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A COMMENT ON DAMAGES IN UNLAWFUL DETAINER ACTIONS IN WASHINGTON

CORNELIUS J. PECK*

One might hope that the damage aspects of litigation under a statute enacted in 1891 would now be so well explored and thoroughly understood as to be beyond the area of current comment. However, the product of the years has been an accumulation of inconsistent and ambiguous statements as well as a few instances of obvious conflict between decisions, all of which goes to make a review appropriate. Moreover, a recent decision1 of the supreme court in a case which has already been noted in these pages holds that set-offs and counterclaims cannot be adjudicated in unlawful detainer proceedings—a holding which takes on additional significance in light of the provisions for doubling damages in unlawful detainer proceedings. Finally, adoption of the new rules of pleading, practice, and procedure as a January 1, 1960, may have had a special significance with regard to pleading rules developed under the unlawful detainer statute.

The section of the unlawful detainer statute respecting damages is now found in RCW 59.12.170. It applies not only to unlawful detainer actions, but also to actions for forcible entry and forcible detainer. The language has remained unchanged since enactment of the statute in 1891.2 After providing that the consequences of a verdict for the plaintiff shall be restitution of the premises and, where appropriate, forfeiture of an existing lease, provision is then made for recovery of damages:

...The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned, to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible

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2 Wash. Sess. Laws, 1891, Ch. 96.
entry, forcible detainer or unlawful detainer for *twice the amount of damages thus assessed and of the rent, if any, found due.* (Emphasis supplied.)

Provision is then made for relief from forfeiture of the lease in cases of failure to pay rent by payment of the entire judgment and costs within five days after entry.

The bases upon which one may become guilty of unlawful detainer are set out in the statute. One may be guilty of unlawful detainer by holding over after the expiration of a tenancy for a specific term, even though no notice is given of termination of the tenancy. One may also be guilty of unlawful detainer by holding over after service of a twenty-day notice terminating a periodic tenancy. Or, failure to pay rent or surrender the premises within three days after service of notice to quit or pay rent constitutes unlawful detainer. Likewise, continued possession and failure to keep or perform any condition or covenant in a lease within ten days after service of notice of the breach constitutes unlawful detainer, as does continued possession more than three days after notice is served of waste committed on the premises.

At least in the case of failure to pay rent it is clear that a tenant is not guilty of unlawful detainer until he has remained in possession more than three days after service of a notice to quit or pay rent, and that the unlawful detainer period consists of only those days following the three-day period. Presumably the same reasoning applies to other cases in which service of a notice is required to establish an unlawful detainer.

**The Elements of Damages**

As reference to the statutory language will indicate, the monetary aspect of a judgment in an unlawful detainer action consists of two major elements: one, the damages occasioned by the unlawful detainer of the premises, and the other the rent found due in actions brought for failure to pay the rent. The other aspect of the judgment consists of the restitution of the premises and the forfeiture of any existing lease. In other jurisdictions it has been said that because unlawful detainer pro-

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3 RCW 59.12.030.
4 RCW 59.12.030(6) also provides that unlawful detainer may be committed by one who, without permission of the owner and without having color or title to land, enters and fails or refuses to remove after three days after service of a written notice upon him. Thus, as the court has noted, the existence of the landlord-tenant relationship is not necessary to the maintenance of an action under that subsection. Commercial Waterway Dist. No. 1 v. Larson, 26 Wn.2d 219, 173 P.2d 531 (1946); Columbia & Puget Sound R. Co. v. Moss, 44 Wash. 589, 87 Pac. 951 (1906).
ceedings are a special and summary statutory proceeding, only the damages provided for in the statute may be recovered. Thus it is not surprising to find Washington cases holding that title to personal property on the premises cannot be determined in unlawful detainer proceedings.

However, any conclusion that the damages recoverable in Washington under its unlawful detainer statute are limited to damages for the unlawful detention and the rent is dissolved upon consideration of other cases. Thus in an early case it was held that the amount due on a covenant to pay taxes was recoverable in an unlawful detainer proceeding. Another early case allowed recovery of the rental for a one month period during which a house remained vacant after an unlawful detainer, but since the court refused to allow a doubling of the rent for that period it clearly did not treat it as an item of the damage "occasioned by" the unlawful detainer. In the same case the court refused to allow recovery of the alleged additional living expenses of the landlord, who moved from what was apparently an economical life in a hotel to a more expensive life in the house, but the denial rested upon general considerations of the law of damages rather than the limitations of unlawful detainer proceedings. A more recent decision held that because the damages caused by removal of a building from leased premises were recoverable in the unlawful detainer action which the landlord had brought to recover possession of the premises, the bringing of that action without claiming those damages constituted a waiver and precluded their recovery in a subsequent separate action. Shortly thereafter the court refused to allow a doubling of the amount due on a note given for rent that had accrued, treating the note as a settlement of the rent claim and hence not an item to be doubled under the statutory language. However, because counsel for the tenant did not object to recovery on the note in an unlawful detainer proceeding, the court approved a judgment including that amount. A more recent holding,

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8 Agen v. Nelson, 51 Wash. 431, 98 Pac. 1115 (1909). The amount was not doubled, however, although the amount of the accrued rent was, thus giving emphasis to the fact that the amount due on the covenant to pay taxes was not considered a portion of the unlawful detainer damages.
9 Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823 (1911).
10 Munro v. Irwin, 163 Wash. 452, 1 P.2d 329 (1931).
11 Walker v. Myers, 166 Wash. 392, 7 P.2d 21 (1932).
however, is to the effect that the parties to an unlawful detainer proceeding cannot, by the agreement implied from their conduct, convert an unlawful detainer proceeding into a general proceeding for the settlement of their conflicting claims. The most recent holding denied a landlord's claim for the amount he had to pay to obtain insurance coverage which it was the obligation of the tenant to purchase—the reason being that the proceeding had been instituted upon a notice to quit or pay rent, and that, while the accrued, unpaid rent could be recovered, the claim on the insurance covenant was one over which the court did not have jurisdiction in absence of the landlord's service of a ten-day notice to perform that covenant of the lease. In other words, the amount due on a covenant to purchase insurance could not be recovered in an unlawful detainer action based on failure to pay rent.

Thus, as is frequently the case, doubt exists as to how many elements of damage other than those caused by the unlawful detainer or the accrual of rent can be recovered in such a proceeding. Whether a landlord should in a particular case assert all his claims against a tenant can be determined only by balancing his concern that he will be held to have waived some elements of damage by failure to include them against the possibility of delay and reversal on appeal if he includes them.

The Doubling of Accrued Rent

As a close reading of the damage provision of the statute quoted above will reveal, the grammatical structure of the sentence is such as to lead to the initial conclusion that in unlawful detainer proceedings brought for failure to pay rent the judgment is to be entered for not only double the damages occasioned by the unlawful detainer but also for double all the accrued and unpaid rent. The prepositional phrase "of the rent" must be attached to some antecedent noun, and the only noun to which it can be attached is the word "amount." So placing it subjects the delinquent rent to the doubling prescribed for damages. If the word "of" had not been used or if the word "for" had been used in its place, the judgment could be given for double the damages occasioned by the unlawful detainer but for only the actual amount of the rent accrued. It was an analysis such as this which led the Montana court to conclude that under comparable statutory language it had no

discretion to enter anything but a judgment for triple the accrued rents.\textsuperscript{14}

The Washington court has yet to engage in such a grammatical analysis of the statutory language. In a case involving only the damages accruing during a period of unlawful detainer the court did say that, "the statute is not susceptible of construction,"\textsuperscript{15} thereby manifesting a conclusion that the language has but a single clear meaning. But a readiness to read a penalty provision as having a single clear meaning in a case in which the penalty bears a reasonable relationship to the defendant's wrong does not carry over to the imposition of a penalty which appears arbitrary because its severity depends upon factors bearing little relation to the defendant's wrongdoing. Where damages occasioned by an unlawful detainer are doubled, the total penalty inflicted bears a proportional relationship to the period of wrongful detention and hence to the wrong committed. But where the rent which accrued prior to the period of unlawful detainer is doubled, the penalty thus imposed bears no relation to the wrong of the defendant in remaining in possession of the property. Thus, if the strict grammatical reading is used, a tenant whose financial difficulties caused him to fall four months delinquent in rent may be visited with the penalty of doubling that accrued rental for a period of unlawful detainer as short as one or two days.

Possibly the tenant whose inability to manage his financial affairs caused him to fall behind on rent payments does not present the most sympathetic case for avoidance of a penalty. But what of a tenant who, for example, has a valid claim against his landlord for failure to make repairs, for failure to purchase insurance, or for a partial eviction? If he does what seems a common sense thing—deduct his claim from the rent due the landlord—he may find himself a defendant in an unlawful detainer proceeding brought for failure to pay rent. Under the recent decision of the Washington Supreme Court in \textit{Young v. Riley},\textsuperscript{16} reference to which was made at the beginning of this comment, he will not be able to assert either a set-off or a counterclaim in that proceeding. The consequence will be that the tenant will be required to pay to his landlord twice the amount of the tenant's valid claim against the landlord as the accrued rent which is doubled in the judgment. Of course, in a separate action the tenant should be entitled to recover the amount

\textsuperscript{14} Steinbrenner v. Love, 113 Mont. 466, 129 P.2d 101 (1942).

\textsuperscript{15} Bond v. Chapman, 34 Wash. 606, 76 Pac. 97 (1904).

of his claim. But even if he does, the final result is that the landlord has succeeded in making a net recovery from the tenant of the amount which the tenant was entitled to recover from the landlord! It is a weak answer to say that his plight is attributable to his lack of wisdom in acting without legal advice when the action he took is one which is fully in accord with general community standards and practices. Perhaps the answer is, as suggested in the note on *Young v. Riley* previously published in these pages,\(^7\) that that decision must fall before the reasoning of other Washington cases with which it is in conflict. Another possible solution lies in a careful consideration of the damage provision of the unlawful detainer statute.

The Washington court has long and firmly declared that the doctrine of exemplary or punitive damages is unsound in principle and that such damages cannot be recovered except when explicitly allowed by statute.\(^8\) A legislative agreement with a general policy against punitive damages may be found in the hasty repeal of a punitive damage statute which apparently slipped through the last session of the legislature without attracting attention until it had become law.\(^9\) Like other courts,\(^10\) the Washington court has indicated that penal provisions requiring the doubling of damages should be strictly construed. Thus in one case it said,\(^11\) "It seems to us that the statutory double rent and damage right of a landlord against his tenant is not a right which the landlord may successfully invoke, except by a very clear showing of such right." (For present purposes, however, the significance of the statement is limited by the fact that it was made in the course of an opinion which, while denying the doubling of the value of a note given for rent past due, did permit the doubling of other rent which had accrued prior to the period of unlawful detainer.)

In a number of cases the Washington court has prescribed the doubling of the accrued rent in the computation of the amount of a judgment to be entered for unlawful detainer following a failure to

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\(^7\) *Id.*


\(^9\) Wash. Sess. Laws, Ex. Sess. 1961, Ch. 27, repealing Ch. 97, Laws of 1961. A committee was created, to be appointed by the Governor, to make an investigation of the field of damages and exemplary damages and to make recommendations to the next session of the legislature with respect to the desirability of further legislation on the subject.

\(^10\) E.g., Forrester v. Cook, 77 Utah 137, 292 Pac. 206 (1930); see also cases cited 26 C.J., *Forcible Entry and Detainer*, 863, n.39.

\(^11\) Walker v. Myers, 166 Wash. 392, 397, 7 P.2d 21, 22 (1932); But cf. Western Union Telegraph Co. v. Hansen & Rowland Corp., 166 F.2d 258 (9th Cir. 1948).
quit or pay rent. But, as an examination of the briefs will show, in those cases no argument was made specifically directed to the propriety of doubling the rent which had accrued prior to the period of unlawful detainer. In a considerable number of other cases the court has approved without discussion the doubling of rent which had accrued prior to the period of unlawful detainer. Other cases holding it proper to double the amount of a general verdict carry with them the implication that no distinction is to be made between damages occasioned by an unlawful detainer and accrued rent, though in the facts of the cases there were no claims for accrued rent.

If this were the whole of the picture one might conclude that, despite its general policy with regard to punitive damages and the harsh potential of the rule under consideration, the Washington court was firmly committed to a policy requiring the doubling of any accrued rent due and owing at the time a tenant became guilty of unlawful detainer after notice to quit or pay rent. The language used by the court in one early case is, however, inconsistent with a practice of doubling accrued rent. That case, Shannon v. Loeb, involved a tenant who held over and remained in possession for one month after the expiration of a tenancy for a specific term. The premises remained vacant during the following month. The landlord then moved in and occupied the house. The trial court entered a judgment for double the rental value for both months. The supreme court held that the rental value for the month the house was vacant after the tenants moved out could not be doubled. It said,

Because of the unlawful detention during September, respondents were unable to give possession to their prospective tenants, and the house remained vacant during October. The rental value that month is found to be $110. This amount cannot, however, be doubled, since the statute, Rem. & Bal. Code, § 827 [now RCW 59.12.170], only permits the damages occurring and rent accruing during the time of the unlawful detainer to be doubled. There was no unlawful detainer subsequent to the last of September. Hence, from that time, any damage awarded must be compensatory only.

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23 Sowers v. Lewis, 49 Wn.2d 891, 307 P.2d 1064 (1957); Davis v. Jones, 15 Wn.2d 572, 131 P.2d 430 (1942); Bernard v. Triangle Music Co., 1 Wn.2d 41, 95 P.2d 43 (1939); Decker v. Verloop, 73 Wash. 10, 131 Pac. 190 (1913).

24 Bond v. Chapman, 34 Wash. 606, 76 Pac. 97 (1904); Quandt v. Smith, 28 Wash. 664, 69 Pac. 369 (1902).

25 Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823 (1911).

26 Id. at 643, 118 Pac. at 825.
If the rental value of property after the surrender of possession cannot be doubled because there was no unlawful detainer at that time, it would seem as a matter of logic that rents which accrued prior to the period of unlawful detainer should likewise be excluded from the doubling process. Indeed, the case is stronger for doubling the rental value of premises which the landlord had to leave vacant because of a prior unlawful detainer. Such a loss of rent caused by an unlawful detainer, even though occurring after the detention, would seem to be a damage "occasioned" by the tenant's wrongful act and its doubling would bear some relation to that wrong. The same is not true of doubling the rent which accrued prior to an unlawful detainer.

Indeed, in another early case the court was presented with an argument that, on a literal reading of the statute, rent could be doubled only in cases involving a default in the payment of rent. In rejecting the argument, the court said:

This construction is ingenious but unsound. The plain reading of the statute is that the court or jury shall assess the damages, and find the amount of rent, and that the court shall thereupon double the amount of the damages and rent. The construction contended for by the defendants disregards both the letter and spirit of the statute. The penalty is not imposed for the nonpayment of rent, as the defendants suggest. If it were, the Act could not be sustained on constitutional grounds. The penalty is imposed for the refusal to surrender possession on the termination of the tenancy, whether it be terminated by the terms of the lease for nonpayment of rent, or for any of the other causes specified in the statute.

Although the court's statement includes an apparent approval of doubling accrued rents, it was uttered in a case in which the court did not have to consider the problem. But if the constitutional rationale for double damages is that they are a punishment imposed for refusal to surrender possession, the propriety of doubling the accrued rentals is called into doubt. As mentioned above, the doubling of accrued rentals, which may vary from rent for one month to rent for one year or more, bears no reasonable relationship to a tenant's wrong in remaining in possession for periods varying from a single day to periods of months.

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27 See Wooding v. Sawyer, 38 Wn.2d 381, 229 P.2d 535 (1951), for the proposition that until the notice to quit or pay rent has been served and has remained uncomplied with for a period of three days after its service, the tenant, though in arrears in his rent, is rightfully in possession, and only thereafter guilty of unlawful detainer.

28 Hinckley v. Casey, 45 Wash. 430, 88 Pac. 753 (1907). For another case with a similar holding see Swanson v. Stubb, 108 Wash. 170, 183 Pac. 91 (1919).

29 Id. at 431-432, 88 Pac. at 753.
extending to and after trial. If the unlawful detainer action has been brought because of the commission of waste on the premises, or if it has been brought because of the failure to keep a condition or covenant of the lease, such as one prohibiting the conduct of illegal business on the premises, the wrong of refusing to surrender would seem to be no greater than the wrong of refusing to surrender after failure to pay rent, yet the doubling of damages in the former cases is limited to a doubling of the rental value for the period of time of unlawful detainer. If the “spirit” of the statute is to impose a punishment related to the wrong of a refusal to surrender, perhaps that “spirit” overcomes the harsh and unreasonable result which a literal and grammatical reading of the statute would require.

More recently the court was presented a case in which the complaint prayed for the doubling of damages only during the period of unlawful detainer. Following the pleading rule which it had developed for unlawful detainer actions—that the prayer of the complaint is the limit of the amount that can be recovered in an unlawful detainer action—the court said that it was not necessary to determine how much of the unpaid rent could have been doubled under the statute. From the phraseology utilized by the court the inference may be drawn that this is still an open question. More realistically, one may conclude that the language used by the court manifests no more than a time-saving phrase used to avoid research on an unessential point rather than acknowledgment of an unsettled state of the law. Nevertheless, the language is there for counsel who wish to argue the contrary.

The short of the matter is that a strict and grammatical construction of the statutory language is capable of producing a harsh and arbitrary enforcement of the lease, such as one prohibiting the conduct of illegal business on the premises, the wrong of refusing to surrender would seem to be no greater than the wrong of refusing to surrender after failure to pay rent, yet the doubling of damages in the former cases is limited to a doubling of the rental value for the period of time of unlawful detainer. If the “spirit” of the statute is to impose a punishment related to the wrong of a refusal to surrender, perhaps that “spirit” overcomes the harsh and unreasonable result which a literal and grammatical reading of the statute would require.

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result and one at odds with the general Washington policy on punitive damages. A view that this result must follow because it is what the legislature decreed is founded on what may be an unrealistic assumption that a statute containing twenty-five sections received from the legislators such a careful reading that they would note and appreciate the significance of the presence of the word "of" in the phrase "for twice the amount of damages thus assessed and of the rent, if any, found due." Conceivably the legislative draftsmen might have given the choice of words that attention. But the number of cases in which counsel representing a landlord have failed to demand the doubling of all of the damages to which their clients were entitled under a strict reading suggests that the significance of the word was not noted by many of the legislators. Moreover, there is strong evidence that the Washington statute was merely copied from an earlier California statute enacted in 1874. The present statute, enacted in 1891, was a redraft of a statute adopted in 1890. Only slight changes were made in the section relating to judgments and damages. And the language of the 1890 statute and the language of the California statute are almost identical. The California statute's provision reads, in the pertinent part, "...for three times the amount of the damages thus assessed, and of the rent found due." The only structural difference between it and the 1890 Washington statute is that the Washington statute is not punctuated by a comma between the words "assessed" and "and."

Good reason for making a provision allowing the recovery of rents

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34 Some evidence that there was a specific legislative concern over the punitive damage provisions of the unlawful detainer statute may be found in the changes made in the earlier statute, Wash. Sess. Laws, 1890, ch. 5 § 18, p. 79 by the statute enacted in 1891 (Wash. Sess. Laws, 1891, ch. 96. Thus the pertinent language was changed from "...for twice the amount of damages thus assessed and of the rent found due," by insertion of the phrase, "if any," to read "...for twice the amount of damages thus assessed and of the rent, if any, found due." Moreover, the 1890 statute permitted the tenant to be restored to his estate upon payment of "...the amount found due as rent, with interest thereon, and the amount of the damages found...for the unlawful detainer." The statute enacted in 1891 permitted the tenant to be restored to his estate after default in rent only upon payment of "the amount of his judgment and costs."
35 See cases cited, note 31, 32, supra.
36 Cal. Stat., Code Amendments, 1873-1874, Ch. 383, p. 349, § 153. This statute was in turn a revision of section 1174 of the California Code of Civil Procedure as adopted in 1872. The pertinent language of that provision was, "The jury, or the Court, in case the proceeding is tried without a jury, must also assess the damages occasioned to the plaintiff by the forcible entry or detainer, or in case of rent unpaid, the amount of rent then due, and thereupon judgment against the defendant for three times the amount of such damages or rent, as the case may be, so found or assessed, must be entered." If anything, then, the language of the 1874 statute weakened the case for the tripling of accrued rentals.
37 Wash. Sess. Laws, 1890, ch. 5, § 18, p. 79.
38 See note 34, supra.
DAMAGES FOR UNLAWFUL DETAINER which accrued prior to the period of unlawful detention might be found in an early California case.\textsuperscript{39} It held under an earlier form of the California unlawful detainer statute that, even where a tenancy was terminated for failure to pay rent, only those rents accruing after the tenant's possession had become unlawful could be recovered in an unlawful detainer action. Correction of this result might well have been the principal objective. Again, it is conceivable that the California legislature had as a purpose the trebling of accrued rent as a penalty for an unlawful detention of any duration. But one might be slow to recognize such a harsh departure from the scheme laid down in the English Landlord and Tenant Act of 1730,\textsuperscript{40} under which only the rent accruing during the period of unlawful detainer was doubled. And the presence of the comma in the California statute makes it possible to attach the phrase "of the rent found due" to the antecedent word "judgment," which though somewhat awkward, avoids the tripling which occurs if it is, instead, attached to the antecedent word "amount," from which the comma separates it.\textsuperscript{41} Unfortunately, there appear to have been no California decisions concerning the tripling of the accrued rent decided before the Washington legislature acted. Moreover, before any definitive decision on the question was made,\textsuperscript{42} the California statute was amended to allow the imposition of triple damages in the discretion of the court.\textsuperscript{43}

One thing about the Washington statute is certain. If the legislature copied the California statute without giving consideration to the harsh and inequitable results that could follow from a strict grammarian's reading of the language, it is unlikely, California experience to the contrary notwithstanding, that the oversight will ever be brought to it for reconsideration. While apartment house operators and landlords in general are sufficiently well organized to bring to the attention of the legislature defects in existing statutory and case law, tenants guilty of unlawful detainer form no natural economic or political group and are most unlikely to organize a lobby to obtain repeal of such a defect. Indeed, if the question is ever presented to the court, it might well

\textsuperscript{39} Howard v. Valentine, 20 Calif. 282 (1862); cf. 2 TIFFANY, LANDLORD AND TENANT § 283(b), at 1803 (1st ed. 1910).
\textsuperscript{40} Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, § 1.
\textsuperscript{41} The presence of such a comma in the Montana unlawful detainer statute was not, however, given this effect. See Steinbrenner v. Love, 113 Mont. 466, 129 P.2d 101 (1942).
\textsuperscript{42} See Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440 (1903).
\textsuperscript{43} Cal. Stats. 1907, ch. 57, p. 55 § 1. For the present text of the California statute, see CAL. CODE CIV. PROC. § 1174.
weigh the probability of the question being presented to the legislature for a clearer statement if it refuses to double accrued rents against the improbability of any legislative consideration if it directs the doubling of accrued rents.44

PLEADINGS IN UNLAWFUL DETAINER ACTIONS

Several other features of damage actions under the Washington unlawful detainer statutes deserve comment. As mentioned above, a line of Washington cases45 established the principle that the prayer of the complaint, or amended complaint, establishes the limit of the relief which can be granted in such actions. These cases were decided before the adoption of the new rules of pleading, practice and procedure, which became effective on January 1, 1960. While Rule 8(a) of the new rules states that a pleading shall contain a demand for judgment for the relief to which the pleader deems himself entitled, the view of commentators on the new rules is that the section should not have the effect of limiting the damages to those claimed.46 Instead, they suggest that the courts adopt the liberal practice followed under Rule 54(c) of the Federal Rules of Civil Procedure,47 under which a judgment grants the relief to which the party in whose favor it is rendered is entitled, even if he has not demanded it in his pleadings. Of course, this would be so much clearer if, as is not the case, the Washington rules included the equivalent of Federal Rule 54(c). In the light of only the former holdings concerning pleadings, the double damages of unlawful detainer might be considered special damages which must be specifically stated pursuant to Rule 9(g) of the new rules of pleading, practice, and procedure.48 However, a number of years ago the court referred to the

44 Compare the experience in California, where a supreme court decision overruling the doctrine of sovereign immunity, Muskopf v. Corning Hospital District, 55 Cal.2d 211, 359 P.2d 457 (1961), activated the legislature to consider the problem during a two-year stay against prosecution of tort claims against the state. See Cal. Code Civ. Proc. § 22.3, added by Cal. Stats., 1961, ch. 1404.
45 See note 33, supra.
47 In pertinent part, Fed. R. Civ. P. 54(c) provides, "...Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."
48 Fed. R. Civ. P. 9(g) provides, "When items of special damage are claimed, they shall be specifically stated." For discussions of Rule 9(g) see Meisenholder, The Effect of Proposed Rules 7 Through 25, 32 Wash. L. Rev. 219, 243 (1957); Meisenholder, Commentaries on New Washington Rules of Pleading, Practice and Procedure 18 (1959); 3 Orland, Washington Practice 262 (1960).
market rental value of premises during a period of unlawful detainer as "general damages" and subjected the sum to a doubling.\(^49\)

Since its adoption in 1891, the unlawful detainer statute has contained a provision that the laws of the state with respect to practice in civil actions are applicable to unlawful detainer proceedings, except so far as they are inconsistent with the provisions of the statute.\(^50\) But this and the classifications as "general damages" of the rental value of the premises was not sufficient to prevent the development of a special rule for limiting the damages recoverable to those set in the prayer of the complaint. While one may hope for a resolution of the problem which will produce a uniformity of procedure and avoid traps for the unwary, the prudent thing for counsel is to continue to include in the prayer a request for the doubling of all damages until such time as the pleading of some unfortunate attorney provides the occasion for clarification of the law.

**MISCELLANEOUS OBSERVATIONS**

There remain a miscellany of observations concerning damages in unlawful detainer proceedings. In one case\(^51\) involving the termination of a periodic tenancy there was more than a two-year delay between the time notice was served and suit filed and the time of entry of judgment. The court approved a judgment doubling the rent which had accrued over a twenty-eight month period, noting that delays in the trial could not be attributed solely to the landlord. The court further held, as it has in other cases,\(^52\) that neither tender of the rent during the period of unlawful detainer nor actual payment of the rent into court from the date of termination to the time of the trial were sufficient to avoid the penalty of the double damages. Referring to an earlier decision, the court said, "while our heart was with appellant, we must be guided by the statute (Rem. Rev. Stat., § 827), which left no legitimate ground for the exercise of our sympathy."\(^53\) Nor is a tenant protected from the penalty of double damages because he continues to occupy in good faith under the protection of a temporary injunction.\(^54\)

\(^{49}\) Owens v. Layton, 133 Wash. 346 at 348, 233 Pac. 645 at 645 (1925).

\(^{50}\) RCW 59.12.180.


\(^{52}\) Young v. Riley, 159 Wash. Dec. 55, 365 P.2d 769 (1961); Peterson v. Crockett, 158 Wash. 631, 291 Pac. 721 (1930); Armstrong v. Burkett, 104 Wash. 476, 177 Pac. 333 (1918); Shannon v. Loeb, 65 Wash. 640, 118 Pac. 523 (1911); Newman v. Worthen, 57 Wash. 467, 107 Pac. 188 (1910); Cf. Western Union Telegraph Co. v. Hansen & Rowland Corp., 166 F.2d 258 (9th Cir. 1948).

\(^{53}\) Armstrong v. Burkett, 104 Wash. 476, 177 Pac. 333, 334 (1918).

\(^{54}\) Golden v. Mount, 32 Wn.2d 653, 674, 203 P.2d 667 (1949).
The measure of general damages for the period of unlawful detainer is the fair market rental value of the premises, which may or may not be the same as the rent formerly reserved or paid. Consistency with this approach would require that the damages allowed as rental value for the period of unlawful detainer be apportioned to the exact period of time the tenant was in possession. At the common law, of course, rent was not considered to accrue on a daily basis, as does interest, and it was therefore not subject to apportionment according to time. The tenant was obligated to make payment of the full amount of rent falling due upon any day of his occupancy regardless of whether he occupied for the full period for which that rent was payable. But unlawful detention does not constitute any recognized landlord-tenant relation, and the rental value of the property during such a period should be awarded as damages and not as rent. In a recent case the rental value for the period of unlawful detainer was apportioned to the period, but this was because of the limited prayer of the complaint rather than as a consequence of the rule governing such a problem. The doubling of rent which would have fallen due on a particular day except for the unlawful detainer would not appear proper if the tenant vacated before the end of the period for which that rent would otherwise have been payable.

**Damages for Detention After Trial**

According to a number of cases, where the tenant remains in possession until trial, the damages which are doubled should not include anything for the period after the trial. The theory is that the tenant may have moved out after the trial and a judgment for any further period would be without support in the record. There appears to be no report on any decision relating to the landlord's right to recover double damages for that period of occupancy in a separate action. If the court adheres to the theory that unlawful detainer actions are special statutory proceedings it might well deny recovery of the double damages in a subsequent general action upon the theory that they are a remedy.

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available only in the special statutory proceeding. Such a holding would create the unfortunate situation in which it could be tactically desirable for a defendant in an unlawful detainer proceeding to press for an early trial and to delay the appeal, occupying the premises during the greater portion of his unlawful detainer at no greater expense than the fair market rental value of the premises. In such a case, counsel for the landlord probably should ask for a remand, permitting the reopening of the record for taking additional evidence in order that a judgment appropriate to the then current total fact situation could be entered. In at least one case, in which the trial court decree had ordered immediate restitution of the premises and the record showed that the defendant tenant had subsequently filed the appropriate supersedeas bond for the appeal, the court struck from the decree certain relief granted the defendants, upon the ground that their remaining in possession had rendered that relief inappropriate. While the case is not squarely in point, it certainly offers support for the use of a remand technique.

THE EFFECT OF LIQUIDATED DAMAGE CLAUSES

On one question concerning damages in unlawful detainer proceedings Washington law is in the unfortunate state of having directly conflicting authorities. That question is whether the presence of a liquidated damage clause in the lease and prior deposit or payment of the sum designated as liquidated damages precludes the recovery of damages in an unlawful detainer action. In a 1911 decision, the court held that the presence of such a clause did not preclude the recovery of unlawful detainer damages; in a 1931 decision the court held that the presence of such a clause did preclude the recovery of unlawful detainer damages. Counsel did not call the attention of the court to the earlier decision, and it was not mentioned in the opinion filed in the later case. Because the tenant in the later case surrendered the premises after a short period of unlawful detainer the recovery of damages for that period was not of great significance to the plaintiff, whose principal objective was to double and recover the rent due and unpaid prior to the unlawful detainer. Undoubtedly the court’s attention was directed

60 O’Connell v. Arai, 63 Wash. 280, 115 Pac. 95 (1911); Cf. Barrett v. Monro, 69 Wash. 229, 124 Pac. 369 (1912).
61 Pacific & Puget Sound Bottling Co. v. Clithero, 162 Wash. 156, 298 Pac. 316 (1931).
to that portion of the landlord's claim rather than to the right to recover damages for a wrongful withholding of short duration.

The reasoning of the later decision denying unlawful detainer damages was that, damages for the breach of the covenant to pay rent having been provided for in the lease in an amount specified as liquidated damages, there could be no recovery for rent due and unpaid because the sum specified as liquidated damages had already been paid.\textsuperscript{62} There was, the court said, no further sum to which the landlord was entitled. In the earlier case, a sum had also been deposited with the lessor and designated as liquidated damages to be retained by the lessor in the event of a failure to pay rent or perform other covenants of the lease. The court reasoned that this provision of the lease did not relate to the penalty for the unlawful detention of the premises. That penalty was considered to be fixed by the statute.\textsuperscript{63}

The reasoning behind both decisions leaves something to be desired. A landlord has an option to treat a lease as still subsisting despite a tenant's breach, and sue for the rent as it comes due, or he may treat the lease as terminated and sue for the damages caused by the breach.\textsuperscript{64} The alternative of suit for the damages caused by the breach is available to a landlord who utilizes the procedures of the unlawful detainer statute to regain possession.\textsuperscript{65} When a lease is terminated, liability for rent which has accrued is not eliminated.\textsuperscript{66} Liquidated damage clauses are utilized to cover the damages which would flow from the breach of a lease; they are not intended to serve as a performance of the lease.\textsuperscript{67} Insofar as the claim of a landlord extends to accrued rents, it represents an attempt to enforce the lease according to its terms for the portion of the term during which the rents accrued. The existence of the liquidated damage clause should not operate to preclude recovery of the rents for the period prior to termination of the lease. If, as the Washington statute provides, accrued rents generally may be recovered in an unlawful detainer action, the presence of a liquidated damage clause should not produce a different result. Such a clause should be given effect only with respect to claims arising out of the breach of the lease, and not with respect to demands for specific performance of the lease provisions.

\textsuperscript{62} Id. at 159, 298 Pac. at 317.
\textsuperscript{63} O'Connell v. Arai, 63 Wash. 280, 284-285, 115 Pac. 95, 96 (1911).
\textsuperscript{64} Brown v. Hayes, 92 Wash. 300, 302-303, 159 Pac. 89, 91 (1916).
\textsuperscript{65} Ibid. at 303, 159 Pac. at 91.
\textsuperscript{66} See Heuss v. Olson, 43 Wn.2d 901, 264 P.2d 875 (1953).
\textsuperscript{67} For a general discussion of security clauses in leases, see Piper, \textit{Lease Deposits in Washington}, 30 Wash. L. Rev. 236 (1955).
If accrued rents generally are to be doubled as a penalty for unlawful detainer, as they have been under the Washington statute, the presence of a liquidated damage clause should have no effect.

The damages to which a landlord may be entitled upon termination of a lease consist primarily of the difference between the rent reserved under the lease and the rental value of the premises to the end of the term. In the ordinary situation the damages do not include the reasonable market value of the premises for the entire remainder of the term because the landlord will relet and will obtain that amount from his new tenant. Only during the period immediately following termination, while the landlord looks for a new tenant, will the damages accrue at a rate of the rent reserved, and thus include the reasonable rental value of the premises for that period. Liquidated damage clauses are used by the parties as a substitute for estimating both these elements of the damages.

Unlawful detainer damages, however, consist primarily of the reasonable value of the premises for the period during which the tenant remains in possession unlawfully, and do not include the difference between the rent reserved under the lease and rental value of the premises to the end of the term. In almost every case, there will be some lapse of time between termination of the unlawful detainer and the time the landlord finds and leases to a new tenant. This type of damage has been attributed to the breach rather than to the unlawful detainer. Thus, it is clear that the liquidated damage figure does not constitute the parties' estimate of the unlawful detainer type of damage, and was not intended to serve as its substitute. Accordingly, while the presence of a liquidated damage clause should bar recovery of damages caused by the termination of the lease it should not preclude the recovery of the damages caused by a tenant's unlawful detainer of premises. The injustice of a contrary holding may readily be seen if one contemplates a situation in which a tenant, guilty of unlawful detainer, successfully delays both trial and appeal and then limits his landlord's recovery to the amount of a liquidated damage provision. In short, instead of paying even the fair market rental value for the period of detention, such a tenant would pay only a sum estimated to equal the difference between the fair market rental value and the rent reserved

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68 Brown v. Hayes, note 64 supra.
69 Note 55, supra.
70 Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823 (1911).
in the lease. Occupancy upon more favorable rental terms is difficult to imagine.

**ATTORNEYS’ FEES**

One other area of conflict in the Washington cases appears. In an early case the court allowed a tenant to recover attorneys’ fees in his suit against the sureties on the restitution bond posted by a landlord in an unlawful detainer action. But in a subsequent forcible detainer action the court refused to allow the successful plaintiff attorneys’ fees, saying they did not constitute a proper element of damage in such an action. The supreme court’s statement of the claims and proceedings in the trial court in still another case reveals that the trial judge in that case refused to award attorneys’ fees to a landlord who successfully maintained an unlawful detainer action. The general rule in other jurisdictions would appear to be that attorneys’ fees are not an element of damages in unlawful detainer actions.

**CONCLUSION**

From this miscellany of comments concerning damages in unlawful detainer actions a few major items appear. The court might well reconsider the practice of doubling of accrued rentals as a part of the damages awarded in such suits. Such a practice can produce a harsh and arbitrary punishment bearing no reasonable relationship to the wrong for which it is imposed. Particularly if the court adheres to a policy of denying counterclaims and set-offs in unlawful detainer actions is there a danger of injustice.

Counsel for landlord should, as a matter of caution, continue to claim specifically all of the double damages to which their client might be entitled until such time as a determination is made as to the effect of the new rules of pleading, practice, and procedure has been made. In other areas, it is hoped, this discussion may be of assistance to counsel in locating and analyzing problems which otherwise do not clearly appear in the statutory language or in the accumulation of decisions, some of which have not been indexed or digested as completely as one might hope. Finally, it is hoped this comment may be of some assistance to the court in its tremendous burden of working with the accumulated precedents in various specialized fields of litigation.

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71 Corman v. Sanderson, 72 Wash. 627, 131 Pac. 198 (1913).
72 Enbody v. Hartford Accident & Indemnity Co., 147 Wash. 237, 265 Pac. 734 (1928). RCW 59.12.170, which governs the measure of damages in cases of forcible detainer, likewise governs the measure of damages in cases of unlawful detainer.
74 Forrester v. Cook, 77 Utah 137, 292 Pac. 206 (1930).