PROPERTY LAW AND EQUITY REFORM COMMITTEE

WELLINGTON NEW ZEALAND

INTERIM REPORT ON LEGISLATION RELATING TO LANDLORD AND TENANT

Report of the Property Law
and Equity Reform Committee

Presented to the
Minister of Justice
November 1983

INTERIM REPORT ON LEGISLATION

RELATING TO LANDLORD AND TENANT

To: The Hon. J.K. McLay
Minister of Justice

1. You have asked us to consider the existing legislation relating to landlord and tenant, with a view to its consolidation as a single Landlord and Tenant Act, or in some other appropriate manner.

2. More recently, on 23rd December 1982 you invited us to expand this enquiry into a review of the substantive law relating to residential tenancies, with recommendations for reform. At this point, we have proceeded sufficiently far in our original enquiries that we think it will be helpful to present an interim report. This report will deal with technical matters relating to ancient legislation and the framework of the proposed new legislation. Although some reforms of existing law will be proposed, any significant recommendations for change in the law of landlord and tenant will be deferred until we have had the opportunity to gather ideas and consult more widely among representatives of those who may be affected. We believe that the present paper may be of some assistance in providing the legal background to this enquiry.

A. OBJECTIVES OF INTERIM REPORT

3. The purpose of the present report is

   (a) to draw together the law now found in a number of different statutes;

   (b) to explore ways of removing obsolete legislation, and excising those parts which are no longer appropriate in modern law;

   (c) to express the general legal rules in a clear modern form;

   (d) to establish the basic structure for a Landlord and Tenant Act.

B. SCOPE OF A POSSIBLE CONSOLIDATION

4. We accept the premise that the law relating to landlord and tenant should be in a form readily available to those affected. We would like to see the following provisions incorporated into a single act:

(1) General terms and covenants in leases and tenancies (now found mainly in the Property Law Act 1952);

(2) Special terms and covenants in leases and tenancies of residential properties (now found in the Property Law Act 1952 and the Rent Appeal Act 1973);

(3) Various provisions relating to waste, forfeiture and relief against forfeiture, distress, and other miscellaneous matters.

5. There are a number of provisions which can relate to leases, but which are predominantly the concern of the statutes in which they are now found, in particular

(i) Provisions which apply not only to leases, but to dispositions of land generally, e.g., Property Law Act 1952, s.33A (restrictions on the grounds of race, and other discriminatory restrictions, are void); s.49A (need for writing when creating interests in land); Local Government Act 1974, Part XX (control of subdivisions); Land Settlement Promotion and Land Acquisition Act 1952 (control of acquisition of land);

(ii) Provisions for registration of leases in Part VII of the Land Transfer Act 1952;

(iii) Provisions about leases granted by the Crown and other public bodies: see Land Act 1948, Part V; Public Bodies Leases Act 1969; Local Government Act 1974, Part XIV.

We see no advantage in incorporating these provisions in a new Landlord and Tenant Act, and we consider that in the interests of simplicity and ease of access they should remain where they are. The new legislation would thus deal with the basic rights of landlord and tenant in the event of a dispute arising between them, but would not canvass all the grounds on which leases or particular provisions in them might be held to be invalid or inoperative.

C. OLD PROVISIONS REQUIRING RECONSIDERATION

6. A number of old English provisions, established as part of our law by virtue of their enactment prior to 1840, need either to be repealed or else incorporated in modern form in the new legislation.

(a) Attornment and Rights of Grantees of Reversionary Interests

7. Attornment was used when there was a change of landlord; in early times the legal position of the new lessor was incomplete if the tenant did not "attorn", that is, acknowledge that the new lessor was the person to whom obligations under the lease were owed. There is a modern analogy in the case of assignment of debts: the assignment

may not be complete in law where notice is not given to the debtor. The need for attornment was removed by early legislation, 4 Anne c.16, ss.9 and 10 (1705), and it is unclear what legal consequences, if any, would follow if that legislation is now repealed. We think a provision should be included in the new act, though similar modernising legislation in the Commonwealth is not uniform. The drafting problems are fully discussed in Appendix A. The rights of the tenant who pays rent to the old landlord without knowledge of the change in ownership will continue to be protected, and separate provision may need to be made in the Property Law Act 1952 for the assignment of rent-charges.

8. A further problem can arise where a tenant "attorns" to one who is not the true landlord, without the landlord's consent. Under the Distress for Rent Act 1737 (11 Geo 2 c.19 s.11), such an attornment is absolutely null and void, and does not affect the landlord's rights to possession. The provision was apparently designed to overcome difficulties not fully dealt with by the statute 4 Anne c.16; it seems that a tenant could put the new landlord to considerable trouble under the procedural rules of the time, by fraudulently "attorning tenant" to a stranger. In the Committee's view the safer course now seems to be to follow the general outline of the two statutes, and for reasons further set out in Appendix A, the Committee recommends their re-enactment in modern form, as has been done in both England and New South Wales.

9. Once it is established that there has been an effective transfer of the former lessor's interest in the land to a new lessor, the mutual rights and obligations of the new lessor and the lessee are governed by the Property Law Act 1952, sections 112 and 113. These provisons are based on legislation first enacted as the Grantees of Reversions Act 1540, 32 Hen 8 c.34. That act is still in force in New Zealand; although in the case of leases it has been superseded by the Property Law Act provisions, it seems that it may still apply in the case of incorporeal hereditaments, notably easements and profits granted for a term of years: see e.g., Lord Hastings v. North Eastern Railway Co [1898] 2 Ch 674, on appeal [1898] 1 Ch 565 (CA), [1900] AC 260 (HL). There are, it seems, indications that in this respect the provisions in the Property Law Act are not as wide as those in the act of 1540: Hutchison v. Ripeka Te Peehi [1919] NZLR 313. We would recommend that while the Property Law Act provisons be incorporated in the new landlord and tenant legislation, the 1540 Act either be preserved or that an updated version, applicable to incorporeal hereditaments, be added to the Property Law Act.

(b) Tenant Holding Over

10. Holding over occurs when a tenant remains in occupation after the termination of the lease. The Landlord and Tenant Act 1730 (4 Geo II c.28), s1, and the Landlord and Tenant Act 1737 (11 Geo II c.19) impose potential liability on the tenant for double the yearly value or rent if he wilfully holds over. Professor Burrows in his essay in Studies in Landlord and Tenant (1975) describes these provisions as "somewhat draconian by present day standards and virtually obsolete in practice". We agree, although we note that they have been retained in modern form in Victoria: Landlord and Tenant Act 1958, ss.9 and 10. They do not appear to us to meet any present day social need and should be repealed.

(c) Apportionment

11. The Distress for Rent Act 1737 (11 Geo II c.19), s.15, provides for the apportionment of rents where a life tenant leases property out and dies part-way through a rental period. The section has been superseded by the general provisions for apportionment in the Property Law Act 1952, ss.144-147, and can be repealed.

(d) Waste

12. Waste is damage to, or deterioration of, tenanted land. Under the old law, a tenant could be liable to the lessor for unreasonable actions ("voluntary waste") or failure to take proper steps ("permissive waste") which resulted in such damage or deterioration. This liability was based on the Statute of Marlborough 1267 (52 Hen III c.23). As the law developed, greater emphasis was placed on the covenants expressed in leases, or implied by various statutory provisions, and the accepted view is that the covenants for repair indicate the full extent of the tenant's liability for waste: Woodhouse v. Walker (1880) 5 QBD 404 (a case about a life tenant's covenant to repair).

13. In New Zealand, the law of waste no longer applies to residential premises: Property Law Act 1952, s.116C (as inserted by Property Law Amendment Act 1975, s.10). The residential tenant's obligations are set out in section 116D; they cover most acts which would have been voluntary waste under the old law.

14. In the case of non-residential tenancies:

(i) Tenancies created by Deed or Memorandum of Lease contain by implication the lessee's covenant to repair, set out in Property Law Act 1952, s.106(b), unless it is varied or excluded;

(ii) Tenancies which are not so created, but are based on a specifically enforceable agreement for a lease for a term of three years or more, will also contain that implied term, since specific performance must lead to the execution of a Memorandum to which s.106(b) will apply;

(iii) Tenancies created orally or by informal writing for a term of less than three years, stand in a different category since the Land Transfer Act 1952, s.115, permits the creation of a tenancy without a formal deed or memorandum;

(iv) In the rare case of land not under the Land Transfer Act, the period referred to in subparagraphs (ii) and (iii) is not three years but one year: Property Law Act 1952, s.10.

The old law of waste thus applies only where there is no express covenant and the implied covenant is excluded, or in the cases described in (iii).

15. The distinction between (i) and (ii) on the one hand, and (iii) on the other, is not a rational one, particularly since a Deed may now be made casually or inadvertently. The Property Law Act 1952, s.4, permits a deed to be made by an individual without formal sealing, and the question is always one of intention of the parties, a matter on which there can often be dispute. It would be clearer and more logical, if any distinction is to remain at all, to relate it to the term of the lease; we are inclined to the view that the covenant to repair should be implied in all non-residential leases and tenancies of three years' duration or longer. In the case of tenancies of a shorter duration than three years, there is at present an implied duty to keep the premises in a tenant-like manner, i.e. clean and tidy: Warren v. Kean [1954] 1 QB 15. We think this could be put into statutory form.

16. Whether or not the law is amended in this way, there still needs to be a general provision dealing with voluntary waste, to take the place of the old provision in the Statute of Marlborough. We recommend the adoption, with suitable amendments, of the New South Wales provision in the Imperial Laws Application Act 1969 (NSW). Section 32 states:

> 32. (1) A tenant for life or lives or a leasehold tenant shall not commit voluntary waste.
>
> (2) Nothing in subsection one of this section applies to any estate or tenancy without impeachment of waste, or affects any licence or other right to commit waste.
>
> (3) In subsection one of this section "leasehold tenant" includes a tenant for a term, a tenant under a periodical tenancy, a tenant under a tenancy to which section one hundred and twenty-seven of the Conveyancing Act, 1919, as amended by subsequent Acts, applies, and a tenant at will.

(4) A tenant who infringes subsection one of this section is liable in damages to his remainderman or reversioner but this section imposes no criminal liability.

(5) This section does not affect the operation of any event which may determine a tenancy at will.

17. We are aware that a small businessman or agricultural tenant will not be greatly informed by this formulation of his liability for damage he causes to the land. Nor does it incorporate the concept of "equitable waste" which can apply where the tenancy is granted expressly "without impeachment for waste". To attempt a complete code of obligations could, however, be difficult, given the wide variety of tenancies such a code would have to cover. In the case of equitable waste, there are in particular a number of unresolved issues associated with a lessee's right to cut timber, which would need detailed exploration before any code would be complete. We therefore see the establishment of a code as being beyond the ambit of the present report. The recommended provision would at least reduce the old legislation to modern form, and draw the attention of those who read the statute to the need to make further legal investigations into the possible liabilities of the tenant.

18. We note that the above legislation applies both to tenancies for a term of years, and life tenancies. The law applicable to a life tenancy may not be appropriate in a Landlord and Tenant Act, and it seems preferable to confine the provision for waste included in that act to tenancies for a term of years. There is already a provision in the Property Law Act 1952, s.29, dealing with one aspect of the law of waste as it applies to life tenants. We suggest that a general statement of the life tenant's duty not to commit waste be inserted at that point in the Property Law Act, in similar terms to the provisions proposed for tenancies for a term of years.

(e) Use and Occupation

19. Where a tenant is in breach of his tenancy agreement, it is sometimes convenient to sue him, not for rent, but in an action for use and occupation of the land. This obviates questions about whether the tenancy has come to an end, which could well arise if the terms of the lease are uncertain. The measures of liability, too, can be different.

At common law an action for use and occupation was barred if there was an actual demise of the land. Section 14 of the Distress for Rent Act 1737 (11 Geo II c.19) changed the law so that this was so only if the lease is by Deed:

> 14. And to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, ... it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed;

> And if in evidence on the trial of such action any parol, demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered.

20. This has been replaced in New South Wales by s.31 of the Imperial Acts Application Act 1969:

> 31. (1) Where the agreement between the landlord and tenant is not by deed, the landlord may recover a reasonable satisfaction for the lands held or occupied by the defendant in an action of assumsit for use and occupation. And if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not be non-suited but may make use thereof as evidence of the quantum of the damages to be recovered.
>
> (2) Nothing in subsection one of this section affects actions of debt for use and occupation.

and replaced in Victoria by s.8 of the Landlord and Tenant Act 1958 -

> 8. Where the agreement between the landlord and tenant is not by deed, the landlord may recover a reasonable satisfaction for the lands tenements or hereditaments held or occupied by the defendant in an action for the use and occupation of what was so held or enjoyed. And if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not be nonsuited but may make use thereof on an evidence of the quantum of the damages to be recovered.

21. We prefer the second reformulation of the old legislation, the reference to assumpsit being inappropriate in New Zealand. The provision would still need to be adapted to our own land transfer provisions, and it would be logical in the case of land transfer land, to exclude only registered leases where the term is for three years or more. Where a lesser period is involved it would seem appropriate to permit the more flexible methods of quantifying compensation which were associated with the action of assumpsit in earlier law.

(f) Agricultural Leases

(i) Death of Landlord affecting tenant's rights

22. Where a landlord who is a life tenant, grants a lease of agricultural property and dies during the lease, there is the risk that the tenant will be evicted before his annual crops come to harvest. Under the earliest law, the tenant was permitted to harvest the crop (the right to "emblements").

English legislation in 1851 extended the tenant's lease to the end of the current year: Landlord and Tenant Act 1851, s.1. This legislation was adopted in New Zealand (English Laws Act 1908, s.3 and 2nd Schedule). Our impression is that such tenancies would now be unusual in New Zealand and this legislation could be repealed without adverse consequences. Life tenancies would normally arise only in the context of wills and family trusts, and the trustee has power to lease the property beyond the term of the life tenancy: Trustee Act 1956, s.14(1)(e). Nowadays, a legal life tenant has the same power: ibid, s.88. This seems a preferable way of dealing with the problem.

(ii) Farm Tenant's right to remove agricultural fixtures

23. Section 3 of the same English act, also adopted in New Zealand, gives an agricultural tenant the right to remove buildings and other fixtures erected with the landlord's consent, upon giving the landlord one month's notice. The landlord has the right to purchase the fixtures in lieu of removal. These are in our opinion useful provisions and should be redrafted, substantially in their present form, for inclusion in the legislation.

(g) Action for rent against a tenant for life

24. The Landlord and Tenant Act 1709 (8 Anne c.18), s.4, was designed to cure a deficiency in the common law, in that a life tenant who was obliged to pay rent, could not be proceeded against in debt for arrears; the person seeking the rent had to pursue other remedies. We recommend retention of this provision by inclusion of a section in the Property Law Act 1952, after the model of the modern form adopted in Victoria's Landlord and Tenant Act 1958, s.7:

> 7. Where any person has any rent in arrear or due upon any lease or demise for life or lives he may bring an action for such arrears of rent in the same manner as he might have done in case such rent were due and reserved upon a lease for years.

D. RE-ENTRY, FORFEITURE AND RELIEF

25. The present law on this topic is a curious patchwork of old legislation, new legislation, and decisions based on the court's inherent jurisdiction to give relief against forfeiture. The principal features are:

(i) The power of re-entry and termination of the lease, implied in deeds and memoranda of lease by section 107(c) of the Property Law Act 1952. This applies to all breaches of convenant, including non-payment of rent for a period of one month or more.

(ii) The right of recovery of land in the District Court, where there is no express power of re-entry and rent has been in arrears for periods ranging from 10 days (weekly tenancy) to 42 days (term exceeding one quarter): District Courts Act 1947, s.32(1). This provision does not apply to leases for a longer term than three years.

(iii) The right to recovery of the land in the District Court where the tenant is in arrears for two months in payment of rent and deserts the premises so no sufficient distress can be had: District Courts Act, s.32(2).

(iv) The old statutory power of recovery of possession where (1) half a year's rent is in arrears; (2) there is a power of re-entry in the lease; (3) no sufficient distress is to be found on the premises: Landlord and Tenant Act 1730 (4 Geo 11, c.28) s.2.

(v) The tenant's right to forestall recovery under the District Courts Act or the 1730 Act, by paying the arrears of rent and costs in full before execution of the warrant: District Courts Act, s.32(3); Landlord and Tenant Act, s.4.

(vi) The tenant's right to apply to the court for relief against forfeiture for breach of any covenant, other than the covenant to pay rent, conferred by Property Law Act 1952, ss.117-119. If the tenant is bankrupt, the provisions apply also to forfeiture for failure to pay rent: ss.118(7), as amended by the Property Law Amendment Act 1967.

(vii) In all other cases where there has been a re-entry for forfeiture for non-payment of rent, the tenant's right to apply for relief in the court's inherent equitable jurisdiction: see Daalman v. Oosterdijk [1973] 1 NZLR 717; Hinde, McMorland & Sim, 2 Land Law, para. 5.157. A six month time limit applies, partly under the Landlord and Tenant Act 1730, s.2, and partly by analogy.

(viii) In cases where re-entry of forfeiture is not for non-payment of rent, provision for service of the appropriate notice on the tenant is made by section 118(1) of the Property Law Act 1952.

26. There is a clear need for some coherent and rational system. We recommend that the new Landlord and Tenant Act make the following provisions:

(i) The lessor should have a general power of re-entry, or recovery of the property by court proceedings,

(a) for non-payment of rent, without formal demand, but only after the periods (now) specified in the District Courts Act (we think that the periods could be streamlined with only a ten day period for weekly tenancies, and a standard period - e.g. 21 days - for all tenancies of longer duration);

(b) for breach of any other condition or covenant, upon giving the notice (now) specified in section 118 of the Property Law Act.

(ii) The lessee should have the power to seek relief (without any specific time limit) in terms of section 118 of the Property Law Act, in respect of forfeitures for any reason, including non-payment of rent. In the latter case, the tenant's automatic right to relief before execution or re-entry (see para.23(v)) should be retained, subject possibly to the court's discretion to refuse relief where there is evidence that it has been abused (e.g. by persistent late payment over a period of time).

The old English legislation and section 32 of the District Courts Act should be repealed.

These recommendations relate to the exercise by the lessor of a power of re-entry or recovery of possession where the lessee is in breach of his obligation under the lease. We are aware that an examination of the general question of the period of notice required in relation to notices to quit where the lessee is not in default is desirable and we will be considering this in the course of our review of the substantive law relating to residential tenancies.

E. DISTRESS

27. Under the law of distress, when a tenant is in arrears of rent, the landlord may enter the premises, seize any property of the tenant he finds there, and sell it to recover the rent. The rules of distress have very deep roots in English law; Appendix B is a schedule of the various English statutory provisions which were presumably inherited in New Zealand in 1840. There are also a number of common law rules which are not to be found in any statute. The old law of distress has never been repealed, but further restrictions and procedures are laid down in our Distress and Replevin Act 1908. In respect of residential properties, however, the landlord's right to distress has been taken away by the Property Law Amendment Act 1975.

28. We approach this topic with the suspicion that, in an enlightened jurisdiction, the law of distress would be abolished completely, and we note that this has already happened in some Australian states. Even in the case of commercial tenancies, the remedy seems much too peremptory, when compared with the procedures which must be followed by ordinary creditors; and we are not convinced that a landlord is entitled to some superior status as a creditor of the tenant. In practice, it can lead to enormous legal complications when there is a dispute between the debentureholder, liquidator and landlord of an insolvent company (see In Re New Vogue Ltd, Hope Gibbons Ltd v. Collins [1932] NZLR 1633) without, if that case is anything to go by, any ultimate advantage to the landlord. However, a consideration of the general merits of the law of distress is beyond our terms of reference; our purpose is merely to state the existing law and heads under which it might be consolidated, though we will suggest some minor changes.

29. We think that, if the law of distress is to remain part of the law of New Zealand, there should be a complete consolidation and codification, comprising

    (i) a general statement of the landlord's right to distrain, incorporating the power to levy distress implied in leases by the Property Law Act 1952, s.107(b), and the limitations imposed in New Zealand by the Distress and Replevin Act;

    (ii) a re-enactment in modern form of the various provisons, set out in Appendix B, which are still of importance in the law of distress;

    (iii) a statement of the procedural rules for levying distress now set out in the Distress and Replevin Act;

    (iv) a codification of the common law exemptions from distress, incorporating the statutory exemptions established by the Distress and Replevin Act.

    We set out a full list of section headings in Appendix C, which is our analysis of a proposed new Landlord and Tenant Act. In this part of our report, we refer only to those aspects of distress where reform or codification is necessary.

30. We think that the various penal provisions in the old law, requiring those guilty of pound breach to pay treble damages (Distress Act 1689, 2 Wm. Mary c.5, s.3), and those guilty of wrongful distress to pay double damages (ibid, s.4), are too severe to be included in a modern restatement of the law. The problem is adequately dealt with by the law of exemplary damages, and these provisions should be repealed. This is in line with the recommendation in para. 10.

31. The following exemptions from distress were recognised at common law, without statutory provision:

(i) The property of the Crown. We are not clear how far the Crown is prepared to be bound by the proposed landlord and tenant legislation; some express exemption may be required here;

(ii) The property of ambassadors, and other diplomatic agents. This is now covered by the Diplomatic Privileges and Immunities Act 1957, and requires no separate provision here;

(iii) Goods in the possession of the law. There is now a specific provision in the District Courts Act 1947, s.95, for the landlord to have a preferential claim where rent is in arrears and goods on which distress might have been levied are taken in execution. There is a much older, and more general provision, preventing the sheriff from removing the goods until arrears of rent are paid. These provisions should be drawn together, making it clear that the landlord has priority in all cases.

(iv) Things belonging to third parties and delivered to a person exercising a public trade. This exemption was rendered obsolete in New Zealand by the much more general provisions of the Distress and Replevin Act 1908, s.3, which provides that only property belonging to the tenant or person in possession of the premises can be taken in distress (except for agisted stock).

(v) Fixtures. These are not distrainable since they are part of the realty, even though they might be severed and removed by the tenant. The general statement of principle should be drafted so as to exclude fixtures.

(vi) Things in actual use are privileged from distress, but become amenable to distress once use ceases. This limitation (based on the need to avoid breaches of the peace) could be codified and incorporated in the procedural provisions relating to distress.

(vii) Perishables, loose money, and animals ferae naturalae were privileged from distress at common law, presumably because they were considered unsuitable for this procedure. By comparison, money stored in a bag or chest, and wild animals which are tamed or kept in captivity, are not so privileged. There seems no reason to depart from these traditional privileges, even though they can lead to arbitrary distinctions; we would recommend codification.

(viii) Conditional privilege was accorded agisted animals, growing crops seized in execution, instruments of trade and beasts of the plough: see Statutes of Exchequer (temp uncert). This meant that other assets would be seized first, and conditionally privileged assets would not be taken until the others were exhausted. It seems difficult to justify such and order of priority nowadays, and we would not recommend its retention. Where an asset is liable to distress and also to some other form of security or execution by a third party, the normal operation of the doctrine of "marshalling" might lead to a similar result, but we see no need to codify that doctrine.

See generally 66th Report of the Law Reform Committee of South Australia, Reform of the Law of Distress for a more detailed analysis of these exemptions.

32. We draw attention to the fact that distress is also available as a remedy for failure to satisfy a rent charge: Property Law Act 1952, s.150(2); Landlord and Tenant Act 1730 (4 Geo. II c.28) s.5 (the former provision being inapplicable to land under the Land Transfer Act). There seem to be purely historical reasons for this, although it does give the chargeholder a less drastic alternative remedy than exercise of his power of sale. There is also the possibility that the power of sale may be inappropriate to a particular relationship and deleted by contract, when distress is the only security the chargeholder has. If it is desired to retain this remedy, rent charges should not be included in an Act dealing with landlord and tenant; separate provision should be made by a suitable re-enactment of the substance of s.150(2) of the Property Law Act, to apply to land, whether held under the Land Transfer Act or not.

F. STRUCTURE OF LANDLORD AND TENANT ACT

33. In considering the structure of a legislation dealing with landlord and tenant, we have given thought to whether there should be a single act covering both residential and non-residential tenancies, or whether there should be a general act and then separate legislation dealing solely with residential tenancies. We think either option is viable, although we recognise that if there are two separate acts it will be necessary to duplicate a number of sections which are generally applicable to all leases. Our own inclination is towards a single act, including a separate part comprising all those sections which apply only to residential property. We have prepared our structure of a Landlord and Tenant Act on that assumption; if the alternative proposal is ultimately found preferable, the relevant sections can readily be identified and included in legislation applicable solely to residential tenancies. Our proposed structure is attached as Appendix C. It comprises four parts:

Part I: General Rights and Obligations of Landlord and Tenant

Part II: Residential Properties

Part III: Re-entry, Forfeiture and Relief

Part IV: Distress

G. CHANGES TO PROPERTY LAW ACT 1952

34. Some of the Committee's recommendations (paras 18, 24 and 32) if accepted will require the substitution or insertion of new sections in the Property Law Act 1952. These are summarised in Appendix D.

Chairman

Members of the Committee

Professor R. J. Sutton (Chairman)
Mr R.G.F. Barker
Mr A. J. Forbes
Mr W. B. Greig
Professor F. M. Brookfield
Mr J. H. Zohrab
Mr B. J. Blacktop
Miss J. M. Finnigan (Secretary)

APPENDIX A.

ATTORNMENT

(a) Attornment not necessary to transfer of reversion

This matter was dealt with some years ago, together with covenants running with the land, in a report of the Committee (undated) signed by Mr C.P. Hutchinson. The treatment was in some respects too brief and in any event, since the common law rules governing attornment operated quite separately from those governing covenants running with the land, attornment really requires to be separately considered. Accordingly it seem necessary to begin afresh with this obscure and difficult matter. As described by Sweet in the third (1911) edition of Challis on Real Property at 51 -

> "...if a reversion or remainder, or a rent-charge was conveyed by deed of grant to a stranger, it did not pass until the particular tenant attorned; if the grantor dies before attornment, the reversion, remainder, or rent charge descended to his heir (Co Litt 309a). No doubt attornment became in time a mere formality, and the necessity for it was abolished in Queen Anne's reign ..."

Reference to Co Litt 309a confirms the correctness of this statement and that at common law attornment was necessary not only if the reversion on a lease was conveyed, but generally on the conveyance of all reversions, remainders and rent-charges. The Statute of Anne (the Administration of Justice at 1705) 4 Anne c.16, ss.9 and 10 provided as follows:

> IX. And be it further enacted by the authority aforesaid, That from and after the said first day of Trinity term, all grants or conveyances thereafter to be made, by fine or otherwise, any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.
>
> X. Provided nevertheless, That no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee.

Clearly in accordance with Sweet's explanation this provision did away generally with the need for attornment. It is the more puzzling that the English and New South Wales provisions which substituted for the above provision have a more limited scope. Section 151 of the Law of Property Act 1925 (U.K.) which, in its original report, the Committee recommended as a model for the New Zealand reform, provided as follows:

> 151. Provision as to attornments by tenants
>
> (1) Where land is subject to a lease -
>
> (a) the conveyance of a reversion in the land expectant on the determination of the lease; or
>
> (b) the creation or conveyance of a rentcharge to issue or issuing out of the land;
>
> shall be valid without any attornment of the lessee:
>
> Nothing in this subsection -
>
> (i) affects the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to him by the person entitled thereunder; or
>
> (ii) renders the lessee liable for any breach of covenant to pay rent on account of his failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee.
>
> (2) An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor, if made without the consent of the lessor, shall be void.
>
> (This subsection does not apply to an attornment -
>
> (a) made pursuant to a judgment of a court of competent jurisdiction; or
>
> (b) to a mortgagee, by a lessee holding under a lease from the mortgagor where the right of redemption is barred; or
>
> (c) to any other person rightfully deriving title under the lessor.

Section 125 of the Conveyancing Act 1919 (NSW) provided as follows:

> 125. (1) Upon a conveyance of the reversion or remainder expectant or depending upon a lease of any land no attornment by the lessee under the lease shall be necessary.

(2) No lessee shall be prejudiced or damaged by payment of any rent to any grantor, transferror, or assignor of any reversion, or by breach thereby occasioned of any condition for non-payment of rent, before notice is given to him of such grant, transfer, or assignment by the grantee, transferee, or assignee.

(3) An attornment by a lessee of land to a stranger claiming title to the estate of the lessor shall be void unless the same is made with the consent of the lessor.

(4) Sections nine and ten of the Imperial Act Four Anne, chapter sixteen (or chapter three), and section eleven of the Imperial Act Eleven, George the Second, chapter nineteen, are hereby repealed so far as the same apply to New South Wales.

It is not easy to account for all the differences between the two sections. One thing is clear; neither substituted for the Statute of Anne in its full application to assignments of rent-charges. The NSW section does not apply to them at all (which is perhaps understandable since it is in a part of the Act dealing with leases): the English section does so only in obscure and limited terms "where there is a lease".

It is, however, necessary to consider first whether any provision, specifically declaring that attornment is unnecessary, is required. No doubt a transfer of a reversion remainder or rent-charge does on registration vest the interest in the transferee without attornment; and it may be that even outside the Land Transfer Act a conveyance does the same under ss.44 and 45 of the Property Law Act 1952 (see definition of "land" in s.2). Further, it may be that insofar as the provisions of the Statute of Anne go on to protect the tenant (leasehold or freehold) who, having no notice of the assignment, continues to pay rent to the assignor, this protection too may be unnecessary today. A Court would perhaps extend the equitable protection for mortgagors (see Nioia v. Bell (1901) 27 VLR 82) to tenants also.

However, there seem sufficient doubts in all this not to repeal the provisions in the Statute of Anne without substituting for them. But when substituting we should do so without too much concern for the somewhat puzzling terms of the English and New South Wales precedents. That is, the redrafting should be based directly on the ancient provisions and hence should provide to this effect:

(1) Upon assignment of a reversion or remainder or of a rent or rent-charge, attornment of the tenant (leasehold or freehold as the case may be) shall not be necessary.

(2) The tenant shall not be prejudiced by any payment of rent made to the assignor without notice of the assignment.

(b) Attornment without Consent of Lessor.

This is generally prohibited by another provision ripe for replacement, s.11 of the Distress for Rent Act 1737 (11 Geo.2 c.19) which provides as follows:

> XI. And whereas the possession of estates in lands, tenements, and hereditaments is rendered very precarious by the frequent and fradulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlord or landlords, lessor or lessors, who by that means are turned out of possession of their respective estates, and put to the difficulty and expence of recovering the possession thereof by actions or suits at law; for remedy thereof, be it enacted by the authority aforesaid, that from and after the said, twenty fourth day of June, in the year of our Lord one thousand seven hundred and thirty eight, all and every such attornment and attornments of any tenant or tenants of any messuages, lands, tenements, or hereditaments, within that part of Great Britain called England, dominion of Wales, or town of Berwick upon Tweed, shall be absolutely null and void to all intents and purposes whatsoever; and the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be any wise changed, altered, or affected by any such attornment or attornments: Provided always, that nothing herein contained shall extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited.

The present-day relevance of section 11 can only be understood in the light of the history of the law of limitations. Section 11 of the Distress for Rent Act 1737 refers to the fact that estates were rendered "precarious" by the fraudulent practice of tenants attorning to strangers "who by that means are turned out of possession of their respective estates, and put to the difficulty and expence of recovering possession by actions or suits at law". The difficulties referred to appear to be illustrated by the case of Hovenden v. Lord Annesley (1806) 2 Sch & Lef 608, 624-6; this was an Irish case dealing with an attornment to a stranger in the 17th century, before the passage of the Statute of Anne. The judge held that the rightful landlord would have been in difficulty if he had attempted to recover his land after the attornment had been made and the limitation period had expired.

The whole topic of the application of limitation periods to the landlord's interest in land was reconsidered by a reform commission in the 1830's, which resulted in the passage of the Act of 3 & 4 William IV, c.27 (1833), section 9; the previous law is discussed in Shelford, Real Property Statutes (4th ed, 1842) 161-162. The limitation period was by that statute made to run from the date the tenant first paid rent to the person wrongfully claiming to be landlord. Under the previous law, the right did

not accrue until the end of the lease, though the authors note that if a tenant "disavowed his landlord's title by attorning to another", and the landlord knew of it and acquiesced, this was adverse possession. This was still in accord with section 11 of the Distress for Rent Act 1737, which excluded from its operation attornments made with the landlord's privity and consent.

It would seem that after the Statute of William was passed, the stranger's possession of the land was irrelevant to any question of limitation to which the statute applied. As long as the lease ran, the only way in which the landlord could be affected was by payment of rent to another: see Chadwick v. Broadwood (1840) 3 Beav, 308, 316; 49 ER 121, 124; Lightood Time Limit on Actions (1909) 113. It would follow that in cases to which the new section applied, there would be no need for the provision of section 11 of the 1737 Act. Nevertheless, the 1833 Act did not apply in cases where there was only a peppercorn rental, or no rental at all; it seems that possession would still be relevant. Thus, there would still be a use for section 11 of the 1737 Act.

The modern New Zealand provision corresponding to section 9 of the Statute of William is section 12(3) of the Limitation Act 1950 (which does not apply to registered interests in land under the Land Transfer Act 1952 - see s.64 of the Land Transfer Act and s.6(2) of the Limitation Act). It is in very similar terms to the old section, but is inapplicable to the Crown. Assuming that the old law is followed, possession of the land would seem to be relevant in cases where section 12(3) does not apply, i.e., where the rental is less than $2, or where the Crown is landlord. If section 11 of the 1737 Act is now repealed, a possible consequence is that in such cases an attornment would set the time limitation period running, even though it occurred without the rightful landlord's knowledge and consent. It would therefore seem desirable to retain the section in modern form.

APPENDIX B

IMPERIAL ACTS - DISTRESS FOR RENT

	Imperial Act	Section	Subject	NZ	RECOMMENDATION
(1)	Statute of Marlborough (1267) 52 Hen 3	c1	Offence to levy Wrongful distress	Crimes Act 1961 (no specific offence) cf Animals Act 1963, s.63	Treat as obsolete
(2)	"	c3 (Rpld UK)	- duty to observe warrants of King's court - landlord not liable for under-lessees offence	-	Obsolete
(3)	"	c4	Distress not to be driven out of county	DRA s.13 (within 3 miles)	Obsolete
(4)	"	"	Distress to be reasonable	-	General statement
(5)	"	c15	No distress out of fee, or on highway or common street	-	General statement of principle (NB "hot pursuit" doctrine; and (18)
(6)	"	c21	Wrongful distress of beasts	-	Obsolete
(7)	Statute of Westminister 1 (1275), 3 Edw 1	c16	Punishment for driving distress out of county, distraining out of fee	See (3)	See (3)
(8)	Statutes of Exchequer (temp uncert)		Tenants right to feed impounded beasts	-	General Statement

Imperial Act	Section	Subject	NZ	RECOMMENDATION
(9) "		Qualified privilege from distress for sheep, beasts that gain the land	-	Repeal
(10) Impounding of Distress Act 1554 1 & 2 Phil & Mary c12	1	No driving more than 3 miles	DRA s13	Obsolete
(11) "	2	Fee for impounding	DRA 4th Schedule	Obsolete
(12) Impounding of Distress Act 1554 1 & 2 Phil & Mary c12	3	Deputies to make replevins	DRA s17	Obsolete
(13) Distress Act 1689, 2 Will & Mar, c5	1	Appraisal and sale of stock	DRA ss12, 18, 19	Obsolete
(14) "	2	Sheaves of corn, loose corn, straw, etc amenable to distress	-	General statement of principle (and see (26))
(15) "	3	Treble damage action for pound breach	-	Repeal
(16) "	4	Double value of action where no rents due and goods sold	-	Repeal
(17) 8 Anne c14, or c18 The Landlord and Tenant Act 1709	1	Execution creditor must pay rent before proceeds with execution	DCA s95 (District Court only)	Extend to High Court executions

Imperial Act	Section	Subject	NZ	RECOMMENDATION
(18) "	2,3	Tenant fraudulently removes goods; landlord may distrain where finds them	-	General statement of principle
(19) "	4,5	Distress for rent for leases for lives	-	General statement of principle
(20) "	6,7	Distraint where tenant holds over	-	General statement of principle
(21) 4 Geo 2 c28 (1730)	5	Distress for seck rents, rents of assize, chief rents	-	General statement of principle
(22) "	6	Renewals, and distress on under-lessees	-	General statement of principle (but not in distress part of legislation)
(23) Distress for Rent Act 1737, 11 Geo 2 c19	1-6	See (18)	-	Presumably applicable in NZ as it replaces (18); penalty provision (ss.3 & 4) obsolete
(24) Distress for Rent Act 1737, 11 Geo 2 c19	7	See (18) - right to breach dwellinghouse to distrain	-	Applicable in NZ as replaces (18) - retain
(25) "	8	Cattle or stock grazing on common appurtenant to premises	-	Applicable in NZ - retain

Imperial Act	Section	Subject	NZ	RECOMMENDATION
(26) "	8	Growing corn, grass etc	-	Statement of general principle
(27) "	9	Notice of where goods taken to	DRA s14	Obsolete
(28) "	10	Take distrained goods to convenient place	DRA ss12,13	Obsolete
(29) "	10	Lawful entry to buy	DRA s20	Obsolete
(30) "	11,12,13	Attornment of tenants void (repld UK)	-	Retain
(31) "	16,17	Deserting tenants - landlord put into possession	See (36)	See Report paras. 25, 26
(32) "	18	Double rent for holding over, and distraint therefor	-	Repeal
(33) "	19	Liability of landlord where mistake or irregularity in distress	DRA ss21,22	Obsolete
(34) "	21,22 (s22 Rpld UK)	Pleading general issue to action of trespass by tenant, and in answer to replevin action (set-off)	CCP RR 506,507	Obsolete
(35) "	23	Procedure for replevin	DRA ss15, 16,17	Obsolete

Imperial Act	Section	Subject	NZ	RECOMMENDATION
(36) Deserted Tenements Act 1817, 57 Geo 3 c52		See (31)	Repealed Resident Magistrates Act 1867, s2	See (31)
(37) Distress (costs) Act 1817, 57 Geo 3 c93		Costs on distress	DRA ss8-10,12	Obsolete
(38) Distress (costs) Act 1827, 7 & 8 Geo 4 c17		See (37)	-	Obsolete

DRA = Distress and Replevin Act 1908.
CCP = Code of Civil Procedure

APPENDIX C

The suggested scheme of the Landlord and Tenant statute is as follows:

1. Short title and commencement.

2. Interpretation.

PART I - General

	Substance	Enactments consolidated
3.	Rent implied covenant for payment	S.106(a) of the Property Law Act 1952
4.	Waste: Lessee for any term to be liable for voluntary waste (except for leases of dwelling-houses where Part II applies)	52 Henry III (Statute of Marlborough) c.23
5.	Repair Covenant to be implied in all leases for 3 years or more except for leases of dwellinghouses, that lessee is liable for repair, with fair wear and tear exception etc.	S.106(b) Property Law Act 1952
6.	Covenant in all leases for less than 3 years, except for leases of dwellinghouses, that Lessee is to keep premises in tenant-like manner	No existing statutory provision, but see Warren v. Keen [1954] 1 QB 15. Cf in regard to leases of dwelling-houses, s.116D of Property Law Act 1952
7.	Lessor's implied powers	
	(a) In all leases except leases of dwellinghouses power to enter to inspect etc	S.107(a) Property Law Act 1952
	(b) In all leases power of re-entry for non-payment if rent (when in arrears for 10 days in case of weekly tenancies; 21 days in others) or breach of covenant	S.107(b) Property Law Act 1952; S.32(1) District Courts Act 1947; S.2 Landlord and Tenant Act 1730 (4 Geo II, c.28)
8.	Effect of licence to assign	S.108 Property Law Act 1952.

9. No fine for licence to assign	S.109 Property Law Act 1952
10. Licence or consent not to be unreasonably withheld	S.110 Property Law Act 1952
11. Merger of reversion not to affect remedies	S.111 Property Law Act 1952
12. (a) Rent and benefit, and (b) Obligations of lessees covenants to run with reversion (or quasi reversion) in regard to (i) all leases and (ii) grants of easements and profits for terms of years	Ss.112 and 113 Property Law Act 1952. Grantees of Reversions 1540 (32 Hen VIII c.34)
13. Apportionment of conditions on severance etc	S.114 Property Law Act 1952
14. Restriction on effect of waiver	S.115 Property Law Act 1952
15. Executor not personally liable for covenants	S.116 Property Law Act 1952
16. Use and occupation: action barred only if lease by Deed (unregistered lease in case of land under Land Transfer Act 1952 if lease for 3 years or more)	S.14 Distress for Rent Act 1737 (11 Geo II c.19)
17. Tenant may remove buildings and fixtures erected by him, unless landlord elects to purchase	S.3 Landlord and Tenant Act 1851

PART II - Leases and Tenancies of Dwellinghouses

Ss.18 to (say) 60 consolidating (a) ss.104A to 104F, 107B and 116A to 116M of the Property Law Act 1952, and (b) provisions of Rent Appeal Act 1973.

PART III - Forfeiture and Relief

Substance	Enactments consolidated
61. Relief against forfeiture for non-payment of rent (a) generally as of right up to execution of judgment on payment of arrears and costs, and (b) at discretion of the Court after execution of the judgment or peaceable re-entry	Ss.2 and 4 Landlord and Tenant Act 1730 S.32(3) District Courts Act 1947 (Also present equitable jurisdiction)

62 to 65.	Relief against forfeiture for breach of covenant	Ss.117 to 119 Property Law Act 1952
66 to 67.	Relief against refusal to grant renewal etc	Ss.120 and 121 Property Law Act 1952

PART IV - Distress

	Substance	Enactments consolidated
68.	Implied power of distraint (unless excluded) when rent is in arrear under any lease of property other than a dwellinghouse to which Part II applies	Property Law Act 1952, s.107(c) (declaratory of common law); Distress and Replevin Act 1908, ss.2-3, 7; Distress for Rent Act 1737, s.7
69.	Distress to be reasonable	Statute of Marlborough 1267 (52 Hen III c.23) c.4
70.	No distress (except by Court officers) out of fee or in the street (subject to 75 below)	Statute of Marlborough 1267, c.15
71.	Growing crops, sheaves etc, to be distrainable (but without restrictions on removal inconsistent with s.13 of the Distress and Replevin Act 1908)	Distress Act 1689 (2 Wm and Mar c.5), s.2; Distress for Rent Act 1737 (11 Geo II, c.19), s.8
72.	Distress where tenant holds over may be made within 6 months of termination	Landlord and Tenant Act 1709 (8 Anne c.18), ss.6 and 7
73.	Distress against tenants may extend to chattels fraudulently removed to other premises; must be made within 30 days of removal and before chattels sold to bona fide purchaser	Distress for Rent Act 1737 (11 Geo II c.19), ss.1 and 2
74.	Cattle grazing on appurtenant land	Distress for Rent Act 1737, s.8
75.	Goods in possession of the Law	District Courts Act 1947, s.95; 8 Anne c.14 (1709) s.1
76.	Exempted and privileged goods	Distress and Replevin Act 1908 ss.5-6, and common law

77.	Distraint of things in use	Common law
78 to 84.	Procedure for distress	Distress and Replevin Act 1908 ss.8-14
85 to 87.	Replevin	Distress and Replevin Act 1908 ss.15-17
88 to 94.	General	Distress and Replevin Act 1908 ss.18-24

APPENDIX D

Suggested changes to Property Law Act 1952

Substance	Enactments Consolidated
New s.28: Life Tenants liability for waste (including equitable waste)	52 Henry III (Statute of Marlborough) c.23; also present s.28 Property Law Act 1952
New section: action for rent against life tenant	Landlord and Tenant Act 1709 (8 Anne c.18), s.4s.4
New section: rent charges power to levy distress	Landlord and Tenant Act 1730 (4 Geo II c.28), s.5 Property Law Act 1952, s.150(2)
New section: assignment of rent-charge without the need for attornment	Distress for Rent Act 1737, s.11