remedy to all regular or recurrent cash payments required by the provisions of the lease. It would be irrelevant whether such payments were called or defined as rent in the lease.

Other payments

4.18 That justification is not so apt to all payments due under lease terms. In particular, it has little force in the context of payments required as reimbursement for exceptional costs or expenses incurred by the landlord, or to compensate or reimburse him when the tenant has defaulted in performance of obligations which did not initially call for the payment of money to the landlord. We would not necessarily suggest such sums could never be made distrainable. We do, however, consider that it would be undesirable to attach an automatic and implicit right of distraining to every conceivable payment, of whatever nature, which may be required pursuant to the provisions of the lease.

Whether other sums distrainable by contract

4.19 Whether the landlord should be entitled to stipulate for distress rights in respect of payments not carrying automatic rights is a separate question. The answer depends largely on the extent to which third party rights are affected by distress. So long as third party goods remain generally vulnerable to distress, it cannot be acceptable to allow the parties to the lease to extend the full ambit of the remedy to other debts, at will. That would be tantamount to allowing a tenant to volunteer other people's goods as security for his own obligations. The owner would have no say, and probably no notion that his goods were being jeopardised in this way.

4.20 A possible compromise would be to allow the tenant to subject his own goods (and those of his successors) to the contractual or extended distress but to disallow contractual distress over third party goods. In practice, however, that would create a two-tier system of distress, possibly with both tiers operating at the same time, and leading to even greater confusion and uncertainties than the present imperfect system.

4.21 If all third party goods are to be exempted from distress,[10] we can see no reason to impede the freedom of contract enjoyed by the landlord and tenant.

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10 As recommended in para. 4.12 supra.

The tenant would be entitled to subject his own goods to a contractual extension of the distress remedy, but that voluntary extension would not affect any stranger to the lease. Within those limitations, there need be no restriction on the parties' rights to provide that distress should be available to enforce payment of any debt due under the provisions of the lease. Distress could thus be extended contractually to debts which could not be described as rent at all, including trading debts. Indeed, there is no logical reason to confine contractual distress to debts arising under the terms of a lease. The alternative view is that any extension of distress should be discouraged, perhaps even to the extent of prohibiting any distress made otherwise than to enforce payment of rent. One disadvantage would be that distrainable rent would have to be defined; it would not be easy to draw the line between the sums payable under the lease for which distress should be permitted and those for which it should not.

(b) Deductions: Cross-claims

4.22 There can be no justification for allowing a landlord to distrain for a sum greater than he could recover by litigation. The tenant should be able to bring into account any amounts owed to him which could be used in equitable set-off to an action for rent,[11]

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11 As in British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd. [1980] Q.B. 137, and see paras. 2.18 and 2.19 supra.

as well as those payments customarily regarded as discharging his liability to pay rent. A cross-claim[12] which goes to the foundation of a rent claim should, in our view, reduce the rent debt, so that the landlord's remedies are limited to the outstanding balance, whether he proceeds in the court or by self-help.

4.23 A general statement that such cross-claims shall be allowable does not go far enough. It is just as important to provide mechanics for how the cross-claim shall be allowed, and with exactly what effect.

4.24 Obviously it would be out of the question simply to lay down a rule making it unlawful for the landlord to distrain for any sum exceeding the net amount due. In many cases, the landlord could not know at the time of levy that the tenant proposed to make a cross-claim, let alone how much of an unquantified cross-claim should ultimately be brought into account.

4.25 Some degree of court involvement is therefore inevitable. It cannot be expected that the parties would always be able to work out agreed terms to stay or continue the effect of a distress while they are waiting for a trial of the issues between them. We would anticipate that the reference to the court would usually be instigated by the tenant.[13] Interlocutory

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12 As to when counterclaims can be used as set off see Hanak v. Green [1958] 2 Q.B. 9.

13 But we see no reason why a landlord reasonably anticipating a dispute should not be entitled to make the reference.

orders are a common feature in all litigation, in cases where one party seeks, or objects to, an immediate change in the parties' respective positions. There is no reason why litigation concerning the property of a distress should be an exception, even though there may be doubt as to which is the correct procedure to use. We think that the solution is to give statutory direction[14] as to the interlocutory procedure (whether existing or new) which ought to be used.[15] To avoid the confusion of tenants not appreciating how they can use their cross-claims to resist distress, their attention should be drawn to that appropriate procedure. That may readily be achieved by requiring the landlord to serve notice of distress containing the relevant information.[16] That would be closely analogous to the requirement for certain information to be set out on a valid notice to quit residential premises.[17]

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14 The detailed procedures would be most coveniently set out in rules made by statutory instrument pursuant to the statute specifying the appropriate method of proceeding.

15 We take the view that none of the procedures presently available is entirely suitable, and suggest the introduction of a new procedure. See para. 4.29 infra.

16 i.e. in addition to the information now required to be given see supra, para. 2.55.

17 i.e. under the Protection from Eviction Act 1977, s. 5 and the Notices to Quit (Prescribed Information) Regulations 1980, S.I. 1980/1624).

Other defences

4.26 At this stage we pause to consider whether it would be appropriate for the same prescribed procedure to be available when the tenant claims to have a defence or partial defence other than set-off. There has always been the possibility of tenants disputing the rent-claims, in whole or in part, and little provision has ever been made for resolution of such disputes. Yet it seems to us that the scope for dispute has been greatly enlarged in recent years. When only traditional rents were payable, the most likely dispute concerned the facts of payment or non-payment. It is now just as likely that the tenant would dispute the landlord's initial quantification, e.g. where the effectiveness of a rent review, or computation of a service charge, is in issue. Dispute may be even more likely if a landlord is distraining for payment or compensation in respect of some other default. We see no reason in principle why a system considered fair for dealing with cross-claims should not also be a fair way of dealing with disputes on the original claim. It may further be argued that a tenant should be allowed to raise an unrelated counterclaim to reduce the amount of distrainable rent. While such a counterclaim would not normally qualify as a defence to an action, a tenant counterclaiming in the courts may nevertheless be able to avoid enforcement until his counterclaim has been taken into account. It seems to us, however, that while fairness calls for a procedure to prevent defences from being discounted, it would not be appropriate to extend the procedure to cover unrelated counterclaims.

Effects of reference to the court

4.27 We have concluded that the tenant alleging a cross-claim or other defence must refer the issue to the court, but it is still necessary to decide what effect that reference should have. In theory, the easiest solution would be to provide that the tenant's reference to the court should nullify a landlord's right to distrain,[18] at least in respect of the disputed part of his claim. The landlord would then be obliged to pursue his rent-claim by court action. That solution would cause some practical difficulties and wasted expenditure if the distress had progressed beyond the preparatory stage. But the insuperable objection would be that it would invite abuse by tenants.[19] A tenant with no bona fide or arguable answer could nevertheless take advantage of the system and halt the process.

4.28 The inescapable conclusion is that the court must give some consideration to the merits. An immediate final determination of the issues would be the Utopian solution, but it would be quite unreasonable to give that degree of priority to a particular class of private litigation. In any event, some delay would be inevitable while the parties prepared their cases. Thus, some sort of interlocutory

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18 Similarly, a third party's reference would take the affected goods out of the ambit of distress.

19 And any third parties if their goods are not exempt.

proceeding with very speedy access to the court would have to be used. We would anticipate that the first step would usually be an interlocutory application by the tenant on notice to the landlord. In urgent cases, where even a short delay could be prejudicial, the court would be able to hear ex parte applications and make interim orders, pending an interlocutory hearing. The permutations and balances between the parties are infinite, and the court should have a wide discretion as to the orders which can be made, and the conditions which can be imposed, at any stage pending the final hearing. Replevin in its existing form would be inadequate, for the reasons already discussed,[20] and the interlocutory procedure under the Torts (Interference with Goods) Act 1977[21] is not completely suitable. The general jurisdiction to grant injunctions is, subject to the limitations in the County Court,[22] sufficiently flexible. But it might not be utilised, or properly utilised, unless there were some express indication that the full flexibility should be available in distress cases. Mere abolition of an established rigid system such as replevin would not necessarily indicate that a less rigid approach is expected.

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20 See supra, paras. 2.20 to 2.24.

21 See supra, para. 2.23.

22 The County Court can only grant an injunction if it is (a) ancillary to a claim for money or other relief within the substantive jurisdiction of the court or (b) in respect of or relating to any land, or the possession, occupation, use or enjoyment of any land; see County Courts Act 1984, ss. 22, 38, and Byrne v. Herbert [1966] 2 Q.B. 121.

Special jurisdiction

4.29 On balance, we think that it would be preferable to confer special jurisdiction by statute, in similar form to section 4 of the Torts (Interference with Goods) Act 1977. It would be made clear that the court would have a wide discretion to make interim and interlocutory orders, subject or not to conditions, in any proceedings raising issues as to the validity of a distress, the validity of a rent-claim or the admissibility and validity of a cross-claim. We see no reason for conferring exclusive jurisdiction on either the County Court (whose Registrar presently has exclusive jurisdiction at the interlocutory stage of replevin)[23] or the High Court. The discretion would be more aptly exercisable in whichever court is the appropriate venue for the substantive proceedings. Obviously the special jurisdiction would be exercisable in a much wider range of cases than replevin is, but it would cover all distress cases now covered by replevin (albeit more flexibly). Thus, replevin could probably be abolished. One objection is that replevin is not particularly confined to distress cases; in theory it is also available in other cases of unlawful seizure. Clearly the remedy must not be abolished completely without further consideration as to which other unlawful seizures now justify the use of replevin, whether any alternative remedy is available and, if necessary, whether such other cases could be brought within the proposed new jurisdiction.

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23 County Courts Act 1984, Sch. 1.

(iii) Rescous and Poundbreach

4.30 It is essential to the effectiveness of the remedy that goods which have been taken for distress cannot lawfully be snatched back by the tenant. This gave rise to difficulties in the early years of distress because the process did not divest the tenant of his title until the goods were actually sold; therefore he could not be liable in trespass for re-taking them before sale. The standard practice was for the goods to be removed from the demised premises to a public or private pound. While the goods were en route to the pound, they were being moved under the lawful authority of the landlord. Once they had arrived, they were undisputably in the custody of the law. Several complexities in distress law arise only because of the breakdown of the levy into the two stages, seizure and impounding.[24] The prime example is the existence of the two parallel wrongs of rescous and poundbreach,[25] according to whether the offender acted before or after the impounding. We do not think that the breakdown serves any useful purpose now, especially as the "impounding" usually takes place in no more formal surroundings than the demised premises themselves. Interference with a lawful distress should obviously remain an actionable wrong, but the distinction between rescous and poundbreach has become very artificial, and in our view should now be dispensed with.

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24 See supra, paras. 2.47, 2.50 et seq.

25 See supra, para. 2.63.

4.31 It would be in accordance with modern thinking to regard the present two stages as a single process. If separate impounding were no longer a necessary element of distress, it would follow that there should be only one remedy for wrongful retaking or interference with distress, replacing rescous and poundbreach. Even if the two stages of levy are retained, there is still a strong case for substituting a single, simplified remedy for wrongful interference instead of the existing complicated and draconian parallel remedies. We would not contemplate that the ordinary remedies for interference with possession of goods would apply.

A criminal offence

4.32 At present, both rescous and poundbreach are indictable offences,[26] as well as carrying penal consequences in civil law. It does not necessarily follow that a surviving or substitute wrong should continue to be a criminal wrong. It might now be considered inappropriate to invoke sanctions of criminal law to assist in a self-help remedy. Nevertheless, we feel that the criminal remedy should

26 Poundbreach is certainly indictable, rescous possibly, see R. v. Bradshaw (1835) 7 C. & P. 233 and R. v. Butterfield (1893) 17 Cox C.C. 598.

be retained, because there is a public interest in maintaining the integrity of legal process, whether exemplified by court orders[27] or by recognised extra-judicial process.[28]

4.33 The existing provisions could be construed as creating absolute criminal offences, which could be committed unwittingly by tenants or others.[29] Strict liability is clearly inappropriate in this context, and we would suggest the present provisions should be replaced by a single offence of knowingly interfering with a lawful distress.[30] Trial on indictment does not

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27 A person who rescues or attempts to rescue any goods seized in execution under process of a County Court is liable to a fine or imprisonment on summary conviction, and can be committed by the County Court judge: see County Courts Act 1984, s. 92. This liability would appear to be absolute. Also, a person who resists or intentionally obstructs a County Court bailiff in executing a possession order against a trespasser is guilty of an offence, Criminal Law Act 1977 s. 10.

28 The Keith Committee, (1983) Cmnd. 8822, considering distress for taxes was sympathetic to the Customs and Excise Department's representation that it should be made an offence to permit distrained goods to be removed without authority. The existing remedies were found to be not particularly practical. See paras. 24.2.17 and 24.2.32.

29 See Abingdon R.D.C. v. O'Gorman [1968] 2 Q.B. 811, 828.

30 The tenant's present right to retake illegal distress up to the time of impounding could be enlarged, entitling him to use self-help at any stage. That would perpetuate the risk of confusion as to whether a distress was illegal or irregular. We think that it would be preferable either to remove the right altogether, or to specify in detail the circumstances which would justify a retaking.

seem to us appropriate for such an offence. It should be a summary offence,[31] which might be punishable with a maximum period of perhaps one month, or a suitable fine. If the interference justifies a higher penalty, some other offence will have been committed.

Tortious liability

4.34 Liability in tort for rescous and poundbreach was also considered to be absolute[32] so that ignorance of the distress was no defence, until strong doubts were expressed in Abingdon R.D.C. v. O'Gorman.[33] Again we would propose that the present provisions should be replaced by a single tort of interfering with lawful distress in which knowledge would be an essential ingredient.[34] Action would lie only at the instance of

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31 The level of penalty would require some consideration, e.g. as to whether fines could be related to the value of the goods involved. Under s. 92 of the County Courts Act 1984 (see n. 27 supra) the maximum penalty is one month's imprisonment and a fine not exceeding level 4 on the standard scale.

32 See Lavell & Co. Ltd. v. O'Leary [1933] 2 K.B. 200, 222.

33 [1968] 2 Q.B. 811.

34 We appreciate that tortious liability for interference with another's property rights does not usually depend on the tortfeasor's knowledge of the other person's rights, but we consider that distress must create a special category in which knowledge is taken into account. This is because the owner's absolute right in his property may become subject to distress rights without his knowledge. The point is of particular importance so long as third party goods can be the subject of distress, but it is also quite possible for the tenant himself to be ignorant that his own goods have been subjected to distress.

a landlord who had suffered actual loss or damage, which would provide the measure of recoverable damages. There would no longer be any prescribed penal damages.[35]

(iv) Walking Possession

4.35 The principal flaw in the walking possession agreement is the uncertainty of its effect on third parties.[36] It is now established[37] that a third party who takes back his own goods without knowledge of the agreement[38] will not be liable for poundbreach, although the exact reason for his immunity is still uncertain. There is also still uncertainty as to the positions of third parties purchasing goods from a landlord who had taken only walking possession, of the true owners (where not the tenant) of those goods, and of third parties purporting to buy from the tenant.

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35 As now provided by the Distress for Rent Act 1689, s. IV.

36 See supra, para. 2.53.

37 By Abingdon R.D.C. v. O'Gorman [1968] 2 Q.B. 811.

38 The decision in Abingdon R.D.C. v. O'Gorman supra does not necessarily mean that a person innocently taking goods from any other sort of pound would be immune, although a contrary result seems unlikely.

4.36 Other partial reforms put forward earlier in this paper could have very significant effect here. In particular, if the impounding stage is made redundant,[39] it will no longer be necessary to consider whether walking possession is equivalent to impounding, so as to validate the landlord's sales. As in execution, the power to sell would then depend on a seizure, followed by a period of possession (of which walking possession is one example) without abandonment before sale.[40] There would no longer be any uncertainty at or after the time of sale, attributable to the use of a walking possession agreement. It would nevertheless be desirable to restate the statutory power of sale, indicating in which circumstances it provides an exception to the nemo dat quod non habet[41] rule. That becomes even more important if there is to be reform of the rules affecting third party goods so that all of or more of them will be exempt.[42]

4.37 There would nevertheless remain some uncertainty as to the result of dealings with goods while they were subject to a walking possession agreement, e.g. a tenant's sale to a purchaser who knew, ought to have known, or did not know of the agreement and its effect. It is important to remember that a person's liability or non-liability in tort will not necessarily be conclusive on questions of title to goods.

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39 See supra, para. 4.30 et seq.

40 See Blades v. Arundale (1813) 1 M. & S. 711, and National Commercial Bank of Scotland Ltd. v. Arcam Demolition and Construction Ltd. [1966] 2 Q.B. 593.

41 See ante, para. 2.59.

42 See ante, para. 4.10 et seq.

A prescribed form

4.38 We think that it would be useful to provide a statutory form for walking possession, whose use would be compulsory for landlords as well as for bailiffs,[43] and whose effect (as between the parties themselves and between the parties and outsiders) would be explained in the statute. The prescribed form would, inter alia, state that no title could pass to persons dealing with affected goods if they knew or ought reasonably to have known of the agreement.[44] It could draw attention to the criminal and civil sanctions in relation to wrongful interference. It could set out a number of effects which do not seem to have been considered in the context of walking possession. For instance, the signatory's usual promise not to remove or allow removal of goods[45] might be sensibly extended to impose stricter duties; there should, we think, be a duty to preserve the goods, to insure them, and not to do any act likely to reduce their value or affect their

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43 The Distress for Rent Rules 1983/1917 already provide (by r. 2) a form which "may be used with such variations as the circumstances may require", and that the charge for walking possession is payable only if a walking possession agreement in that form has been signed by the tenant. The rules do not appear to invalidate the use of other forms.

44 i.e. the same degree of knowledge as would render the person liable for wrongful interference.

45 As in Form 6, para. 3, in Appendix II to the Distress for Rent Rules 1983.

availability if the distress proceeds to a sale.[46] As some situations would undoubtedly call for some modification of such a duty, it seems preferable to imply the statutory terms subject to the parties' right to vary them.[47] One modification to a standard form agreement which might be in demand is that a tenant be expressly permitted to remove a particular article for a specified purpose and for a limited time. For example, the tenant might be permitted to drive his car to work on condition that he also drives it back to the demised premises.

4.39 The basic statutory form of walking possession could be made obligatory for all rent distress, proscribing all the other forms of possession (or impounding) which are now available. However, we think that it would be unreasonable to make walking possession the universal form of possession, imposing

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46 An agreement in Form 6 does not, for instance, prohibit the tenant from consuming the distrained goods, e.g. by burning the coals, or mixing distrained materials, in manufacture, with undistrained goods belonging to the tenant or a third party.

47 e.g. a newsagent might be allowed (or bound) to sell current issues, with a condition that he continue receiving subsequent issues which are to be treated as subject to the walking possession until sold. Variations are likely to be clumsy, but it is inevitable that they will be needed.

on tenants[48] new obligations which they were unwilling to accept or unable to observe. It could also be unfairly prejudicial to landlords who had reason to suppose that the goods would be unlawfully removed if no guard were placed on them. The effect would then be to deprive the landlord of the security which he had seized.

(v) Certification of Bailiffs

4.40 Of all the aspects requiring reform, certification of bailiffs would probably be the most convenient to be dealt with independently of other aspects of the law. Indeed, if the remedy is to be retained at all, this reform would probably be regarded as essential. The certificate granted by the County Court allows the bailiff to offer his services to landlords wishing to distrain for rent but serves no other purpose.[49] A system of certification should ensure that only respectable and responsible persons are employed to carry out distress. The present system is inadequate in our view, because the information

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48 At present, a walking possession agreement may be entered into by any responsible person in possession; see National Commercial Bank of Scotland Ltd. v. Arcam Demolition and Construction Ltd. [1966] 2 Q.B. 593. It could never be appropriate to impose the obligations of "walking possession" upon such a person without his consent, or on an absent tenant who has no knowledge of what is happening.

49 A person does not require a bailiff's certificate to distrain for rates or to carry out any of the other functions which private bailiffs commonly undertake. County Court bailiffs are Government employees attached to the court, and the controls over them are quite separate.

which the applicant has to supply will rarely be sufficient material on which to form a judgment as to his suitability, there are hardly any facilities for checking what he says, and there is no effective control over his conduct in distraining once he has been granted a certificate.

4.41 The principal needs are that applicants for bailiffs' certificates should be required to show that they are suitable persons with some experience or at least knowledge of distress, that there should be improved facilities for checking the information they supply and, above all, that there should be a fair and convenient way of dealing with complaints. A really efficient certification and monitoring machinery requires the introduction of some body charged with responsibility for upholding standards and maintaining records.

Machinery

4.42 At first sight, an attractive precedent is provided by the liquor licensing procedures in the magistrates' courts, where the police perform the role of independent respondents, and other bodies and affected individuals are entitled to make representations.[50] The precedent appears less useful on closer examination, because there is no existing body obviously suited to fill the respondent role, and

50 See the Licensing Act 1964.

the expense of setting up and maintaining a new body specially for that purpose would be considerable and perhaps disproportionate. Nor is there any equivalent local catchment area for other persons likely to be affected, and so eligible to make representations.

4.43 A recent precedent, using existing bodies to control the activities of persons engaged in a particular kind of work, is to be found in the Estate Agents Act 1979. There, the Secretary of State for Trade and Industry can make regulations requiring estate agents to satisfy minimum standards of competence, for which a degree of practical experience will be taken as evidence of competence. The Act imposes duties on persons engaged in estate agency work, and the enforcement of the Act is the responsibility of the local weights and measures authorities, subject to the supervision of the Director General of Fair Trading. The Director can make a prohibition order prohibiting a person from carrying on estate agency work on the ground that he is unfit, or a warning order, warning the estate agent that repetition of a particular failure or practice would render him unfit. Appeal lies to the Secretary of State. The Director must establish and maintain a register of every order and decision he makes.

4.44 That precedent may be adaptable for use in certification of bailiffs. The local consumer protection authorities could be charged with responsibility for verifying the (more extensive) information supplied by the applicant, following up references, records of experience, financial standing

etc. They would cooperate in maintaining central records, so far as possible, and be the publicised receiving point for any comments and complaints about the conduct of distraining bailiffs. Their role would be principally administrative, aimed at revealing any possible grounds for refusal or cancellation of certificates and forfeiture of security. There can be no doubt that any contested application should be heard in the County Court. It is arguable that it would be wasteful to spend court time on unopposed applications. On the other hand, the experience of County Court judges in assessing the character of witnesses is of considerable value, and is an advantage which should not be lightly waived.

4.45 Whatever machinery may be prescribed for the hearing of complaints, we think that it is essential for such machinery to be drawn to the attention of the persons likely to be affected by the activities of bailiffs. This may be achieved very simply by requiring the bailiff's notice of distress to set out the steps which an aggrieved recipient may take. There are many precedents for this.[51]

4.46 Machinery along those lines could possibly be devised, but we are very aware of the increase in resources which it would demand. That demand could be reflected in increased certification fees. A modest increase in certification fees or costs may prove to be a small price to pay to achieve improvement in the practice and the public image of distress.

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51 See supra, para. 4.38.

Qualifications

4.47 The question of how and how far the requirements on application should be made more stringent is quite separate from the question of machinery. We do not think that it would be unreasonable to require new applicants to spend a training period under the supervision of an established bailiff, and/or to require the application to be supported by an established bailiff or other character witness who could be required to attend before the judge. While bonds are a useful form of security, the amount set may be unrealistically low.[52] The court should be given discretion to make orders which are not simply grants, refusals or cancellations of certificates. The court might consider it appropriate to require an applicant to provide a higher security than normal, or to impose other conditions on a grant, or to issue a warning similar to the warning orders which can be made by the Director against estate agents, such warning to be noted on the central register. A second warning would automatically lead to disqualification, but there could be a discretion as to the length of disqualification and/or the effective life of a warning on the register.

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52 Security of £2,500; see Distress for Rent Rules 1983/1917, r. 6.

B. Other Problem Areas

4.48 We now turn to other problem areas which might be considered suitable candidates for individual reform. These are the areas to which we have accorded lesser priority than those mentioned above. We emphasise that our suggestions are intended only to give a broad indication of the directions which we think that reforms might take, without any details of how reforms would be implemented and what technical problems might have to be overcome. The directions can be briefly expressed, but it should not be assumed that implementation would be a simple or straightforward task.

(vi) Goods Available for Distress

4.49 Even if all third party goods (or most of them) were to be exempted from distress, some outdated and unsatisfactory rules as to the availability of goods would remain. One possible approach to reform would be to abolish all the existing privileges or exemptions, but we do not consider total abolition to be a satisfactory solution. It would be oppressive to sweep away all the privileges, including those designed to preserve for the tenant, and his family, some basic necessaries, and those designed to prevent avoidable interference with the tenant's ability to earn money.[53]

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53 See supra, para. 2.36 et seq.

Uniformity

4.50 The second possibility would be to abolish the exemptions which applied exclusively to distress, and to adopt the general (much simpler) rules of exemption from execution. The advantage of substituting a set of rules from an analogous area of law would be the achievement of simplification and uniformity.

4.51 On the other hand, it may be thought that uniformity for its own sake is a poor objective; rules from other branches of the law should not be adopted wholesale unless demonstrably superior. The more positive, and preferable, approach is to retain those of the privileges exclusive to distress which are logically sound and serve a useful purpose. All that is necessary is that they should be brought up to date. Then, uniformity might still be achieved by applying the same exemptions, where appropriate, to all the analogous procedures including execution and other forms of distress. Uniformity which retains all the better features and discards those which are inferior is a more sensible objective than substituting one set of unsatisfactory rules of wide application for one which had narrow application only.

Modernisation

4.52 The modernisation possibilities are quite numerous and we do not propose to detail all of them. Some outline suggestions would be:

(i) the enlargement of qualified privilege to absolute privilege;[54]

(ii) the exemption of defined basic necessaries up to a more realistic value, particularly in the context of residential premises occupied by the tenant and his family;[55]

(iii) the introduction of some element of choice for the tenant, as to which goods should be taken;[56]

(iv) the exemption of things whose seizure was likely to provoke a breach of the peace, assuming that the reaction of the tenant or occupier will be that of a reasonable man;[57]

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54 See supra, paras. 2.37-2.39.

55 See supra, para. 2.40(vi). Cf. the Insolvency Act 1985, s. 130(2) which will exclude from a bankrupt's estate "such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation" and "such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family" without any fixed upper limit of value; cf. the Bankruptcy Act 1914, s. 38(2) under which the upper limit of value is now £250.

56 See supra, para. 2.39.

57 See supra, paras. 2.40(v) and 2.43.

(v) the exemption of things whose removal would have a severe and immediate adverse effect on their own value or on the condition or value of things left behind; thus, for example, perishables would be exempt unless the landlord could, and was willing to, keep them without deterioration until a reasonable sale;[58]

(vi) tenant's fixtures would cease to be exempt.[59]

(vii) Replevin

4.53 We have already indicated the need to substitute a more flexible remedy for the very limited remedy of replevin, in the context of cross-claims and other defences.[60] We would suggest that, even if cross-claims are not to be permitted, the special procedure outlined in paragraph 4.29 above should nevertheless be substituted for the present remedy of replevin.

(viii) Awareness of the Remedy

4.54 We have already expressed our doubts as to the usefulness of requiring the right to distrain to be expressly reserved in a lease before it can be

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58 See supra, para. 2.41.

59 See supra, paras. 2.40(iii) and 2.42.

60 See supra, para. 2.20 et seq.

exercised.[61] The purpose of such a requirement would be to ensure that tenants were fully aware of the landlord's rights of self help. We doubt whether the majority of tenants would fully understand the implications of a short clause simply reserving a right to distrain, but we would certainly not advocate the inclusion of a detailed reservation spelling out the effect of a right to distrain. We think that the time when a tenant is more likely to benefit from being expressly warned as to the availability of distress is the time when distress is imminent.

(ix) Advance Notice or Leave from the Court

4.55 While several of the social criticisms of distress for rent would probably be answered by a universal requirement that the leave of the court be first obtained, we think it very likely that such a requirement would effectively destroy the remedy. Unless there were some expedited, priority procedure for applications, the advantage of speed would be lost. The court could hardly consider the application without some consideration of the merits, as in an ordinary court action. We think that there would be little point in preserving distress as an independent remedy where every exercise must involve an application to the court, especially if the end result is not significantly different from execution of a judgment against the defendant's goods. It would be perfectly

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61 See supra, para. 2.27.

possible, if thought desirable, to preserve some differences between landlords and other judgment creditors, e.g. by allowing landlords to go against some third party goods. We consider, however, that once court involvement were made universal, it would be inexpedient to perpetuate any of the present differences.

4.56 A more effective direction for reform would, in our view, be to require landlords to serve advance notice of intended distress. We would be interested to learn whether distraining landlords would consider themselves prejudiced by a requirement to serve notice, and, indeed, how many distraining landlords do already give advance warning even though not obliged to do so. If in fact the requirement would not be seen as prejudicial in the majority of cases, the best solution might be to require advance notice in every case, unless the court agrees (on an ex parte application) to dispense with it. Alternatively, a Mareva injunction might be considered more appropriate in such a case. Quite apart from the social considerations, we think that an advance notice requirement could very well cut down the overall costs of distraining. We would anticipate that notice would in many cases lead to immediate payment or acceptable arrangements for payment, and disputes would be resolved before, instead of after, the commencement of a distress which might prove to be unlawful.

4.57 There are several ways in which tenants could be discouraged from treating advance notice as an opportunity for avoiding distress. One obvious way is

to provide that all distrainable goods which were on the premises when the notice was served, should still be distrainable notwithstanding subsequent removal and regardless of the motive of the person removing them.[62] Such a rule would not always assist the landlord in practice, because he might not know what goods had been on the premises, or where distrainable goods had been taken. Whether the landlord should have a corresponding power to follow goods onto another's land without his consent is not an easy question to answer. Probably such a power should not be available except through the court. It may be considered more appropriate for the court to order delivery up of the goods rather than to authorise forced entry.

(x) Distress and Residential Lettings

4.58 We recognise that there is a distinction between tenancies of residential premises and premises let for business, agricultural or other purposes, as different social arguments apply.[63] For the reasons

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62 Cf. the existing power to follow, where the landlord must prove that the removal was clandestine or fraudulent, see para. 2.62. The effect of a notice would then be analogous to the issue of a writ or warrant of execution, which binds the debtor's goods. Thereafter, all dealings with the goods are subject to the enforcement officer's right to seize them, unless they have been sold in market overt or to a bona fide purchaser for value without notice.

63 See Part III.

outlined above in paragraph 4.55, we would not be in favour of extending the requirement of obtaining the court's leave to any wider class of tenancies. There is, however, the alternative of excluding all residential tenancies from the ambit of distress altogether, which we consider later in this paper under the heading "Abolition".

(3) FUNDAMENTAL REFORM

4.59 In principle, a codification in modern terms, eliminating the subsisting archaisms and anomalies,[64] would still be the best possible way of reforming the law of distress. The better rules would be retained, perhaps with some modification, but the code would bring in major reforms throughout distress law. It would incorporate reforms under all the headings considered above at paragraphs 4.5 to 4.58 as possible candidates for individual reform. The code would also make improvements in respect of all the other matters whose need for attention is apparent from the summary of the present law in Part II of this paper. Reform would not be confined to those problem areas which have already given trouble.

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64 As suggested in Interim Report on Distress for Rent (1966), Law Com. No. 5.

4.60 Established, successful features from parallel[65] remedies or procedures could be adopted, or drawn on as models. Ambiguities and inconsistencies would be eliminated, along with the outdated and anomalous parts, to produce an efficient and fair modern system of law enforcement.

4.61 At the same time, the rules applicable to other forms of distress,[66] and perhaps other procedures involving forced sale of property for the benefit of creditors,[67] could also be revised. The rules could all be brought into the same statutory code. The only surviving differences between the codified procedures would be those reflecting essential differences in target or substance.[68]

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65 e.g. execution against goods.

66 i.e. distress for rates and taxes and for certain payments ordered to be made by magistrates' courts.

67 e.g. sale by or at the instance of a mortgagee, execution against goods, and possibly also sales on insolvency.

68 e.g. rules governing sale of land and other property cannot be identical because different formalities are required under the general law, some third party goods may still be considered rightly eligible for distress but not for execution and so on.

4.62 We think that there has been appreciable growth in the use of the remedy since 1968 when Lord Denning M.R. said that:

> "It is very rarely that we have a case about distress for rent. It is an archaic remedy which has largely fallen into disuse. Very few landlords have resort to it."[69]

Unfortunately, because of the extra-judicial nature of rent distress, there are no formal statistics[70] to show how great the increase in use has been. We would not expect to find that the increase had been sufficient to transform the remedy into a common method of enforcement. If it could be shown that there had been a much sharper increase in demand for a distress remedy showing a pressing need for modernisation, then codification might become a more feasible option. It might then warrant the major application of resources which modernisation would demand.

4.63 There are other considerations which tend to point away from the option of codification. Two rather serious objections have become apparent during our feasibility study. Firstly, it would appear that the two aims, of improved efficiency and fairness on the one hand, and simplification and streamlining on the

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69 In Abingdon R.D.C. v. O'Gorman [1968] 2 Q.B. 811, at p. 819.

70 The only available statistics relate to applications to the court where leave is required under the Rent Act 1977. See supra, para. 2.29.

other, are quite incompatible. A really efficient scheme, with satisfactory safeguards against abuse, would necessitate a massive code. It would have to cater for an enormously wide range of possible situations. To take but one, minor example, the privileges affecting livestock[71] would have to be rationalised. To sweep those privileges away would be irresponsible as the privileges prevent interruptions to good husbandry. Therefore it is necessary for the code to retain a body of rules relating to the feeding and maintenance of animals while the distress continues, and a body of rules to indicate which categories of animals are privileged. The simpler expedient, of exempting animals generally, would avoid that need, but would exempt family pets, stocks in pet shops, animals kept for show or breeding etc. which cannot be justified on the grounds of good husbandry. The cost of simplicity seems to be unfair preference to some tenants. The cost of fairness seems to be the adoption of rules which are as cumbersome as, if not more cumbersome than, the existing rules.

4.64 Secondly, the only way of safeguarding against the inevitably inherent opportunities for abuse is to build in a greater role for the courts. Because self-help remedies generally are now regarded with some suspicion and disfavour, the modern trend is to impose some degree of judicial control over them. Well known examples include restrictions on repossession of goods

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71 See supra, paras. 2.37, 2.40.

subject to hire purchase agreements without the court's leave,[72] restrictions on taking possession of land occupied by residential occupiers,[73] and indeed the existing bars to distraining without the leave of the court.[74] We could not recommend the creation of a new distress code in which the leave of the court was universally required, for the reasons already given.[75] But we think that it would be essential for the code to provide prompt and easy access to the courts whenever there was a dispute or uncertainty as to the parties' rights. That we consider particularly important in relation to cross-claims and other defences which the tenant might wish to raise,[76] and we would expect the use of such procedure to become fairly common. Other matters which might be more often before the courts are contested third party claims, and complaints as to conduct of distresses, either as tort actions or in the context of bailiffs' certificates. A comprehensive code might also enlarge the landlord's right of entry so that the court could assist in specified circumstances.[77] The emphasis on increased access to and use of the courts must inevitably affect the nature of the remedy. It is no longer a truly extra-judicial

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72 See the Consumer Credit Act 1974.

73 See the Protection from Eviction Act 1977 and the Administration of Justice Act 1970, s. 36.

74 See supra, para. 2.28.

75 See supra, para. 4.55.

76 See supra, para. 2.20 et seq.

77 As to the confusion and inadequacy of the present law, see supra, para. 2.48 et seq.

one. Then, as the degree of court involvement increases, so the arguments against retention of the remedy become stronger. If court time is being taken up anyway, the survival of the remedy depends on there being some other outstanding advantage of using distress. We doubt whether there is such an advantage.

4.65 The enormous scale of a fundamental reform exercise is readily apparent. The exercise would call for the use of a very substantial share of the resources available for law reform, and we have grave doubts as to whether it could be in the public interest to embark on a project of codification now. We would not seek to deny the need for modernisation in terms of law reform, but we do not believe that such a major project would be either justifiable in terms of resources, or practical in the immediately foreseeable future.

(4) ABOLITION

(i) Complete abolition

4.66 As the remedy is unsatisfactory in its present form, and the resources required for any worthwhile reform would seem to be disproportionate to the use made of it, we are drawn to the conclusion that abolition may be the best solution.

4.67 It is to be expected that those tenants who are aware of the continued existence of the remedy would welcome its abolition. It is equally to be

expected that those landlords who are aware of it, and actually use it (or threaten to do so) will protest at being deprived of one of the traditional rights of landlords. Arguments to the effect that tenants also benefit from the existence of a speedy, low cost machinery for rent enforcement tend to ring rather hollow. We would not expect any tenants to support retention on that or any other ground. Arguments that the retention of a distress remedy saves valuable court time, thus keeping down public expenditure, carry more weight, but we suspect that the cost of any such saving is now unacceptable in social terms.

4.68 The answer to the anticipated landlords' objection is simply that the concept of distress for rent has become foreign to modern notions of acceptable practices. Its useful life is now spent and cannot be resuscitated except at expense disproportionate to its value. Perfectly convenient alternatives are available to landlords, making it difficult to justify giving them a privilege whereby they are allowed to enforce monetary claims without submitting any claim to any court.

4.69 Landlords can always go to court for a money judgment, which can be enforced in a number of different ways, including attachment of earnings[78] and sequestration,[79] as well as charging orders against the

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78 See the Attachment of Earnings Act 1971; R.S.C., O. 105 and C.C.R., O. 27.

79 See R.S.C., O. 49; C.C.R., O. 30.

tenant's real property[80] and execution against his goods.[81] It is true that not all goods available for distress are also available for execution, but we would expect the divergence to be considerably narrowed in any reform of distress. In any event, it is not necessary to preserve distress in order to preserve the landlord's right to go against goods not usually available for execution. That divergence could be perpetuated by a special rule governing execution for a rent arrears judgment.

4.70 Landlords will also, almost invariably,[82] have the right to forfeit the lease on the ground of non-payment of rent. These remedies are sometimes limited by court order, e.g. where the court can order payment by instalments[83] or grant relief from forfeiture[84] on payment of the arrears. Relief from forfeiture is not granted unless the arrears have been paid in full, and instalment orders are made after consideration of the tenant's means. Where time has been allowed for payment, that may provide a fair indication of the meagreness of the assets which would have been distrainable.

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80 See the Charging Orders Act 1979; R.S.C., O. 50 and C.C.R., O. 31.

81 See R.S.C., O. 45, O. 47 and County Courts Act 1984, s. 85 et seq.

82 Few, if any, professionally drawn leases will omit the usual proviso for re-entry in case of non-payment of rent.

83 e.g. under the Rent Act 1977, s. 100 and the Housing Act 1985, s. 85.

84 Under the Supreme Court Act 1981, s. 38 and the County Courts Act 1984, ss. 138, 139.

4.71 It is because our provisional recommendation is that the remedy should be abolished, that we have limited our consideration of possible individual reforms. Our exploration of those areas is much less detailed than it might have been if our provisional recommendation had been different. We appreciate that even abolition would make a significant demand on resources. The law of distress has not developed in isolation over centuries, and it was inevitable that the principles should have become entwined with other branches of the law, especially but not exclusively in the context of landlord and tenant law.[85] This means that abolition cannot be achieved by a simple repeal. Abolition will involve consideration of all the existing statute and common law and its effects outside the law of rent distress. We think that this proposed use of relatively modest resources would be amply justified by the removal of this outmoded and impossibly complicated remedy from the law of landlord and tenant.

(ii) Partial abolition

4.72 An alternative conclusion is that there is still a place for distress in modern society, but that place does not cover all the different kinds of tenancy. In particular, it may be concluded that

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85 e.g. the Distress for Rent Act 1737, s. 16, as amended by the Deserted Tenements Act 1817, allows re-entry of deserted premises on which there is insufficient distress to meet rent arrears. Some of the distress for rent rules apply also to other forms of distress such as distress for rates.

distress is no longer an appropriate remedy in the context of residential lettings. Private residential lettings have been made into a special category already by the imposition of the court's leave requirement for protected tenancies.[86] The number of applications is so low that abolition would not be such a very great step. This solution has already been adopted in New Zealand and several Australian states, and does in our view merit serious consideration.

4.73 It must be borne in mind, however, that there is no appropriate statutory definition of "residential letting". But there are many statutory provisions designed to protect particular kinds of residential letting[87] and the courts have often been asked to decide whether a particular tenancy with an element of residence can qualify. The task has not always been easy, and new, difficult questions still arise with some regularity.[88] The spirit of the enactment is not infrequently the deciding factor. We do not think that it would be appropriate to confine an exemption from distress to tenancies which already have some statutory protection, so that a definition in an existing statute could be adopted. As a matter of

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86 See supra, para. 2.29.

87 In the Rent Acts, the Housing Acts, the Leasehold Reform Act 1967, the Landlord and Tenant Act 1954, etc.

88 See e.g. Kavanagh v. Lyroudias [1985] 1 All E.R. 560 and Hampstead Way Investments Ltd. v. Lewis-Weare [1985] 1 W.L.R. 164, both under the Rent Act 1977.

policy, we would think that the aim is to protect residential occupiers even if the residence is temporary, and without regard to the identity of either landlord, tenant or other occupier, or to the quality of the premises or level of rent payable.[89]

4.74 Accordingly, the implementation of this alternative would necessarily require the introduction of a completely fresh statutory test, cutting right across the many other statutes conferring protection on residential tenants. The extent of the residential exemption would be purely a matter of policy but that policy, and hence the test, must be framed with great precision. For instance, it must indicate whether residence in part could or would exempt the whole of the demised premises, and whether residence in breach of covenant would qualify to exempt the premises from distress. Should residence in a caretaker's flat, or a room used occasionally for sleeping exempt the whole of an office block; should residence in a farmhouse exempt the whole farm? Examples of mixed user provide striking illustrations of the policy problems. We would be inclined to restrict any such exemption to that part of the demised premises which could be described as a dwelling house, but, subject to that, to interpret "residential" quite liberally, to exclude only those residential elements which could be described as minimal.

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89 Statutory protection for residential tenants is usually qualified by reference to rateable values and/or rent levels.

4.75 Abolition of distress in the context of agricultural holdings may also be justified, but for quite different reasons. If equipment and stock are taken for distress at a season when they would otherwise have been in use on the farm, e.g. seed and seeding equipment, the lost opportunity cannot be made up immediately, and agricultural resources may be wasted. That must be contrary to public policy, which is already reflected in part by existing privileges referable to agricultural tenancies.[90] Moreover, the agricultural tenant's statutory security of tenure is already dependent on his payment of arrears within the period of two months after demand.[91] This places agricultural landlords in a strong position, so that distress may well have become a superfluous remedy to them.

4.76 Partial abolition cannot be regarded as an alternative to reform. It might answer some social criticisms of distress, but would not begin to answer the more general criticisms. The law of distress would still apply to some tenancies so that the need for reform would be unabated.

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90 See supra, para. 2.37 and the remedy is limited to one year's arrears, instead of the usual six: Agricultural Holdings Act 1986, s. 16.

91 Agricultural Holdings Act 1986, s. 26.

4.77 Another possible approach is to make distress available only to public authorities. In this context, it should be remembered that the Keith Committee[92] concluded that the remedy of distress for unpaid taxes was a central and essential feature of tax recovery, and that the power to distrain was normally exercised only in appropriate circumstances. Distraint for taxes is the only other form of distress which can be used without specific authority from the court; in practice it was only used as a last resort, after a personal call on the taxpayer, investigation as to any special difficulties, and warning of an intention to use distress. It was clear that the threat of distress, rather than the actual levy, secured payment in most cases, and the Committee was struck by the absence of any great volume of criticism of tax distress. Given that a distress remedy exercisable by specific Government departments was found to work more or less satisfactorily, it is arguable that Government departments and other public bodies should retain the right to distrain for rent.

4.78 We anticipate several difficulties and objections to a partial abolition based on the identity of the landlord. Firstly, it has to be decided which bodies should qualify. Local authorities would presumably be included as would the principal Government departments, but it is less obvious whether other bodies like harbour boards and quasi-public bodies such as housing associations and quangos should

92 (1983) Cmnd. 8822.

qualify. Secondly, there are some occasions when a public body's role is indistinguishable from a private individual's. Thus, for instance, some local authorities are major commercial landlords in addition to their role of providing public housing. Their commercial lettings, unlike their residential ones, are not essentially different from those of private landlords. The availability of distress against a commercial tenant will therefore depend on the chance of whether the landlord for the time being was one of the bodies allowed to distrain.

4.79 There are also major differences between the essences of the two remedies. Tax authorities use distress to recover sums which would have priority upon the debtor's insolvency. Warnings are usually effective, so they only rarely need to go as far as levying and selling distress. Rent has no priority other than that gained by distraining. And while the revenue authorities may operate schemes with built-in safeguards, warnings and internal rules of conduct, it does not follow that other public authorities would necessarily do so. Indeed, in many cases they employ the same private bailiff services as do private landlords, and the distraining practice is exactly the same.

4.80 If the remedy were to be retained for use by public bodies only, we would anticipate that at least some of the general reforms outlined above would be carried out, and that departmental guidelines, similar to those in revenue matters, would be drawn up and form an important part of the distress schemes.

Summary

4.81 It will be useful to summarise here the options which we have considered in Part IV:

(1) A statutory restatement of the existing law in modern terms.

(paragraph 4.4)

(2) Protection of third party goods.

(paragraphs 4.10-4.14)

(3) Specification of sums for which the remedy should be automatically available.

(paragraphs 4.16-4.18)

(4) Restrictions on the additional sums which can be made distrainable by agreement between the parties.

(paragraphs 4.19-4.21)

(5) Reduction of recoverable arrears by admitting cross-claims.

(paragraph 4.22)

(6) Procedure to be used by tenants claiming rights of set-off or other defences to rent claims.

(paragraphs 4.23-4.29)

(7) Abolition of impounding as a stage necessary to perfect a distress.

(paragraphs 4.30-4.31)

(8) Replacement of rescous and poundbreach by a single wrong of interference with distress.

(paragraphs 4.31-4.34)

(9) Clarification of the effect of walking possession.

(paragraphs 4.35-4.39)

(10) Review of the procedures for certification and control of bailiffs.

(paragraphs 4.40-4.47)

(11) Modernisation of the rules privileging specified goods from distress.

(paragraphs 4.49-4.52)

(12) Drawing the tenant's attention to (a) the landlord's rights and/or (b) the landlord's present intention to distrain.

(paragraphs 4.54-4.56)

(13) Requiring the leave of the court in all cases of distress.

(paragraph 4.55)

(14) Restrictions on distress in residential premises.

(paragraph 4.58)

(15) Fundamental reform, to replace the present outmoded and unsatisfactory remedy with a simple and efficient modern remedy.

(paragraphs 4.59-4.65)

(16) Total abolition of distress for rent.

(paragraphs 4.66-4.71)

(17) Abolition of the remedy in respect of one or more class of tenancy.

(paragraphs 4.72-4.76)

(18) Abolition of the remedy except in respect of one class of landlord.

(paragraphs 4.77-4.80)

PART V

PROVISIONAL CONCLUSIONS

5.1 We can summarise our present views as follows:

(1) The present law of distress for rent is riddled with inconsistencies, uncertainties, anomalies and archaisms. Reform is long overdue, but the apparent decline in the use of the remedy has blunted any sense of urgency. The decline may now have been halted, or even reversed, which calls for a review of the unsatisfactory state of the law.

(2) The defects in the present system are so fundamental and widespread that very little purpose would be served by collecting up the existing principles from the statutes and common law and restating them in modern terms in a codifying statute.

(3) It would be possible to introduce partial reforms, to remove the worst social or technical defects, using relatively small resources. Many serious problems would inevitably remain; and patchwork reform could not be a satisfactory long-term solution.

(4) The creation of an exhaustive new code, whether or not it embraced other forms of

distress and similar procedures, would be a project of massive proportions. It would go far beyond the resources reasonably available for the reform of a remedy which is supplementary to the landlord's other remedies to enforce payment of rent, and seems to be used by only a relatively small number of them.

(5) We incline to the view that the remedy of distress for rent is a relic from the ancient laws of England which has no place in modern society and should therefore be abolished.

5.2 Our preliminary conclusion is based on an assumption that the present demand and need for a special self-help remedy for landlords is quite small. That assumption may be proved wrong. As there are, inevitably, no official statistics as to how often distress is used, and who uses it, it would be very helpful if such information were supplied by landlords, tenants and bailiffs who have experience of the remedy. It would also be helpful to learn what reasons other landlords may have for choosing not to use distress. We would like to hear which of the problems, whether or not touched on in this paper, are considered to be the most serious in practice, and what kind of reform might be seen to solve them. We look forward generally to receiving comments and suggestions from those who are, have been, or may be involved in distress for rent.

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