SOUTH AUSTRALIA

THIRTY-FIFTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING TO STANDARD TERMS IN TENANCY AGREEMENTS

1975

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE JACOBS, *Deputy Chairman.*

D. W. BOLLEN, Q.C.

B. R. COX, Q.C., S.-G.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

Mr. Griffin was absent during part of the preparation of this report and accordingly did not sign the report.

THIRTY-FIFTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO STANDARD TERMS IN TENANCY AGREEMENTS

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

Your predecessor, now the Honourable Mr. Justice King, was pleased to refer to us the question of whether or not there should be standard clauses applicable to all or some forms of demise whether by lease or by tenancy agreement. We have now considered the problem referred to us and report as follows.

The relationship of landlord and tenant has served different purposes at different times over a period of some eight centuries and relics of the thinking of all those centuries are still apparent in our law of landlord and tenant today.

The earliest forms of tenancy were contractual. Then it began to be seen that they produced some interest in the land even if not a freehold estate in the land. Tenancy was principally used for two reasons: first, for the reward of services performed or to be performed and secondly, particularly in the earliest days, as a method of avoiding the stringent prohibition of the mediaeval canon law against usury: see *Plucknett*: *A Concise History of the Common Law 4th Edition pages* 539-542.

The lessee was treated as being seized of a tenement but not of a free tenement and therefore he did not have the protection of the petty assizes. Maitland ascribed this to the influence of Roman Law and the equation of the term of years to a usufruct. He said:—

> "The termor gets his possessory action; but it is a new action. He is 'seised' but he is not 'seised' of free tenement for he cannot bring an assize. At a somewhat later time he is not 'seised' but is 'possessed'. English law for six centuries and more will rue this youthful flirtation with Romanism". (2 P. & M. 115).

This theory was carried out rigorously. A demise by way of lease was and is personal property and not real property. The lessee is not a freeholder and therefore in older days did not have the vote and he had none of the remedies given by the real actions to those who had an estate of freehold.

Leaving aside for the moment the lease for lives which is uncommon in South Australia and which was equivalent to an estate of freehold, the lessee had no real protection. If he was disseised he had to look to his lessor for protection and for some four centuries the writ quare ejecit which was first invented by Raleigh J. somewhere about the 1240's was his only real remedy but it was subject to very considerable limitations and defects: see *Milsom*: *Historical Foundations of the Common*

Law pages 128-132. Ultimately the writ of ejectment was used not so much to protect a lessee, although it could be used for that purpose, but rather to try title as between two persons claiming the freehold.

From the Sixteenth Century on the position changed. The decay of villein tenure caused a large extension in the practice of letting land to farmers for terms of varying duration. "For the most part", said Coke in *Walker's Case* (1587) 3 *Co. Rep. at f.23a* "every man is lessor or a lessee" and it was the pressure of the farming community to obtain leases which caused as many changes in the general structure of the law of landlord and tenant in the Seventeenth Century as a similar pressure but for different reasons did to the whole political and legal structure of Ireland in the latter part of the Ninteenth Century.

The varieties of tenancies thus set up are well set out in *Holdsworth History of English Law Volume 7 pages* 239-250. Notwithstanding the similarity between a lease for a life or lives and a freehold estate for life there were always differences. A leasehold estate did not cause an abeyance of seisin in the way in which for example the failure of a contingent remainder might do at common law, and therefore if the lessor did not enter immediately he still had certain rights and the lease did not fail. One could have a lease to commence at a future date which was an impossibility with an estate of freehold at common law. Meanwhile the lessor had an interesse termini, a right to which we shall refer in this Report. Similarly whereas at the common law an estate came to an end on breach of a conditional limitation, a breach of a limiting covenant in a lease required then, and still requires now, a re-entry by the lessor and indeed until recent years the distinctions in the law relating to covenants were highly artificial and turned in many cases on very nice distinctions. The older law can be found in *Crabb's Complete Series of Precedents in Conveyancing* (3rd Edition) (1845) Volume II at pages 175-177 with precedents following thereafter and again at pages 403-405. Many of the results of this insistence on covenants, which stemmed from the fact that originally the lessor's only remedy was in covenant, are with us to this day.

Certain attempts have been made over the years to mitigate the difficulties under which tenants and in particular lessees for a term of years operate, but little thought has been given until now to the very large majority of tenants, namely those who live by weekly tenancies either evidenced by a short form stationer's agreement or sometimes simply by the payment of rent and the handing over of a rent book. Both these classes, which comprise the large majority of all residential tenancies, have to be considered today. We should say at the outset that in our opinion a distinction ought to be drawn between business and residential tenancies. Many business tenancies are negotiated by parties who can enter into bargains freely and voluntarily at arm's length and usually with legal advice. The ordinary tenant of a house for residential purposes is in a different position. It is a basic necessity of every family that it have a roof over its head and in these days when there is a substantial shortage of homes for letting, the tenant is, generally speaking, in a very inferior bargaining position. The same protection should in our opinion be given to tenancies of small businesses—the typical "corner shop" type of business tenancy.

Some attempts have been made to remedy this position. Sections 4-12 of the Landlord and Tenant Act, 1936 give some but not very great relief against forfeiture, in the case of non-payment of rent or for breach of condition, but in practice these sections only apply to leases for a year or longer and indeed section 4 would, by reason of its reference to a half years rent, seem to restrict the provisions to leases for at least a period of a year. In fact because of the cost of obtaining an order under these provisions, and we think possibly also the ignorance of their existence by a large number of lessees, applications for relief against forfeiture are few in number and do not provide a very useful remedy from the point of view of the ordinary tenant.

A tenant has a right to have insanitary conditions put right under the provisions of the Health Act, 1935-1955 and in certain cases under the powers given to local governing bodies under the Local Government Act and we have not dealt with those aspects of the law in this report. Similarly there are some pressures which can be brought to bear under Part III of the Housing Improvement Act, 1940-1973 but the ultimate sanction under this last Act is in practice the demolition of the sub-standard house, which does not help the tenant in his need for accommodation, whereas in these days of erection of multiple dwellings it may well suit the landlord to have the premises condemned, the house demolished and a block of flats erected in its place.

As far as rent is concerned, there is some protection against excessive rent, though not a very great one, contained in the Excessive Rents Act, 1962-1966. Insofar as these statutory protections exist we have noted them in this report. We have not dealt with these portions of the subject further where they are already covered by statute, as we regard any amendments to such statutes as a matter of Government policy.

We have therefore in this report confined our remarks to clauses which we feel should become standard clauses in landlord and tenant agreements. We think it is a matter of policy for the Government whether all or any of these clauses, apart from being implied in all landlord and tenant agreements, should be capable of variation by agreement and if so to what extent any such variation by agreement should be permitted. Speaking as a Committee we are against permitting contracting out as certainty and uniformity cannot otherwise be attained but we recognise as we have just said that this decision must be one of Government policy.

We should say at this stage that we have been much assisted in our consideration of this matter by a perusal of the report and recommendation on Florida landlord and tenant law by the Florida Law Revision Council in 1973, a working report on the survey of landlord and tenant law by the Department of Justice in New Brunswick dated the same year, and a discussion paper in 1974 prepared by Mr. Bradbrook, senior lecturer in law in the University of Melbourne, for the Commonwealth Commission of Enquiry into Poverty. We were fortunate to have the assistance of Mr. O'Reilly the officer in charge of the Housing Improvement and Rent Control Branch of the South Australian Housing Trust who gave evidence before us. A copy of his evidence accompanies this Report.

Before dealing with individual clauses, we think we should say that this report is not intended to deal with certain types of relationship which resemble that of landlord and tenant but for one reason or another ought in our opinion to be excluded. The ones which we have excluded from our consideration in this report are:—

(*a*) Those that are excluded at common law—A tenant at will, a tenant at sufferance and an abator: (see Holdsworth History of English Law Volume 7, page 242).

(*b*) Crown lessees under leases granted under the Crown Lands Act, 1939 (as amended).

(*c*) Holders of proprietary leases or strata title leases or interests in groups of flats or home units which are in truth, although not technically, owned by the persons living in them.

(*d*) Occupancy under possession given under a contract of sale and purchase.

(*e*) Occupancy of premises as a term of a contract of employment.

(*f*) Transient occupancy in a hotel, motel, lodging house or caravan park or any similar form of transient occupancy.

(*g*) Residence incidental to a primary purpose such as residence in a hospital, nursing home, school, college, or indeed an institution such as a prison or prison farm.

(*h*) Property owned by the Crown or an instrumentality of the Crown and let to or in the possession of persons who are in possession solely by reason of their service under the Crown or that Crown instrumentality.

(*i*) For constitutional reasons, property owned by and let by the Commonwealth of Australia or any instrumentality of the Crown in right of the Commonwealth.

In order to obviate the possible impact of the common law doctrines of tenure on what we see as a completely contractual situation, it is necessary first to abolish the doctrine of tenure as it applies as between landlord and tenant. Because the statute Quia Emptores in 1290 only applied to estates in fee simple, tenure has always been possible as between landlord and tenant. Just as sub-infeudation in fee simple was abolished nearly seven centuries ago so a similar form of sub-infeudation by leasehold tenure ought to be abolished today. This would get rid of all forms of distress. Distress in relation to a dwelling house is already abolished by the Excessive Rents Act, 1962, Section 16 and we see no reason for its retention elsewhere. This however does not include the abolition of tenancy as an estate in the land because if that were abolished the tenant would have no caveatable interest and no registrable interest under the Real Property Act in the cases to which a caveatable interest or registrable interest now applies: see the Real Property Act, 1886 (as amended), Sections 116 and 191. Indeed the Committee would wish to raise for consideration by the Government the question whether the Real Property Act should not be amended so as to provide that rights in the land delimited by contract as between landlord and tenant should not be sufficient to support the lodging of a caveat under that Act.

We turn then to the specific matters which we think warrant consideration:—

1. *Independent and interdependent covenants.*

It was held as long ago as 1773 that covenants in a contract are in general interdependent but in relation to covenants in a lease or tenancy or other demise they are normally independent. It is true that particular covenants may as a matter of construction be interdependent (see the judgment of the Full Supreme Court of Western Australia in *Roberts* v. *Ghulam Nabie* (1911) 13 *W.A.L.R.* 156,) but this is purely a question of construction and is an exception from the general rule. The present law goes back to the highly technical rules as to covenants in early centuries on which we commented earlier in this report. We propose that it should be a term of every tenancy agreement that all the conditions are interdependent, that is to say the landlord cannot enforce the tenant's covenants unless he himself has carried out his own obligations cast upon him under the agreement or by law. This raises the question of what the tenant should do to protect himself as to rent withheld because of a claimed default by the landlord. Perhaps an extension of Section 119 of the Law of Property Act, 1936, might meet the case.

2. *Warranty of habitability.*

At common law there was no warranty of habitability at all except in the case of a furnished letting and then only by what was at the time regarded as an unusual exception: see the decision in *Smith* v. *Marrable* in (1843) 12 *L. J. Exch.* 223. Apart from that the law has said over and over again that there is no implied term that premises are fit for habitation and we refer to *Sleafer* v. *The Lambeth Borough Council* 1959 3 *W.L.R.* 485 and *Pampris* v. *Thanos* 87 *W.N. N.S.W. Pt.* 2 *page* 161. Those two cases (one decided in England and one in Australia) are two of very many of similar tendency which could be cited on this point as the cases are all one way: see also an article *in* 37 *M.L.R.* 377—*Statutory Covenants of Fitness and Repair: Social Legislation and the Judges by J. I. Reynolds.* As Erle C. J. said in *Robbins* v. *Jones* 15 *C.B.N.S.* 221 "Fraud apart, there is no law against letting a tumble-down house": see also *Cavalier* v. *Pope* 1906 *A.C.* 428. There should be a covenant in every tenancy by the landlord that the premises are fit for the use intended by the parties and that he will keep the demised premises in good repair during the term of the demise, complying where necessary with State and local government requirements as to health, safety and welfare laws except where the lack of repair, the violation of the laws, or the act complained of has been caused by the wilful or negligent conduct of the tenant or those for whom he is responsible. This would involve the repeal of Section 124 (2) of the Real Property Act.

The clause suggested by the Florida Committee is at pages 16 and 17 of their report and reads:—

"(1) The landlord at all times during the tenancy shall:

(*a*) comply with the requirements of applicable building, housing and health codes; and

(*b*) maintain the roofs, windows, screens, doors, floors, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads, and maintain the plumbing in reasonable working condition.

(2) Unless otherwise agreed in a written rental agreement, in addition to the requirements of subsection (1) of this section, the landlord of a dwelling unit other than a single family house at all times during the tenancy shall make reasonable provision for:

(*a*) the extermination of roaches and vermin;

(*b*) locks and keys;

(*c*) the clean and safe condition of common areas;

(*d*) common garbage receptacles and garbage removal; and

(*e*) heat during winter, running water, and hot water.

(3) Nothing contained in subsection (2) of this section prohibits the landlord from providing in the rental agreement that the tenant is obligated to pay costs or charges for garbage removal, water, fuel, or utilities.

(4) If the duty imposed by subsection (1) of this section is the same or greater than any duty imposed by subsection (2), the landlord's duty is determined by subsection (1).

(5) The landlord is not responsible to the tenant under this section for conditions created or caused by the negligent or wrongful act or omission of the tenant, a member of his family, or other person on the premises with his consent."

Except where this Report makes other recommendations, we agree with this summary of the landlord's obligations. The Florida Report also puts certain obligations on the tenant and we think, again with the same qualification as to other recommendations contained in this Report, that these are likewise reasonable. They are at page 18 of the Report and they read:—

"Tenant's oligation to maintain dwelling unit. The tenant at all times during the tenancy shall:

(1) comply with all obligations imposed upon tenants by applicable provisions of building, housing and health codes;

(2) keep that part of the premises which he occupies and uses clean and sanitary;

(3) remove from his dwelling unit all garbage in a clean and sanitary manner;

(4) keep all plumbing fixtures in the dwelling unit or used by the tenant clean and sanitary;

(5) use and operate in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators;

(6) not destroy, deface, damage, impair or remove any part of the premises or property therein belonging to the landlord, nor permit any person to do so; and

(7) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that does not unreasonably disturb his neighbours."

A covenant for habitability should enure to the benefit of all persons residing in the house. Consideration should be given to the position of persons such as boarders having regard to the judgment of Ligertwood J. in *Watson* v. *George* 1953 *S.A.S.R.* 219 (affirmed by the High Court of Australia 89 *C.L.R.* 409).

Mr. Bradbrook's report then raises the question of what happens if the landlord breaks his agreement. Clearly the existing statutory remedies are not easy to enforce and in any case the tenant has to go on living in the house unless he can find somewhere else in which to live and he has to do so (*a*) until the condition of unfitness is removed and (*b*) during the unavoidable upheaval while the repairs are being done especially if these are widespread and substantial.

Mr. Bradbrook then discusses a range of remedies which might be thought to be applicable in such circumstances.

He suggests first that the tenant should be allowed if the breach is serious to end the lease and to recover damages for his costs and expenses in obtaining substitute housing. We do not think this is a very useful remedy in practice; certainly not at present. With the present shortage of houses it is unlikely that many tenants would be in a position where they could avail themselves of this remedy. His second suggestion is that the tenant should be allowed to deduct a portion or the whole of the rent for the time being according to the extent of the disrepair. The cost of repairs today is so high that this would probably not be a very useful remedy in practice because this assumes either that the tenant will do the repairs and pay for them and deduct the amount, or alternatively that there should be some sort of apportionment of the rent whilst the condition of disrepair continues. The first would be beyond the means of many tenants and the second would almost certainly, as Mr. Bradbrook's report indeed envisages, require an application to the Court to have the apportionment made. Tenants have not in the past shown themselves very happy about going to Courts in such circumstances because of the legal costs involved and in any case a reduction of rent made under these circumstances would clearly call for expert evidence on both sides and the costs involved would be substantial. The third is a proposal that the tenant be allowed to withhold the rent until the repairs are done. This is in theory at least a more satisfactory remedy but in practice as Mr. Bradbrook recognises it means the tenant would have to bank the money until the work was done and our experience suggests that tenants might well spend the money, not have it put by to answer the demand when the rent is demanded, and then be in default. His fourth remedy which again deals with petitioning the Court has the same problem as the second remedy, namely that of the cost of legal proceedings as has the fifth remedy. The sixth suggested remedy: allowing the tenant to do the repairs himself and deduct the cost from

the rent, we have already dealt with. The seventh is a more imaginative one, namely to allow the tenant to petition the Court for the appointment of a receiver; that is that until the repairs are done a receiver could be put in who would take possession of the premises, have the repairs done, if necessary with the sanction of the Court raise a mortgage to pay for the repairs, and generally administer the property until the place was put into proper repair. This of course assumes there is a sufficient equity in the property to enable this to be done. No receiver in his right mind would undertake what is after all a personal liability for repairs unless there was a sufficient equity in the property at the end to enable a mortgage to be raised and in any case, at the present rates of interest applicable to second or third mortgages, this might not be a very attractive position. With a property with no mortgage or with a very substantial equity and much lower rates of interest than are now being obtained, this might well be a helpful remedy. His last suggestion is to allow Government agencies to apply sanctions against the landlord. We do not find ourselves able to comment on this. This raises clear questions of policy which are matters for Government and not matters for a law reform committee.

If, after perusal of Mr. O'Reilly's evidence, the Government considers that these are matters which ought to be dealt with administratively following administrative inspection and supervision, then thought will need to be given by the Government to the provision of an administrative remedy if the instruction or order of the administrative authority is not complied with.

The only comment which our combined experience does suggest with regard to all of these remedies and not only the last ones, is that if the remedy given is too draconian, landlords simply will not let premises which they have available for letting or they will devise some means other than the relationship of landlord and tenant, such as a system of licences or a hiring system outside the relationship of landlord and tenant to avoid the problem, especially where new dwelling units are being built. It would it seems to us be unfortunate if homes were not used for tenancies where they can be so used or that newer forms of dwelling units should be devised on such a principle that they are probably unavailable from a cost point of view to the ordinary tenant and we do feel that we ought to draw this difficulty to your attention. There are those amongst us who are old enough to remember the National Security (Landlord and Tenant) Regulations of World War II and the statute in South Australia which continued the policy of the Regulations. These, although well intentioned, quite frequently did not produce anything like the sort of result which was envisaged by those who drew them because in every case they were a challenge to the ingenuity of legal draftsmen to make sure that what was done was outside the purview of the National Security (Landlord and Tenant) Regulations and indeed in practice almost the only tenancies which were caught by them were those which were already in existence at the time when the regulations came into force and this previous experience may well be of some use to Government in considering how far landlords can be pushed by legislation of this sort. We have no doubt that the reforms which we suggested in this report will provide a proper standard in many cases and that this standard may

need to be supplemented by governmental activity but the whole procedure would be self-defeating if the ultimate result were to produce less units for letting rather than more. We have borne this matter in mind in all the recommendations we have made in the report. We have stated it here and we do not think it necessary to say so again on any other of the matters which we discuss in this report.

3. *Covenants for quiet enjoyment.*

As is pointed out in the English Law Commission Report No. 67 on Obligations of Landlords and Tenants, the covenants for quiet enjoyment commonly found in leases are inadequate in several respects. Two of that Committee's recommendations appear to us to be valuable in South Australia. They are:—

(1) That under the present law the landlord's grant does not warrant that the premises may be legally used for the purpose or purposes specified in the lease or that there is no restrictive covenant or town planning or local governmental control in relation to the use of the premises and they refer to *Hill v. Harris* [1965] 2 *Q.B.* 601. We think that if premises are expressly let for a specific purpose or purposes or are agreed by both parties to be so let and those purposes are incapable wholly or partly of being carried out either because of some restriction affecting the use of the premises arising from a building covenant or a negative covenant of some kind which runs with the land or because the premises cannot be legally used for any one or more of the purposes because of town planning controls, council by-laws or other similar forms of control, then the covenant for quiet enjoyment should be extended so as to give the tenant a right of action either for rescission of the lease at his option if the restriction is so important as to render the tenancy materially less valuable than it otherwise would have been or alternatively a right of action for damages for breach of the warranty of quiet enjoyment.

(2) We also think that the present law should be altered in relation to interruption by the lawful acts of parties claiming under title paramount. A conveyancer normally draws a covenant for quiet enjoyment today to cover only the acts of the landlord and all persons claiming by through or under him. This means that if the tenant is ousted or his quiet enjoyment is in some other way interfered with by somebody whose title is paramount to that of the landlord, the tenant has no remedy. We think, as does the English Law Reform Commission, that the covenant for quiet enjoyment should extend to the lawful acts of anyone acting with title paramount whether the justification for the disturbance depends on a title superior to the landlord's or a title created out of the landlord's title.

We think there is a third class of interference to which the covenant for quiet enjoyment should extend and that is that when a landlord has let premises forming part of a group of premises to tenant A for a specified purpose, he may not derogate from his grant in fact though not in law by letting other premises in the same group to tenant B for a use which would seriously interfere with the exercise of the rights given by the first lease. The Committee thinks that in this third class of interference there is or ought to be a distinction drawn between an interference which causes physical disturbance and therefore interferes with the exercise of rights by the first lessee and the granting of a second lease which impinges solely on the economic profitability of the first lessee's business.

We think that all of these modifications of the covenant for quiet enjoyment should be expressed in the legislation so as to be unable to be modified by agreement otherwise they will immediately be excluded by conveyancers.

4. The next matter which requires attention is the landlord's right of access to premises. At common law the landlord had virtually no right of access to the premises leased to the tenant because the lease was a conveyance of the possession of the property to the tenant for that period of time and the landlord had no right to come on to the premises in contravention of the possession thus conveyed. In fact conveyancers have reversed this to such an extent that the balance has swung too far in favour of the landlord and all the reports that we have read refer to the fact that this right can be and sometimes is exercised unreasonably and indeed vexatiously. The Florida Report at page 19 sets out what we regard as reasonable terms for the use of a right of entry and they are as follows:—

"Landlord's access to dwelling unit—

(1) The tenant shall not unreasonably withhold consent to the landlord to enter the dwelling unit from time to time in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen or contractors.

(2) The landlord has the right to enter the dwelling unit only with the consent of the tenant, except in cases of emergency, or when the tenant unreasonably withholds consent, or during an extended absence of the tenant from the premises, the landlord may enter the dwelling unit when necessary for the purposes set forth in subsection (1) or otherwise for the protection or preservation of the premises.

(3) The landlord shall not abuse the right of access nor use it to harass the tenant."

We would add a fourth subclause to provide for the granting of a court order by the landlord to enter and view the premises where access was unreasonably withheld or obstructed by the tenant.

This would involve the repeal of Section 125 (2) of the Real Property Act, 1886 (as amended).

With regard to covenants to repair as the law now stands, a covenant "to keep in repair" is construed as a covenant to put in repair, even though the premises were out of repair at the commencement of the devise: see *Hill and Redman's Law of Landlord and Tenant* 13*th Edn. p.* 213. We think this is too onerous and should be altered by statute.

The reports before us then deal with the question of key money, caution money, or deposits for the performance of tenants' obligations all of which are varying names for similar types of obligation. We understand that this matter is being dealt with separately by legislation during the present session of Parliament and accordingly we do not comment on the matter in this Report.

5. We turn then to the rule usually known as the rule in *Paradine* v. *Jane*. The general rule of the law of contract is that a man is bound to perform any obligation which he has undertaken in terms absolute and he cannot claim to be excused by the mere fact that performance has subsequently become impossible, except in the single case that where before breach performance becomes impossible from the perishing of the thing without default of the contractor, the impossibility of performance arising from the perishing of the thing excuses the performance: see *Taylor* v. *Caldwell* (1863) 3 *B. & S.* 826 and *Anson's Law of Contract* 23*rd Edition pages* 453-455. In *Paradine* v. *Jane* itself (1647) *Aleyn* 26 the lessee was ousted by Prince Rupert, the cavalry commander of Charles I during the Civil War, and being expelled and put out of possession the tenant could not take the profits and he claimed that the rent was not due because he the tenant had been deprived by events beyond his control of the profits from which the rent should have come. The Court at page 27 held that that was no excuse and said:

> "When the party by his own conduct creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."

The Florida Report suggests a provision stating that if the premises are damaged or destroyed or their enjoyment substantially impaired other than by the wrongful or negligent acts of the tenant so that the enjoyment of the premises is substantially impaired the tenant may terminate the rental agreement and immediately vacate the premises or the tenant may vacate the part of the premises rendered unusable by the casualty in which case his liability for rent shall be reduced by the fair rental value of that part of the premises damaged or destroyed. With this recommendation we agree. The Sackville Report makes an alternative suggestion that Section 41 of the British Columbia Landlord and Tenant applies to tenancy agreements". We can only say that the doctrine of frustration. This section states "the doctrine of frustration of contract

applies to tenancy agreements". We can only say that the doctrine of frustration is so difficult to define in the law of contract and so capricious and unreasonable in its application where it does exist, that we think that any such amendment to the law would be productive of extensive litigation and very little benefit to the tenant and we think the Florida solution much the better solution and we recommend it. To give merely two examples of the present operation of the doctrine in this field, a closing order under the Health Act does induce the doctrine of frustration in relation to a lease: see *Robertson* v. *Wilson and Others* (1958) 75. *W.N. NS.W.* 503, whereas the requisition of premises by authority does not produce a frustration: see *Whitehall Court* v. *Ettlinger* 1918/19 *All E.R.* 229; 1920 1 *K.B.*. 680. If the premises are wholly unusable the tenant has to get accommodation elsewhere. If he can use part of the premises then clearly he will do so if at all possible because of the present scarcity of rented premises and in that case he should only have to pay for the part he can use.

6. *Relief to sublessees.*

It not infrequently happens that there is a subletting of portion of the premises. The common law is that if the head lease falls, the underlease falls also. Section 12 of our Landlord and Tenant Act, 1936, provides a measure of relief for underlessees but it does not go as far as Section 146 (4) of the English Law of Property Act, 1925 15 Geo. V c.20 which by subsection (4) permits the underlessee to seek an order vesting the whole term of the lease or any less term in the underlessee, the property comprised in the lease or such part as the underlessee is entitled to, on such terms as the Court thinks fit. We would recommend that a similar clause be inserted in the standard terms of agreement and we do not think that the power should be circumscribed in the way in which it was by Salmon J. (as he then was) in *Chatham Empire Theatre* (1955) *Limited* v. *Ultrans Limited and Others* 1961 1 *W.L.R.* 817 that if there are several sublessees, relief can be refused on the basis that the head lessor should be able to deal with the premises as a whole. In our opinion the rights of each sublessee should depend upon the case put up by that sublessee and not on the position in relation to other sublessees in the case of multiple sublettings.

At the same time as thought is being given to the question of underlessees, the question of assignment of a lease should also be considered. It is a matter of considerable difficulty under the present law (see articles in 118 *Law Journal Newspaper* at 172 and 20 *A.L.J. page* 90) and it requires a balancing of the interests of landlord and tenant. Clearly the landlord should not have an impecunious or otherwise unsatisfactory tenant imposed upon him by assignment. On the other hand the tenant may be compelled to go interstate by the exigencies of his job or may for a number of reasons: widowhood or other family reasons, be compelled to seek other premises, and there ought to be some reasonable right of assignment of the premises. The matter is complicated in this State by the decision of this Court that there is no right of re-entry for an equitable assignment: see *Hill* v. *Short* 1910 *S.A.L.R.* 141. We would, with respect, express some doubt as to the correctness of this decision, but it has stood for very many years and it might be as well in dealing with the matter of assignment to cover the position.

Ontario, by Section 90 of its reform legislation, provides as follows:—

"90. (1) Subject to subsection 3, a tenant has the right to assign, sublet or otherwise part with possession of the rented premises.

(3) A tenancy agreement may provide that the right of a tenant to assign, sublet or otherwise part with possession of the rented premises is subject to the consent of the landlord, and, where it is so provided, such consent shall not be arbitrarily or unreasonably withheld.

(4) A landlord shall not make any charge for giving his consent referred to in subsection 3, except his reasonable expenses incurred thereby.

(5) A landlord or tenant may apply by summary application to a judge of the county or district court of the county or district in which the premises are situate who may determine any question arising under subsection 3 or 4",

and this seems a fairly reasonable way of dealing with the matter. We have omitted subsection (2) which deals with housing administered by the Government of Canada, the Province of Ontario or a municipality, as it does not concern us here because we have already dealt with this in the general part at the beginning of the Report.

7. *Landlord's duty to mitigate damages if a tenant has to give up his tenancy.*

At present the landlord is not compelled to do anything about mitigating the damages but can simply hold the tenant to payment for the balance of the term. That is not so in all American jurisdictions. In some, for example in Oregon, the Supreme Court of Oregon has held in *Wright* v. *Baumann* (1965) 21 *A.L.R.* 3*d*. 527 that there is such an obligation to mitigate on the landlord, but it does not apply generally in this country. We think that there should be a clause imposing a positive duty on the landlord actively to seek other tenants in substitution for the one who has had to give up his tenancy, in such cases as the compulsion to give up the tenancy arises from events which were unforeseen when the tenancy was entered into.

8. Our statute law is somewhat different from the English statute law and for that reason we set out each of our recommendations and our reasons for them. We think that in every tenancy there should be deemed to be implied the following covenants by the tenant in addition to any other covenants that are in the lease:

(*a*) To take all reasonable steps to advise the landlord of any encroachment on the demised premises. This may arise in one of two ways:—either because an actual encroachment has been made by a third party or because it arises out of a fencing dispute between the "occupiers" of land which expression would include the tenant but not necessarily the landlord. This is extremely important because of our Encroachments Act No. 24 of 1944, as unless the tenant were to notify the landlord in these cases a landlord might

find some of his property being suddenly changed from land into a right of compensation for encroachment. The tenant should therefore be required to notify the landlord forthwith of any such encroachment, of any adverse claim to the premises, of any notice served pursuant to the Fences Act, and of any other notice or proceeding known to the tenant, whether addressed to or taken against the tenant or not, which may affect the landlord's interest in the premises.

In these days when trespassers behave in a manner unknown to earlier generations, it may also be thought proper to require the tenant to notify the landlord forthwith if any trespasser should take possession whether peaceably or by force of any portion of the demised premises and that the landlord should have a right of action, separate from the tenant's right as tenant in possession, to eject the trespasser.

(*b*) The other three matters referred to in the English report are ones which are commonly found in our standard forms of leases in any case, that is to say that the tenant shall not contravene any restriction or prohibition imposed by or under any enactment, by-law, town planning regulation or other act of any lawful authority with respect to the premises; not to do or allow to be done on the premises anything which might constitute or grow into a nuisance or annoyance and not to use the premises or cause or allow the premises to be used for any illegal or immoral purpose. These clauses are slightly wider than the ones stated in the English report but they are the standard clauses as they are known to us in South Australia and we think that all of these clauses should be clauses implied in every agreement and ones which cannot be excluded by agreement.

9. There are however four disparate matters which remain to be dealt with. First, we think that all tenancy agreements should either be in writing or if there be no writing, be deemed to be entered into in a prescribed form to be scheduled to the legislation which will thus be deemed to be the terms on which the parties have contracted in the absence of writing. If the tenancy agreement is in writing then we agree with Mr. Bradbrook that a copy ought to be handed to the tenant. The question of costs then arises. It is the experience of those of us who have been in general practice that tenants very frequently protest about having to pay the total legal costs and stamp duty of a tenancy agreement and not least the stamp duty, and as a result a good many relationships of landlord and tenant which would have been very much better governed by a well drawn agreement have in fact been left to be dealt with either by the common law or by the use of a law stationer's form. We think that the problem could be avoided in many cases by providing that the tenant must be given a copy of the written agreement, but that he is liable to pay one-half of the legal costs and stamp duty of the agreement and not, as always happens in documents drawn with legal assistance, the whole of those costs. The tenancy agreement is for the protection of the landlord as well as the tenant and each side should share the costs of having one prepared and should indeed be encouraged to have an agreement in proper form, for the avoidance of disputes and for the proper ascertainment of their respective rights and liabilities.

The next matter is that of retaliation. This is dealt with in all the reports to which we have given consideration and there are already sections in Acts such as the Excessive Rents Act which will deal with the problem. Clearly if either side, not only the landlord, proceeds to retaliate because the other has sought the invocation either of his statutory rights or of the law, then there ought to be provision for the party so retaliating to be dealt with either by prescribing the commission of an offence in such circumstances or by providing some other sanction against retaliation. The nature of the sanction is we think a matter of policy for the Government.

The third matter which we deal with is the matter of removal of fixtures by a tenant at the end of the agreement. The common law rule permitted tenants to remove fixtures erected for the purpose of trade but apart from that there was no right to remove fixtures at common law (see *Elwes* v. *Maw* (1802) 3 *East*. 38). That right has been extended to agricultural holdings by the Agricultural Holdings Act, 1891. In our opinion tenants should either have the right to remove all fixtures made with the approval of the landlord at the end of their tenancy, provided this can be done without undue damage to the property, or if this is not possible the tenant should be entitled to be compensated for the then value of such fixtures he has affixed.

The last matter to which we draw attention is the fact that tenants do occasionally simply "flit", or to put it less colloquially, abandon the tenancy of the property, but leave belongings of theirs remaining in the property. In such a case the landlord has two difficulties: first, to know whether or not he can relet or whether the tenant intends to return, and secondly, as to what he should do with the property that the tenant has left behind, in case he incurs personal liability in relation to it.

This matter has recently been considered by the California Law Revision Commission and in making these recommendations we have been guided by a study of their deliberations. They recommend that a lessor may give a notice of belief of abandonment to the lessee where the rent on the property has been due and unpaid for three weeks and the lessor has reason to believe that the lessee has abandoned the property. The notice must specify a date from which the lessor intends to terminate the lease, which date shall be not less than fifteen days after service of the notice personally or by certified mail on the lessee. The notice shall state the facts on which the lessor relies, and shall also say that the property will be deemed abandoned on a set date, later than the fifteen days notice given to the lessee, unless the lessor receives at the address indicated in the notice a written notice from the lessee stating his intention not to abandon the leased property. The Californian Report does not deal with this point but it may be that the lessor simply does not know an address at which to serve the lessee in these circumstances and we think that there should be a method of approach to the Court written into the proposed Act enabling the lessor to obtain an order for substituted service by advertisement in a proper case. The second matter which arises out of such an abandonment is the leaving of personal property on the premises which the lessor cannot dispose of, may possibly incur personal liability in respect of, even if he does nothing and certainly if he does something about it, and thirdly which will preclude him from giving

vacant possession to an incoming lessee. They recommend that where personal property of a tenant or third person remains on the premises after a tenancy has terminated, whether under the preceding clause or by any manner of termination, and the premises have been vacated by the tenant, the landlord may if he wishes give notice to the tenant and to any other person whom the landlord reasonably believes to be the owner of the property concerned. The notice must describe the property, except that if it is contained within a locked container the lessor is under no obligation to have the container unlocked and can simply describe it by its locked appearance without reference to the contents inside the locked container. The lessor should advise the person to be notified, if he intends to have the property stored, what the cost of storage is and that the reasonable cost of storage is recoverable before the property is returned, where the property may be claimed, and the date before which the claim must be made. Again the notice is a fifteen day notice and the date specified must be a date after the expiry of that fifteen days, and the notice again should be served personally or by certified mail. Again we suggest an alternative procedure of service by advertisement in a proper case. If at the end of that time the property is unclaimed the landlord may then sell the property by public auction and by the proposed Californian law, may if the proceeds are under one hundred dollars retain them. We, however, do not think this is right. The money from the sale should either be paid to the lessee or other person if known or else paid under the Unclaimed Monies Act, 1891-1962 into the Treasury from whence the owner of the property can later retrieve his proceeds. The Californian report also refers to, but makes no recommendation on, the giving of notice to the police in case the property turns out to be lost or stolen property. We think such a duty should be embodied in our legislation and that proper notice should be given to the police in such cases before the landlord takes action. A landlord who follows these procedures is not then liable in trespass or conversion or under any other form of action to the owner of the property unless that person is a person other than the tenant and he can prove that the landlord had notice that such person had an interest in the property and knew or should have known on reasonable investigation the address of that person and did not give him notice in which case the latter's rights of action are preserved.

If it is thought that, other than in respect of the exclusions referred to in this report, this Act should not bind the Crown, we recommend that as the Crown or one of its agencies is the largest landlord in South Australia, that the Crown should use such of the recommendations in this report as are ultimately adopted by the Government as a code of behaviour regulating their dealings with its tenants. However, it would seem to us that, other than in the cases previously referred to, it would in principle be desirable that the Act be expressed so as to bind the Crown.

Where the Government decides that these recommendations should be implemented by an application to the Courts, we recommend the consideration of a simplified procedure for obtaining relief by originating summons where the matter falls within the jurisdiction of the Supreme Court and by summons in chambers where the matter is within the jurisdiction of a Local Court.

There are a large number of other amendments which could be made to the substantive law of landlord and tenant: for example the rules controlling interesse termini, covenants in posse and in esse, the procedure for termination of tenancy, options to purchase, succession and extensions of tenancy, tenancy and estoppel and the law of waste both legal and equitable, all of which raise interesting questions in relation to the law of landlord and tenant and should at some stage be the subject of consideration, but which appear to us to be outside the terms of reference assigned by your predecessor to us in respect to this particular report. We only mention them here to say that our researches have uncovered a considerable amount of material in relation to them and that at some other time it may be thought proper to consider them in more detail if you so desire. All of these however relate to amendments of the substantive law rather than to the sort of terms which ought to go into or be implied in an agreement between landlord and tenant.

We have the honour to be

HOWARD ZELLING

S. J. JACOBS

D. W. BOLLEN

B. R. COX

JOHN KEELER

Law Reform Committee of South Australia

Dated the 17th day of November, 1975.

Law School

25th December, 1975

SEPARATE REPORT OF Mr. J. F. KEELER.

To:

The Honourable P. J. Duncan, M.P.,
Attorney-General for South Australia.

Sir,

The Committee has recommended the enactment of legislation which would have the effect of implying covenants with respect to the repair and habitability of residential premises that have been let; it has moreover recommended that it should not be possible for these covenants to be excluded from a lease. The Committee has also discussed various remedies which may be made available to tenants whose landlords are in breach of these covenants.

I am very conscious of the warning given in the main Report that if the remedies given to a tenant are too draconian landlords may withdraw premises from the letting market, and that in present circumstances this would be most undesirable. On the other hand the point of recommending that tenants be given statutory rights that they do not at present possess would be greatly reduced if adequate remedies are not available to the tenant for their enforcement. With these points in mind, it is clearly desirable that there should be a cheap and speedy remedy open to the tenant which has some prospect of ensuring that the covenants are complied with, rather than leaving the tenant merely with the power to repudiate the tenancy. Most of the remedies canvassed in the main Report are of a judicial character. For a variety of reasons judicial remedies have proved relatively ineffective in the field of landlord and tenant law. They have perhaps been too expensive; on occasions the tenant may well have been ignorant of his rights; and there have been cases where tenants have not wished to take the risk of the landlord terminating or not renewing the lease. The first two of these problems are common to all areas of law where it is sought to protect the consumer; in the field of consumer actions in commercial areas it has been sought to answer them by establishing the Credit Tribunal, amending the Local and District Criminal Courts Act, 1926-74, by providing for a small claims jurisdiction and perhaps most importantly by the publicity given to the investigation process of the Prices and Consumer Affairs Branch.

This experience indicates two possible kinds of remedy that may be made available to tenants: the creation of new tribunals or jurisdictions within existing courts on the one hand or the conferring of powers on an administrative body. The former alone is unlikely to meet the problems set out in the previous paragraph, and this suggests very strongly that the intervention of administrative agencies is desirable. The Housing Trust is a well known agency in South Australia—indeed it is already consulted by tenants who would have rights under the proposed legislation though they have none now—and to extend its powers so that it can intervene in these cases would go further towards solving the problems of expense, speed and publicity than any other

available remedy. This course of action might also in at least some cases reduce the risks of damaging the relations between landlord and tenant that resort to an adversary system as the sole available remedy necessarily involves.

I believe, therefore, that if the rights that the Committee has recommended for tenants are to be at all effective the Housing Trust should be given extra powers, so that it may intervene in such cases. The conferring of such extra powers is, however, by no means free from difficulty. My recommendation is confined to those cases in which it is the implied warranty of repair or habitability that has been broken; in cases in which it is the covenant for quiet enjoyment or some other obligation of the landlord, or any implied covenant by the tenant, that has been broken the matter is less appropriate for the Housing Trust to administer and should be left to existing remedies. The reason for this restriction is that work of this sort is a natural extension of that already performed by the Trust with respect to Part VII of the Housing Improvement Act, 1940-1973, and the Regulations made under it with respect to the criteria to be used in assessing whether premises are substandard; to confer a more general jurisdiction on the Trust would take it beyond its present fields of endeavour and would probably require its reconstitution as a Residential Tenancies Board, perhaps with an associated Tribunal. Nevertheless, it may seem unfair that one part only of the whole relationship of landlord and tenant should be regulated in this way; but since the landlord will normally be seeking the termination of the tenancy with or without damages and in cases in which the tenant is complaining of a breach of the warranty for quiet enjoyment (even if the warranty is extended as the Committee has recommended) he too is likely to have been ousted or will be seeking the termination of the agreement, again with or without damages, the present remedies in the courts would seem to be much more appropriate to cover these situations than those concerning an implied covenant of habitability of the kind that the Committee has recommended.

Other difficulties which arise from allowing intervention by the Housing Trust would be the nature of the sanctions that they might impose (as the Committee has pointed out) and whether such intervention would be appropriate in all cases, especially those in which there has been a professionally drawn lease of, perhaps, luxurious premises. Although the Housing Trust has experienced difficulties in acting together with local authorities to authorise or to repair premises themselves, and it would be attractive to extend its powers under Part III of the Housing Improvement Act I do not recommend that, in the case of residential premises which, though out of repair, do not qualify as substandard the Trust should itself have the power to repair and to claim the cost afterwards. The imposition of rent control, subject to the other protections afforded to a tenant by Part VII of the Act, might perhaps be of more effect to move the landlord of premises which are essentially sound to action than the landlord who would have to find a great deal of money to bring his premises into repair. I believe, too, that there is little to be said for excluding any residential tenancies from the procedures outlined above. The covenants are basic, and the Committee has recommended that it should not be competent to exclude them.

It should not be thought that this recommendation will offer any final solution to the problem of the enforcement of the rights of tenants. Administrative intervention on behalf of tenants has generally been more successful than allowing for recourse to the courts, but it too has its disadvantages and has not been as successful as has been hoped. In the long term the whole range of problems generated by the landlord-tenant relation may only be solved against a wider perspective than that allowed for by this reference to the Committee.

Yours faithfully,

JOHN KEELER

6th November, 1975.