Maryland Law Review

Volume 13 | Issue 3 Article 1

Distress

Allan W. Rhynhart

Maryland Law Review

VOLUME XIII SUMMER, 1953 NUMBER 3

DISTRESS†

By ALLAN W. RHYNHART*

Distress is an ancient feudal remedy designed to enforce services due the king or the lord of the manor.[1] He who was entitled to the services had the right to seize and hold the goods of the obligor until performance. By 2 W. & M. Chapter 5[2] authority was given landlords to sell goods distrained to obtain payment of rent due.[3] It is not an action but a remedy.[4] Liability to distraint arises because the property is on the leased premises when the rent becomes due and not as a result of its ownership so that the goods of a stranger are liable to distress with those of the tenant.[5] It is a remedy which is enforced against the land and the proceeding is conducted as though the land were the debtor.[6]

† Unless otherwise specified, all Code references in this Article are to Flack's 1951 Annotated Code of Maryland, and are hereinafter cited: "Code".

Citations to Alexander's British Statutes are to the Second Edition, published by Coe in 1912. The page references are to those of the second edition, and *not* to the star pages of the first edition. This compilation is hereinafter cited "Alexander".

Certain texts are frequently cited throughout this Article by the names of the authors only. The full title of each such text, and the edition thereof, together with the method of citation, is as follows:

LATROBE, JUSTICES' PRACTICE (8th ed., 1889), hereinafter cited "LATROBE".

OLDHAM & FOSTER, LAW OF DISTRESS (2nd ed., 1889, London), hereinafter cited "OLDHAM".

THOMAS, PROCEDURE IN JUSTICE CASES (2nd ed., 1917), hereinafter cited "THOMAS".

VENABLE, REAL PROPERTY (1892), hereinafter cited "VENABLE".

* Chief Judge, Peoples' Court of Baltimore City; LL.B., University of Maryland, 1920.

[1] Elkman v. Rovner, 129 N. J. L. 575, 30 A. 2d 516 (1943).

[2] 2 Alexander 774.

[3] Lamotte v. Wisner, 51 Md. 543 (1879); 2 TIFFANY, LANDLORD AND TENANT (1910), Sec. 325, p. 1986.

[4] Keller v. Weber, 27 Md. 660 (1867).

[5] THOMAS, Sec. 165.

[6] Howard v. Ramsay, 7 H. & J. 113, 123 (1826).

I. WHO MAY DISTRAIN

(a) General law. In *Giles v. Ebsworth*,[7] the Court of Appeals construed the Act of 1834, Chapter 192,[8] as denying a landlord the right to execute his own distress; so that distress may be executed only by a sheriff, constable or bailiff.

(b) Baltimore County. By an Act of 1929,[9] distraint for rent shall be made only by the sheriff or a constable of Baltimore County, and all warrants for such distraint shall be directed only to such persons.

(c) Baltimore City. Distress shall be made by a constable or sheriff,[10] and in making distress the constable acts as the landlord's bailiff and not as an officer of the law.[11]

(d) Agents. Either the landlord or his agent may make the necessary account and affidavit[12] and sign the warrant.[13] The authority of the agent need not appear, and the acts of an unauthorized agent may be ratified by the landlord.[14]

(e) Assignees. An assignee of a rent cannot distrain for arrears incurred previous to the assignment.[15]

(f) Co-owners. All joint owners or parceners of land must join in the proceedings, but any one may distrain if he does so in the names of all. Tenants in common may distrain severally, each for his own share of the rent, or one may with the consent of all distrain in the names of all. If a distress is an attempt to distrain by all who hold as landlord, and a mistake is made by leaving out the name of one entitled to a share of the rent and inserting the name of one not so entitled, the proceedings are fatally defective.[16]

(g) Executors and administrators. By 32 Henry 8, Chapter 37,[17] the personal representative of anyone seized of a rent in fee, tail or for life may have debt or distrain for

---

[7] 10 Md. 333, 345 (1856).
[8] Code, Art. 53, Sec. 9.
[9] Smith's Code (1948), P. L. L. of Baltimore County, Sec. 185.
[10] THOMAS, Sec. 171; Baltimore City Charter (Flack, 1949), Sec. 463.
[11] TIFFANY, *op. cit., supra*, n. 3, Sec. 336, p. 2052.
[12] Code, Art. 53, Sec. 9.
[13] VENABLE, 48-49.
[14] 1 Alexander 59; Jean v. Spurrier, 35 Md. 110 (1872).
[15] Brown v. Metropolitan, etc. Life Assur. Soc., 9 Eng. Rul. Cas. 610 (Q. B., 1859).
[16] Waring v. Slingluff, 63 Md. 53, 57 (1885).
[17] 1 Alexander 475.

arrears due in the life of the testator or intestate.[18] It is probable that the statute would be construed to apply to leases for years as well as to freehold rents.

(h) Minors. The rents of estates of minors not due at the death of such minor shall for the year in which such minor may die be paid to the guardian, who may maintain distress or suit to recover such rent.[19] If such guardian dies, the executor or administrator of the guardian may recover the same by distress or suit.[20]

(i) Mortgagees. If a mortgagor be given the right of possession, he is entitled to all rents so long as he is not in default[21] and the mortgagee necessarily has no right to distrain therefor.

(j) Termination of landlord's estate. A termor, after his term expires and demand of possession by his lessor, cannot distrain on his under tenant, continuing in possession.[22] Distress cannot be had for rent after the estate of the landlord is determined; as if a man seized of a rent in fee, grants over his estate, he cannot distrain for arrears due before his grant.[23]

II. What Rent May Be Distrained For

(a) Baltimore City. The remedy of distress for rent is available to the landlord only when the letting or lease is for a term of three months or more.[24]

(b) Counties having no restrictions on distress. The landlord has the remedy of distress for unpaid rent in arrear, regardless of the term of the lease, in the following counties: Allegany, Anne Arundel, Calvert, Caroline, Carroll, Charles, Dorchester, Frederick, Garrett, Howard, Montgomery, Prince George's, St. Mary's, Washington, Wicomico and Worcester.[25]

---

[18] Latrobe, Sec. 746.
[19] Code, Art. 53, Sec. 21.
[20] *Ibid*, Sec. 22.
[21] Chelton v. Green, 65 Md. 272, 277, 4 A. 271 (1886).
[22] Latrobe, Sec. 741.
[23] *Ibid*, Sec. 745.
[24] Baltimore City Charter (Flack, 1949), Sec. 455.
[25] Code, Art. 53, Sec. 27.

(c) Counties which have restrictions on distress. The landlord may distrain for unpaid rent in arrear, only when the lease or letting is for three months or more in the following counties: Baltimore, Cecil, Harford, Kent, Queen Anne's, Somerset and Talbot.[26]

(d) Nature and Amount of Rent. The powers conferred on the People's Court and justices in distraint are unaffected by the amount of rent and the jurisdictional limit does not apply.[27] Distress for rent will not lie unless there be an agreement for a sum certain.[28] The amount need not be ascertainable at the time of the lease, provided it can be reduced to a certainty at the time of payment.[28a] Distress may be for grain or other crops due as rent.[29] The taking of security for rent does not affect landlord's right to distrain.[30]

(e) Taxes. Where tenant covenants to pay as rent the taxes on demised premises, the landlord may distrain for taxes which tenant fails so to pay.[31]

(f) Part of rent. Landlord may distrain for balance of rent owing when tenant wrongfully deducts cost of repairs from a rent check.[32]

(g) When rent is payable in installments. When distress has been made for one installment of rent and before the proceedings are completed another installment becomes due, it is necessary that the landlord cause a second distress to be issued because the distress can be only for rent then due[33] and distress proceedings cannot be amended.[34]

(h) Second distress. A voluntary abandonment of a first distress by a landlord, which was not at the request of the tenant, bars a second distress for the same rent.[35]

Many leases in which there is a rent payable monthly provide that there shall be no distress until a certain time

[26] *Ibid;* Smith's Code (1948), P. L. L. of Baltimore County, Sec. 178.
[27] THOMAS, Sec. 166.
[28] LATROBE, Sec. 743; OLDHAM, p. 33; Dunk v. Hunter, 9 Eng. Rul. Cas. 601 (K. B., 1822).
[28a] 1 TIFFANY, LANDLORD AND TENANT (1910), Sec. 173(a), p. 1046; 2 *ibid*, Sec. 327(d), p. 1998.
[29] Code, Art. 53, Secs. 11-13.
[30] *Ibid*, Sec. 16.
[31] Irving Trust Co. v. Burke, 65 F. 2d 730 (4th Cir., 1933).
[32] Bonaparte v. Thayer, 95 Md. 548, 557, 52 A. 496 (1902).
[33] Dailey v. Grimes, 27 Md. 440 (1867); Bonaparte v. Thayer, *ibid.*
[34] Waring v. Slingluff, 63 Md. 53, 55 (1885).
[35] 3 A. & E. Ann. Cas. 821.

after default. When two installments of rent are unpaid, the first clearly subject to distraint, and the second overdue but in the period of contractual restriction against distraint, the question arises whether the landlord may distrain for both installments. There are two theories. The first follows literally the wording of the lease so that the landlord may distrain only for the portion of overdue rent which is distrainable under the lease. Under the second theory the problem is treated not as regards the distraint but as confined to the landlord's account. As the test of the account is "the amount actually due and in arrear"[36] and as the landlord's liability in an irregular distress does not arise unless the goods seized and sold are excessive with reference to the amount of the actual arrears,[37] the account of the landlord may be for the amount of rent in arrear, even though a part of the rent in arrear contractually is not subject to distress at the time the proceeding is filed. No case has been found to support either theory.

III. When Landlord May Distrain

No demand is necessary before distress.[38] A distress for rent cannot be made upon the day on which the rent is payable for it cannot be in arrear until after the last moment of the day.[39] Distress must be made between sunrise and sunset.[40] A landlord may distrain during the term, after the death of the tenant and before administration granted, for rent due and in arrear.[41]

By 8 Anne Chapter 14, Sections 6 and 7, a lessor may distrain within the space of six calendar months after the determination of a lease for years, provided it be during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears become due or someone claiming under him.[42] Such distress

[36] Gambrell v. Earl of Falmouth, 4 Ad. & E. 73, 111 Eng. Repr. 715 (K. B., 1835-6).
[37] Oldham, p. 171.
[38] Venable, 46; Offutt v. Trail, 4 H. & J. 20 (1815).
[39] Latrobe, Sec. 745.
[40] 1 Alexander 60-61; Latrobe, Sec. 744; 15 Eng. Rul. Cas. 315.
[41] Keller v. Weber, 27 Md. 660 (1867).
[42] 2 Alexander 923; Venable, 46; Latrobe, Sec. 747.

can be only when the lease determines by lapse of time and probably after expiration of the lease by operation of a notice to quit — but not after surrender by the tenant,[43] or enforcement of forfeiture by landlord for breach of covenant. Distress must be made on the premises and during the possession of the tenant.[44] If a note be taken for the rent distress cannot be made until after the note is due.[45] The remedy of distress is within the 3-year statute of limitations.[46]

IV. PROPERTY SUBJECT TO DISTRESS

Distress must be made on the land out of which the rent issued.[47] Generally, all movable goods and chattels of the lessee may be distrained for rent due.[48] The landlord may distrain on any goods on the property, whether those of the tenant or another, excepting only those goods exempted by law,[49] as liability of goods to distress arises from the fact that they are on the premises and not from ownership. The goods of a stranger are liable equally with those of a tenant.[50] A landlord may distrain on goods of a tenant who has assigned for the benefit of creditors, as the trustee-assignee is not a bona fide purchaser for value.[51] Goods of a married woman may be distrained for rent due by her husband.[52] Goods which belong to a boarder but which are in general use in the house are not exempt from distress.[53]

V. PROPERTY NOT SUBJECT TO DISTRESS

Property in the possession of a court appointed receiver may not be distrained upon (being in custodia legis) with-

[43] Dailey v. Grimes, 27 Md. 440, 449 (1867); Calvert Bldg. & Const. Co. v. Winakur, 154 Md. 519, 532, 141 A. 355 (1928).
[44] Calvert Bldg. & Const. Co. v. Winakur, *ibid*, 533.
[45] Giles v. Ebsworth, 10 Md. 333, 344 (1856).
[46] Code, Art. 57, Sec. 1.
[47] 1 Alexander 60.
[48] LATROBE, Sec. 750.
[49] Giles v. Ebsworth, *supra*, n. 45, 345; Trieber v. Knabe, 12 Md. 491 (1859); Kennedy v. Lange, 50 Md. 91 (1878); Emig v. Cunningham, 62 Md. 458 (1884); Swartz v. G. B. S. Brewing Co., 109 Md. 393, 71 A. 854 (1909); Mears v. Perine, 156 Md. 56, 143 A. 591 (1928).
[50] See Annotation, Distraint on Goods of Stranger, 62 A. L. R. 1106.
[51] Burnett v. Bealmear, 79 Md. 36, 28 A. 898 (1894).
[52] Emig v. Cunningham, *supra*, n. 49.
[53] Leitch v. Owings, 34 Md. 262 (1871).

out permission of the court which appointed the receiver. However, the mere appointment of a receiver does not place the goods in custodia legis, as they must be in the hands of or in possession of the receiver,[54] who has qualified as such.[55]

By analogy, it appears that such permission to distrain must be obtained when a trustee has been appointed by a court to sell mortgaged chattels on the premises. Goods in custodia legis, as when tenant applied for the benefit of the insolvent law, are exempt from distress,[56] although rental limited to three months immediately prior to the proceeding is entitled to priority of payment out of distrainable goods.[57] Goods which have been levied on under a writ of fi. fa. may not be distrained upon for rent in arrear; although, in such case the execution creditor may not remove the goods from the premises unless the overdue rent, not exceeding one year's rent, is paid to the landlord.[58] When goods are levied upon under distress proceedings, the landlord may enforce his lien by distress sale even though a subsequent writ of attachment or execution is issued against the goods.

As regards a receiver or a trustee to sell under mortgage foreclosure proceedings, if the levy under the distress was completed before the receiver or trustee took possession,[59] then the landlord has the right to sell the distress, as the goods are in his possession under his levy, and consequently are not in custodia legis. Chattels of a stranger on demised premises are not distrainable when in the possession of a court appointed trustee to sell them in a foreclosure sale, they then being in custodia legis; and the landlord is not entitled to rent in arrears out of the proceeds of sale because the Statute of 8 Anne Chapter 14[59a] applies only when execution is against the tenant's goods.[60] In bankruptcy there is a different rule. If after levy in distress a bankruptcy

[54] Everett v. Neff, 28 Md. 176, 187 (1868).
[55] Prentiss Co. v. Whitman & Barnes Co., 88 Md. 240, 41 A. 49 (1898).
[56] Fox v. Merfeld, 81 Md. 80, 31 A. 583 (1895).
[57] Code, Art. 47, Sec. 16.
[58] Calvert Bldg. & Const. Co. v. Winakur, 154 Md. 519, 528, 141 A. 355 (1928).
[59] Everett v. Neff, *supra*, n. 54, 187.
[59a] 2 Alexander 921.
[60] Mears v. Perine, *supra*, n. 49, 62-3.

court takes jurisdiction over tenant's affairs, the landlord may not sell the distress without the permission of the bankruptcy court. If the sale is already pending, i.e., being advertised, then bankruptcy does not automatically result in prohibition of the sale. If the lien has been acquired but sale has not been advertised, then permission of the bankruptcy court must be obtained in order to go forward. Even if the sale is advertised, the bankruptcy court will enjoin the sale if the value of the goods exceeds the amount of the rent claim. This rule is based on the theory that upon the filing of the petition in bankruptcy all of the bankrupt's property, ipso facto, is in custodia legis, preventing its subsequent disposition in any wise without permission of the bankrupt court.[61]

VI. EXEMPTIONS FROM DISTRESS

(a) Statutory.

"The following property shall be exempt from distress for rent when not the property of the tenant: Every horse, carriage and harness, whip and robe, saddle and bridle, or motor vehicle and appurtenances, in any livery stable or garage or in any other place, outhouse or barn of the tenant; and all property of any boarder or sojourner at any hotel, tavern, public or private boarding house; and any vehicle or other personal property in any shop for repair. The following property shall be exempt from distress for rent when not the property of the tenant and which is plainly marked or tagged, stating the name of the owner of said articles; every spinning wheel, loom, sewing machine, typewriter, stove, cash register, piano, organ or other musical instrument, radio receiving sets, telephone instruments, telephone booths and other telephone equipment, ice beverage chests, ice water coolers, ice refrigerators and ice display cases, mechanically operated freezing units, for ice cream and cooling units for soft drinks and water, ranges, space heaters and water heaters, gasoline tanks, gasoline pumps and oil receptacles and vending and weighing machines, designed to receive coins or tokens.

[61] Lazarus v. Prentice, 234 U. S. 263 (1914).

The goods and chattels of the innocent tenant who has paid his rent to the owner of the leasehold estate shall be exempt from distraint for ground rent if any due and owing to the ground rent landlord by the owner of the leasehold estate. Provided that, except in Prince George's County, if the landlord shall distrain upon any goods, chattels or other personal property on the premises not exempt under this section, it shall be the duty of the landlord, before the sale of such property shall be made under such distraint proceedings (except in cases of personal property in office buildings, in which cases there shall not be such duty), to ascertain whether or not any such goods, chattels, or other personal property are being purchased by the tenant under a conditional contract of sale defined in Section 74 of Article 21 or mortgaged by the tenant by a purchase money chattel mortgage under the terms of Sections 49 to 59, inclusive, of Article 21 and if it shall be found that any of such property is being purchased by the tenant under such a conditional contract of sale or covered by a purchase money chattel mortgage executed by said tenant, and if such conditional contract of sale or mortgage shall have been executed and recorded in accordance with the laws of the State of Maryland governing the execution and recording of such instruments, and if such conditional contract of sale or purchase money chattel mortgage shall have been recorded prior to the levy under said distraint the landlord, except in cases of personal property in office buildings, shall either release such property from the distraint proceedings or pay to the vendor named in such conditional contract of sale or to the mortgagee in such mortgage the balance due under such conditional contract of sale or mortgage, and said balance, if paid, by the landlord, shall become a part of the costs in such distraint proceedings; and be collectible in the same manner as are the other costs in such proceedings; and provided further that such vendor or mortgagee shall render, upon demand by the landlord, a true statement of the balance due under such conditional contract of sale or mortgage, and when said balance is paid, shall release unto said landlord such conditional contract of sale or mortgage."[62]

---

[62] Code, Art. 53, Sec. 18.

When the conditional vendor repossesses chattels, leaving them on the premises of the conditional vendee and cancelling the debt, then the landlord of the vendee may distrain thereon.[63] A trial court case decided that a deed of trust to secure payment of the purchase price of chattels does not have the status of a purchase money mortgage, and chattels covered by such a deed are not exempt from distress.[64] While Judge Warnken was reversed in that case[65] on jurisdictional grounds, his determinations regarding distress were not reviewed by the Court of Appeals, and consequently his nisi prius opinion is extensively cited herein.

(b) Fixtures. Things affixed to the freehold, such as the doors or windows of a house;[66] things which cannot be taken away without doing damage to the freehold;[67] and things which cannot be restored in the same plight or condition[68] may not be distrained on for rent. A problem arises regarding fixtures which are removable by the tenant. There are decisions both for and against the right to distrain.[69]

It would seem that the test as to distrainability should be whether or not the goods retain their character as personal property. If trade fixtures, removable by the tenant as such, are on demised premises, it appears that the landlord should be entitled to distrain thereon, because such fixtures do not become a part of the freehold.[70]

(c) Common law. To prevent a breach of the peace, chattels in use at the time of distraint;[71] goods which cannot be identified, such as money;[72] and articles of a perishable nature, such as fruit,[73] may not be distrained on. The widespread use of refrigeration would seem to eliminate, at least partially, this last exemption which came into exist-

[63] Wilhem v. Boyd, 172 Md. 79, 90, 190 A. 823 (1937).
[64] Korbien v. Redwood Hotel, Daily Record, Aug. 1, 1949 (Cir. Ct., Baltimore City).
[65] Redwood Hotel v. Korbien, 73 A. 2d 468 (Md., 1950).
[66] VENABLE, 47; LATROBE, Sec. 759.
[67] Simpson v. Hartopp, 9 Eng. Rul. Cas. 651, 653 (Com. Pl., 1744).
[68] Note, 9 Eng. Rul. Cas. 664, 665.
[69] 52 C. J. S., Landlord & Tenant, Sec. 681(4), pp. 539-40.
[70] Wurlitzer Co. v. Cohen, 156 Md. 368, 144 A. 641 (1929); Mears v. Perine, 156 Md. 56, 143 A. 591 (1928); Schofer v. Hoffman, 182 Md. 270, 34 A. 2d 350 (1943).
[71] OLDHAM, p. 139.
[72] VENABLE, 48.
[73] OLDHAM, p. 137.

ence in an era when artificial preservation of perishables was unknown. If the reason for the rule no longer exists, then the rule should go with it. All property temporarily put in possession of a tenant by his customers in the usual course of business,[74] such as goods in the hands of a commission merchant for sale,[75] or goods in the hands of an auctioneer,[76] are not distrainable. There is authority that if money is contained in a bag or container so that the same identical pieces might be known, it may be distrained.[77] This has been regarded as authority for distraining upon a cash register and the monies therein contained. But as things which cannot be so identified as to be replevied or restored, such as money, may not be distrained upon[78] it would seem that distraint on monies in a cash register is open to question; and as the distrained goods remain in tenant's possession for a period of five days to permit their replevin or ransom, it would appear that distraint upon cash, whether or not in a container, is not worthwhile.

(d) Conditional. The tools of a mechanic, books of a scholar, instruments of a doctor,[79] are not distrainable if there shall be sufficient other goods.[80]

VII. AFFIDAVIT

Previous to taking a distress, the landlord or his agent shall make affidavit to the amount of rent in arrear specifying the amount due in dollars and cents and that all payments directly or indirectly made have been credited.[81] This must be attached to the warrant to the constable[82] together with the account of the landlord showing the amount claimed to be due and in arrear.[83]

---

[74] 1 Alexander 53, n. 4; LATROBE, Sec. 762; OLDHAM, p. 125.
[75] McCreery v. Clafflin, 37 Md. 435 (1873).
[76] LATROBE, Sec. 769; OLDHAM, p. 134.
[77] OLDHAM, p. 137.
[78] LATROBE, Sec. 766.
[79] *Ibid*, Sec. 761.
[80] Trieber v. Knabe, 12 Md. 491 (1859); LATROBE, Sec. 763; THOMAS, Sec. 169.
[81] Code, Art. 53, Sec. 9.
[82] Giles v. Ebsworth, 10 Md. 333 (1856); State v. Timmons, 90 Md. 10, 44 A. 1002 (1899).
[83] *Supra*, n. 81, Sec. 10.

The form is as follows:

> "On, ..., before me, the subscriber, a Judge of the People's Court of Baltimore City personally appeared ..... Agent for ..... Landlord, and made oath in due form of law that ..... Tenant of said Landlord, is justly and bona fide indebted to said landlord in the sum of $..... for distrainable rent in arrear and already due to said Landlord and that said Landlord hath not received, either directly or indirectly, any part or parcel of the said rent claimed to be due and in arrear, or any security or satisfaction for the same, except the credits given, to the best of deponent's knowledge and belief."

VIII. THE WARRANT

> "To ..... Constable, Greetings: You are hereby authorized to distrain any goods or chattels found on the premises known as ....., Baltimore City, Maryland, occupied by ..... to satisfy and pay unto ..... the sum of $..... rent due, as per annexed account; and for so doing this shall be your sufficient authority. Given under my hand this ..... day of .... Landlord."

If the person signing the warrant is in fact the agent of the landlord, the warrant is a sufficient authority to the constable, although not signed in terms as agent, or for the landlord by name.[84] But a distress warrant lacking an affidavit as to the amount of rent due is void.[85]

IX. ACCOUNT

The account need not show the terms of renting, and is sufficient if it shows the amount of rent due. It must state the name of the tenant;[86] that the rent is due and when it became due;[87] and that it is a rent for which distress is an allowed remedy.[88] The account cannot include interest on rent,[89] as distress cannot be levied for interest.[90]

---

[84] Jean v. Spurrier, 35 Md. 110 (1872).
[85] State v. Timmons, *supra*, n. 82.
[86] Joynes v. Wartman, 5 Md. 195 (1853).
[87] Cross v. Tome, 14 Md. 247 (1859); Butler v. Gannon, 53 Md. 333, 346 (1880).
[88] Dailey v. Grimes, 27 Md. 440 (1867).
[89] Longwell v. Ridinger, 1 Gill 57 (1843).
[90] Dennison v. Lee, 6 G. & J. 383 (1833); VENABLE, 48.

X. Amendment

Distress proceedings, once executed, cannot be amended, and least of all can defects in them be cured by an amendment of the avowry in replevin.[91]

XI. Execution Of The Warrant

(a) The levy. There is a fundamental restriction, which dates back to 1604, upon an officer serving a civil writ, that he shall not force an entrance into defendant's property.[92] Thus, neither landlord nor his bailiff, in order to make distress, can lawfully break open gates or enclosures, or force the outer door of any building, or enter by a window which is found shut though not fastened. This prohibition extends not only to forcible entrance into the dwelling, but also to barns or outbuildings located on the demised premises.[93] It may be noted that the restriction against breaking into a building not used as a dwelling applies to distress, but not necessarily to the execution of a judicial writ. The reason for the distinction lies in the fact that the landlord is not acting under an order of court.[94] The landlord or bailiff may open the outer door by the usual means adopted by persons having access to the building, and therefore may open it by turning the key, by lifting the latch, or by drawing back the bolt.[95] The landlord may climb over a fence and enter through an open door or window.[96] Even though goods be fraudulently deposited in a house to prevent distress, the landlord has no authority to break open a door forcibly.[97] If a door be broken open by a person not acting under the authority or sanction or at the instance of the landlord or his bailiff, whereby the person making the distress is enabled to enter for that purpose without force,

[91] Waring v. Slingluff, 63 Md. 53 (1885) ; Thomas, Sec. 174.
[92] Semayne's Case, 5 Coke 91, 77 Eng. Repr. 194 (K. B., 1604), 1 Smith's Lead. Cas. 238 (8th Am. Ed., 1885) ; L. R. A. 1916 D 285.
[93] Dent v. Hancock, 5 Gill 120 (1847) ; Cate v. Schaum, 51 Md. 299, 307 (1879) ; Oldham, p. 219.
[94] 21 Am. Jur., Executions, Sec. 130, p. 70.
[95] 2 Alexander 998; Cate v. Schaum, *supra*, n. 93; Gusdorff v. Duncan, 94 Md. 160, 50 A. 574 (1901).
[96] 2 McAdam, Landlord and Tenant (4th ed., 1910), p. 1581.
[97] Dent v. Hancock, *supra*, n. 93, 128.

such entry will not subject the landlord to liability.[98] If, after entry is legally effected and the distress made, the distrainer is forced to leave by the tenant's violence, he may return and if necessary, force an entrance.[99] When the tenant prevents a distress by locking the door thus excluding the landlord, the landlord may bring ejectment.[100] Many leases contain a provision that the landlord, for non-payment of rent or other breach of covenant by the tenant, may reenter by force if necessary. It is an open question whether such a provision validates forcible entry by the landlord in order to effect distress. A constable or sheriff should not participate in a forcible entry so authorized, unless he is protected by an indemnity bond from the landlord.

(b) The seizure. A seizure is necessary to complete the distress; but slight acts, such as walking around the premises and making an inventory of the goods, and declaring them to be seized are sufficient to constitute a seizure.[101]

XII. PROCEDURE WHEN RENT IS PAYABLE IN PRODUCE

> "Where the distress is for grain or produce, the bailiff or person authorized to levy said distress shall summon and cause to be sworn two disinterested persons, whose duty it shall be, under the said oath, to estimate the money value of the specific amount or quantity of grain, or other produce or proportion of the crops agreed upon as rent, and thereupon the bailiff or person aforesaid shall proceed to levy the said distress as in ordinary cases of money rent, taking such estimated value to be such money rent."[102]

The constable being authorized to make distress for produce rent, summons two disinterested appraisers to whom he administers the oath "to well and truly estimate the money value of the rent of ....., agreed upon as rent between ..... and ....., according to the best of their judgment". A memorandum of the oath

[98] *Ibid*, 126; THOMAS, Sec. 177.
[99] OLDHAM, pp. 221-2; MCADAM, *loc. cit.*, *supra*, n. 96.
[100] 2 POE, PLEADING AND PRACTICE (5th ed., 1912), Sec. 486.
[101] VENABLE, 49.
[102] Code, Art. 53, Sec. 12.

and the time when it was administered should be indorsed upon or annexed to the warrant. Having ascertained the money value of the rent, the appraisers should sign a certificate thereof as follows:

> "We, ... and ....., appraisers, having been duly sworn by ..... constable to well and truly estimate the money value of ....., agreed upon as rent between ..... and ..... according to the best of our judgment, do value said rent as ..... dollars and ..... cents."

Distraint is then made for the value of the rent thus ascertained as in the case of a money rent, and appraisers must be sworn to appraise the goods then distrained upon before sale, as in other cases.[103]

XIII. Inventory And Notice

After seizure the person distraining makes an inventory and serves a copy on the tenant together with a notice in writing of the taking of the goods and the cause thereof.[104] The notice must be in writing,[105] and may be given the tenant in possession. The notice need not show when the rent became due. All goods distrained must be specified in the notice with reasonable certainty. This is done by attaching a copy of the inventory to the notice.[106] As the notice is to afford the tenant an opportunity to replevy his goods (generally left on the premises), the inventory need only be specific enough to enable the tenant or owner of the goods to know what is intended to be seized.[107]

The law contemplates that the inventory and notice be served upon the tenant. If the tenant is not present, then the purpose is served if the inventory and notice be served upon an occupant of the premises. In such event, the name of the person upon whom the service is made should appear on the constable's return. If neither the tenant nor an occupant is present at the time the levy is made, then the

[103] 1 Alexander 139-140; Latrobe, Sec. 775.
[104] Venable, 49.
[105] 2 Wm. & Mary, Ch. 5, 2 Alexander 774, Sec. 2.
[106] Thomas, Sec. 181.
[107] Irving Trust Co. v. Burke, 65 F. 2d 730 (4th Cir., 1933).

inventory or notice should be affixed in a prominent position in the interior of the premises. This rarely occurs, because it is unusual that entrance can be accomplished in an unoccupied house or apartment. At the same time, the rights of the landlord are not destroyed simply because the tenant does not happen to be present at the time of levy. No case has been found to support these principles; however, on principle, it seems that no other conclusion can be reached.

The notice to the tenant being preliminary to the sale, and not to the distress, if the goods are legally distrained upon, a subsequent irregularity may subject the landlord to an action but does not deprive him of his lien.[108]

Form of inventory and notice:

> "Inventory of goods and chattels distrained by me on ....., on the premises of ..... situated at ..... by the authority and on behalf of ..... for the sum of ..... dollars, being the rent due the said ..... on ..... (here make list of goods distrained). Take notice that I have this day distrained on the premises above mentioned the several goods and chattels specified in the above inventory for the sum of ..... dollars, being the rent due to ..... on ....., for the said premises and unless you pay the said rent with the charges of distraint for the same within five days from the date hereof, the said goods and chattels will be appraised and sold according to law at ..... Given under my hand this ....."

XIV. IMPOUNDING

At common law the distrainer could not, except with the consent of the tenant, impound the chattels distrained on the demised premises but was bound to remove them elsewhere. The statute of 11 George 2, Chapter 19,[109] made it lawful for the distrainer to impound the distress on the premises.[110] Goods may be treated as impounded, though left on the premises and not collected together in a single

[108] Keller v. Weber, 27 Md. 660, 666 (1867).
[109] 2 Alexander 986, Sec. 10.
[110] 9 A. & E. Encyl. of L. (2nd ed.), Distress, Sec. 12, p. 652.

room.[111] Under the statute ". . . it shall be lawful for any person or persons whatsoever to come and go to and from such place or part of the said premises where any distress for rent shall be impounded . . . in order to view, appraise, and buy and also in order to carry off or remove the same on account of the purchaser thereof; . . ."[112] As a landlord has the right to impound the distress on the premises, he may lock them up in order to secure them.[113] However, the landlord is not entitled to take charge of the whole of the leased premises and exclude the tenant therefrom.[114] When the distress is impounded on the premises, the portion of the premises locked against the tenant should be restricted to the most fit and convenient place for impounding and securing the distress, and not the whole house, unless it sufficiently appears necessary to do so for the safekeeping of the distress.[115]

It appears that under the statutes and the cases, the distraining landlord has the right (1) to remove the distress to a single room of the premises, and to secure the distress by his own lock so that the tenant may not have access to or use of the distress; or (2) without placing the distress in a single room or enclosure, to permit the distress to remain where found on the premises, and, to ensure his entry on return, the landlord may place his own lock or locks on the premises, and retain a key therefor. However, in such case, it appears to be obligatory on him, if the entire premises are so locked, to furnish the tenant with a key. The landlord rarely exercises his right to direct the removal of the goods distrained upon, the usual practice being to leave them in the tenant's possession with the landlord's consent and sometimes on condition that the tenant execute a bond.

(a) Bond of tenant to retain possession of goods.

"We, the undersigned, do bargain and agree that the goods and chattels distrained this ..... day of .....

[111] WOODFALL, LANDLORD AND TENANT (24th ed., 1939, London), p. 438.
[112] OLDHAM, p. 238.
[113] Cox v. Painter, 7 Car. & P. 767, 173 Eng. Repr. 334 (N. P., 1837).
[114] Meadows v. Corinne Coal & Land Co., 115 W. Va. 522, 177 S. E. 281 (1934).
[115] Woods v. Durant, 16 M. & W. 149, 153 Eng. Repr. 1137 (Ex., 1846).

> by ....., constable, for ..... (landlord), shall remain on the premises, in order to enable ....., (tenant) to pay the debt and costs of said distress amounting to $..... and we covenant and agree that the above-named constable shall have free and full access to the property levied on at any time until the above-named debt and costs are paid. And in consideration of the sum of one dollar, to us paid, the receipt whereof is hereby acknowledged, we hereby bind ourselves to pay to said constable the above-named debt and costs, if the goods and chattels levied on shall be removed from said premises, or if the constable shall at any time be denied free access to the same."[116]

The tenant has the right to pay the rent and costs within five days from the time of the levy.[117] A tender of rent and expenses made by the tenant after impounding and before the sale is good tender.[118] In all cases of distress for rent the tenant shall be liable to the landlord for costs.[119] By 2 W. & M. Chapter 5, if goods be distrained for rent, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken replevy the same, then the distrainer may cause the goods to be appraised by two sworn appraisers, and after such appraisement may sell the goods so distrained toward the satisfaction of the rent claim and costs.[120] Until goods distrained upon are duly sold, the property in them remains in the tenant or other owner, so that if cattle die during the distress the loss is that of the tenant and not of the landlord.[121]

If the landlord apprehends removal or damage to the distress, he may arrange for a watchman to take charge of the goods on the premises; but the tenant cannot be charged with the fees of such watchman unless he agrees.[122]

If an arrangement is reached between the landlord and tenant whereby the goods remain on tenant's premises beyond the five days allowed the tenant to pay the claim

---

[116] THOMAS, Sec. 180; word "constable" substituted for "bailiff".
[117] 2 Alexander 774.
[118] Johnson v. Upham, 2 El. & El. 250, 121 Eng. Repr. 95 (Q. B., 1859).
[119] Code, Art. 53, Sec. 15.
[120] 2 Alexander 774-5.
[121] OLDHAM, p. 248.
[122] THOMAS, Sec. 177.

or replevy them, thus affording to the tenant a further time for payment, written consent should be signed by the tenant in order to preserve the landlord's rights and prevent him from being liable as a trespasser.[123] Possession of such a receipt removes any question as to the terms upon which the distrained goods remain in tenant's custody.

(b) Form of consent by tenant.

> "The undersigned, being either the tenant or the person in occupancy acting on behalf of the tenant of the premises ..... in Baltimore City, Maryland, hereby agrees that ..... Chief Constable of Baltimore City, holds possession of the goods and chattels distrained upon this day for rent due to ..... landlord, and listed in the Inventory and Notice served. Custody of said goods having been left with the tenant, it is agreed that the landlord and ....., Chief Constable, shall continue in possession thereof on the premises. It is further agreed that the landlord and ....., Chief Constable, or any constable of Baltimore City acting under the latter's direction, shall have free access to said goods distrained upon and may enter upon the premises by force if necessary, in order to take physical possession of said goods. If the goods are not replevied and if the rent claim and costs are not paid, consent is hereby given to sale of said goods on the premises. This does not affect the right of either tenant or owner of the goods distrained upon to assert any claim or defense that may exist in them or any of them."

The problems that arise between levy and sale and replevin or ransom of the distress fall into one of two categories: (1) removal of the goods by the tenant or owner and (2) locking up the place where the goods are contained and denying access to the landlord or constable.

(c) Rescue and pound breach. Rescue is the forcible taking away by the owner of things distrained, before they are impounded, from the custody of the distrainer.[124] Another definition is: when the owner or other person by force takes way a thing distrained from the person distraining, after the latter has been actually in possession.[125]

[123] LATROBE, Sec. 820.
[124] OLDHAM, p. 311.
[125] WOODFALL, *op. cit., supra*, n. 111, p. 455.

Pound breach is retaking the things distrained after they are impounded.[126] When goods are impounded on the premises any person removing them is liable for pound-breach.[127]

By 11 George 2, Chapter 19, Section 10,[128] if any pound-breach or rescue be made of any goods or chattels impounded, the person aggrieved thereby shall have the like remedy as in cases of pound-breach or rescue by 2 W. & M. Session 1, Chapter 5,[129] which allows substantial money damages against the offender. As to goods rescued from distress, the landlord has the right of recaption, but this right is confined to instances when it can take place without a breach of the peace, and upon fresh pursuit.[130] If a man breaks a pound, hue and cry might be raised against the offender, as against those who break the peace, and the party who distrained may retake the goods wherever he finds them and again impound them.[131] Neither of the foregoing remedies would seem ordinarily to be very effective. A money judgment against an insolvent tenant is of doubtful cash value. It would be a rash constable who would undertake to take by force a distress removed by the tenant, unless substantially indemnified.

If any person other than the landlord or his bailiff remove distrained goods without landlord's written consent, he is guilty of a misdemeanor and subject to fine and imprisonment.[132] Over the years, experience in the People's Court indicates that this is a simple and effectual remedy.

While a following distress conventionally is used to pursue goods removed prior to distress, there would seem to be no reason why the remedy granted by 11 George 2, Chapter 19,[133] and Article 53, Section 20,[134] should not be

---

[126] OLDHAM, p. 312.
[127] WOODFALL, *op. cit., supra*, n. 111, p. 439.
[128] 2 Alexander 986-7.
[129] *Ibid*, 774.
[130] Rich v. Wooley, 7 Bing. 651, 131 Eng. Repr. 252 (Com. Pl., 1831).
[131] OLDHAM, pp. 315-6; WOODFALL, *op. cit., supra*, n. 111, p. 456.
[132] Code, Art. 53, Sec. 19.
[133] 2 Alexander 981.
[134] Code.

available to a landlord when the goods on which he has distrained are illegally removed from the premises by the tenant or owner.

(d) Premises locked after distress. If the premises are locked when the landlord returns for the purpose of sale, or if admittance is then refused, there exists a right of forcible entry. "The use of force against another for the purpose of recaption is not privileged unless the other . . . refuses to surrender the chattel . . . the other having received from the actor custody but not possession of the chattel, . . .".[135] When goods distrained on are left on the premises and the distress is not abandoned, the landlord or bailiff who leaves the premises and returns to find them locked against him may force an entrance.[136] If the first distress is good then a second entry may be made.[137]

As a practicality, the forcible entry for the purpose of sale must be made by the constable, either as principal or participant. No such entry should be made unless the constable is indemnified by the landlord. While an order of Court may be of some protection, it must be kept in mind that distress is not a judicial proceeding and doubt exists whether an order of Court would protect him in event of a suit for trespass.

XV. Payment On Account After Levy

A payment by the tenant, after the levy, of a part of the rent claim, and acceptance thereof by the landlord, does not destroy the landlord's lien nor vitiate the distress; as a payment of a part of a sum due does not extinguish a lien for the whole sum, nor impede its enforcement. The prohibition of amendment of distress proceedings requires that no change or amendment be made in the voucher or bill. The proper practice is that the landlord file with the Chief Constable an order, as follows:

> "Mr. ..... Chief Constable. This is to advise you that since the levy in distress upon the goods

[135] Restatement, Torts, Sec. 101.
[136] Bannister v. Hyde, 2 El. & El. 627, 121 Eng. Repr. 235 (Q. B., 1860).
[137] Russell v. Rider, 6 Car. & P. 416, 172 Eng. Repr. 1301 (Com. Pl., 1834).

of ..... Tenant, there has been paid on account of my rent claim the sum of $..... Therefore the amount necessary to be produced by sale of the goods in order to satisfy my rent claim is to be reduced by this amount."

XVI. APPRAISAL

It is necessary that goods distrained on be appraised by two sworn appraisers.[138] No sheriff, constable or bailiff in cases of distress for rent shall summon more than two appraisers of property distrained, and the compensation of the appraisers shall be thirty cents each, to be recovered and paid as other costs in such cases.[139] Appraisers must be reasonably competent, indifferent persons but need not be professional appraisers.[140] The form is as follows:

"That on ..... two appraisers, were sworn in due form of law by me ..... Constable, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment. Witness my hand, ... Constable.

"We, the above-named being sworn in due form of law by ..... Constable well and truly appraised the goods and chattels mentioned in this inventory, according to the best of our judgment, and having viewed the said goods and chattels, do appraise the same at the sum of ..... dollars. Witness our hands this ..... day of ....."

XVII. SALE

(a) Direction. While not spelled out in the law, the responsibility for determining the distrainability of the goods lies in the landlord. Consequently, before the goods are placed on sale, the landlord is required to give a direction in the following form:

"Mr. J. Hanson Hooper, Chief Constable: You are hereby directed to proceed with the advertisement and sale of the goods distrained upon in this action. None

[138] Korbien v. Redwood Hotel, Daily Record, Aug. 1, 1949 (Cir. Ct., Baltimore City).
[139] Code, Art. 53, Sec. 14.
[140] Cahill v. Lee, 55 Md. 319 (1881).

of the goods distrained upon are: (1) in custodia legis, such as being goods taken in execution; (2) under the jurisdiction of the U. S. District Court in Bankruptcy; (3) exempt by statute; or (4) subject to a valid purchase money lien or mortgage.

Excepted from the foregoing order are the following goods, which are released from the operation of the distress and which are to remain on the premises unaffected by this proceeding."

There are no statutory provisions for the notice of sale. The sale must be fairly conducted, and if sold at public auction the price realized will be presumed to be the best that can be gotten. If a number of articles are sold they should be properly lotted and sold in parcels.[141] At common law the landlord could not sell the goods to himself or take them at the appraised value,[142] the theory being that the landlord conducts the sale and the auctioneer is the landlord's agent.[143] In Baltimore City the sale is conducted by the constable or sheriff at public auction, and is not conducted by the landlord. There is authority that when the sale is at public auction by the constable a sale to the landlord, he being the highest bidder, is valid.[144] When the conduct of a sale is not in charge of the plaintiff but is by law or decree committed to some other person, there is no disqualification on the part of the plaintiff to purchase.[145] However, it should be kept in mind that a distress sale is not a judicial sale. In practice, the notice of sale is twice published, the last on the day of sale. Experience of years in People's Court has developed that buyers respond only to advertisements published on the day of sale. In *Korbien v. Redwood*,[146] a sale was held valid when the only advertisement was that published on the day of sale, although the question of adequacy of the advertisement was not decided by the Court. For at least thirty years landlords

[141] *Ibid*, 326, *et seq.*
[142] OLDHAM, pp. 247, 254.
[143] King v. England, 4 B. & S. 782, 122 Eng. Repr. 654 (Ex., 1864); Moore, Nettlefold & Co. v. Singer Mfg. Co., 1 K. B. 820 (1904).
[144] 2 TIFFANY, LANDLORD AND TENANT (1910), Sec. 342, pp. 2065-6.
[145] FREEMAN, VOID JUDICIAL SALES (4th ed., 1902), Sec. 33, p. 118.
[146] Daily Record, Aug. 1, 1949 (Cir. Ct., Baltimore City).

have been accepted as bidders and purchasers at distress sales by the Chief Constable of the People's Court.

(b) Form of notice of sale.

> "By virtue of a warrant of distress, issued at the suit of ..... against the goods and chattels, lands and tenements of ....., to me directed, I have seized and taken in distress all the estate, right, title, interest, property, claim and demand at law and in equity of the said ....., in and to (here describe property seized). And I hereby give notice, that on ....., at ..... o'clock, at ....., in ..... county, I will offer for sale the said property so seized and taken in distress, by public auction, to the highest bidder for cash."[147]

(c) Surplus proceeds and unsold goods. By 2 W. & M. 1, Chapter 5, the surplus in the hands of the sheriff or constable, after payment of the rent and costs, are held "for the owners use".[148] No right of action against the landlord arises in the mortgagee of goods distrained on and unsold, if the landlord returns the unsold goods to the place of distraint and leaves the surplus proceeds in the hands of the sheriff or constable,[149] as the landlord is under no duty to find the owner of the goods for the purpose of paying him the overplus.[150] The expense of returning the unsold goods to the demised premises should present no problem to the prudent officer. As the removal of the goods from the premises to the place of sale is the result of the default of the tenant-owner, then the expense of return should be borne by him. In practice, sufficient goods should be sold to pay the rent claim and costs, and as a part of the costs there is taxable the expense of return of goods to the demised premises. An officer, awake to his own duties, rights and liabilities, will see to it that, if any goods are to be returned, the proceeds of sale of goods sold will be sufficient to absorb this expense.

---

[147] THOMAS, Sec. 186.
[148] 2 Alexander 774; 2 TIFFANY, *op. cit., supra*, n. 144, Sec. 343, p. 2067.
[149] Evans v. Wright, 2 H. & N. 527, 157 Eng. Repr. 217 (Ex., 1857).
[150] Yates v. Eastwood, 6 Ex. 805, 155 Eng. Repr. 771 (Ex., 1851).

While the unsold goods should be returned to the premises from which they were removed[151] and the overplus left in the hands of constable for the owner's use,[152] as between the tenant and the owner or mortgagee of the goods, the latter may be entitled to possession of the unsold goods or to the overplus in the hands of the constable. If the tenant is unwilling to sign an order directing payment or delivery to the mortgagee or owner, the constable is not required to decide upon conflicting claims at his peril. Under such circumstances, the constable may interplead in equity. If the constable fails or refuses to interplead, then the owner or mortgagee may bring the appropriate action at law or in equity against the constable, as a levy under a distress for rent by a landlord does not place the goods in custodia legis.[153] In *Siegel v. Hooper, garnishee,*[154] W. Conwell Smith, C.J., sustained the right of a plaintiff to attach the overplus in the hands of the Chief Constable of the People's Court after a distraint sale and satisfaction of the rent claim.

XVIII. Wrongful Distress

When the distraint is an illegal one, the tenant may bring an action against the landlord in replevin, trespass, trover or case.[155] Every distress for rent which shall be made contrary to the provisions of Article 53 of the Code and all sales made under and by virtue of said distress shall be absolutely illegal and void.[156]

(a) Unwarrantable distress. A distress is unwarrantable when tender is made before distress; or when one distress has been had and enough property taken to satisfy the rent;[157] when made by a stranger; when no rent is due;[158] or in the night time.[159] An unlawful entry upon the premises

[151] Oldham, p. 264.
[152] *Ibid*, p. 263.
[153] 1 Anderson, Sheriffs, Coroners and Constables (1941), Sec. 454, p. 427; Sookiasian v. Swift & Co., Inc., 100 Pa. Super. 69 (1930).
[154] Superior Court Docket, 1948, p. 1028.
[155] 2 Alexander 780; Venable, 50.
[156] Code, Art. 53, Sec. 17.
[157] Everett v. Neff, 28 Md. 176 (1868).
[158] Dailey v. Grimes, 27 Md. 440 (1867); Venable, 50.
[159] Oldham, p. 320.

to make distress renders the seizure of the goods void and the party making it a trespasser ab initio.[160] When the distress is wholly unwarrantable, the landlord is a trespasser ab initio.[161] Under 2 W. & M., Chapter 5, Section 5, in case of a distress and sale for rent pretended to be in arrear when in truth no rent is in arrear or due to the person distraining, the owner of the goods sold has an action against the person distraining, for double the value of the goods distrained and sold, plus costs of suit.[162] When rent is due, but because of the manner of levying the distraint the landlord becomes a trespasser ab initio, then the tenant can recover the entire value of goods seized in distraint in an action of trespass.[163]

(b) Irregular distress. An irregular distress is one in which there is something unlawful or wrong or tortious in connection with the disposition of the distress, such as an excessive distress or one obviously unreasonable,[164] or abuse or mismanagement of the goods taken.[165] Abuse of a distress consists in using it, such as working horses distrained upon instead of keeping them in the pound,[166] or selling the distress too soon or keeping the distress on the premises for a period unreasonably longer than five days.[167] Under 11 George 2, Chapter 19, Section 19, a distress subsequently irregular in character is not unlawful.[168] If the distress be excessive the tenant may recover the fair value of the goods taken in excess;[169] similarly if more rent is claimed than is due and more goods sold than necessary to pay the true amount of the landlord's claim.[170] If the landlord abandons a distress and there is a fair opportunity to work out payment of the rent, his duty to do so is in the first distress and if he abandon it and levy a second distress,

---

[160] Cate v. Schaum, 51 Md. 299 (1879).
[161] VENABLE, 50; RESTATEMENT, TORTS, Sec. 278, Com. c.
[162] 2 Alexander 776.
[163] Cate v. Schaum, *supra*, n. 160.
[164] OLDHAM, p. 335.
[165] 2 Alexander 779; VENABLE, 50; Cahill v. Lee, 55 Md. 319 (1881).
[166] Smith v. Wright, 6 H. & N. 821, 158 Eng. Repr. 338 (Ex., 1861).
[167] OLDHAM, p. 328.
[168] 2 Alexander 991.
[169] 1 Alexander 56.
[170] *Ibid*, 57.

tenant's remedy for the taking under the second distress is trespass, case or trover.[171]

If distress is properly and legally made the landlord has the right to seize and sell even though the claim is excessive in amount,[172] as a distress is not vitiated by more rent being distrained for than is due,[173] and no action lies against the landlord even though the distress is malicious.[174] However, if the excessive claim is followed by a sale of more goods than necessary to pay the true claim and costs, then a good cause of action arises.[175] If the distress is legally made, a subsequent irregularity, such as failure to secure the appraisal of two sworn appraisers, does not affect the validity of the sale and the purchaser secures good title.[176]

XIX. Rights of Owner of Goods

When goods of a stranger are distrained on, he has an action against the tenant either for the value of the property taken or the amount paid to emancipate the goods.[177] While the goods of a stranger are neither exempt nor privileged because of sufficient goods of the tenant subject to distress,[178] when a stranger's goods are seized and sold under distress, the owner may buy them in at the sale and recover the price from the tenant.[179]

XX. Rights of Tenants

As distress is not an action at law, the means by which the tenant or the owner of chattels distrained upon may challenge the landlord's action is by bringing suit in replevin for the goods distrained upon and not by suit for injunction.[180] Replevin may be brought at any time before

[171] Everett v. Neff, 28 Md. 176 (1868).
[172] Bonaparte v. Thayer, 95 Md. 548, 52 A. 496 (1902).
[173] Jean v. Spurrier, 35 Md. 110 (1872).
[174] Hamilton v. Windolf, 36 Md. 301 (1872).
[175] 1 Alexander 57; Bonaparte v. Thayer, *supra*, n. 172; Hamilton v. Windolf, *supra*, n. 174.
[176] Korbien v. Redwood Hotel, Daily Record, Aug. 1, 1949 (Cir. Ct., Baltimore City).
[177] Myers v. Smith, 27 Md. 91 (1867).
[178] Giles v. Ebsworth, 10 Md. 333, 345 (1856).
[179] Swartz v. G. B. S. Brewing Co., 109 Md. 393, 71 A. 854 (1909).
[180] Banks v. Busey, 34 Md. 437 (1871).

sale.[181] The tenant must file a bond for double the value of the goods distrained upon.[182] The effect of the replevin is to restore possession of the goods to the tenant or owner, free of the distress, so that the landlord has no claim or lien of any sort against the goods.[183] In an irregular distress, not void ab initio, the rights of the tenant are restricted to a suit at law for any special damage.[184]

XXI. FOLLOWING DISTRESS

Whenever property is removed from premises within sixty days prior or subsequent to the time when the rent becomes due, the landlord may follow and seize and sell such property under distress for any rent due.[185] The right given the landlord under Article 53, Section 20, to pursue property removed only exists for rent actually due and only against property that belonged to the tenant at the time of removal,[186] as goods of a stranger cannot be taken for rent in any place except on the demised premises.[187]

By 11 George 2, Chapter 19, Section 2, in a following distress the lessor may not seize goods bona fide sold before the seizure for a valuable consideration,[188] or goods taken in execution.[189] The lessor may break into a house to seize such goods,[190] provided he must do so in the daytime.[191] The landlord may follow only when he has a reversion, and if he convey away his reversion before removal of the goods the landlord loses the benefit of the law,[192] although there is authority to the effect that the landlord's interest in the demised property need not continue to the time of the distress.[193] When the tenant removes his goods to a warehouse and stores them there, a new set of problems arises. As

[181] 2 Alexander 777.
[182] *Ibid*, 743, Sec. 23.
[183] Gelston v. Rullman, 15 Md. 260 (1860).
[184] Korbien v. Redwood Hotel, *supra*, n. 176.
[185] Code, Art. 53, Sec. 20; 2 Alexander 995.
[186] Gaither v. Stockbridge, 67 Md. 222, 228, 9 A. 632 (1887).
[187] Neale v. Clautice, 7 H. & J. 372, 380 (1826); Mears v. Perine, 156 Md. 56, 143 A. 591 (1928).
[188] 2 Alexander 982.
[189] Code, Art. 53, Sec. 20.
[190] 2 Alexander 984, Sec. 7.
[191] LATROBE, Sec. 744.
[192] 2 Alexander 994-5.
[193] Dorsey v. Hays, 7 H. & J. 370 (1826).

goods removed and sold to a bona fide purchaser for value may not be seized on a following distraint, the landlord's rights may be subject to intervening rights of the warehouseman. These rights depend upon the character of the receipt given by the warehouseman. If he has given a non-negotiable receipt, then he is justified in delivering the goods to the person lawfully entitled to possession of the same;[194] however, the warehouseman has a lien upon the goods for his storage charges[195] and may refuse to deliver them until his lien is satisfied.[196] If the warehouseman has issued a negotiable receipt, then delivery to any person other than the holder of the receipt may subject the warehouseman to liability.[197] If a negotiable receipt is outstanding, it would appear that the landlord's rights against the goods are lost, so far as the distress is concerned, because of the potential rights in a purchaser in due course, and the liabilities and responsibilities on the warehouseman consequent on the issuance of a negotiable warehouse receipt. However, when a non-negotiable warehouse receipt has been issued, it would appear that the landlord has the right to possession of the goods upon payment to the warehouseman of his charges. Any charges so paid are a part of the costs of the distress.

No special proceeding is required in levying distress upon property which has been removed from the premises. It is the practice when property has been removed that the landlord make complaint and obtain a warrant commanding a constable to assist in the distraint.[198]

(a) Form of complaint of removal:

"On this ..... before the subscriber, comes ....., and complains and makes oath that certain goods and chattels of ..... have been removed from ..... by the said ..... to prevent ..... from distraining the same for arrears of rent due to the said ..... for the said property, and that the said goods and chattels are detained in the house of ....., so

[194] Code, Art. 14A, Sec. 9.
[195] *Ibid*, Sec. 27.
[196] *Ibid*, Sec. 31.
[197] *Ibid*, Sec. 11; RESTATEMENT, TORTS, Sec. 276(2).
[198] THOMAS, Sec. 177.

as to prevent the same from being seized as a distress for arrears in rent; and that the same ..... hath a reasonable ground to suspect and doth suspect that the said goods and chattels are at the dwelling house of the said ....."

(b) Form of warrant to constable to distrain goods removed:

"To ....., Chief Constable of Baltimore City, Greetings: Whereas, ... hath this ..... day of ..... exhibited his complaint, and made oath before me that certain goods and chattels of ..... have been removed from the house of the said ..... in which the said ..... resided as tenant, by the said ..... to prevent the said ..... from distraining the same for arrears of rent due to the said ..... for the said house and the said goods and chattels are put, placed or kept in the house of ..... so as to prevent the same from being taken and seized as a distress for arrears of rent; and that the said ..... has a reasonable ground to suspect that the said goods and chattels are in the dwelling house of the said ..... These are, therefore, in the name of the State of Maryland, to command you to take or seize as a distress for rent, the said goods and chattels, in the daytime to break open and enter into the said dwelling house or other place of the said ..... and take and seize the said goods and chattels for the said arreas of rent, according to law."

The proceedings in a following distraint, are similar to those in an original distraint. However, at the time of the levy, the following certification is made on the schedule.

"The goods listed on this schedule were identified by me as belonging to the tenant and as having been removed by him from the premises leased by me to him. ..... Landlord or agent."

There is neither statutory nor case law dealing with the rights of a landlord, when goods have been removed by the tenant out of one jurisdiction into another. When there has been an unsuccessful original distress the following procedure might be followed: The constable marks on the warrant *the goods having been removed, I return the warrant unexecuted.* Then the landlord files his complaint with

a magistrate or proper officer in the county or jurisdiction to which the goods have been removed, in the following form:

> "On this ..... before the subscriber, comes ..... and complains and makes oath that on ..... he caused a distress to issue before ..... a Justice of the Peace, in and for ..... county for distrainable rent due him by ..... tenant of the premises ....., in said county. That said distress was not completed because said tenant previously removed his goods and chattels from said premises; as will appear by reference to a copy of the original warrant attached to this affidavit. And said landlord further made oath that the said goods and chattels were removed from said demised premises by the said tenant, in order to prevent the landlord from distraining the same for arrears of rent due to the said landlord for the said property, and that the said goods and chattels are now detained in the house of ..... at ..... so as to prevent the same from being seized as a distress for arrears in rent; and that the said landlord has reasonable ground to suspect and doth suspect that the said goods and chattels are at the house of ....."

When a distress has been filed within the sixty day period before a magistrate in the jurisdiction of the demised premises, a following distress may not be filed after the sixty day period in another jurisdiction to which the chattels have been removed, even though the delay may be the result of the failure of the magistrate or constable to promptly notify the landlord. The reason is that the two proceedings are entirely different. Distress was a remedy in existence in 1266 when the statute of 51 Henry 3, Statute 4,[199] was enacted. Following distress to seize chattels clandestinely removed by the tenant was authorized in 1738 by the statute of 11 George 2, Chapter 19.[200] The right of the landlord to a following distress is founded on the removal of the tenant's goods, and not upon the failure of an original distress, so that a following distress is itself an original proceeding.

---

[199] 1 Alexander 49.
[200] 2 Alexander 981.