URLTA, KANSAS, AND THE COMMON LAW

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I. INTRODUCTION

Tess Trueheart lies strapped to the conveyor belt, inching ever nearer the buzz-saw. "Pay the rent," the landlord demands. "I can't pay the rent," she pleads. Closer, closer . . . and then *he* appears, the handsome young *deus ex machina* who gallantly announces "I'll pay the rent," switches off the instrument of terror, and liberates Tess and audience alike from the impending butchery. A bit overstated, but this classic film portrayal of the relationship between landlord and residential tenant had some basis in reality. Can any lawyer forget sitting stunned in his Property I class as the professor explained that while it might be a shame that the tenant's home had burned down on the first day of his three-year lease, the full rent must be paid? This infamous "fire rule"[1] was but one of many apparent injustices imposed by the common law upon the residential tenant, and while statutory relief from the very harshest common-law rules had been afforded in some states,[2] most jurisdictions entered the post-World War II era with buzz-saws intact.

Since that time, however, there has been an accelerating movement in both legislatures and appellate courts to rectify many of these imbalances. This trend was given a considerable boost during the middle and late 1960's when certain maxims of landlord-tenant law coupled with a shortage of decent rental housing in urban areas were marked as contributing causes of the civil disturbances that flashed upon the American scene during that period.[3] Change is now proceeding at an unprecedented rate, and landlord-

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[1] Chambers v. North River Line, 179 N.C. 199, 102 S.E. 198 (1920).

[2] See note 190 *infra*.

[3] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY at 6, 15, and 36-37 (1967); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (The Kerner Report) at 468-69 (Bantam 1968).

tenant law has become a topic of interest not only to legal scholars, but writers of more popular forms of literature as well.[4] It has even been suggested that the pendulum has occasionally swung too far toward tenant protection, changing that classic format to "Fix the house"—"I can't fix the house."[5]

Into this swirl of activity stepped the National Conference of Commissioners on Uniform State Laws. They prepared four drafts of a Uniform Residential Landlord Tenant Act (URLTA), held hearings on the third draft last year in San Francisco,[6] and subsequently approved the final draft, recommending it for adoption by the States. Conference endorsement of the URLTA in August of 1972 has already triggered action by state legislatures. Twenty such bodies, including the Kansas Senate, have seen the Act introduced this year.[7] Two states had previously adopted versions of the third draft.[8] The Kansas bill[9] was referred to the Senate Judiciary Committee, then to a special interim committee where it is currently receiving scrutiny.[10] It thus appears that the URLTA will become the focal point for legislative reform in landlord-tenant law, particularly in Kansas. This article will examine the URLTA, note the departures from common-law principles it incorporates, project the changes its adoption would effect in Kansas landlord-tenant law, and evaluate the wisdom of those departures and changes.

The first question any legislature considering the URLTA must confront is why a uniform act? Former products of the National Commissioners' like the Uniform Commercial Code (UCC) and the Uniform Consumer Credit Code (U3C) have been successful at least partly because of the recognized need for certainty in conducting commercial affairs which frequently extend beyond state boundaries. Such a problem is seldom present in residential landlord-tenant matters. Additionally, both the UCC and the U3C were grounded in and based upon previous codifications which had received widespread acceptance,[11] while the URLTA is an amalgamation of piecemeal reforms. With the law evolving so quickly, would it not be better to allow some time for local effort and experimentation?

Although both of these criticisms were offered by witnesses in the hearings

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[4] See GOODMAN, THE TENANTS SURVIVAL BOOK (1972); MOSKOVITZ, WARNER & SHERMAN, CALIFORNIA TENANT'S HANDBOOK (1972); Rutkus, *The Lengthening List of New Tenant Rights Laws*, SATURDAY REV. OF SOC'Y, Feb. 1973, at 56.

[5] *Comment, Landlord's Lament: New Tenant Remedies in Florida*, 24 U. FLA. L. REV. 769 (1972).

[6] This hearing was held on June 9, 1972. For a summary of the testimony, see II L. PROJ. BULL. at 6 (June 1972).

[7] The other states are Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Washington, and Wisconsin.

[8] Hawaii and Delaware. Hawaii Sess. Laws 1972, Act 132 (effective Jan. 1, 1973).

[9] Kan. Sen. B. 233 (1973).

[10] Hearings on the bill began in late August, 1973.

[11] At the time the Uniform Commercial Code was drafted every state had enacted the Uniform Negotiable Instruments Law and the Uniform Warehouse Receipts Acts, and approximately two-thirds had passed the Uniform Sales Act and the Uniform Trust Receipts Act. The Uniform Consumer Credit Code was closely tied to the UCC and was drafted after 49 states had adopted the Commercial Code.

on the third product,[12] the commissioners did not respond in their final draft.[13] The only apparent answer is that the URLTA should not be considered a *uniform* act, but a proposed *model* act which state legislatures should consequently approach with greater flexibility than the commercial bills previously recommended. If certain provisions are found unacceptable, a legislature can either tinker with them or eliminate them altogether, with little fear of disturbing a growing interstate network of legislation. The two states which have already adopted versions of the Act[14] have followed this course.[15]

II. GENERAL PROVISIONS AND DEFINITIONS

Anyone familiar with the format of the UCC will feel comfortable with the URLTA. The first article of each act relates to interpretation, definition, and general principles.[16] This introductory article is followed by the substantive articles concerning specific duties and remedies; the last article speaks to the date of effectiveness and repeal of other laws.

As with the UCC, the introductory article of the URLTA is extremely important. The general principles and definitions set forth in Article I give meaning to all of the substantive provisions which follow. Also, the Article attempts to set the tone for judicial interpretation of the Act. This latter function is likely to become even more important with the URLTA than with its commercial brother, for, in general, provisions of the URLTA are far less specific than those of the UCC.

Part I of the Article specifies the purposes of the Act and establishes rules for its construction. Any doubts regarding the origins of the Commission's feeling that landlord-tenant legislation is needed are quickly eliminated by the Comment to section 1.102, the initial operative section.[17] The drafters, after noting the agrarian, pre-contract law bases of our landlord-tenant law, declare that the two doctrinal foundations of that law, the lease-as-conveyance and the independence of covenants, are "inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect."[18] This statement makes clear the determination of the drafters to sever ties with the past, a determination which is carried throughout the substantive provisions of Articles II to V.

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[12] II L. PROJ. BULL. at 6 (June 1972).

[13] Section 1.102(b)(3) of the Act lists as one of the underlying purposes and policies "to make uniform the law with respect to the subject of this Act among those states which enact it," but this is not further explained in the comment to the section.

[14] See note 8 *supra*.

[15] II L. PROJ. BULL. at 3 (August 1972).

[16] KAN. STAT. ANN. §§ 84-1-101 through 84-1-209 (1965).

[17] Section 1.101 gives the short title. Besides the rather empty gesture toward uniformity (see note 13 *supra*), § 1.102(b) lists as purposes of the Act: "(1) to simplify, clarify, modernize, and revise the law governing the rental of dwelling units . . . [and] (2) to encourage landlords and tenants to maintain and improve the quality of housing . . . ." § 1.102(a) states that the Act is to be "liberally construed."

[18] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.102, Comment.

Section 1.102 is followed by two important but uncontroversial provisions[19] relating to the preservation of all laws not specifically repealed.[20] Next, however, is a highly significant provision regarding the administration of remedies.[21] Section 1.105 provides that remedies are to be administered so that any aggrieved party may recover damages[22] and imposes a general duty on such a party to mitigate damages. While the first part of this provision makes no apparent change in previous law, the mitigation duty marks the initial doctrinal split with the common law. Because the lease has traditionally been viewed as a conveyance, the contractual notion of mitigation has seldom been applied to landlord-tenant controversies.[23] The question has usually arisen when a tenant has abandoned his tenement before expiration of his lease. Must the landlord try to seek out a replacement, or may he sit idly by while the term runs and then sue for full rental? The great majority of the states have held that he may, indeed, do nothing and still collect.[24] Even those states that have diverged from the common-law rule have usually felt the need to find a supplementary ground for decision.[25] Yet this would be one major change in common-law principles that would leave Kansas law unaffected. As early as 1901 the Kansas Supreme Court noted in a landlord-tenant case that "[i]t is a general rule that after a wrong has been committed it is the duty of the injured party to make reasonable efforts to prevent an increase or extension of the injury, and, if he fails to do so, he cannot recover for such increased injury."[26] This rule was followed pro forma in several subsequent decisions[27] and then solidified in *Lawson v. Calloway*.[28] There the court cited the previous cases and held the mitigation rule applicable to the facts of the residential case before them. They noted: "While the rule declared in Kansas appears to be in conflict with the weight of authority in the United States, it has been so long declared and so consistently followed that it has become a rule of property and should not now be overruled."[29] The *Calloway* case could possibly be distinguished from the usual abandonment situation, since the landlord there turned down a third party's offer to lease the premises. Given the court's declaration that mitigation was a "rule

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[19] The Comment to § 1.104, however, has serious implications for local regulation outside the structure of the Act. See p. 411 *infra*.

[20] These are virtually identical to §§ 1-103 and 1-104 of the UCC. See KAN. STAT. ANN. §§ 84-1-103, -104 (1965).

[21] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.105.

[22] The Comment reflects that this includes third parties when appropriate.

[23] 1 AMERICAN LAW OF PROPERTY § 3.99 (A.J. Casner ed. 1952).

[24] Liberty Plan Co. v. Adwan, 370 P.2d 928 (Okla. 1962).

[25] *See, e.g.*, Wright v. Baumann, 239 Ore. 410, 398 P.2d 119 (1965). The Oregon Supreme Court imposing a mitigation duty described the case as involving a contract to make a lease. *See also* Note, *Contract Principles and Leases of Property*, 50 B.U.L. REV. 24 (1970).

[26] Brown v. Cairns, 63 Kan. 584, 588, 66 P. 639, 640 (1901).

[27] Wilson v. National Refining Co., 126 Kan. 139, 266 P. 941 (1928); Guy v. Gould, 126 Kan. 25, 266 P. 925 (1928); Steinman v. John Hall Tailoring Co., 99 Kan. 699, 163 P. 452 (1917); Hoke v. Williamson, 98 Kan. 580, 158 P. 1115 (1916).

[28] 131 Kan. 789, 293 P. 503 (1930).

[29] 131 Kan. at 791, 293 P. at 504.

of property," however, and more recent cases following the same doctrine,[30] it is safe to assume that section 1.105(a) would not alter Kansas law.

The final provision of Part I appears innocuous but may prove troublesome. It states that any good faith dispute concerning a right or claim arising under the Act or rental agreement may be settled by agreement. The problem arises because the drafters, obviously aware of the usual disparity in bargaining power between the parties, have wisely provided elsewhere in the Act that a tenant may not agree to waive or forego any rights and remedies arising under the Act.[31] The obvious question is whether the landlord may circumvent this prohibition after a dispute by imposing an agreement that could not have been reached by the terms of the original lease. Although there is a specific "good faith" requirement in section 1.106,[32] it applies only to the existence of the "dispute," not the terms of the settlement. The comment to the section seems to recognize the difficulty but does little to resolve it.[33] Section 1.303(a)(2), which imposes a general standard of conscionable conduct on the parties, gives a court discretion to enforce, to refuse to enforce, or to limit enforcement of an unconscionable settlement in which a party has waived a right or remedy. The Comment to section 1.303 reiterates that the section is intended to allow the courts to pass directly on the issue of unconscionability.[34] It is understandable that the drafters wished to allow the parties some flexibility in negotiating and settling claims out of the courtroom, but the Act seems to go too far in that regard. The unconscionability section should be redrafted to force the party who is benefiting from the waiver to make a clear showing that the unconscionable agreement should be enforced.

Part II of Article I has only three sections, two of which are of only minor significance. Section 1.201 provides that the Act applies to all rentals of dwelling units within the state. Section 1.203 grants in personam jurisdiction over nonresident landlords and provides for alternative service of process. The plaintiff may serve either a designated agent, or the Secretary of State if service to the latter is coupled with a certified or registered mail service to the defendant. This jurisdictional grant would be redundant for Kansas, since this state's long-arm statute covers both landlords and tenants.[35] The

[30] Gordon v. Consolidated Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965); *cf.* Peterson v. Wilson, 180 Kan. 180, 303 P.2d 129 (1956).

[31] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(a)(1).

[32] See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.302 and Comment.

[33] "Subsequent sections of this Act . . . forbid the tenant from prior waiver of rights . . . and . . . subject the bargain of the parties to the test of conscionability . . . ." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.106, Comment.

[34] The drafters have also formulated a test: "whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.303, Comment.

[35] The Uniform Residential Landlord and Tenant Act curiously exempts tenants from this provision because such an action "should be made by general legislation applying to all debtors, naturally including tenants." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.203, Comment. KAN. STAT. ANN. § 60-308(b)(3) (Supp. 1972) provides that any person owning, using, or possessing real property in the state submits to personal jurisdiction.

URLTA service of process provision, by allowing alternative service to nonresident landlords, differs from the Kansas long-arm statute, which requires personal service to all individual defendants[36] and permits alternative service only to foreign corporations[37] and nonresident motorists.[38] This alternative scheme is probably constitutional,[39] thus rendering the decision of whether to include this section a mere policy question. Should a legislature not accept the alternative service scheme, it would probably be best simply to eliminate section 1.203 from the proposal.

The middle section of Part II is of much greater importance, for it excludes from the operation of the Act several types of dwelling units.[40] The principal exclusion—commercial leases—are not even mentioned since these are defined out from coverage elsewhere in the Act.[41] The first five exclusions raise no objections: prisons, hospitals, dorms, nunneries, fraternities, hotels and motels, and dwellings held under land contract or as a condition of employment.[42] The sixth excludes owners of condominiums and holders of proprietary leases in cooperatives. The apparent reason for these exclusions (the provision is not explained in the Comment) is an assumption that such persons will probably have greater bargaining power than the typical residential lessee. While the distinction is understandable vis-a-vis condominium owners, it is less so regarding proprietary lessees. Very often a "down payment" in these cooperatives is for a minimal amount, turnover is high, and the "purchaser" has little, if any, control in the management of the project. In short, he is far more "lessee" than "proprietor," and should probably be afforded the protections of the Act.

By far the most significant exclusion for Kansas is the last—"occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes."[43] The key terms are "premises" and "primarily for agricultural purposes." "Premises" is clearly defined by the Act,[44] but the latter phrase is not further explained. The drafters offer no explanation in the accompanying Comment for excluding such leases, although questions regarding the exclusion were raised prior to approval and recommendation.[45] Possible bases for the exclusion are that such leaseholds are more commercial than residential in nature and thus the parties enter the relationship in a more balanced bargaining posture; that many states are likely to have special

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[36] KAN. STAT. ANN. § 60-308(a)(2) (Supp. 1972).
[37] KAN. STAT. ANN. § 60-304(f) (Supp. 1972).
[38] KAN. STAT. ANN. § 8-401 (1964), § 8-402 (Supp. 1972).
[39] See Woodring v. Hall, 200 Kan. 597, 438 P.2d 135 (1968); Bond v. Golden, 273 F.2d 265 (10th Cir. 1959).
[40] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.202.
[41] Section 1.201 states that the Act applies to "dwelling units," later defined in § 1.301(3) as "a structure or the part of a structure that is used as a home, residence, or sleeping place . . . ."
[42] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.202(1)-(5).
[43] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.202(7).
[44] " '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 tenants." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.301(9).
[45] II L. PROJ. BULL. at 2 (May 1972).

statutory or judge-made doctrines applying to such tenancies;[46] that such leases more closely resemble the conveyance-of-an-estate idea that the URLTA repudiates;[47] or that farm tenants are more equipped to carry out many of the repair duties which the Act shifts to urban landlords.[48] The task of any legislature weighing the question of exclusion must be to examine these rationales carefully in light of their own knowledge of agricultural leases. If the decision is to adopt the exclusion, however, it would be wise to explain the term "primarily used for agricultural purposes." At least residential tenants with their own gardens or chicken coops and farm tenants who do not participate in agricultural activities should be covered by the Act. Whatever the bases for the exclusion, none would seem applicable to these situations. These exceptions to the exclusion could either be explained in the Comment to section 1.202 or, more appropriately, made a part of a definition of "primarily for agricultural purposes" as an amendment to section 1.301.

Part III of Article I sets forth the definitions applicable to the Act,[49] the general obligations of good faith and conscionability,[50] and a special provision regarding "notice."[51] Only two of the fourteen definitions listed in section 1.301 merit comment outside the context of the substantive provisions to which they relate. While the basic intent of the drafters is obvious, the confusing definition of "roomer" is practically useless and should be redrafted by the enacting body.[52] Similarly, "tenant" is defined as a person entitled to occupy a dwelling unit "under a rental agreement." This definition poses no problems until compared with section 1.401(b) which states that "[i]n absence of an agreement, the *tenant* shall pay as rent the fair rental value. . ." (emphasis added). The provisions can be reconciled,[53] but an amendment to section 1.401(b) to provide that it applies only in the absence of an agreement regarding *rent* would probably aid subsequent interpretation.

The general obligations of good faith and conscionable conduct imposed by sections 1.302 and 1.303 are difficult to discuss in the absence of a factual setting. Both sections have been a part of the Kansas Uniform Commercial Code since its enactment[54] but have received only slight notice from either

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[46] Such is certainly the case in Kansas. See KAN. STAT. ANN. §§ 58-220, -221, -2506, -2524 to -2526, -2531 to -2533.

[47] See p. 389 *supra.*

[48] See p. 406 *infra.*

[49] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.301.

[50] See notes 32-34 and accompanying text *supra.*

[51] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.304.

[52] Try it yourself: " 'Roomer' means a person occupying a dwelling unit [so far, so good] that does not include a toilet and either a bath tub or a shower and a refrigerator, stove, and kitchen sink, all provided by the landlord, and where one or more of these facilities are used in common by occupants in the structure." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.301(12). OK? Now, without looking back, is one who shares a shower, has his own toilet, and has a stove provided by the landlord a "roomer"? You cheated!

[53] "Rental agreement" is defined in § 1.301(11) to encompass all terms of the relationship. "Agreement" in § 1.401(b) is apparently meant to encompass only the tenant's rental obligation.

[54] KAN. STAT. ANN. §§ 84-1-203, 84-2-302 (1965).

courts or commentators.[55] Good faith is defined in URLTA section 1.301(4) as "honesty in fact in the conduct of the transaction concerned," a close enough duplication of the UCC language[56] to assure future cross-references. The unconscionability section also closely parallels the UCC approach.[57] Since both duties have elsewhere received considerable attention as UCC obligations,[58] the similarities between the UCC and the URLTA provisions assure Kansas jurists some criteria for applying these otherwise amorphous standards of conduct to specific situations.

The special notice provisions of section 1.304 are also closely akin to their counterparts in the UCC.[59] The notice concept is an enormously important one in the URLTA, because virtually every remedy available to either party is dependent upon proof that "notice" has been given of the breach upon which a claim for relief is based.[60] Fortunately, section 1.304 facilitates this process by setting out understandable and reasonable rules for each party to follow in giving notice.[61] The provision also seems to set forth an objective test for courts to utilize in determining whether a party has notice of a fact notwithstanding the formal processes.[62] However, past interpretations of the analogous language in the UCC show that this question is still open.[63]

There are two subparts to Part IV of Article I. The first includes sections 1.401 and 1.402 which lay out several common-sense rules to apply when the parties have failed to cover all aspects of their relationship in the rental agreement. Section 1.401(b), mentioned above,[64] provides for payment of fair rental value when no rent figure has been settled. This rule is in accord with common-law doctrine traceable to the early 18th century.[65] The next two subsections codify typical schemes regarding length of term, time and place

[55] The unconscionability provision was relied on in Steele v. J. I. Case Co., 197 Kan. 554, 563, 419 P.2d 902, 910 (1966) and is discussed at some length in Comment, *Uniform Commercial Code-Unconscionability*, 7 WASHBURN L.J. 415 (1968); good faith is mentioned only in passing in Oldfather, *Floor Plan Financing Under Article 9 of the Uniform Commercial Code*, 14 KAN. L. REV. 571, 581 (1966) and Balloun, *Secured Transactions in Kansas: The New Look*, 5 WASHBURN L.J. 192, 194, 198 (1966).

[56] " 'Good faith' means honesty in fact in the conduct or transaction concerned." KAN. STAT. ANN. § 84-1-201(19) (1965).

[57] See note 34 and accompanying text *supra*.

[58] Helpful discussions of these general obligations and their meanings can be found in Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968), and West, *Unconscionability: A State by State Survey*, V CLEARINGHOUSE REV. 61 (June 1971). The Comment to § 1.303 also offers some assistance: "The basic test [of unconscionability] is whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable . . . ."

[59] See KAN. STAT. ANN. § 84-1-201(25)-(27) (1965).

[60] *See, e.g.*, §§ 4.101, 4.102, and 4.104(a), (d) (tenant's remedies); § 4.201(a), (b) and § 4.203(c) (landlord's remedies).

[61] Any person has received notice when "it comes to his attention." URLTA § 1.304(b)(1). Landlords have notice when it is delivered to their place of business or other designated place, URLTA § 1.304(b)(2), and tenants receive notice if it is sent by registered or certified mail to either a designated place or their last known address (usually the tenement). URLTA § 1.304(b)(3).

[62] "A person has notice of a fact if . . . from all the facts and circumstances known to him at the time in question he has reason to know that it exists . . . ." URLTA § 1.304(a)(3).

[63] J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 472-73 (1972).

[64] See note 53 and accompanying text *supra*.

[65] 11 Geo. 2, c. 19, § 14 (1738); *cf.* Pessemier v. Hupe, 121 Kan. 511, 513, 247 P. 435, 436 (1926); KAN. STAT. ANN. § 58-2520 (1964).

for rent payments, and apportionment of rent on a daily basis. The length-of-term subsection[66] would be particularly helpful in Kansas where the current statute seems to create as many problems as it solves.[67] Section 1.402 covers the relatively rare situation where one party has signed and legally delivered a rental agreement to the other party who begins performance without signing. The Act provides that in such cases the rental agreement will be deemed fully operative, while limiting that operation to one year for leases of a term longer than that period.[68] This treatment is strongly reminiscent of the contract formation provisions of the UCC,[69] and seems in complete conformity with present Kansas law.[70]

The second subpart of Part IV begins the major departures from common-law property theories forecasted earlier in Article I.[71] Each of the two sections prohibits certain provisions from being written into rental agreements. Section 1.403 renders unenforceable provisions which impose upon tenants confession of judgment clauses, agreements to pay attorneys fees, exculpatory clauses, or waivers of rights and remedies guaranteed under the Act.[72] The latter section forbids making the landlord's obligation of repair independent of the tenant's duty to pay rent.[73] Separately, these sections are essential to the scheme of rights and obligations subsequently set out in Articles II and III. Together, they afford an insight into one of the major premises of the URLTA —that the bargaining power of residential landlords greatly exceeds that of residential tenants and consequently that all rights and remedies otherwise given tenants in the Act must be protected by statute from contractual encroachment. This premise is particularly apparent in section 1.403 which protects *only* tenants from the listed prohibitions and which offers tenants a substantial remedy for deliberate breach by the landlord.[74] Indeed, section 1.403(a)(1), forbidding waiver of rights and remedies, forms the cornerstone

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[66] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.401(c).

[67] KAN. STAT. ANN. § 58-2503 (1964) provides: "When rent is reserved payable at intervals of three months or less, the tenant shall be deemed to hold from one period to another equal to the interval between the days of payment, unless there is an express contract to the contrary." Two questions are left unanswered. First, does a lease agreement beginning and ending on specific dates but which calls for monthly rent payments constitute "an express contract to the contrary," thus making the leasehold a term for the period of the entire contract? Also, how does one establish "the interval between days of payment" without referring to some document or conversation which could be deemed "an express contract"? Apparently these matters have never been considered by the Kansas Supreme Court. *Cf.*, Intfen v. Foster, 8 Kan. App. 336, 56 P. 1125 (1899). The language of the Uniform Residential Landlord Tenant Act provision ("unless the rental agreement fixes a definite term . . .") is much better.

[68] See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.402(c).

[69] KAN. STAT. ANN. § 84-2-204(1) (1965).

[70] "The law is well settled that a lease signed by a leasor alone is binding on the lessee when it is delivered and there is a general acceptance of it and lessee takes possession of the property and acts under the terms of the lease." Means v. Dierks, 180 F.2d 306, 309 (10th Cir. 1950), *citing* Baker v. Readicker, 84 Kan. 489, 115 P. 112 (1911).

[71] See notes 18 and 19 and accompanying text *supra*.

[72] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403.

[73] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.404.

[74] "If a landlord deliberately uses a rental agreement containing provisions known by him 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." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(b).

of the new equality in relationships the Act attempts to build. If the assumption of unequal power is accurate—and it is difficult to refute in this day of boilerplate leases and an ever-diminishing supply of decent, low-cost housing[75]—it would be either foolish or duplicitous to adopt the Act without such prohibitions.

None of the other specific limitations set out in section 1.403[76] would markedly alter Kansas law. Although there seem to be no Kansas decisions regarding confession of judgment clauses, they are constitutionally suspect[77] and already prohibited in Kansas consumer credit transactions by the Uniform Consumer Credit Code.[78] Attorneys' fees have been awarded to a prevailing party in landlord-tenant disputes,[79] but this practice is not prevented by section 1.403(a)(3). That provision merely bans pre-dispute agreements regarding fees, another rational off-shoot of the inequality premise.[80] Finally, while the prohibition against exculpatory clauses seems to run counter to Kansas precedent,[81] the Kansas Supreme Court has recently pointed out that such clauses are not favored and will be enforced only when the parties are in an equal bargaining position at the time of the agreement.[82] As all Kansas cases upholding these clauses involved commercial leases,[83] adoption of the proposed law for residential agreements would not be a radical alteration of these rulings.

But there is no such explanation available for the section 1.404 provision which establishes rent and repair as mutually dependent covenants. The independence of covenants generally, and the independence of a repair covenant from a rent covenant specifically, have been an integral part of the common law[84] and Kansas law[85] for a long time. The original basis for this doctrine seems to have been rooted in the traditional treatment of a lease as a conveyance of an estate in real property.[86] It has been suggested, however,

[75] REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME 7-8, 41-42 (1968); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 468-472; PRESIDENT OF THE UNITED STATES, FIRST ANNUAL REPORT ON NATIONAL HOUSING GOALS, H.R. Doc. No. 63, 91st Cong., 1st Sess. 48-53s. (1969); Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant,* 77 YALE L.J. 1368, 1374-1383 (1968); Loeb, *The Low-Income Tenant in California: A Study in Frustration,* 21 HASTINGS L.J. 287, 287-89 (1970); Wall Street Journal, Dec. 2, 1970, at 1, col. 6.

[76] See notes 72 and 73 and accompanying text *supra.*

[77] See D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), in which the Supreme Court upheld a confession of judgment provision in a commercial setting, but strongly indicated that a different result might be reached in a consumer context when bargaining power was less equal. Confession of judgment clauses may therefore not be valid in a residential lease situation. See also Swarb v. Lennox, 405 U.S. 191 (1972).

[78] Kan. Sess. Laws 1973, ch. 85, art. 3, § 52.

[79] Stephenson v. Peterson, 131 Kan. 690, 293 P. 497 (1930).

[80] The Comment to § 1.403 makes this clear: "Attorney's fees under the Act may be asserted against either the landlord or tenant . . . . The right to recover . . . however, must arise under the statute, not by contract of the parties."

[81] New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc., 203 Kan. 720, 457 P.2d 133 (1969).

[82] Talley v. Skelley Oil Co., 199 Kan. 767, 433 P.2d 425 (1967).

[83] See cases cited in notes 81 ad 82 *supra; cf.* Thirlwell v. Railway Co., 108 Kan. 700, 196 P. 1068 (1921); Railroad Co. v. Blaker, 68 Kan. 244, 75 P. 71 (1904).

[84] 1 AMERICAN LAW OF PROPERTY § 3.79 (A.J. Casner ed. 1952).

[85] Bankers Mortgage Co. v. Robson, 123 Kan. 746, 256 P. 997 (1927); Seapy v. Smart, 102 Kan. 294, 169 P. 1151 (1918).

[86] *See* Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?,* 9 KAN. L. REV. 369 (1961).

that more modern rationales have silently replaced the conveyance theory and thus retarded judicial movement toward a contractual analysis.[87] A complete view of the impact of section 1.404 is provided later in conjunction with the obligations that section binds together,[88] but it should be recognized at this point as the only serious departure from Kansas law that the lengthy Article I[89] effects.

III. DUTIES OF THE PARTIES

A. *Landlord Obligations Other Than Maintenance and Repair*

The first section of Article II deals with one of the thorniest of all issues in landlord-tenant law—the security deposit or prepaid rent.[90] There is a relative dearth of both case law and secondary authority on the subject and the scant material that is available relates almost exclusively to commercial agreements.

The question regarding security that has evoked the most judicial attention is how to define the legal relationship between the parties. Most courts have either held or assumed that the lessor became an unsecured debtor for the amount deposited.[91] This approach allows the lessor to commingle the security with his other funds[92] and denies the tenant a secured claim in bankruptcy.[93] A few courts have found a pledgor-pledgee relationship[94] which allows use by the lessor but gives preferred status to the tenant if the landlord becomes a bankrupt. A California appellate case seemed to establish a trust relationship.[95] Other security deposit issues discussed by the appellate courts have been the effect of a transfer of the landlord's reversionary interest, the significance of terming the deposit "prepaid rent," and the possibility that prepaid rent or security deposits are penalties rather than liquidated damages.[96] Reflecting the paucity of authority on these common-law issues, Kansas reporters contain only one case that directly meets the security problem.[97] There a breaching lessee who was five months in arrears sued for the return of a deposit that secured performance of his five-year lease. The court

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[87] *Trends in Landlord-Tenant Law*, 6 R. PROP., PROB. & T.J. 550, 588 (1971).

[88] See discussion of repair and maintenance obligations, pp. 404-09 *infra*.

[89] The official Uniform Residential Landlord and Tenant Act is 30 pages long, 12 of which are devoted to the definitions and general provisions of Article I. This ratio is in sharp contrast with other uniform acts and hopefully explains the apparently inordinate percentage of this author's work which is devoted to that Article.

[90] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.101.

[91] Handle v. Real-Estate Land Title & Trust Co., 316 Pa. 116, 173 A. 313 (1934), *noted in* 83 U. PA. L. REV. 536 (1935); Commercial Nat'l Bank v. Cutter Realty Co., 205 N.C. 99, 170 S.E. 139 (1933).

[92] Commercial Nat'l Bank v. Cutter Realty Co., 205 N.C. 99, 170 S.E. 139 (1933).

[93] *In re* Banner, 149 F. 936 (S.D.N.Y. 1907).

[94] Partington v. Miller, 122 N.J.L. 388, 5 A.2d 468 (1939).

[95] Ingram v. Pantages, 85 Cal. App. 41, 260 P. 395 (1927). *But see* CAL. CIV. CODE § 1951 (West Supp. 1973).

[96] 1 AMERICAN LAW OF PROPERTY § 3.73 (A.J. Casner ed. 1952).

[97] Cunningham v. Stockton, 81 Kan. 780, 106 P. 1057 (1910). Robinson v. Eagle-Picher Lead Co., 132 Kan. 860, 297 P. 697 (1931) states that the landlord-tenant relationship is usually not a fiduciary one, thus apparently rejecting any trust relationship.

allowed the lessor a set-off to the extent of the unpaid rent, but ordered the return of the remaining deposit because the lessor had terminated the agreement. This holding is not particularly instructive on the questions raised above, although the court in dictum made clear that large deposit requirements might be considered penalties.[98]

The scheme set out in section 2.101 answers two of these common-law issues. The "penalty" problem is handled by assuring that the amount of a deposit will vary proportionately with the amount of rent and suggesting the deposit should be limited to one month's rent.[99] The transfer issue[100] is squarely decided by requiring a transferee to meet all of the landlord's original obligations.[101] This latter requirement seems reasonable, as it will usually be far easier for a new landlord to discover old security obligations than for an old tenant to discover a new landlord.[102] A limitation on deposits based upon rent was unknown to the common law, but is not a novel concept. Recently several states have passed legislation in response to the security problem[103] by passing legislation of varying degrees of comprehensiveness,[104] and a few of the new statutes include such a provision. All statutes dealing with the issue require more than one month's rent in most circumstances.[105] The appropriate amount should depend on what the deposit is "securing,"[106] but even in the usual situation where the deposit covers all obligations, one month's rent appears to be sufficient. The chief obligations secured by the deposit are taking possession, maintaining the premises, and fulfilling the terms of the lease. Given the varied remedies at the landlord's disposal upon failure to maintain[107] or abandonment,[108] a month's rent should more than meet these needs. The amount should also suffice in the "no-show" situation—particularly because actual damages and attorney's fees seem available if mitigation[109] is unsuccessful.[110]

All but one of the existing statutory schemes and the URLTA set forth ground rules regarding the return of the deposits.[111] After termination of

[98] Cunningham v. Stockton, 81 Kan. 780, 786, 106 P. 1057, 1059 (1910).

[99] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.101(a).

[100] See note 96 and accompanying text *supra*.

[101] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.101(e).

[102] The obligation also remains with the original lessor. See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.105(a).

[103] CAL. CIV. CODE § 1950.5 (West Supp. 1973); COLO. REV. STAT. ANN. § 58-1-26 to 28 (Supp. 1971); DEL. CODE ANN. tit. 25, § 5112 (Supp. 1971); FLA. STAT. ANN. § 83.261 (Supp. 1972); ILL. REV. STAT. ch. 74, §§ 91-93 (Supp. 1973); MD. CODE ANN. art. 53, §§ 41-43 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1972); MINN. STAT. ANN. § 504.19 (Supp. 1973); N.J. STAT. ANN. §§ 46:8-19 to 8-26 (Supp. 1973); PA. STAT. ANN. tit. 68, § 250.512 (Supp. 1973).

[104] Compare ILL. REV. STAT. ch. 74, §§ 91-93 (Supp. 1973) with N.J. STAT. ANN. § 46:8-19 to 8-26 (Supp. 1973).

[105] *E.g.*, N.J. STAT. ANN. § 46:8-21.2 (1973) (1½ times the monthly rent); MASS. GEN. LAWS ANN. ch. 186, § 15B (1972) (twice the rent); MD. CODE ANN. art. 53, § 42 (1971) (twice the rent or $50, whichever is greater).

[106] Cunningham v. Stockton, 81 Kan. 780, 106 P. 1057 (1910).

[107] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.202.

[108] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203.

[109] See notes 24-27 and accompanying text *supra*.

[110] See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.206.

[111] The Illinois statute, ILL. REV. STAT. ch. 74, §§ 91-93 (Supp. 1973), deals only with the question of interest.

the tenancy, the URLTA allows a landlord to apply the deposit to unmet obligations of rent and maintenance if he itemizes the amounts due in written notice and delivers the notice and the amount due to the tenant within 14 days after termination and demand.[112] The suggested penalty for failure to return the deposit within the time limit is twice the amount due plus attorney's fees.[113] The 14-day suggested return time is in general keeping with current statutes, though a majority allow 30 days.[114] All demand a similar written accounting. None of the statutes, however, hold the tenant to the curious prerequisite of "demand" contained in section 2.101(b), apparently based on the reasonable assumption that all tenants want their money back and that failure to "demand" same should not free the landlord from liability. The requirement of "demand," undefined in the Act, should be removed. Other current statutory obligations that could harmoniously be incorporated into section 2.101 include the duty to prepare and deliver a receipt for the security,[115] to provide upon demand a statement of condition of the premises before possession is taken,[116] and to return unused deposits by registered or certified mail.[117] A Pennsylvania provision requiring a tenant to give notice of his new address also seems to be reasonable.[118]

The URLTA is silent on the problem of what, if any, obligation a landlord has to segregate deposits and/or pay interest on them upon return. This omission was intentional: the Commissioners indicated in the Comment to section 2.101 that such provisions created more difficulties than they resolved.[119] Three of the present state statutes seem to use this same "not to decide is to decide" approach,[120] thus relegating the matter to the vagaries of the common law.[121] Several statutes, however, require segregation of deposits,[122] and others afford priority to tenants in case of landlord insolvency.[123] Those statutes mandating an interest payment vary the amounts from three percent[124] to going market rates,[125] though several dictate minimum amounts or particular terms which must be involved before the interest requirements are triggered.[126] The question of whether to include such provisions is a tough one. While it

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[112] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.101(b).

[113] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.101(c).

[114] Colorado, Massachusetts, New Jersey and Pennsylvania allow 30 days, Delaware and Florida 15, and Minnesota 31. For statutory cites see note 103 *supra*.

[115] MD. CODE ANN. art. 53, § 41-43 (Supp. 1972).

[116] *Id.*

[117] N.J. STAT. ANN. § 46:8-21.1 (Supp. 1973).

[118] PA. STAT. ANN. tit. 68, § 250.512 (Supp. 1973).

[119] "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)."

[120] COLO. REV. STAT. ANN. § 1-26 to 28 (Supp. 1971); MINN. STAT. ANN. § 504.19 (Supp. 1973); PA. STAT. ANN. tit. 68, § 250.512 (Supp. 1973).

[121] See notes 91-95 and accompanying text *supra*.

[122] DEL. CODE ANN. tit. 25, § 5112 (Supp. 1971); N.J. STAT. ANN. § 46:8-19 to 8-26 (Supp. 1973).

[123] CAL. CIV. CODE § 1950.5 (Supp. 1973); MD. CODE ANN. art. 53, §§ 41-43 (Supp. 1972).

[124] MD. CODE ANN. art. 53, § 43C (Supp. 1972).

[125] *See, e.g.*, DEL. CODE ANN. tit. 25, § 5112 (Supp. 1971).

[126] The Maryland and Illinois statutes have a six month minimum; Massachusetts has one year. The Maryland scheme also establishes a $50 minimum.

seems unfair to allow a large deposit holder to reap the substantial interest sums which a collection of deposits can draw, one suspects that these interest receipts are built into the rental rate which would rise should those receipts be terminated. Administrative costs would also increase, particularly if the interest provision were tied to segregation. On balance the determination not to include such provisions is probably a wise one, though the approach could be improved by defining the relationship between the parties and by granting the tenant a priority claim for the amount of the deposit. Should a legislature decide to require interest payments, the New Jersey method of paying the going rate less one percent for administrative costs[127] coupled with a six-month minimum time of possession provision seems most accommodating to the interests of both parties.

The next provision in Article II places a simple but essential obligation on the landlord to keep the tenant fully apprised of the proper person to which any notices, complaints, demands, processes, or other communications regarding the tenancy should be addressed.[128] Section 2.102(a) requires either the landlord or his authorized agent to disclose the names and addresses of the manager and either the owner or his agent for the purpose of receiving notices and demands. Section 2.102(b) requires that this information be kept current. One possible problem arises in the final subsection which the drafters interpret in the accompanying Comment as preventing avoidance of the drafters' design by making "the person collecting the rent"[129] the landlord's agent for all essential purposes. The operative language of the provision seems at odds with this interpretation, however,[130] and should be clarified if the intent of the Commissioners is to be preserved. This provision, and indeed all landlord's obligations, would apply to a tenant-sublessor, though apparently not by a tenant-assignor.[131]

The next section of Article II relates to the ancient question of who has the duty to place the tenant in possession at the beginning of the term.[132] In fact, the section is a sleeper, which by requiring the landlord to deliver possession "in compliance with the rental agreement and section 2.104 (the duty of repair provision),"[133] imposes a warranty of initial habitability on the landlord. Since it is preferable to discuss that aspect of section 2.103 with the repair and maintenance issues in section C, it is sufficient for now to take

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[127] N.J. STAT. ANN. § 46:8-19 (Supp. 1973).

[128] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.102.

[129] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.102, Comment.

[130] Section 2.102(c) refers to those failing to comply with the disclosure provision of § 2.102(a). The person § 2.102(a) defines, however, is not necessarily the rent collector. That person can be any person authorized to act for and on behalf of the owner for the purpose of service of process and receiving and receipting for notices and demands.

[131] "Landlord" is defined in § 1.301(5) as "the owner, lessor, or sublessor of the dwelling unit or the building of which it is a part, and . . . also a manager of the premises who fails to disclose as required by § 2.102." For the classic distinction between assignors and sublessors, see Haynes v. Eagle-Picher Co., 295 F.2d 761 (10th Cir. 1961), *cert. denied*, 369 U.S. 828 (1962).

[132] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.103, Comment.

[133] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.103.

the Commissioners' word that the possession issue is the chief concern of the provision.

It is well settled that a landlord impliedly promises to a new tenant to oust from the leased premises any other person holding a valid lease under that landlord.[134] The rub comes when a person is in unlawful possession of the property at the time it is leased. Who has primary responsibility to throw out the rascal? The courts that have held eviction to be the tenant's responsibility have reasoned that (1) the tenant is the owner of an estate in land and such ownership carries with it the responsibility to protect the estate against wrongdoers and (2) the landlord has not covenanted against the wrongful acts of others and, in keeping with the general law of torts, should not be responsible for such wrongdoing in the absence of specific agreement.[135] This rule has been termed the "American rule." Other courts, adopting the "English rule," have placed the ousting responsibility on the landlord, because this treatment seemed a better expression of the parties' intent and because the landlord was considered to be in a far superior position to anticipate and remedy the unlawful possession problem.[136] Both the Kansas Supreme Court[137] and the URLTA Commissioners[138] have selected the latter alternative. This choice by the Commissioners is fortunate. The rationales for the English rule are sounder, and at least one of the basic premises for the American rule has been completely rejected by the URLTA.[139] Also, the English rule prevents the somewhat incredible result of a tenant being both out of possession and liable on his contract for rent![140]

The last section in Article II[141] considers the situation of a landlord who transfers the premises in a good faith sale to a bona fide purchaser. The section removes all liabilities from a landlord under either the rental agreement or the Act as of the time the landlord gives written notice of the conveyance to the tenant. Liability for security obligations is excepted.[142] This section simply reflects that the transferor no longer falls within the definition of a "landlord"[143] after he has fulfilled the duty of disclosure,[144] though it might be helpful to expand the wording of section 2.105(a) to emphasize that the transferee immediately assumes the obligations of a "landlord." Enactment of section 2.105(a) with this addition would bring a major secondary benefit in liberating practitioners, students, and professors from chasing those running covenants around the courtroom and classroom, at least in the residential

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[134] 1 AMERICAN LAW OF PROPERTY § 3.37 (A.J. Casner ed. 1952).
[135] Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).
[136] Herpolsheinaer v. Christopher, 76 Neb. 352, 107 N.W. 382 (1906).
[137] Wallace v. Carter, 133 Kan. 303, 299 P. 966 (1931).
[138] See note 133 and accompanying text *supra*.
[139] See text accompanying notes 17-18 *supra*.
[140] It can happen. Snider v. Deban, 249 Mass. 59, 144 N.E. 69 (1924).
[141] Section 2.104, relating to the landlord's duty of repair, will be treated separately. See p. 404 *infra*.
[142] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.105.
[143] Note 131 *supra*.
[144] See note 128 and accompanying text *supra*.

lease context.[145] Present Kansas statutes protect the remedies of the transferee.[146]

B. *Tenant Obligations Other Than Maintenance and Repair*

Article III imposes three general duties upon the tenant in addition to his basic obligations of rent[147] and maintenance of the premises.[148] These include the duty of abiding by lawful rules and regulations concerning use and occupancy,[149] allowing the landlord reasonable access to the premises,[150] and using the tenement only as a dwelling unit absent an agreement to the contrary.[151] Section 3.102 places several limitations on the landlord's ability to incorporate rules and regulations into the rental agreement. Several merely require full disclosure and even-handed enforcement and should raise no serious questions.[152] Section 3.102(5) attempts to preserve the integrity of the Act by forbidding rules or regulations which are "for the purpose of evading the obligations of the landlord." This wording seems unfortunate. It could easily be interpreted to mean that a landlord can evade his obligations under the Act through rules and regulations unless the offending passages were willfully included in the rental agreement for the specific purpose of avoiding those obligations. If this interpretation was intended by the drafters, it creates a serious flaw in the overall scheme of the Act. The specific intent to avoid obligations would be very difficult to prove in a post-agreement dispute, and landlords could often avoid via rules and regulations the important duties imposed elsewhere in the Act. Yet such a reading of section 3.102(5) directly conflicts with the waiver of rights prohibition in section 1.403,[153] indicating that the mistake is in drafting, not design. In either event, any body enacting the URLTA should clarify the provision to negate rules and regulations that have either the purpose *or effect* of permitting evasion of the landlord's statutory or contractual responsibilities.

The other substantive limitation on rules and regulations is set out in section 3.102(1) and (2). These subsections require that any such restrictions must be for the purpose of promoting "the convenience, safety, or welfare of the tenants," preserving the property from abusive use, or assuring "a fair distribution of services and facilities,"[154] and that the restrictions be reasonably

[145] For a good analysis of covenants "real" v. covenants "collateral" in the landlord-tenant context see Abbott v. Bob's U-Drive, 222 Ore. 147, 352 P.2d 598, 81 A.L.R.2d 793 (1960).

[146] KAN. STAT. ANN. §§ 58-2513, -2514. Even without these, the ancient doctrine of attornment would probably be found to have outlived its usefulness. 1 AMERICAN LAW OF PROPERTY § 3.60 (A.J. Casner ed. 1952).

[147] The Act does not codify the obligation to pay rent though it supplies the landlord with a remedy for failure to meet a contractual obligation. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.201.

[148] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.101, p. 404 *infra*.

[149] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.102.

[150] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.103.

[151] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.104.

[152] Sections 3.102(a)(3), (4) provide that any rule or regulation must apply "to all tenants . . . in a fair manner" and be "sufficiently explicit in its prohibition, direction, or limitation . . . to fairly inform." According to § 3.102(a)(6), the tenant must have notice of the measure at the time of entering the rental agreement or when adopted and under § 3.102(b) must consent in writing to post-agreement rules or regulations which work "a substantial modification of his bargain."

[153] Notes 74-75 and accompanying text *supra*.

[154] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.102(1).

related to these lawful purposes.[155] The provision would apparently have no effect on the usual don't-mark-on-walls, no running-in-the-halls, everyone-out-of-the-pool-by-eight restrictions. The growing tendency to ban all pets from apartment complexes might run into difficulties unless exceptions are made for patently innocuous animals such as parakeets. While bans on home solicitation might be upheld on safety grounds, the frequent landlord view that such regulations prohibit all forms of door-to-door political activity would be more suspect. Tenants who wished to receive literature distributions and personal visits would have a good argument that the Act's "reasonably related" standard would necessitate either that the lease disclose the scope of the ban or that a screening process preserve their access to political information.

The obligation to provide reasonable access to the landlord changes the common-law doctrine that the tenant's possessory interest was absolute, even against the landlord.[156] A few exceptions have been gradually carved from this rule,[157] but in Kansas the only recorded deviation was to allow the abatement of a nuisance.[158] The URLTA allows entry at reasonable times upon two days notice (except where "impracticable")[159] for all reasonable purposes.[160] It further sanctions entry at any time in case of emergency,[161] under court order,[162] or when specifically permitted under the remedy provisions.[163] Overall, the section lays out a rational system which should be acceptable to both parties. It also represents one example of how abandoning common-law principles can work to the favor of the landlord as well as the tenant.

The tenant's third general obligation—to use the premises only for residential purposes absent agreement to the contrary[164]—also protects the landlord by reversing a presumption of the common law. Without such a statutory limitation a lessee could use the premises for all lawful purposes,[165] and while his uses could be restricted by contract, such limitations were strictly construed.[166] Kansas law has already deviated somewhat from this doctrine by limiting use to that not prejudicial to the purposes for which the premises are reasonably

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[155] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.102(2).

[156] Sawyer v. McGillicuddy, 81 Me. 318, 17 A. 124 (1889).

[157] These included the common-law right to levy distress, the right to demand rent when due, and, in one state, the right to prevent waste. 1 AMERICAN LAW OF PROPERTY § 3.38 (A.J. Casner ed. 1952).

[158] Bailey v. Kelly, 86 Kan. 911, 122 P. 1027 (1912).

[159] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.103(c).

[160] "A 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." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.103(a).

[161] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.103(b).

[162] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.103(d)(1).

[163] Sections 4.202 and 4.203(b) give entry as a part of the arsenal of remedies afforded the landlord; see notes 246, 270-72 and accompanying texts *infra*. Section 3.103(d)(3) allows entrance after "the tenant has abandoned or surrendered," leaving the definition of those mercurial terms to existing law; see notes 294-96 and accompanying texts *infra*.

[164] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.104.

[165] 1 AMERICAN LAW OF PROPERTY § 3.40 (A.J. Casner ed. 1952).

[166] Carbon Fuel Co. v. Gregory, 131 W. Va. 494, 48 S.E.2d 338, 2 A.L.R.2d 1143 (1948).

adapted.[167] The URLTA provisions conform to the Kansas approach with the retreat from the conveyance theory of leaseholds, and with the usual interests of the parties. The same section also expressly approves agreements requiring the tenant to notify the landlord before "any anticipated extended absence."[168] The suggested time allowed before notice must be given is seven days. This period seems rather short in an era of two and three week vacations, particularly when the landlord could terminate for such a breach after 14 days notice.[169]

C. *Repair and Maintenance Duties*

Whatever the fate of the duties and obligations discussed above, it seems certain that sections 2.104 and 3.101, dealing with the repair and maintenance duties of the parties, are destined to become the focal point of controversy in most bodies deliberating the Act. This debate is only fitting, for these twin provisions, particularly when dove-tailed with the remedies Articles, represent for most states the most radical innovations in landlord-tenant law suggested by the Commissioners. Generally, sections 2.104 and 3.101 set forth three obligations: the landlord must have the dwelling unit in a habitable condition at the time the tenant enters into possession;[170] the landlord must maintain the premises in that condition;[171] and the tenant must keep the dwelling unit as clean as the conditions permit.[172] It is the first two of these obligations that signify a major departure from both the common law and the current statutory law in most jurisdictions.

When a lease was silent, the common law did not imply a warranty from the landlord that rental premises were in a habitable condition.[173] A few minor exceptions gradually evolved, but most of these were designed more for commercial than residential leases.[174] While there seem to be no Kansas cases directly on point, there are strong dicta in at least two cases which indicate accord.[175] The rationale for the rule was simple. If the tenant had wished a warranty, he would have made it a part of the lease agreement. Thus, this situation was the real property equivalent of *caveat emptor*.[176]

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[167] Asling v. McAllister-Fitzgerald Lumber Co., 120 Kan. 455, 244 P. 16 (1926), *noted in* 27 COLUM. L. REV. 224 (1927); 75 U. PA. L. REV. 86 (1927).

[168] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.104.

[169] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.201(a).

[170] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(a)(1), (2). Actually, § 2.103 seems to have already imposed a warranty of habitability; see note 134 *supra* and accompanying text.

[171] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(a), (b).

[172] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.101.

[173] 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

[174] A warranty was found when the premises were not yet constructed, Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938), or were limited to a particular (commercial) use. Economy v. S.B. & L. Bldg. Corp., 138 Misc. 296, 245 N.Y.S. 352 (1st Dept. 1930). The chief residential exception to the rule was the "furnished house" exception, providing a warranty for furnished dwellings rented on a short-term basis. The usual rationale offered for the exception was that the tenant did not have an adequate opportunity to inspect. Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942). See generally Note, *Landlord and Tenant—Recent Erosions of Caveat Emptor in the Leasing of Residential Housing*, 49 N.C.L. REV. 175 (1970).

[175] Bailey v. Kelly, 93 Kan. 723, 145 P. 556 (1915); Moore v. Parker, 63 Kan. 52, 64 P. 975 (1901).

[176] L. JONES, LANDLORD AND TENANT § 576 (1906).

But it would be wrong to leave the impression that the URLTA makes a clean break with the current law on this matter. For while most jurisdictions have retained the no-warranty rule, a growing number have forsaken it through either legislative[177] or judicial[178] action. The official Comment to section 2.104 lists ten jurisdictions[179] that now require a warranty of habitability. This trend reflects, in the main, a growing dissatisfaction with treatment of a leased dwelling unit as basically different than other goods and services commonly purchased in the market place. This new approach assumes that renters of living space need the same protections afforded buyers of other commodities.[180] This view is often buttressed by reference to the statutory and administrative requirements of health and safety placed upon landlords by housing, building, and fire codes.[181]

The new approach is sound. The warranty requirements of the UCC for consumer goods are based on the assumption that the seller has knowledge superior to the buyer regarding the general industry producing the sales item and the specific product in question, and that a buyer purchasing a new widget has an expectation that it will be a decent one meriting the protection of the law.[182] The Code consequently imposes on the seller certain minimal guarantees of quality which must accompany the product.[183] This same warranty of merchantability has been applied to sales of new housing[184] and leases of personal property[185] and will very likely evolve as the minimum standard for the rendering of personal services.[186] There is little if any reason for excepting residential leases from the analysis. The average prospective tenant knows virtually nothing about plumbing, electrical systems, hot water heaters, furnaces, appliances, or other contrivances which provide adequate heat, water, sanitation, safety, light, and ventilation—yet he expects these amenities to function properly. Even a basic knowledge of such matters would be of no assistance in the usual case where equipment is beyond inspection because of the nature of its construction or its location in a multi-unit dwelling. On the other hand, it is not only the landlord's business to know of and control such matters, but also his lawful duty under most housing and fire codes.

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[177] *See, e.g.*, CAL. CIV. CODE § 1941 (West 1954); N.Y. MULTI-DWELLING LAW § 78 (McKinney 1946).

[178] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Pines v. Perssion, 14 Wis. 2d 290, 111 N.W.2d 409 (1961); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

[179] California, Washington, D.C., Wisconsin, New Jersey, Illinois, Hawaii, Michigan, New Hampshire, Colorado, Georgia.

[180] See Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

[181] Spurred by the "workable program" requirement of the Urban Renewal Act, Housing Act of 1954, § 303, 68 Stat. 623, *as amended* 42 U.S.C.A. § 1451(c) (Supp. 1972), the number of communities with housing codes grew from 56 to over 1000 in the decade after 1954. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966). See Pines v. Perssion, 14 Wis. 2d 290, 111 N.W.2d 409 (1961).

[182] See Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962).

[183] KAN. STAT. ANN. § 84-2-314 (1965).

[184] Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).

[185] Cintrone v. Hertz Trucking Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965).

[186] See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 287-89 (1972).

A warranty of habitability thus places the risk for a deficient product on the person with superior knowledge, protects the reasonable expectations of the tenant-purchaser, and reinforces the public policy of the codes by providing a basis for private action against a public wrong.

It would be misleading, however, to summarize section 2.104 as merely imposing a warranty of habitability on the landlords, for the provision definitely goes beyond a simple reversal of the common law's failure to imply a warranty. A second, equally significant burden requires the landlord to maintain the premises in a habitable condition throughout the term by making all necessary repairs.[187] This requirement also constitutes a rejection of a common-law maxim still in effect in Kansas—that in the absence of any agreement the landlord has no burden of repair.[188] But a mandatory landlord repair statute is hardly new to American landlord-tenant law. A 1901 law, forerunner of modern housing codes, required New York City landlords to maintain and repair both the common parts of multi-unit dwellings and the dwelling units themselves.[189] By the 1950's several states required that landlords repair dwelling units in various circumstances,[190] and that trend has accelerated.[191]

Modern urban conditions have obliterated any possible rationale for the common-law repair rule. The rule, at least 500 years old,[192] was born of a simple English agrarian economy in which the hardy and resourceful tenant farmer, living out his life on one tenement, had both far greater "mechanical" skills and considerably more control over the objects of repair than his patrician, manor-bound lord. Now, access to the objects of repair is gone in most multi-unit dwellings, the skills required to repair far out-strip those of the beleaguered tenant, and the tenant is likely to reside in numerous tenements during his life. Further, the landlord will generally have more borrowing power if such is needed for repairs, and may have superior ability to arrange for quick, efficient, and economical work. Thus, while the repair doctrine lingers as one of the oldest vestiges of the common law of leaseholds, it is one of the least defensible and one which the URLTA affords a richly deserved requiem.

These noteworthy shifts in ancient principles comprise only a few of the maintenance and repair provisions. Additional specific obligations placed on the landlord include maintenance of all major fixtures "supplied or re-

[187] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(a)(2).

[188] Mitchell v. Foran, 143 Kan. 191, 53 P.2d 490 (1936); 1 AMERICAN LAW OF PROPERTY § 3.78 (A.J. Casner ed. 1952).

[189] See Gribbetz & Grad, *supra* note 181, at 1259.

[190] In 1952 Professor Casner listed the following statutes as imposing some kind of obligation on landlords: 2 CONN. REV. GEN. STAT. §§ 4050, 4054 (1949); IOWA CODE ANN. §§ 413.66, .108 (1949); KY. REV. STAT. ANN. §§ 101.170, .990 (1948); MASS. GEN. LAWS (Ter. ed. 1932) c. 144, §§ 66, 89; MICH. COMP. LAWS §§ 125.471, .501 (1948); N.Y. MULT. DWELLING LAW § 78 (1946). 1 AMERICAN LAW OF PROPERTY § 3.78, note 10 (A.J. Casner ed. 1952).

[191] See generally Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695 (1968). Many of the court decisions imposing a warranty of habitability explicitly included a repair requirement as part of that duty. See cases cited note 178 *supra*.

[192] 3 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 122-23 (6th ed. 1934).

quired to be supplied,"[193] provision for and maintenance of proper waste disposal items,[194] and provision for running water, hot water, and wintertime heat.[195] It is clear, however, if building and housing codes relating in a material way to health and safety impose more stringent guidelines, the general duty to comply with the codes supersedes the more specific duties of the URLTA.[196] For this part, the tenant must comply with code provisions relating to him, keep the premises as clean and safe as the conditions permit, use all fixtures and other appliances in a reasonable manner, refrain from intentionally or negligently defacing or destroying any part of the premises, and conduct himself and others in such a manner as not to disturb his neighbors' peaceful enjoyment.[197] Though most of these provisions, especially those of section 3.101, are sufficiently general to portend numerous problems of interpretation, the intent of the drafters seems fairly clear and greater specificity would probably be more harmful than beneficial. Unfortunately, this is not true with respect to two sections of section 2.104 as yet unmentioned.

Section 2.104(a)(3) provides that "[a] landlord shall . . . keep all common areas of the premises in a clean and safe condition." Superficially, the section merely restates the uniformly recognized doctrine that the landlord bears tort responsibility for areas of multi-unit dwellings within his exclusive control,[198] and until very recently would not have been worthy of mention. But there are now several very controversial cases extending this liability to require compensation of victims of criminal conduct within these areas when an urban landlord has reason to know that such a danger exists and does nothing to remedy it.[199] The initial decision imposing liability did so because "[t]he risk of criminal assault and robbery on any tenant was clearly predictable, a risk of which the appellee landlord had specific notice, a risk which became reality with increasing frequency, and this risk materialized on the very premises peculiarly under the control, and therefore the protection, of the landlord . . . ."[200] The rationale for imposing the obligation is persuasive. Under the conditions set forth, it is the landlord who is in the best position to take measures appropriate to ameliorate the danger. Nevertheless, the obligation is a grave one, particularly in high crime sectors. Therefore, any legislature considering the URLTA has the obligation, apparently unmet

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[193] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(a)(4).

[194] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(b)(5).

[195] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(a)(6). The "heat" or "hot water" duties are the tenant's if the unit generating same is within his exclusive control and has its own public utility connection.

[196] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(b).

[197] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 3.101.

[198] AM. JUR. 2d *Landlord-Tenant* § 914 (1970); Trimble v. Spears, 182 Kan. 406, 320 P.2d 1029 (1958).

[199] Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Smith v. ABC Realty Co., 66 Misc. 2d 276, 322 N.Y.S.2d 207 (City Ct. 1971); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972). See also Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275 (1971).

[200] Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 487 (D.C. Cir. 1970).

by the drafters,[201] to recognize the ambiguity of the term "safe conditions" and to spell out in either section 2.104(a)(3), or the Comment thereto, the extent of the duty being imposed.

Section 2.104(d), the second provision of the section that needs some repair, is difficult to summarize. The general thrust seems to be that tenants of dwelling units in multi-family structures may agree to perform unspecified repair and maintenance tasks if such agreement is entered in good faith, is not "for the purpose of evading the obligations of the landlord,"[202] is set out in "a separate writing signed by the parties and supported by adequate consideration,"[203] is not necessary to *cure* noncompliance with the landlord's duties under housing and building codes,[204] and does not affect the rights of other tenants "in the premises."[205] The principal issue raised by this language is whether a landlord can use section 2.104(d) to avoid his otherwise unalterable obligations of warranting habitability and making major repairs set forth in section 2.104(a). If so, the superior bargaining power possessed by landlords will virtually guarantee that these key duties will be passed along to tenants, thereby destroying the intricate design and balance of duties established by the drafters. Arguably, section 2.104(d) could not be so used, because the obligation to comply with housing and building codes supersedes all other, more specific landlord obligations,[206] and the provision disallows use for avoiding this duty. But section 2.104(d)(2) indicates that the disallowance applies only to curing violations, thereby implying that the continuing obligation to keep the premises in compliance may be shunted onto the tenant. The Comment to section 2.104[207] leaves the confusion intact by noting that the landlord's duties may not be waived "[e]xcept as specifically provided."[208] More murk is added by section 2.104(c), which allows assumption of trash removal, running water, hot water, and wintertime heat duties by tenants of single family residences, yet also allows the transfer of other unnamed maintenance and repair duties.[209] This specifying of particular duties that may be assumed by the tenant may be a reasonable idea, given the basis for imposing the obligations on landlords of multi-unit dwellings.[210] Such specificity, however, indicates that the other maintenance

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[201] It is arguable that the Comment to § 2.104 nullifies any possible liability for criminal conduct by describing the provisions as imposing general "duties of repair and maintenance." This language applies to all subsections, however, and would easily be interpreted as only summarizing the thrust of the entire provision.

[202] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(d)(1).

[203] *Id.*

[204] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(d)(2).

[205] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(d)(3).

[206] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(b). See note 196 and accompanying text *supra*.

[207] The Comment cites § 1.403 which forbids contractual waiver of any tenant rights or remedies. See notes 74, 75 and accompanying texts *supra*.

[208] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104, Comment.

[209] These agreements, like those discussed in § 2.104(d), must be made in good faith and cannot be for the purpose of evading the landlord's obligations. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(d).

[210] See notes 183-186, 192 and accompanying texts *supra*.

and repair duties referred to in section 2.104(c) are those lesser obligations not covered by either sections 2.104(a) and (b) or 3.101. This specificity in section 2.104(c) in turn suggests that the identically vague terminology in section 2.104(d) also applies only to otherwise unmentioned duties. The language prohibiting transfer "for the purpose of evading the obligations of the landlord" reinforces this notion. But if section 2.104(d) is intended to apply only to non-section 2.104 duties, why is it necessary at all? Sections 2.104(a) and (b) are the only sections in the Act imposing repair and maintenance obligations on landlords, and section 1.401(a) would clearly sanction rental agreement provisions imposing other such duties on the tenant.[211] Only one statement can be made about section 2.104(d) with any degree of certainty—it is a poorly conceived, badly written, and potentially dangerous section needing either drastic reworking or rapid annihilation by the legislative body.

IV. REMEDIES

The two remaining substantive articles[212] of the URLTA are devoted to granting and denying various remedies to the parties for breaches of the sundry duties set out in the first three articles. By far the most significant of these last two is Article IV, which in three parts covers virtually all difficulties that might arise under the duty provisions of the Act, leaving only retaliatory conduct to be dealt with in Article V. Since some of the more important duty sections are interrelated, these will be discussed together.

A. *Basic Remedy for Noncompliance or Breach*

Each party is initially granted a catch-all remedy for the common situation when his opposite either materially breaches the rental agreement or fails to comply with his maintenance and repair duties to a degree materially affecting health and safety.[213] Basically, the twin provisions allow the injured party to terminate the agreement in not less than 30 days if written notice of the acts or omissions constituting the breach is given to the other party, and if that party does not remedy the violation within the time period.[214] No curing time is allowed if the same kind of breach has occurred within the recent past,[215] and attorney's fees may be recovered when a breach is

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[211] "A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this Act or other rule of law, including rent, term of the agreement, and other provisions governing the rights and obligations of the parties." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.401(a).

[212] Article VI relates only to the effective date, a specific repealer and savings and severability clauses.

[213] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.101, 4.201. For some reason the body of these texts differ slightly in punctuation. Section 4.201 seems the clearer.

[214] Some confusion is created in both provisions by wording that allows 14 days for curing in some situations, while affording at least 30 when "the breach is remediable by repairs, the payment of damages or otherwise." It is rather puzzling to imagine how one could remedy a breach other than by repair, damage payment, *or otherwise!*

[215] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(a)(2) (tenant), § 4.201(b) (landlord). Six months is recommended.

adjudged "willful."[216] Tenants may not terminate for self-inflicted conditions.[217] Injunctive or damage relief may also be obtained,[218] though the drafters have again created needless confusion by specifically noting in the tenant's provision that the remedies are cumulative[219] while adding no similar statement in the landlord's provision. This inconsistency is apparently an oversight, for there is no reason why a landlord should be denied cumulative remedies, particularly in light of the explicit policy of the Act that "remedies . . . shall be so administered that an aggrieved party may recover appropriate damages."[220] The different treatment should at least be clarified if not eliminated. In addition to these basic remedies, the tenant is given the right to receive all recoverable security after termination,[221] and the landlord is afforded a right to terminate the lease after nonpayment of rent.[222]

For the tenant these remedies emerge as a combination of breach of contract rules and the construction eviction doctrine, the net effect being a broadening of remedies in some situations and a possible narrowing in others. The tenant's ability to terminate after a material breach by the landlord regardless of the length of the term is not a novel idea, but this contractual approach has been used sparingly, and then almost always in commercial lease situations.[223] The property-based analysis that all covenants in residential leases are independent (the covenant of quiet enjoyment being the exception) has been by far the more frequent viewpoint of the courts, and thus in most jurisdictions enactment of section 4.101(a) would expand tenant remedies. Kansas may once more be an exception. While a number of cases have ritualistically followed the common-law idea of independent covenants,[224] at least one decision apparently holds to the contrary. In *Murrell v. Crawford*[225] the court stated that breach by a landlord of his covenant to repair is "ground for recission and termination of the tenancy."[226] There is no indication that the court was intentionally breaking new ground, nor that the same analysis would apply to breaches of other covenants. Still, the undisturbed presence of *Murrell* for more than 50 years indicates that the termination

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[216] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(b) (tenant), § 4.201(c) (landlord).

[217] "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." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(a)(3).

[218] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(b) (tenant), § 4.201(c) (landlord).

[219] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(c).

[220] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.105(a).

[221] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(d).

[222] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.201(b). The section suggests that this right should accrue 14 days after notice by the landlord of nonpayment.

[223] The leading case is University of Chicago Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914), where a commercial lessee was allowed to rescind a one-year lease after only two months because the lessor was found to have breached an "essential covenant." See also 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

[224] Grady v. Erhard, 143 Kan. 170, 53 P.2d 478 (1936); Bankers' Mortgage Co. v. Robson, 123 Kan. 746, 256 P. 997 (1927); Seapy v. Smart, 102 Kan. 294, 169 P. 1151 (1918); O'Neal v. Bainbridge, 94 Kan. 518, 146 P. 1165 (1915); Douglas v. McFadin, 15 Kan. 259 (1875).

[225] 102 Kan. 118, 169 P. 561 (1917).

[226] *Id.* at 122, 169 P. at 563.

option afforded tenants in section 4.101(a) would be less revolutionary in Kansas than in most jurisdictions.

It is unclear if and how section 4.101 relates to the common-law concepts of actual, constructive, and partial evictions, for Article IV nowhere speaks in "eviction" terms. Section 4.107 relates to when "a landlord unlawfully removes or excludes the tenant from the premises," but both that language and the stringent remedies provided the tenant therein indicate that it is to be used only in case of what was formerly termed "total actual evictions."[227] The other members of the eviction family must, therefore (1) remain intact as alternatives to the URLTA remedies, (2) be eliminated by the URLTA, or (3) remain as concepts, but with section 4.101 substituted for the common-law remedy. This third alternative seems to be the best guess of the Commissioners' intent.[228] Section 1.103[229] declares that the "principles of . . . real property" are preserved unless displaced by provisions of the Act, and while it is arguable that the specific duties imposed on the landlord in Article II eliminate all other duties by negative implication, it is hardly imaginable that such a backdoor analysis could be successfully invoked to eradicate the tenant's right to be free from interference with his possessory interest. On the other hand, if such a right were implied as a part of the rental agreement,[230] section 4.101 would clearly supersede the common-law remedies for breaches.

If section 4.101 does so apply, it slightly expands the traditional remedy for total constructive eviction, while considerably shrinking the remedy for both constructive and actual partial evictions. Termination has always been the usual remedy for total constructive eviction[231] and the notice and cure provisions of the Act are merely quantified restatements of constructive eviction prerequisites.[232] The only apparent change worked by section 4.101 is to allow termination when the interference is initiated by a fellow tenant, a right not permitted under common-law rules.[233] Termination was not, however, the remedy for partial actual eviction. The law viewed the rent as issuing "out of the land, and that the whole rent is charged on every part of

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[227] "If a landlord unlawfully *removes or excludes* the tenant from the premises . . . , the tenant may 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 fee." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.107 (emphasis added).

[228] Again there is no explicit indication of the drafters' view.

[229] See note 20 *supra*.

[230] "[T]he overwhelming weight of authority is that the covenant will be implied from the mere relation of landlord and tenant. It follows that the covenant is implied in a lease by parol." 1 AMERICAN LAW OF PROPERTY § 3.47 at 272 (A.J. Casner ed. 1952). See also Robinson v. Armstrong, 154 Kan. 336, 118 P.2d 503 (1941).

[231] Thurman v. Trim, 199 Kan. 679, 433 P.2d 367 (1967); Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826).

[232] "Usually, the claim of constructive eviction will not be sustained unless it is shown that the lessor was notified of the condition and afforded an opportunity to make necessary corrections." W. BURBY, REAL PROPERTY 174 (3d ed. 1965). Even the requirement of a "material" breach dovetails with current law in many states. *See, e.g.*, Talbot v. Citizens Nat'l Bank, 389 F.2d 207 (7th Cir. 1968).

[233] *See, e.g.*, Stewart v. Lawson, 199 Mich. 497, 165 N.W. 716 (1917). Section 4.101(a)(3) forbids termination when breach is initiated by the tenant or those in his control, implying that breach (if it is a breach) initiated by anyone else is sufficient grounds.

the land."[234] Thus a tenant suffering such a wrong was permitted to both remain in possession and to suspend all rent payments.[235] This same remedy has been recently applied when the nature of the partial eviction was constructive, not actual.[236] Although the relief established in section 4.101 which supercedes the common law is less beneficent toward the tenant, the treatment is more fair to the landlord. The notion that the "whole rent is charged on every part of the land" is a blatant fiction and as irrelevant to present landlord-tenant relations as the general lease-as-estate-in-land concept which is its sire. While a provision requiring rent apportionment during the notification and cure period would be helpful, section 4.101 otherwise provides the tenant with a sufficient mode of redress.

Enactment of the identical landlord termination remedy of section 4.201 would mean far less change for landlords. Theoretically, section 4.201 could greatly expand the powers of landlords, for under the common law no forfeiture could be wrought unless the breaching act effected such a result by the express terms of the lease.[237] As a practical matter, though, almost all residential leases have an omnibus provision giving the landlord the right to terminate upon the breach of any covenant. Thus, section 4.201(a) merely eliminates the need for such language. The special remedy suggesting 14-day termination for nonpayment of rent[238] is in line with the statutory power to forfeit, currently given landlords in several states, including Kansas.[239] However, verbatim acceptance of the suggested time span would bring minor changes to those schemes. In Kansas the grace periods provided for payment after notice are now three days if the term is less than three months,[240] and ten days if longer.[241]

B. *Additional Remedies for Breach of Repair and Maintenance Duties*

The basic termination remedies of section 4.101 and section 4.201 are available to either party when health or safety are materially affected by failure of the other party to perform repair or maintenance duties imposed by the Act. In addition, each party is granted special remedies for use in particular circumstances of neglect to repair or maintain. The tenant may engage in self-help for minor violations,[242] may take several measures to remedy a failure to provide essential services,[243] may raise all claims in defense

[234] Smith v. McEnany, 170 Mass. 26, 27, 48 N.E. 781 (1897) (Holmes, J.). See also Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917).

[235] 1 AMERICAN LAW OF PROPERTY §§ 3.49, 3.50 (A.J. Casner ed. 1952); W. BURBY, REAL PROPERTY 172-73 (3d ed. 1965).

[236] East Haven Associates Inc. v. Gurian, 64 Misc. 2d 276, 313 N.Y.S.2d 927 (Civ. Ct. 1970), *noted in* 49 J. URBAN L. 201 (1971). *Contra,* Zweighaft v. Remington, 66 Misc. 2d 261, 320 N.Y.S.2d 151 (Civ. Ct. 1971).

[237] Winkler v. Gibson, 2 Kan. App. 621, 42 P. 937 (1895); Barnett v. Dooley, 186 Tenn. 611, 212 S.W.2d 598 (1948).

[238] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.201(b); note 222 *supra.*

[239] KAN. STAT. ANN. §§ 58-2507, -2508 (1964).

[240] KAN. STAT. ANN. § 58-2508 (1964).

[241] KAN. STAT. ANN. § 58-2507 (1964).

[242] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103.

[243] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104.

to an action for rent,[244] and may receive penalty damages for certain willful interruptions of services.[245] The landlord has the power to perform the tenant's obligations and charge him the actual costs thereof if prior nonperformance has materially affected health or safety and proper notice has been given.[246]

The drafters suggest limiting the tenant's power to cure minor violations through self-help and rent deduction to those violations not exceeding 100 dollars or one half the monthly rental, whichever is greater.[247] The general ability to withhold and cure was unknown at common law, though again at least one Kansas case seems to hold the opposite.[248] Several states have granted the power by statute, each allowing deduction of a full month's rent if provable.[249] The idea is not without dangers: the tenant dare not guess wrong, and the repairs are apt to be done in a less economical way than the landlord could have arranged;[250] but given the requirement of two week post-notice cure time afforded the landlord in section 4.101, the provision is, on balance, an equitable one. The ceiling suggested by the Act seems more in harmony with the intent of relegating self-help to minor matters than does the full-month limit of the existing statutes.

The URLTA permits the tenant to raise all claims and defenses in a forcible entry and detainer (FED) action[251] and to sue for exemplary damages when willfully ousted through exclusion or termination of essential services.[252] While such remedies would mark significant changes in the law of some states, neither idea is revolutionary in Kansas. Kansas has apparently always viewed the summary possession action as one in which all issues may be litigated,[253] although the United States Supreme Court recently held that a state may constitutionally limit the inquiry in FED cases to whether rent has been paid.[254] The Kansas rule adopted by the URLTA is more in conformity with modern procedural rules allowing liberal joinder of claims.[255] A Kansas court awarded exemplary damages for wrongful exclusion in *Walterscheid v. Crupper*[256] when the landlord used violence to oust the tenant.

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[244] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.105.
[245] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.107.
[246] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.202.
[247] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103.
[248] "If the repairs would cost but little, the tenant may make them himself, and offset the expense against the rent." Murrell v. Crawford, 102 Kan. 118, 122, 169 P. 561, 563 (1917).
[249] CAL. CIV. CODE §§ 1941, 1942 (West 1874); MONT. REV. CODES ANN. §§ 42-201, -202 (1947); N.D. CENT. CODE ANN. §§ 47-16-12, -13 (1960); OKLA. STAT. ANN. tit. 41, §§ 31, 32 (1961); S.D. COMP. L. ANN. §§ 43-32-8, -9 (1967).
[250] Report of the Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP. P. & T.J. 550, 589 (1971).
[251] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.105.
[252] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.107.
[253] Read literally, the Kansas FED statute, KAN. STAT. ANN. § 61-2309 (Supp. 1972), would limit the triable issues to one: the accuracy of the complaint. *But see* Mueller v. Seiler, 158 Kan. 440, 148 P.2d 266 (1944); Conaway v. Gore, 27 Kan. 122 (1882); Comment, *Forcible Entry and Detainer Actions in Kansas: Some Observations on Lindsey v. Normet*, 21 KAN. L. REV. 71 (1972).
[254] Lindsey v. Normet, 405 U.S. 56 (1972).
[255] KAN. STAT. ANN. § 60-218 (Supp. 1972).
[256] 79 Kan. 627, 100 P. 623 (1909).

While section 4.107 extends this liability to encompass intentional exclusion without violence, the court is given discretion to determine whether to invoke the penalty provisions. In such a posture section 4.107 merely maintains the integrity of the FED laws. Additionally, it is particularly important to preserve the threat of treble damages for willful interruption of essential services as proposed by the URLTA. Turning off a tenant's gas, heat, or water is an extremely common method of avoiding use of the FED processes, and one which conceptually approaches the violent means prohibited by *Walterscheid*. In this regard, it is unfortunate that the provision can be read to require termination of the tenancy if the treble damage remedy is invoked for interruption of essential services.[257] Such an interpretation not only sanctions eviction-by-interruption, but virtually eliminates the provision as a remedy in tight housing market areas where termination would at best mean moving to similar premises and at worst mean having no housing at all. It is inconceivable that this was the drafters' intent, and the provision should be clarified.

Separate remedies are offered the tenant when the landlord either intentionally or negligently *fails to provide* the essential services.[258] The interruption/failure-to-provide dichotomy is unexplained[259] and will no doubt create problems of interpretation which the enacting body may wish to forestall by definition. If a failure to provide essential services is shown, the tenant has three options: (1) procure the product himself and deduct the cost from the rent;[260] (2) recover damages based on dimunition of fair rental values;[261] or (3) procure reasonable substitute housing, have the original rent suspended, and subsequently collect damages not exceeding the original rent to pay for the substitute housing.[262] Attorney's fees may be collected in all cases.[263] Though sounding rather ferocious, the section is duplicative in many respects and inadequate in all. The general repair-and-deduct provision of section 4.103 covers all of the landlord's obligations to maintain the premises, and since procurement of services will almost always involve an amount less than the statutory limitation of that provision (one half the rent or 100 dollars, whichever is greater), the repair-and-deduct provision of section 4.104(a)(1) adds little.[264] Regardless of the source, procure-and-deduct is an ineffectual remedy, for often the tenant will either be without authority to order public utility

[257] "[T]he tenant may recover possession or terminate the rental agreement and, in either case [ask for treble damages] . . . ." § 4.107. Can a tenant who has had services interrupted "recover possession"? If not, the language can be viewed as making termination a condition precedent to the damage penalty.

[258] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104.

[259] The Comment to § 4.104 notes that § 4.107 is "applicable where the landlord affirmatively acts to interrupt [services]." Does this mean that a landlord can never negligently or intentionally fail to deliver after the term begins?

[260] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104(a)(1).

[261] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104(a)(2).

[262] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104(a)(3).

[263] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104(b).

[264] As attorneys will very seldom be needed in a repair-and-deduct situation, the only advantage of using § 4.104(a)(1) is that § 4.103 requires a 14-day waiting period. But even that may be ignored "in case of emergency" when the tenant may procure "as promptly as conditions require." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103(a).

services or will face a considerable delay in obtaining a new hook-up. The damage remedy of section 4.104(a)(2), the traditional one available under an "independent covenant" analysis,[265] is preserved elsewhere in Article IV,[266] and is obviously of no assistance when the tenant is freezing or watching the food rot in the refrigerator. The section 4.104(a)(3) substitution remedy is novel but flawed. As stated above, alternative housing will often be difficult to find. This difficulty is seriously compounded in section 4.104(a)(3), which forgives further rent suspension as soon as service is begun. Since rent is uniformly apportioned from day to day,[267] this provision offers the tenant who finds substitute housing the prospect of either paying double rent,[268] or moving twice in a very short period of time and paying for the moves himself. A minimal salvage job on section 4.104 would allow procurement of utilities *and* full suspension of rent for those situations in which a tenant is able to obtain services quickly, or in cases where substitute housing is necessary, suspension for at least two weeks after service is resumed plus a damage action for moving costs.

The most peculiar aspect of section 4.104 specifically and tenant's remedies generally is the absence of any provision, other than the basic termination section, which addresses the problem of serious breaches of the landlord's other section 2.104 obligations of habitability and repair. The failure to provide electricity, gas, or water can be a grave problem meriting particular reactions like those suggested in section 4.104. But are these difficulties much more serious than a hole in the ceiling or rat infestation? Heat is of small value if the windowpanes are broken, and all of the gas in Kansas will not inspire a broken stove or refrigerator to perform. Yet when confronted with holes, rats, major window damage, or malfunctioning appliances the tenant can only repair and deduct under section 4.103 or terminate. The former remedy is of no value when the breach is major, and the latter merely perpetuates the anachronistic constructive-eviction notions which are now being rejected in so many quarters.[269] It approaches hypocrisy to offer the tenant hope in the "rights" provisions of the URLTA and then to be so niggardly in providing remedies. This incongruity is particularly evident when such feeble treatment is juxtaposed with the powerful tools granted the landlord to meet serious tenant noncompliance with repair and maintenance duties. In such situations the landlord may, after 14-days notice, or sooner in an emergency, "enter the dwelling unit and cause the work to be done in a workmanlike manner and submit the itemized bill for the actual and reasonable cost . . . as rent on the next date . . . ."[270] No monetary limitation is

[265] Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 383 (1970).

[266] Note 218 *supra*.

[267] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.401(c).

[268] It is unclear whether the landlord's obligation to pay for substitute housing also ceases at the time service is provided, but this is the most likely interpretation of § 4.104(a)(3).

[269] Notes 178-83, 191-92 and accompanying texts *supra*.

[270] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.202.

imposed, no termination required. If it needs to be done, it gets done, and the rental agreement continues. The remedy is a major change from the common law[271] and in effect gives the landlord the power to evict, as few tenants will be able to make an additional large rent payment the next month. But given the inexpensive and common sense duties imposed on the tenants by section 3.101,[272] it is only fair to allow the landlord to preserve his reversionary interest if noncompliance has reached the stage of affecting health and safety. Thus, the imbalance of the remedies section is not created by what is granted the landlord, but by what is denied the tenant. All of the recent landmark decisions imposing a warranty of habitability on landlords have concluded that the warranty is meaningless unless the tenant can force repair by remaining in possession and withholding all, or at least part of the rent.[273] Clearly this remedy is the most effective way to force compliance with repair duties and consequently to advance the Act's basic purpose of encouraging maintenance.[274] The fears of such a provision presumably stem from a concern about either abandonment[275] or possible administrative difficulties.[276] Unquestionably, abandonment is ravaging the housing market of several major cities.[277] This problem is not serious in Kansas, however, and even if it were to become so, forcing tenants to bounce from one uninhabitable tenement to another is hardly the way to resolve the problem. A possession-and-rent-suspension rule does create some administrative headaches, but several jurisdictions now seem to be successfully coping with these troubles.[278] Thus, no insurmountable legal impediments prevent passage of such a provision, though the political impediments may be more substantial. Certainly the additional remedy is necessary to fulfill the promises of the rights provisions, to restore the balance struck elsewhere in the Act, and ultimately to encourage maintenance and improvement of the enacting state's housing stock.

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[271] The landlord had no right to enter the premises for any purpose, Sawyer v. McGillicuddy, 81 Me. 318, 17 A. 124 (1889), and was relegated to an action for waste if the tenant failed to meet repair or maintenance obligations, 1 AMERICAN LAW OF PROPERTY § 3.39 (A.J. Casner ed. 1952).

[272] Note 197 *supra.*

[273] Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Pines v. Perssion, 14 Wis. 2d 290, 111 N.W.2d 409 (1961). As the habitability issue has arisen in the context of summary eviction proceedings, the question of how much rent will be excused has not always been discussed. The *Javins* court gives the matter full treatment, however, suggesting a sliding scale of rent forgiveness based on the degree of breach. For further examination of how such "damage" should be measured, see Comment, *Rent Mitigation for Housing Code Violations,* 56 IOWA L. REV. 460 (1970); Recent Cases, *Landlord's Violation of Housing Code During Lease Term is Breach of Implied Warranty of Habitability Constituting Partial or Total Defense to an Eviction Action Based on Nonpayment of Rent,* 84 HARV. L. REV. 729 (1971).

[274] "Underlying purposes and policies of this Act are . . . to encourage landlords and tenants to maintain and improve the quality of housing . . . ." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.102(b)(2).

[275] Report of the Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code,* 6 REAL. PROP. P. & T.J. 550, 588 (1971); Note, *Building Abandonment in New York City,* 16 N.Y.L. FORUM 798 (1970).

[276] See Gibbons, *supra* note 265, at 384.

[277] NEWSWEEK, Feb. 28, 1972, at 60.

[278] See Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970), which sets forth ground rules as to when trial courts should issue "protective orders" requiring tenants to pay rent into the court registry pending trial or appeal of a warranty case.

C. *Other Remedies*

Article IV also contains several specific remedy provisions relating to rights created elsewhere in the Act. If the landlord breaches his obligation to deliver possession on the first day of the term,[279] the tenant may terminate upon five days notice, maintain an action for possession against either the landlord or a holdover tenant (or other person in wrongful possession), and, if he can show the failure to deliver is "willful and not in good faith," recover treble damages and attorney's fees.[280] In all cases rent is abated until possession is delivered. These provisions seem reasonable, though the termination section should be revised to clarify that the landlord may cure during the five-day notice period. (Why else have it?) The landlord is also given a treble damage action against willful and bad faith holdovers.[281]

That obnoxious "fire rule"[282] is laid to rest in section 4.106 which allows the tenant to terminate as of the day of the fire or, if occupation is still lawful, to vacate the damaged portion of the premises and have the rent apportioned on a fair rental value basis. It is unclear whether present Kansas law would allow the latter remedy,[283] but there is other precedent for such a determination.[284] Whatever its present status, the proportional rent rule is beneficial to both parties and is a worthwhile addition to the Act. Other provisions of Article IV forbid self-help evictions,[285] give either party useful remedies if access rights are abused,[286] and abolish distraint and landlord's liens.[287] This latter section would create few problems in Kansas where distraint is not recognized and where landlord's liens are restricted to crops,[288] though landlord's liens are now everywhere in danger of being held unconstitutional as violations of the tenant's right of due process of law.[289]

Two final sections of Article IV attempt to make life easier for the land-

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[279] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.103; notes 134-40 and accompanying text *supra*.

[280] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.102.

[281] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.301(c).

[282] Notes 1, 134-37 and accompanying texts *supra*.

[283] Whitaker v. Hawley, 25 Kan. 674 (1881), allowed an abatement when destroyed fixtures represented a considerable portion of the contract value to the tenant. *But see* O'Neal v. Bainbridge, 94 Kan. 518, 146 P. 1165 (1915).

[284] Wattles v. Omaha Ice & Coal Co., 50 Neb. 251, 69 N.W. 785 (1897); W. BURBY, REAL PROPERTY 178-79 (3d ed. 1965).

[285] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.207. The section hardly seems necessary, given the action for possession afforded the landlord in § 4.301 and the penalty provisions for intentional ouster, notes 252, 256-57 *supra*.

[286] The parties may obtain injunctive relief to compel or prevent access, or may terminate for abusive conduct. Tenants may also recover actual damages (not less than one month's rent) and attorney's fees when the landlord abuses. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.302. The scheme seems to adequately balance the competing interests of access and privacy, though the termination alternative could create some interpretative problems in subsequent FED or rent actions.

[287] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.205. The provision is prospective only, preserving all liens perfected before the effective date of the Act.

[288] KAN. STAT. ANN. §§ 58-203 to -206, -218, -219, -2524 to -2529, -2531 to -2533 (1964), *as amended* (Supp. 1972).

[289] Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). For an excellent discussion of the possible ramifications upon landlord's liens of Fuentes v. Shevin, 407 U.S. 67 (1972), which held certain state replevin statutes unconstitutional, see Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 383-85 (1973).

lord who discovers a tenement empty during the middle of a term. One section would succeed; one would not. Section 4.206 provides the landlord with a "claim for possession and for rent and a separate claim for actual damages for breach of the rental agreement" when there has been a premature termination. This section will permit the landlord to bring an action for anticipatory breach of the rental agreement immediately upon discovering an abandonment, rather than being forced to await the due date of any particular payment. This latter common-law requirement, another doctrinal spin-off of the lease-as-conveyance idea, is now rejected in many jurisdictions,[290] among them Kansas.[291] The URLTA understandably joins the trend to the contract-based anticipatory repudiation idea which recognizes that the landlord may have to act immediately against a fleeing tenant or be left without recourse. The anticipatory breach action also allows the landlord to meet his duty to mitigate damages in the abandonment situation without fear of losing the right to sue for any monetary loss the subsequent rental contract might bring.[292]

Less helpful to the landlord is section 4.203, purporting to regulate tenant absence, nonuse, and abandonment. The provisions regarding absence and nonuse are acceptable,[293] but the treatment of "abandonment" would bring migraines to landlords and judges alike. The provision starts strong by restating the duty to mitigate and declaring that the first rental contract terminates on the date the rerental term commences. Then come the pain inducers: "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 . . . *as of the date the landlord has notice of the abandonment.*"[294] If any courts have had much luck in articulating exactly what constitutes an "acceptance of an abandonment as a surrender" (an unlikely proposition), Kansas is not one of them. Here, as elsewhere, this method of concluding the contractual relationship "may be implied from the circumstances and acts of the parties," though "some unequivocal act" by the landlord is necessary.[295] All of this language leaves the "abandoned" landlord in a quandary. May the keys be accepted? The locks

[290] 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952). An excellent discussion of the remedy can be found in Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A. 464 (1935).

[291] Lips v. Opp, 150 Kan. 745, 96 P.2d 865 (1939); Wilson v. National Refining Co., 126 Kan. 139, 266 P. 941 (1928).

[292] The damages for anticipatory repudiation are usually the difference between the rental specified in the lease and the fair rental value over the remainder of the term. Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A. 464 (1935). If the landlord makes a reasonable contract upon reletting, that second rental figure will probably stand as "fair rental value." Thus § 4.206 will not usually affect the *amount* of recovery, just the time at which it may be obtained.

[293] If an extended absence is willful, the landlord may receive actual damages. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203(a). Whenever an absence exceeds seven days, the landlord may enter when reasonably necessary. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203(b). See note 169 and accompanying text *supra* for a criticism of the suggested seven-day period.

[294] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203(c) (emphasis added).

[295] Rogers v. Dockstader, 90 Kan. 189, 191, 133 P. 717 (1913). Other Kansas cases which have struggled with the surrender concept are Gordon v. Consolidated Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965); Christenson v. Ohrman, 159 Kan. 565, 156 P.2d 848 (1945); Guy v. Gould, 126 Kan. 25, 266 P. 925 (1928).

changed? The wall color modified from the former tenant's request? The URLTA makes these risks even greater than did the common law by deeming the agreement terminated *not* at the time the landlord crosses the invisible line to "unequivocation" but when he first receives notice of the abandonment. A wise legislature would strike this scheme and replace it with a provision that the rental agreement continues until the landlord either brings an action for anticipatory breach[296] or stops his reasonable effort to mitigate. Such a revision will lessen the imponderable difficulties imposed on the owner by the hidebound notion of an acceptance of surrender.

V. RETALIATORY CONDUCT

The final substantive Article has only one section and deals with only one subject—retaliatory conduct by the landlord.[297] If the Act had been drafted a decade ago, the topic probably would have gone unmentioned. There were at that time few court or statutory challenges to the common-law principle that a landlord can terminate (or not renew) a tenancy for any reason whatsoever.[298] But a 1968 decision by the District of Columbia Circuit Court of Appeals found that the public policy underlying the D.C. Housing Code prevented termination of a tenancy if the termination was motivated by retaliation for tenant complaints regarding housing code violations.[299] This landmark case spawned considerable discussion of retaliatory evictions in legal literature,[300] and some form of limitation on retaliatory conduct was quickly accepted by numerous courts and legislatures.[301] And while the idea of landlord retaliation conjures images of teeming slums in vast urban centers, a recent study of Kansas landlord-tenant problems found that such retaliation was a very serious problem. One researcher reported that 44 percent of the evictions surveyed were apparently so motivated.[302]

The URLTA's approach to the issue is thorough and commendable. The initial subsection prohibits not only actual eviction but also threatened evic-

[296] Notes 290-92 and accompanying text *supra*.

[297] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101.

[298] Wormood v. Alton Bay Camp Meeting Ass'n, 87 N.H. 136, 175 A. 233 (1934). Wartime measures concerning housing and rent control limited unfettered discretion. Ritchie v. Johnson, 158 Kan. 103, 144 P.2d 925 (1944); Bell v. Dennis, 158 Kan. 35, 144 P.2d 938 (1944); Gabriel v. Borowy, 324 Mass. 231, 85 N.E.2d 435 (1949). Also, the fourteenth amendment has been interpreted to prevent termination based solely upon grounds of racial discrimination. Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).

[299] Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

[300] Baden, *1971 Revision of Eviction Practice in Wisconsin*, 54 MARQ. L. REV. 298 (1971); McElhaney, *Retaliatory Evictions: Landlords, Tenants and Law Reform*, 29 MD. L. REV. 193 (1969); Moskovitz, *Retaliatory Eviction—A New Doctrine in California*, 46 CAL. S.B.J. 23 (1971); Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia*, 36 GEO. WASH. L. REV. 190 (1967); Note, *Landlord and Tenant—Retaliatory Eviction and Housing Code Enforcement*, 49 N.C.L. REV. 569 (1971); Note, *Retaliatory Eviction: The Tenant's Right to Challenge the Landlord's Motive*, 21 SYR. L. REV. 986 (1970).

[301] *See, e.g.*, Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970); CAL. CIV. CODE ANN. § 1942.5 (West Supp. 1973); CONN. GEN. STAT. ANN. § 52-546 (Supp. 1973); DEL. CODE ANN. ch. 25, § 5917 (1971); MASS. LAWS ANN. ch. 186 § 8 (1969); MINN. STAT. ANN. ch. 240, § 566.03 (Supp. 1971); PA. STAT. ANN. tit. 35, §§ 1700-01 (Supp. 1973); R.I. GEN. LAWS ANN. § 34-20-10 (1969).

[302] JOINT COMMITTEE REPORT, KANSAS LANDLORD-TENANT LAW at 15 (1969) (unpublished report on reserve, University of Kansas Law Library).

tion, increased rent, or decreased services in retaliation, and protects the tenant when he complains directly to the landlord, joins a tenant organization, or reports violations to proper authorities.[303] This provision takes the best from existing statutes and writers' recommendations on the subject. The gist of the retaliatory eviction concept is to liberate the tenant from fear of expressing dissatisfaction with housing conditions. If any of these prohibitions or protections were removed, the entire structure of the Act would be jeopardized, for each represents a step which a tenant might reasonably take when displeased with his landlord's attitudes or actions regarding maintenance and repair. Section 5.101(a) thus stands as a delicately integrated scheme which definitely should remain undisturbed by the enacting body.

The one-year presumption of retaliatory conduct suggested by section 5.101(b) is quite long in comparison to other statutes. Several have only a 90-day period,[304] and the American Bar Foundation Model Code,[305] forerunner of the URLTA, recommends six months.[306] This latter time period seems to strike a better balance between the competing interests of discouraging retaliatory conduct and avoiding strangulation of the landlord's freedom to turn over his property in reaction to increased costs or a rising rental market. That strangulation possibility is reduced somewhat by the following subsection which excepts from the Article actions for possession in certain narrow situations. Regardless of either the presumption or direct evidence of a retaliatory motive, a landlord may regain possession if the tenant "primarily caused" the complained-of condition[307] or is in default in rent,[308] or if compliance with the building code requires remodeling which would deprive the tenant of use of the dwelling unit.[309] Several existing statutes have no such exceptions,[310] but they seem justified in the circumstances set forth, particularly if the tenant's rent-withholding remedies are modified as suggested previously.[311] On the other hand, a much longer list of exceptions set out in the American Bar Foundation's Model Code, a forerunner of the URLTA, seems overextensive and again raises possibilities of circumnavigation of basic intent.[312]

[303] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a).

[304] MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1973); N.J. STAT. ANN. § 2A:42-10.12(d) (Supp. 1973).

[305] The A.B.F. Model Code was completed in 1969. One of the drafters of that code, Julian H. Levi, became the reporter-draftsman of the Uniform Residential Landlord and Tenant Act.

[306] AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE §§ 2-407, -408 (Tent. Draft 1969).

[307] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(c)(1).

[308] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(c)(2).

[309] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(c)(3).

[310] MASS. LAWS ANN. ch. 186 § 8 (1969); MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1973); N.J. STAT. ANN. § 2A:42-10.12(d) (Supp. 1973).

[311] Notes 269-78 and accompanying text *supra*.

[312] Several Model Code exceptions are included in the definition of retaliatory conduct in the Uniform Residential Landlord and Tenant Act. Compare American Bar Foundation, Model Residential Landlord Tenant Code § 2-407(2)(f), (h) with Uniform Residential Landlord and Tenant Act § 5.101(a). Other Model Code provisions which create obvious temptations are those protecting the landlord if he recovers the premises for his own use, § 2-407(2)(b), remodels on his own initiative, § 2-407(2)(c), removes the unit from the market for six months, § 2-407(2)(d), or recovers the premises after a bona fide sale, § 2-407(2)(g). A final exception in the Model Code would allow termination without regard to motive if the tenant is committing "waste," a common-law concept the Uniform Residential Landlord and Tenant Act has wisely eschewed.