An Agricultural Law Research Article

Legal and Economic Considerations in Drafting Arkansas Farm Leases

by

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Leases play a crucial role in Arkansas agriculture. In fact, approximately 35% of all Arkansas farmers rent all or part of the land used in their farming operations.[1] As farmland prices rise, leasing arrangements become more attractive to farm operators. Although farmland has been considered an attractive investment and rising land prices have caused increases in landowners' wealth, land appreciation is not a part of the farmer's annual net return. Many farm operators have discovered that their capital can be more profitably used for production costs than for real estate investments.

The primary objective of the farm lease is to provide for a profitable business with sufficient incentives to both the landlord and the tenant. Landlords contribute land and improvements and often bear the associated expenses of property taxes, insurance, and repairs. Accordingly, their objective is to receive a return sufficient to pay these expenses and to profit from the investment while preserving the value of the property. Similarly, tenants wish to be compensated for their contribution to the business and to achieve a reasonable standard of living. They want assurances that the leases will continue for a reasonable time—at least long enough to recover investments made in the property at their own expense, such as liming and fertilization or other soil conservation expenditures. Tenants contribute labor and management, and often contribute the machinery and equipment used in the business. They expect compensation for these items and the related expenses such as depreciation,

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1. *See* U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, 1978 CENSUS OF AGRICULTURE, vol. 1, pt. 4, at 2 (1981). The number of tenant operators increased from 5,436 in 1974 to 6,452 in 1978, while the number of farm owners who also rent part of the land used in their farming operations grew from 11,187 to 14,159 during the same period. *Id.*

repairs, fuel and supplies. Other variable operating expenses may be allocated to the landowners or the tenants, or shared, depending on their relative contributions. Thus, the parties need to make adjustments which will fairly reflect projected expenses and income for their operation.

Several types of leases have been developed to meet the needs of various farming operations and the objectives of the parties. Although the type of lease will vary, many of the legal and economic considerations will be similar. Disputes most often arise because the parties fail to include important terms in the agreement or fail to understand the terms used. A significant number of farm leases in Arkansas—perhaps the vast majority—are oral.[2] Many written leases are prepared without the assistance of legal counsel. Thus, the Arkansas attorney frequently encounters farm leases only after a dispute arises concerning an oral agreement or a self-drafted contract. At the same time, more farmers are becoming aware of the problems that result when they fail to obtain legal counsel during the drafting stage. As a result, the attorney must be familiar with both legal and economic considerations when drafting leases to fit particular farm tenancy situations, and when representing clients after disputes arise.

This article will survey the use of leases in Arkansas agriculture. The primary emphasis will be on the lease of farm land and buildings, but the lease of chattels such as cattle and irrigation equipment will be briefly discussed. Part I will address the general economic considerations with which the attorney should be familiar in his role as counselor and draftsman. Part II will discuss the legal rights and duties which attach after the parties enter into the lease.

PART I: ECONOMIC CONSIDERATIONS

The attorney should be thoroughly familiar with his client's agricultural operations, so that he can assist the client

2. No recent empirical data exists to support this conclusion. Rather, it is based on discussions with farmers and farm advisors in significant agricultural areas of the state.

in selecting and negotiating the type of lease, or combination of leases, appropriate to the operation. He also should be prepared to assist in the calculation of the contribution to be expected from each of the parties. Finally, he should be ready to advise his client of the tax consequences of the leasing arrangement. This Part will deal with each of these economic considerations in order.[3]

A. Type of Lease

Agricultural leases are classified generally according to subject matter and method of rental payment. Thus, in a cash lease the landlord's rent is a fixed sum of money, while in a share lease the landlord receives a portion of the farm product (or its money value) as rent. There are several types of leases in common use in agriculture: (1) the crop-share lease, (2) the cash lease, (3) the flexible cash lease, (4) the crop-share-cash lease, (5) the farm building lease, (6) the pasture lease, (7) the livestock-share lease, (8) the beef cow lease, (9) the labor-share lease, and (10) the irrigation lease. The type of lease selected depends on the type and condition of the farm, local custom, and the preferences of the parties. Also, the amount of time, interest and responsibility each party is willing to invest in the farm operation will influence the choice of the type of lease. For example, the landlord may not wish to be actively involved in the operation and may not want to share the risk of fluctuating income. If this is true, the cash lease likely would be most desirable. On the other hand, if the landlord wishes to be involved in the decision-making process and is willing to bear some of the risk of fluctuating income, a crop-share lease may be the better alternative. Farm leases often follow the traditional land rental pattern for a particular community, but the negotiated arrangement, with an objective of equitable treatment of both parties, is becoming more popular.

3. This section and the next include materials prepared for a forthcoming book by the author, BUSINESS MANAGEMENT FOR FARMERS, to be released in 1982 by Doane Agricultural Service.

Crop-Share Lease

The crop-share lease is one of the most widely used types of farm rental arrangements. The crop-share lease provides the landowner with a share of the crops as his return for his contribution—primarily land—to the farming operations. The actual share arrangement varies depending on the crops grown, soil quality and custom in the area.

This type of lease can be adapted to many different types of operations so long as the contributions of each party are fairly evaluated. In the typical arrangement, the landowner furnishes land and buildings and shares the costs of certain inputs such as fertilizer, seed and pesticides. The tenant typically furnishes labor, machinery, equipment and fuel supplies, and may share costs of other inputs. The major problems facing the parties are to determine what share of the crops is a fair rent and what share of the costs will be paid by each party. To be equitable, each party should contribute the same portion of annual investment that he receives in income.[4]

A number of special problems exist in determining each party's share of direct operating inputs such as seed, fertilizer, pesticides, harvesting costs and transportation costs. Also, problems may develop in determining the relative burden in sharing the cost of farm improvements, soil and water conservation expenses and crop insurance. One solution would be for all variable operating expenses to be shared in the same proportion as farm income and fixed resources. New technology, though, may affect the parties differently. For example, herbicides can reduce the need for cultivation, thus saving labor for the tenant. The party receiving the savings from the new technology may be the proper one to pay for the change in operating inputs.

Seed costs ordinarily are split in the same proportion as fixed inputs, unless the share of income to the landowner is reduced because the landowner does not wish to contribute anything but land to the operation or the landowner's contri-

4. A method for determining the relative contributions of the parties is discussed in the next section.

bution beyond land is limited (*i.e.*, land plus a share of fertilizers and chemicals only). For example, some rental agreements provide for the tenant to receive 2/3 or 3/4 of the income, but require him to bear all or most operating expenses including the cost of seed.

Annual fertilizer costs also usually are shared as income is shared. Special problems are encountered where the farm production does not meet the general level of productivity in the area or where the tenant has applied materials with carryover value, such as lime or rock phosphate. Also, custom application of fertilizer can raise questions of who should pay the application costs. Generally, the landlord will bear the expense of bringing the farm up to the average productivity level for the area unless an adjustment is made in the income-sharing arrangement to compensate the tenant for expenditures on basic fertilizer materials. Where the tenant applies longer lasting products, the agreement should provide for the reimbursement for unused portions upon termination of the lease. Soil tests are often used as a guide to determine which costs are necessary to build up soil fertility and which are necessary to maintain the fertility at average levels. Application expenses normally would be the tenant's responsibility unless application is by custom operators. Custom application of annual fertilizer requirements saves the tenant in labor and machinery cost, but benefits the landowner as well if the crop can be planted earlier.

Pesticide costs generally are shared as income is shared if the pesticides, such as pre-emergence herbicides or insecticide sprays for corn or sorghums, serve to increase yields. Where a particular weed problem exists on a farm, the landlord may be willing to bear the cost of eradication.

Crop harvesting costs are shared in a variety of ways. Small grain harvesting costs typically are shared as income is shared. The variations include a per acre charge to the landowner where the tenant owns the combine, a reduced share to the landlord where the tenant provides the harvesting, or sharing of the expenses in a ratio other than that for income because of differences in contributions toward harvesting. Similar arrangements often are made for corn when the ten-

ant provides all harvesting, hauling and handling equipment for field shelling and all fuel and labor used in the process. The tenant may be paid a set rate, receive a higher share of the crop or be reimbursed in other ways for his contribution. The landlord may furnish storage and drying equipment as part of his contribution to the harvesting process. Such contributions call for negotiation between the parties so that the individual contributions of each are fairly recognized in the sharing agreement. Transportation costs or other related marketing costs also may pose special problems in the crop-share lease if the price varies and the parties have failed to reach agreement on essential items such as the delivery location and the delivery time. In some locations, the landlord pays a set rate for transportation to market (*e.g.*, 8-10¢ per bushel).

Farm improvements may benefit both the landlord and the tenant. The landlord would receive the benefit from the valuable capital investment, while increased returns generated from the use of the structure would inure to the tenant's benefit. Unless the improvement is one used directly by the tenant, he should not be required to bear part of the cost of the improvement. If the tenant uses the improvement in the farming operation, however, the landlord will want to receive a return on the investment. This can be assured by either adjusting the landlord's contribution and his share of the crop, or by providing for a sharing of the cost of the improvement with reimbursement of the tenant's unused portion if the lease is terminated. Soil conservation expenditures such as building terraces, ponds, dams and drainage may be handled in a similar fashion. Another option for removable improvements would be for the tenant to bear the cost but to have the right of removal if the lease terminates.

Additional problems may occur regarding crop insurance. Each party is entitled to and generally bears the responsibility to carry crop insurance on his share of the crop. Any agreement to the contrary should be a part of the express provisions in the lease contract.

Government program payments generally will be shared as income is shared. But if payments result because

of improvements on the farm, such as pond construction where the government participates in the cost of the improvement, the government payment would be shared only if the cost is shared.

The crop-share lease offers advantages and disadvantages to both the landlord and the tenant. To the landlord, the crop-share lease offers relief from labor and management responsibilities, but an opportunity to maintain an active interest in the business and some control over the operation. The landlord bears some of the costs associated with production and marketing, but he may realize greater long-run earnings potential than with a cash lease. To the tenant, the crop-share arrangement offers an opportunity to share some of the risks and management responsibilities, and a chance to operate with less capital and cash reserves.

Cash Lease

In a simple cash lease arrangement the tenant pays a set sum for the use of the farm. The tenant receives all of the income and often pays all of the expenses except for real property taxes, insurance and repairs directly associated with farm improvements, and depreciation on the structures.

The parties may agree to restrictions on the use of the land and on the level of soil fertility that must be maintained. Beyond these decisions, the tenant usually has a free hand to plan and operate the business. The risk falls primarily upon the tenant; the landlord is assured of a steady income and is not concerned with variations in price or yield and does not have to be concerned with marketing choices. Obviously, the tenant stands to gain if a favorable market develops, and has the incentive to strive for high yields. The tenant benefits from superior management ability and from the adoption of new technology.

One attractive aspect of the cash lease for the retired landowner is avoidance of a reduction in social security benefits. Social security rules provide that a landlord who "materially participates" in a farming operation is considered to be self-employed and rentals are "earned income." For the landowner 62 to 70 years of age (1982 and thereafter),

earned income can result in a reduction in social security benefits if it exceeds the earnings limitation.[5] This potential problem is avoided in a cash lease arrangement, though, because the cash lease normally does not allow for material participation by the landlord.

A major concern for the landlord in the cash lease is the maintenance of soil productivity. The tenant may not have sufficient incentive to maintain high fertility unless he is assured of a long enough term to recover his investment. This problem can be solved by a lease agreement which provides for maintenance of soil fertility with reimbursement to the tenant for unused lime and fertilizer if the lease is terminated.

Determining the amount of rent constitutes the major difficulty in the cash lease arrangement. Many rentals simply accept the "going rate" in a particular community. This approach, however, assumes that the local rate fairly reflects the relative contributions of the parties. Two basic methods are used to calculate an appropriate range for the rental. One is to estimate the maximum rent the tenant can afford to pay. This method estimates the tenant's return above all production costs including a charge for labor and management. The difference between the tenant's estimated return and the production costs is an approximation of the maximum he could afford to pay to the landlord for use of the landlord's resources. The second method approaches the problem from the landlord's perspective by determining the landlord's ownership costs. The landlord's costs, including a fair return on his investment, indicate what minimum rent would induce the landlord to enter the agreement. The costs include real estate taxes, insurance on buildings, repairs on productive improvements, depreciation on improvements and a return on the real estate investment. Both of these methods require information about costs, input values and expected yields and prices. Comprehensive farm records could provide useful information to compute an approxi-

5. *See infra* text accompanying notes 20-24 for a more detailed discussion of this problem.

mate rental rate to be used as a basis for bargaining between the parties.

Flexible Cash Lease

In some recent years, cash lease landlords did not share in the windfalls created by rapidly changing crop prices. At the same time, tenants' costs have risen rapidly, and when crop prices drop or crops fail, tenants face net losses. Because of these fluctuations and uncertainties, the flexible cash rent arrangement has become more attractive to both landlords and tenants as a method of sharing price and production risks.

A flexible cash rental arrangement sets both a minimum and maximum rental for a given crop. A base price and base yield can be determined by historical records of "normal" years—perhaps on a five year average with adjustments for upward or downward trends. Adjustments can then be made for price variation or for price and yield variation by a simple calculation:[6]

Adjustment for price variation:

$$\text{Current rent} = (\text{Base Rent}) \times \frac{\text{Current Price}}{\text{Base Price}}$$

$$\text{Current rent} = (\text{Base Rent}) \times \frac{\text{Current Yield}}{\text{Base Yield}} \times \frac{\text{Current Price}}{\text{Base Price}}$$

The "current price" to be used in such calculations must also be agreed upon by the parties in advance. This price may be the average cash grain price at the local elevator for a specific time period, a price in a particular month for a

6. Assume that a particular farm has a base yield of 75 bushels of corn per acre and that the parties initially agree on a base rent of $45.00 per acre with a minimum of $30.00 per acre and a maximum of $60.00 per acre and that the base price is $3.00 per bushel.

If their flexible cash lease calls for adjustment for price variation only and if the current price is determined to be $2.75, the calculation would reflect a current rent of $41.25 per acre.

$$\$41.25 = \$45 \times \frac{\$2.75}{\$3.00}$$

If their agreement called for adjustment for price and yield calculation with the same current price and a yield of 90 bushels per acre, the current rent would be $49.50 per acre.

$$\$49.50 = \$45 \times \frac{\$2.75}{\$3.00} \times \frac{90}{75}$$

crop reporting district, a Board of Trade closing price for a particular date or any other method of estimating a fair current price agreeable to the parties. Obviously, the flexible cash rent arrangement is a compromise solution which requires considerable negotiation between the parties. It is potentially a more equitable agreement for both parties during periods of rapidly changing costs and price levels and allows both to assume some of the risk inherent in crop production.

Crop-Share-Cash Lease

A crop-share-cash lease is a variation of the crop-share lease in which the crop is shared according to the agreement of the parties and a supplementary cash rental is paid to the landlord for land in hay or pasture or for use of farm buildings. Such an arrangement may be used when the parties wish to share in management decisions regarding the cropping program but the tenant alone wishes to manage the livestock operation.

Farm Building Lease

Farm buildings such as a poultry house for broiler production, a confinement swine feeding facility, or a dairy barn may be rented for the operation of an enterprise. Other farm buildings such as hay barns or grain bins may be rented specifically for crop storage. When a crop-share or cash lease is used, the parties must arrive at a fair rental for farm buildings used by the tenant. The building owner would like to be able to recover building ownership costs—interest, taxes, insurance, repairs and depreciation.[7] Obviously, the owner

7. Each of these can be estimated as a percent of value. For example, if a building has a new value of $25,000 with a 25 year remaining life, 8% interest rate, 1.5% repair cost, 1.0% taxes, and 0.5% insurance, ownership costs would be $3,750.00 annually.

Item	Rate	Annual Cost
Depreciation (100% divided by 25)	4.0 × $25,000 =	$1,000.00
Interest	8.0 × 25,000 =	2,000.00
Repair	1.5 × 25,000 =	375.00
Taxes	1.0 × 25,000 =	250.00
Insurance	0.5 × 25,000 =	125.00
		$3,750.00

would like to cover as much of the total ownership cost as possible, but he may be willing to accept less—particularly if the buildings were located on the property when it was purchased, or if the price for unimproved land in a given area is equivalent to that for improved property. The tenant may not be willing to pay all of the ownership costs unless the building contributes directly to the farm operation. Even then, the tenant will be willing to pay no more than the value of the building in producing income.[8]

Pasture Lease

Rental rates for pasture are difficult to determine because quality and quantity of production cannot be measured easily. In addition, stocking rates, fencing, water availability, grazing quality and fertility practices have an impact on the value of the pasture to the livestock producer. Pasture rent is generally paid in terms of: (1) rental per head per month, (2) rental per acre, or (3) share of gain.

The per head per month method requires that the parties agree on a stocking rate for the pasture. The landowner will want a heavy stocking rate, but the livestock owner will desire a lower stocking rate in order to increase the gain per head. Since the size of the animal can affect consumption, adjustments should be made in rental rates to reflect the size and class of animal.[9]

When pasture is rented on a per acre basis the objectives of the parties reverse. The livestock owner will want to

8. One approach to determine this value is to calculate all *other* costs and subtract the total from gross returns. The residual is the maximum that the tenant can afford to pay and can be considered as the contribution of the buildings to the farming enterprise.

9. If a 1,000 pound animal is considered to be an animal unit (AU) the following table can be used for this adjustment.

Age & class	Weight	AU Equivalent
mature bulls	1,400 - 1,600	1.4
mature cow	1,200	1.2
mature cow	1,000	1.0
heifers (1-2)	700	.7
heifers under 1 year	600	.6
calves	400	.45
calves	300	.35

graze it heavily; the landowner will want a lower stocking rate to minimize long term damage. Pasture rental on a per acre basis should reflect carrying capacity and productivity. Improved pastures obviously would demand higher rental than unimproved pastures. Productivity is difficult to estimate for a particular season because of the uncertainty of weather.

The third method of quoting pasture rent is on a share of gain basis. This method is used primarily for stockers and feeders rather than for cows. The cattle are weighed both on and off the pasture to determine weights. The value of the gain is determined by current cattle prices, and is shared according to the agreement of the parties.

Because of the difficulty in arriving at a fair pasture rent by either of these three methods, guidelines have been developed which combine several factors into one calculation. The "Nebraska formula" considers size of animals, the price of alternate feeds and the quality of the pasture.[10] The size of the animal is adjusted using the "animal units equivalents" table.[11] The price of alternate feeds is determined by the current price for hay of similar quality. Rental rate per head per month is then calculated by multiplying "animal unit equivalents" by the average price of hay and the quality factor.[12] This formula could be adjusted for other factors, such as fencing and water availability, to arrive at an actual rental rate for the pasture involved.

The factors considered in arriving at a fair rental rate should include both the landowner's costs and the livestock

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10. *Farm Manager's Approach To Setting Pasture Rent*, WALLACE'S FARMER (May 14, 1977), p. 12.

11. *See supra* note 9.

12. The quality of the pasture can be rated as follows:

Lush, green high protein pasture	.22
Excellent tallgrass pasture	.20
Fair to good native pasture, predominately shortgrass	.15
Poor short grass or considerable weed growth	.12

Suppose 1,200 lb. cows were to be grazed on excellent tallgrass pasture and the average price of good hay is $45 per ton. The rate per head per month would be $10.80.

$1.2 \times \$45 \times .20 = \$10.80$

Wallace's Farmer, *supra* note 10, at 12.

owner's earnings from the pasture. The landowner's costs include interest and taxes on the property plus repairs and depreciation on improvements such as fencing, buildings, and handling facilities. These ownership costs could determine the amount of rent the landowner would desire. The livestock owner's earnings determine what the tenant can afford to pay. This may be determined by a residual calculation. The tenant's costs would include interest, taxes, insurance, death losses, purchasing, selling, hauling, labor, management and depreciation for purchased cows or bulls. After returns are adjusted for all these items the residual can be attributed to gain due to the pasture and would give an indication of the amount the tenant could pay for pasture rent.

Livestock-Share Lease

In the typical livestock-share arrangement, the landlord supplies the land, fences and buildings, and owns a share of the livestock, feed inventories and livestock handling equipment. He pays a share of the expenses, such as feed purchases, and receives a share of the income. The tenant provides labor and management, perhaps some equipment, and also owns a share of the livestock feed inventories and livestock handling equipment. He will share in expenses and income.

The livestock-share lease resembles a partnership. The landlord actively participates in the supervision of the operation and shares in the risk. He also provides the greater share of capital. The tenant does not have to finance and manage all of the livestock but can gain experience in the operation and may be involved in the business without as much capital invested. Wide variations exist in these arrangements because of the differences in individual farms and items furnished. In order to make such arrangements as fair as possible, the contributions of each party should be determined and the income shared accordingly.[13]

13. *See infra* text at notes 16-20 for a procedure for determining the relative contributions of each party.

Beef Cow Lease

In some situations, a beef cow lease might have more advantages than the livestock-share lease. The purpose of the beef cow lease is to allow the livestock owner to retire from the active operation of the business but to receive some return on his capital investment. In the typical cow herd lease, the owner retains title to the breeding herd and may contribute buildings, equipment, summer grazing and winter feed. The farm operator contributes all of the labor and all or some of the other major costs. A number of additional factors must be considered, including the selection of replacements, death losses, breeding bills, marketing decisions, feeding practices and tax considerations. The contribution of each party is determined by the same method as in other types of leases.[14] The expenses of the operation and the income from annual production are shared in the same proportion as the contributions.

Labor-Share Lease

Technically, the labor-share lease is not a farm lease. Rather, it is an arrangement where one party (often a parent) furnishes a farm to another person (often a child) who acts as manager-operator of the farm with little or no capital investment. These arrangements take on characteristics of partnerships and often are legally classified as such.[15] The agreements vary considerably, depending on the particular operation and the objectives of the family, but basically each party shares the returns in proportion to his contribution.

Irrigation Leases

In some areas of the country, including a number of counties in Arkansas, irrigated land for farm production predominates. Much of this land is leased on a crop-share or cash lease basis. Special problems are encountered in such leases because of the costs of development, including land

14. *Id.*

15. *See infra* text at notes 48-58 for a discussion of the distinction between leases and partnerships.

leveling, wells, pumps, gear heads, pipes and systems, which often require high capital investments. If the value of all irrigation components is known, the contributions of each party can be fairly determined. Because of the depreciable nature of the irrigation components, however, the correct life or rate must be used to arrive at an equitable agreement. In addition, tenants will not be willing to share in these costs unless they either have a long-term written lease or the lease provides for reimbursement upon termination of the agreement. If these items are taken into account in developing the irrigation lease, the procedures discussed below can be used to arrive at the relative contribution of each party.

B. Determining the Contribution of the Parties

The relative contributions of the parties can be used to determine the share of income each party receives from the business by application of two basic approaches. One is to determine the value of the basic contributions of each party and divide all other expenses and the returns in the same proportion as the share of basic contributions. For example, the contribution of fixed resources (land, buildings, improvements, labor, machinery, livestock, management) may be allocated to each party according to the value of each resource. The resulting proportion could then serve as the basis for dividing responsibility for other expenses and for sharing profit. A second approach involves an initial decision as to the proportion that each party will contribute. Income is then divided in the same proportion. For example, the parties might decide, in advance, that each would contribute 50% of the total inputs, including fixed resources, to the business. Income would then be shared 50:50 as well.

While this discussion applies primarily to a share lease, the same procedure may be used for the cash lease. For a cash lease, however, only the contribution of the landlord is evaluated. A fair rental value may be based on the value of the landlord's contribution to the business operation. In all cases, the preferable way to evaluate the contribution of both

parties is to budget the anticipated inputs.[16]

Valuation of Inputs

The most difficult task in using these methods is estimating value for the contributions of land, buildings and improvements, machinery and equipment, livestock, labor and management. The value of each will vary depending on the type of farm enterprise. For purposes of determining the landlord's contribution to the lease, land value is determined on the basis of its agricultural value—what a willing buyer would pay and a willing seller would accept *for farming purposes*.[17] Once this value has been established, the annual contribution to the farm operation can be determined by multiplication of the agricultural value by an appropriate percentage rate of return. This should be a conservative rate, such as that the landowner could earn if the money were in government bonds, plus some adjustment for property taxes (and insurance, if involved).[18] A higher interest rate, for example the mortgage interest rate, will increase the value of the landlord's contribution but may not yield the most equitable value. The mortgage rate represents the cost of money, not its long-run earning potential for the investor.

Building and Improvements

Buildings and improvements should be evaluated on the basis of their contribution to the farm operation. If a particular operation does not use the buildings on the premises, it would be unfair for the landlord to receive a share of returns based on the value of such structures. For example, if a silo is located on the property but the lease arrangement is for the production of grain crops, the silo would not con-

16. *See* Appendix A for a form which may be used for this budgeting process.

17. Agriculture use value will frequently be less than the fair market value for non-farming purposes. Traditional appraisal techniques may be used for establishing agricultural value. *See* W. MURRAY, FARM APPRAISAL AND VALUATION (5th Ed. 1969).

18. For example, assume the interest rate on such bonds is 10% and that 1% is a reasonable estimate for taxes and insurance. If the farm value of the property is $120,000, the value of the contribution of the landlord would be calculated as $120,000 × 11% = $13,200.

tribute to the farm operation. To determine the contribution of buildings and improvements, a replacement value—not a reproduction value—is used. This value represents economically adequate facilities to serve the purpose. Adjustments may have to be made for facilities that are structurally obsolescent or otherwise unsuitable.

The landlord is entitled to recover his depreciation, taxes, insurance and repair as well as a fair return on the investment. Depreciation should be actual physical depreciation, normally calculated by a straight-line method. Depreciation schedules for tax purposes do not necessarily reflect the actual physical depreciation of the structure over the entire useful life of the structure.[19] Taxes are an annual charge which can be determined from the records of the owner, as can insurance for those buildings normally insured. Repairs are also an annual charge to the landowner and may run 1-2% of new cost.

Machinery and Equipment

The evaluation of the contribution of the machinery and equipment is similar to that for buildings and improvements. Depreciation, taxes, insurance, repair, housing and a fair return on the investment may be determined by reference to new prices for equivalent machinery and equipment, in order to avoid problems of calculation based on actual ages of machinery and equipment. To be fair to the landlord, only that machinery and equipment actually used in the operation should be evaluated, with adjustments for equipment that is not in suitable condition or for luxury accessories.

Livestock

In livestock-share leases, the value of the contributions of the livestock must be determined. The basic charges associated with the livestock are similar to those for other items used in the business—taxes, insurance and interest on the

19. This is particularly true under the Accelerated Cost Recovery System enacted as a part of the Economic Recovery Tax Act of 1981, 26 U.S.C. § 168 (1981).

investment. Depreciation also may be a proper charge for some herds, depending on the extent of replacement by purchase. Livestock-share leases vary considerably depending on the specific agreements of landlords and tenants, and it is often difficult to establish a totally equitable contribution rate.

Labor

The value of unpaid labor furnished by either party must be considered at the going wage rate for the type of work performed. This is important in determining the tenant's contribution in share leases. Adjustments may be required for unpaid labor contributions of the landlord, members of either family and for the perquisites available to the tenant living on the farm, such as a home, garden or farm products used.

Management

Management contributions are generally determined only in the share lease. In the cash lease, the tenant's management (and labor) are usually considered to be a residual item and the landlord ordinarily contributes neither. To arrive at a reasonable value of the management contribution of each party, two approaches may be used: a percentage of the adjusted gross sales, or a percentage of the total investment by both landlord and tenant. The percentage of adjusted gross sales is usually 5-8%, depending on how intensive the management requirements are for the operation. When the value of the total investment is used, a fixed charge of about 2.5% is standard.[20] In some leases, labor and management are not calculated separately, but are considered as one item and valued accordingly.

Operating Costs

Once all the fixed contributions have been properly allocated, the additional operating costs can be determined

20. *See* Moore, FARM LEASING: A CORRESPONDENCE COURSE COOPERATIVE EXTENSION SERVICE, (1979).

and allocated to the responsible party. After listing the annual contributions of the landowner and the tenant, the proportion contributed by each can be determined. The percentage contributed by the landowner can be used as the share rent or can be used to determine the cash rent.

This analysis can serve as a guide for determining the contribution of each party in a fair lease. The exact rent will be determined by negotiation between the parties and may vary somewhat from the percentage determined by the methods outlined. Custom in a community, peculiarities on a particular farm and other factors may call for adjustments or other special arrangements. For example, fertilizer applications may be necessary to bring a particular farm up to the general level of productivity of farms in the area. The lease should reflect the special contributions of each party for that purpose.

C. Tax Considerations

Self-Employment Taxes and Social Security Benefits

Most farmers report net farm profit as "self-employment income" for tax purposes. Self-employment income normally does not include rental income from farm real estate or from personal property which is leased along with the farm real estate.[21] If the landlord participates in the management of the farming operation, however, his rental income may be subject to tax as self-employment income. Self-employment income generates social security benefits. Therefore, an owner may desire to show material participation in order to qualify for social security benefits later. Self-employment income also may reduce current social security benefits. Up to age 70 (1982 and thereafter), any farmer who draws above a statutory maximum ($6000 in 1982) of earned income will incur the possibility of reduced social security benefits.[22] Therefore, a retired individual may wish to avoid

21. 42 U.S.C. § 411(a)(1) (1976).

22. 42 U.S.C.A. § 403(f)(8) (Supp. 1981). The exempt amounts may be increased with increases in the cost of living.

participation in order *not* to reduce current social security benefits.

The key in these situations is "material participation" by the landowner, which may occur in a variety of ways. The tests to determine whether a landlord is materially participating in the production or management of production of farm products as set out in the *Farmers Tax Guide* are:

> *TEST NO. 1.* You do any three of the following: 1) advance, pay, or stand good for at least half the direct costs of producing the crop; 2) furnish at least half the tools, equipment, and livestock used in producing the crop; 3) consult with your tenant; and 4) inspect the production activities periodically.
> *TEST NO. 2.* You regularly and frequently make, or take an important part in making, management decisions substantially contributing to or affecting the success of the enterprise.
> *TEST NO. 3.* You work 100 hours or more spread over a period of 5 weeks or more in activities connected with crop production.
> *TEST NO. 4.* You do things which, considered in their total effect, show that you are materially and significantly involved in the production of the farm commodities.[23]

Since these tests are general guidelines, the ultimate decision must be on a case by case basis. The requirements emphasize the benefit of an agreement which carefully limits the activities of the landowner, if appropriate. The landowner may be able to avoid taxation under self-employment and at the same time receive full social security benefits.[24]

Material Participation and Qualification for Special Use Valuation for Estate Tax Purposes

According to provisions of section 2032A of the Internal

23. Internal Revenue Service, Department of the Treasury, Publication 225 (Rev. Oct. 1981) p. 45. These tests are also outlined in H.E.W. Publication No. (SSA) 78-10066.

24. *See* Uchtmann and Carpenter, *The Retiring Farmer's Dilemma: Optimizing Social Security Retirement Benefits v. Preserving I.R.C. Section 2032A "Use Valuation" and I.R.C. Section 6166 "Estate Tax Deferral" Options*, 2 AG. L.J. 125 (1980).

Revenue Code, certain property may qualify for special valuation for estate tax purposes. Real property devoted to farming may be valued for estate tax purposes at the property's value in farming rather than at its fair market value determined by the "highest and best" use test. Generally, the special election of section 2032A can be used to reduce estate tax liability for property which qualifies for the special valuation procedure.

To qualify for this valuation, the value of the farm or closely held business property in the decedent's gross estate, including both real and personal property, must make up at least 50% of the decedent's gross estate (reduced by debts and expenses), and at least 25% of the adjusted value of the gross estate must be farm or closely held business real property. The property must have been owned by the decedent or a family member and used as a farm or closely held business prior the decedent's death.[25] The decedent or a family member must have "materially participated" in the business in five of eight years prior to death, date of disability (lasting until death) or date of the start of receipt of social security benefits (continuing until death).[26] The property must pass to a "qualified heir"—defined generally as a member of the decedent's family—and to avoid recapture of the tax savings the qualified heir must "materially participate" in the business for 10 years after the decedent's death.[27]

The concept of material participation is derived from the social security rules. The test for material participation

25. 26 U.S.C. § 2032A(b) (1976). This provision was clarified in the Economic Recovery Tax Act of 1981, 26 U.S.C.A. § 2032(A)(b) (Supp. 1981), so that property could qualify for special valuation if used by the decedent *or a family member* in the qualified use.

26. The provision in 26 U.S.C. § 2032A(b)(1)(C) (1976) was modifed by the Economic Recovery Tax Act of 1981, U.S.C.A. § 2032(A) (Supp. 1981). Prior law required material participation in five of eight years prior to death.

27. 26 U.S.C. § 2032(A)(e). Prior law required 15 years of participation. A new provision permits a grace period of two years within which the use by the heir may commence. Under the 1981 Act, if the qualified heir is the surviving spouse, under the age of 21, a full time student, or disabled, "active management" is treated as material participation. "Active management" means the making of the management decisions of business (other than daily operating decisions)." 26 U.S.C. § 2032A(e)(12).

is the same used in determining whether rental income is to be treated as net earnings from self-employment for self-employment tax purposes.[28] Material participation is presumed not to have occurred if self-employment taxes have not been paid. The presumption can be overcome by adequate proof of actual material participation and the payment of all such taxes (including interest and penalties).[29] Payment of the tax is not conclusive of the issue. While no one factor is determinative, physical work and participation in financial decisions are the principal factors.[30] Actual employment on a substantially full-time basis (35 hours a week or more) is sufficient for material participation, and even to a lesser extent if only seasonal activity is required to manage fully the farm business.[31] The regulations set forth a number of factors that may be considered.[32] It is apparent that a passive cash rental to a non-family member would not be considered "material participation" in the farm business by either the decedent prior to retirement, disability or death, or by qualified heirs after death.[33] Thus, if a landlord wishes to preserve the section 2032A special valuation the property must be used in a trade or business. The regulation states:

> Under the section 2032A, the term trade or business applies only to an active business such as manufacturing, mercantile, or service enterprise or to the raising of agricultural or horticultural commodities, as distinguished from passive investment activities. The mere passive rental of property to a party other than a member of the decedent's family will not qualify. The decedent or a member of the decedent's family must own an equity interest in the farm operation.[34]

While the purpose of this language is not clear, the implication is that a passive rental arrangement could result in disqualification for special use valuation. To preserve the

28. *See* 26 U.S.C.A. § 1402(a)(1)(B) (Supp. 1981).
29. Treas. Reg. § 20.2032A-3(e)(1).
30. Treas. Reg. § 20.2032A-3(e)(2).
31. Treas. Reg. § 20-2032A-3(e)(1).
32. Treas. Reg. § 20-2032A-3(e)(2).
33. Treas. Reg. §§ 20.2032A-3(a) and (b).
34. Treas. Reg. § 20.2032A-3(b)(1).

election, the landlord should either materially participate in the farming operation, rent to a family member, or see that a member of the family materially participates in the business.

Section 2032A is considered a post-mortem estate planning device because the executor may decide whether to elect special use valuation. The farm family must make a number of lifetime decisions, however, to assure its availability. Plans for continued material participation both prior to and following death, disability or retirement of the property owner are indicated. In addition, a family must make sure that the property is used in an active trade or business in order to have the option of special valuation.

PART II: LEGAL RIGHTS AND DUTIES

The attorney may first encounter his agricultural client after a dispute arises over the terms of an oral lease or a self-drafted written lease. To resolve these disputes, the attorney must be aware of the rules of construction which will be applied to ambiguous terms of the contract, and of the rights and duties normally imposed under leasing agreements, either by their terms or by implication. A thorough knowledge of the legal problems that commonly occur between landlord and tenant is also important to the attorney who is drafting an agricultural lease. This section will discuss the most common legal problems: distinguishing leases from other types of agreements, classification of agricultural tenancies, limitations on use of the property, the duty to make repairs, responsibility for alterations and improvements, crop ownership, and other rights and duties.

A. Distinguishing Leases From Other Agreements

The relationship between a landowner and a farm operator may be classified as a landlord-tenant relationship, an employment contract or a partnership, depending on the provisions of their agreement. The distinction determines the rights and duties of the parties under the agreement and their obligations to third parties.

Tenant or Employee

An agreement between a landowner and a laborer for the raising of a crop creates a landlord-tenant relationship unless the contrary intent is clearly expressed. The Arkansas Supreme Court has stated that a construction of contracts which would tend to destroy the relation of landlord and tenant would "materially neutralize" an important policy of the state:[35]

> It is the policy of the state, and the prosperity of the people as a whole requires it, that landowners, without the force or capital to work their own lands to their full capacity, should be encouraged to let them to those who can furnish their own labor, at least, if no more. By this system the aggregate products of the state will be brought to the highest point, and the general prosperity increased by the impetus thus afforded to all other industries.[36]

The intention of the parties controls construction of the contract. In determining intent, any written instrument is construed as a whole. If the contract is oral, the language used by the parties and their acts in carrying out the contract are considered.[37] Many contracts, however, contain language of both employment agreements and leases. For example, a contract may use the terms "rental" or "tenant" but be, in fact, an employment agreement because of the control exercised over the operation by the owner, particularly where the owner supplies all seed, fertilizer, machinery and the productive inputs except labor.[38]

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35. Birmingham v. Rogers, 46 Ark. 254 (1885).

36. *Id.* at 258.

37. Johnson v. Mantooth, 108 Ark. 36, 156 S.W. 448 (1913).

38. Such contracts were once commonly used in sharecropping—particularly in the Delta. For example, in 1940 over 40% of the non-owner operators in Arkansas were classified as "croppers." *See* Solberg, *The Legal Aspects of Farm Tenancy in Arkansas*, Bull. 468, Arkansas Agricultural Experiment Station (1946). These arrangements should not be confused with the modern crop-share lease. Under the typical cropper arrangement, the landowner supplied tools, equipment (and animals) for the cultivation of the land. This is usually not the case in today's crop-share lease. *See infra* accompanying note 190. These arrangements are much less common today in Arkansas but still are found in some areas and are usually classified as employment contracts rather than leases.

The most recent case[39] in which the Arkansas Supreme Court was required to classify a relationship involved the applicability of the Arkansas garnishment statute. The court found that a sharecropper was an employee. Apparently the "landlord" had provided the land and had furnished cash advances to the sharecropper for making the crop and was, thus, sufficiently in control of the operation to be classified as an employer rather than a landlord. The decision rested on the old definition of a cropper as one who is being paid essentially for labor,[40] especially where the intent of the parties clearly indicates that an employment arrangement was contemplated.[41]

Control or dominion over the farming operation is a key indication that an agreement is an *employment* contract. Where the landowner has the right to "direct" the cultivation and harvesting of the crop, an employment arrangement may be involved.[42] Factors that indicate a landlord-tenant relationship include surrender of possession of the land to the tenant, exclusive dominion of the land by the tenant during the term, the tenant's right to determine the methods used in the cultivation of the crops, and, in a share-lease, his right to gather and hold the crops as his own until the division is made between the parties.[43]

The tenant-employee distinction is important in several major respects. First, different income tax withholding, social security tax (FICA) and employment tax (FUTA) rules may be involved. Also, liability for debts and other obligations arising out of the farming operation will vary depending on the classification of the arrangement between the parties. Such questions as the landowner's right of access, the applicability of the landlord's lien to the crops, notice requirements and other basic rights and duties arising from the relationship will be determined by the classification. Fi-

39. Coward v. Barnes, 232 Ark. 177, 334 S.W.2d 894 (1960).

40. Barnhardt v. State, 169 Ark. 567, 275 S.W.2d 909 (1925).

41. Johnson v. Mantooth, 108 Ark. 36, 156 S.W. 448 (1913); Tinsley v. Craige, 54 Ark. 346, 15 S.W. 897 (1891), *aff'd on rehearing* in 54 Ark. 346, 350, 16 S.W. 570 (1891).

42. Hardeman v. Arthurs, 144 Ark. 289, 222 S.W. 20 (1920).

43. *Id.*; Campbell v. Anderson, 189 Ark. 671, 74 S.W.2d 782 (1934).

nally, title to the crop is determined by the nature of the relationship. In the landlord-tenant relationship, title to the crop is in the tenant; in the employer-employee relationship, title is in the landlord. The tenant delivers a share for rental, while the employee receives a share in payment of services.[44] The employee has a laborer's lien for the work performed,[45] while the landlord has a lien on the crops raised for the rent, or for advances[46] of money or other supplies necessary to raise the crops.[47]

Tenant or Partner

The distinction between the tenant and the partner is likely to be more important in modern agriculture than the distinction between the tenant and the "cropper," particularly because of the unlimited liability feature of partnerships.[48] The landlord will not wish to be held liable for all debts and obligations of the tenant. The key to this distinction is the intent of the parties, which may be expressed in the contract or inferred from the acts of the parties and the surrounding circumstances.[49] Many farm leases contain provisions stating that no partnership is intended and that neither party assumes the liabilities of the other. These clauses serve as some expression of the intent of the parties, but if sufficient evidence exists to establish the existence of a partnership, such clauses may not be binding on third parties.[50]

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44. Tinsley v. Craige, 54 Ark. 346, 15 S.W. 897 (1891), *aff'd on rehearing* in 54 Ark. 346, 350, 16 S.W. 570 (1891); *see also* Hammock v. Creekmore, 48 Ark. 264, 3 S.W. 180 (1886); Neal v. Brandon, 70 Ark. 79, 66 S.W. 200 (1902); St. Louis I.M. & S. Ry Co. v. Hardie, 87 Ark. 475, 113 S.W. 31 (1908); Valentine v. Edwards, 112 Ark. 354, 166 S.W. 531 (1914); Bourland v. McKnight & Bros., 79 Ark. 427, 96 S.W. 179 (1906); Parks & Co. v. Webb, 48 Ark. 293, 3 S.W. 521 (1886).

45. *See* ARK. STAT. ANN. § 51-301 (Repl. 1971).

46. *See* ARK. STAT. ANN. § 51-201 (Repl. 1971) (rent) and ARK. STAT. ANN. § 51-203 (Repl. 1971) (advances). For a discussion of the effect of those laws on property ownership, see *infra* notes 185-207 and accompanying text.

47. Barnhardt v. State, 169 Ark. 567, 275 S.W.2d 909 (1925); Burgie v. Davis, 34 Ark. 179 (1879); Campbell v. Anderson, 189 Ark. 671, 74 S.W.2d 782 (1934).

48. *See* ARK. STAT. ANN. § 65-115 (Repl. 1980).

49. Roach v. Rector, 93 Ark. 521, 123 S.W. 399 (1909).

50. *See* Annot., 131 A.L.R. 508 (1941).

The usual factors which distinguish the partnership are joint control and profit sharing. The Uniform Partnership Act, as adopted in Arkansas,[51] specifically limits the inferences to be drawn from these factors in three ways. First, the sharing of profit from the use of property held in coownership does not, of itself, establish a partnership.[52] Second, the sharing of gross returns does not establish a partnership even if the persons sharing them have a joint or common right or interest in any property from which the returns are derived.[53] If, however, the landlord retains joint possession of property used in the business with a tenant, the possibility of joint control and the inference of a partnership are more likely. Finally, the Act states that no inference of partnership can be drawn from the sharing of profits from a business where such profits are received in payment as *rent* to a landlord,[54] even though the sharing of profits from a business is generally prima facie evidence of a partnership.[55]

Where the business operation is a family enterprise, it may be particularly difficult to distinguish the landlord-tenant relationship from the partnership. These limitations indicate that profit sharing and joint control could as easily apply to a landlord-tenant arrangement as to a partnership.[56] The two relationships can be distinguished in other respects, however. The partnership generally must be established by

51. ARK. STAT. ANN. §§ 65-101 to 65-143 (Repl. 1980).

52. ARK. STAT. ANN. § 65-107(2) (Repl. 1980).

53. ARK. STAT. ANN. § 65-107(3) (Repl. 1980).

54. ARK. STAT. ANN. § 65-107(4)(b) (Repl. 1980).

55. ARK. STAT. ANN. § 65-107(4) (Repl. 1980).

56. The same can be said of many of the other factors that characterize the partnership such as: 1) equal management rights, 2) common intent to bind the firm, and 3) contribution of capital of services. For a discussion of these factors in the tax context, see J. Pennell & J. O'Byrne, *Federal Income Taxation and Partnerships* ALI/ABA PRACTICE HANDBOOK (1971). *See also* Malvern National Bank v. Halliday, 195 Iowa 734, 192 N.W. 843 (1923) where the existence of a partnership was suggested in the operation of a business by a landlord and tenant. *Compare In re* Estate of Drennan, 9 Ill. App. 2d 324, 132 N.E.2d 599 (3d Dist. 1956) (court found a livestock-share lease to constitute a partnership) *with* United States v. Farrington, 244 F.2d 111 (7th Cir. 1957) (court, applying Indiana law, held that a livestock-share lease did not create a partnership). For a discussion of the partnership aspects of the livestock-share lease, *see* Note, *Livestock-Share Lease Construed As Not Creating A Partnership*, 1957 U. Ill. L. F. 532.

certain requisites[57] reflected in the Uniform Partnership Act definition of a partnership: "A partnership is an association of two [2] or more persons to carry on as co-owners a business for profit."[58] The absence of any intent to carry on a business as coowners tends to indicate that a landlord-tenant relationship is created. Also, even though both arrangements may provide for the sharing of profits, the partnership arrangement normally includes an express agrement to share losses as well as profits. This is usually not true in a landlord-tenant arrangement.

B. Classification of Agricultural Tenancies[59]

Leases can be classified according to the term of the lease. Whether the lease is a cash lease, a crop-share lease, a livestock-share lease or some combination, this classification is particularly important in determining the application of statutory provisions relating to the termination of farm leases and of notice requirements. The usual classifications of agricultural leases according to the term are: tenancies from year to year, tenancies for years or for a term, tenancies at will, and tenancies at sufferance.

Tenancies from year to year

The tenancy from year to year is a periodic tenancy which is automatically renewed unless adequate termination notice is given. Typically, year to year tenancies are created by oral agreement, but a year to year tenancy is frequently embodied in a written lease. Such leases are terminated by notice of termination which conforms to statutory requirements[60] or notice requirements as stipulated in the agreement.

Writing requirement. Arkansas has codified the essential elements of the Statute of Frauds, which requires certain

57. *See* Roach v. Rector, 93 Ark. 521, 123 S.W. 399 (1909).

58. ARK. STAT. ANN. § 65-106 (Repl. 1980).

59. For an expanded version of this discussion see D. Uchtmann and J. Looney. *Agricultural Law: Principles and Cases* (1981).

60. *See, e.g.*, ARK. STAT. ANN. § 50-531 (Supp. 1981).

agreements to be in writing and "signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized."[61] The fifth section of the Arkansas version of the Statute of Frauds requires a writing in order to "charge any person upon any lease of lands, tenements, or hereditaments for a longer term than one (1) year," and specifies that the measuring term for the lease is one year from the date the lease commences.[62] An oral lease for an exact one year period does not violate the Statute of Frauds.[63] In *Thomas v. Croom*,[64] attention focused on a 1912 case in which the defendant argued that an oral contract for a lease was void because no time was stated for completion of improvements to be made and work done. The court explicitly held that since the work was capable of being performed within a one year period, the Statute of Frauds limitation did not apply.

Inclusion of this section eliminates the necessity of determining whether a lease is a "chattel real" or whether it constitutes a sale of property. This distinction has been made in some states.[65] If the lease is regarded as a "chattel real" it would not be covered in the section of the Statute of Frauds governing the sale of land. Presumably such contracts would fall under the provision requiring a writing for agreements that cannot be performed within one year.

Arkansas has gone one additional step and attempts to delineate the effect of oral leases:

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61. ARK. STAT. ANN. § 38-101 (Repl. 1962).

62. *Id.*

63. Scott v. Altom, 240 Ark. 710, 401 S.W. 2d 734 (1966); Boddy v. Thompson, 179 Ark. 71, 14 S.W. 2d 240 (1929); Alexander-Amberg & Co. v. Hollis, 115 Ark. 589, 171 S.W. 915 (1914). In Higgins v. Gager, 65 Ark. 604, 47 S.W. 848 (1898), the court observed:

> It will be observed that the words "from the making thereof" are not used in the fifth subdivision. They were doubtless omitted for the very purpose of excepting from the purview of the statute verbal contracts to lease lands for one year or less, thus leaving such contracts valid, as they were at the common law, and thereby having the law to conform to what was the custom of the people of this state as to such contracts.

Id. at 606, 47 S.W. at 848-849.

64. 102 Ark. 108, 143 S.W. 88 (1912).

65. *See, e.g.*, People *ex rel.* Harding v. City of Chicago, 335 Ill. 450, 167 N.E. 79 (1929).

> All leases, estates, interests or freeholds, or lease of years, or any uncertain interest of, in or out of any messuages, lands or tenants, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one year.[66]

Despite this rather strong declaration of the lack of effect of purely oral leases, verbal leases may be taken out of the Statute of Frauds by application of the concepts of part performance and, perhaps, estoppel.[67]

In a series of cases involving a combination of the factors of possession, partial payment and the addition of valuable improvements, the Arkansas court has upheld oral leases.[68] The concept of upholding the oral lease is to provide some protection to the tenant who has made valuable improvements, and the fact that their cost exceeded the value of the yearly rent of the premises, indicated that they were in part performance of the lease agreement.[69]

The building of fences and clearing of land in accordance with the terms of the oral agreement have been considered "valuable improvements" for purposes of the part performance requirement,[70] as have expenditures on houses, barns, cribs, wells, cisterns, and taxes as required under the oral lease.[71] The making of valuable improvements coupled with the payment (and acceptance) of two years rent on a five year oral lease has also been sufficient to take an oral

66. ARK. STAT. ANN. § 38-104 (Repl. 1962).

67. The doctrine of estoppel has on one occasion served as a basis for upholding an oral lease agreement, but in a situation where the lessee relied to his detriment on the verbal statements of the owner made in modification of a written lease agreement. Conley v. Johnson, 69 Ark. 513, 64 S.W. 277 (1901).

68. Brockway v. Thomas, 36 Ark. 518 (1880). *See* cases cited *infra* notes 68-77.

69. Morrison v. Peay, Rec, 21 Ark. 110 (1860).

70. Newton v. Mathes, 140 Ark. 252, 215 S.W. 615 (1919); Reichardt v. Howe, 91 Ark. 280, 121 S.W. 347 (1909).

71. Grant v. Burrows, 139 Ark. 16, 212 S.W. 95 (1919); Newton v. Mathes, 140 Ark. 252, 215 S.W. 615 (1919).

agreement out of the Statute of Frauds.[72] In order to take the case out of the Statute of Frauds, though, the improvements must be substantial, not just routine activities associated with use of the property. Slight fence repair,[73] routine maintenance,[74] cleaning[75] and preparation for cultivation[76] have been held insufficient, as were improvements made purely for the convenience and profit of the tenant which added no permanent value to the freehold.[77]

The absence of any writing in a large number of leasing situations, plus customary year to year arrangements in the agricultural setting, has led to recognition of the "tenancy from year to year." These tenancies were recognized at common law in order to give some measure of protection to both landlords and tenants under circumstances where inadequate agreements were used.[78] These tenancies are now recognized by specific legislation in some states.[79] The primary result of recognizing the tenancy from year to year is that notice must be given by a specified date within a certain period or the lease continues for another year and the provisions of the original agreement remain in force.

Notice requirement. The common law year to year tenancy requiring a six month notice to terminate has been recognized in Arkansas in limited circumstances. For example, where the tenant holds over and pays rent in advance or commences the planting of the next crop, a tenancy from year to year exists unless the tenant's actions are contrary to express terms of a written lease.[80] Paying rent in advance,

72. Phillips v. Grubbs, 112 Ark. 562, 167 S.W. 101 (1914).
73. Storthz v. Watts, 117 Ark. 500, 175 S.W. 406 (1915).
74. French v. Castleberry, 238 Ark. 1038, 386 S.W.2d 482 (1965).
75. Garner v. Starling, 137 Ark. 464, 208 S.W. 593 (1919).
76. Norton v. Hindsley, 245 Ark. 966, 435 S.W.2d 788 (1969).
77. Dunn v. Turner Hardware Co., 166 Ark. 520, 266 S.W. 954 (1924).
78. *See generally* Day v. Smith, 30 P.2d 786, 788 (Wyo. 1934); *see also* Bush v. Sullivan, 3 Iowa (Greene) 344 (1851).
79. *See, e.g.*, KAN. STAT. ANN. § 58-2506 (Supp. 1981); ILL. REV. STAT. ch. 80, § 51 (1975); VA. CODE ANN. § 55-222 (Repl. 1974).
80. *See* M.L. Sigmon Forest Products, Inc. v. Scroggins, 250 Ark. 385, 465 S.W.2d 673 (1971), where the court refused to require notice for termination of a written agreement where the tenant willfully held over after the expiration of the term of the agreement.

however, is not necessarily required to establish a tenancy from year to year. Justice McColloch in a concurring opinion in *Lamew v. Townsend*[81] stated: "The holding over of farm lands and preparation for the planting of a crop would doubtless be circumstances which would justify any court in holding that a tenancy from term to term had been created if no objection was made by the landlord, even without accepting rent."[82]

In the absence of a statute specifying a notice requirement, six months notice must be given.[83] Any notice given less than six months in advance would be insufficient because it would require termination at a time other than at the end of the yearly tenancy.[84] The six month notice provision has been strictly construed in Arkansas. In *Gregory v. Walker*,[85] notice given on July 1, 1962, was insufficient to terminate a tenancy running to December 31, 1962. Since Arkansas requires that the tenant vacate only at the end of a period of tenancy, this notice period was not a full six months. In Arkansas, a month is defined by statute as a calendar month.[86] If a certain number of days are required to intervene between two acts, the day of only one of the acts may be counted.[87] The court in *Gregory v. Walker* stated that the first day specified is excluded and the last day is included.[88]

The Arkansas legislature has attempted to clarify the notice requirement for oral leases in Act 866 of 1981.[89] This act provides, in its entirety:

> The owner of farm lands which are leased under an oral agreement may elect not to renew the oral rental or lease

81. 147 Ark. 282, 227 S.W. 593 (1921).

82. *Id.* at 288, 227 S.W. at 595 (McCulloch, C.J., concurring opinion).

83. Peel v. Lane, 148 Ark. 79, 229 S.W. 20 (1921); Jonesboro Trust Co. v. Harbough, 155 Ark. 416, 244 S.W. 455 (1922); Bromley v. Aday, 70 Ark. 351, 68 S.W. 32 (1902).

84. Peel v. Lane, 148 Ark. 79, 229 S.W. 20 (1921).

85. 239 Ark. 415, 389 S.W.2d 892 (1965).

86. ARK. STAT. ANN. § 27-127 (Repl. 1979).

87. ARK. STAT. ANN. § 27-130 (Repl. 1979).

88. Gregory v. Walker, 239 Ark. 415, 389 S.W.2d 892 (1965) (*citing* State v. Hall, 228 Ark. 500, 308 S.W.2d 828 (1958)).

89. ARK. STAT. ANN. § 50-531 (Repl. 1971 & Supp. 1981).

> agreement for the following calendar year by giving written notice by certified registered mail to the renter or lessee, on or before June 30, that the lease or rental agreement will not be renewed for the following calendar year.

The Act recognizes the common law six-month notice requirement, at least as applied to the calendar year lease. The provision that the notice may be in writing and by certified registered mail is apparently optional because the statute provides only that an owner *may elect* not to renew the lease by this method. No provision is made for notice to the landlord. While the common law rule has been generally accepted as a "notice to tenant" provision, some states have considered notice provisions to be reciprocal.[90] Act 866 adds some certainty regarding the termination of a calendar year lease, but it does not address the problem of notice to a party whose lease does not end with the calendar year. A more appropriate notice requirement would be one that provided for written notice by some date prior to the end of the tenancy.[91]

The notice requirement can be varied by the terms of the original agreement. In Arkansas, if a tenant holds over after expiration of the original term and no new agreement is made between the parties, the tenancy becomes one from year to year and is subject to the terms of the original lease.[92] This rule has been applied to uphold various provisions

90. Smith v. Pritchett, 168 Md. 347, 178 A. 113 (1935).

91. For example, by Virginia law such a lease may be terminated by either party giving notice in writing three months prior to the end of the lease year. VA. CODE ANN. § 59-222 (Repl. 1973). In Illinois, the statute calls for notice not less than four months prior to the termination of the tenancy. ILL. REV. STAT., ch. 80, § 5.1 (1966) (for agriculture lease only). Since in Illinois most tenancies commence on March 1, the usual effect of the statute is to require that the notice be given before November. In Kansas, the state legislature has attempted to distinguish leases for land with fall-seeded crops from leases on other types of land. The usual termination date for farm leases in Kansas is March 1, with a thirty-day notice requirement. KAN. STAT. ANN. § 58-2506 (Supp. 1979). If the fall-seeded crop has been planted, however, the notice is still required thirty days prior to March 1, but the lease does not terminate until August 1 or the last day of harvest.

92. Belding v. Texas Produce Co., 61 Ark. 377, 33 S.W. 421 (1895).

from the original lease[93] and has also been applied to notice. For example, in *Dover v. Henderson*[94] the original lease contained a provision allowing termination of the lease on a specific date on thirty days prior notice by the lessee and at any time on five days notice by the lessor. The court held that the provision applied even after the conversion to a tenancy from year to year. Similarly, in *Arkansas Western Gas Co. v. Keller*,[95] the court validated the original agreement which provided for successive one year extensions and for notification to the owner in writing on or before the expiration date of each extended term if the tenant elected not to extend the term for another year. If no such notice was given, the lease was automatically extended for another one year term. In *Lamew v. Townsend*,[96] the original written lease for a one year rental provided that the parties had the option to continue from time to time as long as conditions were satisfactory to both parties. The court considered the continuation of the lease beyond the original one year term to carry the right to terminate the lease at any time during the year. The court found, however, that each party was entitled to "reasonable notice" of an intent to terminate the contract and could not act "arbitrarily and capriciously."[97]

A distinction should be made between notice required when a tenancy is converted to a tenancy from year to year and that required where the parties have established a *new* agreement. The latter is typically the situation in agricultural lease arrangements. Often, near the end of the existing term, the parties discuss the subsequent year's terms and conditions, and reach a new agreement as to the next year's tenancy. If a new agreement is entered, the tenancy will not be a tenancy from year to year; it may terminate either without additional notice or according to any notice provision of the new agreement.

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93. *Id.* (relating to the purchase of improvements by the landlord upon sale of the property).

94. 195 Ark. 496, 112 S.W.2d 963 (1938).

95. 252 Ark. 904, 481 S.W.2d 358 (1972).

96. 147 Ark. 282, 227 S.W. 593 (1921).

97. *Id.* at 287, 227 S.W. at 594. Justice McCulloch concurred with the result but found a year to year tenancy had been created requiring six months notice.

Tenancies for Years or for a Term

Frequently, the landlord and tenant will enter an agreement which creates a tenancy for years or for a specified term.[98] The tenant's right of possession terminates without notice at the end of the period unless a specific notice requirement is included in the agreement.[99] The lease may provide for either extension or renewal. An option for extension can be conferred by the terms of the original lease or by subsequent agreement. If exercised, the option for extension, much like the tenancy from year to year, carries with it the terms of the original lease.[100] A renewal is generally considered to be a new lease on the same terms and conditions as the old.[101]

The major difference between the option for extension, exercisable by the lessee, and the option for renewal, exercisable by either, is that no new lease need be executed when the option for extension is exercised. Upon renewal the parties execute a new agreement, although it may be on the same terms and conditions as the old.[102] An option either to extend or to renew the lease must be expressed in reasonably definite language. For example, language providing for renewal "upon such terms as may be agreed upon" is void for uncertainty.[103] Where the expressed intent to renew is indefinite because of a failure to fix all terms (*e.g.*, amount of rent), the subsequent actions of the parties may uphold an otherwise null provision.[104]

The distinction between extension and renewal also is important in determining whether exercise of the option violates the Statute of Frauds. If an option to renew creates a new lease, the Statute of Frauds is violated if the renewal

98. If the term is greater than one year, a writing is required under the Statute of Frauds. *See supra* note 62.

99. M.L. Sigmon Forest Products, Inc. v. Scroggins, 250 Ark. 385, 465 S.W.2d 673 (1971).

100. Felder v. Hall Bros. Co., 151 Ark. 182, 235 S.W. 789 (1921).

101. Montgomery Ward & Company v. Metzger, 216 Ark. 88, 224 S.W.2d 368 (1949).

102. Neal v. Harris, 140 Ark. 619, 216 S.W. 6 (1919).

103. Keating v. Michael, 154 Ark. 267, 242 S.W. 563 (1922).

104. Beasley v. Boren, 210 Ark. 608, 197 S.W.2d 287 (1946).

period is greater than one year unless the parties execute a new written agreement. On the other hand, an option to extend the terms of a written lease is construed to be a part of the original written lease, so the Statute is satisfied.[105] This distinction was recognized by the Arkansas court in *Riverside Land Co. v. Big Rock Stone and Material Co.*,[106] where the court stated:

> This court has also recognized that there is a difference between a stipulation for the renewal of a lease and one for its extension. The reason is that where a renewal is provided for, a new lease should be executed or at least the lessee should do everything required of him to procure the execution of a new one so that the failure of the lessor to execute a new lease would work an estoppel against him. In the case of an extension clause, the execution of a new lease is not necessary, and the parties continue under the provisions of the original lease by complying with the extension agreement.[107]

A renewal by exercise of an option in which new terms are involved, however, can be construed as a substitution of an oral agreement for the written one, and thus subject to the Statute of Frauds.[108]

Tenancies at Will

The tenancy at will can be terminated at any time by either party. Such tenancies may be expressly created or inferred from the actions of the parties. For example, such a tenancy might be established by terms of a lease which reserves a right of termination to either party. Courts disfavor the tenancy at will because of the potentially harsh impact on the party against whom the tenancy was terminated. As a result, courts may require a specific understanding of the nature of the tenancy before finding that such a tenancy exists.

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105. *Id.* at 614, 197 S.W.2d at 290.

106. 183 Ark. 1061, 40 S.W.2d 423 (1931).

107. *Id.* at 1065-66, 40 S.W.2d at 424-25.

108. Cook v. Cave, 163 Ark. 407, 260 S.W. 49 (1924).

Tenancies at Sufferance

The tenancy at sufferance is the relationship between a landlord and a holdover tenant—a tenant whose lease has expired and who has not yet vacated the premises. If the tenant holds over, statutory procedures for eviction, including the notice to vacate, are appropriate.[109] If the eviction is made without proper notice, the tenant will be entitled to damages.[110] On the other hand, an unlawful holding over after proper notice can lead to the imposition of a penalty for double rents.[111] The tenancy at sufferance can exist only for a short time, after which the tenant must be physically dispossessed or be considered a tenant from year to year entitled to possession for another year.[112]

C. Use of the Property

The tenant has an exclusive right to possess and use the premises during the term of the agreement. Frequently in farm leases, the permitted uses will be detailed in the agree-

109. *See generally* Chappell v. Reynolds, 206 Ark. 452, 176 S.W.2d 154 (1943).

110. Brickley v. Lacy, 245 Ark. 860, 435 S.W.2d 443 (1968). The notice required for an unlawful detainer action upon the tenant's holding over is specified in ARK. STAT. ANN. § 34-1507 (Supp. 1981), and should not be confused with the notice required to terminate a year to year tenancy.

111. ARK. STAT. ANN. § 50-509 (Repl. 1971) provides:

> If any tenant for life or years, or if any other person who may have come into possession of any lands and tenements under or by collusion with such tenant, shall willfully hold over the same, after the termination of such term and thirty [30] days previous notice in writing given, requiring the possession thereof, by the person entitled thereto, such person so holding over, shall pay to the person so kept out of possession double the yearly rent of the lands or tenements so detained, for all the time he shall keep the person entitled thereto out of possession.

See M.L. Sigmon Forest Products, Inc. v. Scroggins, 250 Ark. 385, 465 S.W.2d 673 (1971).

112. Neither the tenancy at will nor the tenancy at sufferance are of particular interest in drafting leases except to the extent that the parties might wish to make a lease terminable at will by either party. This is not practical for most agricultural leases with the possible exception of the pasture-lease or the livestock-share lease, thus it is not discussed further here.

The liability of the tenant for rent is discussed in Dell v. Gardner, 25 Ark. 134 (1867) and Bright v. Bostick, 27 Ark. 55 (1871). The conversion of a tenancy at sufferance to a tenancy from year to year is discussed in Lamew v. Townsend, 147 Ark. 282, 227 S.W. 593 (1921) and in Belding v. Texas Produce Co., 61 Ark. 377, 33 S.W. 421 (1895).

ment, which may call for a specific cropping pattern with close supervision by the landlord. Some leases require the landlord to participate in management decisions concerning the use of the property, the cropping patterns and the method of operation.[113] If the lease does not limit the use to be made of the property (*e.g.*, selection of crops), this decision is left to the tenant.[114] The tenant is nevertheless required to use the premises for purposes contemplated by the parties in reaching the lease agreement and may not put the premises to any use "materially different from that in which they are usually employed, or apparently violative of the spirit and purpose of the lease as such spirit and purpose is evidenced by recitals therein."[115] These usage restrictions would generally imply that the tenant is to actually occupy and use the premises for the intended purposes where there is an economic interdependence between the use by the tenant and the landlord's reason for leasing (*e.g.*, in a crop-share lease for farmland) or where other special circumstances exist.[116] For example, in *Arkansas Rural Rehabilitation Corp. v. Longino*[117] the parties entered a crop-share contract in which the landlord was to receive one-fifth of the crop from 120 acres of leased land. The lease was designated a "Lease of Real Estate for Small Grains," and it was

113. For a discussion of "material participation" by a landlord, *see supra* text accompanying notes 21-34.

114. In a Missouri case, Bert v. Rhodes, 258 S.W. 40 (Mo. Ct. App. 1924), the tenant was specifically found to have the right to determine which crops were to be grown. Apparently no specific Arkansas case exists on this point, but since the tenant has the right to use the premises for any lawful purpose this right would seem to be the tenant's unless an express or necessarily implied covenant to the contrary appears in the lease.

115. Stonegap Colliery Co. v. Kelley & Vicars, 115 Va. 390, 79 S.E. 341, 342 (1914), quoted with approval in Amisano v. Shaw, 214 Ark. 874, 877, 218 S.W.2d 707, 709 (1949).

116. *See* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT (1980) [hereinafter cited as Schoshinski] §§ 5:2 & 5:3, and cases cited *infra* notes at 228-238, including Childs v. Goode, 261 Ark. 382, 383, 548 S.W.2d 827, 828 (1977) where the court construed a lease covenant to "use and occupy the premises for retail grocery store outlet purposes only and for no other object or purpose without the written consent of the lessor" to prohibit implicitly leaving the building vacant and unoccupied. The "special circumstance" involved the loss of the lessor's nonconforming use status for the property under a zoning ordinance.

117. 192 Ark. 912, 95 S.W.2d 897 (1936).

apparently contemplated that the tenant would sow oats on the entire tillable acreage (114.8 acres). The tenant planted on only 35 acres because he had discharged his tenants and sold his teams and farming equipment. The court held that the landlord was entitled to damages for the tenant's failure to cultivate the land by the "usual and customary" methods prevailing for small grain production. The damages were based on what the land would have produced following these methods. Additionally, one Arkansas court held that a tenant's failure to plant and harvest contemplated crops violated the lease agreement. Thus, the tenant was not entitled to a share of hay which grew on the uncultivated land.[118] Similarly, one court did not allow a tenant to claim any proceeds of a crop on a fruit farm where he failed to care for the trees or gather the crop.[119]

These cases should be distinguished from the situation when the tenant actually cultivates the crop but the landlord is dissatisfied with the amount of production. In *Patton v. Garrett*[120] the court upheld a jury instruction regarding manner of cultivation by stating:

> It would give rise to interminable litigation, if landlords, leasing on shares, could claim all that would have inured to their benefit, if the tenant had exercised ordinary industry, and judgment in the cultivation of the crops. The amicable adjustments of rents would be almost exceptional. The landlord chooses his tenant, and must judge of his skill and fidelity in husbandry, or if he desires assurance on these points, should make special stipulations, or have money rent secured.[121]

The landlord has effective control over the tenant's use of the property, including crop selection, in the year to year lease or in leases providing for renewal if the lessor has some "veto power" over the renewal decision. The landlord can use the threat of forcing the tenant to move at the end of the year to control use of the property. If the lease agreement

118. Porter v. Vail, 148 Ark. 642, 231 S.W. 3 (1921).
119. Goldstein v. Biggs, 126 Ark. 627, 191 S.W. 219 (1917).
120. 37 Ark. 605 (1881).
121. *Id.* at 610.

contains specific provisions regarding the tenant's duties, a violation can serve as a basis for the landlord's refusal to renew the lease.[122]

Prohibited Uses

A lease which calls for unlawful uses of the premises generally is void if such uses are contemplated by both parties at the time the lease is entered into.[123] Leases for illegal uses, such as violation of a liquor ordinance, are specifically prohibited by statute in some states. The effect of voiding the lease is that neither party can maintain an action to enforce it. The landlord can recover possession, but has no remedy if the tenant abandons the premises.[124] Some states give the landlord power to terminate the lease if the tenant unilaterally makes an illegal use of the premises.[125] In the absence of a statute, however, the landlord may not be able to evict a tenant who makes an unlawful use of the premises unless a specific covenant appears in the lease against such uses.[126]

A second restriction on the use of the property is the tenant's duty not to commit waste while in possession of the property. The tenant must return the premises in substantially the same condition, normal wear and tear excepted, as when the tenancy commenced. Waste can be either voluntary or permissive. Voluntary waste results from affirmative action by the tenant, such as removing topsoil, destroying buildings or fences, cutting or selling timber, or destroying shrubbery or other cover. Permissive waste involves a *failure* to do something, such as neglecting to follow proper soil conservation or good husbandry practices. In either case the resulting injury must be both substantial and permanent.

Waste is frequently prohibited by statute,[127] but because

122. *See* Felder v. Hall Bros. Co., 151 Ark. 182, 235 S.W. 789 (1921), where the tenant's failure to complete repairs as required by the lease served as sufficient grounds for the landlord to refuse to renew the lease.

123. Schoshinski, *supra* note 116, at § 5:12.

124. *Id.* at 258-259. *See* cases cited *supra* notes 68-70.

125. *Id.* at 259. *See* statutes cited *supra* note 74. Arkansas has no such statute.

126. *Id.*

127. *See, e.g.*, KAN. STAT. ANN. § 58-2523 (1976) and VA. CODE ANN. § 55-211 *et*

Arkansas has no statutory prohibition, the definition of waste in Arkansas is determined on a case by case basis. The concept has been addressed primarily in cases involving life tenants or construction of language in leases included to prohibit waste. For example, in a case involving an allegation of waste by a life tenant the court referred to waste both by "wrongful act" and by "omission" resulting in permanent injury where "material deterioration" in the premises occurred.[128] In construing language prohibiting waste in a lease of premises destroyed by fire, the court referred to permissive waste as being founded on negligence:[129] "The modern decisions, especially in America, hold that the tenant's duty is to exercise reasonable care to guard the premises against injury. Nevertheless the tenant is not an insurer."[130] Other cases involving allegations of waste have focused on the removal of portions of buildings,[131] removal of fixtures[132] or similar changes in structure.

The third area of potential conflict over use of the premises is the liability for nuisance. The party, landlord or tenant, who is responsible for the condition of leased premises, generally is liable for any nuisance maintained on the property. A tenant may be held liable for nuisance created on leased premises during the term of the lease, but is not liable for nuisance existing at the time the premises were leased.[133] Whether the maintenance of a nuisance on the premises by the tenant can be considered a prohibited use, giving rise to a possible claim by the landlord of a right to evict the tenant, depends on the terms of the lease.

D. Repairs

At common law, absent an express agreement to the contrary, the tenant has a duty to make minor repairs neces-

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seq. (Repl. 1974). Over 40 states have statutes. *See* M. HARRIS, LEGAL-ECONOMIC ASPECTS OF WASTE LAW AS IT RELATES TO FARMING (1974).

128. Kory v. Less, 180 Ark. 342, 22 S.W.2d 25 (1929).

129. Kirkpatrick v. Reese, 219 Ark. 124, 240 S.W.2d 1 (1951).

130. *Id.* at 126, 240 S.W.2d at 2.

131. *See, e.g.*, Mosley v. McDavid, 250 Ark. 735, 466 S.W.2d 922 (1971).

132. *See, e.g.*, Sparkman v. Etter, 249 Ark. 93, 458 S.W.2d 129 (1970).

133. Malco-Arkansas Theatres, Inc. v. Cole, 198 Ark. 951, 132 S.W.2d 174 (1939).

sary to preserve the premises. Since the lease is a conveyance of the rights to possess and control the premises, the landlord has no control and thus no obligation to repair. This doctrine still prevails for agricultural tenancies, although it has been substantially modified by legislation for residential property.[134] Arkansas has adopted the common law rule. For example, in *Jones v. Felker*[135] a landlord had no duty to repay a tenant who rebuilt a fence destroyed by rains.[136]

The court has been reluctant to imply convenants which could have been expressed if intended.[137] Instead, the responsibility for repairs normally is stated in the lease agreement. As a result, disputes over responsibility involve construction of the language used by the parties.[138] For example, when the tenant agreed to "build, repair and maintain" fences, and to "build, and repair" buildings and to keep them "in good condition," he was bound to continue the process through the entire lease term, or he would be liable for non-performance.[139] But, when the landlord agreed to repair for "fire, windstorm or other unavoidable casualty," the natural deterioration of the buildings over the years was not covered by the specific language of the lease so the landlord was not responsible for such repair.[140]

An express covenant by the tenant to make repairs will be strictly construed. For example, in *Whipple v. Driver*[141]

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134. Schoshinski, *supra* note 116, at §§ 3:13 & 5:18.

135. 72 Ark. 405, 80 S.W. 1088 (1904).

136. For additional examples, *see* Haizlip v. Rosenburg, 63 Ark. 430, 39 S.W. 60 (1897) and Delaney v. Johnson, 95 Ark. 131, 128 S.W. 859 (1910). This rule has most recently been affirmed in E.E. Terry, Inc. v. Cities of Helena and West Helena, 256 Ark. 226, 506 S.W.2d 573 (1974). Local custom may not be shown regarding the duty to repair if in contradiction to the "well established" rule. Rundell v. Rogers, 144 Ark. 293, 222 S.W. 19 (1920); Clark v. Matlock, 189 Ark. 1081, 76 S.W.2d 104 (1934).

137. In Rundell v. Rogers, 144 Ark. 293, 222 S.W. 19 (1920), the court noted parenthetically that such covenants "ought to have been" stated.

138. *See, e.g.*, LaFarque v. LaFarque, 210 Ark. 97, 194 S.W.2d 438 (1946), in which part of the dispute involved the question of whether certain repairs were "major" and therefore the responsibility of the lessor under the terms of the lease.

139. Franklin v. Triplett, 79 Ark. 82, 94 S.W. 929 (1906).

140. E.E. Terry, Inc. v. Cities of Helena and West Helena, 256 Ark. 226, 506 S.W.2d 573 (1974).

141. 140 Ark. 393, 215 S.W. 669 (1919).

the tenant agreed to "keep all fences around and about said lands in good repair." When portions of rail fences burned, through no fault of the tenant, he was bound to repair the damage. The Arkansas court also has held a tenant liable for damage caused by flooding of machinery when the tenant had agreed to "keep the machinery in as good working order as when he took possession, less the natural wear and tear of the same."[142] "Thus where the covenant is 'to repair' in general terms or 'to repair, uphold and support,' or however otherwise phrased, if it prescribes the duty to repair, it binds the lessee to rebuild if the premises are destroyed."[143] This is a reflection of the common law rule imposing on the tenant the duty to rebuild if there is an express unconditional agreement to "repair," "redeliver in good order" or "keep in good repair."[144] The rule is "not imperative and unbending", however, and the parties' intention is the determining factor.[145] The court will require evidence of the tenant's willingness to assume the risk: "The tendency of the more recent decisions is adverse to extending the responsibility of the tenant when the covenant is not special and express, and so clear as to leave little doubt that he really meant to take the risk of an insurer."[146]

The landlord's remedy for the tenant's failure to repair is a suit for damages. Such a breach also justifies refusal to renew the lease,[147] and may be grounds for rescission if the rental due is the completion of the repairs.[148] The tenant must be given a reasonable time to repair, however. The time may be affected by "custom" in the community and "requirements of good husbandry."[149] For example, if similar repairs are usually made during a certain season and the "usefulness of the farm is not impaired," the tenant is not

142. Bradley v. Holleman, 134 Ark. 588, 202 S.W. 469 (1918).
143. *Id.* at 596, 202 S.W. at 422.
144. Halbut v. Forrest City, 34 Ark. 246 (1879).
145. *Id.* at 253.
146. *Id.* at 253.
147. Felder v. Hall Bros. Co., 151 Ark. 182, 235 S.W. 789 (1921).
148. Tate v. McClure, 25 Ark. 168 (1867).
149. Whipple v. Driver, 140 Ark. 393, 215 S.W. 669 (1919).

bound to make repairs at a specific time.[150]

If the landlord has expressly agreed to make repairs, but fails to do so, the tenant is relieved of the duty to pay rent[151] and may abandon the premises.[152] If the tenant remains in possession, however, his only claim is for damages and he remains liable for the rental.[153] The tenant must notify the landlord of the necessity for repairs, and the landlord must be given a reasonable time to complete the repairs.[154] The tenant may make the repairs and recover the cost from the landlord.[155] In fact, it may be the tenant's duty to prevent or reduce damage by making the repairs if they are not extensive.[156]

The measure of damages for the landlord's breach of the covenant to repair depends on the cost of the repair. If the repair is inexpensive, the measure is the cost of repair. Indirect and consequential damages or speculative losses are not available.[157] If the repairs are extensive and the cost is large in relation to the rental, the measure of damages is the diminution in rental value, *i.e.*, the difference between the rental value with the repairs and the rental value without the

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150. *Id.* at 397, 215 S.W. at 670.

151. Berman v. Shelby, 93 Ark. 472, 125 S.W. 124 (1910).

152. Tedstrom v. Puddephatt, 99 Ark. 193, 137 S.W. 816 (1911); Berman v. Shelby, 93 Ark. 472, 125 S.W. 124 (1910).

153. Young v. Berman, 96 Ark. 78, 131 S.W. 62 (1910).

154. Bowling v. Carroll, 122 Ark. 23, 182 S.W. 514 (1916); Tedstrom v. Puddephatt, 99 Ark. 193, 137 S.W. 816 (1911); *see also* Waldrip v. Grisham, 112 Ark. 57, 164 S.W. 1133 (1914), in which jury instructions were approved which required the tenant to notify the landlord that the repairs were necessary as a condition precedent to recovery for failure to repair.

155. Young v. Berman, 96 Ark. 78, 131 S.W. 62 (1910); Franks v. Rogers, 156 Ark. 120, 245 S.W. 311 (1922).

156. In Johnson v. Inman, 134 Ark. 345, 203 S.W. 836 (1918), the court stated: "This court is committed to the doctrine that only compensatory damages will be allowed, and that one injured by the breach of a contract must prevent or reduce the damages by the exercise of reasonable effort or the expenditure of reasonable sums." *Id.* at 348, 203 S.W. at 837.

157. The rule was apparently first stated by the Arkansas court in Varner v. Rice, 39 Ark. 344 (1882), in which damages from the trespass of cattle were denied. The rule was restated in Bowling v. Carroll, 122 Ark. 23, 182 S.W. 514 (1916) also involving damages by cattle. *See also* Childress v. Tyson, 200 Ark. 1129, 143 S.W.2d 45 (1940).

repairs.[158]

E. Alterations and Improvements

Farm improvements may benefit both the landlord and the tenant. The landlord benefits because of the addition of a valuable capital asset. The tenant benefits because of the increased returns from the use of the structure. This mutual benefit from the improvement can be recognized by providing in the lease for a sharing of the cost, with assurance to the tenant of reimbursement of any unused portion if the lease is terminated. For example, soil conservation expenditures such as terraces, ponds, dams and drainage may be handled by providing for reimbursement to the tenant for a portion of the value upon termination of the lease.[159] For removable improvements, the tenant may bear the cost but have the right of removal if the lease terminates.

The common law prohibited the tenant from making substantial changes in the leased premises without the landlord's consent. Even when the value of the property was enhanced, the tenant could be held liable for ameliorating waste.[160] Today, courts frequently refuse to impose liability on the tenant for improvements or alterations that are beneficial and enhance the value of the premises, but recognize that the tenant has no absolute right to make any alterations or improvements.[161] The landlord may be entitled to nominal damages unless actual economic loss resulting from the alteration or improvement can be shown. An action for injunction to prevent the change is the more common remedy.[162]

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158. Childress v. Tyson, 200 Ark. 1129, 143 S.W.2d 45 (1940); Johns v. Hudson, 182 Ark. 1162, 34 S.W.2d 760 (1931); Brunson v. Teague, 123 Ark. 594, 186 S.W. 78 (1916); Young v. Berman, 96 Ark. 78, 131 S.W. 62 (1910).

159. *See, e.g.*, Bauer v. Eudy, 238 Ark. 591, 383 S.W.2d 493 (1964).

160. Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N.W. 738 (1899).

161. *See* Schoshinski, *supra* note 116, at 287-293, where the following factors are listed as the most important considerations in determining whether the tenant will be permitted to make alterations or improvements without liability for waste: 1) Benefit to the reversion, 2) The type of tenancy, 3) The nature and scope of the alteration or improvement, 4) The economic necessity of the alteration or improvement, and 5) The types of relief sought.

162. Schoshinski, *supra* note 116, at § 5:36.

If the agreement of the parties does not address the question of improvements, the tenant is presumed to repair and improve for his own benefit, and has no right to recovery for the value of the improvements at the end of the term.[163] The landlord's failure to object to the improvements does not raise a presumption that the landlord intends to compensate the tenant.[164] If the lease specifically provides for compensation to the tenant for the value of improvements at the end of the term, or if the tenant is wrongfully evicted prior to the end of the term, compensation may be due.[165] For example, in a case of wrongful eviction, a tenant was permitted to recover the cost of repairs and improvements that were not usable elsewhere, even though they might not have been of value to the landlord.[166]

If the landlord agrees to pay for improvements to be made on the premises by the tenant, a statutory lien may be imposed on the property by suppliers of materials used in the improvement.[167] The tenant is deemd to be an agent for the landlord in such cases.[168] In the absence of statutory authority, however, the landlord does not subject the property to the mechanics' or materialmen's lien merely by consenting to improvements by the tenant.[169]

If the tenant reserves the right to remove improvements, the only remaining question is when removal may occur. The character of the improvements is irrelevant. They may

163. National Housewares Corp. v. Trahin, 247 Ark. 1, 444 S.W.2d 68 (1969); Gocio v. Day, 51 Ark. 46, 9 S.W. 433 (1888).

164. Gocio v. Day, 51 Ark. 46, 9 S.W. 433 (1888).

165. Schoshinski, *supra* note 116, at § 5:25. *See, e.g.*, Powell v. South Bend Plantation, Inc., 219 Ark. 845, 245 S.W.2d 562 (1952), in which the agreement called for an offset on rent for improvements; State v. Baxter, 50 Ark. 447, 8 S.W. 188 (1887), in which the tenant was entitled to credit for improvements constructed when a lease was ruled invalid; Smith v. Caldwell, 78 Ark. 333, 95 S.W. 467 (1906) and Cockrum v. McCallie, 253 Ark. 745, 488 S.W.2d 717 (1973), in which a compensation claim was denied; Jones v. Hoard, 59 Ark. 42, 26 S.W. 193 (1894), in which compensation was authorized for two houses as called for in lease but not for a third when it was constructed without the consent of and over the protest of the landlord.

166. Byers v. Moore, 110 Ark. 504, 163 S.W. 147 (1913).

167. Whitcomb v. Gans, 90 Ark. 469, 119 S.W. 676 (1909).

168. Davis v. Osceola Lumber Co., 168 Ark. 584, 270 S.W. 960 (1925).

169. Donald v. Heigel Lumber Co., 187 Ark. 1014, 63 S.W.2d 646 (1933); Hawkins v. Faubel, 182 Ark. 304, 31 S.W.2d 401 (1930).

be removable chattels such as individual hog houses, brooder houses, grain bins or structures not ordinarily permanently affixed, or they may be more permanent structures such as houses, barns or other buildings. If the lease specifically reserves the right of removal, or if the lease agreement as a whole clearly indicates that the improvements are not intended to become part of the realty,[170] even permanent structures remain the property of the tenant.[171]

The tenant ordinarily will be obligated to remove improvements within the time specified in the lease agreement or they will become part of the reality to which attached.[172] The tenant must, however, be given a reasonable time after expiration of the lease (particularly if it is not one for a definite term) to put the premises back in their prior condition. This could include the removal of fixtures where appropriate.[173] If the tenant abandons the premises and leaves fixtures in place, he may later be prohibited from removing the fixtures if the landlord has taken possession and made extensive repairs under the impression that the tenant has given up all rights under the lease.[174] The tenant may also abandon or waive rights under the lease, if at the expiration he does not vacate as called for in the lease. He then becomes a tenant by sufferance and cannot rely on lease provisions in absence of an extension or renewal of the lease.[175]

If the lease reserves a right in the tenant to remove improvements after the expiration of the term and the landlord prevents him from doing so, the tenant may recover the depreciation in value of the improvement from the time he attempted to remove it until recovery.[176] The landlord's attempt to gain additional security for the payment of rent

170. Buffalo Zinc & Copper Co. v. Hale, 136 Ark. 10, 206 S.W. 661 (1918).

171. Beauchamp v. Bertig, 90 Ark. 351, 119 S.W. 75 (1909); Harmon v. Kline, 52 Ark. 251, 12 S.W. 496 (1889).

172. Vanhooser v. Gattis, 139 Ark. 390, 214 S.W. 44 (1919).

173. Sparkman v. Etter, 249 Ark. 93, 458 S.W.2d 129 (1970); Heim v. Brock, 133 Ark. 593, 202 S.W. 36 (1918).

174. Heim v. Brock, 133 Ark. 593, 202 S.W. 36 (1918).

175. Wilson v. Davis, 202 Ark. 827, 153 S.W.2d 171 (1941).

176. Vanhooser v. Gattis, 139 Ark. 390, 214 S.W. 44 (1919). The damages do not include loss of use during that period, especially since the improvements (a barn in this case) would have to be torn down and reassembled anyway.

by preventing the removal unless all rent is paid will prove futile. If the items being removed are trade fixtures, the tenant may remove them during the term of the lease if not in arrears on rent.[177] The court has also refused to permit the landlord to assert a lien on removable property in the absence of statutory authority:[178]

> [T]hroughout nearly a hundred years of the history of this State, no court or Legislature has ever recognized the harsh and oppressive remedies of the landlord's common-law right of distraint, and, in the absence of a statutory direction, we are unwilling now to revive and apply that doctrine. It is a matter of common knowledge that the tenant class of this State are among the poorest and most helpless of our citizens, and, in the absence of a statute or contract authorizing it, we decline to say that a landlord may seize and dispose of the poor belongings of his tenant for rent in arrears, which, in many cases are all they have.[179]

If the tenant's right of removal of improvements is not addressed in the lease agreement, the general rule is that the tenant may remove those fixtures he has erected, provided they are not so physically annexed to the land or buildings that severance would be impracticable and would cause material injury to the remaining real estate.[180] The tenant has been granted considerable flexibility in order to encourage improvements. The United States Supreme Court, in an early case, recognized broad rights of removal as to agricultural fixtures.[181] The removal of trade fixtures is more liberally permitted in a landlord-tenant arrangement than in other relationships.[182]

The primary difficulty in removal cases is distinguishing between removable fixtures and items that have become per-

177. Reed Oil Co. v. Shnable, 168 Ark. 863, 271 S.W. 957 (1925); Buffalo Zinc & Copper Co. v. Hale, 136 Ark. 10, 206 S.W. 661 (1918).

178. Bennett v. Taylor, 185 Ark. 794, 49 S.W.2d 608 (1932); Hill v. Morris, 124 Ark. 132, 186 S.W. 609 (1916).

179. Bennett v. Taylor, 185 Ark. 794, 797, 49 S.W.2d 608, 609 (1932).

180. Schoshinski, *supra* note 116, at § 5:29.

181. Van Ness v. Pacard, 27 U.S. (2 Pet.) 137 (1829).

182. Arkansas Cold Storage & Ice Co. v. Fulbright, 171 Ark. 552, 285 S.W.12 (1926); Choate v. Kimball, 56 Ark. 52, 19 S.W. 108 (1892).

manently affixed to the realty. The Arkansas Supreme Court addressed the question in *Choate v. Kimball*,[183] and stated that intent is the key element, as determined by:

(1) Real or constructive annexation of the article in question to the realty.
(2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.
(3) The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made.[184]

Custom also may be relevant in determining the intent of the person making the annexation.[185] In the application of these rules the court has usually determined that trade fixtures are removable, and that a variety of types of property may qualify as trade fixtures.[186] Similarly, where the intent to annex is clear, articles that ordinarily might be trade fixtures may be deemed a permanent part of the realty.[187]

F. Crop Ownership

Disputes sometimes arise concerning the respective interests of the landlord and the tenant in crops grown or growing on the premises. These disputes usually occur when rent is due and unpaid and the landlord asserts rights in the

183. Choate v. Kimball, 56 Ark 52, 19 S.W. 108 (1892).

184. *Id.* at 60-61, 19 S.W. at 109.

185. *Id.* at 62; 19 S.W. at 109; Bemis v. First National Bank, 63 Ark. 625, 40 S.W. 127 (1897); Choate v. Kimball, 56 Ark. 52, 19 S.W. 108 (1892).

186. *See, e.g.*, Romich v. Kempner Bros. Realty Co., 192 Ark. 454, 92 S.W.2d 215 (1936) (sprinkler system); Rogers v. Vanderbilt, 175 Ark. 977, 1 S.W.2d 71 (1928) (small dwellings); Barnes v. Jeffus, 173 Ark. 100, 291 S.W. 990 (1927); Field v. Morris, 95 Ark. 268, 129 S.W. 543 (1910) (ginning and milling equipment).

187. *See, e.g.*, Dent v. Bowers, 166 Ark. 418, 265 S.W. 636 (1924) (gasoline tanks and pumps); Stone v. Suckle, 145 Ark. 387, 224 S.W. 735 (1920) (ceiling fans); Markle v. Stackhouse, 65 Ark. 23, 44 S.W. 808 (1898) (sawmill); Bemis v. First National Bank, 63 Ark. 625, 40 S.W. 127 (1897) (mill, planer and machinery).

crop, or when the lease term has expired and the tenant asserts some right to the crop growing on the premises.

Much of the case law in Arkansas has dealt with the respective rights of landlords and croppers as to crops. In traditional cropping arrangements, the landlord retained title to the crop[188] and the cropper had only a laborer's lien to secure the payment of any amounts due after deductions for advances.[189] Since these arrangements are of less importance in modern agriculture, much of the case law is no longer applicable.[190]

In modern agriculture, the tenant has title to the crop, unless the parties have agreed otherwise, subject to the landlord's liens for rent and for advances.[191] The tenant's title is complete, and he has the right to remove and sell the crop.[192] The landlord's lien for rent applies only to the crop grown in a year for which rent is due,[193] and it expires six months after the rent becomes due and payable.[194] The landlord's lien for

188. *See, e.g.*, Barnhardt v. State, 169 Ark. 567, 275 S.W. 909 (1925); Woodson v. McLaughlin, 150 Ark. 340, 234 S.W. 185 (1921); Rand v. Walton, 130 Ark. 431, 197 S.W. 852 (1917); Valentine v. Edwards, 112 Ark. 354, 166 S.W. 531 (1914); Bourland v. McKnight, 79 Ark. 427, 96 S.W. 179 (1906); Hammock v. Creekmore, 48 Ark. 264, 3 S.W. 180 (1887); Sentell v. Moore, 34 Ark. 687 (1879); Fenton v. Price, 145 Ark. 116, 223 S.W. 364 (1920); Christian v. Crocker, 25 Ark. 327 (1869).

189. ARK. STAT. ANN. § 51-301 (1947). *See, e.g.* Houck v. Birmingham, 217 Ark. 449, 230 S.W.2d 952 (1950); Cotton v. Chandler, 150 Ark. 368, 234 S.W. 165 (1921); Burgie v. Davis, 34 Ark. 179 (1879).

190. Confusion still exists between the traditional cropping arrangement and the modern crop-share lease. Considerable attention is still focused on the cropping arrangement in legal references. For example, *Arkansas Digest* and *Corpus Juris Secundum* have entire sections devoted to "Renting on Shares" that deal almost exclusively with traditional cropping arrangements and make no distinction between these and the modern crop-share lease. The Arkansas court recently referred to a "share-cropping arrangement" in comparing the crop ownership of the landlord in such cases to that of the tenant in a cash rental situation. *See* Holmes v. Riceland Foods, 261 Ark. 27, 546 S.W.2d 414 (1977).

191. ARK. STAT. ANN. § 51-201 (1947) (rent); ARK. STAT. ANN. § 51-203 (1947) (advances). A complete review of the cases relating to these liens is beyond the scope of this article. A good discussion may be found in Solberg, *supra* note 38.

192. Barnhardt v. State, 169 Ark. 567, 275 S.W. 909 (1925); Page v. Andrews, 134 Ark. 106, 203 S.W. 273 (1918).

193. Henry v. Irby, 170 Ark. 928, 282 S.W. 3 (1926); Mills v. Pryor, 65 Ark. 214, 45 S.W. 350 (1898).

194. Taylor v. Crawford, 187 Ark. 316, 59 S.W.2d 484 (1933); Cooke v. Clausen, 67 Ark. 455, 55 S.W. 846 (1900).

advances secures payment for "necessary supplies" advanced to the tenant to grow the crop. Necessary supplies include "money, provisions, clothing, stock, or other necessary articles."[195] Although such a lien was frequently used in cropping arrangements, it has little application in modern agriculture.[196]

The landlord's lien attaches as soon as the crop comes into existence.[197] It is superior to all other liens on the crop[198] except the ginner's lien.[199] The landlord's lien is, by statute, superior to the rights of the purchaser or an assignee of the receipt of "any ginner, warehouse holder, cotton factor or other bailee for any cotton, corn or other farm products in store or custody of such ginner, warehouseman, cotton factor, or other bailee."[200]

If the tenant sells the crop to a bona fide purchaser without notice, the buyer takes free of the lien.[201] In the typical marketing situation, however, the purchaser will be a local cooperative or private elevator which is likely to be aware of landlord-tenant relationships in the area. Local cooperatives often check records for liens against their members.[202] If tenants secure crop financing from agricultural lenders such as the Farmers Home Administration or Production Credit Association, these lenders will seek to

195. ARK. STAT. ANN. § 51-203 (Repl. 1971).

196. For a review of the cases involving this lien, *see* Solberg, *supra* note 38, at 724.

197. Murphy v. Myar, 95 Ark. 32, 128 S.W. 359 (1910).

198. *See, e.g.*, Smith v. Meyer & Bros., 25 Ark. 609 (1869) (superior to mortgage for supplies); Lambeth v. Ponder, 33 Ark. 707 (1878) (superior to crop mortgages); Watson v. Johnson, 33 Ark. 737 (1878), Sevier v. Shaw, Barbour & Co., 25 Ark. 417 (1869) (superior to attachment); Tomlinson v. Greenfield, 31 Ark. 557 (1876), Lunsford v. Skelton, 169 Ark. 547, 275 S.W. 901 (1925) (superior to rights of an execution creditor).

199. The ginner's lien, ARK. STAT. ANN. § 51-901 (Repl. 1971), applies only to cottonseed and baled cotton and is to secure the payment of the ginning, and the baggging and ties used in baling the cotton and is superior to all prior liens.

200. ARK. STAT. ANN. § 51-205 (Repl. 1971). *See* Lynch v. Mackey, 151 Ark. 145, 235 S.W. 781 (1921).

201. Holmes v. Riceland Foods, Inc., 261 Ark. 27, 546 S.W.2d 414 (1977); Van Etten v. Lesser-Goldman Cotton Co., 158 Ark. 432, 250 S.W. 338 (1923); Hunter v. Matthews, 67 Ark. 362, 55 S.W. 144 (1899); Puckett v. Reed, 31 Ark. 131 (1876).

202. *See, e.g.*, Homes v. Riceland Foods, Inc., 261 Ark. 27, 546 S.W.2d 414 (1977).

subordinate the landlord's lien to their security interest, and typically will inform potential purchasers of their interests. This "common knowledge" of landlord-tenant relationships may negate any claims that the purchaser was without notice.[203]

The landlord may waive the lien either expressly or by implication. By statute, the landlord may waive his lien in favor of the tenant's employees by written consent to a written employment agreement.[204] The landlord's lien also may be waived, partially or fully, in favor of the rights of a mortgagee if the waiver is recited in or attached to the mortgage.[205] Wavier may be inferred from actions of the landlord evidencing an intent to waive the lien.[206] Because of the presumption against wavier, however, the proof of intent must be "express or very plain and clear."[207]

A second area of dispute regarding crop ownership concerns the tenant's rights to harvest a growing crop after the expiration of the lease term. If the lease ends through no fault of the tenant (*e.g.*, wrongful eviction by the landlord, death of a landlord who was but a life tenant, or notice not received or improperly given) the tenant may, in some states, return and harvest the crop if it was seeded before receipt of notice that the tenancy would be terminated.[208] In Arkansas, the tenant has no such right in the absence of agreement or custom to the contrary. In *Huckaby v. Walker*[209] the tenants did not complete the harvest of cotton prior to the expiration of the lease. The lease contained no provision for the har-

203. In a Kansas case, Knapp v. Hipes, 159 Kan. 94, 152 P.2d 805 (1952), the court found such rental practices to be common knowledge.

204. ARK. STAT. ANN. § 51-204 (1971 Repl.).

205. ARK. STAT. ANN. § 51-212 (1971 Repl.). The waiver is invalid as against subsequent mortgages, purchasers or assigners unless either recited in the mortgage or attached thereto.

206. *Cf.* Woods v. Pankey, 214 Ark. 236, 215 S.W.2d 292 (1949) (an agreement to waive the lien may be indicated by the landlord's express or implied statements).

207. Holmes v. Riceland Foods, 261 Ark. 27, 30, 546 S.W.2d 414 (1977); Blackwood v. Farmers Bank & Trust Co., 200 Ark. 738, 749, 141 S.W.2d 1, 6 (1940).

208. This concept is an expansion of the doctrine of "emblements" or "waygoing crops" which is applicable to resolve disputes when a tenancy terminates. *See* Schuler-Olsen Ranches, Inc. v. Garvin, 197 Neb. 746, 250 N.W.2d 906 (1977).

209. 141 Ark. 477, 217 S.W. 481 (1920).

vesting of the crop after expiration of the tenancy. Without proof of custom that the "off-going tenant should have the way-going crops," the court applied the common law rule that the tenant is not entitled to such crops.[210] On the other hand, if the lease reserves the tenant's rights to gather the crop after expiration of the lease, he is entitled to free access for that purpose, although he may not hold over and retain possession of the premises.[211] Thus, the tenant should insist on including protective provisions in the lease in case of early termination of the agreement.

G. Other Rights and Duties

The number of additional rights and duties that may be created by the lease agreement is potentially limitless. The following, however, may be of major importance.

The Right of the Tenant in Case of Sale

The tenant's rights under the lease ordinarily will continue after a sale by the landlord. In the usual agricultural situation, the tenant's possession of the premises is sufficient notice to a potential purchaser of the existence of the lease.[212] The landlord may reserve a right of sale, but the tenant will want to couple this right with an agreement to compensate the tenant for amounts expended on permanent improvements or other items paid in advance, such as taxes.[213]

The Landlord's Right to Mortgage the Property

The landlord may mortgage the land either before or after the lease commences. If the land is already mortgaged at the time the lease is entered into, the tenant takes the property subject to the rights of the mortgagee. If foreclo-

210. *Id.* at 481, 217 S.W. at 482.

211. Stoddard & Hewett v. Walters, 30 Ark. 156 (1875).

212. *See* Prince v. Alford, 173 Ark. 633, 293 S.W. 36 (1927); *cf.* Sullivan v. Wilson Mercantile Co., 168 Ark. 262, 271 S.W. 30 (1925) (Although there was a written lease with "dubious" description of the land, the tenant's possession supplied further notice to purchaser.).

213. *See* Miller v. Jenkins, 95 Ark. 144, 128 S.W. 856 (1910).

sure becomes necessary, the purchaser at foreclosure is entitled to immediate possession. Thus, termination of the tenancy, at the option of the purchaser, may result if the tenant is made a party to the foreclosure proceeding.[214] If the tenant is not made a party to the proceeding, the lease continues with the purchaser as a new landlord.[215] If the mortgage is made after the lease begins, and the mortgagee has notice of the lease, the mortgagee takes subject to the rights of the tenant. Upon foreclosure, the purchaser becomes a new landlord and the tenancy continues for the remainder of the term.[216] In either situation, the tenant presumably retains ownership of crops growing on the premises[217] and should be entitled to harvest and remove the crop.[218]

Effect of Death or Bankruptcy of Either Party

The tenant's rights are not ordinarily affected by the landlord's death. The property passes to the devisees or heirs and they become the landlords. Accrued rents are payable to the personal representative of the deceased as are rents during administration, although the heirs and devisees will be entitled to rents accruing after death.[219] The tenant's death does not terminate the lease unless a statute or the terms of the lease provide to the contrary.[220] The terms of a standard lease tyically provide that the lease "shall bind and shall inure to the benefit of the heirs, executors or administrators, successors and assigns" of the parties. If so, the tenant's estate is liable for the rent.[221]

Bankruptcy of the landlord does not terminate the lease, although if a judicial sale becomes necessary the effect may

214. *See generally* Wilson v. Campbell, 244 Ark. 451, 425 S.W. 518 (1968).

215. Schoshinski, *supra* note 116, at § 10:5.

216. *Id.*

217. Apparently there are no Arkansas cases directly in point. A good illustration is the California case of Modesto Bank v. Owens, 121 Cal. 223, 53 P. 552 (1898), in which the tenant's rights in the crop were preserved.

218. *See* Deville v. Courillion, 5 La. App. 519 (1926). *But see* Reed v. Swan, 133 Mo. 100, 34 S.W. 483 (1896).

219. Dean v. Stuckey, 234 Ark. 1103, 356 S.W.2d 622 (1962).

220. *See In re* Estate of Church, 504 S.W.2d 214 (Mo. App. 1973).

221. *In re* Speare's Estate, 349 Pa. 76, 36 A.2d 489 (1944).

be similar to a foreclosure.[222] Bankruptcy of the tenant also does not terminate the lease unless specific provision is made.[223]

The Right to Assign or Sublet

In most states, a tenant may assign the lease or sublet part or all of the farm unless prohibited by the terms of the lease or by statute.[224] The consent of the landlord is not necessary.[225] In Arkansas, the only statutory restriction is that the assignment of leases for periods exceeding one year must be in writing.[226] A valid assignment gives the assignee the same rights against the landlord as the original tenant. The original tenant, although he has transferred the entire interest, is still liable under the terms of the lease agreement.

A sublease transfers less than the entire interest and establishes a landlord-tenant relationship between the original tenant and the sublessee. The original tenant, again, remains liable for rent and for all terms of the lease.[227] The original tenant can be released by the landlord from the terms of the lease upon assignment or sublease, but it is not likely that most landlords will readily agree to such a release.

Landlord's Right to Visit the Farm

If the landlord does not reserve a right of entry on the leased premises, the tenant may prohibit such visits or bring a trespass action unless the landlord is on the premises for certain recognized purposes. In many jurisdictions, the landlord may enter the premises to collect rent, prevent waste, make repairs or improvements, deliver a notice or to perform duties imposed by state statute.[228] Arkansas courts apparently follow the general rule and impose no liability

222. *See* W.T. Grant Co. v. Utitz, 102 S.W. 2d, 436 (Tex. Civ. App. 1937).
223. *See generally In re* Dan Cohen Co., 221 F. Supp. 447 (S.D. Ohio 1963).
224. Schoshinski, *supra* note 116, at § 8:10.
225. Keith v. McGregor, 163 Ark. 203, 259 S.W. 725 (1924).
226. ARK. STAT. ANN. § 38-105 (Repl. 1962).
227. Evans v. McClure, 108 Ark. 531, 158 S.W. 487 (1913).
228. *See, e.g.*, Sproul v. Gilbert, 226 Or. 392, 359 P.2d 543 (1961); Flanders v. New Hampshire Savings Bank, 90 N.H. 285, 7 A.2d 233 (1939).

for trespass if the landlord does not interfere with the use and enjoyment of the premises by the tenant.[229]

Taxes and Insurance

As owner, the landlord has the responsibility to pay real estate taxes. The tenant is responsible for the payment of taxes on removable fixtures or other improvements which are not intended to become affixed to the premises.[230] The crucial test for responsibility for taxes in such cases may be a determination of ultimate benefit. If the improvement is for the tenant's own purposes and is of no benefit to the landlord, then the responsibility for taxes should fall on the tenant. The tenant may assume the total tax burden by a covenant in the lease to "pay taxes." Such a convenant typically applies only to real estate taxes and does not extend to special assessments levied on the property unless the tenant has also agreed, by clear and unambiguous language in the lease, to assume the burden for them.[231] For example, when a lease included a covenant that the tenant would pay "all taxes" the tenant was not required to bear the burden of an assessment for a levy district created subsequently.[232]

Both the landlord and the tenant have an insurable interest in improvements on the leased property. The landlord has a reversionary interest in the fee and the permanent improvements affixed to the land. The tenant, as one holding a right of exclusive possession, has an interest in the improvements during the term and will be especially concerned about insurance if he has the obligation to repair or to return

229. *See* Whipple v. Gorsuch, 82 Ark. 252, 101 S.W. 735 (1907); Smith v. Caldwell, 78 Ark. 333, 95 S.W. 467 (1906). *But see* Crane v. Patton, 57 Ark. 340, 21 S.W. 466 (1893), in which liability was imposed when wrongful action of the landlord prevented the tenant from exercising rights under the lease.

230. *See* Kentucky Farm & Cattle Co. v. Williams, 140 F. Supp. 449 (E.D. Ky. 1956); Callahan v. Broadway Nat'l Bank, 286 Mass. 473, 190 N.E. 792 (1934).

231. Schoshinski, *supra* note 116, at § 5:52.

232. Stewart v. Fleming, 96 Ark. 371, 131 S.W. 955 (1910). The tenant had actually signed a renewal lease in which he agreed to pay all taxes and "any legal assessments on or against the land," but the former lease contained a provision that he would pay "taxes" only. The landlord apparently represented that the renewal lease contained the same covenants as the old and this representation served as a defense to an action against the tenant to recover the special assessment.

the premises to the landlord at the end of the term in the same condition as when the tenancy commenced. The intent of the parties is the crucial factor in placing responsibility for repairing or replacing the improvements destroyed or damaged by fire or other disaster.[233] If the premises are insured under a covenant requiring the tenant to insure the premises, any proceeds paid to the tenant should be used to rebuild or the tenant will incur liability for the failure to re-erect. On the other hand, if the landlord bears the responsibility for insurance, but fails to use the proceeds to re-erect the structures, the tenant would be entitled to a rental reduction or perhaps to rescission of the agreement.[234]

Additional Terms Which Should Be Included in the Lease Agreement

A number of items peculiar to farm leases must be addressed in some situations. For example, the right to any government payments computed for the farm, such as deficiency payments under price support programs, disaster payments through the Federal Crop Insurance program, or soil conservation or cost-sharing payments through the Agricultural Stabilization and Conservation Service, may be allocated between the landlord and tenant according to their respective interests in a particular crop or allocated to the person furnishing the labor, equipment and materials.[235]

233. *See, e.g.*, Halbut et al. v. Forrest City, 34 Ark. 246 (1879). *See also supra* text accompanying notes 142-146.

234. *See* Burnstine v. Margulies, 18 N.J. Super. 259, 87 A.2d 37 (1952).

235. For example, under the Soil Conservation and Domestic Allotment Act, April 27, 1935, Pub. L. 46, 49 Stat. 163, 16 U.S.C. § 590, as amended by the Food and Agriculture Act of 1977, Pub. L. 95-113, 91 Stat. 1020, Sept. 29, 1977, payments to producers for various conservation and environmental enhancement measures are to be divided "among landlords, tenants, and sharecroppers in proportion to the extent such landlords, tenants, or sharecroppers contribute to the cost of carrying out the conservation or environmental enhancement measures."

APPENDIX

DETERMINING RENTAL RATES

ITEM	TOTAL INVESTMENT	INTEREST	DEPRECIATION
Land			
Buildings			
Other Improvements			
Machinery & Equipment			
Livestock			
Operating Capital			
Trees or Established Crops			
Other			
TOTAL			

ITEM	TOTAL VALUE	PAID BY LANDOWNER	PAID BY TENANT
Interest on Real Estate			
Interest on Machinery and Equipment			
Interest on Operating Capital			
Depreciation on Buildings & Improvements			
Depreciation on Machinery and Equipment			
Unpaid Labor			
Hired Labor			
Contract Work			
Seed			
Fertilizer			
Chemicals			
Gas & Oil			
Repairs			
Management Allowance			
Feed			
Veterinary			
Supplies			
Taxes			
Insurance			
Office Expense			
Dwelling			
Other			
TOTAL			
PERCENT OF TOTAL	100.0		