SOUTH AUSTRALIA

SIXTY-SIXTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW OF DISTRESS

1983

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

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

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The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

SIXTY-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW OF DISTRESS

To:

The Honourable K. T. Griffin, M.L.C.
Attorney-General for South Australia.

Sir,

In the Fifty-Fourth Report of this Committee relating to the Inherited Imperial statute law, we referred to four statutes on the topic of the law of distress: the Statute De Districtione Scaccarii (1266) 51 Hen. III Stat. 4 regulating distress for Crown debts, the Statute de Marleberge (1267) 52 Hen. III cc. 1-29, chapters 1-4 and 15 of which relate to distress, the Statute of Westminster I (1275) 3 Edw. I cc. 1-51 of which chapters 16 and 17 relate to distress and the Statute 11 Geo. II c.19 (1737), the Landlord and Tenant Act 1737 dealing with that topic. In the Sixty-First Report of our Committee we dealt with the Statute 2 Will. III & Mary Session 1 c.5 (1690) dealing with pound breach following a distress and giving double damages and costs in case of wrongful distrainer.

The common law as to distress is set out by Coke in his commentary on chapters 4 and 15 of the Statute of Marleberge (2 Co. Inst. (1642) 106-7 and 131-3). It is not necessary to set it out in full here as we have set out the effect of the common law as developed by later cases further on in this paper. Coke treats chapter 16 of the Statute of Westminster I as being merely confirmatory of chapter 4 of the Statute of Marleberge (2 Co. Inst. 191). Chapter 17, as Coke points out, arose out of the troubles that Henry III had with his barons (op. cit. page 193). Sections 1, 2 and 10 of the Act of George II are re-enacted as parts of Sections 38 and 32 respectively of our Landlord and Tenant Act 1936. Sections 1 and 2 of the Act of William III and Mary are contained in Sections 27, 30, 31 and 32 of our Landlord and Tenant Act. Section 3 of the Act of William and Mary is contained in Section 43 of our Impounding Act 1920. Unfortunately neither of these South Australian Acts specifically repeal the sections taken from the older Imperial Acts.

The reservation of services on the transfer of an estate of freehold was abolished by the Statute Quia Emptores (1290) 18 Edw. I c.1. That statute did not apply to leasehold estates in land and accordingly the common law, and the various statutes amending the common law, still permit services to issue out of the land in the case of leasehold estates for which, except where the law has otherwise provided, distress is a remedy for non-render of the services. As *Holdsworth* points out *"An Historical Introduction to the Land Law" (1927) page 239,* rent was regarded as a species of property and never as a mere chose in action. Accordingly rent could not be reserved out of an incorporeal thing and had to be attached to visible land because otherwise it would be difficult to exercise the remedy of distraint: see *British Mutoscope and Biograph Co. v. Homer [1901] 1 Ch. 671 at 675.* Farwell J. in that case gave a very learned judgment on distress at pages 674-676. However, provided the rent services were reserved out of a corporeal hereditament, then, except for certain exceptions both by common law and statute with which we will deal, distress was available as a remedy for non-render. The law has been amended by statute in South Australia, as far as enforcement is concerned, by Section 66 of the Law of Property Act, 1936 which permits apportioned rents to be recovered in the same way as if they were entire rents and

by Section 138 of the Real Property Act, 1886, which gives power to a mortgagee to distrain on a tenant or occupier for arrears under his mortgage not exceeding the amount of rent due by the tenant or occupier at the time of levying the distress.

The general rule as to distress is stated in *Hill & Redman: Law of Landlord and Tenant (13th Edition 1960) page 360* as follows:—

> "Under the common law a landlord can prima facie seize and distrain for rent in arrear all goods and chattels found on the premises out of which the rent issues; the goods and chattels may be the property of the tenant, or of a stranger, the landlord being entitled to have recourse to all chattels actually on his tenant's premises without reference to their ownership. The rule, however, applies only to goods and personal chattels, but not to chattels of an incorporeal nature and incorporeal hereditaments, . . . [which] are incapable of physical possession and seizure, although the actual goods the subject of these rights those goods may be taken."

Unless otherwise provided for by statute or by agreement between the parties, the person distraining for rent under a demise must possess the reversion to which the rent is incidental at the time when the distress is made.

Where chattels are let with houses or land at one entire rent, the payment issues out of the land and is rent and may be distrained for: see *Selby v. Greaves (1868) L.R. 3 C.P. 594 at 602* and *Marshall v. Schofield [1882] 52 L.J. Q.B. 58.*

At common law growing corn could not be distrained but the law was altered by Sections 8 and 9 of the Distress for Rent Act 1737 to which we have already referred. Similarly sheaves of corn were not distrainable at common law but became distrainable by the Distress for Rent Act 1689 to which also we have referred.

The following things were absolutely privileged from distress:

1. The property of the Crown, whether in the Crown's possession or on premises demised to a subject: see *The Secretary of State for War v. Wynne [1905] 2 K.B. 845.* That right is reinforced in South Australia by Section 120 of the Law of Property Act 1936.
2. The property of ambassadors and other public ministers of foreign princes or states authorised and received as such in this country and all persons characterised as "diplomatic agents"—see the Diplomatic Privileges and Immunities Act 1967 Articles 30 and 31 of the Schedule. The same position applies in the case of a member of an organ of a declared international organisation—see the International Organizations (Privileges and Immunities) Act 1963-1966 First Schedule, and to consuls to a limited extent—see the Consular Privileges and Immunities Act 1972 Article 31 of the Schedule.
3. Goods in possession of the law, especially when seized by virtue of an execution, are immune from distress except at the hands of the Crown: see *Co. Litt. 47a.* Whether the Crown's distress only attaches if the distress put in by the subject has not been completely executed does not seem to be certain, but this would appear to be so from the judgment of Chitty J. in *Attorney-General v. Leonard [1888] 38 Ch.D. 622.*
4. Things delivered to a person exercising a public trade to be carried, wrought, worked up or managed in the way of his trade are privileged from distress for rent due from the person in

whose custody they are. For the insistence on the element of public trade see *Farrant v. Robson (1834) 3 L.J.C.P. 146.* This however does not apply to goods being made up for a person where the person does not have the right at any time to possession of the goods, as for example in the case of an unfinished ship being built for a plaintiff in a dry dock: see *Clarke v. Millwall Dock Co. [1886] 17 Q.B.D. 494.* It appears that goods sent to an auctioneer to be sold are not privileged where the auction takes place on the owner's premises: *Lyons v. Elliott [1876] 1 Q.B.D. 210.* As to goods deposited in another's warehouse by a factor see *Matthias v. Mesnard [1826] 2 Carrington & Payne 353; 172 E.R. 159.*

5. Fixtures, so long as they continue such are not distrainable, whether they are irremovable, or whether they are fixtures severable by a tenant: see *Crossley Brothers Ltd. v. Lee [1908] 1 K.B. 86,* or whether they are removable at the end of the tenancy: see *Provincial Bill Posting Company v. Low Moor Iron Company [1909] 2 K.B. 344.* We do not deal in this report with the question of what are fixtures, which is often a matter of considerable complexity. For a recent example in this State see the judgment of White J. in *R. v. Turner 95 L.S.J.S. 307.*

6. To avoid breaches of the peace, things in actual use are privileged whilst they are actually in use but once they cease to be in use the privilege ceases: see *Co. Litt. 47a.* In the case of a dog it must be shown to be under personal control and in the presence and sight of the controller to be exempt: see *Bunch v. Kennington [1841] 1 Q.B. 679.*

7. Wearing apparel, bedding and tools of trade are privileged up to a value of Twenty Dollars (see our Landlord and Tenant Act 1936 Section 45).

It is convenient here to refer to the statutory exemptions from distress in South Australia contained in Sections 43-46 of the Landlord and Tenant Act 1936 which read as follows:

"43. Cattle and Vehicles at livery, with all saddles, bridles, and other harness belonging or appertaining thereto are hereby exempted from distress for rent.

44. It shall not be lawful to distrain any sewing machine, typewriting machine, or mangle, the property of or under hire to any female person, whether belonging to the tenant or otherwise, for any rent claimed in respect of the premises or place in which such sewing machine, typewriting machine, or mangle may be: Provided that any such person shall not be entitled to have more than one sewing machine, one typewriting machine, and one mangle protected from distress under this section.

45. (1) Wearing apparel, tools and implements of trade, and household requisites to the total value of ten pounds shall be exempt from seizure under any distress for rent, and such goods are hereby protected from such seizure.

(2) The word 'value' as applied to goods in this section means value of such goods at a forced sale. The value of any article protected under the preceding section of this Act shall not be taken into account in computing the said sum of ten pounds.

46. (1) The two last preceding Sections shall not extend to any case where the lease, term, or interest of the tenant has

expired, and where possession of the premises in respect of which the rent is claimed has been demanded in writing, and where the distress is made not earlier than seven days after such demand.

(2) The said sections shall be taken as providing for and supplementing exemptions, and not limiting any exemption already existing."

8. There are miscellaneous common law privileges: *(a)* things of a perishable nature or such as cannot be restored again in the same state and condition are exempt from distress; *(b)* money in a bag or chest may be distrained but not loose money; *(c)* animals ferae naturae in which there is no right of property are exempt from distress: *Co. Litt. 47a.* However where deer were in a park they were considered to be so tame and reclaimed from their wild state as to be no longer ferae naturae: see *Morgan v. Earl of Abergavenny [1849] 8 C.B. 768.*

9. Certain things are conditionally privileged from distress: agisted animals, growing crops seized in execution, instruments of trade and beasts of the plough. The exception as to agisted cattle occurs in the definition of "goods" in Section 13 of our Landlord and Tenant Act, 1936.

10. A landlord cannot distrain on the goods of a third person brought on the demised premises by the landlord himself or with his consent and he may waive by conduct his right to distress on a stranger's goods.

11. By the Residential Tenancies Act, 1978 of this State, Section 41, no person shall levy or make distress for rent payable under a residential tenancy agreement and "residential tenancy agreement" is defined by Section 5 as meaning "any agreement, whether express or implied, under which any person for valuable consideration grants to any other person a right to occupy, whether exclusively or otherwise, any residential premises for the purpose of residence". This follows on a previous exemption in the Excessive Rents Act, 1962 and before that in National Security Regulations dating from World War II.

Distress for rent is completely abolished in Victoria by Section 12 of the Victorian Landlord and Tenant Act 1958, as from the 13th day of August, 1948. Similarly distress for rent was completely abolished in Western Australia by the Act No. 38 of 1936; in New South Wales by the Landlord and Tenant Amendment (Distress Abolition) Act No. 49 of 1930 and in Queensland by Section 103 and Sixth Schedule of the Property Law Act 1974-1978.

12. By Section 119 of the Licensing Act, 1967 no *bona fide* property of any traveller, guest or inmate of any premises in respect of which a full publican's or limited publican's licence has been granted under that Act, or of any person who has entrusted any such traveller, guest or inmate therewith and being in or on the said premises or any part thereof or in or on any place used or occupied therewith, shall be liable to be distrained or seized for or in respect of the rent of the said premises or place.

13. By Section 43 of the Hire Purchase Act, 1960 goods comprised in a hire purchase agreement are exempt from distress for rent. That statute has been repealed but the privilege would be carried forward by Section 16 (1) (iii) of the Acts Interpretation Act, 1915. The real problem is raised by Section 24 of the Consumer

Transactions Act 1972 Section 24 which abolishes contracts of hire purchase and provides that the property passes to the consumer on delivery of the goods to him. As the definition of "consumer" means a person other than a body corporate entering into a consumer contract for certain purposes, or entering as a mortgagor into a consumer mortgage, it is possible that the 1960 exception, even though repealed, may still conceivably take effect in the case of some corporate transactions.

14. Distress in relation to bills of sale is dealt with by Sections 30 and 31 of the Bills of Sale Act which read:—

> "30. A bill of sale shall not protect the personal chattels therein comprised against any distress for any rates or taxes payable by the owner or occupier of any land under any Act of Parliament.
>
> 31. No distress for any rent made and levied upon any personal chattels comprised in any duly registered bill of sale shall be available except for four weeks' rent where the tenement is let by the week; for two terms of payment (but not exceeding three months) where the tenement is let for any other term less than six months; or for twelve months' rent where the tenement is let for any longer term, unless the landlord shall pay off the sum of money owing on such bill of sale."

Certain statutory rights of distress also exist in this State. What follows is not an exhaustive list but simply some illustrations:—examples are Sections 29 and 41 of the Dog Fence Act, 1946-1975, the Irrigation Act, 1930-1975, Section 80 j, the Local Goverment Act, 1934-1981, section 261, the Sewerage Act, 1929-1977, section 92 and the Waterworks Act, 1932-1978, sections 92 (3) and 95.

However the current tendency is against having rights of distress inserted in Acts for the recovery of rates, taxes and similar imposts. The right of recovery by distress which was previously in the Land Tax Act, 1936-1975, section 60, was repealed by Act No. 79 of 1972, section 14 and the rights of distress given by the Vermin Act, 1931, sections 35 and 194 and by the Wild Dogs Act, 1931, section 5, were not carried forward when those Acts were repealed by the Vertebrate Pests Act, 1975.

Further, distress is used as a method of execution under the Justices Act, Division VI of Part IV, to enforce payment of fines and sums adjudged by any order of a court of summary jurisdiction to be paid. Section 87 prescribes certain exceptions to what can be taken under a warrant of distress. It may be that unless the provisions of Section 300-300h of the Criminal Law Consolidation Act, 1935 are to be treated as an exclusive code for the recovery of moneys in the criminal jurisdiction of the Supreme Court, which is unlikely as the sanctions all include imprisonment which is impossible in the case of a corporation, that it is still possible as at common law for a Judge to order distress as a sanction for a corporation failing to pay on a fine, bond or recognizance.

We think that notwithstanding our general recommendations in this matter, distress as a means of enforcing a fine, bond or recognizance given to the Crown, may need to be preserved as it is not always easy to devise any other way of compelling a corporation to pay moneys due to the Crown on a fine, bond or recognizance.

Subject to that observation, it is our opinion that distress ought to be abolished altogether as has already been done in New South Wales, Western Australia, Victoria and Queensland. It is anachronistic at the

present day. Self help is not well regarded today. It presses hardest on the so-called "submerged tenth" of the population who are least able to fight a distress or get an injunction to stop its oppressive use. It gives a landlord a priority which is out of touch with present day thinking. The right of distress given to a mortgagee by the Real Property Act is also not in consonance with present day thought. Accordingly, except for the Justices Act and possibly the Criminal Law Consolidation Act, we think that the rights of distress given by statute should, as in the case of the Land Tax Act and Vertebrate Pests Act referred to above, be taken away by a general statute. In the case of the Justices' Act, if distress is to be retained, the exemptions should be amended to reflect present day values of money and goods.

We have not in this report dealt with the archaic law relating to distress damage feasant as we think this is better subsumed under the reform of the law relating to animals.

We have the honour to be

HOWARD ZELLING
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Law Reform Committee of South Australia.

20th October, 1982.

D J WOOLMAN, GOVERNMENT PRINTER, SOUTH AUSTRALIA