
FORCIBLE ENTRY AND DETAINER

TOPIC SCOPE

Scope of Topic:

This article discusses generally both the civil and criminal aspects of forcible entry and detainer.

Treated Elsewhere:

are the actions of unlawful detainer and other remedies for the eviction of a tenant who wrongfully holds over after the expiration of his term (see Landlord and Tenant); forcible entry to serve or execute process (see Process); assault and battery in connection with forcible entries or evictions (see 6 Am Jur 2d, Assault and Battery §§ 81 , 167 et seq.); and the actions of trespass (see Trespass) and ejectment (see 25 Am Jur 2d, Ejectment). The general article on writs of assistance (see 6 Am Jur 2d, Assistance, Writ of) should also be borne in mind.

I. IN GENERAL

§ 1 Definitions; wrongs distinguished

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The phrase "forcible entry and detainer" is in common use, 1 but there is rarely a proceeding to which both terms apply. 2 Although force is ordinarily an element of both, 3 they are separate and distinct wrongs. 4 A forcible entry, except where its meaning has been changed by statute, is an entry on real property peaceably in the possession of another, against his will, without authority of law, by actual force, or with such an array of force and apparent intent to employ it for the purpose of overcoming resistance that the occupant in yielding and permitting possession to be taken from him must be regarded as acting from a well-founded apprehension that his resistance would be perilous or unavailing. 5 Forcible detainer, on the other hand, is controlled by circumstances existing after entry, whether forcible or not, and may, and usually does, consist of the unlawful holding or detention of real property by force or by threats or menaces after a peaceable entry. 6

§ 1 ----Definitions; wrongs distinguished [SUPPLEMENT]

Footnotes

Footnote 1. Newsom v Damron, 302 Ky 79, 193 SW2d 643.

Footnote 2. Schroeder v Woody, 166 Or 93, 109 P2d 597.

Footnote 3. §§ 28 et seq., infra.

Footnote 4. Fults v Munro, 202 NY 34, 95 NE 23; Schroeder v Woody, 166 Or 93, 109 P2d 597; Buchanan v Crites, 106 Utah 428, 150 P2d 100, 154 ALR 167.

Footnote 5. Newsom v Damron, 302 Ky 79, 193 SW2d 643; Mastin v May, 127 Minn 93, 148 NW 893; Grundy v Goff, 191 Va 148, 60 SE2d 273.

"Forcible entry" is the gaining of possession of real property by a threat of violence, or by violence, or by the creation of circumstances of terror accompanying the act of entering the premises. Castro v Tewksbury, 69 Cal 562, 11 P 339.

Footnote 6. Newsom v Damron, 302 Ky 79, 193 SW2d 643; Mastin v May, 127 Minn 93, 148 NW 893.

"Forcible detainer" consists of unlawfully holding and keeping possession of real property by force or by menaces and threats of violence, whether possession was acquired peaceably or otherwise. Providence Baptist Asso. v Los Angeles Hompa Honowanji Buddhist Temple, 79 Cal App 2d 734, 180 P2d 925.

§ 2 Forcible entries at common law; origin of civil remedy

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The summary process of forcible entry and detainer at common law was a criminal or quasi-criminal process, 7 and was only permitted where the entry or detainer or both were by actual force. 8 The legislatures of the various states have devised a process of the same name, now civil in form for the cases specified in the statutes, 9 though the process thus created is based on the English forcible entry and detainer, which is a criminal proceeding. 10 In other words, the civil remedy for the recovery of possession of premises, grounded on a forcible entry or detainer, is of statutory origin, 11 being intended to provide a summary method for a party rightfully entitled to possession of the property. 12 The early common law conceded to a party with title to land and right of entry the right to use actual force to recover possession if forcible resistance was offered. 13 Since his right of entry was perfect, no other person could lawfully resist him in the exercise of that right. 14 This was a remedy concurrent with the possessory actions, such as trespass, ejectment, or assize of novel disseisin, and available to a person disseised until his right of entry was tolled. 15 The only limitation on its exercise was

that the party with the right of possession was subject to indictment if he entered on the premises with such force and violence as amounted to or directly tended toward a breach of the peace, since this involved the security of the state and was a matter in which the public at large was vitally interested. This, however, was a matter entirely between the entrant and the state, and conferred no right or advantage on the party dispossessed. Whether the entry was peaceable or forcible, the effect in either case was to restore to the owner his lawful possession and seisin, and such restoration of his rights related back to the time of his disseisin, and thereby enabled him to maintain an action for the recovery of the intermediate damages or mesne profits during the time he was wrongfully kept out of possession. The party dispossessed was without remedy for obtaining restitution of the premises, or for the recovery of damages for the entry, trespass, or even assault on his person, unless the force was excessive or the damage wantonly inflicted. 16

Footnotes

Footnote 7. *Eveleth v Gill*, 97 Me 315, 54 A 756.

Elements of criminal responsibility generally, see § 58, *infra*.

Footnote 8. *Gower v Waters*, 125 Me 223, 132 A 550, 45 ALR 309.

Footnote 9. *Eveleth v Gill*, 97 Me 315, 54 A 756.

Footnote 10. *Sweeney v Dahl*, 140 Me 133, 34 A2d 673, 151 ALR 356.

Footnote 11. *Hinton v Hotchkiss*, 65 Ariz 110, 174 P2d 749.

Footnote 12. *Heywood v Ziol*, 91 Ariz 309, 372 P2d 200; *Muscatel v Storey*, 56 Wash 2d 635, 354 P2d 931.

Nature and purpose of proceeding generally, see § 5, *infra*.

Footnote 13. *Hinton v Hotchkiss*, 65 Ariz 110, 174 P2d 749.

Footnote 14. *Hinton v Hotchkiss*, *supra*; *Tribble v Frame*, 7 JJ Marsh (Ky) 599; *Butts v Voorhees*, 13 NJL 13; *Hyatt v Wood*, 4 Johns (NY) 150; *Mosseller v Deaver*, 106 NC 494, 11 SE 529; *Buchanan v Crites*, 106 Utah 428, 150 P2d 100, 154 ALR 167.

Footnote 15. *Page v Dwight*, 170 Mass 29, 48 NE 850.

Footnote 16. *Hewitt v State*, 108 Fla 335, 146 So 578; *Ft. Dearborn Lodge v Klein*, 115 Ill 177, 3 NE 272; *Stearns v Sampson*, 59 Me 568; *Fults v Munro*, 202 NY 34, 95 NE 23; *Smith v Reeder*, 21 Or 541, 28 P 890.

§ 3 Statutory development

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The privilege allowed by the ancient common law to persons disseised or turned out of possession to use violent methods to reinstate themselves¹⁷ was found at an early date to be prejudicial to the public peace as tending to lawlessness.¹⁸ Several statutes were accordingly enacted in England "to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they have no justice in their claim."¹⁹ The first was the Statute of 5 Richard II (1381), which provided that "none from thenceforth shall make any entry into any lands and tenements but in cases where entry is given by law; and in such cases not with strong hand nor with multitude of people, but only in peaceable and easy manner, and if any man from henceforth shall do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body." It will be noted that this act gives no civil remedy²⁰ and refers only to forcible entries. The Statute of 15 Richard II extended the remedy to forcible detainer after an unlawful entry and contained a number of supplementary provisions to give effect to both statutes. The Statute of 8 Henry VI afforded to the aggrieved party a remedy by indictment, and also "by assize or novel disseisin or action of trespass" to recover treble damages for any loss suffered by him. Several other statutes were subsequently passed in extension of the above.¹ The substance and, in large degree, the phraseology of these enactments have been retained by a number of American statutes,² but in some statutes the remedy of forcible entry and detainer is extended to cases that would not have been considered forcible under the construction given to the English statutes.³ Although the modern statutes provide for a civil proceeding for restitution,⁴ such provision does not usually effect any alteration in the nature or component parts of the wrong.⁵

§ 3 ----Statutory development [SUPPLEMENT]

Practice Aids: Nogues, Jr., Defects in Current Forcible Entry and Detainer Law in the United States and England. 25 UCLA LR 1067, June, 1978.

Footnotes

Footnote 17. § 2, supra.

Footnote 18. *Hinton v Hotchkiss*, 65 Ariz 110, 174 P2d 749; *Mosseller v Deaver*, 106 NC 494, 11 SE 529.

Footnote 19. *Hinton v Hotchkiss*, 65 Ariz 110, 174 P2d 749.

Footnote 20. *Buchanan v Crites*, 106 Utah 428, 150 P2d 100, 154 ALR 167.

Footnote 1. *Ft. Dearborn Lodge v Klein*, 115 Ill 177, 3 NE 272; *Tribble v Frame*, 7 JJ Marsh (Ky) 599; *Page v Dwight*, 170 Mass 29, 48 NE 850; *Cashman v Vickers*, 69 Mont 516, 223 P 897; *Fults v Munro*, 202 NY 34, 95 NE 23.

Footnote 2. *French v Miller*, 126 Ill 611, 18 NE 811; *Sayers & M. Serv. Station v Indian Ref. Co.* 266 Ky 779, 100 SW2d 687; *Mastin v May*, 127 Minn 93, 148 NW 893.

Annotation: 12 ALR2d 1199, § 4.

Footnote 3. § 28, *infra*.

Footnote 4. *Hamilton v Adams*, 15 Ala 596; *French v Miller*, 126 Ill 611, 18 NE 811; *Hale v Brown*, 119 Kan 303, 239 P 963.

Writ of restitution generally, see § 53, *infra*.

Footnote 5. *Butts v Voorhees*, 13 NJL 13.

§ 4 Other actions compared

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An action of forcible entry and detainer bears a certain resemblance to other actions involving the possession of real property, but is distinguished from each of them in matters of fundamental importance. It differs from trespass *quare clausum fregit*, first of all, in the degree and kind of force with which the entry is made, *manu forti*, with unusual weapons, or with menace to life or limb. The words "*manu forti*" are understood to impart something criminal in its nature, something more than is meant by the words "*vi et armis*," and distinguish this kind of entry from an ordinary trespass by entering into another's land, which is not so violent as a forcible entry. 6 Again, although trespass may be maintained on a naked possession against a mere wrongdoer, in most jurisdictions it will not lie against a party with title and right of possession who enters or holds possession with force, and a plea of *liberum tenementum* is valid as a defense in such action, the defendant being liable only for breach of the peace or for trespass to the person if excessive force is used. 7 On the other hand, forcible entry and detainer involves only the actual possession of the premises, and can be maintained by a wrongdoer in possession against even the owner of the premises, so that *liberum tenementum* is usually not a good plea therein. 8

Forcible entry and detainer is not intended as a substitute for ejectment. 9 The fact that the mere naked possession alone is at issue in forcible entry and detainer distinguishes this form of action from ejectment in which the object is to try the title or right of entry. 10 However, in jurisdictions wherein actual force is unnecessary to sustain the action of unlawful detainer, the latter is regarded as the mere substitute for ejectment to recover speedy possession in those cases in which the right to the possession alone is in controversy and the plaintiff is not required to show title to sustain his action; and he can maintain forcible entry and detainer on the same right and proofs that would sustain an action of ejectment. 11 Indeed, provision is sometimes made by statute for transforming an action of forcible entry and detainer into an action of ejectment if the question of title is raised. 12

§ 4 ----Other actions compared [SUPPLEMENT]

p 893, n 6—Dean v State, 13 Md App 654, 285 A2d 295.

Footnotes

Footnote 6. McLeod v Jones, 105 Mass 403; Smith v Detroit Loan & Bldg. Asso. 115 Mich 340, 73 NW 395; Butts v Voorhees, 13 NJL 13; Smith v Reeder, 21 Or 541, 28 P 890; Kramer v Lott, 50 Pa 495.

Footnote 7. Gilbert v Peck, 162 Cal 54, 121 P 315; Ft. Dearborn Lodge v Klein, 115 Ill 177, 3 NE 272; Tribble v Frame, 7 JJ Marsh (Ky) 599; Stearns v Sampson, 59 Me 568; Page v Dwight, 170 Mass 29, 48 NE 850; Fuhr v Dean, 26 Mo 116; Scribner v Beach, 4 Denio (NY) 448; Beecher v Parmele, 9 Vt 352.

Footnote 8. § 7, infra.

Footnote 9. Mastin v May, 127 Minn 93, 148 NW 893.

Footnote 10. Sass v Thomas, 6 Ind Terr 60, 89 SW 656, affd (CA8) 152 F 627, error dismd 214 US 489, 53 L ed 1057, 29 S Ct 695; Lorimer v Lewis, Morris (Iowa) 253; Mattox v Helm, 5 Litt (Ky) 185.

Footnote 11. French v Miller, 126 Ill 611, 18 NE 811; Emerick v Tavener, 9 Gratt (Va) 220.

Footnote 12. § 7, infra.

§ 5 Nature and purpose of proceeding

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A forcible entry and detainer proceeding is an "action,"¹³ or an action in the nature of a special proceeding.¹⁴ It is a statutory action,¹⁵ unknown to and in derogation of the common law.¹⁶ It is summary¹⁷ and civil¹⁸ in character, though penal,¹⁹ and has been described as quasi criminal in nature.²⁰ The action sounds in tort,¹ and in general is purely a proceeding at law, which does not and cannot involve the exercise of equitable jurisdiction.²

The general purpose of forcible entry and detainer statutes is to assure that, regardless of the actual condition of the title to or the right of possession of the property, the party actually in peaceable and quiet possession shall not be turned out by strong hand, violence, or terror.³ One who is guilty of a forcible entry, therefore, or of a forcible

detainer after a peaceable but unlawful entry is not only subject to indictment, 4 but required to restore possession to the party from whom it was taken or detained. 5 In affording this remedy of restitution, the object of the statutes is to prevent breaches of the peace and criminal disorder which would ensue from withdrawal of the remedy, and the reasonable hope such withdrawal would create that some advantage must accrue to those persons who, believing themselves entitled to the possession of property, resort to force to gain possession rather than to some appropriate judicial action to assert their claims. 6 This is the philosophy at the foundation of actions of forcible entry and detainer, which are designed to compel the party out of possession to respect and resort to the law alone to obtain what he claims is his. 7

§ 5 ----Nature and purpose of proceeding [SUPPLEMENT]

Practice Aids: Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 ALR3rd 177.

p 894, n 2–

In Iowa, a forcible entry and detainer action brought in the district court is an action in equity, reviewable de novo by the supreme court. *Parris-West Maytag Hotel Corp. v Continental Amusement Co.* _____ Iowa _____, 168 NW2d 735; *Steele v Northup*, _____ Iowa _____, 168 NW2d 785.

p 894, n 3–

The legislative intent in enacting forcible entry statutes was to establish a summary procedure for the restitution of real property, and, thereby, to promote the settlements of disputes over possession by legal means rather by self-help. *Daluiso v Boone*, 71 Cal 2d 484, 78 Cal Rptr 707, 455 P2d 811.

p 894, n 17–*Mihans v Municipal Court for Berkeley-Albany Judicial Dist.* 7 Cal App 3d 479, 87 Cal Rptr 17, stating that an unlawful detainer action is a summary proceeding, the primary purpose of which is to obtain possession of real property in the cases specified by statute.

p 895, n 6–

The entry and detainer action is designed to compel the party who is out of actual possession, whether the real owner and as such entitled to the ultimate right of possession, or not, to respect the actual present possession of another, wrongful though it might be, by requiring him, in order to obtain the possession he claims to be his, to resort to legal channels, such as a suit for ejectment, or trespass to try title, or removal of tenant proceedings. *Floro v Parker* (Fla App) 205 So 2d 363.

Case authorities:

A landlord entitled to possession must, on refusal of the tenant to surrender the leased

premises, resort to the remedy given by law; otherwise the landlord will be liable in damages for using force or deception to regain possession. *Bass v Boetel & Co.*, 191 Neb 733, 217 NW2d 804.

Since a forcible entry and detainer action relates only to present possession and not title, the fact that another action; to allow a municipal court to title does not constitute a bar to such action, and to allow a municipal court to stay such proceedings would be to defeat the purpose of the statutes, i.e., immediate possession. *State ex rel. Carpenter v Warren Municipal Court* (1980) 61 Ohio St 2d 208, 15 Ohio Ops 3d 225, 400 NE2d 391.

Footnotes

Footnote 13. *Raynolds v Larkin*, 10 Colo 126 (holding that statute regulating appeals from judgments of justices of peace in civil and criminal "actions" applied to forcible entry and detainer proceedings).

Footnote 14. *Zelig v Blue Point Oyster Co.* 54 Or 543, 104 P 193.

Footnote 15. *Heywood v Ziol*, 91 Ariz 309, 372 P2d 200; *Hewitt v State*, 108 Fla 335, 146 So 578; *Biebel Roofing Co. v Pritchett*, 373 Ill 214, 25 NE2d 800; *Schuldt v Lee*, 226 Iowa 189, 284 NW 89; *Brown v Beckerdite*, 174 Kan 153, 254 P2d 308; *Hutchinson v Burton*, 126 Mont 279, 247 P2d 987; *Sporer v Herlik*, 158 Neb 644, 64 NW2d 342; *Schroeder v Woody*, 166 Or 93, 109 P2d 597; *Story v Story*, 142 Tex 212, 176 SW2d 925; *Allen v Houn*, 30 Wyo 186, 219 P 573.

Footnote 16. *West Side Trust & Sav. Bank v Lopoten*, 358 Ill 631, 193 NE 462; *Rust v Dames* (Mo App) 142 SW2d 797; *Schroeder v Woody*, 166 Or 93, 109 P2d 597; *White v Veitch*, 27 Wyo 401, 197 P 983.

The action in forcible entry and detainer was not available at common law, but is a creature of statute. *Smith v Etling*, 96 Ohio App 417, 54 Ohio Ops 406, 122 NE2d 18.

Origin of civil remedy, see § 2, *supra*.

Footnote 17. *Harris v Harris*, 190 Ala 619, 67 So 465; *West Side Trust & Sav. Bank v Lopoten*, 358 Ill 631, 193 NE 462; *Denny v Jacobson*, 243 Iowa 1383, 55 NW2d 568; *Brown v Beckerdite*, 174 Kan 153, 254 P2d 308; *Tate v Tate*, 217 Miss 734, 64 So 2d 908; *Sporer v Herlik*, 158 Neb 644, 64 NW2d 342; *Warren v Stansbury*, 199 Okla 683, 189 P2d 948; *Schroeder v Woody*, 166 Or 93, 109 P2d 597; *Rose v Skiles* (Tex Civ App) 245 SW 127; *Paxton v Fisher*, 86 Utah 408, 45 P2d 903.

Footnote 18. *Harris v Harris*, 190 Ala 619, 67 So 465; *West Side Trust & Sav. Bank v Lopoten*, 358 Ill 631, 193 NE 462; *Brown v Beckerdite*, 174 Kan 153, 254 P2d 308; *Sweeney v Dahl*, 140 Me 133, 34 A2d 673, 151 ALR 356.

Footnote 19. *Paxton v Fisher*, 86 Utah 408, 45 P2d 903.

Footnote 20. *Sporer v Herlik*, 158 Neb 644, 64 NW2d 342.

Footnote 1. *Harris v Harris*, 190 Ala 619, 67 So 465; *Cline v Smith*, 205 Ark 136, 167

SW2d 872; Sayers & Muir Service Station v Indian Refining Co. 266 Ky 779, 100 SW2d 687.

The action of forcible entry and detainer was originally a quasi-criminal process, and, while it is now civil in its aspect, it has retained its highly tortious character. Sweeney v Dahl, 140 Me 133, 34 A2d 673, 151 ALR 356.

Footnote 2. Vansellous v Huene, 26 Okla 243, 108 P 1102; Yukon Invest. Co. v Crescent Meat Co. 140 Wash 136, 248 P 377.

Footnote 3. Iron Mountan & H. R. Co. v Johnson, 119 US 608, 30 L ed 504, 7 S Ct 339; Hewitt v State, 108 Fla 335, 146 So 578; Davidson v Phillips, 9 Yerg (Tenn) 93; Chezum v Campbell, 42 Wash 560, 85 P 48; Ferguson v Haygood, 67 Wyo 422, 225 P2d 336.

Footnote 4. § 59, *infra*.

Footnote 5. Iron Mountain & H. R. Co. v Johnson, 119 US 608, 30 L ed 504, 7 S Ct 339; Hewitt v State, 108 Fla 335, 146 So 578; Beeler v Cardwell, 29 Mo 72; Schwinn v Perkins, 79 NJL 515, 78 A 19; Kramer v Lott, 50 Pa 495.

Writ of restitution generally, see § 53, *infra*.

Footnote 6. Wilson v Campbell, 75 Kan 159, 88 P 548; Newsom v Damron, 302 Ky 79, 193 SW2d 643.

Footnote 7. Coward v Fleming, 89 Ohio App 485, 46 Ohio Ops 289, 102 NE2d 850.

§ 6 Issues involved or triable

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In the absence of statutory modification, the plaintiff's possession and the forcible entry or detainer are ordinarily the sole questions at issue; 8 it is necessary to prove only that the plaintiff was in actual and peaceable possession of the premises, and that the defendant forcibly entered and turned him out or dispossessed him by force after a peaceable entry. 9 The title or ultimate right to possession of the premises is not involved and may not, apart from statutory authorization, be inquired into, 10 and deeds or other testimony tending to prove a superior title or right to possession in the defendant are ordinarily not admissible. 11 Nor, in such a proceeding, will the court consider a claim for betterments, 12 the right of partners, on discontinuing the partnership, in the leases which they hold or in the good will of the partnership business, 13 or the validity and construction of the contract under which the plaintiff possessed the property from which he was ousted. 14 It has also been held that in a suit for forcible detainer brought by a purchaser on foreclosure of a trust deed against the former owner in possession of the property, the validity of the foreclosure sale is not open to question. 15

On the other hand, in some circumstances or where the statute permits it, title may be considered in a forcible entry and detainer action as an incident of the right of possession, but only for the purpose of determining that question, and not for the purpose of determining title. 16

Footnotes

Footnote 8. *Denee v Ankeny (Denee v Ridpath)* 246 US 208, 62 L ed 669, 38 S Ct 226; *Boutwell v Board of Education*, 244 Ala 77, 12 So 2d 349; *Shulman v Moser*, 284 Ill 134, 119 NE 936; *Heron v Ramsey*, 45 NM 491, 117 P2d 247; *Casey v Kitchens*, 66 Okla 169, 168 P 812.

Footnote 9. *Denee v Ankeny (Denee v Ridpath)* 246 US 208, 62 L ed 669, 38 S Ct 226; *Moye v Thurber*, 146 Ala 180, 40 So 822; *Jordan v Talbot*, 55 Cal 2d 597, 12 Cal Rptr 488, 361 P2d 20, 6 ALR3d 161; *Casey v Kitchens*, 66 Okla 169, 168 P 812.

Prior peaceable possession of premises as prerequisite to maintenance of action, see §§ 14 et seq., *infra*.

Footnote 10. *Iron Mountain & H. R. Co. v Johnson*, 119 US 608, 30 L ed 504, 7 S Ct 339; *Fenter v Homestead Development & Trust Co.* 3 Ariz App 248, 413 P2d 579; *Saxmann v Allen*, 410 Ill 31, 101 NE2d 69; *Rudolph v Davis*, 239 Iowa 372, 30 NW2d 484; *Wilson v Campbell*, 75 Kan 159, 88 P 548; *Jones v Schmidt*, 163 Neb 508, 80 NW2d 289; *Heron v Ramsey*, 45 NM 491, 117 P2d 247; *Richardson v Lewis (Okla)* 301 P2d 358; *Scott v Hewitt*, 127 Tex 31, 90 SW2d 816, 103 ALR 977; *Priestley Mining & Milling Co. v Lenox Mining & Development Co.* 41 Wash 2d 101, 247 P2d 688; *Allen v Houn*, 30 Wyo 186, 219 P 573.

Annotation: 115 ALR 510.

See *Brown v Grayson*, 160 Tenn 374, 24 SW2d 894 (stating that in forcible entry and detainer the title cannot be inquired into in an action at law, but that the rule is different in equity).

And see *Raich v Weisman*, 58 SD 4, 234 NW 664 (wherein it was stated that the action, being a strictly law action in forcible entry and detainer, can only determine the right of possession of the property as of the date of commencement of the action, and involves only the then legal title).

Footnote 11. § 45, *infra*.

Footnote 12. *United States v Burrill*, 107 Me 382, 78 A 568.

Footnote 13. *Knapp v Reed*, 88 Neb 754, 130 NW 430.

Footnote 14. *Iron Mountain & H. R. Co. v Johnson*, 119 US 608, 30 L ed 504, 7 S Ct 339.

Footnote 15. *Scott v Hewitt*, 127 Tex 31, 90 SW2d 816, 103 ALR 977.

Footnote 16. *Washington v Spriggs*, 213 Ala 622, 105 So 811; *Black v Handley* (Ark) 240 SW 411; *McCracken v Wright*, 159 Kan 615, 157 P2d 814; *Brown v Thomas*, 306 Ky 706, 208 SW2d 723; *Steinke v Leicht* (Mo App) 235 SW2d 115; *State ex rel. Hamshaw v Justice Court of Union Tp.* 108 Mont 12, 88 P2d 1; *Schroeder v Woody*, 166 Or 93, 109 P2d 597; *Wiles v Walker*, 88 W Va 147, 106 SE 423; *Allen v Houn*, 30 Wyo 186, 219 P 573.

§ 7 Cases in which remedy is available

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Although the remedy of forcible entry and detainer usually is available in cases in which the relation of landlord and tenant exists, 17 it is not, in the absence of statutory restriction, limited to such cases, 18 but affords a speedy remedy to recover the possession of any land which was forcibly taken or detained from the person in actual peaceable possession thereof. 19 Under some statutes, a purchaser of property at a judicial sale may maintain an action of forcible entry and detainer to recover possession of the property from the judgment debtor who was in possession at the time of the judgment under which the sale was made. 20 Obviously, an action of forcible entry and detainer will not lie to dispossess a purchaser lawfully placed in actual possession in pursuance of the decree and order of a court of competent jurisdiction, and a court of equity will quiet and prevent a wrongful interference with such possession by enjoining the execution of a writ of possession issued in such action. 1

§ 7 ----Cases in which remedy is available [SUPPLEMENT]

p 896– Add new paragraph following note 1: Forcible detainer statutes comprehend a landlord-tenant relationship and proceedings thereunder may not be maintained by a vendor against his vendee. 1.5

Footnotes

Footnote 17. *Jordan v Talbot*, 55 Cal 2d 597, 12 Cal Rptr 488, 361 P2d 20, 6 ALR3d 161; *Johnson Oil Ref. Co. v Gillam*, 256 Ill App 531.

Summary possessory actions and proceedings available to landlord generally, see *Landlord and Tenant* (1st ed §§ 1016 et seq.).

Footnote 18. *West Side Trust & Sav. Bank v Lopoten*, 358 Ill 631, 193 NE 462; *Knapp v Reed*, 88 Neb 754, 130 NW 430; *Fults v Munro*, 202 NY 34, 95 NE 23.

Under a statute so providing, an action of forcible entry and detainer is limited to cases in which the relation of landlord and tenant exists, except when the entry has been made

forcibly. *Purcell v Edmunds*, 175 Or 68, 151 P2d 629.

Footnote 19. *Mastin v May*, 127 Minn 93, 148 NW 893.

For requisites with respect to prior possession of plaintiff, see §§ 14 et seq., *infra*.

Footnote 20. *Johnson v Baker*, 38 Ill 98 (holding that action of forcible detainer may be brought by purchaser at sheriff's sale who produces valid judgment, execution, and deed for premises on sale by sheriff under judgment); *Green v Morse*, 57 Neb 391, 77 NW 925; *Beggs v Thompson*, 2 Ohio 95; *Hale v Henrie*, 2 Watts (Pa) 143.

Footnote 1. *Cope v Payne*, 111 Tenn 128, 76 SW 820.

Footnote 1.5. *Phoenix-Sunflower Industries, Inc. v Hughes*, 105 Ariz 334, 464 P2d 617.

§ 8 Property for which action is maintainable

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The action of forcible entry and detainer is restricted to recovering possession of real property for which a writ of entry will lie at common law or by statute. It is therefore not available as a remedy for the purpose of recovering possession of personalty² or of incorporeal real property.³ Hence a house which in contemplation of law is personal property is not subject to a forcible entry proceeding.⁴ But under a statute providing for an action of forcible entry and detainer to recover possession of lands and tenements, such action lies to recover possession of a house built on land to which the house owner has no title, but in which he claims and enjoys the right of peaceable possession, such house being a "tenement" within the statute.⁵ It has been held that a party forcibly ousted from possession of a house by order of a surveyor of customs may recover possession and damages even though the land on which the building was erected belongs to the United States.⁶ The fact that the land of which possession is sought to be recovered is part of the public domain constitutes no justification for the forcible entry thereon, even for the purpose of initiating a homestead right, if previously in the possession of another, and hence is no defense to an action for the recovery of possession.⁷

Footnotes

Footnote 2. *Hoffman v Reichert*, 31 Ill App 558, *affd* 147 Ill 274, 35 NE 527; *Woodworth v Maddox*, 115 Kan 445, 223 P 275.

The question of conversion of personal property cannot be litigated in a forcible detainer action. *Hager v Parcher*, 136 Wash 518, 240 P 924.

Footnote 3. § 9, *infra*.

Footnote 4. *Kassing v Keohane*, 4 Ill App 460; *Field v Higgins*, 35 Me 339.

Footnote 5. *Polson v Parsons*, 23 Okla 778, 104 P 336.

Footnote 6. *Bailey v Taylor*, 8 Mart NS (La) 124.

Footnote 7. *Denee v Ankeny* (*Denee v Ridpath*), 246 US 208, 62 L ed 669, 38 S Ct 226.

§ 9 --Incorporeal property; easements and licenses

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An action of forcible entry and detainer lies only to recover possession of tangible or corporeal real property; one whose interest therein is merely incorporeal has no such possession of the land as will support the action. 8 The action will not lie for forcibly taking possession of a right of way or other easement, 9 nor be maintained by a mere licensee without property or possession. 10 However, if the person entitled to an easement or license is also entitled to, and holds exclusive possession of, corporeal real property connected therewith and as an incident thereto, he may maintain his action for the forcible entry on, or detainer of, the land. 11

Footnotes

Footnote 8. An action of forcible entry will not lie for forcibly taking possession of a ferry which, in technical language, is denominated incorporeal property. *Rees v Lawless*, Litt Sel Cas (Ky) 184.

Footnote 9. *Moye v Thurber*, 146 Ala 180, 40 So 822; *Lowe v American Zinc, Lead & Smelting Co.* 89 Mo App 680; *Roberts v Trujillo*, 3 NM 87, 1 P 855; *Becher v New York*, 102 App Div 269, 92 NYS 460.

Footnote 10. The owner of a refreshment stand erected on municipal property in pursuance of a permit or license granted for a designated period by written agreement with the municipality may not maintain an action of forcible entry and detainer against the municipality because of revocation of the permit and forcible removal of the stand by municipal employees before expiration of the term of the agreement. *Becher v New York*, supra.

Footnote 11. *Iron Mountain & H. R. Co. v Johnson*, 119 US 608, 30 L ed 504, 7 S Ct 339; *Farley v Bay Shell Road Co.* 125 Ala 184, 27 So 770; *Chicago, B. & Q. R. Co. v Aman*, 254 Ill App 498; *Vance v Ferguson*, 101 SC 125, 85 SE 241.

See *Sproule v Alabama & V. R. Co.* 78 Miss 88, 29 So 163, holding that a railroad company continually using its track in the center of its right of way has sufficient possession to support an action of forcible entry and detainer against a party who

wrongfully enters thereon.

Annotation: 47 ALR 556, 564.

§ 10 Who may maintain action

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Since the action of forcible entry and detainer is grounded on forcible expulsion or exclusion from possession, the proper party to institute and maintain the action is he who held the peaceable possession of the property as a matter of law at the time of the forcible dispossession, 12 and who has the right of immediate possession of the property, 13 regardless of who may have the title or the ultimate right to possession. 14 The action may not be maintained by one who has never been in possession of the property and who is suing merely under a power of attorney from the real party in interest. 15

A married woman cannot maintain an action of forcible entry and detainer where it appears that, at the time of the acts complained of, her husband alone was in actual possession of the premises in question. 16 But where the possession was that of a wife, she may maintain the action whether the property is her separate estate or, because of her husband's desertion or for some other reason, it was her possession and not his. 17 To a like effect, where a conveyance was executed by a husband for the purpose of defeating his wife's alimony, it has been held that she, on a decree being subsequently rendered in her favor, might recover the property by a proceeding in forcible entry and detainer. 18

Where there has been a forcible entry on premises in the possession of a tenant, he and not his landlord is the proper person to maintain an action of forcible entry and detainer, 19 but a lessee who has never been in possession may not maintain the action. 20

§ 10 ----Who may maintain action [SUPPLEMENT]

p 898– Add following note 15: A forcible detainer action may not be maintained by a vendor against his vendee. 15.5

Footnotes

Footnote 12. Prior peaceable possession by plaintiff as prerequisite to maintenance of action, see § 14, *infra*.

Footnote 13. *Melburg v Dakin*, 337 Ill App 204, 85 NE2d 482; *Glissmann v Bauermeister*, 149 Neb 131, 30 NW2d 649.

Footnote 14. § 6, *supra*.

Footnote 15. *Novick v Washington*, 110 Misc 379, 176 NYS 387.

Effect of possession by agent or servant, see § 22, *infra*.

Footnote 16. *Funkhauser v Colloty*, 67 NJL 132, 50 A 580.

Footnote 17. *Davis v Woodward*, 19 Minn 174, Gil 137.

Effect of wife's possession generally, see § 21, *infra*.

Footnote 18. *Bailey v Bailey*, 61 Me 361.

Footnote 19. § 23, *infra*.

Footnote 20. *Long v Noe*, 49 Mo App 19.

Footnote 15.5. *Phoenix-Sunflower Industries, Inc. v Hughes*, 105 Ariz 334, 464 P2d 617.

§ 11 --Persons claiming under owner or occupant

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The right of action for forcible entry vests at once in the party whose possession was divested; unless otherwise provided by statute, it may be enforced only by him, and does not pass to his assignee or grantee. 1 General words in a statute purporting to give this right of action to a person entitled to the possession will not be construed as referring to the grantee of the person dispossessed, but as the whole proceeding is within legislative control, statutes have been enacted and enforced which clearly give the right to the grantee in certain cases; 2 purchasers at judicial sales are entitled to the benefit of such statutes. 3 A purchaser who is the equitable owner of the premises, and who has been let into possession by the vendor subject only to the vendor's lien for the unpaid purchase money, may also maintain an action of forcible entry and detainer. 4

Where authorized by statute, a personal representative who has possession of lands belonging to the decedent's estate in the course of administration may maintain an action against one who forcibly and unlawfully dispossesses him, 5 but in the absence of statutory authorization he may not maintain an action of forcible detainer unless he has a vestiture of title. 6 Under a statute permitting a forcible detainer action after a peaceable entry by defendant, such action may be maintained by one who succeeded to the rights of his ancestor in whose possession the property in question was when defendant entered. 7

If the possession of real property is for any purpose taken by a receiver and is afterward forcibly taken from him, he may, in his own name, maintain a proceeding in forcible entry and detainer. 8 Likewise, under a statute vesting the guardian of an incompetent person with the right to possession of land, the action may be maintained by the guardian in his own name on behalf of ward. 9

Footnotes

Footnote 1. *Fitzgerald v Quinn*, 165 Ill 354, 46 NE 287; *Yoder v Easley*, 32 Ky (2 Dana) 245.

Footnote 2. *Thomasson v Wilson*, 146 Ill 384, 34 NE 432.

Footnote 3. *Pensoneau v Heinrich*, 54 Ill 271.

Footnote 4. *Spero v Shapiro*, 162 Ill App 603.

Footnote 5. *Cutburth v Bell*, 55 Okla 157, 155 P 1136.

Footnote 6. *Hall's Exrs. v Robinson*, 291 Ky 631, 165 SW2d 163.

Footnote 7. *Winitt v Winitt*, 339 Ill App 75, 89 NE2d 71.

Footnote 8. *Baker v Cooper*, 57 Me 388.

Footnote 9. *Simmons v Zarthas*, 99 Or 476, 195 P 157.

§ 12 Persons liable

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An action of forcible entry and detainer may be maintained against a private corporation, 10 and also against a municipal corporation, even though the premises of which it took possession is claimed by it as a public street. 11

Persons who come into the possession of property after an original forcible entry thereon has been consummated and thereby succeed to whatever right or title the party making the forcible entry had, but without participation in the forcible entry, are probably not subject to any action founded on such entry. 12

Under some statutes an action of forcible entry or detainer lies against a public officer acting beyond the scope of his authority or under insufficient legal process, and against the party placed in possession of realty by such officer; 13 under other statutes, however, it is held that although the party so dispossessed is entitled to relief, he cannot maintain forcible entry and detainer. 14 The party responsible for the conduct of an officer has been held guilty of forcible detainer, where the officer, after securing possession of the property peaceably, but wrongfully under invalid process, paced back and forth before it, carrying a gun, which he occasionally discharged, and ordered the person dispossessed, who remained in the vicinity, to keep off the property. 15 It has been held that forcible entry and detainer will not lie against a military officer acting under orders of his superior for the military occupation of the plaintiff's premises for use as a camp and quarters. 16

The fact that a defendant since committing a forcible entry has been adjudicated a bankrupt constitutes no reason for his being permitted to retain possession. Apparently, such fact does not exonerate him from any liability for damages; the action may therefore proceed notwithstanding such adjudication, and the same judgment may be entered therein as if his bankruptcy had not occurred. 17

Footnotes

Footnote 10. *Iron Mountain & H. R. Co. v Johnson*, 119 US 608, 30 L ed 504, 7 S Ct 339.

Footnote 11. *Edwardsville v Barnsback*, 66 Ill App 381.

Footnote 12. *Clark v Barker*, 44 Ill 349; *Cagwin v Chicago & N. W. R. Co.* 114 Iowa 129, 86 NW 220.

Footnote 13. *Brush v Fowler*, 36 Ill 53; *Wallace v Hall*, 22 Kan 271; *Bailey v Taylor*, 8 Mart NS (La) 124; *Laird v Winters*, 27 Tex 440.

Footnote 14. *Janson v Brooks*, 29 Cal 214; *Link v Harrington*, 23 Mo App 429; *Fults v Munro*, 202 NY 34, 95 NE 23.

Footnote 15. *Fults v Munro*, *supra*.

Footnote 16. *Drehman v Stifel*, 41 Mo 184, *affd* 8 Wall (US) 595, 19 L ed 508.

Footnote 17. *Lomax v Spear*, 51 Ala 532.

See generally, 9 Am Jur 2d, Bankruptcy.

§ 13 Exclusiveness of remedy

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Ordinarily, the statutory proceeding of forcible entry and detainer is not the exclusive remedy of an occupant of premises dispossessed without legal process by one claiming a superior right to possession, but is cumulative of any other remedy the aggrieved party may have. 18 The remedy is not a substitute for trespass or ejection, 19 and where a statute expressly makes the remedy of forcible entry and detainer available in sales under judicial process when the judgment debtor is in possession, it is a concurrent remedy with a writ of assistance in the original proceeding. 20 On the other hand, there are cases holding that the statutory proceeding of forcible entry and detainer is the exclusive remedy of an occupant of premises who has been dispossessed without legal process. 1

§ 13 ----Exclusiveness of remedy [SUPPLEMENT]

Case authorities:

A judgment of possession in favor of a defendant in a forcible detainer action did not deprive the district court of jurisdiction to hear and determine the plaintiffs' suit to cancel the trustee's deed to the subject property. *Martinez v Beasley* (1978, Tex Civ App) 572 SW2d 83.

Footnotes

Footnote 18. *Union Oil Co. v Lindauer*, 131 Colo 138, 280 P2d 444; *Wernet v Jurgensen*, 241 Iowa 833, 43 NW2d 194; *Scott v Hewitt*, 127 Tex 31, 90 SW 816, 103 ALR 977; *Buchanan v Crites*, 106 Utah 428, 150 P2d 100, 154 ALR 167; *Allen v Houn*, 30 Wyo 186, 219 P 573.

Annotation: 154 ALR 182.

Except insofar as forcible entry and detainer statutes are expressly or by necessary implication in conflict with the common law, they do not deprive one of his common-law remedies. *Gower v Waters*, 125 Me 223, 132 A 550, 45 ALR 309.

Footnote 19. *Purcell v Edmunds*, 175 Or 68, 151 P2d 629.

Ejectment, which is an appropriate remedy to recover possession of real property, is not inconsistent or incompatible with an action in forcible entry and detainer, and the owner of the premises, by resorting to an action in forcible entry and detainer, does not preclude himself from later invoking the other remedy. *Warren v Stansbury*, 199 Okla 683, 189 P2d 948.

Footnote 20. *Green v Morse*, 57 Neb 391, 77 NW 925.

Footnote 1. *Vinson v Flynn*, 64 Ark 453, 43 SW 146, 46 SW 186 (except as to damages for unnecessary injury); *Hammond Sav. & T. Co. v Boney*, 61 Ind App 295, 107 NE 480; *Hoskins v Morgan*, 249 Ky 576, 61 SW2d 30.

Annotation: 154 ALR 185.

II. REQUISITES WITH RESPECT TO TITLE OR POSSESSION OF PLAINTIFF

§ 14 Generally

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To maintain an action of forcible entry and detainer, the plaintiff need not ordinarily be the owner of the property in dispute, since title and the legal or ultimate right to possession of the property, as distinguished from the immediate right to possession, are not involved or triable in such a proceeding. 2 Nevertheless, in the absence of a statute providing otherwise, the action may be maintained only by one who was in actual possession at the time of defendant's wrongful entry and ouster; 3 the action can seldom be resorted to by a person who has never been in possession, 4 or by one whose possession is merely constructive. 5

Under a statute expressly so providing, however, it is not essential that plaintiff have prior possession of the property or that his possession be invaded by defendant as a basis for an action of forcible detainer, as distinguished from an action of forcible entry and detainer; a right of action for forcible detainer exists where peaceable entry is made on premises in the actual possession of either plaintiff, or of those to whose rights he had succeeded, and the possession is unlawfully withheld after demand. 6 It is not required under such a statute that the relation of landlord or tenant, or any other particular contractual relation, should exist to authorize restoration to the party entitled to possession. 7

§ 14 ----Generally [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 567, Forcible entry and detainer: requisite right, title, or possession of plaintiff.

Footnotes

Footnote 2. § 6, supra.

Footnote 3. Phillips v Gunby, 31 Del 462, 117 A 383; Davis v Robinson, 302 Ill App 365, 23 NE2d 816; Knapp v Reed, 88 Neb 754, 130 NW 430; Seidman v John Craven & Sons Co. 6 NJ Misc 1062, 143 A 726; Heron v Kelly, 48 NM 123, 146 P2d 851.

Footnote 4. A forcible entry and detainer can be made only where there is an existing, actual possession. Madon v Commonwealth, 303 Ky 586, 198 SW2d 320.

Footnote 5. Chezum v Campbell, 42 Wash 560, 85 P 48.

Footnote 6. West Side Trust & Sav. Bank v Lopoten, 368 Ill 631, 193 NE 462.

Footnote 7. West Side Trust & Sav. Bank v Lopoten, supra.

Unlawful detainer proceedings by landlord for recovery of possession of leased premises, see Landlord and Tenant (1st ed §§ 1016 et seq.).

§ 15 Character and sufficiency of possession

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Generally, the possession of an occupant must not only be actual, 8 but also quiet and peaceable 9 –that is, one which is not maintained by force or threats, 10 in order to give rise to an action of forcible entry and detainer in case of dispossession. In a general sense, the actual possession which is sufficient consists in the exercise of dominion over the property of such a character that owners of like property usually exercise over it, 11 such as by fencing, cultivating, or other unmistakable acts of exclusive custody and control. 12 The possession must be something more than a mere mental state, 13 or a mere foothold or semblance of possession. 14 Merely walking on the land and posting a sign for others to keep off, or merely cutting some posts on the land, do not constitute possession. 15 It is not essential that there be a continuous personal presence on the land, but there must be exercised at least some actual physical control, with the intent and apparent purpose of asserting dominion. 16 Furthermore, mere occupancy or personal presence on the ground is not necessarily sufficient to constitute that possession which the law clothes with legal rights as such. There may be possession without occupancy, as where a man's servant is in the actual occupancy of the property and is holding possession for him, or where a man has temporarily gone out of his house, leaving no one in charge, but still having legal possession; and there may be a case of occupancy without possession, as where, in a man's absence, a mere stranger, visitor, or trespasser goes into the man's house without claim of right. 17 A person who enters on land under a mere license has no such possession as enables him to maintain forcible entry or detainer against a licensor in whom the legal possession remains. 18 It has been held that a clerk of a county who had been forcibly ejected from a room in the courthouse occupied by him as an office did not have sufficient possession to entitle him to maintain an action of forcible entry and detainer against the court of county commissioners who ordered his ejection. 19

§ 15 ----Character and sufficiency of possession [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 567, Forcible entry and detainer: requisite right, title, or possession of plaintiff.

Footnotes

Footnote 8. *Willows Cattle Co. v Connell*, 25 Ariz 592, 220 P 1082; *Heron v Ramsey*, 45 NM 491, 117 P2d 247; *Jones v Czaza*, 19 Tenn App 327, 86 SW2d 1096; *Priestley Mining & Milling Co. v Lenox Mining & Development Co.* 41 Wash 2d 101, 247 P2d 688.

Footnote 9. *Schwinn v Perkins*, 79 NJL 515, 78 A 19; *Heron v Ramsey*, 45 NM 491, 117 P2d 247; *Priestley Mining & Milling Co. v Lenox Mining & Development Co.* 41 Wash 2d 101, 247 P2d 688.

Footnote 10. *Bowers v Cherokee Bob*, 45 Cal 495.

Footnote 11. *Wynn v Vessey*, 127 Wash 492, 221 P 295.

Footnote 12. *Johnson v Connaway*, 184 Okla 516, 88 P2d 338.

Particular acts evidencing possession, see § 20, *infra*.

Footnote 13. *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

Footnote 14. *Jones v Czaza*, 19 Tenn App 327, 86 SW2d 1096.

Footnote 15. *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

Footnote 16. *Wynn v Vessey*, 127 Wash 492, 221 P 295.

Footnote 17. *Schwinn v Perkins*, 79 NJL 515, 78 A 19.

Footnote 18. *Rochester v Gate City Min. Co.* 86 Mo App 447.

Footnote 19. *Watson v Scarborough*, 147 Ala 689, 40 So 672.

§ 16 --Exclusiveness of possession

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Generally, in order to maintain an action for forcible entry and detainer, plaintiff's prior possession of the land in dispute should have been exclusive, 20 in the sense that it was not shared with the defendant. 1 But a party's possession continues notwithstanding the presence of other persons or their property on the land, provided they hold in subordination to his rights and not as independent claimants or possessors. 2

Footnotes

Footnote 20. *Moldovan v Fischer*, 149 Cal App 2d 600, 308 P2d 844; *Jones v Czaza*, 19 Tenn App 327, 86 SW2d 1096.

Footnote 1. *Barnewell v Stephens*, 142 Ala 609, 38 So 662; *Tribble v Frame*, 7 JJ Marsh (Ky) 599; *Gardner v Hickock*, 102 Mich 497, 60 NW 974.

Footnote 2. *House v Camp*, 32 Ala 541.

As to possession by an agent or servant, see § 22, *infra*.

§ 17 --Possession obtained by trespass or without right

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Unless the statute expressly limits the right of recovery on forcible entry and detainer to persons who had rightfully obtained possession of the premises in dispute, 3 the mere fact that a person in actual peaceful possession of the property was not rightfully entitled thereto at the time the owner ousted him by force does not deprive him of the right to recover the possession in an action of forcible entry and detainer. 4 Even though an original entry was forcible or fraudulent and without the slightest color of right, nevertheless, if the party in possession submits and allows a trespasser to remain quietly in possession for a considerable time, he cannot afterward take the law into his own hands and repel the intruder by force, because, under such circumstances, the possession, although wrongful and at first maintained by menaces or violence, will have ripened into a peaceable possession for a disturbance of which forcible entry and detainer would be the appropriate remedy. 5

§ 17 --Possession obtained by trespass or without right [SUPPLEMENT]

p 902, n 4—Floro v Parker (Fla App) 205 So 2d 363.

Footnotes

Footnote 3. Page v Dwight, 170 Mass 29, 48 NE 850.

Footnote 4. Schwinn v Perkins, 79 NJL 515, 78 A 19.

Footnote 5. Lorimer v Lewis, Morris (Iowa) 253; Wilson v Campbell, 75 Kan 159, 88 P 548; King v St. Louis Gaslight Co. 34 Mo 34; Sunday v Moore, 135 Wash 414, 237 P 1014.

§ 18 --Scrambling possession

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An action for forcible entry and detainer cannot be predicated on a mere "scrambling possession," 6 by which is signified that two or more parties are struggling for the possession of land, 7 or at least that one party has unlawfully entered on the possession of another without his knowledge, or without an opportunity to determine whether or not

he will submit to it. 8 In neither case, as a rule, is there such actual peaceable possession as will support an action of forcible entry and detainer. Possession taken by force or stealth does not at once become peaceable within the meaning of the statute so that it is protected from a forcible re-entry by the person who has been dispossessed. 9 If the possession taken is involved in a struggle or is so recent that a struggle may yet be reasonably apprehended, while it is probable that the person in possession is not in law subject to the forcible entry of a person who is not a party to the struggle and has hitherto had no possession, yet, as to the person on whom the entry has been made, the possession may be deemed scrambling or incomplete, or at least not peaceable and not sufficient to support an action against him should he subsequently regain possession. 10 No universal rule can be laid down by which to determine the precise point at which possession ceases to be a scrambling possession and ripens into peaceable possession; each case must of necessity be governed by its own circumstances. 11 A mere *pedis possessio* or momentary personal presence on land in the lawful possession of another, although gained without actual force, is not sufficient. 12

Footnotes

Footnote 6. *Tivnen v Monahan*, 76 Cal 131, 18 P 144; *Jones v Czaza*, 19 Tenn App 327, 86 SW2d 1096.

Footnote 7. Where two parties struggle for possession of unimproved lands, neither can maintain an action of forcible entry and detainer until he has actual possession which has developed into the necessary peaceable occupancy. *Voll v Butler*, 49 Cal 74.

A "scrambling possession" of premises is a possession without any savor of the legitimate enjoyment of property rights and neither sought nor secured on such account, but only scrambled for, by one party or by both, because of some supposed advantage it may command in a pending struggle. *Femmer v Gay* (Mo App) 167 SW2d 940.

Footnote 8. *Bowers v Cherokee Bob*, 45 Cal 495.

Footnote 9. *Wilson v Campbell*, 75 Kan 159, 88 P 548; *Robertson v Robertson*, 2 B Mon (Ky) 235.

Footnote 10. *Bowers v Cherokee Bob*, 45 Cal 495.

Footnote 11. *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

An intruder during the absence of the occupant cannot establish a peaceable possession where the occupant on his return persists in his forcible efforts to accomplish his re-entry. *Bowers v Cherokee Bob*, 45 Cal 495.

Footnote 12. *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

§ 19 --Possession of part as possession of whole tract

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The possession of a mere trespasser or of one who, without color of title, enters on part of a tract in the possession of another is restricted to his actual occupancy and does not extend to the balance of the tract entered on. 13 It is established, however, that a party in actual possession of land under color of title is deemed to be in legal possession of all the land embraced in the title, except such part as may be in the adverse possession of other persons; such possession will entitle him to maintain an action of forcible entry and detainer against any one who makes a forcible entry and detainer, 14 even the rightful owner, 15 on any part of the tract which is not in the adverse possession of other persons. 16

Footnotes

Footnote 13. Kincaid v Logue, 7 Mo 166.

Footnote 14. Jenkins v Tynon, 1 Colo App 133, 27 P 893; Seals v Williams, 80 Miss 234, 31 So 707.

Footnote 15. Oyster Bay v Jacob, 109 App Div 613, 96 NYS 620; Sunday v Moore, 135 Wash 414, 237 P 1014; Curtis v Meadows, 77 W Va 22, 86 SE 886.

Footnote 16. Seals v Williams, 80 Miss 234, 31 So 707.

§ 20 --Acts evidencing possession

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Every forcible entry and detainer case must of necessity rest on its own facts in determining what constitutes the requisite prior possession by plaintiff. 17 What acts or circumstances constitute such possession is a question of law for the court to decide, 18 but the existence of these facts or circumstances is a question of fact for jury determination. 19

An inclosure of land by fences or by a natural barrier, or by a combination of both, constitutes an actual possession of the premises without any other act being done indicating dominion. 20 While it is possible to have actual possession without fences or inclosures of any kind, 1 in the absence of an inclosure it must appear from other facts and circumstances that the plaintiff was exercising exclusive dominion and control over the premises. 2

A substantial cultivation of the land in dispute in the ordinary manner, in good faith, and in the usual course of husbandry constitutes actual possession, 3 especially when accompanied by the erection of a fence or other inclosure, 4 but mere entry on the land and ploughing a few furrows across a portion of it are insufficient to show an actual

possession on plaintiff's part. 5

The land may be of a character or situated in a part of the country where its ordinary use does not require either inclosure or cultivation, as where it is used for pasturage, and that use may constitute possession. 6 Where uninclosed public land is concerned, however, the ranging of stock over such land does not evidence possession of any specific portion of the land in the owner of the stock as will enable him to maintain a forcible entry and detainer action. 7 But one who enters unoccupied public land, builds a house, and proceeds, step by step, to perfect his claim to it may maintain such action against another who disturbs his possession. 8

Footnotes

Footnote 17. *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

Footnote 18. *Underwood v Caruthersville*, 197 Mo App 358, 194 SW 1090.

Footnote 19. *Underwood v Caruthersville*, supra; *Hicks v Bluefield*, 86 W Va 367, 103 SE 323.

Footnote 20. *Knowles v Crocker Estate Co.* 149 Cal 278, 86 P 715.

Footnote 1. *Goodrich v Van Landigham*, 46 Cal 601.

Footnote 2. *McCormick v Sheridan*, 77 Cal 253, 19 P 419.

Footnote 3. *Valencia v Couch*, 32 Cal 339; *Galligher v Connell*, 35 Neb 517, 53 NW 383.

Footnote 4. *Valencia v Couch*, 32 Cal 339; *Galligher v Connell*, 35 Neb 517, 53 NW 383.

Footnote 5. *Edwards v Cary*, 60 Mo 572.

Footnote 6. *Giddings v '76 Land & Water Co.* 83 Cal 96, 23 P 196.

Footnote 7. *Buel v Frazier*, 38 Cal 693.

Footnote 8. *Stark v Barnes*, 4 Cal 412.

§ 21 Possession in case of persons occupying particular relationships

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The capacity in which a person occupies the premises may be important in determining whether his actual or physical possession carries with it the legal possession as well, and, if so, whether this legal possession inures to the occupant alone, to some other person alone, or to both the occupant and another person. Thus, for example, the occupancy by

an agent or servant preserves the possession in the employer or principal, so that a forcible entry is a wrong to such employer or principal, and not to the agent or servant. 9 Similarly, where an officer of a private corporation takes possession of its property, his possession is that of the corporation in the absence of any act or declaration to the contrary, so that if the corporation subsequently enters into possession through another of its officers, the former officer cannot maintain forcible entry and detainer against the corporation, although prior to taking possession he had purchased the property at a sheriff's sale, if the time for redemption has not expired when the corporation takes the later possession through its second officer. 10 It has been held that the mere fact that a wife lives with her husband on land leased to him does not give her a possession sufficient to enable her to maintain forcible entry and detainer. 11 It has even been held that where a man has deserted his wife, but she remains living on the premises, he has sufficient possession to maintain an action. 12 Under some circumstances, however, it has been held that a married woman holds possession jointly with her husband, or in her sole right, and may maintain the action even without his joinder. 13 However, where title to the premises is in the wife, the husband as the head of the household is not entitled to possession of a part of the premises occupied by guests invited to live in the home by the wife who owns the property. 14

Footnotes

Footnote 9. § 22, *infra*.

Footnote 10. *Hoffman v Reichert*, 147 Ill 274, 35 NE 527.

Footnote 11. *Funkhauser v Colloty*, 67 NJL 132, 50 A 580.

Footnote 12. *Davis v Woodward*, 19 Minn 174, Gil 137.

Footnote 13. *Hurst v Thompson*, 68 Ala 560; *Davis v Woodward*, 19 Minn 174, Gil 137; *Bobb v Taylor*, 25 Mo App 583.

Footnote 14. *Jones v Kilfether*, 12 Ill App 2d 390, 139 NE2d 801.

§ 22 Agent or servant

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Possession of premises by an employee or agent is the possession of the employer or principal, and an invasion of such possession is a wrong to the employer or principal for which an action of forcible entry and detainer should be brought in his name rather than in that of the employee or agent. 15 A servant who occupies real property incidental to, and as a part of, his employment is not, in legal effect, in possession of the property so as to enable him to maintain an action of forcible entry and detainer against the master for forcible ejection or exclusion from the premises on the termination of his services. 16 However, there are decisions in which, under the peculiar circumstances of the case, the

possession by an agent has been held to be such as to support an action by him when forcibly dispossessed by a stranger. 17

Footnotes

Footnote 15. *Douglas v Lamb*, 157 Ark 11, 247 SW 77; *Schwinn v Perkins*, 79 NJL 515, 78 A 19.

Footnote 16. *Davis v Long*, 45 ND 581, 178 NW 936, 14 ALR 796.

Annotation: 14 ALR 808.

Footnote 17. *House v Camp*, 32 Ala 541; *Central Park Baptist Church v Patterson*, 9 Misc 452, 30 NYS 248, rearg gr and app den 12 Misc 636, 32 NYS 1140; *Bradley v Bell*, 34 SC 107, 12 SE 1071.

§ 23 --Tenant or lessee

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Where a tenant in actual possession of leased premises is forcibly turned out of possession at any time during his term by a third party making a wrongful entry, he alone, not his landlord, may maintain an action of forcible entry and detainer. 18 Even after the tenancy has been terminated either by expiration of the lease or by abandonment of the premises by the tenant, the landlord is not authorized, as a general rule, to maintain an action of forcible entry and detainer against a third person who made an entry while the tenant was in possession; 19 the forcible entry on the possession of a tenant has been described as a personal wrong, a tort done to him alone, for which he alone may maintain the action. 20

A tenant at will may maintain an action of forcible entry and detainer, 1 even under a statute requiring the plaintiff to "set forth his estate in the land." 2 But it must appear that the plaintiff was in possession in the legal sense, and not as merely representing the owner's possession, as where he is on the property as a mere servant or agent of the owner. 3

A lessee may maintain an action of forcible entry and detainer against the lessor to recover possession of the leased premises. 4

The rule that an employee generally does not have such possession as will permit him to maintain a forcible detainer action against his employer 5 does not preclude a general partner from maintaining such action against a limited partner holding a lease of business premises, where the general partner is entitled to exclusive control of the business and all the benefits of the lease. 6

Footnotes

Footnote 18. *Polack v Shafer*, 46 Cal 270; *Phillips Petroleum Co. v Skinner*, 140 Kan 413, 36 P2d 968; *Vincent v Brant*, 101 Mich 60, 59 NW 421; *Bennet v Montgomery*, 8 NJL 48; *McDaniel v Vaughn*, 42 NM 422, 80 P2d 417; *Chezum v Campbell*, 42 Wash 560, 85 P 48; *Chancey v Smith*, 25 W Va 404.

Annotation: 12 ALR2d 1199, § 4.

But see *Holzhausen v Hoskins*, 115 Mo App 261, 91 SW 410 (wherein it was held that where a building is occupied by several tenants who severally hold exclusive possession of different parts of it, the landlord is the proper party to bring a forcible entry and detainer action against an adjoining lot owner who cuts away the outer walls of the building, while the building is in the possession of the tenants, since in such a case, the several tenants have only incidental use of the outer walls, and a confusion of rights might occur if any one tenant should be allowed to take exclusive possession of the outer walls as parcel of his leasehold).

Remedies of tenant against third persons generally, see *Landlord and Tenant* (1st ed § 242).

Footnote 19. *McKeen v Nelms*, 9 Ala 507; *Hudgen v Temple*, 51 Ky (12 B Mon) 198; *Hyde v Fraher*, 25 Mo App 414.

Footnote 20. *Yoder v Easley*, 32 Ky (2 Dana) 245.

But see *Thomasson v Wilson*, 146 Ill 384, 34 NE 432 (stating that while the landlord cannot maintain a forcible entry and detainer action against one who intrudes on his tenant during the tenant's possession, nevertheless, on termination of the tenancy, the right of possession reverts to the landlord and he may bring his action to oust the intruder).

Footnote 1. *Walker v Sharpe*, 96 Mass (14 Allen) 43.

Footnote 2. *McDonald v Gayle* (Ala) 1 Minor 98.

Footnote 3. *Jones v Shay*, 50 Cal 508.

Footnote 4. *Jordan v Talbot*, 55 Cal 2d 597, 12 Cal Rptr 488, 361 P2d 20, 6 ALR3d 161 (holding that statutory lien granted to lessors must be enforced in lawful manner and without violation of forcible entry statute); *Farncomb v Stern*, 18 Colo 279, 32 P 612; *Ardell v Milner* (Fla App) 166 So 2d 714; *Phelps v Randolph*, 147 Ill 335, 35 NE 243; *Pelavin v Misner*, 241 Mich 209, 217 NW 36, 60 ALR 276, same result reached on reh 243 Mich 516, 220 NW 665, 60 ALR 279; *Steinke v Leicht* (Mo App) 235 SW2d 115; *Peterson v Platt*, 16 Utah 2d 330, 400 P2d 507.

Annotation: 6 ALR3d 199, § 8.

An oil company which holds a lease of premises to be used as a gasoline station may maintain a forcible entry and detainer action to recover possession from the lessor. *Johnson Oil Ref. Co. v Gillam*, 256 Ill App 531. Annotation: 83 ALR 1419, s. 126

ALR 1385.

Footnote 5. § 22, supra.

Footnote 6. *Moldovan v Fischer*, 149 Cal App 2d 600, 308 P2d 844.

§ 24 --Cotenants

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Although all cotenants may join in an action of forcible entry and detainer when a forcible entry has been made on lands theretofore possessed by all, 7 one tenant in common may maintain the action against a stranger, without joining his cotenants as plaintiffs, and recover the entire possession. 8 Since the possession of one tenant in common is presumed to be in support of the common title of all, 9 if one is restored to possession such possession is that of his cotenants, as well as of himself. 10 The unlawful detention is a wrong to each and every person from whom possession is forcibly detained; the wrong to one is not lessened by that to others, nor should one be precluded from redress though others, who may have been injured in like manner, do not choose to join him in the action. 11

Footnotes

Footnote 7. *Bowers v Cherokee Bob*, 45 Cal 495; *Moody v Seaman*, 46 Mich 74, 8 NW 711.

Footnote 8. *Bowers v Cherokee Bob*, 45 Cal 495; *Van Emmerik v Vuille*, 249 Iowa 911, 88 NW2d 47; *Klingbeil v Neubauer*, 111 Kan 716, 208 P 255; *Mason v Bascom*, 42 Ky (3 B Mon) 269; *Rabe v Fyler*, 10 Smedes & M (Miss) 440; *Jones v Phillips*, 57 Tenn (10 Heisk) 562.

Footnote 9. See 20 Am Jur 2d, Cotenancy and Joint Ownership § 33.

Footnote 10. *Van Emmerik v Vuille*, 249 Iowa 911, 88 NW2d 47.

Footnote 11. *Willis v Weeks*, 129 Iowa 525, 105 NW 1012.

§ 25 Duration of possession

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It is not ordinarily required that a plaintiff in a forcible entry and detainer action be in possession of the land in dispute for any particular length of time before he can maintain the action, 12 except that his possession must be of sufficient duration to become, to a legal intent, peaceable, 13 and it must be continuous in the sense that it must not be an interrupted or scrambling possession. 14 Under a statute so providing, however, the action may be brought only by a person who has been in the peaceable and undisturbed possession of the property for a specified period preceding the wrongful entry. 15 Such a statute does not conflict with the federal homestead laws relating to entries on unappropriated public lands. 16

Footnotes

Footnote 12. *Highland Park Oil Co. v Western Minerals Co.* 1 Cal App 340, 82 P 228; *Jones v Czaza*, 19 Tenn App 327, 86 SW2d 1096.

Footnote 13. *Castro v Tewksbury*, 69 Cal 562, 11 P 339.

Footnote 14. *Jones v Czaza*, 19 Tenn App 327, 86 SW2d 1096.

What constitutes scrambling possession, see § 18, *supra*.

Footnote 15. *Priestley Mining & Milling Co. v Lenox Mining & Development Co.* 41 Wash 2d 101, 247 P2d 688 (5 days).

Footnote 16. *Denee v Ridpath (Denee v Ankeny)* 246 US 208, 62 L ed 669, 38 S Ct 226.

§ 26 Effect of termination of possession prior to entry

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An action of forcible entry and detainer may not be maintained where plaintiff's possession of the land in dispute was terminated, prior to the alleged wrongful entry, by lawful surrender or transfer, by voluntary abandonment, 17 or by eviction which has ripened into a peaceful possession on the part of the intruder. 18 It is not essential for retention of possession, however, that plaintiff must at all times reside or stay on the premises; 19 a mere temporary absence from the premises at the time of the entry complained of is not an abandonment and will not preclude him from maintaining the action against one who forcibly enters or detains the premises during such absence. 20 Although a mere intention to abandon premises, followed by acts in effectuation thereof, does not put an end to possession until actual occupancy has terminated, 1 an essential ingredient of abandonment of possession is the intention to abandon. 2 Any act done by plaintiff indicating an intention to hold rather than to abandon possession will be sufficient to continue the possession in him. 3

Plaintiff's abandonment of possession cannot constitute a defense if, before the forcible

entry, he has resumed possession, or if the abandonment takes place after the defendant's entry. 4

Footnotes

Footnote 17. *Hopkins v Calloway*, 35 Tenn (3 Sneed) 11.

Footnote 18. § 27, *infra*.

Footnote 19. *Schwinn v Perkins*, 79 NJL 515, 78 A 19.

Footnote 20. *Lewis v Yoakum* (Tex Civ App) 32 SW 237 (one who had key to empty house was regarded as being in possession of house).

One who exercises dominion over the premises, though absent, is entitled to maintain an action of forcible entry and detainer if peaceable possession can be established. *Shelby v Houston*, 38 Cal 410.

Footnote 1. *Wynn v Vessey*, 127 Wash 492, 221 P 295.

Footnote 2. *Schwinn v Perkins*, 79 NJL 515, 78 A 19.

Intention as element of abandonment generally, see 1 Am Jur 2d, Abandoned, Lost, and Unclaimed Property §§ 15 et seq.

Footnote 3. *King v St. Louis Gaslight Co.* 34 Mo 34; *Davidson v Phillips*, 9 Yerg (Tenn) 93.

Footnote 4. *Keyser v Rawlings*, 22 Mo 126.

§ 27 --Eviction under judicial process

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The question as to whether possession has been transferred or lost is sometimes presented in cases wherein the occupant of land has been ejected and another placed in control under color of legal or judicial process. In some jurisdictions, the purchaser at a judicial sale may maintain forcible entry and detainer to obtain possession of the property from the judgment debtor who was in possession when the judgment was rendered. 5 Since a writ of possession does not run against a person not a party to legal proceedings to try the question of title or right to possession, such person being in actual peaceable possession of the premises at the time the proceedings were instituted, 6 such writ does not justify an entry by the plaintiff or the forcible dispossession of the party in possession by the sheriff. Consequently, a party so dispossessed may maintain an action of forcible entry and detainer for restitution of the premises; and if he yields to the force, but peaceably returns to his possession as soon as the sheriff departs and the force is gone, his

possession is reinstated, and the plaintiff cannot maintain an action of unlawful detainer against him, since such plaintiff does not, in such circumstances, obtain lawful possession under his writ of possession. 7 On the same theory, where a judgment and writ of possession are against one of two joint possessors, and the sheriff enters thereunder in the absence of both and delivers possession to the plaintiff's agent, who does not remain on the premises, the plaintiff cannot maintain forcible entry and detainer against the joint tenant not named in the writ on his return and re-entry on the premises, since there is no actual eviction as to him by the formal delivery of possession by the sheriff, and since the plaintiff's possession is constructive only, and not actual, in such case. 8 Likewise, on the eviction of one of two tenants in common under a writ of possession against him alone, leaving the other in possession, the latter's possession is that of both; the return into actual possession of the evicted one does not enable the plaintiff to maintain forcible entry and detainer against either or both. 9 Even where the writ of possession runs against the party in actual possession, the latter's possession is not terminated until the writ is fully executed by complete delivery of actual possession thereunder. Accordingly, where the sheriff removes the defendant's family and effects from the house into the yard, and is in the act of removing them from the premises when he is served with an injunction against execution, and desists, and the defendant, on endeavoring to resume possession of the house, is violently resisted by the plaintiff and his companions and, accordingly, goes with his family to a barn on the premises and takes up his residence there, it has been held that he can maintain forcible entry and detainer against the plaintiff to recover possession of the house. 10

Footnotes

Footnote 5. *Green v Morse*, 57 Neb 391, 77 NW 925.

Footnote 6. See 25 Am Jur 2d, Ejectment § 135.

Footnote 7. *Brush v Fowler*, 36 Ill 53; *Bernecker v Miller*, 40 Mo 473; *Fults v Munro*, 202 NY 34, 95 NE 23; *Laird v Winters*, 27 Tex 440.

Footnote 8. *Kercheval v Ambler*, 7 JJ Marsh (Ky) 626.

Footnote 9. *Bernecker v Miller*, 40 Mo 473.

Footnote 10. *Farnsworth v Fowler*, 1 Swan (Tenn) 1.

III. REQUISITES WITH RESPECT TO FORCE BY DEFENDANT

§ 28 Generally

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As a general rule the element of force on the part of defendant is essential to the maintenance of an action of forcible entry and detainer. 11 The gist of the action is the forcible and wrongful taking or withholding of the land in dispute; 12 a mere peaceful entry ordinarily will not suffice to support the action. 13 But, under a statute so providing, one is guilty of a forcible entry if, after a peaceable entry, he excludes the occupant from possession by force or threats of violence. 14 If the possession is taken forcibly, the action lies, regardless of whether the subsequent possession is maintained by force or violence. 15

Generally, or at least except as otherwise provided by statute or broadened by judicial construction, a forcible entry is such only where it is made with actual physical force on the premises, or by violence directed or threatened against the person in occupancy. 16 As is sometimes stated, it signifies only such entry as is made with a strong hand, with unusual weapons, or with an unusual number of servants or attendants, and with menace to life or limb. 17 Consequently, an entry without force by a party entitled to possession, or unlawful entry without actual force, violence, or menace, which has no force other than the law implies in a trespass, is ordinarily not a forcible entry within the meaning of the statutes. 18 Many entries may, therefore, be plainly unlawful, and yet not give rise to a forcible entry and detainer proceeding, although it is without contradiction that every forcible entry is unlawful. 19 Each action for forcible entry and detainer rests on its own facts in determining whether a forcible entry has been effected. 20 It is not essential, however, that an assault should have been committed; it is sufficient that the acts of defendant are such as to cause a reasonable apprehension of physical violence. 1

In some jurisdictions, the courts have widened the concept of forcible entry to include the obtaining of land by fraud, stealth, or other unlawful means, as well as by actual violence. 2 Since the proceeding for forcible entry and detainer is purely statutory, 3 a comprehensive view of what is regarded as constituting a forcible entry can only be obtained by considering the statutes of the several states when judicially construed in the light of present-day conditions and existing remedies. 4

Ordinarily, the mere fact that an entry was against the will of the occupant, 5 or without his permission or consent, 6 does not constitute it a forcible entry. Under some statutes, however, a forcible entry includes any entry against the will, or merely without the consent of, the party in possession. 7 To constitute forcible entry and detainer under such statutes, it is not essential that the entry be made with a strong hand, or be accompanied with actual force or violence, either against persons or property; 8 the word "force," as used therein, means no more than the term "vi et armis" at common-law—that is, with either actual or implied force. 9

Where a person has no valid contract authorizing him to occupy the premises and the owner forbids him to do so, his subsequent entry onto the premises is forcible. 10

§ 28 ----Generally [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 607, Forcible entry and detainer; requisite force by defendant.

Footnotes

Footnote 11. *Patterson v Dombrowski*, 337 Mich 557, 60 NW2d 456; *Mastin v May*, 127 Minn 93, 148 NW 893; *Schroeder v Woody*, 166 Or 93, 109 P2d 597.

Footnote 12. *Ball v Dancer*, 44 Okla 114, 143 P 855.

An action of forcible entry requires that the entry and ouster shall be forcible. *Wilson v Campbell*, 75 Kan 159, 88 P 548.

Footnote 13. *Adams v Tilley*, 87 W Va 332, 104 SE 601.

Footnote 14. *Jordan v Talbot*, 55 Cal 2d 597, 12 Cal Rptr 488, 361 P2d 20, 6 ALR3d 161.

Forcible detainer after entry, see § 32, *infra*.

Footnote 15. *Mastin v May*, 127 Minn 83, 148 NW 893.

Footnote 16. *Wilson v Campbell*, 75 Kan 159, 88 P 548; *Fults v Munro*, 202 NY 34, 95 NE 23; *Butts v Voorhees*, 13 NJL 13; *Foster v Kelsey*, 36 Vt 199.

A forcible entry, within the meaning of the Forcible Entry and Detainer Act, is one accompanied with some circumstance of force or violence to the person, or one accompanied in a riotous or tumultuous manner endangering the public peace. *Simhiser v Farber*, 270 Wis 420, 71 NW2d 412.

To constitute a forcible entry or detainer, the entry or detainer must have been riotous, personal violence must have been used or threatened, or the defendant's conduct must have been such as to inspire terror or alarm. There must have been force used or threatened against the person. *Christian v Amster*, 253 Mich 400, 235 NW 199.

The act of cutting through an inside fence as an act separate and apart from a prior entry on and possession of the premises as a whole is not a forcible entry on the premises, and will not support an action of forcible entry and detainer. *Phillips v Phillips*, 186 Ala 545, 65 So 49.

Footnote 17. *Butts v Voorhees*, 13 NJL 13; *Foster v Kelsey*, 36 Vt 199.

Footnote 18. *Hewitt v State*, 108 Fla 335, 146 So 578; *Barbee v Winnsboro Granite Corp.* 190 SC 245, 2 SE2d 737; *Simhiser v Farber*, 270 Wis 420, 71 NW2d 412.

There is a mere trespass, and not a forcible entry, where a person enters an unoccupied house in the nighttime, furtively, and without force or violence. *Foster v Kelsey*, 36 Vt 199.

Footnote 19. The entry of the owner on land in the rightful possession of the occupant is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. *Grundy v Goff*, 191 Va 148, 60 SE2d 273.

Where the summary proceeding provided by statute is a substitute for the proceeding at common law, nothing constitutes a forcible entry which would not have been indictable at common law. *Christian v Amster*, 253 Mich 400, 235 NW 199.

Footnote 20. *Giese v Weeden*, 165 Kan 551, 196 P2d 207.

Footnote 1. *Holzman v Gattis*, 195 Ark 773, 114 SW2d 3; *Crossen v Campbell*, 102 Or 666, 202 P 745.

Footnote 2. *Buchanan v Crites*, 106 Utah 428, 150 P2d 100, 154 ALR 167; *Simhiser v Farber*, 270 Wis 420, 71 NW2d 412 (holding that no trick or deception was used to gain entrance where entry was made openly through front door of premises).

A landlord who entices the tenant outside the building by a ruse and then locks the door and forcibly prevents a re-entry is guilty of forcible entry and detainer. *Pelavin v Misner*, 241 Mich 209, 217 NW 36, 60 ALR 276.

Footnote 3. § 5, *supra*.

Footnote 4. *Grundy v Goff*, 191 Va 148, 60 SE2d 273.

Footnote 5. *Wiles v Walker*, 88 W Va 147, 106 SE 423.

Footnote 6. *Jefferson County v Parker*, 211 Ala 289, 100 So 338.

Footnote 7. *Willows Cattle Co. v Connell*, 25 Ariz 592, 220 P 1082; *Harper v Sallee*, 376 Ill 540, 34 NE2d 860, 135 ALR 189; *Conley v Shepherd*, 237 Ky 128, 35 SW2d 5; *Seals v Williams*, 80 Miss 234, 31 So 707; *Heron v Ramsey*, 45 NM 491, 117 P2d 247; *Casey v Kitchens*, 66 Okla 169, 168 P 812.

Footnote 8. *Harper v Sallee*, 376 Ill 540, 34 NE2d 860, 135 ALR 189; *Casey v Kitchens*, 66 Okla 169, 168 P 812.

Footnote 9. *Harper v Sallee*, 376 Ill 540, 34 NE2d 860, 135 ALR 189.

Footnote 10. *Newsom v Damron*, 302 Ky 79, 193 SW2d 643.

§ 29 Force amounting to breach of peace

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An entry on land is forcible where it is accomplished or accompanied by acts that amount or directly tend to a breach of the peace. 11 However, though it has been said that acts of this character are necessary, 12 there is other authority stating that to constitute a forcible entry it is not necessary that there be actual violence amounting to a breach of the peace, 13 or that the person in possession should resist to such an extent as to bring

about a breach of the peace. 14 A person in peaceable possession should not be compelled to offer resistance to a threatened invasion until he himself provokes a breach of the peace, 15 and if he is dispossessed during his absence he is not required to bring about an actual breach of the peace before he can maintain an action of forcible entry and detainer. 16

§ 29 ----Force amounting to breach of peace [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 607, Forcible entry and detainer; requisite force by defendant.

Footnotes

Footnote 11. Turner v Lumbrick, 19 Tenn (Meigs) 7; Grundy v Goff, 191 Va 148, 60 SE2d 273.

Footnote 12. Harrington v Scott, 1 Mich 17.

Footnote 13. Smith v Hoag, 45 Ill 250.

Footnote 14. Knowles v Crocker Estate Co. 149 Cal 278, 86 P 715.

Footnote 15. Southern R. Co. v Lima Wood & Coal Co. 156 Va 829, 159 SE 69.

Footnote 16. Crossen v Campbell, 102 Or 666, 202 P 745.

§ 30 Breaking into building; opening gate or unlocking door

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Forcing open the outer door of a dwelling in a peaceable manner is not of itself ordinarily sufficient to constitute a forcible entry, though the occupant be absent. 17 Under some statutes expressly so providing, however, the breaking open of doors, windows, or other parts of a house, is sufficient to support an action of forcible entry and detainer, regardless of whether there be any person in the house, or whether the entry be accompanied by any kind of violence. 18

Generally, the mere opening of a gate, 19 or unlocking the front door to a house with a key, 20 is not such force as to constitute a forcible entry.

§ 30 ----Breaking into building; opening gate or unlocking door [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 607, Forcible entry and detainer; requisite

force by defendant.

Footnotes

Footnote 17. *Smith v Reeder*, 21 Or 541, 28 P 890.

Footnote 18. *Butts v Voorhees*, 13 NJL 13; *Davidson v Phillips*, 9 Yerg (Tenn) 93.

A landlord who enters the premises in the absence of a tenant at will by unlocking doors and removing them from their hinges makes a forcible entry within the statute providing that every person is guilty of a forcible entry who either by breaking open doors, windows, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstance of terror, enters on or into any real property. *Buchanan v Crites*, 106 Utah 428, 150 P2d 100, 154 ALR 167.

Footnote 19. *Fowler v Pritchard*, 148 Ala 261, 41 So 667.

Footnote 20. *Barbee v Winnsboro Granite Corp.* 190 SC 245, 2 SE2d 737.

§ 31 Threats and display of force

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To constitute a forcible entry it is not necessary that the force be accompanied by tumult or riot directed against the party in possession, 1 or that there be an actual collision or physical combat; 2 it is sufficient if the entry is attended with such display of force as manifests an intention to intimidate the party in possession, deter him from defending his rights, or excite him to repel the invasion. 3 As the rule is sometimes stated, whenever the party either by his behavior or by his speech at the time of his entry gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is deemed forcible, 4 whether he causes the terror by taking with him an unusual number of servants or companions, by arming himself with unusual weapons or in such a manner as plainly to indicate a design to back his pretensions by force, by actually threatening to beat, maim, or kill those who continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall offer resistance. 5 There is no necessity that the force offered or intended to be offered be resisted if the failure to resist is due to intimidation or a well-founded belief that resistance will be useless. 6 If the demonstration of force is such as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace, it is sufficient. It is not necessary that the party be actually put in fear; there need only be such a number of persons or show of force as is calculated to deter the person in possession from undertaking to send them away or to retain his possession. 7 The behavior or speech at the time of the entry must be such as to give just cause of fear of bodily harm. 8 A threat to spoil another's goods, to destroy his cattle, or to do him any other harm which is not personal is not sufficient, and much less so is a threat by the

defendant merely to serve a writ of restitution, which he has sued out, if the plaintiff does not yield possession. 9 If the natural tendency of the array of force and of the actions, words, and circumstances is to excite fear or apprehension of danger, in case resistance is offered, the threat to take possession by force need not be in boisterous terms, since those most to be dreaded are sometimes conveyed in the mildest tones and with the gentlest expressions. 10

§ 31 ----Threats and display of force [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 607, Forcible entry and detainer; requisite force by defendant.

Footnotes

Footnote 1. Ely v Yore, 71 Cal 130, 11 P 868.

Footnote 2. Crossen v Campbell, 102 Or 666, 202 P 745; Smith v Sinclair Refining Co. (Tex Civ App) 77 SW2d 894.

Footnote 3. Knowles v Crocker Estate Co. 149 Cal 278, 86 P 715.

Footnote 4. Booker v McKnight (La App) 179 So 332; McIntyre v Murphy, 153 Mich 342, 116 NW 1003; Crossen v Campbell, 102 Or 666, 202 P 745; Simhiser v Farber, 270 Wis 420, 71 NW2d 412.

Footnote 5. Booker v McKnight (La App) 179 So 332; McIntyre v Murphy, 153 Mich 342, 116 NW 1003; Butts v Voorhees, 13 NJL 13; Crossen v Campbell, 102 Or 666, 202 P 745; Foster v Kelsey, 36 Vt 199.

Footnote 6. Crossen v Campbell, 102 Or 666, 202 P 745.

Footnote 7. Douglas v Lamb, 157 Ark 11, 247 SW 77.

Footnote 8. Angry words and threats of force may be, in and of themselves, sufficient to constitute acts of forcible entry. Calidino Hotel Co. v Bank of America Nat. Trust & Sav. Asso. 31 Cal App 2d 295, 87 P2d 923.

Footnote 9. Butts v Voorhees, 13 NJL 13.

Footnote 10. Mercereau v Bergen, 15 NJL 244.

§ 32 Forcible expulsion or detainer after entry

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Under some statutes an action of forcible entry and detainer may be maintained against one who, after entering the premises peaceably, turns the occupant out of possession by force, or frightens him out of possession by threats of personal violence. 11 Where the entry is obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to be the expulsion of the party in possession, followed by an actual expulsion by means of personal threats or violence or by superior force, this amounts to a forcible entry. 12

Where the real gravamen of the action is not force or violence in the entry, but in the detainer of the property after the entry, the same circumstances of violence or terror which make an entry forcible will also make a detainer forcible. 13 Hence, not only the actual use of force or violence to retain possession, but also threats to do bodily harm to the former possessor if he dares return, will constitute forcible detainer although no attempt is made to re-enter. 14 Such threats may be by acts or conduct as well as by words, and are made out by proof of such a show of force on the part of the possessor or his agent as tends to bring about a breach of the peace and give rise to a reasonable apprehension by the former possessor of personal violence or injury, if he should attempt to re-enter, thereby deterring him from so doing. 15

The action of forcible entry and detainer under the particular statute being a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it may be sufficient to sustain a charge of forcible detainer that the party unlawfully in possession refuses to vacate the premises on lawful notice to do so. 16 Under some statutes the action cannot be maintained by one who peaceably and under claim of right enters into the possession of the property and does not forcibly detain it. 17 Under a statute authorizing the owner summarily to eject mere intruders on his property, the question may be whether the entry was under a bona fide claim of right, so that the good faith of the party is material and, if established, relieves him from the proceeding. 18 Finally, as in summary proceedings against tenants holding over, the statutes of a number of states expressly eliminate the question of force altogether in both the entry and the detainer, and make the question turn solely on the right to the possession. 19

Footnotes

Footnote 11. *Evill v Conwell* (Ind) 2 Blackf 133.

Entrance into the possession of another, forcible removal of the possessor against his remonstrances, and construction of a fence by the intruders constitutes forcible entry. *Valencia v Couch*, 32 Cal 339.

Footnote 12. *McIntyre v Murphy*, 153 Mich 342, 116 NW 1003.

Footnote 13. *Fults v Munro*, 202 NY 34, 95 NE 23; *Foster v Kelsey*, 36 Vt 199.

Footnote 14. *Foster v Kelsey*, *supra*.

Footnote 15. *Fults v Munro*, 202 NY 34, 95 NE 23.

There may be a forcible detainer although the entry is peaceable, and, as in the case of forcible entry, it is not essential that an assault should have been committed, but it is

sufficient that the acts of defendant are such as to cause a reasonable apprehension of physical violence. *Crossen v Campbell*, 102 Or 666, 202 P 745.

Footnote 16. *Board of Educational Lands & Funds v Gillett*, 158 Neb 558, 64 NW2d 105.

Footnote 17. *Mastin v May*, 127 Minn 93, 148 NW 893.

Fastening the doors and refusing to open them or to give up possession to an agent of the owner who comes to make entry do not constitute forcible detainer, although it will be otherwise if the circumstances indicate an intention to compel the owner not only to use force to get in, but also to use force in resisting his attempts to re-enter. *Foster v Kelsey*, 36 Vt 199.

Footnote 18. *Lane v Williams*, 114 Ga 124, 39 SE 919.

Footnote 19. See *Landlord and Tenant* (1st ed §§ 1016 et seq.).

IV. PRACTICE AND PROCEDURE IN CIVIL ACTIONS

§ 33 Generally; jurisdiction and venue

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Under the constitutions and statutes of the various states, original jurisdiction over forcible entry and detainer actions is usually vested in the justices' or other inferior courts. 20 In some states justices of the peace and courts authorized to exercise the jurisdiction of such justices have exclusive original jurisdiction; 1 in others jurisdiction is vested concurrently in the justice's court and in other specified courts, 2 while in still other states a justice of the peace has no jurisdiction in such an action. 3

Since the action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, 4 the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be coram non iudice and void. 5 Even if the action is tried in a court of record, such court does not proceed therein by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and, in such proceeding, is therefore to be treated as a court of special and limited jurisdiction. 6 There is no presumption in favor of the record; the facts necessary to vest the court with jurisdiction must affirmatively appear on the face of the record. 7

In the absence of a special statute to the contrary, the jurisdiction of the justice or other court entertaining an action of forcible entry and detainer is confined to determining the issue of peaceable possession, and does not extend to an adjudication of the title 8 or right to ultimate possession of the land in dispute; 9 nor can the justice adjudicate a

right of possession that depends on an equitable interest in the premises or inquire into equitable rights and give relief to which the party might be entitled in equity. 10 The jurisdiction of the court, however, is not ousted by a mere averment of ownership 11 or that a question of title is involved; 12 the court may proceed until it appears that the question involved is in fact one of title. 13 Under a statute specifically conferring on municipal courts jurisdiction in any forcible entry and detainer action, a municipal court has jurisdiction to hear and determine such an action where, although title to the realty is drawn in question, there is no question as to present title. 14

Under a statute so providing, an action of forcible entry and detainer must be brought before the justice of the peace of the precinct in which the land in question is situated, or, if there is none, before the justice in an adjoining precinct. 15 A statutory provision that justices of the peace "in their respective counties" shall have jurisdiction of actions of forcible entry and detainer gives them a jurisdiction coextensive with the area of their respective counties, notwithstanding a general statute limiting their jurisdiction to their townships. 16

§ 33 ----Generally; jurisdiction and venue [SUPPLEMENT]

p 913, n 5—Color-Ad Packaging, Inc. v Kapak Industries, Inc. 285 Minn 525, 172 NW2d 568, overruled on other grounds Township Board of Lake Valley Township v Lewis (Minn) 234 NW2d 815. (court without jurisdiction to enter judgment in unlawful detainer action where return date of summons was less than the 3 days required by statute).

p 914, n 8—

But see *Steele v Northup*, _____ Iowa _____, 168 NW2d 785, wherein the court indicated that, under Iowa statutes, title is a justiciable issue in a forcible entry and detainer action when the action has been originally commenced in district court or when the case has been transferred to such court after title has been raised in a lower court.

Case authorities:

The Court of Appeals lacked jurisdiction to review the issue of possession in a forcible detainer action, where after lender foreclosed on lessor's property, it brought a suit for forcible detainer and was awarded possession of the premises in which lessee operated a restaurant, whereupon lessee sought an injunction or writ of prohibition against removal pending appeal, because the court had no jurisdiction where possession of premises involved commercial activity. *Chang v Resolution Trust Corp.* (1991, Tex App Houston (1st Dist)) 814 SW2d 543.

Footnotes

Footnote 20. *Garcia v Venegas*, 106 Cal App 2d 364, 235 P2d 89; *Hickman v Hickman*, 49 Del 568, 121 A2d 689; *Corkill v Thompson*, 169 Kan 38, 217 P2d 273; *Allen v Moore*, 173 Ky 394, 191 SW 93; *Schmidt v Henderson*, 148 Neb 343, 27 NW2d 396;

Brown v Bigham, 65 NM 45, 331 P2d 1106; Haginas v Malbis Memorial Foundation, 163 Tex 274, 354 SW2d 368; Allen v Houn, 30 Wyo 186, 219 P 573.

Footnote 1. Haginas v Malbis Memorial Foundation, 163 Tex 274, 354 SW2d 368; Allen v Houn, 30 Wyo 186, 219 P 573.

Footnote 2. Owens v Smith, 200 Iowa 261, 204 NW 439; State ex rel. Hamshaw v Justice Court of Union Tp. 108 Mont 12, 88 P2d 1.

Footnote 3. Vinson v Flynn, 64 Ark 453, 43 SW 146, 46 SW 186; Strozzi v Wines, 24 Nev 389, 55 P 828, reh den 24 Nev 395, 57 P 382.

Footnote 4. § 5, supra.

Footnote 5. West Side Trust & Sav. Bank v Lopoten, 358 Ill 631, 193 NE 462; Goodin v King, 192 Kan 304, 387 P2d 206; Y. W. C. A. v La Presto (Mo App) 169 SW2d 78; Schuman v Brown, 180 Okla 130, 68 P2d 779; Schroeder v Woody, 166 Or 93, 109 P2d 597.

Footnote 6. Harris v Christy, 166 Kan 395, 201 P2d 1067; Schuman v Brown, 180 Okla 130, 68 P2d 779; Schroeder v Woody, 166 Or 93, 109 P2d 597; Allen v Houn, 30 Wyo 186, 219 P 573.

Footnote 7. Harris v Christy, 166 Kan 395, 201 P2d 1067.

Footnote 8. Dodd v Scott, 81 Iowa 319, 46 NW 1057; Page v Dwight, 170 Mass 29, 48 NE 850; Williams v Gordon (App) 53 Ohio L Abs 464, 86 NE2d 34; Norton v Van Voorst, 191 Or 577, 231 P2d 947.

Footnote 9. Issues involved or triable on forcible entry and detainer generally, see § 6, supra.

Footnote 10. Finney v Cist, 34 Mo 303; Knapp v Reed, 88 Neb 754, 130 NW 430.

Footnote 11. Bollinger v Dietrich, 161 Kan 358, 168 P2d 87; Heiney v Heiney, 43 Or 577, 73 P 1038.

Footnote 12. Glissman v Bauermeister, 149 Neb 131, 30 NW2d 649; Brown v Bigham, 65 NM 45, 331 P2d 1106; Hall v Haines, 175 Okla 81, 51 P2d 570.

Footnote 13. Bollinger v Dietrich, 161 Kan 358, 168 P2d 87; Glissman v Bauermeister, 149 Neb 131, 30 NW2d 649.

Generally, as to jurisdiction of justice of peace as affected by fact that title to, or right of possession of, land is involved, see Justices of the Peace (1st ed §§ 48 et seq.).

Footnote 14. Haas v Gerski, 175 Ohio St 327, 25 Ohio Ops 2d 212, 194 NE2d 765.

Footnote 15. Tietjen v McCoy, 24 NM 164, 172 P 1144.

Footnote 16. Raynolds v Larkin, 10 Colo 126, 14 P 114.

§ 34 Notice or demand–necessity; waiver

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In the absence of a statute expressly so requiring, no notice to surrender or demand for possession of the land in question need be given as a condition precedent to an action of forcible entry and detainer. 17 Under some statutes however, notice or demand is a prerequisite to the maintenance of the action. 18 But a demand or notice may sometimes be required only under a particular clause of the statute, and not under other clauses or subdivisions. 19 The language of some statutes has been held to preclude the necessity for the statutory notice or demand where the relation of landlord and tenant did not exist between the parties, 20 or where the original entry was forcible. 1

The statutory requirement of notice or demand may be waived. 2

§ 34 ----Notice or demand–necessity; waiver [SUPPLEMENT]

Case authorities:

After serving a notice to vacate, it is inconsistent for a landlord to accept and retain rent payments in advance, and by so doing, he is deemed to have waived the notice; however, since a tenant who remains in possession is liable for rent during the pendency of the suit, a landlord may accept rent paid for liability already incurred. *Presidential Park Apartments v Colston* (1980, App) 17 Ohio Ops 3d 220, NE2d.

The county court's failure to provide the tenant/appellant who failed to pay her rent into the court register within the time prescribed by RCP Rule 749b with notice and a hearing prior to considering and issuing a Writ of Restitution did not deprive the tenant of her constitutional right to due process where the tenant had previously had a hearing in justice court concerning possession of the premises. *Ibarra v Housing Authority of Corpus Christi* (1990, Tex App Corpus Christi) 791 SW2d 224, writ den.

Footnotes

Footnote 17. *Rutledge v Barger*, 82 Cal App 356, 255 P 537; *Sullivan v Culp*, 260 Ill App 443.

Footnote 18. *Kowalski v Burman*, 13 Ill App 2d 332, 142 NE2d 159; *Van Emmerik v Vuille*, 249 Iowa 911, 88 NW2d 47; *Goodin v King*, 192 Kan 304, 387 P2d 206; *Watkins v Dodson*, 159 Neb 745, 68 NW2d 508; *Barr Hotel Co. v Lloyd MacKeown Buick Co.* 104 Ohio App 69, 4 Ohio Ops 2d 157, 146 NE2d 879.

Footnote 19. *Savold v Baldwin*, 27 ND 342, 146 NW 544.

Footnote 20. Tolleson v Anderson, 192 Okla 333, 136 P2d 882.

Footnote 1. The requirement in a statute that a 90 days' notice to quit be given before forcible entry and detainer can be brought, grounded on constructive force, does not apply to a plaintiff expelled by actual force from possession of premises acquired in a peaceable manner. Smith v Reeder, 21 Or 541, 28 P 890.

Footnote 2. Espen v Hinchliffe, 131 Ill 468, 23 NE 592; Polson v Parsons, 23 Okla 778, 104 P 336.

§ 35 --Form and requisites

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The notice to quit or demand for possession of the land forcibly entered and detained need not be in writing, 3 except where a written notice or demand is required by statute. 4

A substantial compliance with the statutory requisites as to the form and contents of the notice or demand is all that is required; 5 it is sufficient if the person to whom it is given can understand from it what is demanded of him and by whom. 6

The primary purpose of a notice to vacate is to apprise the party to whom it is given of the description of the property desired to be vacated with such reasonable certainty that he cannot be mistaken as to what land is meant. 7 While accuracy in the description of property in the notice is essential, yet what is required is substantial and not technical accuracy. 8 It is desirable practice to add to the description the name of the county and state where the land is located, but a failure to do so is not fatal if the notice shows by the caption and the description of the premises that no other land could be meant than that for which the action is brought to recover possession. 9

The notice must be for the period of time prescribed by the statute, 10 but need not, at least in the absence of a statute so requiring, specify the time when possession is to be delivered up. 11 It has been held that a demand for possession is sufficient, though it does not specify the exact day on which the property should be given up, where it requires possession to be delivered on or before a specified number of days, especially as against a defendant who in his answer sets forth that he proposes to retain possession. 12

The notice should show clearly who claims to be entitled to the possession of the premises and who makes the demand therefor, 13 and, while this fact need not appear in the body of the notice or demand, it must either appear there or be shown by the signature at the end. 14

§ 35 --Form and requisites [SUPPLEMENT]

Practice Aids: Notice to quit. 8 Am Jur Legal Forms 2d § 121:4.

Notice to pay rent or quit. 8 Am Jur Legal Forms 2d § 121:5.

Notice to quit for breach of covenant or condition not curable. 8 Am Jur Legal Forms 2d, § 121:6.

Case authorities:

Compliance with RC § 1923.04, which requires that the three-day notice to vacate contain certain specified language "printed or written in a conspicuous manner," is a condition precedent to bringing an action in forcible entry and detainer, and where the language is set apart in a separate paragraph but is otherwise indistinguishable from the other five printed paragraphs, such language is not conspicuous. *Dayton Met. Housing Auth. v Russell* (App, Montgomery Co) 16 Ohio Ops 3d 94.

Footnotes

Footnote 3. *Knowles v Ogletree*, 96 Ala 555, 12 So 397.

Footnote 4. *Nunlist v Motter*, 81 Ohio App 506, 37 Ohio Ops 335, 50 Ohio L Abs 187, 77 NE2d 369; *Oklahoma City v Hill*, 4 Okla 521, 46 P 568.

Footnote 5. *Crawford v Norman* (App) 46 Ohio L Abs 404, 66 NE2d 559; *Shaw v Edwards*, 198 Okla 79, 175 P2d 315.

Practice Aids: –Forms of notice or demand. 5 Am Jur Legal Forms 5:1421-5:1423; 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:341-9:343.

Footnote 6. *Crawford v Norman* (App) 46 Ohio L Abs 404, 66 NE2d 559.

Footnote 7. *Avants v Bruner*, 39 Okla 730, 136 P 593.

Footnote 8. *Dimmett v Appleton*, 20 Neb 208, 29 NW 474.

Footnote 9. *Avants v Bruner*, 39 Okla 730, 136 P 593.

Footnote 10. *Hale v Brown*, 119 Kan 303, 239 P 963; *Howard v Davis*, 66 Okla 260, 168 P 429.

Footnote 11. *Ashpole v Delaney*, 217 Iowa 792, 253 NW 30; *Hale v Brown*, 119 Kan 303, 239 P 963.

Footnote 12. *Smith v Soper*, 12 Colo App 264, 55 P 195.

Footnote 13. *Best v Frazier*, 16 Okla 523, 85 P 1119.

Footnote 14. *Oklahoma City v Hill*, 4 Okla 521, 46 P 568.

§ 36 Parties

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The rules governing parties in civil actions generally undoubtedly apply in forcible entry and detainer actions, unless otherwise provided by statute. Thus, in the absence of any such provision, it has been held that the usual rule that every action must be prosecuted in the name of the real party in interest is applicable. 15

Generally, the best test by which to determine who should be parties defendant in a forcible entry and detainer action is to inquire who were guilty, either in person or by agents, of the acts amounting to the forcible entry, and who remain in possession, so that a judgment in favor of the plaintiff may not be sufficient to afford him complete relief unless they are removed from the premises. 16

Where a tract of land consists of distinct parcels, persons forcibly entering on different parts and holding and claiming in severalty cannot ordinarily be joined as defendants in one proceeding. 17 It is sometimes provided by statute, however, that in certain cases, where the action is joined in its inception and the tenancy is afterward severed, all may be joined in one suit but the verdict and judgment must be several. 18

A person claiming to be the owner of the realty involved in a forcible entry case may intervene in the action, but may not institute against the plaintiff in that action another forcible entry action involving the same property. 19

Footnotes

Footnote 15. *Towles v Hamilton*, 94 Neb 588, 143 NW 935.

Footnote 16. *Byrd v Peterson*, 66 Ariz 253, 186 P2d 955.

Persons liable for wrongful entry and detainer, see § 12, *supra*.

Footnote 17. *Kerr v Phillips*, 5 NJL 818.

Footnote 18. *Gould v Hendrickson*, 9 Ill App 171.

Footnote 19. *De Clerk v Spikes*, 206 Ark 1004, 178 SW2d 70.

§ 37 Process

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The statutes sometimes prescribe a special form of summons to be used in forcible entry and detainer proceedings. 20 Where this is the case, a summons in compliance with the special statute is sufficient to obtain jurisdiction over a defendant, though it does not comply with certain requirements of a summons prescribed by statute for the commencement of general actions. 1 In general, it may be said that since the object of the proceeding is to obtain prompt relief for the injured party, the writ of summons is usually returnable within a shorter time than is allowed in ordinary cases; a special provision in a statute applicable to forcible entry and detainer fixing an early return day will prevail over a general direction in the procedure statute fixing certain stated return days for all process. 2

Where constructive or substituted service is authorized by statute in a forcible entry and detainer action, the process must be served in the manner prescribed by statute; 3 nothing less than strict and literal compliance with the statute will invest the court with jurisdiction. 4 Under a statute providing that posting is to be substituted in such an action only if defendant has left the jurisdiction or cannot be found and there is no person over a certain age in possession or residing on the premises who can be found, the absence of these conditions must be adequately ascertained as a condition to the validity of service by posting. 5 It has been held that the words "place of residence," as used in a forcible detainer statute, should be construed in its popular sense as the act of abiding or dwelling in a place for some continuance of time, and not restricted to mean "domicile." 6

A return of service of a summons in forcible entry and detainer which fails to show that a copy of the complaint was certified to by the justice of the peace or by the plaintiff or his agent or attorney is insufficient to maintain a judgment by default. 7

§ 37 ----Process [SUPPLEMENT]

p 917, n 2-

A state statute requiring, in eviction proceedings for nonpayment of rent, that trial shall be held between 2 and 6 days after service of the complaint unless security for accruing rent is provided is not invalid on its face under the due process or equal protection clauses of the Fourteenth Amendment. *Lindsey v Normet*, 405 US 56, 31 L Ed 2d 36, 92 S Ct 862.

Case authorities:

Service of a summons in a forcible entry and detainer action must be done in accordance with the rules in other cases. The record in a forcible entry and detainer action contained evidence upon which the trial court could find compliance with the civil rule that process be left at the usual place of residence with a person of suitable age and discretion, where the individual who effected service testified he left it with an individual who appeared to be over twenty-one, notwithstanding that he did not obtain that person's name. *Burton v Murry* (1978, App) 8 Ohio Ops 2d 179.

Footnotes

Footnote 20. *Hickman v Ryan*, 43 Del 431, 48 A2d 517; *Steinke v Leicht* (Mo App) 235 SW2d 115; *Boyd v North*, 114 Wash 540, 195 P 1011.

Footnote 1. *Boyd v North*, supra.

Practice Aids: –Form of summons in forcible entry and detainer. 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:361.

Footnote 2. *Kenny v Sen Si Lum*, 101 Minn 253, 112 NW 220.

Footnote 3. *Dewey v Clark*, 86 App DC 137, 180 F2d 766; *Ezydorski v Krozka*, 31 Ill App 2d 79, 175 NE2d 668; *Tinsley v Majorana* (Ky) 240 SW2d 539.

Footnote 4. *Ezydorski v Krozka*, 31 Ill App 2d 79, 175 NE2d 668.

Footnote 5. *Dewey v Clark*, 86 App DC 137, 180 F2d 766.

Footnote 6. *Ezydorski v Krozka*, 31 Ill App 2d 79, 175 NE2d 668.

Footnote 7. *Belfils v Flint*, 15 Or 158, 14 P 295.

§ 38 Complaint

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The requisites of the complaint are generally prescribed by the forcible entry and detainer acts, and its sufficiency is to be determined by the provisions of such act rather than by the provisions applicable to pleadings in civil actions generally, 8 except insofar as they are made applicable. 9 The complaint should set forth the facts essential to entitle the plaintiff to recover, 10 but since the proceeding is a summary one for the speedy adjustment of controversies about possession, which usually is cognizable before justices of the peace not familiar with pleading, it would seem that it was not intended that the strict and technical rules of pleading should be applied to complainants in these actions. 11 Allegations showing ownership or right of possession are held to be merely descriptive, and do not and cannot, in forcible entry and detainer proceedings, raise the question of title. The relief sought, and not the allegations, determines the character of the action. 12

The forcible entry and the forcible detainer are separate causes of action, and ought, therefore, to be separately stated. If not so stated, a complaint would be bad on demurrer, but if not so demurred to, the objection is waived and there is no reason why the plaintiff should even amend his complaint at a later stage for the purpose of stating the entry and the detainer in separate counts. 13

According to some authorities, a complaint in forcible entry and detainer should be verified in compliance with statutory requirements, 14 and is fatally defective when made solely by a person other than the complainant. 15 On the other hand, there is authority to the effect that an unverified complaint in such action, or one not properly verified as required by statute, does not render the entire proceeding void, 16 at least where no objection on that ground is interposed until after judgment. 17

Amendments of the pleadings are, as a rule, liberally allowed, in actions of this character. 18 Thus, a complaint in an action of forcible entry and detainer which alleges an "unlawful" entry may be properly amended so as to aver an "unlawful and forcible entry." 19 Where the averments of the declaration do not bring a case within the provision of a statute relative to the recovery of treble damages, it is not error to permit the plaintiff to amend the declaration by striking therefrom all reference to such statute. 20

Footnotes

Footnote 8. *Kenney v Daugherty*, 67 Colo 56, 185 P 471; *Lakota v Gray*, 240 Iowa 193, 35 NW2d 841.

Footnote 9. See *Sporer v Herlick*, 158 Neb 644, 64 NW2d 342, wherein it was held that the ordinary rules of pleading apply when a forcible entry and detainer proceeding is brought in the district court.

Footnote 10. *Leiferman v Osten*, 167 Ill 93, 47 NE 203.

Practice Aids: –Complaint, petition, or declaration for forcible entry and detainer. 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:351-9:353.

Footnote 11. *Wilson v Campbell*, 75 Kan 159, 88 P 548; *Lambert v Helena Adjustment Co.* 69 Mont 510, 222 P 1057.

Footnote 12. *Casey v Kitchens*, 66 Okla 169, 168 P 812.

Footnote 13. *Valencia v Couch*, 32 Cal 339; *Fults v Munro*, 202 NY 34, 95 NE 23.

Footnote 14. *Levy v David*, 24 RI 249, 52 A 1080.

Footnote 15. *Levy v David*, *supra*.

Footnote 16. *Kuykendall v Ulibarri*, 56 NM 43, 239 P2d 731.

Footnote 17. *Kuykendall v Ulibarri*, *supra*.

Footnote 18. *Valencia v Couch*, 32 Cal 339.

Footnote 19. *Wilson v Campbell*, 75 Kan 159, 88 P 548.

Footnote 20. *McIntyre v Murphy*, 153 Mich 342, 116 NW 1003.

§ 39 --Description of premises

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The complaint in a forcible entry and detainer action must particularly describe the premises in question; 1 this requirement has been held jurisdictional. 2 The property should be particularly described so as to enable the sheriff to give possession, 3 and so that it may be readily identified, 4 though reasonable certainty is all that is required. 5 The land may be described by name, 6 by government subdivisions, 7 or by street and number, and in other ways. 8 A description sufficient in a deed will suffice. 9

Footnotes

Footnote 1. Board of Educational Lands & Funds v Gillett, 158 Neb 558, 64 NW2d 105; Victor Furniture Co. v Wool (App) 49 Ohio L Abs 114, 75 NE2d 250; Holladay Coal Co. v Kirker, 20 Utah 192, 57 P 882.

Footnote 2. Bishop v Spaulding, 99 Neb 573, 156 NW 1080.

See, however, Family Invest. Co. v Paley (Tex Civ App) 356 SW2d 353, error dismd (holding an insufficient description in the complaint not to be such a defect as to deprive the court of jurisdiction, since the complaint may ordinarily be amended).

As to right of amendment, see § 38, supra.

Footnote 3. Bishop v Spaulding, 99 Neb 573, 156 NW 1080 (description must be such that officer with writ of restitution can ascertain from writ itself property intended); Sanchez v Luna, 1 NM 238.

Footnote 4. Patten v Balch, 15 NM 276, 106 P 388; Stewart v Breese (Tex Civ App) 367 SW2d 72, err dismd (description of property as "Rt. 1, Box 496, Old Seagoville Road, Texas," was sufficient).

Footnote 5. More v Del Valle, 28 Cal 170 (failure to mention state in description not fatal); Patten v Balch, 15 NM 276, 106 P 388.

Footnote 6. Kykendall v Clinton, 3 Kan 85.

Footnote 7. Bice v Hendrix, 274 Ala 281, 148 So 2d 224; Devine v Burleson, 35 Neb 238, 52 NW 1112 (description by government subdivisions giving neither meridian, county, or state).

Footnote 8. Bishop v Spaulding, 99 Neb 573, 156 NW 1080 (description as "S.W. corner" of two named streets).

Footnote 9. Kykendall v Clinton, 3 Kan 85.

§ 40 --Allegations as to entry and detainer

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In an action of forcible entry or detainer, the complaint should allege a forcible entry 10 or forcible detention 11 of the property in question; it is not sufficient to allege facts merely supporting an action of ejectment 12 or trespass. 13 It has been held that the plaintiff may allege any operative facts which would be descriptive of acts constituting either forcible entry or detainer or forcible detainer, and is not, in so doing, deemed to be pleading evidence merely. 14 However, some courts hold that it is not necessary to set forth the particular facts constituting the force relied on, but that it is sufficient to charge an entry and detainer in the language of the statute. 15

Footnotes

Footnote 10. *Cline v Smith*, 205 Ark 136, 167 SW2d 872; *McEvoy v Igo*, 27 Cal 375; *Lambert v Helena Adjustment Co.* 69 Mont 510, 222 P 1057.

Footnote 11. *Moore v Parker*, 59 Neb 29, 80 NW 43.

Footnote 12. *McEvoy v Igo*, 27 Cal 375.

Footnote 13. *Polack v McGrath*, 25 Cal 54.

Footnote 14. *Kenney v Daugherty*, 67 Colo 56, 185 P 471.

Footnote 15. *Armour Packing Co. v Howe*, 68 Kan 663, 75 P 1014; *Board of Educational Lands & Funds v Gillett*, 158 Neb 558, 64 NW2d 105; *Greenameyer v Coate*, 12 Okla 452, 72 P 377.

§ 41 Answer or plea

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Where the statute is silent as to the manner of answering the complaint in forcible entry and detainer, no written answer or plea is necessary, 16 and the defendant may give all defenses in evidence without plea. 17 Sometimes under the applicable practice a written answer is required only when the defendant sets up new matter by way of excuse, justification, or avoidance. 18 Where a statute specifically so provides, the answer must be in writing. 19 Under a statute providing that on or before the day for his appearance

the defendant may appear and demur or answer, the defendant, where the action is brought in the justice's court, may interpose a general denial, even though the complaint is verified. 20

If the answer in a forcible entry and detainer action does not deny the material allegations of the complaint, and no material new matter is set up, no issue is raised and plaintiff is entitled to judgment on the pleadings. 1 For this purpose, no relevant issue is raised by the denial of an immaterial allegation, such as an allegation of title. 2 But an answer which denies the forcible detainer alleged and the allegation that the plaintiff is entitled to the possession raises issues of fact precluding the rendition of a judgment on the pleadings. 3 A denial that the defendant unlawfully and forcibly detains possession of the property in question merely denies the unlawfulness and forcibleness of the detention, and therefore admits the possession and detention alleged. 4 It has been held that where the complaint alleges the particular acts of force committed, an answer merely denying that the defendant took possession of the property by force is insufficient under a statute requiring the answer specifically to admit or deny all the material facts. 5

Footnotes

Footnote 16. *Aufenkamp v Storch*, 138 Ky 104, 127 SW 529; *Fireproof Constr. Inc. v Brenner-Bell, Inc.* (App) 54 Ohio L Abs 149, 87 NE2d 174, reh den 54 Ohio L Abs 152, 87 NE2d 491, revd on jurisdictional ground 152 Ohio St 347, 40 Ohio Ops 375, 89 NE2d 472.

Footnote 17. *Oklahoma City v Hill*, 4 Okla 521, 46 P 568.

Footnote 18. *Berryhill v Healey*, 89 Minn 444, 95 NW 314.

Footnote 19. *Mahaney v Field*, 120 Colo 518, 211 P2d 827.

Footnote 20. *Henderson v Allen*, 23 Cal 519.

Footnote 1. *More v Del Valle*, 28 Cal 170.

Footnote 2. *Warburton v Doble*, 38 Cal 619.

Footnote 3. *Kennedy v Dickie*, 27 Mont 70, 69 P 672.

Footnote 4. *Church v Blakesley*, 39 Wyo 434, 273 P 541.

Footnote 5. *Kenney v Daugherty*, 67 Colo 56, 185 P 471.

§ 42 Defenses

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Generally, the defendant in forcible entry and detainer cases may set up any and all defenses which would bar the plaintiff's right of recovery. 6 He may show that the alleged entry was peaceable and not violent, 7 that he was in possession of the property for a specified statutory period prior to the alleged entry, 8 that he did not take possession of the property sued for or did not detain it at the commencement of the proceeding, 9 and that the plaintiff was never in possession, or if he was, that he had abandoned the possession. 10 But abandonment of the premises by plaintiff subsequent to the alleged wrong is no defense. 11 And a cause of action for money had and received cannot ordinarily be set up as a defense to the possessory action of forcible entry and detainer. 12

Though it has been stated that equitable defenses cannot be entertained in forcible entry and detainer proceedings 13 in the absence of statutory authorization, 14 under some statutes the defendant may interpose an equitable as well as a legal defense, 15 and is not driven to another court or form of action to assert such defense. 16

Ordinarily, title to the land or right to possession in the defendant cannot be relied on as a defense, 17 and it is no defense that plaintiff, having acquired actual possession of the property, lacked title. 18 But it is sufficient as a defense for the defendant to establish his peaceful entry prior to agreement and that he has a substantial claim of title as distinguished from a mere pretext or pretentious claim which entitles him to possession. 19

§ 42 ----Defenses [SUPPLEMENT]

p 920, n 6–

A state statute, providing, in eviction proceedings for nonpayment of rent, that litigable issues are limited to those involving the tenant's default and that consideration of defenses based on the landlord's breach of a duty to maintain the premises is precluded, is not invalid on its face under the equal protection clause of the Fourteenth Amendment. *Lindsey v Normet*, 405 US 56, 31 L Ed 2d 36, 92 S Ct 862.

Case authorities:

In action by landlord for possession pursuant to forcible entry and detainer statute, trial court erred in striking tenant's affirmative defenses, including, inter alia, that landlord had failed to comply with express covenant to repair. *Richardson v Wilson* (1977) 46 Ill App 3d 622, 5 Ill Dec 110, 361 NE2d 110.

Footnotes

Footnote 6. *Harrell v Martin*, 117 Fla 754, 158 So 287; *Mueller v Seiler*, 158 Kan 440, 148 P2d 266; *Paducah Home Oil Co. v Paxton*, 222 Ky 778, 2 SW2d 650, 56 ALR 797; *Cosgrove v Jones*, 194 Okla 641, 154 P2d 55.

Footnote 7. *Foster v Kelsey*, 36 Vt 199.

Footnote 8. *Kedrovsky v Rojdesvensky*, 123 Misc 159, 204 NYS 442.

Footnote 9. *Preston v Davis*, 112 Ill App 636.

Footnote 10. *Dudley v Lee*, 39 Ill 339.

Footnote 11. *Spellman v Rhode*, 33 Mont 21, 81 P 395.

Footnote 12. *Share v Williams*, 204 Or 664, 277 P2d 775, adhered to on reh 204 Or 677, 285 P2d 523.

Footnote 13. *D. J. Bielzoff Products Co. v James B. Beam Distilling Co.* 3 Ill App 2d 530, 123 NE2d 135.

The common-law rule was that a defendant in a forcible entry and detainer action could not prevail on equitable grounds. *Rancourt v Nichols*, 139 Me 339, 31 A2d 410.

Footnote 14. *Pefkaros v Harman*, 20 Del Ch 238, 174 A 124.

Footnote 15. *Melburg v Dakin*, 337 Ill App 204, 85 NE2d 482 (holding that trial court erred in its conclusion that defense of part performance was not available to defendants); *Mueller v Seiler*, 158 Kan 440, 148 P2d 266; *Paducah Home Oil Co. v Paxton*, 222 Ky 778, 2 SW2d 650, 56 ALR 797; *Kuhn v Griffin*, 3 Ohio App 2d 195, 32 Ohio Ops 2d 278, 209 NE2d 824.

A statute permitting a defendant in any action at law to defend by pleading any matter which would be ground for relief in equity is sufficiently broad to include actions for forcible entry. *Rancourt v Nichols*, 139 Me 339, 31 A2d 410.

Footnote 16. *Mueller v Seiler*, 158 Kan 440, 148 P2d 266.

Footnote 17. *Orentlicherman v Matarese*, 99 Conn 122, 121 A 275; *Conley v Shepherd*, 237 Ky 128, 35 SW2d 5; *Barnes v Davitt*, 160 Neb 595, 71 NW2d 107; *Woodbury v Bunker*, 98 Utah 216, 98 P2d 948.

Footnote 18. *Noble v Neace*, 293 Ky 496, 169 SW2d 308.

Footnote 19. *Dix v Burkhard*, 191 Okla 443, 130 P2d 837.

§ 43 Setoff, counterclaim, and cross complaint

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In the absence of statutory authorization, a setoff, counterclaim, or cross complaint may not be interposed in an action of forcible entry and detainer. 20 Under some statutes, however, a counterclaim in forcible entry and detainer may be filed where the subject matter is germane to the question of possession. 1

§ 43 ----Setoff, counterclaim, and cross complaint [SUPPLEMENT]

p 921, n 1–

A cross complaint is permitted in an unlawful detainer action if the defendant has surrendered possession of the premises before trial. *Erbe Corp. v W & B Realty Co.* 255 Cal App 2d 773, 63 Cal Rptr 462.

Case authorities:

In forcible entry and detainer action brought by agent of landlord, the United States Secretary of Housing and Urban Development, trial court erred in dismissing tenant's counterclaim seeking specific performance of landlord's alleged express covenant to repair premises. *South Austin Realty Asso. v Sombright* (1977) 47 Ill App 3d 89, 5 Ill Dec 472, 361 NE2d 795.

A counterclaim filed by a tenant in response to a landlord's complaint in Forcible Entry and Detainer, in which the tenant alleged that the landlord's action for possession of the premises was in retaliation for the tenant's complaint to various governmental agencies and to the landlord regarding housing code violations existing in the premises and that the landlord's failure to comply with housing code regulations breached the rental agreement between the parties and breached the warranty of habitability implied in every rental agreement, stated a claim upon which relief could be granted. *Laster v Bowman*, 52 Ohio App 2d 379, 6 Ohio Ops 2d 428, 370 NE2d 767.

In forceable entry and detainer case, tenants did not have right to assert counterclaim based upon landlord's breach of duty to repair where trial court had no jurisdiction to hear such counterclaims under forceable entry and detainer statute. *Schuminsky v Field* (1980, Okla) 606 P2d 1133.

In a forcible detainer action, the county court properly dismissed, for lack of subject matter jurisdiction, the tenant's counterclaim for damages for unlawful retention of her security deposit and wrongful eviction, since the tenant's damages, if any, accruing from the alleged wrongful retention of her security deposit were not suffered in maintaining or defending possession of the premises, and since the claim for wrongful eviction did not arrive out of the forcible detainer action at issue, but arose out of a second forcible detainer action filed by the lessor. *Hanks v Lake Towne Apartments* (1991, Tex App Dallas) 812 SW2d 625.

In unlawful detainer action by restaurant lessor against lessee, lessee was not entitled to recover on counterclaim against lessor for tortious interference with business expectancy where lease had been lawfully terminated by lessor because of lessee's default and breach before alleged damages were sustained. Therefore, all rights that may have arisen by virtue of lease had been terminated. *Marina Shores, Ltd. v Cohn-Phillips, Ltd.* (1993, Va) 435 SE2d 136.

Footnotes

Footnote 20. *Neyens v Donato*, 67 Ariz 1, 188 P2d 588; *Votruba v Hanke*, 202 Iowa 658, 210 NW 753; *Spellman v Rhode*, 33 Mont 21, 81 P 395.

A setoff or counterclaim for breach of a landlord's covenant to repair the leased premises cannot be asserted in a forcible detainer proceeding. *Montgomery v Blocher*, 194 Ky 280, 239 SW 46.

Footnote 1. *Bleck v Cosgrove*, 32 Ill App 2d 267, 177 NE2d 647.

§ 44 Burden of proof and presumptions

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The burden of proof rests with the plaintiff in a forcible entry and detainer action to show that his right of possession to the premises is superior to that of the defendant, 2 and to establish every essential element on which to predicate his action under the particular statute invoked, 3 such as that there was a forcible entry or detainer by defendant, 4 and that the plaintiff was peaceably in actual possession at the time of forcible entry or was entitled to possession at the time of forcible detainer. 5 If the right to possession is in dispute, a person who is in the actual peaceful possession of the property will be presumed to be rightfully in possession, and the burden is on the plaintiff to overcome the presumption. 6 One suing in forcible entry and detainer must show a right of possession in himself; he cannot rely on the lack of such right in the defendant. 7

The defendant has the burden of proving an affirmative defense. 8 If he pleads title, the title is the only issue, and the burden of proof is on him. 9

Footnotes

Footnote 2. *Wiles v Walker*, 88 W Va 147, 106 SE 423.

Footnote 3. *Gilbert v Gerrity*, 108 Me 258, 80 A 704; *Welling v Abbott*, 52 Utah 240, 173 P 245; *Columbia & P. S. R. Co. v Moss*, 44 Wash 589, 87 P 951.

Footnote 4. *Phillips v Phillips*, 186 Ala 545, 65 So 49; *Gipe v Cummins*, 116 Ind 511, 19 NE 466; *Welling v Abbott*, 52 Utah 240, 173 P 245.

Footnote 5. *Bush v Thomas*, 162 Ala 168, 50 So 133; *Bittman v Courington*, 86 Cal App 2d 213, 194 P2d 43; *Welling v Abbott*, 52 Utah 240, 173 P 245.

The plaintiff in an action of forcible entry and detainer need not show any more than that he was in peaceable possession, that he was unlawfully ousted by the defendant and

excluded from the premises, and that possession was afterward forcibly withheld. *Casey v Kitchens*, 66 Okla 169, 168 P 812.

Footnote 6. *Fitzgerald v Quinn*, 165 Ill 354, 46 NE 287.

Footnote 7. *Brunton v Habel*, 333 Ill App 333, 77 NE2d 566.

Footnote 8. *Nugent v Dittel*, 213 Iowa 671, 239 NW 559.

Footnote 9. *Gray v Hutchins*, 150 Me 96, 104 A2d 423.

§ 45 Admissibility of evidence

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Inasmuch as the question of title cannot, apart from statutory authorization, be adjudicated in an action of forcible entry and detainer, 10 evidence of title to the land 11 adverse to the plaintiff 12 is ordinarily inadmissible. In some cases, however, it may be necessary to show right of ownership in order to show right to possession, 13 and deeds and other documentary evidence of title may be admissible insofar as they bear on the right to or extent of possession. 14 For example, such evidence may be admissible when offered by plaintiff, not for the purpose of establishing title, but to show that the title was conveyed to him by the grantor in possession, 15 to show that the apparent possession by a third person at the time of entry was as an agent of the plaintiff, 16 or to show a transfer of possession to the plaintiff sufficient to entitle him to an action of forcible entry and detainer against an intruder. 17

Since forcible entry and detainer is a possessory action, 18 any evidence shedding light on the actual possession of the premises in question, 19 or tending to show which party is entitled to possession, 20 is ordinarily admissible. When relevant and material, it is competent to show that plaintiff had instructed his agent to take possession of the premises on the termination of his tenant's occupancy, 1 a written agreement by a witness to deliver peaceable possession of the premises to plaintiff, 2 and the payment of taxes by one under whom plaintiff claims for the purpose of showing that the payor's possession and claim is in good faith. 3 While defendant may not, in the absence of other proofs of possession or right of possession, be permitted to prove payment of taxes by him, 4 he may, for the purpose of showing that he was in actual possession of the premises at the time of the alleged forcible entry, introduce evidence that he was then in possession under a lease. 5 And for the purpose of showing his peaceable possession, the defendant may introduce evidence of an agreement for a survey to locate a disputed boundary line and that he took possession thereunder. 6

For the purpose of determining whether an entry is forcible within the meaning of a statute, all that transpires between the coming of the defendant and the going of the plaintiff may be taken into account. 7 Declarations by the defendant's agent while in the act of taking possession of the premises are admissible to show that the defendant was

holding possession by force. 8

§ 45 ----Admissibility of evidence [SUPPLEMENT]

Practice Aids: 21 Am Jur Proof of Facts 2d 567, Forcible entry and detainer: requisite right, title, or possession of plaintiff.

21 Am Jur Proof of Facts 2d 607, Forcible entry and detainer; requisite force by defendant.

Case authorities:

Evidence pertinent to the issue of possession is properly admissible in an unlawful detainer action, even if the evidence is equitable in nature. *Heiser v Rodway* (SD) 247 NW2d 65.

Footnotes

Footnote 10. § 6, *supra*.

Footnote 11. *Ingram v Slayton*, 33 Cal App 630, 165 P 1026; *Davidson v Phillips*, 9 Yerg (Tenn) 93.

Footnote 12. *Goldblatt Bros. v Hoefeld*, 284 Ill App 31, 1 NE2d 573; *Phillips v Riley*, 309 Ky 512, 218 SW2d 50; *Mercereau v Bergen*, 15 NJL 244.

Footnote 13. *White v Hall* (Ky) 245 SW2d 603.

Allegations and proof in regard to title are admissible in a forcible entry and detainer action where they are merely incidental to the question of right of possession. *Merrifield v Merrifield*, 95 Ariz 152, 388 P2d 153.

Footnote 14. *Foster v Black*, 20 Ariz 64, 176 P 845; tions of forcible entry. *Rancourt v Nichols*, *Goldblatt Bros. v Hoefeld*, 284 Ill App 31, 1 NE2d 573; *Casey v Kitchens*, 66 Okla 169, 168 P 812; *Orange Laundry Co. v Stark* (Tex Civ App) 179 SW2d 841; *Seeley v Houston*, 105 Utah 202, 141 P2d 880.

While forcible detainer proceedings are possessory actions only and do not involve the title to the land, a deed is admissible in evidence by either party to show the character and extent of his possession. *Hines v Perkins*, 230 Ky 339, 19 SW2d 991.

Footnote 15. *Goldblatt Bros. v Hoefeld*, 284 Ill App 31, 1 NE2d 573.

Footnote 16. *Morgan v Higgins*, 37 Cal 59.

Footnote 17. *Conroy v Duane*, 45 Cal 597.

Footnote 18. § 5, *supra*.

Footnote 19. *Washington v Spriggs*, 213 Ala 622, 105 So 811.

Footnote 20. *Jones v Schmidt*, 163 Neb 508, 80 NW2d 289.

Footnote 1. *Bibby v Thomas*, 131 Ala 350, 31 So 432.

Footnote 2. *Huffaker v Boring*, 8 Ala 87.

Footnote 3. *Galligher v Connell*, 35 Neb 517, 53 NW 383.

Footnote 4. *Bellingham Bay & B. C. R. Co. v Strand*, 1 Wash 133, 23 P 928.

Footnote 5. *Peddicord v Kile*, 83 Iowa 542, 49 NW 997.

Footnote 6. *Flint v Lovdall*, 122 Cal 551, 55 P 424.

Footnote 7. *Valencia v Couch*, 32 Cal 339.

Footnote 8. *Bibby v Thomas*, 131 Ala 350, 31 So 432.

§ 46 Trial

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The general rules relating to the trial of causes are applicable to forcible entry and detainer actions except where they are in conflict with the evident purpose of the legislature in providing different rules. 9 The fact that the only issue to be tried is the right of possession does not authorize the court to apply any other than ordinary rules. 10

The practice in a particular state may require the day for trial to be fixed by the judge at the commencement of the action. 11 While provision is sometimes made for a continuance of the defendant's application accompanied by a proper bond conditioned for the payment of rent that may accrue, the mere interposition of an equitable defense does not of itself stay the action. 12

A statutory provision conferring a right to a trial by jury in actions for the recovery of specific real property has been held to be applicable to an action for forcible entry and detainer. 13 But the defendant in such an action is not entitled to a jury trial merely because the only defense interposed is equitable in nature. 14

The trial court may not properly inquire into the merits of a quitclaim deed between the parties, 15 but may, when permitted by statute, inquire into and determine the existence of a substantial claim, as distinguished from the legal sufficiency, of title and eliminate a claim which is nothing more than a mere pretext or pretense. 16

The court cannot direct a verdict for the plaintiff in an action of forcible entry and

detainer to recover the possession of real estate on the admission of counsel in his opening statement that the legal title is in the plaintiff. 17

§ 46 ----Trial [SUPPLEMENT]

Case authorities:

See *Ibarra v Housing Authority of Corpus Christi* (1990, Tex App Corpus Christi) 791 SW2d 224, writ den, § 34.

See *Triple T Inns, Inc. v Roberts* (1990, Tex App Amarillo) 800 SW2d 681, writ den (Mar 27, 1991) and reh'g of writ of error overr (May 30, 1991), § 47.

Footnotes

Footnote 9. *Stacks v Simmons* (Tex Civ App) 58 SW 958.

Footnote 10. *Clayton v Hurt*, 88 Tex 595, 32 SW 876.

Footnote 11. *Friedenthal v Thompson*, 146 Or 640, 31 P2d 643.

Footnote 12. *Friedenthal v Thompson*, supra.

Footnote 13. *Interior Lumber Co. v Kunert*, 61 ND 322, 237 NW 780.

Footnote 14. *Stone v Lerner*, 118 Colo 455, 195 P2d 964, 4 ALR2d 97.

Footnote 15. *Merrifield v Merrifield*, 95 Ariz 152, 388 P2d 153 (quitclaim deed from divorced wife to former husband who instituted forcible detainer action).

Footnote 16. *Dix v Burkhard*, 191 Okla 443, 130 P2d 837.

Footnote 17. *Pietsch v Pietsch*, 245 Ill 454, 92 NE 325.

§ 47 Judgment

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In an action of forcible entry and detainer, the right to judgment depends on the facts as they existed at the time of commencement of the action, 18 not at the time of trial. 19 It would appear, however, that this rule is not applicable to a trial de novo on appeal from an inferior court. 20

A judgment in an action of forcible entry or detainer does not determine rights of

ownership or possession; it simply decides that there shall or shall not be a restoration to the complaining party of immediate possession of property alleged to have been taken by an illegal or unwarranted ouster. 1 Where the verdict or findings are for the plaintiff, judgment must ordinarily be entered for restitution or restoration to him of the premises described in the complaint 2 and for costs of suit. 3

Since the judgment of a justice of the peace is not complete until entered in the official record and signed, the justice is not concluded by his oral announcement after the trial in forcible entry and detainer that his judgment was or would be for the defendant, but may lawfully change his mind and enter judgment in his docket for the plaintiff. 4

§ 47 ----Judgment [SUPPLEMENT]

Case authorities:

A justice of the peace may instruct a jury verdict in a forcible entry and detainer case, and such an action in no way restricts or denies a litigant his right to jury trial. *Triple T Inns, Inc. v Roberts* (1990, Tex App Amarillo) 800 SW2d 681, writ den (Mar 27, 1991) and reh'g of writ of error overr (May 30, 1991).

Footnotes

Footnote 18. *Bell v Dennis*, 158 Kan 35, 144 P2d 938.

Footnote 19. *Fults v Munro*, 202 NY 34, 95 NE 23.

Footnote 20. On appeal from a justice to a district court in an action of forcible entry and detainer, the cause is triable de novo, and the rights of the parties are to be determined as of the time of the hearing in the district court. *Kelley v Kelley*, 187 Iowa 349, 174 NW 342.

Trial de novo generally, see § 57, *infra*.

Footnote 1. *Mitchell v Hagood*, 6 Cal 148.

Practice Aids: –Forms of judgment in forcible entry and detainer action. 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:371, 9:374.

Footnote 2. *Fleming v Jones*, 12 Ill App 2d 107, 138 NE2d 861; *Reckard v Ryan*, 133 Or 108, 288 P 1053.

Writ of restitution for enforcement of judgment, see § 53, *infra*.

Footnote 3. § 52, *infra*.

Footnote 4. *Robertson v Donelan*, 138 Ky 149, 127 SW 754.

§ 48 --By confession or default

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Under some statutes a judgment by default 5 or a confession of judgment 6 on warranty of attorney 7 is not authorized in forcible entry and detainer cases. Under other statutes or rules of practice a judgment by default may be entered against the defendant for failure or refusal to answer 8 on or before the return day specified in the summons, 9 where no damages are claimed or sought by the plaintiff 10 in addition to possession of the premises. 11 Such a judgment is proper even though the defendant has filed an affidavit for change of venue, and even though an unverified answer is tendered by him after a change of venue has been taken subsequent to expiration of the return date fixed by the summons. 12 But, as in ordinary cases, where an answer is filed after the expiration of the time limit therefor, a default may not be entered until the answer has been stricken from the files. 13

Footnotes

Footnote 5. Hennessey v Penderson, 28 Minn 461, 11 NW 63.

Footnote 6. Paul v Armstrong, 1 Nev 82.

Footnote 7. French v Willer, 126 Ill 611, 18 NE 811 (holding that parties cannot by contract engraft on procedure prescribed for summary proceeding remedy or practice not warranted by statute).

Footnote 8. Carpenter v Bunke, 145 Ark 499, 224 SW 968.

Footnote 9. Mahaney v Field, 120 Colo 518, 211 P2d 827.

Footnote 10. Carpenter v Bunke, 145 Ark 499, 224 SW 968.

Footnote 11. Orebaugh v Duskocil, 145 Colo 484, 359 P2d 671.

Footnote 12. Mahaney v Field, 120 Colo 518, 211 P2d 827.

Footnote 13. Lunnun v Morris, 7 Cal App 710, 95 P 907.

§ 49 --Operation and effect

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A judgment in an action of forcible entry and detainer, like any other judgment, binds only the parties and their privies, 14 and is conclusive between the parties as to matters which could and should have been adjudicated as well as to matters put in issue and determined. 15 Where the mere naked possession in fact alone is put in issue, the judgment does not affect the title of the parties to the land in controversy; 16 it merely has the effect of placing the parties in their original positions prior to the wrongful entry. 17 Accordingly, the judgment is no bar to a subsequent action between the same parties to establish title to the same premises. 18 If, subsequent to the entry of a judgment for plaintiff, the defendant has acquired title or a right of possession superior to that of the plaintiff, the defendant may file an independent action to establish such superior right, but, until he does so, he is bound to abide by the judgment for plaintiff. 19

§ 49 --Operation and effect [SUPPLEMENT]

Case authorities:

In a trespass to try title suit, the district court was without jurisdiction to issue a temporary injunction or to alter the status quo as established by the judgment previously entered by a county court in a forcible detainer suit involving the same property and the same parties where the county court judgment solely resolved the question of who was entitled to immediate possession. *Cuellar v Martinez* (1981, Tex Civ App 4th Dist) 625 SW2d 3.

Footnotes

Footnote 14. If an action of forcible entry and detainer is brought against a tenant alone without making the landlord a party thereto, the landlord is not bound by the judgment rendered, although he had knowledge of the pendency of the action. *Winkler v Winkler*, 190 Okla 379, 123 P2d 963.

Footnote 15. *Cannon v Arizona Game & Fish Com.* 85 Ariz 1, 330 P2d 501.

Footnote 16. *Hamilton v Adams*, 15 Ala 596; *Pipitone v Mandala*, 33 Ill App 2d 461, 180 NE2d 33; *White v Ziegenhardt*, 339 Mich 195, 63 NW2d 625; *Towles v Hamilton*, 94 Neb 588, 143 NW 935; *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

A judgment that the defendant is not guilty of forcible entry and detainer does not preclude the plaintiff from subsequently asserting his title or ultimate right to possession. *Hedden v Waldeck*, 89 Cal App 494, 265 P 344.

Footnote 17. *Heron v Ramsey*, 45 NM 491, 117 P2d 247.

Footnote 18. *Cannon v Arizona Game & Fish Com.* 85 Ariz 1, 330 P2d 501; *Keating v Springer*, 146 Ill 481, 34 NE 805; *State Exch. Bank v Iblings*, 190 Iowa 1045, 181 NW 423; *Dale v Doddridge*, 9 Neb 138, 1 NW 999.

A judgment in an unlawful detainer action is not evidence of title to the demanded premises, and may not be considered for such purpose in an action of ejectment between the same parties. *Fish v Benson*, 71 Cal 428, 12 P 454.

Footnote 19. *Cannon v Arizona Game & Fish Com.* 85 Ariz 1, 330 P2d 501.

§ 50 Damages

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In the absence of a statute expressly authorizing it, damages for the ouster cannot be recovered by the plaintiff in a forcible entry and detainer action. 20 In some jurisdictions, however, the court and jury are expressly authorized by statute to assess the damages caused to the plaintiff by a forcible entry or detainer, 1 and, under some statutes, a judgment may be entered for two or three times the amount of the damages thus assessed. 2 This includes only such damages as are the natural and proximate result of the forcible entry, 3 such as the loss of rents plaintiff may have sustained, 4 loss sustained by the cessation of plaintiff's business, 5 and the loss of crops. 6 The plaintiff may not, however, recover damages for injury to his credit and his circumstances, 7 or damages for bodily or mental pain and anguish. 8 Where it is shown that a claim for compensatory damages is not supported, a judgment for nominal damages only may be rendered. 9

§ 50 ----Damages [SUPPLEMENT]

p 925– Add new paragraph following note 9: In at least one jurisdiction it has been held that quite apart from the statutory remedy of forcible entry and detainer, plaintiff may recover, in an action sounding in tort, damages for injuries to his person and goods naturally and proximately resulting from defendant's forcible entry on land in plaintiff's peaceable possession, irrespective of whether or not defendant had title to, or right to possession of, the land at the time of the forcible entry. 9.5

Case authorities:

In forcible entry and detainer action by lessor of radio tower against radio station, trial court erred in submitting to jury station's claims for fraud and negligent misrepresentation, reviewing court stated that damages for loss of the benefit of claimant's bargain were difference between value of benefits actually received under contract and value benefits would have had if false representations had been true. *Western Cities Broadcasting, Inc. v Schueller* (1991, Colo App) 830 P2d 1074, cert gr (Colo) 1992 Colo LEXIS 483.

Footnotes

Footnote 20. *Keating v Springer*, 146 Ill 481, 34 NE 805; *United States v Burrill*, 107 Me 382, 78 A 568 (holding that claim for betterments cannot be recovered in forcible entry and detainer); *Hart v Ferguson*, 73 Okla 293, 176 P 396; *Reckard v Ryan*, 133 Or 108, 288 P 1053.

Annotation: 101 ALR 476.

Footnote 1. *Brought v Minor*, 17 Ariz 28, 148 P 294; *McCleary v Crowley*, 22 Mont 245, 56 P 227.

Footnote 2. § 51, *infra*.

Footnote 3. *Anderson v Taylor*, 56 Cal 131; *Perry v Luetlich* (Tex Civ App) 93 SW2d 790, *revid* on other grounds 132 Tex 159, 121 SW2d 332; *Tobakas v Gaty*, 121 Wash 136, 208 P 257.

Footnote 4. *San Francisco & S. Home Bldg. Soc. v Leonard*, 17 Cal App 254, 119 P 405; *Sunday v Moore*, 135 Wash 414, 237 P 1014.

Footnote 5. *San Francisco & S. Home Bldg. Soc. v Leonard*, 17 Cal App 254, 119 P 405.

Footnote 6. *Giddings v '76 Land & Water Co.* 83 Cal 96, 23 P 196.

Footnote 7. *Anderson v Taylor*, 56 Cal 131.

Footnote 8. *Anderson v Taylor*, *supra*; *Hunt v Weems* (Tex Civ App) 208 SW2d 423, *error dismd.*

Footnote 9. *Karp v Margolis*, 159 Cal App 2d 69, 323 P2d 557 (holding, further, that court was authorized to treble amount of nominal damages assessed).

Footnote 9.5. *Daluiso v Bonne*, 71 Cal 2d 484, 78 Cal Rptr 707, 455 P2d 811.

§ 51 --Double or treble damages

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Under some statutes the duty is imposed on the court in a forcible entry and detainer case to render a judgment for two or three times the amount of the damages assessed by the court or jury, 10 whereas under other statutes the rendition of a judgment for such damages rests in the discretion of the court. 11 The jury, if there be one, should fix the actual damages, and the party should then apply to the court to have the damages doubled or trebled. 12 Where there is forcible entry within the contemplation of the statute, the question of good or bad faith cannot affect the right to treble damages, 13 but exemplary or punitive damages cannot be used as a basis for doubling or trebling the damages. 14

Where the matter of treble damages rests in the discretion of the court, the power should be exercised only where the evidence discloses that the defendant committed the forcible entry or detainer wantonly and by oppression, or with malice, express or implied. 15 A special plea for such damages need not be made in order to authorize the court to assess them. 16

It has been held that a statute authorizing double damages has no application to trial of forcible entry and detainer cases in the justice courts, and does not begin to operate until there is an appeal from a justice court judgment to the district court, which, in a proper case, is authorized to award double damages. 17

Footnotes

Footnote 10. *Eccles v Union P. Coal Co.* 15 Utah 14, 48 P 148.

Practice Aids: –Judgment for recovery of treble damages. 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:372.

Footnote 11. A statute providing that judgment "may" be entered for three times the amount at which the actual damages are assessed is permissive and does not entitle plaintiff to such damages as a matter of right. *Glock v Elges*, 39 Nev 415, 159 P 629.

Footnote 12. *Orly v Russell*, 53 Cal App 660, 200 P 732.

Footnote 13. *Kowing v Williams*, 75 SD 454, 67 NW2d 780.

Footnote 14. *Orly v Russell*, 53 Cal App 660, 200 P 732; *Vance v Ferguson*, 101 SC 125, 85 SE 241.

Footnote 15. *San Francisco & S. Home Bldg. Soc. v Leonard*, 17 Cal App 254, 119 P 405 (general averment that detainer is forcible permits plaintiff to prove malice, fraud, or oppression of any sort).

Footnote 16. *Tewksbury v O'Connell*, 25 Cal 262.

Footnote 17. *Sanchez v Reilly*, 54 NM 264, 221 P2d 560.

§ 52 Costs

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Under some statutes the successful plaintiff in a forcible entry and detainer case may, in addition to judgment for possession, 18 have a judgment for his costs, 19 and the unsuccessful litigant may be taxed the costs of executing the writ of restitution. 20 But the defendant is not liable for costs where the only possession plaintiff had of the land

was the placing on it of some lumber which was moved by defendant. 1 If the defendant's plea is that he was not in possession, the judgment would be for costs against plaintiff reciting that defendant disclaimed possession; or, if issue joined, would involve only the issue as to whom should be taxed the costs. 2

Unless authorized by statute, the court has no power to tax attorney's fees as costs against the plaintiff in a forcible entry and detainer case. 3

§ 52 ----Costs [SUPPLEMENT]

Case authorities:

Landlord who prevailed in forcible detainer action was entitled to attorney fees; judgment would include provision for additional fees if case were appealed to state supreme court. West Anderson Plaza v Feyznia (1994, Tex App Austin) 876 SW2d 528.

Footnotes

Footnote 18. § 47, supra.

Footnote 19. Fleming v Jones, 12 Ill App 2d 107, 138 NE2d 861; Reckard v Ryan, 133 Or 108, 288 P 1053.

Footnote 20. Where it was impossible to ascertain, on the date of rendition of judgment for plaintiff, what the costs for executing the writ of execution would be, the subsequent taxing of these costs was a mere ministerial act, which could have been performed by the clerk of court, so that no notice of motion for taxing costs was necessary, and the order staying issuance of the writ did not have to be entered within 30 days from the date of the judgment. Fleming v Jones, 12 Ill App 2d 107, 138 NE2d 861.

Footnote 1. Salinger v Gunn, 61 Ark 414, 33 SW 959.

Footnote 2. Murf v Maupin, 113 Miss 670, 74 So 614.

Footnote 3. Harris v Short, 253 Iowa 1206, 115 NW2d 865.

§ 53 Judgment; writ of restitution

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A judgment for the plaintiff in a forcible entry and detainer case is generally enforced by a writ of restitution, and the court which renders such judgment is the proper court in which to make an application for the writ. 4 A judgment ordering a writ of restitution in favor of plaintiff is authorized whether defendant has been found guilty of forcible entry or forcible detainer, or both. 5 If the plaintiff obtained possession of the premises after

commencement of the action and before judgment, a writ of restitution may issue in favor of the defendant. 6

The time when a writ of restitution may issue depends on local practice. Under some statutes it is provided that if judgment of forcible entry and detainer is rendered against a tenant, no writ of restitution shall be issued until the expiration of a specified period. 7 Under other statutes it is provided that the plaintiff, at the time of commencing his action, or at any time afterward, may apply for and obtain a writ of restitution restoring to him the property described in the complaint, on his giving bond for the defendant's protection should the writ be wrongfully sued out; such a provision has been held to be constitutional. 8 The defendant cannot prevent execution of a writ of restitution by transferring possession of the premises to a stranger. 9

One in whose behalf a writ of restitution is executed is not liable for the manner in which it is executed if he did not direct its execution. It cannot be presumed that because a party requested a writ to issue as soon as possible that he intended a premature issuance, or that he intended that it be executed in an improper manner. 10

Footnotes

Footnote 4. *Magic City Realty Co. v Scheneckenberger*, 82 Neb 648, 118 NW 567.

Practice Aids: –Form of writ of restitution. 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:376.

Footnote 5. *Newsom v Damron*, 302 Ky 79, 193 SW2d 643.

Footnote 6. *Olds Bros. Lumber Co. v Rushing*, 64 Ariz 199, 167 P2d 394.

Footnote 7. *French v Willer*, 126 Ill 611, 18 NE 811.

Footnote 8. *State ex rel. German Sav. & L. Soc. v Prather*, 19 Wash 336, 53 P 344.

Footnote 9. *Fremont v Crippen*, 10 Cal 211.

Footnote 10. *Rosenfield v Barnett*, 26 Tex Civ App 71, 64 SW 944.

§ 54 Relief against enforcement of judgment

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In the absence of fraud or mistake or a showing of manifest irreparable injury, 11 a court of equity will not ordinarily interfere by injunction to restrain the execution of a writ of restitution issued on a judgment in forcible entry and detainer, 12 although the party in whose favor it was rendered is insolvent. 13 But injunctive relief will lie to prevent the enforcement of a judgment which is void, such as a judgment adjudicating the right of

possession at some future time. 14

Footnotes

Footnote 11. *Schuldt v Lee*, 226 Iowa 189, 284 NW 89.

Footnote 12. *Hamilton v Adams*, 15 Ala 596; *Lamb v Drew*, 20 Iowa 15.

Footnote 13. *Hamilton v Adams*, 15 Ala 596.

Footnote 14. *Maybin v Fitzgerald* (Tex Civ App) 45 SW 611.

§ 55 Appeal and error

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Under some statutes an appeal lies from a judgment of a justice of the peace in forcible entry and detainer regardless of the amount involved, 15 while under other statutes the judgment of the justice or other inferior court is appealable only where the amount of damages claimed equals or exceeds the jurisdictional limit specified in the constitutions and statutes. 16 Where the right of appeal does not exist, the proceedings may in general be reviewed by proceedings in error. 17 Sometimes the right of appeal has been recognized even though not expressly conferred, 18 or an unsuccessful party may take an appeal or sue out a writ of error, as he elects. 19 And it has been held that a party may appeal from a judgment of a justice of the peace under a statute authorizing an appeal in all cases not specifically provided for. 20

Although the statute requires a written complaint to be filed before the justice, and one is actually filed, the failure of the justice to send it with his original transcript to the circuit court on appeal is not a jurisdictional defect where the parties go to trial in the circuit court without objecting to its absence. 1

§ 55 ----Appeal and error [SUPPLEMENT]

p 928– Add new paragraph after note 14: A provision of a forcible entry and detainer statute requiring that notice of appeal be filed within 5 days after judgment, as compared to 30 days in other types of cases, has been held to be violative of the equal-protection clause of the Fourteenth Amendment. 14.5

Case authorities:

The pauper's affidavit filed by the tenant when appealing the justice court's judgment in favor of the landlord in a forcible entry and detainer case, was a plain effort to invoke the

jurisdiction of the county court and was sufficient to do so though it did not refer to the cause, judgment, or appeal and did not state in so many words that the tenant was unable to pay such costs or any part thereof, or to give security, where the affidavit alleged facts from which might readily be inferred the implicit conclusion that the tenant was unable to pay or give security for any of the costs in the case; the tenant's reasonably prompt efforts to meet the requirements of RCP Rule 749c that she deposit one month's rent were sufficient to perfect her appeal in the absence of any deadline for the deposit under the rules. *Walker v Blue Water Garden Apartments* (1989, Tex) 776 SW2d 578.

Where county court entered final judgment disposing of cause, judgment was conclusive on all issues brought before Court of Civil Appeals and court therefore had no jurisdiction of appeal. *Woolley v Burger* (1980, Tex Civ App 7th Dist) 602 SW2d 116, disapproving *Meyer v Young* (1976, Tex Civ App 3d Dist) 545 SW2d 37.

District court had no authority to enjoin enforcement of forcible entry and detainer judgment of county court, thus disturbing status quo, where county court judgment solely resolved issue of who was entitled to immediate possession. *Home Sav. Asso. v Ramirez* (1980, Tex Civ App 13th Dist) 600 SW2d 911.

In an action brought by a tenant against her landlord seeking a temporary injunction to enjoin the clerk and constable from issuing and executing a writ of restitution against the property which she occupied which writ of restitution had been ordered by the county court as a result of a suit for forcible detainer brought by the landlord, the county court did not exceed its jurisdiction in determining title as between the landlord and another where there was never a claim of title by the tenant. *Johnson v Fellowship Baptist Church* (1981, Tex App 13th Dist) 627 SW2d 203.

Footnotes

Footnote 15. *Burdsal v Shields*, 71 Kan 95, 79 P 1067.

Footnote 16. *Brennan Mercantile Co. v Vickers*, 31 Colo 323, 73 P 45; *McDole v Shepardson*, 156 Ill 383, 40 NE 953; *Beacon Lumber Co. v Brown* (Tex Com App) 14 SW2d 1022.

Footnote 17. *Armstrong v Mayer*, 60 Neb 423, 83 NW 401, error dismd 183 US 693, 46 L ed 393, 22 S Ct 933.

Footnote 18. *Wolfer v Hurst*, 47 Or 156, 80 P 419.

Footnote 19. *Hewitt v Landis*, 75 Colo 277, 225 P 842.

Footnote 20. *Hale v Brown*, 119 Kan 303, 239 P 963.

Footnote 1. *Leiferman v Osten*, 167 Ill 93, 47 NE 203.

Footnote 14.5. *Hamilton Corp. v Alexander*, 53 Ill 2d 175, 290 NE2d 589.

§ 56 --Bond or undertaking

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Under some statutes a party taking an appeal from a judgment in forcible entry and detainer must furnish a bond or undertaking for the payment of costs on appeal. 2 While an appeal is perfected when the bond is filed and the notice of appeal given, 3 if the prescribed bond is not furnished within the time limit therefor, the appellate court will acquire no jurisdiction of an attempted appeal. 4 The undertaking for costs is separate and distinct from that given for the stay of execution during the pendency of the appeal, and the latter will not take the place of the former. 5 In some jurisdictions the giving of an undertaking to stay execution is optional with the appellant, 6 but in others the statute also requires him to give this bond, 7 at least if he desires to stay further proceedings. 8 The undertaking or bond on appeal must comply with the statute as to all the essential requirements, any substantial variation from the conditions prescribed being fatal to the jurisdiction of the appellate court. 9 It is the better practice to comply strictly with the language and conditions of the statute; if different words are employed, the court or justice ought not to approve the undertaking, unless the language and conditions of the statute are substantially followed. 10 Under some statutes the defendant cannot limit plaintiff's right of recovery by fixing any certain sum of money in the bond as the extent of his liability, 11 unless by consent and acceptance of the obligee. 12 Though the statute requires the filing of a "bond," the instrument is not void because no specific sum of money is specified therein as a penalty. 13

§ 56 --Bond or undertaking [SUPPLEMENT]

p 929– Add new paragraph after note 13: A state statute requiring a tenant, who wishes to appeal from an adverse decision in an eviction proceeding for nonpayment of rent, to post bond for twice the amount of rent expected to accrue pending appellate decision and to forfeit the entire double bond to the landlord if the lower court decision is affirmed, has been held a violation of the tenant's right to equal protection of the laws. 13.5

A statutory provision requiring the filing of an appeal bond as a prerequisite to prosecuting an appeal from an adverse judgment in a forcible entry and detainer proceeding has been held to violate an aggrieved litigant's right to appeal under the state's constitution. 13.6

Case authorities:

Statutory provision for giving of bond in an amount double that of a judgment rendered against a tenant for damages and an amount sufficient to cover one year's rent bears a reasonable relation to the amount that may be subject to be recovered under the bond if the landlord prevails on appeal and does not constitute a denial of the due process or equal protection clauses of the federal and state constitutions. State ex rel. Reece v Gies (W Va) 198 SE2d 211.

Footnotes

Footnote 2. *Logue v Gibraltar Sav. & Bldg. Asso.* (Tex Civ App) 175 SW2d 117.

Footnote 3. *People ex rel. Hamilton v Harris*, 9 Cal 571.

Footnote 4. *Territory ex rel. Price v Doan*, 7 Ariz 89, 60 P 893; *Zelig v Blue Point Oyster Co.* 54 Or 543, 104 P 193; *Rudolph v Herman*, 2 SD 399, 50 NW 833.

Footnote 5. *Rudolph v Herman*, *supra*.

Footnote 6. *Washington v Spriggs*, 213 Ala 622, 105 So 811; *Rudolph v Herman*, 2 SD 399, 50 NW 833.

Footnote 7. *Gruenberg v Saumweber*, 188 Minn 566, 248 NW 38; *Zelig v Blue Point Oyster Co.* 54 Or 543, 104 P 193.

Footnote 8. *Miami Invest. Corp. v Baker*, 109 Ohio App 334, 11 Ohio Ops 2d 134, 165 NE2d 690.

Footnote 9. *Territory ex rel. Price v Doan*, 7 Ariz 89, 60 P 893; *Heron v Gaylor*, 49 NM 62, 157 P2d 239; *Guess v Hogue*, 186 Okla 357, 98 P2d 598; *Ringgold v Graham* (Tex Com App) 13 SW2d 355.

Footnote 10. *Templeton v Millis*, 24 Kan 381.

Under a statute so providing, a bond must be given not to commit waste and to pay double the use and value of the property. *Shannon v Daniels*, 170 Kan 319, 224 P2d 1002.

Practice Aids: –Forms of undertaking on appeal from judgment in forcible entry and detainer. 9 Am Jur Pl & Pr Forms, Forcible Entry and Detainer, 9:381, 9:382.

Footnote 11. *Territory ex rel. Price v Doan*, 7 Ariz 89, 60 P 893; *Rourke & Dunn v Bozarth*, 103 Okla 133, 229 P 495.

Footnote 12. *Rourke & Dunn v Bozarth*, *supra*.

Footnote 13. *Morrison v Boggs*, 44 Neb 248, 62 NW 473.

Footnote 13.5. *Lindsey v Normet*, 405 US 56, 31 L Ed 2d 36, 92 S Ct 862.

Footnote 13.6. *Hamilton Corp. v Alexander*, 53 Ill 2d 175, 290 NE2d 589.

§ 57 --Trial de novo

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Cases in forcible entry and detainer brought before a court of general jurisdiction on appeal from a justice court are generally tried de novo, 14 that is, the entire case is tried anew according to rules of practice in the upper court 15 as if no action had been instituted in the court below. 16 The case is brought up with all the original papers, 17 and no further pleadings than those already filed are required. 18 The court to which the appeal is taken has no jurisdiction to litigate issues prohibited in or beyond the jurisdiction of the justice court. 19

§ 57 --Trial de novo [SUPPLEMENT]

Case authorities:

The county court properly exercised its jurisdiction over an appeal from an agreed judgment in a forcible detainer suit; an agreed judgment in justice court does not deprive the county court of jurisdiction to hear the case in a trial de novo. *Mullins v Coussons* (1987, Tex App Houston (14th Dist)) 745 SW2d 50.

Footnotes

Footnote 14. *Cunningham v Bostwick*, 7 Colo App 169, 43 P 151; *Hall v Ward*, 168 Kan 141, 211 P2d 52; *Lambert v Helena Adjustment Co.* 69 Mont 510, 222 P 1057; *Fair v Morrow*, 40 NM 11, 52 P2d 612; *Ball v Dancer*, 44 Okla 114, 143 P 855.

See *Interior Lumber Co. v Kunert*, 61 ND 322, 237 NW 780, wherein it was held that an action in forcible entry and detainer is not triable de novo on appeal under a statute relating only to cases not triable to a jury.

Footnote 15. *Samuels v Greenspan*, 9 Kan App 140, 58 P 482.

Footnote 16. *Kelley v Kelley*, 187 Iowa 349, 174 NW 342; *Peters v Holder*, 40 Okla 93, 136 P 400.

Footnote 17. *Missoula Electric Light Co. v Morgan*, 13 Mont 394, 34 P 488.

Footnote 18. *Anderson v Carlson*, 86 Neb 126, 125 NW 157.

Footnote 19. *Vidger v Nolin*, 10 ND 353, 87 NW 593; *Brown v Hartshorn*, 12 Okla 121, 69 P 1049; *Dechenbach v Rima*, 45 Or 500, 77 P 391.

V. CRIMINAL RESPONSIBILITY AND PROCEDURE

§ 58 Generally; essentials of offense

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Forcible entry and detainer was a misdemeanor both at common law and under the early statutes of England, 20 and it has been held that a state statute providing for a civil remedy does not abolish or repeal the common law on the subject. 1

To constitute the offense of forcible entry and detainer, there must be a wrongful ouster or taking of possession of real property, as distinguished from personal property. 2 It need only appear that the prosecutor had actually entered on and peacefully occupied the premises; 3 it is not necessary to show that his possession was held under title in any sense other than that of being peaceably held and enjoyed by him at the time the forcible act was done by the defendant. 4 Nor is it necessary that the prosecutor have been personally present on the premises at the time of forcible entry, if in actual exercise of authority and control over them. 5

While there must be an actual entry to constitute the offense, 6 actual personal violence or breach of the peace is not essential to the completion of the offense if the party, either by his behavior or his speech at the time of his entry, gives those in possession just cause to fear that he will do them some bodily harm if they do not give way to him, 7 or that any resistance would be useless. 8 Nor is it necessary that those in possession actually be put in fear. 9 It has been held that a defendant may not escape criminal responsibility for forcible entry on the ground that the entry was peaceable, where, after the entry, he was guilty of conduct which was grossly insulting and threatening, accompanied by demonstrations of violence intended to provoke a breach of the peace and intimidate the person in possession. 10 However, a mere invasion of the premises of another during his absence, accompanied by only such violence as was incident to effecting an entry into an unoccupied dwelling house thereon, is but a naked trespass, not indictable as a forcible entry, since there can be no forcible entry in the absence of acts naturally tending to excite a breach of the peace. 11

§ 58 ----Generally; essentials of offense [SUPPLEMENT]

p 930, n 5—Dean v State, 13 Md App 654, 285 A2d 295.

p 930, n 9—Dean v State, 13 Md App 654, 285 A2d 295.

Footnotes

Footnote 20. Hearn v Hearn, 39 Del 427, 1 A2d 585.

Footnote 1. Cruiser v State, 18 NJL 206.

Footnote 2. State v Brinkerhoff, 44 Mo App 169.

Forcible trespass and forcible entry were distinct offenses at common law; the former applied to personal property, the latter to lands and tenements. *State v Jacobs*, 94 NC 950.

Footnote 3. *State v Lawson*, 123 NC 740, 31 SE 667; *Bennett v State*, 16 SCL (Harp) 503.

Footnote 4. *State v Pollok*, 26 NC (4 Ired L) 305.

Footnote 5. *State v Davis*, 109 NC 809, 13 SE 883.

Footnote 6. *State v Bryant*, 103 NC 436, 9 SE 1.

Footnote 7. *State v Lawson*, 123 NC 740, 31 SE 667.

Footnote 8. *Lissner v State*, 84 Ga 669, 11 SE 500.

Footnote 9. *State v Davis*, 109 NC 809, 13 SE 883.

Footnote 10. *State v Wilson*, 94 NC 839.

Annotation: 49 ALR 597.

Footnote 11. *Lewis v State*, 99 Ga 692, 26 SE 496; *State v Mills*, 104 NC 905, 10 SE 676.

§ 59 Persons liable

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A person who is present at the time of and cooperating with another in making a forcible entry 12 is guilty of the offense, whether or not he actually comes on the land. 13

§ 59 ----Persons liable [SUPPLEMENT]

p 930, n 13—*Dean v State*, 13 Md App 654, 285 A2d 295.

Footnotes

Footnote 12. *Bennett v State*, 16 SCL (Harp) 503.

Footnote 13. *Bennett v State*, *supra*.

§ 60 Indictment and plea

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Forcible entry and forcible detainer may both be charged in a single count of the indictment. However, it has been held that where this is done, it is essential to a conviction under the indictment that both be proved, and that where the evidence does not warrant a conviction for forcible entry, the verdict of guilty must be set aside. 14 On the other hand, it has been held that a conviction may be had for forcible detainer alone, where the complaint charges forcible entry and detainer and forcible detainer only is proved. 15

A plea of former acquittal to an indictment for forcible entry and detainer is sustained by proof of acquittal of forcible trespass grounded on the same transaction, since the only distinction between forcible trespass and forcible entry and detainer is that the former refers to personal property and the latter to realty, a distinction which is not always observed. 16

Footnotes

Footnote 14. *Lewis v State*, 99 Ga 692, 26 SE 496.

Footnote 15. *Foster v Kelsey*, 36 Vt 199.

Footnote 16. *State v Lawson*, 123 NC 740, 31 SE 667.

§ 61 Evidence and procedure

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Proof of peaceable possession of the premises by the prosecuting witness and of his forcible ouster by the defendant is all that is essential to sustain a conviction of forcible entry and detainer; the defendant's title is not admissible in evidence. 17 The fact that the entrant remained in possession is admissible in evidence to show his purpose in making the entry, and to show, also, that he accomplished that purpose and made his entry effectual. Although he is charged with forcible entry only, the completeness of his entry is shown by his retention of possession and by the nature and extent of that possession. 18 If there are two counts in an indictment for forcible entry and detainer, a general verdict of guilty on both is a verdict of guilty on each, where the defendant does

not exercise his right to require a separate verdict on each count. Hence, if one of the counts is good, it will support the judgment, even though an erroneous instruction was given on the other. 19

In some states, following the British statutes, the prosecutor may have a writ of restitution for the premises immediately on the rendition of a verdict of guilty on an indictment for forcible entry and detainer; and the operation of such writ of restitution is not suspended by an appeal by the defendant. 20

§ 61 ----Evidence and procedure [SUPPLEMENT]

p 931, n 17–

Conviction of defendant of offense of forcible entry into university administration building was sustained by evidence showing that defendant entered the building against the will of the possessors, without authority of law and by actual force, or in cooperation with others using actual force, and fact that defendant may have had the right to enter the building under normal circumstances was no defense to the crime of forcible entry. *Dean v State*, 13 Md App 654, 285 A2d 295.

Footnotes

Footnote 17. *State v Robbins*, 123 NC 730, 31 SE 669; *Bennett v State*, 16 SCL (Harp) 503.

Footnote 18. *Lissner v State*, 84 Ga 669, 11 SE 500.

Footnote 19. *State v Robbins*, 123 NC 730, 31 SE 669.

Footnote 20. *Bennett v State*, 16 SCL (Harp) 503.

Restitution in civil actions, see § 53, *supra*.

E. B. E.