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Legal Remedies of Landlord Against Tenant Who Holds Over: Effect of the Indiana Statutory Changes of 1927

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LEGAL REMEDIES OF LANDLORD AGAINST TENANT
WHO HOLDS OVER; EFFECT OF THE INDIANA
STATUTORY CHANGES OF 1927

According to common law principles and in keeping with the decided weight of authority at the present time it seems clear that the landlord has the right to regain possession of the premises by force where the tenant holds over wrongfully after the expiration of his lease.¹ This was the early common law rule, and, in spite of a certain vacillation in the English decisions of a later date, the rule holds in most American jurisdictions today, except in so far as it has been changed by statute.² This right to regain possession by force is perhaps one of the most striking instances in the modern law of a right of self-help which obtained in many legal relations under the early law. The doctrine itself continues in its full vigor; the landlord may use whatever force is reasonably necessary to regain possession against the tenant who wrongfully holds over. Thus he is not liable if he puts the tenant's family and their belongings out on the sidewalk in the middle of winter or kills the tenant himself if he resists when the landlord uses such force as may be reasonably necessary to regain possession. Except as changed by statute, this is the common law rule in Indiana today.³

The courts in some jurisdictions have interpreted these statutory provisions rather liberally so as to allow them to change this general right of the landlord at common law to regain possession by force. Some jurisdictions have criminal statutes making the retaking of possession by force punishable by fine or imprisonment on the theory that it is calculated to cause a breach of the peace. It will be noted that the basis for criminal punishment here is that there may be a breach of peace even though the landlord has a common law right to retake possession by force. The punishment is for endangering the public peace not for the retaking of possession under a common law right.

¹ Harvey v. Brydges, 14 M. & W. 437; Walker v. Chanslor (1908), 153 Cal. 118, 94 Pac. 606, 126 Am. St. 61, 17 L. R. A. (N. S.) 555; 24 Cyc. 1394; 36 C. J. 615-26; *Right of a Landlord to Regain Possession by Force*, 4 A. L. R. 429; Moyer v. Gordan (1888) 113 Ind. 282, 287, 14 N. E. 476; Hammond Savings and Trust Co. v. Boney (1915), 61 Ind. App. 295, 310, 107 N. E. 480.

² 36 C. J. 624-26. Hammond v. Boney, *supra* note 1, 310-312.

³ Hammond v. Boney, *supra* note 1, 310-12.

Indiana has such a criminal statute forbidding the retaking of possession by force and it has been construed strictly by the courts in keeping with their interpretation that it does not change the civil liabilities of the parties or enlarge the private rights of the tenant.⁴ It seems clear that those jurisdictions which hold that such criminal statutes change the common law of trespass are in error. Indiana has been consistent in holding that these statutes are criminal and that they do not change the civil law rights of the parties since they do not do so expressly and criminal statutes are not construed beyond their express words or fair meaning derived from the express words.⁵

Many jurisdictions have not only criminal statutes designed to keep the landlord from regaining possession by force but they have civil statutes giving the tenant a statutory right of action to sue for damages in case the landlord undertakes to oust him by force after termination of the lease. The statutes give this right to anyone "lawfully in possession," which the courts have interpreted to cover the tenant who lawfully entered into possession under his lease but who held over unlawfully after the termination of the lease.⁶ Indiana has such a statute also.⁷ In this connection we must note particularly that the Indiana courts held even this civil statute does not change the common law right of the land lord to regain possession by force; he may do so without liability in damages if the tenant sues him on a cause of action sounding in trespass at common law and not specifically under the statute.⁸

The General Assembly in 1927 passed a third statute dealing with this field of the law by which it is provided that if the tenant holds over wrongfully the landlord can take possession providing he files an adequate bond to cover the possible damages in the suit for possession then pending, unless the tenant elects to file such a bond and retain possession.⁹ Under the Indiana statutes hitherto there are provisions for summary proceedings where the tenant holds over; these are designed to aid the landlord in regaining possession quickly by process of law.¹⁰ Such provisions have not been very effective in practice, however,

⁴ Sec. 2488 Burns' 1926; *Peelle v. State*, 161 Ind. 378, 68 N. E. 682.

⁵ *Hammond v. Boney*, *supra* note 1, 295, 312; 8 L. R. A. (N. S.) 226; 32 L. R. A. (N. S.) 51.

⁶ *Tiffany, Landlord and Tenant* (1910) sec. 212-216; 36 C. J. 624-26.

⁷ Sec. 9558 Burns' 1926.

⁸ *Moyer v. Gordan*, *supra* note 1; *Hammond v. Boney*, *supra* note 1.

⁹ *Laws of Indiana* (1927) chap. 254 (p. 741-2).

¹⁰ Sec. 9558 Burns' 1926.

inasmuch as the summary proceedings do little more than expedite the suit in the trial court and the tenant may still retain possession pending the two or three years that may be consumed in litigation in the Appellate and Supreme courts. Under the new statute some of the burdens from this delay will be eliminated, since the landlord will be sure at least of recovering his damages if he prevails in the final decision, inasmuch as the tenant must file adequate bond in case he elects to retain possession pending the final outcome of the suit.

It will be observed that even this important legislation is perhaps inadequate for the full protection of the landlord's reasonable interests. A contentious and vindictive tenant may still insist on retaining possession to the great injury of the landlord and he may do so with comparative impunity, since the damages are likely to be no more than the reasonable rental of the property in any case, while the serious, though indirect, injury to the landlord will be of such character that it cannot be compensated in damages. If we consider the law of damages on this point, the likelihood of injury to the landlord will be readily understood. Under the decisions in Indiana and elsewhere the landlord has three elements of damages: (1) The actual damages which he has suffered through the tenant's wrongful holding over.¹¹ Usually this means the rental value of the premises not on the basis of the original lease, but the fair rental value for the time that the tenant actually held over regardless of the lease.¹² (2) If the landlord has sued the tenant for possession in a previous action and then sues later for all his damages he may recover his attorney's fees in the ejectment suit occasioned by the tenant holding over.¹³ (3) Finally, the landlord may recover consequential damages due to the tenant's holding over.¹⁴ Thus it has been held that where a third person was willing to rent the premises at a higher rental and had paid a cash bonus for such a lease, the landlord could recover the amount of this bonus where he was prevented from carrying out such a lease due to the tenant's holding possession.¹⁵ When we have regarded these three general bases for the recovery of damages in such cases we have indicated the full remedy of the landlord even under our recent statute.

¹¹ 36 C. J. 626, 2 Tiffany, *Landlord and Tenant* (1910) sec. 212.

¹² 36 C. J. 626.

¹³ 2 Tiffany, *Landlord and Tenant*, (1910) sec. 212; *Harvey v. Pflug*, (1885) 37 La. Ann. 904.

¹⁴ 2 Tiffany, *Landlord and Tenant* (1910), sec. 212-14.

¹⁵ *Harvey v. Pflug*, *supra* note 13.

It will be seen that there is no basis for exemplary damages in these cases inasmuch as in theory the landlord can recover damages for all consequences of the tenant's wrongful act; there is no residuum of insult or reprehensible conduct of such character that the law awards punitive as well as actual damages. One may reasonably say that it is highly irritating to the landlord for the tenant to hold over where the landlord has a future opportunity to sell to a third person; this is especially true since the landlord knows that at common law he had the right to take immediate possession by force. It may even be that this situation is likely to cause a breach of the peace and a violation of the statute against forcible entry; yet it does not involve those facts of personal aggression or offensive conduct which form the basis for exemplary damages. Since the landlord may recover all consequential damages of the tenant's wrongful holding over there is no basis in law for giving the landlord punitive damages.

It is, however, the almost daily experience of those engaged in the management of real estate that even the consequential damages to the landlord allowed by the law are inadequate in these cases. For instance, the tenant usually holds over because the general economic conditions make it advantageous for him at that time; he does so knowing that it is beyond his legal right and with the full knowledge that he will have to pay the reasonable rental value of the premises for that time. He holds over anyway, either because the premises are valuable to him and he wants in this manner to force the landlord to rent to him, or because of a vindictive will to injure the landlord. While the tenant is holding over wrongfully, the landlord may lose opportunities to sell or lease the premises advantageously. Profits that he might have made from such sale or lease are considered speculative and are not recoverable in law.¹⁶ Purchasers or lessees do not make definite offers, however, until they have viewed the premises and have found, in our supposed instance, that the tenant is in possession and that they could not secure immediate possession by lease or sale. It is well known that boom prices occur from time to time in real estate holdings and that one must sell then if he is to sell to his greatest advantage. Under the present Indiana law, however, the tenant might wrongfully hold over in these circumstances and he would be liable only for the reasonable rental value of the premises while he held over; thus for these damages to the landlord in losing his oppor-

¹⁶ 4 *Sedwick on Damages* (9th ed. 1920), sec. 999G, 999J.

tunity to sell the property at two or three times the former price no compensation can be recovered since they are speculative in nature and cannot be protected in court. This situation is entirely understood by those who deal in real estate and they feel that it involves great hardships to business men who realize that the ability to give immediate possession and clear title are indispensable to any advantageous sale. It seems clear that this is a field of the law in which legal remedies are inadequate for the reasonable protection of business interests. Not only do they enable the tenant to injure the owner without being answerable to him in reasonable damages for the injury, but also they permit a tenant seriously to injure the owner without any significant advantage to himself and purely for his own trivial convenience or to gratify his ill-will.

In view of this insufficient protection for the rights of the landlord, many jurisdictions have passed statutes by which the landlord is to recover double or treble the actual damages in case the tenant willfully holds over after the termination of the lease.¹⁷ These statutes usually specify that the landlord shall recover double or treble the rental value of the premises and they have been held to be unenforceable by the courts where they cover all damages, since the courts have regarded them as penal statutes to be strictly construed. Perhaps this strict construction is sound since it can not be held that the legislature intended the landlord to recover double or treble damages in case the jury awarded attorney's fees in previous litigation and extensive consequential damages in addition to the reasonable rental during the period of the wrongful holding over.¹⁸

The fairness involved in these statutes is apparent. England has had such an act for over one hundred and fifty years and it may be said that such statutes are increasing in this country.¹⁹ Surely the explanation behind them is that the landlord is likely to suffer heavy damages which will not be recoverable since they represent speculative damages in theory of law. It will follow that to give double or treble the rental value will no more than partially compensate the landlord in many cases, and will not be improper in any case since it will carry only a fair penalty for the tenant's wilful and vindictive conduct in holding over unlawfully.

It must be noted, however, that such statutes may preclude the

¹⁷ 2 Tiffany, *Landlord and Tenant*, sec. 213.

¹⁸ *State v. Pittinger* (1905), 37 Wash. 264, 79 P. 942.

¹⁹ St. 4 Geo. 2 c. 28, sec. 1. (1729)

full realizing of the landlord's rights at common law. First, because the landlord and tenant may provide in their lease that the landlord shall recover double or treble rental in case the tenant wrongfully holds over. Such a stipulation is enforced by the courts on the ground that it is a provision for liquidated damages and not a penalty. On the other hand these statutes for double or treble damages are construed by most courts to supersede any such contractual provisions for damages, so that the landlord may recover only under the statute and not under his contract.²⁰ Secondly, because the landlord may now recover consequential damages where the tenant holds over, but where there is a statute giving double or treble damages the statute refers only to the rental value. In all cases now where the statutes have been held effective they have actually said that the landlord shall recover double or treble the fair rental during the holding over period.²¹ Such a double or treble recovery under the statute is held to preclude any right of the landlord to recover consequential damages in addition to the fair rental value.²²

In theory it may well be that the common law and statutory provisions now in force in Indiana are both logical and adequate. In legal theory the landlord should not be entitled to speculative damages and under the present law he can recover consequential damages due to the tenant's wrongful act. In theory therefore he would recover a larger sum as consequential damages in a proper case than he would under a statute giving double or treble damages. In practice, however, it is likely that the statutory provisions for double or treble damages where the tenant wrongfully holds over would afford a more adequate protection to the landlord and would be entirely fair to the tenant; they would give the landlord partial compensation for damages which it would be difficult for the jury to estimate; or which would be speculative under the law of damages and not recoverable, although in the field of business a serious financial injury had been done. Perhaps we may expect, therefore, that the legislature in Indiana will later complete the statutory protection of the landlord by allowing him to recover double or triple the rental value of the premises, in case the tenant holds over wrongfully.²³

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²⁰ 36 C. J. 626.

²¹ 2 Tiffany, *Landlord and Tenant*, sec. 213; *Regan v. King* (1916) 39 Nev. 216, 156 P. 688.

²² *Beach v. Nixon* (1873), 9 N. Y. 35, 36 C. J. 626.

²³ If the tenant holds over because of an honest misinterpretation of his rights, he is never liable under these statutes. 18 A. and E. Encyc. 409(5).