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Forcible Detainer in Kentucky Under the Uniform Residential Landlord and Tenant Act

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FORCIBLE DETAINER IN KENTUCKY UNDER THE UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT

Forcible detainer is the statutory procedure which enables a landlord to recover possession of rental premises from a tenant. While this action in Kentucky has evolved from an English criminal proceeding, it is not a common law action. Rather, forcible detainer is a special statutory procedure in derogation of the common law which was developed specifically to meet the needs of lessors. The action has traditionally been summary in nature, limited solely to the issue of which party was entitled to possession. The entire proceeding, from complaint to "eviction," may be completed in as few as six days. Thus, although there are other possessory actions available to a landlord, forcible detainer is, as a practical matter, the only such remedy that is used.

For the attorney who does not regularly work in the area of landlord-tenant law, it may be expedient to have, at the very least, a working knowledge of the forcible detainer action. For instance, many tenants seek legal assistance only after they have been served with a writ of forcible detainer. Similarly, many landlords, especially those who rent under oral agree-

1 Ky. Rev. Stat. § 383.200(3)(a) (1972) [hereinafter cited as KRS]. A tenant is entitled to bring possessory actions in certain situations, but he may not bring a forcible detainer proceeding. Mattingly's Ex'r v. Brents, 159 S.W. 1157, 1160 (Ky. 1919); see KRS § 383.200. Despite the nomenclature, the procedure is appropriate where the tenant is holding wrongfully or unlawfully; the tenant's continued possession need not involve force. Newson v. Damron, 193 S.W.2d 643, 644 (Ky. 1946).


3 2 R. Powell, Real Property ¶250 at 372.126 (P. Rohan ed. 1974) [hereinafter cited as Powell].


5 Compare KRS § 383.210 (1) (three days notice prior to hearing) with KRS § 383.245 (warrant of restitution may be issued on third day after judgment).

6 See 2 Powell, supra note 3, ¶250 at 372.126. Other possessory actions, such as ejectment, are comparatively slow, complex and expensive. Id. Furthermore, an unsuccessful forcible detainer action does not bar the subsequent use of a different action. Glenn, supra note 2, at 30-31; Johnson v. Haynes, 330 S.W.2d 109 (Ky. 1959).
COMMENTS

ments, seek legal advice to enable them to recover possession only after a serious dispute has developed with a tenant. Thus, an understanding of forcible detainer, which is one of the most important aspects of this area of the law, is necessary for any attorney who is likely to have contact with landlord-tenant problems.

Already the primary method of recovering possession of rental premises, forcible detainer takes on increased significance under the recently enacted Uniform Residential Landlord and Tenant Act,\(^7\) [hereinafter referred to as the Uniform Act]. Under this Act, an “action for possession” is the only method by which the landlord can recover possession of rental premises which the tenant will not voluntarily relinquish.\(^8\) Thus, under a tenancy governed by the Uniform Act,\(^9\) forcible detainer may be the only practical means for a landlord to dispossess an unwilling tenant.

The Uniform Act does not directly change Kentucky’s forcible detainer procedure.\(^10\) However, in addition to increasing the importance of the action, the Uniform Act effects substantive changes in traditional landlord-tenant law\(^11\) which will sig-

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\(^7\) Uniform Residential Landlord and Tenant Act, KRS §§ 383.505-.715 (1974 Supp.) [hereinafter cited as URLTA].

\(^8\) Compare URLTA, KRS § 383.690 with URLTA, KRS § 383.695(4). If the landlord unlawfully removes or excludes the tenant from the premises, the tenant may recover possession and is entitled to recover damages not exceeding three months’ rent plus attorney’s fees. URLTA, KRS § 383.655. The purpose of the forcible detainer proceeding is to prevent breaches of the peace that may result if the landlord attempts to evict the tenant by force. Cuyler v. Estis, 64 S.W. 673 (Ky. 1901). Nonetheless, the common law rule in Kentucky permitted a landlord to recover possession in some circumstances without resort to legal process. See Stoll Oil Ref. Co. v. Pierce, 337 S.W.2d 263 (Ky. 1960).

\(^9\) The Uniform Act governs only residential tenancies. URLTA, KRS § 383.530. At present, the Act applies only to Jefferson and Fayette Counties. URLTA, KRS § 383.715(1). As to residential arrangements that are specifically excluded from the coverage of the Uniform Act see URLTA, KRS § 383.535.

\(^10\) However, the provisions of the Uniform Act indicate that the landlord may join his claim for possession with a claim for back rent. See URLTA, KRS § 383.685. Likewise, the provisions indicate that the tenant may counterclaim for damages in any forcible detainer action. See URLTA, KRS § 383.545(1). But see URLTA, KRS §§ 383.645(1)-(2).

nificantly affect forcible detainer proceedings. Thus, it be-
comes appropriate to examine the entire forcible detainer pro-
cedure in light of these changes. This comment, then, will ex-
amine three aspects of forcible detainer in Kentucky under the
Uniform Act: (1) the forcible detainer procedure, (2) the cir-
cumstances that may lead to forcible detainer action by the
landlord, and, (3) the defenses available to the tenant.

I. THE FORCIBLE DETAINER PROCEDURE

Original jurisdiction of all actions under the Uniform Act
is given to quarterly courts in Kentucky. Accordingly, a forci-
bles detainer proceeding for a tenancy governed by the Act is
initiated by the landlord's complaint to a quarterly court
judge. When the complaint is made, the judge issues a war-
rant to an authorized sheriff or constable, directing the officer
to notify the defendant tenant of the charge. This notice must
be served at least three days in advance of the hearing date. A
tenant who has not received adequate notice has a right to a
continuance, and no action can be taken against a tenant who
has not been notified at all. Adequacy of notice, however, does

See also Report, Proposed Uniform Residential Landlord and Tenant Act, 8 REAL PROP.
PROB. & TR. J. 104 (1973); Strum, Proposed Uniform Residential Landlord and Tenant

Forcible detainer is a special statutory action. The statutory procedures are exclusive; the Kentucky Rules of Civil Procedure do not apply. Glenn, supra note 2, at 30.

The Kentucky Legislative Research Commission is presently studying the existing forcible detainer procedure, and it is likely that certain changes will be proposed in the 1976 General Assembly.

URLTA, KRS § 383.540.

According to prevailing practice, this complaint need not be in writing. Similarly, no written response is required. Glenn, supra note 2, at 29. Query whether this practice will be continued with the additional issues and affirmative defenses that may now be raised in a forcible detainer proceeding under the Uniform Act.

Compare URLTA, KRS § 383.540 with KRS § 383.210(1). The author of this comment was informed by members of the Kentucky Legislative Research Commission that the intention was to give quarterly courts exclusive original jurisdiction of forcible detainer actions under the Uniform Act.

KRS § 383.210(1).

KRS § 383.215. One legal commentator has further suggested that default judg-
ments, as such, are never authorized in forcible detainer actions; the landlord must always prove his allegation that the tenant is forcibly detaining the premises. Glenn,
not necessarily require personal receipt by the tenant. Notice given to a member of the tenant’s family over 16 years of age or even notice posted on the door of the premises is sufficient.\textsuperscript{18} This notice requirement is apparently satisfied by taking steps that are “reasonably calculated to inform.”\textsuperscript{19}

At the hearing before the quarterly court, either party has the right to demand a jury trial; however, unless specifically requested, the right is waived.\textsuperscript{20} Virtually all forcible detainer proceedings in the past have been tried by the judge sitting without a jury. There are two possible explanations for this. First, it is likely that many tenants and landlords have been unaware of the right to a jury trial in this type of proceeding.\textsuperscript{21} Secondly, due to the summary nature of the proceeding, in many cases impaneling a jury was merely a waste of time. With

\textsuperscript{supra} note 2, at 29-30. Mr. Glenn makes this assertion on the basis of KRS \$ 383.235 (verdict to be made “after hearing the evidence . . .”) and language in KRS \$\$ 383.235, 383.245 (forcible detainer described as an “inquest” or “inquisition”). \textit{See also} Jolly v. Gilbert, 226 S.W. 354, 355 (Ky. 1920) (proof of refusal to surrender possession upon demand required to authorize judgment). Mr. Glenn reasons that:

\begin{quote}
[a]s an action of forcible detainer is a special statutory proceeding . . . in derogation of the common law, the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it or jurisdiction will fail to attach and the proceeding will be void.
\end{quote}

Glenn, \textit{supra} note 2, at 28-29.

This argument, however, was raised and rejected by a federal district court which held, \textit{inter alia}, that despite the special statutory character of the forcible detainer proceedings in Kentucky, default judgments are authorized; the court is not required to inquire into the merits of the case when the tenant does not make an appearance. Branham v. Malone, 367 F. Supp. 370, 372 (W.D. Ky. 1973). Apparently, default judgments have been issued in forcible detainer actions by courts in Kentucky. \textit{See} Bledsoe v. Leohnart, 205 S.W.2d 483, 485 (Ky. 1947); Terry v. Henry, 120 S.W.2d 404, 405 (Ky. 1938).

Nonetheless, strict compliance with the statutes is required in other circumstances. \textit{See}, \textit{e.g.}, Gray v. Holbrooks, 247 S.W.2d 213 (Ky. 1952) (failure to execute traverse bond as required by statute means that the circuit court lacks jurisdiction and must dismiss the appeal). \textit{See note 26 infra} and accompanying text. Considering that the inquisition is held on short notice, requiring the landlord to establish that he is entitled to possession (by proof or avowal) would appear to be a reasonable safeguard.

\textsuperscript{18} KRS \$ 454.030. \textit{But see} Glenn, \textit{supra} note 2, at 29.


\textsuperscript{20} KRS \$ 383.210(2); \textit{accord}, Ky. R. Civ. P. 38.04. The demand for a jury may be made when the case is called for trial. KRS \$ 383.210(2).

\textsuperscript{21} The right to a jury trial in a forcible detainer action in Kentucky is a statutory rather than a constitutional right. \textit{See} Pernell v. Southall Realty, 416 U.S. 363 (1974).
the significant changes in the substantive law that are incorporated in the Uniform Act, it is likely that the right to a jury trial will become much more important to both parties in a forcible detainer proceeding.

When the judgment in the quarterly court is in favor of the landlord, the judge is authorized, after three days, to issue a warrant of restitution. This warrant directs the sheriff or constable to put the landlord into possession of the premises in question, by physically removing the tenant and his personal property if necessary. It is possible, however, for the aggrieved tenant to stay the execution of the judgment while he obtains a trial de novo in circuit court. To do this, the tenant must file a traverse before the quarterly court judge and provide a surety bond. Both these requirements must be satisfied within three days; if they are not, the circuit court is said to lack jurisdiction and must dismiss the appeal.

23 KRS §§ 383.245, 383.255. This traverse must be filed before the original trial court, not the circuit court. Allen v. Caldwell, 209 S.W.2d 712 (Ky. 1948). The traverse is the sole and exclusive remedy of the aggrieved party in a forcible detainer action; it is not possible to obtain a new trial in the lower court. Chapman v. Baker, 226 S.W.2d 769, 770 (Ky. 1950).
24 KRS § 383.255.
25 Chapman v. Baker, 226 S.W.2d 769 (Ky. 1950). The day of judgment is counted as the first day. Only judicial days, i.e., days when court is in session, are counted. Id.
26 Gray v. Holbrooks, 247 S.W.2d 213 (Ky. 1952); Mayhew v. Kentucky River Coal Corp., 38 S.W.2d 452, 455 (Ky. 1931). This view is consistent with the idea that the special statutory procedures must be strictly followed. See note 17 supra.

Nonetheless, the bond requirement effectively deprives indigent tenants of their right to appeal. On this basis, one circuit court held the traverse bond requirement unconstitutional as applied to indigents. Hogue v. Edwards, No. 32364 at 8 (Fayette Cir. Ct., Ky. 1972). This holding, however, was based on the premise that housing is a "fundamental right." Id. at 5. Contra, Lindsey v. Normet, 405 U.S. 56, 73-74 (1972). In any event, the constitutionality of the traverse bond is presently being challenged in a federal district court action. Louisville Courier-Journal, Jan. 25, 1975, § A at 4, Col. 1.

Functionally, the traverse bond relates only to the stay of execution, not to the right of appeal. The purpose of the bond is to protect the landlord; the bond is used to compensate him for any damages or losses he suffers while he is unable to recover possession if the traverse is not successfully prosecuted by the tenant. KRS § 383.260. The landlord is entitled to this protection not because the appeal is being taken, but because he may suffer losses if he is unable to have the lower court judgment executed and recover possession.

The court in Hogue recognized this distinction and held that if no bond was provided, the landlord could have the lower court judgment executed during the pen-
II. TERMINATION: REQUIREMENTS FOR FORCIBLE DETAINER ACTION BY THE LANDLORD

The Uniform Act defines the exclusive methods by which a landlord may recover possession of rental premises. Forcible detainer (or other “action for possession”) is the only authorized method in situations where the tenant will not voluntarily relinquish possession. Since the issue to be resolved is which party is entitled to possession, the action does not lie while the tenant has the right to present occupancy. Only when the tenancy has terminated, either through natural expiration or by law, can the landlord successfully maintain a forcible detainer action. Thus, it is necessary to examine the circumstances that lead to the termination of a rental agreement.

A. Termination Without a Breach by the Tenant

1. Rental Agreements for an Indefinite Term

A landlord may not terminate a rental agreement which is for a definite period or term until the end of that established term, unless there has been a material breach by the tenant or unless there are extraordinary circumstances. On the other hand, if the rental agreement establishes no definite term, a periodic tenancy is created and, generally, the landlord may

1. See notes 6-8 supra and accompanying text.
3. At the end of a tenancy for a definite term, the landlord may bring a forcible detainer action if the tenant remains in possession. URLTA, KRS § 383.695(4). Of course, the landlord could insert a provision to provide for early termination. See Southeastern Land Co. v. Clem, 39 S.W.2d 674 (Ky. 1931).
4. “Unless the rental agreement fixes a definite term, the tenancy is week-to-week in the case of a roomer who pays weekly rent, and in all other cases month-to-month.”
terminate even if there has been no breach or other cause. For
such periodic tenancies, the only requirement imposed upon
landlords who wish to terminate “without cause” is that they
give sufficient notice of the termination date to the tenant.

The sufficiency of the notice required for a termination
“without cause” depends upon the type of tenancy involved.
For example, written notice must be given at least seven days
in advance in order to terminate a week-to-week tenancy.\(^1\)
Similarly, 30 days written notice is required to terminate a
month-to-month tenancy.\(^2\) However, the Uniform Act further
provides that a month-to-month tenancy may be terminated
only at the end of the rental period.\(^3\) Apparently, where rent
is payable on the first day of the month, the only date that
could properly be given as the termination date would be the
last day of the month, since this would be the end of the “rental
period.” This provision certainly gives uniformity to the law
governing the termination of month-to-month tenancies but,
other than this, the rationale for such a rule is questionable.\(^4\)
In any event, a periodic tenancy terminates on the date speci-
fied in the properly given notice to vacate. If the tenant re-
 mains in possession after the rental agreement has terminated,
the landlord may institute a forcible detainer action.

URLTA, KRS § 383.565(3) (emphasis added). Previously in Kentucky, all such peri-
odic tenancies were defined as “tenancies at will.” See, e.g., Goodwin v. Beutel, 256
S.W.2d 532 (Ky. 1953).
\(^1\) URLTA, KRS § 383.695(1).
\(^2\) URLTA, KRS § 383.695(2).
\(^3\) “The landlord or the tenant may terminate a month-to-month tenancy by a
written notice given to the other at least thirty (30) days before the periodic rental date
specified in the notice.” Id. (emphasis added). Accord, Scheidell v. McGregor, 106
S.W.2d 651 (Ky. 1937); Pack v. Feuchtenberger, 22 S.W.2d 914 (Ky. 1930).
\(^4\) It is submitted that this rule may work a hardship on both landlords and
tenants, either of whom may have legitimate reasons for desiring to terminate a ten-
ancy in the middle of a rental period. Furthermore, it is likely that many people are
unaware of the existence of this rule, which may lead to additional hardships. See notes
63-69 infra, and accompanying text.

It has been suggested that this rule serves a useful purpose in that it gives “a
certainty of duration” to periodic tenancies. 2 Powell, supra note 3, ¶253. If this was
the desired goal, a 60-day notification period could have been required, as suggested
by the Commissioners. Uniform Residential Landlord and Tenant Act § 4.301.
2. *Destruction or Substantial Impairment of the Tenant's Use of the Premises*

If the dwelling unit or premises are damaged or destroyed by fire or casualty or so injured by the elements, act of God, or other cause to an extent that enjoyment of the dwelling unit is substantially impaired, the tenant or the landlord may terminate the rental agreement upon 14 days written notice; however, the tenant may immediately vacate the premises.  

The above provision of the Uniform Act makes it clear that a landlord may terminate a rental agreement (for any type of tenancy) under these extraordinary circumstances even though there has been no breach by the tenant. Likewise, a landlord may apparently bring an action for possession in order to comply with local housing codes, where such compliance necessitates demolition or extensive repairs that would "effectively deprive the tenant of the use of the dwelling unit." Such provisions are consistent with one major purpose of the Uniform Act: to insure that residential housing conforms, at the very least, to the minimal standards of habitability.

B. *Termination Due to a Breach by the Tenant*

1. *Material Non-Compliance by the Tenant with Specific Duties Imposed under the Uniform Act*

The Uniform Act imposes many specific duties upon a tenant. The Act further provides that material non-compliance with some of these statutory duties authorizes the landlord to terminate the rental agreement. Thus, for example, if a ten-
tant unreasonably prevents the landlord from entering the dwelling unit for legitimate purposes, the landlord has the right to terminate the rental agreement immediately.

The most important duties imposed upon tenants under the Uniform Act, however, are those found in Kentucky Revised Statutes § 383.605. Under this provision a tenant must: comply with all obligations of local housing codes that are primarily imposed upon tenants; keep that part of the premises that he occupies in a reasonably clean and safe condition; dispose of all waste in a clean and safe manner; keep all plumbing fixtures that he uses reasonably clean; use all facilities and appliances in the premises in a reasonable manner; exercise care so as not to damage or destroy any part of the premises or knowingly permit any person to do so; and regulate his conduct and that of his guests so as not to disturb his neighbor's peaceful enjoyment of the premises. Where the tenant has materially breached one of these duties, the landlord may give written notice specifying the nature of the breach and informing the tenant that the rental agreement will terminate in 14 days. The tenant then has those 14 days to adequately remedy the breach, either by repair, payment of damages, or otherwise, but a failure to do so within the time allowed entitles the landlord to possession. Having cured the first breach, if the tenant commits another material breach of substantially the same nature within six months, the landlord again has the power to terminate the rental agreement upon 14 days notice. In this case, however, there is no provision allowing the tenant to avoid termination by remedying the breach.

Obviously, the tenant is under a duty to pay rent. Equally as obvious is the fact that non-payment of rent is the most frequent basis for a forcible detainer action. It is therefore

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383.660(3) (damages). Termination is available only in specified instances.
39 URLTA, KRS § 383.615(1). The landlord's right to enter is defined by URLTA, KRS §§ 383.615, 383.665, 383.679(2).
40 URLTA, KRS § 383.700(1).
41 URLTA, KRS § 383.660(1).
42 Id.
43 Id.
44 URLTA, KRS § 383.365(2). See also URLTA, KRS § 383.545(10); URLTA, KRS § 383.665.
hardly surprising that the drafters of the Uniform Act gave special consideration to this particular problem. Thus, if the tenant does not pay his rent when due, the landlord may give written notice specifying that the rental agreement will terminate in seven days unless payment is made within that time. If the tenant fails to make payment the rental agreement terminates, and the landlord is entitled to bring an action to recover possession.

2. Material Non-Compliance by the Tenant with Specific Duties Imposed by the Rental Agreement

It should be apparent from the preceding section that the Uniform Act specifically defines and regulates many of the rights and duties of both landlords and tenants. Nonetheless, the provisions of the Act are not all-encompassing. Any other terms and conditions that the parties may wish to provide for may be incorporated in a rental agreement. This rental agreement may be either written or oral, and may include any terms not prohibited by law. Thus, the rental agreement further defines the rights and obligations of the parties, and its provisions are binding on both the landlord and the tenant.

Where there has been material non-compliance by the tenant with a term of the rental agreement, the landlord may terminate the tenancy upon 14 days written notice, unless the tenant adequately remedies the breach within that time. Again, if a similar breach occurs within six months, the landlord has the absolute right to terminate after giving notice. To

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43 URLTA, KRS § 383.660(2).
44 URLTA, KRS § 383.530.
47 URLTA, KRS § 383.545(11). The rental agreement similarly includes rules and regulations adopted by the landlord. Id. These rules and regulations are defined in URLTA, KRS § 383.610. See also Southland Dev. Corp. v. Ehrler's Dairy, Inc., 468 S.W.2d 284, 287 (Ky. 1971).
48 URLTA, KRS § 383.565(1). Prohibited terms include: waivers of rights; confession of judgment clauses; agreements to pay the attorney's fees of the landlord; and exculpatory clauses. URLTA, KRS § 383.570(1). Likewise the rental agreement may not permit the landlord to receive rent free of his statutory obligations of repair and upkeep. URLTA, KRS § 383.575. These prohibitions may be meaningless. See notes 80-85 infra and accompanying text.
49 URLTA, KRS § 383.660(1).
50 Id.
illustrate, the Uniform Act provides that, unless otherwise agreed, a tenant is to occupy his dwelling unit only as a dwelling unit. No remedy is specifically given to the landlord under the Act for a breach of this obligation. The rental agreement, however, could provide that use of the premises by the tenant for any unauthorized purpose would be grounds for termination. A material breach of this covenant, then, would allow the landlord to notify and terminate in the manner outlined above.

III. Tenant's Defenses to Forcible Detainer Action

The Uniform Act provides a dissatisfied tenant with many rights and remedies that were not available at common law. Generally, however, a tenant must follow the explicit procedures and methods set out in the Act before he can avail himself of these rights and remedies. In some instances, a failure to follow these procedural requirements may also prevent a tenant from asserting certain otherwise legitimate defenses.

The defenses available to a tenant under the Uniform Act arise from three sources. First, several defenses are expressly provided for in the Act. Others necessarily arise by implication from specific provisions of the Act. Finally, some defenses, such as fraud or misrepresentation, are made available by virtue of the provision which incorporates “principles of law and equity” to supplement the Uniform Act. Regardless of how they arise, however, defenses to forcible detainer proceedings may be viewed in terms of public policy. In other words, these defenses are upheld where it would not be in the public interest to allow the landlord to recover possession. Public policy may require that the tenant be protected in some instances, or it may require that the landlord be “punished” for certain acts or omissions. With these considerations in mind, this comment

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51 URLTA, KRS § 383.620. This provision, however, may be altered by agreement.
52 See generally the authorities cited in note 11, supra.
53 See, e.g., URLTA, KRS § 383.640(4) (“Rights of the tenant under this section do not arise until he has given notice to the landlord . . . .”).
54 See URLTA, KRS § 383.510.
55 It must also be recognized, however, that a successful defense may be almost meaningless in the case of a tenant from month-to-month. Generally, the landlord can give notice to terminate “without cause” at any time, perhaps immediately after he
will now focus on several of the more important defenses available.

A. *Dispute Over Grounds for Termination: Materiality of Breach*

Naturally, where the landlord’s ground for a forcible detainer action is a breach by the tenant, the tenant may defend by denying the landlord’s allegation. Similarly, the tenant could maintain, that, although there was a breach, someone else was responsible. The burden of proof in such a case, indeed, in all forcible detainer actions, is on the landlord.

This burden of proof, however, goes beyond proving the occurrence of *any* breach; the landlord must prove that a material breach has occurred. This is a substantial change from the common law rule that any breach could lead to a forfeiture of the right to possession if so provided in a written lease. In order to avoid the often harsh results of this common law rule, courts developed a number of doctrines, all of which implemented the well-known maxim, “The law abhors a forfeiture.” Under the Uniform Act it is no longer necessary for a tenant to rely on a “court of equity” for relief from a forfeiture incurred by an insignificant breach. While the landlord may be able to recover damages or obtain injunctive relief for any breach, he can recover possession only where there has been a material breach.

B. *Improper Notice*

As previously discussed, the Uniform Act generally re-
quires a landlord to give notice of his intention to terminate the rental agreement. Therefore, a landlord's failure to give the requisite notice would be a valid defense in a forcible detainer action. Similarly, the Uniform Act provides that, where the reason for the intended termination is a breach by the tenant, the notice must specify the particular breach involved. This enables the tenant to remedy his breach if possible and thus avoid termination. If the notice fails to specify the reason for the intended termination, and the tenant is thereby unable to remedy his breach, the landlord should be precluded from recovering possession.

A third aspect of the notice requirements raises an important question. Notice must be given a specified number of days in advance of the termination date. For example, in order to terminate a month-to-month tenancy "without cause," the landlord must so notify the tenant at least 30 days before the specified periodic rental date. Consider the case of a month-to-month tenancy where rent is payable on the first of the month. The landlord, unaware of the above rule, gives the tenant notice on March 15 that the rental agreement will terminate in 30 days, on April 15. The tenancy will not terminate on April 15, however, because this date is in the middle, rather than at the end of the rental period. The crucial issue in this situation is whether the notice, as given, will serve to terminate the rental agreement on April 30, the first permissible termination date that occurs after 30 days.

Under the common-law rule in Kentucky, improper or insufficient notice is totally invalid; it has no legal significance.

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60 URLTA, KRS §§ 383.650, 383.660(1). There are two exceptions to the requirement that the landlord give notice of termination. URLTA, KRS § 383.695(4) (holdover after expiration of a tenancy for a definite term); URLTA, KRS § 383.700(1) (refusal to allow lawful access).

61 Accord, Goodwin v. Beutel, 256 S.W.2d 532, 533 (Ky. 1953).

62 URLTA, KRS § 383.660(1). The opportunity to remedy is available only for the first breach of a particular nature within a six-month period. Id. See also URLTA, KRS § 383.660(2) (non-payment of rent).

64 URLTA, KRS § 383.695(2). See notes 32-34 supra and accompanying text.

There is no doubt that the rental agreement would terminate on April 30 if the landlord had properly specified this date in the notice given. A similar issue would arise, for example, where the landlord mistakenly gave termination notice 10 days in advance instead of 14 as required.
and, thus, will not terminate a tenancy at any time. In the above situation, the landlord would be required to give notice of termination all over again. If he did not learn of his mistake until the middle of April, the earliest date that could properly be set for the termination would be May 30, because this is the end of a rental period that is at least 30 days removed.

This common law rule is unduly technical and should be re-examined. It would seem that the notice requirements are designed, first of all, to inform the tenant of the intended termination and, further, to allow the tenant a reasonable period of time so that he may remedy a breach if possible or find new housing if necessary. In the hypothetical posed above, both of these purposes are accomplished, although the notice is technically improper. First, the tenant is informed of the landlord’s intention to terminate the rental agreement. In addition, if the improper notice is given legal effect (i.e., if the tenancy does terminate on April 30) the tenant still receives more than the required 30-day period to take whatever action is necessary. Thus, there is no apparent justification for the complete invalidation of technically defective notice in such a situation.

If the notice fails to accomplish either of the two purposes suggested above, the tenant should have a valid defense to a forcible detainer action. As long as both of these purposes are achieved, however, the landlord should be allowed to recover

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45 Schiedell v. McGregor, 106 S.W.2d 651 (Ky. 1937); Pack v. Feuchtenberger, 22 S.W.2d 914 (Ky. 1929).
46 See Pack v. Feuchtenberger, 22 S.W.2d 914, 916 (Ky. 1929). Professor Powell suggests that notice is required so that termination of periodic tenancies will not be made abruptly. 2 POWELL, supra note 3, ¶253 at 377. This policy stems in part from the recognition that the tenant may have difficulty finding new accommodations with the present housing shortage. Id., ¶225[2] at 232.3.
47 URLTA, KRS § 383.560(1) provides that a person has notice of a fact if: (a) he has actual knowledge of it; (b) he has received notice or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

Thus, even though the tenant may initially have been given an incorrect date, he is nonetheless put on notice of the landlord’s intention to terminate.

48 The common-law rule appears to be premised on the notion that, as a matter of law, notice specifying an improper termination date would never accomplish the desired purposes. See Pack v. Feuchtenberger, 22 S.W.2d 914, 916-17 (Ky. 1929). Under the Uniform Act, however, this would appear to be treated as an issue of fact. See URLTA, KRS § 383.560(1).
possession. A mere technical defect in the notice, which does not mislead the tenant or impair his rights, should not serve as a valid defense to a forcible detainer action.\(^9\)

C. **Waiver and Estoppel**

Acceptance of rent with knowledge of a default by the tenant or acceptance of performance by him that varies from the terms of the rental agreement constitutes a waiver of the landlord's right to terminate the rental agreement for that breach, unless otherwise agreed after the breach has occurred.\(^7\)

The doctrine of waiver precludes a lessor from initially tolerating certain behavior and, thereafter, changing his mind and attempting to terminate the rental agreement on the basis of that behavior.\(^7\) As drafted, however, the above provision has raised an important question of interpretation. In several situations, a tenant is given a period of time in which to remedy a breach. The issue arises as to whether the landlord can accept rent before this "grace period" has elapsed without waiving his right to terminate in the event the remedy is not made.\(^7\)

If the doctrine of waiver applies in this situation, the landlord would have to wait to see whether the breach was remedied before he could collect any rent. Once the landlord accepted rent, the tenant could not be dispossessed if he failed or even if he willfully refused to remedy his breach. It is unlikely that this was the result intended by the drafters. On the other hand, if the doctrine of waiver does not apply to the acceptance of rent during the "grace period," the landlord would be able to accept rent on the assumption that the breach will be remedied. If the remedy is made within the time allowed there will be no termination without regard to the doctrine of waiver. If the tenant fails to remedy his breach within this time, however,

\(^{69}\) The mistake, of course, must have been made in "good faith." URLTA, KRS § 383.550.

\(^{70}\) URLTA, KRS § 383.675.

\(^{71}\) 2 Powell, supra note 3, ¶250 at 372.128-.130.

\(^{72}\) This question was raised in Report, Proposed Uniform Residential Landlord and Tenant Act, 8 REAL PROP. PROB. & TR. J. 104, 121 (1973). The Report recommended a revision of this provision. Id., at n.82.
the landlord should have the right to terminate even though he has accepted rent.\textsuperscript{73}

Once the "grace period" has elapsed, or in a case where the tenant is not given an opportunity to remedy, it would seem that acceptance of rent by the landlord would, indeed, constitute a waiver. A distinction must be drawn, however, between acceptance of rent for past occupancy and acceptance of rent for future occupancy. A landlord does not waive his right to terminate by accepting rent for past occupancy.\textsuperscript{74} For example, a landlord seeking to terminate a rental agreement on March 1 would be entitled to collect the rent for the month of February, since this rent is due whether the landlord terminates or not. On the other hand, if the landlord accepts the rent for the entire month of March (future rent) with knowledge of the breach, he has waived his right to terminate for that breach.\textsuperscript{75}

The waiver of the right to terminate for a particular breach in the past, however, does not bar the landlord's right to terminate for a subsequent breach.\textsuperscript{76} Past acceptance of improper performance, or prior leniency, does not estop the landlord from terminating for a current breach of a similar nature. This rule, developed at common law,\textsuperscript{77} appears to be equally appropriate under the Uniform Act. The essence of the doctrine of estoppel is a reliance by one party on the acts or conduct of another.\textsuperscript{78} Under the Uniform Act, a landlord must give notice of an intended termination, which, in turn, gives the tenant an opportunity to remedy a breach. The notice itself manifests the landlord's intention not to permit or accept improper perform-

\textsuperscript{73} Id. To reach this result, one would have to conclude that the landlord has no "right to terminate" while the tenant has an opportunity to remedy his breach. Alternatively, one could argue that the tenant is not in "default" until the grace period has elapsed.

\textsuperscript{74} Daily v. Kelly, 200 S.W.2d 114, 116 (Ky. 1946); Cleve v. Mazzoni, 45 S.W. 88 (Ky. 1898). "Acceptance of unpaid rent after expiration of a termination notice does not constitute a waiver of the termination." \textsc{Uniform Residential Landlord and Tenant Act} § 4.204, Comment (emphasis added). Although the Commissioners did not make a distinction, it is presumed that "unpaid rent" means rent for past occupancy.

\textsuperscript{75} Daily v. Kelly, 200 S.W.2d 114, 116 (Ky. 1946); cf. Bridges v. Jeffrey, 437 S.W.2d 732 (Ky. 1968).

\textsuperscript{76} \textsc{Uniform Residential Landlord and Tenant Act} § 4.204, Comment.

\textsuperscript{77} See, e.g., Miller Dairy Prods. v. Puryear, 310 S.W.2d 518, 521 (Ky. 1957).

\textsuperscript{78} See generally 31 C.J.S. Estoppel (1964).
ance, even if he has done so in the past. Thus, a tenant could not reasonably rely on past acquiescence by the landlord in the face of an express notice to the contrary.\textsuperscript{79} Estoppel, in this sense then, will not serve as a valid defense in a forcible detain-

er action.\textsuperscript{80}

D. Unconscionability

Under the Uniform Act, courts may refuse to enforce unconscionable rental agreements or specific provisions thereof, or may limit the application of unconscionable provisions to avoid an unconscionable result.\textsuperscript{81} It seems clear that when a landlord brings a forcible detainer action based on a breach of a provision that is found by the court to be unconscionable, the court should not allow the landlord to recover possession.\textsuperscript{82} On the other hand, where the rental agreement contains an unconscionable provision that is totally unrelated to the tenant's breach, it appears that the court would be justified in allowing the landlord to regain possession.\textsuperscript{83}

\textsuperscript{79} See Annot. 31 A.L.R.2d 321, 326 (1953). A problem may arise, however, with respect to nonpayment of rent. Under the Uniform Act, rent is due on the agreed date without notice or demand. URLTA, KRS § 383.565(2). Nonetheless, if rent is not paid the landlord must give written notice demanding payment within seven days before he can terminate the rental agreement. URLTA, KRS § 383.660(2). It is submitted that many landlords will \textit{routinely} mail these demand notices on the due date—not to be able to terminate the rental agreement, but, rather, to encourage prompt payment. In such a case, if the landlord \textit{regularly} accepts rental payments after the seven day "grace" period, thereby establishing a course of conduct, he should thereafter be estopped from terminating for a subsequent default. In these circumstances, it would be reasonable for the tenant to rely on the past conduct of the landlord. The demand notices never manifested an actual intention on the part of the landlord to terminate if he did not receive proper performance. The landlord, therefore, should be estopped until he unequivocally informs the tenant that late payments, although permitted in the past, will no longer be accepted. See Annot., 31 A.L.R.2d 321, 376 (1953). Cf. \textit{Restatement of Contracts} § 300 (1932); Fox v. Grange, 103 N.E. 576 (Ill. 1913).

\textsuperscript{80} The term "estoppel" is used in a variety of contexts. See \textit{Black's Law Dictionary} 648-51 (Rev. 4th ed. 1968). Estoppel may, indeed, be a valid defense to a forcible detainer action in some of the other contexts in which it is used. See URLTA, KRS § 383.510; Warfield Natural Gas Co. v. Ward, 51 S.W.2d 256 (Ky. 1932) (landlord estopped to declare a forfeiture after he stood by and allowed tenant to make improvements).

\textsuperscript{81} URLTA, KRS § 383.555(1)(a).

\textsuperscript{82} Id. See also \textit{Uniform Commercial Code} § 2-302, Comments 1, 2 (1962).

\textsuperscript{83} Id.
Nonetheless, it is likely that some landlords will intentionally include unconscionable provisions in rental agreements, as well as provisions that are specifically prohibited. These provisions will be included without the hope of judicial enforcement, but for the sole purpose of coercing naive tenants into submission and forfeiture of their rights. Such conduct on the part of landlords clearly falls within the Uniform Act's definition of unconscionability, which refers to "any act or conduct which is willful and is so harsh and unjust as would be condemned or considered to be wrongful and would be shocking to the conscience of honest and fairminded persons." Where such conduct can be established, courts should consider allowing the tenant to remain in possession.

E. Retaliatory Eviction

A tenant may not be evicted simply because he has complained to a governmental agency concerning a housing code violation that the landlord is under a duty to repair, or merely because he has complained to the landlord about a breach of the landlord's statutorily imposed duties under the Uniform Act. In a forcible detainer proceeding, evidence of such a com-
plaint raises a presumption that the eviction is retaliatory in nature. This presumption is rebuttable, however, and the landlord can recover possession if he can prove that the termination is not in retaliation for the tenant's complaint, but is justified by other reasons, such as a breach by the tenant or the need to make extensive repairs. The defense of retaliatory eviction recognizes the importance of encouraging tenants to report needed repairs to their landlords or to housing authorities. There is a strong public interest in developing and maintaining decent and adequate housing; certainly this defense will promote that interest.

F. Breach by the Landlord as a Defense to Non-payment of Rent

When the landlord brings a forcible detainer action based upon non-payment of rent, the tenant is allowed to counterclaim for any damages that he is entitled to recover under the rental agreement or the Uniform Act. In this event, the court may order the tenant to pay into court all or a part of the rental payments due, or that become due during litigation, to be held in escrow. The court then determines the net amount due to either party. This amount is paid, to the extent possible, from tenant merely because he has joined a tenant's union. URLTA, KRS § 383.705(1)(c).

URLTA, KRS § 383.705(2).

URLTA, KRS §§ 383.705 (2), (3).

Inadequate housing often leads to crime, disease and other social problems which necessitate expenditure of public funds. H.B. No. 125 § 2(a) (Ky. 1974) (deleted in final passage). See note 40 supra. See also Pines v. Perssion, 111 N.W.2d 409, 413 (Wis. 1961).

Query, however, as to how long the policy behind retaliatory eviction allows a tenant to remain in possession. See URLTA, KRS § 383.705(2).

URLTA, KRS § 383.645(1). The tenant apparently may counter-claim for damages in any forcible detainer action. See URLTA, KRS § 383.545(1). But see URLTA, KRS § 383.645(2). In any event, only where the landlord's claim for possession is based on non-payment of rent do these claims constitute a defense.

Except as otherwise provided, "the tenant may recover damages . . . for any noncompliance by the landlord with the rental agreement of [sic] KRS 383.595." URLTA, KRS § 383.625(2). The tenant may also recover damages under URLTA, KRS §§ 383.630(1)(b), (2) (failure to deliver possession), 383.640(1)(b), (2) (failure to supply essential services), 383.655 (same), 383.700 (unlawful or unreasonable entry), and 383.705(2) (retaliatory eviction). The tenant is also entitled to recover his security deposit if the landlord has not followed the statutory requirements for those deposits. URLTA, KRS § 383.580(4).
the escrow account, and any balance must be paid by the party owing. Payment of the net amount due, if any, to the landlord entitles the tenant to remain in possession.92

This provision represents a substantial change from the common law.93 It is interesting to note that the Uniform Act, which "regulates and determines rights, obligations and remedies"94 of both parties, does not specifically give the tenant the right to withhold rent as a remedy when the landlord has breached. The tenant’s obligation to pay rent is not completely dependent upon the landlord’s adherence to the terms of the lease or the Act; that is, a breach by the landlord does not excuse the tenant from paying rent. Nevertheless, this provision does allow the tenant to get a judicial determination of set-offs against his obligation to pay rent. The tenant is entitled to remain in possession if he is willing and able to meet his obligation to pay the net rental amount due. Moreover, the tenant need not initiate an action for such a determination; he may wait until the landlord brings a forcible detainer action and use this provision as a successful defense.95

IV. CONCLUSION

The purpose of a forcible detainer action is to determine which party is entitled to possession of leased premises. Such a determination necessarily involves a resolution of competing interests. On the one hand, the landlord is the owner of a property interest. On the other hand, our society generally allows a person to use his property as he sees fit, subject only to the duties and restric-
tions imposed by law. The duties and restrictions imposed upon landlords should not be harsh or unjust, for the likely result of such impositions will be a reduction in the flow of capital into the private housing sector. The inadequacies of public housing as a means of providing sufficient and suitable dwelling accommodations suggest that it is expedient to encourage the maintenance and development of private housing. Thus, it is in the public interest to protect the rights of the landlord.

Forcible detainer under the Uniform Act provides this protection for the landlord. The action remains a speedy and effective means for a lessor to recover possession of rental premises. The restrictions and conditions placed upon the availability of the forcible detainer action are neither unreasonable nor difficult to comply with. In addition, the Uniform Act makes forcible detainer available to landlords in situations where it was not always available before. Therefore, forcible detainer under the Uniform Act provides adequate protection for the property interests of the landlord.

At the same time, however, the summary nature of the forcible detainer proceeding requires that the rights of the tenant likewise be given adequate protection. The tenant, too, is the owner of a valuable property interest—the right to present possession. Although this property right in itself entitles the tenant to protection, the average residential tenant is not particularly impressed by the fact that he is the owner of an estate in land. He is more interested in being able to live in decent and adequate housing.

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99 For example, the Uniform Act permits any landlord to terminate a rental agreement if rent is not paid within 7 days after a demand notice is given. URLTA, KRS § 383.660(2). At common law, however, non-payment of rent did not give the landlord the right to terminate unless there was a specific stipulation in the lease to that effect. Goodwin v. Beutel, 256 S.W.2d 532, 533 (Ky. 1953). See note 91 supra and accompanying text.

100 Glenn, supra note 2, at 27-28 and authorities cited therein.

variety of social problems that require substantial expenditures of public funds. Thus, public policy requires that the tenant's interest be protected. Several defenses to forcible detainer proceedings under the Uniform Act, such as the defense to retaliatory eviction, are based on a recognition of the importance of this interest.

Furthermore, an eviction often entails more than mere removal from a dwelling with all the attendant disruptions this can cause. From the tenant's point of view, an eviction may entail the loss of a "home." At the very least, the tenant deserves fair treatment when the loss of his home is at stake. The Uniform Act provides fairness in the eviction procedure, as evidenced by the notice requirements and the doctrine of waiver, and thus offers protection to the tenant in a forcible detainer action.

On this basis, it would seem that forcible detainer under the Uniform Act does an adequate job of balancing the competing interests of landlords and tenants. There are, of course, some particular aspects of the procedure and the governing law that are open to criticism, but these problems can be easily resolved by the courts and the legislature. Hopefully, the foregoing discussion will serve to spur efforts in that direction and to promote an understanding of forcible detainer under the Uniform Act which will ensure just and proper results in the resolution of conflicts between landlords and tenants.

Thomas H. Watson


102 Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961).


The idea that a tenant has some "interest" beyond the mere right to present possession is implicit in the provisions of the Uniform Act and in the cases cited in the preceding footnotes. If this were not the case, there would be no need to allow the tenant to "affirmatively" defend in a forcible detainer action. He could be adequately protected by an action for damages after the landlord recovered possession.