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Walter E. Barnett

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WHEN THE LANDLORD RESORTS TO SELF-HELP: A PLEA FOR CLARIFICATION OF THE LAW IN FLORIDA

WALTER E. BARNETT*

There are probably few lawyers in general practice or specializing in real estate transactions who have not been asked by a landlord whose tenants will neither vacate nor pay rent: "Why can't I just go in and move their things out on the sidewalk?" Chances are that the lawyer sat back rather stunned by the idea, and finally said, "I wouldn't advise it in any event." Whether this advice was prompted by an unconscious aversion to nonjudicial remedies or a conscious desire to avoid situations that might be productive of violence, it is highly unlikely that it was prompted by a clear understanding of the client's civil and criminal liabilities in such situations. It is surprising that so simple a question cannot be promptly answered today by lawyers in many American jurisdictions. The purpose of this article is to examine the remedy of self-help from the perspective of Florida law.¹ Because much of the substance is in reference to statutory law, which varies considerably from jurisdiction to jurisdiction, the author has employed judicial decisions from other states for comparative purposes only.²

Briefly put, the question to be examined is whether the landlord may evict a tenant without the aid of the courts. Although there are other ways of interpreting "the landlord's right of self-help," its use in this article is confined to efforts toward eviction. Before examining the law on the question, however, it is desirable first to discuss briefly the preconditions for *any* eviction of a tenant.

SOME PRELIMINARY CONSIDERATIONS

Perhaps the most essential precondition to any removal of an undesirable tenant, whether the removal be effected by self-help or by court proceeding, is that the landlord must be legally entitled to im-

*B.A. 1954, Yale University; LL.B. 1957, University of Texas; Diplôme 1958, College of Europe, Belgium; Assistant Professor of Law, University of Miami.

1. A brief treatment of the Florida statutes and cases is found in 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§37.11-15 (1966). The cases in which the question is litigated would rarely involve much money, so any great expenditure of time and effort by counsel to research the law thoroughly would rarely be rewarded. On reading the Florida cases one senses this lack of thorough research and advocacy by the counsel involved.

2. A recent compilation that digests cases on this subject from almost all the states, but which fails to treat the statutes underlying those cases, may be found in Annot., 6 A.L.R.3d 177 (1966).

mediate possession of the leased premises. Yesterday's lawyer would say that the landlord must have a "right of entry" against the tenant. What circumstances will entitle the landlord to immediate possession is a matter rarely understood by laymen and occasionally misunderstood by lawyers.

Generally speaking, in the absence of statutory modification of the common law, the landlord is entitled to immediate possession only upon termination of the tenancy. As long as the tenancy exists, the tenant is entitled to exclusive possession of the leased premises.³ And a tenancy is not terminated merely by the tenant's failure to pay rent, or by his default on any other covenant contained in the lease, nor does the landlord have the right to terminate the lease in such circumstances unless it expressly so provides.⁴ Stated another way, the landlord is not excused from performance of the lease because the tenant fails to perform, for courts traditionally have regarded the respective obligations of landlord and tenant as independent of each other. It has been said that this is a good example of a legal rule in which the aspect of a lease as a conveyance has prevailed over its aspect as a contract.⁵ So the tenancy remains in effect despite the tenant's default, and the landlord is relegated to an action for debt or damages or, in the case of default in payment of rent, to distress of the tenant's goods.

How then is a tenancy brought to an end so as to entitle the landlord to immediate possession? The answer depends on what kind of tenancy is involved. If the tenancy is for a definite term, it is brought to an end by expiration of the term.⁶ In Florida, the tenancy for a term can exist only by written lease; all oral leases are declared by statute to be tenancies at will.⁷ Likewise, all written leases that create a tenancy from period to period but fail to place a definite

3. The conclusion follows from the very essence of a lease, which is a transfer to the tenant of the present right to possession of the land, the landlord retaining a reversion, or future possessory estate in the land. See 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* §35.03 (3) (1966). This does not mean that the landlord has no right whatever to enter during the tenancy. He is privileged to do so at reasonable times and in a reasonable manner to determine whether waste is taking place and to discover the necessity for, as well as to make, repairs (if by lease or statute he has a right or duty to make them). 1 *RESTATEMENT (SECOND), TORTS* §186 (1965). At common law he was also privileged to enter to demand, or to distrain for, rent in default. *Id.* §187. But the common law privilege to enter to distrain for rent apparently no longer exists in Florida. See *Van Hoose v. Robbins*, 165 So. 2d 209, 211 (2d D.C.A. Fla. 1964).

4. 1 *AMERICAN LAW OF PROPERTY* §§3.11, 3.94 (Casner ed. 1952).

5. *Id.* §3.11.

6. *Id.* §3.88.

7. FLA. STAT. §83.01 (1965): "Any lease of lands and tenements, or either, hereafter made, shall be deemed and held to be a tenancy at will, unless the same shall be in writing signed by the lessor. . . ."

term on the tenancy are deemed to create a tenancy at will.⁸ The statutes then provide that a tenancy at will can be terminated by the giving of a prescribed notice by either party, the length of the notice being dependent upon the periods at which rent is payable.⁹ The net effect of these statutes is to assimilate oral tenancies for a term, oral and written tenancies at will, and oral and written tenancies from period to period. All of these are called by the statutes "tenancies at will" but are treated as the tenancy from period to period was treated at common law. Such a conclusion derives from the fact that these tenancies can be terminated only at the end of a rental payment period by giving prescribed notice as required by statute for the rental payment period in question.¹⁰

These observations on termination of tenancies are, of course, subject to the qualification that the parties may, by their agreement, provide for different or additional methods of termination. It is quite common for a term lease contract to provide that, upon default by the tenant on certain or even any of his covenants, the landlord may terminate the lease before the end of the term by giving the tenant his prescribed notice. If the tenant is in fact in default, and the landlord follows the procedure for premature termination prescribed by the lease, the tenancy is terminated, and the landlord is entitled to immediate possession.¹¹ Similarly, there would appear to

8. FLA. STAT. §83.02 (1965): "Where any tenancy shall have been created by an instrument in writing from year to year, or quarter to quarter, or month to month, or week to week, to be determined by the periods at which the rent is payable, and the term of which such [*sic*] tenancy is unlimited, such tenancy shall be a tenancy at will. . . ."

9. FLA. STAT. §83.03 (1965): "A tenancy at will may be terminated by either party giving notice as follows: Where the tenancy is from year to year, by giving not less than three months notice prior to any annual period; where the tenancy is from quarter to quarter, by giving not less than forty-five days notice prior to the end of any quarter; where the tenancy is from month to month, by giving not less than fifteen days notice prior to the end of any monthly period, and where the tenancy is from week to week, by giving not less than seven days notice prior to the end of any weekly period."

10. Termination at the end of a rental payment period by the giving of advance notice, the length of which varied with the length of the rental payment period, was the distinguishing characteristic of the common law tenancy from period to period. 1 AMERICAN LAW OF PROPERTY §3.90 (Casner ed. 1952). But the common law tenancy at will was terminable at any time by either party without notice. *Id.* §3.91. Of course, the Florida statutory "tenancies at will" are not treated precisely as a periodic tenancy was treated at common law, considering that the lengths of notice prescribed by the Florida statute differ from the lengths of notice required at common law.

11. This statement should be qualified by noting that, on occasion, courts of equity have asserted their power to prevent a forfeiture of the lease when the

be no reason why a landlord and tenant cannot, by agreement, make their own provisions for termination of the other types of tenancies that are lumped together by the Florida statutes into the category of "tenancies at will."¹² Again, if, and only if, the landlord has followed such provisions strictly, the tenancy is terminated and the landlord entitled to possession. The point deserves emphasis because the courts are emphatic in pointing out that the law abhors forfeitures. Also laymen are notorious for jumping to wrong conclusions on whether their "opponent" is in default on his obligations and for disregarding lease details on such matters as the giving of termination notices.

As has been stated, in the absence of statutory modification of the common law, the landlord is entitled to possession only upon termination of the tenancy. Florida has apparently modified the common law rule by conferring on the landlord the right to immediate possession whenever the tenant defaults in payment of the rent, although the statute fails to indicate whether the tenancy is terminated.¹³ This right is conferred without regard to whether a written lease for a term or one of Florida's "tenancies at will" is involved. It has been said that the legislature intended that this right be read into every contract calling for the payment of rent, assuming there is no clear indication that the parties to the contract intended otherwise.¹⁴ The major problem that confronts one seeking to rely on this statutory right lies in ascertaining whether the tenant is in fact in default on

default of the tenant consists of failure to pay a sum certain, such as rent, on the day it was due and when it would otherwise be inequitable to enforce a forfeiture upon the tenant. The theory of these decisions is that, though the lease provides a right of forfeiture or premature termination in such event, the real purpose of the provision is simply to give the landlord leverage to compel payment. Hence equity should step in and avoid a forfeiture if the tenant now stands ready, willing, and able to pay the sum due, plus interest, and the landlord has not changed positions in the meantime. Some cases have extended this doctrine to other types of defaults as well. See 1 AMERICAN LAW OF PROPERTY §3.96 (Casner ed. 1952); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §35.13 (1966).

12. Although there are no Florida appellate cases in point, Florida Statutes, section 83.03, quoted note 9 *supra*, is not in form mandatory, and no reason is perceived why the parties may not, by contract, make their own "law" in this area as in so many other areas of landlord and tenant.

13. FLA. STAT. §83.05 (1965): "If any person leasing or re-renting any land or house shall fail to pay the rent at the time it becomes due, the lessor may immediately thereafter enter and take possession of the property so leased or rented." It is conceivable that this statute simply *means* the landlord is empowered to terminate the tenancy in such event, rather than that he is entitled to possession though the lease continues in effect. See *Stephenson v. National Bank of Winter Haven*, 39 F.2d 16 (5th Cir. 1930). See also the further discussion of this statute in the text at notes 78-83 *infra*.

14. *Baker v. Clifford—Mathew Inv. Co.*, 99 Fla. 1229, 128 So. 827 (1930).

his rent. One would think that this is merely a factual inquiry, but such is not the case. Unless the agreement of the parties provides that the rent is payable without demand at the lessor's home or office or some other such place, the tenant is not in default until a demand for the rent has been made at the leased premises within reasonable hours on the day on which it is due.¹⁵ The same problem confronts a landlord seeking to rely on a lease clause that provides for premature termination for default in the payment of rent.¹⁶

Some comment should be made about the Florida law governing the effect of a holding over by a tenant for a term. It has already been said that a tenancy for a term is brought to an end by the expiration of the term. Accordingly, the landlord is entitled to immediate possession at such expiration. Actually, at common law a tenant for a term who held over beyond the expiration of the term, without the landlord's consent, took on that curious and rather ill-defined status of "tenant at sufferance." The landlord had the election of treating him either as a trespasser or as a tenant for an additional term.¹⁷ Because the courts had to have some way of characterizing the relationship of the parties until the landlord exercised this election, the status of "tenant at sufferance" was probably invented as a conceptual way station for a tenant on the road to becoming trespasser or tenant for an additional term. It was just a phrase used to describe the tenant's status during the interim between the ending date of the lease and the time the landlord exercised his election. Since little was likely to occur during that interim, it was rare that the courts were called upon to define the precise meaning of the status.¹⁸ Whatever else it meant, it is clear that at common law the landlord had a right to immediate possession, without notice, against a tenant at sufferance.¹⁹ To say that he could elect to treat the tenant as a trespasser is perhaps another way of saying the same thing.

15. *Ibid.*

16. *Ibid.*

17. Actually, there is considerable difference of opinion whether the new tenancy that may thus be imposed on the tenant is one for a term certain or from period to period. Also opinions differ concerning the length of the term or period. See 1 AMERICAN LAW OF PROPERTY §3.35 (Casner ed. 1952).

18. For an example of a case in which the court *was* called upon to define the meaning of the status and decided that the status was practically equivalent to that of a trespasser, see *Margosian v. Markarian*, 288 Mass. 197, 192 N.E. 612 (1934).

19. 1 AMERICAN LAW OF PROPERTY §3.32 (Casner ed. 1952). When it is said in the text that the landlord is entitled to immediate possession "without notice" to the tenant, this means that no particular period of prior notice, not even a "reasonable length of time," is required. It is probably true, however, that before a landlord can evict a tenant at sufferance, either by self-help or by commencing a court action for that purpose, he has to afford the tenant at least a minimal

A Florida statute alters the common law governing holdovers in several respects.²⁰ It states that the holding over shall be construed to be a tenancy at sufferance unless the lease has been renewed by some further instrument in writing. It then deprives the landlord of his option to treat the holding over as a renewal of the term by providing that the mere payment or acceptance of rent (and hence, by implication, the mere holding over of possession by the tenant) shall not be construed to be a renewal of the term. The statute further provides that if the holding over be continued with the landlord's written consent, the tenancy will become a tenancy at will. Thus, the effect of the statute appears to be that until there is a written renewal of the lease or written consent of the landlord to continuation of the holding over, the holdover tenant remains a tenant at sufferance indefinitely.²¹ Since the statute implies no change in the rule that the landlord is entitled to immediate possession, without notice, against a tenant at sufferance, then that right would seem to continue as long as the tenancy retains such character. But this conclusion is probably unsound. Suppose the landlord accepts an additional month's rent from the holdover tenant. Is it likely that a court would hold the landlord entitled to possession before the expiration of such additional period, and leave the tenant to recover back his rent pro rata on a theory of unjust enrichment? A more plausible construction of the statute would be that the landlord is entitled to immediate possession, against such a "tenant at sufferance," only as long as he accepts no new rent; and if he does accept rent, he is not entitled to possession until the period covered by that payment expires. At the expiration of such period, though, his right to immediate possession would revive automatically, that is, without necessity of any notice to the tenant. Such a construction would give reasonable effect to the statute. Conversely, any construction which held the landlord's right to possession did not revive automatically would seem to conflict with

opportunity to vacate voluntarily, by making a demand on him for possession. In other words, he has to let the tenant know that he is being treated as a trespasser rather than as a tenant for an additional term.

20. FLA. STAT. §83.04 (1965).

21. See *Brown v. Markham*, 56 Fla. 202, 48 So. 39 (1909); *Leaders Int'l Jewelry, Inc. v. Board of County Comm'rs*, 183 So. 2d 242 (3d D.C.A. Fla. 1966). Despite the wording of the statute requiring a writing for the tenancy at sufferance to be converted into one at will or for an additional term, a Florida court has held that continued possession by the holdover tenant, together with payment of rent and the making of substantial improvements, constitutes sufficient part performance to entitle the tenant to enforce in equity an oral promise by the landlord to renew the lease. See *S. Lemel, Inc. v. 27th Avenue Farmers Mkt., Inc.*, 126 So. 2d 167 (3d D.C.A. Fla.), *cert. denied mem.*, 133 So. 2d 322 (Fla. 1961). Compare *S. Lemel, Inc. v. 27th Avenue Farmers Mkt. supra*, with *Schmerer v. Hammer*, 155 So. 2d 710 (3d D.C.A. Fla. 1963).

Florida's apparent intention that the tenancy at sufferance become a "tenancy at will" (and hence terminable upon the giving of a certain amount of notice) only in those cases in which the landlord's written consent to the holding over is obtained.

SELF-HELP RIGHTS IN ENGLISH LAW

The beginning of any inquiry into the landlord's right of self-help should be to ask what rights he had at English common law. Like the vast majority of American states, Florida has adopted the common law of England to the extent that it is of a general nature and is not inconsistent with the Constitution and laws of the United States or the acts of the Florida Legislature. This adoption extended to the statute laws of England, subject to the same qualification, and encompassed only such law as was in effect down to July the 4th, 1776.²²

It is difficult to say with any great assurance what right the landlord had at English common law because at a very early date the decisions of the courts began to concern themselves with the effect of statutory enactments on such right. The great English legal historian, Sir Frederick Pollock, in his work on Torts, contented himself with the statement: "A person entitled to the possession of lands or tenements does no wrong to the person wrongfully in possession by entering upon him; and it is said that by the old common law he might have entered by force."²³ Suffice it to say that both commentators and courts, English and American, generally agree that at common law a landlord entitled to possession committed no tort when entering against a tenant wrongfully in possession and expelling him and his goods, even by force (provided the force used did not exceed that which was reasonably necessary).²⁴

With this tenet of the common law as a touchstone, the next step is to ascertain whether and how it has been altered by statute. I have chosen first to set forth the development of the law in England, not because the English statutes have any force in Florida,²⁵ but be-

22. FLA. STAT. §2.01 (1965).

23. POLLOCK, TORTS 368 (6th ed. 1901).

24. See, e.g., *Hewitt v. State ex rel. Palmer*, 108 Fla. 335, 337, 146 So. 578, 579 (1933); 6-A AMERICAN LAW OF PROPERTY §28.19 (Casner ed. 1954); 1 RESTATEMENT (SECOND), TORTS 158 (1965). In England, it may be that forcible entry was *criminal*, even at common law. See 1 RUSSELL, CRIME 279-80 (12th ed. Turner 1964).

25. Although the statute adopting for Florida the general common and statute laws of England was passed in 1829, it was not until 1845 that the Governor, pursuant to an authorizing act passed that year by the Florida Legislature, commissioned an official compilation of the English statutes deemed to be in force in Florida. The compilation, which appears in 1 FLA. STAT. ANN. 136-45 (1961), does

cause the Florida statutes are to a considerable extent modeled upon them and because the Florida Supreme Court has indicated that the intent and purpose of the Florida statutes are the same as those of the English statutes.²⁶ The relevant English statutes are five in number and are known collectively today as the Forcible Entry Acts.

In 1381 the statute of Richard II was enacted, providing in its material portion 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."²⁷ The statute was criminal providing for punishment by imprisonment on conviction. The second statute²⁸ simply confirmed the first by commanding the justices of the peace, upon complaint, to go to the place where any forcible entry had been made and take and put in jail any violator, there to await conviction. The third statute²⁹ was the first to provide explicitly a civil remedy to the person expelled. It commanded the justices to restore possession to him and also gave him an action against the violator in the form of assize of novel disseisin or writ of trespass, which allowed for recovery of treble damages if a forcible entry was found by the verdict (or a forcible detainer following a peaceable entry). Restitution of possession was precluded, however, by this act and by the fourth statute³⁰ if the violator had had possession for three or more years before the indictment was brought. Restitution was available at first only to freeholders, but the fifth and last statute³¹ extended restitution to tenants for years whose land had been forcibly

not include any of the English statutes relative to forcible entry and detainer. Why they were omitted is a mystery since they were certainly of a general and not a local nature, and no Florida statutes on the subject appear to have been enacted until 1868. Consequently there could hardly have been any claim of inconsistency with acts of the Florida Legislature. Other American states apparently did consider these statutes (or at least that of 5 Rich. 2) as having been received as part of the common law. See *Gower v. Waters*, 125 Me. 223, 227, 132 Atl. 550, 552 (1926).

26. In *Goffin v. McCall*, 91 Fla. 514, 520, 108 So. 556, 559 (1926), the court said: "[T]here is no purpose evident in the language of the Florida Statutes to change or add to the conditions which under the English statutes constituted a crime, but the purpose was merely to transform that which was a crime into a private wrong or tort. A civil action was merely substituted for the criminal one." Little reliance should be placed on this statement since the court was simply making the point that no action for an unlawful entry would lie under the statutes unless the complaining party had been in *actual* possession of the land at the time of entry.

27. 5 Rich. 2, stat. 1, c.7 (1381).

28. 15 Rich. 2, c. 2 (1391).

29. 8 Hen. 6, c. 9 (1429).

30. 31 Eliz. 1, c. 11 (1588).

31. 21 Jac. 1, c. 15 (1623).

entered or forcibly detained. These five statutes still comprise the statutory law of England in this area. Of course, the Forcible Entry Acts of England, like their American counterparts, were of general applicability; they were applied to persons in all sorts of relationships, not merely to landlord and tenant. Because of their general construction, they have caused about as much judicial confusion in England as their American counterparts have caused in this country.

In regard to the criminal offense, earlier cases appeared to establish the rule that the indictment must allege a freehold title in the complainant (or at least a term of years) so that a forcible entry against a tenant at will,³² a tenant at sufferance, or a trespasser in possession was not indictable.³³ Cases decided in the second quarter of the 19th century, however, took the position that title was immaterial. The only questions were whether the complainant was in possession at the time and whether the defendant had used force to deprive the complainant of possession. Modern English practice appears to have followed this latter position, though it is still said that if the entry was made against a mere trespasser or against a servant of the defendant who had merely custody rather than possession, there has been no offense under the Forcible Entry Acts.³⁴

On the civil side, it appears that actions were brought for forcible entries based, in effect, on the statute of 1381 even before the third statute, that of 1429, expressly conferred a civil remedy. The old authorities appear to have taken the position that neither statute could be the basis of a civil action for damages for the entry itself unless the plaintiff had some title or right to possession as against the defendant. Hence, if a landlord broke into a house in the possession of a tenant no longer entitled to possession, there could be no recovery against the landlord either for the entry (though it was forcible, and hence a criminal offense) or for his remaining on the premises.³⁵ Presumably, the theory was that the entry must amount to a disseisin or a trespass *quare clausum fregit* to be actionable, but there could be no disseisin of a tenant, other than a life tenant, and there could be no trespass to land by the

32. The reference here is, of course, to a tenancy at will at common law, rather than to the peculiar Florida statutory "tenancies at will." At common law, the landlord had the right to terminate a tenancy at will at any time, without notice, so a tenancy at will was a rather precarious estate. See note 10 *supra*.

33. See the opinion of Lord Justice Scrutton in *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 743-44 (C.A.).

34. See the opinion of Lord Justice Duke in *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 751-52 (C.A.); ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES §§3603, 3605 (35th ed. 1962).

35. See the opinion of Lord Justice Scrutton in *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 744-46 (C.A.); Opinion of Justice Erskine in *Newton v. Harland*, 1 Man. & G. 644, 666-67, 133 Eng. Rep. 490, 499 (1840).

owner having the right to possession. The idea that the statute's criminal prohibition in and of itself might render the entry tortious, which seems to have occurred to a few American courts,³⁶ does not appear to have been fully discussed and rejected in England until 1920.³⁷ The rule that an action for trespass to land (that is, for an invasion of the tenant's possession of the land) will not lie against a landlord entitled to possession, though he commits a crime in entering forcibly, has been conceded by the majority of American courts as well.³⁸

Suppose, however, that the landlord while entering directs force not merely against the physical premises but also against the person of the tenant or members of his family or, having entered, physically expels the tenant and his belongings from the premises. May the tenant recover for assault and battery, or for trespass *de bonis asportatis*? Although it is hard to believe that none of the earlier cases involved acts directed against the person or goods of the tenant, it was not until 1840, in the case of *Newton v. Harland*,³⁹ that an English court squarely considered the question whether such invasions of personality and of personal property of the tenant might be actionable. In that case, three out of four judges of the Court of Common Pleas who were hearing en banc the point of law at an intermediate stage of the proceedings, ruled that such invasions were actionable. Although the authority of the case was weakened because the point was never ruled on by the full court and because two of the other judges of the same court who heard the point at the trial of the case agreed with the dissenter, *Newton v. Harland* was accepted as good precedent by most American courts.⁴⁰ In spite of this, *Newton* never was really accepted in England, either by the legal profession or by the judges,⁴¹ although it was followed in *Beddall v. Maitland*⁴² and *Edwick v. Hawkes*⁴³ by a judge of the Chancery Division of the High Court of Justice. In 1920 *Newton v. Harland* and the cases

36. *Reeder v. Purdy*, 41 Ill. 279 (1866); *Mosseller v. Deaver*, 106 N.C. 494, 11 S.E. 529 (1890); *Dustin v. Cowdry*, 23 Vt. 631 (1851).

37. See the opinion of Lord Justice Banks and Lord Justice Scrutton in *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 731-33, 746 (C.A.).

38. 1 HARPER & JAMES, TORTS §1.12 (1956); 1 RESTATEMENT (SECOND), TORTS §185 (1965).

39. 1 Man. & G. 644, 133 Eng. Rep. 490 (1840).

40. PROSSER, TORTS 125 (3d ed. 1964). It is interesting to note that the Florida Supreme Court in *Goffin v. McCall*, 91 Fla. 514, 519, 108 So. 556, 558 (1926) inadvertently cited *Newton v. Harland* and *Beddall v. Maitland* without noting that they had been overruled in England six years earlier.

41. See the opinions in *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 736, 739-40 (C.A.).

42. 17 Ch. D. 174 (1881).

43. 18 Ch. D. 199 (1881).

following it were overruled by a unanimous court of appeal in *Hemmings v. Stoke Poges Golf Club*.⁴⁴

The theory of *Newton v. Harland* was that a trespass to the person of the tenant or a member of his family (and, presumably, to the tenant's goods) must be considered independently from the re-entry upon the land itself, and would be tortious unless consented to or privileged. Although it can be argued that in taking a lease a tenant impliedly gives an irrevocable consent to re-entry by the landlord at the lease's termination,⁴⁵ it is not so easy to imply consent to an assault or battery upon the person of the tenant or members of his family or to an interference with the tenant's possession and control of his personal property. The only privilege the landlord might conceivably argue is that which allows one in possession of land to defend his possession by expelling persons who lack his consent to be there. The landlord's argument in *Newton v. Harland* went as follows: "I have the right to possession, and by my re-entry I joined to such right an actual occupation; therefore, in the eyes of the law, the land is now in my possession, and no longer in that of my former tenant; and I may then defend my possession against all intruders, including my former tenant who has remained on the premises." The judges who ruled against the landlord in *Newton v. Harland* did not disagree with the premise that possession was in the landlord after re-entry. Instead these judges maintained that the privilege to defend possession of land applies only to a lawful possession, and that the defendant landlord could not allege he was in lawful possession if that possession had been gained by a forcible entry contrary to the criminal prohibition of the statute of 1381.⁴⁶ It should not be assumed that the judges were ultimately persuaded to rule as they did simply by reason of this rather ingenious theory. Probably a more compelling reason is indicated by the following passage from Justice Erskine's opinion: "I cannot but apprehend that, if it were once established at law that a landlord might, in all cases where his tenant holds over, enter by force upon the premises and expel the tenant, and thereby subject himself to no greater risk than the peril of an indictment for a forcible entry, under which no restitution could be awarded, the peace of the country would be endangered by the frequent resort to their summary proceedings . . ."⁴⁷ In contrast the dissenting judge said: "For the preservation of the peace, the law will punish for the forcible entry; but the tenant at sufferance being himself a wrongdoer, ought not to be heard to complain in a civil

44. [1920] 1 K.B. 720 (C.A.).

45. 1 HARPER & JAMES, TORTS §3.15, at 255-56 (1956).

46. *Newton v. Harland*, 133 Eng. Rep. 490, 496-97, 499 (1840).

47. *Id.* at 499.

action for that which is the result of his own misconduct and injustice."⁴⁸ These opposing views provide the gist of the controversy on this subject in America as well as in England.

The case of *Hemmings v. Stoke Poges Golf Club*, which overturned *Newton v. Harland*, is interesting in that it did not involve the eviction of a tenant in the true sense. Hemmings was simply an employee of the golf club, which had allowed him and his family to occupy a gate house in connection with his duties. When Hemmings stayed on after his employment and neglected several notices to vacate, the club sent some of its agents and employees to remove him and his belongings. He refused to leave on the ground that he had been unable to find other lodgings due to the wartime housing shortage. No active resistance was offered by Hemmings and his wife. Like our present day sit-in demonstrators, they simply refused to budge and were led or carried out bodily along with their belongings.⁴⁹ While the legal status of Hemmings, who was more a custodial occupant than a tenant, could conceivably have been distinguished from that of the holdover tenant (or tenant at sufferance) in *Newton v. Harland*, the court of appeal declined to do so and considered both to be in no better position than a mere trespasser whose possession had always been wrongful. There may also have been some question whether the defendant landlord's actions amounted to a forcible entry, but the case was nevertheless decided on that assumption.

A great deal of the reasoning of the court of appeal in *Hemmings* was taken up by an analysis of the precedents and authorities prior to *Newton v. Harland*. Beyond the idea that *Newton v. Harland* misread the ancient precedents, it is possible to discern several reasons why the court overruled that decision. One reason, previously mentioned, is the rationale advanced by the dissenter in *Newton* — that the criminal prohibition against a forcible entry hardly justifies making a civil award to a wrongdoer whose very act of wrongdoing provoked the entry. Another reason is that if a landlord cannot forcibly effect an eviction without being liable in damages to the holdover tenant, it must follow that the law confers a civil right of occupancy on the

48. *Id.* at 498.

49. A particularly poignant note is struck by the fact that Mrs. Hemmings was seated in a chair with a baby in her arms, and the chair with both its human occupants was lifted and deposited outside. One wonders why no resistance was offered by Mr. Hemmings. Doubtless he had legal advice, and perhaps the following quotation from a work on English criminal law gives us the explanation: "A person who unjustifiably seeks to retain possession of land by force is guilty of a forcible detainer. Therefore, if a lessor uses force to recover possession of land against a lessee who is holding over, and the lessee forcibly resists him, both parties may be guilty of a crime." CROSS & JONES, AN INTRODUCTION TO CRIMINAL LAW 277 (4th ed. 1959).

tenant, "the length of which is determined only by the law's delay"⁵⁰ in restoring possession to the landlord. Finally, it is unreasonable to hold that there can be no cause of action for the entry itself while allowing one for the removal of the tenant and his goods since the very object of any "right of entry" is the recovery of exclusive possession, and the "right" is thus useless if it allows the landlord merely to come in and cohabit the premises with the tenant. The court also pointed out that in *Jones v. Foley*⁵¹ a landlord was held not liable to a tenant, who wrongfully refused to vacate, for damage to the tenant's furniture resulting from the landlord's dismantling the house because such action did not amount to a forcible entry. Consequently, the law was in a rather ridiculous state: a landlord could pull the roof down over his tenant's head without incurring liability, yet could not dislodge him by more direct means.

How did the court of appeal fend off the notion that the peace of the country would be endangered by landlords taking their remedies into their own hands? Lord Justice Bankes' answer was, "I have no fear that the present decision will encourage lawlessness as was suggested for the respondent. A person who makes a forcible entry upon lands and tenements renders himself liable to [criminal] punishment, and he exposes himself also to the civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods."⁵² Lord Justice Scrutton said practically the same thing.⁵³

The law of England on self-help has thus been left in the following position:⁵⁴ A landlord entitled to possession may, of course, enforce his rights by commencing an action in court for possession. He may also regain possession by self-help, without civil or criminal liability, if he can do so peaceably. If, however, any force is used in regaining possession by self-help, either in effecting an entry or in turning out the occupant, the landlord subjects himself to criminal liability. He does not, however, subject himself to civil liability unless (1) the force used exceeds that which was reasonably necessary to regain possession, or (2) the force used results in death or serious bodily injury. In either type of repossession by self-help, peaceable or forcible, the landlord will be civilly liable for any damage to the tenant's goods resulting from a lack of proper care in their removal.

50. *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 737 (C.A.).

51. [1891] 1 Q.B. 730.

52. *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720, 737 (C.A.).

53. *Id.* at 747.

54. See 1 HARPER & JAMES, TORTS §3.15 (1956); MEGARRY, REAL PROPERTY 391 (3d ed. 1962); POLLOCK, TORTS 289-92 (15th ed. Landon 1951); 1 RUSSELL, CRIME 284-86 (12th ed. Turner 1964).

One final question remains before turning to Florida's statutes and cases: what is a forcible entry as distinguished from a peaceable entry? The English authorities, both ancient and modern, have consistently taken the position that a forcible entry is the use of violence or threat of violence either to effect the entry or to remove the occupants after entry. Thus, breaking open the doors or windows, or beating the occupants, or threatening to do so, would constitute a forcible entry. Opening a door with a key, or entering by an open window, would not. Of course, a threat need not be verbal; the possession of weapons, the presence of a number of companions, or other "appearance" of readiness to use violence will suffice.⁵⁵

THE FLORIDA STATUTES AND CASES

Lawfulness of a Forcible Entry

The Florida statutes on forcible entry and unlawful detainer were originally enacted by the "reconstruction" legislature of 1868.⁵⁶ The first important difference from the English statutes lies in the fact that the prohibition of forcible entry enacted in 1381, though copied almost verbatim,⁵⁷ was made the subject of civil rather than criminal law and a civil remedy was prescribed.⁵⁸ Consequently, Florida

55. *Milner v. Maclean*, 2 Car. & P. 17, 172 Eng. Rep. 8 (K.B. 1825); ARCHBOLD, *op. cit. supra* note 34 at §3602; POLLOCK, *op. cit. supra* note 54 at 290.

56. Fla. Laws 1868, ch. 1630 [hereinafter referred to collectively as "chapter 82," because they are codified in FLA. STAT. ch. 82 (1965)].

57. Compare the language of 5 Rich. 2, stat. 1, c. 7 (1381), quoted in the text of this article at note 27 *supra*, with the following language of FLA. STAT. §82.01 (1965): "No person shall enter into any lands or tenements but in case where entry is given by law, nor shall any person, where entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner."

58. FLA. STAT. §82.03 (1965): "If any person shall enter or shall have entered into lands or tenements in case where entry is not given by law, or if any person shall enter or shall have entered into any lands or tenements with strong hand or with multitude of people, even in case entry is given by law, the party turned out or deprived of possession by such unlawful or by such forcible entry, by whatever right or title he held such possession, or whatever estate he held or claimed in the lands or tenures of which he was so dispossessed, shall at any time within three years thereafter be entitled to the summary remedy herein provided." The remedial procedure, resulting in a judgment for restitution of possession and for damages, is then set forth in §§82.06-.20. Actually, the Florida Legislature, in the same year that it enacted these civil provisions now found in FLA. STAT. ch. 82 (1965), also enacted a criminal provision reading: "Whoever forcibly enters into the possession of the lands and tenements of another, and does not, upon demand made by the party entitled to possession, vacate the same within four days after the demand, shall be punished by a fine not exceeding one thousand dollars." FLA. STAT. §821.30 (1965).

courts have never had to wrestle with the problems discussed in the preceding part of this article, namely, whether the entry itself was civilly actionable because criminally prohibited, and if not, whether any invasion of the tenant's interests of personality or of personal property would nevertheless be actionable. In Florida, damages are recoverable for a forcible entry though there has been no assault or battery on the tenant or a member of his family and no interference with his belongings. But the entry must be tantamount to a dispossession of the tenant.⁵⁹

If sections 82.01 and 82.03 of the Florida Statutes were the only ones bearing upon the substantive rights of the parties in this general area of the landlord's right of self-help, there would probably be little confusion. There are others, however. One, section 83.05,⁶⁰ has already been mentioned. With this statute there does not appear to be any problem. Though it expressly purports to give the landlord the right to enter and take possession from a tenant in default on his rent, nothing in the language of section 83.05 connotes that the right might be exercised forcibly. Moreover, it was first enacted in 1828, while sections 82.01 and 82.03 were enacted in 1868. Even if it were concluded that in 1828 the right thus given might have been exercised forcibly (there being no prohibition on using force to effect a right of entry, either at common law or, as we have seen, in the Florida statutes of that era), the later statutes, sections 82.01 and 82.03, would have to be construed as modifying such right to the extent of making the use of force to effectuate it wrongful.

A more difficult problem is posed by section 85.18 of the Florida Statutes. This statute has probably been overlooked by the courts and the profession because it purports to deal with the conferring of a lien in favor of keepers of hotels, apartment houses, rooming houses, and boarding houses upon the goods and chattels of guests and tenants for the latter's board, lodging, and occupancy. This statute was enacted in 1874, which places it subsequent to the forcible entry and detainer statutes⁶¹ and hence in a position to modify or detract from them. The crucial provision is the last sentence of the statute: "Upon the nonpayment of such sums in accordance with the rules of

59. This last mentioned qualification is merely a surmise drawn from the fact that §82.03 gives the statutory remedy to "the party turned out or deprived of possession" and also from the fact that §§82.01 and 82.03 were enacted as a "package," the latter apparently declaring *the* remedy for the former. *But see* *Adelhelm v. Dougherty*, 129 Fla. 680, 176 So. 775 (1937), discussed *infra* at note 97, in which a tenant was allowed a remedy for "forcible entry" by means of an action in trespass, wholly apart from this special chapter 82 procedural remedy. The tenant in that case, however, had been deprived of possession.

60. FLA. STAT. §83.05 (1965) (see quotation note 13 *supra*).

61. FLA. STAT. §§82.01-20 (1965).

such hotels, apartment houses, rooming houses or boarding houses, the keeper thereof may instantly eject such guests or tenants therefrom."⁶² The addition of the word "tenants," together with the words "apartment houses" and "rooming houses," to the statute by a 1933 amendment⁶³ is a pretty clear indication that the statute does apply to persons in the relationship of landlord and tenant in the types of tenements covered by the statute, and not merely to persons in the relationship of landowner and licensee or innkeeper and lodger. And the language used by the statute surely carries the implication that force may be used. Unfortunately, only one decided case and an attorney general's opinion have construed the provision. In the case,⁶⁴ the Supreme Court of Florida found no unlawful or improper conduct on the part of a hotelkeeper who, in the absence of the plaintiff guest, locked the door of the latter's room with his clothing in it and on his return asked him to settle amicably the hotel's claim. It does not appear from the case whether the hotelkeeper broke into the room, secured entrance by means of a regular or skeleton key, changed the locks, or had obtained the guest's own key and simply refused to give it back to him until the bill was settled.⁶⁵ The attorney general's opinion⁶⁶ is only slightly more enlightening. After stating that the statute authorized the owner or operator of a hotel or apartment house to eject guests or tenants who fail to pay for their lodging, it continues: "The method of ejectment is discretionary, and so long as it is reasonable, is authorized. Where an owner or operator of a hotel or apartment house locks a tenant out of his room or apartment for the tenant's failure to comply with the establishment's rules or regulations for rental payments, it would appear that this type of ejection is reasonable."

In the writer's opinion, a fair argument can be made that section 85.18 carves an exception out of the forcible entry statutes⁶⁷ so as

62. FLA. STAT. §85.18 (1965).

63. Fla. Laws 1933, ch. 16042, §44.

64. *Kloeppel v. Bradford*, 133 Fla. 695, 182 So. 839 (1938).

65. Even in the absence of a statute such as §85.18, a forcible entry by a *hotelkeeper* into one of his *lodgers'* rooms probably would not contravene the forcible entry and unlawful detainer statutes. To make out a case of forcible entry, the plaintiff must prove that he was in actual *possession* of the premises. See *Florida Athletic & Health Club v. Royce*, 160 Fla. 27, 33 So. 2d 222 (1948); *Goffin v. McCall*, 91 Fla. 514, 520, 108 So. 556, 559 (1926). In the relationship of hotelkeeper and lodger, the former has "possession." See 1 AMERICAN LAW OF PROPERTY §3.7 (Casner ed. 1952). Thus, possible conflict between §85.18 and §§82.01-.03 would not be as apparent in such a situation as in one involving a landlord and his tenant. But it is not always easy to tell which type of relationship is involved in a particular case. *Ibid.* See also *Goodell v. Morris Lansburgh & Associates*, 77 So. 2d 247 (Fla. 1955).

66. 1953-1954 OPS. ATT'Y GEN. FLA. 55.

67. FLA. STAT. §§82.01-.20 (1965).

to permit a forcible entry upon and forcible dispossession of tenants in apartment houses, rooming houses, hotels and boarding houses, who are in default in payment of their rent. Apart from this possible exception, any forcible dispossession of a tenant would appear civilly actionable in Florida.

Lawfulness of a Peaceable Entry

The next question that needs to be asked is whether the Florida statutes permit a landlord to regain possession by self-help, without liability, if he can do so peaceably. In other words, is a peaceable entry legal in Florida? For present purposes, we shall use the term "peaceable entry" to mean any entry that falls short of a forcible entry and is made by a landlord entitled to possession, upon the possession of and without the consent of the tenant, and without benefit of a court order. It is best to save the problem of differentiating a peaceable from a forcible entry until this question has been discussed, since we need never reach that problem if we conclude that the only type of entry against the tenant's consent which is legally permissible in Florida is one effected by court order. This question of the legality of a peaceable entry is the most difficult and confusing of all questions in this area in Florida.

There is no doubt that the statutes in chapter 82 do purport to deal with something called "unlawful entry," in addition to "forcible entry." The problem is to determine whether a peaceable entry by a landlord entitled to possession falls within this statutory prohibition of "unlawful entry." To begin with, let us examine carefully the language of section 82.01 of the Florida Statutes: "No person shall enter into any lands or tenements but in case where entry is given by law, nor shall any person, where entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner." If the phrase "given by law" means "authorized by judicial proceeding," then the answer is simple—a peaceable entry is not legal. It seems clear, however, that the phrase does not carry that meaning, for two reasons. First, the language is practically identical with that of the English statute of 1381, and the latter statute was never construed in England to prohibit a peaceable entry made without the benefit of legal process by one who was entitled to possession⁶⁸ The English construction allowing self-help by peaceable entry has been approved by most American courts as well.⁶⁹ Second, the statute would make no sense if "given by law" is read to

68. See CROSS & JONES, *op. cit. supra* note 49, at 276; MEGARRY, *op. cit. supra* note 54, at 391.

69. See PROSSER, TORTS 126 (3d ed. 1964).

mean "authorized by judicial process." Such a reading would have us believe that the second clause (in which the phrase "where entry is given by law" is repeated) prohibits the use of force even in effecting an entry authorized by court order, which is patently absurd. Moreover, there would seem to be no need for the lawmaker to prohibit forcible entries in the second clause if he has already in the first clause prohibited all entries without the consent of the party in possession except those authorized by court order. The more reasonable construction of the statute is that it prohibits all entries unless the one entering is entitled to possession and then proceeds to prohibit even such a person from entering by force. The only difficulty with this preferred construction is that the first clause of the statute does nothing more than restate the common law, namely, that an entry by one without a right of entry is a trespass. Perhaps the difficulty is mitigated when one considers that this Florida *civil* statute was copied from an English *criminal* statute, and this first clause, in the latter context, may have been more meaningful legislation. It must be admitted, however, that in England this first clause has apparently never been given any effect in the criminal courts, the element of force mentioned in the second clause being regarded as the gist of the offense.

If, then, section 82.01 does not prohibit a peaceable entry by one entitled to possession, do any of the other statutes do so? Section 82.03⁷⁰ simply tracks the language of section 82.01, so it deserves no independent scrutiny. Section 82.04,⁷¹ declaring the remedy for unlawful detention, is concerned with an entirely different wrong, but its opening clause certainly seems to imply that a peaceable entry by one having a right of entry is unobjectionable, the wrong of unlawful detention consisting of his holding over "after the expiration of his right" against the consent of the party then entitled to the possession.

The real difficulty is posed by section 82.02: "No person who shall, without consent, enter in a peaceable, easy and open manner into any lands or tenements, shall hold the same afterwards against the consent of the party entitled to possession thereof."⁷² This section is captioned, "unlawful entry and unlawful detention defined," but section 82.01

70. FLA. STAT. §82.03 (1965) (see quotation note 58 *supra*).

71. FLA. STAT. §82.04 (1965): "If any person shall enter or shall have entered in a peaceable manner into any lands or tenements, in case such entry is lawful, and after the expiration of his right shall continue to hold the same against the consent of the party entitled to the possession, the party so entitled, whether as tenant of the freehold, tenant for years, or otherwise, shall be entitled to the like summary remedy at any time within three years after the possession shall so have been withheld from him against his consent."

72. FLA. STAT. §82.02 (1965).

in its caption likewise purports to define unlawful entry (along with forcible entry). And, as already pointed out, section 82.03, which is captioned "remedy declared for unlawful entry and forcible entry," tracks the language of section 82.01 rather than the language of section 82.02. Furthermore, one would think that section 82.04, which is captioned "remedy declared for unlawful detention," would track the language of section 82.02, but instead it seems to *redefine* unlawful detention in a different way and then declare the remedy. So it is not easy to see how section 82.02 fits into the scheme of this group of statutes as a whole, assuming there is an intelligible scheme.

It may be contended that the language of section 82.02 means that a peaceable entry for which the consent of the person in possession was not obtained is wrongful. But the phrase, "without consent," does not tell us *whose* consent is referred to, and the second time the statutory language uses the word "consent" it tells us that the consent referred to is that of "the party entitled to possession." To adopt the former view then would have us interpret the statute as if it read, "no person who shall, without consent of the party in possession, enter in a peaceable, easy and open manner into any lands or tenements, shall hold the same afterwards against the consent of such party who was in possession." Such a rewriting of the statute seems untenable. The better interpretation would seem to be that the word "consent," the first time it is used, refers to the same party it does the second time it is used, namely, the party *entitled to possession*. Thus, in our landlord-tenant context, section 82.02 would not make unlawful a peaceable entry by the landlord since he is "the party entitled to possession," and it is his consent that the statute refers to and not that of the tenant in possession.

The only difficulty with this preferred interpretation is that it cannot be applied, in many cases outside the landlord-tenant context, without contravening the provision of section 82.05, which reads, "no question of title, but only a right of possession and of damages, shall be involved in the action."⁷³ Suppose, for example, a peaceable entry is effected by one claiming ownership of the land upon the possession of another also claiming ownership (without the latter's consent, of course). In such case, the "right of possession" depends on resolution of the question who has title, which is prohibited. So if the statute is to have any effect to render the entry in such case unlawful, the actual peaceful possession of the party entered upon must be regarded as "entitling" him to possession. That the statute was intended to render the entry in such case actionable in a chapter 82 proceeding may be a questionable assumption,⁷⁴ but even if the

73. FLA. STAT. §82.05 (1965).

74. The courts might just as reasonably have concluded in such a case that

assumption is correct, does it justify applying the same "fiction" to the landlord-tenant context so that the tenant's actual prior possession makes him, in the statutory language, "the party entitled to possession"? Undoubtedly, there is some virtue in consistency. It is submitted, however, that these two different contexts can reasonably be treated differently. The procedure prescribed in chapter 82 is a summary one, with special jury oaths and verdicts, and it is understandable that the legislature would not wish it to become bogged down in complex and difficult issues of title that are more appropriately litigated in suits in ejectment or trespass to try title. But in the landlord-tenant context, there is no question of title, but only one of the right to possession, which is basically a question whether the tenancy has been terminated. That the latter question can be litigated by means of the procedure prescribed in chapter 82 is apparently not open to doubt, since the remedy for unlawful detention declared by section 82.04 is obviously available to a landlord against an overstaying tenant. The question whether the tenant has continued to hold "after the expiration of his right" must inevitably be decided

since determination of the "party entitled to possession" cannot be made in the chapter 82 proceeding without violating §82.05, it is impossible in such a proceeding to determine whether there has been an "unlawful entry" under §82.02, the former determination being an indispensable element of the latter. The dispossessed claimant to ownership would thus have been relegated to actions in ejectment or trespass to try title in order to settle whether he or his rival claimant is the "party entitled to possession," and thus to regain, or fail to regain, possession. Though this possible alternative conclusion does not appear to have been considered by the Florida Supreme Court in *Florida Athletic & Health Club v. Royce*, discussed at note 92 *infra*, that decision, by making the assumption and resorting to the "fiction" mentioned in the text, doubtless forecloses the matter in this particular context (that of a peaceable entry by one claimant to ownership upon the possession of his rival claimant). If the court *had* considered and adopted this alternative conclusion making §82.02 inapplicable to controversies involving rival claimants to ownership, and if it were also to hold that §82.02 does not make "unlawful" a peaceable entry by a landlord entitled to possession, the two conclusions would be consistent both with the statutory language and with each other. Yet one nagging question would remain: In what situations *does* §82.02 make a peaceable entry unlawful? It may be that the legislature had in mind simply to make available to a landowner who had been dispossessed peaceably by one having no bona fide claim to the land (in other words, a trespasser, pure and simple) the summary restitution of possession afforded by the chapter 82 proceeding. This notion is buttressed by (1) the fact that §82.02 does not fit neatly in with its companion sections and had no counterpart in the statutes of England or of most other American states and hence appears to be largely *sui generis*, (2) the fact that the statutory language really prohibits the withholding of the lands against the consent of the "party entitled to possession," rather than the entry itself, and (3) the fact that it was enacted in a period in which the old order had just been violently overturned and a new order had not yet been firmly established — the post-Civil War era of "reconstruction."

therein.⁷⁵ In other words, when both parties claim ownership of the land, the court may force them to resort to more appropriate judicial proceedings by restoring them to their relative positions prior to entry and refusing to try the issue of title. In the landlord-tenant controversy, on the other hand, if the court applies section 82.02 so as to restore possession to a tenant who was not entitled to the possession at the time the landlord entered peaceably, and refuses to try the issue of who was entitled to the possession at that time, then the plaintiff and defendant simply reverse positions and bring the same type of summary proceeding under section 82.04. The court then must decide the very issue of right to possession that it refused to decide earlier. And, of course, if the landlord does in fact prove his case in the second proceeding, the tenant who had just been restored to possession by court order is now ousted by court order in the same type of proceeding. Such a game of musical chairs would seem an expensive waste of the court's time.⁷⁶

75. See State *ex rel.* Rich v. Ward, 135 Fla. 885, 185 So. 846 (1939) and cases cited therein.

76. If the Florida courts were to conclude that a peaceable entry by a landlord entitled to possession is not unlawful under §82.02, as is suggested in the text, another rather intriguing question would arise. This question is whether other "rights of entry" known to property law, such as a right of entry arising from a fee simple subject to condition subsequent, could be exercised peaceably without giving rise to an action for unlawful entry under §82.02. Such "rights of entry" are more commonly referred to today as "powers of termination." Although the question whether the condition subsequent has been violated, so as to permit exercise of the "right of entry," is in many ways similar to the question whether a lease has been terminated, the writer believes that the former does involve, in the true sense, a "question of title," while the latter involves only the "right of possession." It is true that in many respects the nonfreehold estates of tenancy are equivalent to ownership, but the courts have always recognized that they are simply temporary possessory interests, whereas a fee simple subject to condition subsequent, though it may terminate sooner than some tenancies for years, should be regarded as truly a form of ownership or "title." Thus, in a chapter 82 proceeding involving a peaceable entry made by the holder of a right of entry upon a fee simple subject to condition subject, one would expect the Florida courts to take the same position that was taken in *Florida Athletic & Health Club v. Royce*, discussed at note 92 *infra*, namely, that the case involves a question of title and therefore the actual possession of the party entered upon must be regarded as *entitling* him to possession. In consequence, it would seem that such a right of entry could be effected by self-help in Florida only in a situation in which the holder of the fee simple subject to condition subsequent does not have actual possession of the land. A fortiori, entries by holders of possibilities of reverter or executory interests should be treated as involving "questions of title." The "right of entry" that a vendor under an installment land contract may have against his vendee in default presents a more difficult problem, but such a controversy seems more akin to the landlord-tenant controversy, that is, it seems not to involve a question of title but merely the "right to possession."

There are other statutes that are relevant to any consideration of the possibility of the lawfulness of a peaceable entry. Sections 83.20-.38 provide an even faster summary procedure for the removal of tenants than is available under section 82.04. Such procedure is restricted by section 83.20 to use in two situations: (1) "Where . . . [the tenant] shall hold over and continue in the possession of the demised premises, or any part thereof, after the expiration of his time, without the permission of his landlord;" and (2) "Where . . . [the tenant] shall hold over without permission as aforesaid, after any default in the payment of rent pursuant to the agreement under which such premises are held, and three days' notice in writing, requiring the payment of such rent or the possession of the premises, shall have been served by the person entitled to such rent on the person owing the same."⁷⁷ Oddly enough, these two situations appear to include all those in which a landlord would be entitled to immediate possession, as discussed under the subheading SOME PRELIMINARY CONSIDERATIONS of this article, assuming that the words, "after the expiration of his time," refer to a holding over after a lease has been prematurely terminated by a landlord pursuant to its provisions as well as the usual type of holding over beyond the gross period of the lease. Situation number (2) specified in section 83.20, except for the special notice provision, appears to cover the same ground as section 83.05, which is probably the only situation in which in Florida a landlord can be entitled to immediate possession without the tenancy having been terminated.⁷⁸

What then is the impact of sections 83.20 - .38 and the statutes in chapter 82 (forcible and unlawful entry and detainer) on section 83.05? It will be recalled that section 83.05 is the earliest of the Florida statutes being discussed in this article, having been enacted in 1828, and uses quite direct language: "If any person leasing or re-renting any land or house shall fail to pay the rent at the time it becomes due, the lessor may immediately thereafter enter and take possession of the property so leased or rented."⁷⁹ It will also be recalled, in view of the common law rule allowing forcible entry and of the absence of any statutory prohibition of forcible entry in Florida until 1868, that section 83.05 had the effect of allowing the landlord to recover possession by a forcible as well as a peaceable entry. Although it is conceded that recovery by a forcible entry has been outlawed since 1868, it is submitted that section 83.05, to have any meaning at all today, must be interpreted as allowing recovery of possession by a peaceable entry. It was not repealed or modified in

77. FLA. STAT. §83.20 (1965).

78. See text at notes 13-15 *supra*.

79. FLA. STAT. §83.05 (1965).

1868, which is some indication that the prohibition of "unlawful" entries in the forcible entry and detainer statutes enacted that year was not intended to prohibit all peaceable entries against the possessor's consent and unsanctioned by court order. Because it was not repealed or modified in 1881 when section 83.20 was first enacted also seems to indicate that section 83.20 was not intended to prescribe the sole means by which the landlord's right to possession on the tenant's default in payment of rent is to be put into effect, just as section 83.20 does not prescribe the sole means by which the landlord's right to possession against a tenant holding over after the expiration of his lease is to be effectuated (section 82.04 affording at least one alternative means for the latter). In this connection, it should be noted that the introductory language of section 83.20 certainly sounds as though it were affording an additional, rather than a mandatory or exclusive, remedy: "Any tenant . . . may be removed from such premises in the manner hereinafter provided in the following cases"⁸⁰ True, the speediness of the remedy afforded by sections 83.20 - .38 takes away much of the practical justification for allowing any remedy by self-help, but can one legitimately conclude therefrom that the legislature intended to eliminate such other remedies despite the total absence of any indication of such intent in the statutory language used? It could be argued that the legislature, in enacting section 83.05 originally or at least in leaving it unaltered on the statute books after the enactment of section 83.20 in 1881, did not intend to declare a *remedy* by self-help, but intended merely to create a *right* to possession or a *right* to terminate the tenancy in favor of the landlord upon the tenant's default in payment of rent. In other words, the argument would be that section 83.05 set up a *right* of possession in derogation of the common law in such circumstances, and is not to be understood as saying anything about the means by which that right may be given effect.⁸¹ If so, the language used in section 83.05, whatever it conveyed to the Florida lawyer of 1828, apparently does not convey the same sense to the Florida lawyer of 1966.⁸² Moreover, if such is the true meaning of section 83.05, it is difficult to see why it was retained after the enactment of section 83.20, which

80. FLA. STAT. §83.20 (1965).

81. See *Stephenson v. National Bank of Winter Haven*, 39 F.2d 16 (5th Cir. 1930).

82. See O'Toole, *Landlord and Tenant*, in 3 FLORIDA REAL PROPERTY PRACTICE 227 (1966) (a publication of The Florida Bar). Judge O'Toole lists the available remedies from which a landlord must choose. Besides the summary procedure afforded by §83.20 and the unlawful detainer proceeding under chapter 82, he indicates that the landlord may choose "to take possession of the premises by eviction for his own use *under the statutory right of peaceful re-entry described in §83.05.*" (Emphasis added.)

appears adequate both to declare a right in the landlord to possession and to prescribe a remedy for such right.

In summary, it is submitted that a proper construction of the statutory prohibition of "unlawful entry" in chapter 82 does not take away the landlord's remedy of self-help by peaceable entry, which he had at common law and which is ostensibly "extended" by statute to the circumstances covered by section 83.05. And section 83.20, properly construed, provides not an exclusive, but simply an additional, remedy. It should be noted, also, that even if one places the opposite construction on these statutes, and succeeds in reconciling section 83.05 with that construction, there still remains the seemingly unreconcilable exception relating to tenants of apartment houses, rooming houses, and the like, found in section 85.18, previously discussed.⁸³

Having examined the statutes on the issue of the lawfulness of a peaceable entry, a look at the case law is now in order. In the writer's opinion, it does not yield a clear answer. In a number of cases, the language used by the Florida Supreme Court seems to indicate that a peaceable entry is lawful. In *Liddon v. Hodnett*,⁸⁴ an early case that fails to disclose the relationship of the parties involved, the court attempted to classify the situations in which the forcible entry and unlawful detainer statutes give a recovery of possession to one turned out or deprived of his possession, as follows:⁸⁵

(1) Where another enters in any case where entry is not given by law. (2) Where another enters with strong hand or multitude of people, even in case where entry is given by law. (3) Where another who has entered both lawfully and peaceably holds over after the expiration of his right and against the consent of the party entitled to possession. The first and second classes are unlawful entries, the second differing from the first in that the latter is made unlawful by the fact of its being with strong hand or multitude of people, however rightful it may otherwise be.

It is interesting to note that the court in so doing used the provisions of the first and second clauses of section 82.01 together with section 82.04 to make up its classification, and made no attempt to work in the enigmatic provisions of section 82.02 which, as we have seen,

83. See text at notes 62-66 *supra*. It is worth observing that §§83.05 and 85.18 appear to complement, rather than overlap, each other. The former covers only tenants of "land or house[s]"; the latter, only tenants of rooms and apartments.

84. 22 Fla. 271 (1886).

85. *Id.* at 275.

pose the major obstacle to finding a peaceable entry lawful. In *Goffin v. McCall*,⁸⁶ which involved a suit for unlawful entry between two rival claimants to ownership of some vacant lots that the defendants had entered upon and enclosed, the principal point made by the court was that there could be no suit for either forcible or unlawful entry unless the complainant had been in actual possession at the time of the entry. But the court added the following significant statement: "An entry by the owner of the title who has the right of entry or by one who enters under a bona fide claim of title where it can be effected in a peaceable, easy and open manner is not an unlawful entry *because it is given by law*."⁸⁷ Again, in *Hewitt v. State ex rel. Palmer*⁸⁸ (which fails to indicate the relationship of the parties), the court in defining "forcible entry" clearly indicated that a peaceable entry, in the landlord-tenant context, is not an "unlawful entry": "*But an entry without force by a party entitled to possession, or an unlawful entry without actual force, violence or menaces, and which has no other force than such as the law implies in every trespass, is not a forcible entry within the meaning of the statutes.*"⁸⁹ A final quotation comes from the case of *Waits v. Orange Creek Turpentine Corp.*,⁹⁰ which did involve a landlord-tenant controversy. In that case, a tenant succeeded in enjoining his landlord from trespassing. The lease authorized re-entry and repossession by the landlord in the event of the tenant's failure to abide by any covenant of the lease, but the court found no showing of noncompliance on the tenant's part. In the following statement, the court clearly assumes that the landlord's entry would not be unlawful if the tenant had violated one of the lease's covenants: "The rule is well settled that a landlord may under the terms of a lease or at its expiration re-enter and take possession of the leased premises and defend his possessions against all persons but he is bound by the provisions of the lease for re-entry."⁹¹

Three other cases require discussion, since they come as close as any to saying that a peaceable entry is unlawful. One is *Florida Athletic & Health Club v. Royce*.⁹² This was an action for "unlawful entry" under chapter 82 of the Florida Statutes. There is no indication in the opinion that the parties stood in the relationship of landlord and tenant. Indeed, the fact that the court ruled as error the trial judge's admission of evidence of title points toward a contro-

86. 91 Fla. 514, 108 So. 556 (1926).

87. *Id.* at 521-22, 108 So. at 559. (Emphasis added.)

88. 108 Fla. 335, 146 So. 578 (1933).

89. *Id.* at 339, 146 So. at 579 (Emphasis added.)

90. 123 Fla. 31, 166 So. 449 (1936).

91. *Id.* at 35, 166 So. at 451.

92. 160 Fla. 27, 33 So. 2d 222 (1948).

versy over ownership. It is clear that the entry could in no wise be regarded as forcible, the caretaker employed by the plaintiff club having voluntarily yielded possession to the defendants (without authorization from the club, of course). The contention upheld by the court was that the plaintiff need prove only that it was in actual possession, that it was ousted from possession without its consent and without the assistance of any writ of possession or similar order resulting from any court proceeding, that possession continues to be withheld from it without its consent, and that the ouster occurred within three years of the filing of the action. The opinion reveals that the court drew from sections 82.01 and 82.02 the words "[not] given by law" and "without consent" as the elements making an entry unlawful, and then proceeded to treat these as meaning "not given by judicial proceeding," and "without consent of the party in possession." This process of reasoning appears most clearly in the following quotation: "The Florida statute divides the action into two parts, one part, 'unlawful entry,' is applicable where the entry is without force but *without due process of law and without the consent of the party in possession*, and the other, 'forcible entry,' where the entry is accompanied by force or with a multitude of people . . ."⁹³ It has already been shown that assigning such meanings to these statutory words is hardly an easy matter, but the court's opinion gives us no justification for its conclusions apart from quoting the statutes and various excerpts from *Liddon v. Hodnett*,⁹⁴ *Goffin v. McCall*,⁹⁵ and *Hewitt v. State ex rel. Palmer*,⁹⁶ all of which, as previously noted, contain language favorable to the lawfulness of a peaceable entry. It is submitted that this case, despite the meanings it assigned the statutory words in question, is not authority for using the same reasoning in the landlord-tenant context. If the statutes in chapter 82 are to be applied in a controversy between two claimants of the ownership in fee, the actual possession at the time of the entry must suffice, *in such a controversy*, to show the "right of possession" and the "party entitled to possession," as such words are used in the statutes. This conclusion results from the fact that in such a controversy the right of possession depends on which party has title, and section 82.05 states that no question of title shall be involved in actions under chapter 82. That such consideration loomed large in the court's mind in this case is demonstrated by the concluding paragraphs of the opinion, in which the court quoted section 82.05 a second time and indicated that the ultimate right of possession must

93. *Id.* at 31, 33 So. 2d at 225. (Emphasis added.)

94. 22 Fla. 271 (1886).

95. 91 Fla. 514, 108 So. 556 (1926).

96. 108 Fla. 335, 146 So. 578 (1933).

be determined in a suit in ejectment or trespass to try title. As already noted, the same considerations do not apply in the landlord-tenant context; the latter parties *can* try the "ultimate" right of possession, at least under section 82.04 (unlawful detainer).

The second case is *Adelhelm v. Dougherty*,⁹⁷ which was a suit by a tenant for damages for unlawful entry and wrongful eviction by his landlord. The facts are puzzling. The landlord had commenced judicial proceedings for the removal of the tenant and obtained a default judgment on which a warrant of possession was issued. But before the warrant was executed, the tenant got the judgment vacated, and this fact was communicated to the landlord. Thereafter, the landlord, armed with the void warrant (which he apparently thought still valid), got a deputy sheriff to accompany him to the premises. Finding no one at home but new locks on the doors, they secured entrance with the help of a locksmith and moved the tenant's belongings out. The Florida Supreme Court, upholding judgment in favor of the tenant, said:⁹⁸

It seems to us that the statement of the case answers the questions propounded. . . .

It is elementary that no person has the right to *forcibly* enter premises in the possession of and occupied by another, whether the person occupying the premises happens to be in the premises or absent therefrom at the time. The law provides an adequate and speedy remedy for the acquisition of possession of premises which are wrongfully held by another and in this case the defendants in the court below had no more right to enter the premises by procuring keys to the locks placed thereon by the occupant than they would have had without having filed any proceeding to acquire possession of the property because the judgment awarding them possession had been canceled

The court's opinion does not discuss or even cite any of the Florida statutes or previous Florida cases. It appears that the errors assigned by the defendant on his appeal predicated the lawfulness of the entry upon the fact that it was performed by an officer of the law, acting in his official capacity, and ostensibly pursuant to court process. The bulk of the opinion was devoted to disposing of this contention. It is thus unreasonable to view the opinion as a considered, authoritative statement on the lawfulness of self-help unaided by judicial process. The extent to which it says anything on the latter subject is shown, in its entirety, in the quotation set forth above. The quotation demon-

97. 129 Fla. 680, 176 So. 775 (1937).

98. *Id.* at 684, 176 So. at 777. (Emphasis added.)

strates that the court considered this to be a *forcible* entry. And, in light of the fact that the premises were a dwelling house (rather than an apartment or room), it is "elementary" that self-help by forcible entry is civilly unlawful in Florida. How then does one dispose of the fact that the opinion, at its outset, tells us that the action was to recover damages for an "alleged unlawful entry," rather than for a forcible entry? The explanation is found further on in the opinion, where the court tells us that this was an "action in trespass." Thus the action apparently was not a chapter 82 proceeding at all, and the court was not referring to "unlawful entry" in the special sense in which it is used in those statutes, that is, as meaning a nonforcible entry which is not "given by law." Actually, then, *Adelhelm v. Dougherty* really tells us nothing about the lawfulness of a peaceable entry.

The third case is the recent one of *Ardell v. Milner*.⁹⁹ Unlike the cases previously discussed, this was not a decision of the Florida Supreme Court, but one by Florida's Third District Court of Appeal. The opinion tells us that the action was one for unlawful eviction, but there is nothing to indicate that it was a proceeding under chapter 82. In fact, the opinion never mentions any of the statutes in chapter 82, though it discusses the English statute of 1381. The case is interesting in that it does mention sections 83.05 and 83.20. The tenant, a dentist, had rented an office under a written lease. When the landlord failed to provide adequate air conditioning, the tenant withheld certain rentals due. Thereupon the landlord entered the office at night and changed the locks, thus evicting the tenant. The court, reversing a directed verdict for the landlord and remanding the case, briefly outlined the effect of the English statute of 1381 on the common law doctrine of self-help, concluding:¹⁰⁰

Thus, except where reentry can be made without force, the right to reenter at common law is simply the right to maintain ejectment. . . .

However, under the common law, non-payment of rent does not as a general rule work a forfeiture and confers no right of reentry. . . . In Florida, the Legislature has enacted §83.05 . . . giving the right to entry upon default in rent in derogation of the common law It appears that Ch. 83 [presumably the court is referring to sections 83.20 - .38] . . . provides for summary remedies by which a landlord may speedily regain possession and said remedy is *exclusive* of the right of the landlord to make a forcible entry [citing *Adelhelm v. Dougherty*].

99. 166 So. 2d 714 (3d D.C.A. Fla. 1964).

100. *Id.* at 716.

It is obvious that the court is regarding the entry here involved as a forcible one. Surely no one can quarrel with its conclusion that, though a right of entry is conferred by section 83.05 upon default in payment of rent, any possibility of exercising that right by means of a forcible entry is excluded by the Florida statutes.¹⁰¹ (The writer feels the opinion is misleading as it appears to ascribe that exclusion to the supposed "exclusiveness" of the remedy prescribed by sections 83.20 - .38. Rather it should have attributed the exclusion to the flat prohibition of section 82.01). Unfortunately, the opinion fails to disclose *how* the landlord obtained entry into the office on the night in question, so, as with the *Adelhelm* case, we have no alternative to classifying this case as just another case of forcible entry which tells us nothing about the lawfulness of a peaceable entry.

Distinguishing a Peaceable From a Forcible Entry

If a peaceable entry is lawful in the landlord-tenant context, there remains the question left aside earlier when "peaceable entry" was defined to mean any entry that falls short of a forcible entry: What is a forcible entry as opposed to a nonforcible entry? The old statutory language — "with strong hand or with multitude of people," juxtaposed to the phrase, "in a peaceable, easy and open manner"¹⁰² — doubtless has left to modern courts a fair margin for the accumulation of judicial gloss. It has already been noted that the English courts interpreted a forcible entry to include the use of threats or violence either in effecting an entry or in putting out the occupant or his belongings after entry.¹⁰³ The problem now is to discover where the Florida courts appear to draw the line. As the reader has probably suspected from the cases already discussed, there has been some tendency to blur the line. The following cases will no doubt reinforce that suspicion.¹⁰⁴

An early Florida case that gives some warning of the dimensions of this problem is *Walls v. Endel*.¹⁰⁵ In that case, the defendants

101. The statement in the text is subject to the possible exception created by FLA. STAT. §85.18 (1965), discussed at notes 62-66 *supra*, which was probably inapplicable to the facts in *Ardell v. Milner* because the dentist's office was not situated in a hotel, apartment house, rooming house, or boarding house.

102. The language is that of FLA. STAT. §82.01 (1965), but is virtually identical with that of the old English statute of Richard II.

103. See text at note 55 *supra*.

104. The writer believes that for the problem now to be discussed, unlike those previously discussed, cases that do not involve landlords and tenants are just as authoritative as those that do. Thus, no particular effort is made to point out in these cases any identification (or lack of identification) of the relationship of the parties involved.

105. 17 Fla. 478 (1880).

claimed to have acquired title to the plaintiff's house by a deed executed by the plaintiff and his wife, and thus argued that the plaintiff had remained in possession as their tenant. When the plaintiff was taken to an insane asylum, the defendants made frequent visits to the house and "importuned" his wife to give up possession to them, representing to her the poverty and helplessness of her condition, that her title was gone, that she could not afford to pay the rent they demanded, and that they had rented the premises to another. She was thus induced to leave, and the defendants entered and took possession. Reversing a judgment in favor of the defendants, the Florida Supreme Court evidently accepted the sufficiency of this evidence to establish a forcible entry:¹⁰⁶

The yielding by the "sick and worried" wife of the lunatic of the possession, under these circumstances, can have no influence upon the rights of Walls, nor upon the rights of the defendants.

The degree of "force" necessary to be shown to sustain the charge of a forcible entry may be ascertained by consulting the American cases cited in

The apparent absence of any actual threat of violence, either explicit or implicit, indicates some lack of objectivity in the test of forcibleness applied by the court. It is as though the court were placing itself in the particular circumstances of the party "entered upon" and asking itself whether she probably did experience fear for her safety in her state of mind at the time, rather than asking itself whether a dispassionate observer of the scene would reasonably have apprehended a likelihood of violence.

Another early case in which it is difficult to see how the court found a forcible entry is *Greeley v. Spratt*.¹⁰⁷ In that case the plaintiff was occupying a room as his law office, leaving it locked at night. The defendant had his agent enter it at night by means of a skeleton key, remove the plaintiff's furniture and belongings, and put someone else into possession. When the plaintiff returned the next morning, he found his furniture in the hall and the agent putting a new lock on the door. When he sought to enter, he was not allowed to do so, someone inside placing his foot against the door. The Florida Supreme Court sustained a judgment of forcible entry. A few years after the *Greeley* case, the Florida Supreme Court had occasion to distinguish its facts from the very similar facts of *Livingston v. Webster*.¹⁰⁸ In the latter case, the court reversed the trial

106. *Id.* at 483.

107. 19 Fla. 644 (1883).

108. 26 Fla. 325, 8 So. 442 (1890).

judge's decision because the evidence failed to show that the entry was forcible. The evidence indicated that the plaintiff had put one Du Bois in possession of the premises as his agent, and that Du Bois, though not in occupancy himself, allowed a porter to sleep there at night. The porter apparently decided to quit the premises, and without any authorization from the plaintiff or Du Bois, turned over the keys to one Masters, who turned them over to the defendant. The defendant and Masters went to the premises one evening, used the keys to unlock them and secure entrance, and placed the defendant's agent in possession; and the agent refused entrance to Du Bois when the latter came by the next morning. Distinguishing *Greely v. Spratt*, the court said:¹⁰⁹

In that case the defendant, in the night time entered Spratt's law office by means of skeleton keys, and after entering he threw Spratt's office furniture out of the room or office, and forcibly prevented Spratt from entering the office. The entry and the throwing the goods out of the office was [*sic*] one and the same transaction, and taken together they were of such a character as to inspire apprehension of violent acts toward Spratt and his property, and therefore, a case of forcible entry was made out

We are aware that there are some authorities to support the position of the appellee that the entry of the premises by means of keys was such an entry as to make out a case of forcible entry, but the great current of decisions is against this proposition, for in all cases, unless there is some use of force, or of threats and intimidation, there is no forcible entry. . . .

In *Hewitt v. State ex rel. Palmer*,¹¹⁰ the facts relied upon to show a forcible entry were that the defendant secured a key from a previous tenant, made a new one from it, and by this means secured entrance to the house occupied by the plaintiff which she kept securely locked; that the defendant immediately left upon discovering the plaintiff's presence; that the plaintiff then placed new locks upon the house; but that the defendant again "forced admission" against the will of the plaintiff by use of a skeleton key. In a footnote to the opinion, the court states:¹¹¹

That surreptitiously forcing an entrance into a locked house, either by use of skeleton keys, or by breaking off the locks, would tend to a breach of the peace and possible homicide on

109. *Id.* at 331-32, 8 So. at 444.

110. 108 Fla. 335, 146 So. 578 (1933).

111. *Id.* at 340 n.*, 146 So. at 580 n.1.

the part of the occupant defending possession, can scarcely be gainsaid. Therefore, such conduct amounts to a forcible entry of the premises.

It will be recalled that in *Adelhelm v. Dougherty*¹¹² the court appears to have treated as forcible an entry obtained by having a locksmith "pick" the new locks that had been placed on the house by the plaintiff.¹¹³ Although in that case the plaintiff was absent from the premises at the time, the defendants did not appear to have chosen the time of their entry for that reason, so there was probably nothing "surreptitious" about their activities as there had been about those of the defendant in the *Palmer* case. Of course, in *Adelhelm v. Dougherty*, there was the added element of removal of the plaintiff's belongings from the house, but it would be difficult to characterize them as having been "thrown out."

What is the teaching of these cases about where the line is to be drawn between forcible and nonforcible? None has overruled or even discussed the others, except to the extent already indicated. Perhaps the answer is that no hard and fast line can be drawn, that the court will always review the totality of the defendant's acts in light of the prior relations between the parties, and make its own estimate whether such acts, in such context, would reasonably excite fear of violence to person or property in the mind of the occupant (without regard to whether he is in fact present or absent at the time). On the other hand, a distinction might be drawn between an entry of locked premises effected by means of skeleton keys or the like, which should be regarded as equivalent to "breaking" the lock, and an entry effected by means of regular keys legally obtained or even by an entry of unlocked premises.¹¹⁴ Such a distinction would draw a rather fine line, but one that perhaps is not wholly without merit. In any event, what the defendant does after he "gets in" is just as germane in Florida to the issue of forcibleness as it has been in England. If after entering he "throws out" the occupants' belongings, the entry will be regarded as forcible. If, however, he takes care to remove their belongings to other suitable shelter and to avoid damaging

112. 129 Fla. 680, 176 So. 775 (1937).

113. One case in which entry was thus effected held that the entry was *not* unlawful, but the reason there was the court found that the real estate broker who so entered and placed the defendant in possession was acting as the plaintiff's agent at the time. Accordingly the case, *Caplan v. Burns*, 149 Fla. 429, 6 So. 2d 8 (1942), is not germane to our discussion.

114. One case in which the defendant had opened an unlocked gate in a fence held the entry forcible, but there was the additional fact that after thus securing admission into the enclosure he "drove" the plaintiff's cattle out. See *Chapman v. State ex rel. Carlton*, 152 Fla. 183, 11 So. 2d 335 (1943).

them in the process, the fact of removal should not suffice of itself to render the entry forcible. Otherwise, no entry could really be effective as a repossession without being held "forcible." For the same reason, the fact that the defendant proceeds to refuse entry to the former occupants whom he dispossessed, and even backs up that refusal by force, should be irrelevant in determining whether the entry was forcible.¹¹⁵

*Can the Parties by Contract Alter the Results
That the Courts Would Otherwise Reach?*

The question to be discussed in this subpart is probably the most crucial of all, yet happens to be one on which the decided cases give practically no guidance at all. And as one would expect, the statutes are wholly silent on this issue. The question can be divided as follows: (1) If, contrary to the conclusions previously suggested in this article, it is determined that a peaceable entry (in the landlord-tenant context) is unlawful because chapter 82 prohibits all entries without the consent of the person in possession and without the assistance of judicial process, or because section 83.20 provides an exclusive remedy, may a landlord and a tenant nevertheless validly provide by contract for civil nonliability for such an entry? (2) May a landlord and a tenant validly provide by contract for civil nonliability for a forcible entry? These questions would surely occur sooner or later to any experienced practitioner in real property since the relationship of landlord and tenant is, at least at its outset, invariably contractual, and the courts have traditionally regarded it as the sphere *par excellence* in which the parties can "make their own law."

With regard to a peaceable entry, it is submitted that the parties could provide validly for civil nonliability. As we have already seen, the major obstacle to finding a peaceable entry lawful, even in the absence of such a contractual provision, lies in the words, "without consent," used in section 82.02. Would not such a provision constitute "consent" of the tenant to the landlord's entry, thus rendering section

115. Such a refusal should properly be regarded as simply defense of a possession, the retaking of which is already completed, and not as part of or "coloring" the entry or retaking itself. In England, the rule is well established that legal possession attaches to physical control, acquired even for a very short period of time (if it be "definite and appreciable") by the rightful owner. See *Lows v. Telford*, 1 App. Cas. 414 (1876). Thus, the entry would be regarded as peaceable, and hence rightful. Refusal to readmit the tenant, though backed up by force, would also be rightful because it is made in defense of a rightful *possession* lawfully acquired. *Winn v. State*, 55 Ark. 360, 18 S.W. 375 (1892); *Smith v. Detroit Loan & Bldg. Ass'n*, 115 Mich. 340, 73 N.W. 395 (1897). But some American courts have felt such reasoning undermines the basic reason for prohibiting forcible entries. See *Mason v. Hawes*, 52 Conn. 12 (1884).

82.02 inapplicable? Conceivably, it could be argued that in the creation of every tenancy the tenant impliedly consents to a re-entry by the landlord upon termination of the tenancy.¹¹⁶ Accordingly there would be no need to make explicit provision for such consent in order to render section 82.02 inapplicable. In the writer's opinion, the latter argument is not very persuasive. Consent, if implied at all, would have to be "implied in law" from the legal nature of the landlord-tenant relationship and not as a factual inference drawn from the tenant's outward acts. But an express provision in the lease is an entirely different matter. One can, of course, argue that the "consent" referred to in the statute is "apparent consent at the time of the entry," and that regardless of the lease provision for consent, the landlord is prohibited by section 82.02 from entering if at that later time the tenant appears to have withdrawn his consent.¹¹⁷ But entirely apart from any effort to make the contractual provision serve as the "consent" referred to in section 82.02, the fact remains that the only prohibition that might exist in Florida against a peaceable entry is a civil one, giving rise to a civil right in the tenant that he did not possess at common law. Therefore it is difficult to perceive why he should not be allowed to waive such right as part of the consideration for obtaining a particular lease. The writer believes that most courts would find it difficult to hold such a contractual waiver void as against public policy.¹¹⁸ It is likewise felt that most courts would have to be confronted with a far clearer indication of legislative intent than that found in section 83.20 in order to hold that the remedy prescribed by that section "excludes" any possibility of the parties making provision by contract for the self-help remedy of a peaceable entry.

The question with respect to a forcible entry presents a different aspect. In this area we have to contend with a criminal statute, which reads, "whoever forcibly enters into the possession of the lands and tenements of another, and does not, upon demand made by the

116. See note 45 *supra*.

117. The opposing argument is that the lease represents the "bargain" struck by the parties, which they intended to govern their entire relationship. It would seem most unfair to allow the tenant, who acquired possession of the landlord's property on the express understanding that he consents to a re-entry by the landlord, later to renege on their bargain by withdrawing his consent. In other situations the law has recognized that a consent or license to another to enter upon land may be or become irrevocable. See 1 RESTATEMENT (SECOND), TORTS §§176-84 (1965) and in particular the Scope Note at 320.

118. See *Clark v. Service Auto Co.*, 143 Miss. 602, 108 So. 704 (1926). Cf. *C.I.T. Corp. v. Reeves*, 112 Fla. 424, 150 So. 638 (1933); *McDowell v. James Talcott, Inc.*, 183 So. 2d 592 (3d D.C.A. Fla. 1966), holding valid a contractual provision for peaceable repossession of personalty without judicial process.

party entitled to possession, vacate the same within four days after the demand, shall be punished by a fine not exceeding one thousand dollars."¹¹⁹ A glance at this language reveals that it raises almost the same dilemmas of statutory construction as were raised by the language of section 82.02: Does "of another" mean "belonging to another" or does it mean "in the possession of another"? Does "the party entitled to possession" mean what it seems to say, or does it rather mean merely "the party who was dispossessed by the forcible entry"? But even if we resolve these dilemmas in favor of the latter interpretations, so that a forcible entry made by a landlord entitled to possession is held to be criminally unlawful,¹²⁰ our question about the effect of a lease provision authorizing re-entry by force is still unanswered. It may be that a lease provision permitting the landlord to re-enter by force cannot make his act any less a crime.¹²¹ But although the legislature has found the public interest to require the attachment of a criminal penalty to forcible entries, does it follow that a contractual provision for civil nonliability for such entries is therefore void as against public policy? Apparently, the majority of American courts that have had occasion to consider the question have held valid contractual provisions giving a privilege of entry by force, notwithstanding the statute.¹²²

The only Florida cases that appear to have touched, even remotely, upon these questions are the two recent ones of *Ardell v. Milner*,¹²³ and *Van Hoose v. Robbins*,¹²⁴ both being decisions by intermediate appellate courts. The former appears to have involved some type of provision in the lease authorizing the landlord to re-enter in the event of the tenant's default, but unfortunately the court's opinion does not tell us what it said. So we do not know

119. FLA. STAT. §821.30 (1965). Other criminal provisions, such as those prohibiting assaults, batteries, and breaches of the peace, may also be involved in a particular case.

120. There are no Florida appellate cases construing these provisions of FLA. STAT. §821.30 (1965).

121. There are no Florida appellate cases directly in point on this issue, and it would unduly lengthen this article to try to resolve the issue by argument from analogy. See, however, *Percifield v. State*, 93 Fla. 247, 111 So. 519 (1927) (no larceny in repossession of personalty by self-help from conditional vendee who in contract had "consented" thereto).

122. See *Goshen v. People*, 22 Colo. 270, 44 Pac. 503 (1896); *Fabri v. Bryan*, 80 Ill. 182 (1875); *Backus v. West*, 104 Ore. 129, 205 Pac. 533 (1922); *Virginia Iron, Coal & Coke Co. v. Dickenson*, 143 Va. 250, 129 S.E. 228 (1925). In support of holding such a contractual provision void as against public policy see *Jordan v. Talbot*, 55 Cal. 2d 597, 361 P.2d 20 (1961) (dictum); *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53 (1902) (dictum).

123. 166 So. 2d 714 (3d D.C.A. Fla. 1964).

124. 165 So. 2d 209 (2d D.C.A. Fla. 1964).

whether the provision simply authorized a re-entry, or went further and authorized the use of force if necessary. The position of the court on the question is found in the following quotation:¹²⁵

It appears that Ch. 83 . . . provides for summary remedies by which a landlord may speedily regain possession and said remedy is exclusive of the right of the landlord to make a forcible entry, even though the lease contains a provision permitting the landlord to re-enter. See: *Adelhelm v. Dougherty*

....

If the lease provision did not expressly authorize the use of force in effecting the re-entry, then the court's statement that the landlord has no right to make a forcible entry does not tell us anything new. If, on the other hand, the lease provision did authorize the use of force, then by failing to tell us so the opinion has certainly eliminated all its value as authority for the proposition that the landlord still cannot make a forcible entry without liability. Even if the opinion had told us that the lease expressly permitted re-entry by force, its authority would still be weak because (1) the only case it cites for its proposition, *Adelhelm v. Dougherty*, did not involve that particular point at all, (2) the opinion gives us no rationale whatever for its conclusion, and (3) as already indicated,¹²⁶ the clear weight of authority elsewhere is opposed to its conclusion. In any event, *Ardell v. Milner* tells us nothing about the effectiveness of a lease provision to excuse liability for a "peaceable entry."

The other case, *Van Hoose v. Robbins*, is of even less importance as a guide in this area. Basically, it involved the assertion by a landlord of the common law right of distress of the tenant's goods for rent due. In a replevin action brought by the tenant, the court held that the Florida statutory proceedings for distress supersedes the common law right, and that there is no provision in the former for a self-executing possessory lien. It did not appear just how the landlord got possession of the tenant's personalty, but the court, apparently assuming that some or all of it may have been taken from the leased premises, uttered the following dictum:¹²⁷

This general right of re-entry [that accorded by Florida Statutes, section 83.05], however, is not unqualified and may not be asserted by *trespass* on the lessee's unforeclosed right of possession Absent abandonment or voluntary relinquishment of the leasehold, the landlord's right to re-enter precedent to taking possession should appear as a matter of contract or be established by prescribed legal process.

125. *Ardell v. Milner*, 166 So. 2d 714, 716 (3d D.C.A. Fla. 1964).

126. See cases cited note 122 *supra*.

127. *Van Hoose v. Robbins*, 165 So. 2d 209, 211 (2d D.C.A. Fla. 1964).

The statement implies that there is no right of either forcible or peaceable entry against the tenant's consent and without aid of legal process, *except as the parties may have contracted for such right*. It seems fair to say that this court felt the parties could validly create by contract a self-help remedy.¹²⁸

*"Constructive" Eviction¹²⁹ or How a Landlord Can
Be Nasty Without Being Illegal*

All of the prior discussion has assumed that the "self-help" employed by the landlord involves an entry upon and ouster of the tenant from the leased premises, either with or without force. There are, however, other less direct means by which a landlord could conceivably get rid of a tenant who wrongfully remains in possession, without going to court. Since such means would not, except by resorting to pure fiction, contravene the forcible entry and detainer statutes, it is correspondingly more difficult to find any actionable wrong on the part of the landlord.

The first of these means to come to mind is the cutting off of utilities or services, including heat, air-conditioning, water, gas, and electricity. If these are to be supplied by the landlord under the lease agreement, rather than arranged for by the tenant directly with the utility company, and can be interrupted without physically entering the leased premises, it is hard to see how the landlord could incur any liability for cutting them off, since his obligation to supply them has ended with the termination of the lease.¹³⁰ The same would appear true of a failure to make repairs when the lease has shifted this duty to the landlord. Of course, the success of such a device to get rid of a tenant depends both upon how indispensable such services are

128. For a federal case from Florida that appears to assume the parties are free to contract at variance with the statutory provisions, see the quotation in the text at note 134 *infra*.

129. The term "constructive eviction" normally refers to any acts or omissions of the landlord, short of actual physical ouster, which interfere so substantially with the tenant's possession or enjoyment of the leased premises that he is, in effect, deprived of the beneficial use of them. See 1 AMERICAN LAW OF PROPERTY §3.51 (Casner ed. 1952). It is almost invariably in issue in cases in which a tenant has voluntarily abandoned the premises *before* the end of the tenancy and is defending an action for rent on the ground that his landlord breached the covenant of quiet enjoyment. In this article the term is applied in quite a different context to the same sorts of acts and omissions on the part of the landlord, but excludes those acts that might constitute an "entry" in violation of the forcible entry and detainer statutes.

130. Here we are again assuming, as elsewhere in this article, that the landlord is entitled to immediate possession of the leased premises, which, generally speaking, means that the tenancy has been properly terminated.

to the enjoyment of the premises and upon how recalcitrant the particular tenant is.¹³¹

Other means exist only when the landlord retains legal control of the areas surrounding or adjacent to the leased premises. Thus, they are usually only available in instances in which the leased premises consist of a room, apartment, or suite which is part of a larger building. For example, it is perfectly conceivable that a landlord, being in possession and control of the hallways of such a building, could affix a padlock to the outside of the door leading into the leased premises, erect a barricade, or otherwise interfere with or block the tenant's ingress to the leased premises without ever effecting an "entry of the premises." There is, of course, the danger in such case that a claim of conversion of the tenant's personalty could be made because he was deprived of access to it. But this danger could probably be avoided by affixing a notice in plain sight to the effect that upon request the tenant would be allowed to enter for the purpose of removing his belongings. Obviously, such measures should not be utilized while the tenant is inside the leased premises or an action for false imprisonment might result.

Another example is afforded by a federal case that arose in Florida, *Stephenson v. National Bank of Winter Haven*.¹³² In that case the landlord, pursuant to the provisions of the lease, declared it to be terminated when the tenant proffered an installment of rent five days after it was due. The tenant, however, remained in possession. The landlord, while insisting that the tenant was now only a tenant at sufferance and refusing to accept any further payments, made no effort to obtain judicial aid in removing him. Instead, the landlord commenced excavations on its adjoining property which undermined and rendered untenable the building under lease. The tenant sued for damages, whereupon the landlord won a directed verdict. The tenant seems to have urged that section 83.20 requires, as a precondition to the removal of a tenant in default on his rent, that three days' notice in writing demanding payment or possession be served on the tenant. In reply the landlord maintained that section 83.05 makes no such requirement.¹³³ The court said:¹³⁴

It does not appear to us that there is any inconsistency between these two sections; by one the lessor is given the power

131. It may also be that the cutting off of certain utilities, such as water, might violate state public health laws. See FLA. STAT. chs. 385, 386 (1965).

132. 39 F.2d 16 (5th Cir. 1930).

133. The references are to FLA. STAT. §§83.20, .05 (1965), but the citations appearing in *Stephenson* are to earlier compilations containing those provisions.

134. *Stephenson v. National Bank of Winter Haven*, 39 F.2d 16, 17-18 (5th Cir. 1930). (Emphasis added.)

to terminate the lease, by the other his right to possession depends upon whether the rent is paid within three days after demand. *However that may be, neither section takes away the power of the lessor and lessee to fix their rights by contract.* It was agreed in the . . . lease that upon default . . . the lessee should become a tenant by sufferance and should waive all right of notice, not only to quit, but of demand to pay rent as well. His failure to pay rent when it was due by his own agreement made him a tenant by sufferance The conclusion is that . . . [the landlord] in making the excavations complained of acted within its rights.

In its conclusion this case thus seems to follow in the tradition of the English case of *Jones v. Foley*.¹³⁵ The landlord will not be liable to a tenant wrongfully in possession for actions which destroy the leased premises or otherwise render them untenable but which fail to violate the forcible entry and detainer laws. There was nothing in either case to indicate that the landlord took these actions for the sole purpose of inflicting personal injury on the tenant or on his belongings and thereby forcing him to vacate. If there had been such evidence, the damage may well have been actionable as wantonly and intentionally inflicted. Consequently, the cases may stand merely for the proposition that a landlord who had planned to take such actions in any event does not subject himself to liability to a tenant who by wrongfully remaining on the premises simply "got in the way" of such operations. Of course, it would be a rare occasion for any landlord to be willing to take such drastic action against his own property merely in order to get rid of a tenant. Few landlords would be willing even to forego making needed repairs, just to get rid of a tenant.

SUMMARY AND CONCLUSIONS

Undoubtedly, a forcible entry by a landlord entitled to possession will result in his being civilly liable to the tenant, unless the leased premises are situated in a hotel, an apartment house, a boarding house, or the like. Even in the latter apparently privileged situations, the landlord will probably be liable for any use of more force than was reasonably necessary to eject the tenant, for any force resulting in serious bodily injury or death, and for any damage to the tenant's belongings resulting from a lack of proper care in their removal. On the criminal side, the landlord may subject himself to prosecution for assault, battery, breach of the peace, or affray, if the entry involves

135. See text at note 51 *supra*.

violence to the person. Even if it does not, he may nevertheless be subject to prosecution for the statutory offense of "forcible entry." It is not clear that the definition of the latter offense covers a forcible entry by a landlord entitled to possession, but the possibility must be reckoned with. The privilege of forcible ejection apparently accorded to landlords of hotels, rooming and boarding houses, and apartment houses could, however, conceivably protect them from criminal prosecution as well as from civil liability.

There is no criminal liability attached to a peaceable entry, and civil liability is not yet clearly indicated by the cases. But civil liability may well result from an extension to the landlord-tenant context of the reasoning of *Florida Athletic & Health Club v. Royce*.¹³⁶ Even if not, the possibility of recovering possession by means of a peaceable entry can hardly be considered a realistic one because of the difficulty of guessing correctly what conduct the courts will hold peaceable and what forcible. A tendency to blur the distinction, and thus swallow up all entries into the "forcible" category, is clearly discernible in the cases. Even in case a particular entry is held peaceable and lawful, it would seem that the landlord ought to be liable for any damage to the tenant's belongings resulting from a lack of proper care in their removal and storage.

Whether the parties may vary their civil rights and liabilities by contract in this area seems still an open question in Florida. The only court pronouncements available to us are of uncertain import and perhaps conflicting. What effect contractual provisions giving "consent" to, or removing liability for, forcible entries may have on the landlord's *criminal* liability is also an open question.

In view of the many questions left unanswered in this area, it is doubtful that any lawyer should advise a client-landlord to try to effect a peaceable entry and dispossession of his tenant, much less a forcible entry. But even if there are enough "red flags" along the way to warn off the prudent attorney and clients who consult him before they act, is this really a satisfactory situation? Does not the State of Florida in the second half of the twentieth century deserve a clearer answer to this ancient question of the landlord's right of self-help? In the writer's opinion it does, and the answer must surely come from the legislature rather than the courts. The present confusing state of the law is largely traceable to the statutes themselves, some of which use 14th century language that was perhaps none too clear even in that era. Others of more recent derivation, while reasonably clear when considered by themselves, seem to have been enacted without much thought for those laws already on the books.

136. See text and notes at note 92 *supra*.

If, then, statutory reform is so obviously needed, what direction should it take? In the writer's view, there is something to be said for the logical consistency of the position of English law. That position is that the state's interest lies solely in discouraging the use of force, and such interest can be adequately protected by the normal method of imposing a criminal penalty. Hence, if the landlord can regain possession peaceably, he incurs neither civil nor criminal liability; and if he uses force, although he will incur criminal liability, he incurs no civil liability to the tenant who is himself in the wrong for having overstayed his tenancy. It is the idea of rewarding a delinquent tenant, not only with restitution of possession but also damages, that is repugnant. Perhaps this resolute refusal to reward the wrongdoing tenant is the most appealing aspect of the English rule.

The major difficulty with the English position is that it assumes the landlord is clearly entitled to possession. In many cases he is. Perhaps the fact that the landlord was so obviously entitled to the possession in the *Hemmings* case accounts for the unanimity of the English appellate judges in that landmark decision. But in many cases it is no simple matter, even for a lawyer, to determine who is entitled to possession. Either the interpretation of the lease or the fact of the tenant's default may be in bona fide dispute. Remember also the problems dealt with under the heading SOME PRELIMINARY CONSIDERATIONS in this article. Under the English rules, the landlord is civilly liable, even for a forcible entry, only when he has misjudged his right to possession. So there is a fair chance that he will not be liable at all to the other party for dispossessing him, even by force. A landlord may be willing to take this gamble and run the remote risk of a criminal prosecution. What is wrong with letting him take the gamble? If he decides correctly the issue of who is entitled to possession, no real harm has been done. And if he decides wrongly, the tenant can obtain restitution of possession and full damages in a court of law. Yet this line of reasoning, in the writer's opinion, has two fallacies. First, it is hard to justify letting one party to a dispute have such a gamble, and not the other party. But if both parties have such a choice, then possession acquired by either will remain precarious because each may be encouraged in turn to resort to self-help. In other words, if there is any possibility that self-help will succeed in regaining possession without liability, for both parties alike, resort to it is unlikely to end with the first dispossession and there is no telling where the contest will end. Serious violence may well be the result. The other fallacy in the argument derives from the peculiar situation of the tenant. A considerable amount of real estate under lease provides necessary shelter for the tenant, his family, his belongings, and his business activities. The point is, if the landlord

misjudges the right to possession and ousts the tenant by self-help, the tenant may in many cases be effectively discouraged from enforcing the right to possession that he has. Why? Because once he is deprived of the shelter of the leased premises, some adequate substitute must, in most cases, be provided immediately. And once such a substitute is found, regaining possession of the former tenancy and securing damages through court action may be more trouble than it is worth, especially if he has to prove all the facts and law showing that he *did* have the right to possession. And it is probably true that most tenants whom landlords dare to dispossess by self-help are relatively poor anyway and thereby reluctant to seek the aid of lawyers. In other words, the change in status quo brought about by the landlord's resort to self-help usually has a far more drastic effect on the tenant than maintenance of the status quo has on the landlord. The effect may be so drastic that the tenant is discouraged from enforcing his rights and is therefore deprived of them. This is a serious matter in a society which has set for itself the goal, "equal justice under law."

If, then, the tenant in bona fide dispute with his landlord ought to be protected against dispossession by self-help, the question is whether such protection can be afforded by the law without impairing the landlord's right of self-help against a tenant who is clearly and knowingly in the wrong. The writer believes the only way the former can adequately be protected is to eliminate the landlord's right of self-help altogether, not merely by establishing a legal rule to that effect, but also by affording the speediest, most adequate, and least expensive civil remedy the law can devise. In this situation a rule without such a remedy is not worth much. Normal civil processes to enforce it are too slow, and criminal enforcement does nothing toward making the tenant whole. True, the rule may have some deterrent effect, but only on lawyers or on landlords who consult lawyers before they act, but this is a small lot. The remedy ought to be so devised that it can place a tenant back in possession within a week of his ouster. The chapter 82 summary proceeding cannot operate that fast. In any event, the remedy available to the tenant ought to be at least as fast as that available to the landlord pursuant to Florida Statutes, section 83.20. Moreover, the remedy should allow the tenant to recover all his reasonable and necessary expenses, such as moving charges both ways, the cost of substitute lodging or shelter, wages or profits lost, and, in addition, some compensation for the inconvenience caused him.¹³⁷

137. A fuller explanation of the remedy that presently exists is in order. FLA. STAT. §82.16 (1965) states that in the event of a verdict in favor of the plaintiff, the court shall award a judgment for him that he recover possession of the property "with his damages and costs" but FLA. STAT. §82.14 (1965) requires the

Besides damages, the only elements the tenant should have to prove are his actual possession of the premises prior to the ouster, and his eviction by the landlord against his will.¹³⁸ Such issues should be triable before a judge without jury, and default judgments should be permitted. The time limitation for bringing such an action should be considerably reduced from its present three years, at least in the present context of landlord and tenant.

The reasons given above for eliminating the landlord's right of self-help apply equally to forcible entries and peaceable entries. It is submitted that the ancient distinction between the two has outlived its usefulness. Either should be actionable by the tenant in the special proceeding here recommended. Moreover, retaining the landlord's right of self-help in cases involving tenants in hotels, rooming houses, boarding houses, and apartment houses does not have much to recommend it, save the difficulty of distinguishing between "tenants" and mere lodgers in such places. It is difficult to see how most of the types of "constructive eviction" mentioned could be made actionable as a wrongful ouster by self-help, though undoubtedly a physical barring of the tenant's way of ingress to the premises could and should be.

The final question is what effect should be permitted to lease provisions authorizing the landlord to re-enter or relieving him from liability for a re-entry. It is common knowledge that the vast majority of leases, at least for residential property, are drafted for landlords and in their favor. As long as we continue to indulge in the notion that the tenant has read and understood the lease and all its provisions before signing it, the landlord's right of self-help will never be effectively laid to rest. All the landlord need do is ensure that such a clause

jury, in case of recovery by the plaintiff, to fix his damages at double the rental value of the premises from the time of the unlawful or wrongful holding (with an exception for unlawful detainers that are not wilful or knowingly wrongful). Such a measure of damages, in cases of dispossession of the tenant by the landlord, should usually cover the tenant's actual damage adequately, but sometimes it may not. A Florida trial court case appears to have taken the position that the plaintiff may sue for his items of actual damage in lieu of the rental value of the premises. See *Dorsey v. Horne*, 11 Fla. Supp. 149 (County J. Ct. 1957).

138. Reducing the issues to these three—possession, ouster, and damages—will undoubtedly benefit many tenants who have no bona fide dispute with their landlords about their lack of right to remain in possession but who nevertheless refuse to vacate. It seems unfair that landlords should be compelled to hire a lawyer and go to court to get rid of such persons, but the fact that the remedy for ouster by self-help must be quick in order to protect the tenant who is in bona fide dispute with his landlord probably outweighs the unfairness in such cases. The judicial proceeding available to the landlord to remove a tenant is relatively quick and inexpensive. See FLA. STAT. §§83.20-.38 (1965).

is inserted, and nine times out of ten the prospective tenant will make no objection. There is nothing wrong with clauses that merely give the landlord a *right* to declare the tenancy prematurely terminated on the tenant's default, but perhaps it is high time the legislature declared a public policy against clauses authorizing the landlord to serve as "judge, jury, and executioner."