THE ACTIONS FOR DOUBLE RENT AND DOUBLE VALUE AGAINST OVERHOLDING TENANTS

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INTRODUCTION

The origin of the actions for double rent and double value can be traced back to two separate enactments of the British parliament in the early eighteenth century. Section 1 of the Landlord and Tenant Act 1730 (U.K.) (hereinafter referred to as the 1730 Act) gave the landlord the remedy of an action for double value against a tenant who wilfully held over after the determination of his lease:

> "In case any tenant or tenants for any term for life, lives, or years, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession hereof by his or their landlords or lessors or the person or persons to whom the remainder of reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorised, then and in such case, such person or persons so holding over shall, for and during the time he, she, and they shall so hold over or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his Majesty's courts of record by action *of debt,* . . .".

Section 18 of the Distress for Rent Act 1737 (U.K.) (hereinafter referred to as the 1737 Act) gave the landlord the remedy of an action for double rent in the converse situation where the tenant gives a valid notice to quit but does not deliver possession at the time mentioned in the notice:

> ". . . in case any tenant or tenants shall give notice of his, her, or their intention to quite the premises by him, her, or them holden,

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> at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforeard pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid."

These ancient Statutes were later incorporated into the Australian States by virtue of the reception of imperial laws legislation.[1] It would appear that the actions are still available in all Australian States except New South Wales, where they have been abolished by section 8(1) of the Imperial Acts Application Act 1969.[2] In Queensland, Victoria and Tasmania, State legislation in modern times has replaced the necessity for reliance on the British legislation.[3] This State legislation has modernized the language of the U.K. legislation but has adhered to the substance of its provisions. For example, sections 138 and 139 of the Property Law Act 1974-1975 (Qld.) read:

> "Where any tenant for years, including a tenant from year to year or other person who is or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after—
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> (a) determination of the lease or term: and
> (b) after demand made and notice in writing has been given for the delivery of possession thereof by the lessor or landlord or the person to whom the remainder or reversion of such land belongs to his agent thereunto lawfully authorized—
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> then the person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession of such land, be liable to the person so kept out of possession at the rate of double the yearly value of the land so detained for so long as the

1 Australian Courts Act 1828 (U.K.), s.24; Constitution Act 1867 (Qld.), s.33; Acts Interpretation Act 1918-1936 (S.A.), s.48; Imperial Laws Application Act 1922 (Vic.); Interpretation Act 1918 (W.A.), s.43.

2 Section 8(1) reads: "In addition to the repeals effected by sub-section two of section five of this Act all other Imperial enactments (commencing with the Statute of Merton, 20 Henry III A.D. 1235-6) in force in England at the time of the passing of the Imperial Act 9 George IV Chapter 83 are so far as they are in force in New South Wales hereby repealed".

3 Property Law Act 1974-1975 (Qld.), ss. 138, 139; Landlord and Tenant Act 1958 (Vic.), ss. 9, 10; Landlord and Tenant Act 1935 (Tas.), ss. 9, 10.

> land shall have been so detained, to be recovered by action in any court of competent jurisdiction."
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> "Where a lessee who has given notice of his intention to quit the land held by him at a time specified in such notice does not accordingly deliver up possession at the time so specified, then he shall thereafter be liable to the lessor for double the rent or sum which would have been payable to the lessor before such notice was given. Such lessee shall continue to be liable for such double rent or sum during the time he continues in possession as aforesaid, to be recovered by action in any court of competent jurisdiction."

In South Australia and Western Australia no specific State legislation covering this matter exists, and reliance is still placed on the U.K. legislation.

In view of the lengthy history of these remedies and their potential usefulness to landlords, there are surprisingly few reported cases in Australia concerning these actions. Despite the observation of Stephen C.J. in 1866 in *Glasson* v. *Egan*[4] that in New South Wales the action for double rent had been acted upon in a great number of cases during the previous thirty years,[5] there are only two cases on this action reported since 1900. However, the application of these long-forgotten statutes has recently come into prominence by virtue of the recent decision of the Supreme Court of Ontario in *Yonge-Rosedale Developments Ltd.* v. *Levitt*,[6] the first case in this area anywhere in the common law world since 1959.[7] This case involved an application by a landlord of business premises for the double value penalty pursuant to a provision in the Ontario Landlord and Tenant Act which substantially re-enacted the 1737 Act. Having determined that the tenants tacitly recognized the validity of the landlord's notice to quit, but at the same time did not bargain in good faith with the landlord for a renewal of the lease nor took any steps towards giving up possession, Keith J. imposed the double value penalty, holding that the value of the land is to be determined by a subjective test, according to the special circumstances of the particular landlord.[8]

The major significance of the case lies not in the judicial reasoning or the decision, but in the fact that the case will bring the existence of this ancient law to the attention of legal practitioners and may well lead to its increased use as a sanction against tenants. In this light, it is instructive to examine the operation of the actions for double rent and double

4 (1866) 6 S.C.R. (N.S.W.) 85.
5 Id. at 87.
6 (1978) 82 D.L.R. (3d.) 263.
7 French v. Elliott [1959] 3 All E.R. 866 (Paull J.).
8 (1978) 82 D.L.R. (3d.) 263, 270.

value to determine whether they should be continued in their present form, whether and to what extent they should be modified by legislation, or whether they should be repealed.

A CRITIQUE OF THE PRESENT LAW

The deficiencies in the present practice and procedure relating to the recovery of possession from defaulting or overholding tenants are the major justification for the continued existence of the double rent and double value penalties. Each of the present alternatives available to a landlord who seeks to enforce his right of possession is unsatisfactory. A Supreme Court writ of possession is the most effective procedure, but the possession order sought scarcely justifies the legal costs to the parties or the burden imposed on the Supreme Court in dealing with this type of action. On the other hand, the existing landlord and tenant summons procedure in the Magistrates' Court takes a minimum of ten weeks and as much as four months from the date of first default in the enforcement of eviction.

The Commission of Enquiry into Poverty analysed the factors contributing to this delay.[9] A landlord or his agent does not take action to terminate a tenancy on the day on which default is made as a period of grace, usually at least two weeks, is invariably granted. Assuming that the owner or his agent takes immediate action after this period, fourteen days is the practical minimum time for the service of a notice to quit. Again assuming that there is no delay after the expiry of the notice to quit in issuing a summons to apply to the court for the issue of a warrant of possession, a further fourteen days is the minimum within which the summons could be heard by the court. If an order is made and the warrant is issued forthwith, a further period of four weeks will elapse before the police, in normal practice, will execute the warrant. These time delays may often be greater as a considerably longer period than two weeks normally elapses from the time when the landlord institutes legal proceedings. Normally it is closer to four weeks than two weeks from the time when the landlord decides to issue a summons to the hearing by the court. This would be considered a more normal time to allow for the landlord and his agent to instruct the landlord's solicitor to prepare and issue a Summons, for its service, and for any delay in the bearing by the court. Even further delays may eventuate where the tenant either deliberately avoids service or where neither the tenant nor any other person is available on the premises.

[9] A. J. Bradbrook, *Poverty and the Residential Landlord-Tenant Law,* (1975), 70-72; R. Sackville, *Law and Poverty in Australia* (1975), 83-84.

The only State which has attempted to remedy these delays is South Australia, and then only in the case of residential tenancies. Pursuant to the Residential Tenancies Act 1978 (S.A.), section 73(l), where a landlord gives a notice of termination to a tenant and the tenant fails to deliver possession on the day specified, the landlord may apply within thirty days to the Residential Tenancies Tribunal for an order for possession. Except in the case of hardship,[10] where the Tribunal makes an order for possession the order must operate not more than seven days after the making of the order.[11] Elsewhere in Australia, the present system is clearly disadvantageous to landlords.

While considerable delays in obtaining possession continue to exist, a strong argument can be made that some form of deterrent, such as the double rent or double value penalties, must exist in order to deter unscrupulous tenants from exploiting the situation.

Conversely, however, a number of serious criticisms can be made against the actions for double rent and double value based on the details of the existing laws. First, despite the observations of Lord Mansfield C.J. that "the two laws [Landlord and Tenant Act 1730 and Distress for Rent Act 1737] are only parts of the same provisions",[12] and of Blackstone J. that "The statutes [Landlord and Tenant Act 1730 and Distress for Rent Act 1737] being in *pari materia* ought to have the same construction",[13] a number of illogical and unnecessary distinctions exist in the scope and operation of the present laws. While the double rent penalty applies universally regardless of the nature of the tenancy, the double value penalty appears not to extend to periodic tenancies other than yearly periodic tenancies.[14] While it may be true to argue that there is no real justification for extending the double value penalty to short periodic tenancies as they are generally of less valuable premises and can be readily determined,[15] the same arguments could be applied to the double rent penalty. Similarly inexplicable is the fact that although a landlord must give his tenant written notice before he can

10 Residential Tenancies Act 1978 (S.A.), s.73(3).

11 Id. at s.73(5).

12 Timmins v. Rowlison (1765) 1 Wm. Bl. 533; 96 E.R. 309, 309.

13 Cutting v. Derby (1776) 2 Wm. Bl. 1075, 1077; 96 E.R. 633, 634.

14 The action for double value does not lie against a weekly tenant: Lloyd v. Rosbee (1810) 2 Camp. 453; 170 E.R. 1216; Sullivan v. Bishop (1826), 2 Car. & P. 359; 172 E.R. 162. Quaere whether a quarterly tenant is liable under this action: Wilkinson v. Hall (1837) 3 Bing. N.C. 508; 132 E.R. 506. The action definitely applies to tenancies from year to year: Ryal v. Rich (1808) 10 East 48; 103 E.R. 693.

15 See Queensland Law Reform Commission, *Report on the Law Relating to Relief from Forfeiture of an Option to Renew and Certain Aspects of the Law Relating to Landlord and Tenant* (Q.L.R.C. 1: 1970) 10.

sue for the double value penalty,[16] in the case of the double rent penalty the notice given by the tenant can be either written or oral.[17] Again, the requirement in the 1730 Act that the tenant hold over "wilfully" before being liable for the double value penalty does not appear in the 1737 Act. A further illogicality is that at common law the double rent penalty, but not the double value penalty can be enforced by distress.[18] While conceptually this latter distinction can be justified as the double value penalty is in the nature of unliquidated damages rather than rent, the distinction makes no sense on policy grounds. As the two penalties cover the same area of tenant default, it is submitted that if they are to continue in existence they should be similar in their scope and operation.

Secondly, problems exist in the calculation of the double value penalty. Although in the Queensland case of *Public Curator* v. *L. A. Wilkinson (Northern) Ltd.*[19] double yearly value was calculated by doubling single rent, it has been held before and since that case that "double yearly value and double rent are two entirely different things, and you cannot ordinarily estimate the former by doubling a single rent, for this might not afford an equivalent compensation."[20] Despite the assumption by some judges that the double value penalty is more favourable to landlords than the double rent penalty, this is not universally correct. The double value penalty must be calculated on the yearly value of the premises, and must not include the value of incidental advantages. Thus, in *Robinson* v. *Learoyd,*[21] where the landlord, the owner of a woollen mill and steam-engine, let to the tenant a room in the mill together with a supply of power from the steam-engine, it was held that the value of the power supplied could not be included in the calculation of the double value penalty. In addition, according to

16 W. Woodfall, *Law of Landlord and Tenant,* (27 ed.) by Blundell and Wellings, (1968) 989. See also French v. Elliott [1959] 3 All E.R. 866.

17 Johnstone v Hudlestone (1825) 4 B. & C. 922, 107 E.R. 1302; Timmins v. Rowlison (1765) 1 Wm. Bl. 533, 96 E.R. 309.

18 Humberstone v. Dubois (1842) 10 M. & W. 765, 152 E. R. 681; Timmins v. Rowlison (1765) 1 Wm. Bl. 533, 96 E.R. 309. The remedy of distress has been abolished in Victoria, New South Wales, Queensland and Western Australia: Landlord and Tenant Act 1958 (Vic.), s.12; Landlord and Tenant Amendment (Distress Abolition) Act 1930 (N.S.W.), s.2; Property Law Act 1974-1975 (Qld.), s.103; Distress for Rent Abolition Act 1936-1941 (W.A.), s.2. It has also been abolished in respect of residential tenancies only in South Australia: Residential Tenancies Act 1978 (S.A.), s.41. Distress is still legal in Tasmania, the Australian Capital Territory and South Australia (business premises only).

19 [1933] Q.W.N. 28.

20 Trivett v. Hurst [1937] Q.S.R. 265, 271 *per* Blair, C.J. See also *Doe d.* Matthews v. Jackson (1779) 1 Doug. K.B. 175, 99 E.R. 115.

21 (1840) 7 M. & W. 48, 151 E.R. 673.

Keith J. in *Yonge-Rosedale Developments Ltd.* v. *Levitt,* the value of the land means "the pecuniary value to the particular landlord having regard to his own special circumstances. In other words, the true test is subjective . . ."[22] In this case, despite evidence that the landlord could have let the premises at a rental of between $3,000 and $4,000 per month on a medium to long-term lease, this would have conflicted with the intention of the landlord to keep the tenancy subject to termination on short notice. Accordingly, the double value was assessed on the rental of $2,000, the value of the premises let on a short-term lease. Thus, the double value penalty causes uncertainty and confusion in its calculation, discourages the parties from settling the case out-of-court and leads to a significant increase in the length of trials.

Thirdly, in the case of the double value penalty, delays and difficulties arise over the legislative requirement that the tenant must hold over the land "wilfully" before being held liable. Macdonald, B. supplied the first interpretation of this word in 1805:

> "The title of the Act is to prevent frauds committed by tenants, but the Act could never be meant to apply to a case where no fraud was intended, and where the resistance to possession was under a fair claim of right. The true construction of the Act appears to be that where there is a clear contumacy in the tenant, he shall be within the penalty of the Act; for if there is any doubt, if he had any fair ground of defence and that defence was *bona fide* taken, it would be a hard construction to subject him to a penalty, for so it is called in the Act, for a fair assertion of his title."[23]

This interpretation has been affirmed in recent times by Paull, J. in *French* v. *Elliott:*

> "It has been held that 'wilfully' means 'contumaceously', but I can see no reason why the old English word 'wilfully' does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumaceous tenant. It deals only with the moment of time when the tenancy comes to an end. At that moment of time a tenant may say: 'I shall stay on. I think I have a right to do so.' His staying on is not wilful. On the other hand, a tenant may say: 'I will stay on, although I know I have no right to do so.' That is wilful, and well illustrates the now sometimes forgotten distinction between 'I shall' and the insistent 'I will'.[24]

Paull J. also squashed the alternative argument that the whole conduct of the tenant should be examined to determine whether the overholding was done "wilfully":

[22] (1978) 82 D.L.R. (3d.) 263, 270.
[23] Wright v. Smith (1805) 5 Esp. 203, 216; 17O E.R. 786, 790.
[24] [1959] 3 All E.R. 866, 874.

> "As I see it, the fact that the defendant was habitually late in paying his rent, or behaved badly while a tenant, has nothing to do with whether the plaintiffs are entitled to double value."[25]

However, despite its certainty of meaning, this requirement has in the past consistently protracted the length of the trial of the issue as a factual enquiry to determine the motives of the tenant is necessary to establish the tenant's liability under the 1730 Act. In addition, the usual problems of proof inherent in the proof of a subjective mental intention also exist here.

Fourthly, the application of the common law rules as to waiver in the context of the actions for double rent and double value produces unjust and arbitrary results.[26] The double value penalty under the statute is only payable "for and during the time" of overholding, and may be waived by the landlord by implication of law. Although a landlord who intends to sue for the double value penalty may well consider himself justified in accepting the normal rent proffered by the tenant, by this act the landlord may unwittingly destroy his cause of action.

There is a dispute between the authorities as to the effect of the acceptance by a landlord of the single rent. According to one line of authorities, acceptance of rent is not necessarily fatal to a later claim for double value. For example, according to Blair C.J. in *Trivett* v. *Hurst:*

> "If after [the double value penalty] has accrued [the landlord] accepts the single rent, it is a question of fact whether such rent has been received in part satisfaction of the claim to double value or as a waiver of it. What acts on either side amount to a waiver of a notice after its expiration is ordinarily a mixed question of law and fact, the intention with which the act was done being for the jury and its legal effects for the Court to decide."[27]

However, Woodfall and other authors have found cases to support the proposition that the acceptance of single rent, accrued due subsequently to the notice to quit, is always a waiver of the landlord's right to double value.[28] Proponents of this proposition regard the receipt of rent as inherently inconsistent with a claim for double value.

25 Id. 874.

26 See infra n. 43-48 for a discussion of the problems in landlord-tenant law caused by the doctrine of waiver outside the context of the actions for double rent and double value.

27 [1937] Q.S.R. 265, 273. Ellenborough, C.J. expressed the same view in Ryal v. Rich (1808) 10 East 48, 103 E.R. 693.

28 Woodfall, supra at n. 16, 993. See also D. L. Evans, *The Law of Landlord and Tenant* (1974) 219. Cases supporting this proposition are Doe d. Cheny v. Batten (1775) 1 Cowp. 243, 98 E.R., 1066; and Davenport v. The Queen [1877] 3 A.C. 115. See also the arguments of counsel for the respondent in Public Curator v. L. A. Wilkinson (Northern) Ltd. [1933] Q.W.N. 28.

Neither line of authorities makes any real sense from the standpoint of the landlord. It is submitted that the law should not penalize a landlord for accepting as rent money which is validly owing to him merely in order to preserve outmoded principles of common law. A further objection to the waiver principle is that arguments as to its possible application will again add to the length of the trial.

Finally, serious policy objections can be made against the double rent and double value penalties. As emphatically stated by the Law Reform Commission of British Columbia:

> "We consider the landlord's claim for double rent to be an archaic and inappropriate remedy. We have no quarrel with the proposition that the landlord should be entitled to full compensation for any losses which he may suffer when a tenant overholds; but to fix his compensation at 'double rent' is, at best, a crude attempt to do justice. To the extent that the double rent remedy acts as a penalty which will deter tenants from overholding, it seems inappropriate that it should go to the landlord. The modern tendency is that actions for penalties be pursued by public prosecutors and that proceeds go to the Crown."[29]

This "modern tendency" applies to Australia as well as Canada. A useful illustration is the Residential Tenancies Act 1978 (S.A.), which provides for maximum monetary penalties ranging from $50 to $500 for breaches of its various provisions by either a landlord or a tenant. Prosecutions under this Act are undertaken by the Commissioner for Consumer Affairs.[30] The obvious advantages of the fixed monetary penalties are that they apply consistently in all tenancies, relate more readily to the gravity of the offence, and avoid the necessity for calculating double value.

PROPOSALS FOR REFORM

Despite the increasing attention shown in recent years by the various State law reform instrumentalities to the need for landlord-tenant law reform, the actions for double value and double rent have received scant consideration. The Queensland Law Reform Commission analysed the case law on the subject and recommended the introduction of the provisions which now constitute sections 138 and 139 of the Property Law Act 1974-1975.[31] However, this proposal amounted to no

29 Law Reform Commission of British Columbia, *Report on Landlord and Tenant Relationships: Residential Tenancies* (Project No. 12, 1973), 321.

30 Residential Tenancies Act 1978 (S.A.), s.11(2).

31 Queensland Law Reform Commission, op. cit. supra n. 15, 9-11. See also Queensland Law Reform Commission, *A Report on A Bill to Consolidate, Amend, and Reform the Law relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* (Q.L.R.C. 16, 1973), 90-91.

more than a codification of the *status quo,* and the Commission failed to discuss any of the policy arguments relating to the issue. The recent reports on residential landlord-tenant law reform by the Law Reform Commission of Tasmania[32] and the South Australian Law Reform Committee[33] failed to mention the two actions. Although the latter could possibly justify this omission on the ground that its terms of reference were limited to a discussion of the possible contents of a standard form of tenancy agreement and it is at least arguable that the double value and double rent actions would fall outside the scope of this enquiry, no such excuse exists for the Tasmanian Law Reform Commission. In fact, there is no evidence to suggest that the Commission even recognized the existence of the actions.

It is time to rectify this lack of attention. It is submitted that the two actions would become unnecessary and could be repealed if only the existing inadequacies and injustices in the present laws relating to the recovery of possession discussed above could be rectified. Three aspects of these laws need re-examination: the legal procedure for recovery, the methods of service of notices, and the doctrine of waiver.

The Commission of Enquiry into Poverty recommended the introduction of a streamlined form of recovery of possession designed to expedite proceedings and to alleviate the present hardship caused to landlords by excessive delays.[34] This scheme envisages that only one document should be necessary to determine the tenancy and to enable the issue to be brought before the court if the tenant refuses to comply with the notice. This document would give formal notice to the tenant requiring vacant possession to be given to the landlord on a certain date, and would be equivalent to the present Notice to Quit. The Notice, which could be called the Notice for Possession, would also include a notice to the tenant that if he failed to vacate, the landlord would apply to the court for an Order of Possession. This document would take the place of the present Notice to Quit and Summons for Ejectment. It would save the duplication required by the present procedure and the time and expense involved in taking the separate steps. The tenant would have the alternatives of vacating or attending the court to give reasons why the court should grant relief against forfeiture.[35]

[32] Law Reform Commission of Tasmania, *Report and Recommendations on the Common Law and Statute Law in Tasmania Relating to Residential Landlord and Tenant Law* (No. 19, 1978).

[33] Law Reform Committee of South Australia, *Report Relating to Standard Terms in Tenancy Agreements* (35th Report, 1975).

[34] Bradbrook, supra at n. 9, 71; Sackville, supra at n. 9, 83-84.

[35] This recommendation was endorsed by the Landlord and Tenant Committee of the Law Institute of Victoria in its *Report to the Council of the Law Institute* (1976).

This proposal commended itself to the Law Reform Commission of Tasmania[36] and has already been adopted in modified form in South Australia in relation to residential tenancies.[37] If it were applicable to all rented premises in each State, the inducement for unscrupulous tenants to overhold would be much reduced and the necessity for landlords to retain the double rent and double value actions as a deterrent would be removed.

The present delays suffered by landlords could be reduced even further if the laws relating to the service of notices were amended to prevent tenants evading notice. In Western Australia, Tasmania and New South Wales,[38] the common law rules on service of notices still apply. While personal service is not strictly necessary at common law, the court has to be satisfied on the facts that the service has reached its intended recipient.[39] For example, it has been held that the mere leaving of a notice to quit at the tenant's home, without further proof of its being delivered to a servant and explained, is not sufficient.[40] Also, the delivery of the notice to the last known address of the tenant in cases where the tenant disappears has been held to be insufficient.[41] In short, under common law no litigant can feel certain that he has satisfied the legal requirements unless personal service is affected.

Recent legislation enacted in Queensland, South Australia and Victoria has endeavoured to solve this problem. The Residential Tenancies Act 1975 (Qld.), section 19, imposes the most comprehensive solution:

> (1) A notice to quit shall be sufficiently given if—
>
> (a) it is delivered personally to the tenant or, as the case requires, to the landlord or his agent;
>
> (b) it is delivered personally to some person apparently over the age of 18 years and apparently residing in or in occupation of the dwelling-house;

36 Law Reform Commission of Tasmania, supra at n. 32, para. 33.

37 Residential Tenancies Act 1978 (S.A.), ss.63, 73.

38 In New South Wales the common law has been modified in respect of prescribed premises. The Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.62(4) reads: "Service of the notice to quit may, without prejudice to any other mode of service, be effected—

(i) by delivering the notice to

(a) some person apparently over the age of sixteen years and apparently residing in or in occupation of the premises; or

(b) the person by whom the rent of the premises is customarily paid;

(ii) with the leave of the court, by affixing the same to the premises and by sending copies thereof by prepaid post addressed to the lessee at the premises and at his address to the lessor."

39 Hope v. Hope (1854) 4 De G.M. & G. 328, 342; 43 E.R. 534, 539.

40 Doe d. Buross v. Lucas (1804) 5 Esp. 153, 170 E.R. 769; Ex parte Smith, Re Robertson (1947) 48 S.R. (N.S.W.) 29.

41 Jones d. Griffiths v. March (1791) 4 Term Rep. 464, 100 E.R. 1121.

(c) it is delivered personally to the person by whom the rent is usually paid, if that person is apparently over the age of 18 years;
(d) it is affixed to a conspicuous place upon some part of the dwelling-house;
(e) it is sent by post to the tenant at the place of his residence or business last known to the landlord or his agent."

Under South Australian and Victorian legislation, any notice shall be deemed to have been duly given to a tenant if it is given either to any person apparently over the age of 16 years apparently residing in the rented premises, or to the person who ordinarily pays the rent under the agreement.[42]

It is submitted that the most effective method of curbing the problem of tenants evading notice would be for each State to introduce legislation similar to the Queensland Residential Tenancies Act, possibly substituting the age of 16 years instead of 18 years in section 19(1)(b).

The common law doctrine of implied waiver also aggravates the problem of landlords seeking recovery of possession and on occasion can cause injustice.[43] On learning of the occurrence of an event entitling him to re-enter, such as non-payment of rent, the landlord has a choice whether he will exercise his right of forfeiture.[44] At common law the forfeiture is said to be waived and cannot be revived once the landlord has chosen not to exercise it. The election by the landlord can be express or implied. Although there would seem to be no reason to question the existing law on express waiver, the law on implied waiver is still a major cause of concern to landlords in New South Wales, Western Australia and Tasmania. The common law, which still applies in this area of law in these States, provides that the landlord is deemed to waive a breach of covenant when, after he has learned of the breach, he demands, accepts, or sues for rent falling due after the breach. The landlord cannot

42 Residential Tenancies Act 1978 (S.A.), s.93(3); Landlord and Tenant (Amendment) Act 1971 (Vic.), s.3.

43 See *supra* n. 26-28 and accompanying text for a discussion of the application of the doctrine of waiver to the actions for double rent and double value. For a discussion of the operation of the doctrine of waiver in landlord-tenant law generally, see Brooking, R. and Chernov. A., *Tenancy Law and Practice—Victoria,* Butterworths, Sydney, 1972, 213-217; *Foa's General Law of Landlord and Tenant,* 8th ed. by Heathcote-Williams, H., Thames, 1957, 648-656; Megarry, R. E. and Wade, H. W. R., *The Law of Real Property,* 4th ed., Stevens, London, 1975, 657-659.

44 The landlord must have knowledge of the cause of forfeiture before the doctrine of waiver can come into operation. See Carson v. Wood (1884) 10 V.L.R. (L.) 223; Majala Pty. Ltd. v. Ellas [1949] V.L.R. 104; Campbell v. Payne (1953) 53 S.R. (N.S.W.) 537.

avoid a waiver by demanding the rent "without prejudice" to his right of forfeiture.[45]

The present law would seem to be unfair to both parties. It is unfair to the landlord because it effectively prevents him from accepting money owed by the tenant for the period of occupation after the breach has occurred, for fear of losing his right of forfeiture. Although at the hearing of the issue the court is empowered to order the tenant to pay occupation rent for the time after the lease terminated, the landlord has to suffer a considerable delay before he can receive the money, and in many cases by the time the case reaches trial the tenant will have vacated the premises without paying and without notifying the landlord of his whereabouts. The law also works to the detriment of the tenant in that, according to the Real Estate and Stock Institute of Victoria,[46] landlords are reluctant to grant extensions of time to pay the rent lest if they do, and the tenant still fails to pay, the right of forfeiture will be deemed to have been waived. In the light of the present law, the actions for double rent and double value might be argued to be justified as a necessary measure to compensate landlords for the hardship caused to them by the implied waiver doctrine. However, this possible justification would disappear if the implied waiver doctrine were abolished.

A useful method of remedying the inadequacies of the present law on implied waiver would be for each State to introduce legislation stating that the acceptance of rent after the giving of a notice to quit shall not invalidate any notice previously given. Strangely, this was acknowledged in the post-war legislation relating to prescribed premises in Victoria and New South Wales,[47] but the law has never been altered with respect to non-prescribed premises in New South Wales and has only recently been altered in Victoria by virtue of section 4 of the Landlord and Tenant (Amendment) Act 1971. This section reads:

> "Where notice to quit any premises has been given, whether before or after the commencement of this Act—
>
> (a) any demand by the lessor for payment of rent, or of any sum of money as rent, in respect of any period within six months after the giving of the notice;
>
> (b) the commencement of proceedings by the lessor to recover rent, or any sum of money as rent, in respect of any such period; or

45 Segal Securities Ltd. v. Thoseby [1963] 1 All E.R. 500; Oak Property Co. Ltd. v. Chapman [1947] 2 All E.R. 1.

46 Information supplied by Mr. M. Gray, ex-President of the Real Estate and Stock Institute of Victoria.

47 Landlord and Tenant Act 1958 (Vic.), s.103; Landlord and Tenant (Amendment) Act 1948-1969 (N.S.W.), s.80.

(c) the acceptance of rent, or of any sum of money as rent, by the lessor in respect of any such period—shall not of itself constitute evidence of a new tenancy or operate as a waiver of the notice."

Similar, although not identical, legislation has also been enacted in South Australia and Queensland.[48] The Queensland legislation goes further than its Victorian and South Australian counterparts, as it provides that: "The burden of proof that the notice to quit or demand of possession has been waived or the tenancy reinstated or a new tenancy created is upon the person so claiming." However, this provision would seem unnecessary as the same result would be reached under common law rules of evidence.

It should be a comparatively simple matter to secure the repeal of the actions for double rent and double value once all justifications for their continuance are removed. This reform would best be achieved by way of amendment to the existing State landlord-tenant legislation.[49] It is submitted that three separate sections would be required to effect this reform. First, it would be specifically enacted that section 1 of the Landlord and Tenant Act 1730 (U.K.) and section 18 of the Distress for Rent Act 1737 (U.K.), or their modern State legislative equivalents,[50] are repealed.[51] Secondly, the legislation would state that any agreement between the parties as to the payment of double rent or double value under any circumstances is void and of no effect. Finally, if it is thought necessary to preserve some form of deterrent against overholding tenants, it could be made an offence, subject to a maximum monetary penalty (say $500), for any tenant, regardless of the nature of his tenancy, to:

"(1) wilfully hold over any land after the determination of the lease, and after demand made and notice in writing has been given for the delivery of possession by the landlord; or

(2) wilfully hold over any land after the tenant has given notice of his intention to quit on a specified date and fails to deliver up possession on the date so specified."

48 Residential Tenancies Act 1978 (S.A.), s.68; Residential Tenancies Act 1975 (Qld.), s.10(3).

49 The legislation to be amended would be the Landlord and Tenant Act 1958 (Vic.); Landlord and Tenant (Amendment) Act 1948-1969 (N.S.W.); Residential Tenancies Act 1978 (S.A.); Landlord and Tenant Act 1935 (Tas.); Residential Tenancies Act 1975 (Qld.); Property Law Act 1969-1973 (W.A.); Landlord and Tenant Ordinance 1949-1976 (A.C.T.).

50 *Supra* n. 2.

51 This section would not be required in New South Wales as the actions for double rent and double value no longer apply in that State. See *supra* n. 2 and accompanying text.