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FORCIBLE TRESPASS TO REAL PROPERTY

DAVID J. SHARPE*

The English common law recognized only a few crimes against real property: arson and burglary were two, and forcible trespass was a third.¹ Although the very term is now unfamiliar, forcible trespass exists as a common law crime today in North Carolina and perhaps in England as well, but probably nowhere else. This essay is in three parts: first, a survey of the English authorities on forcible trespass; second, a description and analysis of forcible trespass in North Carolina; and third, an attempt to disentangle forcible trespass from two other crimes, both of legislative origin: forcible entry and detainer, G.S. § 14-126, and entry after being forbidden, G.S. § 14-134.

THE ENGLISH BACKGROUND

Although the English cases on common law forcible trespass to real property are not plentiful, there seems to be adequate and uncontradicted support for the propositions that forcible trespass to real property was an indictable common law crime in England long before the American Revolution and that it still exists in England. Granted, Sergeant Hawkins said that forcible trespass to real property was not a common law crime in England because the field had been occupied by the statutes of forcible entry and detainer,² but he cited no cases to support this view; and the subsequent cases which went squarely against him induced later editors to mention common law forcible trespass cases in their notes, though they left the text unchanged.³ But Hawkins's statement demonstrates a persistent and understandable tendency, both in England and in North Carolina, to confuse forcible trespass, the common law crime, with the statutory crime of forcible entry and detainer, whose roots go so far back in English history that it seems almost a part of the common law.

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¹ "Forcible trespass" appears to embrace all the common law refinements serving to distinguish between real and personal property. The indiscriminate application of the term "forcible trespass" to real and personal property has obscured the distinctions, but as a matter of practice an indictment alleging a forcible trespass to personal property will not support a conviction for forcible trespass to real property. *State v. Graves*, 74 N.C. 396 (1876). This article is concerned only with forcible trespass to real property.

² 1 HAWKINS, *PLEAS OF THE CROWN* ch. 64, § 4 (1st ed. 1716).

³ *E.g.*, HAWKINS, *PLEAS OF THE CROWN* 274 (Leach 6th ed. 1787); HAWKINS, *PLEAS OF THE CROWN* 495 (Curwood 8th ed. 1874).

The Assize of Novel Disseisin⁴ was a statutory attempt by Henry II to limit the amount of private warfare being carried on among the English nobility over the possession of land. The Assize was a speedy, summary means of restoring freshly ousted persons to the possession of their property, but it contained a short period—five days at first, then progressively longer—during which the ousted person could gather his friends and relatives and servants and throw out the trespasser by self-help.⁵ Obviously, the forcible self-help allowed under the Assize was not merely a technical breach of the King's peace: it was, in those days and among those people, a threat to the maintenance of stable government.

In 1381 the first statute forbidding forcible entries was enacted.⁶ It said nothing about a period of permissible self-help: it forbade all forcible entries in simple, direct terms, whether the entry was under title or not. But this criminal statute left the ousted person where he was, out of possession. He was required to proceed in civil litigation with the interminable writ of right in order to recover possession of his property, but the law's delay tempted him to resort to self-help as before; and it was to prevent this result that the statute had been enacted in the first place. Therefore in 1391 the justices of the peace were given summary power to gather as much strength as they needed from the county and forcibly dispossess the trespasser.⁷

These two statutes were still found to be inadequate in practice, and so in 1429 a provision for actual restitution of the possession of property to the ousted freeholder was added to the statutes of Richard II, while confirming them and continuing them in force.⁸ This statute began the history of forcible entry and detainer as a mixed criminal and civil proceeding. The English statutory history concluded with two more Forcible Entry Acts, which limited the application of the statutes to comparatively recent ousters⁹ and extended the statutes to cover leaseholds.¹⁰

This legacy of English statutes was taken up by the infant state of North Carolina; and the first statute of forcible entry enacted in England in 1381 appears alone today in the General Statutes, a close translation of the French in which it was originally written:

§ 14-126. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with

⁴ Circa 1186.

⁵ See Maitland, *The Beatitude of Seisin*, 4 L.Q. REV. 24, 286 (1888).

⁶ The Forcible Entry Act, 1381, 5 Rich. 2, Stat. 1, c. 7.

⁷ The Statute of Forcible Entry, 1391, 15 Rich. 2, c. 2.

⁸ The Forcible Entry Act, 1429, 8 Hen. 6, c. 9.

⁹ 1588, 31 Eliz. 1, c. 11.

¹⁰ 1623, 21 Jac. 1, c. 15.

strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor.¹¹

The key to identifying indictments under the statutes is a phrase in the earliest statute, the requirement of an entry with a "strong hand," *manu forti*. For example, in the earliest case mentioning forcible trespass to real property in England, *The Queen v. Dyer*,¹² the court clearly recognized the existence of an indictable trespass to real property which was not the same as forcible entry and detainer, because it refused to quash an indictment which omitted the words *manu forti*.

The first well-defined English case on forcible trespass at common law came fifty years later. In *Rex v. Bathurst*,¹³ which referred to no prior authority on forcible trespass, all the justices of the King's Bench agreed that forcible trespass was a common law crime; the differences among the justices lay in the sufficiency of the first indictment to charge it. The prosecuting witness charged a forcible entry and detainer with force and arms, but he failed to allege that he had an estate in the premises which entitled him to the protection of the statutes. This failure was unanimously adjudged fatal to an indictment under the statutes, but the justices split 2-2 on whether it nevertheless charged a forcible trespass at common law.

The second indictment concluded at common law, referring to no statute, and charged a trespass upon a dwelling-house with force and arms by three persons. Chief Justice Ryder stated that the words "force and arms" in an indictment for forcible entry at common law always import some actual force. Therefore, since the indictment was not framed under the statute of 5 Richard II, which used the expression *manu forti*, it need not include those words; but on trial, in order to secure a conviction, there must be proof of strong-handed force, and not a mere technical trespass with force and arms. On this reasoning, the justices unanimously gave judgment for the King on the defendant's demurrer to the second indictment.¹⁴

¹¹ In fact, North Carolina originally took over not only the first but all seven English statutes having to do with forcible entry and detainer. The full texts appear in MARTIN, *COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA* (1792).

¹² 6 Mod. 96, 87 Eng. Rep. 854 (K.B. 1703).

¹³ Say. 225, 96 Eng. Rep. 860 (K.B. 1755). Further details on the facts and pleading in *Bathurst* are given in *Rex v. Storr*, 3 Burr. 1698, 97 Eng. Rep. 1053 (K.B. 1765), and in *The King v. Wilson*, 8 Term R. 357, 101 Eng. Rep. 1432 (K.B. 1799).

¹⁴ The requirement of strong-handed force fulfilled the need for a breach of the peace, since a mere technical trespass *vi et armis* was no crime. Breaches of the Queen's peace have been indictable from earliest times, but the exact English common law definition of "breach of the peace" is yet to appear. Glanville Williams calls this lack of definition "surprising." Williams, *Arrest for Breach of the Peace*, [1954] CRIM. L. REV. (Eng.) 578. J. W. C. Turner agrees that it is "strange." KENNY, *OUTLINES OF CRIMINAL LAW* § 695 (Turner 17th ed. 1958).

Ten years later, Lord Mansfield heard the Attorney-General make an ingenious attempt to broaden the scope of forcible trespass in *Rex v. Storr*.¹⁵ Every battery was an indictable breach of the King's peace, argued the Attorney-General, and the victim might also bring a civil action against his assailant. Then conversely, the victim of every trespass to land, since he might maintain a civil action against the trespasser, should also be able to proceed criminally against the trespasser for the conceptual battery to the land. But the justices quashed three indictments which charged only that the defendant had entered upon the close of the prosecutor *vi et armis* and had there dug in his dooryard and erected a shed, because the indictments contained no allegation which would support proof of a breach of the peace. Counsel for the defendant abandoned his motion to quash a fourth indictment, which used the words "with a strong hand" and hence must have sufficiently charged a forcible trespass.

In *Storr* the court discussed and considerably amplified the report of *Bathurst*, taking it as the ruling authority on forcible trespass. *Bathurst*, said the justices, should not be read as holding that the strong hand essential to an indictment for forcible trespass may be charged *vi et armis*, leaving strong-handed force to be proved at trial. The strong hand must be charged in the indictment, but it may be charged in either of two ways: directly, by use of the words "with strong hand," or indirectly, by charging trespass *vi et armis* and in addition alleging facts which tend to show a high-handed invasion of property of nature (such as a dwelling house) or in a manner (such as trespass by a riotous mob or an armed man) likely to cause a breach of the peace. The three indictments against *Storr* were quashed because, having failed to allege the strong hand, they also gave no facts which tended to show the strong hand indirectly: there was only one trespasser, unarmed, and the property in question was a dooryard, not a dwelling house. It had long been settled that an indictment charging a trespass to land only *vi et armis*, without other facts, would be quashed on motion for failing to charge a crime.¹⁶

The King's Bench almost immediately confined to dwelling houses the pleading of strong-handed entries as trespasses *vi et armis*. Not more than five months after *Storr*, *Rex v. Bake*¹⁷ came before the same court. Here sixteen men had broken a close which was not a dwelling house. The justices ignored the riotous implications of the trespass as charged and unanimously quashed the indictment for failing to allege a trespass with a strong hand.

¹⁵ 3 Burr. 1698, 97 Eng. Rep. 1053 (K.B. 1765).

¹⁶ *E.g.*, *Rex v. Tomlinson*, Sess.Cas. 131, 93 Eng. Rep. 132 (K.B. 1723).

¹⁷ 3 Burr. 1731, 97 Eng. Rep. 1070 (K.B. 1765); often but erroneously cited as "Blake."

Bake was the last reported English forcible trespass case before the American Revolution, but the English cases since 1776 have also been cited approvingly in North Carolina. In *The King v. Wilson*¹⁸ Wilson and eleven others threw the prosecutor out of several buildings, including dwelling houses. The court of King's Bench reconfirmed the existence of common law forcible trespass, and it explicitly contrasted forcible trespass with statutory forcible entry and detainer. Most important, the court stated that *manu forti*, the words of the statutes, had been held to import a breach of the peace without further description in the indictment. Therefore, the words *manu forti* by themselves in an indictment at common law were held to be sufficient to withstand demurrer, in spite of a vigorous argument by counsel that forcible trespasses at common law were indictable only on account of the attendant breach of the peace, which ought to be described on the face of the indictment by more than a term of art taken from another crime. The most recent English case seems to be *The King v. Williams*,¹⁹ which in the clearest dictum said that the common law crime existed as an alternative to forcible entry and detainer. Though none of the forcible trespass cases have been cited in recent years to show that forcible trespass is still alive in England, neither have they ever been expressly or by implication overruled; and current secondary authority states that forcible trespass is a common law misdemeanor today.²⁰

Given this quantity of English cases on forcible trespass prior to the American Revolution, the reception of English authority, both common law and statutory, by North Carolina after 1776 is quite clear. The Act of 1778, chapter 5, acknowledged in its title that English statute law had theretofore been in force in the crown colony, reciting in the preamble, "Whereas doubts may arise, upon the revolution in government, whether any and what laws continue in force here . . ." The first line of the act resolved the doubts by stating that "all such statutes, and such parts of the common law, as were heretofore in force and use within this territory . . . are hereby declared to be in full force within this state."²¹ And confirming the transition of English law to North Carolina in the area of forcible trespass at common law, the North Carolina court has since cited the English cases frequently, particularly *Bathurst*, *Storr*, and *Wilson*.²²

¹⁸ 8 Term R. 357, 101 Eng. Rep. 1432 (K.B. 1799).

¹⁹ 9 B. & C. 549, 109 Eng. Rep. 205 (K.B. 1829).

²⁰ 10 HALSBURY, *LAW OF ENGLAND, Criminal Law* § 1100 (3d ed. 1955).

²¹ The substance of the Act of 1778 is retained in N.C. GEN. STAT. § 4-1 (1943). The quotation above is drawn from 1 IREDELL, *PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA* 252 (Martin rev. ed. 1804).

²² *E.g.*, *State v. Simpson*, 12 N.C. (1 Dev.L.) 504 (1828); *State v. Pollock*, 26 N.C. (4 Ired. L.) 305 (1844); *State v. Pridgen*, 30 N.C. (8 Ired. L.) 84 (1847); and *State v. Whitfield*, 30 N.C. (8 Ired. L.) 315 (1848).

NORTH CAROLINA EXPERIENCE

The development of forcible trespass continued in North Carolina well into the twentieth century. Analyzing approximately seventy North Carolina cases, this chapter portrays the characteristics of forcible trespass and charts the boundaries of its doctrine, dealing first with aspects of the force required, then with aspects of the trespass to real property, and last with attempts to justify forcible trespasses.

Force: The Aspects of Assault

Forcible trespass can be described as an indictable assault which follows a trespassory entry upon real property. This assault is essential to making a trespass upon property a crime at common law. The force of the entry is further characterized as "high-handed," but surely this actually describes the effect upon the person present; to the property, one trespass must feel much like another. Property cannot be put in fear of harm from an entering person, and property cannot resist an entry and thus breach the peace, but persons can. Hence the presence of a person can add to a trespassory entry an aspect of assault, and the aspect of assault creates a threat of a breach of the peace; and then all the elements of a forcible trespass are satisfied. Thus the legal function of the force in forcible trespass can be given the conventional label "assault."

Force: The Concept of Occupancy

A term is also needed to describe the status of the person present who complains of a forcible trespass. "Person in possession" is the logical first choice, and often the person present was indeed the lawful possessor, even the owner of the fee. But in some decided cases the most that could be said of this person is that his presence had gone undisturbed for some considerable period of time; he may even have been a trespasser. To use "possession" to compass both a freeholder and a trespasser strains the term.²³ And so, although "possession" might be used after carefully dissecting away all implications of title, as a matter of practical convenience it seems better to coin a special term of art, rather than to use an ancient term in a special sense. The word "occupancy" therefore describes a person peacefully present on real property with the intent to remain there, although "occupancy" so used is the author's invention and appears nowhere in the cases.

The concept of occupancy is demonstrably useful in two ways: one, in distinguishing among the three principal criminal trespasses to land

²³ There are other impediments to the orderly description of forcible trespass, directly traceable to the use of "possession," which will appear as "trespass" is elaborated below.

in North Carolina; the other, in providing a logical foundation for drawing indictments for forcible trespass.

Each of the criminal trespasses to land can be characterized by a minimum relationship of the complainant to the land trespassed upon. "Actual possession" implies occupancy plus some claim of right to occupy, even as little right as a mistaken but colorable title or lease; and actual possession is the minimum requirement for maintaining an action for forcible entry and detainer.²⁴ "Constructive possession" describes the right of a title-holder, who may never have set foot on premises, to occupy them; and with only constructive possession, one may maintain an action for entry after being forbidden.²⁵ But bare occupancy continues to be all that is required for maintaining a prosecution for forcible trespass.²⁶ This occupancy must be peaceful—that is, it must have continued without force over some period of time, so that a bare and recent trespasser cannot use the threat of a forcible trespass prosecution to deter attempts to repel him.²⁷ But beyond peaceful occupancy, no kind of possession need be shown by the prosecutor. Indeed, occupancy rather than possession is so much the essence of forcible trespass that it is possible to lay the occupancy in the title-holder if he is temporarily present but not in possession, as in the case of a landlord forbidding a forcible trespass upon land which was then leased to a tenant, even though the tenant was also present but silent.²⁸

The concept of occupancy also helps to avoid a common defect in forcible trespass indictments. Although the word "possession" need not appear in an indictment for forcible trespass, the concept of possession underlies the choice of the person in whom the occupancy is laid. As long as the complainant has legal possession, this creates no problem; but when the possessor is absent and the complainant is a bare occupant, the concept of possession presents the draftsman with a dilemma: either plead one person and prove another, which is patently improper, or fictionalize possession in one who had none. Occupancy renders this dilemma hornless: possession is not the issue at all, and the draftsman can simply name and prove the person present in fact against whom the assault was committed.

The cases bear out this solution in the form of two rules. First, the indictment for forcible trespass must allege that a named person

²⁴ *State v. Ross*, 49 N. C. (4 Jones Law) 315 (1857); *State v. Bryant*, 103 N.C. 436, 9 S.E. 1 (1889).

²⁵ *State v. Yellowday*, 152 N.C. 793, 67 S.E. 480 (1910).

²⁶ *State v. Robbins*, 123 N.C. 730, 31 S.E. 669 (1898).

²⁷ *State v. Curtis*, 20 N.C. (4 D. & B.L.) 222 (1839).

²⁸ *State v. Robbins*, 123 N.C. 730, 31 S.E. 669 (1898).

was present.²⁹ Second, the proof must follow the pleading, without the substitution of another person for the one named in the indictment. For example, an indictment alleged that *J. H.* was present in a house when the trespass was committed, but a special verdict found that *J. H.* had been absent throughout, that only his family was present, and that he had not returned until the next day. Judgment for the defendant was affirmed.³⁰ Presumably an indictment laying the occupancy in the family would have been perfectly sound on this proof.

How closely the cases lie on each side of the line of pleading and proving what this discussion calls "occupancy," and how the concept of possession has produced confusion, appears from the opposite results of two cases in the same volume of the reports. In *State v. Morgan*³¹ the indictment asserted the bare occupancy of Mary Bell in these words, which were held insufficient: "[I]nto the house of one John Bell, Mary Bell being then and there present, and forbidding . . ." But in *State v. Drake*,³² an indictment for a forcible trespass to personal property was held to be sufficient in using this language: "[D]id seize and take from the actual possession of the said William F. Miller, he being present and forbidding the same by his son and agent, William H. Miller . . ." In fact, neither John Bell in *Morgan* nor William F. Miller in *Drake* was actually present at any time during either transaction. In *Morgan*, the court could not overlook the failure of the indictment to show the relationship of Mary to John or to allege that the building was a dwelling house, either one of which assertions would have given Mary a recognizable interest in defending John's possession. In *Drake*, the assertion of a fictional possession by the son seems to have been sufficient. Neither line of reasoning would have been necessary if the concept of occupancy had been used, and both indictments would have been good without changing a word.

In later cases the court retreated somewhat from the seeming requirement of *Morgan* that some possessory interest of the occupant be pleaded. Apparently indictments suffering from this sort of defect can be amended to correct an inadvertent error as to the name of the occupant, conforming pleading to proof.³³ It is impossible to determine the impact of *State v. Davis*³⁴ on this question because the opinion does not mention the problem. The indictment laid possession of a shop in a blacksmith; the proof was that at the time of the incident

²⁹ *State v. Fort*, 20 N.C. (4 D. & B.L.) 192 (1839); *State v. Hathcock*, 29 N.C. (7 Ired. L.) 52 (1846); *State v. Ward* 46 N.C. (1 Jones Law) 290 (1854).

³⁰ *State v. Walker*, 32 N.C. (10 Ired. L.) 234 (1849).

³¹ 60 N.C. 243 (1 Win. 246) (1864).

³² 60 N.C. 238 (1 Win. 241) (1864).

³³ *State v. Sherrill*, 81 N.C. 550 (1879), 82 N.C. 694 (1880).

³⁴ 109 N.C. 809, 13 S.E. 883 (1891).

the blacksmith was about seventy-five yards away and his son was in the shop; the conviction was affirmed; and the opinion dealt primarily with the distance from the shop, from which it would appear that the presence of the son, which was not alleged, would not suffice.

Davis does raise an incidental question concerning occupancy which has not received explicit attention in any of the opinions: assuming that occupancy is not to be fictionalized, how far away from occupiable property can a person be and still be an occupant? It seems that seventy-five yards is enough, if the would-be occupant is being held out by force or threats. In an earlier opinion, the court asserted that forcible trespass could be maintained even if a house were wholly vacant; but in that case, the prosecutrix and her friends had heard the defendant coming and had run out of the house and hid in the garden.³⁵ Surely this case does not compel the conclusion that the court has abandoned the requirement that the complainant must actually occupy the property, though taken with *Davis* it suggests a certain amount of geographical leeway.

The impact of the rule forbidding the prosecution to lay possession in one person and prove occupancy in another has also been reduced, thanks to the doctrine that during a brief absence the occupancy does not cease, as long as the person named in the indictment as occupant returns while the trespasser is present. This person's occupancy is thus established whether someone else was present in the meantime or not. If the father of a family is absent overnight, for example, and does not return during the forcible trespass, the result in *Walker*³⁶ seems to be right: the occupancy ought to be laid in the family, not in the father. But if the occupant is temporarily absent for "a brief space and upon the most urgent necessity," the court says that occupancy may properly be laid in the absent person nonetheless, just so he returns in time.³⁷ In order to explain and justify this result, it is necessary to look ahead to the rule on trespass which states that a forcible refusal to leave constitutes a forcible trespass. Thus, whether the occupant returns from his temporary absence while a forcible entry is in progress,³⁸ or whether his return precipitates a forcible refusal to leave,³⁹ the occupant is personally exposed to the necessary assault. Hence the temporary absence doctrine is not a fiction, because no matter when the occupant appears, it is the defendant's forcible conduct

³⁵ *State v. Jacobs*, 94 N. C. 950 (1886).

³⁶ *State v. Walker*, 32 N.C. (10 Ired. L.) 234 (1849).

³⁷ *State v. Shepard*, 82 N.C. 614, 615 (1880).

³⁸ *State v. Shepard*, 82 N.C. 614 (1880); *State v. Lawson*, 98 N.C. 759, 4 S.E. 134 (1887); *State v. Woodward*, 119 N.C. 836, 25 S.E. 868 (1896).

³⁹ *State v. Caldwell*, 47 N.C. (2 Jones Law) 468 (1855); *State v. Conder*, 126 N.C. 985, 35 S.E. 249 (1900).

in the occupant's own presence which creates the threat of a breach of the peace.

Force: The Quantum of Force

The force involved in a common law forcible trespass is expressed as a trespass with a "strong hand." This is a direct translation from the technical expression *manu forti* in the statute of 5 Richard II, and the same quantum of force applies equally to forcible entry and detainment and to forcible trespass to real property.

An actual battery upon a person, committed in the course of a trespass to real property, undoubtedly is itself a breach of the peace and provides the strong hand needed to maintain an indictment for forcible trespass.⁴⁰

The proof of constructive force, conduct creating fear of a battery in a reasonable man, is the usual problem in forcible trespass prosecutions. If fear is a natural result of facts alleged in an indictment, fear need not even be specifically alleged.⁴¹ Fear is typically induced by persons who forcibly offer to enter property in opposition to the occupant's wishes and in the face of any resistance he may be prepared to offer. This constructive force is an assault to the person of the occupant, whether in the form of fear of immediate bodily harm in the older criminal law sense, if the trespassers make an actual offer of violence, or in the form of forcing the occupant to enter or leave a place against his will in the civil assault sense. Both of these results constitute indictable assaults in North Carolina:

It is not always necessary to constitute an assault that the person whose conduct is in question should have the present capacity to inflict injury, for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault.⁴²

The reports contain various examples of the constructive force which will suffice for forcible trespass. The bare weight of numbers of trespassers, in proportion to the occupants' numbers, will suffice: seven men to one,⁴³ or two white men and six slaves against one white man and one slave.⁴⁴ The presence of arms and weapons increases the disproportion and magnifies the danger of a breach of the peace, whether

⁴⁰ State v. McCaulless, 31 N.C. (9 Ired. L.) 375 (1849).

⁴¹ State v. Austin, 121 N.C. 620, 28 S.E. 361 (1897).

⁴² State v. Daniel, 136 N.C. 571, 575, 48 S.E. 544, 545 (1904).

⁴³ State v. Wilson, 23 N. C. (1 Ired. L.) 32 (1840).

⁴⁴ State v. Pollock, 26 N.C. (4 Ired. L.) 305 (1844).

there are three men armed with a rock, a stick, a whip, and a pistol,⁴⁵ or just one man armed with a revolver.⁴⁶ A man, his wife, and his two daughters, who invaded a dooryard, cursed and threatened the prosecutrix, and threw "certain filth and dead carcasses" into the house through the door, were said to have "a tendency to alarm some, and cause others to commit breaches of the peace."⁴⁷

The identity of the person forbidding the trespass is also material, and the law assumes that women, both white⁴⁸ and colored,⁴⁹ are especially likely to be put in fear by shows of force or even by words, as in *State v. Hinson*,⁵⁰ where the defendant rode into the prosecutrix's dooryard and cursed her from horseback but made no offer of violence.⁵¹

Words alone, however, cannot ordinarily so intimidate a man as to constitute strong-handed force, other circumstances being equal.⁵² A rousing argument, accompanied by a trespass to land but not by any threat or appearance of force, does not constitute forcible trespass:

Here, the alleged trespass was committed by one person on the actual possession of two who were both on the spot. . . . [T]he bare words of one man unaccompanied by any exhibition of force, are not sufficient or calculated to excite terror or to intimidate two men of ordinary courage and firmness, as the law assumes them to be.⁵³

And moving into lands under a title and building a house there, outside the prosecutor's close, is not of itself "calculated to frighten a man of ordinary firmness."⁵⁴

But putting another person in fear of his safety is only one type of breach of the peace. In *State v. Pearman*⁵⁵ the court reached a sound result on the fundamental proposition that forcible trespass protects the public peace generally, as well as the rights of particular individuals. Here three defendants broke open a farm building and took away personal property in a title dispute, the prosecutor being present and forbidding the trespasses but apparently not being intimidated beyond failing to offer any resistance. Said the court, "'Putting in fear' is not necessary. If it were, then one man's guilt would depend upon

⁴⁵ *State v. Buckner*, 61 N.C. (Phil. Law) 558 (1868).

⁴⁶ *State v. Bordeaux*, 47 N.C. (2 Jones Law) 241 (1855).

⁴⁷ *State v. Tolever*, 27 N.C. (5 Ired. L.) 452, 454 (1845).

⁴⁸ *State v. Simpson*, 12 N.C. (1 Dev.L.) 504 (1828).

⁴⁹ *State v. Elks*, 125 N.C. 603, 34 S.E. 109 (1899).

⁵⁰ 83 N.C. 640 (1880).

⁵¹ In *State v. Lloyd*, 85 N.C. 573, 576 (1881), the court said that Hinson was armed, which would put an entirely different light on the case.

⁵² *State v. Lloyd*, 85 N.C. 573 (1881); *State v. Mills*, 104 N.C. 905, 10 S.E. 676 (1889).

⁵³ *State v. Covington*, 70 N.C. 71, 74 (1874).

⁵⁴ *State v. Ross*, 49 N.C. (4 Jones Law) 315, 317 (1857).

⁵⁵ 61 N.C. (Phil. Law) 371 (1867).

another man's nerve. Force is necessary to constitute the offense, because it tends to a breach of the peace; and this is done whether the owner is put in fear or not; and the rather if he is not put in fear."⁵⁶ Here is no academic discussion of the objective test of putting in fear: this justice knew from living in a lawless time that a friendly fist fight is as much a breach of the peace and dignity of the State as a trespass on real property accomplished through intimidating the helpless occupant.

Trespass: The Real Property

Houses constitute real property within the meaning of forcible trespass, though it is best to use the term "dwelling house" in indictments.⁵⁷ But what is a dwelling-house? A two-room structure, used in fact for living quarters by a steward and unattached to any other residential building, but within the master's curtilage and facing an inner court, has been held not to be a house distinct from the master's house,⁵⁸ though servants can be tenants of separate dwelling houses.⁵⁹ A shed attached to a dwelling-house and not used for sleeping quarters, but only for storage of household goods, is not a house.⁶⁰

The concept of the curtilage has only had limited significance in the law of forcible trespass. Proof of a trespass only into a dooryard will support conviction of forcible trespass to occupants who were in the house or on a porch.⁶¹ No case has presented the problem whether alleging forcible trespass against an outbuilding within the curtilage would be supported by proof of occupancy of the dwelling house. One case dealt with a corncrib, which on the facts might have been within the curtilage, but there the forcible trespass was to personal property, the corn.⁶² Alleging the trespass outside the curtilage and proving it within constitutes a fatal variance between pleading and proof.⁶³

Structures other than houses may be the subject of forcible trespass to real property: a milldam,⁶⁴ a blacksmith shop,⁶⁵ a sawmill,⁶⁶ a commercial livery stable,⁶⁷ and a general store.⁶⁸

⁵⁶ *Id.* at 372.

⁵⁷ *State v. Morgan*, 60 N.C. 243 (1 Win. 246) (1864).

⁵⁸ *State v. Curtis*, 20 N.C. (4 D. & B.L.) 222 (1839).

⁵⁹ *State v. Smith*, 100 N.C. 466, 6 S.E. 84 (1888).

⁶⁰ *State v. Pridgen*, 30 N.C. (8 Ired. L.) 84 (1847).

⁶¹ *State v. Tolever*, 27 N.C. (5 Ired. L.) 452 (1845); *State v. Bogue*, 31 N.C. (9 Ired. L.) 360 (1849); *State v. Hinson*, 83 N.C. 640 (1880).

⁶² *State v. Drake*, 60 N.C. 238 (1 Win. 241) (1864).

⁶³ *State v. Smith*, 24 N.C. (2 Ired. L.) 127 (1841).

⁶⁴ *State v. Wilson*, 23 N.C. (1 Ired. L.) 32 (1840).

⁶⁵ *State v. Davis*, 109 N.C. 809, 13 S.E. 883 (1891).

⁶⁶ *State v. Woodward*, 119 N.C. 836, 25 S.E. 868 (1896).

⁶⁷ *State v. Conder*, 126 N.C. 985, 35 S.E. 249 (1900).

⁶⁸ *State v. Tyndall*, 192 N.C. 559, 135 S.E. 451 (1926).

A person present in a field under cultivation and forbidding a trespass with high-handed force may charge the entrant with a forcible trespass.⁶⁹ Standing crops themselves are also the subject of forcible trespass when they are gathered and taken away by the trespasser in a continuous transaction.⁷⁰ Timberlands are the subject of forcible trespass,⁷¹ and other real fixtures in their capacity as real property also seem to be the subject of forcible trespass.⁷² There has been some question as to whether public roads are the subject of forcible trespass. They are doubtless real property, but the prosecutor may have no protectable interest in forbidding the defendants to enter upon them. Two cases⁷³ held that rural roads were private property subject to the public's easement of peaceable passage only, and convictions for forcible trespass were upheld. The other case on this point states that municipal streets are public property⁷⁴ and as such would not be occupiable by a private person, but reversal of the conviction was based upon an insufficient showing of force.

There is no reason to suppose that forcible trespass is limited to the types of real property enumerated above. Any real property which can in fact be privately occupied can apparently be the subject of forcible trespass: even a stone quarry⁷⁵ or a small island in Eglow's Sound.⁷⁶

Trespass: Actual Trespassory Entries

In the civil law of trespass, every unpermitted entry upon the real property of another is unlawful and hence is impliedly forbidden.⁷⁷ In the criminal law of forcible trespass, because the trespass must be wilful as well as unlawful, the forbidding of the entry must be more explicit, though it may be implied from the circumstances. The simplest actual forcible entry occurs, therefore, when the occupant sees the would-be trespasser coming, while still not trespassing, and forbids him to enter upon the property. If the person enters wilfully after being forbidden,

⁶⁹ *State v. Robbins*, 123 N.C. 730, 31 S.E. 669 (1898); *State v. Lawson*, 123 N.C. 740, 31 S.E. 667 (1898).

⁷⁰ *State v. Simpson*, 12 N.C. (1 Dev.L.) 504 (1828); *State v. Covington*, 70 N.C. 71 (1874); *State v. Laney*, 87 N.C. 535 (1882); *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898) (dictum).

⁷¹ *State v. Pollok*, 26 N.C. (4 Ired. L.) 305 (1844); *State v. Elks*, 125 N.C. 603, 34 S.E. 109 (1899); *State v. Davenport*, 156 N.C. 596, 72 S.E. 7 (1911).

⁷² *State v. Graves*, 74 N.C. 396 (1876) (*semble*), and *State v. Webster*, 121 N.C. 586, 28 S.E. 254 (1897).

⁷³ *State v. Buckner*, 61 N.C. (Phil. Law) 558 (1868), and *State v. Widenhouse*, 71 N.C. 279 (1874).

⁷⁴ *State v. Lloyd*, 85 N.C. 573 (1881).

⁷⁵ *State v. Childs*, 119 N.C. 858, 26 S.E. 36 (1896).

⁷⁶ *State v. Ward*, 46 N.C. (1 Jones Law) 290 (1854). *But see* *State v. Newbury*, 122 N.C. 1077, 29 S.E. 367 (1898), which suggests that even actual presence and forbidding a trespass upon unimproved and unused property would not give rise to a criminal action.

⁷⁷ *Dougherty v. Stepp*, 18 N.C. (1 D. & B.L.) 371 (1835).

with some show of force, his entry is actually forcible, though the force may be only "constructive," that is, putting the occupant in fear.

The forbidding can be purely oral and without even an offer of forcible resistance, provided the force offered by the entrant is reasonably sufficient under the circumstances to overwhelm any resistance which might be offered.⁷⁸ The prosecutor need not even occupy the property trespassed upon to the full extent possible: shouting a prohibition to enter a timberlot from twenty yards away may, under the circumstances, be sufficient prohibition.⁷⁹ It is the best practice to allege in the indictment that the entry was forbidden; then the jury may infer from the circumstances of the entry both the unlawfulness of the entry—that the occupant forbade it—and the wilfulness of the entry—that the defendant knew that he was forbidden to enter. Of course, no person should have to be told that he is impliedly forbidden to enter or do violence to an occupied dwelling house; he need not be expressly forbidden by the occupant.⁸⁰ But once alleged, the forbidding may be proved by evidence of past ill feeling between the occupant and the trespasser,⁸¹ or by evidence that the defendant had previously been forbidden to visit the prosecutor's daughter.⁸² And when the rightful possessor is not an occupant but arrives on the scene of the trespass after an entry by several persons is in progress, his forbidding is sufficient whether none,⁸³ only part,⁸⁴ or all of the trespassers⁸⁵ have entered.

If the alleged trespass consists of a forbidden entry, the defendant can defend on the ground that his entry was permitted, or he can argue that the forbidding was ineffective because he was himself the occupant.

Ordinarily the defense of permission is no problem: whether permission was given or not is a fact within the province of the jury.⁸⁶ The extent to which one person's permission can bind another person is more troublesome. A servant can in fact forbid a trespassory entry in the name of his master, and if the entry is made forcibly despite the forbidding, an indictment laying the occupancy in the master should be provable by presence of the servant, whose occupancy is only that of his master. No case has arisen where a master gave permission to enter and a servant forbade the entry, leading to a forcible entry, but

⁷⁸ *E.g.*, *State v. Simpson*, 12 N.C. (1 Dev.L.) 504 (1828).

⁷⁹ *State v. Elks*, 125 N.C. 603, 34 S.E. 109 (1899).

⁸⁰ *State v. Austin*, 121 N.C. 620, 28 S.E. 361 (1897).

⁸¹ *State v. Bordeaux*, 47 N.C. (2 Jones Law) 241 (1855).

⁸² *State v. Caldwell*, 47 N.C. (2 Jones Law) 468 (1855).

⁸³ *State v. Lawson*, 98 N.C. 759, 4 S.E. 134 (1887).

⁸⁴ *State v. Woodward*, 119 N.C. 836, 25 S.E. 868 (1896).

⁸⁵ *State v. Davis*, 109 N.C. 809, 13 S.E. 883 (1891).

⁸⁶ *But see State v. Emory*, 51 N.C. (6 Jones Law) 133 (1858).

presumably the servant's occupancy would be insufficient to support a prosecution.⁸⁷

The defense of occupancy comes up in two forms: in one, the trespasser occupies adversely to the peaceful occupant, and the question is the length of time necessary to establish the onetime trespasser as successor occupant. In *State v. Childs*⁸⁸ the nature of the property was a prime consideration. The court reasoned that one can only occupy a stone quarry during working hours; that a sort of constructive occupancy continued through the night, when the prosecutor peacefully occupied the quarry; and therefore that the occupier could not be guilty of a forcible trespass upon his own occupancy in evicting the prosecutor by force. This seems plainly to go too far, erecting a fictional occupancy where it only excuses a breach of the peace.⁸⁹ But peaceful occupancy of timberlands by trespassers for three days was enough for them to maintain a prosecution for forcible trespass.⁹⁰

In the other form of the defense of occupancy, the defending entrant is a master and the prosecutor is his ex-servant. Ordinarily the servant occupies under his master's occupancy, and his status estops him to set up a separate occupancy. But when the servant has been dismissed from his master's service and is allowed to remain for a time in quarters owned by the master, whether the servant can claim to be an independent occupant apparently depends upon whether or not the quarters constitute a separate dwelling house. The master can bodily throw the ex-servant out of the master's own dwelling house, using no stronger hand than is necessary to expel him, as he would a trespasser.⁹¹ But if the ex-servant has been allowed to remain in peaceful occupancy of a separate dwelling house not occupied by the master, he becomes a tenant at sufferance, and as such he has independent occupancy sufficient to compel the master-now-landlord to resort to civil process in eviction.⁹²

Where the person who enters by force defends on the ground that his title rather than his occupancy prevents his entry from being a trespass, he is completely wrong; and he has committed a forcible tres-

⁸⁷ The converse situation, where the servant or some other person subordinate to the occupant has permitted an entry against the occupant's will, has arisen, but since this involves erection of a fictional entry, it will be discussed in the following section.

⁸⁸ 119 N.C. 858, 26 S.E. 36 (1896).

⁸⁹ *State v. McCauley*, 31 N.C. (9 Ired. L.) 375 (1849), seems to contain the same rationale as to the sufficiency of establishing an adverse occupancy.

⁹⁰ *State v. Davenport*, 156 N.C. 596, 72 S.E. 7 (1911).

⁹¹ Said the supreme court in *State v. Curtis*, "When Mr. Curtis dismissed the man from his service, he had a right also to exclude him from his premises; provided, as in this case, he did so without injury to his person, or other breach of the peace." 20 N.C. (4 D. & B.L.) 222, 227 (1839).

⁹² *State v. Bennett*, 20 N.C. (4 D. & B.L.) 43 (1838); *State v. Smith*, 100 N.C. 466, 6 S.E. 84 (1888).

pass to the occupant, though not, in the civil sense, to the property. "The gist of the offence of forcible trespass is a high handed invasion of the actual possession of another, he being present—title is not drawn in question."⁹³ A peaceful occupant may maintain a criminal action for forcible trespass against any person who seeks forcibly to enter, even under a title upon which he could secure a court order putting him in possession. In securing such an order, title would be put at issue, but in forcible trespass proceedings, as one opinion stated, "The true question was, not who had the *best right* to possess, but who had the actual possession—the *possessio pedis* of the law."⁹⁴

The peaceful occupant may, of course, be a freeholder or a leaseholder within the protection of the statutes of forcible entry and detainer, and such a person has a choice of remedies under the criminal trespass laws. But he may maintain forcible trespass, when he could not prosecute for forcible entry and detainer, as a tenant at will⁹⁵ or a tenant at sufferance,⁹⁶ or even as a trespasser if in peaceful occupancy.⁹⁷ Occupancy may be proved by parol, without documentary proof of title,⁹⁸ and even in the face of a title allegedly procured from the occupant by fraud.⁹⁹ As a defense, title is less than unavailing: evidence of the defendant's title is irrelevant and should be excluded on trial.¹⁰⁰

Trespass: Constructive Trespasory Entries

If a person has gained entry into premises by permission or a license and he is to be made accountable criminally for a strong-handed refusal to leave, his permitted entry must fictionally be made trespasory: it must be rendered a constructive trespasory entry.

Permission to enter real property is of various kinds: some permission must usually be given explicitly, such as permission to enter a dwelling house; some may be implied in fact, such as permission to enter a business establishment; and some is given by law, such as permission to use a public thoroughfare or a public building. But however permission to enter was first given, it is impliedly revoked by conduct on the premises tending to produce a breach of the peace. Sometimes revocation of permission by the permitter¹⁰¹ or by another

⁹³ State v. McCauley, 31 N. C. (9 Ired. L.) 375, 376 (1849).

⁹⁴ From the charge to the jury in State v. Pollok, 26 N.C. (4 Ired. L.) 305, 307 (1844).

⁹⁵ State v. Woodward, 119 N.C. 836, 25 S.E. 868 (1896).

⁹⁶ State v. Mace, 65 N.C. 344 (1871) (dictum).

⁹⁷ State v. Talbot, 97 N.C. 494, 2 S.E. 148 (1887); State v. Smith, 100 N.C. 466, 6 S.E. 84 (1888).

⁹⁸ State v. Wilson, 23 N.C. (1 Ired. L.) 32 (1840).

⁹⁹ State v. Bennett, 20 N.C. (4 D. & B.L.) 43 (1838).

¹⁰⁰ *Ibid.*; State v. Webster, 121 N.C. 586, 28 S.E. 254 (1897); State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

¹⁰¹ State v. Hawkins, 125 N.C. 690, 34 S.E. 537 (1899).

occupant¹⁰² is explicit, prior to any threat of a breach of the peace, and if so, the revocation must be followed by a reasonable period for the entrant to absorb the idea that he is not welcome and to leave. Thereafter, if he refuses to leave and makes a display of force on the same order as that creating a forcible entry, he may be prosecuted as a forcible trespasser. No uniform doctrine has ever developed for constructing a forcible trespass through a fictional forcible entry in these circumstances.

In rare cases the trouble starts when the occupant does not ratify permission to enter given by another person who has no separate occupancy. If the entrant is to be charged with a forcible trespass for refusing thereupon to leave, the court must find a constructive prohibition to enter which legally superseded the actual permission from the beginning. For example, a servant is capable of giving permission to enter in fact, but the servant's occupancy of premises is only that of his master. Hence, if the servant gives permission against his master's will, and the master returns and orders the entrant to leave, and the entrant refuses with a show of force, in order to construct a forcible entry the court must make one of two findings in defiance of observable fact: first, that the servant did not give permission, or second, that refusal to leave rendered the peaceful entry forcible. This situation arose in *State v. Pridgen*,¹⁰³ but the court held for the defendant on another ground; and in ordering a new trial, the court suggested yet a third fiction, that collusion between the entrant and the servant might have vitiated the servant's permission. In the other case of permission to enter which was revoked by one who did not give it,¹⁰⁴ the defendant had entered a house peacefully, by permission of the prosecutor's wife, while the prosecutor was temporarily absent. When the prosecutor returned, the defendant refused to leave on demand and made a sizeable show of force. In sustaining the conviction for forcible trespass, the court took no notice that it was doing any violence to the wife's permission, though it consciously fictionalized the forcible entry.

It has been far more common for the entrant to resist an order to leave given by the same person who originally permitted him to enter. Under the statute of Henry VI,¹⁰⁵ forcibly refusing to leave premises entered peacefully was made a forcible detainer, and the term "forcible detainer" as applied to the common law of criminal trespass appeared several times in the cases. But no conviction of a forcible detainer at common law has ever been upheld; many doubts have been

¹⁰² *State v. Caldwell*, 47 N.C. (2 Jones Law) 468 (1855).

¹⁰³ 30 N.C. (8 Ired. L.) 84 (1847).

¹⁰⁴ *State v. Caldwell*, 47 N.C. (2 Jones Law) 468 (1855).

¹⁰⁵ The Forcible Entry Act, 1429, 8 Hen. 6, c. 9.

expressed as to its existence; and therefore it is unlikely that "forcible detainer at common law" ever was a crime in North Carolina or elsewhere. The origin of forcible detainer at common law seems to be found in English experience under the statutes. Whether the original entry must have been unlawful albeit peaceful, in order to support an action for forcible detainer under the statutes, was unsettled in England until 1832, when the court finally ruled that unlawfulness must be alleged.¹⁰⁶ The same problem was raised by dictum in the first North Carolina case on forcible detainer at common law,¹⁰⁷ where the defendant had entered land under a sheriff's deed. His entry was held to have been lawful as well as peaceful, and his conviction for forcible detainer at common law was reversed. Later cases followed the same line: a tenant could not be convicted of forcible detainer at common law in holding over after his lease had expired, because he had entered lawfully under the lease¹⁰⁸ or under color of a lease;¹⁰⁹ and a general verdict of guilty of "common law forcible entry and detainer," when the evidence supported only the detainer, was bad for failing to show an unlawful entry.¹¹⁰ The court has suggested in one other case that the defendants might be guilty of a forcible detainer;¹¹¹ and, most recently, an indictment for forcible detainer was mentioned as having been abandoned on trial.¹¹²

During the fitful history of forcible detainer at common law, two other fictional devices for constructing forcible trespasses out of peaceful entries made single appearances: "continuous transaction," a term probably borrowed from the law of larceny and used in a situation where the temporary absence doctrine alone would have been more satisfactory;¹¹³ and an unnamed concept resembling the doctrine of continuing transactions, in the sense that carrying stolen property through several counties successively is regarded as a fresh taking in each one: "[I]t was a fresh aggression to pass with a strong hand over other parts of the field, when the prosecutor was present forbidding it, with demonstrations of violence which intimidated and overcame resistance."¹¹⁴ Neither of these theories was ever used again, though the conviction for forcible trespass was upheld in each case.

The only theory of constructive forcible entry which has been both successful and respectable is that relic of the *Six Carpenters' Case*,¹¹⁵

¹⁰⁶ *The King v. Oakley*, 4 B. & Ad. 307, 110 Eng. Rep. 470 (K.B. 1832).

¹⁰⁷ *State v. Johnson*, 18 N.C. (1 D. & B.L.) 324 (1835).

¹⁰⁸ *State v. Godsey*, 35 N.C. (13 Ired. L.) 348 (1852).

¹⁰⁹ *State v. McCauley*, 31 N.C. (9 Ired. L.) 375 (1849).

¹¹⁰ *State v. Ward*, 46 N.C. (1 Jones Law) 290 (1854).

¹¹¹ *State v. Laney*, 87 N.C. 535 (1882).

¹¹² *State v. Tyndall*, 192 N.C. 559, 135 S.E. 451 (1926).

¹¹³ *State v. Caldwell*, 47 N.C. (2 Jones Law) 468 (1855).

¹¹⁴ *State v. Talbot*, 97 N.C. 494, 495, 2 S.E. 148, 149 (1887).

¹¹⁵ 8 Co. 146a, 77 Eng. Rep. 695 (K.B. 1610).

trespass *ab initio*. The doctrine was first used approvingly in North Carolina in a civil case in 1868;¹¹⁶ and at the same term of court, *State v. Buckner*¹¹⁷ not only adopted it for forcible trespass but also applied it with fidelity to the original model. The defendants, as members of the public, enjoyed an easement of peaceful passage along the highway crossing the prosecutor's property, and hence their entry was given by law, as was that of the celebrated carpenters into the inn; but when they threatened and frightened the prosecutor, they became trespassers from the outset:

Grant that the defendants had a right to pass along the way, and that the entry, if peaceable, was not even a civil trespass, yet as soon as they committed the violence charged, they were trespassers *ab initio*. This would have been so, if they had stood in the middle of the road; but they left the road and went up to the gate and stood there.¹¹⁸

The fidelity of application has diminished somewhat in the two later cases using trespass *ab initio*, in both of which the defendant began as a business invitee.¹¹⁹ No case, however, has yet carried trespass *ab initio* all the way into the private home, for example; and so the full scope of forbidden conduct available but never occupied under the doubtful theory of forcible detainer at common law remains unoccupied by trespass *ab initio*.

Justifications: Self-Help Restitution

Justifications for forcible trespasses, as distinct from defenses to the various elements, remain to be discussed. In justifying, the defendant attempts to show that even though he entered real property with a strong hand after being forbidden, the law should not regard this conduct as a forcible trespass.

One such justification for forcible trespass is frankly forcible self-help restitution. From the words of all the statutes of forcible entry and detainer, one would think that self-help restitution was plainly forbidden; and the whole thrust of common law forcible trespass would seem to forbid breaching the peace in the name of reclaiming possession. But a few cases both in England and in North Carolina have suggested—though none has ever squarely so held—that a forcible tres-

¹¹⁶ *Parish v. Wilhelm*, 63 N.C. 50 (1868).

¹¹⁷ 61 N.C. (Phil. Law) 558 (1868).

¹¹⁸ *Id.* at 560. The court in *State v. Widenhouse*, 71 N.C. 279 (1874), endorsed *Buckner* entirely, in a very similar case, and the court there again used the term "trespasser *ab initio*."

¹¹⁹ *State v. Wilson*, 94 N.C. 839 (1886); *State v. Conder*, 126 N.C. 985, 35 S.E. 249 (1900). Few present-day North Carolinians would admit of a doctrine which suggested that the customers of general business establishments enter them as a matter of right given by law; but see Pollitt, *Dime Store Demonstrations*, 1960 *Duke L.J.* 315, 358-65.

pass may be justified in the name of self-help restitution. The suggestion seems to have originated in Hawkins's *Pleas of the Crown*, but Sergeant Hawkins can hardly be blamed for the use to which his words were put. He had described the times before the first forcible entry statute in these words: "It seems that at the Common Law a man disseised of any Lands, or Tenements, (if he could not prevail by fair Means,) might lawfully regain the Possession thereof by Force. . . ."¹²⁰ By taking these words from section one absolutely at their face value and ignoring section two,¹²¹ the King's Bench in 1799 produced this dictum:

Perhaps some doubt may hereafter arise respecting what Mr. Serjt. Hawkins says, that at common law the party may enter with force into that which he has a legal title. But without giving any opinion concerning that dictum one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched, it appearing by this indictment that the defendants unlawfully entered, and therefore this Court cannot intend that they had any title.¹²²

The dictum was never pursued in England, but it was picked up in North Carolina in 1848, when the court, freely paraphrasing the opinion quoted, quite unnecessarily announced the possibility "that at common law one disseised has a right to enter into his lands by force, if he can do so without committing a battery on the person in possession."¹²³

In *State v. Ross*¹²⁴ the court held that the defendants, who held a deed from the prosecutor, had not entered with sufficient force to be guilty of forcible trespass; but after quoting the passages from Hawkins substantially as given above, the court added, "[W]e find it an unsettled question, whether one who has a right of entry may not use force, if necessary, to assert his right, according to the common law."¹²⁵ Justice Pearson then went on to create some real confusion, which would eventually have to be resolved, by his final "suggestion":

Perhaps it will be found that the authorities may be reconciled on this distinction: One having a right of entry, may, at common law, use force, provided it does not amount to an actual *breach of the peace*; whereas one, not having a right of entry, is guilty

¹²⁰ 1 HAWKINS, *PLEAS OF THE CROWN* ch. 64, § 1 (1st ed. 1716).

¹²¹ "But this Indulgence of the Common Law . . . having been found by Experience to be very prejudicial to the publick Peace . . . it was thought necessary by many severe Laws to restrain all Persons from the use of such violent Methods of doing themselves Justice." *Id.* § 2.

¹²² *The King v. Wilson*, 8 Term R. 357, 364, 101 Eng. Rep. 1432, 1435 (K.B. 1799).

¹²³ *State v. Whitfield*, 30 N.C. (8 Ired. L.) 315, 317 (1848).

¹²⁴ 49 N.C. (4 Jones Law) 315 (1857).

¹²⁵ *Id.* at 317.

of a trespass, indictable at common law, if he enters with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. This, however, is merely a suggestion.¹²⁶

There the justification of self-help restitution remained for thirty years.

In 1880, Chief Justice Smith, hinting that the *Ross* suggestion had been long since resolved by the statutes of forcible entry and detainer, still shied away from ruling that an entry by a landlord against a hold-over tenant was lawful though forcible and hence was justified: "It is sufficient to say the indictment charges an unlawful entry, and in the absence of evidence of a rightful claim it must be assumed not to exist, and an unsustained claim cannot protect the act of violence."¹²⁷

It remained for a private warfare case,¹²⁸ on the scale if not in the style of an English battle of barons, to raise and settle once and for all the flimsy doubts raised in *Whitfield*, *Ross*, and *Shepard*. Two timber companies had a dispute over the title to timberland in the Dismal Swamp. Apparently the employers of the defendant lumberjacks had already gone to court in North Carolina in a civil action for possession of the land and for an injunction, but they had been unable to secure service of process on the rival lumber company, whose lumberjacks were the prosecutors here, because the rival company was a Virginia corporation and because the prosecutors could avoid service of process by stepping across the state line. In order to occupy the entire tract in dispute, the defendant Davenport and some forty other men invaded the lumber camp of the other company and demolished and burned three tarpaper shacks in which the rival lumberjacks had been living for three days. No physical resistance was offered by the ousted lumbermen, apparently because of the overwhelming force offered by the defendants. The defendants argued that they had entered the lumber camp lawfully and in defense of their right to occupy the whole of the timber tract in dispute. In answering this contention, Justice Walker first paraphrased the quotation from *Ross*, and then he said of self-help forcible restitution:

This doctrine, if it ever had any real existence at the common law, and this is extremely doubtful when the authorities are carefully examined and considered, has long since been repudiated by the courts and abrogated by statute. . . :

[I]t is very sure that the law has been changed by statute, both in England and in this country, so that it is plain and unmistakable.¹²⁹

¹²⁶ *Id.* at 318-19.

¹²⁷ *State v. Shepard*, 82 N.C. 614, 617 (1880).

¹²⁸ *State v. Davenport*, 156 N.C. 596, 72 S.E. 7 (1911).

¹²⁹ *Id.* at 604-05.

Justifications: Execution of Process

Another justification occasionally offered in a prosecution for forcible trespass is that the forcible trespass was committed in the course of executing legal process.

The strong-handed execution of *fieri facias*, a civil process, upon personal property located within a dwelling house has been held to be a forcible trespass, under the general doctrine that a man's home is his castle.¹³⁰ But this is an exception; apart from dwelling houses, force may be used in levying execution upon either real or personal property.¹³¹ Statutory authority determines whether force may be used in executing other civil processes against real property, including dwelling houses. For example, a court order to evict a holdover tenant contemplates the use of force if necessary, and the sheriff and his posse are protected from a prosecution for forcible trespass if the process issued from a court of competent jurisdiction, even if it was issued upon a mistake of law or fact.¹³²

Process issued in support of criminal actions justifies the use of strong-handed force against all types of real property, so long as the process is superficially valid and has been issued in good faith. But if the process is void for want of authority in the court to issue it, whether because of improperly conducted proceedings¹³³ or because the court had no jurisdiction of the offense charged,¹³⁴ or if the process was issued maliciously and in an effort to harass the occupant,¹³⁵ then an action for forcible trespass may be maintained against the peace officer and others who assist him in forcibly executing the process.

Justifications: Eminent Domain

The third justification offered for forcible trespass to land is forcible entry under the power of eminent domain. To some extent this resembles entry under a court order contemplating the use of force, but it would be shocking to hear a public or private body vested with the power of eminent domain assert that it could breach the public peace freely and with impunity in taking private property for public use. However this may be, in none of the cases discussed here was a court

¹³⁰ *State v. Armfield*, 9 N.C. (2 Hawks) 246 (1822); *State v. Whitaker*, 107 N.C. 802, 12 S.E. 456 (1890).

¹³¹ *State to use of Sutton v. Allison*, 47 N.C. (2 Jones Law) 339 (1855).

¹³² *State v. Ferguson*, 67 N.C. 219 (1872).

¹³³ *State v. Anders*, 30 N.C. (8 Ired. L.) 15 (1847) (order of restitution issued upon improperly conducted inquisition for forcible entry and detainer).

¹³⁴ *State v. McDonald*, 14 N.C. (3 Dev.L.) 468 (1832) (warrant to search for runaway slaves issued by justice of the peace, when search warrants could issue only to search for stolen property—and justices had no jurisdiction over larceny); *State v. Yarborough*, 70 N.C. 250 (1874) (restitution ordered by justice of the peace after jurisdiction had been abolished by the Constitution of 1868).

¹³⁵ *State v. Sneed*, 84 N.C. 816 (1881) (*semble*).

order in effect: the property taken had only been identified and condemned by the authorities vested with the power of eminent domain.

Two cases involved towns. In one, the town of Reidsville passed an ordinance decreeing that a street be widened. The effect of the widening was to leave the prosecutor's fence encroaching upon the street. The defendants, employees of the town, tore down the fence, with the prosecutor present and forbidding on the ground that he had not yet been compensated for the taking. Said the court,

We think . . . that the town authorities . . . may at once proceed, when they have determined on the enlargement of a street, to have the work done, and no private owner can offer forced resistance, for the sole reason that his land has not been designated, condemned and paid for

As the persons indicted used no unnecessary force in carrying out the orders of the commissioners in enlarging the width of the street, they have not committed the illegal act charged¹³⁶

Although the expression "unnecessary force" raises the possibility that the reversal of the forcible trespass conviction was based upon insufficient force, the facts of the case show that the number of defendants would have constituted sufficient force under the circumstances to threaten a breach of the peace.

That eminent domain is not a defense but a justification was made clear in 1905. The town of Creedmoor voted to lay out a street across the prosecutor's property, and the prosecutor asked for a jury trial in the superior court on the issue of notice of the taking. In the meantime, the defendants, who included the mayor, entered the property in spite of the prosecutor's presence and forbidding, and they were charged with a forcible trespass. Holding that condemnation was a political act, that the prosecutor was not entitled to notice and a hearing, and that condemnation gave the town the immediate right to enter without appraisal, let alone payment of compensation, the court said this about justification of the force: "We assume that the acts of the defendant, Lyon, who was mayor, and his associates, constituted a forcible trespass unless they were duly authorized to enter upon and take possession of said land and open it as a public street."¹³⁷ The court held that the entry was duly authorized and affirmed judgment for the defendants on a special verdict.

In the last case, a farm owner was unsuccessful in trying to keep the Watauga & Yadkin River Railroad Company off his pasture. The railroad had surveyed the route, and the superior court had refused to enjoin its passage. The prosecutor dug a trench across the route along

¹³⁶ *State v. Lyle*, 100 N.C. 497, 502-03, 6 S.E. 379, 381 (1888).

¹³⁷ *State v. Jones*, 139 N.C. 613, 614, 52 S.E. 240 (1905).

his property line, stretched a strand of barbed wire there, and took up a position on his side of the wire with two double-barrelled shotguns and two boxes of shells. The railroad workers did not accept his challenge. They sent for the local constable, who arrested the prosecutor, admittedly without a warrant. In overturning the conviction of the railroad workers for forcible trespass, Chief Justice Clark slipped past the crucial point in the case a trifle quickly: "[H]ere the defendants have entered under the right of eminent domain, and the company was entitled to possession, having surveyed and located the right of way and entered thereupon for the construction of the road."¹³⁸ The opinion does not explain how the railroad was so far in occupancy, by having made a survey, that it remained constructively in an occupancy paramount to that of the prosecutor for forcible trespass purposes. Justice Walker dissented. Citing a number of familiar forcible trespass cases on the nature of the crime as an offense against occupancy, he argued that this case was the same as a forcible entry upon an invalid warrant: undeniably the prosecutor was in actual and peaceful occupancy; and granting that the railroad company's title was paramount, the courts were open, and the railroad could have secured an order to eject the prosecutor, without resorting to forcible self-help.

None of the eminent domain cases have explained the doctrinal mechanism by which they justify forcible trespasses. The rationale may be that the condemnor, holding its power as a delegate of the state, cannot be proceeded against in the state's courts for exercising the state's power. On the other hand, forcible trespass is a crime by people against people; and there would seem to be no overwhelming public policy in favor of an exception to the general laws, allowing condemnors acting under color of state authority to breach the public peace.

CONFUSIONS AND DISTINCTIONS

Confusions

It cannot be denied that the court has not always understood either the history of¹³⁹ or the distinction between¹⁴⁰ forcible entry and detainer and forcible trespass. There is even a short string of cases which

¹³⁸ *State v. Jones*, 170 N.C. 753, 755, 87 S.E. 235, 236 (1915).

¹³⁹ "This indictment is under the statute [of forcible entry and detainer], and that it is a most wise and beneficial statute, appears in the fact, that although from its antiquity it has become a part of the common law, yet it is brought forward and re-enacted in the statute law of most, if not all the States of the Union." *State v. Eason*, 70 N.C. 88, 92 (1874).

¹⁴⁰ "The defendant was indicted for forcible entry and detainer (The Code, sec. 1028), which differs from forcible trespass in that the entry is committed in the absence of the person claiming possession (*S. v. Laney*, 87 N.C., 535), gist being the forcible entry as well as withholding possession by the strong hand after the return of the party who was in possession." *State v. Leary*, 136 N.C. 578, 48 S.E. 570 (1904) (Clark, C.J.).

tried to establish a rule that "forcible trespass" applied only to personal property and that "forcible entry" applied to real property.¹⁴¹ Justice Clark first doubted this distinction,¹⁴² but later he picked up the idea and adapted it to support his apparent belief that common law "forcible entry" was the same as forcible entry and detainer.¹⁴³ This means of distinction between real and personal property crimes has not been heard from again, but Justice Clark's belief in the identity of forcible trespass and forcible entry and detainer, which he never expressed in so many words, has been adopted without discussion in this century.

The pressure to merge forcible trespass and forcible entry and detainer has always been strong, and so have the efforts to keep the two crimes distinct. Such epithets as "confusion" and "merger" are not, however, special pleading directed toward the renaissance of forcible trespass: the most recent efforts to preserve the separation have been directed toward maintaining the independence of forcible entry and detainer against mongrelization with forcible trespass, and not vice versa.

*State v. Eason*¹⁴⁴ had raised the question whether the complainant's occupancy must be proved in a prosecution for forcible entry and detainer. Justice Merrimon answered this question negatively in *State v. Bryant*,¹⁴⁵ where he stated that pleading and proving "actual possession" was sufficient: "By actual possession is not meant that the person having it is continuously present in person on the land, but that he actually exercises authority and control over it, whether personally present or not—as by having it cultivated or used for some purpose by his family or servants."¹⁴⁶ This use of "possession" was based upon the language of the statute of forcible entry and detainer, which then as now required the complainant to establish his right to possession of lands and tenements or a term of years in order to prosecute.

The negative inference, that one having no right to possess could not prosecute for a forcible entry and detainer, was established as law in two subsequent cases; and in both of these, forcible trespass could have been brought even though the complainant was no more than a peaceful occupant. In *State v. Thompson*¹⁴⁷ the court began its opinion by saying, "This is an indictment for forcible trespass, or rather

¹⁴¹ *E.g.*, *State v. Jacobs*, 94 N.C. 950 (1886).

¹⁴² *State v. Davis*, 109 N.C. 809, 13 S.E. 883 (1891).

¹⁴³ *State v. Lawson*, 123 N.C. 740, 31 S.E. 667 (1898).

¹⁴⁴ 70 N.C. 88 (1874).

¹⁴⁵ 103 N.C. 436, 9 S.E. 1 (1889); see also *State v. Fort*, 20 N.C. (4 D. & B.L.) 192 (1839).

¹⁴⁶ 103 N.C. at 437, 9 S.E. at 1.

¹⁴⁷ 130 N.C. 680, 41 S.E. 486 (1902).

for forcible entry and detainer." In spite of this inauspicious beginning, the court finally ruled that since the prosecutrix by her own evidence showed that she had no title, dower rights not having been assigned to her in the disputed property, she could not have possession of any kind, and therefore she could not complain under the statute. And two years later, Chief Justice Clark took the opportunity offered by *State v. Leary*¹⁴⁸ to note that among other defects in pleading and proof, the prosecutrix had no possession of a term of years, within the meaning of the statute. She was not even a tenant at sufferance, because an oral lease had expired and the landlord had taken steps to reclaim possession.

But these efforts to preserve forcible entry and detainer from encroachment by forcible trespass only seem to have paved the way for the period of confusion which began in 1927 and extends up to the present day. For example, were there no statement in *State v. Fleming*¹⁴⁹ that the indictment was framed under the forcible entry and detainer statute, it would seem to be a forcible trespass case, using the doctrine of trespass *ab initio*, since no evidence of a forcible entry was presented. The court cited six forcible trespass cases to show that the force involved—three men against one in a cultivated field—was sufficient under the statute, and this was appropriate because the quantum of force is the same for both crimes. Nothing was said in this opinion about the estate in the land which the prosecutor held.

Justice Clarkson, who wrote the *Fleming* opinion, also wrote the opinion in *State v. Earp*¹⁵⁰ at the following term, holding that because the prosecutor was in actual possession of the stables in question, his actual presence and forbidding was sufficient possession under the statute. Unlike the quantum of force, however, the minimum elements of the two crimes are not the same here: if the prosecutor's lease had expired but he remained in occupancy, he could maintain forcible trespass but not forcible entry and detainer, assuming that the phrase "term of years" in the statute still means what it says. Nothing was said in *Earp* about the estate of the prosecutor, but the evidence indicates that it was at most a lease for one year which had expired. Justice Clarkson showed in *Earp* that he believed forcible entry and detainer under the statute was the same as forcible trespass at common law: "The gist of the offense of forcible trespass is the high-handed invasion of the actual possession of another, he being present forbidding. Title is not involved."¹⁵¹ But in forcible entry and detainer title *is* involved, not as a defense for the defendant, but as a statutory element

¹⁴⁸ 136 N.C. 578, 48 S.E. 570 (1904).

¹⁴⁹ 194 N.C. 42, 138 S.E. 342 (1927).

¹⁵⁰ 196 N.C. 164, 145 S.E. 23 (1928).

¹⁵¹ *Id.* at 167, 145 S.E. at 25.

giving the prosecutor standing to complain. The trial judge seems to have been careful in charging the jury that the prosecution must prove a leasehold in the prosecutor, Johnson: "The defendants contend that Johnson was not in possession of the land, and they admit they took off the lock and turned the mules out, claiming that Johnson was not in possession of the land. So it [possession] is a question for you to say."¹⁵² Said the supreme court, "On this testimony the prosecuting witness had actual possession ["occupancy" in this discussion] of the stables. The charge, perhaps, was too favorable to defendants."¹⁵³ It seems that the trial court and the supreme court were talking at cross purposes and about two different crimes.

There have been subsequent hints of the same sort of merger by implication. Justice Seawell, in *State v. Gibson*,¹⁵⁴ did not state whether the count in the indictment for "forcible trespass," the term used throughout the opinion, was under the statute of forcible entry and detainer or not; but he cited both the statute, by number, and seven cases, both common law and statutory, following a statement which began with the phrase, "Forcible trespass, using the term as the equivalent of forcible entry under the statute . . ."¹⁵⁵ This comes close to merging common law forcible trespass in statutory forcible entry and detainer, but "equivalent" is still not "the same as" or "merged in."

In *State v. Baker*¹⁵⁶ Justice Ervin made a number of statements which, if not so poorly borne out by his precedents, would tend to support the continuing existence of forcible trespass to land at common law and would distinguish it from forcible entry and detainer. For example, the opinion states that "various criminal trespasses to land and fixtures are known to the law. Some are common law crimes, and others are legislative creations."¹⁵⁷ This is perfectly true, but of the four cases cited to sustain the proposition, all deal with forcible trespass at common law to personal property—respectively a dog, a horse, a slave, and a banknote, none of which is land or a fixture. In another paragraph, the opinion makes this statement: "Others, *e.g.* the misdemeanor of forcible trespass under G.S. 14-126, are designed to protect actual possession only, and in them it is no defense that the accused has title to the *locus in quo* if the prosecutor be in actual possession of it."¹⁵⁸ Again, of the eight cases cited in the paragraph, not one turns on G.S. § 14-126: three¹⁵⁹ are plainly common law forcible

¹⁵² *Ibid.*

¹⁵³ *Id.* at 168, 145 S.E. at 25.

¹⁵⁴ 226 N.C. 194, 37 S.E.2d 316' (1946).

¹⁵⁵ *Id.* at 199, 37 S.E.2d at 319.

¹⁵⁶ 231 N.C. 136, 56 S.E.2d 424 (1949).

¹⁵⁷ *Id.* at 139, 56 S.E.2d at 426.

¹⁵⁸ *Ibid.*

¹⁵⁹ *State v. Laney*, 87 N.C. 535 (1882); *State v. Webster*, 121 N.C. 586, 28 S.E. 254 (1897); *State v. Davenport*, 156 N.C. 596, 72 S.E. 7 (1911).

trespasses to real property, and the other five were brought under a statute forbidding pulling down fences or houses.¹⁶⁰ It would thus seem that no statement in the *Baker* dicta should be taken as a reliable pronouncement on the nature or existence of the law or laws of forcible trespass.

Three recent cases involving trespasses by Negroes upon segregated business premises complete the unhelpful recent history of forcible entry and detainer. All of the statements made on forcible entry and detainer and/or forcible trespass are pure dictum, because all the prosecutions were brought under G.S. § 14-134, entry after being forbidden; but nonetheless, the trend toward confusing rather than merging or distinguishing forcible entry and detainer and forcible trespass has continued in these cases.

Justice Rodman's opinion in the first appeal of *State v. Cooke* showed that he believed that "forcible trespass" is simply the North Carolina name given to forcible entry and detainer:

By the common law and unauthorized entry on the lands of another was redressed by civil action, but where the entry was made by means of force or threats apt to disrupt the peace, the trespass was made a crime in England prior to Sir Walter Raleigh's ill-fated attempt to establish a colony on our shores. Such a disturbance of possession is a statutory crime under our laws. G.S. 14-126. To convict one of the crime of forcible trespass. . . .¹⁶¹

In the subsequent appeal of *Cooke*, Justice Rodman again showed that forcible trespass in his mind was identical with forcible entry and detainer, saying of the defendants' refusal to leave a golf course, "The conduct depicted and not denied would suffice to convict defendants of a forcible trespass. G.S. 14-126."¹⁶²

In the intervening case of *State v. Clyburn*, Justice Rodman had said, still as dictum, "A peaceful entry negatives liability under G.S. 14-126"; but he contradicted himself in the following paragraph by saying, "We have repeatedly held, in applying G.S. 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized."¹⁶³ This contradiction is more apparent than real, however; and in harmonizing the two sentences lies the final proof that forcible entry and detainer and forcible trespass still have separate functions to perform.

¹⁶⁰ *State v. Hovis*, 76 N.C. 117 (1877); *State v. Marsh*, 91 N.C. 632 (1884); *State v. Howell*, 107 N.C. 835, 12 S.E. 569 (1890); *State v. Fender*, 125 N.C. 649, 34 S.E. 448 (1899); *State v. Campbell*, 133 N.C. 640, 45 S.E. 344 (1903).

¹⁶¹ *State v. Cooke*, 246 N.C. 518, 520, 98 S.E.2d 885, 887 (1957).

¹⁶² *State v. Cooke*, 248 N.C. 485, 489, 103 S.E.2d 846, 849 (1958), *appeal dismissed sub nom. Wolfe v. North Carolina*, 364 U.S. 177 (1960).

¹⁶³ *State v. Clyburn*, 247 N.C. 455, 462, 101 S.E.2d 295, 300 (1957).

There has never been a North Carolina criminal case under G.S. § 14-126 squarely affirming a conviction for a forcible detainer; and because the statute of Henry VI, which made forcible detainers unlawful in England, was eliminated from The Code of 1883 in removing the restitutionary provisions of the English statutes,¹⁶⁴ there probably cannot be such a holding under the present North Carolina forcible entry statute, which, like the original statute of Richard II, speaks only of forcible entries, even though the catchline reads "forcible entry and detainer." On the other hand, forcible refusals to leave are firmly established as forcible trespasses *ab initio* at common law. Hence Justice Rodman's first sentence is true of forcible entry and detainer under the statute, and the second sentence is true of forcible trespass at common law.

Distinctions

There has never been any question that G.S. § 14-134, entry after being forbidden,¹⁶⁵ is a separate crime. It has a distinct statutory origin and existence; it is a petty misdemeanor with narrowly limited punishment, not a general misdemeanor; and it does not involve strong-handed force.¹⁶⁶ Early cases ruled that entry after being forbidden did not absorb forcible trespass;¹⁶⁷ and no case has ever suggested that entry after being forbidden has anything to do with forcible entry and detainer.

The distinctions between forcible trespass and forcible entry and detainer have not been so carefully observed in recent years as they were in the 1800's. English cases clearly held that forcible trespass and forcible entry and detainer existed side by side in the late eighteenth century.¹⁶⁸ The English cases were expressly adopted in North Carolina after the American Revolution,¹⁶⁹ together with the statutes of

¹⁶⁴ The revisers who prepared The Code of 1883 decided that the string of English statutes of forcible entry and detainer which dealt with restitutionary remedies might as well be omitted, since justice of the peace jurisdiction to award restitution had been abolished under the Constitution of 1868, art. IV, § 33. But the revisers did not notice that in leaving out § 2 of chapter 49 of the Revised Code of 1854, they also omitted that part of The Forcible Entry Act, 1429, 8 Hen. 6, c. 9, which made forcible detainers unlawful.

¹⁶⁵ So far as immediately applicable to this discussion, the text of G.S. § 14-134 is as follows: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days."

¹⁶⁶ *State v. Crawley*, 103 N.C. 353, 9 S.E. 409 (1889); *State v. Faggart*, 170 N.C. 737, 87 S.E. 31 (1915).

¹⁶⁷ *State v. Hanks*, 66 N.C. 612 (1872); *State v. Batchelor*, 72 N.C. 468 (1875).

¹⁶⁸ *E.g.*, *The King v. Wilson*, 8 Term R. 357, 101 Eng. Rep. 1432 (K.B. 1799).

¹⁶⁹ *E.g.*, *State v. Simpson*, 12 N.C. (1 Dev.L.) 504 (1828). Forcible trespass also appeared in other states, but nowhere with development nearly as complete as in North Carolina. Tennessee received the doctrine from North Carolina and employed it occasionally. *State v. Thompson*, 2 Tenn. (2 Overt.) 96 (1807); *State*

forcible entry and detainer.¹⁷⁰ Beyond merely continuing two parallel lines of cases, the supreme court explicitly distinguished between the two crimes. For example, in *State v. Bennett*¹⁷¹ the court pointed out that restitution was not available upon a conviction of forcible trespass, unlike forcible entry and detainer, and in *State v. Fort*¹⁷² the court held that occupancy was required in forcible trespass, but only actual possession in forcible entry and detainer. In *State v. Curtis*¹⁷³ the prosecutor, having no estate in the premises, could not have maintained a prosecution for forcible entry and detainer, and so he had to use forcible trespass; and in *State v. Ross*¹⁷⁴ the prosecutor could not have brought an action for forcible entry and detainer because his right to occupy depended upon an unenforceable parol lease for ten years; and had he brought the action, he could not have testified; and so his action had to be for a forcible trespass.

As a threat, a criminal prosecution for forcible trespass has been and remains a powerful bargaining weapon; and if a prosecution succeeds, a conviction of forcible trespass in effect determines title to the premises for the time being, pending a civil action. The prerequisite of a title or lease has apparently prevented abuses of the action for forcible entry and detainer, but several forcible trespass cases contain warnings against using forcible trespass frivolously, simply in order to save the costs of civil actions and, before 1866, to enable the prosecutor to testify in his own case.¹⁷⁵ The court has a rarely-used weapon

v. Farnsworth, 18 Tenn. (10 Yerg.) 261 (1837); *State v. Watkins*, 23 Tenn. (4 Humph.) 256 (1843); *Temple v. State*, 65 Tenn. (6 Bax.) 496 (1873), 66 Tenn. (7 Bax.) 109 (1874). Massachusetts acknowledged the existence of forcible trespass also. *Sampson v. Henry*, 30 Mass. (13 Pick.) 36 (1832); *Commonwealth v. Shattuck*, 58 Mass. (4 Cush.) 141 (1849); *Page v. Dwight*, 170 Mass. 29, 48 N.E. 850 (1897); and Maine took it up. *In re Harding*, 1 Me. (1 Greenl.) 22 (1820). Other states having used forcible trespass are New Jersey, *Cruiser v. State*, 18 N.J.L. (3 Harr.) 206 (1841); Pennsylvania, *Commonwealth v. Taylor*, 5 Binn. 277 (Pa. Sup. Ct. 1812); *Commonwealth v. Toram*, 3 Clark 346, 5 Pa. Law J. 296 (Phila. County Quar. Sess. 1846); South Carolina, *State v. Speirin*, 1 Brev. (3 S.C.L.) 119 (1802); *State v. Jones*, 14 S.C. 344 (1880); and Virginia, *Henderson v. Commonwealth*, 49 Va. (8 Gratt.) 708 (1852); and see *Miller v. Harless*, 153 Va. 228, 149 S.E. 619 (1929).

In all of these states, forcible trespass had a common experience: it appeared in the early nineteenth century as a holdover from England, received passing mention, and since then has been neither heard from nor expressly abolished. Three general reasons can be advanced to account for the disappearance of forcible trespass in these states: (1) inadequate digesting of forcible trespass as an independent crime, both before and after West's American Digest System; (2) activities of the codifiers in the criminal law; (3) enactment of statutory equivalents to forcible trespass along the lines of entry after being forbidden, but offering more severe penalties than 30 days or fifty dollars.

¹⁷⁰ *State v. Butler*, 1 N.C. 501 (Tayl. 262) (1801).

¹⁷¹ 20 N.C. (4 D. & B.L.) 43 (1838).

¹⁷² 20 N.C. (4 D. & B.L.) 192 (1839).

¹⁷³ 20 N.C. (4 D. & B.L.) 222 (1839).

¹⁷⁴ 49 N.C. (4 Jones Law) 315 (1857).

¹⁷⁵ E.g., *State v. Ross*, 49 N.C. (4 Jones Law) 315 (1857); *State v. Lloyd*, 85 N.C. 573 (1881); *State v. Mills*, 104 N.C. 905, 10 S.E. 676 (1889).

for frivolous indictments: rather than merely dismissing the action, the court may also require the prosecutor to pay the costs of prosecution and may imprison him for non-payment.¹⁷⁶

Several of the once important functional distinctions between forcible trespass and forcible entry and detainer, on the one hand, and between civil and criminal actions for trespass, on the other, have been greatly modified by the statutory and constitutional changes of the 1860's. For example, granting that a civil action for damages for trespass *quare clausum fregit* could theoretically be maintained by any person against whom a forcible trespass was committed, such a civil action was not actually practicable before 1866 if the would-be plaintiff was the solitary occupant because, being interested in the outcome of the litigation, he could not testify in his own case. Therefore, when the force used in a trespass was strong-handed, the victim's only resort to the courts was a criminal prosecution. Which crime he chose partly depended upon which one he was eligible to maintain. If he had been an occupant when the trespass occurred, and he occupied under a title or a lease, the prosecutor could choose either forcible entry and detainer—if he had another witness—or forcible trespass. If he was not an occupant at the time of the trespass, he was confined to forcible entry and detainer; but he could not testify in his own case, as he could not in a civil action, because restitution was available, making him interested in the outcome. Any peaceful occupant, on the other hand, could maintain an action for forcible trespass and testify in it, whether he had any right to possession or not; but he could not secure restitution in the criminal proceeding.¹⁷⁷ Today the prosecutor and plaintiff can always be witnesses in their own behalf, whether the case be civil or criminal,¹⁷⁸ but summary restitution can no longer be had in forcible entry and detainer proceedings.¹⁷⁹

There is no authority in the twentieth century removing the requirement that the prosecutor in an action for forcible entry and detainer have actual possession, implying ownership of an estate of freehold or a lease to the premises from which he was ousted, and G.S. § 14-126 still speaks of "lands and tenements, or term of years." Such a requirement serves no useful purpose today, because its principal func-

¹⁷⁶ N.C. GEN. STAT. §§ 6-49, -50 (1943); *State v. Hodson*, 74 N.C. 151 (1876); *State v. Stone*, 153 N.C. 614, 69 S.E. 219 (1910).

¹⁷⁷ "But as the proceedings on [forcible entry and detainer] . . . are attended with much trouble and expense, and the common law sufficiently punishes the forcible entry or forcible detainer; recourse has been rarely had to this act or will be probably, unless where immediate restitution is sought for. But the indictment at common law will be resorted to for punishing the injury on the part of the public." 7 DANE, ABRIDGMENT ch. 204, art. 12, § 9 (1824).

¹⁷⁸ N.C. GEN. STAT. § 8-49 (1943).

¹⁷⁹ *Atlantic, T. & O.R.R. v. Sharpe*, 70 N.C. 509 (1874); *Perry v. Shepherd*, 78 N.C. 83 (1878).

tion—assuring that summary restitution would be awarded only to persons having a right to possession—was abolished when justice of the peace jurisdiction terminated under the constitution of 1868. Were the requirement expressly overruled, one important distinction between forcible entry and detainer and forcible trespass would disappear. But until forcible entry and detainer can definitely be maintained by a mere peaceful occupant without a claim of title or lease, there will continue to be a need for the common law crime of forcible trespass.

The basic functional distinction between the two forcible trespasses to land has not changed, however: forcible entry and detainer is principally designed to put the ousted owner of land back into possession, if not by formal restitution under court order, then by locking up the trespasser in jail; whereas forcible trespass is designed to prevent and punish breaches of the peace resulting from trespasses which do not necessarily oust the occupant. There is a strong hint of this distinction in a forcible entry and detainer case: "By *entry* is meant taking possession by forcible means, indicated by the statute, and the offence is not complete until such entry is made. An ineffectual attempt to make such an entry might constitute another different offence."¹⁸⁰

Resuming now the chronological account of distinctions, even after the statutory and constitutional changes of the 1860's, North Carolina cases continued to distinguish between forcible entry and detainer and forcible trespass. Said the court in 1874, "[F]orcible entry is an offence, indictable at common law, without regard to any statute, English or American."¹⁸¹ And the distinctions are plainly implicit in other cases: for example, the defendants in *State v. Davenport*¹⁸² clearly were arguing that the prosecutors, having no title to the timberlands in question, could not maintain the action, but their conviction for forcible trespass was affirmed. The rules on the minimum possession of premises required to support prosecution will serve to show how the distinctions among the three crimes have continued into the present day: constructive possession of premises will suffice to support an action for entry after being forbidden;¹⁸³ actual possession is required under the statute of forcible entry and detainer;¹⁸⁴ and occupancy continues to be both required and sufficient for forcible trespass.¹⁸⁵

In concluding, it can be said at the very least that forcible trespass has never consciously been abolished or consciously merged with forci-

¹⁸⁰ *State v. Bryant*, 103 N.C. 436, 437, 9 S.E. 1 (1889). Citations of five forcible trespass cases are omitted.

¹⁸¹ *State v. Yarborough*, 70 N.C. 250, 253 (1874); see also *State v. Batchelor*, 72 N.C. 468 (1875): "The offence charged ["forcible trespass"] is one at common law . . ."

¹⁸² 156 N.C. 596, 72 S.E. 7 (1911).

¹⁸³ *State v. Yellowday*, 152 N.C. 793, 67 S.E. 480 (1910).

¹⁸⁴ *State v. Bryant*, 103 N.C. 436, 9 S.E. 1 (1889).

¹⁸⁵ *State v. Robbins*, 123 N.C. 730, 31 S.E. 669 (1898).

ble entry and detainer. It remains to be seen whether the court in this decade will restore forcible trespass to its earlier usefulness. It would seem that forcible trespass deserves, if it is to be abolished or merged with forcible entry and detainer, to go down with a bang, not a whimper; once having had an independent existence, it should either be expressly acknowledged or expressly abolished. There is ample precedent for ruling today that it is still a flexible and beneficial law enforcement weapon, for even-handed application whenever the peaceful occupancy of real property is threatened by persons lawlessly using force or fear to accomplish their purposes.