PROPOSALS RELATING TO DISTRESS FOR RENT

Law Reform Commission of Saskatchewan.
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TABLE OF CONTENTS

I. INTRODUCTION

A landlord owed arrears in rent has traditionally had two remedies available to collect from a delinquent tenant. The tenant could be sued for the arrears in an action for rent. Alternatively, the landlord could levy distress by seizing and selling the tenant's goods to recover the arrears. Both are ancient ~n origin, taking modern form nearly three centuries ago. Nevertheless, both remain important parts of the law of landlord and tenant, routinely resorted to in Saskatchewan to collect rents under commercial tenancy agreements governed by *The Landlord and Tenant Act.*[1]

Distress, more -so than the action for rent, betrays its origins. In 1941, *Halsbury's Laws of England* introduced the subject of distress with this warning:

> Although the right to distrain is of common law origin, it was subject to many exceptions and has since been subject to many statutory modifications and been extended by additional statutory powers. The exceptions are so many that scarcely an important absolute statement can be made in dealing with the law of distress as it affects landlord and tenant. The law of distress as it stood before statutory alteration was perhaps simple and of easy application. Today it demands by reason of statutory alterations, more knowledge of various branches of law than any other common law authority which is as frequently exercised. It calls for knowledge of law relating to fixtures, trespass, property in goods, specific performance, fraud, executions, and the obligations arising in respect of the sale of the goods distrained.[2]

The law of distress has hardly been altered since that date. If anything, it is even more difficult to reconcile with contemporary commercial needs today than at the beginning of the century. As the Law Reform Commission of British Columbia, has observed, "The passage of time has not decreased the complexity of this body of law. It has only made it more obscure.'[3]

One important change in the scope, though not the content, of the law of distress was made in 1973. Distress has been abolished in Saskatchewan in regard to tenancies governed by *The Residential Tenancies Act.*[4] But while it is a remedy that is clearly in need of substantial

[1]R.S.S. 1978, c. L—6

-2ii Hats. para. 199 (1st ed. 1910).

[3]Law Reform Commission of British Cotumbia, Report on Distress for Rent, (LRC 53, 1981).

1978, c. R—22.

reform, it cannot be easily dispensed with in commercial tenancies law.

In practice, the right to sue for rent and the right to levy distress are complementary remedies. An action for rent is usually straightforward. The landlord can obtain judgement for the rent owing, and enforce it against the tenant in the same manner as any other judgement of the court.[5] But the action for rent is not always an effective remedy. Particularly in the case of commercial tenancies, a tenant's inability to pay rent is often a symptom of a wider financial crisis for the business. It is likely that the tenant has other creditors in addition to the landlord. Since the landlord does.not rank as a secured creditor, she must compete with the other unsecured creditors for what is left after the secured creditors have been satisfied. The right to distrain the tenant's goods gives the landlord an additional remedy less vulnerable to the claims of other creditors.

Through distress, the landlord can raise the rent owing by sale of the tenant's goods, without any obligation to share proceeds with any of the other unsecured creditors. In addition, although there is some uncertainty about the priority position of a landlord to whom rent is owing with respect to secured creditors and creditors of the tenant, *The Landlord and Tenant Act* gives the landlord an advantage over at least some secured competitors. For example, under section 25(2)(b) of *Act,* distress will defeat even secured creditors who have not taken possession of the goods in which they claim a security interest, unless the credit was advanced by way of a purchase money security interest to finance acquisition of the collateral itself.

Distress confers on the landlord what amounts to *de facto* status as a secured creditor. This status arises, not by contract, but by operation of law. In fact, some authorities have characterized distress for rent as a primitive form of security interest, a 'taking, without legal process, [ofJ goods as a pledge, to compel the satisfaction of a demand [for payment of rentJ.'[6] The law of landlord and tenant has not found it necessary to make provision for securing rents as they come due because distress exists. It could not be abolished without putting something in its place. In fact, the commercial need for distress has increased since the remedy was introduced into Saskatchewan law. Under modern business financing arrangements, landlords have to compete with a wider array of secured and unsecured creditors for a share of the assets of a failing business than in the past, when a landlord was usually the only major creditor of a typical small or medium 'sized business.

· Ironically, the circumstances that make distress an important contemporary remedy also operate to intensify its inadequacies. It is a species of security interest outside *ThePersonal* `Property Security Act.`[7] That act was intended to rationalize and codify the law relating to security interests in personal property. Most types of security recognized by the `pre-Act` law were abolished, and replaced with the flexible security regime established by the *Act.* Distress largely escaped this exercise in law reform. When `The Personal Property Security Act` was

[5]See general.ty WiLLiams and Rhodes, Canadian Law of Landtord and Tenant, 5th ed., 7—1 ff.

613 Hats. ***para.*** 201, n. 1 (4th ed) citing Brady's Law of Distresses 1 (2nd edj.

[7]R.S.S. 1978, c. P—6.1.

adopted, section 25 of *The Landlord and Tenant Act* was amended to recognise the existence of the new regime to the extent of giving priority to holders of purchase money security interests. No other effort was made to rationalize distress with *The Personal Property Security Act* or correct the uncertainty that had long surrounded priority questions.

The need to rationalize distress with the personal property· security regime would be reason enough to reform or replace the remedy. The archaisms and confusions that infect the law of distress provide additional reasons for over-hauling it. Some of the significant problems associated with the right of. distress include:

(1) Current distress law is a confusing combination of common law and statute law. Much of the latter is derived from only partially digested English statutes, some as early as the 13th
8
century. Many of the concepts associated with distress are obscure, betraying the ancient origins of the remedy.

(2) The measures that a landlord can take to seize and sell distraine d goods are inconsistent and unclear.

(3) Constructive distress (distress without taking and retaining actual possession) is recognized at common law, creating conflicts with the rights of others who may deal with the goods.

(4) Some aspects of the remedy are seriously out of step with contemporary realities. For example, provisions in *The Landlord and Tenant Act* dealing with agricultural enterprises were formulated in an earlier age to deal with what now seem to be primitive agricultural practises. In other respects, the remedy has failed to recognise new realities. For example, for what are essentially technical, historical reasons, it is not possible under the present law to levy distress against trade fixtures.

In the Commission's view, distress can most effectively be reformed only by abolishing it in its present form and replacing it with a new system integrated with *The Personal Property Security Act.* The regime proposed in the report is designed to do the following:

(1) Eliminate common law distress entirely and replace it with a system that recognises that distress against goods is the equivalent to taking a security interest in them.

(2) Make applicable to distress all relevant provisions of *The Personal Property Security Act* relating to seizure and sale of collateral.

(3) Provide a priority scheme that gives a special, though limited, priority to landlords over both secured and unsecured creditors.

(5) Provide for distress against fixtures.

(6) Provide statutory regulation of some anomalous types of distress related to distraint of

[8]See the commission's Status of EngLishStatute Law in Saskatchewan.

goods for rent: Distress against rental payments would be assimilated by the law relating to assignment of rents and choses in action; distress damage feasance (seizure of escaped livestock or other chattels that have caused damage) would be brought within the statutory scheme.

The Commission's proposals have been drafted as an amendment to *The Landlord and Tenant Act* that would replace all of Part III of the present Act, entitled "Distress", and section 63, which also deals with distress. At the core of the recommendations are provisions that would convert a landlord's interest in distrained goods or rental payments into deemed security interests governed by *The Personal Property Security Act.* The amendment would provide that:

23(1) Where a landlord has distrained goods,

(a) the landlord is.deemed to be a secured party holding a non-purchase money security interest in the goods distrained,

(b) the tenant is deemed to be a debtor who has given to the landlord a non-purchase money security interest in the goods distrained,

(c) the amount referred to in section 20(1) is deemed to be an obligation secured by the security interest,

(d) the goods distrained are deemed to be collateral,

(e) the deemed security interest is perfected for the purposes of section 24 of *The Personal Property Security Act* when the landlord takes possession of the goods.

(2) When a landlord has distrained rental payments,

(a) the tenant is deemed to be the assignor and the landlord the assignee of rental payments distrained, and

(b) Section 124.3 of *The Land Titles Act* applies to the deemed assignment.

Assimilation of distress for rent to personal property security law would create a new context in which many of the problems the remedy has accumulated over time will simply disappear. The substance of the law would be little changed, though rendered simpler and less obscure. These reforms should be welcomed by the bar and commercial community. However, the Commission recognises that because the law of distress is presently so complex and obscure, the impact of the proposed new regime on the rights of landlords and tenants, and the practical differences between the old and new regimes, is far from obvious. In the result, the effect of the Commission's proposals can only be properly understood by carefully comparing the principal features of the present law with the law as it will stand if the proposals are adopted. For that reason, the rationale for the Commission's proposals is developed in this report by surveying the present law, identifying problems and inconsistencies within it, and then briefly explaining the differences between it and the regime proposed by the Commission.

II. THE LAW OF DISTRESS: THE PRESENT LAW AND THE COMMISSION'S PROPOSALS

1. Development of the law

Distress for rent is essentially a relic of feudalism. Originally, it was not so much a remedy as a means of obtaining one. The chattels distrained could only be retained as a pledge. A feudal tenant was bound by the ties of fealty to render to his lord various services and dues. Upon failure to do so, the lord was entitled to retake the land and hold it as a pledge. Since seizure of the land deprived the tenant of the only means of fulfilling his obligations, the practice arose of distraining chattels on the land rather than the land itself.[9] Leave of the court .was anciently required to levy distress, which appears to have been regarded as a form of execution.[10] The development of the modern self-help remedy out of its medieval precursor occurred piece-meal over the centuries, a product of adaption to new circumstances and historical accident.

Abolition of the requirement of leave of the court, a change that accounts for much of the remedy's modern utility, occurred before the end of the middle ages. It was probably not regarded as particularly significant when it was made. The leave requirement was a mere formality when it existed, since it was usually granted in the lord's own manorial court.[11] In the result, however, distress entered the modern age as an exceptional remedy. Few other remedies permitting seizure of the property of another operate without due process of law and court supervision.

Distress was recast by statute during the 17th and 18th centuries, as modern land law began to take shape. The most important change in substance, creation of a right to sell the distrained goods, was adopted by the *Distress for Rent Act,* 168912. A second *Distress for Rent Act,* 173713 included a number of piece-meal reforms (creating a right to seize goods removed from premises "fraudulently and clandestinely', for example). Other 18th century landlord and tenant statutes also dealt with distress, but none altered the basic common law governing the remedy. Saskatchewan received the 17th and 18th century distress statutes as part of its

~13 HaLs. para. 201, n. I (4th ed) citing Brady's Law of Distresses 1 (2nd ed.).

[10]Statute of Martborough, 1267, 52, Hen. 3 c.I.

11 . Woodfatt, LandLord and Tenant, para. 1—079? (28th ed)., 1978.

122 WilL and Mar., c. 5.

l3ii Geo. 2 , c.19.

colonial inheritance. Part 3 of *The Landlord and Tenant Act,* adopted in the 1918-19 session of the legislature, incorporated most of the received statute law relevant to distress. The 1920 revised statutes indicated the source of most of the provisions borrowed from the English statute books.

The 17th and 18th century statutes were largely concerned with expanding the rights of landlords to levy distress. During the 19th, English legislators adopted several measures to protect some classes of goods of both the tenant and third parties.[14] The most important change was reversal of the common law rule permitting seizure of all goods found on the premises, whether owned by the tenant or not. The 19th century reforms were not received in Saskatchewan, but their substance was enacted in *The LandLord and Tenant Act.* Section 25 of the 19 19-20 Act, like its modern counterpart, permits seizure only of the tenant's goods, subject to certain exceptions that will be discussed later in this report.

· Given its history, it is hardly surprising that the law of distress is a complex, often inconsistent, and that it sometimes reflects policies that have not been seriously reconsidered for centuries.

2. The Legal Basis for Distress

The right to distrain for rent entitles a landlord or assignee of the reversion to enter the premises when rent is in arrears. The distress must occur during the term of the lease, or within 6 months of its termination. The landlord must retain title, and the tenant must still be in possession of the premises when the entry occurs. The landlord may take possession of the tenant's goods without legal process to satisfy the amount of the rent due. If within *5* days of the seizure of the goods the rent remains unpaid, the goods may be sold.[15]

Another, more obscure, purpose for which common law distress is exercisable is to seize a trespassing chattel and hold it as a pledge in satisfaction for any damage done. This ancient remedy is termed "distress damage feasant". It probably arose to deal ·with the damage done by wandering cattle, but can be invoked against any chattel that causes damage, such as an unlawfully parked car. A mere technical trespass does not invoke the privilege; nor may it be exercised over chattels in personal control or use of its possessor if seizure is likely to provoke a breach of the peace.[16]

The remedy of distress -is not available against the Crown as tenant. Similarly, if the Crown has an interest in goods and chattels of a tenant, the Crown's interest cannot be affected

14
e.g. The Law of Distress Amendment Acts, 1888 and 1905.

[15]Wittiams and Rhodes, Canadian Law of LandLord and Tenant (6th ed. 1988) 8—1.

[16]Fteming, The Law of Torts (7th ed.,1987) at p. 80.

by a distress. 17

Although the common law and accumulated statute law governing distress would be entirely replaced by the proposed statutory regime, the broad outline of the law would be largely unchanged, and the new regime would encompass distress damage feasant. The right to seize and sell the tenant's goods when rent is in arrears would continue to exist under the new regime, but would conform to the rules regulating seizure and sale of collateral under *The Personal Property Security Act.* However, the Crown would become liable to distress. The Crown is bound by the *Personal Property Security Act.* In the Commission's opinion, there is no valid policy reason for retaining the ancient exemption for the Crown..

3. When and Where the Remedy is Available

(a) The Landlord and Tenant Relationship

Distress must be made during the term of a tenancy or within 6 months after the termination of the lease. Therefore, a landlord cannot distrain where his interest has expired before the distress, or where the tenant is no longer in possession of the premises..

At common law, no distress could be levied after the expiration of the lease so that a landlord had no remedy by distress for rent falling due the last day of the term, or where a new lease has been entered and arrears have accumulated under the former lease.[18] This limitation on the remedy was partially alleviated by *The Landlord and Tenant Act,* 1709 . Section 6, adopted as Section 20 of the Saskatchewan *Landlord and Tenant Act.* The statute extends the right of distress for 6 months after the lease has "ended or determined", provided that the landlord's title or interest continues, and the defaulting tenant remains in possession of the premises. It has been held, however, that the words "ended or determined" do not include determination by forfeiture.[19] Therefore, if the landlord terminates the lease the right to distress is lost. Similarly, if the tenant surrenders the lease, there is no right to distrain.[20]

Note that it is the right to levy distress that appears to be affected by the requirements set out above. Thus a distress is proper if made before termination of a lease, or if the lease has expired, before the tenant gives up possession. Presumably, after distress has been levied, the landlord is free to end the lease and put the tenant out of possesston. It is the practise in Saskatchewan and most other common law jurisdictions for a distraining landlord to enter the premises, levy distress, and then padlock the door to put the tenant out of possession and end the lease. However, there is at least some authority for the proposition that a distress becomes irregular when the tenant is put out of possession, so that a landlord who distrains and

[17]Rhodes, 8—1.

[18]co Litt. 47b

[19]Grimwood v. Moss (1872) L.R. 7 CP 360.

[20]Lewis v. Brooks (1852),8 U.C.Q.B. 576 (C.A.); Bruce v. Smith, P1923) 3 D.L.R. 887 (Alta. C.A.).

subsequently padlocks looses the right to retain or sell the distrained goods.[21] The cases supporting this point of view may be anomolics, but their very existence underlines the perplexing complexity of the law of distress.

The requirement that the tenant must be in possession at the time of the distraint has been severely criticized. The Law Reform Commission of British Columbia stated:

> These provisions create a technical difficulty where a distress is made coincidentally with, or as a part of a termination of the tenancy by the landlord, though his retaking the .premises may simply involve putting a padlock on the door. But section 4 [of the *British Columbia Commercial Tenancy Actl* permits distress only when the tenant remains in possession and this is inconsistent with padlocking the premises. In the result, the landlord must exercise great caution in the order in which he asserts his rights. He must distrain first and padlock the
> premises second. If the order of those steps is reversed- -even though they may only be minutes apart- - the distress is unlawful.
>
> In the Report on Distress it was concluded that this rule was an anachronistic technicality which placed landlords in needless jeopardy. It was recommended that section 4 be amended by striking out the words "and during the possession of the tenant from whom the arrears became due." The effect of this amendment would be to make the order in which the landlord assets his rights irrelevant.[22]

In the Commission s vtew, there is no valid reason for retaining the requirement that the tenant must be in possession if the lease has ended in order to justify distress. The right to levy distress should remain intact as long as distrainable goods of the tenant remain on the premises. The Commission's proposals define "tenant" to include a former tenant, and further provide that

21. A right of distress may be exercised before or up to 6 months after the termination of the tenant's interest in the premises, whether or not the tenant remains in possession of the premises.

(b) The Title of the Landlord

At common law, the right of distress for rent in arrears could only be exercised by the owner of the reversion, which must be vested at the time of the distress.- Note that the

21 country Kitchen vs. ~Jatbush (1981) 120 DLR (3d) 358 (Nftd. c.A.); Re Ctarkson and Co. (1983) 40 O.R.(2d) 771 (Ont. H.C.).

22 Law Reform commission of British CoLumbia, Report on the

Commercial Tenancy Act, 1989, 90.

[23]Stavety *v.* Attcock (1851), 117 E.R. 1024; Co. Litt. 47a 142b.

extension of the right to distrain after termination of the tenancy created by section 20 of *The Landlord and Tenant Act* applies only when the landlord retains an interest in the property. The full implications of this deceptively simple statement were worked out in common law and statute, with some surprising results. Some of the complexities infecting the law are examined below.

(1) Assignment by lessee or sub-lease

If a lessee assigns his interest reserving rent, he cannot distrain for rent in arrears unless he reserves an express power of distress.[24] This rule appears to rest on no policy foundation; it is merely a logical consequence of the fact that the assignee has no reversion. Similarly, if a lessee sub-leases the premises, she cannot distrain against the sub-lessee after the expiration of her own lease, even if the sub-tenant remains in possession.[25] Again, this result follows from the fact that the sub-lessee does not retain a reversionary interest after expiration of the head lease.

(2) Personal Representatives

Executors and administrators can distrain for rent accruing due. At common law, however, the right to distrain was available onlyin respect to arrears accumulating after the reversion vested in the personal representative.[26] However, under section 41 of *The Landlord and Tenant Act*, an executor or administrator of a lessor or landlord can now distrain for rent

in arrears at the time of a testator's death. This provision is necessary only because of the peculiar limitation on the right of personal representatives to distrain at common law.

(3) Persons Entitled to Rent *Pur Autre Vie*

Section 21 of the Saskatchewan *Landlord and Tenant Act* permits a person entitled to any rent for the life of another to distrain for rent due at the time of the death of the person on whose life the right to the rent depended. This provision is copied from a statute of the reign of Henry VII.[27] It, too, is necessary only because of the peculiarities of the common law.

(4) Receivers and Agents

An agent to collect rent does not have the reversion, and therefore, has no power to distrain.[28] A receiver can, however, be given a power of distress under an attornment by the tenant, even though the receiver does not have the reversion.- Presumably, attornment of the tenant provides the basis for the receiver's right to distrain. From a policy point of view,

[24]Preece V. Corrie (1828), 130 E.R. 968, 5 Bing 24.

[25]Burne v. Richardson (1813), 128 E. R. 513, 4 Taunt. 720.

[26]Co Lit. 162a.

2732 Hen. 8, c.37, s.4.

[28]Ward v. Shew (1833), 131 ER. 742, 9 Bing.

[29]Witkins v Miner (1926), 3 '~Jt4R 778 (ALta. C.A.).

however, the different treatment oF receivers and agents is simply inconsistent.

(5) Assignee of the Rents

Future rents are both choses in action 'and incorporeal hereditaments.- An assignment of rents, as ordinarily understood in modern commercial practice, is a transfer of rents as a chose in action rather than as an interest in the land. The assignee has no right to levy distress to collect the 30 But the law is rendered somewhat less clear, and certainly much less consistent, by the different treatment accorded to another mechanism for transferring an interest in future rents, the rent charge.

A rent charge is a transfer or reservation of -future rents as a heredilament, and thus as an interest in real property. A hereditament is an interest apart from the land itself, but passing with the land when the land is alienated or descends to heirs. Since the assignee of a hereditament does not have the reversionary interest, the assignment does not in itself transfer the right of distress. Nevertheless, the common law did recognise a right of distress in the assignee if the deed reserving the rents expressly so provided. An assignment of future rents as. an interest in real property without an express distress clause was referred to as a rent seck, a "dry rent".[31] In the eighteenth century, the right to levy distress was extended to rent seck, so an express distress clause was no longer required.[32] Rent charges were an important component of the system of settlements of land used to control the fortunes of the landed classes in the 17th and 18th centuries. This probably accounts for the attention they received from courts and legislators. The modern assignment of rents is a more recent commercial innovation.[33] Unfortunately, the relationship between rent charges and assignment of rents has not been clearly worked out by the courts.

In the received law, a rent charge could be created only by deed or will.[34] In Saskatchewan, no deed is required to convey an interest in land if the statutory form of transfer provided by *The Land Titles Act* is used.[35] Section *125* of the *Act* provides that a rent charge or other periodic payment charged against land is to be registered as a mortgage "in form P" (what is sometimes referred to as an annuity mortgage). An assignment of rents as choses in action, on the other hand, may be created by simple contract without the formality

[30]Mutual Life Assurance Company of Canada v. Boban Construction Ltd. (1984), 55 B.C.L.R. 112 (B.C.S.C.); Canada Trustco V. Skoretz E1983J 4 W.R.R. .618 (ALta. Q.B.).

[31]Cheshires Modern Law of Real Property, 11th ed., 608—609; Coke Litt., 143b—144a.

[32]Landlord and Tenant Act, 1730, s. 5; S. 19 of the Saskatchewan Act.

33 At common Law, a chose in action was not assignable, though equity would intervene to enforce an assignment. Assignment was possible in taw as well as equity (and thus practically enforceable) only after the merger of Law and equity by the Judicature Act, 1873, s.25(6). The substance of the English reform was adopted in Saskatchewan in The Choses in Action Act, R.S.S. 1978, c. C—li.

[34]Cheshire,p .610—611.

[35]See Thoms Canadian Torrens' System, 2nd, p.244.

of either deed or statutory form. But this distinction in form is largely nullified by the fact that equity will enforce a contract to transfer an interest in reality without the formality of a deed by deeming "that which ought have been done to have been done". This doctrine has been applied to rent charges[36]. As a result, determining whether an assignment operates as a rent charge or as an assignment of rents as choses in action is essentially a matter of construction, and often a difficult one, leading to considerable uncertainty in practice.[37] It was for that reason that the Commission recommended in its *Proposals for a new Personal Property Security Act* that assignments of rents be uniformly treated as interests in land *for purposes of settling priority disputes* when assignments are made the subject matter of security agreements. This recommendation does not, however, remove uncertainty as to whether an assignment of rents is enforceable by distress.

In the Commission's opinion, retention of the reversion in the leased premises should not be required to entitle a landlord to levy distress. There are few cases in practice in which a tenant in arrears will still have goods on the leased premises when the landlord no longer has the reversion other than in the anomalous circumstances outlined above. In those cases, denying a right to distrain cannot be defended on any contemporary policy grounds.

It might nevertheless be argued -that preserving the right to distrain would be objectionable in the unusual event that the landlord has sold the reversion with rents owing and goods of the tenant remaining on the premises. In such a case, exercise of the right to distrain might be regarded as interference with the landlord-tenant relationship between the tenant and the new landlord. However, it must be remembered that the distraint relates to a debt due to the former landlord. Seizure of the tenant's goods is no more an interference with the new landlord-tenant relationship than a seizure of goods of the tenant for default under a security agreement.

In the regime proposed by the Commission, "premises" are defined to include "land formerly the subject matter of a tenancy agreement . . . . (proposed section 19(g)), and no reference is made in the proposed legislation to retention of the reversionary interest. The right to seize a defaulting tenant's goods belongs, under the proposals to the "landlord'. This term is not exhaustively defined, but includes the lessor of the property at the time the arrears in rent accumulated, a receiver, and an agent of the landlord for collection of rents (proposed section 19(d)).

(c) Rent must be in Arrears

The rent must be in arrears before the landlord's right to distrain can arise. Under the present law, when rent comes due on a day certain, it is not in arrears until after midnight of that day. Under the Commission's proposals, the right to distrain arises when the rent is "due

[36]Jackson v. Lever (1792), 3 Bro~ C.C. 605.

the comments in R.C.C. Cuming and Roderick J. Wood, A Handbook on the Saskatchewan Personal Property Security Act (LRCS, 1987), pp. 44-45. .

and payable" (proposed section 20(1)), instead of under the traditional formula requiring rent to be "in arrears". When rent is due is a question of fact, to be resolved by reference to the lease agreement ·between landlord and tenant. By avoiding the traditional formula, the common law requirement that distraint cannot occur until the d·ay following the day on which the rent is due will no longer apply.

(d) Land From Which Rent Issues

Ordinarily, distress can only be made on the land from which the rent issues.[38] This rule is, however, subject to certain exceptions:

(1) The parties ma~y agree that distress may be levied on lands of the lessee other than the demised premises. Under the ·new regime. there would be no statutory right of distress in such a case, but landlord and tenant could adopt a security agreement pledging stipulated goods in lieu of a right to distrain on the leased premises.

(2) If a tenant fraudulently or clandestinely removes his goods to avoid a distress, s. 30 of *The Landlord and Tenant Act* gives the landlord the right to seize the goods within 60 days and sell them (unless the goods were sold prior to the seizure to a purchaser in good faith without knowledge of the fraud). Section 31 gives the landlord a limited right to break open any premises, with the assistance of a peace officer, to recover goods fraudulently removed to prevent a seizure for distress. Section 32 provides that a tenant, or anyone who knowingly assists a tenant in fraudulent removal or concealment, is liable for a penalty of double the value of the goods.

Under the proposed regime, once goods have been seized, the landlord's interest in them would be the same as if they had been seized under a security agreement. However, the security interest does not arise until the landlord has actual possession. Section *65(5)* of *The Personal Property Security Act* provides a remedy "if a person, without reasonable excuse, fails to. discharge any duties or obligations imposed upon the person by this Act", but is. doubtful that this would apply to fraudulent removal of goods in the absence of a clearly-defined statutory obligatton to keep goods available for seizure. Thus it is necessary to retain an express provision dealing with fraudulent removal of goods to evade seizure.

However, an open-ended right to pursue goods that the landlord believes have been removed to evade distress is problematic. Purchasers of the goods and creditors who accept the goods as collateral after they have been removed from the premises should be protected. Note that under section 30, purchasers for value without knowledge that the goods are subject to distress are protected. The status of secured creditors is not addressed by the section, and is,
in the result, uncertain. The Commission agrees with the British Columbia Law Reform Commission that the most satisfactory way to regulate the exceptional right to levy distress off the premises would be to require court approval before the goods are seized. This approach is particularly attractive because it avoids complicating priority rules to accommodate an unusual

[38]See Section 29 of The Saskatchewan Landlord and Tenant Act.

[39]Daniets v. Stepney (1874), L.R 9 Ex. 185.

circumstance.

Section 20 of the proposals provides that:

(5) Notwithstanding subsection 1, where a tenant has removed goods from the premises that would otherwise be subject to seizure with intent to defeat the landlord's right of distress, a court may order that the landlord may distrain the goods wherever they may be found.

4. Rents and Other Obligations

Rent reserved upon a lease, and payable to the landlord by the tenant, is technically "rent service". As noted above, a right of distress also attaches to rent charges and rent seck. The problems occasioned for the law of distress by the latter two species of rent have been discussed above. Those problems, however, do not exhaust the difficulties in the present law regarding. the definition of 'rent".

At common law, "rent" has been defined as a payment made to the landlord in consideration of the enjoyment by the tenant of the landlord's land.[40] The Manitoba Law Reform Commission has identified a problem in the view that rent is compensation that issues out of the *land:* Many leases define repairs, insurance premium reimbursements, and other tangential obligations as "rent." While the tenant is obligated to pay these amounts to the landlord, they are not "directly attributable to the use or enjoyment of the land". Therefore, there is some doubt as to whether the breach of such obligations will justify distress.[41] Similarly, The English Law Commission has suggested that although the parties may define such obligations as "rent", the right to distrain would be contractual rather than inherent, and that the inherent right to distrain for rent may not attach to the sums described in the lease as "rent". In the result:

> [Tihe landlord's rights would be more limited with respect to those "tangential rents" than with respect to any "pure rent" owing. For example, a landlord normally has certain rights to seize the goods of third parties in a distress situation: where the right to distrain for "tangential rent" is a term of the contract, the right to seize third party goods would presumably be unavailable
> as the third party would not be bound by the contract between the landlord and the tenant.[42]

Clearly, such distinctions have no place in the modern law of commercial tenancies. Any doubt that a right to distress exists regarding what the English Commission called "tangential

[40]T & E. Homes Ltd. v. Robinson, (1979) 1 W.L.R.452 (C.A.).

[41]Manitoba Law Reform Commission, Discussion Paper on Distress in Commercial Tenancies, 1990, p.7.

[42]The Law Conmission (England), Distress for Rent (Uorking Paper #97, 1986) 20—22.

rents" should be eliminated. For that- reason, the proposed legislation applies to any "monetary obligation arising under a tenancy agreement" (proposed sections 19(d) and 20(1)(a)).

5. Property subject to distraint

(a) Introduction

At common law, virtually any goods or chattels found on the tenant's premises were subject to distraint. The exceptions to this general rule were few. In fact, most of the common law exceptions were hardly true exceptions at all. Thus, for example, fixtures were held not to be subject to distress, but only because they are part of the reality, and have lost their identity as chattels.

While some special types of property were protected from seizure by the common law and statute, no coherent exemptions policy was developed by the common law or English legislation before reception date. A rudimentary exemptions policy is contained in the Saskatchewan *Landlord and Tenant Act,* but it was primarily intended to provide protection for householders, and thus has been of little practical significance since adoption of *The Residential Tenancies Act.*Priorities between .a landlord who levies distress and secured creditors will be discussed in a later section of this report. Here, other exemptions and exceptions under the existing law will be described and compared with the new regime proposed by the Commission.

(b) Exemptions

Most branches of modern debtor-creditor law make some provision to exempt certain property of a debtor from seizure and sale, usually to prevent impoverishment and to ensure that the debtor retains the necessities of life. At common law, distress was something of an anomaly in this regard. The only general exemption recognized by the common law that remains part of the law is very limited: Goods in actual use were absolutely exempt from distress for rent, or even for damage feasant.

Presumably, this exemption existed, not to protect the debtor from loss of the goods, but because of the danger in such cases that an attempted seizure would cause a breach of the peace. It- has been held that a horse when being ridden or an axe being used for cutting wood cannot be distrained.[43] But the moment active use ceases, such things become liable to seizure. Thus wearing apparel is exempt while it is being worn, but if taken off for sleep, becomes

[43]Co. Lit. 47a; Storey v. Robinson (1795) 6 T.R. 138.

liable to distress.

At common law, sheaves of grain were not distrainable.[45] But this rule was reversed by statute in 1689,46 and distraint of growing ·crops was permitted by statute in 1737. Similarly, a medieval statute made it illegal to distrain sheep if there are other goods on the premises sufficient to satisfy the rent[48], and the principle was extended by the courts to any animals that "gain the land" (except in cases of damage feasant).[49] However, this exemption was removed by statute. Section 24 of the Saskatchewan Act permits a landlord to take and seize cattle and livestock as distress for arrears.

The ancient exemptions of livestock and grain provided some protection against starvation for subsistence farmers, but it was not until the 20th century that an exemptions policy similar to that found in other branches of debtor-creditor law was grafted onto the law of distress. Section 26 of the Saskatchewan Act now provides several statutory exemptions. As noted above, most of the exemptions were only relevant when distress was still available with respect to residential tenancies; the list includes beds, wearing apparel cooking appliances, and food.[50]

All of the statutory provisions and common law rules discussed above will be superseded if the Commission's proposals are adopted. Section 22(1) of the Commission's proposals provide that a landlord exercising the right of distress "has the same rights and powers to take possession of goods distrained as has a secured party . . . Adoption of this formula would abolish the archaic exemption for goods in actual use. Otherwise, however, the law would be essentially unchanged.

At common law, it is not always clear when growing crops are to be deemed to be chattels rather than part of the reality. It may have been for that reason that *The Distress for Rents Act, 1737* dealt specifically with distraint of growing crops. Whether the statute was sufficient to authorize distraint of growing crops in all cases, or only in cases in which the crops would be classified as chattels at common law, remained uncertain, however. Growing crops would continue to be subject to distraint under the new regime, and in addition, the

~Bissett v. Caldwell (1790), 170 E.R., Peake 50. [45]Co. Litt. 47a.

[1~]Distress for Rent Act, 1689 (Eng) c. 5. s. 3; s. 23 of the Saskatchewan Act.

[47]Distress for Rent Act of 1737, c. 19; s. 24(2) of the Saskatchewan Act— which also gives the landlord a right to harvest the crops.

~51 Hen. 3) c. 4

[49]Hope v. White (1871), 22 UCCP S (C.A.).

[50]1t should be noted that The Residential Tenancies Act applies to Leases of property that include both living accommodation and commercial premises. Thus the exemptions are not retevant even in such cases.

uncertainty would be resolved. Under *The Personal Property Security Act*, "crops" are included in the definition of "goods", and would therefore be subject to distress. The new *Personal Property Security Act* proposed by the Commission would also give priority to secured creditors claiming an interest in growing crops over third parties claiming an interest in the land.[51] Harvested grain and livestock would, of course, also remain subject to distress.

The Exemptions Act[52] currently applies to. seizure of goods under security agreements. When the new *Personal Property Security Act* is adopted, *The Exemptions Act* will no longer apply to enforcement of security agreements; the -new *Act* will include its own exemptions provision.[53] The distress provisions recommended in this report are premised on adoption of the new *Personal Property Security Act.* The policy of the exemptions provision in the new Act is based on the premise that business assets should not be exempt from seizure under a security agreement. The new Act would exempt household furnishings, health aids, and a vehicle necessary for business purposes or transportation to a place of employment from seizure under a non-purchase money security agreement. In addition, a debtor could apply for exemption of any "consumer goods" on the ground that seizure would cause hardshi~,, or that the costs of seizure and sale would be disproportionate to the value of the goods. Only the exemption of a vehicle would be relevant in the context of distress for rent, and even that exemption would be applicable only in rare circumstances.[55]

(c) Fixtures

Once a chattel has been "affixed" to the land, it looses its character as personally and becomes part of the reality~ Since fixtures are no longer chattels, it is not surprising that they are exempt from distress at common law. Interestingly, however, the authorities that established this rule articulated a somewhat unusual reason for excluding fixtures from distress. A distress being anciently regarded as a form of pledge, it was held that nothing could be distrained unless it could be returned in specie and undamaged, precluding distraint of items affixed to the premises.[56]

Classification of fixtures as reality has long been recognized as unrealistic in many commercial contexts. Part of the problem has to do with the inherent difficulty in determining

[51] s37(3) 37(5) creates an exception where there is a writ of execution or certificate under The Creditor's Relief Act "affecting the Land".

52 1978 c. E-14, as amended 1988 c. 52 s.8

53 s.564.

54 56((4)(e).

[55] 1f the Exemptions Act rather than the new PISA were to be applied to distress, the result would be Less satisfactory, and represent a more significant change in the law. The Exemptions Act exempts certain business assets from seizure——— tools of trade and office equipment (to the extent of $4500) and books of professionals (c. E—14 s.2(1)).

[56] Co Lit. 47a; Pitt v. Shew (1821) 48 & AId. 206; Bailey-v. Miller (1932) 2 WWR 260 (Sask. C.A.).

whether a chattel has been securely enough joined to the reality to loose its character as personal property. This has proved to be a particularly difficult problem in regard to what the commercial usage calls "trade fixtures". Items such as store counters, shelves and display cases, machinery and equipment, can be installed in numerous ways, some of which make them legal fixtures, some of which do not. In the result, reasonable commercial expectations are easily thwarted. An article in which a creditor has taken a security interest may subsequently be affixed to the reality, creating a potential conflict between the secured party and a mortgagor or purchaser of the land. In the past, these problems were addressed, though not always successfully, by contract. The trend in recent commercial law reform has been to avoid the problems by treating fixtures as personalty for at least some purposes.

Fixtures (other than building materials) are defined as goods under *The Personal Property Security Act* and may, therefore, be given as security. The Act also provides rules for resolving priority disputes between secured creditors and third parties claiming an interest in the reality.[57] Adoption of the Commission's distress proposals would, therefore, change the existing law, making trade fixtures subject to distraint whether or not they are technically reality~ This change would introduce the approach to fixtures that has characterized recent developments in other branches of commercial law into the law of distress.

(d) Other exceptions

The few other apparent exceptions to the rule that all chattels owned by the tenant are subject to distress will be unchanged if the proposed new regime is adopted.

At common law, wild animals cannot be distrained, unless they have been tamed or caged.[58] Since at common law there is no property in wild animals, they are not "goods of the tenant" and would therefore not be subject to distraint under -the proposals.

Money is not distrainable unless it is in a sealed container so that it can be identified.[59] T his rule probably reflects the origin of distress as a form of pledge. Money cannot, of course, be pledged for money. Likewise, money is not appropriate security under any other form of security agreement; it is excluded from the definition of "goods" under *The Personal Property Security Act.*

Things delivered to a person to be "carried, wrought, worked up, or managed in the way of his trade or employ" are exempt from distress Thus, a horse in a smith's shop and cloth provided to a tailor for making a suit have been held to be exempt.[60] This rule antedates the reform of distress law to limit seizure to goods owned by the tenant, and become largely superfluous thereafter. There is no need to retain it in the modern law.

[57] s. **36.**

[58] Davies v. Powell, (1737) WiLles 46.

[59] Bac. Abr. "Distress" B, 697.

[60] 5impson v. Hartopp (1744) 125 E.R. 1295.

6. Entry and Seizure

It is surprising that the law governing entry onto a debtor's premises to distrain goods or enforce a security agreement is both obscure and contradictory. The law regulating seizure of goods by a sheriff under a writ of execution is reasonably clear[61]. It might be expected that exercise of a self-help remedy by a pri-vate citizen would have been spelled out at least as clearly by courts or legislatures, -if for no other reason than to avoid compounding conflicts between debtors and creditors. That, unfortunately, is not the case.

Only two propositions in this murky area of the law appear to be well established. First, a landlord or secured creditor may trespass on the debtor's premises, so long as no breach of the peace is occasioned, and no more damage is done than is necessary to remove the goods being seized.[62] Second, no door, lock or window may be broken by a landlord or creditor to enter a residence.[63]

Since distress is now confined to commercial tenancies, the second rule outlined above is not directly relevant in the present context.[64] However, the uncertainty in other aspects of the law governing seizures is largely the result of conflicting authorities as to whether the rule against breaking into a dwelling also applies to other classes of buildings.

Semayne's Case, the 16th century authority that established the rule in its original form, was clearly confined to dwellings. The policy behind the decision was essentially protection of the privacy of a residence; this is the case that introduced the proposition that "every man's house is his castle" into the common law. Although *Semayne's Case* was one of seizure under a writ of execution, the court made it clear that the principle applied to any entry into a dwellin~ to seize goods under process of law, including distress. A century later in *Penton v Brown*, it was established that the rule did not apply to buildings other than dwellings, so that locks might be broken and windows forced to gain entry. Although the case was again one involving seizure under a writ of execution, it was not suggested that the law would be any different in a case of distress. The policy protecting the common man in his castle did not apply elsewhere. In the next century, however, the authorities became less clear.

[61]See the excellent summary in The Sheriff's Legal and Procedural Handbook Sask. Dept. A.G., 1980.

[62]See Rhodes 84—9 (distress) and D.M. Paciocco, "Personal Property Security Act Repossession: The Risk and the Remedy" in M.A. Springman and E. Gertner, Debtor Creditor Law. Practise and Doctrine, 1985, chpt. 8 · (security agreements).

[63]Semayne's Case (1604), 77 E.R. 194, 5 Co. Rep. 91a.

~The Residential Tenancies Act applies to leased premises used for both residential and commercial purposes. Therefore, distress can not be levied at any place used even in part for residential purposes.

65i Sid. 186.

In *Lee ~' Gamsel,*[66] *Penton v Brown* was upheld without criticism or amendment. But in *Brown v Glenn,*[67] Lord Campbell expressed a distinctly different view. He regarded prevention of breach of the peace as the basis for the rule in *Semayne's Case,* and frankly doubted that *Penton vErown* should be interpreted as permitting break-and-enter of all buildings other than dwellings, though he declined to suggest just what other types of buildings should be regarded as inviolate. However, he was prepared to hold *Penton v Brown* was confined on its facts to seizures by sheriffs, concluding that

> A distinction can reasonably be made between the powers of an officer acting in execution of legal process, and the powers of a private individual who takes the law into his own hands.

Not all the authorities in the late eighteenth and early nineteenth centuries agreed. In *Hobson v Thelluson,*[68] for example, Lord Mansfield defended *Penton v Brown,* further rationalizing the decision in terms that made no distinction between execution and distress: Breaking open a dwelling is objectionable because it would expose the inhabitants to injury from looters.

As late as *1895* there were still doubts that even a sheriff had the right to break into a building other than a dwelling. In *Hodder v Williams,*[69] the English court of appeal resolved that question in favour of sheriffs. But the court only added to the existing uncertainty in regard to distress. Lord Esher affirmed that *Penton v Brown* is good law. He did not express a direct opinion on distress, but it worth noting that he adopted Lord Mansfield's rational for the rule in *Penton v Brown.* Lopes, L.J., also avoided any discussion of distress, but commented that despite the criticism of *Penton v Brown* in *Brown v Glenn,* the former case had been regarded as good law for far too long to be questioned. Kay, L.J., on the other hand, did address an *obiter* comment to distress, adopting Lord Campbell's distinction in *Brown v Glenn* between the powers of sheriffs and private citizens.

Remarkably, no more recent authority in Canada or Britain has done much to further clarify the law in regard to distress. The rights of secured creditors have received even less attention in the courts. The law governing seizures by secured creditors in Canada remains uncertain.

The law governing seizure of goods by landlords levying distress obviously needs clarification. In the Commission's view, this end could most effectively be achieved by giving landlords the same powers as sheriffs seizing goods under writs of execution. While such an approach may create some distinction between the rights of landlords and secured creditors, there would be little point in exchanging one set of uncertainties for another.

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Even assuming for purposes of discussion that landlords do not at present possess the right to break into commercial premises to levy distress, giving them the powers of sheriffs in this regard will not have significant practical consequences. Distress is now almost always resorted to at the same time a tenant is put out of possession. Therefore, entry onto the premises by the landlord to seize goods will rarely interfere with the tenant's legitimate use of the premises.

It should also be noted that application of the law.governing sheriffs to landlords will have the effect of abolishing certain common law rules relating to the time at which distress may be levied. It has been held that distress for rent cannot be made in the night (after sunset and before sunrise), or on a Sunday.[70] These rules have no parallel in the law regulating entry and seizure under writs of execution.[71] The common law rules were likely devised to
protect the privacy of the tenant's residence, and are unnecessary in regard to commercial premises.

7. Constructive Distress

Under the present law, it is not necessary for a landlord to take actual possession of goods to distrain them. Any words or action manifesting an intention to assume control of the goods is sufficient to constitute constructive distress. In practice, constructive distress may be effected by taking measures to prevent the removal of the distrained goods from the ,~remises, or even by merely entering the premises and declaring that distress has been levied.

The Landlord and Tenant Act permits another method of effecting a distress that is similar in some respects to constructive distress. Under section 33 of the *Act* distrained goods may either be impounded on the premises and sold from there, or removed to a pound off the premises. Impoundment amounts to "imprisonment of the goods- in safe custody"[73] A pound on the premises must be under the control of the landlord, and not accessible by the tenant.[74]

The obvious difficulty with both constructive distress and impoundment on the premises

[70]Tutton v. Darke (1860), 157 E.R. 1338, 5 H. & N. 647; Mah P0 v. McCarthy (1909) 2 Sask. L.R. 119, 10 W.L.R. 670.

[71]There are no general limitations on the times at which seizures or service of documents can take place; Thus, for example, the Rules of Court prohibiting service of writs of summons on Sunday and non—juridical days have been held not to apply to service of other documents—— Murray v. Stephenson (1887), 19 Q.B.D. 60). See generally The Sheriff's Leqal and Procedurat Handbook.

[72]Rhodes, 8—61,62.

[73]Kinci v. Ennland (186-4), 122 E.R. 654, 4 B & S 782.

[74]Rhodes, 8-89,90,91.

is that it may prejudice third parties who are unaware that the tenant's ownership is encumbered, and who may be induced to buy the goods or lend money on their security. Under such circumstances, the landlord may have priority even though the third party was unaware of and had no means of discovering the landlord's rights.[75]

Constructive seizure of goods subject to a. security agreement is possible in limited circumstances under *The Personal -Property Security Act.*[76] However, this option is only available if the security interest has been perfected by registration. A secured creditor cannot establish a priority by entering into a security agreement and constructively seizing the collateral without registration. The policy underlying these rules is simple: Registration is effective notice to third parties of the creditor's interest. Constructive seizure without registration is not.

Creation of a deemed security interest by distress is analogous to perfection of an ordinary security interest by possession. Since the deemed interest is not registered, there is no notice to third parties. Therefore, under the Commission's proposals, constructive distress and impoundment on the premises would no longer be permitted. Subsection 22(2) of the proposals requires the landlord to have actual physical possession of the goods to constitute and maintain a distress. Subsection 22(3) further provides that a landlord does not have actual physical possession of the goods that are in the actual or apparent possession of the tenant. Note, however that a landlord could effect a constructive seizure after entering into a security agreement with the tenant to secure arrears in rent, and registering the interest to establish priority over subsequent claims.

It would be possible to design a method of constructive distress that would provide more protection for third parties than the present law. The British Columbia Law Reform Commission would retain impoundment on the premises so long as the distrained goods are clearly segregated and placed outside the tenant's control, and permit constructive distress if a notice of distress is registered. In the Saskatchewan Commission's opinion, such measures are an unnecessary complication, and in the case of impoundment on the premises, would probably not provide real protection for third parties against a tenant insistent on dealing with the goods as though they were unencumbered.

The option of -offering the tenant a security agreement instead of levying distress would be sufficient to alleviate difficulty in cases in which it would be inconvenient to physically remove goods from the premises. Moreover, the usual practice in Saskatchewan is to levy distress only when a- tenant is being evicted from the premises. Few landlords are now willing to retain a tenant when the arrears problem has become serious enough to justify distress. In the result, constructive distress is not as important as it was in the past. Adopting special rules to accommodate it is unnecessary.

[75]See the comments of the Law Reform Commission of British Columbia, Report on Distress for Rent.

76~ 58.

8. Priorities

(a) Introduction

The law of distress took shape long before commercial law included a consistent approach to settling competing claims between creditors. No attempt was made to establish a coherent system of priorities between distress and the claims of creditors and others claiming an interest in a defaulting tenant's goods until the late nineteenth century. Even then, no fully-developed system of priorities was established. As noted in the introduction to this report, only minimal rationalization occurred even when *The Personal Property Security Act* was adopted. The result is a haphazard and incomplete set of priority rules that can only be explained by their history.

Perhaps the most important consequence of defining a landlord's interest in distrained goods as a security interest would be to bring distress within the priority structure established by *The Personal Property Security Act.* Because of the present state of distress law, some change in the position of landlords *vis a vis* secured creditors and execution creditors would inevitably be entailed by assimilation of distress to personal property security law. For reasons that will be set out below, the Commission has concluded that the changes should be kept to a minimum, preserving in substance the advantages presently enjoyed by landlords who levy distress. This will require adoption of special priority rules to govern distress.

(b) Distress and Secured Creditors

At common law, a landlord was entitled to seize any chattels found on the leased premises. Section *25(1.1)* of *The Landlord and Tenant Act,* based on nineteenth century English statute law, now limits the right to distrain to goods of "the tenant or person who is liable for rent". However, the *Act* does not go so far as to provide full priority for secured creditors. Section 25(2) of the Act carves certain exceptions out of the general rule. In particular, Section *25(1.1)(b)* does not apply to protect interests in the distrained goods of "persons whose title is derived by purchase, gift,transfer, or assignment by the tenant, or by way of a security agreement, other than .a purchase-money security interest or otherwise".[7]

Section 25 establishes priorities in a rather -back-handed fashion. On its face, it is merely a rule identifying those goods which may be seized by a landlord. It does not expressly give the landlord an interest in the goods free of any encumbrance, though it appears to be accepted that the landlord is entitled to realize the arrears from sale of the goods, even if another party claims an interest in them. In this respect, section 25 operates in practice like a conventional priority rule. However section 35 requires the landlord to return any surplus after the goods have been sold to the tenant. In the absence of any statutory rule requiring the landlord to account to anyone other than the tenant, section 25 is unlike conventional priority rules, which

77~· 25(2)(c) extends the exception to "conditional sellers to the extent of the tenant's interest in the goods". since conditional sales agreements are assimilated to-PMSI's under The Personal Property Security Act, this clause is no longer of practical significance.

provide for satisfaction of subordinate claims out of proceeds of a sale. In the result, distress may effectively defeat a subordinate interest, even when there are sufficient funds to satisfy both the landlord and the subordinate interest holder. The subordinate interest holder is left without the original security, and must try to collect the excess proceeds from the tenant.

The basic implication of Section 25 is clear enough, however. As of the time of the distress, the landlord takes at least a *de facto* priority over a secured creditor, other than the holder of a purchase money security interest, who has not acted to protect her interests by taking possession of the goods before the distress occurs. The holder of a PMSI, on the other hand, has de facto priority over the landlord. The landlord simply cannot legitimately seize goods that are security under a PMSI.

Regarded as a security interest, the landlord's claim to goods seized is roughly equivalent to a pledge or other security interest that has been perfected by possession. It differs from an ordinary security interest, however, in that it takes priority over previously registered or otherwise perfected security interests other than a PMSI. In this respect, it is somewhat like a PMSI, though subordinate to it. Formalizing the status implicitly enjoyed by the landlord's interest in goods distrained would not violate the conceptual integrity of the personal property security system. *The Personal Property Security Act* already accords special priority status to the PMSI; recognising a new special category represents no departure in principle. The question, then, is only whether the present de facto priority given to landlords is justified.

It is likely that the preferred position given to landlords by the law of distress had its origin in- the political dominance of the land-owning (as opposed to commercial) classes in England at the time the law took shape. The British Columbia Law Reform Commission argues that the law gives an unfair advantage to landlords over other creditors. But there are good practical and commercial reasons why landlords should retain some advantage over unsecured and at least some classes of secured creditors.

It should not be forgotten that, unlike other creditors dealing with a business, the landlord's rights are dictated in large part by the law relating to tenancies; it is not practically possible at present for the landlord to contract with a tenant to create secured creditor status. Distraint confers on the landlord what amounts to the status of a secured creditor. As noted in the introduction to this report, the law of landlord and tenant has not found it necessary to make provision for securing rents as they come due because the distress remedy exits.

When *The Landlord and TenantAct* was enacted in 1918, credit was only rarely advanced to retail merchants, and when it was, it was almost always unsecured inventory financing provided by suppliers of the stock-in-trade.[78] Modern business financing is a different matter. Credit is usually provided either by suppliers who take a security interest in the goods provided, or banks, credit unions, and other lending institutions which invariably insist on taking a security interest not only in goods purchased but in other business assets as well. Without distress, landlords of failing businesses would have little hope of collecting arrears in rent. In turn, few landlords would be willing to take the risk of permitting a tenant in

[78] See the Commission's Report on the Bulk Sales Act.

difficulty to fall into arrears, prematurely forcing under businesses with some hope of recovery.

Furthermore, if distress is to be an effective remedy under modern business conditions, the landlord must have some assurance that there will be goods available to distrain when rent falls into arrears. Unlike a banker, the landlord has no control over when "credit" will be advanced in the form of arrears in rent. If secured credit financiers have taken security interests in virtually all the assets of the business, distress will be a hollow remedy unless the landlord has priority over secured creditors. While a special priority rule for distraining landlords unavoidably interferes with the interests of secured creditors, the fact that distress has always received special treatment mitigates the problem. Distress has been accepted as part of commercial reality, and secured credit has accommodated to that fact. The Commission cannot, therefore, agree with the British Columbia Law Reform Commission that a landlord's security interest in goods distrained should be wholly analogous to an ordinary security interest perfected by possession, and take priority only over subsequently registered interests.

On the other hand, retaining priority for purchase money security interests over the landlord's claim is justifiable. The special status accorded to PMSI's in secured credit law rests on the assumption that when money is loaned to purchase a specific chattel, and the chattel
used to secure the loan, the arrangement should be outside ordinary priority rules. The PMSI is functionally like the old hire purchase or conditional sale in which a vendor retains a species of title until the goods are paid for.

Section *25(1)* of the Commission's proposals would expressly provide that a- landlord's "deemed security interest in distrained goods" would take priority over "any prior non-purchase money security interest in the goods distrained" to the extent of the arrears in rent. The priority of purchase money security interests would follow, in the absence of any special provision, from the general priority rules under *The Personal Property Security Act.*

The Commission's proposal would leave the substance of existing *de facto* priority rules unchanged. However, by recasting the priority system in terms compatible with *The Personal Property Security Act*, the ambiguities that infect the present system would be removed. In addition, the Commission's proposal would convert the existing regime into a true priority system in which subordinate interests would be protected. Under *The Personal Property Security Act,*[79] any surplus remaining after sale of distrained goods would be paid, first to holders of registered subordinate interests, then to any other person claiming an interest, and, if any thing is still left, the debtor.

(c) Distress and Execution Creditors

When a writ of execution is delivered to the sheriff, it "binds" the goods and chattels of

the debtor.[80] Although no true property interest is thus created, the claim of the sheriff on behalf of the execution creditor takes priority for some purposes over subsequent claims to an interest in the debtor's goods. The extent of this quasi-proprietary interest is uncertain enough that specific rules governing its effect on the rights of both secured creditors and landlords have been adopted. In both cases, a limited priority over execution creditors has been preserved, but the manner in which this end is achieved is different in each.

The mechanism for establishing priorities between landlords and execution debtors dates from *The Landlord and Tenant Act* of 1709. The provision in that Act dealing with execution was designed to prevent execution creditors from preempting a landlord by seizing goods before distress was levied. It did so by the simple expedient of prohibiting seizure under a writ of execution when rent is in arrears, unless security is given for the arrears to a maximum of one year's rent. Section 63 of the Saskatchewan *Landlord and Tenant Act* similarly provides that chattels cannot be seized from leased premises by a sheriff under a writ of execution unless, before the goods are taken, the landlord is paid "all money due for rent of the premises at the time of the taking ... if the arrears of rent do not amount to more than one year's rent" or one year's rent "if such arrears exceed one year's rent".

The rule thus formulated is not a fully-developed priority system. At common law, a landlord had no proprietary interest in a tenant's chattels until they were seized. *The Landlord and Tenant Act* does not alter this proposition. In a 1924 Saskatchewan case, *Jorgenson v. Engelstad,*[81] the sheriff levied execution, apparently unaware that a mortgagor had a right
to distrain chattels on the premises. The mortgagor claimed priority, and demanded that the sheriff hand proceeds from the sale of the seized goods over to him. However, Chief Justice Haultain observed that

> [Tihe sheriff is not bound to pay the rent or to proceed to sell the goods ... If [the execution creditor] will not pay the rent, the sheriff can withdraw. If the sheriff withdraws, the landlord can then distrain. The Act, therefore, gives the landlord no right equivalent to the right of distraint and impounding, as his right is not against the goods, for he cannot have them sold for his benefit, and if they are sold, he has no action against the sheriff for money had and received.

According to Haultain, if the sheriff removed the goods before the rent was paid, the landlord's proper remedy would be an action against the sheriff for wrongful removal.

Similarly, because s.63 is not a true priority rule, it does not affect the common law rule that goods in custody of the law cannot be distrained.[82] Thus if the sheriff has constructively seized goods under a writ of execution, leaving them physically on the premises, the landlord cannot levy distress against the goods, whether the arrears in rent which justify the distress

[80]The Executions Act, R.S.S. 1978,-c. E—12.

81(1924) 1 WUR 1233, (1924) 2 DLR 635, 18 Sask. L.R. 269 (C.A.).

[82]see Ibid.; the rule is also discussed in Wharton v. Naylor (1848) 116.

arose before or after the sheriff's seizure of the goods.

Yet the fact remains that s. 63 does give a landlord a very real advantage over execution creditors. Although the authorities all agree that the section creates no proprietary interest before seizure, it has been described as "impounding the goods on the premises for the benefit of the landlord" and as "practically" amounting to a lien. ~ The section is perhaps all too typical of distress law. It is a survival from before the evolution of modern priority concepts that is now unavoidably obscure and difficult to reconcile with contemporary principles of debtor-creditor law.

Resolution of priority problems between execution creditors and secured creditors is more consistent and conceptually less flawed. Section 2.2 of *The Executions Act* makes registration the key to sorting out the competing claims of secured creditors and execution creditors. The general rule is that a writ that has been registered takes priority over "a security interest that has not been registered or which was registered after the writ of execution was registered." However, an unregistered security interest may still take priority if the goods were seized by the secured creditor before registration of the writ. In addition, special provision is also made for purchase money security interests. A PMSI will take priority over even a registered writ of execution if registered within 15 days of the date the debtor took possession of the goods to which the agreement applies.

Although this report recommends assimilation of distress law to secured credit law in so far as possible, the priority system applying to security agreements cannot be applied to distress without some modification. Under the Commission's proposals, once goods have been taken by distress, the landlord is deemed to have what amounts to a perfected security interest in them without registration. The landlord's priority must, therefore, be linked to seizure, not registration. In addition, if the landlord is to retain any priority over execution creditors before distress is actually levied, an additional priority rule must be established.

In the Commission's opinion, a landlord should retain a limited priority over execution creditors when the arrears in rent began to accumulate before registration of the writ of execution. This conclusion rests on much the same policy foundations -as those which justify priority over non-purchase money security interests. The more difficult question concerns the form the priority should take.

An obvious- option would be to preserve s. 63 of *The Landlord and Tenant Act,* or adopt a close analog to it. To do so would, however, replicate the obscurities that infect the present law. If a satisfactory option exists that is more compatible with priority structures in other branches of debtor-creditor law, it should be preferred. Since a registered writ of execution has the practical effect of ranking the execution creditor with secured creditors, the most consistent approach would be to adopt a priority rule similar to that applying to security agreements. Therefore, the Commission recommends that a landlord who has distrained goods should have priority over an execution creditor, whether the writ of execution was registered prior to the distraint or not (proposal *25(1)(b).*

[83] 1n re Mackenzie t18991 2 08 566.

Under the recommendation a landlord would lose the right to insist on payment of arrears in rent by the execution creditor before seizure of goods under the writ. If goods are seized under a writ before distress has occurred, the landlord would be unable to distrain them, and thus unable to assert a security interest in them. This is not, however, as significant a change in the law as it might appear to be on the- surface. A landlord may have good reason for delaying distress as arrears accumulate, but if she is aware of actions for debt on behalf of unsecured creditors or simply wants to minimize risk, she could insist that the tenant enter a security agreement to secure present and future arrears in rent. Registration of the agreement would establish priority over any subsequently registered writ.

There appears to be -no good reason for retaining the *de facto* limitation on the landlord's priority to one year's rent. The limit may make sense in the- context of s. 63, since it requires the execution debtor to pay arrears before goods are seized and sold. This imposes a considerable burden on the execution debtor. The sheriff's sale at which the arrears will be recaptured may not occur immediately, and in any event may not generate enough proceeds to cover the arrears. These considerations do not apply if s. 63 is replaced by the priority structure recommended above.

Finally, it should be noted that no provision analogous to section 25(2)(a) of *The Landlord and Tenant A-ct* will be necessary under the proposed priority scheme. This clause provides that the statutory rule limiting distraint to goods belonging to the tenant does not apply "in favour of a person claiming title under an execution against the tenant". The reference to "title" in the provision is ambiguous. It likely refers to the title obtained by a purchaser at a sheriff's sale. If that is the case, the provision applies only when a constructive seizure has occurred and the goods have been sold but left on the premises. On the other hand, "title" may refer to. the quasi-proprietary interest arising when goods are bound by a writ of execution. If that is the case, the provision would provide a priority rule, though reconciling it with s. -63 would be difficult. In any event, s. 25(2)(a) is only necessary because neither the common law nor s. 63 provide a complete priority structure.

(d) Security Interests in Distrained Goods

Distress under the Commission's proposals operates as a deemed security interest arising when the landlord takes possession of goods of a defaulting tenant. For a variety of practical business purposes, the landlord may prefer to secure arrears in rent by entering into a conventional security agreement with the tenant instead of levying distress or retaining possession of distrained goods. If the security interest is perfected by registration rather than by taking possession of the goods, such an arrangement would make it unnecessary to remove goods from the premises to provide security for arrears, and permit the tenant to continue to use the goods in her business. In other cases, a landlord may agree to return goods distrained to the tenant if the tenant agrees to enter a security agreement with respect to the goods.

Since a conventional security interest is involved in the examples above, in the absence of a special priority rule, priority would date from perfection of the security agreement. In the

result, the use of security agreements to secure arrears in rent would be less attractive in most cases than distress. For that reason, the Commission recommends that priority in such cases should be the same as if distress had been levied and the goods retained by the landlord. The proposals provide that:

27(1) A landlord, who before surrendering possession of goods distrained, enters into a security agreement with the tenant providing for a security interest in the goods retains, upon
perfection of the security interest, the priority referred to in section 25 as if possession of the goods had not be surrendered

(2) A landlord who, instead -of distraining the goods of a tenant, enters into a security agreement with the tenant in respect to goods subject to distress has, upon perfection of
the security agreement, the priority referred to in section *25* as if the goods had been distrained at the time the security interest is perfected.

(e) Distress and Wages

Section 36 of *The Landlord and Tenant Act* provides that an employee may file a claim for wages owing with the sheriff after goods of her employer have been distrained. The claim for wages, to the extent of three months wages, or $500, whichever is less, "a lien upon the moneys realized from the sale of the goods" by the landlord. This priority for wages may have been more important when it was adopted than at present. The small amount of the permitted claim has not kept up with inflation, and if the employer is insolvent, it is likely that the wage priority will be superseded by bankruptcy priority rules in any event. It does not appear that claims for wages are often filed under the section at present.

The *Labour Standards Act* provides a mechanism for employees to make a claim for wages when a secured creditor seizes and sells collateral under a security agreement. This remedy would replace section 36 of *The Landlord and Tenant Act* if the Commission's proposals are adopted. Some minor amendment to *The Labour Standards Act* may be required to ensure that it applies to the deemed security arising when distress is levied.

9. Sale of Distrained Goods

(a) Notice of Sale

Under the present law, at least five days before distrained goods may be sold, notice of the distress must be left at a conspicuous place on the premises[84] The notice must contain a statement of the fact that distress has been made, the time when the rent and other charges

~The Landlord and Tenant Act, s. 35. The Act requires notice to be left at "the dwelling house or other most conspicuous place on the premises". The reference to dwelling house is now, of course, surplusage since distress at a residence is no longer permitted.

must be paid to avoid sale of the distrained goods, the amount of arrears due, and the place where the goods are impounded.

This notice requirement is inadequate in several respects. Note first that it is a notice of distress, not of sale. Thus, it does not require the landlord to stipulate the time and place of the sale. The nature of the notice may also explain why only five days between notice and sale is required by section *35*. If the notice were- intended to give the tenant a realistic opportunity to reclaim the goods by paying arrears, a longer notice period would be appropriate.

Delivery of the notice to the premises is an archaism, dating from a time when distress was usually levied without evicting the tenant. Since today few tenants are left in possession of the premises for very long after distress occurred, notice at the premises is not good notice to the tenant in most cases.

Assimilation of distress to secured property law would make the notice of sale provisions in *The Personal Property Security Act* applicable to distress. Under the *Act*,[85] a landlord would ordinarily be required to give the tenant twenty days notice prior to the sale rather than the five days now required, and to-give notice as well to anyone with a subordinate registered security interest or who has given the landlord written notice of an interest in the goods distrained. The notice would stipulate the goods seized, the amOunt that must be paid to reclaim the goods, and the time and place of the sale. The notice would ordinarily be served[86] at the place of residence or place of business of the tenant.

(b) Method of Sale

At common law, distrained goods were held as a pledge, and could not be sold. The right to sell the goods distrained for rent was granted by the *Distress for Rent Act*, 1689, incorporated into the Saskatchewan *Landlord and Tenant Act* as section *35*. Under the statute, goods distrained for rent may be sold for the best price that can be obtained for them, and the proceeds applied to satisfaction of the rent and the costs of the distress and sale.

The courts added the stipulation that the sale must be to a third person. Abuses were thought to be too -likely to permit the landlord to purchase the goods, even at an appraised price or at auction.[87] Sale remained permissive under the statute. Thus, the landlord may retain the goods rather than sell them, though since the goods are held upon a pledge, the landlord could not obtain unencumbered title to the goods in this way.

Under the Commission's proposals, sale of distrained goods would be governed by the provisions of *The Personal Property Security Act* relating to sale of seized collateral. The Act permits public or private sale at any "commercially reasonable" time and place. In this respect, the law would not be changed by the proposals. However, *The Personal Property Security Act*

85 s.59

86 s.67.

[87] King v. England (1864), 122 E.R. 654.

would permit the landlord to purchase the distrained goods "at a public sale and only for a price that bears a reasonable relationship to the market value". There is no evidence that secured creditors have abused the right to purchase collateral. By complying with notice requirements in the *Act,* a landlord would also be able to retain the distrained goods in satisfaction of the arrears if there is no objection from the tenant.[88]

88 s.61.

APPENDIX
RECOMMENDATIONS

Part III and section 63 of *The Landlord and Tenant Act* should be repealed and replaced with the following:

PART III

19. In this Part

(a) "collateral" has the same meaning as in section 2(1)(g) of *The Personal Property Security Act*,

(b) "debtor" has the same meaning as in section 2(1)(m)(i) of *The Personal Property Security Act*,

(c) "goods" has the same meaning as in section 2(1)(u) of *The Personal Property Security Act*,

(d) "landlord" includes the owner of property, whether or not the property is subject to a tenancy agreement, an agent, receiver, personal representative, assignee of rents, sublessor, or other person standing in the place of a landlord,

(e) "monetary obligation" includes an obligation to pay rent and any obligation of the tenant the breach of which entitles the landlord to monetary compensation,

(f) "non-purchase money security interest" means a security interest that is not a purchase money security interest as defined in section 2(ff) of *The Personal Property Security Act*,

(g) "premises" means land that is the subject matter of a tenancy agreement and,

(i) in section 20(2)(a), includes land formerly the subject matter of a tenancy agreement and on which goods of the tenant are located, and

(ii) in section 20(2)(b), includes land on which the goods are located.

(h) "secured party" has the same meaning as in section 2(1)(jj) of The *Personal Property Security Act.*

(i) "subtenant" means a tenant of the tenant who owes a monetary obligation to the landlord.

(j) "tenant" includes

(i) a former tenant, -and

(ii) other person owing a monetary obligation to the landlord as a result of a tenancy agreement, and

(iii) an owner of goods mentioned in section 20(1)(b).

20(1) Unless otherwise provided by agreement, a landlord has a right, of distress as herein provided, but not otherwise, to enforce

(a) a monetary obligation arising under a tenancy agreement that is due and payable, and

(b) a claim for damages caused by goods coming on to the premises under circumstances amounting to trespass,

as well as expenses referred to in section *59(2)(a)* of *The Personal Property Security Act.*

(2) A right of distress against goods may be exercised by taking possession of

(a) goods of the tenant on the premises or,

(b) goods on the premises mentioned in subsection (1)(b).

(3) A right of distress may be exercised against rental payments payable by a subtenant to the tenant by giving the subtenant a notice that all such rental payments accruing due after the notice are distrained.

(4) The notice referred to in subsection (3) may be delivered to the subtenant by leaving it at the premises occupied by the subtenant- or by giving it to the subtenant as provided in section 68 of *The Personal Property Security Act.*

(5) Notwithstanding subsection 1, where a tenant has removed goods from the premises that would otherwise be subject to seizure with intent to defeat the landlord's right of distress, a court may order that the landlord may distrain the goods wherever they may be found.

21. A right of distress may be exercised before or up to 6 months after the termination of the tenant's interest in the premises, whether or not the tenant remains in possession of the premises.

DISTRESS

22(1) A landlord exercising a right of distress under section 20

(a) has the same rights and powers to take possession of goods distrained or to collect rental payments distrained as has a secured party under Part V of *The Personal Property Security Act,* and

(b) has the same right of entry to premises as a sheriff acting under the authority of a writ of execution against goods.

(2) Goods remain subject to distress only -so long as they are in the actual physical possession of the landlord or his agent.

(3) A landlord does not have actual physical possession of goods that are in the actual or apparent possession of the tenant or the tenant's agent.

23(1) Where a landlord has distrained goods,

(a) the landlord is deemed to be a secured party holding a non-purchase money security interest in the goods distrained,

(b) the tenant is deemed to be a debtor who has given to the landlord a non-purchase money security interest in the goods distrained,

(c) the amount referred to in section 20(1) is deemed to be an obligation secured by the security interest,

(d) the goods distrained are deemed to be collateral,

- (e) the deemed security interest is perfected for the purposes of section 24 of *The Personal Property Security Act* when the landlord takes possession of the goods.

(2) When a landlord has distrained rental payments,

(a) the tenant is deemed to be the assignor and the landlord, the assignee of rental payments distrained, and

(b) Section 124.3 of *The Land Titles Act* applies to the deemed assignment.

24(1) Subject to subsection (2), where the context permits, *The Personal Property Security Act* and regulations made under that Act apply to a deemed security interest mentioned in Section 23(1).

(2) The following sections of *The Personal Property Security Act* do not apply to the deemed security interest referred to in subsection (1):[3,41,9-14,[15,16,21,25-

(9)1, 69,[70-72].

DISTRESS

25(1) Notwithstanding *The Personal Property Security Act*, the deemed security interest in distrained goods referred to in section 23(1) has priority over

(a) any prior non-purchase money security interest in the goods distrained; and

(b) any claim or interest arising as a result of issue of a writ of execution or seizure of the goods under a writ of execution

to the extent of the amount referred to in section 20(1) and the expenses referred to in section *59(2)(a)* of *The Personal Property Security Act.*

(2) The deemed assignment of rental payments referred to in section 23(2) has priority over any claim or interest arising as a result of the seizure of the rental payments under a writ of execution or attachment under garnishee proceedings to the extent of the amount of the obligation referred to in section 20(1)(a) accruing during a period of one year prior to the distress.

26(1) The Lieutenant Governor in Council may prescribe a deemed minimum amount of damages in respect of actions brought under section *65(5)* of *The Personal Property Security Act* for non-compliance with this Act.

(2) On application of a landlord, tenant or a person with an interest in the goods distrained, the Court may

(a) determine the amount of damages for the purposes of section 20(1)(b), or

(b)direct that the issue be tried.

27(1) A landlord, who before surrendering possession of goods distrained, enters into a security agreement with the tenant providing for a security interest in the goods, retains, upon perfection of the security interest, the priority referred to in section 25 as if possession of the goods had not been surrendered.

(2) A landlord who, instead of distraining the goods of a tenant, enters into a security agreement with the tenant in respect to goods subject to distress has, upon perfection of the security agreement, the priority referred to in section 25 as if the goods had been distrained at the time the security interest is perfected.

28(1) Except as provided in subsections (2) or (3), this Part applies to tenancy agreements made before this Part comes into force.

(2) Subject to subsection (3), where goods have been distrained before this

section comes into force, whether or not the right of distress is created by an provision repealed by this Act, the rights of a person in or to the goods which arose

(a) before this section came into force are determined as if this Part had not come into force, and

(b) after this section came into force are determined under this Part where applicable.

(3) The interest of a landlord in goods held subject to distress at time this Part comes into force is a deemed perfected security interest under this Act for a period of 6 months and continues thereafter to be a deemed security interest only if the landlord complies with section 22(2)-(3) or 27 before the expiry of the *6* months.

29(1) *The Landlord and Tenant Act*, Part III, and section 63 are hereby repealed.

(2) The common law of distress for rent and distress damage feasant, and any statute of England governing distress for rent or distress damage feasant is declared to be inoperative.

30 The Crown is bound by the Act.