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DEFENDING THE LOW-INCOME TENANT IN NORTH CAROLINA*

DALE A. WHITMAN**

The low-income tenant is in a uniquely precarious position under the law. He typically holds under an oral lease, often on an implied periodic tenancy from week to week. Even where a written lease is executed, it is almost invariably on a form prepared by the landlord. The tenant has little bargaining power in today's urban housing markets; moreover, he is usually not represented by counsel and is unable to intelligently exert whatever bargaining power he may possess. The landlord is generally a professional in the renting business, and knows well how to manipulate the legal rules for his own purposes; the tenant is often a rank amateur, dealing with rules which do not favor him in any event.

Thus, when the landlord later determines to evict the tenant, the lease provisions offer the tenant little solace. The purpose of this article is to investigate defenses and remedies available to the tenant under North Carolina law, as it has developed to date. Certain theories which have developed in other jurisdictions, such as those involving retaliatory evictions and implied warranties of habitability, will not be discussed here.

The summary ejectment procedure. Summary ejectment is a method designed to give a landlord a speedy means of removing from the realty a tenant unlawfully holding it. It is in part a substitute for the common-law action in the ejectment, a remedy which was so hedged with legal restrictions¹ that it was thought landlords could not effectively use it to recover quick possession from their tenants. Summary ejectment allows a landlord to secure an early hearing, usually before a minor judicial of-

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¹ The plaintiff in a conventional ejectment action may not rely solely on the defendant's wrongful possession, but must also plead and prove his own title. *Tripp v. Keais*, 255 N.C. 404, 121 S.E.2d 596 (1961). As a result, such an action would have been appropriate only in Superior Court or County Court prior to the 1965 court reform, since the Justice of Peace had no jurisdiction of cases in which title to land was an issue. N.C. GEN. STAT. § 7-121 (1953). No docket precedence is provided for ordinary ejectment actions, and the attendant delay would be unacceptable to landlords as a whole.

ficer, and to obtain a judgment of possession plus any past-due rent, which the sheriff will immediately execute.² The situations in which summary ejectment is appropriate are severely restricted by the statute. The relation between the parties must be that of landlord and tenant. Summary ejectment will lie under a tenancy at will provided the tenancy is based on some demise or lease,³ but it is not otherwise available in tenancies at will or at sufferance.⁴

Even in a clear-cut landlord-tenant case, summary ejectment will lie only when the tenant holds over after his term has expired or has been properly terminated by the landlord for breach of a condition by the tenant, or when the tenant has abandoned the property while in default on his rent or under a share-cropping agreement.⁵ The mere breach by the tenant of a covenant which has not been made a *condition* by the terms of the lease (i.e., for which a right of entry or power of termination has not been reserved by the landlord) will not justify summary ejectment.⁶

The legal basis upon which a landlord brings a summary ejectment action against his tenant is almost invariably one of two types. The first is the "holdover" situation; the leasehold estate of the tenant has been terminated, the tenant no longer has the legal right to remain on the property but refuses to move voluntarily, and the landlord seeks legal process to recover possession.⁷ Most tenancies of low-income families are periodic. The period may, of course, be specified in the lease agreement (which is generally oral); but if no period is agreed upon, the courts will imply that the period is identical to the rental payment period.⁸

² See generally N.C. GEN. STAT. § 7A-210 to 232 (Supp. 1967); § 42-26 to 36 (1953).

³ See, e.g., *Simons v. Lebrun*, 219 N.C. 42, 12 S.E.2d 644 (1941); *McCombs v. Wallace*, 66 N.C. 484 (1872); but see *Goins v. McLoud*, 228 N.C. 655, 46 S.E.2d 712 (1948).

⁴ *Id.* A relationship of vendor-vendee or mortgagor-mortgagee will not sustain a summary ejectment action. *McLaurin v. McIntyre*, 167 N.C. 350, 83 S.E. 627 (1914).

⁵ N.C. GEN. STAT. § 42-26 (1953); see *Morris v. Austraw*, 269 N.C. 218, 152 S.E.2d 155 (1967).

⁶ See *Morris v. Austraw*, note 5, *supra*. An exception is the breach of the covenant to pay rent, which by statute is ground for forfeiture of the tenant's estate even absent a lease clause so stipulating. N.C. GEN. STAT. § 42-3 (1953). See text accompanying note 14, *infra*.

⁷ The landlord may also claim money damages for unpaid rent or damages resulting from the tenant's holdover following the expiration of his estate, subject to the jurisdictional limits discussed at note 22, *infra*. N.C. GEN. STAT. § 42-28 (1953).

⁸ I AMERICAN LAW OF PROPERTY § 3.25 (A. J. Casner ed. 1952) [hereinafter cited as A.L.P.]; R. POWELL, REAL PROPERTY ¶ 254 (abr. ed. 1968).

Thus, the most common tenancies of low-income families are from week to week and from month to month.⁹

The unique feature of a periodic tenancy is that it will automatically renew itself for an indefinite number of successive periods unless one of the parties gives the other appropriate notice that the tenancy will end at the conclusion of a certain period. The notice, if given, simply precludes the automatic renewal which would otherwise occur. At common law the party giving the notice was obliged to do so at least one period in advance of the desired termination date, except that only six months' notice was required for termination of a periodic tenancy with a period of one year or greater.¹⁰ The times for giving notice have been altered by statute in many states; in North Carolina seven days' notice is required to terminate a tenancy from month to month, and only two days' notice is required to terminate a tenancy from week to week.¹¹ Note that the tenancy will not necessarily terminate precisely seven days, or two days, from the date the notice is given; it will terminate at the end of the *regular period* during which the notice is given, provided the notice is given *at least* the requisite number of days prior to the end of the period.

An intriguing question is raised by the North Carolina statute: suppose there is an oral lease for an indefinite period, with rent being paid every two weeks. A court on such facts could well hold that a periodic tenancy exists, specifically a tenancy "from two-weeks to two-weeks." (The language is admittedly clumsy, but concept seems perfectly sound.) The statute does not address itself to such a tenancy, so the common law would arguably be in effect, requiring two weeks' notice to terminate. The anomaly would thus be presented of a longer notice period being required for the tenancy described in this paragraph than for a tenancy from month to month.

The North Carolina statute shortening the common-law termination notice periods represents a regressive step, although a fairly common one.¹² Viewed in the light of today's tight urban housing markets, North Carolina's statute is blatantly pro-landlord, and obviously has great potential for hardship upon the residential tenant; it is simply incredible

⁹ J. Curry, *A Survey to Determine the Presence of "Slum Lords" in a Low Income Section of Durham, North Carolina* (1968 unpublished; on file in Law Library, University of North Carolina.)

¹⁰ See generally I A.L.P. § 3.23; R. POWELL, *REAL PROPERTY* ¶ 253 (abr. ed. 1968); H. TIFFANY, *REAL PROPERTY* § 124 (abr. ed. 1940).

¹¹ N.C. GEN. STAT. § 42-13 (1953); see generally I A.L.P. § 3.90.

¹² See I A.L.P. § 3.90 note 6.

that the law should adopt a policy which gives a family only two days to locate a new home and move from their existing one! Theoretically, it is possible for the parties, in their lease agreement, to provide for a longer (or perhaps a shorter) notice period,¹³ but for the manifest reasons of innocence of legal knowledge and lack of bargaining power, tenants almost never obtain provisions for longer notice periods.

It is crucial to recognize that a landlord who seeks to summarily eject his tenant after giving the appropriate notice as described above need not allege a default in rental payments or any other defalcation by the tenant; it is sufficient for the landlord to assert that proper notice has been given, the period has ended, and the tenant has not moved. On the face of the matter, the tenant's only defense is a lack of timely notice. Even if such a defense is founded in fact, it may be difficult of proof, since the notice may be oral, and the factual issue may thus be presented as the landlord's word against the tenant's, with the trier of fact (usually a magistrate) probably inclined by background and position to believe the landlord. Moreover, if the defense is successful, the tenant's victory is short-lived, for the notice which was inadequate to terminate the tenancy at the end of the period in question will surely be sufficient to terminate it when the next succeeding period ends. The tenant's respite is thus only one period; there seems to be no permanent defense. This is not to say that the delay is useless; delay may be most helpful to both the tenant and his attorney.

The second common legal ground for a summary ejectment action is the breach by the tenant of a covenant in the lease which is also a condition—that is, for the breach of which the landlord has a power to terminate the lease or declare a forfeiture. Any covenant by the tenant *may* by express agreement be made a condition, giving rise to a power of termination in the event of breach; but in oral leases of short-period periodic tenancies, this is rarely done. However, by statute in North Carolina there is one covenant made by the tenant for the breach of which the law implies a power of termination: the covenant to pay rent.¹⁴ The landlord's power becomes operative only after the following events have occurred: (a) a default in rent payments which, under the lease agreement, were to have been paid at a definite time; (b) a demand by the landlord of all past due rent; and (c) the failure of the tenant to pay all rent due within ten days after the demand.

¹³ *Cherry v. Whitehurst*, 216 N.C. 340, 4 S.E.2d 900 (1938).

¹⁴ N.C. GEN. STAT. § 42-3 (1953).

Several defenses are possible in a summary ejectment action based upon a rent default. First, it is possible for the tenant to assert some technical deficiency in the landlord's demand; but this is not a promising line of defense since there is no requirement that the demand be written, and the landlord will probably be patient enough to wait for the ten day period to run.

Two other possible defenses are likely to be of more value to the typical tenant; that he has paid, or is now willing and able to pay, the rent due; or that the rent demanded is not due at all. The first of these defenses is augmented by the statute, which provides that if the tenant pays or tenders the rent due plus costs at any time before judgment, the action may not be pursued further by the landlord.¹⁵ The statute applies only when a rent default is the ground for the ejectment action; tendering rent will be of no avail when a wrongful holdover is the basis for the landlord's case.

If the tenant's defense is that the rent demanded is not due, both legal and factual questions may be presented. The tenant might show, for example, that the landlord did not specifically require when the lease was made that rent should be paid in advance, and thus, in accord with the common law, rent is due only at the end of the period to which it applies.¹⁶ Or the tenant may present evidence (a receipt, cancelled check, or witness to the payment) that his rent payments are up to date and no further rent is currently due. More difficult questions arise if the tenant argues that, while he has admittedly not paid part or all of his rent, certain defaults by the landlord or unremedied defects in the property excuse the payment. At common law the tenant could not successfully maintain such a position, and there are no North Carolina cases supporting it.

Summary ejectment procedure in North Carolina has been considerably clouded by the transfer of the functions of the justice of the peace to the office of magistrate under the 1965 North Carolina court system revision. General Statutes § 42-26 through § 42-36, the summary ejectment article, was not revised when the court revision was enacted; it is based on the assumption that summary ejectment actions will be tried originally by justices of the peace, with appeals lying to the superior court. Indeed, it will not be practical to rewrite this article of chapter 42 until the 1971 General Assembly meets, since seventeen counties in the

¹⁵ N.C. GEN. STAT. § 42-23 (1953).

¹⁶ I A.L.P. § 3.64.

state are still operating under the old court system and will continue under it until December, 1970. The older 83 counties, including all of the most populous counties except Buncombe, have already made the change. For this reason, this paper will concentrate on the new procedures created by chapter 7A of the General Statutes, which embodies the revised court system.

In every county in which the new system of courts is in operation, the office of justice of the peace has been abolished.¹⁷ In such counties there are three levels of trial courts, all of which, together with the appellate courts of the state, are subsumed under the title "General Court of Justice." These trial courts are the Superior Court, which has civil jurisdiction of cases having an amount in controversy in excess of \$5,000, the District Court with civil jurisdiction when the amount in controversy is \$5,000 or less, and the magistrate's court, a subdivision of the District Court to which "small claims" of \$300 or less may be assigned for trial by the chief judge of the District Court.¹⁸ Summary ejectment is defined as a "small claim."¹⁹ This does not mean that every summary ejectment case will necessarily be tried before a magistrate. The magistrate will try the case only if:

- (a) The plaintiff has requested that the case be assigned to a magistrate.²⁰ But the designation "Small Claim" on the face of the complaint is a sufficient request for assignment.²¹
- (b) The amount in controversy does not exceed \$300.²² Where monetary relief is prayed for, the amount of the prayer (exclusive of interests and costs) fixes the amount in controversy for all practical purposes.²³ If there is no prayer for money damages, where the relief sought "... would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy." Since summary ejectment is a means for the landlord to establish his right to possession of the premises, it would seem necessary, in order to fall under the jurisdictional limit, that the right to possession be worth less than \$300 ... certainly a rare case, even in slum housing, since

¹⁷ N.C. GEN. STAT. § 7A-176 (Supp. 1967).

¹⁸ N.C. GEN. STAT. §§ 7A-243, 7A-210 (Supp. 1967).

¹⁹ N.C. GEN. STAT. § 7A-210 (Supp. 1967). Although summary ejectment must be pursued under the "small claims" procedures of chapter 7A, see N.C. GEN. STAT. § 7A-223 (Supp. 1967), the older chapter 42 procedures presumably still apply to the extent that they touch upon points not covered by chapter 7A.

²⁰ N.C. GEN. STAT. § 7A-210(3) (Supp. 1967).

²¹ N.C. GEN. STAT. § 7A-213 (Supp. 1967).

²² N.C. GEN. STAT. § 7A-243(1) (Supp. 1967).

²³ N.C. GEN. STAT. § 7A-243(2) (Supp. 1967).

even a unit yielding a net rent of only \$200 annually and capitalized at 10% would have a possessory value of \$2,000. The practical result seems to be that, in order to obtain a trial by magistrate, the landlord must include a prayer for money damages, and its amount must not exceed \$300.

(c) The chief judge of the district court has in fact directed that the case be assigned to a magistrate, either by general rule or specific order. Assignment is proper only if the defendant and the *magistrate* are residents of the same county, a rule presumably designed to avoid excessive inconvenience to the defendant in making his appearance.²⁴

(d) The tenant has not put the landlord's title in issue by denying title in his answer.²⁵ If all of the above criteria are satisfied, the trial will be held by the magistrate. No provision is made for a defendant to "remove" the case to a higher court for trial.

Service of process. Service on the tenant may be personal, or, if the tenant is under no legal disability, by certified mail, written acceptance of service, or voluntary appearance.²⁶ In addition to these methods provided by chapter 7A, the 1969 General Assembly added subdivision (4) to G.S. § 7A-217, which incorporates by reference the mechanisms for service provided in the old Justice of the Peace Court under G.S. § 42-29. The only method of service actually added by this clause is ". . . fixing a copy on some conspicuous part of the premises. . .". This technique is permissible only if (a) the defendant has no usual place of residence in the county, *and* (b) he cannot be found therein.

This "service by nail" is, of course, open to serious attack on due process grounds. Under the relevant decisions of the U. S. Supreme Court,²⁷ ". . . notice must be reasonably calculated to inform . . ." the defendant of the proceedings against him. In light of the possibility that process nailed to the door of a building may often be removed or destroyed by weather or vandals, it is arguable that this method would be constitutionally sound only on a showing that both personal service and service by certified mail had proven impossible. The constitutional issue would be avoided if the statute were amended and the provision for the fixing of copies on the premises were made a last resort; as an alternative to personal service, the statute could simply provide for service by certi-

²⁴ N.C. GEN. STAT. § 7A-212 (Supp. 1967).

²⁵ N.C. GEN. STAT. § 7A-223 (Supp. 1967).

²⁶ N.C. GEN. STAT. § 7A-217 (Supp. 1967).

²⁷ *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

fied mail to the tenant's last known address, with a return receipt required. If the tenant refused to sign the receipt, service by ordinary mail would then be authorized, since the postman's notation of the tenant's refusal to sign would be abundant evidence that the tenant is receiving mail at the address to which the first attempt was directed.

Aside from possible due process objections to this procedure, a correct interpretation of the statute suggests that this form of service will rarely be permissible upon a residential tenant, since the property in question will generally be the defendant's "usual place of residence." Note that if this is so, it is immaterial that the process server may have difficulty actually finding the defendant; the "service by nail" is still impermissible. It is difficult to avoid the suspicion that there will be abuses of "service by nail"—both in its use in unauthorized situations, and in its proper use, but with the papers never actually coming into the hands of the defendant.

The issuance of the summons "commences" the action; it includes notice to the defendant of the assignment of the case to the magistrate, and specifies the time, date, and place of trial.²⁸

Trial must be set within 30 days after the action is commenced.²⁹ After service upon the tenant, the magistrate must notify the landlord of the time, date and place of trial. Thus, it is at least implicitly unlawful for trial to be held before service upon the tenant, which was a real possibility under the old summary ejectment procedure, G.S. § 42-28 through § 42-30, and under the new procedure prior to the 1969 amendment.³⁰ But it is possible for trial to be held within a day or two after service, giving the tenant little opportunity to find counsel and prepare his defense.

A tenant may fail to appear at trial because service of process (whether technically sufficient or not) did not actually reach him, or because the notice he received was too short for him to arrange his affairs. Whether this possibility is objectionable depends on whether a default judgment may be rendered against him. The old procedure was explicit in permitting default judgments, but the newer chapter 7A is silent on the point. As originally enacted, G.S. § 7A-218 provided that "No default judgments are rendered in small claim actions unless

²⁸ N.C. GEN. STAT. § 7A-213 (Supp. 1967).

²⁹ N.C. GEN. STAT. § 7A-214 (Supp. 1967).

³⁰ N.C. GEN. STAT. § 7A-213 (Supp. 1967) as amended ch. 1190, S.20 [1969] N.C. SESS. L.

the answer admits all the material allegations of the complaint." This sentence was stricken by amendment in 1967.³¹ The language was not very apt, since an answer admitting all the material allegations of a well-pleaded complaint would make a judgment for the plaintiff on the pleadings appropriate. But the provision had the great advantage of protecting the tenant from an unwarranted and perhaps unconstitutional judgment. The amendment deleting this sentence is not particularly enlightening on the question whether default judgments are now permitted. It is at least arguable that since there is nothing in the new rules inconsistent with old G.S. § 42-30, which expressly permits default judgments, that provision is still operative. Moreover, there is nothing in either the old or new procedures which clearly requires the magistrate to hold a hearing before entering a default judgment. Those magistrates who have attended the course offered for them in the Institute of Government in Chapel Hill have been instructed that they should enter judgment for the plaintiff in a small claims case only after he "proves his case"; but in the defendant's absence, no one is likely to dispute the plaintiff's evidence. Such an *ex parte* hearing can hardly be thought an adequate substitute for an adversary trial.³²

Of course, the entry of judgment against a defendant who has not yet been served in a way reasonably calculated to give notice is a denial of due process of law; the judgment would not be based on personal jurisdiction of the defendant, would be void, and subject to direct or collateral attack.³³ For example, if the tenant is able to obtain counsel he may move the district judge to set aside the judgment and to set a date for a new

³¹ Ch. 691, S.20 [1967] N.C. SESS. L.

³² It is at least arguable that under N.C. GEN. STAT. § 1A-1, Rule 55, no magistrate may ever enter a default judgment, since that rule provides only for entry of default by the clerk or the judge. Moreover, entry by the clerk would not be proper under Rule 55 in the usual summary ejectment action, since the clerk has such power only when the plaintiff's claim is for a sum which is or may by computation be made certain; a prayer for possession of realty surely does not qualify. Whether G.S. § 42-30, authorizing entry of default judgment by Justices of the Peace, should be regarded as superseded either by Rule 55 or by chapter 7A is conjectural. If G.S. § 42-30 is no longer in effect, and if Rule 55 does not have the effect attributed to it above, then perhaps reference should be made to the pre-1970 decisions on default judgments. Under them, if the defendant files an answer but fails to appear for trial, the plaintiff must prove his case before obtaining a judgment. See MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1661 (1956). Since in summary ejectment, failure to answer is taken as a general denial (G.S. § 7A-218), plaintiff should be obliged to prove his case in every instance.

³³ F. JAMES, CIVIL PROCEDURE § 11.6 (1965) (hereinafter cited James).

trial.³⁴ Alternatively, the tenant may appeal the judgment on the ground that lack of jurisdiction makes it void,³⁵ the provision in G.S. § 7A-221, to the effect that objections to improper jurisdiction are waived if not made before trial, cannot constitutionally be applied in a case in which the lack of jurisdiction grows out of a failure of notice to the tenant and a resultant non-appearance.³⁶ And as a third choice, the tenant may file an independent action in the superior court to impeach and vacate the judgment.³⁷ Even if the service is deemed constitutionally sufficient and conforms to the statute, the tenant may be successful in moving the magistrate to set aside the judgment if the tenant can show that in fact he never received notice of the suit—as, for example, if the “service by nail” were destroyed by weather or vandals before the tenant found it.³⁸

Unfortunately, these theoretical remedies will be meaningless to many low-income tenants, who will be intimidated by the sheriff's efforts to execute the judgment and are not likely to obtain legal counsel. The problem of default judgments could be obviated by an amendment to G.S. § 7A-222 to add the following sentence:

If defendant fails to appear at trial, no trial may be held and no judgment may be entered unless the magistrate shall find upon competent evidence that the defendant received actual notice of the trial at least five days prior thereto.

Pleadings. The complaint must be in writing and verified; it need follow no particular form, although a sample form is provided in G.S. § 7A-232. It must be filed in the office of the clerk of the superior court,

³⁴ N.C. GEN. STAT. § 1A-1, Rule 60 (Supp. 1967). The new rules of civil procedure for North Carolina went into effect January 1, 1970. Since Rule I provides that the rules govern procedure in the district courts, they appear to apply to small claims actions except in situations in which Chapter 7A makes some other provision. See N.C. GEN. STAT. § 7A-170 (Supp. 1967). For further discussion of the motion to set aside a judgment, see *McINTOSH* § 1715 *et seq.* The motion is properly made to the district court since, by N.C. GEN. STAT. § 7A-224 (Supp. 1967), the judgment is regarded as a judgment of the district court. It is arguable that no new trial could be held without a new service of process on the tenant, since the court would lack jurisdiction. See, *e.g.*, *Drexel Savings and Loan Assn. v. McCall*, 245 N.E.2d 900 (Ill. App. 1969).

³⁵ See *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE § 1714.

³⁶ See *JAMES* § 11.6.

³⁷ See generally *Menzel v. Menzel*, 250 N.C. 649, 110 S.E.2d 333 (1959); *McINTOSH* § 1718.

³⁸ N.C. GEN. STAT. § 1A-1, Rule 60(b) (Supp. 1967) permits relief of a party from a judgment on grounds of mistake, inadvertence, surprise or excusable neglect. See also *McINTOSH* § 1717.

even though the action is technically under the jurisdiction of the district court.³⁹

The defendant is permitted to file a written answer at any time prior to trial, setting forth any defense he may wish to assert.⁴⁰ Apparently it is not intended that the answer be served upon the plaintiff, but only filed with the clerk. Failure to file an answer constitutes a general denial.⁴¹ The tenant's attorney should weigh carefully whether failure to answer will serve his client's interests; if the defense is to be based only upon disagreement with the factual allegations of the complaint, the general denial is sufficient to permit proof of the defendant's version of the facts.⁴² But if the defendant wishes to assert an affirmative defense, it must be pleaded in a written answer. Rule 8 of the new North Carolina Rules of Civil Procedure⁴³ lists a number of such affirmative defenses, including several which might have application in a summary ejection case: accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, payment, release, and waiver, to mention the more obvious items. These defenses must be pled or proof on them will be foreclosed.⁴⁴

The only objection permitted to the sufficiency of the complaint is the "motion [to] order the plaintiff to perfect the statement of his claim," which may be written or oral, and apparently may be made at any time prior to or at the commencement of trial.⁴⁵ This motion may be granted by the clerk, the chief district judge, or the magistrate. It appears that the motion is intended to be made *ex parte* to any of the foregoing officers (presumably the magistrate, if made at the commencement of trial). If the officer grants the motion he may grant extensions of time or continuances to the plaintiff to permit compliance by amendment of his complaint. Although the statute does not explicitly speak to the point, it seems plausible to assume that if the plaintiff fails to comply with the order, the com-

³⁹ N.C. GEN. STAT. § 7A-213 (Supp. 1967).

⁴⁰ N.C. GEN. STAT. § 7A-218 (Supp. 1967).

⁴¹ *Id.*

⁴² See F. JAMES, CIVIL PROCEDURE § 4.7 (1965).

⁴³ N.C. GEN. STAT. § 1A-1, Rule 8 (Supp. 1967).

⁴⁴ Under the new rules amendments to pleadings are liberally allowed. N.C. GEN. STAT. § 1A-1, Rule 15 (Supp. 1967). These amendment procedures would appear to apply as well to the implied general denial resulting from failure to answer; but the better practice is to draft a proper answer if an affirmative defense is to be made, so that amendment will be unnecessary.

⁴⁵ N.C. GEN. STAT. § 7A-216 (Supp. 1967).

plaint may be dismissed. No other pleadings are permitted, and new matter alleged in the answer, if any, is taken as denied or avoided.⁴⁶

The defendant is permitted, by motion or answer prior to trial, to object to venue or absence of personal jurisdiction, or to move for a change of venue.⁴⁷ Objections to these matters are waived if not made prior to trial. Such objections are heard by a district judge, not the magistrate. If venue is ordered changed, the trial will proceed before a district judge in the new venue, and may not be assigned to a magistrate there.

There is a variety of situations in which the tenant might wish to press a claim against his landlord—for breach of a lease covenant (*e.g.*, a promise to keep the property in safe or clean condition), for failure of consideration, personal injury, fraud, return of a security deposit, or the like. In a summary ejectment action which has been assigned to a magistrate, such claims may be asserted as *counterclaims* only if they would not “make the amount in controversy exceed . . . \$300.”⁴⁸ The meaning of this language is far from obvious, as the following example will illustrate: suppose the landlord claims \$200 in unpaid rent, and the tenant counterclaims \$200 for personal injuries resulting from the landlord’s failure to maintain the property. Is the amount in controversy determined by adding the original prayer and the counterclaim, or by testing each party’s claim independently? The phrase “. . . would make the amount . . . exceed . . . \$300,” suggests that the claims should be added. But according to G.S. § 7A-210, the amount in controversy is to be computed in accordance with G.S. § 7A-243, which does not speak directly to the present question, but provides that the rules therein for determining the amount in controversy apply “with respect to claims asserted by complaint, counterclaim, cross-complaint, *or* third-party complaint.” (Emphasis added.) The use of the disjunctive suggests that each such claim should be considered individually, and if each were under \$300 the case would appropriately be tried to the magistrate.⁴⁹ The argu-

⁴⁶ N.C. GEN. STAT. § 7A-220 (Supp. 1967).

⁴⁷ N.C. GEN. STAT. § 7A-221 (Supp. 1967).

⁴⁸ N.C. GEN. STAT. § 7A-219 (Supp. 1967).

⁴⁹ Under the former North Carolina practice in small claims cases, the jurisdiction of the Justice of the Peace was constitutionally limited to cases in which “. . . the sum demanded shall not exceed two hundred dollars.”. . . N.C. CONST. art. IV, § 27 (1868). Under this language it was held that, if the plaintiff’s prayer were for \$200 or less, the justice had jurisdiction regardless of the amount of the defendant’s counterclaim; but unless the counterclaim was \$200 or less, or was remitted to this level, the defendant could have no affirmative recovery, but could utilize the counterclaim only for purposes of defense. *Stacey Cheese Co. v. Pipkin*, 155 N.C. 394, 71 S.E. 442 (1911). Under the present prac-

ment for aggregating the claims seems the stronger, but the statute should be clarified.⁶⁰

Another ambiguity arises once it is clear that a proposed counterclaim (say, in the amount of \$350) does transcend the jurisdictional limit. Is the defendant foreclosed from making such a counterclaim, or may he file it and throw the entire case into the lap of a district judge, effectively revoking the assignment to the magistrate? G.S. § 7A-219 states that no such counterclaim "is permissible in a small claim action assigned to a magistrate." One might infer here that the counterclaim is impermissible once assignment to a magistrate has been made, and a purported counterclaim should simply be disregarded. But the statute permits only "small claim actions" to be assigned to magistrates, and G.S. § 7A-210 defines the "small claim action" (in part) as a civil action in which "... (1) the amount in controversy, computed in accordance with § 7A-243, does not exceed three hundred dollars (\$300)." Since § 7A-243 provides that the computation must consider the amounts of any counterclaims, it is arguable that a counterclaim exceeding the \$300 limit makes the assignment erroneous and subject to revocation upon motion of the counterclaiming defendant. The statute makes no provision for such a motion, and seems to negate its possibility by stating that "The sole remedy for improper assignment is appeal for trial de novo before a district judge. . .". Although again the statute is not explicit, it seems likely that the appeal mentioned here is an appeal from the judgment of the magistrate on the merits, not an appeal from the denial of a motion objecting to improper assignment. Since few magistrates are likely to decline jurisdiction in cases assigned to them by district judges, whatever the size of the counterclaim, the most probable result is that a counterclaim exceeding the jurisdictional limit will, at the plaintiff's request, simply be ignored by the magistrate.

Unless the law in this area is clarified, the tenant's attorney will be wise to withhold possible counterclaims (or at least those demanding \$300 or more), and bring them as independent actions. Even in this posture, of course, the tenant's claim may be used to apply leverage on

tice there is no constitutional limitation on the magistrate's jurisdiction, and the statutory limitation is phrased in terms of "amount in controversy" rather than "sum demanded," so the prior case law seems to have little relevance.

⁶⁰ A similar problem arises in federal diversity suits, which require a *minimum* amount in controversy of \$10,000, rather than a *maximum* amount as in the North Carolina small claims cases. But the federal decisions are in a state of confusion and offer little guidance. See C. WRIGHT, *FEDERAL COURTS* § 37 (1963).

the landlord toward a favorable settlement of the summary ejectment action. If the counterclaim would result in the surpassing of the \$300 limit, it may safely be withheld for later independent action even though it is of a type ordinarily classified as "compulsory"⁵¹ without fear of an estoppel arising from adverse findings of law or fact by the magistrate.⁵²

Trial. Jury trials, which were permitted under the older chapter 42 procedure, are no longer allowed in summary ejectment cases assigned to magistrates.⁵³ If, however, assignment is not proper because of any of the grounds discussed above, a jury in the district court is possible upon request by any party.⁵⁴ In trial before a magistrate, the defendant is permitted to move for nonsuit following the plaintiff's evidence; if the motion is denied, the defendant may put on his evidence.⁵⁵ Judgments are in writing, are docketed in the same manner as regular district court judgments, and constitute a lien on the defendant's property as provided for other judgments.⁵⁶

Appeals. Appeal from the judgment of a magistrate is by trial de novo in the district court.⁵⁷ Notice of appeal may be given orally in open court when the judgment is announced, or in writing within ten days after entry of judgment. If in writing, the notice must be filed with the clerk of the superior court and served upon all other parties.⁵⁸ On appeal, the district judge may order repleading in his discretion. A jury trial is available if demanded by any party.⁵⁹ Apparently the judge may permit the introduction of a counterclaim, cross-claim, or third-party claim which would not have been permitted before the magistrate.

There is no automatic stay of execution of the judgment pending ap-

⁵¹ N.C. GEN. STAT. § 7A-219 (1967). Regarding compulsory counterclaims, see N.C. GEN. STAT. § 1A-1, Rule 13 (Supp. 1967) and comment thereunder.

⁵² This very protection from collateral estoppel makes the question of proper computation of the "amount in controversy" a crucial one. In the example of the \$200 claim and the \$200 counterclaim, suppose the defendant does not assert the counterclaim, believing it is impermissible before the magistrate. Later on appeal, if it is held that the counterclaim could properly have been brought before the magistrate, is the protection against estoppel lost? If so, the defendant may have paid a high price to learn the law on this point.

⁵³ N.C. GEN. STAT. § 7A-222 (Supp. 1967).

⁵⁴ N.C. GEN. STAT. § 7A-223 (Supp. 1967). One way for the defendant to force a withdrawal of the assignment from the magistrate, and to get a jury trial, is to file a written answer denying the landlord's title. See text accompanying notes 73-75, *infra*.

⁵⁵ N.C. GEN. STAT. § 7A-222 (Supp. 1967).

⁵⁶ N.C. GEN. STAT. 7A-224, 25 (Supp. 1967).

⁵⁷ N.C. GEN. STAT. § 7A-229 (Supp. 1967).

⁵⁸ N.C. GEN. STAT. § 7A-228 (Supp. 1967).

⁵⁹ N.C. GEN. STAT. § 7A-230 (Supp. 1967).

peal. If the tenant wishes a stay, as he generally will, he may petition the clerk of the superior court for a stay order. Accompanying the petition must be an undertaking executed by sufficient sureties who will pay the judgment and costs if the appeal fails.⁶⁰ Apparently the acceptability of the sureties is in the clerk's discretion.⁶¹ In lieu of an undertaking, it seems likely that the posting of a cash bond in the amount of the accrued rent would be satisfactory, provided the tenant continued to pay the rent into court as it came due during the pendency of the appeal. Indeed, the argument is made in *Simmons v. West Haven Housing Authority*,⁶² heard by the U. S. Supreme Court this term, that any more onerous requirement would deny due process and equal protection.⁶³

Since the newer provisions of chapter 7A do not negate it, the penalty of double rent might still be imposed under G.S. § 42-32 if an appeal is taken for the purpose of delay and is without merit. Of course, such a penalty ought not to be imposed merely because the tenant's theory on appeal is novel and without North Carolina precedent.

Real party in interest. It is a fairly common practice for a rental agent or realtor employed by the landlord to institute a summary ejectment action. Because every "claim shall be prosecuted in the name of the real party in interest,"⁶⁴ such an agent may not properly be a plaintiff in an action for possession⁶⁵ or for rent.⁶⁶ The reason is simply that the agent is not entitled to possession and is not personally owed the rent. The real party in interest rule requires that the plaintiff have an interest in

⁶⁰ N.C. GEN. STAT. § 7A-227 (Supp. 1967). Under the older summary ejectment procedure, an undertaking in the amount of one year's rent was required. N.C. GEN. STAT. § 42-34 (1953). The newer statute appears to overrule this very onerous requirement, but the author is informed that some clerks are still demanding one year's rent.

⁶¹ N.C. GEN. STAT. § 7A-227 (Supp. 1967); cf. *Steadman v. Jones*, 65 N.C. 388 (1871).

⁶² *Prob. juris.* noted, 394 U.S. 957 (April 7, 1969) (No. 81, 1969 Term). The bond requirement in Connecticut is distinguishable from North Carolina's since Connecticut requires that the bond cover all rent which might accrue during the appeal's pendency. See also *Williams v. Shaffer*, 385 U.S. 1037 (1967) (Douglas, J., dissenting from denial of certiorari.)

⁶³ Also before the Court is *Georgia v. Sanks*, 225 Ga. 88, 166 S.E.2d 19 (1969). *Prob. juris.* noted, 37 U.S.L.W. 3493 (June 23, 1969) (No. 266, 1969 Term), which attacks the Georgia requirement that the tenant post a bond before *defending* a dispossession warrant.

⁶⁴ N.C. GEN. STAT. § 1A-1, Rule 17(a) (Supp. 1967); see generally, *McINTOSH* § 591 *et seq.*

⁶⁵ *Choate Rental Co. v. Justice*, 211 N.C. 54, 188 S.E.2d 609 (1936).

⁶⁶ *Home Real Estate Loan and Ins. Co. v. Locker*, 214 N.C. 1, 197 S.E.2d 555 (1938); see generally, *Howard v. Boyce*, 266 N.C. 572, 146 S.E.2d 828 (1966) and cases cited therein.

the subject matter of the action, not merely in the litigation.⁶⁷ Moreover, while the former practice in summary ejectment cases permitted an agent to execute the necessary oath in a verified complaint,⁶⁸ the present rules require that the complaint be signed "by the party or his attorney, and verified."⁶⁹ No agent other than the landlord's lawyer would seem to suffice. Even an assignment by the landlord to the rental agent of the cause of action in summary ejectment would not make the agent the real party in interest if the assignment were shown to be for purposes of collection only.⁷⁰

Of course, a defense based on the real party in interest rule is likely to be useful only for purposes of delay. It does constitute a basis for dismissal of the plaintiff's action,⁷¹ but the complaint can be immediately refiled under the landlord's name. Indeed, though the authorities are not clear, it is possible that the magistrate or judge could permit an amendment of the original complaint to show the landlord as plaintiff.⁷² But since most rental agents are unassisted by counsel, they may not be likely to seek an amendment. In any event, the value to the tenant of delay should not be underestimated; it may provide badly needed time to locate a new home.

The question may arise whether assertion of the real party in interest defense is inconsistent with the rule that a tenant is estopped to deny his landlord's title.⁷³ There is clearly no such inconsistency when the lease was made in the landlord's name (either signed by him directly or by the rental agent *as agent*), since the tenant is not denying the landlord's title, but merely denying that the agent-plaintiff is the landlord.⁷⁴ The question is more difficult if the agent executed the lease as though he were the fee owner, without disclosing the existence of the actual land-

⁶⁷ Choate Rental Co. v. Justice, *supra* note 65.

⁶⁸ N.C. GEN. STAT. § 42-28 (1966).

⁶⁹ N.C. GEN. STAT. § 7A-216 (Supp. 1967).

⁷⁰ See First National Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927).

⁷¹ Howard v. Boyce, *supra* note 66.

⁷² Choate Rental Co. v. Justice, 212 N.C. 523, 193 S.E. 817 (1937); but see Schambley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E.2d 18 (1965), noted in Brandis, *Survey of North Carolina Law: Civil Procedure*, 44 N.C.L. REV. 897, 901 (1966).

⁷³ The estoppel doctrine is in effect in North Carolina. Harwell v. Rohrabacher, 243 N.C. 255, 90 S.E.2d 499 (1955). There are several exceptions: the tenant may deny his landlord's title if he has surrendered possession, since the landlord-tenant relationship then no longer exists; and the tenant may show that the landlord's title was good when the lease commenced but has since become defective. Lassiter v. Stell, 214 N.C. 391, 199 S.E. 409 (1938).

⁷⁴ This was the situation in Home Real Estate Loan and Ins. Co. v. Locker, *supra* note 66.

lord.⁷⁵ The tenant's position is not a very appealing one, since he has supposedly received the benefits of the leasehold from the agent, and now asserts that he is not liable to that same agent for the burdens. There seems to be no direct authority on the point. To the extent that attorneys representing the poor have the opportunity to educate them, it would be highly worthwhile to persuade such clients that they need leases specifically naming the landowner as lessor.

Self-help by the landlord. Because of the delays, expense and risks attendant to a summary ejectment action, a landlord may decide to act without legal process to evict a tenant who is wrongfully holding over. The landlord might try a direct and forceful approach, physically removing the tenant; or the landlord might move more stealthily, for example, by moving out the tenant's personalty and changing the lock while the tenant is temporarily out of the apartment. In either event, are there legal remedies open to the tenant?

The fundamental case in North Carolina is *Mosseller v. Deaver*,⁷⁶ in which the plaintiff was in possession of certain land (under circumstances not made clear) to which the defendant had paramount title. The defendant forcibly removed the plaintiff from the property, and the civil suit followed. The trial judge charged the jury that the defendant had the right to use reasonable force to remove the plaintiff. The North Carolina Supreme Court ordered a new trial, disapproving the instruction:

. . . as it is not only opposed to the public policy, which requires the owner to use peaceful means or resort to the courts in order to regain his possession, but is directly contrary to a statute which condemns the violent act as a criminal offense.⁷⁷

The statute mentioned is the forcible entry and detainer statute.⁷⁸ The language makes it clear enough that a landlord who uses any force to evict a tenant will incur civil liability; according to *Mosseller*, the tenant may recover nominal damages for the trespass, actual damages for injury to the tenant's person or personal property, and exemplary damages if the entry was done in "a wanton and reckless manner." The opinion makes no mention of repossession by the tenant as a possible remedy, but in most

⁷⁵ The estoppel has been held to operate on such facts. *Stott v. Rutherford*, 92 U.S. 107 (1875).

⁷⁶ 106 N.C. 494, 11 S.E. 529 (1890).

⁷⁷ *Id.* at 495.

⁷⁸ N.C. GEN. STAT. § 14-126 (1953).

cases it would be an irrelevant one, since the tenant is likely to have already found other accommodations.

The more difficult question arises when the landlord locks the tenant out without using physical force against the tenant's person. It is doubtful that such conduct would violate the forcible entry and detainer statute, which requires actual force or appearances tending to inspire a just apprehension of violence.⁷⁹ A peaceful entry does not violate the statute unless the trespasser is ordered to leave by the possessor.⁸⁰ Yet the civil action by the tenant is not necessarily restricted to those facts which would constitute a criminal violation; in *Mosseller* the court placed its holding on the dual grounds that forceful entry by the trespasser would violate both public policy, ". . . which requires the owner to use peaceful means or resort to the courts . . .",⁸¹ and the criminal statute as well.

It may thus be argued that a lockout is not the use of "peaceful means," and gives rise to civil liability. A stealthy lockout is quite likely to give rise to heated tempers and violent action when the tenant returns and discovers the treatment the landlord has given him. Even a landlord who used peaceful means to gain possession may be obliged to use force to keep it.⁸² Any unconsented entry into one's home will naturally cause an emotional reaction, and therefore, cannot be regarded as "peaceful means." A man's home ought to be regarded as his castle, whether he owns or rents it, at least to the extent that one who invades it without consent or legal process should be liable for the invasion. Such behaviour seems closely related to the tort of intentional infliction of mental distress.⁸³

It must be conceded that under the present authorities in North Carolina, the unconsented lockout might be upheld. Other jurisdictions have split on the issue,⁸⁴ and those finding the landlord liable for a lockout have usually relied upon explicit language in a forcible entry and detainer

⁷⁹State v. Davenport, 156 N.C. 597, 603, 72 S.E. 7 (1911); State v. Mills, 104 N.C. 905, 10 S.E. 676 (1889).

⁸⁰State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961). The changing of locks, without more, was held not to violate the criminal forcible ejection statute in State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904).

⁸¹Note 77, *supra*.

⁸²The court adopted this approach in Mason v. Hawes, 52 Conn. 12 (1884), discussed in Annot., 6 A.L.R.3d 177, 194 (1966).

⁸³See W. PROSSER, TORTS § 11 (3d ed. 1964); REST. TORTS 2d § 46 (1965). The tort is not well-developed in North Carolina. See, e.g., Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936).

⁸⁴See generally Annot., 6 A.L.R. 3d 177 (1966).

statute.⁸⁵ The North Carolina statute is not conducive to such an interpretation, but even in North Carolina the implicit threat of a lawsuit by the tenant will suffice in many situations to deter the landlord's misbehaviour.

Rights in the tenant's personal property. Under the common law the landlord had the right to seize personalty belonging to the tenant and hold or sell it as security for unpaid rent.⁸⁶ This harsh remedy, known as "distress" or "distrain," was never incorporated into the North Carolina statutes and has been expressly rejected by the courts in this state.⁸⁷ However, the landlord in a tenancy for agricultural purposes is given by statute⁸⁸ a lien on the crops and crop insurance⁸⁹ (but on no other personalty) to secure rent owed and advances or expenses incurred by the landlord to the tenant with respect to the crops.⁹⁰ This lien has priority over all others, and the tenant will be both civilly and criminally liable if he removes any of the crops without notice before paying the rent and advances owed to the landlord.⁹¹ The lien exists (unless negated by specific agreement between the parties) whether the arrangement is for share-cropping or a conventional landlord-tenant relation.⁹²

With the exception of the crop lien described above, the landlord has no right to interfere with the tenant's possession and use of the tenant's personalty. Yet a landlord attempting to evict a tenant without legal process may occasionally use the tenant's personalty as a point of attack: by locking the tenant out of the premises while the personalty remains inside; by removing the personalty from the rental unit and putting it on the sidewalk or in the hall; or by having it hauled away and warehoused, purportedly at the tenant's expense. It is arguable that such

⁸⁵ See *Jordan v. Talbot*, 55 Cal. 2d 597, 361 P.2d 20, 6 A.L.R. 3d 161 (1961); *Adelhelm v. Dougherty*, 129 Fla. 680, 176 So. 775 (1937); *Ardell v. Milner*, 166 So. 2d 714 (Fla. 1964); *Peterson v. Platt*, 16 Utah 2d 330, 400 P.2d 507 (1965); *Barnett, When the Landlord Resorts to Self-help: A Plea for Clarification of the Law in Florida*, 19 U. FLA. L. REV. 238 (1966).

⁸⁶ H. TIFFANY, *REAL PROPERTY* § 613 (abr. ed. 1940); R. POWELL, *REAL PROPERTY* § 230(2) (abr. ed. 1968).

⁸⁷ *Reynolds v. Taylor*, 144 N.C. 165, 56 S.E. 871 (1907); *Harrison v. Ricks*, 71 N.C. 7 (1874); *Dalglish v. Grandy*, 1 N.C. 161 (1800).

⁸⁸ N.C. GEN. STAT. § 42-15 *et seq.* (1966).

⁸⁹ N.C. GEN. STAT. § 42-15.1 (1966).

⁹⁰ See generally R. Lee, *Liens on Personalty Not Governed by the Uniform Commercial Code*, 44 N.C. L. REV. 322, 351-55 (1966); the U.C.C. does not affect any landlord's lien rights. N.C. GEN. STAT. § 25-9-104(b) (1965).

⁹¹ N.C. GEN. STAT. § 42-22 (1966).

⁹² See *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954), for a general discussion of the landlord's crop lien.

behavior is an actionable use of force in a situation where only legal process may be utilized, as discussed in the section on self-help evictions above. But the success of this theory is problematical.

More certain remedies may be found in personal property law. The tenant must make an initial election whether to proceed in an action to recover possession of the property wrongfully detained by the landlord, or to treat the landlord's action as a wrongful conversion—in effect, a forced sale to the landlord—for which monetary damages may be recovered. An action for possession, which would be in the nature of a common-law action in replevin or detinue, could be accompanied by a prayer in claim and delivery.⁹³ This provisional remedy permits the plaintiff to obtain possession of the articles sought at the outset of the lawsuit, provided he can procure the undertaking of sufficient sureties in the amount of twice the value of the property.⁹⁴ In an action for possession, the plaintiff need not allege or prove his title, but merely the deprivation of possession,⁹⁵ but for the ancillary remedy of claim and delivery, the plaintiff must show at least a special title in the goods.⁹⁶ In a case where the landlord has merely put the tenant's furniture on the street or in the hall, an action for possession would, of course, be meaningless.

An action for trespass to chattels may be combined with an action in replevin⁹⁷ or pursued separately. If the property is not recovered in specie, damages would be equal to the market value; if the property is recovered by the tenant, either by a replevin action or by the landlord's voluntary act, he could still claim damages for diminution in value,⁹⁸ loss of use of the goods,⁹⁹ and possibly punitive damages.¹⁰⁰ As with replevin, the gist of the action is injury to possession; title need not be alleged or proved by the plaintiff.¹⁰¹ There is some suggestion in the cases that trespass

⁹³ See N.C. GEN. STAT. § 1-472 (1953).

⁹⁴ N.C. GEN. STAT. § 1-475 (1953).

⁹⁵ *Holmes v. Godwin*, 69 N.C. 467 (1873); *Freshwater v. Nichols*, 52 N.C. 251 (1860).

⁹⁶ *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960).

⁹⁷ *Mica Industries, Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

⁹⁸ *Owens v. Blackwood Lumber Co.*, 212 N.C. 133, 193 S.E. 219 (1937). See generally 87 C.J.S. *Trespass* § 116 (1954).

⁹⁹ *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 23 S.E.2d 894 (1943).

¹⁰⁰ *Id.* Punitive damages are available for gross negligence or willful misconduct.

¹⁰¹ *Motley v. Thompson*, 259 N.C. 612, 131 S.E.2d 447 (1963).

must involve a taking:¹⁰² thus, it is not clear that locking a tenant's furniture in his apartment would suffice. It may also be inferred from one case that a trespass must involve some threatening actions, or at least harsh words, by the defendant, so that the plaintiff would reasonably fear a breach of the peace if he resisted.¹⁰³ Trespass, with a prayer for punitive damages, is probably the most attractive theory where the landlord has left the tenant's property on the sidewalk or the like.

If the plaintiff prefers, he may in many cases recover the full market value of the goods by bringing an action in conversion. This tort is defined as:

Unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.¹⁰⁴

The plaintiff here must allege and prove his own title, and the defendant may use plaintiff's lack of title as a defense.¹⁰⁵ No demand need be made by the plaintiff, at least where he knows the defendant has already disposed of the property and cannot return it.¹⁰⁶ Once the conversion is complete, an offer by the defendant to return it need not be accepted and will not bar the action.¹⁰⁷

The measure of damages for conversion is the value of the goods at the time and place of the conversion.¹⁰⁸ Interest from the date of the conversion may be added in the jury's discretion.¹⁰⁹ Whether any additional compensation may be awarded for loss of use or profits is unclear.¹¹⁰

This brief summary of the arsenal of weapons available to the tenant's attorney should suffice to indicate the risks being assumed by the landlord who wrongfully seizes his tenant's furniture or other goods.

Conclusion. Although the North Carolina landlord-tenant law is not well-balanced, and at first glance the landlord seems to have an inherent

¹⁰² *Binder v. General Motors Acceptance Corp.*, *supra* note 99; *Cf.* 87 C.J.S. *Trespass* § 3,10 (1954).

¹⁰³ *Binder v. General Motors Acceptance Corp.*, *supra* note 99.

¹⁰⁴ *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E.2d 559 (1966).

¹⁰⁵ *Boyce v. Williams*, 84 N.C. 275 (1881).

¹⁰⁶ *Porter v. Alexander*, 195 N.C. 5, 141 S.E. 343 (1928); *Cf.* *American Sur. Co. v. Baker*, 172 F.2d 689 (4th Cir. 1949).

¹⁰⁷ *Wall v. Colvard, Inc.*, *supra* note 104.

¹⁰⁸ *Waller v. Bowling*, 108 N.C. 289, 12 S.E. 488 (1891).

¹⁰⁹ *Jackson v. City of Gastonia*, 247 N.C. 88, 100 S.E.2d 241 (1957); *Lance v. Butler*, 135 N.C. 419, 47 S.E. 488 (1904); but *see* *Crouch v. Louther Trucking Co.*, 262 N.C. 85, 136 S.E.2d 246 (1964), which seems to allow interest automatically.

¹¹⁰ Compare *Crouch v. Louther Trucking Co.*, 262 N.C. 85, 136 S.E.2d 246 (1964) with *Bowen v. Harris*, 146 N.C. 385, 59 S.E. 1044 (1907).

upper hand, the techniques described in this paper will permit a sympathetic and imaginative attorney to go a long way toward assuring fair treatment for his client. We are unlikely to see sweeping legislative reforms in this area, although such reforms are being made in other states.¹¹¹ But perhaps the greatest service an attorney can perform for a tenant client in this area is to permit sufficient delay to allow the tenant to pay past-due rent or find another home. This is not the sort of headline-catching victory attorneys relish, but it can alleviate great hardship and ease the life of people who frequently feel that the law offers them no protection.

¹¹¹ See, *e.g.*, MICH. STAT. ANN. § 26-1109 and §§ 5.2891(1)-5.2891(15) (1968); N.J. STAT. ANN. § 2A:42-74 through 2A:42-84 (1966); MASS. ANN. LAWS c. 111, § 127A-127J (1966); MASS. ANN. LAWS c. 239, § 8A (1967); PA. STAT. ANN. tit. 35, § 1700-1 (1966); CONN. REV. STAT. tit. 47, § 47-24 (1959).