Land & Water Law Review

Volume 6 | Issue 2 Article 7

1971

Application of Wyoming Statutes: Section 34-60 (1957) - The Possibility of Implied Tenancies Other than Tenancies by Sufferance in Wyoming

David Berry

APPLICATION OF WYOMING STATUTES: SECTION 34-60 (1957)--THE POSSIBILITY OF IMPLIED TENANCIES OTHER THAN TENANCIES BY SUFFERANCE IN WYOMING

We shall ultimately be concerned with attempting to decipher the meaning and propriety of Wyoming Statutes, Section 34-60, 34-61 (1957)[1] as ascertained from a review of their judicial interpretation and as ascertained from a study of the statutes themselves. These statutes deal with holdover tenants and tenants by sufferance; however, before we can consider these statutes and related Wyoming cases specifically, we must consider the concepts of tenancy by sufferance, of tenancy at will, of tenancy from period to period, and of holdover tenancy as they are applied today.

TENANCY BY SUFFERANCE

Tenancy by sufferance is most frequently discussed in connection with the holdover tenant. A holdover tenant is one who has entered upon land with the permission of the owner or rightful possessor but has subsequently remained on the land after his right to possession has expired. Absent some affirmative action on the part of the rightful possessor, the holdover tenant is a tenant by sufferance who continues in

---

1. WYO. STAT. § 34-60 (1957).
   In this state there shall not exist the relations of landlord and tenant, by implication or operation of law, except a tenancy by sufferance. Upon expiration of a term created by lease, either verbal or written, there shall be no implied renewal of the same, for any period of time whatever, either by the tenant holding over or by the landlord accepting compensation or rent for or during any period of such holding over. Such holding over by the tenant and acceptance of rent by the landlord shall constitute only a tenancy by sufferance, with the rights, duties, obligations and incidents of such tenancy.
   Except for minor changes grammatically, WYO. STAT. § 34-60 is the same as each of these preceding statutes:
   WYO. C.L. ch. 72 § 2 (1876), WYO. R.S. § 1387 (1887); WYO. R.S. § 2772 (1899), WYO. C.S. § 3664 (1910), WYO. C.S. § 4621 (1920), WYO. R.S. § 97-207 (1931), WYO. C.S. § 61-219 (1945).
   WYO. STAT. § 34-61 (1957).
   No lease which shall have expired by its own limitation shall be again renewed except by express contract in writing, signed by the parties thereto, whether the original lease be written or verbal. Nor shall any other tenancy than that by sufferance exist after the termination of the original lease, unless created as aforesaid, by express contract in writing.
   Except for minor grammatical changes, WYO. STAT. § 34-61 (1957) is the same as each of these preceding statutes:
   WYO. C.L. ch. 72 § 2 (1976), WYO. R.S. § 1387 (1887), WYO. R.S. § 2773 (1899), WYO. C.S. § 3665 (1910), WYO. C.S. 4622 (1920), WYO. R.S. § 97-208 (1931), WYO. C.S. § 61-220 (1945).

possession only due to the forbearance or laches of such rightful possessor.[2] Such a tenant has no title[3] and stands in no privity with the rightful possesor.[4] A tenant by sufferance merely has naked possession of the land.[5]

Tenancy by sufferance might also arise when a tenant at will tries to transfer or assign his interest; such an attempt terminates the interest. In this particular situation the tenant at will might become a tenant by sufferance; the transferee, however, is definitely a trespasser, not a tenant by sufferance, since he has entered without right.[6] A tenant at will whose landlord dies also becomes a tenant by sufferance with respect to his landlord's successor.[7]

The landlord or rightful possessor has three options when dealing with a holdover tenant. First, through continued forbearance he may extend the holdover tenant's status as a tenant by sufferance.[8] Second, the landlord may take affirmative action and may treat the overholding tenant as a tenant for a year.[9] Third, again by affirmative action, the landlord may treat such a tenant as a trespasser.[10] Should the landlord elect the course of forbearance, the tenant by sufferance is a bare licensee toward whom only a duty of protection from willful and wanton injury is due.[11] The tenant by sufferance is entitled to no notice to quit, and he need give none.[12] A tenant by sufferance is not liable for rent;[13] however, he is responsible for the reasonable value of his occupation and use.[14] When a tenant by sufferance is forced to vacate the land, he must leave immediately, but he can take his possessions with him. Should a tenant by sufferance fail to take his possessions with him when he vacates, the vacation may be considered incomplete, and the landlord may enter and remove the holdover's personal property from the premises provided that the land-

2. Benton v. Williams, 202 Mass. 189, 88 N.E. 843, 844 (1909).
3. Margosian v. Markarian, 288 Mass. 197, 192 N.E. 612, 613 (1934).
4. Benton v. Williams, *supra* note 2, at 844.
5. Margosian v. Markarian, *supra* note 3.
6. McLeran v. Benton, 73 Cal. 329, 14 P. 879 (1887).
7. Sabinski v. Patterson, 100 Ind. App. 657, 196 N.E. 539 (1935).
8. Benton v. Williams, *supra* note 4.
9. Kokalis v. Whitehurst, 334 Mich. 477, 54 N.W.2d 628, 630 (1952).
10. *Id.*
11. Margosian v. Markarian, *supra* note 3, at 613.
12. Benton v. Williams, *supra* note 2, at 844.
13. Hampton v. Mott Motors, 32 A.2d 247, 248 (Mun. App. 1943).
14. Lawer v. Mitts, 33 Wyo. 249, 238 P. 654 (1925).

lord doesn't convert it to his own use[15] and provided that he uses no unreasonable force. A tenant by sufferance is, however, entitled to re-enter and recover any crops grown by him prior to notice to vacate.[16]

If the landlord elects to treat the holdover tenant as a tenant from period to period, the duration of the period will be fixed by reference to the rent reservation arrangement found in the previously expired lease. The amount of rent due will be fixed in like manner. A more detailed discussion of the rights and responsibilities due to and from a tenant from period to period will be presented later in this work.

If the landlord elects the third course of action and treats the holdover tenant as a trespasser, an interesting situation arises; a tenant by sufferance becomes a trespasser. Since a tenant by sufferance differs from a trespasser or disseisor only in that the tenant by sufferance first entered the land by color of right,[17] the step between the two is logical, once the right is terminated by an act of the landlord, the distinction between trespasser and tenant by sufferance ceases to exist. However, a more complete analysis and comparison of the remedies against a trespasser and against tenant by sufferance is necessary to fully discover the consequences of this course of action.

As noted above, the main difference between a tenant by sufferance and a trespasser is the presence of initial right of entry in the former. Though these concepts are quite similar, it is apparently to the landlord's advantage to convert the tenant by suferance into a trespasser by affirmative action, *i.e.*, ejectment or summary proceedings or an attempted entry by the landlord.[18] The advantage arises from an increase in available remedies. Against a tenant by sufferance, the landlord has but one real remedy, an action for use and occupation.[19] Such action in assumpsit is founded upon the fiction that a tenant by sufferance holds "of" the landlord; actually he holds "against" the landlord.[20] A suit for use and occupa-

15. Finnigan v. Hadley, 286 Mass. 345, 190 N.E. 528 (1934).
16. Fleming v. Groggins, 375 P.2d 474, 476 (Wyo. 1962).
17. Benton v. Williams, *supra* note 2.
18. Mitchell v. Hyman, 43 R.I. 267, 111 A. 369, 370 (1920).
19. TIFFANY, REAL PROPERTY § 174, at 280 (3d ed. 1939).
20. *Id.* at 279.

tion allows the landlord to recover the reasonable value of the holdover's stay.[21] A landlord may recover possession by an action of ejectment against the tenant by sufferance,[22] but at common law a prerequisite to such a suit is actual entry upon the land by the landlord.[23] Such an affirmative action actually transforms the tenant by sufferance into a trespasser so the remedy of ejectment does not exist against a tenant by sufferance. Summary proceedings, which require no entry on the part of the landlord, may be viewed as a remedy against the tenant by sufferance, but the act of commencing such proceedings is probably enough of an affirmative act to make the holdover become a trespasser.

The most advantageous remedies available to the landlord, who treats the holdover as a trespasser, are mesne profits[24] and consequential damages.[25] These damage measures taken together quite conceivably involve a greater monetary recovery than merely suing for use and occupation. Mesne profits involves loss of intervening profits for the length of the trespass whereas use and occupation involves only the reasonable value of the use during the holdover period. Also available as a remedy against a trespasser is action for forcible entry and detainer.[26] Of course the holdover tenant entered with right, but once he is treated as a trespasser this distinction would be lost and a forcible entry suit could follow.

From the preceding it is apparent that it can be to the landlord's advantage in many cases to treat the holdover as a trespasser rather than as a tenant by sufferance. The same may also be true regarding the options of tenancy at will versus trespasser; this advantage will be discussed later.

TENANCY AT WILL

Closely allied with and often confused with tenancy by sufferance is the concept of tenancy at will. A tenancy at will is easily distinguished from a tenancy by sufferance; the lat-

21. Lawer v. Mitts, *supra* note 14.
22. TIFFANY, REAL PROPERTY, *supra* note 19, at 288.
23. TIFFANY, REAL PROPERTY, *supra* note 19, at 278.
24. Sargent v. Smith, 78 Mass. (12 Gray) 426 (1859).
25. *See* Note, *Tenancy At Sufferance In Massachusetts*, 44 BOST. L. R. 213 at 225 (1964).
26. Sargent v. Smith, *supra* note 24.

ter usually arises when a tenant holds over without the consent of the rightful possessor while the former arises when a tenant enters with right and holds over with consent of the rightful possessor and absent a notice to terminate.[27] The confusion results when judicial opinions and statutory statements use the terms interchangeably. Historically, a tenancy at will is created when a lease is expressly or impliedly created having an indefinite length and being conditioned upon the will of either or both parties.[28] Express tenancies at will are created by express leases, either verbal or written, for an indeterminable period of time,[29] but they generally provide for rent reservation on a regular basis.[30] One should take care not to confuse such rent reservation with the term of a periodic tenancy which will be discussed later.

Tenancies at will may also be created by operation of law. Such would be the case if one gained possession of real property under an oral lease made unenforceable by the Statute of Frauds,[31] or if one gained or retained possession of real property while negotiating a lease and while under no actual lease agreement,[32] or if one gained possession of property under a contract of sale rendered unenforceable because of the Statute of Frauds.[33] A tenancy at will is implied when one enters on land with permission but without reservation of rent or designation of term.[34]

Perhaps the closest similarity between a tenancy at will and a tenancy by sufferance is evident in requirements for notice to terminate. At common law, neither a tenant at will nor a tenant by sufferance was entitled to notice to quit.[35] Ten-

27. Berry v. Opel, 194 Okla. 670, 154 P.2d 575 (1945).
28. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY, at 126 (3d ed. 1965).
29. Spiritwood Grain Co. v. No. Pac. Ry. Co., 179 F.2d 338 (1950).
30. Donnelly Advertising Corp. v. Flaccomio, 140 A.2d 165, 168, 171 (Md. 1958). Reservation of rent on a yearly basis, or on a fraction of a year basis, may create a tenancy from year to year, but at common law some courts viewed a tenancy from year to year as a special form of tenancy at will.
31. Davis v. Lovick, 226 N.C. 252, 37 S.E.2d 680 (1946).
32. Lyon v. Cunningham, 136 Mass. 532 (1884).
33. Harris v. Frink, 49 N.Y. 24 (1872).
34. Maffetone v. Micari, 205 Misc. 459, 127 N.Y.S.2d 756 (1954).
35. Standard Realty Co. v. Gates, 99 N.J. Eq. 271, 132 A. 487, 489 (1926). 'A tenancy at will is stated by Littleton to exist 'where lands or tenements are let by one man to another, to have and to hold at the will of the lessor by force of which lease the tenant is in possession. . . .' at common law, a tenancy at will was immediately terminated on notice by either the landlord or the tenant.' TIFFANY, LANDLORD AND TENANT § 13 (1912).

ancies at will may be terminated by operation of law[36] and by attempt to assign or sublease,[37] and in neither instance is notice to terminate required.[38]

When a tenant at will fails to vacate following termination of his tenancy, he becomes a holdover tenant by definition since he has entered the land under color of right and has remained on the land following the expiration of that right. As a holdover the tenant is subject to the same rights and options as previously discussed. The advantages of each of the landlord's options have also been discussed.

TENANCY FROM PERIOD TO PERIOD

The most obvious way that tenancy from period to period differs from either a tenancy at will or a tenancy by sufferance is in the requirement of notice to terminate a periodic tenancy. At common law the notice requirement makes it necessary for either party, the landlord or the tenant,[39] to give notice of at least one full term before the lease is terminated provided the lease term was for less than one year, if the lease term is one year or longer, notice of six months prior to the expiration of a term is required.[40] Any attempt to terminate the periodic tenancy without proper notice results in the continuation of the tenancy for another period.[41]

In addition to notice requirements, periodic tenancies differ from other tenancies in their duration. While neither a tenancy at will nor a tenancy by sufferance has an established duration, a tenancy from period to period exists only for the length of the set period; a tenancy from period to period is renewed automatically for successive periods of equal length until notice requirements are fulfilled.[42]

Periodic tenancies can be created by express agreements[43] stating the terms; however, such agreements should not be

36. Seavey v. Cloudman, 90 Me. 536, 38 A. 540 (1897).
37. McLeran v. Benton, *supra* note 6.
38. Seavey v. Cloudman, *supra* note 36.
McLeran v. Benton, *supra* note 6.
39. University of Southern California v. Weiss, 208 Cal. App.2d 759, 25 Cal. Rptr. 475 (1962).
40. Maniatty v. Carroll Co., 114 Vt. 168, 41 A.2d 144 (1945).
41. Flower v. Darby, 1 Teron Rep. 159, 99 Eng. Rep. 1029 (K.B. 1786), as cited in 15 BAYLOR L. REV. 337 (1963).
42. TIFFANY, REAL PROPERTY, *supra* note 19, at 264.

regarded as a series of separate tenancy agreements but rather as a single agreement for tenancy for a self-perpetuating progression of terms which continues until proper notice is given. Periodic tenancies may also be implied, absent statutory material to the contrary. In many jurisdictions a periodic tenancy will be implied in the case of a holdover tenant if the landlord so elects.[44]

The preceding background will be essential to our discussion of Sections 34-60 and 34-61. According to the construction applied to these statutes, many of these tenancy situations may or may not be presently operative in Wyoming.

Section 34-60 presents a difficult problem of interpretation. The first sentence purports to rule out the possibility of any tenancies by implication or operation of law, other than tenancies by sufferance. This creates an anomolous situation. The anomoly arises with the second sentence of Section 34-60, continues throughout the rest of the statute, and actually carries into Section 34-61.

The situation is this. While the first sentence of Section 34-60 deals with all implied tenancies and transmutes all implied tenancies into tenancies by sufferance, the remainder of Section 34-60 and the entirety of Section 34-61 deal only with implied tenancies which arise in holdover situations following the expiration of an express lease. Legislative intent can, of course, be questioned here. If the first sentence of Section 34-60 is a statement of controlling intent, then the Wyoming statute may create an unduly harsh outcome. Perhaps the best example of this harshness is the situation of an express oral lease agreement with rent reservations of one year but with express duration greater than one year. In common law jurisdictions a court could preserve the obvious intent of the parties by finding an implied periodic tenancy instead of a tenancy at will, under which both parties' right to proper notice is preserved and the landlord's right to the agreed upon rent is retained.[45] In Wyoming, if the first sentence of Section 34-60 controls, both parties lose the protection of proper notice due

43. *See* Note, *Creation and Termination of Periodic Tenancies*, 15 BAYLOR L. REV. 329.

44. A. H. Fetting Mfg. Jewelry Co. v. Waltz, 160 Md. 50, 152 A. 434 (1930).

45. TIFFANY, REAL PROPERTY, *supra* note 19, at 267.

to the creation of a tenancy by sufferance; the landlord can maintain action only for the fair value of the lease property during the tenant's occupation. This value is in no way reflective of the intent or agreement of the parties.

If the first sentence of Section 34-60 is not an expression of intent but merely a preparatory statement, then the second sentence controls as legislative intent. This means that Section 34-60 was intended to deal only with holdover situations arising upon the expiration of express leases. There is more than nominal support for this interpretation.

The rules for statutory construction as applied in Wyoming indicate that statutes in pari materia are to be construed together[46] and in harmony as far as possible.[47] Wyoming Statutes, Section 34-61 (1957) is in pari materia with Section 34-60. Section 34-61, like the bulk of Section 34-60, deals with circumstances involved in the holdover tenant situation. If the definition of the condition of a holdover tenant in Wyoming is the overriding purpose of Section 34-60 as it clearly is with Section 34-61 and if by reading these two statutes in conjunction one can more readily infer this intent, then the contention, that sentence one of Section 34-60 is merely preparatory, gains support.

This possibility obtains validity when we note that all of the Wyoming cases that construe Section 34-60 deal with holdover tenant situations. *McNamara v. O'Brien,*[48] decided in 1881, defendant McNamara (plaintiff in error) had a written lease for a term of one year for March 5, 1876, to March 5, 1877. Under this agreement rent was payable on a monthly basis. After the expiration of the lease on March 5, 1877, defendant held over and continued to pay rent. On March 5, 1878, defendant vacated the premises without prior notice. Plaintiff sought rent for the period from March 5, 1878 to April 5, 1878, on the grounds that defendant had held the premises under an implied periodic tenancy and, as a periodic tenant, had failed to give proper notice. The court construed Section 34-60 to mean that defendant holding over after the

46. Stringer v. Board of County Com'rs of Big Horn County, 347 P.2d 197 (Wyo. 1959).
47. Gale v. School Dist. No. 4, 49 Wyo. 384, 54 P.2d 811 (1936).
48. McNamara v. O'Brien, 2 Wyo. 447 (1881).

expiration of an express lease, without a written renewal of the lease and absent an express new lease, was only a tenant by sufferance. As such the tenant retained mere naked possession by permission of the landlord without right, and defendant was entitled to no notice of termination. McNamara, therefore owed O'Brien no notice, and consequently owed no rent for the period claimed.

In 1904 the court in *Frank v. Stratford-Handcock*[49] affirmed the *McNamara v. O'Brien*[50] construction by holding that mere possession does not impart new vitality to an expired lease, and, absent any other evidence, only a tenancy by sufferance is created. In this situation, plaintiff Stratford-Handcock took possession of land under a six-month lease agreement containing a purchase option if certain conditions precedent were met. Plaintiff failed to perform the conditions but tendered the purchase price anyway. When defendant refused to accept the tender, plaintiff retained possession of the land under claim of right following expiration of the lease and sued for specific performance. The courts construction of Section 34-60 resulted from its denial of plaintiff's contention that a new or renewed lease existed.

Lawer v. Mitts,[51] decided in 1925, involved a landlord-plaintiff Lawer who sought damages in the form of reasonable use value against defendant Mitts for the loss of use of premises. Such premises had been occupied and closed by the sheriff because defendant had been illegally selling alcoholic beverages. Defendant's actions had ocurred both while he was a tenant under lease and while he was a holdover tenant following the expiration of the lease. The premises were closed while defendant was a holdover. In deciding for plaintiff, the court reaffirmed its earlier position concluding that a holdover tenant was only a tenant by sufferance. In this case the court expanded its previous construction of Section 34-60 by noting that nothing in the statute precluded a tenant's liability for the reasonable value of the use of the premises during the holdover term. The court also concluded that Section 34-60 prevented the landlord from exercising his common law

49. Frank v. Stratford-Handcock, 13 Wyo. 37, 77 P. 134 (1904).
50. McNamara v. O'Brien, *supra* note 48.
51. Lawer v. Mitts, *supra* note 14.

option to treat the holdover tenant as either a trespasser or periodic tenant. Thus by 1925 a trend toward strict construction of Section 34-60, as applicable to holdover tenants, had developed.

In 1930 the Wyoming Supreme Court once again followed the *McNamara v. O'Brien*[52] construction of Section 34-60. *Hitshew v. Rosson*[53] involved an action in forcible entry and detainer brought by plaintiff Hitshew to recover possession of certain premises from defendant Rosson. Defendant had retained the premises following the expiration of a written lease, and the facts indicate that no new lease existed therefor defendant was a holdover tenant. Though no notice is required either at common law or under Section 34-60, defendant had repeatedly refused to vacate the premises when served notice to do so. The court found that defendant was a tenant by sufferance under Section 34-60 and entered judgment for plaintiff.

Welch v. Rice,[54] a 1945 case, involved a suit for wrongful eviction brought by plaintiff-tenants against defendant-landlords. Plaintiffs were school teachers who had occupied defendant's basement apartment for one year under an oral lease agreement. At the commencement of the second year plaintiffs were notified that the rent would be increased. At this time plaintiffs commenced a search for another apartment while retaining an oral agreement with defendants that, should other housing be unavailable, plaintiffs could remain for the higher rent payment. The court found that under Section 34-60 the tenants became tenants by sufferance when notified of the rent increase since such notice terminated the previous oral lease and since plaintiffs failed to accept the new lease. As tenants by sufferance they were entitled to no notice but were actually given five days' notice. Plaintiffs' failure to vacate on time made them trespassers and as such they were not entitled to damages for wrongful eviction.

The most recent case construing Section 34-60 was decided in 1949. In *Vissenberg v. Breshnahen*[55] the court dealt with

52. McNamara v. O'Brien, *supra* note 48.
53. Hitshew v. Rosson, 41 Wyo. 509, 287 P. 316 (1930).
54. Welch v. Rice, 61 Wyo. 511, 159 P.2d 502 (1945).
55. Vissenberg v. Breshnahen, 65 Wyo. 367, 202 P.2d 663 (1949).

a tenant (plaintiff) who held over after the expiration of his written lease. Defendant-landlord gave notice to vacate and subsequently obtained a judgment in a suit for forcible entry and detainer. When tenant still refused to vacate, defendant peaceably entered. Plaintiff-tenant seeks recovery for damages and conversion. The court found that plaintiff was a tenant by sufferance by operation of Section 34-60 and of Section 34-61. As such the court held that plaintiff could not recover for defendant's peaceable entry.

Apparently Wyoming is committed to the rule that by operation of law, a holdover tenant can only be considered to be a tenant by sufferance. Since nothing in the cases previously discussed aids us in determining which sentence in Section 34-60 controls as an indicator of intent, we must now turn to a consideration of *Day v. Smith*.[56]

Day v. Smith[57] poses an interesting problem for consideration. At first reading this case seems to be precedent for the conclusion that tenancies, other than those by sufferance, may exist by implication in Wyoming. Should other implied tenancies exist in Wyoming, then one can more convincingly argue that Section 34-60 applies only to holdover tenants.

Day v. Smith[58] involves an express oral lease of indefinite duration with rent reserved on a day to day basis. Since the lease was express, Section 34-60 was not a matter for the court to construe and the statute was not mentioned in the case. The question before the court concerns the propriety of the landlord's re-entry. Briefly stated, the facts are these. Plaintiff Day entered into the oral lease agreement as a tenant of defendant Smith. On or about May 15, 1928, plaintiff became insane and left the premises. At this time he was committed to the state insane asylum. At some uncertain date thereafter defendant entered on and took possession of the leasehold. The facts indicate that no notice of termination of the lease was given by either party. The court held that mere non-payment of rent conferred no right of re-entry without notice upon defendant.[59] Of the several issues raised, the ones concerning

56. Day v. Smith, 46 Wyo. 515, 30 P.2d 786 (1934).
57. *Id.*
58. *Id.*
59. *Id.*, at 788.

us here are, (1) the type of tenancy involved and, (2) the notice required under that type of tenancy.

In determining the type of tenancy present, the court proceeded to confuse the issue of tenancies by implication in Wyoming. The tenancy in question was one for undetermined duration with rent reserved on a day by day basis. By definition this might be considered to be a special form of tenancy at will.[60] Had the court accepted this definition, it could have ruled that no notice was required for termination of a tenancy at will.[61] The validity of the landlord's re-entry would have been established without any hint of the possible existence of tenancies by implication in Wyoming contrary to Section 34-60.

The court, however, saw no actual tenancy at will. They perceived that a lease for an indefinite time must depend on the intervals of rent payment for its actual term duration. This meant that the lease in question had to be viewed as a tenancy from day to day, *i.e.*, a periodic tenancy, either implied or express. This produced a logical roadblock for the court for a periodic tenancy cannot be implied due to Section 34-60, and whether the periodic tenancy is express or implied, it requires notice for termination.[62] The facts were unclear as to the presence or absence of notice. The court would have had to conclude that, absent proof of notice, the landlord-defendant was unlawfully on the premises after re-entry. To do so would be to hold against the defendant on the re-entry issue; the court was apparently unwilling to do this since it then launched into an attempt to show that no notice was needed in the case of a tenancy from day to day. This the court accomplished by relating the significance of a day to day tenancy to that of a tenancy at will. The court concluded that tenancies from period to period arose out of tenancies at will.[63] Next the court concluded that tenancies from day to day were not worth much more than tenancies at will so such periodic tenancies for extremely short terms could be treated as tenan-

60. Spiritwood Grain Co. v. No. Pac. Ry. Co., *supra* note 29. Donnelly Advertising Corp. v. Flaccomio, *supra* note 30.
61. Standard Realty Co. v. Gates, *supra* note 35.
62. Day v. Smith, *supra* note 56, at 788.
63. Day v. Smith, *supra* note 56, at 789.

cies at will.[64] Now the court said that notice to quit was not required of tenancies at will so logically it could not be required of tenancies from day to day which were like tenancies at will.[65] Therefore, the landlord's re-entry without apparent or proven notice was justified. To strengthen its position and admittedly to cover its logic if wrong, the court proceeded to say that the equities of the situation justified the landlord's action anyway.[66]

At this point the court turned to consideration of other issues unimportant to us here. We are still left wondering if the court actually found an implied periodic tenancy. The answer is no. The lease from the beginning created a tenancy at will. For all its logical rambling through the wonderland of periodic tenancies from day to day, the court ultimately found a tenancy that was so like a tenancy at will that they must be treated similarily. To conclude that *Day v. Smith*[67] establishes precedent for the implication of tenancies other than those provided for by Section 34-60 would be to further agitate the water already muddied.

Where then do we stand in our attempt to construe Section 34-60? We have determined that the only cases applying this statute deal with holdover tenants. *Day v. Smith*[68] provides no useable precedent to the contrary.

CONCLUSION

The question of tenancy by implication is a complicated and confused area of Wyoming law. Section 34-60 is couched in language that precludes any tenancy by implication in Wyoming except tenancy by sufferance. By implication Section 34-60 may apply only to holdover tenant situations; judicial application seems to uphold this notion. *Day v. Smith,*[69] an isolated 1930 decision, lends no support to the contention that periodic tenancies by implication may exist in Wyo-

64. *Id.*
65. *Id.*
66. *Id.*
67. Day v. Smith, *supra* note 56.
68. *Id.*
69. *Id.*

ming. All of the preceding conclusions taken together indicate a need for statutory revision.

The first step in such a revision should be to separate different situations by statute. The majority of tenancies by implication arise from holdover situations. Since holdover tenants hold without consent and are only bare licensees, they should be afforded no such benefit as to be considered bona fide tenants of any sort. Holdover tenants should continue to be considered to be tenants by sufferance only. In order to codify case law and eliminate speculation, the holdover statute should provide that the tenant is (1) liable for reasonable occupation and use, (2) liable in ejectment or summary proceedings should he fail to vacate when ordered to do so, and (3) is entitled to no advance notice of termination.

Another statute should preclude periodic tenancies by implication. Implied periodic tenancies too often bastardize the intent of the parties because not only must the presence of a tenancy be implied but all the terms of such tenancy must be implied as well.

A third statute should state that tenancies at will are to be implied in all situations requiring implied tenancies except the holdover situation. Tenants at will hold as a result of the affirmative consent of the landlord and are in many ways similar to tenants by sufferance, except that tenants at will hold by right. This statute would preserve the intent of the parties to create a tenancy, but it would bind neither party should he desire to terminate or enter into a subsequent express agreement. An implied tenancy at will, contrary to an implied periodic tenancy, would force the implication of nothing more than a tenancy by right.

To avoid the inequity of failing to allow rent apportionment, the tenancy at will statute should also provide that any rent due and owing by the tenant at will is to be apportioned. Such apportionment will be based on the number of days of actual occupation as compared with the number of days in the rent period. Such a provision would protect the tenant from being compelled to pay rent for a whole period should he

vacate in the middle of a rent period. Such a provision would also allow the landlord to collect rent for the length of use of the property should he elect to terminate the tenancy in the middle of a period.

DAVID BERRY