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Landlord-Tenant Law: Abolition of Self-Help in Minnesota

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Rodney Wiley leased property to Kathleen Berg, who operated a restaurant on the premises. Their written lease imposed certain restrictions on the tenant,[1] and gave the landlord the right to reenter and take possession of the property if the tenant violated the restrictions.[2] After a series of disputes between Berg and Wiley during the first two years of the lease term,[3] Wiley asserted that Berg had violated the restrictions in the lease, thereby entitling Wiley to retake possession.[4] Two weeks later, Wiley, accompanied by a locksmith and a police officer, changed the locks and took possession of the premises while Berg was absent. Berg brought an unlawful detainer action and, in a separate action, sought damages for lost profits, damage to chattels, and intentional infliction of emotional distress, based on claims

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1. The restrictions were contained in lease items 5 and 6:

Item #5 The Lessee will make no changes to the building structure without first receiving written authorization from the Lessor. The Lessor will promptly reply in writing to each request and will cooperate with the Lessee on any reasonable request.

Item #6 The Lessee agrees to operate the restaurant in a lawful and prudent manner during the lease period.

Berg v. Wiley, 264 N.W.2d 145, 147 n.1 (Minn. 1978).

2. The reentry clause provided, "Item #7 Should the Lessee fail to meet the conditions of this Lease the Lessor may at their [*sic*] option retake possession of said premises." *Id.*

3. The discord between Wiley and Berg was initially caused by the continual state of disrepair of the premises due to remodeling. Wiley alleged that Berg had started remodeling projects without the written approval required by lease item #5. *See* note 1 *supra.* Two events precipitated the dispute over the remodeling. First, in order to protect the substantial investment that would accompany additional remodeling of the premises, Berg requested either a renewal of the lease or a new five year lease. Appellants' Brief, app. at A-4. Second, Berg incorporated the business, with herself as sole stockholder, and requested an assignment of the lease to the corporation. *See id.* at A-7. Wiley refused both requests, citing as the basis for the denial Berg's previous failure to obtain approval for remodeling. *Id.* at A-5 to -6. In spite of Wiley's refusal, the corporation began paying the rent, which was accepted, and Berg began several new remodeling projects.

4. Wiley's assertions were contained in a letter listing eight separate demands. *See* Appellants' Brief, app. at A-14 to -16. He insisted on compliance with the demands within two weeks and threatened to exercise his option to retake possession under lease item 7, *see* note 2 *supra,* if the deadline was not met. One of Wiley's demands was that the restaurant be approved by the state and city health departments. Earlier, the Minnesota Department of Health had inspected the restaurant and ordered that a number of code violations be corrected. 264 N.W.2d at 147. Several of Wiley's other demands were similar to orders by the Department of Health in response to code violations. At the end of the two week period, Wiley's demands had not been met. *Id.*

in wrongful eviction, contract, and tort.[5] The trial court found that Berg had been wrongfully evicted, and awarded her damages for lost profits and loss of chattels.[6] The trial court based its finding of wrongful eviction on two grounds. First, Wiley's repossession was not peaceable and, therefore, was wrongful under the common law. Second, even if Wiley had acted peaceably, modern doctrine requires a landlord to resort to judicial process to secure possession from a tenant who refuses to surrender the premises.[7] On appeal, the Minnesota Supreme Court affirmed, *holding* that "the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to judicial process." *Berg v. Wiley,* 264 N.W.2d 145, 151 (Minn. 1978).

The early common law permitted landlords to forcibly dispossess tenants who were not legally entitled to possession.[8] The right to use force was restricted in England by a statute enacted in 1381 that made forcible entry a criminal offense.[9] The initial statute was fol-

5. The damage action was suspended for the duration of the separate unlawful detainer action brought under MINN. STAT. §§ 566.01-.17 (1974) (amended 1976). After the Minnesota Supreme Court held that an unlawful detainer action is not available to a tenant against his landlord, Berg v. Wiley, 303 Minn. 247, 251, 226 N.W.2d 904, 907 (1975), proceedings in the damage action were resumed. 264 N.W.2d at 148 & n.2.

6. The claims in wrongful eviction and intentional infliction of emotional distress were submitted to the jury by special verdict. The jury found no liability for intentional infliction of emotional distress. Based on the finding of wrongful eviction, however, the jury awarded damages of $31,000 for lost profits and $3,540 for loss of chattels. 264 N.W.2d at 148.

7. *Id.* at 149.

8. The common law right to use force was available to any person entitled to the possession of land, not only to those in the relationship of landlord and tenant. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 3.15 (1956).

9. 5 Rich. 2, c. 7 (1381) provided,

> And also the King defendeth, That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. (2) And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

In Taunton v. Costar, 101 Eng. Rep. 1060 (K.B. 1797), the court held that the statutory remedy was exclusive and that no civil cause of action could be maintained by the person dispossessed. Lord Kenyon reasoned,

> The case is too plain for argument. Here is a tenant from year to year, whose term expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear that the landlord could have justified under a pleas of liberum tenementum. If indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry: but

lowed by others,[10] which served as models for forcible entry and detainer[11] statutes enacted in the United States.[12]

Although the first American statutes made forcible entry and detainer criminal offenses, most states have replaced the criminal sanctions[13] with a civil remedy that allows summary recovery of the

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there can be no doubt of his right to enter upon the land at the expiration of the term. There is not the slightest pretence for considering him as a trespasser in this case . . . .

Id. at 1060-61. The courts in two later cases, however, awarded damages to dispossessed tenants who brought civil actions against their former landlords. Newton v. Harland, 133 Eng. Rep. 490, 496, 500 (C.P. 1840)(action for assault); Hillary v. Gay, 172 Eng. Rep. 1243, 1244 (Ex. 1833)(action for breaking and entering, expulsion, and taking of tenant's goods). Many English courts disregarded *Newton* and *Hillary*, and sanctioned forcible dispossession by landlords having a right to possession. *See, e.g.*, Lows v. Telford, 1 App. Cas. 414, 423 (1876) (landlord retained right of possession following forcible reentry); Harvey v. Brydges, 153 Eng. Rep. 546, 548 (Ex. 1845) (freeholder who dispossesses wrongfully possessing tenant by force is not liable to tenant, "although the freeholder may be responsible to the public in the shape of an indictment for forcible entry"). *Newton* was expressly overruled by a subsequent case, Hemmings v. Stoke Poges Golf Club, Ltd., [1920] 1 K.B. 720, 737-38, 747, 753 (1919).

10. A series of forcible entry and detainer statutes were enacted in England between 1381 and 1623. These statutes were generally available to dispossessed landowners and did not apply only to landlords and tenants. In addition to 5 Rich. 2, c. 7 (1381), *see* note 9 *supra*, the statutes were: 15 Rich. 2, c. 2 (1391), which prohibited forcible entry followed by forcible detainer and compelled justices to act upon forcible entry complaints; 4 Hen. 4, c. 8 (1402), which provided a civil remedy to dispossessed freeholders; 8 Hen. 6, c. 9 (1429), which prohibited forcible detainer following a peaceable entry and altered freeholders' civil remedies to include restitution and treble damages; and 21 Jac. 1, c. 15 (1623), which extended to tenants for a term of years the civil remedies created by 4 Hen. 4, c. 8 (1402) and 8 Hen. 6, c. 9 (1429).

It should be noted that the civil remedies expressly created by these statutes were limited to dispossessed freeholders and tenants for a term of years. The civil remedies were therefore not available to tenants no longer entitled to possession who had been forcibly evicted by their landlords. *See* Barnett, *When the Landlord Resorts to Self-Help: A Plea for Clarification of the Law in Florida*, 19 U. FLA. L. REV. 238 (1966); Note, *Right of a Landlord to Regain Possession by Force*, 4 AM. L. REV. 429 (1869); Comment, *Defects in the Current Forcible Entry and Detainer Laws of the United States and England*, 25 U.C.L.A. L. REV. 1067 (1978).

11. 5 Rich. 2, c. 7 (1381), prohibited only forcible entries, but later English statutes extended the prohibition to forcible detainers. *See* note 10 *supra*. Although forcible entry and detainer are closely related, the two terms are distinct. Forcible entry is generally an entry on real property in the possession of another without legal right and with some degree of force. In contrast, detainer, which may or may not be preceded by a forcible entry, is the unlawful holding of real property. *See* Schroeder v. Woody, 166 Or. 93, 96, 109 P.2d 597, 599 (1941); Buchanan v. Crites, 106 Utah 428, 437, 150 P.2d 100, 104 (1944). *See generally* 35 AM. JUR. 2D *Forcible Entry and Detainer* § 1 (1967).

12. Note, *supra* note 10, at 430.

13. For a list of the states where forcible entry and detainer remain crimes, see Comment, *supra* note 10, at 1077 n.50.

property.[14] Generally, if the tenant is unlawfully in possession,[15] the summary recovery statute affords the landlord summary restitution of the premises through an unlawful detainer proceeding.[16] Alternatively, if the tenant is in lawful possession and is dispossessed by the landlord, the statute gives the tenant summary restitution of the premises.[17]

The landlord may choose to evict the tenant through self-help rather than judicial proceedings. If the self-help is deemed forcible, however, most states hold the landlord liable to the tenant for damages, regardless of whether the tenant's possession was lawful or unlawful.[18] The theories of recovery vary depending on the circum-

14. Because the proceeding is summary, the range of issues that may be litigated is limited. Generally, legal title or the ultimate right to possession will not be considered by the court; the dispossessed person need only prove the immediate right to possession. For example, if a tenant is unlawfully in possession, the immediate right to possession is in the landlord or successor lessee. Possession will be granted to the proper person by the summary recovery statute. Similarly, if a tenant lawfully in possession is dispossessed, the immediate right to possession remains in the tenant although title and the ultimate right to possession are in the landlord. The summary recovery statute will restore possession to the tenant. *See, e.g.*, Daluiso v. Boone, 71 Cal. 2d 484, 495-96, 455 P.2d 811, 817-18, 78 Cal. Rptr. 707, 713-14 (1969); Keller v. Henvit, 219 Minn. 580, 585, 18 N.W.2d 544, 547 (1945). *See generally* 35 AM. JUR. 2D *Forcible Entry and Detainer* §§ 14-27 (1967). The civil proceeding under the statute is not intended to be the exclusive remedy available to the dispossessed person. Other actions such as trespass or ejectment may be brought. *See, e.g.*, Henschke v. Young, 226 Minn. 339, 341, 32 N.W.2d 854, 855 (1948); Mutual Trust Life Ins. Co. v. Berg, 187 Minn. 503, 505, 246 N.W. 9, 10 (1932); American Holding Co. v. Hanson, 23 Utah 2d 432, 434-35, 464 P.2d 592, 593-94 (1970) (Ellett, J., concurring).

15. A tenant's possession is unlawful in the following situations: 1) if he has retained possession after the expiration of the tenancy and the landlord chooses not to hold him to another term, *see* 49 AM. JUR. 2D *Landlord and Tenant* §§ 1115-1116 (1970); and 2) if the tenant has breached a condition that the lease states will result in forfeiture and the landlord elects to terminate the lease. *See id.* §§ 1021-1022.

16. In addition to the unlawful detainer action, the landlord is entitled to bring a separate action to recover damages equal to the fair rental value of the property for the period of its detention. Under appropriate circumstances, special damages may also be recovered. 1 AMERICAN LAW OF PROPERTY § 3.36 (A.J. Casner ed. 1952).

17. *See, e.g.*, Smith v. Hegg, 88 S.D. 29, 214 N.W.2d 789 (1974). *See generally* 52 C.J.S. *Landlord & Tenant* § 460(1) (1968). In addition to recovering the premises through the summary proceeding, the tenant is entitled to bring a separate damage action. The theories of recovery available to a tenant whose possession is lawful are the same as those available to a tenant evicted by force. *See* notes 19-24 *infra* and accompanying text. A minority of jurisdictions, including Minnesota, prohibit tenants from prosecuting their landlords under the forcible entry and detainer statutes. The Minnesota Supreme Court held in Berg v. Wiley, 303 Minn. 247, 250, 226 N.W.2d 904, 906 (1975), that MINN. STAT. § 566.03 (1) (1974) (amended 1976), excludes tenants from the classes of plaintiffs who may sue for possession in unlawful detainer proceedings. *See* note 5 *supra*. According to the court, the tenant's proper remedy is an action in ejectment. 303 Minn. at 251, 226 N.W.2d at 907.

18. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 23 (4th ed. 1971). *See*

stances,[19] but the tenant may generally recover actual damages—including those for physical injury,[20] emotional distress,[21] lost profits,[22] and damage to property[23]—as well as punitive damages.[24]

If a landlord retakes possession from a tenant in unlawful possession through *peaceable* self-help, the majority of states do not hold the landlord liable to the tenant.[25] In many states, however, the range of peaceable[26] entries is narrow; courts have been willing to find forci-

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generally Annot., 6 A.L.R.3d 177 (1966).

A small number of states follow the rule that allows the landlord to use reasonable force to regain possession. In these states, the landlord is not liable to the tenant for the use of reasonable force even if actual damage results. *See, e.g.*, Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966) (Virginia); Paddock v. Clay, 138 Mont. 541, 357 P.2d 1 (1960).

In all states, a landlord is liable to the tenant for the use of excessive force. 1 F. HARPER & F. JAMES, *supra* note 8, at 259; W. PROSSER, *supra*.

19. The theories most often utilized are: 1) wrongful eviction (*see, e.g.*, Malcolm v. Little, 295 A.2d 711 (Del. 1972); Freeway Park Bldg., Inc. v. Western States Wholesale Supply, 22 Utah 2d 266, 451 P.2d 778 (1969)); 2) conversion (*see, e.g.*, Polley v. Shoemaker, 201 Neb. 91, 266 N.W.2d 222 (1978)); 3) trespass to chattels (*see, e.g.*, Price v. Osborne, 24 Tenn. App. 525, 147 S.W.2d 412 (1940)); and 4) assault and battery (*see, e.g.*, Chapman v. Johnson, 39 App. Div. 2d 629, 331 N.Y.S.2d 184 (1972); Nelson v. Swanson, 177 Wash. 187, 31 P.2d 521 (1934)). *See also* W. PROSSER, *supra* note 18.

20. *See, e.g.*, Kaufman v. Abramson, 363 F.2d 865, 866 (4th Cir. 1966); Nelson v. Swanson, 177 Wash. 187, 191, 31 P.2d 521, 522 (1934).

21. *See, e.g.*, Peterson v. Platt, 16 Utah 2d 330, 331, 400 P.2d 507, 508 (1965).

22. *See, e.g.*, Weber v. McMillan, 285 So. 2d 349, 352 (La. Ct. App. 1973); Freeway Park Bldg., Inc. v. Western States Wholesale Supply, 22 Utah 2d 266, 272-73, 451 P.2d 778, 783 (1969).

23. *See, e.g.*, Buchanan v. Daspit, 245 So. 2d 506, 506-07 (La. Ct. App. 1971); Price v. Osborne, 24 Tenn. App. 525, 527, 147 S.W.2d 412, 413 (1940).

24. *See, e.g.*, Robert L. Merwin & Co. v. Strong, 429 F.2d 50, 52-53 (3d Cir. 1970); Peterson v. Platt, 16 Utah 2d 330, 331, 400 P.2d 507, 508 (1965).

25. *See, e.g.*, Krasner v. Gurley, 252 Ala. 235, 40 So. 2d 328 (1949); Calef v. Jesswein, 93 Ind. App. 514, 176 N.E. 632 (1931); Chappee v. Lubrite Refining Co., 337 Mo. 791, 85 S.W.2d 1034 (1935); Simhiser v. Farber, 270 Wis. 420, 71 N.W.2d 412 (1955). *See generally* 2 RESTATEMENT (SECOND) OF PROPERTY, Reporter's Note § 14.2, note 1 at 16 (1977); Annot., *supra* note 18. Of course, if the tenant is in lawful possession and is evicted by the landlord, the landlord is liable to the tenant for damages regardless of whether the eviction is forcible or peaceable. *See* note 17 *supra*.

26. In defining "peaceable," courts generally refer to the forcible entry and detainer statute in effect in their jurisdiction. For this reason, modern revisions of the statutory language become significant. Early American statutes generally incorporated the language of the English forcible entry statute and prohibited entry "with strong hand" or "with multitude of people." *See* note 9 *supra*. This language was construed in both England and the United States as prohibiting only the use of actual force. *See, e.g.*, Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N.E. 272 (1885). Through statutory revision, however, many states have replaced this language with less explicit language that is construed to prohibit acts not involving actual force. For example, compare IOWA REV. STAT. ch. 86, art. XII, § 2 (1843) ("[i]f any person shall enter upon or into

ble entries in cases in which only minimal force was actually used. For example, entries made with the assistance of a locksmith,[27] with a passkey,[28] and through an open window,[29] although made in the tenant's absence and with no actual violence, have been held to be forcible within the meaning of the forcible entry and detainer statutes.

A growing minority of states prohibit self-help entirely. This approach abrogates the common law right of reentry in all cases and requires landlords to use judicial means to regain possession from tenants unlawfully in possession.[30] Under this rule, tenants can recover damages whenever self-help is used, even if actual violence does not occur.[31] When no damages are suffered by the tenant, nominal damages may be awarded.[32]

Prior to *Berg,* Minnesota case law concerning self-help evictions focused primarily on whether the landlord was legally entitled to possession when he dispossessed the tenant, rather than on whether the entry was forcible or peaceable.[33] The earliest Minnesota case to discuss the manner in which a landlord may repossess premises was *Mercil v. Broulette.*[34] In *Mercil,* a case involving the right of an owner of cropland to dispossess a trespasser who had lived on and cultivated

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any lands, tenements, or other possessions, and detain and hold same with force or strong hand," then that person "shall be deemed guilty of a forcible entry and detainer"), with IOWA CODE § 648.1(1) (1977) (allows a summary remedy for forcible entry or detention "[w]here the defendant has by force, intimidation, fraud, or stealth entered upon the prior actual possession of another in real property, and detains the same").

27. Karp v. Margolis, 159 Cal. App. 2d 69, 323 P.2d 557 (Dist. Ct. App. 1958). In *Karp,* the landlord had even given prior notice of his intention to the local police.

28. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100 (1944). In *Buchanan,* the landlord had removed the doors from their hinges after entering.

29. McNeil v. Higgins, 86 Cal. App. 2d 723, 195 P.2d 470 (Dist. Ct. App. 1948).

30. *See, e.g.,* Jordan v. Talbot, 55 Cal. 2d 597, 605, 361 P.2d 20, 24, 12 Cal. Rptr. 488, 492 (1961); Malcolm v. Little, 295 A.2d 711, 713-14 (Del. 1972); Weber v. McMillan, 285 So. 2d 349, 351 (La. Ct. App. 1973); Bass v. Boetel & Co., 191 Neb. 733, 739, 217 N.W.2d 804, 807 (1974); Edwards v. C.N. Inv. Co., 27 Ohio Misc. 57, 62, 272 N.E.2d 652, 655 (Shaker Heights Mun. Ct. 1971). *See generally* 2 RESTATEMENT (SECOND) OF PROPERTY § 14.2 (1977); Annot., *supra* note 18.

31. *See, e.g.,* Daluiso v. Boone, 71 Cal. 2d 484, 500, 455 P.2d 811, 821, 78 Cal. Rptr. 707, 717 (1969) (compensatory damages for intentional infliction of emotional distress awarded); Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) (punitive damages awarded); Polley v. Shoemaker, 201 Neb. 91, 266 N.W.2d 222 (1978) (discussion of tenant's cause of action based on conversion); Freeway Park Bldg., Inc. v. Western States Wholesale Supply, 22 Utah 2d 266, 272-73, 451 P.2d 778, 783 (1969)(jury may award damages for lost profits).

32. *See, e.g.,* King v. Firm, 3 Utah 2d 419, 426-27, 285 P.2d 1114, 1119 (1955).

33. *See* 264 N.W.2d at 149; note 39 *infra.*

34. 66 Minn. 416, 69 N.W. 218 (1896).

the land for a number of years,[35] the court held that a person lawfully entitled to possession had the right to enter in a peaceable manner even while another occupied the premises.[36] Thus, in *Mercil,* the Minnesota Supreme Court adopted the common law majority rule allowing a landlord to reenter the premises when he was legally entitled to possession and his reentry was peaceable.[37] The *Mercil* rule was reaffirmed in *Lobdell v. Keene*[38] and was followed until *Berg.*[39] The *Berg* court overruled *Mercil* and adopted the minority rule requiring landlords to use judicial means to dispossess tenants.[40] In noting that

35. The plaintiff-owner entered on and cultivated the land in the spring of 1894. Although the defendant, who had previously lived on and worked the land, was no longer occupying it, one of his sons was living there. The son announced that the plaintiff was forbidden to work the land, but neither attempted to cultivate it himself, nor made any further objection to plaintiff's presence. In the fall, defendant and two of his sons took possession of the grain cultivated by the plaintiff. The plaintiff commenced an action in claim and delivery for the grain. *Id.* at 417-18, 69 N.W. at 219. The court does not mention any possible adverse possession claim by the defendant.

36. *Id.* at 418, 69 N.W. at 219.

37. *See* note 25 *supra* and accompanying text. For a discussion of the types of liability a landlord may incur in unlawfully dispossessing a tenant, see notes 18-24 *supra* and accompanying text.

38. 85 Minn. 90, 88 N.W. 426 (1901). In *Lobdell,* the defendant landlord restrained the tenant's son while the defendant's father took possession of the leased premises. The defendant then joined his father in the building. When the tenant tried to enter, the defendant shot him. *Id.* at 93-94, 88 N.W. at 426-27. In the resulting damage action for assault and battery, the court reaffirmed the *Mercil* rule that a landlord may enter peaceably if he is entitled to possession, but found that the defendant neither was entitled to possession nor entered peaceably. *Id.* at 96-97, 88 N.W. at 428. Since the reentry in *Mercil* was clearly peaceful and the reentry in *Lobdell* was clearly forcible, neither case required the court to make a fine distinction between a peaceable and a forcible entry.

39. Prior to *Berg,* the Minnesota Supreme Court decided several other cases in addition to *Lobdell* that involved the repossession of premises by landlords. The decisions, however, were based on the question of the landlord's right to possession rather than on the manner of reentering. *See, e.g.,* Keller v. Henvit, 219 Minn. 580, 584-85, 18 N.W.2d 544, 546-47 (1945); State v. Brown, 203 Minn. 505, 506, 282 N.W. 136, 137 (1938).

40. *See* 264 N.W.2d at 151. Before adopting the minority rule, the court analyzed the facts in *Berg* under the common law rule and concluded that Wiley's reentry was forcible and therefore unlawful. The court acknowledged that no actual violence resulted from Wiley's repossession but noted that the potential for violence existed. In support of its finding that the reentry was forcible, the court cited Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Ct. Civ. App. 1968). In *Gulf Oil,* a case with facts similar to those in *Berg,* the Texas court found that a reentry made by picking the locks in the tenant's absence, without his knowledge and without notification, was forcible. *Id.* at 265; *see* 264 N.W.2d at 150.

The findings that the reentries in *Berg* and *Gulf Oil* were forcible cannot be defended logically unless "peaceable" and "forcible" are redefined to mean entries made pursuant to judicial process and those not made pursuant to judicial process, respectively. Neither court, however, expressly adopted these definitions. The result

a growing minority of states no longer permit landlords to use self-help, the court observed that "there is no cause to sanction such potentially disruptive self-help where adequate and speedy means are provided for removing a tenant peacefully through judicial process."[41]

In reaching its result, the Minnesota court recognized a policy of disfavoring the types of self-help that may lead to breaches of the peace.[42] This policy, which underlies both Minnesota case law and statutes, is especially evident in the forcible entry and unlawful detainer statute;[43] early Minnesota cases indicated that such a statute is intended "to prevent the acquisition of claimed rights by force and violence"[44] and "to prevent parties from taking the law into their own hands."[45] Under the statute, possession can be restored to a dispossessed person in as few as three to ten days after a complaint is filed.[46] The availability of such a remedy obviates the need for self-help repossession.

The court found further evidence of the policy in section 557.08 of the Minnesota Statutes, which, in certain cases, permits treble damages to be awarded to persons forcibly evicted. Three statutes adopted in 1975 also reflect the policy in that they create a summary repossession procedure for residential tenants who are unlawfully removed,[47] authorize treble damages if a landlord interrupts utility services to a residential tenant,[48] and make the intentional interruption of utilities or the intentional and unlawful ouster of a tenant a misdemeanor.[49]

The rule adopted in *Berg*, as stated by the Minnesota court,[50] contains a limiting factor: If the tenant has abandoned or voluntarily surrendered the premises, the rule does not apply.[51] Obviously, in

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in Texas, as noted in *Berg*, is that *Gulf Oil* "left open the possibility that self-help *may* be available in that state to dispossess a tenant in some *undefined circumstances* which *may* be found peaceable." 264 N.W.2d at 150 (emphasis added). A similar result could have followed in Minnesota if the *Berg* court had not gone beyond its initial holding that Wiley's reentry was forcible and adopted the minority rule prohibiting all self-help evictions, whether peaceable or forcible.

41. 264 N.W.2d at 151.

42. *Id.* at 149-50.

43. MINN. STAT. § 566.01-.17 (1978).

44. Strand v. Hand, 178 Minn. 460, 463, 227 N.W. 656, 657 (1929).

45. Mutual Trust Life Ins. Co. v. Berg, 187 Minn. 503, 505, 246 N.W. 9, 10, (1932).

46. MINN. STAT. § 566.05 (1978).

47. *Id.* § 556.175.

48. *Id.* § 504.26.

49. *Id.* § 504.25.

50. *See* 264 N.W2d at 151.

51. *Id.*

cases of abandonment or surrender,[52] a landlord should not be required to go to court to repossess premises that the former tenant no longer claims. In such circumstances, the landlord's reentry will not thwart the policy of discouraging self-help and the resulting violence.

Although the *Berg* court referred only to written leases,[53] the dominant objective of discouraging self-help—avoiding possible breaches of the peace—would be advanced by a proscription of self-help in oral leases as well. It seems certain, in light of the rationale underlying a prohibition of self-help, that the court did not intend such a limitation;[54] landlords would be well advised, therefore, to avoid using self-help regardless of whether the lease is oral or written.

Because *Berg* involved a commercial tenant, its application to residential tenants may be questioned. No policy reasons exist, however, for refusing to give residential tenants the protection of the *Berg* rule. Several policy considerations suggest instead that *Berg* should be extended to residential tenants. First, extending the rule would further the policy of discouraging violence; self-help repossession is more likely to lead to violence in a residential setting than in a commercial setting.[55] Second, in certain circumstances, Minnesota law currently provides greater protection to residential tenants than to commercial tenants;[56] restricting *Berg* to commercial tenants would be inconsistent with this policy. Furthermore, no other jurisdiction that follows the rule espoused in *Berg* applies it exclusively to commercial tenants.[57] It is thus probable that the *Berg* rule will be ex-

52. In subsequent self-help reentry cases, counsel for defendant landlords are likely to argue for broader definitions of abandonment and surrender to avoid the application of *Berg*. It is unlikely, however, that such definitions will be adopted in light of the policies underlying *Berg*.

53. 264 N.W.2d at 151.

54. Further, the common law rule made no distinction between tenants holding under oral leases and those holding under written leases. *See, e.g.*, Lobdell v. Keene, 85 Minn. 90, 95-96, 88 N.W. 426, 428 (1901).

55. Both emotional and practical considerations suggest that being dispossessed of one's residence is more personally threatening than losing possession of commercial property and is thus more likely to result in violence. One who is removed from his home not only suffers the psychological loss of his personal dwelling but also may have great difficulty satisfying his immediate need for shelter. A violent response by the tenant is therefore much more likely in a residential dispossession than in a commercial dispossession, where provisions for basic human needs are generally not threatened.

56. The following Minnesota statutes apply exclusively to residential tenants: MINN. STAT. § 566.175 (1978) (*see* text accompanying note 47 *supra*); *id.* § 504.25 (1978) (*see* text accompanying note 49 *supra*); *id.* § 504.26 (1978) (*see* text accompanying note 48 *supra*); *id.* § 504.18 (1978) (statutory covenants of habitability); *id.* § 504.20 (security deposit statute); *id.* § 504.22 (disclosure legislation); *id.* § 504.24 (property abandonment provision); and *id.* §§ 566.18-.33 (substandard housing statute).

57. In states that have, by judicial decision, adopted a rule disfavoring self-help,

tended to give residential tenants who are dispossessed by self-help a damage action against their landlords.

Damage actions against landlords, however, may not be effective in deterring self-help in residential settings. If the tenant is a commercial one, the landlord's liability for actual damages could be substantial because the tenant's lost profits are recoverable.[58] Since a residential tenant's actual damages, on the other hand, may be insignificant, the threat of liability would be less likely to discourage landlords from using self-help. The holding in *Berg* that self-help repossessions are unlawful,[59] however, makes other statutory penalties applicable.[60] These penalties, combined with the availability of punitive damages in appropriate cases,[61] will ensure that residential landlords comply with *Berg*.[62]

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the courts have not distinguished between commercial and residential tenants. In states that have statutes prohibiting self-help repossession of residential property, self-help in commercial settings may still be allowed. For example, N.J. STAT. ANN. § 2A:39-1 (West Supp. 1978) prohibits any entry not made pursuant to legal process into solely residential property. Self-help reentries are therefore presumably allowed if the property is not residential. *See* Zankman v. Tireno Towers, 121 N.J. Super. 346, 348-49, 297 A.2d 23, 24-25 (Bergen County Dist. Ct. 1972). *See also* Tanella v. Rettagliata, 120 N.J. Super. 400, 410-11, 294 A.2d 431, 436-37 (Bergen County Dist. Ct. 1972).

58. In *Berg*, lost profits in the amount of $31,000 were awarded. 264 N.W.2d at 148.

59. The court held that, "subsequent to their decision in this case, the *only lawful means* to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to judicial process." *Id.* at 151 (emphasis added).

60. MINN. STAT. § 566.175 (1978) allows tenants who are unlawfully removed or excluded from lands or tenements to recover possession. MINN. STAT. § 504.25 (1978) makes it a misdemeanor to unlawfully and intentionally remove or exclude a tenant from lands or tenements.

61. The Minnesota Supreme Court has affirmed awards of punitive damages to unlawfully evicted tenants. *See* Sweeney v. Meyers, 199 Minn. 21, 24, 270 N.W. 906, 907 (1937); Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931). Punitive damages may be awarded in Minnesota if the following conditions are met:

1. The party must be entitled to actual damages before punitive damages will be awarded. Erickson v. Pomerank, 66 Minn. 376, 377, 69 N.W. 39, 39 (1896).

2. The action must be in tort, not in contract. Beaulieu v. Great N. Ry. Co., 103 Minn. 47, 53, 114 N.W. 353, 355 (1907).

3. The wrongful act must have been done willfully, wantonly and maliciously. Mere negligence is not enough. As used here, malice means only the willful violation of a known right; spitefulness is immaterial. Johnson v. Radde, 293 Minn. 409, 410, 196 N.W.2d 478, 480 (1972); Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 528-29, 151 N.W.2d 422, 427-28 (1967).

62. One might suggest that MINN. STAT. § 557.08 (1978), which authorizes treble damages for forcible evictions, should be applied to all self-help eviction cases in order to encourage compliance with *Berg*. Past judicial interpretations of the statute limit its application to cases that, in the judgment of the trial court, involve unusual force

Berg also has the effect of invalidating lease clauses that confer upon the landlord a right of reentry in case of breach. In *Berg*, the court did not specifically address the validity of the express reentry clause contained in the lease.[63] But in holding that a landlord may *never* use self-help against a tenant claiming possession, the court must first have implicitly concluded that a right of reentry clause has no binding effect on the parties. Although thus invalidated by *Berg*, reentry clauses may continue to be written into leases. If a tenant is unaware that a reentry clause included in his lease is unenforceable, the clause may either deter him from challenging a self-help eviction by the landlord, or cause him to move if the landlord threatens a self-help eviction. Hence, to ensure that the effectiveness of the *Berg* rule is not diminished by any *in terrorem* effects of reentry clauses, the court or the legislature should specifically prohibit the inclusion of such clauses in leases.

A further implication of the rule adopted in *Berg* is that tenants will have the opportunity to present any defenses to their eviction at the required judicial proceeding.[64] Formerly, tenants evicted through self-help had no opportunity to present defenses until after the eviction,[65] and then only by initiating an action against the landlord. *Berg*'s implicit modification of this rule is especially significant because recent statutes and court decisions have expanded the range of

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that "tend[s] to bring about a breach of the peace." Poppen v. Wadleigh, 235 Minn. 400, 407, 51 N.W.2d 75, 79 (1952) (quoting Fults v. Munro, 202 N.Y. 34, 42, 95 N.E. 23, 26 (1911)). *See* Behrendt v. Rassmussen, 234 Minn. 97, 101, 47 N.W.2d 779, 782 (1951). In view of the availability of compensatory and punitive damages and the statutory penalties that can be imposed for unlawful evictions, *see* note 60 *supra*, expansion of the treble damages remedy to all self-help evictions appears unnecessary.

Although the trial court in *Berg* found Wiley's reentry to be forcible, 264 N.W.2d at 149, Berg's motion for treble damages under MINN. STAT. § 557.08 (1978) was denied. Appellants' Brief, app. at A-43. The Minnesota Supreme Court implicitly used two different definitions of "forcible" in affirming this result. One was the definition applied to the common law right of reentry and was equivalent to entry not pursuant to judicial process. *See* note 40 *supra*. The other definition, applied to MINN. STAT. § 557.08 (1978), involved the concept of actual or unusual force. The court's inconsistent use of the term "forcible" might have led to inconsistent results in subsequent cases if the court had confined its analysis to the common law rule rather than adopting the minority rule.

63. *See* note 2 *supra*.

64. MINN. STAT. § 566.07 (1978) provides in part that the defendant in an unlawful detainer proceeding may answer the complaint with "all matters in excuse, justification, or avoidance of the allegations thereof."

65. *See* Edwards v. C.N. Inv. Co., 27 Ohio Misc. 57, 61, 272 N.E.2d 652, 655 (Shaker Heights Mun. Ct. 1971): "Plaintiff, herein may have had some defense to an action in forcible entry and detainer; on the other hand, he may have had none. But this can never be determined inasmuch as he was peremptorily deprived of his right to resort to the processes of the courts."

defenses to unlawful detainer proceedings. Since 1970, retaliatory eviction,[66] failure to comply with statutory disclosure requirements,[67] and breach of the covenants of habitability,[68] have been recognized as valid defenses for residential tenants.

Landlords who have used self-help evictions are likely to be dissatisfied with *Berg*. They will argue that the required judicial proceedings will cause unnecessary delays in removing tenants and will result in the loss of rental income.[69] In practice, however, *Berg* may not impose significant burdens on landlords. The required proceedings are summary and can result in restitution of the premises within three to ten days after the complaint is filed.[70] Additional delays may occur, of course, but delays of more than several days require the defendant to post bond to cover the rent that will accrue as well as the costs of the action.[71] Another aspect of the delay problem is the possibility that tenants may damage premises before repossession. The court in *Berg* foresaw this and noted that several remedies are available to the landlord, including law enforcement protection, temporary restraining orders under Rule 65 of the Minnesota Rules of

66. Subdivision 2 of the retaliatory eviction statute, MINN. STAT. § 566.03 (1978), specifies that retaliatory eviction is a defense to an action for recovery of premises. *See* Parkin v. Fitzgerald, 307 Minn. 423, 426-27, 240 N.W.2d 828, 830-31 (1976).

67. The disclosure statute, MINN. STAT. § 504.22 (1978), requires that certain information about the management and ownership of the premises be disclosed to the tenant. Subdivision 5 provides that no action to recover the premises can be maintained unless the information has been disclosed or was otherwise known to the tenant.

68. The statutory covenants of habitability are found in MINN. STAT. § 504.18 (1978). Breach of the covenants was held to be a valid defense to unlawful detainer proceedings in Fritz v. Warthen, 298 Minn. 54, 59, 213 N.W.2d 339, 342 (1973).

69. They may also argue that they are now required to incur court expenses to regain possession. The forcible entry statute recognizes this problem and provides that the person in whose favor judgment is given is entitled to court costs. MINN. STAT. § 566.09 (1978). It is probable, however, that the landlord will not recover court costs, especially if the unlawful detainer action is brought for nonpayment of rent.

70. *Id.* § 566.01-.17.

71. If personal service of the defendant cannot be made, an additional delay may occur. *See id.* § 566.06. At trial, adjournment for no more than six days beyond the trial date may be had without the consent of the parties; adjournment for more than six days may be had under specified circumstances if the defendant gives bond equaling rent, costs, and damages. *Id.* § 566.08. Upon judgment for the plaintiff, the writ of restitution against the defendant may be stayed for no more than seven days upon a showing of substantial hardship, except that no stay may extend later than three days prior to the date the rent is next due. *See id.* § 566.09. The writ of restitution will also be stayed upon appeal by the defendant, provided bond is posted. *See id.* § 566.12. If the appellant is a holdover tenant, the writ may be issued notwithstanding the appeal, provided the plaintiff gives bond equaling costs and damages. *See id.* § 566.11-.12.

Civil Procedure,[72] injunctions against waste, and damage actions.[73]

Berg replaces the common law rule previously followed in Minnesota with the more modern doctrine that prohibits self-help repossessions unless the tenant has surrendered or abandoned possession. The inconveniences to landlords that may result from this new rule are outweighed by its benefits. Violent repossessions will occur less frequently, and tenants will be assured of a fair hearing. The decision places Minnesota among the growing number of states that recognize that "[i]n our modern society, with the availability of prompt and sufficient legal remedies . . . , there is no place and no need for self-help against a tenant in claimed lawful possession of leased premises."[74]

72. The authors of Rule 65 specifically foresaw circumstances in which temporary restraining orders would be issued without prior notice to the restrained party in order to prevent that party from "acting in a manner which [would] render moot the order sought." 3 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 102 (1970).

73. Berg v. Wiley, 264 N.W.2d at 151 & n.8 (Minn. 1978).

74. *Id.* at 151.