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Landlord and Tenant—Unlawful Detainer—Set-off's & Counterclaims

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LANDLORD AND TENANT

Unlawful Detainer—Set-off's & Counterclaims. In *Young v. Riley*[1] the Washington Supreme Court cited a broken line of decisions, called them "unbroken," and held that set-off's and counterclaims cannot be adjudicated in unlawful detainer actions.

On June 17, 1960, Maude Riley was delinquent in the payment of her rent for May and June. She received the statutory notice[2] to pay rent or vacate within three days, from her landlord, Marta Young. Four days later she notified her landlord that the rent would be withheld in order to cover damages resulting from the disturbance of her possession through occupancy of a portion of the leased premises by the landlord and her minor daughter.

The landlord commenced an unlawful detainer action, seeking judgment for double[3] rent and restoration of the premises. In her answer the tenant pleaded the disturbance of possession and counterclaimed for thirty-five hundred dollars, a sum exceeding the amount of rent due.

The supreme court reversed the trial court's determination that the tenant was not in default of rent, and said that the lower court's judgment "completely ignore[d] the purpose of the statutory action for unlawful detainer, which is to preserve the peace."[4] The court then stated:

> The statute affords a summary remedy for obtaining possession of property withheld by tenants who fail to pay rent within three days after the service of statutory notice.... The right and remedy alike are statutory, and the procedural remedy is an integral part of the right itself. RCW 59.12. In an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized

[1] 159 Wash. Dec. 55, 365 P.2d 769 (1961).

[2] RCW 59.12.030 "Unlawful detainer defined. A tenant of real property for a term less than life is guilty of unlawful detainer either:.... (3) When he continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due...."

[3] RCW 59.12.170 "Judgment-Execution. If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer... after default in the payment of rent, the judgment shall also declare the forfeiture of the lease agreement or tenancy. The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff... 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... for twice the amount of damages thus assessed and of the rent, if any, found due...."

[4] Young v. Riley, 159 Wash. Dec. 55, 56, 365 P.2d 769, 771 (1961).

> by statute and not as a court of general jurisdiction with the power to hear and determine other issues.... RCW 59.12.170 provides that, upon a finding of default in the payment of rent, "... the judgment shall also declare the forfeiture of the lease, agreement or tenancy...."
>
> It is settled by an unbroken line of decisions that in such proceeding the defendant may not assert a set-off or counterclaim.[5]

This "unbroken line of decisions" denying the tenant a set-off or counterclaim in unlawful detainer proceedings, began in 1891 with *Ralph v. Lomer*.[6] Subsequent cases through 1909 asserted this same proposition and said that a tenant's only remedy is to bring an independent action for breach of covenant.[7]

The first break in the "unbroken line of decisions" occurred in *Andersonian Inv. Co. v. Wade*,[8] in 1919. In discussing the availability of equitable defenses in unlawful detainer proceedings, the court said:

> We cannot conclude, therefore, that a defendant in an unlawful detainer action can in no case present an equitable defense; his right to do so, we think, must depend upon the acts which give rise to the action. If he acquires possession lawfully and it is sought to oust him because of his subsequent acts, he may defend by setting up any defense which will justify his act.[9]

The court's willingness to allow *any* equitable defense is an extension of prior Washington cases,[10] which involve unlawful detainer actions premised upon either breach of covenants or holding over by the tenant after termination of his tenancy.[11] While these cases consistently

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[5] *Ibid.* The court cited these cases in support of not allowing set-off's or counterclaims: Woodward v. Blanchett, 36 Wn.2d 27, 216 P.2d 228 (1950); Chung v. Louie Fong Co., 130 Wash. 154, 226 Pac. 726 (1924); Phillips v. Port Townsend Lodge, No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476 (1894); Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760 (1891).

[6] 3 Wash. 401, 28 Pac. 760 (1891).

[7] Hutchinson v. Wilson, 54 Wash. 410, 103 Pac. 474 (1909); Owens v. Swanton, 25 Wash. 112, 64 Pac. 921 (1901); Phillips v. Port Townsend Lodge, No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476 (1894).

[8] 108 Wash. 373, 184 Pac. 327 (1919).

[9] *Id.* at 378-79, 184 Pac. at 330.

[10] Hutchinson Inv. Co. v. Van Nostern, 99 Wash. 549, 170 Pac. 121 (1918) (Tenant allowed to prove no nuisance, and thus no breach of covenant. He failed.); Northcraft v. Blumauer, 53 Wash. 243, 101 Pac. 871 (1909) (defense of no breach and part performance defense to remove oral lease from Statute of Frauds); Watkins v. Balch, 41 Wash. 310, 83 Pac. 321 (1906) (part performance); Teater v. King, 35 Wash. 138, 76 Pac. 688 (1904) (proved valid lease); Brown v. Baruch, 24 Wash. 572, 64 Pac. 789 (1901) (estoppel).

[11] RCW 59.12.030 "Unlawful detainer defined. A tenant of real property for a term less than life is guilty of unlawful detainer either: (1) When he holds over or continues in possession... of the property... after the expiration of the term for which it is let to him.... (2) When he, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession... after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice... requiring him to quit the premises at the

allowed the tenant to assert the equitable defenses of estoppel or part performance, the cases cited in *Young* just as consistently refused to allow the equitable defense[12] of set-off in an unlawful detainer action premised upon nonpayment of rent.[13] The *Andersonian* decision seems to abolish the inconsistency.

In 1930, the major break in the "unbroken line of decisions" occurred. In *Income Properties Inv. Corp. v. Trefethen*,[14] the court cited the *Andersonian* case and allowed a tenant to recoup his damages for the landlord's breach of a covenant to repair. The unlawful detainer action had been commenced because the tenant, claiming an offset for the landlord's breach, refused to pay rent. Thereafter the tenant brought a bill in equity to restrain the landlord's action, so long as the alleged damages exceeded the amount of rent due. The two actions were consolidated for trial. The court found the tenant's remedy at law to be inadequate, and that the landlord was seeking only a forfeiture, which equity abhors. The court said: "It is well settled that, when the conditions and circumstances are such as to warrant the interference of equity, equity will assume jurisdiction for all purposes and give such relief as may be required."[15] The court then affirmed the trial court decree enjoining the unlawful detainer action, or any action which would lead to a forfeiture until the landlord performed his part of the lease contract.

While the *Income Properties* case is procedurally distinguishable from the prior cases cited, it does permit a tenant to withhold rent when his landlord has breached covenants in the lease contract, subject only to the requirement that the amount of alleged damages exceed the amount of rent due. With the premise established, this conclusion follows. In an unlawful detainer action for nonpayment of rent, the court will allow, as an affirmative equitable defense, the tenant's claim that his default in rent is justified because the landlord has breached a covenant.

The soundness of such an extension of the *Income Properties* case

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expiration of such month or period.... (4) When he continues in possession... after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement... than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property... shall remain uncomplied with for ten days after service thereof...."

[12] On equitable and statutory set-off, see 3 STORY, EQUITY JURISPRUDENCE § 1866 (14 ed. 1918), and Clark & Surbeck, *The Pleading of Counterclaims*, 37 YALE L.J. 300 (1927).

[13] See cases cited note 7 *supra*.

[14] 155 Wash. 493, 284 Pac. 782 (1930).

[15] *Id.* at 506, 284 Pac. at 786.

has not been established. A dictum in *Woodward v. Blanchett*[16] supports the old rule. The *Income Properties* case is not mentioned. The *Young* case also did not settle the issue, because the *Income Properties* decision was not cited to the court in respondent's brief and is not mentioned in the decision.

If the *Income Properties* case had been presented in *Young v. Riley*, the court could have used either of two reasons for not following it. First, the weight of authority supports the prior decisions in Washington. Professor Williston has stated the general rule as follows:

> If the lease or a statute, as is usually the case, allows a landlord to eject a tenant for non-payment of his rent, the landlord may pursue this remedy, and it cannot be said that the tenant has paid or tendered the rent due if he has deducted even a valid crossclaim.[17]

Second, the willingness of equity to prevent a forfeiture in that case is against the weight of authority. The general rule is that a stipulation in a lease allowing re-entry and forfeiture for nonpayment of rent is deemed mere security for the payment of rent. Whenever the other can be made whole by the payment of rents and interest, equity will relieve against forfeiture.[18] However, an exception exists in the unlawful detainer action. When the statute provides a specific period of time during which the tenant may pay his rent and avoid forfeiture, equity will not give relief after such time has run.[19] The reason is that forfeiture is imposed by statute and granting relief after the statutory grace period would "contravene the express will of the legislature."[20] The Washington unlawful detainer statute gives the tenant three days in which to pay all arrears in rent and thus completely protect himself from forfeiture.[21] After the three days have elapsed, equity will not give relief.[22] The Washington statute also provides a period of five days after the judgment is entered during which the tenant, by fully satisfying the

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[16] 36 Wn.2d 27, 216 P.2d 228 (1950).

[17] 3 WILLISTON, CONTRACTS § 887 F at 2507 (rev. ed. 1936), citing among many cases, Phillips v. Port Townsend Lodge, No. 6, F. & A. M., 8 Wash. 529, 26 Pac. 476 (1894). See note 5 *supra*.

[18] 3 STORY, EQUITY JURISPRUDENCE § 1727 (14 ed. 1918). D. Paradis Co. v. North Hudson Holding Co., 137 N.J.Eq. 430, 45 A.2d 323 (1946).

[19] New Mexico Motor Corp. v. Bliss, 27 N.M. 304, 201 Pac. 105 (1921); Rainey v. Quigley, 180 Ore. 554, 178 P.2d 148 (1947); Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760 (1891); Herman v. Kennard Buick Co., 5 Wis. 2d 480, 93 N.W.2d 340 (1958).

[20] Note, *Real Property-Tenant's Right To Relief From Forfeiture For Non-payment of Rent*, 1950 WIS. L. REV. 741, 743.

[21] RCW 59.12.030 (3). See note 2 *supra*.

[22] 2 TIFFANY, LANDLORD AND TENANT § 274 d(7) (1910).

judgment, can be restored to his estate.[23] The Wisconsin court has refused to restrain enforcement of an unlawful detainer judgment because the tenant failed to avail himself of a similar grace period (ten days).[24] The Washington statute also contains a provision permitting discretionary relief from forfeiture within thirty days after the entry of judgment, upon proper application to the court.[25]

While the *Income Properties* case stands against the weight of authority, the argument supporting its basic precept is perhaps of equal persuasiveness. As stated in the *Young* case, the action of unlawful detainer is designed to afford the landlord a summary remedy for obtaining possession after a default in the payment of rent. As evidenced by the varied statutory provisions enabling the tenant to avoid forfeiture, the purpose of the statute is to force prompt payment of the rent by threatening forfeiture. The primary interest being protected is the landlord's interest in seasonable receipt of his expected income, not his interest in regaining possession shortly after a default in rent payments. Is not the landlord's interest in prompt receipt of the rental income adequately safeguarded by a scheme giving him the benefit of the coercive power of the unlawful detainer statute, but subject to the condition that he has reasonably fulfilled and performed his duties under the lease contract? In other contracts with independent conditions, the parties are still able to bargain effectively in seeing that the other performs his duties. While no conditions precedent to a suit may exist, a potential counterclaim can have the effect of forcing each to duly discharge his duties under the contract. But in the unlawful detainer situation, failure to pay rent within the three-day period will result in forfeiture or double damages or both.

The landlord has ample coercive power, the speedy summary proceeding. The tenant can only threaten a separate suit for breach of covenants, a less effective remedy because of the time element and the continuing duty to make all rent payments. The crucial question thus becomes: Does the landlord need and deserve such protection? Should the unwary tenant who withholds rent in order to force the landlord to repair or perform other covenants be told not only that he must resort

[23] RCW 59.12.170 "Judgment-Execution.... When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant... may pay into court... the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate...."

[24] Herman v. Kennard Buick Co., 5 Wis. 2d 480, 93 N.W.2d 340 (1958).

[25] RCW 59.12.190 "Relief against forfeiture."

to a separate action, but also that he forfeits his lease unless he can pay the double damages within the statutory grace period?

Perhaps for the above reasons, the New York Legislature has expressly provided for counterclaims in unlawful detainer proceedings.[26] As in Washington, it is a summary proceeding governed entirely by statute.[27] Either legal or equitable defenses may be used,[28] allowing the tenant to counterclaim for his landlord's breach of covenant.[29] The establishment of a counterclaim in excess of the amount of rent due, purges the default and is a complete defense.[30]

The District of Columbia has a similar statute.[31] Whenever possession is sought for nonpayment of rent, the tenant may assert any counterclaim or equitable defense sufficient to defeat the claim for rent.[32] Arkansas has a general counterclaim statute,[33] and it has been construed to permit counterclaims in unlawful detainer actions.[34]

The significant departures from the majority position in the United States have been accomplished by legislation. This does not necessarily mean that only the legislature can or should permit set-off's and counterclaims in unlawful detainer actions. The remedy is a legislative creation, but in the absence of an express prohibition of set-off's and counterclaims, the court could construe the statute to allow them.[35]

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[26] N.Y. CIVIL PRACTICE ACT § 1410 (supp. 1961). "When tenant may be removed. In either of the following cases, a tenant... of real property... may be removed therefrom, as prescribed in this article:.... 2. Where he holds over... after a default in the payment of rent,... and a demand of the rent has been made, or at least three days' notice in writing requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served...." § 1425. "Answer. Judgment for rent due.... [T]he person... may answer... denying generally the allegations,... or setting forth a statement of any new matter constituting a legal or equitable defense, or counterclaim. Such defense or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action.... If the court finds that a defense or counterclaim has been established in whole or in part, it shall, upon rendering a final order, determine the amount of rent due to the petitioner... and may give affirmative judgment for the amount found to be due on the counterclaim."

[27] Liberty Place Holding Corp. v. Adolf Schwob, Inc., 136 Misc. 405, 241 N.Y. Supp. 438 (App. Div. 1930).

[28] Magnotta v. Parkway Fleetwood Bldg., Inc., 277 App. Div. 896, 98 N.Y.S.2d 77 (1950).

[29] 240 West Thirty-Seventh St. Co. v. Lippman, 21 App. Div. 529, 272 N.Y. Supp. 739 (1934).

[30] Fenham, Inc. v. Safeway Stores, Inc., 76 N.Y.S.2d 308 (Sup. Ct. 1947).

[31] D.C.CODE ANN. § 13-214 (1961). "Equitable defenses in actions at law. In all actions at law equitable defenses may be interposed by plea or replication."

[32] Seidenberg v. Burka, 106 A.2d 499 (Mun. Ct. App. D.C. 1954). Lalekos v. Manset, 47 A.2d 617 (Mun. Ct. App. D.C. 1946).

[33] ARK. STAT. ANN. § 27-1123 (1947). "Counterclaim defined. The counterclaim mentioned in this chapter... may be any cause of action in favor of the defendants, or some of them against the plaintiffs or some of them."

[34] Smith v. Glover, 135 Ark. 531, 205 S.W. 891 (1918).

[35] On the propriety of the court considering the social need manifested by legislation in other jurisdictions, see CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 98-141 (1921).

The present Washington case law is inconsistent concerning such a construction. The *Income Properties* case indicates a willingness by the court to exercise its inherent equitable powers and thus accomplish what was done in New York by statute. *Young v. Riley* does not overrule *Income Properties,* but does take a contrary position. The precedential value of *Young* is only greater because of its more recent origin. Whether it implicitly overrules *Income Properties* remains to be determined if and when both cases are argued to the court.

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PLEADING, PRACTICE AND PROCEDURE

Sanctions for Enforcement of Discovery—Constitutionality of Rule 37. The Washington Supreme Court recently heard *Mitchell v. Watson,*[1] a case of first impression concerning the interpretation, application, and constitutionality of Rule of Pleading, Practice and Procedure 37.[2] The principles derived from the decision have an im-

[1] 158 Wash. Dec. 194, 361 P.2d 744 (1961).

[2] WASH. *RPPP* 37: "*Refusal to make discovery: Consequences,* (a) *Refusal to Answer.* If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the county where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted, and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

"(b) *Failure to Comply with Order.* (1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the county in which the deposition is being taken, the refusal may be considered a contempt of that court.

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(i) An order that the matters regarding which the questions were asked or the character or description of the thing or land or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated