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By Stephen E. Kalish*

The Nebraska Residential Landlord and Tenant Act

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I. INTRODUCTION

In recent years there has been a remarkable development in landlord-tenant law, particularly in the residential area. Courts and legislatures which had ignored the problems in this field for years began to take an active interest.¹ Illustrative of this development is the fact that the Nebraska Supreme Court has recently

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1. See *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689 (1973).

reversed two hoary landlord-tenant rules. The first was that the landlord did not have to mitigate damages if the tenant abandoned the leasehold during the term; now he must.² The second rule was that a landlord could peaceably enter and take possession of the tenant's property if the lease so provided and if the tenant was in arrears in his rent payments; now he cannot.³

In 1974, the Nebraska Legislature passed the Nebraska Residential Landlord and Tenant Act ("NRLTA").⁴ It was modeled after the Uniform Law Commissioner's Uniform Residential Landlord and Tenant Act ("URLTA"),⁵ and is an attempt at coherent reform.

The purpose of this article will be to examine the NRLTA's effect on prior Nebraska law, and to suggest possible interpretations of ambiguous sections. The Nebraska and common law backgrounds are given where they seem appropriate. Section IA examines certain interpretive problems and Section IB examines NRLTA coverage; Section II focuses on landlord-tenant agreements; Section III studies landlord obligations and tenant remedies; Section IV discusses tenant obligations and landlord remedies; Section V analyzes problems related to jurisdiction and the summary repossession provisions; and Section VI presents a brief conclusion.

In all the areas discussed, the article will examine instances in which the NRLTA differs from the URLTA and will show that in many instances the Nebraska modifications destroy the sense and coherency of the URLTA. What was a well-developed model scheme has been changed to create an interpreter's nightmare. In a few other instances, it will be shown that the Nebraska changes improve the URLTA, and these modifications will also be discussed. Generally, if there is a lesson to be learned, it is that a state legislature should tamper with well-developed model legislation only with caution.⁶

2. *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969).

3. *Bass v. Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974).

4. NEB. REV. STAT. §§ 76-1401 to 49 (Cum. Supp. 1974).

5. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT. [hereinafter cited as URLTA.]

6. Admittedly, this is a limited conclusion. It would also be possible to suggest a more political conclusion. The outline of such an argument would be that prior Nebraska law greatly favored the landlord; that the URLTA would have provided the tenant with a more balanced law; and that the NRLTA provides the tenant with more than he had before but not with as much as he would have had under the URLTA. The lesson to be learned could be that the Nebraska Legislature was too greatly influenced by the landlords' lobby. The author does not explicitly draw this conclusion. The balance of power favors the tenant more now than it did before. It could thus be equally well argued

A. Interpretation

Before beginning the detailed examination of the NRLTA, several more general interpretive problems should be exposed. The NRLTA explicitly provides that it should be liberally construed: (a) to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant; (b) to encourage landlord and tenant to maintain and improve the quality of housing; and (c) to make uniform the law among those states which enact it.⁷

These statutory commands should be given substantial weight; however, applying these principles in context may be difficult. For example, the last purpose—to enhance uniformity—may suggest controversial interpretations and in particular instances, it will not be followed. In many cases, problems in applying it will arise in situations in which the Nebraska Legislature explicitly amended the close facsimile of the URLTA which was introduced to the 1974 Legislature. At the least, this shows that there may have been some purpose in changing the URLTA. It may indicate an “intent” to reject the URLTA in the specific instance. If this “intent” were clearly reflected in the statutory language, it will be adopted. But if the statutory language were ambiguous, the interpreter will have to guess at legislative “intent.” The legislative history will be informative, but the statutory mandate to construe the statute in a way to make the law uniform with other states’ laws will usually be more persuasive. The manifest intent of the NRLTA, as witnessed by the title of the Act,⁸ is to introduce a wave of the future in which all jurisdictions will have adopted their own URLTA. The URLTA will, therefore, be taken as the standard of uniformity.

Another controversial problem of interpretation will arise when there is a gap in the NRLTA’s coverage of a situation. It is arguable that existing Nebraska law should apply and that what the statute does not change, it leaves. This principle will, of course, be given some weight, particularly in instances in which there is reported legislative intent to adopt the existing Nebraska rule. But the NRLTA explicitly provides that “[t]his act [is] a general act

that the Nebraska Legislature was too greatly influenced by the tenants’ lobby.

The author’s approach is to avoid a political interpretation of this compromise. Instead, the focus will be on the form of the compromise which was made.

7. NEB. REV. STAT. § 76-1402 (Cum. Supp. 1974).

8. NEB. REV. STAT. § 76-1401 (Cum. Supp. 1974). The NRLTA is to be cited as the Uniform Residential Landlord and Tenant Act. In this article, however, the Nebraska legislation will be referred to as the NRLTA to distinguish it from the unchanged Uniform Act.

intended as a unified coverage of its subject matter."⁹ This implies that the gaps should be filled with an eye to the statutory policies of the NRLTA. This implication should be followed. In some cases interpretations will be submitted which change existing Nebraska law, not because the NRLTA explicitly so dictates, but because the changes are appropriate policy extensions of the NRLTA.

A final, additional and controversial interpretive principle must be exposed. The NRLTA divides duties and obligations from remedies. Will a remedy be inferred if it is not explicitly delineated? Will it be inferred if the Nebraska Legislature deleted it from the proposed URLTA facsimile? A specific statutory command implies that the remedy should be inferred.¹⁰ This principle will usually be adopted, with the only exception being those circumstances in which the legislative "intent" is clear with respect to the reason why there is no remedy. All remedies shall, of course, be interpreted so as to give appropriate damages, and all aggrieved parties will have a duty to mitigate.¹¹

In conclusion, the following interpretive principles will be presumed to be applicable. First, the law will be construed to make it consistent with the URLTA. Second, the NRLTA will be interpreted to speak implicitly to "gap" situations not explicitly covered. Third, appropriate remedies will be inferred to enforce duties and obligations. At appropriate points in this article, other interpretive problems will be highlighted.

B. Coverage

Sections 76-1407 and 76-1408 define the coverage of the NRLTA.¹² Section 76-1407 affirmatively provides that the NRLTA applies to lease arrangements for dwelling units within Nebraska. In other words, the NRLTA applies to Nebraska residential tenancies. Section 76-1408 negatively provides that certain of these residential arrangements will not be covered. These include incidental institutional or fraternal residential arrangements; purchase

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9. NEB. REV. STAT. § 76-1404 (Cum. Supp. 1974). The official comment to section 1.104 of the URLTA indicates that the provisions of the Act should be particularly resistant to implied repeal. This is because it is "carefully integrated and intended as a uniform codification" of an "entire 'field' of law."
 10. NEB. REV. STAT. § 76-1405(2) (Cum. Supp. 1974). This section provides that "any right or obligation . . . is enforceable by action unless the provision declaring it specifies a different and limited effect."
 11. NEB. REV. STAT. § 76-1405(1) (Cum. Supp. 1974).
 12. Hereinafter, all references to sections of the NRLTA will be made by using section numbers only. Section 76-1410 defines many terms used in the NRLTA. Rather than discussing these terms separately, they will be explained when relevant.

arrangements; transient and managerial relationships; condominium or cooperative residences; and occupancies related to premises rented primarily for agricultural purposes. The NRLTA also excludes residential arrangements if the term is in excess of five years.¹³ The NRLTA became operative on July 1, 1975. However, all rental agreements entered into, extended or renewed after July 12, 1974 are covered.¹⁴

Definitional coverage-type sections, such as this one, raise many issues. What institutions are similar to those which provide medical, geriatric, educational counseling or religious services?¹⁵ What does it mean to be a "transient?"¹⁶ What amount of agriculture implies that premises were rented "primarily" for agricultural purposes?¹⁷ Despite these many issues, the broad contours are clear.

The NRLTA covers short-term (i.e., less than five years) residential arrangements; it does not apply to commercial, agricultural or long-term residential relationships. The important question is: Does this division make sense. It certainly does. It recognizes that the agricultural, commercial and residential situations are functionally different. Persons enter the various relationships with different goals; they bring vastly different resources to the arrangements.

The NRLTA was the response to a landlord-tenant law that has been largely a product of a medieval and agrarian past. Its rules were developed in response to the unique problems of that period. As society became increasingly more commercial and urban, tensions developed between the rule of law and the needs of society.

13. Section 1.202 of the URLTA did not include this exclusion. There is no reported legislative history with respect to it. Apparently, it was believed that such long-term leases were different in kind or that long-term tenants were not in need of NRLTA protection. The NRLTA would have been more coherent if long-term residential tenancies were not excluded.

14. Section 76-1448 provides that the NRLTA applies to all rental agreements entered into, extended or renewed after July 1, 1975. Section 76-1449 provides that it will not apply to transactions entered into, renewed or extended before July 12, 1974. The inference, therefore, is that the NRLTA does apply to transactions entered into, renewed or extended after July 12, 1974, although not until the operative date of the statute. This interpretation is bolstered by the fact that L.B. 7, 84th Leg., 1st Sess. (1975), would have amended section 76-1449 to provide that the NRLTA would not apply to transactions entered into, extended or renewed between July 12, 1974 and July 1, 1975. This bill was not adopted.

15. NEB. REV. STAT. § 76-1408(1) (Cum. Supp. 1974).

16. NEB. REV. STAT. § 76-1408(4) (Cum. Supp. 1974).

17. NEB. REV. STAT. § 76-1408(7) (Cum. Supp. 1974).

In an urban and commercial setting, the old agrarian rules made little sense.¹⁸

Regardless of how dated the law might be, certain landlords and tenants can agree, in their lease, to write their own private law. Usually, this occurs in commercial situations in which both the landlord and the tenant have the economic muscle and the practical know-how to shape the law to their needs. The urban residential tenant is left, however, in need of urgent help. Unlike the agrarian tenant, the law is totally out of step with his needs. Unlike the businessman, for whom the law is archaic, but who has the means to shape it to his needs, the residential tenant does not have the necessary power to bargain the law away. The URLTA rightfully fills the gap. It leaves the agrarian tenant with his common law and the businessman with his bargained law. It fashions a new law where it is most crucially needed, in the area of urban residential tenancies.

There may still be a need for reform in other landlord-tenant areas: the commercial tenant may not find an agrarian set of rules very useful and he may not, in fact, be able to fashion a law to suit his needs; even an agrarian tenant may not find a medieval set of rules useful today. But reform must begin somewhere. The day in which one set of rules could cover such functionally different areas has passed; experiment and reform are needed everywhere. Nevertheless, the simple fact is that it makes sense to reform first that area which most needs modernizing.

18. The most infamous hangover from the common law was the rule that if demised premises were destroyed during the term, the tenant remained liable for the rent. The rationale for this was that the tenant could be relieved of a rent obligation only if the subject matter of the lease were destroyed, and land was considered to be the subject matter. Whatever sense this made in a more agrarian age, it was singularly inappropriate in a residential or commercial setting. The tenant did not lease for the land; he truly leased the building. Nebraska rejected the "fire rule" as early as 1897, *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N.W. 785 (1897), and permitted the tenant to terminate the lease if casualty or natural disaster substantially destroyed the premises.

Section 76-1429 clarifies and extends this position. The tenant may vacate the premises and notify the landlord in writing within fourteen days after the premises are damaged or destroyed by fire or casualty such that the enjoyment of the premises is substantially impaired, in which case termination is deemed to have occurred on the day of vacating. No definition of substantially impaired is given. The URLTA draftsmen hint that it may mean that the premises are untenable or unfit for occupancy. URLTA § 4.106, Comment. In the alternative, the tenant can stay, if this is physically possible, paying only a proportionate part of the rent. In such a case, the landlord, who finds it impracticable to repair, must apparently continue to rent the premises—at the reduced rent—to the tenant.

II. AGREEMENTS

In Nebraska, as at common law, any agreements (usually contained in a lease) between the landlord and the tenant were the heart of their relationship. What the parties had agreed to defined their rights and duties.¹⁹ If a lease clause were ambiguous, the Nebraska courts tried to determine the parties' intent in order to interpret the lease.²⁰ They rarely found a lease clause to be void as against public policy.²¹ Landlord-tenant law was a part of the unregulated private domain in which individuals could theoretically bargain and agree as they chose.²²

Although contractual modes of interpretation were used in determining intent,²³ leases were generally conceptualized as conveyances. For example, if the tenant abandoned the premises during the term, the landlord did not have to mitigate damages. He could wait until the term was over and sue for the due rent.²⁴ The theory underlying this procedure was that the landlord had conveyed property to the tenant, and he did not have to accept its surrender. Concomitantly, lease clauses were generally considered to be independent of each other. This meant that if the landlord breached any of his duties, the tenant could not legitimately breach any of his. Often this issue was focused on in a landlord repossession action. The landlord might sue for repossession based on non-payment of rent.²⁵ The tenant would try to defend by raising the landlord's breach. The courts denied the tenant such a right,²⁶ the underlying theory being that summary repossession was a quick remedy and that lease clauses were independent.²⁷

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19. *Johnson v. City of Lincoln*, 174 Neb. 837, 120 N.W.2d 297 (1963).
 20. *See Clough v. Standard Oil Co.*, 130 Neb. 136, 264 N.W. 170 (1936); *Farley v. McKeegan*, 48 Neb. 237, 67 N.W. 161 (1896); *Steen v. Scheel*, 46 Neb. 252, 64 N.W. 957 (1895).
 21. *Bass v. Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974), is one exception. It held a landlord's contractual right of entry void.
 22. Obviously, because of the unfair bargaining positions, the theory was often inconsistent with what was done in practice. This is one of the reasons why there was a need for a new law.
 23. "A lease is a species of contract . . ." 174 Neb. at 846, 120 N.W.2d at 303.
 24. *Prucha v. Coufal*, 91 Neb. 724, 136 N.W. 1019 (1912); *Merrill v. Willis*, 51 Neb. 162, 70 N.W. 914 (1897); *Hayward Bros. v. Ramge*, 33 Neb. 836, 51 N.W. 229 (1892). All the above were apparently overruled in *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 174 (1969).
 25. By statute possession was conditioned on payment of rent. Thus, possession and rent were dependent obligations. NEB. REV. STAT. § 24-569 (Cum. Supp. 1974).
 26. *Stover v. Hazelbaker*, 42 Neb. 393, 60 N.W. 597 (1894). *But see* *McJunkin v. Waldo*, 95 Neb. 235, 145 N.W. 337 (1914).
 27. *Lindsey v. Normet*, 405 U.S. 56 (1971).

The NRLTA has clearly rejected both these concepts. Leases are called rental agreements and are considered to be contracts, and covenants are dependent. The Comment to section 1.102 of the URLTA provides:

Existing landlord-tenant law in the United States, save as modified by statute or judicial interpretation, is a product of English common law developed within an agricultural society at a time when doctrines of promissory contract were unrecognized. Thus, the landlord-tenant relationship was viewed as conveyance of a lease-hold estate and the covenants of the parties generally independent. These doctrines are inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect.

This Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent.

Several sections of the URLTA focus directly on this consensual aspect of landlord-tenant law. The effect is (a) to prescribe the parameters of the rental agreement, implying certain clauses and prohibiting other clauses, and requiring that no part of it be unconscionable; (b) to permit settlement of disputes and to require that they too not be unconscionable; and (c) to account for certain other agreements. The URLTA carefully regulates an area of the law that had once been left to private ordering. In so doing, it radically alters the pre-existing lease law; but the alteration is coherent. The NRLTA, however, includes only portions of the URLTA, and its cut-and-paste approach invites confusion and ambiguity.

A. Rental Agreements

The NRLTA lease is called the rental agreement. It includes all agreements, written and oral, between a landlord and tenant, as well as validly adopted rules and regulations.²⁸ It may include additional covenants unless to do so is expressly prohibited in the NRLTA.²⁹ The text below will focus first on what can be implied in the rental agreement and second on what cannot be included in it.

An initial question that arises is: What if the parties drew up a lease, but one of them fails to sign it. Is the lease nevertheless valid? In Nebraska, it was valid if the parties acted upon it and if rent were paid and accepted pursuant to it, although the arrangement could not be for longer than one year.³⁰ This was consistent

28. NEB. REV. STAT. § 76-1410(11) (Cum. Supp. 1974).

29. NEB. REV. STAT. § 76-1414(1) (Cum. Supp. 1974).

30. Where an agreement for the lease of a piece of real estate is reduced to writing, and bears the signatures of the lessees but not that of the lessor, and possession taken under such agree-

with the Nebraska law of oral leases; such leases were valid, as agreed to, for a period not in excess of one year.³¹ Section 1.402 of the URLTA would have restated this position.³² The NRLTA has no similar provision. What then is the relationship between the landlord and the tenant in the circumstances described above? The brief reported legislative history indicates that some legislators believed it should be a tenancy at will. The history also indicates that the legislators were not aware of the then existing law.³³ Under such circumstances, the impact of "legislative history" is minimized. A preferable interpretation would be that the pre-existing law continues; coincidentally, this would bring about a result roughly equivalent to that provided for by section 1.402 of the URLTA. This would assure both landlords and tenants that when they rely on an agreement, written or oral, their legitimate expectations will be enforced. The mere technical defect of a missing signature should not vitiate the arrangement. This is particularly appropriate in that it would be anomalous to uphold an oral rental agreement—as the NRLTA does³⁴—but not a written, accepted and acted upon rental agreement, which is only defective in its lack of signature.

ment by said lessees, and the payment of rent made by them, and by said lessor accepted, and said lease, had it been properly executed, would have been for the term of one year, though payments of rent under such agreement are to be made monthly, *held*, that said lease is valid as an oral lease for one year, and said lessees are thereby made tenants for one year.

Nicholls v. Barnes, 39 Neb. 103, 57 N.W. 990 (1894) (Syllabus of the Court, headnote 1).

31. Alloway v. Aiken, 146 Neb. 714, 21 N.W.2d 495 (1946).

32. (a) If the landlord does not sign and deliver a written rental agreement signed and delivered to him by the tenant, acceptance of rent without reservation by the landlord gives the rental agreement the same effect as if it had been signed and delivered by the landlord.

(b) If the tenant does not sign and deliver a written rental agreement signed and delivered to him by the landlord, acceptance of possession and payment of rent without reservation gives the rental agreement the same effect as if it had been signed and delivered by the tenant.

(c) If a rental agreement given effect by the operation of this section provides for a term longer than one year, it is effective for only one year.

URLTA § 1.402.

33. Senator Goodrich explained the deletion of section 1.402 of the URLTA, as follows: "The second [amendment] corrects the provision in the bill where if I were a tenant, for example, I can take a lease to the landlord, and whether he signs it or not. If he accepts my rent he automatically accepts the lease even if he didn't sign it." UNICAMERAL TRANSCRIPTS, 83d Leg., 2d Sess. 4946 (January 30, 1974) (remarks of Sen. Goodrich).

34. NEB. REV. STAT. § 76-1410(11) (Cum. Supp. 1974).

Nebraska law before the NRLTA would also have "filled in" most of the non-express terms in an "incomplete" lease. If the lease were indefinite as to rent, the fair rental value was deemed to be the rent.³⁵ The rent was considered to be due at the demised premises;³⁶ it was payable at the end of the term,³⁷ unless a time was prescribed in the lease; and it was not apportionable.³⁸ Therefore, if the tenant were to vacate early, the landlord had to wait until the due date before he could demand rent. In all cases, the landlord had to demand the rent before the tenant was considered to be in default.³⁹ If the agreement did not prescribe a definite term, the tenancy was considered one at will.⁴⁰ In this case, no explicit time period was required before either party could give the other notice of termination.

Section 76-1414 modifies some of this law.⁴¹ It provides that in the absence of an express agreement the rent will be the fair rental value for use and occupancy. The payment must be at the dwelling unit. This restates existing Nebraska law and avoids the problem of a landlord being "unavailable" when the rent is due. Rent is payable, without demand, at the beginning of a month term, and it is uniformly apportionable day-by-day. Unless a period is explicitly agreed to, the tenancy shall be from month-to-month, unless rent is paid weekly by a roomer, and then it will be from week-to-week.

These provisions change the Nebraska rule and the changes are desirable. Demand is unnecessary because the termination and eviction provisions provide the tenant with adequate protection.

35. *Ryan v. Nelson*, 177 Neb. 130, 128 N.W.2d 592 (1964); *Beacom v. Daley*, 164 Neb. 120, 81 N.W.2d 907 (1957).

36. *House v. Lewis*, 108 Neb. 257, 187 N.W. 784 (1922).

37. *First Nat'l Bank v. Omaha Nat'l Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974).

38. *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964).

39. *Cannon v. Wilbur*, 30 Neb. 777, 47 N.W. 85 (1890). The three day notice-to-quit would have served as the needed demand.

40. *Sage v. Shaul*, 159 Neb. 543, 67 N.W.2d 921 (1955).

41. (2) In absence of agreement, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit.

(3) Rent shall be payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the dwelling unit and periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each month. Unless otherwise agreed, rent shall be uniformly apportionable from day-to-day.

(4) Unless the rental agreement fixes a definite term, the tenancy shall be week-to-week in case of a roomer who pays weekly rent, and in all other cases month-to-month.

NEB. REV. STAT. §§ 76-1414(2) - (4) (Cum. Supp. 1974).

Apportionable rent ties in well with the requirement of mitigation; and the fact that a tenant will usually be considered a month-to-month tenant will assure him at least a thirty day notice before the lease can be terminated.

Having determined the status of the agreement when it is missing a signature or an express term and having determined what can be implied to remedy these defects, it is now necessary to examine the status of a rental agreement which includes too much.⁴² Section 76-1415 explicitly provides that a rental agreement may not include clauses in which the tenant (1) agrees to waive or to forego rights or remedies; (2) authorizes any person to confess judgment; (3) agrees to pay the landlord's attorney's fees; or (4) agrees to the exculpation or limitation of the landlord's liability. Any clause which provides for any of these is unenforceable, and if the landlord deliberately uses a rental agreement containing any of them, then the tenant may recover actual damages and reasonable attorney's fees. Section 1.403 of the URLTA would have additionally penalized the landlord who deliberately included prohibited clauses in his rental agreement.⁴³ The reason for this is

42. In addition to the unenforceable rental agreement clauses that are discussed in the text, under given circumstances, otherwise legitimate clauses may also be void. A court, either in its own motion or on any party's motion, may vitiate an "unconscionable" rental agreement. NEB. REV. STAT. § 76-1412 (Cum. Supp. 1974). This capability is extremely important in the housing area, for tenants often face a short supply of homes and frequently are in urgent need of shelter. They are, therefore, in a weak bargaining position. Moreover, leases and rental agreements are long and tedious documents, often written in language too technical to understand or in print too small to read. Tenants are not always capable of protecting themselves from oppression. On the other hand, the standard is beneficially protean enough to cover both existing, and also unforeseeable, conditions and agreements. But is the phrase "unconscionable" too amorphous to provide guidance to private parties? How can they be certain that they have made a valid, and enforceable agreement? The draftsmen's test that "in light of the background and setting of the market, the conditions of the particular parties to the rental agreement . . . are so one-sided as to be unconscionable. . . ." provides little certain guidance. See URLTA § 1.303, Comment. Analogies and cases in the commercial world will be more helpful. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). For example, one important factor should be whether the parties have had a reasonable opportunity to understand the contract. See Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 (1974). Over a period of time, cases and comments will supply the minimal level of certainty as to what is "unconscionable." Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).

43. (b) A provision prohibited by subsection (a) included in a rental agreement is unenforceable. If a landlord *deliberately* uses a rental agreement containing provisions known by him

that the mere inclusion of unenforceable clauses can greatly prejudice the tenant's true rights. The parties to an agreement often look to the words of the agreement to determine their respective duties; therefore, a tenant might do something stated in the lease which he could not have been legally obligated to do. Moreover, the mere misapprehension of the actual state of legal rights might encourage an unwarranted settlement. This possibility may be a probability under the NRLTA because settlements may not be subject to "unconscionability" standards. The consequences of the "softer" NRLTA approach will be that landlords may be tempted to include unenforceable clauses in their leases since they may have little to lose by doing so.⁴⁴

to be prohibited, the tenant may recover in addition to his actual damages *an amount up to [3] months' periodic rent* and reasonable attorney's fees.

URLTA § 1.403(b) (emphasis added).

44. As will be indicated, the Nebraska Legislature deleted many of the penalty provisions from the URLTA. This may make the enforcement of the NRLTA difficult, and it will be argued, in several instances, that the NRLTA would have been better without these deletions. The problem with including punitive damage provisions in the statute is that they may be unconstitutional if the recovery goes to an individual. NEB. CONST. art. VII, § 5; *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). See also *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881) and *Boyer v. Barr*, 8 Neb. 68 (1878) which held that it may be unconstitutional simply to provide for punitive damages.

Two important questions must be answered. First, are the damage awards of the URLTA truly punitive, or are they more in the nature of liquidated damages?

It is clearly within the province of the Legislature to provide for liquidated damages in favor of a private person, although in form a penalty, if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards.

170 Neb. 926, 931, 104 N.W.2d 684, 689 (1960). The answer is difficult, but it is at least arguable that certain URLTA provisions are more in the nature of liquidated damages and, therefore, could have been included in the NRLTA. For example, it will be very difficult to determine the damages associated with the inclusion of unenforceable clauses in leases. The URLTA provision for three months' rent as damages may be a liquidated damages clause, even though the URLTA provides for it only in cases of deliberate landlord inclusion. URLTA § 1.403(b). See also NEB. REV. STAT. § 76-1430 (Cum. Supp. 1974). Second, as will be noted, the rendering of attorney's fees has both a compensatory and punitive edge. Additionally, the practice serves as an incentive to bring suit. Could these awards be unconstitutional? The answer should be no, because it is not a question of a private party getting a "wind-fall", but rather a question of who pays the "costs" of litigation. Moreover, when a "penalty" also has a legitimate compensatory function the Nebraska Supreme Court has upheld it. See *Abel v. Conover*, 170 Neb. 926, 937, 104 N.W.2d 684, 692 (1960).

The NRLTA apportions the rights and remedies between the parties. The landlord may agree to do, or to forego doing, something extra for the tenant. The tenant, on the other hand, may not waive any of his rights or remedies. The NRLTA is premised on the belief that the landlord does not need the protection of the law. Usually, it will be he, or a landlords' group, who has drafted the rental agreement, and thus there is little risk that he will not know the content of a small-print adhesion clause. Moreover, it is believed that the landlord will generally be in a better economic bargaining position than the tenant, and, therefore, there is little risk that he will agree to an obligation out of economic necessity. The opposites of both these arguments apply to the tenant. Section 76-1415, a key to the entire legislation, prevents the tenant from entering an agreement to his detriment.

The practice of including confessions of judgment clauses in leases has not been used frequently in Nebraska landlord-tenant law.⁴⁵ When they have been used, they have been construed narrowly.⁴⁶ The unfairness inherent in them is obvious. A tenant could forfeit his entire case without having received notice or hearing. For poor debtors, or tenants, such clauses are most obnoxious, because these individuals may not be in a strong enough bargaining position to resist their inclusion in the rental agreement. The United States Supreme Court has held such clauses unconstitutional as applied to a large class of poor consumers. In so doing, the Court emphasized the unfair bargaining posture of the poor consumers and the lack of due process in the judgment.⁴⁷ The situation is analogous to that found in many residential landlord-tenant cases in which tenants are often poor. Thus the use of such clauses may have been unconstitutional in Nebraska; at any rate, it is now prohibited by section 76-1415.⁴⁸

A tenant may not agree to pay the landlord's attorney's fees.⁴⁹

45. Such clauses were legal in Nebraska. See NEB. REV. STAT. § 25-906-07 (Reissue 1968); NEB. REV. STAT. § 25-1309 (Reissue 1968). NEB. REV. STAT. § 8-447 (Reissue 1974) explicitly prohibits them in some situations, thus raising the inference that they are appropriate elsewhere. See *generally* Thornhill v. Hargreaves, 76 Neb. 582, 107 N.W. 847 (1906).

46. *Wiley v. Neal*, 24 Neb. 141, 37 N.W. 926 (1888). See also *Custer County v. Chicago B. & Q.R.R.*, 62 Neb. 657, 87 N.W. 341 (1901).

47. *Swarb v. Lennox*, 405 U.S. 191 (1972). But see *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

48. Of course, the tenant can still proceed under the general provisions of sections 25-906 and 25-907 to confess judgment. But, he is prohibited, as noted, from authorizing the confession of judgment in the rental agreement.

49. Although it is not free from doubt, it does seem that at least in cases for money damages, Nebraska will not permit one party to agree to pay

Litigation is to be discouraged, and the prize of paid attorney's fees may encourage gambling litigation. Attorney's fees may only be awarded to effectuate certain specified legislative policies.⁵⁰ Payment of fees is a particularly important device, for it will encourage lawyers to take cases which they otherwise might not have considered. Whether this policy becomes an actuality will depend on the amount of the fee awards. It may be psychologically difficult for a judge to award \$100 in attorney's fees for a \$50 damage deposit suit. But if a lawyer is not fairly paid for the value of his time, he will not take these cases and the policy of the NRLTA will be vitiated.

Section 76-1414(1)(c) provides that the "tenant" may not agree "to pay the tenant's attorney's fees." This is sloppy drafting.⁵¹ The

the attorney's fees of another. *Dow v. Updike Bros.*, 11 Neb. 95, 7 N.W. 857 (1881). However, NEB. REV. STAT. § 8-823 (Reissue 1974) prohibits agreements for payment of attorney's fees in certain kinds of transactions, and this raises the inference that they are otherwise permissible.

50. The recovery of reasonable attorney's fees may be instrumental in the enforcement of the NRLTA. Lonquist & Healey, "A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska," 8 CREIGHTON L. REV. 336, 363 (1975). Section 76-1415(1)(c) prohibits the parties from contracting to pay each other's attorney's fees. The only time that such payment is allowed is when the NRLTA authorizes it. The purpose of these sections are (1) to encourage a case to be litigated even if the stakes are small and (2) to discourage particularly offensive activity. It is this latter punitive purpose which seems to predominate. Reasonable attorney's fees may be awarded if (1) a landlord *deliberately* uses an unenforceable clause, section 76-1415(2); (2) a landlord fails to return a security deposit, which is a particularly heinous act, section 76-1416(3); (3) a landlord *willfully* fails to comply with the rental agreement or section 76-1425(2); (4) a person *willfully* and *not in good faith* fails to deliver possession, section 76-1426(2); (5) the landlord *deliberately* or negligently fails to supply certain essential services, again a particularly important commitment, section 76-1427(1)(c); (6) a tenant raises a counterclaim or a defense *without merit* and *not in good faith*, section 76-1428(1); (7) a landlord *unlawfully* or *willfully* and *wrongfully* excludes the tenant or diminishes services, section 76-1430; (8) a tenant *willfully* fails to comply with the rental agreement or the NRLTA, section 76-1431(3); (9) a tenant *willfully* fails to give a notice of an extended absence when he has agreed to give such a notice, section 76-1432(1); (10) a tenant *willfully* and *not in good faith* holds over, section 76-1437(3); (11) a tenant refuses lawful access, again a serious violation, section 76-1438(1); and (12) a landlord enters unlawfully or in an unreasonable manner, or harasses the tenant, again an important violation, section 76-1438(2).
51. "No rental agreement may provide that the tenant . . . agrees to pay the landlord's or tenant's attorney's fees." NEB. REV. STAT. § 76-1415(1)(c) (Cum. Supp. 1974). The italicized words were added to the URLTA by the Nebraska Legislature.

apparent thrust of this amendment to the URLTA was to prevent landlords from agreeing to pay the tenant's attorney's fees. In spite of the awkwardness of the language the intent is that neither the landlord nor the tenant should be able to shift the burden of paying the other's attorney's fees by private agreement.

A final protection for the tenant is that he may not exculpate or limit the landlord's liability that occurs due to active and actionable negligence. The clause raises two distinct problems. First, can the tenant exculpate the landlord from *inactive* negligence? Arguably, the negative inference is that he can. This interpretation is suggested by the fact that the NRLTA is different from the URLTA which prohibited the inclusion of *any* exculpatory clause.⁵² The second issue concerns the definition of active negligence. What is it? It may be argued that this reincarnates the difference between misfeasance and nonfeasance. Thus, if a landlord has no duty to repair, but does so anyway, and does it negligently, he would be liable and would not be able to exculpate himself in a rental agreement. On the other hand, if he had an express agreement to repair, and he did nothing, he would still be liable in tort, but he would be able to exculpate himself.⁵³ It is unclear why the legislature would permit exculpatory clauses for one kind of negligence and not another; therefore, it is preferable to interpret "active" negligence as "any" negligence. In a sense, this always must be the case, because the active-inactive distinction is highly artificial. In other words, the inference that the agreement could include an exculpation clause for inactive negligence is rejected. A tenant may not agree to indemnify the landlord for *any* negligence.⁵⁴ This interpretation would make the NRLTA consistent with the URLTA, and thus promote uniformity.

B. Settlement Agreements

In addition to the rental agreement, the NRLTA provides for two other types of agreements between a landlord and a tenant:

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52. No rental agreement may provide that the tenant . . .
 (d) Agrees to the exculpation or limitation of any liability of the landlord *arising due to active and actionable negligence of the landlord* or to indemnify the landlord for that liability *arising due to active and actionable negligence* or the costs connected therewith.
 NEB. REV. STAT. § 76-1415(1) (d) (Cum. Supp. 1974) (emphasis added). Section 1.403(4) of the URLTA simply provided for no exculpation for any liability *arising under law*.
53. This distinction has been articulated in one landlord-tenant case. *Kuzmiak v. Brookchester Inc.*, 33 N.J. Super. 575, 111 A.2d 425 (1955).
54. "Actionable," of course, means the type of negligence which would support a suit. Thus the use of the word is inherently redundant.

"settlement" agreements and "contracting-out" agreements.⁵⁵

Any claim may be settled. The NRLTA appears to permit the landlord to use all his economic muscle to get an advantageous settlement, because there is no express limitation with respect to settlements either in conscience or at law. First, there is arguably no good faith requirement with respect to settlements. Whereas the URLTA permitted settlements of either a claim or a right only if it was disputed in good faith, the NRLTA does not include the good faith proviso.⁵⁶ Second, the URLTA provided that settlements would be vitiated if unconscionable; the NRLTA does not include this proviso either.⁵⁷

There are several rational explanations for the NRLTA's position distinguishing settlements from rental agreements by not requiring a good faith or unconscionability limitation on the former. First, the adhesion character of settlements is minimal. In a normal lease situation, a party may not know to what he is agreeing because the clause is hidden in small-print. The settlement agreement, however, does not have this defect. Although the bargaining positions may be one-sided, the parties will at least know what they are bargaining about. Second, it is unlikely that the bargaining position of the parties will be as unequal as it is in the initial leasing situation. If the tenant has a claim, he will have some clout. Moreover, he will often be in the dwelling unit. As a result, he is in a much better position to extract from the landlord an agreement that is fair. Third, the Nebraska legislative policy may have been designed to reduce litigation. Settlements are an effective means of doing this. If each settlement agreement were subject to challenge with respect to the landlord's lack of good faith or its unconscionability, settlements would be agreed to reluctantly. In many cases there would be no agreement to any settlement. This result

55. See discussion in Section II, C, *infra*.

56. "A claim or right arising under this Act or on a rental agreement, if *disputed in good faith*, may be settled by agreement." URLTA § 1.106. The italicized portions were deleted from NEB. REV. STAT. § 76-1406 (Cum. Supp. 1974).

57. If the court, as a matter of law, finds . . .

(a) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision or limit the application of any unconscionable provision to avoid an unconscionable result.

URLTA § 1.303(a)(2). This paragraph was excised from NEB. REV. STAT. § 76-1412 (Cum. Supp. 1974).

Of course, one could read the "good faith" clause of section 76-1411 as implying the same thing as the "unconscionability" clause. If this were done, the NRLTA would be consistent with the URLTA.

would be undesirable for tenants as well as landlords, for often they will need fast remedial relief, and if a landlord has no incentive to settle, he will not.

One major risk in removing the good faith and unconscionability limitation on settlements is that a settlement may become a subterfuge for an unenforceable rental agreement or contracting-out agreement. For instance, the tenant may have a damage claim for \$150 because the landlord has breached his obligation to keep all common areas of the premises in a clean and safe condition. The landlord and tenant may settle this claim by the landlord's paying the tenant \$5, and the tenant promising to keep the common areas of the premises in a clean and safe condition in the future. This settlement agreement would be between the landlord and the tenant, and it would be with respect to the conditions of the premises.⁵⁸ Could such a "settlement" agreement be vitiated because it was either not made in good faith or it was unconscionable when made? The answer is probably yes, because such an arrangement is more properly conceived of as a rental agreement.

The Nebraska draftsmen apparently intended a difference between a rental agreement, a contracting-out agreement, and a settlement agreement. In the first two cases, they emphasized good faith and conscionability; in the latter, they emphasized certainty and finality. To determine whether an agreement is one or the other, all alleged settlements which could also be rental agreements or contracting-out agreements should be deemed such. This will prevent landlords from using the "settlement" agreement as a means of avoiding compliance with the NRLTA. Thus, if the settlement relates to the terms and conditions concerning the use and occupancy of the premises, as the agreement about the common areas, illustrated above, it might be a rental agreement and it should be subject to the NRLTA rules with respect to rental agreements.⁵⁹ On the other hand, if it were a pure money settlement, one unrelated to any continuing concern with the use and occupancy of the premises, then it would not be a rental agreement or a contracting-out agreement. In the case above, if the tenant simply released his \$150 claim for \$5 and that was to be the end of the matter, then this would be a pure money settlement. The court would not be entitled to review it with respect to the landlord's good faith or its unconscionability.⁶⁰ Pure money settle-

58. If this clause were part of the rental agreement, it would be void. If it were a separate "contracting-out" agreement, it would be valid only if made in good faith and supported by adequate consideration. See NEB. REV. STAT. § 76-1419 (Cum. Supp. 1974).

59. NEB. REV. STAT. § 76-1410(11) (Cum. Supp. 1974).

60. Section 76-1411 provides that every duty and every act that must be

ments would thus be encouraged, and litigation would hopefully be reduced.

C. Contracting-out Agreements

Landlords are given certain duties and responsibilities under the NRLTA. In three situations, they may "contract-out" these obligations to persons living on the demised premises. This may be to the advantage of the landlord; it also may be to the advantage of tenants, for it permits them to pay with "sweat-rent."⁶¹ The first situation in which contracting-out is permitted deals with managers whose occupancy is conditioned on their employment, and who, as tenants, are excluded from NRLTA coverage.⁶² The second instance deals with tenants of single family homes who may agree to perform certain landlord responsibilities if the transaction (1) is in writing; (2) is for good consideration; (3) is entered into in good faith; and (4) is not for the purpose of evading the landlord's obligations.⁶³ The third includes tenants in multiple dwellings who may agree to perform certain landlord duties if the agreement (1) is in a signed separate writing; (2) is for adequate consideration; (3) is entered in good faith; and (4) is not for the purpose of evading the landlord's obligations.⁶⁴ One important difference between these latter two situations is that the "contracting-out" agreement in the third case must be in a *separate* writing and, therefore, may not be a part of the rental agreement. This assures that the tenant in a multi-unit building knows to what he is agreeing. The separate writing should impress on him the importance of his undertaking.

In addition to these three situations illustrating how a landlord can contract-out his obligations, the NRLTA also states that a land-

performed as a condition to the exercise of a right or remedy must be done in *good faith*. This section should provide the court the means of introducing concepts of equity and fairness in the application of this statute to particular instances.

61. Lonquist & Healey, *supra* note 50, at 355.

62. NEB. REV. STAT. § 76-1408(5) (Cum. Supp. 1974).

63. NEB. REV. STAT. § 76-1419(2) (Cum. Supp. 1974) provides that the tenant may agree to perform the landlord's subsection (e) and (f) obligations (e.g., garbage disposal and water and heat supply) as well as specified repairs, maintenance tasks, alterations and remodeling.

64. NEB. REV. STAT. § 76-1419(3) (Cum. Supp. 1974) provides that the tenant may agree to perform specified repairs, maintenance tasks, alterations or remodeling. Regardless of what contracting-out arrangements are made with individual tenants, the landlord will not be relieved of his duties and obligations to other tenants. NEB. REV. STAT. § 76-1419(3) (b) (Cum. Supp. 1974).

lord may employ a tenant to perform his obligations.⁶⁵ This last provision is unique to the NRLTA and the draftsmen probably intended it to restate the other "contracting-out" situations and not to add another exception to the statutory scheme, which generally prohibits contracting-out.⁶⁶

What is the landlord's remedy if the tenant should breach his section 76-1419 contracting-out obligations? He is certainly entitled to normal contract damage relief. But is he entitled to terminate the tenancy? Under the URLTA, the answer was clearly no.⁶⁷ Section 4.201 of the URLTA⁶⁸ explicitly permitted termination only in the case of specified breaches of the rental agreement or of specified noncompliance with the URLTA counterpart to section 76-1419 of the NRLTA. Moreover, section 2.104(e) of the URLTA⁶⁹ provided that the multi-unit tenant's performance of the contracting-out agreement could be interpreted neither as a condition of a land-

65. NEB. REV. STAT. § 76-1419(4) (Cum. Supp. 1974).

66. [This] deals with a tenant working with the landlord. If, for example, you have a tenant that you want to hire to maintain, say the hallways or you want to hire this tenant to cut the grass it says in essence that you shall agree with your tenant in a separate written statement to the affect that this is not an amendment to the lease itself. This is a separate agreement.

NEB. LEG. JOUR. 83d Leg., 2d Sess. 5320 (February 11, 1974) (remarks of Sen. Goodrich).

67. ABA Subcommittee on the Model Landlord-Tenant Act of Committee Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROPERTY PROBATE & TRUST 104, 112 (1973). This provision has been criticized because it was unfair to require the landlord to continue to provide housing services after the tenant had broken his agreement.

68. (a) Except as provided in this Act, if there is a material noncompliance by the tenant with the rental agreement or a noncompliance with Section 3.101 materially affecting health and safety, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than [30] days after receipt of the notice. If the breach is not remedied in [14] days, the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach before the date specified in the notice, the rental agreement shall not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within [6] months, the landlord may terminate the rental agreement upon at least [14] days' written notice specifying the breach and the date of termination of the rental agreement.

URLTA § 4.201(a).

69. "The landlord may not treat performance of the separate agreement described in subsection (d) as a condition to any obligation or performance of any rental agreement." URLTA § 2.104(e). This provision was deleted in the NRLTA.

lord's performing his obligation nor as a condition of the tenant's continued occupancy. Both these sections are different in the NRLTA. A landlord can terminate the tenancy for a breach of a separate agreement⁷⁰ and section 2.104(e) of the URLTA is deleted from section 76-1419. Thus, if a tenant does not comply with a contracting-out agreement, his estate can be terminated. This raises the stakes considerably. But does this, by definition, exclude the tenant from all NRLTA protection?

Section 76-1408(5) excludes a manager from the coverage of the act. A manager is defined as an "employee . . . whose right to occupy is conditional upon employment. . . ."⁷¹ Thus, a "Catch-22" circle is provided. If the landlord employs a tenant to do work, and if the landlord can terminate the lease for the tenant's failure to do work properly, the relationship is excluded from the hegemony of the NRLTA. On the other hand, if the landlord cannot terminate the tenancy for breach, the amendment to section 76-1431⁷² and the deletion from section 76-1419⁷³ mentioned above are of little purpose. To break the circle, the section 76-1408(5) exclusion from NRLTA coverage should be limited to one who *only* exchanges work for his right to occupy the dwelling unit and who makes no additional rent payment. This would conform to the facts of many situations. In other cases, any person who paid some money for the premises, with the rest being "sweat-rent," would be a tenant covered by the NRLTA. His tenancy could be terminated for failure to comply with the separate agreement, but in all other aspects he would be afforded the protection of the NRLTA.

III. LANDLORD OBLIGATIONS AND TENANT REMEDIES

This section examines the important landlord obligations which are: to return the security deposit; to disclose, or to have disclosed, his identity; to deliver possession; and to maintain the premises. Concurrently, the relevant tenant remedies available should the landlord fail to comply with his obligations are explained.

A. Duty to Return Security Deposit

It is customary for a landlord to demand a security deposit from

70. "[I]f there is a [tenant] noncompliance . . . with the rental agreement or *any separate agreement*, the landlord . . . [may terminate]" NEB. REV. STAT. § 76-1431(1) (Cum. Supp. 1974). The italicized words were added to the URLTA. NEB. REV. STAT. § 76-1431(1) (Cum. Supp. 1974).

71. NEB. REV. STAT. § 76-1408(5) (Cum. Supp. 1974).

72. See note 70, *supra*.

73. See note 69, *supra*.

a residential tenant. At the end of the term, the landlord is obligated—barring no tenant breaches or noncompliances—to return the deposit to the tenant. Thus, section 76-1416, which provides for this, is properly categorized as a landlord's obligation.

There are several good reasons why a landlord might require a security deposit. The tenant-caused damage may be slight, and not worth a lawsuit. The tenant may be judgment proof. The tenant may even have disappeared and, therefore, be unavailable for suit. The landlord protects himself against these contingencies by covering, i.e., by getting money into his hands ahead of time. Tenants resent the exaction; many view the deposit as extortion which they will never be able to get back. As a practical, and a legal matter, when there has been a dispute over ultimate disposition of the deposit, the odds have greatly favored the landlord's keeping the money.

Since there is little Nebraska law on the subject, the three major common law problems with respect to the tenant security deposit should be examined. They are: how to identify it; what the landlord can do with it during the term; and the rules with respect to disposing of it after the term.⁷⁴

First, it is necessary to identify what type of payments are to be considered security deposits. Tenant payments are categorized as (1) the advance payment of rent; (2) consideration for granting the lease; (3) liquidated damages; or (4) a deposit to secure payment of rent (also termed an advance) or to secure fulfillment of all lease covenants and obligations.⁷⁵ If the payment is categorized as (1) or (3), the landlord can keep the entire amount in the event of tenant default. If it is categorized as (2), the landlord keeps it as a part of the consideration. If the payment is a true security deposit, category (4), the landlord can only use it to cover his actual damages in the event of a tenant default. To determine in which category the payment falls, the courts guess the intent of the parties, often emphasizing the language of the lease. The common law sets no maximum amount for a security deposit; this is left to be bargained for by the parties.

The second problem is the manner in which the deposit can be used by the landlord while he holds it. The courts categorize the

74. See generally Kalish, *Residential Tenant Security Deposits: A Legislative Proposal*, 1974 U. ILL. L.F. 569. This article discusses not only a statutory solution to the problems discussed herein, but also the common law of security deposits.

75. 2 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 231(2) (perm. ed. rev. 1974).

deposit as a trust, a pledge, or a debt.⁷⁶ This is based partially on the supposed intent of the parties and on a predisposition of the courts of a particular jurisdiction to conceptualize the deposit in one way or another.⁷⁷ Once the deposit is characterized, certain legal consequences follow. If the deposit is considered a debt, then the landlord can use the money and commingle it as he chooses. If the deposit is considered a trust, then the landlord is obligated to keep it separate and to hold it for the benefit of the tenant. In the case of a pledge, which is the probable categorization of a deposit in Nebraska, the landlord does not have to pay interest on the deposit. The landlord probably can commingle the funds with other funds, although he cannot use the money in a way contrary to the interests of the tenant. If there is a dispute over the deposit between a creditor of the landlord and the tenant, the tenant has priority, for he has retained title to the money. The obligation to return the deposit runs with the pledge. This means that if the landlord transfers his reversion, he will remain responsible for the obligation; but if he assigns the deposit, the successor landlord will become obligated and the original landlord will be relieved.⁷⁸

The third important question focuses on the disposition of the deposit. In all circumstances, the landlord can use the deposit to cover the damages resulting from breaches of obligations designated in the lease. In other words, what can be covered by the deposit is contractually determined; if the parties choose, the deposit can be used to cover the most insignificant covenant. The landlord is to return the remainder. If he does not do so, he may be liable for conversion. This result is probable if the deposit is conceptualized as being a trust or a pledge. However, regardless of the conceptualization, the tenant is at a disadvantage in making sure that the money is used properly. The tenant will rarely know what is being done with "his" money; therefore, as a practical matter, he will not have the facts to complain of a misuse. Moreover, if the landlord should return only part of the deposit, the tenant will have the burden of proof as to whether the landlord has withheld the remainder wrongfully. This can be an insurmountable burden.

76. See Kalish, *supra* note 74, at 571-73.

77. The one Nebraska case close to the problem does state that the tenant retains title to the property. This would imply a pledge relationship.

The delivery of possession of personal property by a lessee to the lessor to be held and managed as security for delinquent rent until paid does not operate to transfer the title to said property, but is in the nature of a pledge. . . .

Krug Park Amusement Co. v. New York Underwriters Ins., 129 Neb. 239, 240, 261 N.W. 364, 365 (1935) (headnote 2).

78. See Kalish, *supra* note 74, at 571-72.

Coupling this with the cost of a suit means that a tenant's action for the return of the deposit is unlikely.

Section 76-1416 changes existing Nebraska law. Section 76-1416(1)⁷⁹ provides that the language of the rental agreement is not critical in determining whether or not a payment is to be considered a deposit. A functional security deposit, *however denominated*, will be covered by the section. This will force the courts to examine the substance of the arrangement, not its form, and if the deposit either secures, or is intended to secure, a tenant obligation, it will fall under this section. The amount of the security deposit is limited to one month's rent, plus twenty-five percent of a month's rent as a pet deposit.⁸⁰ This floating limitation of one month's rent should satisfy most landlords, for as the rent goes up, so may the security deposit. This statutory maximum is critical and may eliminate many practical problems for the tenant's total loss in a dispute will never be excessive.

The NRLTA apparently conceptualizes a security deposit and prepaid rent as being different entities,⁸¹ and, therefore, there is no maximum on the amount of prepaid rent that can be required. This should not vitiate the force of the statutory maximum on security deposits, for prepaid rent cannot be used to cover tenant-caused damages, and the unused portions of the prepaid rent must be returned to the tenant on termination.⁸² Public housing author-

79. NEB. REV. STAT. § 76-1416(1) (Cum. Supp. 1974).

80. Section 2.101 of the URLTA did not provide for a pet deposit.

81. This conclusion is premised on the statutory language which uses the words "prepaid rent" and "security" and which provides that only the "security" may not exceed one month's rent. NEB. REV. STAT. § 76-1416 (Cum. Supp. 1974).

82. It would be incredible if prepaid rent could be used to cover the cost of physical damage to the premises. Since there is no maximum on the amount of prepaid rent which may be collected, such an interpretation would vitiate the maximum security deposit limitation. Nevertheless, it is arguable that prepaid rent can cover the cost of physical damages.

Upon termination of the tenancy property or money held by the landlord *as prepaid rent* and security may be applied to the payment of rent and the *amount of damages which the landlord has suffered by reason of the tenant's noncompliance with the rental agreement or section 76-1421.*

NEB. REV. STAT. § 76-1416(2) (Cum. Supp. 1974) (emphasis added). If the underlined words are emphasized, the incredible result follows. Further support for this conclusion that such a result is incredible rests in the language of section 2.101 of the URLTA, which emphasizes that only "security may be applied to . . . the amount of damages which the landlord has suffered. . . ." To avoid this result, section 76-1416 (2) should be interpreted to mean that prepaid rent only can be applied to the payment of rent and the security deposit to the amount of damages.

ities are exempted from this section. Since they collect so little rent, to limit them to a tenant's deposit equal to one month's rent would, as a practical matter, deprive them of all security protection.⁸³

While section 76-1416 explicitly provides for the amount of the deposit, it says nothing explicitly about the landlord's responsibility in the use and management of the deposit nor about interest payments. The URLTA draftsmen and the NRLTA draftsmen took an ambiguous middle-way.⁸⁴ It is possible to interpret this as implying that the individual states were to decide each problem as it arose. In Nebraska, the courts would probably resolve particular problems by deducing obligations from the concept of the deposit-as-pledge. It is preferable, however, to apply the interpretive principle of *exclusio unis alterius*; what the landlord is not prohibited from doing, or directed to do, he is free to do, as he chooses. Thus, he may use and commingle the deposit, since he is not prohibited from doing either; he need not pay interest, for he is not directed to do so.⁸⁵ And as a corollary to the above, the tenant is just a general creditor as to the funds. This interpretation simplifies and clarifies the law; there is no uncertainty as to what the courts will conceptualize the deposit as being, and there is no confusion as to

83. Well, it isn't a question of the United States government living with the bill. We can live with the bill, but for instance, you have a clause in here that says that we should have one month's rent as security deposit. Now, we have tenants who pay five dollars a month, as I pointed out, and that is no security deposit. We don't have tenants that have financial responsibilities so we are going to increase the operating losses of the authority which, if you gentlemen read the papers, you know from Washington there is a pressure and a reduction of subsidies which we won't be able to continue the service for long.

Hearings on Nebraska Residential Landlord Tenant Act Before the Judiciary Committee, 83d Leg., 1st Sess. 66 (February 7, 1973) (remarks of Mr. Beber).

84. URLTA § 2.101, Comment.

85. Additional weight is given to this argument by the actions of the 1975 Nebraska Legislature's Urban Affairs Committee. On March 19, 1975, it recommended an additional subsection 6 to section 76-1416, which would have provided for the separate handling of deposit funds in particular cases.

(6) All security deposits received by a landlord renting or leasing more than four rental units on and after the effective date of this act, as described in subsection (1) of this section, shall be held by the landlord in a separate account in a licensed financial institution located in this state. Such account shall be designated as a security deposit trust account.

UNICAMERAL TRANSCRIPTS, 84th Leg., 1st Sess. 954 (March 19, 1975). The bill was not adopted.

what follows from a particular conceptualization. Moreover, such a construction will avoid the difficulties inherent in supervising the management of deposit funds.⁸⁶ Finally, this interpretation—if followed consistently in the various states which adopt the URLTA—is the only one which promises any hope of uniformity.

The NRLTA stance on the issue of who, among successive landlords, should be obligated to return the deposit is complicated. Section 76-1416(5) provides that the landlord who holds the reversion at the termination of the tenancy (even though he may not have received an assignment of the deposit) is obligated to return both the prepaid rent and the security deposit to the tenant, when to do so is appropriate.⁸⁷ The successor landlord, rather than the tenant, bears the risk of an absconding landlord. This is desirable since he will at least know that the original landlord is transferring the reversion, and if it is rental property he should suspect the existence of deposit obligations.

Section 76-1420(1), like the URLTA, provides that the original landlord also remains liable to the tenant for the deposit and for the prepaid rent. A reason for this is that the tenant, in giving a deposit, conceivably could have relied on the individual landlord's financial integrity. However, the reliance is unlikely, since few residential tenants check on the financial solvency of the landlord. Moreover, such a continuing obligation for the original landlord poses a problem since it may inhibit the alienability of realty.⁸⁸

The NRLTA adds to its URLTA counterpart a provision whereby the original landlord can wash his hands of a continuing obligation.⁸⁹ Section 76-1420(1) permits such a result if the original land-

86. Difficulties in administration and accounting of security deposits have led some authorities to advocate their abolition (see Interim Report Landlord and Tenant Law Applicable to Residential Tenancies, Ontario Law Reform Commission [1968] pgs. 21 and 28). The Uniform Act preserves the security deposit but limits the amount and prescribes penalties for its misuse.

URLTA § 2.101, Comment.

87. Although there are no Nebraska cases directly on point, a transferee of the reversion must comply with an option to sell, *Jamson v. Poulos*, 184 Neb. 480, 168 N.W.2d 526 (1969), and apparently with other obligations, at least in circumstances in which the transferee has notice of the lease arrangement. *Friedlander v. Ryder*, 30 Neb. 783, 47 N.W. 83 (1890).

88. See ABA Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, *supra* note 67, at 113, which criticized the URLTA's position that the original landlord could never relieve himself of the security and prepaid rent obligation.

89. Unless otherwise agreed, a landlord, who conveys premises that include a dwelling unit subject to a rental agreement in a good faith sale to a bona fide purchaser, is relieved of liabil-

lord assigns the deposit or the prepaid rent to a bona fide purchaser with written notice to the tenant, so that the tenant will now know who is obligated to him. This provision may be advantageous to the tenant. To simply make the successor landlord liable for the deposit, whether he knew about it or not, may result in certain landlords, who did not know of the deposit obligations, refusing to return the deposit. The clear assignment of the funds means that the successor landlord will not feel duped when called on to return the deposit.

Upon termination of the tenancy, by any means and by either party, the landlord must return the deposit less any amount which he has used.⁹⁰ The landlord can cover rent which is due by the prepaid rent, and can cover other damages by the security deposit. The landlord must also deliver a written itemization of the amounts withheld to the tenant. The effects of this provision will in part turn on what "itemization" means. It is suggested that it means a full and detailed accounting; this interpretation will serve to help the tenant decide if the landlord's claim was legitimate; and it will also serve as a prophylactic, for it will encourage the landlord to operate properly in the first instance. The landlord must return that portion of the deposit which he is going to return within fourteen days of demand by the tenant and a notification by the tenant of his new address. The demand requirement is unfortunate for it may serve as a trap for an unwary tenant who forgets to make the demand.⁹¹

ity under the rental agreement and sections 24-568 and 76-1401 to 76-1449 as to events occurring subsequent to written notice to the tenant of the conveyance, but he remains liable to the tenant for any property and money to which the tenant is entitled under section 76-1416, *except that assignment of any security deposits or prepaid rents to a bona fide purchaser with written notice to the tenant shall serve to relieve the conveying landlord of any further liability under section 76-1416.*

NEB. REV. STAT. § 76-1420(1) (Cum. Supp. 1974) (emphasis added). *Inter alia*, the italicized words are not in the URLTA equivalent statute.

90. The landlord is obligated to return the security deposit and prepaid rent pursuant to NEB. REV. STAT. §§ 76-1416(2), 76-1420(1), 76-1425(4) (termination based on landlord's noncompliance), 76-1426(2) (landlord failure to deliver possession), 76-1429(2) (termination due to fire) and 76-1430 (termination due to landlord's unlawful ouster) (Cum. Supp. 1974).
91. It appears obvious that the tenant must have vacated the premises before he is entitled to the return of his deposit, otherwise a holdover tenant could demand the deposit return before he vacated. Section 2.101(b) of the URLTA explicitly provided that the tenant was entitled to a deposit return only after "delivery of possession." NEB. REV. STAT. § 76-1416 (Cum. Supp. 1974) does not include this provision. Nevertheless, the section should be interpreted to allow the tenant to demand the deposit only after he has left. Support for this argument is found

Section 76-1416(2) provides that the landlord can cover rent payments which are due with prepaid rent and that he can cover the amount of damages caused by the tenant's noncompliance with the rental agreement or with section 76-1421 with the security deposit. The URLTA counterpart to this section provided that the landlord could *only* use the security deposit to cover damages resulting from noncompliance with the section 76-1421 counterpart.⁹² This limited the landlord's use of the security deposit to only important acts of noncompliance. The Nebraska Legislature added the phrase "for noncompliance with the rental agreement"; therefore, the landlord can cover *any* breaches of the agreement with the security deposit. This may result in the landlord "finding" a breach so as to be able to hold at least part of the deposit.⁹³ He risks little by such effort, and he may gain the deposit.

If the landlord fails to return the deposit or to send the itemization notice, the tenant can of course sue for any provable damages. The URLTA section further provided that if the landlord should fail to return the deposit as prescribed, the tenant could sue also for punitive or liquidated damages and reasonable attorney's fees. This was an important provision, for it gave the tenant an incentive to sue to collect a wrongfully withheld deposit.⁹⁴ It also forced

in the language which requires the tenant to designate where the deposit should be sent.

92. Upon termination of the tenancy property or money held by the landlord as prepaid rent and security may be applied to the payment of rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with the rental agreement or section 76-1421. The balance, if any, and a written itemization shall be delivered or mailed to the tenant within fourteen days after demand and designation of the location where payment may be made or mailed.
- NEB. REV. STAT. § 76-1416(2) (Cum. Supp. 1974) (emphasis added). *Inter alia*, the italicized words were added in the Nebraska statute.
93. NEB. REV. STAT. § 76-1416(4) (Cum. Supp. 1974) provides that neither the landlord nor the tenant is precluded from bringing a suit to recover damages. Therefore, the issue is not one of ultimate compensation, but rather of what the security deposit may be used for.
94. (c) If the landlord fails to comply with subsection (b) or if he fails to return any prepaid rent required to be paid to the tenants under this Act the tenant may recover the property and money due him together with damages in an amount equal to [twice] the amount wrongfully withheld and reasonable attorney's fees.

URLTA § 2.101(c).

NEB. REV. STAT. § 76-1416(3) (Cum. Supp. 1974) provides that "[i]f the landlord fails to comply with subsection (2) the tenant may recover the property and money due him and reasonable attorney's fees."

It should be noted that the inference of both sections is that there may be no damages merely because the landlord failed to send the written itemization.

the landlord into thinking twice before withholding a deposit. Section 76-1416(3) does not include the extra damages provision; the tenant is only entitled to recover the wrongfully withheld money and reasonable attorney's fees. The result will be that landlords in Nebraska will risk less in withholding deposits and tenants will have less reason to sue for small amounts. The NRLTA strictures are thus more likely to go unheeded.⁹⁵

B. Duty to Disclose Identity

One of the major problems in Nebraska has been that tenants often have to deal with an anonymous or absentee landlord. The tenant rents from an agent, and often pays his rent to the agent. If a dispute arises, or if a demand is made, the tenant knows only the agent, and often the agent will disclaim any responsibility with respect to the problem.

Section 76-1417 is designed to "smoke out" the landlord.⁹⁶ It provides that either the landlord or any person authorized to enter into a rental agreement on his behalf shall disclose to the tenant the name and address of the person authorized to manage the premises and of the owner or person authorized to act for the

95. The Urban Affairs Committee of the 1975 Nebraska Legislature recognized this; it provided an amendment as follows:

(7) Any person who violates the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than one hundred dollars and not more than five thousand dollars.

NEB. LEG. JOUR., 84th Leg., 1st Sess. 954-55 (March 19, 1975). The bill was not adopted.

96. (1) The landlord or any person authorized to enter into a rental agreement on his behalf shall disclose to the tenant in writing at or before the commencement of the tenancy the name and address of:

(a) The person authorized to manage the premises; and

(b) An owner of the premises or a person authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for notices and demands.

(2) The information required to be furnished by this section shall be kept current and this section extends to and is enforceable against any successor landlord, owner, or manager.

(3) A person who fails to comply with subsection (1) becomes an agent of each person who is a landlord for the purpose of:

(a) Service of process and receiving and receipting for notices and demands; and

(b) Performing the obligations of the landlord under sections 24-568 and 76-1401 to 76-1449 and under the rental agreement and expending or making available for the purpose all rent collected from the premises.

NEB. REV. STAT. § 76-1417 (Cum. Supp. 1974).

owner for purposes of service and of receiving demands. This information must be kept current.

The URLTA draftsmen identified the "person authorized to enter into a rental agreement" with the "person collecting the rent".⁹⁷ If the disclosure obligations were not complied with, *this* person was deemed responsible for certain landlord duties. The Nebraska statute does not clearly reflect this identity. The person authorized to enter into the rental agreement may not be the person authorized to collect the rent. This may present problems, for if the information is not disclosed, and the person authorized to enter into the rental agreement is absent, there may be no one under the statute responsible for the landlord's duties. To resolve this, it is submitted that the statute be interpreted as the URLTA draftsmen hoped it would be.⁹⁸

If the person responsible for disclosing this information about the manager and owner fails to do so, he is deemed to be the agent of the landlord for the purpose of (1) receiving service; (2) receiving and receipting for notices and demands; and (3) performing the obligations of the landlord under the URLTA and the rental agreement. Thus, the needed names and addresses should be flushed out, for few landlords will want to be in a situation in which an agent can receive service for them and few agents will want to be liable for the landlord's obligations.⁹⁹

One inherent ambiguity relates to the potential extent of the agent's liability. Section 76-1410(5) provides that "a manager who fails to disclose as required by section 76-1417" is, by definition, a landlord. One would infer that the manager would then be responsible as a landlord.¹⁰⁰ However, section 76-1417 provides that the

97. URLTA § 2.102, Comment.

98. It is also possible that a truly "Machiavellian" landlord could instruct his agent-manager not to disclose who he is, and then fire him. The manager would be relieved of any future obligations he might have when he is terminated and after written notice of such termination is given to the tenant. NEB. REV. STAT. § 76-1420(2) (Cum. Supp. 1974). Admittedly, once a new manager is appointed, he becomes responsible if he does not disclose who the landlord is. NEB. REV. STAT. § 76-1417(2) (Cum. Supp. 1974). But the landlord may not appoint another. Of course, the tenant could argue that the person designated to collect rent becomes the surrogate landlord, but as indicated, it is not necessary that this person also be the person "authorized to enter into the rental agreement" on the landlord's behalf.

99. The owner will have an interest in disclosure, for without disclosure there could be legal service on this created agent, thus increasing the chance of default judgments.

100. "In the absence of such disclosure the person collecting the rent shall be deemed to have the authority to accept notices and service and to provide for the necessary maintenance and repairs." URLTA § 2.102, Comment.

manager who fails to disclose *only* becomes the agent of the landlord for the purpose of performing the obligations of the landlord and "expending or making available for the purpose all rent collected from the premises."¹⁰¹ The difference may be important, for this phrase seems to limit the agent's exposure. If, for example, rent were \$200 and damages resulting from a breach of the rental agreement were \$1,000, the "landlord" would be liable for the damages. The "agent of the landlord" would also be liable, but not necessarily for the complete amount; he would apparently be liable, pursuant to the section quoted above, only to the "extent of making available for the purpose all rent collected;" this rent may be only \$200. The emphasis is on using the collected rent to perform the obligations. In other words, the agent is seen as a rent conduit. This puts a reasonable ceiling on his liability, but it does not eliminate his personal risk.

The failure to disclose may be a peccadillo, and it seems unreasonable to expose such a wrong-doer to a sky-is-the-limit liability. Moreover, by limiting the agent's exposure in this way, the tenant is not unduly injured. He still has his rights against the landlord and he is in the same position with respect to exercising them as he is under existing law. The agent's personal risk lies in the fact that if the agent does not have the rent collected or if he has already passed it on to the undisclosed landlord, he is still liable to use an equivalent amount to perform the obligations. This threat should induce disclosure. The compromise reached satisfied many interests.

C. Duty to Deliver Possession

A frequent problem in landlord-tenant relations is that the demised premises are not ready for occupancy on the agreed upon date. Often a prior tenant is holding-over on a prior term. Common law jurisdictions differ with respect to whether there is an implied warranty on the part of the landlord to deliver *actual* possession. The American rule is that there is no such implied warranty; the landlord only conveys the *right* to possession. The En-

101. (3) A person who fails to comply with subsection (1) becomes an agent of each person who is a landlord for the purpose of:

(a) Service of process and receiving and receipting for notices and demands; and

(b) Performing the obligations of the landlord under sections 24-568 and 76-1401 to 76-1449 and under the rental agreement and *expending or making available for the purpose all rent collected from the premises.*

NEB. REV. STAT. § 76-1417(3) (b) (Cum. Supp. 1974) (emphasis added).

glish rule is that there is an obligation to deliver actual possession. Nebraska has adopted the English rule.¹⁰² If the landlord fails to deliver possession, the second tenant can rescind the lease.¹⁰³ He can also recover damages (e.g., the rental value of the premises less the reserved rent), plus special damages if they are certain and provable.¹⁰⁴ The landlord can, of course, sue the hold-over tenant for possession and for damages; the second tenant could also sue the "trespassing" occupier for possession.¹⁰⁵

Section 76-1418 provides that the landlord shall deliver possession to the new tenant.¹⁰⁶ In spite of some arguments that this may mean legal possession or only the right to possession,¹⁰⁷ this provision restates the English rule.¹⁰⁸ "Possession" means actual possession and not the legal right to possession. The last sentence of section 76-1418, which is not found in the URLTA counterpart section, provides that the landlord who makes reasonable efforts to "obtain" possession will not be liable to the tenant. This must refer to actual possession. Section 76-1426, the corresponding remedial section, permits the tenant to abate the rent if he does not receive possession; this too must refer to actual possession.

The first sentence of section 76-1418 provides that the premises must be delivered "in compliance with the rental agreement and section 76-1419." This is an important "sleeper" clause for it may permit the tenant to use section 76-1426 remedies in situations in which the landlord does not comply at the commencement of the term with section 76-1419, which requires the landlord to keep the premises fit.¹⁰⁸ These remedies will be in addition to the normal remedies associated with section 76-1419.¹⁰⁹ For example, if the landlord knowingly delivers premises which do not substantially comply with the requirements of the applicable minimum housing codes materially affecting health and safety, section 76-1419(1) would have been violated. Section 76-1425 provides that in such

102. *Herpolsheimer v. Christopher*, 76 Neb. 355, 111 N.W. 359 (1907).

103. *Canaday v. Krueger*, 156 Neb. 287, 56 N.W.2d 123 (1952); *Poulos v. Skregas*, 110 Neb. 296, 193 N.W. 703 (1923).

104. 76 Neb. 355, 111 N.W. 359 (1907).

105. *Gregory v. Pribbeno*, 143 Neb. 379, 9 N.W.2d 485 (1943).

106. The analysis of this section will focus on the holdover problem. There will be few interpretive problems if it is the landlord who is occupying the dwelling when it is to be delivered to the tenant.

107. Comment, *The Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?*, 48 ST. JOHN'S L. REV. 546, 556 (1974).

108. Davis, *URLTA, Kansas and the Common Law*, 21 KAN. L. REV. 387, 400 (1973).

109. See notes 151-65 and accompanying text *infra*.

a situation, the tenant may terminate the tenancy, sue for damages or bring an action for injunction. It does not provide that the tenant may abate rent payment. Section 76-1426, however, provides that the tenant will be able to abate rent until possession is delivered and that he may demand "performance of the rental agreement" by the landlord.¹¹⁰

Can the tenant move into the dwelling, refuse to pay any rent, and demand landlord compliance? The answer may be yes if "possession" in section 76-1418 means possession "in compliance with . . . section 76-1419."¹¹¹ Admittedly, some would consider such an interpretation extreme, but it has much to say for it. It would impose an obligation on the landlord to deliver suitable premises at the commencement of the term, and if he does not so comply, the tenant will have an important weapon (e.g., rent abatement) to compel compliance. This may serve all parties beneficially.

The landlord may bring an action for possession against any person wrongfully in possession and he may recover section 76-1437(3) damages. Section 76-1437(3) provides damages in the amount of three months' periodic rent or of threefold the actual damages, whichever is greater, and reasonable attorney's fees. These punitive damages are appropriate as a method of assuring that hold-over tenants, for example, move out when they should.¹¹² But section 76-1437(3) only permits these punitive damages if the tenant's hold-over is willful and not in good faith. Is the landlord's action for punitive damages pursuant to section 76-1418 (presuming he can maintain such an action) limited in this same way? Apparently it is, for section 76-1418 calls for the damages "provided" in section 76-1437(3), and they are only provided for if the hold-over tenant is acting willfully and not in good faith. Moreover, the tenant's parallel recovery section provides for these punitive damages *only if* the wrong done is willful and not in good faith.¹¹³ It would be absurd to limit the real aggrieved party, i.e.,

110. If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 76-1418, rent abates until possession is delivered and the tenant shall: . . .

(2) Demand performance of the rental agreement by the landlord. . . .

NEB. REV. STAT. § 76-1426(2) (Cum. Supp. 1974).

111. NEB. REV. STAT. § 76-1418 (Cum. Supp. 1974).

112. It is difficult to construe this provision in any other way than as punitive. Its constitutionality is therefore in doubt.

113. If a person's failure to deliver possession is willful and not in good faith, an aggrieved person may recover from that person an amount not more than three months' periodic rent or threefold the actual damages sustained by him, whichever is greater, and reasonable attorney's fees.

NEB. REV. STAT. § 76-1426(2) (Cum. Supp. 1974).

the tenant, while not equally restricting the landlord. As indicated, the aggrieved tenant may also sue the "trespassing" occupier. This is reasonable for he is the one entitled to possession.

The final sentence in section 76-1418 is not in the URLTA counterpart section.¹¹⁴ It provides that if the landlord uses reasonable efforts to obtain possession, he shall not be liable for an action under this section. As a practical matter, this clause may relieve the landlord of the obligation he had under the first sentence. What had appeared to be an obligation which would provide tenants with assurance that they would get the premises, is watered down to give them this assurance only if the landlord is at fault. This is a mid-way position between the American and English rule, and it modifies existing Nebraska law.

What "reasonable efforts" means is uncertain. Of course, it will depend on the facts of each particular case. Nevertheless, at a minimum, it should require the landlord to pursue judicial remedies against the hold-over. The fact that section 76-1418 states that the landlord "may" bring such action does not infer that he need not in some cases. For example, if the landlord does not deliver possession on the due date, the potential tenant may elect to terminate. If he does so, the landlord may, or may not, institute an action against the hold-over. But where the new tenant wants possession, it is reasonable to require the landlord to institute, at a minimum, a repossession suit. This is consistent with the URLTA's preference for the judicial resolution of problems.

The meaning of "not be liable for an action" also needs interpretation. Section 76-1426, the tenant's remedial section, begins: "If the landlord fails to deliver possession of the dwelling unit to the tenant, as provided in section 76-1418, rent abates until possession is delivered." The tenant then has the alternative remedies of termination or a damage suit. Is it possible that if the landlord uses reasonable efforts to obtain possession the remedies provided in this section are inoperative and the tenant without possession will be liable for rent? The answer must be no. The section 76-1418 words "not be liable for an action" imply that the landlord

114.

At the commencement of the term the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and section 76-1419. The landlord may bring an action for possession against any person wrongfully in possession and may recover the damages provided in subsection (3) of section 76-1437. *If the landlord makes reasonable efforts to obtain possession of the premises, he shall not be liable for an action under this section.*

NEB. REV. STAT. § 76-1418 (Cum. Supp. 1974). The emphasized sentence was not in the URLTA counterpart.

will be saved money in those cases in which he tries his best. The implication is not that the tenant will remain liable for rent even though he was not given actual possession. The appropriate resolution is to allow rent to abate when actual possession is not delivered, regardless of the landlord's efforts to deliver possession. The landlord who makes a reasonable effort will only be relieved of a suit for damages.

Even if the landlord does not use any efforts to gain possession, he may still not be liable to the tenant for damages. This is one of the most puzzling interpretation problems in the NRLTA. Section 76-1426 (2) does not explicitly provide that the tenant can sue the landlord for damages, while the URLTA provided that he could. The NRLTA provides only for suit against a person in possession and this would not be the landlord in a hold-over case.¹¹⁵ One inference is that in hold-over cases there cannot be a suit against the landlord, regardless of whether the landlord makes reasonable efforts or not to deliver possession. However, section 76-1405 provides that every right can be enforced by an action. The tenant does have a right to actual possession, at least in cases in which the landlord does not use his best efforts to rid the premises of the wrongdoer. Therefore, if the first sentence of section 76-1418 is to have any meaning beyond a requirement that the landlord not personally withhold actual possession from the tenant, it is appropriate that the tenant be allowed to sue the landlord for damages if he does not use reasonable efforts to get possession.¹¹⁶ This is not only in line with the existing Nebraska law which allows the preferred "English rule," but it is also the best way to effectuate uniformity in the landlord-tenant law.

D. Duty to Maintain

In Nebraska, the rule of "caveat tenant" prevailed; a landlord did not impliedly warrant that the premises were fit and habitable at the commencement of the term. The tenant took the conveyance

115. If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 76-1418, rent abates until possession is delivered and the tenant shall:

(2) Demand performance of the rental agreement by the landlord and, if the tenant elects, maintain an action for possession of the dwelling unit against [the landlord or] any person wrongfully in possession or *wrongfully withholding possession* and recover the damages sustained by him.

NEB. REV. STAT. § 76-1426 (Cum. Supp. 1974). The bracketed words were deleted from the URLTA counterpart, and the underlined words were added. Of course, it is possible to interpret the person "wrongfully withholding possession" as the landlord, but this seems counter-intuitive.

116. NEB. REV. STAT. § 76-1405 (2) (Cum. Supp. 1974).

“as is.”¹¹⁷ *A fortiori*, the landlord did not impliedly agree to repair and to maintain the premises during the term.¹¹⁸ The agrarian justification for this rule once made sense. The leased property was the land, and the tenant could determine for himself the condition of the property by inspection. The tenant was believed to be equipped to make the repairs if necessary. Moreover, during the term, the landlord was not in possession and, therefore, would not necessarily know what repairs were needed. Even if he should know, he could not infringe on the tenant’s private domain to make the repairs.

The Nebraska courts fashioned a few exceptions to this harsh general rule.¹¹⁹ The landlord did have to disclose the existence of latent and defective conditions at the beginning of the term of which he actually knew.¹²⁰ He was responsible for maintaining common areas in a reasonable fashion and for inspecting for problems as a reasonably prudent person would.¹²¹ The landlord was also responsible for maintenance and repair if a statute or ordinance required him to keep the premises safe.¹²² Finally, he was responsible if he had promised or covenanted to maintain and repair the premises.¹²³ In all these situations, if the tenant were injured as a result of the landlord’s noncompliance, and if the tenant were not culpable himself (e.g., if he were not contributorily negligent), the tenant could recover personal injury damages. However, these were the narrow exceptions to the general Nebraska rules of “caveat tenant” and “no duty to maintain.”

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117. *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966); *Wright v. Barclay*, 151 Neb. 94, 36 N.W.2d 645 (1949); *Roberts v. Rogers*, 129 Neb. 298, 261 N.W. 354 (1935).
118. See *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966); *Sipprell v. Merner Motors*, 164 Neb. 447, 82 N.W.2d 648 (1957); *Quist v. Duda*, 159 Neb. 393, 67 N.W.2d 481 (1954); *Bartholomew v. Skelly Oil Co.*, 144 Neb. 51, 12 N.W.2d 122 (1943); *Roberts v. Rogers*, 129 Neb. 298, 261 N.W. 354 (1935); *Daggett v. Panebianco*, 106 Neb. 572, 184 N.W. 177 (1921); *Young v. Rohrbough*, 88 Neb. 101, 129 N.W. 167 (1910); *Murphy v. Illinois Trust & Sav. Bank*, 57 Neb. 519, 77 N.W. 1102 (1899); and *Turner v. Townsend*, 42 Neb. 376, 60 N.W. 587 (1894).
119. For example, if the landlord attempted to make repairs even where he was not obligated to do so, he would be culpable for negligence. See *Carlson v. City Sav. Bank*, 82 Neb. 582, 118 N.W. 334 (1908).
120. *Rankin v. Elizabeth Kountze Real Estate Co.*, 101 Neb. 174, 162 N.W. 531 (1917); *Davis v. Manning*, 98 Neb. 707, 154 N.W. 239 (1915).
121. *Smith v. Rigguto*, 133 Neb. 655, 276 N.W. 406 (1937); *Blotckey v. Gahm*, 108 Neb. 275, 187 N.W. 640 (1922).
122. *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N.W. 952 (1928); *Weitz v. United States Trust Co.*, 143 Neb. 703, 10 N.W.2d 632 (1943); *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N.W. 393 (1938).
123. *Zuroski v. Estate of Strickland*, 176 Neb. 633, 126 N.W.2d 888 (1964); *Fried v. Burhmann*, 128 Neb. 590, 259 N.W. 512 (1935).

In the last fifteen years, several courts and legislatures have clearly reversed the general rule, finding it inappropriate in the modern, urban residential setting.¹²⁴ Landlords are charged with a duty to provide habitable premises at the commencement of the term and to repair and to maintain the premises during the term. This development is salutary, for it recognizes the realities of life. Tenants expect a package of residential services, and today's landlords are clearly more able than today's transient tenants to provide them. The precise parameters of the new obligation vary. In some cases, the local housing code provisions relating to health and safety define the obligation. In other cases, substantial compliance with such codes define the obligation. In some instances, the imposed standards of habitability are worked out completely independently of any particular local code obligations, while in other cases such code standards at least inform the courts with respect to the articulation of a standard.¹²⁵ Neither the Nebraska courts nor the Nebraska Legislature had imposed such a general obligation on the landlord.

Section 76-1419 is the heart of the NRLTA, and it dramatically changes existing law. It is also very different from its URLTA counterpart. The Nebraska result is an unclear and undesirable compromise between existing law and the URLTA.¹²⁶

124. One of the first of these cases is *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

125. For a treatment of the parameters of the landlord's obligation see, *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, *supra* note 1.

126. At this point, it is instructive to examine the liability of landlords after the reversion is conveyed. Statutorily imposed obligations present few common law problems. The first landlord, or the successor landlord, is responsible depending on the relevant statutory language. In other words, who is a "landlord" for the purpose of the particular statute? Section 76-1410(5) defines landlord as "owner, lessor, a sublessor." It is arguable that once a landlord has conveyed the reversion he is no longer an owner or lessor, and, therefore, is no longer responsible. However, section 76-1420(1) provides certain specified ways in which this first landlord can relieve himself of liability by transfer. Therefore, the negative inference is that if the first landlord does not comply with these rules, he will remain an owner or a lessor for the duration of the tenancy.

The question of landlord covenants is more complicated. In Nebraska, as at common law, a landlord who conveyed the reversion remained responsible for any promise he had made to the tenant. Only rarely would the courts find an implied assignment of the obligation. The tenant had "bargained" for this landlord's promise, and it was believed unfair to allow the landlords to switch. This was particularly true in that the first landlord could protect himself by extracting an indemnification letter from the successor landlord or by providing in the original lease that he would not remain liable to the tenant if the

The first part of the URLTA counterpart to this section imposed a duty on the landlord, enforceable by the tenant, to comply with applicable housing codes materially affecting health and safety.¹²⁷ Section 76-1419(1)(a)¹²⁸ follows the form of the URLTA,¹²⁹ but its language is different in several significant respects.

First, the Nebraska landlord need only "substantially" comply with the code. This is consistent with some case law;¹³⁰ nevertheless, it is ambiguous in terms of the meaning of "substantially" and will work to the ultimate disadvantage of both landlords and tenants for several reasons. Tenants will not know when they can

property was transferred. The successor landlord was nevertheless primarily responsible if the covenant, such as a duty to repair, ran with the land. In some jurisdictions, the successor landlord also had to have notice of the obligation, but in Nebraska such actual knowledge was unnecessary. Apparently, if the successor landlord had knowledge of the tenancy, then he was charged with knowledge of the tenant's rights, and therefore obligated. *Friedlander v. Rider*, 30 Neb. 783, 47 N.W. 83 (1890). See also *Jamson v. Poulos*, 184 Neb. 480, 168 N.W.2d 526 (1969).

Section 76-1420(1) delineates under what conditions the first landlord is relieved of liability under the rental agreement and the URLTA. The section provides that a landlord who conveys the premises in a good faith sale to a bona fide purchaser is relieved of liability for events occurring after he gives written notice of the transfer to the tenants. The provision encourages the alienability of land, for landlords will be able to wash their hands completely of all the indicia of ownership (e.g., their responsibilities). Is this the only method of transfer by which a landlord can be relieved of an obligation? What if there is a gift, or a devise? These may be legitimate transfers and not ones designed to evade legitimate obligations; nevertheless, the section hints, by negative inference, that the landlord will remain liable under these conditions. The section insists that only the landlord with whom the tenant has had any dealings remains responsible, except in a very narrow set of legitimate transfers. To prevent any abuses, some otherwise legitimate transfers (e.g., gifts) will not relieve a landlord of his duty. In other words, section 76-1420 provides a limited safe-harbor. If the landlord wants more protection, he can include the necessary clause in his lease or he can extract the necessary indemnification letter.

Regardless of whether the prior landlord remains a landlord or not, the transferee, by definition, will become the landlord, and thus responsible for the landlord's duties. This will assure the tenant that there will always be at least one person responsible to him.

127. URLTA § 2.104(a) (1).

128. "The landlord shall substantially comply, after written or actual notice, with the requirements of the applicable minimum housing codes materially affecting health and safety." NEB. REV. STAT. § 76-1419(1)(a) (Cum. Supp. 1974).

129. "A landlord shall comply with the requirements of applicable building and housing codes materially affecting health and safety." URLTA § 2.104(a) (1).

130. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

take remedial steps and landlords will not know with certainty when they have complied with the provisions of the NRLTA.

A second way in which the NRLTA differs from the URLTA is that the landlord is only obligated to comply after written or actual notice. The URLTA did not require such notice. The landlord was simply obligated to comply with the applicable code. The Nebraska Legislature first amended the proposed bill to add that the landlord must substantially comply only after written notice; this implied a procedure of notification from the tenant.¹³¹ This amendment was further amended on the floor of the legislature so as to provide that if the landlord had actual notice of the noncompliance he would be responsible.¹³² This at least relieved the tenant of the responsibility of activating the statutory provision, but it still may temporarily relieve the landlord of many obligations which the URLTA would have imposed on him immediately. Moreover, since notice is generally defined as a situation in which the landlord has reason to know that a defect exists, the use of "actual" vitiates its constructive force.¹³³ The landlord apparently has no duty to find out about defects, but once he knows of them, he must comply with the applicable code. It would have been preferable for the

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131. And it says in essence that the bill provides that if, for example, there is a defect in the apartment or the house that does not bring the house up to minimum standards that the tenant shall give notice, written notice to the landlord to the affect that defect does exist. This is designed so that the landlord doesn't have to go in there any more frequently than the tenant wants him to go in there for periodic inspections. If the tenant . . . if there is a defect in there the landlord does not know about then the tenant puts the landlord on notice in writing, and then the landlord is liable for that problem.

UNICAMERAL TRANSCRIPTS, 83d Leg., 2d Sess. 3320 (February 11, 1974) (remarks of Sen. Goodrich).

132. SENATOR CHAMBERS: It seems to me that compliance, required compliance by the landlord with the minimum code is on a written notice by the tenant of the condition of the premises that do not meet the minimum code is that correct?
 SENATOR GOODRICH: This is true. And what we are trying to make sure of is that the landlord isn't pestering the tenant with inspections.
 SENATOR CHAMBERS: Well, suppose the landlord had actual notice but not as a result of that what the tenant wrote? If it's a defect which can clearly be seen. Will the landlord not be liable for that defect until he receives written notice from the tenant.

UNICAMERAL TRANSCRIPTS, 83d Leg., 2d Sess. 5321-22 (February 11, 1974) (remarks of Senators Goodrich and Chambers).

133. Section 76-1413 provides that a person has notice of a fact if, *inter alia*, "from all the facts and circumstances known to him at the time in question he has reason to know that it exists." Thus, notice means what has traditionally been termed constructive or inquiry notice.

Nebraska Legislature to have required simple compliance with a code. This would have placed upon the landlord the obligation of inspecting his property, as most housing codes require.

A third difference is that section 76-1419(1) (a) provides that the landlord need only comply with the applicable minimum housing codes materially affecting health and safety. What is the minimum housing code? It is defined as those parts of housing codes "dealing specifically with health and minimum standards of fitness for habitation."¹³⁴ There is no recorded legislative history with respect to this definition. It is possible that the drafters misread court decisions which found minimum standards of habitability to be defined by the housing code.¹³⁵ For these courts, however, the minimum standard was the housing code, and to speak of a minimum code is nonsensical. For example, if a housing code has a given fitness standard, is a lesser standard the minimum standard of fitness? If a code should require window screens, it does not make sense to say that at a minimum only some of the windows need screens. The best definition of minimum housing code is to incorporate all those housing code standards specifically (and perhaps inherent in this word "specifically" is a directive that the standard be written very clearly) related to health and safety, or related to fitness for habitation. These are by definition minimum. Thus, "minimum housing code" should be interpreted to mean "housing code."

Section 76-1419(1) (b) provides that the landlord make the repairs and do whatever is necessary to put and to keep the premises in a fit and habitable condition.¹³⁶ This is a statutory version of the implied warranty of habitability adopted in several other states.¹³⁷ Its parameters are not defined in the act, and the URLTA version was designed to allow for case by case judicial development. Thus, the warranty could be defined by the housing code (thus repeating the thrust of the prior section) or it could expand beyond any par-

134. "Minimum housing code shall be limited to those laws, resolutions . . . or portions thereof, dealing specifically with health and minimum standards of fitness for habitation." NEB. REV. STAT. § 76-1410(2) (Cum. Supp. 1974). This language was not in the URLTA.

135. 428 F.2d 1071 (D.C. Cir. 1970).

136. "The landlord shall make all repairs and do whatever is necessary, after written or actual notice, to put and keep the premises in a fit and habitable condition." NEB. REV. STAT. § 76-1419(1) (b) (Cum. Supp. 1974).

Compare the URLTA section. "A landlord shall make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." URLTA § 2.104(a) (2).

137. See *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, *supra* note 1.

ticular code. Such judicial development has been circumscribed in the NRLTA. The penultimate sentence of section 76-1419(1) provides that if there should be a minimum housing code applicable to the premises, then the duty of the landlord under section 76-1419(1)(a) is his maximum duty. Thus, the warranty of habitability cannot impose a greater duty on the landlord than the local code. This directly reverses the original URLTA counterpart.¹³⁸

A locality can now discourage the judicial development of a warranty of habitability. By adopting a minimum housing code, the locality can assure itself that no landlord in its community will be responsible for a greater obligation. In view of the enormous power often exercised by landlord interest groups in local government, this may be troublesome. At the very least, the implied warranty of habitability will mean different things in different parts of Nebraska. Thus, the NRLTA position not only discourages uniformity among the states, it discourages uniformity within the state.

As in the prior subsection, the Nebraska landlord is only obligated to perform his duty after written or actual notice. The URLTA counterpart section would simply have imposed a duty to keep the premises fit. Although this requirement of written or actual notice poses the same problems discussed above, it is perhaps more justified here. The landlord's obligations under a judicially developed warranty will never have the precision of a code; therefore, the landlord is more in need of notice of noncompliance.

Sections 76-1419(1)(c) through 76-1419(1)(f) provide that the landlord keep all common areas of the premises in a clean and safe condition, an obligation the landlord had at common law; that the landlord maintain certain essential services, such as electrical and plumbing services, garbage services, and water and heat services; that the landlord provide and maintain garbage removal equipment; and that the landlord supply water and heat in certain circumstances.¹³⁹ None of these are surprising obligations and they ac-

138. "If there exists a minimum housing code applicable to the premises, the landlord's maximum duty under this section shall be determined by subdivision (1)(a) of this section." NEB. REV. STAT. § 76-1419(1) (Cum. Supp. 1974).

Compare the URLTA section. "If the duty imposed by paragraph (1) of the subsection (a) is greater than any duty imposed by any other paragraph of that subsection, the landlord's duty shall be determined by reference to paragraph (1) of subsection (a)." URLTA § 2.104(b).

139. The landlord shall:

(c) Keep all common areas of the premises in a clean and safe condition;

(d) Maintain in good and safe working order and condition

curately reflect the legitimate expectations of landlords and tenants.

The last sentence of section 76-1419(1) is perhaps the most difficult one in the section to interpret. It is not found in the URLTA counterpart. It asserts that: "The obligations imposed by this section are not intended to change existing tort law in the state." The apparent purpose of this amendment seems intuitively obvious; however, its origins are unclear, and, it therefore, introduces a number of difficult interpretation problems.

Does "not . . . to change" mean that tort law in the landlord-tenant area is frozen in Nebraska? This would imply that regardless of what developments there might be, there may be no judicial extension of the present rule. This interpretation is unlikely in that the sentence only provides that "the obligations imposed" are not intended to change existing tort law, not that tort doctrine can never change. But even if limited in this way, what is meant by saying that the "obligations imposed" are not intended to change the law is uncertain. Apparently, it suggests that a judge must ignore the NRLTA in deciding a tort case. This will be difficult, if not impossible to do. The NRLTA will dramatically influence all of residential landlord-tenant law. Duties and rights will change because of it. To ask a judge to decide a tort case without considering "the obligations imposed" will require super-human restraint and self-imposed myopia. But it is logically possible. For example, the Nebraska law has been that a landlord is not liable for accidents resulting from latent defects of which he did not have actual knowledge.¹⁴⁰ A court today might hold a landlord liable for accidents resulting from latent defects of which he should have known. If the court chooses to accept this second rule, the judge must apparently make his decision as if section 76-1419 did not exist.

all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;

(e) Provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal from the appropriate receptacle; and

(f) Supply running water and reasonable amounts of hot water at all times and reasonable heat except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

NEB. REV. STAT. § 76-1419(1) (c)-(f) (Cum. Supp. 1974).

140. Rankin v. Elizabeth Kountze Real Estate Co., 101 Neb. 174, 162 N.W. 531 (1917); Davis v. Manning, 98 Neb. 707, 154 N.W. 239 (1915).

It is also not clear what "tort" means. If a tenant is injured as a result of a landlord's failure to comply with 76-1419(1)(b), are his personal injuries a tort claim? It might be viewed as a suit for damages pursuant to noncompliance with a statutory obligation. If articulated in the second fashion, there has been no change in existing tort law. The argument is an unlikely one, but it is not totally far-fetched. Under existing law, if a landlord should agree to an express covenant to repair, and if he should breach the agreement, the tenant can sue and recover personal injuries caused by the breach.¹⁴¹ Is this a contract suit, analogous to the suit for damages based on noncompliance with a statute, or is it a tort suit? Although the Nebraska court has tentatively answered that it is a tort, this is hardly definitive.¹⁴²

Finally, even if "tort" can be defined, what tort "law" means is unclear. Existing tort law provides that if a landlord violates a mandatory maintenance code relating to health and safety, and if such violation is the proximate cause of an injury, the tenant can sue for damages.¹⁴³ The landlord's noncompliance is negligence per se. It is arguable that the existing tort law can, therefore, be stated as follows: If the landlord does not comply with a mandatory code related to safety, he is liable to persons injured as a result of his failure. The *particular* mandatory rule is not the tort law, it is only an element of it, such as the landlord's act would be. New legislation, such as the NRLTA, does not change the tort law, it simply changes an element of it, namely the particular mandatory rule. Therefore, the adoption of the NRLTA does not change the "law."

In sum, section 76-1419(1) is only a very rough facsimile of its URLTA counterpart. Almost all the Nebraska changes are undesirable, for not only do they cause confusion and discourage uniformity, but they also impede enlightened reform in the residential landlord-tenant area.

As discussed above,¹⁴⁴ section 76-1419(2) permits a landlord and a tenant of a single family residence to agree to have the tenant perform the landlord's duties provided in subsections (e) and (f). These include the landlord's obligations to provide for garbage disposal and to supply water and heat. Presumably, this latter obligation does not refer to situations where the "heat and hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection" because

141. *Fried v. Buhrmann*, 128 Neb. 590, 259 N.W. 512 (1935).

142. *Id.*

143. See note 38 *supra*.

144. See notes 61-73 and accompanying text *supra*.

the landlord has no obligations to supply heat and water under these circumstances.¹⁴⁵ In addition, the tenant may agree to perform certain specified maintenance work.¹⁴⁶ This is reasonable in context, for a tenant of a single family residence closely resembles an owner. Since he will have sole responsibility for the property, there will be no confusion as to which tenant will be responsible for the work. He also will probably be on a more equal footing in bargaining and will, therefore, be better equipped to protect his own position. Moreover, as further assurance that his position will be protected, the contracting-out must be in writing, it must be for consideration and it must not be for the purpose of evading the landlord's obligations.¹⁴⁷ This latter phrase may prove troublesome, for any shift in obligation will be made for the purpose of evading the obligation. The word "evading" connotes, however, the shift of obligation unfairly or in bad faith, and the statute ought to be construed in this way.

Section 76-1419(3) permits a landlord and tenant in a multiple dwelling unit also to make separate contracting-out agreements. The tenant may agree to perform the same specified repairs, maintenance tasks, alterations, or remodeling as the tenant of a single family residence. The section also provides that the agreement is valid only if entered into in good faith, for purposes other than evading the obligations of the landlord, and for adequate consideration. In addition to following the section 76-1419(2) requirements, the contracting-out to a tenant of a multiple unit must be in a separate writing.¹⁴⁸ This is designed to impress on the tenant most emphatically what he is agreeing to do. Nevertheless, this contracting-out clause is troublesome, for the situation of a tenant in a multiple apartment is not analogous to that of the owner. He probably will not have the bargaining power of the single family residence tenant, and if more than one tenant agrees to do the work, confusion is almost certain.

The URLTA counterpart of this section was sensitive to these problems and explicitly prohibited the tenant from agreeing to remedy a landlord's noncompliance with the housing code.¹⁴⁹ That

145. NEB. REV. STAT. § 76-1419(1) (f) (Cum. Supp. 1974).

146. This work may include "specified repairs, maintenance tasks, alterations and remodeling." NEB. REV. STAT. § 76-1419(2) (Cum. Supp. 1974).

147. See notes 61-70 and accompanying text *supra*.

148. See notes 64-70 and accompanying text *supra*.

149. (d) The landlord and tenant of any dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only if

very important obligation was to stay where the statute put it. However, this prohibition on what can be contracted-out is not in the URLTA. Regardless of this, the landlord may not be too cavalier in contracting-out important obligations, for such an agreement cannot affect his obligations to other tenants. If a landlord, for example, contracted-out his obligation to keep the common areas safe to *each* of his tenants in an effort to relieve himself completely of this obligation, the courts would certainly find that his purpose was to evade his obligations.¹⁵⁰

Section 76-1419(4) provides that a landlord may employ a tenant to perform the obligations of the landlord. This should only occur as specified in sections 76-1419(2) and 76-1419(3). If the tenant did not have to comply with the limitations of these sections and could agree orally, or for inadequate consideration, the restrictions of those sections would be easily circumvented. The design of the statute is to allow only "regulated" shifts of duty.

The tenant's remedies for a landlord's breach of the rental agreement or noncompliance with section 76-1419 are set forth in sections 76-1425 and 76-1427.¹⁵¹ They build on a confusing Nebraska com-

(2) the work is not necessary to cure noncompliance with subsection (a) (1) of this section;
URLTA § 2.104(d) (2).

150. NEB. REV. STAT. § 76-1419(3) (b) (Cum. Supp. 1974).

151. Section 4.103 of the URLTA provided that in certain narrow circumstances, the tenant could repair the premises and deduct the cost of such repairs from his rent.

(a) If the landlord fails to comply with the rental agreement or Section 2.104, and the reasonable cost of compliance is less than [\$100], or an amount equal to [one-half] the periodic rent, whichever amount is greater, the tenant may recover damages for the breach under Section 4.101(b) or may notify the landlord of his intention to correct the condition at the landlord's expense. If the landlord fails to comply within [14] days after being notified by the tenant in writing or as promptly as conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and, after submitting to the landlord an itemized statement, deduct from his rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.

(b) A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

URLTA § 4.103.

This would have been an important tenant remedy for if the tenant took advantage of it, and was later sued for possession based on non-payment of rent, he would have a defense. Whether or not he could make up his rent payment after such a suit if it was found that he were wrong is uncertain.

mon law pattern in which lease covenants were apparently considered to be independent. The doctrine of independent covenants is an historical legacy of property law and it is premised on a view of a lease as a conveyance.¹⁵² According to the doctrine, if the landlord were to breach his agreement, the tenant's remedy was to sue for damages, and not to terminate the lease. Normal damages were the difference between the value of the leasehold with and without the breach;¹⁵³ moreover, special damages could be recovered if specific and provable.¹⁵⁴ The only clearly dependent covenant was the express or implied warranty of quiet enjoyment.¹⁵⁵ If the landlord were to interfere substantially with the tenant's quiet enjoyment, the tenant could vacate within a reasonable time and terminate the tenancy.¹⁵⁶ The tenant could, of course, sue for additional damages from this breach. Nebraska did not adopt the common law doctrine of partial constructive eviction which permitted the tenant to stay and not to pay rent. If there were a partial interference with the tenant's right of quiet enjoyment, his only remedy was to sue for damages.¹⁵⁷

Section 76-1425(1) provides that if there is a material noncompliance with the rental agreement or a noncompliance with section 76-1419, the tenant may terminate the tenancy.¹⁵⁸ This is an articulation of the doctrine of dependent covenants. It is premised on the view of a lease as a contract, a position certainly held by all parties today. In the event that there are such noncompliances,

As *quid pro quo* for the deletion of this important clause, the Nebraska Legislature also deleted section 4.202 of the URLTA, which provided for the landlord to make certain tenant-obligated repairs and to bill the tenant for them as rent.

And number eight is the landlord side of the repair and deduct section. We struck the tenant's side of the repair and deduct and we are agreeing to go ahead and strike the landlord's side.

UNICAMERAL TRANSCRIPTS, 83d Leg., 1st Sess. 5321 (February 11, 1974) (remarks of Sen. Goodrich).

152. One purported purpose of the URLTA was to rid landlord-tenant law of this anachronism. See URLTA § 1.102, Comment. See also notes 19-27 and accompanying text *supra*.
153. If the tenant was out of possession, the measure of damages was the rental value of the property for the unexpired term less the amount of rent reserved. *Dinkel v. Hagedorn*, 156 Neb. 419, 56 N.W.2d 464 (1953); *Cannon v. Wilbur*, 30 Neb. 777, 47 N.W. 85 (1890).
154. *Schneider v. Reeves*, 98 Neb. 629, 154 N.W. 210 (1915).
155. *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471, 95 N.W. 688 (1901).
156. *Kimball v. Lincoln Theatre Corp.*, 125 Neb. 677, 251 N.W. 290 (1933).
157. *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, 96 N.W. 487 (1902).
158. Of course, if the tenant caused the condition, he may not terminate. NEB. REV. STAT. § 76-1425(1) (Cum. Supp. 1974).

the tenant must deliver a written notice to the landlord specifying these acts or omissions and stating that in not less than thirty days the tenancy will terminate unless the landlord remedies the defects within fourteen days. If the problems are remedied within the specified time, there may be no termination. If substantially the same act or omission reoccurs within six months, the tenant may terminate on a simple fourteen days' notice.

This section raises at least two unique problems.¹⁵⁹ First, the ambiguities inherent in section 76-1419, such as those raised by the word "substantially", will not precisely delineate when the tenant can exercise his rights pursuant to section 76-1425(1). In such uncertain situations, both landlord and tenant must fumble along, not knowing with certainty what their rights are. Second, sections 76-1419(1) and (2) are only operative if the landlord has actual notice of the defect. Can the tenant's notice pursuant to section 76-1425(1) also constitute the section 76-1419 notice to the landlord? In other words, if the landlord fails to maintain screens on the windows, as required by a housing code, can the tenant give him notice of the defect, thus placing the landlord in noncompliance with section 76-1419(1) at the same time he elects to terminate thirty days later? The answer should be yes. It would be unreasonable for the tenant to send two notices to the landlord, one to inform him of the noncompliance and of the violation of section 76-1419, and a second one to serve as the catalyst for a section 76-1425 termination. Since the landlord will generally have at least fourteen days to correct the problem, it is fair to require only that the tenant send one notice.

Whereas section 76-1425(1) permits the right to terminate if there is a material noncompliance with the rental agreement or a noncompliance with section 76-1419 materially affecting health and safety, section 76-1425(2) provides for damages and injunctive relief, and reasonable attorney's fees if the landlord's noncompliance is willful.¹⁶⁰ This should deter wrongful, and particularly heinous, landlord noncompliance. With respect to damages, the URLTA counterpart to this section is straight-forward.¹⁶¹ The NRLTA sec-

159. An additional problem may be raised by the meaning of "substantially the same." This is discussed more fully in the text associated with notes 213-14 *infra*.

160. NEB. REV. STAT. § 76-1425(3) (Cum. Supp. 1974) provides that these remedies are cumulative with the termination remedy.

161. (b) Except as provided in this Act, the tenant may recover actual damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or Section 2.104. If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees.

URLTA § 4.101(b).

tion added the following sentence: "If the landlord's noncompliance is caused by conditions or circumstances beyond his control, the tenant may not recover consequential damages, but retains remedies provided in section 76-1427." The thrust of this provision is to permit a tenant to recover *only* the difference between the rental value without the noncompliance and the rental value with the noncompliance in those circumstances in which the noncompliance was beyond the landlord's control. This serves as a limitation on the landlord's liability. Any special damages, even if certain and provable, would not be allowed.

To distinguish between damages and consequential damages is undesirable. First, it is a difficult line to draw, and one that will certainly lead to unfortunate disputes. Second, it seems fair to compensate the tenant fully if he is injured as a result of the landlord's noncompliance, and not to compensate him only a little in some circumstances. Third, the effort to relieve the landlord of the consequences of certain acts of noncompliance when he is not at fault, which would be the case when the cause of the condition is beyond his control, is one way of allocating risk, but it is not the URLTA way. The URLTA placed certain burdens on the landlord because he was the one best able to bear the loss. The NRLTA shift is inconsistent with this position, and it will hinder uniformity in the application of the law.

A final remedy for the tenant is to give injunctive relief. This may prove to be an important remedy for him. In many circumstances, a direct judicial order that the landlord comply with his obligations will be more costly to the landlord than a payment of damages. In a tight housing market, there may be little difference in rental value in the premises with and without the breach. If this is the case, or if the breach is caused by circumstances beyond the landlord's control, the tenant may recover nothing for a landlord's breach or noncompliance. Since money damages, in such cases, will be inadequate, injunctive relief will be crucial.

Section 76-1427 introduces a new concept to Nebraska law.¹⁶² It

162.

(1) If contrary to the rental agreement or section 76-1419 the landlord deliberately or negligently fails to supply running water, hot water, or heat, or essential services, the tenant may give written notice to the landlord specifying the breach and may:

(a) Procure reasonable amounts of hot water, running water, heat and essential services during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;

(b) Recover damages based upon the diminution in the fair rental value of the dwelling unit; or

(c) Procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant

provides a particular alternative battery of remedies to a tenant denied essential services, such as heat and water.¹⁶³ It is primarily designed to get the essential services functioning when the landlord has deliberately or negligently failed to supply them.¹⁶⁴ Since it is hard to imagine a deliberate or negligent failure to supply when the circumstances are not within the landlord's control, the NRLTA addition to the URLTA, i.e., "This section is not intended to cover circumstances beyond the landlord's control," is surplusage.

The section provides that the tenant give written notice to the landlord of the noncompliance. There is no explicit grace period in this section and the notice does not guarantee the landlord a period of time to make repairs or to provide the service. The notice assures the landlord that he will know what is happening and it at least will give him a chance to remedy the situation. Once the written notice has been given, the tenant has several remedies available to him. He may procure a reasonable amount of the essential services and deduct the actual and reasonable costs of these from the rent; he may recover damages based on the diminution in the fair rental value of the dwelling; or he may procure reasonable substitute housing during the period of the landlord's noncompliance and he will be excused from paying rent during this period. If the landlord's noncompliance is deliberate, the tenant may also recover a limited amount of the rent spent for this substitute housing. In all events, the tenant can recover reasonable attorney's fees.

is excused from paying rent for the period of the landlord's noncompliance.

In addition to the remedy provided in subdivisions (a) and (c), if the failure to supply is deliberate, the tenant may recover the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent, and in any case under this subsection reasonable attorney's fees.

(2) If the tenant proceeds under this section, he may not proceed under section 76-1425 as to that breach.

(3) The rights under this section do not arise until the tenant has given written notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent. This section is not intended to cover circumstances beyond the landlord's control.

NEB. REV. STAT. § 76-1427 (Cum. Supp. 1974).

163. See also NEB. REV. STAT. § 76-1430 (Cum. Supp. 1974).

164. Of course, the tenant may not take advantage of this section if he was a cause of the problem. Moreover, he cannot take advantage of the section unless the landlord is at fault. The NRLTA made this clear by adding a last sentence to the URLTA. "[T]his section is not intended to cover circumstances beyond the landlord's control." NEB. REV. STAT. § 76-1427(3) (Cum. Supp. 1974).

Section 76-1427(1) (a) provides that the tenant may procure reasonable amounts of the essential services and deduct the actual and reasonable cost from the rent. This could lead to substantial costs being assessed against the landlord. If a new furnace is needed, the costs of supplying it will be high. It is submitted that this section be interpreted reasonably. Certainly the tenant is entitled to heat, and if the landlord deliberately or negligently fails to provide it, the tenant should be compensated. But to force a landlord to accept a new furnace which a tenant has purchased, and then to relieve a tenant of a rent obligation equal to the cost of the furnace, is oppressive. The concept of procuring reasonable amounts of essential services would seem to connote a more temporary arrangement. If a new furnace is needed, this is not a temporary accommodation. In such cases, the tenant should be limited to his section 76-1425 remedies or to his other section 76-1427 remedies.

Section 76-1427(1) (c) provides that the tenant may procure substitute housing and that he is excused from paying rent during the period of the landlord's noncompliance. If the rental house is unheated, the tenant should be able to leave and not be obligated to pay rent while there is no heat. A troublesome situation will arise if the tenant must sign another lease in order to get housing, and the first landlord then supplies heat. In this case, the tenant may wind up obligated to both landlords. Only when the landlord's action is deliberate, not merely negligent, will he have to pay for the substitute housing, and even then it is unclear if the landlord must pay for a period after he begins to supply services. The general thrust of this section is clear, but the details of interpretation are complicated. It is submitted that the courts should interpret this provision with an eye to its central purpose, that of assuring the tenant of these crucial services and of allowing him, if necessary, to take care of the problems himself, while at the same time assuring the landlord that he will not be improved out of his estate.

IV. TENANT OBLIGATIONS AND LANDLORD REMEDIES

This section examines tenant obligations and landlord remedies.¹⁶⁵ Since tenant obligations pursuant to a rental agreement have been alluded to in Section II, the tenant's statutory duties are herein examined. The landlord's remedies for tenant noncompliance with either the rental agreement or the statutory obliga-

165. Certain tenant remedies are also discussed where appropriate; for example, the tenant's remedies for abusive landlord remedial action are highlighted.

tions are analyzed, and the section concludes with an explication of how the NRLTA has vitiated whatever self-help remedies the landlord might previously have had.

A. Duty to Maintain

At common law, Nebraska tenants could neither commit active nor permissive waste; they were responsible for "any act or omission of duty . . . which results in permanent injury . . ."¹⁶⁶ This was the general rule. Notwithstanding this rule, Nebraska tenants were not responsible for changes which improved the premises.¹⁶⁷ Furthermore, they were not liable for substantial damage caused by an extraordinary or sudden event beyond their control.¹⁶⁸

The Nebraska tenants' duty to repair demised premises rested on an obligation to avoid waste. Those courts which discussed this duty did so in cases in which the tenant expressly covenanted to repair the premises.¹⁶⁹ Because of this, it is uncertain what the scope of the tenant's obligation was in the absence of such an express agreement. For example, did the tenant have an obligation to repair damage caused by ordinary wear and tear? In *Sky Harbor Air Service v. Airport Authority of the City of Omaha*,¹⁷⁰ the court gave an ambiguous answer. The tenant had leased certain buildings and ramps. Repairs became necessary as a result of the normal exposure of the property to the weather. The Nebraska Supreme Court asked if "the lessor [had] assumed the duty that otherwise rested upon the lessee"¹⁷¹ and held that the landlord had not. It was unclear as to whether the duty "otherwise rested" upon the tenant because that was the law and the law implied a tenant obligation to repair ordinary wear, or because the tenant had expressly agreed to keep the premises "in a presentable condition" and "in good repair." Regardless, it is clear that whatever tenant duties there were, they were only directed to returning the premises to the landlord in a particular physical state.

Section 76-1421 changes the prior law by relieving the tenant

166. *Hayman v. Rownd*, 82 Neb. 598, 601, 118 N.W. 328, 329 (1908). See also *Bayse v. Tri-County Feed, Inc.*, 189 Neb. 458, 203 N.W.2d 171 (1973); *Sears v. Mid City Motors, Inc.*, 179 Neb. 100, 136 N.W.2d 428 (1965); *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918).

167. *Bee Bldg. Co. v. Peters Trust Co.*, 106 Neb. 294, 183 N.W. 302 (1921).
168. *Turner v. Townsend*, 42 Neb. 376, 60 N.W. 587 (1894). See also *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N.W. 785 (1897).

169. See *Bartholomew v. Skelly Oil Co.*, 144 Neb. 51, 12 N.W.2d 122 (1943); *Blotcky v. Gahm*, 108 Neb. 275, 187 N.W. 640 (1922).

170. 174 Neb. 243, 117 N.W.2d 383 (1962).

171. *Id.* at 245, 117 N.W.2d at 383.

of some of his common law repair obligations and substituting for them other housekeeping duties.¹⁷² Section 76-1421(1) imposes certain public obligations on the tenant; section 76-1421(6) modifies the law of waste. There arises a minimal duty to repair from both these obligations. Sections 76-1421(2) to (5) impose the housekeeping duties mentioned previously; they do not mandate a duty to repair. The tenant cannot agree to do more unless such agreements are made in the manner prescribed in section 76-1419.¹⁷³ This allocation of the responsibility for repairs and housekeeping is in accord with the respective capabilities and probable expectations of all parties. The modern residential tenant has neither the money, skill, nor interest to make repairs; he legitimately expects the place in which he lives to be maintained. The modern landlord has the money, skill and interest that the tenant lacks. Furthermore, it is his property, and it is appropriate that he have the duty to spend money to repair it.

Section 76-1421(1) provides that the tenant shall "comply with all obligations primarily imposed upon tenants by applicable minimum standards of building and housing codes materially affecting health or safety." The language of this section is almost identical to that of the URLTA.¹⁷⁴ The only important change is that the tenant need only comply with "applicable minimum" standards rather than with applicable provisions of the code sections. This section imposes upon the tenant no duty to maintain or repair except to the extent that such obligations can be inferred from the tenant's responsibility to comply with the relevant public regulations. In most instances, these sorts of duties would be minimal since most codes impose the substantial repair obligations on the landlord.

The official URLTA Comment to this section indicates that the section was meant to be the converse of section 76-1419(1),¹⁷⁵ which

172. Much of the preliminary work in the URLTA was completed in the Model Residential Landlord Tenant Code (Tent. Draft 1969). This will be helpful in interpreting the URLTA and the NRLTA.

The tenant is required by this section to perform and observe enumerated obligations. Taken together, the tenant should behave as a reasonable owner of the dwelling unit would, except that when deterioration of the property necessitates repair, the landlord retains liability. The change in existing law is not great, but it is significant.

MODEL RESIDENTIAL LANDLORD TENANT CODE § 2-304, Comment.

173. See notes 61-64 and accompanying text *supra*.

174. "A tenant shall comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety. . . ." URLTA § 3.101(1).

175. See notes 128-38 and accompanying text *supra*.

prescribes parallel landlord obligations.¹⁷⁶ By treating both landlord and tenant equally with respect to their public obligations, the URLTA struck a fair balance. The NRLTA, as introduced to the legislature, paralleled the URLTA in this balance. Major amendments to section 76-1419, however, altered the parallelism dramatically. As indicated previously,¹⁷⁷ the landlord must *only* "substantially" comply with public regulations, and he must comply *only* after he has "notice" of the need to do so. These code-imposed obligations establish the landlord's maximum duties pursuant to section 76-1419, but the tenant may, under certain circumstances, be held to a higher duty under section 76-1421. For example, although the housing code may not require the tenant to maintain the plumbing fixtures, section 76-1421(4) will at least require that he keep them clean.

Such tinkering as this with a balanced uniform act and the resulting apparent advantage to landlords will cause tenant resentment. Landlord-tenant relations will be better if all parties believe that their rights and duties are fairly allocated. Vindictive individual tenant activity is common in circumstances in which the tenant believes that a landlord is overreaching; this same sentiment will be aggravated among tenants as a whole when they recognize the distortions in the NRLTA.

It would be better to have both sections similar. In comparing the two, the tenant's section is the better drafted one. It has the virtue of clarity and precision; the tenant who knows the law knows what he must do. If he does not conform, he knows that he will be subject to government and/or private sanctions. The landlord will also be more likely to know his rights. What tenant noncompliance is will be clearer to him because of the statute. This should result in the avoidance of unnecessary litigation over whether there has been noncompliance in a particular instance.

Section 76-1421(6) reduces the Nebraska tenant's duty not to commit waste and his concomitant duty to repair. This section only obligates the tenant not to "deliberately or negligently destroy, deface, damage, impair, or remove any part of the premises . . ."¹⁷⁸ The connotation attached to these verbs is that the tenant must not actively injure the property. What has traditionally been

176. "This section, the converse of Section 2.104, establishes minimum duties of tenants consistent with public standards of health and safety." URLTA § 3.101, Comment.

177. See notes 126-36 and accompanying text *supra*.

178. It also prohibits the tenant from "knowingly permit[ing] any person to do so." This additional prohibition does not change the analysis of this section.

termed permissive waste is not prohibited. In other words, a tenant under the NRLTA would not be responsible if he negligently overlooked a problem, and a situation developed which injured the property.¹⁷⁹ This is, of course, an important change. The landlord must now be more vigilant in protecting his investment. Appropriately, the NRLTA gives him the capacity to be more vigilant.¹⁸⁰ The change is a salutary one, for, as noted, it is the landlord who has the means to repair; and it is no longer true, if ever it was, that the tenant on-the-scene is better-equipped to inhibit gradual waste.

Sections 76-1421(2) to 76-1421(5) further define the tenant's housekeeping obligations.¹⁸¹ Existing Nebraska law did not require a tenant to keep the premises in any particular way during the term. Now he must keep house properly. This shift in emphasis is apparent from the language of the statute. Section 76-1421(2) requires the tenant to place the dwelling unit in clean condition at the end of the term. Section 76-1421(3) requires him to dispose of garbage in a clean and safe manner. Section 76-1421(4) requires him to keep plumbing fixtures as clean as possible. Section 76-1421(5) requires him to use certain facilities in a reasonable manner. In none of these situations is there an implication that the tenant repair. The duty to repair is left to the landlord; the tenant must only act reasonably to keep the premises clean.¹⁸²

179. Of course, the situation described could be interpreted as negligent destruction. If this were the case, the NRLTA would less substantially change the prior law.

180. NEB. REV. STAT. §§ 76-1423-24; 76-1432 (Cum. Supp. 1974).

181. (2) Keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit, and upon termination of the tenancy place the dwelling unit in as clean condition, excepting ordinary wear and tear, as when the tenancy commenced;

(3) Dispose from his dwelling unit all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(4) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(5) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances including elevators in the premises.

NEB. REV. STAT. § 76-1421(2)-(5) (Cum. Supp. 1974).

182. Subsection (1) requires that the tenant keep the area he occupies clean and sanitary. This was not a duty recognized at common law, except in the unlikely event that a lack of cleanliness harmed the landlord's reversion.

Subsection (2) requires that the tenant dispose of garbage. This requirement goes a step beyond the common law duty to eschew waste. A common law landlord would be unable to enforce his rights with regard to the property until the damage was actual or imminent. This section allows landlord action when the possible damage is still quite speculative, to insure that protection of the landlord and other tenants—including future tenants—is given proper consideration by the courts.

If there is an exception to this analysis, it is section 76-1421 (2) which additionally requires that the tenant keep the premises which he uses in as clean and safe condition as the premises permit.¹⁸³ Precisely what is meant by "safe" is unclear.¹⁸⁴ It seems appropriate, however, to limit its meaning so that the tenant's repair obligations remain minimal and related to the sanitation and cleanliness of the dwelling. This interpretation is consistent with the history of the URLTA, which obligated the tenant to keep the premises in a clean condition, but did not mention returning them in this condition.¹⁸⁵ Additionally, this interpretation is consistent with the policy of the NRLTA, which places special emphasis on cleanliness and shifts major repair obligations to the landlord. Finally, this interpretation reduces the ambiguities inherent in the NRLTA.¹⁸⁶ If ambiguity were permitted to exist, it would be unclear who was responsible for certain safety-related repairs. The result might be that both landlord and tenant would believe that

Subsection (3) continues the cleanliness obligations, extending them to plumbing fixtures.

Subsection (4) requires the tenant to use plumbing and electrical fixtures "properly." The tenant's rights in an urban environment cannot be absolute, even as to the premises which he occupies, in theory, exclusively. Since improper operation of important fixtures tends to damage them, it is not allowed.

MODEL RESIDENTIAL LANDLORD TENANT CODE § 2-303, Comment.

183. (2) Keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit, and upon termination of the tenancy place the dwelling unit in as clean condition, excepting ordinary wear and tear, as when the tenancy commenced.
- NEB. REV. STAT. § 76-1421 (2) (Cum. Supp. 1974).
184. Section 2-303 of the Model Residential Landlord Tenant Code required only that the tenant "keep that part of the premises which he occupies and uses as clean and sanitary as the conditions of the premises permit."
185. "A tenant shall (2) keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit; . . ." URLTA § 3.101 (2).
186. If the tenant's obligation to keep the premises safe entailed substantial repairs, this obligation would contradict the landlord's obligation to keep the premises fit and habitable. NEB. REV. STAT. § 76-1419 (1) (b) (Cum. Supp. 1974). The tenant's obligation applies to that part of the premises that he occupies and uses. Section 76-1410 (9) provides that "premises" include dwelling units, which are obviously a part of the premises which the tenant occupies. Since the landlord's obligation to keep the premises fit and habitable implies keeping them safe, his obligation would overlap the tenant's responsibility for keeping what he uses and occupies safe. A still more obvious redundancy is that the tenant uses common areas; if he were obligated, pursuant to this section, to keep them in repair in order to keep them safe, his duty would overlap the landlord's duty to keep the common areas safe. NEB. REV. STAT. § 76-1419 (1) (c) (Cum. Supp. 1974).

the other were responsible, and each would, therefore, leave the job to the other. It is preferable to avoid the ambiguity and to be certain that the parties know where the responsibility for safety-related repairs rests.

Section 76-1421 (7) provides that the tenant conduct himself, and require other persons who are on the premises with his consent to conduct themselves, in a manner that will not disturb his neighbors. This has always been the existing rule, and a person who was disturbed could always sue his neighbor who was disturbing him.¹⁸⁷ At most, this section extends the enforcement right to the landlord.¹⁸⁸ It does not directly confront the truly controversial issue: whether a tenant who was disturbed can legitimately vacate if his peaceful enjoyment were upset by a tenant who was disturbing him? The Nebraska courts have held that the tenant who was disturbed could not vacate, on a theory of constructive eviction, unless the landlord directly controlled the offending tenant.¹⁸⁹

Does section 76-1421 (7) change this rule? Certainly it does not do so directly. The section merely states what the tenant shall not do; other sections give the landlord remedial power to do something about the disturbance if he so chooses. There is no mandate that he must do anything. Since he need not act to control an offending tenant, he is not at fault when this tenant disturbs another. It is, therefore, clear that the tenant who is disturbed has no explicit claim against the landlord in these circumstances. It arguably follows that this tenant will not be able to vacate legitimately.

It is preferable, however, to give the tenant who is disturbed the right to terminate or to sue the landlord if the landlord fails to control an offending tenant within a reasonable time. There is justification for this. Prior to the NRLTA, there was an implied warranty of quiet enjoyment, which in Nebraska did not impose an obligation on a landlord to control a tenant who was disturbing another tenant. First, it is submitted that this implied obligation

187. *McCrary Corp. v. Durwood American, Inc.*, 343 F. Supp. 150 (D. Neb. 1972); *Miller v. FitzGerald Dry Goods Co.*, 62 Neb. 270, 86 N.W. 1078 (1901).

188. A tenant who is disturbed can sue the tenant who is disturbing him—in law or in equity—under the NRLTA. NEB. REV. STAT. § 76-1405 (2) (Cum. Supp. 1974).

189. There will be a constructive eviction if there is a disturbance of the tenant's possession *by the landlord or by someone under his authority*, whereby the premises are rendered unfit for occupancy for the purpose for which they were demised or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction, if the tenant abandons the premises within a reasonable time.

Kimball v. Lincoln Theatre Corp., 125 Neb. 677, 678, 251 N.W. 290, 291 (1933) (emphasis added).

remains after the NRLTA's operative date, thus, potentially expanding the landlord's duties beyond those outlined in the NRLTA. Second, it is submitted that the implied warranty now requires a landlord to control offending tenants.¹⁹⁰ The policy for this is clear. The landlord is in the better position to sue, if necessary, and he probably has more experience in dealing with offensive tenants. The disturbing tenant is probably more willing to listen to his landlord than to just a neighbor. Therefore, the tenant who is disturbed by another tenant should be able, in appropriate circumstances, to exercise his section 76-1425 remedies (e.g., termination).

Section 76-1421(8) is not the counterpart to any URLTA section.¹⁹¹ This section provides that a tenant must comply with the rules of any applicable condominium housing regime, cooperative housing agreement or neighborhood association, if such rules are not inconsistent with the landlord's rights or duties. What relationship this section refers to is uncertain. It is possible that it refers to the tenant-condominium/cooperative/association relationship. In other words, the tenant will stand in the shoes of his landlord vis-a-vis the condominium/cooperative/association. This interpretation is unlikely, for occupancy by the owner of a condominium or cooperative is excluded from the NRLTA's coverage,¹⁹² and there is no reason to obligate the tenant to do something when his landlord would not be similarly obligated. It is more probable that the section refers to the owner-tenant relationship. From this perspective, the section gives the landlord a battery of remedies if the tenant should fail to comply with the condominium/cooperative/association rules. Its purpose is to give the landlord the means to protect his investment.¹⁹³ It is unclear what "not inconsistent with the landlord's rights and duties" means. Apparently, it means that some obligations, such as an owner's duty to pay a share of the real estate taxes, will not run to his tenant, and will, therefore, not be enforceable by the landlord against the tenant. But what these obligations specifically are is uncertain.

B. Duty to Comply with Rules and Regulations

A Nebraska lease under existing law could incorporate by refer-

190. See Davis, *supra* note 108, at 411.

191. The tenant shall abide by all by-laws, covenants, rules or regulations of any applicable condominium regime, cooperative housing agreement, or neighborhood association not inconsistent with landlord's rights or duties.

NEB. REV. STAT. § 76-1421(8) (Cum. Supp. 1974).

192. NEB. REV. STAT. § 76-1408(6) (Cum. Supp. 1974).

193. See Lonquist & Healey, *supra* note 50, at 374.

ence existing rules and regulations.¹⁹⁴ In other words, a landlord could bind a tenant to the "rules and regulations" of the apartment house. There was no explicit requirement that these rules and regulations be reasonable. This situation resulted in cases in which the tenant was obligated to comply with a rule that he knew nothing about. It aggravated the problem inherent in adhesion clauses, for not only were the rules in small-print, but they were also hidden from sight.

After the lease had been signed, the landlord could change the rules and regulations; he did not need further consideration from the tenant.¹⁹⁵ However, in *Westbrook v. Masonic Manor*,¹⁹⁶ the Nebraska Supreme Court held that subsequently adopted rules and regulations, at least if they were substantial, must be consented to by the tenant before they were binding. This was true even though the tenant had given prior consent to the adoption of new rules and regulations in the lease.¹⁹⁷

Sections 76-1410(11) and 76-1422 permit the rental agreement to incorporate rules and regulations by reference. Section 76-1422 limits the substance of the rules, thus avoiding the more serious adhesion problem. It would have been of little advantage to the tenant only to require the landlord to include the rules and regulations in the lease proper. Often there would be many trivial and technical rules, and to include them in a lease would make it even more difficult to understand.

The rules and regulations must be for appropriate purposes, must be reasonably related to those purposes, must be applied in a fair manner and must be clear. Further, they must not be for the purpose of evading the Act, and the tenant must have notice of the rule at the time he enters the rental agreement.¹⁹⁸ Appar-

194. *Westbrook v. Masonic Manor*, 185 Neb. 660, 178 N.W.2d 280 (1970).

195. *But see* Lonquist & Healey, *supra* note 50, at 373.

196. 185 Neb. 660, 178 N.W.2d 280 (1970). The modification would have required the tenant to pay assessment charges after vacating but before re-renting; clearly this was a substantial modification.

197. In the *Westbrook* case, the lease provided that the tenant would be subject to "rules and regulations which will be adopted to govern the manor." *Id.* at 661, 178 N.W.2d at 281.

198. A landlord, from time to time, may adopt rules or regulations, however described, concerning the tenant's use and occupancy of the premises. It is enforceable as provided in section 76-1431 against the tenant only if:

(1) Its purpose is to promote the appearance, convenience, safety, or welfare of the tenants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally;

(2) It is reasonably related to the purpose for which it is adopted;

ently, this last clause refers to notice of a particular rule or regulation and not simply to notice of the existence of apartment by-laws. The tenant is, however, deemed to have notice of a rule and a regulation if he has reason to know that it exists.¹⁹⁹ Thus, it should be sufficient notice to the tenant of a "dog-on-leash" rule if he has reason to know that there are rules in existence related to pets. This interpretation should obviate the problems associated with the landlord's "secreting" rules and regulations in the corporate office, while still allowing him the convenience of incorporation by reference.

With respect to new rules and regulations adopted after the tenant enters into the rental agreement, section 76-1422 provides that they are only enforceable against the tenant if reasonable notice of the adoption is given to the tenant and the new rules or regulations do not work a substantial modification of his bargain. These two statutory provisions are joined conjunctively. An arguable negative inference is that only non-substantial modifications can be adopted, and even those can be adopted only if the tenant has reasonable notice of their adoption.²⁰⁰ The NRLTA differs from its URLTA counterpart in that the URLTA provided that a substantial modification could be adopted if, and only if, the tenant consented to it.²⁰¹ This was consistent with the *Westbrook* case. A possible purpose behind the NRLTA change was to permit certain landlord modifications without tenant consent. If this were the purpose, it was not articulated. Rules which incorporate major

(3) It applies to all tenants in the premises in a fair manner;

(4) It is sufficiently explicit in its prohibition, direction, or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;

(5) It is not for the purpose of evading the obligations of the landlord; and

(6) The tenant has notice of it at the time he enters into the rental agreement.

NEB. REV. STAT. § 76-1422 (Cum. Supp. 1974).

199. NEB. REV. STAT. § 76-1413 (Cum. Supp. 1974).

200. Even with a non-substantial change, the tenant must have reasonable notice of it. It is uncertain what "reasonable" adds to the definition of notice, which is that from all facts and circumstances known to the tenant at the time in question, he has reason to know something exists. NEB. REV. STAT. § 76-1413 (Cum. Supp. 1974).

201. A rule or regulation adopted after the tenant enters into the rental agreement is enforceable against the tenant if reasonable notice of its adoption is given to the tenant and it does not work a substantial modification of his bargain.

NEB. REV. STAT. § 76-1422 (Cum. Supp. 1974).

URLTA section 3.102(b) provides that "if a rule or regulation is adopted after the tenant enters into the rental agreement that works a substantial modification of his bargain it is not valid unless the tenant consents to it in writing."

changes are arguably unenforceable, with or without tenant consent. Apparently, the landlord must give new consideration before the tenant will be bound by the new rule.

The NRLTA language is confusing, and it will invite unnecessary litigation. No one will know whether a particular change is a substantial or a non-substantial modification, and both landlords and tenants will have to guess whether a particular rule is or is not enforceable. A preferable interpretation of section 76-1422 would be premised on the fact that the section does not explicitly state that a substantial rule modification will not be enforceable under any circumstances. Such a reading would allow section 76-1422 to be interpreted consistently with the URLTA and with prior Nebraska law and would permit the adoption of rules and regulations that bring about substantial changes, provided the tenant has notice of the adoption of these rules and gives written consent. This interpretation would enhance uniformity and add salutary flexibility to the relationship between landlord and tenant. Moreover, since any rules must meet certain criteria of reasonableness before passage, there is little danger in such an interpretation.²⁰²

C. Duty to Comply

At common law, covenants, including the tenant's obligation to pay rent, were independent. A tenant's breach or failure to pay rent did not mean that the landlord could terminate the tenancy or legitimately refuse to comply with his obligations. He could do neither. His only recourse was to sue, and, in some circumstances, to apply self-help remedies, such as distress. Obviously, such a conceptualization of the relationship, premised on the view of the lease as a conveyance,²⁰³ presented hardships to the landlord interested in protecting his investment. The tenant could be in noncompliance, and there would be nothing the landlord could do about it.

As a result of this law, it has been common practice in leases, and often in statutory provisions, to provide that certain sorts of tenant noncompliance will result in an automatic termination of the lease.²⁰⁴ These lease clauses are usually viewed as forfeiture clauses, and often they merit this perjorative classification. If a tenant should have a two year lease containing the proviso that if he should fail to pay his rent on the first of each month, the estate shall terminate, then he may lose his entire estate if he is one day late on an early month's payment. It is an unfair penalty for such a pécadillo; and there is certainly no necessary relationship

202. NEB. REV. STAT. § 76-1422(1)-(6) (Cum. Supp. 1974).

203. See notes 23-27 and accompanying text *supra*.

204. NEB. REV. STAT. § 24-569 (Cum. Supp. 1974) provides that tenant non-payment may result in a termination of the leasehold.

between the damage caused by the breach and the tenant's return of the estate. For these reasons, Nebraska courts have been reluctant to enforce forfeiture clauses and have construed such clauses narrowly against the landlord.²⁰⁵ Unless forfeiture is expressly provided for and clearly stated, courts will not terminate the lease.²⁰⁶ Moreover, equity often dictates that the tenant be given a chance to make the landlord whole. In line with this reasoning, Nebraska courts have long refused to permit a forfeiture for nonpayment of rent without a clear landlord demand for the rent,²⁰⁷ and a late payment will often be acceptable.²⁰⁸

Section 76-1431 is the general landlord remedial section, although it must be read in juxtaposition with section 76-1405 which provides, *inter alia*, for landlords to receive appropriate damages. Section 76-1431 provides for termination of the tenancy, as well as damages and injunctive relief. In many ways the section parallels section 76-1425. The provisions relating to damages and injunctive relief will be discussed first.

Section 76-1431(3) provides that the landlord may recover damages and injunctive relief for a tenant's noncompliance with either the rental agreement²⁰⁹ or with the provisions of section 76-1421.²¹⁰ The landlord may recover regardless of the fact that the noncompliance may not be material and may not affect health and safety. If the tenant's noncompliance is willful, the landlord may recover reasonable attorney's fees. This serves as a penalty to tenants who act willfully and it encourages landlord enforcement of tenant agreements or statutory obligations even in small cases. The section does not expressly make these remedies cumulative with the termination remedy. This is probably an oversight, for in section 76-1425(3), the tenant's parallel general remedial section, such a remedy is expressly made cumulative.

Section 76-1431(2) provides that if the tenant should fail to pay rent within three days after written notice of nonpayment is given,

205. *Hawthorne v. Cassidy*, 179 Neb. 245, 137 N.W.2d 818 (1965); *Hague v. Sterns*, 175 Neb. 1, 120 N.W.2d 287 (1963).

206. *Chestnut v. Master Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947).

207. *Farmer v. Pitts*, 108 Neb. 9, 187 N.W. 95 (1922). The statutory three day notice to quit, jurisdictionally required in the existing summary repossession statute, could serve as the demand. *Haynes v. Union Inv. Co.*, 35 Neb. 76, 53 N.W. 979 (1892).

208. In *House v. Lewis*, 108 Neb. 257, 187 N.W. 784 (1922), the Nebraska Supreme Court held that where the lease is silent as to place of payment, rent is payable on the leased premises. There can be no forfeiture if the payment is late because the tenant could not find the landlord.

209. See Section II, A, *supra*.

210. See Section IV, A, *supra*.

the landlord may elect to terminate the estate.²¹¹ Thus it is not

211. The landlord may waive his right to terminate a lease. He, of course, will retain his right to sue for damages. Since the Nebraska courts were generally reluctant to impose a forfeiture on the tenant, landlord waivers were not uncommon. If the landlord customarily accepted rent at a time different than that provided for in the lease, he waived his right to strict performance. *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.*, 156 Neb. 604, 57 N.W.2d 169 (1953). If the landlord accepted a rent payment after rent payment default, he waived his right to terminate. *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951). This was true even if eviction proceedings had been initiated. *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951); *Stover v. Hazelbaker*, 42 Neb. 393, 60 N.W. 597 (1894). If he accepted a rent payment, or a nonconforming tenant performance, after a covenant breach, he also waived his right to terminate. *Chestnut v. Master Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947); *Platner Lumber Co. v. Krug Park Amusement Co.*, 131 Neb. 831, 270 N.W. 473 (1936). However, if he accepted performance of a continuing obligation, such as the monthly duty to pay, the original acceptance would not constitute a waiver of a subsequent breach.

The waiver mechanism provides a needed flexibility in landlord-tenant law. The relationship is a continuing one, and a landlord may want to give the tenant a second chance. However, he may also want to preserve his rights if the tenant should prove recalcitrant. The simple waiver allows him to do this without the paraphernalia of writings.

Section 76-1433 codifies the law; however, it presents four potential problems. First, section 76-1433 provides that either acceptance of rent with knowledge of default by a tenant or acceptance of performance by the tenant that varies from the terms of the rental agreement or rules or regulations constitute a waiver. Does this mean the acceptance of rent after a breach "in performance" will not be a waiver? Nebraska law would have found such rent acceptance a waiver. This is desirable for if the landlord is willing to take the rent, he apparently is willing to live with the lease. The tenant should be assured of his right to possession if he has paid, and if the payment is accepted. It is suggested that the language "default by tenant" refers not only to a nonpayment of rent, but also to a default in performance. Thus, acceptance of rent will be considered a waiver. Second, section 76-1433 does not state whether an acceptance of rent after initiation of an eviction suit will constitute a waiver. The Nebraska Supreme Court has held that it would. *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951). It is submitted that the NRLTA be interpreted to change this prior law. Section 4.204 of the URLTA, Comment, provides that "acceptance of unpaid rent paid after expiration of a termination notice does not constitute a waiver of the termination." Admittedly, there seems little reason for this interpretation, but then too there is little reasonable argument against it. In such a case, it is preferable to interpret the section consistently with the URLTA so as to encourage uniformity. Third, does the acceptance of a late rent payment imply a waiver of the right to terminate for future late payments? The answer should be no. To hold otherwise would discourage landlords from being lenient even in a single instance. URLTA § 4.204, Comment. Of course, constant acceptance of late payments could establish a practice on which the tenant would rely, and thus would be a waiver. Finally, section 76-1433

the tenant's failure to pay rent on the due date that gives the landlord the right to terminate, but it is the failure to pay after this three day grace period.²¹² If the tenant should make payment within this time, the landlord may not terminate the tenancy. Admittedly this provision will allow a tenant to delay on his rent payment, but this should not be an undue burden on the landlord. He will know of this contingency ahead of time, and he will be able to cover it in his rent structure. On those occasions in which the rent delay causes serious damages, the landlord will be able to sue for damages pursuant to section 76-1431 (3).

Section 76-1431 (1) also provides that in addition to nonpayment situations the landlord may terminate (1) if the tenant does not comply with those parts of section 76-1421 materially affecting health and safety and (2) if the tenant does not comply materially with the rental agreement or any separate agreement.²¹³ In both

provides that acceptance of rent or of performance need not be a waiver if that is agreed to after the breach has occurred. This does not mean that the landlord cannot reassert his rights to terminate for a "new" breach without the written consent of the tenant. See ABA Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, *supra* note 67, at 121. Instead, the troublesome language—"unless otherwise agreed after the breach has occurred"—only implies that the parties cannot agree, before the waiver-constituting act, that such an act will not be a waiver.

212. Section 4.201 (b) of the URLTA provided for a fourteen day grace period. Nebraska's three day period makes the NRLTA consistent with prior Nebraska law, for although the landlord could terminate the tenancy on the due date, NEB. REV. STAT. § 24-569 (Cum. Supp. 1974), he could not repossess the property without a three day notice to quit. NEB. REV. STAT. § 24-571 (Cum. Supp. 1974).
213. Section 76-1435 clarifies a problem that has haunted termination situations. In Nebraska, rent was not apportionable and, unless agreed otherwise, it was not due until the end of the term. If the tenancy was terminated before its normal expiration date, the landlord could not collect for rent or for damages until the term had expired or until rent was due under the lease. *First Nat'l Bank v. Omaha Nat'l Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974); *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964). This subjected the landlord to an inordinate risk if faced with a disappearing or potentially insolvent tenant. To avoid these problems, acceleration clauses were included in leases. They provided that upon default, or early termination, all the tenant's rent obligation was due immediately. Often these clauses were unenforceable, for they were construed as penalties. The mere sin of a delay in a single rent payment could mean that the tenant could be immediately obligated for a term's worth of rent payments.

Section 76-1435 changes the judicial rule; it allows the landlord to sue for rent and for damages on termination. In other words, the landlord can bring an immediate suit for anticipatory breach. This is consistent with the NRLTA position that rent is apportionable, NEB. REV. STAT. § 76-1414(3) (Cum. Supp. 1974), and that the landlord has a

instances, the landlord must provide the tenant with a thirty day notice of his intent to terminate and he must delineate the acts or omissions which serve as justification for the termination. If the tenant remedies the situation or pays damages within fourteen days, there will be no termination. This statutory grace period is new to Nebraska though it is not a surprising development. It parallels the common law demand requirement in nonpayment situations and reflects the judicial reluctance to enforce forfeitures. The purpose of the statute is to assure that the noncompliance is remedied and that the landlord is compensated; it is not to penalize the tenant for error.

If substantially the same breach occurs within six months of the former breach, the landlord need not provide such a grace period. In this case, the landlord must give the tenant at least fourteen days' written notice, again specifying the breach, in order to terminate the tenancy. What "substantially the same" means may be difficult to determine. This point is best illustrated by two hypothetical situations. In one case, the tenant fails to dispose of garbage; in the second case, the same tenant fails to keep his apartment safe. Has the tenant *again* committed substantially the same noncompliance? The answer would probably be no. Section 76-1431(1) requires written notice of the breach, *specifying* the acts or omissions. The purport of this is not only to let the tenant use his own judgment about whether he should remedy the problem or risk termination (if he believes he is not in noncompliance), but it is also to put him on guard that the landlord will not necessarily tolerate the same act or omission again. With this second purpose in view, the question of whether the tenant's second act or omission is substantially the same as the first should be answered by asking and answering the question: Would a reasonable tenant know that the landlord would not tolerate a non-safe apartment from his reading of a notice which complained of not properly disposing of the garbage? Although the point is debatable, it is submitted that the answer is no.

A further troublesome aspect of this section is that the landlord may terminate the tenancy for a material noncompliance with a separate agreement. The problems inherent in this section have been discussed above.

duty to mitigate. The damages to which the landlord would usually be entitled are the difference between the rent specified in the lease and the fair rental value over the remainder of the term. Finally, if the tenant's noncompliance which resulted in the termination was willful, the landlord may recover attorney's fees.

If the tenant had acted willfully in any of the circumstances enumerated above, the landlord may be entitled to attorney's fees. This provision is new to Nebraska law. Again, it serves to penalize tenants who act in a willfully wrong manner and it encourages landlords to sue to enforce their rights.

D. Duty to Grant Access

In Nebraska, a tenant's home was his castle. The tenant was entitled to maximum privacy; he could exclude anyone, including the landlord, from the premises for whatever reason he chose, reasonable or not.²¹⁴ *Inter alia*, the tenant could bring an action for trespass,²¹⁵ or an injunction action for a continuing trespass.²¹⁶ In a few instances, the common law implied a right in the landlord to enter on the premises to claim rent, to levy a distress or to comply with certain police regulations.²¹⁷ Moreover, if the landlord had expressly agreed to provide particular services to the tenant, the courts might imply a right of entry to permit him to provide the services. As a practical matter and to avoid risk and ambiguity, landlords often reserved in the lease a right to enter.

Section 76-1423 and its corresponding remedial section 76-1438(1) reverse the existing rule.²¹⁸ The landlord is given reasonable access rights, but he is explicitly enjoined from harassing the tenant in the exercise of these rights. Section 76-1423(1) provides that the tenant shall not unreasonably withhold consent to his landlord's request to enter if the landlord wishes to enter for what are considered valid reasons.²¹⁹ This change is appropriate in the 1970's.

214. *Peterson v. Vak*, 169 Neb. 441, 100 N.W.2d 44 (1959); *Vance v. Henderson*, 141 Neb. 766, 4 N.W.2d 833 (1942).

215. *Maas v. Platte Valley Pub. Power & Irrigation Dist.*, 167 Neb. 124, 91 N.W.2d 409 (1958); *Peterson v. Vak*, 160 Neb. 450, 70 N.W.2d 436 (1955).

216. *Fenster v. Isley*, 143 Neb. 888, 11 N.W.2d 822 (1943).

217. 1 AMERICAN LAW OF PROPERTY § 3.38 (A.J. Casner ed. 1952).

218. This section substantially changes the common law where the tenant's right to exclusive possession, even as against the landlord, was absolute. Many cases have found an implied right to access when the landlord covenants in a lease agreement or separately to perform some service on the premises, but the very fact that the tenant seriously raises the issue [of wrongful access] attests to the heartiness of the strict rule.

MODEL RESIDENTIAL LANDLORD TENANT CODE § 2-404, Comment.

219. These reasons are

to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

NEB. REV. STAT. § 76-1423(1) (Cum. Supp. 1974).

The tenant's home is not his castle; the notion that he can keep everyone away (for whatever reason) does not take into account the complexity and interrelatedness of urban dwellings. It is unlikely that any tenant truly thinks of his dwelling unit as a castle. It is not unduly burdensome to require that any refusal to allow the landlord to enter be based on reasonable grounds. Moreover, since the landlord has increased obligations imposed on him under the statute, it is sensible to give him access in order to comply with these obligations. This rationale is akin to that used by earlier courts to imply a right to enter in circumstances in which the landlord had agreed, in the lease, to provide specified services. For example, if he must repair, he must have the right to enter in order to repair.

The landlord shall give the tenant at least one day's notice of his intent to enter and he must enter only at reasonable times and for specified reasons. One day is short notice; the URLTA counterpart section provided for two.²²⁰ Notwithstanding the above notice requirements, the landlord may enter immediately in the following situations: if there is an emergency; if the tenant has abandoned the premises;²²¹ or if entry is "reasonably necessary" during a tenant's absence which exceeds seven days.²²² Finally, the landlord need not give the one day notice if it is impracticable to do so.

As to when it is "impracticable" to give notice, the courts should be strict in making such a determination. There would be great potential for harassment if landlords could enter, even for legitimate reasons, without notice. For example, if the landlord operates a large number of units, it may be inconvenient for him to give a notice before *each* entry. Nevertheless, the tenant is entitled to privacy and to fair warning of reasonable entry; therefore, such an inconvenience should not constitute impracticability.²²³

The other exceptions to the general notice rule raise the questions of what is "an emergency," what is "reasonably necessary," and what is "an abandonment" under the NRLTA. An "emergency" and a "reasonably necessary" case should be interpreted as a situation in which a landlord has to enter so as to avoid perma-

220. URLTA § 3.103 (c).

221. The landlord may also enter if the tenant surrenders. It is unfortunate that this archaic property language was introduced. It is analyzed as being the rough equivalent of an abandonment. The landlord may also enter pursuant to court order. NEB. REV. STAT. § 76-1423 (4) (Cum. Supp. 1974).

222. NEB. REV. STAT. § 76-1432 (2) (Cum. Supp. 1974).

223. See Note, *supra* note 42, at 123.

ment damage to the unit.²²⁴ The landlord must, of course, act in good faith in such a situation. The NRLTA policy is to encourage a landlord to take care of his property. To subject him to liability if he enters in good faith would defeat this policy. This is particularly true in those situations that are thought to be emergencies, for a landlord might never know for sure if there were a true emergency until he entered. For example, the landlord may honestly believe that the sound of dripping water may imply something seriously wrong with the plumbing; if he entered and he were wrong, he should not be held to have violated section 76-1423.

In order to interpret "abandonment" under the NRLTA, it is necessary to look at its traditional interpretation. The question of abandonment depended on the subjective intent of the tenant.²²⁵ Nebraska accepted this articulation of the concept, but the Nebraska Supreme Court relied heavily on objective facts in order to infer the intent.²²⁶ Section 76-1423 does not define abandonment. However, section 76-1432(3) provides that abandonment means a total absence from the premises, without notice, for thirty days or for a rental period, whichever is less.²²⁷ Presumably, an absence of a lesser period could also be an abandonment, provided there was the requisite intent. Contrary to the interpretation of "emergency" and "reasonably necessary" used above, it is submitted that if the landlord in good faith misjudges the facts as to abandonment, he should still be held responsible for his improper entry. This would reverse the Nebraska rule.²²⁸

This suggested interpretation supports the tenant's interest in privacy and is not unfair to the landlord. He can still enter without notice if he believes there is an emergency and his entry is permissible as being reasonably necessary if the tenant is absent for more than seven days. These provisions should furnish him with the means of protecting his investment. If the tenant should refuse lawful access, section 1438(1) provides that the landlord may obtain injunctive relief to compel access, or he may terminate the agreement.²²⁹ The landlord's right to terminate may lead to unduly

224. *Hearings on Nebraska Residential Landlord Tenant Act Before the Judiciary Committee*, 83d Leg., 1st Sess. 43 (February 13, 1973).

225. In *Mathiesen v. Bloomfield*, 184 Neb. 873, 173 N.W.2d 29 (1969), the trial court held that there had been no intent to abandon, and, therefore, no abandonment. The supreme court reversed, however, primarily relying on the tenant's removal to Lincoln.

226. *Langemeier, Inc. v. Pendgraft*, 178 Neb. 250, 132 N.W.2d 880 (1965).

227. The URLTA did not define "abandonment" in any way.

228. 178 Neb. 250, 132 N.W.2d 880 (1965).

229. The obverse of this section is section 76-1438(2), which assures that the landlord will respect the tenant's privacy. If the landlord enters

harsh results, and it should be permitted cautiously. The courts should be vigilant to avoid forfeitures. For example, if the tenant does not know that the landlord could enter to decorate the apartment, after he gives appropriate notice, it would be harsh to allow the landlord to terminate the estate because of the tenant's refusal to grant him entry. Such a consequence would not necessarily relate to the true damages. Finally, the landlord is entitled to damages and to attorney's fees. This last is to encourage landlords to sue for the particularly important rights related to possession and access.

E. Duty to Use Properly

In Nebraska, the tenant could use leased premises for any lawful purpose not inconsistent with the lease terms; and, since courts were reluctant to limit the tenant's use, restrictive clauses in the lease were construed narrowly.²³⁰ Of course, if the clause was valid, the landlord had a remedy for breach.²³¹ Section 76-1424 changes this rule by restricting it. Unless it is agreed to the contrary, the tenant shall occupy his dwelling unit *only* as a dwelling unit. This is consistent with the normal expectations of the parties in the modern residential environment, and is, therefore, a desirable shift in emphasis.

What if the tenant elects to operate a small business, such as a beauty parlor, in the basement? Section 76-1424 provides that the tenant shall use the unit "only" as a dwelling unit. Section 76-1410(3) defines a dwelling unit as a structure that is used as a home, residence or sleeping place. The statutory language does not answer the posed question, for to require use only as a residence could include the operation of an incidental business. Since it is likely that a tenant who could operate such a business legally (i.e.,

unlawfully, or harasses the tenant by repeated demands, the tenant can obtain injunctive relief or terminate the agreement. He can also recover actual damages. In no event will the actual damages awarded be less than one month's rent. In addition, reasonable attorney's fees may be given. The liquidated damages provision is to assure that the landlord is not tempted to interfere with the tenant's privacy because he believes there will be no damages, or because he believes the tenant will not be able to prove them. The provision for attorney's fees is to encourage the tenant to protect important privacy rights even when there is not much money at stake.

230. Bee Bldg. Co. v. Peters Trust Co., 106 Neb. 294, 183 N.W. 302 (1921); Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340, 96 N.W. 487 (1902); Herpolsheimer v. Funke, 1 Neb. (Unof.) 471, 95 N.W. 688 (1901); Miller v. FitzGerald Dry Goods Co., 62 Neb. 270, 86 N.W. 1078 (1901).
231. See Hayward Bros. v. Ramge, 33 Neb. 836, 51 N.W. 229 (1892).

under the zoning law) would anticipate no problem with his landlord, it is appropriate for the courts to construe this provision liberally, and to allow legal incidental business uses by the tenant.

No explicit remedy is provided for a tenant's misuse of the premises. The landlord can certainly sue for damages or injunctive relief;²³² however, presumably he cannot terminate the tenancy. This extreme remedy is provided only for a noncompliance with section 76-1421 or for a noncompliance with the rental agreement.²³³ It is arguable that this result is unfortunate, for misuse of the premises can be as serious as a breach of the rental agreement. Nevertheless, it is desirable to keep the remedy of termination within some boundaries, and the remedy of injunction should protect the landlord's interest.

In regard to the tenant's continued use of the premises, section 76-1424 provides that the rental agreement may require that the tenant notify the landlord of any anticipated extended absence in excess of seven days. This is not a truly new provision, for even before the NRLTA, parties could agree to such a clause. What the clause may suggest is that the tenant cannot bind himself to notify the landlord of absences of less than seven days. Such an interpretation is appropriate. First, there would be little reason for this section unless it had such a negative inference. Second, since the consequences for failure to notify may be severe, they should not be available for a landlord to use in situations in which the tenant merely leaves for the weekend.

In addition to this negative inference, the section seems to be a legislative invitation to use this type clause in the rental agreement. It will serve several purposes. First, it will clarify for the landlord the significance of an absence; from the landlord's point of view, he will not have to guess if there has been an abandonment. Second, since the landlord has the right to enter when reasonably necessary during such an extended absence even when he does not have notice, the notice provision will tip him off as to the appropriate times to exercise these rights. Although many vacations are for more than a week, the problems presented to the tenant by complying with a notice requirement are minimal.²³⁴ Moreover, the notice requirement is operative only if it is in the rental agreement, and the tenant will hopefully know what he is committing himself to do.

232. NEB. REV. STAT. § 76-1431(3) (Cum. Supp. 1974).

233. NEB. REV. STAT. § 76-1431(1) (Cum. Supp. 1974).

234. Davis, *supra* note 190, at 404 criticized this seven day provision in an era of two week vacations.

If the tenant should willfully fail to give the necessary notice, section 76-1432(1) provides that the landlord may recover actual damages. The negative inference may be that if the tenant non-willfully fails to send the notice, the landlord will have no remedy. This is arguably consistent with section 76-1405(2), which provides that all rights will be enforceable by action "unless the provision declaring it specifies a different and limited effect."²³⁵

It is submitted that this interpretation be adopted. If this were not the proper interpretation, there would be an irresolvable conflict between the general remedial section and this one. Section 76-1431(3) provides that the landlord is entitled to damages if there is a breach of the rental agreement, and the notice clause would be part of the agreement. If landlords were to be entitled to damages for a nonwillful breach, they certainly would be liable for a willful breach and section 76-1432(1) would be superfluous. This point is particularly clear because if section 76-1431(3) damages were allowed, the landlord would be entitled to attorney's fees if the breach were willful; section 76-1432(1) does not provide for attorney's fees in these cases. It thus seems apparent that damages for a tenant's noncompliance with the notice requirement are covered by 76-1432(1) only.

Since the concept of such a notice is novel, and giving such notice may easily be overlooked in the era of two week-or-more vacations, this limitation on the remedy is a good result. Admittedly, this may result in uncompensated damage to the landlord, but such damage can be minimized. If the tenant is *in fact* absent for the requisite time, the landlord can enter to protect his interests when reasonably necessary.²³⁶ All the suggested interpretation does is to force him to keep an eye on his property, and not rely on the tenant's notice. Moreover, in case of emergency, the landlord can enter to prevent harm to his property; and if he enters in good faith, he will not be liable should there not be an emergency.

235. See note 10.

236. As has been noted, in notes 214-29 and accompanying text, section 76-1432(2) changes the Nebraska rule by permitting the landlord to enter the premises at times reasonably necessary during any tenant absence of more than seven days. This means that if the tenant is gone for more than seven days, the landlord can enter, if it is reasonably necessary, on the second day. One purpose of the suggested notice provision is to let the landlord know when this can be done. This change assures that the landlord will be able to take care of the apartment in the absence of the tenant. Also, as noted, when it is "reasonably necessary" to enter should be interpreted as necessary to prevent permanent injury to the premises. The landlord's good faith should excuse a mistake if permanent injury to the property is at stake. Good faith should not be an excuse if mere abandonment—and therefore only temporary monetary loss—is the reason for the landlord's entry.

A final problem for the landlord is whether to enter when there appears to be an abandonment. Before 1969, in Nebraska, if the tenant abandoned during the term, the landlord was under no duty to attempt to re-let. He could sit back, wait for the end of the term and collect the rent due.²³⁷ However, as has been noted, rent was not apportionable²³⁸ and was due at the end of the term.²³⁹ This could mean that a landlord who did wait to re-let might risk either not finding the tenant or finding him insolvent. In some jurisdictions,²⁴⁰ this situation was aggravated by the rule that if the landlord tried to re-let abandoned premises he was deemed to accept the surrender, and he was precluded from even a late recovery. In Nebraska, re-letting after an abandonment was not considered the acceptance of the surrender, but the rent collected from the new tenant was on behalf of the abandoning tenant.²⁴¹

In the 1969 case of *Bernstein v. Seglin*,²⁴² the Nebraska Supreme Court reversed this rule. The court held that when a tenant abandoned leased premises, the landlord had a duty to mitigate damages and must enter and attempt to re-let. The broad language of the case justifies this broad statement of the rule.²⁴³ Section 76-1432(3) restates the *Bernstein* position. The first sentence

237. [T]he landlord may in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term, and recover his rent in accordance with the terms of the lease. *Merrill v. Willis*, 51 Neb. 162, 164, 70 N.W. 914, (1897), citing *Hayward Bros. v. Range*, 33 Neb. 836, 51 N.W. 229 (1892). See also *Johnston v. Jackson*, 129 Neb. 545, 262 N.W. 19 (1935); *Prucha v. Coufal*, 91 Neb. 724, 136 N.W. 1019 (1912); *Hayward Bros. v. Range*, 33 Neb. 836, 51 N.W. 229 (1892).

238. *First Nat'l Bank v. Omaha Nat'l Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974); *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964). See notes 35-41 and accompanying text *supra*.

239. 191 Neb. 249, 214 N.W.2d 483 (1974).

240. See generally AMERICAN LAW OF PROPERTY § 3.99 (A.J. Casner ed. 1952).

241. *Merrill v. Willis*, 51 Neb. 162, 70 N.W. 914 (1897). It should also be noted, that if the landlord entered the premises, in good faith, after what he believed was an abandonment, he would only be responsible for a technical violation. *Langemeier v. Pendgraft*, 178 Neb. 250, 132 N.W.2d 880 (1965).

242. 184 Neb. 673, 171 N.W.2d 247 (1969).

243. Arguments for a more narrow interpretation would be based on the following facts of this particular case. It was in a commercial setting; the court relied on *Wright v. Baumann*, 239 Ore. 410, 398 P.2d 119 (1965), which could be interpreted as a contracts case and not a lease abandonment case. And finally, in *Waite Lumber Co. v. Nasid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972), the court cited *Bernstein* for the more limited proposition that a landlord only had the duty to accept a proffered new tenant.

clearly provides that if the tenant abandons, the landlord shall take immediate possession and shall make reasonable efforts to rent it at a fair rental.²⁴⁴ This is consistent with the landlord's section 76-1405 obligation to mitigate damages.

There is no explicit section 76-1432(3) penalty for a landlord's failure to mitigate. The URLTA counterpart section provided that if the landlord did not use reasonable efforts to re-let, the tenancy was deemed terminated from the date the landlord had notice of the abandonment.²⁴⁵ The importance of the fact that section 76-1432(3) does not include such an explicit termination date may be dramatic.²⁴⁶ The landlord might sue for the rent and the tenant would have to defend. Several problems would arise. First, from what date would the tenant be relieved of a rent obligation. The NRLTA offers no guidance. Second, who should have the burden of proving reasonable or unreasonable efforts to mitigate. The URLTA language suggests that the landlord has the burden,²⁴⁷ while prior Nebraska law was that the tenant had this burden.²⁴⁸ Does the NRLTA deletion of this clause imply that the prior Nebraska rule remains the law? It is submitted that the deletion should not be construed as implying this. The landlord is in the best position to know if he has adequately tried to re-let; the tenant will have no certain way of knowing. The landlord should, therefore, have the burden of proving that he did what he was supposed to do. Moreover, such an interpretation would tend to make the law uniform.

This section creates other problems. If the landlord should re-let, but for less rent than in the prior tenancy, it is unclear whether

244. Section 4.203(c) of the URLTA provides that "if the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental. . . ." In NEB. REV. STAT. § 76-1432(3) (Cum. Supp. 1974), it is provided that "if the tenant abandons the dwelling unit, the landlord shall take immediate possession and shall make reasonable efforts to rent it at a fair rental. . . ."

There is no apparent significance to the language difference in this first sentence. The NRLTA should not be read to endorse landlord entry beyond the rights afforded him in other sections of the NRLTA.

245. If the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental or if the landlord accepts the abandonment as a surrender, the rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment.

URLTA § 4.203(c).

246. NEB. REV. STAT. § 76-1432(3) (Cum. Supp. 1974) provides only that "if the landlord rents the dwelling unit for a term beginning prior to the expiration of the rental agreement, it is deemed to be terminated as of the date the new tenancy begins."

247. This conclusion is inferred from the language of section 4.203(c) of the URLTA. See note 245 *supra*.

248. 184 Neb. 673, 171 N.W.2d 247 (1969).

he can collect the difference from the prior tenant. Since rent is apportionable, and since the tenancy is deemed to terminate on the date the new tenancy begins, it is arguable that he is not entitled to the difference. However, section 76-1405 provides that the landlord is to be awarded appropriate damages. This should be the difference between the rent due and the rent collected. The landlord should not suffer injury because he mitigates. Any other rule would discourage him from trying to rent the premises in a declining market.

The NRLTA improves its URLTA counterpart by offering a safe-harbor interpretation of abandonment in section 76-1432(3). The definition of abandonment was not included in the URLTA. It has always been a confusing issue because its resolution turns on the tenant's intent.²⁴⁹ Since this intent could at best be inferred by the landlord, he would never know for sure if there had been an abandonment. In section 76-1432(3), an absence without notice for one full rental period or thirty days, whichever is less, shall automatically constitute an abandonment.²⁵⁰ This adds some salutory certainty to the law both for landlords and for tenants. As indicated, this is a safe-harbor, and there is always the possibility of showing a common law, tenant-intent abandonment.²⁵¹ Furthermore, as has been noted,²⁵² the NRLTA provides the landlord with additional protection by allowing him to enter, when reasonably necessary, when the tenant is gone for an extended period of time. The landlord can at least enter to protect his property from permanent injury; and if he acts in good faith, he will be immune from suit.

F. Remedy for Hold-Over

A periodic tenancy is one which runs for set periods of time (e.g., month-to-month or week-to-week) and requires a notice to terminate.²⁵³ A six month notice was required to terminate a year-

249. 178 Neb. 250, 132 N.W.2d 880 (1965).

250. NEB. REV. STAT. § 1432(3) (Cum. Supp. 1974) provides that "total absence from the premises without notice to landlord for one full rental period or thirty days, whichever is less, shall constitute abandonment."

251. *But see* Lonquist & Healey, *supra* note 50, at 384.

252. *See* notes 218-29 and accompanying text *supra*.

253. A tenancy for an indefinite period is a tenancy at will, and it requires no timed notice to terminate. *Sage v. Shaul*, 159 Neb. 543, 67 N.W.2d 921 (1953). However, if rent payments were due at specified times, the tenancy was periodic, the period being the time between rent payments. *See Farley v. McKeegan*, 48 Neb. 237, 67 N.W. 161 (1896). Oral leases are, of course, binding in Nebraska for periods up to one

to-year tenancy in Nebraska.²⁵⁴ For a periodic tenancy, a notice (which could be oral) equivalent to the length of the rental period was required.²⁵⁵ Section 76-1437(1) and 76-1437(2) codify these general rules, providing for termination after written notice.²⁵⁶ As before, the landlord, or the tenant, may terminate these periodic tenancies for whatever legitimate reason he chooses.²⁵⁷

In the event a tenant stayed beyond the termination date, he was a hold-over tenant. The landlord had the option of treating him as a trespasser, suing him for damages or restitution, or holding him to another term.²⁵⁸ A tenancy created in this way was considered new, although it was subject to the terms of the original agreement.²⁵⁹ Such a tenancy was a periodic tenancy, its period being equal to the term of the prior lease.²⁶⁰ This new term necessitated the giving of the requisite notice to terminate it.²⁶¹ In no event could the new period be for more than a year.

The theory behind affording this option to the landlord was that the tenant, by holding over, was presumed to want to stay for an additional term. If the landlord consented to his staying, it was presumed that both intended a new term. The presumption was rebuttable, but it was difficult to do so.²⁶² The tenant's good faith was not relevant, and only objective facts were considered material.²⁶³ In an agrarian period, it made sense to have a hold-over tenant stay through a complete planting cycle; otherwise, the new tenant, who would get occupancy late, would not have the time to go through the complete cycle. This severe consequence for holding-over tenants, i.e., requiring them to stay a full term, encouraged all to leave on time, and this was to the ultimate advantage of all tenants and landlords. In more modern times, to require

year. NEB. REV. STAT. § 36-105 (Reissue 1974). Schickedantz v. Rincker, 75 Neb. 312, 106 N.W. 441 (1905).

254. Fenster v. Isley, 143 Neb. 888, 11 N.W.2d 822 (1943).

255. Alloway v. Aiken, 146 Neb. 714, 21 N.W.2d 495 (1946).

256. The time periods required are seven days in the week-to-week case, and thirty days for a month-to-month. Sections 4.301(a) and (b) of the URLTA suggested ten and sixty days respectively.

257. Note, *The Uniform Residential Landlord and Tenant Act: Facilitation of or Impediment to Reform Favorable to the Tenant?*, 15 WM. & MARY L. REV. 845, 891-94 (1974).

258. Bradley v. Slater, 50 Neb. 682, 70 N.W. 258 (1897).

259. See Wright v. Barclay, 151 Neb. 94, 36 N.W.2d 645 (1949); Krull v. Rose, 88 Neb. 655, 130 N.W. 272 (1911).

260. Montgomery v. Willis, 45 Neb. 434, 63 N.W. 794 (1895); *But see* Lonquist & Healey, *supra* note 50, at 385 n.311.

261. Barnes v. Davitt, 160 Neb. 595, 71 N.W.2d 107 (1955); Critchfield v. Remley, 21 Neb. 178, 31 N.W. 687 (1887).

262. West v. Landgren, 74 Neb. 105, 103 N.W. 1057 (1905).

263. 50 Neb. 682, 70 N.W. 258 (1897).

a tenant to stay for an entire new term (e.g., a year) simply because he held-over for a period as short as a day would too severely and too arbitrarily penalize the hold-over tenant.

Section 76-1437(3) greatly reduces the punitive potential of the prior law. If the tenant holds over, the landlord may bring an action for restitution and damages, or the landlord may hold the tenant to a new month-to-month tenancy at a maximum.²⁶⁴ This reduces the punitive impact of the prior law and is consistent with the probable beliefs of all parties. On the other hand, if the tenant's hold-over is willful and not in good faith, the landlord is entitled to three months' periodic rent or three times the actual damages, whichever is greater, plus reasonable attorney's fees.²⁶⁵ In some ways, this is more severe than prior law, for the tenant wrongfully holding-over does not even get an unwanted tenancy for his money. If constitutional, this section should furnish an effective mechanism for encouraging prompt tenant action in vacating. This would be to the benefit of all.

G. Remedy of Self-Help

The common law provided landlords with certain self-help remedies for a tenant's breach. Nebraska has rejected them. Sections 76-1434, 76-1436, and 76-1430, with the minor modifications, codify existing Nebraska law.

At common law the landlord had a right of distraint. On a tenant's rent default, the landlord could seize all movable chattel on the demised property. Traditionally, the landlord had no right to sell the property; he could only hold it until he was paid. Later he was afforded the right to sell the chattel to cover his losses. This common law remedy has not been popular in this country, and it has not been adopted in Nebraska.²⁶⁶

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264. If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession. . . . If the landlord consents to the tenant's continued occupancy, subsection (4) of section 76-1414 applies.
NEB. REV. STAT. § 76-1437(3) (Cum. Supp. 1974). NEB. REV. STAT. § 76-1414(4) (Cum. Supp. 1974) then provides that "the tenancy shall be week-to-week in case of a roomer who pays weekly rent, and in all other cases month-to-month."
265. [A]nd if the tenant's holdover is willful and not in good faith the landlord, in addition, may recover an amount not more than three months' periodic rent or threefold the actual damages sustained by him, whichever is greater, and reasonable attorney's fees.
NEB. REV. STAT. § 76-1437(3) (Cum. Supp. 1974).
266. In many instances tenants have agreed in the lease to a lien (analogous

Although the common law distraint was not adopted, often the tenant would agree in the lease to a landlord's lien against his property, and to the landlord's right to enter to enforce the lien. Moreover, Nebraska did incorporate the underlying policies of distraint in a statute which provided the landlord with a lien against the tenant's property for rent due and a right to detain the tenant's property.²⁶⁷ In 1972, in *Deilan v. Levine*,²⁶⁸ a federal court summarily held that the Nebraska landlord lien statute was unconstitutional. The language was plenary, and on its face, the court appeared to hold the entire statutory scheme invalid. However, the gravamen of the decision was that the statutory scheme permitted a taking without due process of law. In other words, there was no hearing as to the legitimacy of the landlord's claims before the landlord's taking. If the holding were limited in this way, the Nebraska landlord could still constitutionally have a lien against the tenant's property for rent due even though he could not personally detain the property to enforce it.

At common law, landlords, with a legal right to possession, could retake possession if they acted with no more force than was necessary. If they acted forcibly, their actions might be criminal. In many jurisdictions,²⁶⁹ such forcible entry would constitute a tort. In 1974, in *Bass v. Boetel & Co.*,²⁷⁰ the Nebraska Supreme Court denied landlords this right. Even if the retaking could be done peaceably, the opportunities for violence and abuse were substantial, and the Nebraska Supreme Court believed it desirable to avoid the risk. Moreover, the court observed that there was a speedy and efficient summary repossession statute available to protect the landlord's rights. The channeling of landlord-tenant disputes through the judicial process was an additional goal of the decision. The fact that the landlord relied on a lease clause for his permission to re-enter, rather than on a common law right, was irrelevant.

Thus, the state of Nebraska law was surprisingly modern. All forms of self-help were denied; the fact that the landlord could act peaceably was not an excuse for his re-entry; and the fact that the tenant might have agreed to the landlord's using self-help was

to the distraint right) against their property. The courts have construed these clauses narrowly. *Thorstensen v. Coxsee*, 78 Neb. 40, 110 N.W. 567 (1907); *Webster v. Bates Mach. Co.*, 64 Neb. 306, 89 N.W. 789 (1902); *Brown v. Nielson*, 61 Neb. 675, 86 N.W. 498 (1901).

267. NEB. REV. STAT. §§ 41-124-26 (Reissue 1974).

268. 344 F. Supp. 823 (D. Neb. 1972).

269. *Jordan v. Talbot*, 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P.2d 20 (1961).

270. 191 Neb. 733, 217 N.W.2d 804 (1974).

no defense for the landlord. The Nebraska Supreme Court recently stated this position in the following manner:

Self-help, relating to the repossession of real estate, has long been contrary to the public policy of Nebraska and is not to be condoned. The lockout herein was unlawful. The right of a landlord legally entitled to possession to dispossess a tenant without legal process is the subject of an annotation "An increasing number of jurisdictions uphold what seems to be the modern doctrine that a landlord otherwise entitled to possession must, on the refusal of the tenant to surrender the leased premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession."²⁷¹

Prior to passage of the NRLTA, all forms of landlord self-help were impermissible, and whether a landlord lien could legitimately give a creditor priority was uncertain.

Following existing law, section 76-1434(2) abolishes distraint. Section 76-1434(1) clarifies the issue of a landlord's lien by providing that a lien or security interest on behalf of the landlord is unenforceable. This probably means unenforceable by a court in a proper lien foreclosure proceeding, as well as unenforceable by the landlord before a hearing. Nebraska law is, therefore, extended a little. As noted previously,²⁷² it was arguable that the *Deilan* case simply condemned the method of lien enforcement, and not the existence of the lien. Several arguments support the position that Nebraska law has been extended to condemn the existence of the lien. First, the language of the statute is not self-limiting; it clearly states the lien is "not enforceable," and this apparently means by anyone. Second, the NRLTA is different from its URLTA counterpart. Section 4.205(2) of the URLTA provided that a lien would still be enforceable if perfected before the effective date of the URLTA.²⁷³ The apparent intent of this section was to allow at least some liens to be enforceable. Nebraska's deletion of this can be interpreted as a refusal to draw such fine distinctions. No lien can be effective in any way. A third argument is that there is no good reason for giving a landlord a statutory priority. Like any businessman, he provides services and he is promised payment. Whatever historical reasons there might have been affording him such a priority are indefensible today. He should take his chances with all the other businessmen who provide services to the tenant.

271. *Id.* at 737-38, 217 N.W.2d at 807.

272. See note 268 and accompanying text *supra*.

273. Section 4.205(a) of the URLTA provides that "[a] lien or security interest on behalf of the landlord in the tenant's household goods is not enforceable unless perfected before the effective date of this Act."

Section 76-1436 extends the *Bass* case in a manner consistent with the rationale on which the decision was based. Landlords are not to take the law into their own hands under any circumstances. Among the self-help methods which the landlord is prohibited from using are the termination or interruption of important utility services.²⁷⁴ The tenants in *Bass* were permitted to prove actual damages; the NRLTA would assure the tenant these same remedies.²⁷⁵ Moreover, section 76-1430 would assure the tenant of additional rights. If the landlord unlawfully removes or excludes the tenant from the premises or willfully and wrongfully diminishes services, the tenant may recover possession, as he could before, or terminate the rental agreement, as he could before. In either case, he can recover an amount equal to three months' periodic rent as liquidated damages and reasonable attorney's fees. This NRLTA section differs from its URLTA counterpart, for the latter section allowed as alternative damages threefold the actual damages, if such a figure were greater than the three months' periodic rent.²⁷⁶

It is possible that the URLTA provision would not be permissible in Nebraska because it might be a penalty. If that were the case, the liquidated damage clause might be the only way to assure the tenant of compensation. But it does have its disadvantages. As a liquidated damages clause, it might set both the maximum and minimum recovery. If this were the case, the tenant would be precluded from recovering actual damages in excess of the liquidated amount. However, this conclusion is not necessarily mandated. It would be preferable to allow the tenant appropriate actual damages if he could prove them, and if not, the liquidated damages clause would prevail. This would assure the tenant that he would at least be compensated, and it would make the NRLTA more consistent with the URLTA.

274. NEB. REV. STAT. § 76-1427 (Cum. Supp. 1974) provides remedies for the tenant if there should be utility interruption.

275. NEB. REV. STAT. § 76-1438(2) (Cum. Supp. 1974) provides the remedies of injunction, termination or damages in the amount of a minimum of one month's rent if the landlord abuses the right of entry.

276. If a landlord unlawfully removes or excludes the tenant from the premises or willfully diminishes services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric, gas, or other essential service, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than (3) months' periodic rent or (threefold) the actual damages sustained by him, whichever is greater, and reasonable attorney's fees. If the rental agreement is terminated the landlord shall return all security recoverable under Section 2.101 and all prepaid rent.

URLTA § 4.107 (emphasis added).

In such a situation, the tenant's case will be a difficult one, since he will have the burden of proving the willful and wrongful act. Pursuant to the URLTA, the landlord in some cases would have had the burden of proof and would have had to prove that the interruption in service was not willful and wrongful. The reason for this is found in section 5.101 of the URLTA, the retaliatory eviction section, which set forth a positive presumption. If the landlord diminished services within one year after the tenant engaged in certain protected activities, such as a complaint to the landlord or a government agency, the landlord's act was presumed to be retaliatory and, therefore, willful and wrongful. This presumption was a relevant factor in a tenant's suit for damages.²⁷⁷ It is deleted from the NRLTA. The unfortunate consequence of this may be that tenants will consistently be unable to prove their case, and landlords will be tempted to engage in illegitimate activities.

V. JURISDICTION AND SUMMARY REPOSSESSION

There is nothing unusual about landlord-tenant litigation. Much of it is handled like other kinds of litigation. However, the summary action for restitution, commonly called a forcible entry and detainer action ("FED") or a summary repossession action, is a type of suit unique to this area of the law. In Nebraska it has been a statutory remedy.²⁷⁸ The remedy was designed to provide a person entitled to possession of realty (regardless of who had title) a quick and simple way to: (1) regain his property;²⁷⁹ (2) discourage self-help in property repossession;²⁸⁰ (3) prevent even rightful owners from taking the law into their own hands and inviting violence;²⁸¹ and (4) assure a landlord of a constant cash flow from his rental property.²⁸² Sections 76-1440 and 24-568 pro-

277. If the landlord acts in violation of subsection (a), the tenant is entitled to the remedies provided in Section 4.107 and has a defense in any retaliatory action against him for possession. In an action by or against the tenant, evidence of a complaint within [1] year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation.

URLTA § 5.101(b).

278. NEB. REV. STAT. §§ 24-568-84 (Cum. Supp. 1974); Law of January 12, 1860, ch. X, §§ 1019-32, [1860] 1866 REV. STAT. TERR. NEB. 75, 6th Leg. Sess.

279. *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 342 (1954) stated that the normal rules of procedure do not apply.

280. *Bass v. Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974).

281. *Myers v. Koenig*, 5 Neb. 419 (1877).

282. *Lindsey v. Normet*, 405 U.S. 56 (1972). Consistent with this purpose, a tenant is deemed to be a holdover tenant when he fails to pay due rent. NEB. REV. STAT. § 24-569 (Cum. Supp. 1974).

vide that the existing FED statutes will continue in force, but all actions for possession of premises covered in the NRLTA will be exclusively controlled by sections 76-1440 to 76-1447. Before examining the intricacies of the new summary repossession action, the issues of jurisdiction and retaliatory eviction must be examined.

A. Jurisdiction

The municipal, county or district courts have jurisdiction with respect to any conduct governed by the NRLTA or with respect to any claim arising from a transaction subject to the NRLTA.²⁸³ These courts apparently have concurrent jurisdiction in a claim for property restitution.²⁸⁴ The question arises as to whether the county and municipal courts will also have concurrent jurisdiction in *all* damage claims arising from a transaction subject to the NRLTA when such action is either joined to a property restitution suit or is brought separately. For example, what if the landlord claimed \$6,000 damages? Could he bring this suit in a county or municipal court? While section 76-1409 provides that a county or municipal court has jurisdiction in claims arising under the NRLTA, sections 24-517²⁸⁵ and 26-116²⁸⁶ state that these courts will not have jurisdiction for amounts greater than \$5,000. Which set of rules should prevail? The general jurisdictional statutes should. The purport of the NRLTA was apparently to give concurrent jurisdiction to the municipal, county or district court in suits for restitution of property. Although a municipal court could hear such a suit for the return of a valuable piece of property, there is no evidence that section 76-1409 was designed to allow a municipal court to hear a suit for \$6,000 just because it arose out of a

283. NEB. REV. STAT. § 76-1409 (Cum. Supp. 1974). This restates pre-existing Nebraska law. NEB. REV. STAT. § 24-568 (Cum. Supp. 1974) gave jurisdiction of forcible entry and of forcible detainer suits to county and municipal courts. NEB. REV. STAT. § 24-302 (Reissue 1964) gave the district court jurisdiction over both civil and criminal actions, "except where otherwise provided." Forcible entry and forcible detainer are quasi-criminal. Since section 24-568 does not provide that the county and municipal courts' jurisdiction is exclusive, it is presumed that the district court has concurrent jurisdiction.

284. The small claims court will not have jurisdiction over real property restitution cases, although it may have jurisdiction over other ordinary landlord and tenant litigation. NEB. REV. STAT. § 24-522 (Cum. Supp. 1974) provides that the small claims court shall have jurisdiction when "the personal property claimed does not exceed five hundred dollars. . . ." The inference is that the court does not have jurisdiction over any claims for real property. *But see* Simon v. Lieberman, 193 Neb. 321, 322, — N.W.2d — (1975).

285. NEB. REV. STAT. § 24-517 (Cum. Supp. 1974).

286. NEB. REV. STAT. § 26-116 (Cum. Supp. 1974).

landlord-tenant dispute. The jurisdictional divisions which have been already established should, therefore, be left intact, because the practical reasons for giving a district court exclusive jurisdiction over a \$10,000 automobile accident claim also apply to a \$10,000 landlord-tenant claim.

Personal jurisdiction over landlords and tenants is acquired as in other civil cases.²⁸⁷ Jurisdiction may also be acquired over a non-resident landlord or a landlord corporation not authorized to do business in Nebraska by substitute service on the Secretary of State.²⁸⁸ There is no comparable provision for substitute service on the tenant; the NRLTA draftsmen apparently believed it was unnecessary.²⁸⁹ This procedure, as applied to landlords, is analogous to the substitute service provisions of the motor vehicle statute.²⁹⁰ It is questionable as to whether there is a need for such

287. The district, county, or municipal court of this state may exercise jurisdiction over any landlord or tenant with respect to any conduct in this state governed by sections 24-568 and 76-1401 to 76-1449 or with respect to any claim arising from a transaction subject to sections 24-568 and 76-1401 to 76-1449 for a dwelling unit located within its jurisdictional boundaries. In addition to any other method provided by rule or by statute, personal jurisdiction over a landlord may be acquired in a civil action or proceeding instituted in the district, county, or municipal court by the service of process in manner provided by this section.

NEB. REV. STAT. § 76-1409(1) (Cum. Supp. 1974).

The Nebraska long-arm statute would also be applicable. NEB. REV. STAT. § 25-536 (Cum. Supp. 1974).

288. If a landlord is not a resident of this state or is a corporation not authorized to do business in this state and engages in any conduct in this state governed by sections 24-568 and 76-1401 to 76-1449, or engages in a transaction subject to sections 24-568 and 76-1401 to 76-1449, he may designate an agent upon whom service of process may be made in this state. The agent shall be a resident of this state or a corporation authorized to do business in this state. The designation shall be in writing and filed with the Secretary of State. If no designation is made and filed or if process cannot be served in this state upon the designated agent, process may be served upon the Secretary of State, but service upon him is not effective unless the plaintiff or petitioner forthwith mails a copy of the process and pleading by registered or certified mail to the defendant or respondent at his last reasonably ascertainable address. An affidavit of compliance with this section shall be filed with the clerk of the court on or before the return day of the process, if any, or within any further time the court allows.

NEB. REV. STAT. § 76-1409(2) (Cum. Supp. 1974).

289. "This section as drawn does not provide for substitute service and jurisdiction in an action brought against a tenant. In the view of the Commissioners authorization for such procedure, if deemed appropriate, should be made by general legislation applying to all debtors, naturally including tenants." URLTA § 1.203, Comment.

290. NEB. REV. STAT. § 25-530 (Cum. Supp. 1974). This statute has been

special jurisdictional rules in landlord-tenant cases. Certainly there is not the same need as in motor vehicle cases, since tenants often know who the landlord is, and usually the landlord will have some property in Nebraska which the tenant can reach, thus obviating the need for personal jurisdiction. Despite this, the provision for substitute service furnishes additional assurance that no Nebraska landlord can hide beyond the Nebraska courts' area of jurisdiction. This should be an incentive to all landlords to comply with the NRLTA, for tenants will always have a convenient Nebraska court in which to enforce their rights. This substitute service may result in the courts' acquiring jurisdiction over a landlord without his knowledge, since service may be made on the Secretary of State and the notice required by this method of service may not in fact reach the landlord.²⁹¹ However, the risks inherent in this method of service can easily be avoided by the landlord's appointing an agent upon whom service of process must be made. If he does this and if his designated agent can be served, then there may be no substitute service.

B. Retaliatory Conduct

Under existing law, the landlord's motive for raising rent, decreasing services or instituting a FED action was irrelevant, and, therefore, could not be used by a tenant as a basis for an affirmative suit nor as a basis for a defense in a FED suit. This rule has been particularly odious to the tenant who seeks to assert his rights against a landlord. He might complain to a housing code administrator of violations in the demised premises and the next day find a thirty day notice to terminate the tenancy in his mailbox. He would have had no cause of action against the landlord, and in a subsequent FED suit for possession, he would have been unable to raise as a defense that the landlord's motive was to retaliate for the tenant's complaint. Recently, however, several courts have permitted the tenant to raise the defense of the landlord's retaliatory motive in a summary repossession suit.²⁹² Nebraska has not. Therefore, the adoption of section 76-1439 appears to change the Nebraska situation dramatically. Whether it does so, as a matter of practice, is problematical.

The landlord may not retaliate by raising the rent, decreasing the services, or by instituting a summary repossession suit after

narrowly construed. *Gatliff v. Little Audrey's Transp. Co.*, 317 F. Supp. 1117 (D. Neb. 1970).

291. The court will require strict compliance with the requirements of this statute. *Wilson v. Smith*, 193 Neb. 433, — N.W.2d — (1975).

292. See *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965).

a tenant has complained about conditions to a government agency or joined a tenant's union. If the landlord does any of these, he is liable for damages and the tenant can raise the landlord's action as a defense in a summary repossession suit.²⁹³ These provisions do not answer the question of whether the landlord can retaliate if the tenant complains to him. If he could, it might vitiate the entire statute. Since many of the landlord's duties become operative only after he has notice of the problem, if the tenant could be penalized for giving him notice, he would be reluctant to do so.

The URLTA counterpart provided that a landlord could not retaliate if the tenant complained to him.²⁹⁴ The NRLTA has no such provision. This at least raises the argument that the landlord's motives are an irrelevant consideration when he institutes a restitution suit after a tenant has complained of a defect to him. Nevertheless, it seems most unfair to encourage a tenant to complain to the landlord, and then to put his tenant status in jeopardy because of such a complaint. If this were the rule, well-advised tenants would complain to the landlord *through government officials*, a clearly circuitous route. It would be preferable to extend the protections afforded by section 76-1439(1) at least to those activities which the NRLTA encourages the tenant to perform in order to activate his rights under the NRLTA.

A second major problem area is the question of proof: Who should bear the burden of proving that the landlord's actions are based on retaliation? As a practical matter, the tenant will have a difficult time if he must carry the burden. He will not know the landlord's true motive, and the circumstantial evidence needed to prove this may not be convincing. The URLTA counterpart to

293.

(1) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after:

(a) The tenant has complained to a government agency charged with responsibility for enforcement of a minimum building or housing code of a violation applicable to the premises materially affecting health and safety; or

(b) The tenant has organized or become a member of a tenants' union or similar organization.

(2) If the landlord acts in violation of subsection (1), the tenant is entitled to the remedies provided in section 76-1430 and has a defense in action against him for possession.

NEB. REV. STAT. § 76-1439 (Cum. Supp. 1974).

294.

(a) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after:

(2) the tenant has complained to the landlord of a violation under Section 2.104. . . .

URLTA § 5.101(a)(2).

section 76-1439 provided that if the landlord raised rent, decreased services or instituted suit after the tenant had complained, his motive was presumed to be retaliatory.²⁹⁵ The burden thus shifted to the landlord to prove his motive was not retaliatory. The NRLTA does not have this provision. In its place the NRLTA states: "Nothing in this section shall be construed as prohibiting reasonable rent increases or changes in services notwithstanding the occurrence of acts specified in subsection (1)."²⁹⁶ The clear inference is that the tenant will have the burden of proving retaliation. This may emasculate the statute.

Finally, it should be noted that despite the protections afforded the tenant, section 76-1439(3)(b) provides that the landlord may bring an action for restitution if the tenant is in default in rent. This should not be interpreted as precluding the tenant's ordinary defenses permitted by the NRLTA. All it does is permit the landlord to sue for restitution based on nonpayment without running the risk that *this* action will be considered retaliatory.

C. Summary Repossession

To initiate a suit for possession, the aggrieved party must file a petition for restitution in the appropriate court of his choice.²⁹⁷ The petition shall contain (1) the facts, stated with particularity, on which the plaintiff seeks to recover, (2) a reasonably accurate description of the property, and (3) a showing of the requisite compliance with the notice provisions of the NRLTA.²⁹⁸ These changes in prior law are designed to provide the tenant-defendant with adequate notice of what is at issue²⁹⁹ and are important for several

295. If the landlord acts in violation of subsection (a), the tenant is entitled to the remedies provided in Section 4.107 and has a defense in any retaliatory action against him for possession. In an action by or against the tenant, evidence of a complaint within [1] year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation. The presumption does not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services. "Presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

URLTA § 5.101(b).

296. NEB. REV. STAT. § 76-1439(2) (Cum. Supp. 1974).

297. A prospective tenant, as well as a landlord, could bring an FED action against a wrongful possessor. *Gregory v. Pribbeno*, 143 Neb. 379, 9 N.W.2d 485 (1943); *Kouma v. Murphy*, 129 Neb. 892, 263 N.W. 211 (1935). This is also true under the NRLTA. The discussion in the text will presume that the landlord is the plaintiff.

298. NEB. REV. STAT. § 76-1441 (Cum. Supp. 1974).

299. NEB. REV. STAT. § 24-572 (Cum. Supp. 1974) provides that the com-

reasons. First, under prior law, the FED charge could be restated in the broad language of the statute.³⁰⁰ This would effectively conceal from the defendant the alleged facts and would make it more difficult to defend. Section 76-1441 remedies this by requiring that the facts be stated with particularity. Second, although the plaintiff had to serve notice and demand under the prior law, he did not have to allege compliance with them in his complaint. If the defendant defaulted, trial was held as if he were there.³⁰¹ The plaintiff did not have to prove compliance with facts which did not have to be alleged in his complaint. However, if the tenant pleaded not guilty, the plaintiff had the burden of proof with respect to all the issues, and demand and notice were necessary elements of a FED action.³⁰²

Section 76-1441 protects the defendant who is not present. At the trial which will be held as if he were present,³⁰³ the landlord must now prove compliance with the notice provisions. This is particularly important in landlord-tenant law for several reasons. Notices to quit, or notices of the opportunity to redeem, are often relied on by private parties in conducting their affairs. Also, there is a lot at stake. A court must be certain that a defendant, such as a defaulting tenant, was given notice of an opportunity to redeem, or else the result would be tantamount to declaring a forfeiture.

The petition may contain other causes of action relating to the tenancy.³⁰⁴ Prior law would have limited the landlord to join only actions for accrued rent and damages to the premises with his restitution claim.³⁰⁵ The apparent theory of the NRLTA, particularly

plaint "shall particularly describe the premises." This had been interpreted to mean a reasonably accurate description. *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 342 (1954); *Dimmett v. Appleton*, 20 Neb. 208, 29 N.W. 474 (1886). Thus, NEB. REV. STAT. § 76-1441 (Cum. Supp. 1974) does not change this.

300. *Board of Educ. Lands & Funds v. Gillett*, 158 Neb. 558, 64 N.W.2d 105 (1954); *Blaco v. Haller*, 9 Neb. 149, 1 N.W. 978 (1879). However, the three day notice-to-quit had to state, at least in a general way, the grounds of the claim. *Connell v. Chambers*, 22 Neb. 302, 34 N.W. 636 (1887).

301. NEB. REV. STAT. § 24-574 (Cum. Supp. 1974).

302. *Boehler v. Kraay*, 130 Neb. 233, 264 N.W. 745 (1936).

303. NEB. REV. STAT. § 76-1444 (Cum. Supp. 1974).

304. NEB. REV. STAT. § 76-1441 (Cum. Supp. 1974).

305. Existing law was not perfectly clear on this point. Prior to 1965, the rule was that the action could be for possession only. *Stover v. Hazelbaker*, 42 Neb. 393, 60 N.W. 597 (1894). In 1965, the FED statute was amended to permit the court "to inquire into the matters between the two litigants such as the amount of rent owing the plaintiff and the amount of damage caused by the defendant to the premises . . ." NEB.

section 76-1441, which provides that "said causes of action shall be answered and tried separately, if requested by either party" is that additional causes of action can be separated from the suit for restitution by a written request by either party. However, this is not completely clear. Section 76-1442 provides that the summons *shall* contain the "answer date for other causes of action" and that the trial of the action "for possession" shall be at a given time and place within specified time parameters. This section seems to imply that the suit for restitution and the other actions brought will be tried separately even if the defendant makes no written request. Despite this implication, it is practical and expedient to try all the causes together unless one party has an objection.³⁰⁶ With this pur-

REV. STAT. § 24-568 (Cum. Supp. 1974). At the least, this infers that the action need not be for possession only. How far to extend "the matters between the two litigants" and whether to extend it at all beyond the specific examples of "rent owing" and "damage caused by the defendant to the premises" is uncertain. Moreover, even after 1965, there was no explicit statement that a judgment in a FED could be for more than restitution and costs. NEB. REV. STAT. § 24-576 (Cum. Supp. 1974). The inference of this last section is that the FED suit remained an action for possession only, in spite of the broad language permitting inquiry into the matters between the litigants.

306. It is arguable that the plaintiff *must* join an action for rent with an action for possession, and if he does not, he will be later barred from bringing this action. The theory would be that an action for rent and an action for possession based on nonpayment of rent are truly the same cause of action. Causes of action can not be split, *Boomer v. Olsen*, 143 Neb. 579, 582, 10 N.W.2d 507, 509 (1943), for if they could it would cause judicial inefficiency and possibly undue harassment. Particular support for this theory is that the prior FED statute explicitly provided that a "judgment . . . shall not be a bar to any future action." NEB. REV. STAT. § 24-570 (Cum. Supp. 1974). This provision is not in the NRLTA, possibly raising the inference that a judgment may be a bar. Furthermore, the RESTATEMENT (SECOND) OF JUDGMENTS provides the following:

Where the plaintiff may in one action claim two or more remedies cumulatively rather than alternatively, all arising from the same transaction, but seeks fewer than all of these remedies, and a judgment is entered that extinguishes the claim under the rules of merger or bar, he is precluded from maintaining another action for the other remedies. Thus if the plaintiff in an action against another in wrongful possession of his land may claim judgment not only for repossession but for damages for the wrongful detention, but seeks and recovers a judgment for repossession only, he may not maintain another action for damages for the detention. In the older law, when several cumulative remedies might have to be sued for in successive separate actions (in the case supposed, an action of ejectment followed by an action for trespass for mesne profits), judgment in an action for one remedy would not preclude a second action for another remedy; but today a plaintiff may generally cumulate his remedies in a single action, with the preclusionary results mentioned.

pose in view, the summons should contain the answer date for the other causes if the defendant has made a written request for separate trials. Otherwise, the answer date will be the appearance date of the restitution suit. In order to avoid confusion and apprise defendants of their rights in this complicated procedure, it would be desirable for the summons to state the defendant's options clearly.

The summons shall be issued as in other cases.³⁰⁷ In addition to stating the time and place of the trial for possession and the answer day for the other causes, it shall contain the cause of the complaint and the assertion that if the defendant does not appear, judgment will be entered against him. In addition, the petition must be attached. This should provide the defendant with adequate facts to prepare a defense.³⁰⁸

The summons may be served by any person, apparently even the plaintiff. Existing law required that it be served as in other cases, and this did not permit a party to the action to serve it.³⁰⁹ Admittedly, the new method expedites the possessory action, for one will not be delayed by the sheriff; however, it is unlikely that the requirement that the person file an affidavit stating with particularity the manner in which it was served will vitiate the problems of sewer service.³¹⁰ Since other related claims can be joined with the claim for restitution, and since they all may be tried together, with or without the defendant, at the time set for the trial of possession, the temptation to "sewer" serve will be great. In this situation, not only will the plaintiff receive a judgment for damages, but he will also receive it quickly.

Under existing Nebraska law, in normal circumstances, trial in the county or municipal courts, where these actions were usually brought, on all the triable issues, would be no later than twenty-seven days after the filing of the complaint. The summons had

RESTATEMENT (SECOND) OF JUDGMENTS § 61.1(j) (Tent. Draft No. 1 1973). In spite of this, it is appropriate to leave the plaintiff with the option of not joining all related causes and not barring a later action. Summary repossession suits have historically been unique, and the explicit policy of the NRLTA is to give the parties a choice of whether to litigate more than the action for possession. See generally *Lindsey v. Normet*, 405 U.S. 56 (1972) for further policy analysis.

307. The applicable statute of limitations is one year after the cause of action accrues. NEB. REV. STAT. § 25-203 (Reissue 1964). Under existing law, it was tolled when the three day notice-to-quit was served. *Federal Trust Co. v. Overlander*, 118 Neb. 167, 223 N.W. 797 (1929).

308. NEB. REV. STAT. § 76-1442 (Cum. Supp. 1974).

309. NEB. REV. STAT. § 24-573 (Cum. Supp. 1974); NEB. REV. STAT. § 25-507 (Reissue 1964).

310. NEB. REV. STAT. § 76-1442 (Cum. Supp. 1974).

to be served and returned within ten days of filing, the tenant had ten days to respond,³¹¹ the answer date was the same as the trial date, and the tenant could be granted a seven day continuance.³¹² Any additional continuance could only be granted for "extraordinary causes," and only if the tenant gave an appropriate undertaking for rent and damages.³¹³ The result of this procedure was that not only would the tenant have to try the issue of possession within a short time, but he would also have to try a related rent issue in a shorter period of time than would normally be given a defendant sued for rent alone.

The NRLTA provides the parties with a fair compromise. The landlord can regain his property quickly, but the tenant has the option of having a normal period of time elapse before trial of the related issues. Under the NRLTA procedure, the summons shall be returned as in other cases; in the county and municipal courts this is not more than ten days after filing. The trial date for possession shall not be less than seven nor more than ten days from the date of service.³¹⁴ This may result in a trial seven to ten days after filing, if the summons is served on the date of issuance. The purpose of the minimum time period is to assure the defendant of some time to prepare a defense. The purpose of providing for the maximum time period is less clear. Perhaps it is a directive to the courts to try these matters quickly.³¹⁵ Perhaps it is to assure the defendant-tenant that the matter will be resolved in a finite amount of time, and that he will not have the problem of guessing when it will be brought. This should help him in making arrangements for new quarters if he should think this necessary. Despite this, providing for the maximum of ten days may present problems. For example, if the summons is issued with a January 15 trial date, and if it is served on January 3, the summons has been served too early and the defendant may have to be served again.

Section 76-1443 provides that no continuance shall be granted

311. NEB. REV. STAT. § 24-535 (Cum. Supp. 1974).

312. NEB. REV. STAT. § 24-575 (Cum. Supp. 1974).

313. NEB. REV. STAT. § 24-575 (Cum. Supp. 1974).

314. NEB. REV. STAT. § 76-1442 (Cum. Supp. 1974).

315. Number nine . . . I have to read my own writing here. Oh yeah, on the eviction . . . number nine deals with the eviction of a tenant non payment of rent or something like that. You must . . . we are trying to get the court to set the trial, if there is a court dispute on the eviction, somewhere between seven and ten days. We are saying in essence, not less than seven nor more than ten days the case shall be heard.

UNICAMERAL TRANSCRIPTS, 83d Leg., 2d Sess. 5321 (February 11, 1974) (remarks of Sen. Goodrich).

unless there are extraordinary causes, and then only if the tenant pays accrued rent to the court or posts an undertaking for it. He must also deposit with the court additional rent as it becomes due.³¹⁶ Thus, in normal cases, the trial date for possession may be as early as seven and no later than twenty days from filing.

The most striking feature of existing Nebraska FED law was the limited nature of the issues which could be tried in an action for possession. In the interests of speed and efficiency, counterclaims were excluded, as were most defenses.³¹⁷ If a landlord claimed his property because rent was due, there was only one important triable issue—was rent due? In *Stover v. Hazelbaker*, the court stated the general rule:

The only finding of fact that can be lawfully made in the trial of a forcible detainer case is whether or not the defendant therein is guilty of forcibly detaining the premises, and the only judgment that can be pronounced in such case is that the plaintiff have restitution of the premises sued for, or that the plaintiff's action be dismissed and that the defendant go hence without day. [The right to recover rent . . .] or the right of Mrs. Stover to set-off against said rent the note she held against Hazelbaker, were not in issue. This was not a suit by Hazelbaker to recover rent for the premises.³¹⁸

316. NEB. REV. STAT. § 24-575 (Cum. Supp. 1974) provided for an "automatic" continuance of seven days. NEB. REV. STAT. § 76-1428 (Cum. Supp. 1974) provides that in the event of a counterclaim, the court may require a tenant to pay accrued and accruing rent to the court, but since NEB. REV. STAT. § 76-1443 (Cum. Supp. 1974) mandates such payments if a continuance is granted, it is difficult to imagine any significant time period during which judicial discretion could be exercised. See *Bell v. Tsintolas*, 430 F.2d 474 (D.C. Cir. 1970).

317. See *Lindsey v. Normet*, 405 U.S. 56 (1972).

318. 42 Neb. 393, 395, 60 N.W. 597, 598 (1894). However, the Nebraska rule was not free from doubt. For example, in *McJunkin v. Waldo*, 95 Neb. 235, 145 N.W. 337 (1914) the landlord had brought a suit for rent owing, and the tenant counterclaimed for services rendered. The court had held for the tenant, thus establishing that no rent was owing. The landlord then brought the FED action because of the tenant's nonpayment of rent. The tenant was permitted to defend by establishing that it had been decided, in the prior case, that no rent was due. The court thought this was obvious, and explicitly did not determine what other claims the tenant might raise by way of offset. In distinguishing a prior case, however, the court noted that the general setoff statute seemed to apply to FED cases based on nonpayment of rent in the same way that it applied in other actions.

Moreover, there may be a constitutional argument that if an action for rent is attached to the suit for restitution, other issues can be raised, at least in defense. The Supreme Court justified the Oregon summary repossession suit by emphasizing the importance of the fact that it was for restitution only. 405 U.S. 56 (1972). The fairness of the summary trial rested on the importance of the possession issue. If normal rent

The common exception to this general rule was that certain equitable defenses could be raised, since the purpose of the FED statute was to secure rent payment and not to exact a lease forfeiture. Thus, it has been held that the statutory failure to pay rent must have been a wrongful failure;³¹⁹ if the tenant paid his rent within three days of receipt of the notice to quit, he could not be evicted;³²⁰ if the tenant's failure to pay was in good faith and he was prepared to pay, this too was an appropriate defense.³²¹ The scope of the equity defense has not been explored beyond these "confused rent" cases, and its parameters have never been clearly articulated.³²²

The NRLTA changes the existing approach dramatically. Section 76-1445 provides that on or before the day fixed for trial, the defendant may appear and assert legal or equitable defenses, setoffs or counterclaims. More specifically, however, section 76-1428 provides that the defendant may counterclaim for any amount which he may recover under the rental agreement or the NRLTA in a repossession suit based on nonpayment.³²³ The juxtaposition of these two sections raises two problems. First, the negative inference of section 76-1428 is that a defendant in possession may not counterclaim if a plaintiff's possession suit is premised on other than nonpayment of rent. However, it is preferable to interpret section 76-1428 as a subclass of section 76-1445, and to allow a defendant to counterclaim in any suit for possession. This interpretation will promote judicial efficiency, and if a plaintiff is harmed, he can move to have the counterclaim tried separately. Second, what is the scope of the permissible counterclaim? If section 76-1445 is controlling, apparently the scope is governed by the general counterclaim statute which permits counterclaims arising out of the contract or

or damage claims are attached to the possession claim—as has been permitted in Nebraska since 1965—it may be constitutionally unfair to preclude any legitimate defenses. See NEB. REV. STAT. § 24-568 (Cum. Supp. 1974).

319. *House v. Lewis*, 108 Neb. 257, 187 N.W. 784 (1922).

320. *Farmer v. Pitts*, 108 Neb. 9, 187 N.W. 95 (1922); *Osterberg v. Scottsbluff Invest. Co.*, 106 Neb. 143, 183 N.W. 95 (1921).

321. *Marine Equip. & Supply Co. v. Welsh*, 188 Neb. 385, 196 N.W.2d 911 (1972).

322. *But see King v. Wilson*, 1 Neb. (Unof.) 93, 95 N.W. 494 (1901), which held that the claim that the landlord leased the premises for an immoral purpose was no defense in a FED suit.

323. NEB. REV. STAT. § 76-1428(1) (Cum. Supp. 1974) provides that "[i]n an action for possession based upon nonpayment of the rent or in an action for rent where the tenant is in possession, the tenant may counterclaim for any amount which he may recover under the rental agreement or sections 24-568 and 76-1401 to 76-1449."

transaction, or the subject matter of the plaintiff's action.³²⁴ Section 76-1428 is broader than this, for it seems to provide that if a landlord-plaintiff should sue for possession based on non-payment, the tenant-defendant could counterclaim for a tort premised on a landlord's unrelated noncompliance with the NRLTA. It is submitted that section 76-1428 be interpreted as repeating the scope of the general counterclaim statute. The apparent purpose of the NRLTA was to permit counterclaims in summary repossession actions, but not necessarily to expand the parameters of the counterclaim.

A problem arises if the landlord has assigned his right to rent to a third party. Can the tenant assert any legal or equitable defense, setoff or counterclaim against this third-party in a suit by this third-party? Under the URLTA, the tenant clearly could assert defenses based on the landlord's noncompliance with his maintenance obligations. Section 1.404 of the URLTA prevented any assignments of rent which would be free of the obligations imposed by section 2.104(a) of the URLTA, the counterpart of section 76-1419(1).³²⁵

Section 1.404 of the URLTA and section 4.105 of the URLTA, the counterpart of section 76-1428, were to be read together, for they make the tenant's covenant to pay rent dependent on the landlord's compliance with building and housing codes. The URLTA draftsmen believed that if rent assignments free of this obligation were allowed, the landlord could thwart the thrust of the URLTA.³²⁶ The assignee could bring an action for rent or possession, and the tenant could not counterclaim or defend charging the landlord's noncompliance with the applicable codes. A rent assignment could thus neutralize one of the tenant's most effective remedial weapons. On the other hand, commentators criticized this prohibition of free rent assignments.³²⁷ They feared that a lender might be discouraged from advancing construction money if it

324. NEB. REV. STAT. § 25-813 (Cum. Supp. 1974) provides that a counterclaim must arise "out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or [be] connected with the subject of the action."

325. "A rental agreement, assignment, conveyance, trust deed, or security instrument may not permit the receipt of rent free of the obligation to comply with Section 2.104(a)." URLTA § 1.404.

326. "The obligation of the landlord to maintain fit premises in accordance with Section 2.104(a) and the rights and remedies of the tenant under Article II and IV cannot be defeated or thwarted by the assignment of rents." URLTA § 1.404, Comment 1.

327. ABA Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, *supra* note 67, at 109; Comment, *supra* note 107, at 555.

feared that it would be saddled with the responsibility of code compliance. The NRLTA did not include this provision against assignments. The inference is that assignments of rent are to be permitted, and that the assignee will be free of any section 76-1419(1) obligation. This would apparently reverse existing law which held that the assignee of rent stood in the shoes of the landlord-assignor.³²⁸ The brief reported legislative history indicates a clear concern about lenders who might be reluctant to advance money for housing.³²⁹ In spite of this, it would be preferable to permit the tenant to raise the issue of the landlord's noncompliance with a maintenance obligation in a suit by an assignee. The NRLTA does not explicitly prevent this result, the legislature's reasons for deleting the URLTA provision were confused, and an interpretation of the NRLTA permitting the tenant to raise this defense would promote uniformity among the states.

This broad power given the tenant to raise defenses and counterclaims presents several problems. The first is whether the defendant *must* raise particular counterclaims. In a sense, this is the obverse of the question of whether a plaintiff could split a cause of action. Since the NRLTA does not answer the question directly, it would seem that general Nebraska law would prevail and counterclaims would not be compulsory.³³⁰ Another problem posed by the potential for counterclaim occurs when the landlord-plaintiff sues for restitution based on non-payment of rent of \$150, and the tenant-defendant believes he has a claim against the landlord-plaintiff for \$600, but may need more time to develop this counterclaim. Can he plead it as a defense only, thus proving that no rent was due? If he could, and he lost, he might not be estopped from bringing his claim for damages later. On the other hand, if he would be estopped, then he must choose between trying his claim at the early restitution trial, or perhaps forfeiting his tenancy. Although the NRLTA does not answer this directly, it is probable that the defendant-tenant would be estopped from raising the exact same claim in two different suits. To allow him to do this would be totally inefficient, and it would go beyond the policy purposes which permits plaintiffs to split causes of action and allows defendants not to raise counterclaims.

328. See *Iowa Sav. Bank v. Frink*, 1 Neb. (Unof.) 14, 92 N.W. 916 (1901).

329. *Hearings on Nebraska Residential Landlord Tenant Act Before the Judiciary Committee*, 83d Leg., 1st Sess. 62-63 (February 7, 1973) (remarks of Mr. Wayne).

330. NEB. REV. STAT. § 25-814 (Reissue 1964) provides a penalty for not raising a counterclaim or a setoff, but does not bar a party from raising the claims later. See *Rogers v. Buettenbach*, 114 Neb. 834, 211 N.W. 168 (1926).

Before leaving the examination of the summary repossession trial, one final area must be explored. Can either party demand a jury trial? Prior law explicitly mandated that either party could.³³¹ The NRLTA does not have such a provision. Nevertheless, either party should have the right of a jury trial for several reasons.³³² First, the general procedural statutes provide that in a civil suit brought in the county or municipal court, a jury trial must be granted to any party on demand.³³³ It must also be granted to any party on demand in any action brought in the district court for the recovery of money or of specific real or personal property.³³⁴ An action for repossession is an action for the recovery of real property, and, therefore, a jury would seem to be required. It is arguable, however, that summary repossession actions are *sui generis* and that the normal rules of procedure are not applicable to them.³³⁵ Nevertheless, the Nebraska Constitution requires a right to jury trial in such an action, by providing in Article I, section 6 that the right of trial by jury shall remain inviolate. The relevant issue, therefore, becomes whether a party would have had such a right in a summary repossession action when the constitution was adopted.³³⁶ At that time, the FED statute provided for a jury.³³⁷ Assuming all this is true, it could still be argued that the NRLTA summary repossession action is not a FED action; however, this argument has little merit. Section 24-568, the FED statute, does provide that it will not apply to actions subject to the NRLTA,³³⁸ but the reason for this is that the NRLTA repossession action is an outgrowth of the normal FED action and is properly seen as an extension of it. As such, the Nebraska Constitution would require each party to have a right to a jury. Finally, it is difficult to understand what the summary repossession action is if it is not an extension of the FED. If it is a completely new action, there is little reason for believing its procedure to be *sui generis*, and, therefore, the general statutes referred to would seem to require a right to jury. And if it is conceptualized as being an extension of ejectment, the constitution would again require a jury.³³⁹

331. NEB. REV. STAT. § 24-576 (Cum. Supp. 1974).

332. See *Pernell v. Southall Realty*, 416 U.S. 363 (1974).

333. NEB. REV. STAT. § 24-536 (Cum. Supp. 1974).

334. NEB. REV. STAT. § 25-1104 (Reissue 1964).

335. See *Lindsey v. Normet*, 405 U.S. 56 (1972); *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 342 (1954).

336. *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939); *Bell v. State*, 104 Neb. 203, 176 N.W. 544 (1920).

337. 1866 REV. STAT. TERR. NEB. 1028, 11th Leg. Sess.

338. NEB. REV. STAT. § 24-568 (Cum. Supp. 1974).

339. *Foltz v. Brakhage*, 151 Neb. 216, 36 N.W.2d 768 (1949).

Once judgment for restitution has been rendered against the defendant, the court, on the request of the plaintiff, shall direct the constable or sheriff to evict the defendant within seven days. Under prior law, the officer would have had ten days after receiving the writ to do this.³⁴⁰

Under what conditions should restitution be awarded to the plaintiff? If the landlord-plaintiff claims restitution because \$150 rent is owed (which, we can assume, the tenant knowingly withheld because he believed he had a section 76-1419 suit against the landlord for at least \$150), and the tenant-defendant counterclaims for damages based on the landlord's noncompliance with section 76-1419, and if the court determined that the landlord is entitled to \$80, is the landlord entitled to restitution? To hold that the tenant loses in this situation might penalize him for the innocent mistake of believing that his claim was worth \$150. To permit the tenant to stay, if he pays the \$80, might penalize the landlord. He has not received rent, and he believes that he is entitled to receive his property back. Tenants might be tempted to delay or to withhold rent payments, knowing they will be given a second chance to pay after a trial.

It is arguable that under section 76-1428 if the tenant should owe any rent, the landlord will be entitled to restitution because it provides that only if *no* rent is owing, shall judgment be entered for the tenant. The inference is that if any rent is owing, judgment will be for the landlord.³⁴¹ Such an interpretation would deter tenants from withholding rent, for they would do so at great risk. If they did not estimate correctly the amount they might owe, they would be evicted. Further support for this position is provided by the Nebraska Legislature's deleting section 4.103 of the URLTA, which would have provided the tenant with a limited, but legitimate, right to use the rent to make minor repairs. The inference of this deletion is that the legislature's intent was to discourage ten-

340. NEB. REV. STAT. § 24-581 (Cum. Supp. 1974).

341.

In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may "counterclaim" for any amount he may recover under the rental agreement or sections 24-568 and 76-1401 to 76-1449. In that event the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession. If the defense or counterclaim by the tenant is without merit and is not raised in good faith, the landlord may recover reasonable attorney's fees.

NEB. REV. STAT. § 76-1428(1) (Cum. Supp. 1974).

ants from making independent decisions with respect to the rent payments.

A preferable interpretation of section 76-1428 supports the conclusion that if the tenant makes the landlord whole, he may keep the property. The section provides that if the tenant pays rent to the court, the party to whom a net amount is owed will be paid first from this amount, and the balance owed will be paid by the other party. This means that the landlord will not get his rent money until after judgment, and it supports the conclusion that if the tenant pays what he owes immediately after trial (even if he had made no payments to court), the landlord should not be awarded restitution. Section 76-1428 further provides that if rent remains due after the application of the statute, the court will award restitution. What "application of the statute" means is uncertain. One interpretation is that it means after the balance of the money owed is paid by the other party. This gives the tenant a chance to pay the rent and damages and not be evicted from the property. Finally, section 76-1428 provides that if the tenant defends or counterclaims and his action is without merit and not done in good faith, the landlord is entitled to reasonable attorney's fees. This should prove a reasonable deterrent to ignoble tenant action, and, therefore, there is no need to penalize the tenant additionally for a mistake in the withholding of the rent. In other words, the tenant should be able to withhold some rent if he believes that the landlord is in noncompliance with section 76-1419, and if he does so in good faith but is wrong, he should still be able to redeem his tenancy.³⁴²

VI. CONCLUSION

Certainly the NRLTA is an improvement over existing law. Conceptually, the law is modernized. A lease-rental agreement clearly is a contract. Functionally, it is rationalized. Duties and responsibilities are generally placed on the party most capable of fulfilling them. Practically, it is sensible. The normal expectations of parties will usually be found in the law, and the parties will not be able to shift obligations around by adhesion leases.

342. Under existing law, either party could appeal, but if there was a judgment in the absence of a party, which was a default (see NEB. REV. STAT. § 24-582 (Cum. Supp. 1974); *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 352 (1954)), there could be no appeal by this party. Section 76-1447 provides that an aggrieved party may appeal as in other action, even if he should have lost by default; an appeal by the defendant shall stay execution so long as the tenant-defendant deposits or posts a bond for judgment and costs, and pays into court the agreed rent every month.

Nevertheless, the law is far from perfect. It would have been better to have adopted the URLTA *in toto*, not because it is impossible to have legitimate policy differences with the URLTA draftsmen, but rather because piece-meal tinkering with a coherent piece of legislation invites confusion and litigation. This article has focused on these changes made by the Nebraska legislators in the URLTA. It is hoped that the next state which adopts the URLTA will not change it at all, or if it must, that it will keep clearly in mind that the URLTA is a coherent, unified act, and to tamper with one part of it will certainly have ramifications on another part.

Appendix

Residential Landlord and Tenant Act

76-1401. Act, how cited. Sections 24-568 and 76-1401 to 76-1449 shall be known and may be cited as the Uniform Residential Landlord and Tenant Act.

76-1402. Purposes; rules of construction. (1) Sections 24-568 and 76-1401 to 76-1449 shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of sections 24-568 and 76-1401 to 76-1449 are:

(a) To simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant;

(b) To encourage landlord and tenant to maintain and improve the quality of housing; and

(c) To make uniform the law among those state which enact it.

76-1403. Supplementary principals of law applicable. Unless displaced by the provisions of sections 24-568 and 76-1401 to 76-1449, the principals of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

76-1404. Construction against implicit repeal. Sections 24-568 and 76-1401 to 76-1449 being a general act intended as a unified coverage of its subject matter, no part of it is to be construed as impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

76-1405. Administration of remedies; enforcement. (1) The remedies provided by sections 24-568 and 76-1401 to 76-1449 shall be so administered that the aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages.

(2) Any right or obligation declared by sections 24-568 and 76-1401 to 76-1449 is enforceable by action unless the provision declaring it specifies a different and limited effect.

76-1406. Settlement of claim or right. A claim or right arising under sections 24-568 and 76-1401 to 76-1449 or on a rental agreement may be settled by agreement.

76-1407. Jurisdiction; territorial application. Sections 24-568 and 76-1401 to 76-1449 apply to, regulate, and determine rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit located within this state.

76-1408. Exclusions from application of act. Unless created to avoid the application of sections 24-568 and 76-1401 to 76-1449, the following arrangements are not governed by sections 24-568 and 76-1401 to 76-1449:

(1) Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service.

(2) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest.

(3) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization.

(4) Transient occupancy in a hotel or motel.

(5) Occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises.

(6) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative.

(7) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

(8) A lease of improved or unimproved residential land for a term of five years or more.

76-1409. Jurisdiction and service of process. (1) The district, county, or municipal court of this state may exercise jurisdiction over any landlord or tenant with respect to any conduct in this state governed by sections 24-568 and 76-1401 to 76-1449 or with respect to any claim arising from a transaction subject to sections 24-568 and 76-1401 to 76-1449 for a dwelling unit located within its jurisdictional boundaries. In addition to any other method provided by rule or by statute, personal jurisdiction over a landlord may be acquired in a civil action or proceeding instituted in the district, county, or municipal court by the service of process in the manner provided by this section.

(2) If a landlord is not a resident of this state or is a corporation not authorized to do business in this state and engages in any conduct in this state governed by sections 24-568 and 76-1401 to 76-1449, or engages in a transaction subject to sections 24-568 and 76-1401 to 76-1449, he may designate an agent upon whom service of process may be made in this state. The agent shall be a resident of this state or a corporation authorized to do business in this state. The designation shall be in writing and filed with the Secretary of State. If no designation is made and filed or if process cannot be served in this state upon the designated agent, process may be served upon the Secretary of State, but service upon him is not effective unless the plaintiff or petitioner forthwith mails a copy of the process and pleading by registered or certified mail to the defendant or respondent at his last reasonably ascertainable address. An affidavit of compliance with this section shall be filed with the clerk of the court on or before the return day of the process, if any, or within any further time the court allows.

76-1410. Terms, defined. Subject to additional definitions contained in sections 24-568 and 76-1401 to 76-1449, and unless the context otherwise requires:

(1) Action includes recoupment, counterclaim, setoff, suit in equity, and any other proceeding in which rights are determined, including an action for possession.

(2) Building and housing codes include any law, ordinance, or governmental regulation concerning fitness for habitation, or the construction, maintenance, operation, occupancy, use, or appearance of any premises, or dwelling unit. Minimum housing code shall be limited to those laws, resolutions, or ordinances or regulations, or portions thereof, dealing specifically with health and minimum standards of fitness for habitation.

(3) Dwelling unit means a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household.

(4) Good faith means honesty in fact in the conduct of the transaction concerned.

(5) Landlord means the owner, lessor, or sublessor of the dwelling unit

or the building of which it is a part, and it also means a manager of the premises who fails to disclose as required by section 76-1417.

(6) Organization includes a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, and any other legal or commercial entity.

(7) Owner means one or more persons, jointly or severally, in whom is vested (a) all or part of the legal title to property, or (b) all or part of the beneficial ownership and a right to present use and enjoyment of the premises; and the term includes a mortgagee in possession.

(8) Person includes an individual or organization.

(9) Premises means a dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas and facilities held out for the use of tenants generally or whose use is promised to the tenant.

(10) Rent means all payments to be made to the landlord under the rental agreement.

(11) Rental agreement means all agreements, written or oral, between a landlord and tenant, and valid rules and regulations adopted under section 76-1422 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises.

(12) Roomer means a person occupying a dwelling unit that lacks a major bathroom or kitchen facility, in a structure where one or more major facilities are used in common by occupants of the dwelling units. Major facility in the case of a bathroom means toilet, or either a bath or shower, and in the case of a kitchen means refrigerator, stove or sink.

(13) Single family residence means a structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it is a single family residence if it has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment, nor any other essential facility or service with any other dwelling unit.

(14) Tenant means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others.

76-1411. Obligation of good faith. Every duty under sections 24-568 and 76-1401 to 76-1449 and every act which must be performed as a condition precedent to the exercise of a right or remedy under sections 24-568 and 76-1401 to 76-1449 imposes an obligation of good faith in its performance or enforcement.

76-1412. Unconscionability. (1) If the court, as a matter of law, finds that a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(2) If unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

76-1413. Notice. (1) A person has notice of a fact if (a) he has actual knowledge of it, (b) he has received a notice or notification of it, or (c) from all facts and circumstances known to him at the time in question he has reason to know that it exists. A person knows or has knowledge of a fact if he has actual knowledge of it.

(2) A person notifies or gives a notice or notification to another by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it. A person receives a notice or notification when (a) it comes to his attention, (b) in the case of the landlord, it is delivered at the place of business of the landlord through which the rental agreement was made or at any place held out by him as the place for receipt of the communication, or (c) in the case of the tenant, it is delivered in hand to the tenant or mailed to him at the place held out by him as the place for receipt of the communication, or in the absence of such designation, to his last-known place of residence.

(3) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction, and in any event from the time it would have been brought to his attention if the organization had exercised reasonable diligence.

76-1414. Terms and conditions of rental agreement. (1) The landlord and tenant may include in a rental agreement terms and conditions not prohibited by sections 24-568 and 76-1401 to 76-1449 or other rule of law including rent, term of the agreement, and other provisions governing the rights and obligations of the parties.

(2) In absence of agreement, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit.

(3) Rent shall be payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the dwelling unit and periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each month. Unless otherwise agreed, rent shall be uniformly apportionable from day-to-day.

(4) Unless the rental agreement fixes a definite term, the tenancy shall be week-to-week in case of a roomer who pays weekly rent, and in all other cases month-to-month.

76-1415. Prohibited provisions in rental agreements. (1) No rental agreement may provide that the tenant:

(a) Agrees to waive or to forego rights or remedies under sections 24-568 and 76-1401 to 76-1449;

(b) Authorizes any person to confess judgment on a claim arising out of the rental agreement;

(c) Agrees to pay the landlord's or tenant's attorney's fees; or

(d) Agrees to the exculpation or limitation of any liability of the landlord arising due to active and actionable negligence of the landlord or to indemnify the landlord for that liability arising due to active and actionable negligence or the costs connected therewith.

(2) A provision prohibited by subsection (1) included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover actual damages sustained by him and reasonable attorney's fees.

76-1416. Security deposits; prepaid rent. (1) A landlord may not demand or receive security, however denominated, in an amount or value in excess of one month's periodic rent, except that a pet deposit not in excess of one-fourth of one month's periodic rent may be demanded or received when appropriate, but this subsection shall not be applicable to housing authorities organized or existing under sections 71-1518 to 71-1554.

(2) Upon termination of the tenancy property or money held by the landlord as prepaid rent and security may be applied to the payment of rent

and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with the rental agreement or section 76-1421. The balance, if any, and a written itemization shall be delivered or mailed to the tenant within fourteen days after demand and designation of the location where payment may be made or mailed.

(3) If the landlord fails to comply with subsection (2) the tenant may recover the property and money due him and reasonable attorney's fees.

(4) This section does not preclude the landlord or tenant from recovering other damages to which he may be entitled under sections 24-568 and 76-1401 to 76-1449.

(5) The holder of the landlord's interest in the premises at the time of the termination of the tenancy is bound by this section.

76-1417. Disclosure. (1) The landlord or any person authorized to enter into a rental agreement on his behalf shall disclose to the tenant in writing at or before the commencement of the tenancy the name and address of:

(a) The person authorized to manage the premises; and

(b) An owner of the premises or a person authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for notices and demands.

(2) The information required to be furnished by this section shall be kept current and this section extends to and is enforceable against any successor landlord, owner, or manager.

(3) A person who fails to comply with subsection (1) becomes an agent of each person who is a landlord for the purpose of:

(a) Service of process and receiving and receipting for notices and demands; and

(b) Performing the obligations of the landlord under sections 24-568 and 76-1401 to 76-1449 under the rental agreement and expending or making available for the purpose all rent collected from the premises.

76-1418. Landlord to supply possession of dwelling unit. At the commencement of the term the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and section 76-1419. The landlord may bring an action for possession against any person wrongfully in possession and may recover the damages provided in subsection (3) of section 76-1437. If the landlord makes reasonable efforts to obtain possession of the premises, he shall not be liable for an action under this section.

76-1419. Landlord to maintain fit premises. (1) The landlord shall:

(a) Substantially comply, after written or actual notice, with the requirements of the applicable minimum housing codes materially affecting health and safety;

(b) Make all repairs and do whatever is necessary, after written or actual notice, to put and keep the premises in a fit and habitable condition;

(c) Keep all common areas of the premises in a clean and safe condition;

(d) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;

(e) Provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal from the appropriate receptacle; and

(f) Supply running water and reasonable amounts of hot water at all times and reasonable heat except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

If there exists a minimum housing code applicable to the premises, the landlord's maximum duty under this section shall be determined by subdivision (1) (a) of this section. The obligations imposed by this section are not intended to change existing tort law in the state.

(2) The landlord and tenant of a single family residence may agree that the tenant perform the landlord's duties specified in subdivisions (e) and (f) of subsection (1) and also specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is in writing, for good consideration, entered into in good faith and not for the purpose of evading the obligations of the landlord.

(3) The landlord and tenant of a dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only if:

(a) The agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord and is set forth in a separate writing signed by the parties and supported by adequate consideration; and

(b) The agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

(4) Notwithstanding any provision of sections 24-568 and 76-1401 to 76-1449, a landlord may employ a tenant to perform the obligations of the landlord.

76-1420. Limitation of liability. (1) Unless otherwise agreed, a landlord, who conveys premises that include a dwelling unit subject to a rental agreement in a good faith sale to a bona fide purchaser, is relieved of liability under the rental agreement and sections 24-568 and 76-1401 to 76-1449 as to events occurring subsequent to written notice to the tenant of the conveyance, but he remains liable to the tenant for any property and money to which the tenant is entitled under section 76-1416, except that assignment of any security deposits or prepaid rents to a bona fide purchaser with written notice to the tenant shall serve to relieve the conveying landlord of any further liability under section 76-1416.

(2) Unless otherwise agreed, a manager of premises that include a dwelling unit is relieved of liability under the rental agreement and sections 24-568 and 76-1401 to 76-1449 as to events occurring after written notice to the tenant of the termination of his management.

76-1421. Tenant to maintain dwelling unit. The tenant shall:

(1) Comply with all obligations primarily imposed upon tenants by applicable minimum standards of building and housing codes materially affecting health or safety;

(2) Keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit, and upon termination of the tenancy place the dwelling unit in as clean condition, excepting ordinary wear and tear, as when the tenancy commenced;

(3) Dispose from his dwelling unit all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(4) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(5) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances including elevators in the premises;

(6) Not deliberately or negligently destroy, deface, damage, impair or remove any part of the premises or knowingly permit any person to do so;

(7) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises; and

(8) Abide by all by-laws, covenants, rules or regulations of any applicable condominium regime, cooperative housing agreement, or neighborhood association not inconsistent with landlord's rights or duties.

76-1422. Rules and regulations. A landlord, from time to time, may adopt rules or regulations, however described, concerning the tenant's use and occupancy of the premises. It is enforceable as provided in section 76-1431 against the tenant only if:

(1) Its purpose is to promote the appearance, convenience, safety, or welfare of the tenants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally;

(2) It is reasonably related to the purpose for which it is adopted;

(3) It applies to all tenants in the premises in a fair manner;

(4) It is sufficiently explicit in its prohibition, direction, or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;

(5) It is not for the purpose of evading the obligations of the landlord; and

(6) The tenant has notice of it at the time he enters into the rental agreement.

A rule or regulation adopted after the tenant enters into the rental agreement is enforceable against the tenant if reasonable notice of its adoption is given to the tenant and it does not work a substantial modification of his bargain.

76-1423. Access. (1) The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

(2) The landlord may enter the dwelling unit without consent of the tenant in case of emergency.

(3) The landlord shall not abuse the right of access or use it to harass the tenant. Except in case of emergency or if it is impracticable to do so, the landlord shall give the tenant at least one day's notice of his intent to enter and enter only at reasonable times.

(4) The landlord has no other right of access except by court order, and as permitted by subsection (2) of section 76-1432, or if the tenant has abandoned or surrendered the premises.

76-1424. Tenant to use and occupy. Unless otherwise agreed, the tenant shall occupy his dwelling unit only as a dwelling unit. The rental agreement may require that the tenant notify the landlord of any anticipated extended absence from the premises in excess of seven days no later than the first day of the extended absence.

76-1425. Noncompliance by landlord. (1) Except as provided in sections 24-568 and 76-1401 to 76-1449, if there is a material noncompliance by

the landlord with the rental agreement or a noncompliance with section 76-1419 materially affecting health and safety, the tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days, and the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the landlord adequately remedies the breach prior to the date specified in the notice, the rental agreement will not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six months, the tenant may terminate the rental agreement upon at least fourteen days' written notice specifying the breach and the date of termination of the rental agreement. The tenant may not terminate for a condition caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

(2) Except as provided in sections 24-568 and 76-1401 to 76-1449, the tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or section 76-1419. If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees. If the landlord's noncompliance is caused by conditions or circumstances beyond his control, the tenant may not recover consequential damages, but retains remedies provided in section 76-1427.

(3) The remedy provided in subsection (2) is in addition to any right of the tenant arising under subsection (1) of section 76-1425.

(4) If the rental agreement is terminated, the landlord shall return all prepaid rent and security recoverable by the tenant under section 76-1416.

76-1426. Failure to deliver possession. If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 76-1418, rent abates until possession is delivered and the tenant shall:

(1) Upon at least five days' written notice to the landlord terminate the rental agreement and upon termination the landlord shall return all prepaid rent and security; or

(2) Demand performance of the rental agreement by the landlord and, if the tenant elects, maintain an action for possession of the dwelling unit against any person wrongfully in possession or wrongfully withholding possession and recover the damages sustained by him.

If a person's failure to deliver possession is willful and not in good faith, an aggrieved person may recover from that person an amount not more than three months' periodic rent or threefold the actual damages sustained by him, whichever is greater, and reasonable attorney's fees.

76-1427. Wrongful failure to supply heat, water, hot water, or essential services. (1) If contrary to the rental agreement or section 76-1419 the landlord deliberately or negligently fails to supply running water, hot water, or heat, or essential services, the tenant may give written notice to the landlord specifying the breach and may:

(a) Procure reasonable amounts of hot water, running water, heat and essential services during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;

(b) Recover damages based upon the diminution in the fair rental value of the dwelling unit; or

(c) Procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance.

In addition to the remedy provided in subdivisions (a) and (c), if the failure to supply is deliberate, the tenant may recover the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent, and in any case under this subsection reasonable attorney's fees.

(2) If the tenant proceeds under this section, he may not proceed under section 76-1425 as to that breach.

(3) The rights under this section do not arise until the tenant has given written notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent. This section is not intended to cover circumstances beyond the landlord's control.

76-1428. Landlords noncompliance as defense to action for possession. (1) In an action for possession based upon nonpayment of the rent or in an action for rent where the tenant is in possession, the tenant may counterclaim for any amount which he may recover under the rental agreement or sections 24-568 and 76-1401 to 76-1449. In that event the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession. If the defense or counterclaim by the tenant is without merit and is not raised in good faith the landlord may recover reasonable attorney's fees.

(2) In an action for rent where the tenant is not in possession, the tenant may counterclaim as provided in subsection (1) but the tenant is not required to pay any rent into court.

76-1429. Fire or casualty damage. (1) If the dwelling unit or premises are damaged or destroyed by fire or casualty to an extent that enjoyment of the dwelling unit is substantially impaired, the tenant may:

(a) Immediately vacate the premises and notify the landlord in writing within fourteen days thereafter of his intention to terminate the rental agreement, in which case the rental agreement terminates as of the date of vacating; or

(b) If continued occupancy is lawful, vacate any part of the dwelling unit rendered unusable by the fire or casualty, in which case the tenant's liability for rent is reduced in proportion to the diminution in the fair rental value of the dwelling unit.

(2) If the rental agreement is terminated the landlord shall return all prepaid rent and security recoverable under section 76-1416. Accounting for rent in the event of termination or apportionment is to occur as of the date of the casualty. Notwithstanding the provisions of this section, the tenant is responsible for damage caused by his negligence.

76-1430. Tenant's remedies for landlord's unlawful ouster, exclusion, or diminution of service. If the landlord unlawfully removes or excludes the tenant from the premises or willfully and wrongfully diminishes services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount equal to three months' periodic rent as liquidated damages, and a reasonable attorney's fee. If the rental agreement is terminated the landlord shall return all prepaid rent and security recoverable under section 76-1416.

76-1431. Noncompliance with rental agreement; failure to pay rent. (1) Except as provided in sections 24-568 and 76-1401 to 76-1449, if there is a noncompliance with section 76-1421 materially affecting health and safety or a material noncompliance by the tenant with the rental agreement or any separate agreement, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days, and the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach prior to the date specified in the notice, the rental agreement will not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six months, the landlord may terminate the rental agreement upon at least fourteen days' written notice specifying the breach and the date of termination of the rental agreement.

(2) If rent is unpaid when due and the tenant fails to pay rent within three days after written notice by the landlord of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement.

(3) Except as provided in sections 24-568 and 76-1401 to 76-1449, the landlord may recover damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or section 76-1421. If the tenant's noncompliance is willful the landlord may recover reasonable attorney's fees.

76-1432. Remedies for absence, nonuse, and abandonment. (1) If the rental agreement requires the tenant to give notice to the landlord of an anticipated extended absence in excess of seven days as required in section 76-1424 and the tenant willfully fails to do so, the landlord may recover actual damages from the tenant.

(2) During any absence of the tenant in excess of seven days, the landlord may enter the dwelling unit at times reasonably necessary.

(3) If the tenant abandons the dwelling unit, the landlord shall take immediate possession and shall make reasonable efforts to rent it at a fair rental. If the landlord rents the dwelling unit for a term beginning prior to the expiration of the rental agreement, it is deemed to be terminated as of the date the new tenancy begins. Total absence from the premises without notice to landlord for one full rental period of thirty days, whichever is less, shall constitute abandonment.

76-1433. Waiver of landlord's right to terminate. Acceptance of rent with knowledge of a default by tenant or acceptance of performance by tenant that varies from the terms of the rental agreement or rules or regulations subsequently adopted by the landlord constitutes a waiver of his right to terminate the rental agreement for that breach, unless otherwise agreed after the breach has occurred.

76-1434. Landlord liens; distress for rent. (1) A lien or security interest on behalf of the landlord in the tenant's household goods is not enforceable.

(2) Distraint for rent is abolished.

76-1435. Remedy for termination. If the rental agreement is terminated, the landlord is entitled to possession and may have a claim for rent and a separate claim for actual damages for breach of the rental agreement and reasonable attorney's fees as provided in subsection (3) of section 76-1431.

76-1436. Recovery of possession limited. A landlord may not recover or take possession of the dwelling unit by action or otherwise, including willful diminution of services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, except in case of abandonment, surrender, or as permitted in sections 24-568 and 76-1401 to 76-1449.

76-1437. Periodic tenancy; holdover remedies. (1) The landlord or the tenant may terminate a week-to-week tenancy by a written notice given to the other at least seven days prior to the termination date specified in the notice.

(2) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty days prior to the periodic rental date specified in the notice.

(3) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession and if the tenant's holdover is willful and not in good faith the landlord, in addition, may recover an amount not more than three months' periodic rent or threefold the actual damages sustained by him, whichever is greater, and reasonable attorney's fees. If the landlord consents to the tenant's continued occupancy, subsection (4) of section 76-1414 applies.

76-1438. Landlord and tenant remedies for abuse of access. (1) If the tenant refuses to allow lawful access, the landlord may obtain injunctive relief to compel access, or terminate the rental agreement. In either case, the landlord may recover actual damages and reasonable attorney's fees.

(2) If the landlord makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the tenant, the tenant may obtain injunctive relief to prevent the recurrence of the conduct, or terminate the rental agreement. In either case, the tenant may recover actual damages not less than an amount equal to one month's rent and reasonable attorney's fees.

76-1439. Retaliatory conduct prohibited. (1) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after:

(a) The tenant has complained to a government agency charged with responsibility for enforcement of a minimum building or housing code of a violation applicable to the premises materially affecting health and safety; or

(b) The tenant has organized or become a member of a tenants' union or similar organization.

(2) If the landlord acts in violation of subsection (1), the tenant is entitled to the remedies provided in section 76-1430 and has a defense in action against him for possession. Nothing in this section shall be construed as prohibiting reasonable rent increases or changes in services notwithstanding the occurrence of acts specified in subsection (1).

(3) Notwithstanding subsections (1) and (2), a landlord may bring an action for possession if:

(a) The violation of the applicable minimum building or housing code was caused primarily by lack of reasonable care by the tenant or other person in his household or upon the premises with his consent;

(b) The tenant is in default in rent; or

(c) Compliance with the applicable minimum building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit.

The maintenance of the action does not release the landlord from liability under subsection (2) of section 76-1425.

76-1440. Action for possession. An action for possession of any premises subject to the provisions of sections 24-568 and 76-1401 to 76-1449 shall be commenced in the manner described by sections 76-1440 to 76-1447.

76-1441. Petition for restitution; filing; contents. The person seeking possession shall file a petition for restitution with the clerk of the district, county, or municipal court. The petition shall contain (a) the facts, with particularity, on which he seeks to recover; (b) a reasonably accurate description of the premises; and (c) the requisite compliance with the notice provisions of the act. The petition may also contain other causes of action relating to the tenancy, but said causes of action shall be answered and tried separately, if requested by either party in writing.

76-1442. Summons; issuance; service. The summons shall be issued and directed, with a copy of the petition attached thereto, and shall state the cause of the complaint, the time and place of trial of the action for possession, answer day for other causes of action, and notice that if the defendant fails to appear judgment shall be entered against him. The summons may be served and returned as in other cases, or by any person. The person making the service shall file with the court an affidavit stating with particularity the manner in which he made the service. Trial of the action for possession shall be not less than seven nor more than ten days after the service of summons.

76-1443. Continuance; when. No continuance shall be granted unless extraordinary cause be shown to the court, and then not unless the defendant applying therefor shall deposit with the clerk of the court payment of any rents that have accrued, or give an undertaking with sufficient surety therefor, and, in addition, deposit with the clerk such rental payments as accrue during the pendency of the suit.

76-1444. Default of defendant. If the defendant shall not appear in response to the summons, and it shall have been properly served, the court shall try the cause as though he were present.

76-1445. Defendant may appear and answer. On or before the day fixed for his appearance, the defendant may appear and answer and assert any legal or equitable defense, setoff, or counterclaim.

76-1446. Trial; judgment; writ of restitution; issuance. Trial shall be had on the date or dates set as in all other cases, and if judgment be rendered against defendant for the restitution of the premises, the court shall declare the forfeiture of the rental agreement, and shall, at the request of the plaintiff or his attorney, issue a writ of restitution, directing the constable or sheriff to restore possession of the premises to the plaintiff on a specified date not more than seven days after entry of judgment.

76-1447. Appeal; effect. If either party feels aggrieved by the judgment, he may appeal as in other civil actions. An appeal by the defendant shall stay the execution of any writ of restitution, so long as the defendant deposits with the clerk of the district court the amount of judgment and costs, or gives an appeal bond with surety therefor, and thereafter pays into

court, on a monthly basis, an amount equal to the monthly rent called for by the rental agreement at the time the complaint was filed.

76-1448. Operative date; act; application. Sections 24-568 and 76-1401 to 76-1449 shall become operative on July 1, 1975. It applies to rental agreements entered into or extended or renewed after that date.

76-1449. Transactions entered into before effective date; effect. Transactions entered into before July 12, 1974, and not extended or renewed after that date, and the rights, duties, and interests flowing from them remain valid and may be terminated, completed, consummated, or enforced as required or permitted prior to July 12, 1974.