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THE LAW BETWEEN LANDLORD AND TENANT IN WASHINGTON:

PART I

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OUTLINE

PROLOGUE

This article will be as utilitarian as a fence post. It is intended as a handbook for lawyers who need to know something about all or part of the law between landlord and tenant in Washington. The level of analysis will be didactic and exegetical, occasionally critical or hortatory, rarely jurisprudential.

The reader who muses over such things may have wondered why the title of the article contains the word "between" where most similar writings say "of." This signifies a limitation upon the subjects that will be covered. In general we will cover only the principles of law governing relations between landlord and tenant, not relations between one or the other of them and third persons. So, for example, while we will deal with personal injury suits brought by a tenant against his landlord, we will not cover those suits brought by a third person against either landlord or tenant. And, as a further example, nothing will be said about creditors, taxing authorities, or purchasers at foreclosure sales who make claims against the landlord's or tenant's interest. There will be no coverage of notices under the Washington unlawful detainer statute, which was the subject of a comparatively recent article by Professor Cornelius J. Peck.[1] The subjects remaining for discussion are still very large and are as complete as might be found in many expositions on landlord-tenant law.

Washington has 700 supreme court opinions, more or less, on landlord-tenant law. These comprise the bulk of the material upon which the article draws. Washington statutes that have any substantial

1. Peck, *Landlord and Tenant Notices,* 31 WASH. L. REV. 51 (1956).

bearing on relations between landlord and tenant will be incorporated in their appropriate places. Extensive reference will be made to the Residential Landlord-Tenant Act of 1973[2] as it bears upon the various parts of the article. Indeed, a desire to give timely coverage to this important new piece of legislation is what prompted this article.

The outline of the article, as expressed in the subdivision headings, follows very closely the outline of the section on landlord and tenant in *American Law of Property*.[3] That section, authored by Professor Hiram H. Lesar, has been found through much experience to be authoritative, eminently usable, and generally the best modern general treatment of landlord-tenant law, despite the unfortunate fact that the treatise is out of print. Besides providing the outline for the present article, *American Law of Property* will be freely drawn upon as authority for statements about the general principles of landlord and tenant law.

Perhaps, before we launch into the body of the article, some general observations on the Washington cases may be ventured. First, the decisions do not form as complete or coherent a mosaic of principles as 700-odd cases in a given area normally would. Instead of there being, say, a dozen opinions turning neatly on a certain principle of law, most of the dozen will turn on features peculiar to each of them. Often the decisive factor will be the language of the lease agreement or some other fact, unique to that case and not apt to be repeated. A remarkably large percentage of the decisions involve only the most general legal principles, often more tacitly assumed than argued, with the reasoning being primarily common sense with little abstract content. This all means, for one thing, that many important legal questions are untouched or only lightly brushed. It also has made many cases difficult to classify by abstract categories. Similarly, the great variety in the fact patterns has proliferated the number of decisions that must be dealt with in this article. Instead of citing only the most recent of a dozen decisions on a point and omitting repetitious citations to the older ones, it has often been necessary to deal with all 12 going back to 1893, because each covers slightly different ground.

2. Ch. 207, [1973] Wash. Laws 1st Ex. Sess., *codified as* WASH. REV. CODE §§ 59.18.010–.420, .900, 59.04.900, 59.08.900 (Supp. 1973).

3. 1 AMERICAN LAW OF PROPERTY §§ 3.1–3.104 (A. J. Casner ed. 1952) [hereafter cited as A.L.P.].

A second phenomenon that all who worked on this article noticed is how few cases involve residential leaseholds. Most that do, or at least the heaviest concentration, are tenants' personal injury suits. It seems to be a fact of life that there seldom is enough at stake between a residential landlord and tenant to make litigation worth the cost, at any rate, at the appellate level. In view of the paucity of residential cases, one might wonder how heavy an impact the 1973 Residential Landlord-Tenant Act will have on life in the state.

The last remark is not intended to decry the usefulness of legislation in the area of landlord-tenant law. There are some subjects upon which legislation ought to be enacted. Relations between residential landlord and tenant needed attention and could probably use more, though legislation in that area should take into account that, for various practical reasons, the parties will either settle most disputes by extrajudicial means or not settle at all. The requirements as to formation of leases, especially the statute of frauds area, should be codified and tidied up. The status of tenancy by sufferance could profitably be clarified and an old statute making a trespasser tenant by sufferance[4] repealed. Some archaic statutes, such as the one creating a special cause of action for defaults in payment where rent is 40 dollars a month or less,[5] ought to be abolished or modernized. Thought should be given to whether the Unlawful Detainer Act, R.C.W. Chapter 59.12, needs to require a hearing before the writ of restitution issues, to meet due process requirements. These and other beneficial reforms will be mentioned at appropriate places in the body of this article. Let us, now, turn to the body of the article.

I. HISTORY AND NATURE OF LEASEHOLDS

A. History

When we get our first view of the leasehold in English law, about the year 1200 or shortly before, the tenant is regarded as having only a species of personalty, a covenantal interest under his lord. For reasons that are in dispute and are of no moment anyway, his possession, though rightful and for a period of time, was not classified as a free-

4. WASH. REV. CODE § 59.04.050 (1963).
5. *Id.* ch. 59.08.

hold estate. Thus, he could not avail himself of the possessory writs, chiefly novel disseisin, or of the writ of right. He had a form of action of covenant against his lord, but against others his right of possession had to be vindicated by the lord. However, during the 13th century the tenant acquired several forms of action to protect himself against third persons, chiefly the action of ejectment, albeit his remedies were for a time limited to money damages. At the very end of the Middle Ages, apparently just before 1500, the tenant was allowed to recover possession in ejectment, and his remedies became efficient enough. So efficient was ejectment, in fact, that freeholders in time adapted it to try their own titles, in place of the cumbersome old real actions, by alleging that a fictional plaintiff held as tenant of his landlord, the latter being the real plaintiff.[6]

Despite some current folklore to the contrary, the medieval origins of landlord-tenant law have had no great practical effect upon that area of Washington law, probably no more than its medieval origins have had on our law in general. Rather, the mass of Washington's landlord-tenant principles are to be found in the decisions of the state supreme court, which come to 700 or so, as already noted. There is no statutory code on the subject, but only a fragmentary collection of statutes, most of which are located in the short R.C.W. Title 59. Subjects covered in that title are: the kinds of tenancies, their methods of formation and termination;[7] the general unlawful detainer action;[8] a special unlawful detainer action for defaults in rent of 40 dollars per month or less;[9] and a special unlawful detainer action against trespassers, which should never have been included among the landlord-tenant statutes.[10] Other statutes affecting landlords and tenants, such as the one in R.C.W. Chapter 60.12 authorizing landlords' crop liens, are scattered here and there.

Special mention should be made at this point of the Residential Landlord-Tenant Act of 1973.[11] This Act applies only to leases of "residences," the Act excluding from that term a number of relation-

6. The material for this paragraph was drawn from T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 570–74 (5th ed. 1956); and from 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 106–17 (2d ed. 1898).
7. WASH. REV. CODE ch. 59.04 (1963).
8. *Id.* ch. 59.12.
9. *Id.* ch. 59.08.
10. *Id.* ch. 59.16.
11. *Id.* ch. 59.18 (Supp. 1973).

ships, such as residence at certain public or private schools, hospitals, and other institutions, farmhouses, housing for employees as part of their employment, and transient lodging.[12] Principal aspects of the landlord-tenant relationship that the Act regulates are maintenance, refuse disposal, rodent control, sanitation,[13] security and damage deposits,[14] and retaliatory evictions.[15] In many other respects, large and small, the Act alters former principles of law as to residential leases. For example, it changes some of the unlawful detainer procedures,[16] and it lowers the period of notice to terminate a periodic tenancy to twenty days for either landlord or tenant.[17] Elaborate remedies and enforcement mechanisms are created.[18] With some exceptions, landlord and tenant may agree to exempt themselves from certain provisions of the Act, but the circumstances in which, and the procedure by which, this may be done are so restrictive that the exemption provisions are unusable for practical purposes.[19] Details of the Act will be worked into appropriate sections of this article. A general preview of the Act has been given here to introduce the scope and pattern of what is, for residential leaseholds only, of course, the nearest approach Washington has to a landlord-tenant code.

B. The Landlord-Tenant Relation

In its most fundamental aspect, the relation of landlord and tenant arises whenever the holder of a possessory estate in land permits another to possess it for a temporal period or at will.[20] The grantor, the landlord, is viewed as retaining a reversion, even if he had only a life estate and purported to create a tenancy for 999 years. The permittee, the tenant, having rightful possession, has an estate in land, though

12. *Id.* §§ 59.18.030–.040.
13. *Id. especially* §§ 59.18.060 & .130.
14. *Id.* §§ 59.19.260–.280.
15. *Id.* §§ 59.18.240–.250.
16. *Id.* §§ 59.18.370–.420.
17. *Id.* § 59.18.200.
18. *See especially id.* §§ 59.18.070–.120, .160–.190, .280, .290, .310, .320–.350 (arbitration procedure).
19. *Id.* §§ 59.18.230 & .360.
20. *Cf.* Hughes v. Chehalis School Dist. No. 302, 61 Wn. 2d 222, 224, 377 P.2d 642, 643 (1963), which contains a very similar definition. The words "temporal period" are intended to eliminate life estates. A tenancy at will, it may be argued, is a species of privilege, similar to a license, not a possession by right. Despite the logical force of this argument, tenancies at will are traditionally treated as leaseholds.

historically not a freehold estate. Distinctions between freehold and nonfreehold estates now play no active role in landlord-tenant relations.

No particular formalities are necessary to form the relationship, except, as will be discussed later, where a statute of frauds requires a special form for some types of leases. The relation may even be implied, as where a landlord demands rent of one who otherwise would be a trespasser.[21] If the owner says or does nothing to signify his permission, such as demanding or accepting rent, it appears that one whose right to possession has expired is only a trespasser.[22] Because the relationship is permissive of the owner, an adverse possessor or one claiming title cannot be a tenant.[23] However, it is possible for a tenant in common in the fee to be a lessee of his co-tenants' shares of the fee.[24] It is quite possible to have a leasehold of very short duration, such as one evening.[25]

Dictum in a 1905 decision suggests that, if the parties have agreed on a lease, the tenant does not have to enter into actual possession for the term to begin.[26] This would be contrary to the old doctrine of *interesse termini,* that the tenant has a right to enter but no estate. While there are a few decisions in other jurisdictions supporting this view, most American decisions do not.[27] If the time for the term has begun according to his lease, the fact that the tenant has not physically entered should not prevent possession in law, *i.e.,* the legally protected right of possession, and thus should not forestall the beginning of the leasehold estate.

21. Brownie v. McNelly, 134 Wash. 380, 235 P. 807 (1925) (alternative ground).
22. Meyer v. Beyer, 43 Wash. 368, 86 P. 661 (1906) (owner did not charge rent); Carlson v. Curran, 42 Wash. 647, 85 P. 627 (1906) (owner refused offers of rent). *Carlson* and *Meyer* both involve the situation in which the possessor was originally a tenant of an owner who lost his title at a tax sale. By implication, the tenancy also was extinguished, and no new tenancy arose between the ex-tenant and the tax-sale purchaser, who did nothing to accept him. The emphasis must be upon the failure to accept, or *Carlson* and *Meyer* would appear contrary to Brownie v. McNelly, cited in the preceding note.
23. Snyder v. Harding, 34 Wash. 286, 75 P. 812 (1904).
24. Brydges v. Millionair Club, Inc., 15 Wn. 2d 714, 132 P.2d 188 (1942). The lessee-tenant in common raised the intriguing argument that, since, as cotenant of the fee, he was entitled to possession of the whole land, he should not have to pay his landlord-cotenants rent for the right. The court held the principle of cotenants' right to possession was "inapplicable" in the situation presented.
25. Hughes v. Chehalis School Dist. No. 302, 61 Wn. 2d 222, 377 P.2d 642 (1963) (lease of part of school building for evening meeting).
26. Schlumpf v. Sasake, 38 Wash. 278, 80 P. 457 (1905).
27. 1 A.L.P. § 3.22.

C. *Leaseholds Distinguished from Other Relationships*

The term "leasehold" ought to be reserved for those relationships that strictly meet the definition given previously. Difficulties usually arise when a court blurs the concepts of "permissive," "possession," "land," and "temporal period." One of the most egregious errors the Supreme Court of Washington has made, to a purist in such affairs at any rate, has been to call a "lease" what everyone knows is a bailment of chattels for hire.[28] To make the whole thing more embarrassing, the two cases just cited are comparatively recent, the court's statements about "leases" were lengthy and calculated, and landlord-tenant decisions were cited as authority for resolving bailment issues. About the only thing to be said in the court's defense is that everyone else, laymen and courts—excepting purists, of course—seem to be moving in the same direction, blending bailment and leasehold principles. Still, there must remain some situations in which separate rules govern bailments and leaseholds. Take *Port of Seattle v. Luketa,*[29] where the ultimate question was whether the plaintiff could deny the defendant lockers in a storage building. In deciding that the relationship was one of warehousing, a bailor-bailee relation, and not a tenancy, the court invoked a statute that prohibited warehousemen from discriminating against customers who applied for service.

1. *Distinguished from license, easement, or profit*

In theory the distinction between a license to *use* land and a leasehold would be double: The license would be permissive (a "privilege" in Hohfeldian terms) and so revocable at will, whereas a lease is of right and not revocable; and the licensee could only use the land, *e.g.*, pass over it, and not, as with a leasehold, fully possess it. If the license were to occupy—possess—the land, then we would, as previously mentioned, refer to it as a tenancy at will, which is traditional terminology, but strictly speaking the interest is a license. Difficult borderline situations arise in practice. In one case the supreme court held that a concession stand at a racetrack was a leasehold, the crucial

28. Gandy v. State, 57 Wn. 2d 690, 359 P.2d 302 (1961) (automobiles); St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co., 46 Wn. 2d 840, 286 P.2d 107 (1955) (Scoopmobile).

29. 12 Wn. 2d 439, 121 P.2d 951 (1942).

factor being exclusive possession of a defined area.[30] In another decision the use of a logging road was held permissive, and so a license, mainly because the landowner had never demanded compensation for the use.[31]

An easement, similar to a leasehold insofar as it is irrevocable, differs in that it gives the right of use only, while the leasehold is possessory. Of course, the neat abstractions blur in actual situations. In the race track case just referred to, it might plausibly have been argued that a concession stand was so insubstantial an object that it merely used, but did not occupy or possess, an area of land. Assuming he clearly expresses his intent to do so, may a landowner grant an easement for a house, or would a possessory estate of some duration, be it a leasehold or freehold, inevitably result?

Intriguing as are the preceding conundrums, there is an easement-leasehold problem more challenging and sophisticated yet. Suppose an owner grants what is clearly an easement, say, for a driveway, but for a term of ten years. Is it a leasehold in an easement? Would the principles of landlord and tenant apply to the relationship?[32] What about the grant of a roadway for "so long as" the premises were used for logging? In an 1897 decision[33] the Washington court labeled this a leasehold upon condition subsequent, though a better classification would have been a determinable easement or easement upon special limitation. The opinion seems dubious authority for the proposition that there may be a leasehold in an easement.

A profit, or profit *à prendre,* is, like an easement, a usufructuary right, but it gives the right to remove substances, commonly stone or minerals, from the soil. So, a grant of the right to mine coal is a profit, despite the supreme court's classifying it as a lease.[34] Though the court's analysis appears wrong, the facts illustrate how the use of land under a profit may look much like possession. Of course, also, the

30. Lamken v. Miller, 181 Wash. 544, 44 P.2d 190 (1935).

31. Reed Logging Co. v. Marenakos, 31 Wn. 2d 321, 196 P.2d 737 (1948). *See also* Port of Willapa Harbor v. Nelson Crab & Oyster Co., 15 Wn. 2d 515, 131 P.2d 155 (1942), in which a rule peculiar to landlord-tenant law was invoked in a suit for wharfage fees. It is not clear that the court meant to say one who uses a wharf by the owner's permission is a tenant instead of a licensee or whether it merely applied the peculiar landlord-tenant rule to a licensee.

32. *See* Walsh, *Licenses and Tenancies for Years,* 19 N.Y.U. L.Q. REV. 333 (1942).

33. Knapp v. Crawford, 16 Wash. 524, 48 P. 261 (1897).

34. Hoover v. Ford's Prairie Coal Co., 145 Wash. 295, 259 P. 1079 (1927) (court emphasized parties called it "lease").

grant of the right to mine coal for ten years might arguably be called a leasehold in a profit, analogously to the discussion in the preceding paragraph.

2. Rights to maintain signs and billboards

An advertiser may secure from a landowner the right to maintain a painted sign or a signboard on the wall of a building, standing on a roof, or standing in an open space of ground. Whether such rights should be categorized as easements or leaseholds depends upon whether the advertiser has possession or only use, which turns largely upon whether his sign excludes the landowner from using the area. Speaking in generalities, then, it would seem that a sign painted on a wall would tend to be an easement, a freestanding sign in a field would tend to be a leasehold, and a sign standing on a roof would be very much on the borderline. No Washington decision has been discovered directly holding on any of these questions. However, the state supreme court has recently spoken of signboards standing in fields as leases.[35]

3. Concessions in department stores

Department stores and other businesses, such as theaters, often engage other persons as concessionaires to carry on parts of the business upon the general premises. Certainly there will be contractual undertakings between the parties, and the concessionaire will normally be assigned a specific area in which to ply his trade. Such arrangements may be referred to as leases by the parties, which is some evidence of that transaction, but not alone determinative. Ultimately the question is whether the concessionaire has enough exclusive control over his area to have the possession requisite to a leasehold.[36] Three Washington cases have been found that shed some light on the problem. One, previously noted, holds that a concession stand at a race track was on a leasehold.[37] In two other cases the ultimate question was whether certain persons were "employees" within the meaning of the

35. Markham Advertising Co. v. State, 73 Wn. 2d 405, 414, 439 P.2d 248, 254 (1968). *See* 1 A.L.P. § 3.4 for further discussion.
36. For a general discussion, see 1 A.L.P. § 3.5.
37. Lamken v. Miller, 181 Wash. 544, 44 P.2d 190 (1935).

State Unemployment Compensation Act. Barbers who "leased" barber chairs were held to be within the Act, while concessionaires in a store were not, the inference being that the former were not tenants and the latter were.[38]

4. Cropping agreements

Very frequently in a lease of agricultural lands, where there is no doubt that there is a tenant in possession, rent will be paid in the form of crop shares; many such farm leases will be cited in later sections of the article. Contrasted with true leases are so-called sharecropping agreements, probably rarer in Washington than in some parts of the country, under which a cultivator grows a crop on land possessed by another, the two of them sharing the crop. In this arrangement the cultivator is an independent contractor, but, since he must have a nonexclusive right to enter the land and the right to perform the necessary agricultural operations upon it, he should be viewed as having an easement also. Once again, the core question is whether the cultivator has possession or use, and we can imagine fact patterns in which the distinction is fuzzy. There do not seem to be many decisions on the question elsewhere,[39] and only one Washington case has been identified dealing with it in a somewhat atypical form. The holding, or at least an apparent holding, is that no sublease occurs when a tenant allows a third person to pasture cattle on the demised premises.[40]

Crop-sharer cases in other jurisdictions have most often posed the question whether landowner and cultivator are co-owners of the crop. Properly analyzed, this question does not turn upon whether they have a contractual or a landlord-tenant relationship, but simply upon whether, either by contract or by rent upon shares, they divided the crop.[41] A Washington decision, holding that the parties were co-owners of a wheat crop, follows this analysis and thus does not reach the issue if they were landlord and tenant.[42]

38. McDermott v. State, 196 Wash. 261, 82 P.2d 568 (1938), seems to contain a holding that barbers were not tenants but had contracts of service. George J. Wolff Co. v. Riley, 24 Wn. 2d 62, 163 P.2d 179 (1945), contains statements, probably dictum, that concessionaires were tenants.
39. 1 A.L.P. § 3.6.
40. Golden v. Mount, 32 Wn. 2d 653, 203 P.2d 667 (1949).
41. *See* 1 A.L.P. § 3.6.
42. Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 P. 666 (1911).

5. Lodging agreements

Comparisons between a "lodger" and a tenant seem especially difficult to make. In the first place, the word "lodger" is only a conclusionary label that does not tell us much about the nature of the relationship. Apparently a lodger is a kind of licensee, for the owner of the premises where he resides may evict him at will, without the statutory notice generally required for a tenant. Of course, this is not an infallible distinction, because it is a characteristic shared with the so-called tenant at will. Many lodging agreements are for a single night or other transitory period, but this may be true also of a leasehold, as we have seen.[43] Also, many arrangements called lodgings are with residents of so-called rooming houses, who may stay there for years. Nor is the lodger necessarily distinguished from a tenant because he uses only a portion of a building, for that is true of occupants of apartments and offices, who generally are classified as tenants.

The gist of a lodging agreement seems to be that the lodger has not sufficient control over his portion of the premises to be said to have possession. Indicia that the owner retains possession seem to be that the lodger shares in using other facilities of the house, usually bathrooms or dining rooms, and that the owner is expected to use keys to enter the lodger's room, perhaps for cleaning or linen supply. Normally a lodging room comes furnished, but this is true of many leased premises, too. Although it is easy enough to say a tenant has possession and a lodger does not, it is not so easy to say why.[44]

Research has failed to uncover a Washington case in which there is a holding on what is or is not a lodging. The 1973 Residential Landlord-Tenant Act, by its express language, does not apply to "residence in a hotel, motel, or other *transient* lodging whose operation is defined in R.C.W. § 19.48.010."[45] R.C.W. § 19.48.010 defines "hotel" as a place of transient lodging with 15 or more rooms. Apparently, then, the Act applies to nontransient lodgings of less than 15 rooms, which would comprehend most rooming and boarding houses. This provision would transform them into leaseholds, so that the principles of landlord-tenant law, including the provisions of the 1973 Act, would gov-

43. Hughes v. Chehalis School Dist. No. 302, 61 Wn. 2d 222, 377 P.2d 642 (1963).
44. 1 A.L.P. § 3.7.
45. WASH. REV. CODE § 59.18.040(3) (emphasis added).

ern, which might produce some odd, perhaps unintended, results. For instance, under the statutory rules guaranteeing the tenant exclusive possession, a rooming house operator may now have to give his roomers two days' notice every time he enters to clean their rooms.[46]

6. *Occupation by employees or servants*

An employee may lease premises from his employer wholly unconnected with his employment, in which event no special problems arise. It is where there is some connection between his employment and his use or possession of land that we may have difficulty determining if he is also a tenant. Most difficult would seem to be the case of a live-in domestic servant occupying quarters on his employer's premises. Though no Washington decisions involving such fact patterns have been found, the considerations should be similar to those in the lodger cases just discussed, the underlying question being whether the employee had exclusive possession of his quarters. One might venture, for instance, that a live-in maid in a home would tend not to be a tenant, while a janitor or manager who had an apartment in an apartment house or office building normally would be.

As employer-employee cases have arisen in American courts, the most frequently litigated issue has been whether an employee can be a tenant if he receives housing as part of his compensation and his employment is terminable at will.[47] In *Najewitz v. City of Seattle* it was settled that such an employee is a tenant at will; the plaintiff occupied a house as caretaker of a gravel pit.[48] Similarly, migrant farm workers who pay their employer daily rent for houses in a labor camp are tenants.[49] However, neither of these arrangements, nor that of any "seasonal agricultural employees," nor that of any "employee of a landlord whose right to occupy is conditioned upon employment in or about the premises," is covered by the Residential Landlord-Tenant Act of 1973.[50] Some tenant-employees, such as most residents of a company town, are within the Act, whether they pay rent in money or whether they receive housing as part of their compensation.

46. *Id.* § 59.18.150.
47. 1 A.L.P. § 3.8.
48. 21 Wn. 2d 656, 152 P.2d 722 (1944).
49. State v. Fox, 82 Wn. 2d 289, 510 P.2d 230 (1973).
50. WASH. REV. CODE §§ 59.18.040(6) & (8).

7. Contract purchaser in possession

In Washington, as elsewhere, it is typical for the contract purchaser of land to have possession of the land while the contract is executory, though title is retained by the vendor. However, the purchaser's possession is not a natural incident of the relationship; the underlying right of possession remains with the owner, who transfers it to the purchaser by an express clause of the contract. Why not conclude that the purchaser is a tenant, since he possesses another's land by permission? Indeed, this position has been taken by some, but American courts generally refuse to admit of a landlord-tenant relation. The question in these cases has often been whether the vendor may use unlawful detainer to oust a defaulting purchaser. In explaining why there is no leasehold, the courts tend to emphasize that the parties did not contemplate one. Were it to be suggested that the purchaser's equitable title is the basis for possession, it could be answered that equitable title does not give possession to the beneficiary of a trust.[51]

Occupancy under a contract of sale is one of the relationships expressly excluded from the operation of the 1973 Residential Landlord-Tenant Act.[52] Other than that, no decisions have been found in Washington determining specifically whether the purchaser is a tenant. There is an opinion that, if the contract purchaser is given the right of possession but allows the vendor to remain in possession upon payment of rent, the vendor is a tenant.[53] This does not tell us the nature of the purchaser's interest, for he could have been a tenant and the vendor his subtenant or the purchaser could equally as well have had some other estate.

D. Is a Lease a Conveyance or a Contract?

One of the classic and fundamental questions in the area of landlord-tenant relations is whether a lease is a conveyance or a contract. Upon this question is based the further question whether principles peculiar to conveyancing law, *e.g.*, the rule of *caveat emptor*, or of contract law, *e.g.*, dependency of covenants, should govern the rela-

51. *See* 1 A.L.P. § 3.9.
52. WASH. REV. CODE § 59.18.040(2).
53. Oregon & Wash. R.R. v. Vulcan Iron Works, 57 Wash. 372, 106 P. 1120 (1910).

tion. The obvious answer to the first question is that a lease is a conveyance, the grant of an estate, and normally also a contract because of the covenants it contains. It might be supposed further that conveyancing rules would govern the grant and contract rules, the covenants. That, however, has not been the traditional answer, though there may be a trend in that direction. Traditionally English and American courts have said conveyancing rules control. This implies, for one thing, that, owing to the *caveat emptor* rule, a tenant has no implied warranties that the premises are fit for his use. With some exceptions, that has been the result. For another thing, it implies that a party cannot rescind for the other's breach, however material, for the conveyancing rule says covenants are independent. In ways that will be mentioned in later sections, we are undergoing a shift away from pure conveyancing principles toward those of contract law.[54]

The Washington supreme court regularly describes leases as "lease contracts" or "lease agreements."[55] There seems to be no decision so holding, and, indeed, it is hard to imagine the question would ever have to be answered in the abstract. We can, however, identify some important ways in which contract principles have been applied to leases. For one, whenever there is a question of interpretation of the language of a lease, the contract rules of interpretation are used.[56] Moreover, the court has said, under facts that may make it a holding, that a lease is both a conveyance and, as to the covenants, a contract.[57]

Two specific causes of action present the conveyance-contract question in its most compelling form. The first is when a tenant claims the

54. *See* 1 A.L.P. § 3.11.

55. Such phrases appear in a large percentage of the decisions cited in this article. Particularly strong discussions will be found in Schorzman v. Kelly, 71 Wn. 2d 457, 429 P.2d 217 (1967); University Properties, Inc. v. Moss, 63 Wn. 2d 619, 388 P.2d 543 (1964) (allowing tenant to "rescind" his "contract" [!]); Gandy v. State, 57 Wn. 2d 690, 359 P.2d 302 (1961) (treating bailment for hire as a lease "contract"); Preugschat v. Hedges, 41 Wn. 2d 660, 251 P.2d 166 (1952) (lease both conveyance and contract); Blume v. Bohanna, 38 Wn. 2d 199, 228 P.2d 146 (1951); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914) (applying "contracts" doctrine of estoppel).

56. *See especially* the following cases, cited note 55 *supra:* Schorzman v. Kelly, Preugschat v. Hedges, and Blume v. Bohanna. *But see* National Bank of Commerce v. Dunn, 194 Wash. 472, 78 P.2d 535 (1938). The lease contained no express promise to pay rent, but said it was "at an annual rent" of $12,600. The court held this was not a covenant to pay rent, though it seems such language would normally be considered promissory under contract rules.

57. Preugschat v. Hedges, 41 Wn. 2d 660, 251 P.2d 166 (1952) (contract rules used to interpret cancellation clause).

landlord has breached an implied warranty of fitness. So far, the Washington position is that no such warranty is implied in nonresidential leases, but the court has just created an implied covenant of fitness for habitation in residential leases. These matters will be detailed in Section III-H.

The second cause of action which presents the question is when a tenant claims he should be allowed to rescind because his landlord has substantially failed to perform. Rescission, the contract remedy, is generally not allowed. In 1964 in *University Properties, Inc., v. Moss*,[58] the Supreme Court of Washington said and held that a tenant might rescind his lease, both the covenants and the conveyance, on account of his landlord's breach of covenant. The tenant had made a two-and-a-half-year lease of office space with his landlord, and the landlord had separately agreed to make available additional adjoining space. When the landlord could not or would not make the additional space available, the tenant quit and vacated the original space, giving notice he "rescinded" his lease. Without apparent recognition of the conveyancing issue, the court agreed the tenant had the right to "rescind" his "contract." While it is true that the court seemed to regard the whole transaction, the lease plus the agreement for additional space, as the "contract," and that the case is unique in this aspect, that does not detract from the fact that the court allowed rescission, not only of the covenants, but of the conveyance itself. This decision plumbs fundamental principles as few cases do, whether the court realized it or not.

E. Nature of Tenant's Property Interest

Something has already been said of the nature of a leasehold. It is an estate in land because it gives the right of possession, though it historically is not dignified as a freehold. Because of this historical characterization, a leasehold is still viewed as personalty, a "chattel real."[59] This concept is apt to have its greatest effect in the settlement of

58. 63 Wn. 2d 619, 388 P.2d 543 (1964).

59. *In re* Barclay's Estate, 1 Wn. 2d 82, 95 P.2d 393 (1939). *But see* Sakris v. Eagle Indemn. Co., 176 Wash. 73, 28 P.2d 316 (1934), holding that a broker who rents land for his clients is a "real estate broker" within the meaning of a statute requiring a bond.

deceased tenants' estates.[60] The leasehold is a present possessory estate, of temporary duration. Like all estates, it may be distinguished from the others by the measure of its duration, which will be expressed as a fixed temporal period or as a series of recurring (but not separate) periods. An exception is the tenancy at will, truly a license but classified as a leasehold, which is of indefinite duration, terminable at either party's will. It seems that a leasehold may be carved out of any estate of longer duration, even out of another leasehold. In the latter event, the smaller estate will be called a sublease, and there will be a true landlord-tenant relation between the head tenant and his subtenant.

These basic concepts may seem commonplace to most, but it is well to keep them straight. In the main, the Washington supreme court has not been seriously misled by failing to do so. However, they have spoken of a leasehold in an easement,[61] which is incorrect because the holder of an easement has not possession; it would be more appropriate to speak of an easement for so many years. Also, in reasoning that leases for over a year must be in deed form, the court has said they are "encumbrances."[62] The same result could have been attained by calling them, more precisely, conveyances.

F. Nature of Landlord's Property Interest

Having granted away a temporary possessory estate of shorter duration than his own estate, the landlord has something left over. It is a future interest, an estate with possession deferred to the end of the supervening leasehold. Since this future interest stays with the landlord and does not pass to a third person, the landlord's interest is properly classified as a reversion.

As a matter of curiosity, we might observe that leaseholds are the nearest modern analogue to the ancient feudal estates in land. Please note that it was not said that leaseholds are descended from the feudal freehold estates; they are not, and the modern freehold estates are. However, one who would understand the feudal freehold might well start by thinking of it as a kind of leasehold that had the duration of a

60. *In re* Barclay's Estate, 1 Wn. 2d 82, 95 P.2d 393 (1939).
61. Northcraft v. Blumauer, 53 Wash. 243, 101 P. 871 (1909); Knapp v. Crawford, 16 Wash. 524, 48 P. 261 (1897).
62. Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956).

freehold, *e.g.*, of a fee simple absolute. During the entire duration of the estate the lord and tenant (we even use the same names for leases) had continuing and recurring duties to each other, much as do today's landlord and tenant. The tenant owed some kind of regular services, which might be services as a knight (knight service), other military or personal service (serjeanty), worship services or prayers if the tenant were a church (frankalmoin), or payments in crops or money (socage). On special events, such as upon the marriage of the lord's daughter, the tenant might owe special services, usually money payments. At all times the tenant owed the lord the mystical duty of fealty. The lord, for his part, vouchsafed the land to the tenant by warranty and by his duty to defend the tenant. It will be seen that a leasehold is very like socage tenure, though the mutual duties are less elaborate and the estate is not a freehold.

II. CREATION OF THE LANDLORD-TENANT RELATIONSHIP

A. Principles Applied to All Leases

A lease being a consensual arrangement between the parties, they must be mentally competent to understand its nature, provisions, and effect.[63] The landlord must, as we have seen, have a possessory estate, but he may be a tenant in common with others.[64] In this event, he would lease only his cotenancy interest, giving the lessee the right of possession with the other cotenants;[65] they are not bound by the lease, and it does not prevent their obtaining a partition by judicial action.[66] Similarly, a life tenant may create a leasehold, though, of course, if he dies before the end of the stated term, the leasehold will fall in with his life estate.[67]

We have previously noted that, save when a statute requires a certain form of document, no special formalities are necessary to make a lease. It may be oral or even implied by the tenant taking possession

63. Tecklenburg v. Washington Gas & Elec. Co., 40 Wn. 2d 141, 241 P.2d 1172 (1952). *See also* Korstad v. Williams, 80 Wash. 452, 141 P. 881 (1914) (member of unincorporated association may be tenant).
64. De la Pole v. Lindley, 131 Wash. 354, 230 P. 144 (1924).
65. *Id.*
66. Hamilton v. Johnson, 137 Wash. 92, 241 P. 672 (1925).
67. Kerns v. Pickett, 47 Wn. 2d 184, 287 P.2d 88 (1955).

with the landlord's permission.[68] The 1973 Residential Act goes so far as to say that rules and regulations posted by the landlord become part of the lease.[69] Of course, the parties must both agree in some manner; for instance, a landlord cannot, by executing a written lease, thrust tenancy upon one who rejects it.[70] Assuming the parties have made a lease, it will be interpreted to effectuate their intent, and contract rules of interpretation will be invoked.[71] The most frequently used rule is that in cases of ambiguity a lease will be interpreted, so it is often said, favorably to the tenant.[72] Though the rule is generally stated in that form, it would be better to say we construe against the drafter, who normally is the landlord. Washington has recognized that "construe against the drafter" is the basis for the rule and, it is felt, the court would probably construe against the tenant if he drafted the lease.[73] Reformation is also available upon clear and convincing evidence that a written lease does not express the parties' intent.[74]

A question that is, frankly, not well decided in Washington is how the premises must be described in a lease.[75] A pair of old cases indicated that the description need not be the legal description, nor even a street address, and that parol evidence could be used to complete it.[76] For example, "the first story of the two story brick building belonging to John A. Nolan" was held adequate.[77] Later decisions, without, of course, overruling the older cases, have apparently laid down the rule that a description is incomplete and inadequate if one must resort to

68. *See* Hughes v. Chehalis School Dist. No. 302, 61 Wn. 2d 222, 377 P.2d 642 (1963). Indeed, Washington statutes provide that a periodic tenancy arises upon what is sometimes called a "general letting," *i.e.*, "for an indefinite time, with monthly or other periodic rent reserved." WASH. REV. CODE §§ 59.04.020 (1963) & 59.18.200 (Supp. 1973).

69. WASH. REV. CODE § 59.18.140.

70. Rademacher v. Rademacher, 27 Wn. 2d 482, 178 P.2d 973 (1947).

71. *See especially* Schorzman v. Kelly, 71 Wn. 2d 457, 429 P.2d 217 (1967); and Blume v. Bohanna, 38 Wn. 2d 199, 228 P.2d 146 (1951).

72. The Washington supreme court has recited this familiar rule many times. *See, e.g.*, Blume v. Bohanna, 38 Wn. 2d 199, 228 P.2d 146 (1951); Kandra v. Higgins, 46 Wn. 2d 321, 281 P.2d 243 (1955) (dictum); and Murray v. Odman, 1 Wn. 2d 481, 96 P.2d 489 (1939).

73. *See* Kandra v. Higgins, 46 Wn. 2d 321, 281 P.2d 243 (1955) (dictum); and Murray v. Odman, 1 Wn. 2d 481, 96 P.2d 489 (1939).

74. Henderson v. Lambros, 181 Wash. 571, 43 P.2d 966 (1935); Spencer v. Patton, 179 Wash. 50, 35 P.2d 768 (1934).

75. *See* 24 WASH. L. REV. 69 (1949).

76. Stanford Land Co. v. Steidle, 28 Wash. 72, 68 P. 178 (1902) (dictum); Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 P. 715 (1902).

77. Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 P. 715 (1902).

parol evidence to determine the location. Thus, descriptions by street number without naming the town, such as "a house at 2626 W. Fairview," have been held to make a lease void.[78] What is not at all clear is whether a complete street and town address is sufficient, or whether the legal description must be used. In view of the well known rule of *Martin v. Seigel*,[79] that sale contracts and conveyances of platted land must contain the full legal description, there is reason to suppose a lease should, too. After all, a lease conveys an estate in land. Also, there is some stray language in a 1956 landlord-tenant decision that assumes a legal description is necessary.[80] As of the present writing, then, the prudent draftsman will include the full legal description in his leases.

In many, likely the vast majority, of cases that will arise, the question of description will have become moot. This is because of the well established rule that an inadequate description is cured if the tenant takes possession of the premises.[81] It is unclear whether the rationale for this result rests upon estoppel or part performance, but, in any event, in the cases cited in the last footnote, landlords and tenants have both been able to avail themselves of the doctrine.

B. Tenancy for Years

1. Nature of estate for years

A tenancy for years is one granted for a fixed chronological term, generally for one year or for some years, but possibly for one hour, one day, one week, or one month. This is so even if rent is payable in monthly or other installments; the term is a single term, despite some unfortunate language in one Washington decision.[82] It generally is understood that the term must be fixed and determinable at its comm-

78. Bonded Adjustment Co. v. Edmunds, 28 Wn. 2d 110, 182 P.2d 17 (1947); Broadway Hosp. & Sanitarium v. Decker, 47 Wash. 586, 92 P. 445 (1907) (alternative ground).

79. 35 Wn. 2d 223, 212 P.2d 107 (1949).

80. McKennon v. Anderson, 49 Wn. 2d 55, 59, 298 P.2d 492, 495 (1956).

81. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956); Zinn v. Knopes, 111 Wash. 606, 191 P. 822 (1920); McLennan v. Grant, 8 Wash. 603, 36 P. 682 (1894).

82. Gandy v. State, 57 Wn. 2d 690, 359 P.2d 302 (1961), in treating a bailment for hire as if it were a leasehold, said that a bailment for a fixed term with payments in installments was "a contract for a series of transactions."

encement, which has caused some difficulty with, say, a lease for the duration of a war.[83] Viewed purely in the calculus of estates, this looks like a defeasible fee estate. However, the Washington position seems to be that the term does not have to be fixed at the beginning if the lease provides a formula by which it will later become fixed.[84] A leasehold for "one or more years" has been held to have a fixed term of two years.[85] Apparently, also, in calculating the term of a Washington leasehold, we should add to the original term the periods of any renewal options the tenant has.[86] The presence of a clause empowering one of the parties to terminate does not transform a tenancy for years into a tenancy at will.[87]

A leasehold for years may commence at some future date,[88] and the period before it commences is not included as part of the term.[89] The commencement point may be an event of uncertain time, such as the completion of a building.[90] But when this is the situation, there is a serious perpetuities problem that no Washington case seems to have raised.[91] A future leasehold is not vested until it becomes possessory, so that the vesting rests upon an uncertain event that may not happen within the period of the rule against perpetuities, which, in the leasing context, would be a 21-year period in gross. It is true that the leading case, from California, saved a tenancy that was to commence upon completion of a shopping center, but the court relied upon facts that would not be present in all leases to commence in futuro.[92] The thorough draftsman can avoid the perpetuities problem by simply providing that the lease will become void if the tenancy does not commence within 21 years, thus causing the estate to "vest or fail" within the period of the rule.

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83. *See* 1 A.L.P. § 3.14.
84. Curtis Studio v. Metropolitan Bldg. Co., 124 Wash. 37, 213 P. 455 (1923). A lease for five years beyond the time it would take for rent, measured by ten percent of the gross income of a business, to equal $3,000 was held to be a tenancy for years.
85. Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 P. 715 (1902).
86. Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956) (by implication); Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945).
87. Peoples Park & Amusement Ass'n v. Anrooney, 200 Wash. 51, 93 P.2d 362 (1939).
88. Thurber v. Clark, 154 Wash. 485, 282 P. 911 (1929); Noyes v. Loughead, 9 Wash. 325, 37 P. 452 (1894).
89. Pappas v. General Mkt. Co., 104 Wash. 116, 176 P. 25 (1918).
90. Noyes v. Loughead, 9 Wash. 325, 37 P. 452 (1894). *See also* Thurber v. Clark, 154 Wash. 485, 282 P. 911 (1929).
91. *See* Wong v. DiGrazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963).
92. *Id.*

2. Parties to lease

We have already observed that parties to a lease must be mentally competent to make it, in the sense that they must understand its nature and effect. In addition to the usual competency questions, Washingtonians, because of community property, are concerned with the capacity of married persons to make leases. The genesis of the problem is the statutory rule that both husband and wife must, normally, join in conveyances of land.[93] This does not mean, nor has it ever meant, that both spouses must execute the lease for the tenant. The tenant husband has historically been able to execute the lease alone,[94] and, with recent amendments to the community property statutes, it seems either spouse may now execute as tenant.[95]

When the party in question is the landlord, the basic proposition is that both husband and wife must execute the lease.[96] It is, nevertheless, possible that the lease may become validated if the nonsigning spouse, who has generally been the wife in the cases, either ratifies it or is estopped to deny it. The lease is said to be voidable, not void, so that the nonsigning spouse may ratify it by seeking to enforce it.[97] Short of express ratification, the landlord-tenant cases do not make it very clear what actions of the nonsigning spouse are sufficient to work a ratification; certainly the spouse would have to have knowledge of the lease and apparently also have to receive benefits from it.[98] Nor is it well established what facts must coincide for the nonsigning spouse to be estopped to deny the lease. There is dictum that the spouse might be estopped by knowledge plus receipt of benefits,[99] though one

93. WASH. REV. CODE § 26.16.030 (1963), *as amended,* WASH. REV. CODE § 26.16.030 (Supp. 1972).
94. Monroe v. Stayt, 57 Wash. 592, 107 P. 517 (1910).
95. WASH. REV. CODE § 26.16.030 (1963), *as amended,* WASH. REV. CODE § 26.16.030 (Supp. 1972). It takes both spouses to purchase "real property" but a leasehold is a chattel.
96. Benedict v. Hendrickson, 19 Wn. 2d 452, 143 P.2d 326 (1943); Bowman v. Hardgrove, 200 Wash. 78, 93 P.2d 303 (1939) (rule apparently not contested by parties); Ballard v. Cox, 193 Wash. 299, 75 P.2d 126 (1938); Spreitzer v. Miller, 98 Wash. 601, 168 P. 179 (1917); Snyder v. Harding, 34 Wash. 286, 75 P. 812 (1904) (alternative holding).
97. Stabbert v. Atlas Imperial Diesel Engine Co., 39 Wn. 2d 789, 238 P.2d 1212 (1951).
98. *See* Benedict v. Hendrickson, 19 Wn. 2d 452, 143 P.2d 326 (1943) (dictum); Bowman v. Hardgrove, 200 Wash. 78, 93 P.2d 303 (1939) (statements by court apparently not in issue).
99. Benedict v. Hendrickson, 19 Wn. 2d 452, 143 P.2d 326 (1943) (dictum).

might suppose a true estoppel would involve the spouse's inducing reliance by the tenant. It can definitely be said that the mere fact that the tenant has taken possession and paid rent will work neither estoppel nor ratification.[100] Even if the tenant does more and makes expenditures and improvements, acts that might take an informal lease out of the statute of frauds, apparently such actions are not enough to estop the nonsigning spouse, though there is room to argue the contrary.[101] However, none of this means there may not be a leasehold of some kind. If the tenant takes possession, while he may not be able to enforce the written lease against the landlord spouse who failed to sign, he will have a periodic tenancy and must pay rent.[102]

3. *Agreements for leases*

If the parties wish a leasehold to commence in the future, there are two ways to achieve the result. One is to make a lease with the term to commence later—a leasehold in futuro. The other way is to make a present contract to make a future lease—a contract for a lease. Significant consequences may flow from the differences between the two transactions. Different formalities may be required, such as those required by statutes of frauds. If there is a lease and the tenant fails to pay the sums he has promised, the landlord recovers rent; but if the tenant breaches a contract, the remedy is damages. In the landlord's action upon a contract, his damages would be diminished to the extent he failed to mitigate damages by attempting to rent the premises to someone else; but mitigation has not been a defense to a tenant in most states.[103]

The Supreme Court of Washington has addressed itself but little to any of these problems. With hardly any decisions, generalizations are risky, but perhaps we can say the court has tended not to distinguish contracts to make leases from leaseholds in futuro. The rule that re-

100. *Id.;* Ballard v. Cox, 193 Wash. 299, 75 P.2d 126 (1938); Spreitzer v. Miller, 98 Wash. 601, 168 P. 179 (1917).

101. Spreitzer v. Miller, 98 Wash. 601, 168 P. 179 (1917). *But see* Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956), a confusing decision in which the court seems to have merged the community property question with a statute of frauds issue.

102. Ballard v. Cox, 193 Wash. 299, 75 P.2d 126 (1938); Ryan v. Lambert, 49 Wash. 649, 96 P. 232 (1908); Issacs v. Holland, 4 Wash. 54, 29 P. 976 (1892).

103. For a discussion of these problems in other jurisdictions, see 1 A.L.P. § 3.17.

quires leases for over a year to be acknowledged by the landlord has been applied to contracts to make leases for a term of that length.[104] In *Oldfield v. Angeles Brewing & Malting Co.*,[105] in which the defendant failed to occupy or pay rent in a new building, as he had promised, the court refused to label the undertaking either a lease or a contract. However, it appears damages awarded the owner were measured by contract rules.[106] Beyond these matters, the Washington supreme court appears not to have dealt with the lease-contract problems.

4. *Requirement of a writing: statute of frauds*

In Washington, all tenancies for years must be in writing, and some must be acknowledged. Any lawyer will recognize that the statute of frauds is at work here, but the statute alone does not reveal the full, convolute story. One must know the cases, too, and they are many. More, in fact, than under any other topic in this article, save possibly tenants' personal injury suits against landlords. As a result, the present section is subdivided into three parts: Nature of the required writings, effect of noncompliance with the requirements, and the theories of part-performance and estoppel.

a. Nature of writing, contents, signature, etc. A lease for over one year must be in deed form, *i.e.*, written, signed by the landlord, and acknowledged.[107] No statute spells this requirement out in so many words; rather, it rests upon the reasoning in the seminal decision of

104. Omak Realty Inv. Co. v. Dewey, 129 Wash. 385, 225 P. 236 (1924); Wood v. Sill, 124 Wash. 377, 214 P. 625 (1923) (alternative holding).

105. 62 Wash. 260, 113 P. 630 (1911).

106. *Id.* The defendant had promised that, when the new building was finished, he would occupy it for five years at a rent of $350 per month. When the defendant refused to perform, the owner sued and, in the trial court, was awarded damages at $350 per month from completion until the date of trial. This looks like a landlord's recovery. On appeal the award was reduced to the difference between $350 per month and the fair rental value. There was no discussion of whether the owner had attempted to mitigate damages by finding a new tenant, which would certainly be relevant to damages on a contract theory. In the end the court said it did not matter if it was a lease or a contract, because, in either case, the measure of damages was the same, since the defendant had breached a covenant of some kind. Landlords would certainly be shocked to learn they cannot recover unpaid rent.

107. WASH. REV. CODE § 64.04.010, .020 (1963); Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956); Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945); Jamison v. Reilly, 92 Wash. 538, 159 P. 699 (1916); Anderson v. Frye & Bruhn, 69 Wash. 89, 124 P. 499 (1912); Forrester v. Reliable Transfer Co., 59 Wash. 86, 109 P. 312 (1910); Dorman v. Plowman, 41 Wash. 477, 83 P. 322 (1906); Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934 (1904).

Richards v. Redelsheimer.[108] First, R.C.W. § 64.04.010 requires every conveyance of, and encumbrance upon, realty to be by "deed," which R.C.W. § 64.04.020 says shall be "in writing, signed by the party bound thereby, and acknowledged by the party." Second, a leasehold is an "encumbrance" and must therefore be in deed form unless some other statute excepts it from the operation of R.C.W. § 64.04.010. Some forms of leasehold, a tenancy for a year or less[109] and a periodic tenancy for less than yearly periods,[110] are excepted, but a tenancy for years for over a year is not and consequently must be in deed form. Finally, since a deed must be signed and acknowledged by the grantor, whom Washington views as "the party bound," only the landlord need sign or acknowledge the lease.[111] However, the tenant must accept the lease in some way, either by taking possession[112] or, apparently, by verbal acceptance without possession.[113]

In most fact patterns it will be plain enough that the parties purported to make a lease for a term of over a year, but some borderline situations have arisen. Washington has determined that periods for which the tenant has options for renewals or extensions should be considered part of the term, so that a leasehold for an original term of a year or less but with renewal options for over a year is a leasehold for over a year.[114] However, when a leasehold is to commence in futuro, the period before it commences is not included in the term.[115] A contract calling for the making of a leasehold for over a year must, like the lease itself, be signed and acknowledged by the landlord-to-be.[116] Somewhat similarly, the Washington court has an-

108. 36 Wash. 325, 78 P. 934 (1904).

109. WASH. REV. CODE § 59.04.010 (1963) provides that tenancies for a term or period not over a year may be "by express written contract."

110. WASH. REV. CODE § 59.04.020 (1963).

111. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956) (analogous holding); Central Bldg. Co. v. Keystone Shares Corp., 185 Wash. 645, 56 P.2d 697 (1936); Starwich v. Washington Cut Glass Co., 64 Wash. 42, 116 P. 459 (1911). *But see* Corner Mkt. Co. v. Gillman, 77 Wash. 625, 138 P. 2 (1914), which contains at least dictum that the tenant should sign and acknowledge the lease.

112. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956) (analogous holding); Central Bldg. Co. v. Keystone Shares Corp., 185 Wash. 645, 56 P.2d 697 (1936). *But see* Corner Mkt. Co. v. Gillman, 77 Wash. 625, 138 P. 2 (1914).

113. Starwich v. Washington Cut Glass Co., 64 Wash. 42, 116 P. 459 (1911).

114. Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956) (by implication); Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945) (extension); Anderson v. Frye & Bruhn, 69 Wash. 89, 124 P. 499 (1912) (renewal).

115. Pappas v. General Mkt. Co., 104 Wash. 116, 176 P. 25 (1918).

116. Omak Realty Inv. Co. v. Dewey, 129 Wash. 385, 225 P. 236 (1924); Wood v. Sill, 124 Wash. 377, 214 P. 625 (1923) (alternative holding).

nounced the rule that, when the original lease must be acknowledged, modifications of it must also be in the same form.[117] We should observe, however, that in the cases announcing the rule, the modification was in fact a change in the amount of rent. There may be room to argue that some modifications, possibly those thought to be "collateral" (or some such expression) to the main undertaking, may be made informally. An informal agreement to delay payment of rent is valid if for consideration, the court viewing it as a waiver instead of a modification.[118] We might add, too, that the rules on modification do not prevent the reception of parol evidence to show the parties' intent when a lease is unclear.[119]

An intriguing and potentially important, but unanswered, question is, do all parts of a lease for over a year have to be acknowledged? Clearly the clause creating the tenancy, the rental clause, and very probably other clauses closely touching the leasehold estate must be acknowledged. *Richards v. Redelsheimer,*[120] it will be recalled, required such leases to be acknowledged because they were characterized as "encumbrances" under R.C.W. § 64.04.010. One wonders why they were not called "conveyances"; maybe the classification was inadvertent, yet it could be significant. The statute requires both a "conveyance" of real estate and "every *contract creating*" (emphasis added) an encumbrance to be acknowledged. From this it might be argued that, not only the actual encumbrance (presumably the leasehold estate) but also the entire leasing agreement must be acknowledged. On the other hand there is language, and to some extent a holding, in the case of *University Properties, Inc. v. Moss*[121] which suggests that certain provisions may be informal. *Moss* held that a tenant might "rescind" his leasehold because his landlord failed to make available adjoining office space. The landlord's promise to make the space available was in an oral agreement, separate from the formal lease for years. The court speaks of the oral agreement and the formal lease as "one contract," which, necessarily implied in the result, was

117. Franklin v. Fischer, 34 Wn. 2d 342, 208 P.2d 902 (1949) (dictum); Vance Lumber Co. v. Tall's Travel Shops, Inc., 19 Wn. 2d 414, 142 P.2d 904 (1943); Hansen v. Central Inv. Co., 10 Wn. 2d 393, 116 P.2d 839 (1941); City Mtg. Co. v. Diller, 180 Wash. 499, 40 P.2d 164 (1935).
118. Gabrielson v. Swinburne, 184 Wash. 242, 51 P.2d 368 (1935).
119. Craig v. Richfield Oil Co., 167 Wash. 664, 10 P.2d 216 (1932).
120. 36 Wash. 325, 78 P. 934 (1904).
121. 63 Wn. 2d 619, 388 P.2d 543 (1964).

all binding. Once again, it appears *Moss* is surely a novel decision and either a very important one or an aberration, as time will tell.

When the term of a tenancy for years is one year or less, the leasing instrument must be in writing and signed by the landlord, but his act need not be acknowledged.[122] Because there are few decisions on the form of such leases, little can be said on direct authority, except that only the landlord need sign; the tenant may accept by taking possession.[123] Other than this, it seems safe to assume that the principles governing acceptance, options for renewals and extensions, commencement in futuro, contracts for leases, and modifications, discussed above in connection with leases for over a year, would apply by analogy to leases for a year or less.

b. Effect of noncompliance with statute. If a leasing instrument fails to comply with the applicable statute of frauds, either because it is not in writing or is not acknowledged, the instrument itself is, without more, wholly void.[124] If certain other facts appear, the instrument may escape the operation of the statute by the doctrines of part performance or estoppel, as will be presently discussed. As will also be discussed, if the tenant enters and pays rent, a periodic tenancy may result. But the document itself, on its face, is void.

c. Part-performance and estoppel. Even though a leasing instrument fails to comply with the statute of frauds because it is informally executed, it may yet become an enforceable document. The instrument may be taken out of the operation of the statute of frauds by an equitable doctrine sometimes called estoppel; sometimes, part-performance; sometimes, both; and sometimes, neither. The doctrine is probably a form of equitable estoppel, based upon the notion

122. WASH. REV. CODE §§ 59.04.010 (1963) & 59.18.210 (Supp. 1973) (for residential leases only); McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956); Armstrong v. Burkett, 104 Wash. 476, 177 P. 333 (1918) (oral lease for 11½ months ineffective). *Contra,* Ward v. Hinckley, 26 Wash. 539, 67 P. 220 (1901), which held an oral lease for one year valid. The court reasoned that the statute, WASH. REV. CODE § 59.04.010, permitted, but did not require, leases of a year to be written. Naturally, the decision has never been formally overruled, but it was all but overruled in Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934 (1904). It is unsound and should be ignored.

123. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956).

124. *See, e.g.,* Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945); Vance Lumber Co. v. Tall's Travel Shops, Inc., 19 Wn. 2d 414, 142 P.2d 904 (1943); Omak Realty Inv. Co. v. Dewey, 129 Wash. 385, 225 P. 236 (1924); Anderson v. Frye & Bruhn, 69 Wash. 89, 124 P. 499 (1912); Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934 (1904).

that certain facts would make it inequitable for the challenging party to be allowed to assert the invalidity of the informal instrument.[125] As a practical matter, the facts that give rise to the doctrine usually arise subsequently and therefore independently of the execution of the instrument.

From the point of view of theoretical purity, perhaps we should discuss part-performance and other forms of estoppel separately. Such an organization, however, would lack utility and might even be misleading, for the Washington court has anything but kept the distinctions clear. Some decisions speak clearly of a theory of "estoppel," said to be derived from equitable principles applied in contracts law.[126] Other decisions, with similar fact patterns, say the doctrine is "part-performance."[127] Still others combine the words, labeling the theory "estoppel by part-performance."[128] In addition, many decisions, especially older ones, omit the labels and simply consider whether there are sufficient facts to take the lease out of the statute of frauds.[129] It seems wisest, therefore, to discuss interchangably principles drawn from all these classes of cases, pointing out distinctions only where they are significant.

According to one Washington holding, the informal lease must be proven by clear and convincing evidence.[130] Once the lease is established, further acts of the parties, generally of the tenant alone but sometimes of both parties, must indicate unequivocably that the parties acted upon the instrument as a lease. Whatever else may be required, it seems that the tenant must always take possession under the lease. This has been the basis of at least two opinions,[131] and no decision has been found enforcing an informal leasing where there was no possession. However, this requirement is satisfied if the tenant is in possession when the arrangements are made, as in the case of an in-

125. *See* 1 A.L.P. § 3.21.

126. *See especially* the leading cases of Garbrick v. Franz, 13 Wn. 2d 427, 125 P.2d 295 (1942), and Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914).

127. *See, e.g.,* Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956); Priestley Mining & Milling Co. v. Lenox Mining & Dev. Co., 41 Wn. 2d 101, 247 P.2d 688 (1952); Vance Lumber Co. v. Tall's Travel Shops, Inc., 19 Wn. 2d 414, 142 P.2d 904 (1943).

128. *See, e.g.,* Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945).

129. *See, e.g.,* Northcraft v. Blumauer, 53 Wash. 243, 101 P. 871 (1909); McGlauflin v. Holman, 1 Wash. 239, 24 P. 439 (1890) (original case on the doctrine).

130. Golden v. Mount, 32 Wn. 2d 653, 203 P.2d 667 (1949).

131. Omak Realty Inv. Co. v. Dewey, 129 Wash. 385, 225 P. 236 (1924); Browder v. Phinney, 37 Wash. 70, 79 P. 598 (1905).

formal agreement to modify a lease.[132] Even where the landlord seeks to invoke the estoppel or part-performance doctrine, the Washington position seems to be that the tenant's possession is a *sine qua non,*[133] however anomolous it may seem to say the tenant is estopped by his own act.

More than possession alone is required to establish an estoppel or part performance. Nor is it enough merely to add the payment of agreed rental installments,[134] although a periodic tenancy results, as will be discussed later. Whether payment of the rent for the entire term would suffice seems undecided; arguably it might suffice, in view of the court's frequent statements that it looks for part performance that relates to the entire term.[135] The clearest cases of sufficient part-performance are those in which the tenant, besides taking possession and paying rent, makes costly and permanent improvements on the demised premises.[136] Some question has been raised whether the improvements must enrich the landlord, but it seems settled that they may equally well be for the tenant's benefit, usually to aid him in his business.[137] In some cases the acts giving rise to estoppel or part-performance have, in addition to possession, been the doing of some other onerous thing the tenant would not have done but for the lease; such acts may be paying sums of money beyond the rent to the landlord or for his benefit.[138] In the case of farmlands the acts of

132. Franklin v. Fischer, 34 Wn. 2d 342, 208 P.2d 902 (1949); Andersonian Inv. Co. v. Wade, 108 Wash. 373, 184 P. 327 (1919); Oregon & Wash. R.R. v. Elliott Bay Mill & Lumber Co., 70 Wash. 148, 126 P. 406 (1912).

133. Omak Realty Inv. Co. v. Dewey, 129 Wash. 385, 225 P. 236 (1924). *See also* Rowland v. Cook, 179 Wash. 624, 38 P.2d 224 (1934).

134. *See, e.g.,* Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945); City Mtg. Co. v. Diller, 180 Wash. 499, 40 P.2d 164 (1935); Armstrong v. Burkett, 104 Wash. 476, 177 P. 333 (1918); Dorman v. Plowman, 41 Wash. 477, 83 P. 322 (1906).

135. *See, e.g.,* Jones v. McQuesten, 172 Wash. 480, 20 P.2d 838 (1933); Lautenschlager v. Smith, 155 Wash. 328, 284 P. 87 (1930); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914). *See also* language in Garbrick v. Franz, 13 Wn. 2d 427, 125 P.2d 295 (1942), to the effect that payment of a sum that went to the whole term might, with possession, suffice.

136. Priestley Mining & Milling Co. v. Lenox Mining & Dev. Co., 41 Wn. 2d 101, 247 P.2d 688 (1952) (mining camp and mining work); Garbrick v. Franz, 13 Wn. 2d 427, 125 P.2d 295 (1942) (house, sawmill, fence, shed, machinery, water pipe); Andersonian Inv. Co. v. Wade, 108 Wash. 373, 184 P. 327 (1919) (mezzanine costing $400); Northcraft v. Blumauer, 53 Wash. 243, 101 P. 871 (1909) (railroad); Schulte v. Schering, 2 Wash. 127, 26 P. 78 (1891); McGlauflin v. Holman, 1 Wash. 239, 24 P. 439 (1890) (building).

137. Garbrick v. Franz, 13 Wn. 2d 427, 125 P.2d 295 (1942).

138. Franklin v. Fischer, 34 Wn. 2d 342, 208 P.2d 902 (1949); Mobley v. Harkins, 14 Wn. 2d 276, 128 P.2d 289 (1942); Matzger v. Arcade Bldg. & Realty Co.,

taking possession and preparing the land for the next year's crop, or similar acts, have several times been held to be sufficient; the court has really been quite liberal to agricultural tenants.[139] On the other hand, if the tenant does no more than operate and build up his business on the premises, this is insufficent activity to take the lease out of the statute, possibly even if the tenant has made plans for the future by stocking merchandise and the like.[140] Futhermore, a certain degree of alteration of the building apparently will not be sufficient if it amounts only to fitting it for business and not to improving the premises.[141]

The landlord, as well as the tenant, may obtain enforcement of an informal lease, though the cases on the point are few. As previously mentioned, the first requirement is that the tenant must be in possession.[142] After this, the landlord's making substantial improvements to the premises to fit them for the tenant's use will be sufficient to take the lease out of the statute.[143] Other sufficient acts may be found in the landlord's undertaking to do for the tenant some other beneficial and onerous act he would not have done but for the lease.[144] In general, the few decisions on the subject indicate that the rules for the landlord parallel those for the tenant.

It may be useful to synthesize some abstract rules on the Washington doctrines of estoppel and part-performance. It seems that the court requires two basic elements: First, acts evincing a leasehold of a

80 Wash. 401, 141 P. 900 (1914); Oregon & Wash. R.R. v. Elliott Bay Mill & Lumber Co., 70 Wash. 148, 126 P. 406 (1912).

139. Lautenschlager v. Smith, 155 Wash. 328, 284 P. 87 (1930) (pasturing cattle and summer-fallowing); Zinn v. Knopes, 111 Wash. 606, 191 P. 822 (1920) (cared for stock and stored feed for future); O'Connor v. Enos, 56 Wash. 448, 105 P. 1039 (1909) (preparation of land and summer-fallowing); O'Connor v. Oliver, 45 Wash. 549, 88 P. 1025 (1907) (seeding next year's crop). *Cf.* MacDonald v. Potts, 132 Wash. 59, 231 P. 164 (1924).

140. Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945) (operating restaurant); Vance Lumber Co. v. Tall's Travel Shops, Inc., 19 Wn. 2d 414, 142 P.2d 904 (1943) (operating business and taking on new lines of merchandise); Grubb v. House, 93 Wash. 200, 160 P. 421 (1916) (operating and expanding hotel business). *But see* Haggen v. Burns, 48 Wn. 2d 611, 295 P.2d 725 (1956), which holds that the stocking of merchandise in such quantities that it could not be sold for several years would, together with possession, save the informal lease.

141. Armstrong v. Burkett, 104 Wash. 476, 177 P. 333 (1918).

142. Omak Realty Inv. Co. v. Dewey, 129 Wash. 385, 225 P. 236 (1924).

143. Rowland v. Cook, 179 Wash. 624, 38 P.2d 224 (1934) (building $1500 balcony); Forrester v. Reliable Transfer Co., 59 Wash. 86, 109 P. 312 (1910) ($750 worth of special improvements).

144. Jones v. McQuesten, 172 Wash. 480, 20 P.2d 838 (1933) (conveying other land to tenant).

term beyond a periodic tenancy and, second, acts making it inequitable not to enforce the lease. The first element is partially supplied by the tenant's taking possession, though this in itself might relate to a short-term as well as to a long-term tenancy, and partially by the other acts of the tenant or landlord, which evidence long-range intentions, such as the making of permanent improvements. Likewise, payment of a sizable sum of money or the performance of an onerous service beyond the payment of rental installments suggests a long-term leasehold.

As to the second element, the doing of the thing that raises the equities, it has been said the thing may be either a detriment to the doer or a benefit to the other party.[145] And, of course, it must have been done because of the lease, not for some other purpose, such as to perform a duty under a contract.[146] Under these principles, one may conclude that the making of permanent improvements or payment of sums or doing of services beyond normal rental installments relate to long-term leaseholds and also constitute detriments or benefits or both. A farmer's preparing for and seeding crops seems to fall into the same category. Conducting normal business operations, to the extent they might expectably have been done under a periodic tenancy, would not. If the businessman tenant makes preparations for the future in a manner he would not do under a short-term lease, this would seem to meet the tests. On this point the Washington decisions are apparently split, *Vance Lumber Co. v. Tall's Travel Shops*[147] tending to say such preparations are not sufficient acts and *Haggen v. Burns*[148] tending to say they are. Perhaps this point can be described as the jagged edge where future battles may be fought.

Having honed up a nice synthesis of the bulk of the estoppel and part-performance decisions, we must now mention a theory that, if it is not contrary to what has been said, certainly stretches what has been said. Two decisions have been discovered in which an informal lease or modification agreement was enforced simply because the parties had operated under it for a long time, seven years in one case and two-and-a-half in the other.[149] In *Metropolitan Bldg. Co. v. Curtis*

145. Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914).
146. MacDonald v. Potts, 132 Wash. 59, 231 P. 164 (1924).
147. 19 Wn. 2d 414, 142 P.2d 904 (1943).
148. 48 Wn. 2d 611, 295 P.2d 725 (1956).
149. Gattavara v. Cascade Petroleum Co., 27 Wn. 2d 263, 177 P.2d 894 (1947)

Studio[150] the doctrine was labeled an "estoppel" arising out of "long acquiescence." This doctrine is potent and seemingly would be available to either party, but its impact is unclear, mainly because we do not know how long is "long."

5. *Recording of leases*

Washington has two statutes requiring that certain leases be filed with public officers. R.C.W. § 65.08.060 requires that any lease for a term of two years or more, or the assignment of such a lease, be recorded with the county auditor of the county in which the land is situated. With registered land, R.C.W. § 65.12.470 requires a lease for a term of three years or more to be registered with the county registrar of deeds. In cases where the term may run over the prescribed times, as where its length depends upon an uncertain event, where it is for so many years "or more," or where renewal or extension options might run it over, one should take the cautious path and record or register the lease.[151]

C. *Periodic Tenancy*

1. *Nature of periodic estate*

By actual number, periodic tenancies must be the commonest kind. The distinguishing mark, as with all leaseholds, lies in the length of the term. A periodic tenancy is one that continues for successive repeating periods, such as one week, one month, or one year, until it is terminated, generally by either party's giving notice in a prescribed manner. The term is conceived of as one continuous period, not as a series of self-renewing periods. This is so even if one of the parties has a power to terminate in the middle of a period; the tenancy does not thereby become a tenancy at will.[152] Normally rent is stated and paid

(two and a half years); Metropolitan Bldg. Co. v. Curtis Studio, 138 Wash. 381, 244 P. 680 (1926) (seven years). *Cf.* Ericksen v. Manufacturers Distrib. Co., 103 Wash. 159, 173 P. 1095 (1918), in which operation for one year and ten months was not sufficient to take a five-year informal lease out of the statute.

150. 138 Wash. 381, 244 P. 680 (1926).

151. *See* discussion in Subsection II-B-1 *supra*.

152. Morris v. Healy Lumber Co., 46 Wash. 686, 91 P. 186 (1907).

by the periods of the leasehold, though in theory rental and tenancy periods could differ.[153]

2. *Creation of periodic tenancy*

a. Express agreement. Few special rules govern the formation of periodic tenancies by express agreement. If the periods are of a year, *i.e.*, a year-to-year tenancy, then the letting must by statute be "by express written contract."[154] No cases have been found deciding whether the lease should be signed by the tenant as well as the landlord. Because the statutes use the word "contract," one might suppose both parties should sign. However, under the same statutory language, it has been held that a tenancy for years for a period not over one year need be signed only by the landlord.[155] So, it probably is safe to have only the landlord sign, but still, because there is an argument *contra* and the point is not directly settled, caution suggests that both parties sign a year-to-year lease.

In the unlikely event anyone should want to make a periodic tenancy with periods longer than one year, *e.g.*, two-year-by-two-year, then it must be signed by the landlord and acknowledged. No special statute takes such a leasehold out of the operation of the General Deed Statute, R.C.W. 59.04.010, and by analogy to the reasoning in *Richards v. Redelsheimer,*[156] one can deduce that the deed form is required.

All periodic tenancies for periods of less than one year may be as well oral as written.[157] Of course the usual periods are week-to-week or month-to-month, but it seems a six-month-to-six-month tenancy might also be created orally.

b. General letting upon periodic rent. In some jurisdictions there is at least an argument that an informal leasing, called a "general letting," with periodic rent creates a tenancy at will.[158] Not in Wash-

153. *See* 1 A.L.P. § 3.23 for a further discussion of the nature of periodic tenancies.
154. WASH. REV. CODE §§ 59.18.210 (Supp. 1973) (residential leases only); 59.04.010 (1963) (all other leases).
155. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956).
156. 36 Wash. 325, 78 P. 934 (1905).
157. WASH. REV. CODE §§ 59.18.020 (Supp. 1973) (residential leases); 59.04.020 (1963) (all other leases); Rossiter v. Moore, 59 Wn. 2d 722, 370 P.2d 250 (1972) (oral month-to-month tenancy).
158. *See* 1 A.L.P. § 3.25.

ington. Statutes expressly provide: "When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable."[159] So strong is this language that it was long doubted that tenancies at will could exist in Washington,[160] though it is now determined that they may, as we will see. But if one has permissive possession of another's land and pays or agrees to pay so much rent per period, then, in the absence of anything else, a periodic tenancy arises.

If no fixed sum is agreed upon, but rent is periodically paid, there is a periodic tenancy upon a *quantum meruit* basis.[161] Apparently the slightest suggestion of periodic rent is sufficient, as where the landlord allowed the tenant to have possession "as long as she pays her rent and keeps a straight house."[162] Possibly even if the possessor enters by trespass and the landowner later demands periodic rent, this will be enough to make the tenant's possession permissive and thereby create a periodic tenancy.[163] Where a tenancy is once established as periodic by one period, it has been held that a subsequent acceptance of rent by a different period does not change the period of tenancy.[164] We might doubt whether this would always be so, especially when the original arrangements were implied rather than express.

c. Holding over after prior tenancy. When the tenant holds over after the expiration of his term without any permission from his landlord, then of course his possession is wrongful, and the landlord has an action to remove him.[165] But if the tenant pays, and the landlord accepts, rent after expiration, a periodic tenancy results.[166] The correct

159. WASH. REV. CODE §§ 59.18.200 (Supp. 1973) (residential leases); 59.04.020 (1963) (all other leases).

160. Morris v. Healy Lumber Co., 46 Wash. 686, 91 P. 186 (1907) (dictum).

161. Provident Mut. Life Ins. Co. v. Thrower, 155 Wash. 613, 285 P. 654 (1930).

162. Schreiner v. Stanton, 26 Wash. 563, 67 P. 219 (1901).

163. Williamson v. Hallett, 108 Wash. 176, 182 P. 940 (1919). The question is not free from doubt. *Williamson* did not clearly identify the kind of tenancy, though it is hard to see what else it could be than a periodic tenancy. This footnote should be read together with the discussion in Section II-E *infra* of tenancy at sufferance.

164. London & San Francisco Bank v. Curtis, 27 Wash. 656, 68 P. 329 (1902).

165. Hinkhouse v. Wacker, 112 Wash. 253, 191 P. 881 (1920) (apparent holding), *aff'd on rehearing*, 112 Wash. 253, 195 P. 218 (1921); WASH. REV. CODE § 59.18.290(2) (residential leases only).

166. Worthington v. Moreland Motor Truck Co., 140 Wash. 528, 250 P. 30 (1926); Wilson v. Barnes, 134 Wash. 108, 234 P. 1029 (1925).

explanation appears to be that a wholly new tenancy has been formed, just as if the parties had entered into an original general letting. It may well happen that they will carry over some of the provisions of their former lease, but this should occur only to the extent they somehow manifest an intention to do so and not automatically.[167]

Special statutory rules govern holding over in agricultural tenancies. R.C.W. § 59.12.035 provides that if a tenant of agricultural lands holds over for more than 60 days after the end of his term without notice to quit by the landlord, he "shall be entitled to hold under the terms of the lease for another full year." During the ensuing year, the tenant may not be evicted, even for nonpayment of rent.[168] Observe also that in the case of an agricultural holding over, the terms of the former lease all apply.[169]

d. Entry under informal lease for years. Should the parties attempt a lease for years that fails to meet the requirements of the applicable statute of frauds and if the lease is not in some way taken out of the statute, then the express lease cannot be enforced as such. Notwithstanding, if the tenant enters and pays rent, according to a legion of decisions, he will become a periodic tenant for the period by which he pays rent.[170] The same result should follow if the attempted formal lease is unenforceable for some other reason and the tenant enters, paying periodic rent.[171] Similar to the case of the holdover tenant, the theory here ought to be simply that there is a general letting, despite some confusing dictum in *Matzger v. Arcade Building & Realty Co.*[172]

167. Whitney v. Hahn, 18 Wn. 2d 198, 138 P.2d 669 (1943) (implied holding that provisions of former lease did not carry over automatically).

168. Bushnell v. Spencer, 122 Wash. 200, 210 P. 195 (1922).

169. Besides the clear language of WASH. REV. CODE § 59.12.035 (1963), this is supported by an alternative holding in American State Bank v. Sullivan, 134 Wash. 300, 235 P. 815 (1925).

170. Labor Hall Ass'n v. Danielsen, 24 Wn. 2d 75, 163 P.2d 167 (1945); Union Oil Co. v. Walker, 150 Wash. 151, 272 P. 64 (1928); Armstrong v. Burkett, 104 Wash. 476, 177 P. 333 (1918); Ericksen v. Manufacturers' Distrib. Co., 103 Wash. 159, 173 P. 1095 (1918); Jamison v. Reilly, 92 Wash. 538, 159 P. 699 (1916); Corner Mkt. Co. v. Gilman, 77 Wash. 625, 138 P. 2 (1914); Mades v. Howaldt, 46 Wash. 450, 90 P. 588 (1907); Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934 (1905).

171. *See* Logan v. Time Oil Co., 73 Wn. 2d 161, 437 P.2d 192 (1968).

172. 80 Wash. 401, 141 P. 900 (1914). The dictum is to the effect that the act of taking possession is sufficient to take the informal lease out of the statute of frauds to the extent of making it a periodic tenancy. Double talk!

D. Tenancy at Will

1. Nature of estate at will

A tenancy at will may be defined as a leasehold having no specified duration that is terminable at the will of either party. By any precise analysis, it would be classified as a license, a privilege instead of a right in Hohfeldian terms, and not as an estate. However, it is traditional and convenient to classify it as a leasehold estate, for, tenuous as it may be, it does give the tenant permissive possession as long as it lasts.

As we have already noted, because of the ease with which informal periodic tenancies may be made in Washington, there was long doubt that the tenancy at will could exist.[173] The question was settled in 1944 in *Najewitz v. City of Seattle,*[174] which found a tenancy at will to have been created. Besides *Najewitz,* there is very little Washington authority on the question.

2. Creation of tenancies at will

In Washington, there are a narrow range of possibilities for forming tenancies at will. The tenant must be in possession by permission of the owner or of someone having the power to grant permission. No length of term may be agreed upon, expressly or impliedly. This means that either no rent is to be paid or rent is to be given in some form that has no reference to periods of time. A tenancy for a stated period is not transformed into a tenancy at will by a party's having a power of termination.[175] In *Najewitz* the tenant was the caretaker of a gravel pit whose employment was at will and who occupied his house as part of his employment.

E. Tenancy at Sufferance

1. Nature of the estate at common law

At common law a tenant at sufferance is one who holds over

173. *See* note 159 and accompanying text *supra.*
174. 21 Wn. 2d 656, 152 P.2d 722 (1944).
175. Peoples Park & Amusement Ass'n v. Anrooney, 200 Wash. 51, 93 P.2d 362 (1939).

without permission after the termination of his tenancy for years, periodic tenancy, tenancy at will or, for that matter, life estate. The resulting relationship, ephemeral and temporary, is enough to make the possession rightful and thus, *inter alia,* to prevent adverse possession. At this point the landlord is, some say by implied agreement and some say by operation of law, given a power to treat the tenant either as a trespasser or as a tenant under a new tenancy. If the landlord elects the latter, the new tenancy is, in most jurisdictions, periodic either for the term of the former lease or for its rental periods. The landlord may fix a new rent, but if he does not, the old rent carries over. If the landlord elects to treat the tenant as a trespasser, he may evict him and recover damages for the period of retention. These principles sketch out in a very general way the nature of the common-law estate at sufferance, as it exists in the United States. As can be imagined, there is a goodly body of law and many points of disagreement among the jurisdictions on the subject.[176]

2. *Tenancy at sufferance in Washington*

From the evidence available, it cannot be determined whether the Washington court or Legislature ever heard of the common-law tenancy at sufferance. Several different relationships have gone by the label "tenancy by sufferance." Only one decision has been found in which the facts suggested the common-law tenancy, and there the court seems not to have followed the usual principles, though they spoke of "tenancy by sufferance."[177] Though it should be possible to have this common-law estate in Washington, one cannot safely say it now exists or ever will.

One kind of "tenancy by sufferance" is that created by a remarkable statute, R.C.W. § 59.04.050, which reads in part: "Whenever any person *obtains* possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises" (emphasis added). Read literally, this statute abolishes virtually all adverse possession in Washington. At all events, it certainly does not

176. *See* 1 A.L.P. §§ 3.32–.36 for more details.
177. Davis v. Jones, 15 Wn. 2d 572, 131 P.2d 430 (1942).

describe a holdover tenant who obtains possession rightfully. And several decisions have applied the statute just like it reads, holding that a trespasser is a "tenant by sufferance" who thereby owes rent and against whom, under R.C.W. Chapter 59.04, the owner has a kind of unlawful detainer action.[178] A new complication is that R.C.W. § 59.04.050 does not apply to "any rental agreement" covered by the 1973 Residential Landlord-Tenant Act.[179] How R.C.W. § 59.04.050 ever applied to any kind of "agreement" is unclear; perhaps it will be held not to apply to residential land.

One case has been found in which the permissive use of a logging road was said to be a "tenancy by sufferance."[180] In the first place, the permissive use of a road is not a leasehold at all; it is either an easement or a license. The court said this was not a license because the owner had never expected compensation. However that may be, it was not a "tenancy," by sufferance or otherwise, and the use of the term just adds a complication.

Then there is *Davis v. Jones,*[181] which may or may not establish the existence of a true tenancy at sufferance. For several years the plaintiff had allowed the defendant to occupy his premises rent-free. Then he gave her a notice to quit, but she stayed two more years. In an unlawful detainer action, it was determined that the defendant had been a "tenant by sufferance" for the two years and owed reasonable rent. The court's reasoning is not given. Did they possibly think the facts fell under R.C.W. § 59.04.050? If they had in mind the common-law tenancy at sufferance, the landlord's notice to quit would hardly seem like an election to create a new tenancy. Coldly analyzed, neither the statutory nor common-law tenancy at sufferance existed; so *Davis's* precedental effect is unclear.

178. Howard v. Edgren, 62 Wn. 2d 884, 385 P.2d 41 (1963) (action for rent); McCourtie v. Bayton, 159 Wash. 418, 294 P. 238 (1930) (alternative holding that tenant who entered before term began was tenant by sufferance); Lake Union Realty Co. v. Woolfield, 119 Wash. 331, 205 P. 14 (1922) (alternative ground); Pacific Mut. Life Ins. Co. v. Munson, 115 Wash. 119, 196 P. 633 (1921) (alternative ground); Williamson v. Hallett, 108 Wash. 176, 182 P. 940 (1919 (alternative ground). To add to the confusion, in the last three cases cited, where the owner had served an unlawful detainer notice to pay rent or quit, the court said, in the alternative, that the demand for rent might be thought of as making the possessor an implied tenant instead of a trespasser.

179. WASH. REV. CODE § 59.04.900.

180. Reed Logging Co. v. Marenakos, 31 Wn. 2d 321, 196 P. 2d 737 (1948).

181. 15 Wn. 2d 572, 131 P.2d 430 (1942).

Language in the 1973 Residential Landlord-Tenant Act may make common-law tenancies at sufferance impossible for a residential tenant. The Act provides that it is "unlawful for the tenant to hold over . . . after the termination of the rental agreement." In such event, the landlord is given an action for "possession of the property and damages."[182] Whether a tenancy at sufferance may exist depends upon how one reads "unlawful" and upon whether the landlord's remedy is thought exclusive of an election to create a new tenancy.

As to nonresidential tenancies, whether common-law tenancies at sufferance may exist seems to turn upon an interpretation of R.C.W. § 59.04.050. Was that statute meant to exclude the traditional common-law tenancy at sufferance—to define it out of existence? Such would not normally be the conclusion, under the rule that statutes in derogation of the common law are to be strictly construed. *Davis v. Jones,* even if it does not establish the common-law estate, does not exclude it either. If one had to venture a guess, it might be that the common-law tenancy at sufferance may exist in Washington for nonresidential tenancies, with all bets off for residential ones.

III. TENANT'S RIGHT OF POSSESSION AND ENJOYMENT

A. Landlord's Implied Covenant to Deliver Possession

Of course a tenant has the exclusive right to possession of the demised premises; that is what his leasehold is all about. As will be discussed later, that right is protected by the implied covenant of quiet enjoyment, assertable against the landlord or one claiming through him. Thus, if the landlord, or one claiming under a title paramount through his landlord, keeps him out, the tenant has an action against the landlord for damages.[183] Apparently the tenant may also claim a *pro tanto* setoff against rent if the landlord denies him possession of a portion of the premises.[184] Alternatively, the tenant may maintain an

182. WASH. REV. CODE § 59.18.290(2).
183. Engstrom v. Merriam, 25 Wash. 73, 64 P. 914 (1901).
184. McCleod v. Russell, 59 Wash. 676, 110 P. 626 (1910). There is dictum in Kneeland v. Aldrich, 63 Wash. 609, 116 P. 204 (1911), that deprivation of substantial portion of the premises might entitle the tenant to avoid paying all the rent until he got possession.

action for possession against a landlord or against one claiming under him who has control of the premises and refuses to allow the tenant to enter.[185] Much the same result may be obtained in a tenant's action for specific performance of the lease, even though he has never taken possession.[186] Also, if one is to take literally our old friend *University Properties, Inc. v. Moss,*[187] the tenant might "rescind" the lease if the landlord or his tenant with an unexpired leasehold withholds a substantial portion of the premises.

The burning question is whether the landlord impliedly makes a covenant to deliver possession. In the above cases, the breach is of the implied covenant of quiet enjoyment, since the interference was by the landlord or one claiming through him. But if the landlord has covenanted to put the tenant in possession against all comers, then the tenant has his action against the landlord even if a trespasser or, as is usually the case, a holdover tenant is in possession, making no claim through the landlord. This question appears not to have been decided in Washington. Where the question has been resolved, American courts seem badly split on whether there is (the so-called English rule) or is not (the American rule) an implied covenant to deliver possession.[188]

B. Tenant's Possessory Interest

Since the tenant has an estate in land, he is, as a general proposition, entitled during the term of that estate to exclusive possession against the whole world, including his landlord. Of course the tenant may voluntarily relinquish to or share his possession with others, such as assignees, subtenants, licensees, or guests. However, under the 1973 Act, the landlord is now given the right of reasonable entry upon residential premises to inspect, make repairs, supply services, and show the premises to certain persons, as well as in cases of emergency.[189] These are acts that most landlords have, as a practical matter, always done, one way or another.

185. Blanc's Cafe v. Corey, 110 Wash. 242, 188 P. 759 (1920). *See also* Blanc's Cafe v. Corey, 118 Wash. 10, 202 P. 266 (1921).
186. Duckworth v. Michel, 172 Wash. 234, 19 P.2d 914 (1933).
187. 63 Wn. 2d 619, 388 P.2d 543 (1964).
188. *See* 1 A.L.P. § 3.37.
189. WASH. REV. CODE § 59.18.150. Except in an emergency or if it is "impracticable," the landlord must give the tenant two days' notice before entering.

1. Interests, such as easements, included in leasehold

Suppose the ordinary situation in which a tenant leases an apartment or office or business space in a larger building. Obviously he must have the use of certain portions of the premises that are under the landlord's general possession, such as hallways, stairways, elevators, and walkways, though the parties likely will not make specific provision for this use in their lease. It is unthinkable that the law would not protect the tenant's use of these parts of the landlord's premises and perhaps other uses that are necessary to the expected use and possession of the demised premises. To the extent he is thus protected, the tenant has a right, not merely a privilege, an easement or servitude, not merely a license.

These principles seem generally to be applied in Washington. Where necessary for access to his premises, the tenant has the right to use entrances, hallways, walks, stairways, and roadways that are owned and possessed by the landlord.[190] This right extends not only to the tenant, but also to his guests and those doing business with him.[191] While the landlord has general control over the access areas and may no doubt maintain them and reasonably regulate their use, he may not unreasonably impede access or interfere with those having the right of use.[192]

Beyond rights of access to the demised premises, the tenant may have other rights to use his landlord's adjoining premises when necessary to enable the tenant to use the leased premises as intended. Apparently he may run necessary utility connections and lines through the landlord's premises, at least as long as he does not unreasonably interfere with the landlord's own use.[193] This does not imply, how-

190. State v. Fox, 82 Wn. 2d 289, 510 P.2d 230 (1973) (gate and roadway); Schedler v. Wagner, 37 Wn. 2d 612, 225 P. 2d 213 (1950), *aff'd on rehearing*, 37 Wn. 2d 612, 230 P.2d 600 (1951) (walkway); Andrews v. McCutcheon, 17 Wn. 2d 340, 135 P.2d 459 (1943) (stairway, dictum); Konick v. Champneys, 108 Wash. 35, 183 P. 75 (1919) (entrance and hallway); Lindbloom v. Berkman, 43 Wash. 356, 86 P. 567 (1906) (stairway and hallway).

191. State v. Fox, 82 Wn. 2d 289, 510 P.2d 230 (1973) (lawyer coming to discuss legal rights with tenant); Konick v. Champneys, 108 Wash. 35, 183 P. 75 (1919) (grocer making delivery to tenant).

192. Konick v. Champneys, 108 Wash. 35, 183 P. 75 (1919) (landlord assaulted tenant's invitee); Lindbloom v. Berkman, 43 Wash. 356, 86 P. 567 (1906) (landlord impeded access by leasing space in hallway to hucksters).

193. Burns v. Dufresne, 67 Wash. 158, 121 P. 46 (1912).

ever, that the landlord would himself be required to alter his own premises for the tenant's benefit.[194]

What we seem to have operating here are implied easements and servitudes that a court is willing to say are within the contemplation of the leasing parties. But how strong must the implication be? A 1909 decision takes the position that the use must be necessary, not merely convenient, to the tenant; thus, a tenant had no implied easement through a side entrance when he had access through a front entrance on the street.[195] One wonders, though, just how the word "necessary" might be applied in another setting. Take the tenant who leases a store in a retail shopping center. Would the landlord be allowed to restrict the tenant and those dealing with him to a path of direct access only? Or would the courts look to the total circumstances to find the parties' implied intention, such as the configuration of the shopping center and the fact that it would be extremely difficult and unusual, and so unexpected by the parties, for the landlord to impose such a restriction? The point is, we are probably not dealing with implied easements of necessity, in the traditional sense of that phrase, but rather with implications and expectations that flow from the total relationship of the parties in all the circumstances.

2. *Right to crops*

The tenant is entitled to harvest, and he owns, all crops that reach maturity during his term, even if they were already growing when the term began.[196] So, in the absence of permission from the tenant, neither the landlord nor, presumably, a former tenant may enter to harvest crops that were growing at the commencement of the leasehold.[197] These conclusions appear to flow from the principle that immature

194. *See* Rockweil v. Eilers Music House, 67 Wash. 478, 122 P. 12 (1912), where it was held a landlord was not obliged to build a fire exit upon his adjoining premises for the tenant, even though city authorities required the tenant to provide a fire exit.

195. Jemo v. Tourist Hotel Co., 55 Wash. 595, 104 P. 820 (1909).

196. Long Island Oyster Co. v. Eagle Oyster Packing Co., 22 Wn. 2d 322, 156 P.2d 222 (1945) (oysters considered a crop); Lynch v. Sprague Roller Mills, 51 Wash. 535, 99 P. 578 (1909) (dictum).

197. Long Island Oyster Co. v. Eagle Oyster Packing Co., 22 Wn. 2d 322, 156 P. 2d 222 (1945).

crops are part of the land and pass with it.[198] The same principle accounts for the rule that a judgment creditor may not attach immature crops.[199] Of course the parties to a lease may by agreement alter the normal ownership of a crop. This alteration occurs when rent is to be paid in crop shares; the landlord and tenant become tenants in common of the produce.[200]

C. Tenant's Mode of Use

1. Waste

Waste is the committing or permitting of an injury to a reversion by one holding the present possessory estate, which of course includes a tenant. Because his reversion is injured or is threatened with injury, the reversioner (the landlord in our context) has an action for damages or injunction. Among the several Washington landlord-tenant waste cases, the following acts by a tenant have been defined as waste: Tearing out flooring and damaging a toilet, a bandstand, and some wiring;[201] and removing a core oven, electrical transformer, jib crane, hoist, and clay floor from a foundry.[202] The following acts have been defined as not amounting to waste: Painting a service station in loud colors;[203] allowing weeds to grow, failing to cultivate fruit trees, and destroying berry bushes;[204] and depositing sand and gravel on a city lot.[205] Pretty clearly, then, the supreme court has looked for serious, permanent damage to the substance of the freehold. Typical examples of waste from other jurisdictions are the cutting of stands of timber and causing serious harm to a building, whether caused by the tenant's acts or by his failure to prevent such harm.

198. However, when one has performed labor in growing crops, he may assert his statutory laborer's lien against them after the land has passed, even if he files the lien after that event. *See* Paik v. Chung, 123 Wash. 37, 211 P. 729 (1923).

199. *See* Lloyd v. Woods, 165 Wash. 541, 5 P.2d 1000 (1931); Tipton v. Martzell, 21 Wash. 273, 57 P. 806 (1899).

200. Loudon v. Cooper, 3 Wn. 2d 229, 100 P.2d 42 (1940) (dictum); Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 P. 666 (1911).

201. Graffell v. Honeysuckle, 30 Wn. 2d 390, 191 P.2d 858 (1948).

202. DeLano v. Tennent, 138 Wash. 39, 244 P. 273 (1926).

203. Morris v. Shell Oil Co., 167 Wash. 331, 9 P.2d 354 (1932).

204. Lee v. Weerda, 124 Wash. 168, 213 P. 919 (1923) (dictum; court said merely bad husbandry).

205. Moore v. Twin City Ice & Storage Co., 92 Wash. 608, 159 P. 779 (1916).

The Washington landlord has three statutory forms of action against a tenant for waste. First, committing or permitting waste is an act of unlawful detainer.[206] Second, R.C.W. § 64.12.020 allows treble damages, attorneys' fees, and, in certain cases, eviction for waste. At one time treble damages were allowed by the state supreme court only where the damage was "wilful and wanton,"[207] but a 1943 amendment now clearly allows them in all cases of commissive, but not permissive, waste.[208] Third, the Residential Landlord-Tenant Act of 1973 prohibits waste, as well as the intentional or neglient damaging of the premises.[209] For the tenant's violation, the landlord may charge him with the cost of repairing the damage or use the violation as the basis for an unlawful detainer action if the violation is "substantial."[210] Theoretically at least, the Act allows the residential landlord to tie into an unlawful detainer action some acts of damage that would not be serious enough to be waste.

2. *Nuisances*

A tenant would presumably be liable to persons living in the vicinity for nuisances that he carried on upon the demised premises. In Washington the landlord also has an action for nuisance against the tenant, in the form of a statutory unlawful detainer action.[211] Two Washington decisions, arising out of the same set of facts, determine that a nuisance not only is an act of unlawful detainer, but also entitles the landlord to abate the nuisance by self-help.[212] The tenant leased space for a stamp works in a large hotel, and his stamping machine was very noisy when operating and shook the building. The court held that a jury might find this activity to constitute a nuisance. If, however, the lease specifies the use to which the premises are to be put, then it apparently will not, as between landlord and tenant, be a

206. WASH. REV. CODE § 59.12.030 (1963).
207. DeLano v. Tennent, 138 Wash. 39, 244 P. 273 (1926).
208. Graffell v. Honeysuckle, 30 Wn. 2d 390, 191 P. 2d 858 (1948).
209. WASH. REV. CODE § 59.18.130.
210. *Id.* 59.18.180.
211. WASH. REV. CODE § 59.12.030(5) (1963) specifically sets up "any nuisance" as a ground of unlawful detainer. The notice period is three days.
212. Ridpath v. Spokane Stamp Works, 48 Wash. 320, 93 P. 416 (1908) (unlawful detainer); Spokane Stamp Works v. Ridpath, 48 Wash. 370, 93 P. 533 (1908) (abatement).

nuisance for the tenant to conduct operations and employ devices that are ordinary to that use.[213]

D. Covenants Limiting Tenant's Use

By express language in his lease, the tenant may covenant that the premises will be used only for specified purposes or possibly that they will not be used for certain purposes. As a general proposition, such covenants are enforceable; the tenant has simply contractually altered the possessory rights he otherwise would have had.[214] This is an area, though, in which the principle of construing against the drafter, assumed usually to be the landlord, is applied with vigor. Hence, a provision that the premises shall be used for one purpose, *e.g.*, a bakery, does not exclude other uses, *e.g.*, a grocery.[215] At work here, too, is the traditional rule that restrictions on the use of land will not be implied, but must be found in express language.[216] For the draftsman, the lesson is clear: If you mean to limit or prohibit the use of the premises for certain purposes, you must expressly so state.

E. Tenant's Duty to Occupy and Use

In our system of estates in land, there is a basic concept that one having a possessory estate does not have physically to occupy the land to possess it. We protect his right of possession. It should fall out, as a corollary, that, absent an express covenant to do so, a tenant has no duty to take possession or, if he does take possession, to use the premises in any particular way. Some policy arguments have been raised, suggesting he ought to have a duty to occupy. The landlord's fire insurance premiums may go up if the premises are vacant, and improve-

213. Jurek v. Walton, 135 Wash. 105, 236 P. 805 (1925).

214. Blakely v. King County Housing Auth., 8 Wn. App. 204, 505 P.2d 151 (1973) (clause prohibiting pets valid).

215. Noon v. Mironski, 58 Wash. 453, 108 P. 1069 (1910) (alternative ground).

216. *See* Benjamin Franklin Thrift Stores v. Jared, 192 Wash. 252, 73 P.2d 525 (1937). A subtenant subleased part of a meat market and covenanted to cooperate in promoting the head tenant's business. This covenant was held not to forbid the subtenant's operating another meat market on other premises. Of course, there are instances in the law in which restrictive covenants are implied quite liberally, a good example of which is the doctrine of implied negative reciprocal servitudes in subdivisions.

ments are often liable to become wasted if they are not tended. Presumably the landlord would have a waste action if, through inattention, the tenant permitted waste. But it appears most courts have found these arguments lacking, so that, with some exceptions, American courts do not impose upon tenants a duty to occupy or to put the premises to a particular use.[217]

Certainly the tenant may expressly covenant that he will occupy or that he will use the premises in a specified manner. This is common in commercial leases, in which there may be elaborate provisions, not only that the tenant will conduct thus-and-so business, but detailing everything from hours of operation to methods of bookkeeping. Landlords will especially desire such protection when rent is expressed wholly or partly as a percentage of the tenant's business income, making the landlord dependent for his rent upon the tenant's successful conduct of the business. Naturally, clauses for occupancy and specified manner of use should be as clear and express as the scrivener can conjure up. There seems to be no doubt that an express clause is enforceable, even if it is conjoined to a forfeiture clause.[218]

One fact pattern is generally recognized to raise an implied covenant to occupy and to conduct a business. This is where the rent is wholly or largely on a percentage basis, and Washington has a classic case in point. In *Reeker v. Remour*,[219] where the rent on a service station was wholly on a gallonage basis, a penny a gallon; the court held this arrangement implied a duty to operate the station. Any other result would make the tenancy rent-free. The decision is quite in line with others throughout the country. However, the courts have generally refused to imply the covenants where there is any substantial minimum fixed rent, such as there usually is in, say, leases of retail stores.

F. Covenants to Protect Tenant's Business

We now consider lease covenants by the landlord that he will not use, or permit the use of, his lands outside the demised premises for stated purposes. Such covenants may be found in a commercial lease

217. *See* 1 A.L.P. § 3.41. The author, Professor Lesar, seems to favor making the tenant occupy, but his footnotes do not bear him out.
218. *See* Capps v. Western Talc Co., 114 Wash. 94, 194 P. 554 (1921).
219. 40 Wn. 2d 519, 244 P.2d 270 (1952).

when the tenant wishes to insure that his business will be free from competition from the landlord's direction.

When the landlord covenants that land within the same building or complex of buildings, *e.g.*, shopping center, will not be used in the stated manner, his covenant is familiarly called an "exclusive clause." When the restriction relates to land farther from the demised premises, *e.g.*, within a radius of two miles from the demised premises, the covenant is called a "radius clause." Exclusive clauses and radius clauses are only two varieties of the same thing. They are nothing more and nothing less than restrictive covenants, benefitting the tenant's leasehold and burdening land in which the landlord has an estate outside the demised premises. As such, they are running covenants, supportable under the doctrine of real covenants and, likely, as equitable servitudes as well. Therefore, if the covenant is properly drawn, its benefit ought to run to the tenant's assignees, and the burden should run to the landlord's grantees and, likely, any possessors of the landlord's other lands. A great deal of confusion has occurred around the country because courts have sometimes failed to keep these basic principles in mind.

Restrictive covenants of the kinds described above are enforceable, though there are some arguments against them. To an extent they restrain free competition, but in Washington, as generally elsewhere, the restraint has been considered so slight and the benefit to the parties so great that the covenants have been upheld.[220] However, the clauses will be read tightly, and covenants will not be implied. For instance, the landlord's covenant not to lease his land to a competing business has been held not to prohibit the landlord himself from engaging in that business on the land.[221] Similarly, when the lease, in an obvious drafting error, said the landlord would not conduct a certain business on the demised premises, the landlord was not prohibited from making that use of contiguous land he owned.[222] It has been held, though, that a clause granting the tenant an "exclusive concession" to sell food on a portion of the premises was violated when the landlord

220. Colby v. McLaughlin, 50 Wn. 2d 152, 310 P.2d 527 (1957).
221. Sylvester v. Hotel Pasco, 153 Wash. 175, 279 P. 566 (1929).
222. Looff v. Seattle Park Co., 59 Wash. 217, 109 P. 806 (1910). *See also* Looff v. Seattle Park Co., 70 Wash. 363, 126 P. 902 (1912), for another phase of the same dispute.

permitted other tenants to sell food on other portions.[223] While the word "exclusive" is frequently found, cautious drafting is fuller and ought to include an express statement that the burdened lands will not be used by the landlord or by any other person for the forbidden purposes.

To be distinguished from true restrictive covenants are promises by the landlord either to insert restrictions in leases of other land or not to lease the other land for stated purposes. It would take a liberal reading to transform such language into a restriction on the land itself. We saw above that Washington has refused so to read a covenant that the landlord will not lease land for a certain activity.[224] So, it appears the landlord may discharge his obligation simply by inserting the specified language in a lease of the other land or by not leasing for the forbidden purpose, and no one would be prevented from actually using the land for that purpose.

G. Illegality of Use

1. Use illegal when lease made

No Washington case has been found in which a lease was made for a purpose that was illegal at the inception of the leasehold. The basic principle is that a lease is void if it limits use of the premises to a purpose that is then illegal, such as prostitution, gambling, or the sale of prohibited liquor. Even when the lease does not so expressly limit the use, but the tenant in fact intends to conduct an illegal use and the landlord knows it, some decisions declare the lease invalid. Other decisions invalidate the lease only if the landlord somehow facilitated the use. It may be of consequence whether the illegality is *malum prohibitum* or only *malum in se*. Where the only illegality would be a violation of existing zoning ordinances, some courts have upheld the lease, on the theory that the parties may have intended to seek a variance, special exception, or the like.[225]

223. Dobrentai v. Piehl, 92 Wash. 433, 159 P. 371 (1916).
224. Sylvester v. Hotel Pasco, 153 Wash. 175, 279 P. 566 (1929).
225. *See* 1 A.L.P. § 3.43 for more details.

2. *Use subsequently illegal*

The Volstead Act produced a lot of cases on supervening illegality, several of them in Washington. In a typical case the lease would limit use to a saloon and for no other purpose, legal enough when the lease was executed; but the subsequent advent of prohibition made this use illegal. With this fact pattern, and presumably with similar kinds of illegality, the leasing becomes void, and the leasehold terminates.[226] Even where the lease, requiring the illegal activity to be conducted, also permits other legal uses, *e.g.*, the sale of cigars, the whole lease has been struck down.[227] While the opinions may not always spell it out, the courts seem to have implied a condition that the lease will terminate if the main business becomes illegal.

If the lease clearly makes the use permissive and not required, supervening illegality will not terminate the lease.[228] However, somewhat contrary to the normal rule against implying restrictions on use, the Washington court seems to have fairly liberally interpreted leases to require permitted uses in this context. For example, a lease "for the purpose of conducting a saloon" was interpreted to require, and not merely to permit, that business, on the grounds that the whole lease evidenced a restrictive intent.[229] The court must have had compassion for a tenant who had been put out of operation.

H. Implied Covenant of Fitness

For hundreds of years now, the basic rule has been that the landlord makes no implied warranty that the premises are fit for any purpose, the tenant taking them as he finds them. This rule flows from the conveyancing principle of *caveat emptor,* the leasing being viewed as a conveyance. Some say *caveat emptor* is contrary to the sales law doctrines of implied warranties, but such statements will be found to be made mostly by contracts teachers, whose view of legal history has

226. Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co., 98 Wash. 12, 167 P. 58 (1917); Shepard v. Sullivan, 94 Wash. 134, 162 P. 34 (1916); Stratford, Inc. v. Seattle Brewing & Malting Co., 94 Wash. 125, 162 P. 31 (1916).

227. Stratford, Inc., v. Seattle Brewing & Malting Co., 94 Wash. 125, 162 P. 31 (1916).

228. Yesler Estate, Inc., v. Continental Distrib. Co., 99 Wash. 480, 169 P. 967 (1918); Hayton v. Seattle Brewing & Malting Co., 66 Wash. 248, 119 P. 739 (1912).

229. Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co., 98 Wash. 12, 167 P. 58 (1917).

a suspicious cant to it. The truth, of course, is that the sales rules are contrary to the conveyancing ones, the latter being already ancient before anyone made sales of much more than cows and maybe a few pigs.

Until 1973, as far as anyone knew, the general rule of no implied warranty of fitness was in force in Washington. The rule was applied in several cases in which tenants tried to recover damages for personal injuries caused by defective conditions.[230] Some exceptions to the rule are recognized in Washington, but they are also recognized elsewhere.[231] Where the landlord newly builds premises for a certain purpose and the lease requires the tenant to use them for that purpose, then an implied warranty arises that the premises will be fit for that purpose.[232] If, however, no certain purpose is required the only warranty is that the building shall conform to stated specifications or that it shall be structurally sound.[233] Another doctrine often listed as an exception, though it really is not, is that the landlord will be liable to the tenant for harm caused by (a) latent or hidden defects (b) that existed at the commencement of the leasehold, (c) of which the landlord had actual knowledge, (d) and of which he failed to inform the tenant. This doctrine is well known in Washington.[234] Really at work here is a kind of deceit theory, in which the landlord is given an affirmative duty to speak to warn where the tenant could not be expected to discover the hidden defect himself.

All this has now been radically altered, at least as far as leases of dwellings go. For a dwelling lease, the covenant of fitness is known as a covenant of habitability, that being the specific kind of fitness required. First off, the Residential Landlord-Tenant Act of 1973 stipu-

230. Taylor v. Stimson, 52 Wn. 2d 278, 324 P.2d 1070 (1958); Conradi v. Arnold, 34 Wn. 2d 730, 209 P.2d 491 (1949) (apparent alternative ground); Peterson v. Betts, 24 Wn. 2d 376, 165 P.2d 95 (1946).

231. For the law of "elsewhere," see 1 A.L.P. § 3.45.

232. Hardman Estate v. McNair, 61 Wash. 74, 111 P. 1059 (1910) (building rebuilt for use as cafe).

233. Frank D. Black, Inc. v. Crescent Mfg. Co., 146 Wash. 119, 262 P. 125 (1927) (structurally sound); Robinson v. Wilson, 102 Wash. 528, 173 P. 331 (1918) (conform to plans and specifications). The latter case also holds there was no implied warranty of fitness.

234. *See, e.g.*, the following decisions, in which the doctrine was applied particularly prominently: Flannery v. Nelson, 59 Wn. 2d 120, 366 P. 2d 329 (1961) (alternative ground); Perkins v. Marsh, 179 Wash. 362, 37 P.2d 689 (1934); Toole v. Franklin Inv. Co., 158 Wash. 696, 291 P. 1101 (1930); Howard v. Washington Water Power Co., 75 Wash. 255, 134 P. 927 (1913).

lates that "the landlord will at all times during the tenancy keep the premises fit for human habitation."[235] Since the Act provides that the landlord's breach will give the tenant "remedies otherwise provided him by law," in addition to special remedies in the statute,[236]it appears a breach would give the tenant a common-law action for damages for loss of rental value or for personal injuries caused by the defective premises. One might raise a weak argument that the statutory language created, in operation, a repair covenant instead of a covenant of habitability, but the Washington court has already suggested it amounts to the latter.[237] Anyway, the tenant would be as well off, for practical purposes, to sue on one of the covenants as the other.

The state supreme court has now, 25 October 1973, created a common-law implied covenant of habitability in *Foisy v. Wyman*.[238] The parties had what turned out to be a general letting of residential premises on a month-to-month tenancy. The tenant agreed to repair the run down premises, the condition of which the tenant knew in advance, in return for reduced rent. After the tenant failed to pay his rent for some months, the landlord brought an unlawful detainer action, in which the tenant sought to defend by offsetting damages for breach of an implied covenant of habitability against the unpaid rent. Also, on trial the tenant tried to show the condition of the premises violated the City of Seattle housing code, but the trial judge excluded the evidence as irrelevant. Judgment was for the landlord on the merits. The supreme court reversed and, to make a long affair short, necessarily laid down the following rules of law: (1) There is an implied warranty of habitability in every lease of a dwelling. (2) The parties may not, even knowingly and for reduced rent, bargain it away; public policy in favor of disadvantaged tenants forbids. (3) Damages (measure not stated) caused by the landlord's breach may be offset against unpaid rent as a defense in an unlawful detainer action, which, in plain English, gives the tenant a limited privilege of rent withholding. (4) Violations of a housing code are evidence of uninhabitability, but, the court said, do not create a prima facie case.

The reasoning was based upon recent decisions from other jurisdic-

235. WASH. REV. CODE § 59.18.060.
236. *Id.* § 59.18.070.
237. *See* Foisy v. Wyman, 83 Wn. 2d 22, 515 P.2d 160 (1973).
238. *Id.*

tions creating the implied warranty and upon the well known implied warranty of fitness Washington has developed for the sale of new houses.[239] Then the court quoted at length from the Residential Landlord-Tenant Act, concluding that the public policy of the state was manifestly that the landlord should provide a habitable dwelling. The results the court fashioned resembled those obtainable under the new Act, had it been in effect when the dispute arose. Indeed, one suspects the court, as much as anything else, was trying to approximate the effect of the Act.

The decision is quite a *tour de force* and quite an exercise in judicial activism. On the unlawful detainer point, that breach of the covenant of habitablity could be raised as a defense to rent, the decision may well be contrary to a long line of prior Washington cases, none of which was even hinted at.[240] However, the Washington law, a considerable body of it, is somewhat confusing on the question, and arguments might be made for the court's decision.[241] In any event, the court should have done more than merely to cite one Illinois case on the question.[242]

The implied-covenant-of-habitability rule is likely enough long overdue; yet, even here the court's bravery is mostly bravado. As to practical effect, the decision comes at a time when it will operate within quite a narrow range, despite its theoretical novelty. First, it pretty clearly applies only to residential leases; *i.e.*, the covenant in question is only of habitability, not the broader covenant of fitness.

239. The court cited House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969). Since the house-sale-warranty cases have all involved new houses, but Foisy v. Wyman, in the leasing context, involves a (disgustingly) old house, does this mean the sales warranty will now be extended to old houses?

240. *See* Young v. Riley, 59 Wn. 2d 50, 365 P.2d 769 (1961), and earlier cases cited in it, going back to Ralph v. Lomer, 3 Wash. 401, 28 P. 760 (1891). These decisions stand for the proposition that a setoff or counterclaim may not be asserted to defeat an unlawful detainer action that is brought for nonpayment of rent. In *Young* the tenant would have set off damages for interference with possession. The court has taken the general view that the unlawful detainer statute means what it says: if the tenant fails to pay his rent within three days after the notice, he is in unlawful detainer, no ifs, ands, or buts.

241. One might argue the defense in Foisy v. Wyman was not a setoff but a diminution in rental value. Then there is Income Prop. Inv. Co. v. Trefethen, 155 Wash. 493, 284 P. 782 (1930), which, while distinguishable on the ground of the procedure used, tends to be contrary to the cases cited in the preceding footnote. *Trefethen* allowed a tenant, in a separate action, to enjoin eviction by unlawful detainer, because his landlord had failed to make repairs he had the duty to make.

242. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

And, as to residential leases, the Residential Landlord-Tenant Act makes the landlord liable for habitability after 16 July 1973, even if the lease was made prior to that date. The court itself said in *Foisy v. Wyman* that the Act and the court's decision produce similar results. The Act does not cover certain small classes of residential leases that *Foisy* presumably covers, namely, leases of farm homes, seasonal agricultural laborers' housing, and houses that go with employment.[243] Of course the decision will govern any controversies that were pending before 16 July 1973, but they certainly are, like the flamingo, a threatened species.

Various sweeping implications, for all appearances unintended, may flow from the court's opinion. For example, it seems implicit that the court treated the covenants as dependent, yet there is nothing to indicate any apprehension of the shock waves that spread out from changing the traditional principle of independence. Despite all that has been said, it would be impermissibly irreverent to suggest that the results of the decision, intended and unintended, did not justify the juridical techniques used.

IV. INTERFERENCE WITH TENANT'S POSSESSION

A. Implied Covenant of Power to Lease

By his act of purporting to lease land to the tenant, the landlord necessarily and impliedly covenants that he has the power to do so.[244] If there is a breach of this covenant, it occurs at the instant of leasing and lies in the fact that the landlord then lacked the legal power to let the premises. If the tenant has taken possession and then is ousted by someone having paramount title, a breach of another implied covenant, the covenant of quiet enjoyment, occurs. Should it be the case that the paramount party had the right of possession from the time the lease was made, for example, a prior tenant whose term had not expired, then the landlord breaches both covenants. But if his right to possession arose only after the lease was made, as with, say, a fore-

243. WASH. REV. CODE §§ 59.18.040(5), (6) & (8).

244. *See* Vellias v. Fifth-Pike Corp., 172 Wash. 319, 20 P.2d 14 (1933), in which the landlord could not put the tenant into possession because a prior tenant was rightfully in possession. The court's language leaves a doubt whether it had in mind a covenant of power to lease or a covenant to deliver possession.

closing mortgagee, then only the covenant of quiet enjoyment is breached. So, the covenants of power to lease and of quiet enjoyment will overlap in some situations and not in others.

B. Implied Covenant of Quiet Enjoyment

Implied in the landlord's act of leasing is his covenant of quiet enjoyment, as has just been suggested. The landlord covenants that, once the tenant has taken possession, he shall not be disturbed in it by the landlord or by any third person with a right of possession paramount to the tenant's. Evictions by the landlord, actual or constructive, are wrongful because they breach this implied covenant; they will be discussed presently. Interferences by third persons may occur if the landlord's estate terminates by the occurence or falling in of a condition or if a mortgagee prior to the leasehold forecloses. The third person, *e.g.*, the holder of the possibility of reverter or the purchaser at a foreclosure sale, must actually interfere with the tenant's possession if the covenant is to be breached.[245] Let us now develop the ramifications of these general principles.

C. Interference by Third Parties Under Paramount Title

Virtually no Washington authority has been found on interference by third persons with a title superior to the tenant's. In two cases in which the landlord's other tenants interfered with the complaining tenant, the Washington court seems to have characterized the acts as being attributable to the landlord.[246]In only one of the cases, however, had the landlord actually leased the same space to both the complaining tenant and to a prior tenant.[247]

D. Interference by Landlord

1. Actual eviction

The purest example of an actual eviction occurs when the landlord

245. *See* 1 A.L.P. §§ 3.47–.53 for more details.
246. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956); Dobrentai v. Piehl, 92 Wash. 433, 159 P. 371 (1916).
247. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956).

physically ousts the tenant from possession and keeps him out. This is so obvious an interference with the tenant's most elemental right under the lease that, even if such pure cases do not often reach appellate courts, the wrongfulness of the landlord's actions is manifest.[248] Under the 1973 Residential Act it is designated "unlawful" for the landlord to "remove or exclude" the tenant except by court order.[249]

Most of the litigation seems to revolve around the question of what lesser acts will amount to actual eviction. Something less than a physical touching may suffice, such as badgering the tenant out by threats to call the sheriff and otherwise forcing him out.[250] But threats that in the circumstances could not be carried out, or if carried out, would not oust the tenant, would not be an eviction.[251] Similarly, threats to bring legal action to evict the tenant or, without more, a notice of forfeiture would not be an eviction.[252]

2. *Constructive eviction*

The doctrine of constructive eviction is an extension of actual eviction. Here, instead of the landlord undertaking or perhaps threatening the tenant's removal, the landlord does, allows or fails in a duty to do something, by reason of which the premises become more or less unusable—"untenantable" is the magic word. After all, if the tenant's use of the premises becomes infeasible, is he not the same as evicted? Such is the gist of constructive eviction. The Washington cases are numerous.

As implied above, the interference must be serious enough substantially to interfere with possession. Clearly, if the premises become dangerous from disrepair[253] or if improvements or facilities necessary to its use become unusable,[254] there is such an interference. Other examples are rat infestation and the shutting off of light and ventila-

248. Shaffer v. Walther, 38 Wn. 2d 786, 232 P.2d 94 (1951) (landlord occupied premises, told tenant to leave, tenant vacated). *See also* Myers v. Western Farmers Ass'n, 75 Wn. 2d 133, 449 P.2d 104 (1969) (not eviction for landlord to change locks with tenant's consent); King v. King, 83 Wash. 615, 145 P. 971 (1915).

249. WASH. REV. CODE § 59.18.29(1).

250. Hobson v. Union Oil Co., 187 Wash. 1, 59 P.2d 929 (1936).

251. Cline v. Altose, 158 Wash. 119, 290 P. 809 (1930) (when tenant did not pay rent, landlord threatened to collect rent subtenants would later owe tenant).

252. Ennis v. Ring, 56 Wn. 2d 465, 341 P.2d 885 (1959); Gibson v. Thisius, 16 Wn. 2d 693, 134 P.2d 713 (1943) (dictum).

253. John B. Stevens & Co. v. Pratt, 119 Wash. 232, 205 P. 10 (1922).

254. Buerkli v. Alderwood Farms, 168 Wash. 330, 11 P.2d 958 (1932) (land-

tion.[255] The Washington court has been particularly sensitive to interference with the tenant's conduct of a business, holding that the following acts were constructive evictions: repeatedly insulting the tenant on the premises in front of customers, leasing to other tenants in violation of a covenant that the first tenant had the exclusive concession for a certain business, and changing the entrance to a store in violation of a covenant.[256] Under the 1973 Residential Act, it is "unlawful" for the landlord to shut off utility services except for a reasonable time to make repairs;[257] apparently such action by the landlord constitutes constructive eviction. Decisions have determined that no constructive eviction occurred when the landlord operated a tap-dancing studio above the tenant's theater or obtained the appointment of a receiver to collect rents or inserted a clause in the lease prohibiting pets.[258]

No matter how serious the interference is, no constructive eviction will occur unless the interference can be attributed to the landlord's breach of a duty he owes the tenant. This occurs most obviously when the landlord or one under his direction, such as a building contractor, does something on the demised premises that causes the interference.[259] As with any constructive eviction, the landlord's act must be wrongful; so, the tenant has no cause of action if he has consented to the landlord's acts of interference.[260] If the landlord breaches a duty to repair, and thereby causes the premises to become untenantable, he has constructively evicted the tenant.[261] Though one presumes the

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lord refused to perform duty to rebuild destroyed buildings); Wusthoff v. Schwartz, 32 Wash. 337, 73 P. 407 (1903) (landlord tore out toilets, stairs, etc.).

255. Washington Chocolate Co. v. Kent, 28 Wn. 2d 448, 183 P.2d 514 (1947) (rats); Matzger v. Arcade Bldg. & Realty Co., 102 Wash. 423, 173 P. 47 (1918) (light and ventilation).

256. Coulos v. Desimone, 34 Wn. 2d 87, 208 P.2d 105 (1949) (insults); Dobrentai v. Piehl, 92 Wash. 433, 159 P. 371 (1916) (exclusive concession); Brewster Cigar Co. v. Atwood, 107 Wash. 639, 182 P. 564 (1919) (entrance).

257. WASH. REV. CODE § 59.18.300.

258. Farrow v. Storck, 167 Wash. 233, 9 P.2d 105 (1932) (tap-dancing); Exeter Co. v. Holland Corp., 172 Wash. 323, 20 P.2d 1, aff'd on rehearing, 23 P. 2d 864 (1933) (receiver); Blakely v. King County Housing Auth., 8 Wn. App. 204, 505 P.2d 151 (1973).

259. Coulos v. Desimone, 34 Wn. 2d 87, 208 P.2d 105 (1949) (insulting tenant in his restaurant); Alexis v. Pittinger, 119 Wash. 626, 206 P. 370 (1922) (contractor's blasting); Wusthoff v. Schwartz, 32 Wash. 337, 73 P. 407 (1903) (contractor's tearing up premises).

260. Thompson v. R. B. Realty Co., 105 Wash. 376, 177 P. 769 (1919) (consent); California Bldg. Co. v. Drury, 103 Wash. 577, 175 P. 302 (1918) (waiver, alternative ground).

261. Buerkli v. Alderwood Farms, 168 Wash. 330, 11 P.2d 958 (1932); John B. Stevens & Co. v. Pratt, 119 Wash. 232, 205 P. 10 (1922).

duty to repair might have been created in various ways, *e.g.*, by a lease covenant, by separate agreement, or by a rule of law, any defense to the duty to repair, such as the tenant's failure to notify of needed repairs or a lack of reasonable opportunity to make them, will be a defense also to wrongful eviction.[262]

Situations are also fairly common in which some wrongful act of the landlord on premises he controls outside the leased premises will have an impact that constitutes constructive eviction. Washington examples are the landlord's allowing rats from his premises to invade the tenant's premises or blocking the tenant's light and air or leasing nearby premises to the tenant's business competitors when the tenant's lease prohibits it.[263] Most such activities are nuisances or akin to them, although it takes a bit of imagination to call business competitors nuisances (in the legal sense, of course). At any rate, we may conclude that the landlord must have caused the interference by a wrongful act or omission.

It is axiomatic that the tenant has no action for constructive eviction unless, within a reasonable time after the interference, he vacates the premises.[264] This brings back to memory what was said earlier, that constructive eviction grew out of the doctrine of actual eviction (*i.e.*, the tenant must be dispossessed). The tenant's duty to pay rent continues until he vacates. It is also established that the tenant may lose his constructive eviction claim by waiver if he fails to vacate within a reasonable time after the interference occurred.[265] Finally, in contrast with the rules developed in the case law, under the Residential Landlord-Tenant Act of 1973 the tenant may, without vacating, assert his special statutory remedy if the landlord violates the Act by cutting off utilities.[266]

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262. Erickson v. Elliot, 177 Wash. 229, 31 P.2d 506 (1934) (alternative ground, lack of reasonable time to make repairs); California Bldg. Co. v. Drury, 103 Wash. 577, 175 P. 302 (1918) (tenant waived demand for repairs).

263. Washington Chocolate Co. v. Kent, 28 Wn. 2d 448, 183 P.2d 514 (1947) (rats); Matzger v. Arcade Bldg. & Realty Co., 102 Wash. 423, 173 P. 47 (1918) (light and air); Dobrentai v. Piehl, 92 Wash. 433, 159 P. 371 (1916) (competitors).

264. Buerkli v. Alderwood Farms, 168 Wash. 330, 11 P.2d 958 (1932) (tenant's duty to pay rent continues until he vacates); John B. Stevens & Co. v. Pratt, 119 Wash. 232, 205 P. 10 (1922) (dictum); Tennes v. American Bldg. Co., 72 Wash. 644, 131 P. 201 (1913); Brine v. Bergstrom, 4 Wn. App. 288, 480 P.2d 783 (1971) (alternative holding).

265. California Bldg. Co. v. Drury, 103 Wash. 577, 175 P. 302 (1918) (alternative ground). *See also* Erikson v. Elliot, 177 Wash. 229, 31 P.2d 506 (1934).

266. WASH. REV. CODE § 59.18.300.

E. Tenant's Remedies Against Landlord for Interference

Not only does the constructive eviction give the tenant a defense to a claim for rent after he vacates, it also gives him an action for damages. The usual measure of damages is the difference between the rental value of the premises with and without the landlord's interference for the unexpired part of the term.[267] If there is no difference, then the tenant receives only nominal damages.[268] He may also recover forms of consequential damages, but it has been held these must be pleaded and proved with reasonable particularity.[269] Consequential damages have often been awarded for lost profits and also for damage to goods and for moving and incidental expenses.[270] At one time the Washington supreme court allowed damages for mental anguish caused by the landlord's interference, but the earlier cases have long since been overruled.[271] Tenants have also recovered for their personal injuries resulting from landlords' constructive evictions, and such cases will be discussed separately in a moment.

An act of interference not major enough to amount to a constructive eviction may give the tenant an action for diminution in value or for consequential damages, similarly to those actions just discussed.[272]

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267. Woodward v. Blanchett, 36 Wn. 2d 27, 216 P.2d 228 (1950); Schermerhorn v. Sayles, 123 Wash. 139, 212 P. 156 (1923); Matzger v. Arcade Bldg. & Realty Co., 102 Wash. 423, 173 P. 47 (1918); King v. King, 83 Wash. 615, 145 P. 971 (1915).

268. Robertson v. Waterman, 123 Wash. 508, 212 P. 1074 (1923).

269. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956) (may recover); Woodward v. Blanchett, 36 Wn. 2d 27, 216 P.2d 228 (1950) (may recover, must plead); Washington Chocolate Co. v. Kent, 28 Wn. 2d 448, 183 P.2d 514 (1947) (may recover); Willard v. Cunningham Bros., 172 Wash. 386, 20 P.2d 35 (1933) (actual eviction; need not prove exactly where obviously substantial); Schermerhorn v. Sayles, 123 Wash. 139, 212 P. 156 (1923) (must show with reasonable accuracy).

270. McKennon v. Anderson, 49 Wn. 2d 55, 298 P.2d 492 (1956) (moving costs, etc.); Woodward v. Blanchett, 36 Wn. 2d 27, 216 P.2d 228 (1950) (lost profits?); Washington Chocolate Co. v. Kent, 28 Wn. 2d 448, 183 P.2d 514 (1947) (damage to goods); Willard v. Cunningham Bros., 172 Wash. 386, 20 P.2d 35 (1933) (lost profits); Schermerhorn v. Sayles, 123 Wash. 139, 212 P. 156 (1923) (lost profits); Risdon v. Hotel Savoy Co., 99 Wash. 616, 170 P. 146 (1918) (lost profits and damage to goods); McClure v. Campbell, 42 Wash. 252, 84 P. 825 (1906) (lost profits and damage to goods).

271. Damages for mental anguish were allowed in Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913), McClure v. Campbell, 42 Wash. 252, 84 P. 825 (1906). Such damages were disallowed in Risdon v. Hotel Savoy Co., 99 Wash. 616, 170 P. 146 (1918), and the earlier decisions were overruled in Barnes v. Bickle, 111 Wash. 133, 189 P. 998 (1920).

272. Purcell v. Warburton, 70 Wash. 129, 126 P. 89 (1912) (diminution in value); Lindbloom v. Berkman, 43 Wash. 356, 86 P. 567 (1906) (consequential damages, apparently).

The landlord's violation of the noninterference sections of the 1973 Residential Act gives the tenant special remedies. If the landlord removes or excludes the tenant, the latter may either terminate or recover possession and may obtain attorney's fees.[273] When the landlord shuts off the utilities in violation of the Act, the tenant may recover actual damages and attorney's fees, plus "up to one hundred dollars for each day or part thereof the tenant is thereby deprived of any utility service."[274]

F. Interference by Strangers to Title

After all that has been said, it is almost anticlimactic to add that there will be no actual or constructive eviction if the interference is caused by a third person who is a stranger to the title and over whom the landlord has no control.[275] For instance, an interference by a trespasser or by a neighbor will not be a constructive eviction by the landlord, though the third person would presumably have some liability.[276] In other jurisdictions the question has been raised whether acts by the landlord's other tenants, committed on premises they lease from him in the same building or nearby, may constitute a constructive eviction if such acts interfere with the tenant.[277] The conclusion should be, and apparently is in most courts, that the landlord is liable only if he could control the other tenant, usually through a clause in the other's lease. This rule seems to underlie the decision in the one Washington case found on the point, in which it was held to be a constructive eviction for the landlord, in breach of his covenant to the tenant, to lease nearby areas to business competitors.[278] There are, however, some opinions in other jurisdictions holding landlords liable for constructive evictions where other nearby tenants of the landlord carried on immoral activities, even though the landlord had no legal control over them. These decisions must be an exception to the usual principles of constructive eviction.

273. WASH. REV. CODE § 59.18.290.
274. *Id.* § 59.18.300.
275. Johnson-Lieber Co. v. Berlin Machine Works, 87 Wash. 426, 151 P. 778 (1915); Hockersmith v. Sullivan, 71 Wash. 244, 128 P. 222 (1912). *See also* Robertson v. Waterman, 123 Wash. 508, 212 P. 1074 (1923).
276. Johnson-Lieber Co. v. Berlin Machine Works, 87 Wash. 426, 151 P. 778 (1915) (neighbor); Hockersmith v. Sullivan, 71 Wash. 244, 128 P. 222 (1912) (trespasser).
277. *See* 1 A.L.P. § 3.53.
278. Dobrentai v. Piehl, 92 Wash. 433, 159 P. 371 (1916).

G. *Injuries to Tenant from Defective Conditions*

As might be imagined, there are a whole host of personal injury suits by tenants, and others, against landlords. In order to keep the present discussion within manageable limits and within the bounds originally stated for this article, some restrictions must be imposed. First, we will cover only cases in which the tenant or someone treated as a tenant makes a claim against his landlord. Then, we will not attempt a discussion, as such, of the principles of tort law, including definitions of negligence, contributory negligence, assumption of risk, and the like. Moreover, we will cover at this point only those cases in which the alleged liability flows from defects on the premises or on adjoining premises that may be within the landlord's control. Cases in which liability may arise out of the landlord's failure to repair or his improper repairs on either the demised premises or on common areas will be discussed under the subject of repairs, Section V-B.

As a starting point, it is convenient to posit that the landlord is liable to the tenant for tort injuries caused by defective conditions that exist on the premises at the beginning of the term only when the landlord is liable for the defective conditions themselves. In other words, tort liability follows our discussion of the theories of implied covenant of habitability and of failure to warn of latent defects, contained in Section III-H above. Therefore, under the traditional doctrine that the act of leasing does not create any implied warranty that the premises are fit for the tenant's use, the tenant may not generally predicate tort liability upon the existence of defective conditions: no covenant, no tort liability.[279]

This general rule is still applicable to nonresidential leases. But, because of the apparent effect of the Residential Landlord-Tenant Act of 1973,[280] and of the holding in *Foisy v. Wyman*,[281] all residential leases now contain an implied covenant that the premises are habitable, *i.e.*, fit for human occupation. It must follow that the landlord is

279. Teglo v. Porter, 65 Wn. 2d 772, 399 P.2d 519 (1965) (dictum); Taylor v. Stimson, 52 Wn. 2d 278, 324 P.2d 1070 (1958); Bidlake v. Youell, Inc., 51 Wn. 2d 59, 315 P.2d 644 (1957); Conradi v. Arnold, 34 Wn. 2d 730, 209 P.2d 491 (1949); Peterson v. Betts, 24 Wn. 2d 376, 165 P.2d 95 (1946); Miller v. Vance Lumber Co., 167 Wash. 348, 9 P.2d 351 (1932); Hogan v. Metropolitan Bldg. Co., 120 Wash. 82, 206 P. 959 (1922) (alternative ground); Johnston v. Nichols, 83 Wash. 394, 145 P. 417 (1915); Mesher v. Osborne, 75 Wash. 439, 134 P. 1092 (1913) (dictum).

280. WASH. REV. CODE §§ 59.18.060 & .070.

281. 83 Wn. 2d 22, 515 P.2d 160 (1973).

now liable to the tenant for injuries to him or his personalty if the injury is caused by unfitness relating to habitability, assuming, of course, that the landlord has no defense on a tort theory. In principle at least, no liability flows unless the defect causing the injury is serious enough to cause uninhabitability or, likely, is a breach of the landlord's duty under the 1973 Act. Whether the court extends tort liability strictly or liberally–one might guess it will be the latter–it is clear that the exposure of residential landlords and of their liability insurers is now substantially enlarged.

Because of the traditional difficulty of establishing tort liability on the implied-covenant theory, tenants were forced to predicate liability on the latent-defect theory. We saw previously that a landlord has a duty to warn his tenant of latent or hidden defects on the premises at the commencement of the term if that landlord knows of them. If he breaches this duty and if the defect later injures the tenant, the landlord is liable.[282] The requirement that the defect be latent or hidden implies that there is no liability if it is open and visible to the tenant, so that he does or should see it.[283] However, the strength of this principle has been somewhat shaken by the 1967 decision in *Thomas v. Housing Authority,* [284] holding that a tenant could not know domestic water was dangerously hot just by observing it coming out of the faucets.

Not only must the defect be hidden from the tenant, it must, so the usual formula goes, be actually known to the landlord. Though there have been undertones to the contrary in two or three cases,[285] the received Washington law on the point is that the landlord has no duty to make any kind of inspection for defects.[286] Still, there has been a bit

282. Thomas v. Housing Auth., 71 Wn. 2d 69, 426 P.2d 836 (1967); Flannery v. Nelson, 59 Wn. 2d 120, 366 P.2d 329 (1961); Conradi v. Arnold, 34 Wn. 2d 730, 209 P.2d 491 (1949) (dictum); Toole v. Franklin Inv. Co., 158 Wash. 696, 291 P. 1101 (1930); Johnson v. Dye, 131 Wash. 637, 230 P. 625 (1924); Casey v. Williams, 111 Wash. 348, 190 P. 1011 (1920) (apparent theory); Mesher v. Osborne, 75 Wash. 439, 134 P. 1092 (1913) (dictum); Howard v. Washington Water Power Co., 75 Wash. 255, 134 P. 927 (1913).

283. Peterson v. Betts, 24 Wn. 2d 376, 165 P.2d 95 (1946); Stoops v. Carlisle-Pennell Lumber Co., 127 Wash. 82, 219 P. 876 (1923); Howard v. Washington Water Power Co., 75 Wash. 255, 134 P. 927 (1913) (jury question).

284. 71 Wn. 2d 69, 426 P.2d 836 (1967).

285. *See* Thomas v. Housing Auth., 71 Wn. 2d 69, 426 P.2d 836 (1967); Bidlake v. Youell, Inc., 51 Wn. 2d 59, 315 P.2d 644 (1957); and possibly McCormick v. Milner Hotels, Inc., 53 Wn. 2d 207, 332 P.2d 239 (1958).

286. Taylor v. Stimson, 52 Wn. 2d 278, 324 P.2d 1070 (1958) (loose window);

of yawing about on the question. It was once held that where the landlord was obligated to repair a certain area by a lease covenant, he was constructively charged with knowledge of a hidden defect in that area, which he would have discovered had he made the repairs he was supposed to make.[287] And in the *Thomas* case it was held that the tenant's telling the landlord, after the term began, of the defect gave him actual knowledge; this case seems to violate the principle that the landlord's liability for latent defects exists only at the beginning of the term.

No systematic or complete attempt will be made here to develop the principles of the landlord's tort liability to third persons. However, a few decisions will be noted in which certain kinds of third persons have or have not been treated as if they were tenants. Members of the tenant's family and domestic servants and their family members are treated as tenants if they live on the premises.[288] But tenants' employees and members of a voluntary association that was the tenant seem to be treated as third persons.[289] What significance these classifications may have for the landlord's tort liability is beyond the scope of this article, but an interesting and recent review of most of the principles governing his liability to third persons will be found in *Regan v. City of Seattle*.[290]

Frequently tenants are injured because of something the landlord does or maintains on nearby areas under his control. Such areas may be common areas (*e.g.*, hallways), other rooms the landlord occupies nearby, or possibly areas leased out to other tenants if the landlord retains some control. The complaining tenant may be injured off his demised premises (*e.g.*, in the hallway), or on the demised premises (*e.g.*, water running down from an upper floor). Naturally, liability cannot arise on the theories we have previously discussed, the cove-

Conradi v. Arnold, 34 Wn. 2d 730, 209 P.2d 491 (1949) (loose stair under rug); Johnston v. Nichols, 83 Wash. 394, 145 P. 417 (1915).

287. Johnson v. Dye, 131 Wash. 637, 230 P. 625 (1924).

288. Thomas v. Housing Auth., 71 Wn. 2d 69, 426 P.2d 836 (1967) (tenant's daughter); Anderson v. Reeder, 42 Wn. 2d 45, 253 P.2d 423 (1953) (tenant's son injured in common area); McCourtie v. Bayton, 159 Wash. 418, 294 P. 238 (1930) (tenant's "housekeeper's" son). *See* WASH. REV. CODE § 59.18.030(8). *See also* Yarbrough v. Smith, 66 Wn. 2d 365, 402 P.2d 667 (1965), in which a tenant's parents, staying temporarily as guests, may have been therefore treated as tenants.

289. Flannery v. Nelson, 59 Wn. 2d 120, 366 P.2d 329 (1961) (employee); Hughes v. Chehalis School Dist. 302, 61 Wn. 2d 222, 377 P.2d 642 (1963) (member).

290. 76 Wn. 2d 501, 458 P.2d 12 (1969).

nant-of-fitness and latent-defect theories, because the injury is not caused by any defect in the demised premises. Rather, liability lies purely in tort theories, usually negligence: the landlord has simply misused his own premises, or at least premises he ought to have controlled. In fact, it is entirely coincidental and insignificant that the parties happen to be landlord and tenant. The landlord would be just as liable to his next-door neighbor as to his tenant for harm caused by his smoky fireplace. He would be just as liable to a visitor as to a tenant who slips and falls in the common hallway of his apartment house.[291]

As to common areas, the landlord is liable for injuries caused to the tenant and others by reason of the landlord's negligent acts or maintenance in such areas.[292] The 1973 Residential Act similarly imposes a duty on the landlord to keep common areas reasonably clean, sanitary, and safe.[293] On a similar basis, he is liable to the tenant if, by his negligence in using or controlling common areas or other areas of the building under his control, the tenant is injured on the demised premises, usually by substances like water or falling plaster.[294] It is possible for the landlord's negligence to lie in failing to control an adjoining tenant if the landlord is found to have that duty.[295] Of course the landlord may interpose the usual negligence defenses, such as assumption of risk.[296] Finally, the areas in question must be under the landlord's, not the tenant's, control for liability to arise. It has been held that a private balcony attached to the tenant's premises was under the tenant's control and that a skylight over the tenant's apartment was within the landlord's control.[297]

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291. On the point that the landlord's liability is the same to third persons as to the tenant, see Gildesgard v. Pacific Warehouse Co., 55 Wn. 2d 870, 350 P.2d 1016 (1960) (tenant's employee); Moohr v. Victoria Inv. Co., 144 Wash. 387, 258 P. 43 (1927) (guest); Leuch v. Dessert, 137 Wash. 293, 242 P. 14 (1926) (guest).

292. Anderson v. Reeder, 42 Wn. 2d 45, 253 P.2d 423 (1953); Kennett v. Yates, 41 Wn. 2d 558, 250 P. 2d 962 (1952) (leading case); McGinnis v. Keylon, 135 Wash. 588, 238 P. 631 (1925); Chambers v. Slattery, 147 Wash. 538, 266 P. 185 (1928).

293. WASH. REV. CODE § 59.18.060(3).

294. Magerstaedt v. Eric Co., 64 Wn. 2d 298, 391 P.2d 533 (1964) (landlord's acts held not cause of injury); Uhl Bros. v. Hull, 130 Wash. 90, 226 P. 723 (1924); LeVette v. Hardman Estate, 77 Wash. 320, 137 P. 454 (1914).

295. Martindale Clothing Co. v. Spokane & Eastern Trust Co., 79 Wash. 643, 140 P. 909 (1914) (landlord failed to tell upstairs tenant how to prevent water pipes from freezing and bursting).

296. Dehn v. Kohout, 54 Wn. 2d 611, 343 P.2d 883 (1959) (*volenti non fit injuria*).

297. Larson v. Eldridge, 153 Wash. 23, 279 P. 120 (1929) (balcony); Leuch v. Dessert, 137 Wash. 293, 242 P. 14 (1926) (skylight).

In some leases landlords have attempted to avoid liability for tenants' injuries by inserting clauses exculpating themselves from such liability. Such clauses, never judicial favorites, have long been tightly interpreted.[298] In 1967 the Supreme Court of Washington declared such clauses void as being against public policy in leases of publicly owned housing.[299] Then in 1971 in *McCutcheon v. United Homes Corporation*,[300] the court invalidated landlords' exculpatory clauses in residential leases in general, again on public policy grounds. The court specifically stated it did not decide their validity (a) in residential leases where bargained for upon reduced rent or (b) in nonresidential leases. As to these categories of leases, all we can presently say is that exculpatory clauses will be strictly interpreted. One might conjecture that the court would not allow even a bargained-for clause in a residential lease, in view of its refusal in *Foisy v. Wyman*[301] to allow a tenant to bargain away the implied covenant of habitability. However, the question is nearly moot, because the 1973 Residential Act expressly disallows landlords' exculpatory clauses and prohibits bargaining them away.[302] The conjecture on commercial leases might be that exculpatory clauses are still possible, because part of the public policy reasoning in the residential cases comes from the inequality in bargaining position between landlord and tenant.

H. Condemnation

An entity having the power of eminent domain may, if necessary to its purposes, condemn all or part of the estates or interests in a parcel of land, for instance, the leasehold as well as the reversion.[303] For our purposes, we will assume the condemnor takes a fee simple absolute, so that both leasehold and reversion are extinguished. If all of the area of the demised premises is taken, the condemnor acquires all the

298. *See* Feigenbaum v. Brink, 66 Wn. 2d 125, 401 P.2d 642 (1965) and LeVette v. Hardman Estate, 77 Wash. 320, 137 P. 454 (1914).
299. Thomas v. Housing Auth., 71 Wn. 2d 69, 426 P.2d 836 (1967).
300. 79 Wn. 2d 443, 486 P.2d 1093 (1971).
301. 83 Wn. 2d 22, 515 P.2d 160 (1973).
302. WASH. REV. CODE §§ 59.18.230 & .260.
303. Support for this as a general proposition of American law, as well as support for other statements of general law in this Section, will be found in 1 A.L.P. §§ 3.54, 3.55. A number of Washington statutes authorize the condemnation of the totality of interests in land, including leaseholds. The more important such statutes are in the following sections of the WASH. REV. CODE: § 8.04.097 (1963) (condemnation by state); § 8.08.010 (1963) (by counties); § 8.12.060 (1963) (by cities); § 8.16.110 (1963) (by school districts); § 8.20.020 (Supp. 1972) (by corporations).

leasehold and all the reversion, and they merge in the condemnor. The leasehold is extinguished and terminated, and the tenant's duty to pay rent ends. The landlord gets the entire condemnation award, and that is that.[304]

Things get more interesting when the condemnor takes only part of the area of the demised premises. It would make sense for the courts to say that, since the leasehold is terminated for the part taken, the tenant's rent is abated pro tanto; but most courts, Washington's included, have not done that. Rather, most say that the duty to pay the entire rent continues unabated, and the tenant may share in the condemnation award.[305] The total award, of course, is the fair market value of the fee, and this award will be split between the landlord and tenant. No good Washington decision has been found establishing the apportionment formula, but the general rule elsewhere is that the tenant gets that amount which, actuarily computed at some assumed investment over the remaining term of the leasehold, will give him the larger of fair rental value or the agreed rent for the part taken. If the rent he will owe for that portion is equal to or above the fair rental figure, he will get only enough to pay the rent. But if his rent is below the fair market figure, so that he has a bonus value in the leasehold, he will net more than the rent for the part taken.

Washington has a complex network of eminent domain statutes, which vary in some respects for various condemning entities. One variation involves the procedure for apportioning any award the tenant gets. In some proceedings, for instance, condemnations by the State of Washington, by school districts or by counties, the jury awards a lump sum, and the judge apportions it.[306] But in proceedings by cities or private corporations, for instance, the jury apportions the award.[307] Since this article cannot become a treatise on eminent domain, these

304. We have found no Washington cases flat on point, but for analogous decisions see State v. Sheets, 48 Wn. 2d 65, 290 P.2d 974 (1955); American Creameries Co. v. Armour & Co., 149 Wash. 690, 271 P. 896 (1928); and Zimmerli v. Waldorf Rest. Co., 122 Wash. 383, 210 P. 801 (1922).

305. Olson Land Co. v. Alki Park Co., 63 Wash. 521, 115 P. 1083 (1911).

306. WASH. REV. CODE §§ 8.04.110 (state); 8.08.050 (counties); 8.16.080 (school districts) (1963).

307. WASH. REV. CODE §§ 8.12.150 (cities); 8.20.080 (corporations) (1963). Regarding the procedure for railroad condemnations, see North Coast Ry. v. Gentry, 58 Wash. 82, 107 P. 1060 (1910) and North Coast Ry. v. Hess, 56 Wash. 335, 105 P. 853 (1909).

are only examples of how local procedures may affect the apportionment of awards between landlord and tenant.

The parties certainly may make special provisions for condemnation in their lease. This is obvious good sense in leases for a term long enough that an unforeseen condemnation might occur during the term or, moreso, if condemnation is anticipated. A frequent formula is to empower one or the other, or either, of the parties to terminate the leasehold if condemnation of a stated portion of the premises occurs. If a party terminates under such a power, then of course the tenant, having no more leasehold and no more duty to pay rent, gets no part of the award.[308] The draftsman might also consider a two-stage procedure, under which there would be apportionment of the award on some formula if less than a certain portion of the premises were taken and a power of termination if more were taken.

V. REPAIRS AND IMPROVEMENTS

A. Common-Law Duty to Repair

Literally and strictly understood, it is accurate to say that neither landlord nor tenant has a duty to repair the demised premises in the absence of a covenantal undertaking or a legislative requirement. Certainly this is true of the landlord.[309] We shall see in the next Section that the landlord, as well as the tenant, may covenant to repair expressly or impliedly; however, no such covenant is implied solely from the existence of a local custom.[310] On the tenant's side of the equation, the foregoing general proposition is qualified in a sense by his duty not to permit waste, a subject gone into in Section III-C-1 above. At some point the tenant has a duty to make repairs necessary to prevent waste, such as patching up a badly leaking roof to keep out the elements or building a dike to deflect flood waters. His duty would arise only when the threatened damage would be so serious as to do harm to the reversion, and presumably he would need to do only enough to prevent harm until the end of his term.

308. State v. Sheets, 48 Wn. 2d 65, 290 P.2d 974 (1955); American Creameries Co. v. Armour & Co., 149 Wash. 690, 271 P. 896 (1928) (landlord could terminate upon a "sale," which court held included condemnation); Zimmerli v. Waldorf Rest. Co., 122 Wash. 383, 210 P. 801 (1922) (lease ran out before condemnation).

309. Tailored Ready Co. v. Fourth & Pike Street Corp., 178 Wash. 673, 35 P.2d 508 (1934); Larson v. Eldridge, 153 Wash. 23, 279 P. 120 (1929). *See also* Black v. Philip Miller Co., 169 Wash. 409, 14 P.2d 11 (1932); 1 A.L.P. § 3.78.

310. Larson v. Eldridge, 153 Wash. 23, 279 P. 120 (1929) (alternative ground).

B. Covenants to Repair

We will first consider landlords' covenants to repair. At the time the lease is entered into, the landlord may expressly covenant to make general or specified repairs, and consideration for his promise will be found in the tenant's covenants.[311] Usually the landlord's written or spoken undertaking is clear enough. Any phrase, such as "necessary repairs to roof, walls or foundations are the concern of the lessor," is sufficient if it shows the parties' intent.[312] Though, surprisingly, no Washington decisions have been uncovered directly deciding the point, it seems that when the parties' agreement is informal and partly implied, as it might be in a general letting, the landlord's making of repairs will imply a covenant to repair, provided his acts show an intent existing when the lease was made. When a promise to repair is made after the commencement of the term, it is unenforceable unless some fresh consideration is given for the promise.[313] Such consideration may be found where the tenant threatens to terminate the leasehold if the landlord does not make the repairs.[314]

Even if the landlord has made a covenant to repair, he may not know that the premises need repair during the term, since the tenant is in possession. Therefore, the landlord's duty to repair does not arise until he learns of the need, generally by the tenant notifying him, and until he has had a reasonable time to do the work.[315] If the defect existed at the beginning of the term and the landlord then promised to repair, no notice is necessary, and the landlord apparently has a duty to inspect, discover, and repair hidden defects that then existed.[316]

The general measure of damages for the landlord's breach of a repair covenant is the difference in rental value between the premises in good repair and in the state of disrepair.[317] As an alternative, the

311. *See* Estep v. Security Sav. & Loan Soc'y, 192 Wash. 432, 73 P.2d 740 (1937).
312. Cordes v. Guy Inv. Co., 146 Wash. 143, 262 P. 131 (1927).
313. Taylor v. Stimson, 52 Wn. 2d 278, 324 P.2d 1070 (1958); Miller v. Vance Lumber Co., 167 Wash. 348, 9 P.2d 351 (1932).
314. Taylor v. Stimson, 52 Wn. 2d 278, 324 P.2d 1070 (1958) (dictum); Lowe v. O'Brien, 77 Wash. 677, 138 P. 295 (1914).
315. Marrion v. Anderson, 36 Wn. 2d 353, 218 P.2d 320 (1950) (apparent holding); Franklin v. Fischer, 34 Wn. 2d 342, 208 P.2d 902 (1949); Stoops v. Carlisle-Pennell Lumber Co., 127 Wash. 82, 219 P. 876 (1923) (dictum).
316. Estep v. Security Sav. & Loan Soc'y, 192 Wash. 432, 73 P.2d 740 (1937).
317. Pappas v. Zerwoodis, 21 Wn. 2d 725, 153 P.2d 170 (1944); Yakima Lodge 53, Knights of Pythias v. Schneider, 173 Wash. 639, 24 P.2d 103 (1933); Gentry v. Krause, 106 Wash. 474, 180 P. 474 (1919).

Washington court has held that the tenant may make the repairs and recover, or set off against rent, their reasonable cost.[318] So, it seems the tenant in this instance may pursue either a conveyancing or a contract remedy. He may also recover consequential damages if, by reason of the landlord's breach of duty to repair, the tenant suffers lost profits or harm to his goods.[319]

The commonest form of consequential damages tenants seek is for personal injuries. In some jurisdictions the landlord's breach of his repair covenant does not give the tenant a basis for such an action.[320] But in Washington if the landlord breaches his covenant by failing to repair a defect which exposes the tenant to an unreasonable risk of harm, and the defect in fact causes injury to the tenant, the landlord is liable.[321] He may be liable also for injuries caused by his negligent making of repairs, and this whether or not he had been obligated to make them.[322] The landlord has the defense of assumption of risk if the tenant knows of the defect that causes his injury and uses the defective thing or place in the face of that knowledge.[323] In strong dictum it has been said there is this qualification upon the assumption-of-risk doctrine: If the tenant notifies the landlord of the defect and the landlord has covenanted to fix it, the tenant does not assume the risk for a reasonable time to make the repairs, but after the landlord fails to repair for an "unreasonable" time, the tenant once again assumes the risk.[324] In substance, it seems the landlord's liability is

318. Thomson Estate v. Washington Inv. Co., 84 Wash. 326, 146 P. 617 (1915); Tipton v. Roberts, 48 Wash. 391, 93 P. 906 (1908). *Tipton,* in fact, held that the tenant, in an unlawful detainer action for nonpayment of rent, could defeat the action by counting the cost of repairs as rent.

319. Pappas v. Zerwoodis, 21 Wn. 2d 725, 153 P.2d 170 (1944); Cordes v. Guy Inv. Co., 146 Wash. 143, 262 P. 131 (1927); Shamek v. Metropolitan Bldg. Co., 127 Wash. 336, 220 P. 816 (1923) (making repairs in bad way); Lowe v. O'Brien, 77 Wash. 677, 138 P. 295 (1914); Kohne v. White, 12 Wash. 199, 40 P. 794 (1895).

320. 1 A.L.P. § 3.79.

321. Teglo v. Porter, 65 Wn. 2d 772, 399 P.2d 519 (1965); Estep v. Security Sav. & Loan Soc'y, 192 Wash. 432, 73 P.2d 740 (1937); Johnson v. Dye, 131 Wash. 637, 230 P. 625 (1924); Mesher v. Osborne, 75 Wash. 439, 134 P. 1092 (1913).

322. Swanson v. White & Bollard, Inc., 185 Wash. 407, 55 P.2d 332 (1936) (dictum); McCourtie v. Bayton, 159 Wash. 418, 294 P. 238 (1930).

323. Swanson v. White & Bollard, Inc., 185 Wash. 407, 55 P.2d 332 (1936) (alternative ground); Johnson v. Dye, 131 Wash. 637, 230 P. 625 (1924) (dictum); Stoops v. Carlisle-Pennell Lumber Co., 127 Wash. 82, 219 P. 876 (1923).

324. Johnson v. Dye, 131 Wash. 637, 230 P. 625 (1924) (dictum); Stoops v. Carlisle-Pennell Lumber Co., 127 Wash. 82, 219 P. 876 (1923) (strong statement, not strictly necessary to reach result). *Stoops* bases this doctrine on some master-servant cases. *See, e.g.,* Johnson v. North Coast Stevedoring Co., 109 Wash. 236,

laid upon a combination of contract and tort theory. He must breach his repair covenant, and his breach must be negligent, in the sense that it exposes the tenant to an unreasonable risk of injury. But when the landlord undertakes to repair and does so negligently, the theory of recovery is purely in tort.

Instead of the landlord's covenanting to repair, it may be the tenant who covenants, or they may divide the obligation on some basis. Tenants' covenants are generally of two sorts, either a covenant to make repairs during the term (a "repair" clause) or a covenant to return the premises in a certain state of repair at the end of the term (a "redelivery" clause). The chief difference in basic operation is that the repair clause obligates the tenant to keep the premises in the designated state of repair at all times, while the redelivery clause is breached only if he fails to return them in the agreed condition at the end of the tenancy.[325]

Most of the repair clause cases have involved the interpretation of the clause, the usual question being whether thus-and-so language required the tenant to make such-and-such repairs. We cannot here go into minute details of language, but a few observations may be useful. It seems first that a general repair clause, such as a covenant to keep the premises in "good repair," obliges the tenant to make major and permanent repairs and repairs required by specific order of public authorities.[326] However, this statement ought to be qualified to some extent by the import of *Puget Investment Company v. Wenck*,[327] which appears to limit the tenant's duty to repair to repairs necessitated by his intended use of the premises. There is also some implication that length of term and amount of rent were factors in interpreting a covenant to keep the premises in a "first-class state of repair." One clear lesson for the draftsman is that "good" and "first-class" are inadequately specific. A covenant that "the tenant shall keep the prem-

186 P. 663 (1920); Lamoon v. Smith Cement Brick Co., 74 Wash. 164, 132 P. 880 (1913).

325. *See especially* Nelson v. Seattle, 180 Wash. 1, 38 P.2d 1034 (1934).

326. Publishers Bldg. Co. v. Miller, 25 Wn. 2d 927, 172 P.2d 489 (1946) (tenant must repair boiler); Arnold-Evans Co. v. Hardung, 132 Wash. 426, 232 P. 290 (1925) (tenant must repair boiler); Lodge Room Co. v. Pacific Bond & Inv. Co., 84 Wash. 150, 146 P. 376 (1915); McManamon v. Tobiason, 75 Wash. 46, 134 P. 524 (1913) (under covenant to make "alterations," tenant had to make alterations public authorities required). *Cf.* Puget Invest. Co. v. Wenck, 36 Wn. 2d 817, 221 P.2d 459 (1950).

327. 36 Wn. 2d 817, 221 P.2d 459 (1950).

ises in as good repair as he puts them" is a bit more specific; this clause has been held to require the tenant to maintain the premises in the state he puts them, even if that is better than they were at the beginning of the term.[328] Damages for the tenant's breach of his promise to repair are measured by the cost of the repairs.[329]

A common form of redelivery clause reads: "Tenant shall quit and deliver up the premises at the end of the term in as good condition and repair as the same now are [or may be put into] [normal wear and tear and casualty loss not the fault of the tenant excepted]." The redelivery clause is breached if, when the term ends, the premises are not in the agreed state of repair, thereby entitling the landlord to damages for the cost of repairs.[330] Many times the lease will contain both repair and redelivery clauses, which, in Washington, has seemed to produce a certain undefinable synergistic effect.[331]

One of the most difficult questions, in Washington and elsewhere, is whether an unqualified general repair clause or an unqualified general redelivery clause, or both, requires a tenant to rebuild structures that are destroyed by a casualty, most often a fire. The 1897 decision in *Armstrong v. Maybee*[332] put Washington in the camp of the traditional majority, who require the tenant to rebuild.[333] This result is based upon a literal reading of general repair or redelivery clauses, in spite of the contrary argument that a covenant to "repair" or to return in a certain state of "repair" does not mean "rebuild." In *Armstrong* the lease had both repair and redelivery clauses, but the court seemed to rely mainly on the repair clause. Years later, in *Anderson v. Ferguson,*[334] the court refused to require a tenant to rebuild where the lease contained only a redelivery clause. *Armstrong* was distinguished because the lease there contained both clauses and because its redelivery

328. Yakima Valley Motors, Inc. v. Webb Tractor & Equip. Co., 14 Wn. 2d 468, 128 P.2d 507 (1942).

329. Publishers Bldg. Co. v. Miller, 25 Wn. 2d 927, 172 P.2d 489 (1946); Yakima Valley Motors, Inc. v. Webb Tractor & Equip. Co., 14 Wn. 2d 468, 128 P.2d 507 (1942).

330. Shafer Bros. Land Co. v. Universal Pictures Corp., 188 Wash. 33, 61 P.2d 593 (1936); Nelson v. Seattle, 180 Wash. 1, 38 P.2d 1034 (1934).

331. *See especially* Anderson v. Ferguson, 17 Wn. 2d 262, 135 P.2d 302 (1943). *See also* Publishers Bldg. Co. v. Miller, 25 Wn. 2d 927, 172 P.2d 489 (1946).

332. 17 Wash. 24, 48 P. 737 (1897).

333. St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co., 46 Wn. 2d 840, 286 P.2d 107 (1955), contains dictum that a general redelivery clause obligates the tenant to rebuild. For a statement of the general American law, see 1 A.L.P. § 3.79.

334. 17 Wn. 2d 262, 135 P.2d 302 (1943).

clause was referenced to the condition of the premises at the beginning of the term, while *Anderson's* clause said "good" repair. Technically the question is still open whether a general repair clause alone will make the tenant liable to rebuild, but it likely would not. However that may be, the lesson for the tenant's legal advisor is obvious: do not let him sign a lease with a general, unqualified repair or redelivery clause. He should specifically except liability for casualty losses not his fault.

Independent of repair or redelivery clauses, the tenant may be liable upon a tort theory if he negligently damages the premises. Presumably the lease might relieve him of such liability, but Washington has refused to interpret a redelivery clause as so relieving him.[335]

As a parting note in this Section, and just to make the record complete, let it be added that, as far as residential leasings go, the 1973 Residential Landlord-Tenant Act has radically altered what has been said in this Section. The Act fixes certain duties of repair and maintenance and, for all practical purposes, forbids the parties to alter the statutory duties.

C. Maintenance and Repairs Required by Legislative Acts

The Residential Landlord-Tenant Act of 1973 has its greatest impact in creating duties of maintenance and repair. For the most part, the landlord is given these duties. An elaborate and complicated network of remedies is provided, some by self-help, some by court action or, if the parties agree, by arbitration. The Act has 45 sections,[336] complex and interlocking and in a number of instances referring to or modifying such other statutes as unlawful detainer,[337] statutes of frauds,[338] and the arbitration statute.[339] All that can be done in this Section of the article is to summarize the new Act's provisions on repairs and maintenance. Section numbers of the Act will be given in the text, for convenience and as a warning to the reader to study the

335. Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 252 P. 939 (1927).
336. When it left the Legislature, it had 47 sections, but the governor vetoed two entire sections. He also made 12 other line vetoes. All his vetoes were favorable to tenants.
337. WASH. REV. CODE ch. 59.12 (1963).
338. *Id.* §§ 59.04.010 & .020 (1963).
339. *Id.* ch. 7.04.

Act itself for possibly important details. First, observations will be made on the landlord's duties, then on the tenant's, and finally on matters of interest between the parties.

Section 6[340] is the principal section controlling the landlord's duties. He is required to: (1) Provide and maintain premises "fit for human habitation"; (2) comply with ordinances or other statutes governing maintenance or operation; (3) maintain roofs, floors, walls, chimneys, fireplaces, foundations, and "all other structural components" in "reasonably good repair"; (4) keep common areas reasonably clean, sanitary, and safe; (5) control insects, rodents, and "other pests"; (6) provide reasonably adequate locks and keys; (7) maintain the dwelling in reasonably weathertight condition; (8) provide adequate facilities to supply heat, water, and hot water if the building is equipped for these services; (9) maintain whatever electrical, plumbing, heating, and other facilities and appliances he may provide; (10) provide trash and garbage receptacles in common areas and have refuse removed, except in single-family dwellings; and (11) notify the tenant who is the landlord or agent to receive notices and process. The landlord is not liable for any defective condition that is caused by the tenant. Nor is the landlord, or the tenant either, for that matter, responsible for repairing items of "normal wear and tear."[341]

If the landlord breaches any of the duties set out above, the tenant has eight possible forms of remedy or nine, depending upon how one counts. First, the Act mentions in Section 7[342] that, in addition to the remedies created by the Act, there are "remedies otherwise provided by law." Whatever these other remedies are, it appears that, to pursue them, the tenant need not be current in his rent[343] or give the statutory notice that will be described in a moment. However, Section 9(2),[344] which presupposes the tenant has given the notice, also says he may sue for remedies "otherwise provided by law." The references are cryptic, but it seems the other remedies would include those given by local ordinances, by other statutes (if any), and by common law.

Common-law remedies would include those for negligent or intentional personal injuries along the lines previously discussed in this ar-

340. *Id.* § 59.18.060.
341. *Id.* §§ 59.18.060(5) & 59.18.130(6).
342. *Id.* § 59.18.070.
343. *See Id.* § 59.18.080.
344. *Id.* § 59.18.090(2).

ticle. What other common-law remedies might be available? For the landlord's breach of a repair covenant in a lease, we have seen the tenant may recover either diminution in rental value or cost of repairs; possibly he could similarly recover for the landlord's failure to make the statutory repairs. Against this view, though, is the fact that the Act itself gives remedies in the nature of diminution in rent and cost of repairs.[345] So, it seems doubtful that the tenant should have common-law recovery for either of these items.

One mystery in connection with common-law recoveries for injuries arises out of Section 9(2),[346] just mentioned. This Section allows the tenant to pursue remedies "otherwise provided by law" after the tenant has notified the landlord of a defect, pursuant to Section 7,[347] and the landlord has failed to repair within specified time limits. This notice provision hardly could be meant to apply to the injury action where the damage had been inflicted before the notice. In fact, the statutory notice would not seem to be a condition precedent to the bringing of any action "otherwise provided by law." Apparently the intention is that the tenant might bring a tort action prior to giving the notice, but that he would have to give the notice and go through the statutory procedures before suing for diminution of rent or cost of repairs as provided in the Act. This conclusion reinforces that reached in the preceding paragraph.

Before exercising any of the repairs remedies given by the Act, the tenant must, under Section 7,[348] give the landlord or his agent notice of the defective condition. Then the landlord has a period of time, 24 hours, 48 hours, seven days, or 30 days, depending on the nature of the defective condition, to make the repairs himself. If he fails to do so, the tenant has then set the stage to pursue his statutory remedies. There is, however, one further condition: Section 8[349] requires the tenant to be current in his rent before he has these remedies.

The simplest remedy the tenant has, though perhaps not his preference, is to terminate the tenancy. As soon as the landlord has failed to repair within the requisite time period, Section 9(1)[350] allows the

345. *Id.* §§ 59.18.100 & .110.
346. *Id.* § 59.18.090(2).
347. *Id.* § 59.18.070.
348. *Id.*
349. *Id.* § 59.18.080.
350. *Id.* § 59.18.090(1).

tenant to terminate by giving the landlord written notice. In that event, the tenant is allowed a pro rata refund of any prepaid rent.

If the tenant does not want to terminate, Sections 10(1) and (2)[351] allow him to obtain and present to his landlord two bids for doing the repairs. If the landlord does not commence the repairs within a "reasonable" time, the tenant may have the work done by the lower bidder and deduct the cost from the rent. However, the total deductions in any 12-month period may not exceed the amount of one month's rent. This limitation will restrain use of the remedy, but that may be necessary to protect the landlord from unlimited acts of self-help.

Another remedy, even quicker than the preceding one but more limited, is allowed in Section 10(3).[352] Under this Section the tenant may make the repairs himself, provided the cost of labor and materials, computing his labor at prevailing rates, does not exceed one-half a month's rent in any 12-month period. It is not wholly clear what remedy the landlord has if the tenant uses self-help in a way that violates the Act, but it apparently could be an act of unlawful detainer. Section 13[353] requires, *inter alia,* that tenants comply with all obligations imposed upon tenants by "state codes" and "statutes." Section 18[354] then says that the tenant's "substantial" noncompliance with Section 13[355] is a ground for unlawful detainer. However, other language in Sections 17 and 18[356] could be used to argue that the particular violation in question, *i.e.,* the tenant's misuse of Section 10,[357] was not intended as an act of unlawful detainer.

Should the tenant not find the self-help remedies utile, he may, again after the requisite notice and provided he is current in his rent, pursue remedies in court or, if the lease provides for it, by arbitration as provided in Section 11[358] of the Act. The court or arbiter may determine the diminution in rental value caused by the landlord's breach of Section 6[359] and award the tenant damages for his loss to date. Then the tenant is allowed to deduct the diminution from his rent

351. *Id.* §§ 59.18.100(1) & (2).
352. *Id.* § 59.18.100(3).
353. *Id.* § 59.18.130.
354. *Id.* § 59.18.180.
355. *Id.* § 59.18.130.
356. *Id.* §§ 59.18.170 & .180.
357. *Id.* § 59.18.100.
358. *Id.* § 59.18.110.
359. *Id.* § 59.18.060.

until the disrepair is corrected. At that point the landlord presumably would want to terminate the tenancy as soon as possible. Section 24[360] of the Act, however, makes it illegal to evict the tenant or raise his rent on account of the tenant's enforcement of rights under the Act. Section 25[361] provides that there is a presumption of retaliation if the landlord takes such action within ninety days after the tenant's attempt to enforce his rights or after action of a court. So, in any event, the landlord would have to wait ninety days to evict, and, because the Act creates no presumption against retaliation after 90 days, he might have to wait—who knows how long?

The court or arbiter may also, in the same action, authorize the tenant to make the necessary repairs, without limit as to amount. The Act contained a limit when it passed the Legislature, but the Governor line-vetoed it. However, the Act still requires that the court allow the landlord further time to make the repairs before the tenant is allowed to do them.

As a final remedy to the tenant, the Act apparently operates to allow a limited form of rent withholding, though it is not a true rent-withholding statute. Sections 38 through 43[362] amend the Unlawful Detainer Statute, R.C.W. Chapter 59.12, as far as residential tenancies go. Sections 38 and 41[363] allow the tenant to assert legal and equitable defenses "or a set-off" as defenses to both the writ of restitution (a hearing is required on it) and the final judgment in an unlawful detainer action. Section 8[364] says expressly that the tenant does not have to be current in his rent to "raise the defense that there is no rent due and owing" in an unlawful detainer action. If the landlord were in breach of his repair or maintenance duties under Section 6,[365] the tenant would have a setoff, at least after the tenant had given the notice required in Section 7[366] and the landlord had not corrected the defect within the required period. If the landlord brought the unlawful detainer action for nonpayment of rent, and provided the setoff was equal to or more than the arrears, then it seems the tenant could de-

360. *Id.* § 59.18.240.
361. *Id.* § 59.18.250.
362. *Id.* §§ 59.18.370–.410; Section 43 of the Act was vetoed by the Governor.
363. *Id.* §§ 59.18.380 & .410.
364. *Id.* § 59.18.080.
365. *Id.* § 59.18.060.
366. *Id.* § 59.18.070.

feat the action. The effective result is that the tenant could, in that case, have withheld rent up to the amount of the setoff. This result, in fact, is the same as the court reached in *Foisy v. Wyman*,[367] though the court there allowed the setoff because of the landlord's breach of an implied covenant of habitability.

A moment's reflection will show that the so-called "limited rent withholding" is indeed quite limited. In the first place, it exists only in contemplation of a defense in an unlawful detainer action. Moreover, it seems it would be a defense only when the ground of unlawful detainer was nonpayment of rent. Landlords should be able to finesse the whole thing by using the 20-day notice for unlawful detainer, since a setoff would not be a defense to that ground of unlawful detainer. Further, the defense exists only if the setoff equals or exceeds the rent claimed.

So much for the landlord's repair duties. The Act also affects the tenant's side of the obligation, more in the area of landlord's remedies than in the area of tenant's duties. Sections 13 and 14[368] are the main ones that describe his duties. He is required by Section 13[369] to: (1) Pay his rent; (2) obey all obligations imposed upon tenants by public statutes, ordinances, and regulations; (3) keep his unit clean and sanitary; (4) properly remove trash and garbage from his unit; (5) properly use and operate fixtures and appliances; (6) not intentionally or negligently, by himself or by his family, invitee, or licensee, damage the premises or facilities; (7) not permit a nuisance or waste; and (8) restore the premises to their initial condition at termination, except for normal wear and tear and repairs the landlord should have made. Hardly any duties are created here that did not exist at common law. Possibly items 3, 4, and 5[370] clarify what might have been ambiguous before. Item 8[371] is, in form, a kind of redelivery clause that may, at least theoretically, create some new duties. For instance, it is possible that the premises could become damaged in some way beyond normal wear and tear, yet not by the tenant's fault and not within the landlord's duty to repair; but the range of possibilities must be very small.

367. 83 Wn. 2d 22, 515 P.2d 160 (1973).
368. WASH. REV. CODE §§ 59.18.130 & .140.
369. *Id.* § 59.18.130.
370. *Id.* §§ 59.18.030, .040 & .050.
371. *Id.* § 59.18.080.

Section 14[372] obliges the tenant to obey such "reasonable" landlord's rules for use and maintenance as are not contrary to the Act and as the landlord makes known to him. The landlord may change the rules upon 30-days written notice to each tenant.

If the tenant breaches any of his duties under Sections 13 or 14[373] the landlord may first, according to Section 17,[374] pursue "remedies otherwise provided by law." Presumably the landlord may still pursue an action for waste, for negligent damage to the premises, for rent, and for failure to leave the premises in the condition required by item 8[375] in the preceding paragraph. Unlawful detainer is still a remedy, but it has been incorporated into the Act and will be discussed a bit later.

To pursue his special remedies under the Act, the landlord is first required by Section 17[376] to notify the tenant in writing of his breach of a duty he has under Section 13 or 14.[377] If the tenant fails to redress within "a reasonable time," then Section 16[378] allows the landlord to "bring an action in an appropriate court, or at arbitration if so agreed for any remedy provided under this chapter or otherwise provided by law." The only court action the chapter provides for the tenant's failure to maintain or repair seems to be unlawful detainer. Actions that are "otherwise provided by law" are apparently those mentioned in the preceding paragraph.

Section 18[379] allows the landlord to use an unlawful detainer action for any "substantial" noncompliance with Sections 13 or 14.[380] The landlord must, of course, have given the written notice required by Sections 16 and 17.[381] The tenant may defeat the unlawful detainer action if he shows he is in "substantial" compliance or if he corrects the noncomplying condition within 30 days after the landlord gives him notice. However, if he does not comply until after the action is commenced, the landlord "may" receive costs and attorney's fees. All

372. *Id.* § 59.18.140.
373. *Id.* § 59.18.130 or .140.
374. *Id.* § 59.18.170.
375. *Id.* § 59.18.080.
376. *Id.* § 59.18.170.
377. *Id.* § 59.18.130 or .140.
378. *Id.* § 59.18.160.
379. *Id.* § 59.18.180.
380. *Id.* § 59.18.130 or .140.
381. *Id.* §§ 59.18.160 & .170.

in all, it seems that the Act gives the landlord a fairly restricted kind of unlawful detainer action for the tenant's failure to keep up the premises.

The landlord may pursue one other remedy under the Act if the tenant's violation of Section 13 or 14,[382] in effect, creates a substantial health, safety, fire, or accident hazard on the premises. In such case if the tenant fails to correct the condition within 30 days, or sooner in an emergency, the landlord may have it corrected and add the reasonable cost to the rent. Details are spelled out in Section 18.[383]

Before we leave this discussion of repairs and maintenance under the 1973 Act, let us touch upon two matters of general application. The first concerns arbitration. Sections 32—35[384] make elaborate provisions for arbitration in lieu of court action for most controversies arising under the Act. Both parties must agree to it in writing. It seems unlikely that arbitration will be used to any extent. A landlord would not likely be willing to agree to it as a blanket matter, say, in a written lease, on the theory that he would rather not provide a cheap, easy forum for the tenant to air his complaints. This is particularly so from the landlord's viewpoint since the tenant has most of the litigable remedies under the Act. Perhaps parties will occasionally agree to arbitration, as they may, after a dispute has arisen, but that is probably not the psychological moment when parties are disposed to be agreeable.

The other general comment concerns the theoretical possibility that residential landlord and tenant may alter their maintenance and repair duties by a specially drafted lease. Section 23[385] forbids the parties to vary some of the remedial provisions of the Act, such as Sections 7, 8, 9, 16, 17, and 18.[386] Section 36,[387] however, in theory permits variation by written lease from the important duties in Sections 6 and 13[388] and from those in some remedial sections. But in order to vary, the parties have to go through a procedure that is practically unusable. Among other things, the lease has to be individually drafted, not a form lease, and it has to be approved by the local county prosecutor's

382. *Id.* § 59.18.130 or .140.
383. *Id.* § 59.18.180.
384. *Id.* §§ 59.18.320–.350.
385. *Id.* § 59.18.230.
386. *Id.* §§ 59.18.070, .080, .090, .160, .170 & .180, respectively.
387. *Id.* § 59.18.360.
388. *Id.* §§ 59.181.060 & .130.

office or the Consumer Protection Division of the Attorney General's office. No landlord is going to wait six months for the county prosecutor to approve each lease, and he certainly is not going to submit it to the Consumer Protection Division.

One final remark on the subject of public regulation of maintenance and repairs: Do not forget the local housing ordinance. Larger cities may have ordinances, such as Chapter 27.12 of the Seattle City Code, that regulate habitability and repairs, generally expanding the landlord's duties. These ordinances are now incorporated by reference into the 1973 Act and are binding in their own right without the Act. There is reason to fear that lawyers frequently overlook them.[389]

D. Annexation of Buildings and Improvements

1. Payment for annexations

In the absence of his promise to do so, the landlord is not obligated to pay the tenant for buildings or improvements he adds to the premises.[390] There seems to be an exception, according to one decision,[391] under which a tenant on state-owned tidelands, and arguably other state lands, may recover the value of his improvements at the end of his term. Of course, if the lease requires, or gives an option to, the landlord to pay for improvements, he must or may do so, as the case may be.[392] By the same token, when the landlord covenants to build a structure for the tenant, he must build it as agreed, for failure of which the tenant may recover damages.[393]

389. Will you pardon a personal note? Several years ago the writer was talking on the telephone with an experienced Seattle lawyer who, so he said, represented a number of apartment house owners. The writer mentioned the Seattle Housing Ordinance, Chapter 27.12 of the Seattle City Code, whereupon the lawyer asked, "Will you give me that citation again"?

390. Najewitz v. Seattle, 21 Wn. 2d 656, 152 P.2d 722 (1944); Sowle v. Johnson, 109 Wash. 218, 186 P. 255 (1919). This seems implicit also in the principle, to be discussed presently, that the landlord's reversion is not subject to labor and materials liens for work ordered by the tenant without the landlord's authorization.

391. Boyer v. State, 19 Wn. 2d 134, 142 P.2d 250 (1943).

392. McFerran v. Heroux, 44 Wn. 2d 631, 269 P.2d 815 (1954) (option); Enquist v. P. J. McGowan & Sons, 121 Wash. 695, 209 P. 1091 (1922) (option). *See also* Toellner v. McGinnis, 55 Wash. 430, 104 P. 641 (1909).

393. Progress Amusement Co. v. Baker, 106 Wash. 64, 179 P. 81 (1919); McNall v. Sandygren, 100 Wash. 133, 170 P. 561 (1918) (statement may not be necessary to decision); Ingalls v. Beall, 68 Wash. 247, 122 P. 1063 (1912).

Most of the Washington cases on payment for annexations have involved lien claims. Strictly, such cases are beyond our present subject, since they are suits by third persons; however, some salient points will be reviewed. The basic proposition is that statutory liens for improving real property do not attach to the landlord's reversion if he did not order the work or somehow make the tenant his agent for that purpose.[394] In case the tenant, not being the agent, has lienable work done, under the authority of R.C.W. § 60.04.170, the lien claimant may remove and sell a building he built if it is practicable to do so.[395] Naturally, if the landlord orders the work or specifically authorizes the tenant to order it, the lien attaches to the reversion.[396] In addition, the tenant may cause liens to attach to the reversion if the lease obligates him to do the work and if the work benefits the reversion.[397] However, no such authority exists if the lease merely permits the work,[398] nor apparently even if the lease requires work that will not benefit the reversion.[399]

2. *Ownership and removal of things annexed*

In the absence of a lease agreement to the contrary, and if they are not "trade fixtures," permanent improvements the tenant adds to the premises become annexed by the doctrine of accession and must be left at the end of the term.[400] Of course, the parties may control the right of removal by their lease. If it requires the tenant to leave the

394. WASH. REV. CODE §§ 60.04.040 (Supp. 1972); 60.12.010 (1963). Prinz v. Second Street Theatre Co., 98 Wash. 149, 167 P.39 (1917). *See also* Globe Elec. Co. v. Union Leasehold Co., 166 Wash. 45, 6 P.2d 394 (1931).

395. WASH. REV. CODE § 60.04.170 (1963); Columbia Lumber Co. v. Bothell Dairy Farm, 174 Wash. 662, 25 P.2d 1037 (1933), *overruling* Colby & Dickinson, Inc. v. Baker, 145 Wash. 584, 261 P. 101 (1927).

396. Housekeeper v. Livingstone, 48 Wash. 209, 93 P. 217 (1908). *See also* Thompson v. O'Leary, 176 Wash. 606, 30 P.2d 661 (1934).

397. Bunn v. Bates, 31 Wn. 2d 315, 196 P.2d 741 (1948); Bengel v. Bates, 29 Wn. 2d 779, 189 P.2d 480 (1948) (dictum); Pioneer Sand & Gravel Co. v. Northern Pac. Ry., 170 Wash. 618, 17 P.2d 9 (1932).

398. Stouffer-Bowman, Inc. v. Webber, 18 Wn. 2d 416, 139 P.2d 717 (1943); Seattle Ass'n of Credit Men v. Daniels, 15 Wn. 2d 393, 130 P.2d 892 (1942) (alternative holding); Miles v. Bunn, 173 Wash. 303, 22 P.2d 985 (1933).

399. Bengel v. Bates, 29 Wn. 2d 779, 189 P.2d 480 (1948). The lease said "shall," but the court characterized this as "permissive."

400. Pier 67, Inc. v. King County, 71 Wn. 2d 92, 426 P.2d 610 (1967) (hotel); Murray v. Odman, 1 Wn. 2d 481, 96 P.2d 489 (1939) (dictum).

improvements, he must do so.[401] When the lease allows him to do so, the tenant may remove his improvements at the end of the term,[402] even if he is behind in his rent[403] or even if the landlord terminates the leasehold by unlawful detainer proceedings.[404] There has been some question about what happens if the tenant does not remove at the end of the term those improvements the lease entitles him to remove. The Washington decisions hold that he may not remove them if he continues on in possession under a new lease that does not give him the privilege of removal.[405] But he may still remove them if he holds over for a time while unsuccessfully negotiating for a new lease[406] or if he renews under an extension of the original lease.[407]

The tenant may, with or without the landlord's consent, remove improvements he has added if they are "trade fixtures." This phrase is something of a misnomer, for if they are removable, they are not "fixtures" in the technical sense. Nevertheless, Washington has allowed tenants to remove some quite substantial improvements and additions. This rule can best be expressed by giving examples: A furnace from an auto repair shop;[408] "garage tools and equipment";[409] bolted-down seats, electric signs and light fixtures, nailed-down carpets, drapes, a picture screen, bolted-down movie projectors, a switchboard, and a built-in pipe organ from a theater;[410] and a shingle mill and outbuildings.[411] Pretty clearly, these cases exemplify a liberal view of what a tenant may remove, much more liberal than when improvements are added by one who is the owner. This distinction flows from the principle, well established in Washington, that the presumed intent of the annexor is the ultimate test of what is removable.[412] A tenant, particu-

401. Forman v. Columbia Theater Co., 20 Wn. 2d 685, 148 P.2d 951 (1944); Robertson v. Waterman, 123 Wash. 508, 212 P. 1074 (1923) (by implication).
402. Coliseum Inv. Co. v. King County, 72 Wash. 687, 131 P. 245 (1913); Morin v. Bremer, 61 Wash. 62, 111 P. 1058 (1910).
403. Oregon-Wash. R.R. & Nav. Co. v. Eastern Ore. Banking Co., 81 Wash. 617, 143 P. 154 (1914).
404. Chung v. Louie Fong Co., 130 Wash. 154, 226 P. 726 (1924).
405. Bernard v. Crosby, 121 Wash. 257, 209 P. 524 (1922) (alternative holding); Spencer v. Commercial Co., 30 Wash. 520, 71 P. 53 (1902).
406. Merriam v. Ridpath, 16 Wash. 104, 47 P. 416 (1896).
407. Lynn v. Waldron, 38 Wash. 82, 80 P. 292 (1905).
408. Whitney v. Hahn, 18 Wn. 2d 198, 138 P.2d 669 (1943).
409. Hill's Garage v. Rice, 134 Wash. 101, 234 P. 1023 (1925).
410. Ballard v. Alaska Theatre Co., 93 Wash. 655, 161 P. 478 (1916).
411. Welsh v. McDonald, 64 Wash. 108, 116 P. 589 (1911).
412. *See especially* Whitney v. Hahn, 18 Wn. 2d 198, 138 P.2d 669 (1943) and Ballard v. Alaska Theatre Co., 93 Wash. 655, 161 P. 478 (1916).

larly where his term is short, presumably has much less intent to make permanent annexations than does an owner.

There is a limit to what the tenant may remove, as shown by *DeLano v. Tennent*.[413] It was held wrongful for the tenant of a foundry to remove a core oven, electrical crane, jib crane, hoist, and clay floor, the court saying removal would practically demolish the premises. So, it seems the tenant's privilege to remove his improvements ends at the point where removal would cause serious and irreparable harm to the landlord's reversion.

One interesting question that seems undecided in Washington is whether a residential tenant may remove domestic improvements on the same basis as a business tenant could remove trade fixtures. If the theory is intent of the annexor and nothing more, it seems he could. However, courts sometimes say, and one of the Washington cases suggests,[414] that underlying the intent test is a policy to aid business and commerce. If that policy is emphasized, then the residential tenant may not fare as well as his businessman brother.

At what point in time must the tenant remove his trade fixtures? The general principle is that he must do so by the end of his term.[415] Dictum in one case suggests he might be allowed a "reasonable" further time upon request.[416] By his lease agreement the tenant may, of course, give up his right to remove trade fixtures, and the word "improvements" has been held to include such fixtures.[417]

(Editor's Note: Scheduled to be concluded in Vol. 49, Book 4, of the *Review*.)

413. 138 Wash. 39, 244 P. 273 (1926) (alternate ground).
414. Whitney v. Hahn, 18 Wn. 2d 198, 138 P.2d 669 (1943).
415. Donahue v. Hardman Estate, 91 Wash. 125, 157 P. 478 (1916). *See also* Gay v. Havermale, 30 Wash. 622, 71 P. 53 (1903).
416. M.H.B. Co. v. Desmond, 151 Wash. 344, 275 P. 733 (1929) (dictum).
417. Olympia Lodge 1, F. & A.M. v. Keller, 142 Wash. 93, 252 P. 121 (1927).