University of Arkansas at Little Rock Law Review

Volume 9 | Issue 4 Article 6

1986

Landlord-Tenant—Forcible Entry and Detainer - Statutory Prohibition of Landlord Self-Help Remedies

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LANDLORD-TENANT—FORCIBLE ENTRY AND DETAINER—STATUTORY PROHIBITION OF LANDLORD SELF-HELP REMEDIES. *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

Johnny and Mary Gorman entered into an agreement in November of 1984 to lease a residence in Jefferson County from Russell Ratliff. The Gormans subsequently defaulted by failing to make a rental payment in April of 1985. Ratliff orally notified the Gormans on several occasions that they should vacate. Ratliff prepared written notice dated April 22, 1985, giving the Gormans three days to vacate;[1] however, during the three day period, Ratliff entered the home while the Gormans were away and confiscated all of their personal property. Ratliff acted pursuant to specific lease provisions that gave him a lien on the Gormans' personal property in case of default. Ratliff stored these items, intending to sell them in thirty days to satisfy the lien created by provisions of the lease.[2]

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1. Record at 161, Gorman v. Ratliff, 289 Ark. 332, 712 S.W.2d 888 (1986) (No. 85-449). The record indicates that the Gormans never received this written notice, however, they indicated at trial that notice to vacate was received at some time in early April although it is unclear when that was. Record at 118. Notice was not at issue in the lawsuit, however, because the lease specifically provided that notice was not required before the landlord exercised the lien on the personal property.

2. Gorman v. Ratliff, 289 Ark. 332, 712 S.W.2d 888 (1986). The lease provided in relevant part:

> 10. Any violation of any provision of this lease by any of the lessees, or any person on the premises with the lessee's consent, or any failure to pay rent upon the date due, shall result, at the option of the lessor, in the immediate termination of this lease without notice of any kind, and lessor may thereupon enter said premises and take and retain possession thereof and exclude lessees therefrom.
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> 12. If lessees leave said premises unoccupied at any time while rent is due and unpaid, lessor may, if desired, take immediate possession thereof and exclude lessee therefrom, removing and storing at the expense of said lessees all property from contained therein.
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> 14. The lessor shall have the lien granted by law all baggage and other property of lessees for their rent, accomodation and services, and the lessees hereby grant to lessor a lien upon all personal property brought into said premises, regardless of any provisions of law or whether or not the apartment is furnished, and lessor may enforce said lien as provided by law or by removing said property therefrom and storing the same at the expense of the lessees. Said lien may be enforced whenever rent is due and unpaid and regardless of whether or not a three (3) day notice to pay rent or quit shall have been served, and enforcement of the lien shall not operate to waive any other rights of the lessor in unlawful detainer or otherwise. If rent is still due and unpaid thirty (30) days after the enforcement of said lien, then the lessor may sell any or all personal property taken possession of as herein provided, and may apply any monies received against the unpaid rent . . . .

Id. at 334-35, 712 S.W.2d at 889.

Central Arkansas Legal Services filed suit on behalf of the Gormans, initially claiming wrongful and constructive eviction and wrongful conversion of property. Ratliff counterclaimed, alleging that the Gormans' violation of the lease entitled him to enforce the lien on the personal property. The counterclaim alleged that Ratliff was also entitled to the delinquent rent, as well as moving, storing, and cleaning charges totalling $528.

The Gormans amended their complaint to allege that Ratliff's actions constituted forcible entry and detainer, which is prohibited by Arkansas law.[3] The Gormans further contended that the lease provisions authorizing Ratliff's actions were illegal, unconscionable, and in violation of public policy.

The Circuit Court of Jefferson County denied the Gormans' request for relief pendente lite in a preliminary hearing. The court ruled that the lease provisions gave Ratliff the right to peaceful repossession of the premises and a lien on the Gormans' belongings. Following a non-jury trial, the court found against the Gormans on every claim. The court concluded that the lease conformed to applicable Arkansas law, and awarded Ratliff the damages set out in his counterclaim.

The Gormans appealed, and on appeal the Arkansas Supreme Court reversed, holding that the provisions of the lease authorizing self-help remedies contravened the forcible entry and detainer statute and were invalid. The court remanded the case for a determination of the Gormans' damages under the damages provision of the forcible entry and detainer statute.[4] *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

The lack of coercive force in the early law of England[5]accounts for the presence of most violent kinds of self-help.[6] The belief that "might makes right" characterized the law prior to 1166,[7] and the best title to land was the possession by strong arm.[8] At a fairly early stage, however, the law substituted the requirements of resort to the legal process, and absolutely prohibited the use of force to avenge one's self.[9]

By the thirteenth century, the English law viewed self-help as "an

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3. ARK. STAT. ANN. §§ 34-1501 to -1512 (Supp. 1985).

4. ARK. STAT. ANN. § 34-1509 (Supp. 1985).

5. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 281 (5th ed. 2d impression 1973).

6. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 574 (2d ed. 1898) (reissued with new introduction, and bibliography 1968).

7. Comment, *Defects in the Current Forcible Entry and Detainer Laws of the United States and England*, 25 UCLA L. REV. 1067, 1068 (1978).

8. 1 L. PIKE, A HISTORY OF CRIME IN ENGLAND 249 (1873-76).

9. 4 F. POLLOCK & F. MAITLAND, *supra* note 6, at 574.

enemy of law, a contempt of the king and his court. . . ."[10] As an exception to the prohibition of self-help, thirteenth century law recognized the continued usefulness of distraint, the oldest form of self-help available to the landlord.[11] Distraint was accomplished through the process of distress, or the taking of a thing.[12] Non-payment of rent was the most important instance for which a distraint might be used.[13] Distraint was freely used in the thirteenth century and was extra-judicial in the sense that no order was required before goods could be seized.[14] The right to distraint, however, continued to be judicial in character by virtue of limiting rules.[15]

The Statute of Marlborough (1267) severely regulated unlawful uses of the practice of distraint.[16] The ultimate effect of the many regulations placed on the practice was to change this method of self-help into a regular legal process.[17] In addition, modern decisions in states continuing to recognize distraint substantially curtail this remedy.[18]

In *Bennett v. Taylor*[19] the Arkansas Supreme Court expressly held

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10. *Id.* The emphasis on the protection of the seisin of lands, chattels, incorporeal things, liberty of serfage, or the marital relationship explains this view. *Id.* "Seisin" as a term connotes peaceful possession, although it eventually came to mean something distinct from mere possession. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 87 (1962). In the medieval common law, concepts of ownership and possession merged into the concept of seisin. The term eventually came to mean a particular kind of possession: "possession under claim of a freehold estate therein." *Id.* at 87-88. The concern with protection of seisin was addressed through the assize of novel disseisin. *Id.* at 88-89. Instituted in 1166, this action gave the possessor of land legal protection. 3 W. HOLDSWORTH, *supra* note 5, at 583. The disseised party could bring this assize, even in the thirteenth century, and could obtain a limited right of re-entry within four or five days. *Id.* at 279, 583. The right to re-enter followed a judgment that the defendant had disseised the plaintiff. C. MOYNIHAN, *supra* at 89.

11. 2 F. POLLOCK & F. MAITLAND, *supra* note 6, at 576-77. According to Blackstone, distraint was "intended for the benefit of landlords" and involved distress, which "is the taking [of] a personal chattel out of the possession of the wrongdoer . . . to procure a satisfaction for the wrong committed." 3 W. BLACKSTONE, COMMENTARIES *6.

12. 2 F. POLLOCK & F. MAITLAND, *supra* note 6, at 575. The thing taken might also be referred to as a distress. 3 W. BLACKSTONE, COMMENTARIES *6.

13. 2 F. POLLOCK & F. MAITLAND, *supra* note 6 at 576. *See also* W. HOLDSWORTH, *supra* note 5, at 281.

14. 2 F. POLLOCK & F. MAITLAND, *supra* note 6, at 576. At some time prior to the thirteenth century, the landlord could not distrain until the court gave him that right. Even in the thirteenth century, rules placed certain items beyond his reach, and failure to follow the rules made him a disseisor. *Id.* at 577.

15. *Id.* at 576. For example, the landlord could not sell or use the distrained items, and he must be ready to return them upon payment of the delinquent rent. *Id.*

16. 3 W. HOLDSWORTH, *supra* note 5, at 282.

17. *Id.* at 283.

18. *See, e.g.*, Backer, *Pennsylvania Landlord Remedies: Collection of Rent and Recovery of Possession*, 89 DICK. L. REV. 53, 77 (1984).

19. 185 Ark. 794, 49 S.W.2d 608 (1932). In the absence of statute or caselaw, two forms of

that the law of Arkansas does not "recognize[] the harsh and oppressive remedies of the landlord's common-law right of distraint. . . ."[20] In *In re King Furniture City, Inc.*,[21] involving a bankruptcy and foreclosure proceeding, the district court acknowledged and followed the holding in *Bennett*.[22] The court in *In re King v. Furniture City, Inc.* held that a lease provision expressly creating a lien in the landlord over a tenant's property and expressly waiving the exemption statutes, could not be upheld as giving the landlord the remedy of distraint.[23]

Distraint has been retained statutorily in some states.[24] Statutory distraint has been characterized as "the sole surviving relic of the early common law's tolerance of self-help."[25] Other states have prohibited distraint by statute.[26] In at least one jurisdiction, the highest court of the state has held the statutorily prescribed process of distraint unconstitutional.[27]

In addition to the self-help remedy of distraint, the common law recognized the landlord's right to enter the property and regain possession peaceably.[28] The use of force in defense of self against forcible

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distraint would have been authorized under the common law adopted by Arkansas in its reception statute, ARK. STAT. ANN. § 1-101 (1976). The law prior to the fourth year of the reign of James I authorized two forms of distraint for rent: (1) rent service (a holding by fealty or homage, as well as certain rent) and (2) rent charge (a holding under a lease containing a clause reserving a right to distrain). It was not until the reign of George II that the distinction between the several kinds of rent was abolished, giving remedy by distress for all rents. *See* 2 BLACKSTONE, COMMENTARIES *41-42.

20. 185 Ark. at 797, 49 S.W.2d at 609 (1932).

21. 240 F. Supp. 453 (E.D. Ark. 1965).

22. *Id.* at 456 (citing Bennett v. Taylor, 185 Ark. 794, 49 S.W.2d 608 (1932)).

23. 240 F. Supp. at 456.

24. C. MOYNIHAN, *supra* note 10, 70 n.3. *See, e.g.*, PA. STAT. ANN. tit. 68, § 250-302 (Purdon 1984-85); N.J. STAT. ANN. § 2A: 33-1 to -23 (West 1952 & Cum. Supp. 1982-83) (the 1971 amendment exempted residential leases from distraint).

25. Callen v. Sherman's, Inc., 92 N.J. 114, 120, 455 A.2d 1102, 1105 (1983).

26. N.C. GEN. STAT. § 42-25.9(b) (Supp. 1985). North Carolina has prohibited landlord distraint/distress and thereby codified the pre-existing caselaw, which has prohibited it since 1800. Dalgeish v. Grandy, 1 N.C. (1 Tay.) 213, 215 (1800). North Carolina did give the landlord a statutory lien on the tenant's goods on the land. *See* N.C. GEN. STAT. § 44-2(a)(e) (repealed 1967).

27. Callen v. Sherman's, Inc., 92 N.J. 114, 455 A.2d 1102 (1983). The court in *Callen* interpreted the New Jersey statute and held that a statute authorizing padlocking and distraint is an unconstitutional deprivation of the tenant's right to due process. The statute did not require that the tenant be given notice or a hearing, before the lessor took possession. *Id.* at 132-33, 455 A.2d at 1111. *See also* Note, *Landlord and Tenant-Distraint-New Jersey Distress Act Held Unconstitutional for Failure to Meet Due Process Hearing and Notice Requirements*, 13 SETON HALL 845 (1983).

28. 3 W. HOLDSWORTH, *supra* note 5, at 279. Early cases decided in this country by the United States Supreme Court held that a landlord's right to re-enter as provided in the lease was waived by an act of distraint. The Court reasoned that the landlord recognized the continuing

resistance of the tenant was also justified.[29] Prior to and extending into the thirteenth century, a disseised party could bring the assize of novel disseisin, and when land was involved, re-enter within four or five days.[30] This summary process was followed by the forcible entry acts,[31] a series of acts passed in England between 1381 and 1623,[32] for the purpose of "prevent[ing] individuals from doing themselves right by force. . . ."[33] Three of these acts, taken together, comprise the origins of the forcible entry and detainer statutes adopted in most states in this country around the early nineteenth century.[34]

In nineteenth century America, lease terms gave the landlord the right to end possession when the tenant defaulted on rent.[35] The legislatures of the various states passed statutes giving the party entitled to

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validity of the lease and the resulting continued relationship of landlord/tenant; therefore, he was estopped from entering to regain possession. *See* 49 AM. JUR. 2D *Landlord/Tenant* § 1066 (1970) (citing Knickerbocker Life Insurance Co. v. Norton, 96 U.S. 234 (1877), and Dermott v. Wallach, 68 U.S. (1 Wall.) 61 (1863).

29. 3 W. HOLDSWORTH, *supra* note 5, at 279.

30. *See* 3 W. HOLDSWORTH, *supra* note 5, at 583; and *supra* note 10 and accompanying text.

31. *See* 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1369 (1981).

32. 18 HALSBURY'S STATUTES OF ENGLAND 405-06 (3d ed. 1970).

33. *See* Thorn v. Reed, 1 Ark. 480, 493 (1839).

34. *Id.* at 493. The earliest forcible entry act, adopted in England in 1381, made forcible entry without legal process a misdemeanor. Forcible Entry Act, 1381, 5 Rich. 2, ch. 7, *repealed by* Criminal Law Act, 1977, ch. 65 § 13(2). The Act provided:

> None from henceforth make any entry into any lands and tenements, but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in [peaceable] and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment.

13 HALSBURY'S STATUTES OF ENGLAND, 405 (3d ed. 1970) (reprinting Forcible Entry Act) (brackets in original, footnote omitted). The terms of this earliest statute did not provide a civil remedy; however, many civil actions were brought pursuant to it. 13 HALSBURY, *supra*, at 406. Later cases established that the rights of the parties were not affected, and therefore damages were improper. 13 HALSBURY, *supra* note 5, at 280.

The second most significant of these acts, The Forcible Entry Act of 1429, 8 Hen. 6, ch. 9, *repealed by* Criminal Law Act, 1977, ch. 65, § 13(2) (*reprinted in* 2 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 494 (7th ed. 1882)), provided that the act of holding lands forcibly after a peaceful entry would likewise be indictable as a detainer. 13 HALSBURY, *supra*, at 408-09. The act empowered justices of the peace to restore the injured person to possession. 13 HALSBURY, *supra*, at 408-09.

Finally, the Forcible Entry Act of 1589, 31 Elizabeth ch. 11, *repealed by* Criminal Law Act, 1977 ch. 65, § 496 (*reprinted in* 2 J. BISHOP, *supra*, § 496), limited the mode of redress by allowing persons indicted under the Act to allege possession for three years to avoid returning the lands. 2 J. BISHOP, *supra*, § 496 at 280. Failure to prove three years possession led to penalty of costs. *Id.*

35. 2 H. TIFFANY, TREATISE ON THE LAW OF LANDLORD AND TENANT § 247(d), (e) at 1764-65 (1912). *See, e.g.*, MASS. GEN. LAWS ANN. ch. 186, § 11 (West Supp. 1986).

possession a summary remedy,[36] and in many cases designated this process as forcible entry and detainer.[37] The statutes of most states provide only a civil process, although some states retain criminal penalties[38] for forcible entry onto land. The statutes have been viewed as permitting varying degrees of landlord self-help.[39]

Traditionally, American landlord/tenant law protects the right of the tenant not to be disturbed in his possession.[40] This protection of the tenant arises from the obligation of the landlord to provide "good title and a clear right to possession at the commencement of the term."[41] Dramatic changes during and since the 1960s have extended the obligations of the landlord to his tenant.[42] These reforms favor the tenant in the summary process of forcible entry and detainer.[43]

The first version of the forcible entry and detainer statute adopted in Arkansas was incorporated by reference in 1819 when the Missouri Territorial statute of forcible entry and detainer[44] was applied to the

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36. 35 AM. JUR. 2D *Forcible Entry and Detainer* § 2 (1967).

37. *Id.*

38. *See* Comment, *supra* note 7, at 1077 n.50 (containing a comprehensive treatment of the forcible entry and detainer statutes in the various jurisdictions). Arkansas is one of the jurisdictions cited as retaining a criminal variation of the statute. This little used counterpart of the forcible entry and detainer statute is found under the short title "Forcible Possession of Land" and provides a penalty of fifty dollars and imprisonment for one year for taking possession of land by force. ARK. STAT. ANN. § 41-2051 (1977). *See infra* note 76 for the entire text of the statute.

39. *See generally* Comment, *Landlord Eviction Remedies Act—Legislative Overreaction to Landlord Self-Help*, 18 WAKE FOREST L. REV. 25, 29-31 (1982).

40. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 510-11 (1982).

41. *Id.* at 510 (citing 1 H. TIFFANY, *supra* note 35, § 182 at 1147-54, 1156-67). The primary obligation of the tenant is to pay rent. GLENDON, *supra* note 40, at 510.

42. *Id.* at 512-14, 523.

43. *Id.* at 539. For example, the reform recognizing the implied warranty of habitability allows the tenant to assert affirmative defenses regarding the landlord's breach in the action instituted by the landlord to regain possession summarily. The lease is extended beyond the term agreed upon during the resolution of these issues. This is true even though the Supreme Court of the United States in Lindsey v. Normet, 405 U.S. 56 (1972), emphasized in upholding the constitutionality of the forcible entry and detainer statutes of Oregon that "the Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated." 405 U.S. at 68.

44. 1813 Mo. Laws titled An Act to Prevent Forcible Entry and Detainer provides in relevant part:

> Be it enacted by the General Assembly of the Territory of Missouri, That no person or persons that hereafter make any entry into any lands, tenements or other possessions, but in cases where entry is given by law, and in such case, not with strong hand, nor with multitude of people, but only in a peaceable and easy manner: and if any person or persons from henceforth, do to the contrary, he shall be taken and deemed to have entered with force and strong hand, as is hereinafter provided, and it shall not be deemed necessary for the complainant as herein after [sic] named to make any other proof of the forcible entry and detainer with strong hand, or of the forcible detainer

Territory of Arkansas.[45] The first reported Arkansas Supreme Court case interpreting the forcible entry and detainer statute, *Thorn v. Reed*,[46] involved the question of whether title is in issue when a tenant holds over after peaceful entry, and an unlawful detainer action is brought by the landlord. The court examined the seventh clause of the forcible entry and detainer statute[47] and determined that two different actions were embraced, "wholly distinct and independent of each other" and "the remedy applied is essentially different."[48] The court concluded that title could be brought into issue in forcible entry and detainer actions, but not in unlawful detainer actions.[49]

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only, than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into or detained the same from him or them.

Act of Aug. 19, 1813, 1813 Mo. Acts 43. This version of the statute, as well as the 1839 version of the statute in Arkansas provided a civil remedy and conferred jurisdiction on the justices of the peace to hear such cases. *See* McGuire v. Cook, 13 Ark. 448 (1853). The Arkansas Supreme Court, in McLain v. Taylor, 4 Ark. 147 (1842), rendered the 1839 version of the statute unconstitutional because it conferred jurisdiction on the justices of the peace. An act was passed in 1845 reenacting much of the statute of 1839, but conferring jurisdiction on the circuit courts to determine these issues. *See* McGuire v. Cook, 13 Ark. 448 (1853) (reviewing the early development of the statute in Arkansas).

45. See Thorn v. Reed, 1 Ark. 480 (1839) for a review of the early history of the statute in Arkansas. The 1819 Arkansas Act provides in relevant part:

> Sec. 1. Be it enacted by the Governor and Judges of the territory of Arkansas, That all the laws and parts of laws now in existence in the territory of Missouri, which are of a public and general and not of a local nature, and which are not repugnant to the provisions of the original law of this territory, or do not come within the purview of any law passed at the present session of the Legislature of the territory of Arkansas, shall be and continue in force as fully, and to the same extent so far as they are applicable. . . .

Act of Aug. 3, 1819, 1819 Ark. Acts 70.

46. 1 Ark. 480 (1839).

47. *Id.* at 494.

48. *Id.* at 494.

49. *Id.* at 494-95. The two actions should be considered as arising for distinct and separate injuries, and the issues involved in unlawful detainer are not involved in forcible entry and detainer. In Arkansas, as in many other states, the action of unlawful detainer is the summary process used by the lessor to regain possession generally. The forcible entry and detainer proceeding is for the protection of any party who has been disseised. *See generally* 3A G. THOMPSON, *supra* note 31, § 1369.

An unlawful detainer action is brought under ARK. STAT. ANN. § 34-1504 (Supp. 1985) which provides:

> Every person who shall willfully and without right hold over any lands, tenements or possessions after the determination of the time for which they were demised or let to him, or the person under whom he claims, or shall peaceably and lawfully obtain possession of any such, and shall hold the same willfully and lawfully after demand made in writing for the delivery or surrender of possession thereof by the person having the right to such possession, his agent or attorney, or who shall fail or refuse to pay the rent therefor when due, and after three (3) days notice to quit and demand made in writing for the possession thereof by the person entitled thereto, his agent or attorney, shall refuse to quit such possession, shall be deemed guilty of an unlawful detainer within the

In the process of determining whether the plaintiff's complaint was defective for failure to allege possession, the court in *McGuire v. Cook*[50] explained that portion of the *Thorn* decision regarding whether title is in issue in forcible entry and detainer actions.[51] According to the court in *McGuire*, the holding in *Thorn*, that legal right or title to possession must be shown by plaintiff to recover, was premised on the construction given the English statutes, "excus[ing] the force where the disseizor had the better right."[52] The court in *McGuire* found that the 1839 revision of the statute expressly provided that the merits of title could not be inquired into in a forcible entry and detainer action.[53] The court stated that "the only question is, who was in possession and how was that possession lost."[54]

In *Hall v. Trucks*[55] the Arkansas Supreme Court addressed the issue of whether an unlawful entry could supply the requisite force for the maintenance of a forcible entry and detainer action. The court answered in the negative after examining the words of the 1875 version of the provision defining forcible entry and detainer.[56] The court in *Hall* found an absence of proof of forcible entry or subsequent holding with force in this boundary dispute.[57]

In *Johnson v. West*[58] the Arkansas Supreme Court again distinguished between unlawful detainer and forcible entry and detainer, and the possession and force required for each action. On the issue of pos-

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meaning of this Act.

50. 13 Ark. 448 (1853).

51. *Id.* at 453, 454-56.

52. *Id.* at 453.

53. *Id.* The court acknowledged that other states might be in disagreement about what constitutes possession, but "the decisions are uniform that its only object is to restore possession forcibly taken or unlawfully detained without regard to the ownership or title to the property." *Id.* at 455-56.

54. *Id.* at 456. It was clear, in the court's view, that the plaintiff's failure to allege possession was fatal. This did not mean that the party bringing suit was required to allege seisin, or even that seisin would be sufficient to sustain the action, because something less than seisin, "bare possession without right[,] will be protected and restored, if invaded by force, or held over by a tenant in fraud of his contract." *Id.* at 459. *Cf.* Floyd v. Ricks, 14 Ark. 286 (1853) (an action in trespass *quare clausum fregit* holding that a party with naked possession without right cannot maintain trespass against the true owner for forcible entry).

55. 38 Ark. 257 (1881).

56. *Id.* at 260. The court provided little analysis in concluding that "unlawful" could not be equated with "forcible," but indicated that the remedy "can only be resorted to in the case of a forcible entry, or a turning out by force, or when the plaintiff parted with the possession under some contract . . . express or implied, that the possession should be restored to him." *Id.* at 259.

57. *Id.* at 260.

58. 41 Ark. 535 (1883). The court examined previous relevant case law, emphasizing McGuire v. Cook, 13 Ark. 448 (1853). *Id.* at 539-40.

session, the court reaffirmed that less than actual possession by the landlord is sufficient in unlawful detainer because the action of unlawful detainer is founded on contract and designed to benefit landlords.[59] The tenant is estopped from denying his landlord's title, whether the landlord himself or his assignee asserts it.[60]

According to the court in *Johnson*, forcible entry and detainer is, by contrast, a tort remedy designed to protect actual possession whether rightful or wrongful.[61] "Force is the gist of the action."[62] Neither constructive possession nor implied force from an unlawful entry is sufficient to maintain the action.[63]

In *Littell v. Grady*[64] the Arkansas Supreme Court stated that the object of this statute is "to keep the peace; nor [sic] to determine rights of property. It is to prevent any and all persons with or without title, from assuming to right themselves with strong hand, after the feudal fashion, when peaceable possession cannot be obtained."[65] The statute was not crucial to the resolution of the case because of the pleadings;[66] however, the court reaffirmed earlier cases holding that title is not at issue or adjudicated in forcible entry and detainer actions, rather only possession is at issue.[67]

The Arkansas Supreme Court cited *Littell* in the subsequent case of *Vinson v. Flynn*.[68] Flynn's refusal to vacate the premises on notice following the expiration of a lease prompted Vinson, his landlord, to seek a writ of possession from a justice of the peace.[69] After Vinson

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59. *Id.* at 540-41.

60. *Id.* at 540.

61. *Id.*

62. *Id.*

63. *Id.* The court concluded that since entry was on unenclosed lands, without weapons or threats, and the taking of the dwelling was without actions likely to cause fear, there was not sufficient force to maintain a forcible entry and detainer action. *Id.* at 541. Similarly, the subsequent refusal to vacate the house did not make the defendants guilty of a forcible detainer. *Id.* In the court's view, the defendant's actions were of no more force than ordinary trespass. *Id.*

64. 38 Ark. 584 (1882).

65. *Id.* at 587.

66. The court acknowledged a unique history of pleading in the facts of *Littell*. When the plaintiff sued Grady under the forcible entry and detainer statute, he was put into possession as required. Littell answered, denying Grady's right to possession and his title. When Grady then withdrew a demurrer to the cross-complaint and consented to have the case transferred to the equity docket, this had the effect of changing the cause of action from forcible detainer to an equitable suit to set aside a deed. *Id.* at 586-87.

67. *Id.* at 587.

68. 64 Ark. 453, 43 S.W. 146 (1897).

69. *Id.* at 455, 43 S.W. at 147. The writ issued after Vinson gave security as required. The constable executed the writ, turning Flynn, his wife, their three children, and their belongings out into the snow. Flynn's witnesses at trial testified that the belongings were damaged, and Vinson

removed Flynn, Flynn successfully recovered damages and Vinson appealed. The Arkansas Supreme Court reversed on various grounds, addressing primarily Flynn's award of punitive damages for the malicious prosecution undertaken by Vinson in obtaining a defective writ of possession.[70] The court concluded that, on remand, the only damages Vinson would be liable for were those actually sustained if the landlord "unnecessarily committed any injury to [the tenant's] person or goods."[71] The court remanded for a rehearing on whether actual damages were sustained, recognizing that the English statutes provided exclusively for a criminal penalty and that no civil rights of the parties were affected.[72]

The court in *Vinson* acknowledged that the rule limiting the relief to that provided by the statute also applies when the statutory proceeding is civil in nature.[73] The circuit court jury instruction authorizing punitive damages was therefore in error, since the forcible entry and detainer statute does not authorize such damages.[74]

The result in *Vinson* should be contrasted with an earlier Arkansas Supreme Court case, *Winn v. State*,[75] which involved provisions of a lease held to successfully confer a right of entry for conditions broken. The landlord was charged and convicted under the criminal corollary to forcible entry and detainer.[76] The conviction was challenged on the

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answered that there was no injury to the family or their goods. *Id.*

70. *Id.* at 459-60, 43 S.W. at 149. The court alluded that the lack of clarity in the record regarding the theory of recovery at the trial level resulted in a need to speculate about why the trial court reached the result it did. *Id.* at 460, 43 S.W. at 149. After concluding that the plaintiff's theory must have been based on malicious prosecution, the court acknowledged a split of authority and declined to follow those jurisdictions sustaining an action for malicious prosecution based on a lack of jurisdiction of the justice of the peace issuing the writs. The result of finding that jurisdiction was not proper was to place Vinson in the same position that he would have been in if he had taken possession without a writ. *Id.* at 461, 43 S.W. at 149.

71. *Id.* at 461, 43 S.W. at 149.

72. *Id.* at 458-59, 43 S.W. at 148. The court cited Jackson v. Farmer, 9 Wend. 201 (N.Y. Sup. Ct. 1832), wherein it was stated:

> It was the abuse of this summary power to right one's self by entry, where the right of entry existed, which gave rise to the numerous English statutes against forcible entry and detainer . . . and in these Acts, and the common law remedy by indictment, are to be found the only protection of the property thus forcibly dispossessed. They punish criminally the force, and in some cases make restitution to the possession.

64 Ark. at 459, 43 S.W. at 148.

73. 64 Ark. at 459, 43 S.W. at 148.

74. *Id.* at 459, 43 S.W. at 149.

75. 55 Ark. 360, 18 S.W. 375 (1892).

76. *Id.* at 361-62, 18 S.W. at 375. The prosecution was brought under the predecessor to ARK. STAT. ANN. § 41-2051 (1977), which provides:

> Every person who shall take, or keep possession of any real estate by actual force or violence, without the authority of law, or who being armed with a deadly or dangerous

ground that the trial court erroneously excluded testimony on the tenant's breach of lease provisions.[77]

The Arkansas Supreme Court held that stipulations contained in the lease were conditions, the breach of which, if proven, entitled the landlord to enter.[78] The court stated that "[the landlord] was entitled to re-enter for condition broken, though not to use force to effect the reentry," and that "if he had the lawful right to possession peaceably acquired, he had the right to protect his possession by force, if necessary. . . ."[79] The decision in *Winn* has been cited as following the weight of authority.[80] The court's holding is consistent with other cases decided around the end of the nineteenth century.[81]

In *Towell v. Etter*,[82] a later case addressing the issue of whether accretions are included in a tax sale, the court referred to *Winn*. The court stated that the landholder might "defend his possession by force, if necessary, and if he do[es] so he will not be guilty of forcible entry and detainer" provided that he has title and right to possession and gains possession peacefully.[83]

Miller v. Plummer[84] is another boundary dispute case decided during the early twentieth century. The Arkansas Supreme Court affirmed the holding of *Towell* and stated that actual force had been

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weapon, shall by violence to any person entitled to the possession, or by putting in fear of immediate danger to his person, obtain or keep possession of any such real estate or property, without legal authority, shall on conviction be adjudged guilty of a misdemeanor, and be fined not less than fifty dollars [$50.00], and be imprisoned not exceeding [1] year.

77. 55 Ark. at 363, 18 S.W. at 375 (1892).

78. *Id.* at 365, 18 S.W. at 375. The lease stated that if the lessees "failed to comply with any of its stipulations, they hereby agree to forfeit said lease." *Id.* at 364, 18 S.W. at 375. One month after serving notice of the breach, the landlord entered the land in the absence of the tenants, who were subsequently prevented from coming onto the land by threats from the armed landlord. The jury found Winn guilty of holding by force, as charged in the indictment, and convicted him. *Id.* at 363, 18 S.W. at 375.

79. *Id.* at 364, 18 S.W. at 376. The court approvingly quoted from another jurisdiction the following: " 'if one have the right to enter and take possession of premises in the occupancy of another, his entry will be legal and not contrary to the statute concerning forcible entry and detainer, if made while the other party is temporarily absent from the premises, leaving no one there.' " *Id.* at 364-65, 18 S.W. at 376 (quoting from Mussey v. Scott, 32 Vt. 82 (1859)). The nonperformance of the conditions, if substantiated, would confer on the landlord a right to enter peacefully.

80. Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process*, 6 A.L.R. 3D 177, 198 (1966).

81. *Id.* at 194-98.

82. 69 Ark. 38, 63 S.W. 53 (1901).

83. *Id.* at 40, 63 S.W. at 55.

84. 105 Ark. 630, 152 S.W. 288 (1912).

required in all the decisions of the court.[85] The court further stated that "in the absence of it the action cannot be maintained."[86]

The force element was further refined and objectively defined in *Douglas v. Lamb*,[87] in which the Arkansas Supreme Court stated that the terms "actual force" did not mean "[a]ctual physical violence upon the person in possession by the one who takes possession . . . but 'if the demonstration of the force is such as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace, it is sufficient.' "[88]

Again, in *Black v. Handley*[89] the crucial question as perceived by the court was whether the defendant had used force in obtaining possession. The court held that when the defendant entered by unfastening the door, in the absence of the plaintiff who is still in possession, there is sufficient force.[90]

Twenty years later, the Arkansas Supreme court in *Wall v. Robling*[91] continued to focus on the issue of force. The court affirmed the trial court's refusal to consider the defendant's claim of superior title, and found sufficient force in the defendant's acts of cutting a fence and running cattle onto the land to maintain the action.[92] There have not been any significant cases in this area in Arkansas since *Wall*.

To assess the development of Arkansas forcible entry and detainer, it is helpful to note the development of the statutes in other jurisdictions after the early nineteenth century. There are three approaches to the amount of force that landlords may use to recover possession under forcible entry and detainer statutes.[93] The English rule allows the use of necessary and reasonable force without resort to judicial process.[94] During the late nineteenth through the mid-twentieth century, this approach was followed by approximately one-third of the jurisdictions.[95]

The decision in *Winn* placed Arkansas in the second category,

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85. *Id.* at 637, 152 S.W. at 291.

86. *Id.* at 634, 152 S.W. at 290 (citing Towell v. Etter, 69 Ark. 34 (1900); Johnson v. West, 41 Ark. 535 (1883); Littell v. Grady, 38 Ark. 587 (1882); Hall v. Trucks, 38 Ark. 257 (1881); Dortch v. Robinson, 31 Ark. 296 (1876); McGuire v. Cook, 13 Ark. 448 (1853)).

87. 157 Ark. 11, 247 S.W. 77 (1923).

88. *Id.* at 14-15, 247 S.W. at 78 (quoting 11 R.C.L. § 23 at 1160-61).

89. 240 S.W. 411 (1922) (unreported opinion, 158 Ark. 640).

90. 240 S.W. at 413.

91. 207 Ark. 987, 183 S.W.2d 605 (1944).

92. *Id.* at 989, 183 S.W.2d at 605-06.

93. *See generally* Annotation, *supra* note 80, at 182-89. *See also* Comment, *supra* note 39, at 28-31.

94. Annotation, *supra* note 80, at 182.

95. *Id.* at 183.

which allows the landlord to enter peacefully and dispossess; however, once force becomes necessary, the landlord must resort to judicial process.[96] The landlord in *Winn* was entitled to use force to hold the premises subsequent to a peaceful entry.[97]

The modern trend and growing majority forbids the use of methods other than judicial process, citing a policy of preventing breaches of the peace as support for this approach.[98]

In *Gorman v. Ratliff*,[99] the Arkansas Supreme Court held that provisions of a lease authorizing landlord self-help are invalid. The court emphasized the clear intent of the legislature, as evidenced in the repeal and reenactment of the forcible entry and detainer statute in Act 615 of 1981, was to provide additional protection to the party in possession by giving him notice and an opportunity to be heard.[100] This revision of the Forcible Entry and Detainer Statute also protected landlords by providing an expeditious judicial method for removal of parties unlawfully in possession.[101] The court noted that Act 615 did not expressly give landlords a right of entry except by first resorting to legal process.[102]

The court found that the public policy of protecting the party in possession, which underlies the Forcible Entry and Detainer scheme, is reinforced by the history of the statute.[103] The court cited *Vinson v. Flynn* as authority for the proposition that the longstanding policy behind forcible entry and detainer statutes is to prevent the landlord from taking land by force.[104]

The court further emphasized that statutes requiring adjudication of possession place the weak and strong on equal terms, citing *Littell v. Grady*.[105] The court acknowledged a growing trend in the direction of requiring a landlord, entitled to possession, to resort to the remedy given by law.[106] The modern trend forbids the use of methods other

96. Annotation, *supra* note 80, at 189.

97. 55 Ark. at 364, 18 S.W. at 376.

98. Annotation, *supra* note 80, at 186.

99. 289 Ark. 332, 337, 712 S.W.2d 888, 889 (1986).

100. *Id.* at 335-36, 712 S.W.2d at 889. Under ARK. STAT. ANN. § 34-1507 (Supp. 1985), if the defendant responds to the notice of complaint and intention to issue a writ of possession within five days, he will be given a hearing. If the defendant fails to respond, the writ of possession is issued.

101. 289 Ark. at 335-36, 712 S.W.2d at 889.

102. *Id.* at 337, 712 S.W.2d at 890.

103. *Id.*

104. *Id.* (citing Vinson v. Flynn, 64 Ark. 453, 43 S.W. 146 (1897)).

105. *Id.* (citing Littell v. Grady, 38 Ark. 584, 587 (1882)).

106. *Id.* (citing Jordan v. Talbot, 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P.2d 20 (1961);

than judicial process.[107] The court cited a policy of preventing breaches of the peace as support for this approach.[108] The court in *Gorman* adopted the modern trend and stated that the "action is designed to compel the party out of actual possession to respect the present possession of the other party and resort to legal channels to obtain possession."[109]

The court did not find persuasive the landlord's position that one section of the statute in particular should be read to prohibit only actions taken " 'without right or claim to title. . . .' "[110] The court adopted the tenant's position that a person engaging in any one of the activities listed in title 34, section 1503 of the Arkansas Statutes Annotated undertakes prohibited activity within the meaning of the Act.[111] The court refused to find that isolated portions of the statute or the entire statute could be waived by contractual agreement.[112]

Justice Newburn, in his concurrence, said he would frame the issue so that a much narrower ground could be used to reach the same result. In his opinion, the issue should be framed "whether a lessee, by a provision in a lease contract, may confer upon the lessor the 'right' to enter which, according to Ark. Stat. Ann. § 34-1503 (Supp. 1985), exempts the landlord from liability. . . ."[113] Justice Newburn would simply invalidate a contract that seeks to avoid the strong public policy against forcible entry.

The opinion in *Gorman* emphasized that Act 615 reflects a public policy favoring invalidation of lease provisions that authorize a landlord

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Flora v. Parker, 205 So. 2d 363 (Fla. App. 1968); Bass v. Boetel & Co., 191 Neb. 733, 217 N.W.2d 804 (1974); Edwards v. C.N. Investment Co., 27 Ohio Misc. 57, 272 N.E.2d 652 (1971)).

107. *See generally* 35 AM. JUR. 2D *Forcible Entry & Detainer* § 5, at 894 (1967).

108. 289 Ark. at 337, 712 S.W.2d at 890.

109. *Id.*

110. *Id.* at 336, 712 S.W.2d at 890. The court quoted ARK. STAT. ANN. § 34-1503 (Supp. 1985) which provides:

> If any person shall enter into or upon any lands, tenaments or other possessions and detain or hold the same without right or claim to title, or who shall enter by breaking open the doors and windows or other parts of the house, whether any person be in or not, or by threatening to kill, maim or beat the party in possession or by such words and actions as have a natural tendency to excite fear or apprehension of danger or by putting out of doors or by carrying away the goods of the party in possession, or by entering peaceably and then turning out by force or frightening by threats or other circumstances of terror the party to yield possession, in such cases every person so offending shall be deemed to be guilty of a forcible entry and detainer within the meaning of this Act.

111. 289 Ark. at 336, 712 S.W.2d at 890.

112. *Id.* at 338, 712 S.W.2d at 891.

113. *Id.* at 339, 712 S.W.2d at 891 (Newburn, J., concurring).

to enter and take personal belongings absent resort to lawful process.[114] On a broader level, the court concluded that since the Act does not give the landlord the right to enter until he has resorted to legal process, self-help action is prohibited.[115] The probable effect of this decision is to invalidate any attempt by landlords to circumvent the statute. Even in the absence of forceful entry, in padlocking for example, it is likely that the court would extend the reasoning of *Gorman* to reach such a situation; the emphasis is no longer on force.

The court in *Gorman* did not address squarely the question of whether force was used by the landlord. The action historically has required in Arkansas that the plaintiff allege and prove that the defendant acted with force. The court could have disposed of the element of force in *Gorman* by ruling that the act undertaken was disallowed as a specific act of forcible entry and detainer, and therefore the force element was satisfied. The court went beyond this and broadly prohibited landlord self-help. The question left open by the case is whether the court will consistently follow its progressive departure from outdated case law in cases not involving a specifically prohibited act.

The majority opinion also relied on Act 615, which added a due process notice requirement and an additional procedural hearing to prohibit landlord self-help.[116] The court's interpretation of legislative intent is consistent with the modern trend which clearly favors protecting the party in possession, even absent force.

Landlords in Arkansas are faced with delinquent tenants every month. Prior to *Gorman*, landlords also faced the uncertainty of using self-help remedies. The court has resolved the uncertainties faced by both landlords and tenants by acknowledging legislative support for a policy against landlord self-help. Attorneys drafting leases in the future are forewarned that provisions granting extra-judicial remedies will be invalidated if those remedies contravene the statute. A landlord could be subjected to damages for exercising contractual "rights" if he violates the act. Conceivably, criminal penalties could be assessed under the infrequently used forcible possession of land statute in a proper case,[117] and it seems unlikely that the decision in *Gorman* would affect the requirement of force in the criminal context.

Existing concurrently with the statutory protections for tenants, the landlord has a clearly delineated civil method for judicial removal

114. *Id.* at 336-37, 712 S.W.2d at 889-90.
115. *Id.* at 337-38, 712 S.W.2d at 890-91.
116. *Id.* at 335-36, 712 S.W.2d at 889.
117. ARK. STAT. ANN. § 41-2051 (1977). See also *supra* note 76.

of holdover tenants.[118] The landlord also has a judicial procedure to prosecute tenants holding over after a ten day notice.[119] The criminal prosecution results in a misdemeanor for holding over after a ten day notice to vacate.[120] A landlord who prevails under the damages provision of the forcible entry and detainer statute is entitled to fair rental value and liquidated damages (three times the monthly rental value in commercial realty).[121] Either method will be likely to serve the landlord's ends of encouraging delinquent tenants to vacate or pay the rent to avoid the threatened judicial procedure.

The forcible entry and detainer statute, rooted in antiquity, has been brought into the twentieth century by the Arkansas Supreme Court in *Gorman*. The court strikes a welcome balance between societal interests in avoiding breaches of the peace and the private property interests of landlords.[122] The holding is narrow in scope and does not affect the disparate treatment of Arkansas tenants in other contexts, but hopefully signals that change in this area is forthcoming.

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118. ARK. STAT. ANN. § 34-1504 (1981). See also *supra* note 49.

119. ARK. STAT. ANN. § 50-523 (1977). According to the National Housing Law Project, this criminal eviction statute distinguishes Arkansas as the only state retaining a criminal eviction statute in the United States. Letter from Frances E. Werner to Don Hollingsworth (Mar. 6, 1987). Prior to Williams v. City of Pine Bluff, 284 Ark. 551, 683 S.W.2d 923 (1985), it was thought that the criminal trespass statute, ARK. STAT. ANN. § 41-2004 (1977), would also provide criminal penalties for the benefit of the landlord attempting to evict, but the Arkansas Supreme Court analyzed the current landlord/tenant statutory scheme and concluded that the unlawful detainer statute, ARK. STAT. ANN. § 34-1504 (Supp. 1985) and the "Failure to Pay Rent-Refusal to Vacate Upon Notice" statute, ARK. STAT. ANN. § 50-523 (1971), historically have governed the landlord/tenant relationship. The court concluded that application of the criminal trespass statute to this relationship would not reflect past legislative treatment of the relationship. 284 Ark. at 555, 683 S.W.2d at 925-26. The court further noted that the fact that the forcible entry and detainer statute has not been challenged since 1875 is persuasive of its validity. 284 Ark. at 555, 683 S.W.2d at 925-26.

120. ARK. STAT. ANN. § 50-523 (1971).

121. ARK. STAT. ANN. § 34-1509 (Supp. 1985).

122. The decision in *Gorman* is in line with the suggested approach of one author on this topic:

> [The emancipation] of the Forcible Entry and Detainer law from archaic common law categories is accomplished only when forcible entry and detainer protection focuses not on "possession" but on protecting people, such that protection of the public peace is favored over protecting property rights, except where imminent danger to property rights cannot be otherwise mitigated.

Comment, *supra* note 7, at 1094 (discussing the problems between owners and "squatters" in England with reference to a trend in the United States).