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Landlord-Tenant Law—Abolition of Self-Help Repossession—Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978)

Landlord-Tenant Law—ABOLITION OF SELF-HELP REPOSSESSION—*Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978).

At common law, landlords acting under a claim of right were permitted to retake held-over premises by self-help, as long as the retaking of the property was accomplished without the use of force or violence.[1] In recent years, however, a growing number of jurisdictions have recognized that the mere prohibition of the use of force or violence in the retaking of property is not adequate to prevent breaches of the peace during the eviction process and, therefore, have abandoned the common law rule.[2] In *Berg v. Wiley*[3] the Minnesota Supreme Court joined the jurisdictions that have rejected the common law rule, holding that landlords may no longer resort to self-help but must make use of the judicial process to remove hold-over tenants from the landlord's property.[4]

In *Berg* the plaintiff Kathleen Berg leased, for use as a restaurant, a building and property owned by the defendant Rodney Wiley.[5] The terms of the lease prohibited Berg from altering the structure of the building without Wiley's consent and, additionally, required her to operate the restaurant in a "lawful and prudent manner."[6] The lease afforded Wiley, as landlord, a right of reentry in the event that the lessee did not meet these conditions.[7] In June of 1973, Wiley notified Berg that

1. At early common law, a landlord could dispossess a tenant with force and violence. *See* Mercil v. Broulette, 66 Minn. 416, 418, 69 N.W. 218, 219 (1896); 2 J. TAYLOR, LANDLORD & TENANT § 786 (8th ed. 1887).

2. *See* Kassan v. Stout, 9 Cal. 3d 39, 43-44, 507 P.2d 87, 89, 106 Cal. Rptr. 783, 785-86 (1973); Mason v. Hawes, 52 Conn. 12, 16 (1884); Malcolm v. Little, 295 A.2d 711, 713-14 (Del. 1972); Adelhelm v. Dougherty, 129 Fla. 680, 684, 176 So. 775, 777 (1937); Entelman v. Hagood, 95 Ga. 390, 22 S.E. 545 (1895); Phelps v. Randolph, 147 Ill. 335, 341, 35 N.E. 243, 245 (1893); Judy v. Citizen, 101 Ind. 18, 19-21 (1885); Boniel v. Block, 44 La. Ann. 514, 10 So. 869 (1892); Bass v. Boetel & Co., 191 Neb. 733, 737-39, 217 N.W.2d 804, 807 (1974); Mosseller v. Deaver, 106 N.C. 494, 11 S.E. 529 (1890); Edwards v. C.N. Inv. Co., 27 Ohio Misc. 57, 60-62 (Mun. Ct. 1971); Price v. Osborne, 24 Tenn. App. 525, 527, 147 S.W.2d 412-13 (1940); Chrone v. Gonzales, 215 S.W. 368 (Tex. Civ. App. 1919); Peterson v. Platt, 16 Utah 2d 330, 400 P.2d 507 (1965); Griffin v. Martel, 77 Vt. 19, 25, 58 A.2d 788, 789 (1904); Nelson v. Swanson, 177 Wash. 187, 191, 31 P.2d 521, 522 (1934).

3. 264 N.W.2d 145 (Minn. 1978). The same parties had been before the supreme court in an earlier case in which the court held that a tenant could not bring an unlawful detainer action against his landlord. *See* Berg v. Wiley, 303 Minn. 247, 250-51, 226 N.W.2d 904, 906-07 (1975). The effect of this decision was negated by Act of June 4, 1975, ch. 410, 1975 Minn. Laws 1373 (codified at MINN. STAT. § 566.175 (1978)), which provides a summary means for tenant recovery of premises wrongfully denied.

4. *See* 264 N.W.2d at 151-52.

5. *Id.* at 147.

6. The lease stated:

> 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.

she had violated the lease by making unauthorized changes in the building's structure and by operating the restaurant in violation of state health regulations.[8] By letter, Wiley gave her two weeks to rectify the violations or be evicted.[9] At the expiration of the two week period, Berg closed the restaurant for remodeling.[10] After determining that Berg had not made the necessary repairs, Wiley, with the assistance of a police officer and a locksmith, retook possession of the property by changing the restaurant's locks.[11]

In response to Wiley's entry, Berg initiated an action based on wrongful eviction, breach of contract, and tort.[12] The trial court ruled, as a matter of law, that Wiley's entry was forcible both under the common law rule and the modern doctrine of forcible entry.[13] The doctrine of forcible entry requires that a landlord resort to the remedy at law to recover the premises when a tenant refuses to surrender the property. On appeal, the supreme court adopted this rule and found that the lockout was wrongful because Wiley failed to resort to a judicial remedy.[14] The court ruled that application of the modern doctrine against Wiley was fair because, even under the common law, the lockout would have been nonpeaceable.[15]

> Item # 6. The Lessee agrees to operate the restaurant in a lawful and prudent manner during the lease period.
> 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. In any event such act will not relieve Lessee from liability for payment [of] the rental herein provided or from the conditions or obligations of this lease.

Id. at 147 n.1.

7. *See* note 6 *supra.*

8. *See* 264 N.W.2d at 147. After an inspection on June 13, 1973, the Department of Health ordered that certain changes to the premises be made to comply with the state health code. *See id.*

9. *See id.* The first *Berg* case explained that the improvements included placing quarry tile on the kitchen floor and ceramic tile on the kitchen walls, bathrooms, and possibly the front and rear entries, as well as installing a heater booster and a drain around the dishwasher. *See* 303 Minn. at 249 n.6, 226 N.W.2d at 906 n.6.

10. 264 N.W.2d at 147.

11. *Id.* at 148.

12. *See id.*

13. *See* Appellants' Brief and Appendix at A-47 to -49 (setting forth the trial court's memorandum). The jury awarded Berg $31,000 for lost profits and an additional $3,540 for loss of chattels caused by the lockout. 264 N.W.2d at 148.

14. *See* 264 N.W.2d at 151-52.

15. *See id.* at 150-51. The Texas case of Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Civ. App. 1968), was cited as authority for the conclusion that Wiley's entry was not peaceable under the common law rule. 264 N.W.2d at 150. The court stated that Texas continues to embrace the common law rule. *Id.* The court, however, subsequently stated that sixteen states had adopted a new, modern rule that any self-help entry was unlawful per se and cited Texas as an example for that statement. *See id.* at 150-51 & 151 n.6.

Current Minnesota law provides that: "No person shall make any entry into lands or tenements except in cases where his entry is allowed by law, and in such cases he shall not enter by force, but only in a peaceable manner."[16] Prior interpretations of this statute, commonly referred to as the Minnesota Forcible Entry and Unlawful Detainer Statute,[17] have allowed a party entitled to possession to reenter land peaceably, without resort to judicial process, although another party still possessed the land.[18] The court recognized peaceable self-help entries into land possessed by another party in at least two decisions. In the 1896 decision of *Mercil v. Broulette,*[19] the court found that the plaintiff peaceably entered the land of the defendant although the defendant occupied the land and asked plaintiff to leave the premises.[20] Eighteen years later, in *Mastin v. May,*[21] the defendant entered the property of the plaintiff pending negotiations for the purchase of the land.[22] Al-

16. MINN. STAT. § 566.01 (1978).

17. In Minnesota the remedy of forcible entry and unlawful detainer has two purposes: first, to prevent those who wish to contest the adverse possession of property from vindicating their interests by use of force or violence, *see, e.g.,* Keller v. Henvit, 219 Minn. 580, 585, 18 N.W.2d 544, 547 (1945) (statute is "intended to prevent parties from taking the law into their own hands"); Mutual Trust Life Ins. Co. v. Berg, 187 Minn. 503, 505, 246 N.W. 9, 10 (1932) (same); Lobdell v. Keene, 85 Minn. 90, 101, 88 N.W. 426, 430 (1901) (statute designed to prevent parties from "redressing their own wrongs by entering into possession in a violent and forcible manner"), and second, to give a timely remedy to those property owners whose right to present possession has been wrongfully denied. *See* O'Neill v. Jones, 72 Minn. 446, 446, 75 N.W. 701, 701 (1898) (purpose of statute "is to give a speedy remedy to those whose possession has been invaded"). To achieve these purposes, the forcible entry and unlawful detainer process has been construed to be summary in nature. *See, e.g.,* Goldberg v. Fields, 247 Minn. 213, 215-16, 76 N.W.2d 668, 669 (1956) ("The remedy which is provided by the unlawful detainer statute is a summary one, and the mode of proceeding is the essence of it."); Pushor v. Dale, 242 Minn. 564, 568, 66 N.W.2d 11, 14 (1954) ("Unlawful detainer proceedings are summary in their nature."); Pushor v. Dale, 240 Minn. 179, 180, 60 N.W.2d 128, 128 (1953) (same). Consequently, the scope of the process is the determination of the right to present possession, not an adjudication of title or of the ultimate rights of the parties. *See, e.g.,* Goldberg v. Fields, 247 Minn. at 215, 76 N.W.2d at 669 ("The judgment in such an action merely determines the right to the present possession of the property."); Pushor v. Dale, 242 Minn. at 568-69, 66 N.W.2d at 14 (such judgments are not "a bar in subsequent actions as to questions of title or other equitable defenses"). To preserve the statute's summary nature, defenses and counterclaims have been severely restricted. *See* Miller v. Benner, 293 Minn. 400, 402, 196 N.W.2d 293, 294 (1972) (oral agreement allowing defendant to retain possession of property not available in unlawful detainer action); Keller v. Henvit, 219 Minn. at 585, 18 N.W.2d at 547 (counterclaim not permitted); William Weisman Holding Co. v. Miller, 152 Minn. 330, 332, 188 N.W. 732, 733 (1922) (same).

18. *See* Mastin v. May, 127 Minn. 93, 95, 148 N.W. 893, 894 (1914); Lobdell v. Keene, 85 Minn. 90, 96-97, 88 N.W. 426, 432 (1901); Mercil v. Broulette, 66 Minn. 416, 418, 69 N.W. 218, 219-20 (1896).

19. 66 Minn. 416, 69 N.W. 218 (1896).

20. *Id.* at 417-18, 69 N.W. at 219.

21. 127 Minn. 93, 148 N.W. 893 (1914).

22. *Id.* at 94, 148 N.W. at 893-94.

though the defendant offered no evidence that he had received consent to enter the property, the court found that he had done so peaceably.[23] In both cases no force or violence was used to enter the property, nor was the imminent threat of force or violence apparent.[24]

Similarly, in *Berg*, Wiley had retaken possession of the restaurant under a claim of right and without threat of force or violence.[25] A law enforcement official and a locksmith accompanied Wiley when he reentered.[26] Based upon *Mercil* and *Mastin*, Wiley arguably acted lawfully,[27] because under the common law, a determination of forcible entry depended not upon what might have resulted, but upon what actually occurred.[28] Although reentry at common law required an immediate threat of force or violence to be unlawful,[29] the *Berg* court adopted a more restrictive interpretation of forcible reentry, holding that prevention of violence due solely to the fortuitous absence of the tenant from the premises did not meet the "without force or violence" requirement

23. *Id.* at 94-95, 148 N.W. at 894.

24. *See id.*; 66 Minn. at 418, 69 N.W. at 219.

25. *See* 264 N.W.2d at 148. When the trial court found Wiley's entry to be forcible as a matter of law, resolution of Wiley's right to possession became unnecessary, even if Berg had breached the lease. *See id.* at 149.

26. *Id.* at 148. Berg was not present when Wiley entered the premises. *Id.* at 150. There appears to be some authority for the proposition that the force necessary to constitute a forcible entry need not be directed against the tenant but may be directed against the tenant's property. *See* Baldwin v. Fisher, 110 Minn. 186, 191, 124 N.W. 1094, 1095 (1910) (entry into land of plaintiff and destruction of crops violated spirit of unlawful detainer statute). The mere changing of the locks, however, prior to *Berg*, would appear not to constitute a forcible entry. *See* Mercil v. Broulette, 66 Minn. 416, 418, 69 N.W. 218, 219 (1896) ("it is not unlawful for [a person repossessing land by self-help] to resort to . . . means, short of employment of force, as will render further occupation by the other impracticable").

27. *See* text accompanying notes 19-24 *supra*.

28. *Compare* Mercil v. Broulette, 66 Minn. 416, 69 N.W. 218 (1896) (plaintiff's servant entered land and planted crops despite warnings from the defendant, no violence erupted, no forcible entry found) *with* Lobdell v. Keene, 85 Minn. 90, 88 N.W. 426 (1901) (defendant entered premises with force and violence, forcible entry found).

29. Although the supreme court has found particular entries into property to be forcible, *see* Lobdell v. Keene, 85 Minn. 90, 88 N.W. 426 (1901), the court has never defined a forcible entry under the forcible entry statutes. The court has, however, given some indication as to what will constitute an eviction in a "forcible manner" for purposes of MINN. STAT. § 557.08 (1978). In Poppen v. Wadleigh, 235 Minn. 400, 51 N.W.2d 75 (1952), the court recited with approval a New York definition:

> The force used must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession.

Id. at 407, 51 N.W.2d at 79 (quoting Fults v. Munro, 202 N.Y. 34, 42, 95 N.E. 23, 26 (1911)).

of the statute.[30] Thus, the court concluded that Wiley had reentered forcibly and, under the common law rule, wrongfully.[31]

In addition to deciding that the reentry had been wrongful at common law, the court held that, in the future, a landlord must resort to judicial process as the only lawful means of dispossessing a tenant who neither abandoned nor surrendered the premises.[32] In reaching this conclusion, the court joined sixteen other jurisdictions that have adopted the modern rule.[33] First rearing its head in California, the modern rule has received growing acceptance in recent years.[34] Courts adopting this rule recognize the potential for violence in the self-help eviction process[35] and favor the undisruptive, speedy relief inherent in the summary judicial eviction procedure.[36]

The modern rule includes varying approaches. Some jurisdictions hold any self-help entry to be forcible in the absence of a surrender or abandonment of the premises by the tenant.[37] Other jurisdictions, however, leave open the possibility that circumstances may exist in which self-help entry may be deemed peaceable and resort to judicial process unnecessary.[38]

With the adoption of the more restrictive form of the modern rule by the Minnesota court,[39] any entry into the premises other than by judicial means when the tenant has not abandoned or surrendered the premises will be forcible as a matter of law.[40] The "judicial process" in Minnesota will mean that a landlord's only remedy will be to resort to an unlawful detainer action[41] or to bring a suit in ejectment.[42] The remedy of unlaw-

30. *See* 264 N.W.2d at 150.

31. *See id.* at 151-52.

32. *See id.* at 151.

33. *See* note 2 *supra* (listing the sixteen states that have adopted the modern rule).

34. For an opinion tracing the development of the modern doctrine, see Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961).

35. *See, e.g.*, 264 N.W.2d at 151.

36. *See, e.g.*, Jordan v. Talbot, 55 Cal. 2d 597, 561, 361 P.2d 20, 24, 12 Cal. Rptr. 488, 492 (1961) ("This remedy [of unlawful detainer] is a complete answer to any claim that self-help is necessary."); Adelhelm v. Dougherty, 129 Fla. 680, 682, 176 So. 775, 777 (1937) ("The law provides an adequate and speedy remedy for acquisition of premises which are wrongfully held by another . . . ."); Comment, *Dispossession of a Tenant Without Judicial Process*, 76 DICK. L. REV. 215, 229-30 (1972).

37. *See, e.g.*, Bass v. Boetel & Co., 191 Neb. 733, 735-36, 217 N.W.2d 804, 807 (1974) (self-help contrary to public policy); Edwards v. C.N. Inv. Co., 27 Ohio Misc. 57, 59-60, 272 N.E.2d 652, 654-55 (1971) (resort must be to legal remedies).

38. *See, e.g.*, Gulf Oil Corp. v. Smithey, 426 S.W.2d 262, 265 (Tex. Civ. App. 1968) ("The provisions in a lease giving the lessor the right to re-enter upon default of the tenant . . . [are] recognized as valid, *provided such rights are exercised peaceably and without force or violence*." (emphasis in original)).

39. *See* note 32 *supra* and accompanying text.

40. *See* 264 N.W.2d at 151-52.

41. *See generally* MINN. STAT. §§ 566.01-.33 (1978).

42. It is the general rule in Minnesota that for the plaintiff to prevail in an ejectment

ful detainer may permit repossession within four days.[43] If a tenant has possessed the premises for three years, however, he may demand a determination on the merits of the right to possession,[44] and thus could delay recovery of the premises for a substantial period of time. The *Berg* court concluded that the delay in obtaining a remedy under the statute posed no threat to the property owner.[45] When more immediate action than that provided for in Minnesota's unlawful detainer statutes is necessary, the landlord may seek a temporary restraining order.[46]

Today, Minnesota landlords must utilize the judicial process to recover possession of their property.[47] Adoption of the modern rule conforms to the purposes of the Minnesota forcible entry and unlawful detainer process.[48] Prohibiting landlords from using any self-help remedies will prevent breaches of the peace that result from attempts by a landlord to recover possession. The summary nature of the forcible entry and unlawful detainer proceeding constitutes an additional justification for adoption of this rule. Finally, adoption of the modern rule by the *Berg* court represents a balancing of the rights of landlord, tenant, and community. In *Berg* the court stated that the potential violence was greatest when the parties were judges of their own rights.[49] Seen in perspective, the adoption of the modern rule may be the inevitable result of a social policy that discourages the use of force.

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proceeding, both a present or immediate right to possession and a legal estate in the property sought to be recovered must be established. Levine v. Twin City Red Barn No. 2, Inc., 296 Minn. 260, 263, 207 N.W.2d 739, 741 (1973); *see, e.g.*, Post v. Sumner, 137 Minn. 201, 204, 163 N.W. 161, 162 (1917) (actual possession based upon claim of right in property is sufficient); Berndt v. Berndt, 127 Minn. 238, 240-41, 149 N.W. 287, 288 (1914) (ejectment action may be maintained by one with legal right to possession); Norton v. Frederick, 107 Minn. 36, 42, 119 N.W. 492, 494 (1909) (claim based upon adverse possession; legal title and right to possession is all that need be shown). Because an ejectment proceeding is not summary in nature and is conducted in a manner similar to other civil actions, *see* MINN. STAT. § 559.07 (1978), and because the *Berg* court did not discuss ejectment, any further analysis of ejectment is outside the scope of this case note.

43. *See* MINN. STAT. § 566.05 (1978) (the summons may demand "the person against whom the complaint is made to appear . . . at a time which shall not be less than three, and not more than ten, days").

44. *See id.* § 566.04. Section 566.04 provides: "No restitution shall be made under this chapter of any lands . . . of which the party complained of . . . [has] been in quiet possession for three years . . . ." *Id.*

45. *See* 264 N.W.2d at 151 & n.8.

46. *See id.* at 151.

47. *See id.* at 151-52.

48. *See* note 17 *supra.*

49. *See* 264 N.W.2d at 149-50.