

COMMENTS

THE RESIDENTIAL TENANCIES ACT, 1978 (S.A.) AND THE PROTECTION OF TENANTS AGAINST SUCCESSION TO THE ORIGINAL LANDLORD

There can be no doubt that the Residential Tenancies Act, 1978 (S.A.),¹ embodies a radical departure in the statutory regulation of the relation of landlord and tenant, not only in South Australia but in Australia generally.² The legislation may be said to provide a "code" of rights for landlord and tenant. The tenant receives new rights in relation, *inter alia*, to security bonds, security of tenure, protection from interference by the landlord and discrimination against children. The landlord receives new rights in relation to damage by tenants. In addition, the legislation sets up administrative machinery designed to ensure swift consideration of the rights of parties to a residential tenancy agreement.³ A Residential Tenancies Tribunal ("the Tribunal") is established to solve disputes between the parties, and the Consumer Affairs Department is to police the operation of the statute, and to advertise and secure the rights of tenants.

It is not the purpose of this note to discuss, or to evaluate, the legislation. The Act is simply drafted: its success in ensuring the protection of landlords and tenants alike remains to be determined. The purpose of this note is to examine one aspect of the Act that has so far not attracted much attention—the protection of the tenant, under a residential tenancy agreement, against successors in title to the original landlord.

A residential tenancy agreement is defined in s.5 as "any agreement, whether express or implied, under which any person for valuable consideration grants to any other person a right to occupy, whether exclusively or otherwise, any residential premises for the purpose of residence". If such an agreement exists, subject to certain exceptions (s.7), the provisions of the Act apply, and the Tribunal has jurisdiction to hear disputes. The definition of a residential tenancy agreement is broad. The agreement may be express, or implied, for instance, where a tenant holds over, after an express agreement has expired, and continues to pay rent. The agreement may give the tenant exclusive possession, or merely a right to use premises along with the landlord. In addition, it would appear that, in spite of the unusual use of the word "grant", which normally implies an agreement by deed, the agreement may be written or oral. All that is required is that there should be an agreement for value to occupy residential premises as a residence.

No doubt by framing the definition broadly it was hoped to avoid the technical distinctions which so bedevil the English rent control legislation. There, the control of rents and the availability of security of tenure for

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1. Assented to 30 March, 1978. At the time of writing the Act had not come into force.
 2. Formerly the rights of landlord and tenant were basically contractual, *i.e.*, contained in the terms of the lease. Legislation was confined to the prevention of excessive rents (Excessive Rents Act, 1962-1973) (S.A.) and the regulation of forfeiture and distress for rent (Landlord and Tenant Act, 1936-1974 (S.A.)).
 3. The administrative machinery is perhaps the most far-reaching part of the legislation. Most of the trouble with the control of rents by the Excessive Rents Act, 1962-1973, sprang from the delays and expense for tenants in the court procedure.

the tenant depend on the existence of an actual lease.⁴ The premises must be let, and it is not sufficient that the occupier has a licence or permission, even for value, to occupy. This in turn involves a consideration of the characteristics of a lease, viz., exclusive possession,⁵ and certainty of duration.⁶ It is not surprising in England, therefore, to find landlords, at times aided by the courts,⁷ seeking to avoid the rent control legislation by framing their agreements with "tenants" as licences.⁸ The South Australian legislation, by referring to the substantive issue of whether there is an agreement for residence, should avoid these difficulties, as it does not matter whether there is a lease or a licence.⁹ On the other hand, doubtless other problems will arise. For instance, are premises automatically "residential" merely because they are let for residence? Moreover, some of the exceptions to the operation of the legislation leave considerable room for manoeuvre. The Act does not, for instance, apply to lodgers or boarders.¹⁰ While a boarder is clearly someone who receives meals, along with accommodation, a lodger is far harder to define. What services distinguish the lodger from the independent tenant? Is a person who shares any facilities with the owner of premises a lodger, even though that person has his own room? Since this concerns a jurisdictional fact, expensive litigation may well be required to determine the ambit of the Act, probably on a case to case basis.¹¹

Assuming a residential tenancy exists, the agreement will, of course, bind the parties—the landlord and the tenant. In regard to land under the Real Property Act, 1886-1975 (S.A.) (with which we are exclusively concerned) this will be so even if the agreement is not registered or caveated, or even if it is incapable of being registered or caveated.¹² The landlord as registered proprietor is bound by his contract, and may only terminate the tenancy agreement in accordance with the provisions of the Residential Tenancies Act, 1978 (S.A.). The methods of termination, set out in s.61(1) of the Act, require the landlord to serve a notice of termination on the tenant, and after a period of time, usually one hundred and twenty days, if the tenant does not then voluntarily depart, to apply

4. Rent Act, 1977 (U.K.), s.1(1).

5. *Addiscombe Garden Estates v. Crabbe* [1958] 1 Q.B. 513; *Clore v. Theatrical Properties Ltd.* [1936] 3 All E.R. 483; *King v. David Allen & Sons Billposting Ltd.* [1916] 2 A.C. 54. For Australia, see *Claude Neon Ltd. v. Melbourne and Metropolitan Board of Works* (1969) 43 A.L.J.R. 69; *Radaich v. Smith* (1959) 101 C.L.R. 209. For a general discussion, see Megarry & Wade, *The Law of Real Property*, 617-623.

6. *Lace v. Chantler* [1944] K.B. 368; *Amad v. Grant* (1947) 74 C.L.R. 327.

7. *Addiscombe Garden Estates v. Crabbe* [1958] 1 Q.B. 513. Cf. MacCallum & Bradbrook, "Discrimination against Families in the Provision of Rented Accommodation", *supra*, pp.453-454.

8. The courts should foil these attempts to frame leases as licences: cf. *Facchini v. Bryson* [1952] 1 T.L.R. 1386. They should look to the existence of exclusive possession, and not merely to terminology. However the recent tendency in England is to look more to the intention of the parties: *Radaich v. Smith* (1959) 101 C.L.R. 209, 220; *Shell-Mex and B.P. Ltd. v. Manchester Garages Ltd.* [1971] 1 All E.R. 841, 844 per Lord Denning M.R.; 845 per Buckley L.J.

9. Since the same termination of tenancy provisions apply to fixed and periodic tenancies, the distinction between the two types of tenancy becomes less important, at least between the original landlord and tenant.

10. Residential Tenancies Act, 1978 (S.A.), s.7(2)(d).

11. The jurisdiction of the Tribunal would be subject to the control of the Supreme Court of S.A. Also see Residential Tenancies Act, 1978 (S.A.), s.28. The Tribunal may refer points of law to the Supreme Court.

12. Real Property Act, 1886-1975 (S.A.), s.71 IV.

to the Tribunal for an order of possession of the premises.¹³ The landlord's ability to terminate a tenancy agreement is thus limited.

But what if the landlord should dispose of his freehold reversion to a successor? Then it is not simply a question of looking to the agreement, and the provisions of the Residential Tenancies Act, 1978 (S.A.), but to a third element—the rules as to priorities, and whether the successor should be bound by the agreement. This in turn involves a consideration of whether the Residential Tenancies Act, 1978 (S.A.), has in any way altered the existing rules as to priority. Are the rules now different where a residential tenancy is involved?

The new Act does not deal directly with the position of the tenant vis-à-vis the successor to the landlord. It does not specify when, and how far, a residential tenancy agreement will bind the new registered proprietor. The only provisions are contained in Part V dealing with security of tenure and the termination of residential tenancies. S.61(1) reads:

“Notwithstanding any Act or law to the contrary, a residential tenancy agreement shall not terminate or be terminated except . . . (c.1) where a person succeeding to the title of the landlord becomes entitled to the possession of the premises . . .”

This subsection clearly entitles a successor in title to terminate a residential tenancy at some stage, and thus destroy the rights of the tenant. However, what rights this subsection gives the landlord's successor to terminate a residential tenancy cannot be decided without considering whether he takes subject to the tenancy in the first place. On the one hand, if the successor is not bound by the residential tenancy, apart from the subsection, there is nothing to terminate. On the other hand, if the successor is bound by the residential tenancy, then seemingly he can only terminate it in the normal way. Why should his status as successor give him any special privileges? We must therefore consider the normal rules for the enforcement of leases under the Real Property Act, 1886-1975 (S.A.).

The first possibility is that the residential tenancy agreement is registered,¹⁴ or caveated¹⁵ as a lease under the Real Property Act, 1886-1975 (S.A.). If so, it is surely inconceivable that the successor to the original landlord, when he becomes registered proprietor of the land, could take free of the agreement. The agreement is prior to his interest in the land, and has been duly protected.¹⁶ Whether he has given value or not, he must be bound by it. Moreover, since he is bound by the agreement, it is submitted that the successor is not in a position to take advantage of s.61(c.1), so as to enable him to terminate the agreement. S.61(c.1) gives a successor power to terminate a residential tenancy where he is “entitled to possession”. How can a person who is bound by a prior tenancy agreement be entitled to possession until that agreement has expired? Thus

13. Shorter periods of time are provided for in certain cases (a) where the tenant is in breach of the agreement — fourteen days, (b) where he requires the premises for his own occupation — sixty days. See Residential Tenancies Act, 1978 (S.A.), ss.63, 64. In all s.61(1) provides nine methods of termination.

14. To be so, it would have had to have been granted in registrable form: Real Property Act, 1886-1975 (S.A.), s.116 and 8th Schedule.

15. This would be possible if the agreement constituted an equitable lease: *cf. Walsh v. Lonsdale* (1882) 21 Ch. D. 9. The agreement would have to be in writing, or supported by part performance.

16. See Real Property Act, 1886-1975 (S.A.), ss.69, 191 effects of registration and a caveat respectively. The successor must search the register to safeguard himself.

where a tenant is careful to register or caveat his interest, he is in as good a position as if the original landlord were still entitled to the land.

The next issue that arises is the position of a tenant, who neither registers nor caveats his interest. Such an agreement, constituting as it does an equitable lease, will bind a successor in title to the original landlord who is a volunteer.¹⁷ Moreover, under one of the exceptions to indefeasibility contained in the Real Property Act, 1886-1975 (S.A.), where the lease is of one year's duration or less,¹⁸ it will also bind a purchaser. In these cases, the tenants seem to be the same position as those who have registered or caveated.

What, however, of the purchaser who both registers and who has given value for land which is subject to an equitable lease in excess of one year? Will he be bound merely because the lease falls within the definition of a residential tenancy agreement? One simple answer is to apply the proviso to s.71 of the Real Property Act, 1886-1975 (S.A.), and hold that the lease does not bind the purchaser. Upon registration, he should take free of all unregistered rights. The tenant thus loses out to the purchaser, who is immediately entitled to possession.¹⁹ Moreover it is submitted that the purchaser need not terminate the tenancy, for the tenancy simply does not exist against him.

There are, however, objections to such a conclusion. The purpose of the legislation is to give tenants a measure of security in their home. Surely a tenant should not be deprived of this security merely because his landlord chooses to sell his freehold reversion. He is still a tenant who deserves protection. Moreover it is submitted that it is no answer to say that the tenant should register or caveat his lease. Many leases are not in registrable form, and few tenants, having signed a lease, will take advantage of the caveat system (even assuming they are aware of its existence) in case the landlord should decide to sell.

Can the conclusion that the purchaser is not bound by the unprotected residential lease be avoided? An argument is available, revolving around sub-s. (c.1) of the Act. The argument is consistent with the radical nature of the Residential Tenancies Act, 1978.

It has been stated above that the result of concluding that the purchaser is not bound by the equitable residential lease is that there is no lease for the purchaser to terminate. The lease has been terminated already by operation of the priority rules. But if this is the case, then sub-s. (c.1), which speaks of the successor in title being able to terminate the lease on becoming entitled to possession, is devoid of meaning: there is nothing for

17. Real Property Act, 1886-1975 (S.A.), s.71. Only *bona fide* purchasers will take free of unregistered rights. If the original landlord gives the property away, existing leases will survive: *King v. Smail* [1958] V.R. 273. Note that the lease must be in writing, or supported by part performance.

18. Real Property Act, 1886-1975 (S.A.), s.69(VIII). Leases for one year or less taking effect in possession constitute an absolute exception to indefeasibility. A large number of leases will fall into this category.

19. It is interesting to inquire what steps the successor may take, if the tenant refuses to give up possession. Presumably he does not go to the Tribunal, as there is no lease to terminate and the Tribunal has no jurisdiction. He must surely go to the Local Court for an order to evict the occupier — who is either a squatter or a tenant at sufferance. Perhaps the Act should be amended to allow the purchaser the simple process available to all other landlords who terminate leases in accordance with the provisions of the Act.

him to bring to an end. The only way to give sub-s. (c.1) meaning is to regard the purchaser as being bound by the unprotected lease (which he may at some time terminate). Moreover this argument is reinforced when one remembers that s.61 of the Residential Tenancies Act, 1978 (S.A.) does set out a list of ways in which a residential tenancy may be brought to an end, and terminating a lease by operation of the priority rules is not one of them. Moreover there seems little point in arguing that the proviso to s.71 of the Real Property Act, 1886-1975 (S.A.), constitutes yet another method by which a residential tenancy may be terminated—viz. by failure to protect the tenancy against purchase by a third party. S.61 of the Residential Tenancies Act, 1978 (S.A.), is expressed to apply, “notwithstanding any Act or law to the contrary”. As the methods of terminating a lease set out in s.61 are intended to be exhaustive, the provisions of the earlier inconsistent statute are, on this view, *pro tanto* repealed.²⁰

If this argument is accepted it raises the question when does the purchaser become entitled to possession under sub-s. (c.1), and so able to terminate the lease? The answer, since he is bound by the lease, is at the same time as the original landlord. The original landlord would be entitled to possession in accordance with the security of tenure provisions outlined previously.²¹ The minimum period is in general one hundred and twenty days, provided the term agreed upon in the lease has expired.²² A lease for five years, can only be terminated after five years. This could, of course, be hard on the purchaser, who may have searched the register, and found nothing. To this, three answers may be made. First, perhaps the Residential Tenancies Act, 1978, should be amended, to give the landlord in such cases a right to serve a notice on the tenant to terminate the agreement after 120 days whether or not the agreed term has expired. Secondly, s.75 of the Act gives the Tribunal a discretion to terminate a residential tenancy early in a case where a landlord would suffer undue hardship. Thirdly, the purchaser should, of course, visit the premises he is buying. In a vast majority of cases, the tenant will be in occupation, and thus the purchaser will become aware of his existence, and may inquire as to the length of any tenancy. His decision to purchase will thus be an informed one.²³ It is therefore submitted that the purchaser suffers little from the thesis that he is bound by existing, unprotected residential leases.²⁴

20. Real Property Act, 1886-1975 (S.A.), s.6 provides that the Act is only to be ousted by the later legislation expressly excluding it, and there is no such express exclusion in the Residential Tenancies Act, 1978 (S.A.). However, s.6 is without constitutional effect: Parliament cannot exclude implied repeal of prior statutes, and the R.P.A. may thus be amended impliedly: *South Eastern Drainage Board (S.A.) v. Savings Bank of South Australia* (1939) 62 C.L.R. 603. (Unregistered charge created against land given priority by South Eastern Drainage Act 1900 (S.A.), although conflicting provisions of R.P.A. not expressly excluded). The effect of s.6 may, however, be to establish a presumption against implied repeal. If so this, though it does not destroy, weakens the argument in the text.

21. Residential Tenancies Act, 1978 (S.A.), ss.61-74.

22. *Id.*, s.65(3).

23. This equates the purchaser in South Australia with his counterpart in England. In England purchasers have constructive knowledge of all those in actual occupation of the land: *Hunt v. Luck* [1902] 1 Ch. 428; *Hodgson v. Marks* [1971] 8 Ch. 892. This is, of course, heresy in relation to the theory of the Torrens System. However, there are absolute exceptions to indefeasibility: see s.69(iv-v) and (viii) Real Property Act, 1886-1975 (S.A.), and the residential tenancy would simply be an additional one.

24. In addition, the purchaser may well have a recourse in damages against the vendor, or his land agent, if the lease was not disclosed to him—see s.90(6) Land and Business Agents Act, 1973-1975 (S.A.). It is the vendor's duty to disclose all existing leases.

In opposition to this protection against successors in title it can be argued, that making the purchaser take subject to such leases renders sub-s. (c.1) otiose. After all, if the successor is subject to the same rights as any other landlord, why have a separate subsection for him? This is a hard argument to rebut, especially considering that sub-s. (c.1), which was not in the original bill, must be presumed to have some purpose. However, as already stated, to regard the purchaser as not bound by such leases is to render sub-s. (c.1) meaningless.²⁵ Its effect could be merely to preserve priority rules otherwise existing, and to exclude a successor, not otherwise subject to the lease, from the notice requirements. Perhaps it would have been better if sub-s. (c.1) had never been included in the Act.²⁶

Even if the argument that unprotected residential tenancies bind third parties is not accepted, then the tenant in such a case is not absolutely helpless. In most cases he should be able to combine the rules of general law, and the provisions of the Real Property Act, 1885-1975 (S.A.), to get some protection. The tenant under a residential tenancy agreement is in possession; he is also paying rent. Taking the period over which rent is assessed,²⁷ the payment of rent plus possession (provided it is exclusive) should serve to make him a periodic tenant, in addition to having an equitable lease.²⁸ Where the equitable lease and periodic tenancy conflict, equity being superior to the law, the equitable lease must take precedence.²⁹ Where they do not, the periodic tenancy survives. In the situation in which an unprotected residential lease is held not to bind a purchaser, there can be no conflict, precisely because the equitable lease has been defeated. The tenant may therefore argue the existence of a periodic tenancy. As the periodic tenancy is for the purpose of residence, the provisions of the Residential Tenancies Act, 1978 (S.A.), will apply to give the tenant a measure of security of tenure. Since a periodic tenancy is necessarily for one year or a lesser period (*e.g.*, monthly), it will fall under the protection of s.69 (viii) of the Real Property Act, 1886-1975 (S.A.), and bind a purchaser, whether he has notice of the tenancy or not. Such a right will be valuable to the tenant, for the purchaser will have to serve the requisite notices to terminate the tenancy, and, if the tenant refuses to move, go to the Tribunal to secure possession. By this means, the tenant may well achieve over five months security against the purchaser,³⁰ even

25. The only way to give real meaning to sub-s. (c.1) would be to read it as "the successor to the original landlord shall be entitled to possession". But it actually reads "becomes entitled to possession". That depends, as argued, on whether he is bound or not.

26. Such an event would not make the argument that the purchaser is bound by existing leases untenable. For s.61 would then read that leases shall only terminate on the giving of notice or by order of the Tribunal: sub-ss. (a) and (b). If a tenancy does not bind a purchaser, it must be regarded as terminated, and s.61 does not provide for this method of termination. Therefore, it must bind the purchaser, who must bring it to an end in a recognised way.

27. *Ladies Hosiery and Underwear Ltd. v. Parker* [1930] 1 Ch. 304, 328-329.

28. See *Moore v. Dimond* [1919] 43 C.L.R. 105 (Tenant in possession under an agreement for a lease held to have a yearly periodic tenancy).

29. *Walsh v. Lonsdale* (1882) 21 Ch. D. 9.

30. This would be the result of a combined effect of ss.65 and 73 (One hundred and twenty days security, plus thirty days waiting for a hearing before the Tribunal). As a result of this, it may well be that landlords will constantly keep their tenants on notice to leave — a strange effect for legislation designed to achieve a measure of security of tenure.

though the purchaser is not bound by the actual residential tenancy agreement.³¹

In discussing the enforceability of a residential tenancy agreement, it has been necessary to assume that the agreement does in fact constitute a lease. This is a property right capable of running against a successor in title to the land. It is, however, possible that a residential tenancy agreement does not constitute a lease—and is, therefore, not a property right. The most obvious reason for this would be if the tenant did not have exclusive possession.³² In such a case, the agreement will constitute a contractual licence.

It has been argued that a contractual licence is a property right capable of binding a successor to the land.³³ If so, it should be capable of being caveated,³⁴ and, if caveated, will bind a successor like any other equitable lease that has been so protected. On the other hand, in Australia, it seems the trend is against recognizing contractual licences as a form of property right.³⁵ If that is the case, then, since apart from the Residential Tenancies Act, 1978 (S.A.), the contractual licence is not capable of binding third parties, the tenant under such a residential tenancy agreement would lose out against a successor to the original landlord,³⁶ and not be protected like the lessee. Moreover if the tenant does succeed in caveating the agreement, the caveat could be removed at the suit of the successor.

However if, as argued, all equitable leases that are also residential tenancies, do bind a purchaser, is this not creating a new property right—the residential tenancy—to which specific priority rules apply—and which,

31. We have above been solely concerned with the position of the purchaser who registers. This will occur in almost every case. However, what if the purchaser does not register, or, more likely, is faced by a caveat entered, after the creation of the purchaser's right by a contract of sale, and after the purchaser will have searched the register, but before the purchaser lodges for registration? If the purchaser who registers is, as has been argued, bound by an unprotected lease, then, more so, should the purchaser who does not achieve registration. If however the argument advanced by the text is not followed then the position of the tenant and the unregistered purchaser will come to depend upon the normal rules relating to equitable priorities as an unregistered lease will be in competition with a contract of sale — the first in time will bind the second in time, unless there is some reason to postpone the first. See *Butler v. Fairclough* (1917) 23 C.L.R. 78; *Osmanoski v. Rose* [1974] V.R. 523; *Taddeo v. Catalano* (1975) 11 S.A.L.R. 492. The failure to caveat, before the purchaser searches, could be a reason to postpone the tenant's interest. However could one not argue that the tenant preserves his priority by being in possession of the premises. This would place a duty on the purchaser to inspect the premises before contract. It does, of course, detract from the register as the focal point of the Torrens System.

32. Another reason could be that the agreement is of uncertain duration (*supra*, n.6).

33. See *Hurst v. Picture Theatres Ltd.* [1915] 1 K.B. 1; *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.* [1946] 1 All E.R. 678, 684 per Lord Greene M.R., *Hounslow L.B.C. v. Twickenham Garden Developments Ltd.* [1971] Ch. 233; *Errington v. Errington* [1952] 1 K.B. 290. Cf. the damaging remarks in *N.P.B. v. Ainsworth* [1965] A.C. 1175, 1239 per Lord Upjohn; 1251 per Lord Wilberforce.

34. Real Property Act, 1886-1975 (S.A.), s.191.

35. *Cowell v. Rosehill Racecourse Co. Ltd.* (1937) 56 C.L.R. 605 esp. 614 per Latham C.J. However, the contractual licence in this case was for a few hours only. Would the equitable remedies have been available if the licence was for a much larger period? Cf. *Evatt J., id.*, 640-652. Even *Evatt J.* views the equitable remedies as available only against the contracting party.

36. He will not even bind a volunteer successor, since this interest is personal only.

incidentally becomes an absolute exception to indefeasibility?³⁷ Moreover if it does create a new type of property right, the factor which distinguishes it from other leases which, if unprotected, do not bind a purchaser, is surely that of residence. If residence is so crucial, why should not residential tenancy agreements that do not amount to leases for lack of exclusive occupation (*i.e.*, residential contractual licences) also bind a purchaser? They are residential, and, as argued, the definition of a residential tenancy agreement takes no account of technical distinctions between leases and licences. Such agreements thus become an integral part of the new property right, and all residential tenants are treated alike. In light of the definition of residential tenancy agreements, the protection of the tenant should not depend upon the reintroduction of the distinction between leases and licences that the definition was so careful to exclude.

It has been argued above that all residential tenancy agreements, whether leases or licences, bind successors to the original landlord. At worst, the position appears to be that a lessee, if not a licensee, is able to establish a periodic tenancy that will bind a purchaser, and thus afford a measure of security of tenure for some months. That the position of a residential tenant is uncertain is perhaps due, at least in part, to the paltry debates in parliament, which did not highlight the legal issues involved. S.61 (c.1) was itself only introduced as a late amendment, and was inadequately thought out. The possible relation between the Real Property Act, 1886-1975, and the Residential Tenancies Act, 1978 (S.A.), was largely unexplored. When faced with the enforceability of a residential tenancy, the courts may use Real Property Act provisions to destroy a tenancy that is neither registered or caveated.

Alternatively, they may espouse the argument advanced above, and the policy of social welfare embodied in the Act, to enforce all residential tenancies against successors to the original landlord. It would be better for s.61 (c.1) to be reconsidered to resolve the position of residential tenants against successors in title to the original landlord.³⁸

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37. Such a new exception does not conflict with the strictures against the existence of non-statutory exceptions to indefeasibility, contained in *Breskvar v. Wall* (1971) 46 A.L.J.R. 68. *Frazer v. Walker* [1967] 1 A.C. 569. The new exception is contained in a statute — The Residential Tenancies Act, 1978.

38. See finally s.61(c.2), which provides that a tenancy may be terminated where "a mortgagee in respect of the premises takes possession of the premises in pursuance of the mortgage." This clearly allows a mortgagee, where the mortgage was created prior to a lease, to terminate the lease if the mortgagor should default on payment; it also allows the mortgagee to require possession before sale. While one could argue the tenant should have some security, most mortgage deeds contain a provision preventing the premises being leased without the mortgagee's consent. Any attempt to give the tenant security would surely lead to mortgagees refusing to consent to tenancies. What however if the lease is prior to the mortgage? The mortgagee should be in the same possession as any other purchaser: he should be bound whether the residential tenancy is protected or not. Assuming that the words "takes possession" means "entitled to possession", (why should the mortgagee who succeeds in getting into the property, be in a better position than the one who is barred by a tenant, especially as even peaceful entry is illegal: Residential Tenancies Act, 1978 (S.A.) s.80?) nonetheless sub-s. (c.2) is not limited to the mortgagee whose interest is prior to the tenant. The wording implies that any mortgagee, even one subsequent to the tenant, may terminate the tenancy if the mortgagee is entitled to possession. It is to be hoped the courts will not destroy tenants' rights in this way. If they do, even registered leases may be vulnerable, and yet another exception to indefeasibility will have been created by th Act.

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