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PEACEFUL PADLOCKING IN A PERFECT WORLD Commentary and Rebuttal

THOMAS W. EARNHARDT*

INTRODUCTION

One note¹ and a comment² have already been written on *Spinks v. Taylor*,³ a case in which a tenant sued her landlord for padlocking her apartment for non-payment of rent. In *Spinks*, the North Carolina Court of Appeals found "peaceful self-help" to be an acceptable means for a landlord to regain possession of rental property.⁴ The case was appealed and shortly after the North Carolina Supreme Court issued its opinion, which affirmed in part the decision of the Court of Appeals,⁵ the North Carolina General Assembly enacted into law the "Landlord Eviction Remedies Act".⁶ "As a matter of public policy . . . and in order to maintain the public peace" the Act forbids any form of self-help residential eviction by landlords.⁷ In the *Wake Forest Law Review* comment entitled "Landlord Eviction Remedies Act—

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1. Note, *Landlord-Tenant—Spinks v. Taylor and G.S. § 42-26: Abolition of Self-Help Evictions in North Carolina*, 60 N.C.L. REV. 885 (1982).

2. Comment, *Landlord Eviction Remedies Act—Legislative Overreaction to Landlord Self-Help*, 18 WAKE FOREST L. REV. 25 (hereinafter cited in notes as comment, *Legislative Overreaction*) (1982).

3. 47 N.C. App. 68, 266 S.E.2d 857 (1980), rev'd in part, 303 N.C. 256, 278 S.E.2d 501 (1981). The Court of Appeals upheld the decision of the Guilford County District Court with regard to two separate actions, involving plaintiffs Richardson and Spinks, which had been consolidated for trial. On appeal to the Supreme Court only the case of one of the two original plaintiffs, Ms. Spinks, was reviewed by the Court. Of the two original plaintiffs the Court found that only Ms. Spinks had filed a verified complaint.

4. 47 N.C. App. at 74, 266 S.E.2d at 860.

5. 303 N.C. 256, 264-66, 278 S.E.2d 501, 506-07. The Supreme Court upheld defendant Taylor's padlocking procedure but reversed the court of appeals in holding that defendant Taylor's refusal to permit Ms. Spinks to re-enter her apartment would, if proven, amount to a forcible taking; and further, that denial of access to her property would, if true, constitute conversion. See also notes 12 and 13 *infra*.

6. N.C. GEN. STAT. § 42-25.6 to 25.9, 44A-2(e) (Cum. Supp. 1981).

The Landlord Eviction Remedies Bill was introduced after the decision of the Court of Appeals in *Spinks*. See Law of June 12, 1981, ch. 566 (1981) 6 N.C. Adv. Serv. 238 (codified at N.C. GEN. STAT. §§ 42-25.6 to 25.9, 44A-2(e) (Cum. Supp. 1981)). The decision of the North Carolina Supreme Court was filed on June 2, 1981, ten days before the June 12 ratification of the bill.

7. *Id.* § 42-25.6. The Act also prohibits distress and distraint (the seizure of a tenant's belongings for back rent. *Id.* § 42-25.7).

Legislative Overreaction to Landlord Self-Help,”⁸ the author contends that the General Assembly “could have discouraged breaches of peace while fulfilling its desire for public enforcement simply by declaring ‘peaceful’ self-help to be the public policy of North Carolina.”⁹ This commentary and rebuttal is submitted because of this writer’s strong belief that the comment’s interpretation of the law of “peaceful self-help” and its conclusions concerning alleged overreaction by the North Carolina General Assembly would, if adopted, have far-reaching and even dangerous consequences for both landlord and tenant in North Carolina. The views of law and public policy which follow are not offered as criticism of the *Legislative Overreaction* comment, which relied heavily on the views of the North Carolina Court of Appeals in *Spinks*, but as an effort to add balance to this very important area of landlord/tenant law.

I. PADLOCKING AS “PEACEFUL SELF-HELP”

The major issue to be dealt with in the pages that follow is whether “peaceful self-help” may be used in North Carolina by landlords to evict tenants for non-payment of rent, or for other reasons for which a landlord might seek to oust a tenant. One thing should be made clear from the start, however. What the North Carolina Court of Appeals and the *Legislative Overreaction* comment are offering as “peaceful self-help” is padlocking, changing locks or other methods by which a landlord might secure a house or apartment against re-entry by the tenant in possession. Padlocking, however, as the principal method of “peaceful self-help” offered, has been obscured by associating it with a number of non-self-help procedures in the form of alternative forums or non-court tribunals.¹⁰

The comment decries the fact that the “Landlord Eviction Remedies Act abrogates any remaining self-help remedies that landlords . . . had with respect to defaulting tenants.”¹¹ Other than padlocking, what are the remaining self-help remedies?

After highlighting the padlocking self-help of *Spinks v. Taylor*,¹² it is asserted that “exclusive judicial remedies are inappropriate to meet present-day problems in the landlord-tenant area.”¹³ The comment then suggests the use of “referees and clerks of court”¹⁴ to help reduce

8. See *supra* note 2 (hereinafter cited in text as *Legislative Overreaction* comment).

9. Comment, *Legislative Overreaction*, *supra* note 2, at 40.

10. Comment, *Legislative Overreaction*, *supra* note 2, at 39-40; 47 N.C. App. at 76, 266 S.E.2d at 861.

11. Comment, *Legislative Overreaction*, *supra* note 2, at 40 (emphasis added).

12. *Id.* at 33, 39.

13. *Id.* at 39.

14. *Id.* at 39.

case loads of overburdened courts. The Court of Appeals in *Spinks* offered the same views in more detail.

[T]he modern policy of diverting conflicts away from courts supports lawful self-help remedies. This theory, utilizing arbitration, citizen courts, referees, traffic offense commissions, debt-counselling services, tax conferences, and other non-court methods of resolving disputes, recognizes that the courts cannot resolve every dispute between persons or between persons and the state.¹⁵

All of the non-court actions above are worth applauding, but in each non-court method listed above, there are people between, or working with, the combatants—referees, commissioners, counselors—to help settle disputes. The use of such non-court methods is *not* self-help such as the padlocking in *Spinks* where the landlord assumes all roles—prosecutor, judge, jury and finally, sheriff. If the General Assembly wants to provide alternative forums, like those mentioned above, to give some relief to the clerks,¹⁶ magistrates¹⁷ and judges¹⁸ handling these problems, such action would most certainly be welcomed by landlords, tenants and the entire legal community. Such alternative forums, however, have nothing to do with the unqualified prohibition of self-help decreed by the North Carolina General Assembly in the Landlord Eviction Remedies Act. The Act provides summary ejectment¹⁹ as a landlord's exclusive remedy and therefore eliminates all potential provocative or coercive acts of self-help "in order to maintain the public peace"²⁰ Even with non-court tribunals to handle landlord/tenant problems, it would still be necessary to prohibit forms of self-help, such as padlocking, because of the foreseeable and, therefore, unnecessary one-on-one confrontation.²¹ The *only* "peaceful self-help" method presented in *Spinks* and the *Legislative Overreaction* comment is padlocking, and this single offering of a self-help method should not be obfuscated by discussion of alternative forums.

The eviction from one's home, be it a house, apartment, trailer or rowhouse, is a traumatic event and stirs defense mechanisms of even the most rational person. If a tenant has ignored written or oral notice that eviction proceedings will begin at a certain time, and still refuses to leave, reason would seem to dictate that a disinterested person be placed between the parties. This is precisely what the Landlord Eviction Remedies Act does. Since the term "peaceful self-help" means

15. 47 N.C. App. at 76, 266 S.E.2d at 861.

16. N.C. GEN. STAT. § 42-28.

17. *Id.* § 42-30.

18. *Id.* § 42-34.

19. *Id.* § 42-25.6. The Act provides for ejectment "only in accordance with the procedure prescribed in Article 3 [§§ 42-26 to 42-36] of this Chapter."

20. *Id.* § 42-25.6.

21. See *infra* section IV, hypotheticals 1 through 6 in text.

nothing more than padlocking, when viewed in the context of the Comment and *Spinks*, it will be shown in the pages that follow that "peaceful self-help" is a contradiction in terms.

II. THE "PRECEDENT" OF *MOSSSELLER V. DEAVER*

The high courts of this state relied heavily on an 1890 case, *Mosseller v. Deaver*,²² in justifying the self-help in *Spinks*. The *Legislative Overreaction* comment also found that *Mosseller* "permitted peaceful self-help. . . ."²³ The comment calls *Mosseller* a peaceful self-help "precedent"²⁴ and even gives it the lofty status of the "*Mosseller* doctrine."²⁵ "[F]or ninety years North Carolina followed the precedent set by *Mosseller v. Deaver*. . . ."²⁶ There is, however, another view of *Mosseller* vastly different from those of the comment and the two high courts of this state.

Mosseller, like *Spinks*, is a landlord/tenant case, but here the similarity ends. It is submitted that it is *neither a self-help precedent nor doctrine*. It is a case of forcible entry and ejectment in which the landlord's agent entered land in possession of the tenant and *forcibly* removed him after notice to quit had been given.²⁷ The major issue before the court was the instruction given by the trial court that the landlord or his agent "had the right to go there and put him out by force, if no more force was used than was necessary for that purpose."²⁸ In finding error on the part of the trial court, the *Mosseller* court said in part:

[W]e cannot approve of the instruction given, as it is not only opposed to the public policy, which requires the owner *to use peaceful means or resort to the courts* in order to regain his possession, but is directly contrary to a statute which condemns the violent act as a criminal offense.²⁹

It should be noted that (1) this was a forcible eviction case, not a self-help padlocking case, as in *Spinks*; (2) "necessary force," not "peaceful self-help" was the issue presented to the court for decision; and (3) the term "self-help" never appears in the case. Yet, one is supposed to accept the proposition that the North Carolina General Assembly has "altered the common law rule in response to a court of appeals decision

22. 106 N.C. 494, 11 S.E.529 (1890).

23. Comment, *Legislative Overreaction*, *supra* note 2, at 25.

24. *Id.*

25. *Id.*

26. *Id.*

27. 106 N.C. at 495, 11 S.E. at 529-30.

28. *Id.*

29. *Id.* (emphasis added).

applying the Mosseller doctrine."³⁰ The fact is that the "Mosseller doctrine" and "precedent," which is supposed to have "permitted peaceful self-help . . .,"³¹ never existed before the 1980 decision of the court of appeals in *Spinks*.³²

"Precedent" is not a catch word to be used for anything the court may have said. A case's holding, rule, or doctrine when cited as precedent, or *stare decisis*, has a precise meaning. "It means that a principal of law actually presented to the court of authority for consideration and determination has, after due consideration, been declared to serve as a rule for guidance in the same or analogous cases. . . ."³³

The term "peaceful means" was, in the *Mosseller* case, *dictum* only. To say that the case is a precedent standing for "peaceful self-help" is to create a precedent out of a paraphrased *dictum*. In *Webster v. Fall*,³⁴ the United States Supreme Court stated, "[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."³⁵ In negating *Spinks*, the General Assembly did no more than overrule a "lurking" *dictum*, not a precedent or doctrine.

Courts must, and do, cite *obiter dicta*, not as controlling law but as justification when it "logically assists in answering the question"³⁶ before the court. *Dicta*, however, should be clear when cited for a particular proposition. The *dictum* "peaceful means," does not have to mean self-help such as padlocking. Arguably, "peaceful means" could just as easily have meant written or oral notice from landlord to tenant that failure by the tenant to pay back rent or meet obligations under the lease will result in eviction through legal process. Today, this is still a "peaceful means" which can be employed by a landlord prior to resorting to the courts for help.

Regardless of what the court meant by this *dictum*, one thing is clear. Until the decision in *Spinks*, *Mosseller* had been widely cited by a number of major legal compendiums,³⁷ other writers,³⁸ and state

30. Comment, Legislative Overreaction, *supra* note 2, at 25.

31. *Id.*

32. See *supra* text accompanying notes 20-24.

33. Black's Law Dictionary, 1261 (rev. 5th ed. 1979). "The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons." *Potter v. Wafer Co.*, 253 N.C. 112, 117-18, 116 S.E.2d 374, 378 (1960), (quoting from *Williams v. Randolph Hospital*, 237 N.C. 387, 75 S.E.2d 303 (1953)).

34. 266 U.S. 503 (1925).

35. *Id.* at 511.

36. *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960).

37. RESTATEMENT (SECOND) OF PROPERTY § 14-1, notes at 10 (1977); Annot., 6 A.L.R.3d 177, 186, 187 (1966), 45 A.L.R. 313, 316 (1926); 50 Am. Jur. 2d, Landlord & Tenant § 1224 (1970).

courts³⁹ for the proposition that extra-judicial self-help action can subject landlords to liability and is likely to cause a breach of the peace. This other view of *Mosseller* holds that summary ejectment is the landlord's exclusive remedy against a tenant not complying with rules of the lease.

It is ironic that the "precedent" which the General Assembly is supposed to have overruled is cited by so many authorities for the entirely opposite proposition. In its opinion the *Mosseller* court refused to apply the common law rule of "necessary and reasonable force" and reversed an instruction of the trial court because

it was error on the part of the court in making the case turn upon the question whether the force used was necessary to the expulsion of the plaintiff, as we have seen that the forcible entry was unlawful, *without reference to the amount of force* necessary to effectuate the purpose. . . .⁴⁰

Instead of embracing the English common law rule of necessary and reasonable force, the court found that *any* force by the landlord was excessive and unlawful. What the General Assembly did, therefore, was overturn the several months old self-help precedent of *Spinks* and reinstate the peaceful views of the *Mosseller* court.

Other than the *Spinks* case, no other cases have been found in North Carolina which hold that self-help eviction, peaceful or not, is allowed. As has already been shown, *Mosseller* cannot be viewed as a self-help precedent or supportive of the common law rule. One case should be distinguished, however. In *Spinks*, the court of appeals cited *State v. Leary*,⁴¹ which "held the changing of locks on a door to keep out an occupant is not a forcible entry within the meaning of the criminal laws. . . . Under *Leary*, this appears to be peaceful means."⁴² The only problem with *Leary* is that it is *not* a landlord/tenant case. In this case, the defendant changed locks while the "prosecutrix" (plaintiff) was absent from the premises. The difference between this case and *Spinks* is, in *Leary* "[t]he prosecutrix was not a tenant"⁴³ She had "no possession save by sufferance."⁴⁴ In such situations the person

38. Boyer and Grable, *Reform of Landlord-Tenant Statutes to Eliminate Self-Help in Evicting Tenant*, 22 U. MIAMI L. REV. 800 (1968). "[O]ther courts realized that if the landlord were permitted to pre-judge his own case and forcibly enter and retake possession, the public peace would be threatened." *Id.* at 801, n.4.

39. *Berg v. Wiley*, 264 N.W.2d 145, 151 (Minn. 1978): "To approve this lockout . . . would be to encourage all future tenants in order to protect their possessions, to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage."

40. 106 N.C. at 498, 11 S.E. at 530 (emphasis added).

41. 136 N.C. 578, 48 S.E. 570 (1904).

42. 47 N.C. App. at 75, 266 S.E.2d at 861.

43. 136 N.C. at 580, 48 S.E. at 571.

44. *Id.* at 579, 48 S.E. at 576.

to be ousted is a "mere trespasser or intruder."⁴⁵ The court stated, "It is true . . . that a landlord is guilty of forcible entry who violently dispossess a *tenant* whose lease has expired. . . . [b]ut here the prosecutrix *had never been a tenant*, and there was no violence."⁴⁶ *Leary* is therefore, quite different from *Spinks* and *Mosseller* in that the plaintiff had never been a tenant. It is submitted that locking out a trespasser or intruder without violence is quite different from padlocking a tenant's rental home or apartment. This case cannot be viewed as an acceptance by the North Carolina Supreme Court of "peaceful self-help" eviction of a tenant by a landlord.

III. THE ROLE OF THE GENERAL ASSEMBLY IN LANDLORD TENANT RELATIONS

In the United States, lower courts must follow clear precedents set down by higher courts. Courts of last resort, however, may overrule their own precedents. Departure by high courts from the precedents of a case, or line of cases, is not done lightly, however. Precedents in cases are overruled when it becomes necessary to keep the rule of law in this country viable and responsive to changing conditions⁴⁷ whether in the areas of controlled substances, tax reform or landlord/tenant. Legislatures also make law: like courts of last resort, action by a legislature can have the effect of repealing previous acts of the same body, or can even overrule precedents of the highest court except when legislation runs afoul of an applicable constitution.

The passage of the Landlord Eviction Remedies Act effectively overruled the decision of the North Carolina Supreme Court in *Spinks*.⁴⁸ This action was not, however, isolated involvement by the North Carolina General Assembly in making law in the landlord/tenant area. In fact, for well over one hundred years the General Assembly has been actively involved in making law and responding to changing conditions in landlord/tenant relations in North Carolina. The work of this legislative body has over the years clearly benefited both landlord and tenant. The new Landlord Eviction Remedies Act is no exception.

In 1866 the General Assembly outlawed force as a method of entry in North Carolina and provided a criminal penalty for the use of force. The General Assembly, using the language of the statute of Richard II,⁴⁹ said that entry could be made "not with strong hand or with multi-

45. *Id.* at 580, 48 S.E. at 571, quoting *State v. Davis*, 109 N.C. 809, 812, 13 S.E. 883, 885 (1891).

46. 136 N.C. at 580, 48 S.E. at 571 (emphasis added).

47. See generally *Potter v. Carolina Water Co.*, 253 N.C. 112, 117-18, 116 S.E.2d 374, 378 (1960).

48. See *supra* text accompanying note 5.

49. 5 Rich. II, Stat. 1, c. 7 (1381).

tude of people, but only in a peaceful and easy manner. . . ."⁵⁰ It is arguable that before the passage of this statute that the English common law rule of "necessary and reasonable force" was in effect.⁵¹ However, no cases have been found in North Carolina in which forcible entry or self-help by a landlord was authorized. In effect, the common law rule was of no consequence because neither the General Assembly nor the courts ever accepted or followed the "necessary and reasonable" force rule.

In 1868 the General Assembly helped facilitate the peaceful retaking of property by landlords with a relatively fast and simple summary process. Under the "Summary Ejectment Act"⁵² the time between the issuance of a summons and a court appearance is only five days.⁵³ A strong inference can be drawn that even at the time of enactment this summary ejectment statute was intended by the General Assembly to be the exclusive remedy available to landlords. This inference is manifested in a number of ways. Since the statute provides an almost immediate remedy, it seems strange at best that the General Assembly would have condoned another rapid eviction method. More importantly, the statute provides summary ejectment for (1) hold-over tenants, (2) a tenant who has committed an act in violation of terms stipulated in his lease, and (3) a tenant who is behind in his rent.⁵⁴ It also gives the tenant a forum to assert defenses before a magistrate: "If the defendant by his answer denies any material allegation . . . the magistrate shall hear the evidence and give judgment. . . ."⁵⁵ In amendments the Legislature later gave tenants a procedure to stay an unfavorable ruling by a magistrate while awaiting a trial *de novo*.⁵⁶ Surely the General Assembly never intended that the hearing before a magistrate or a trial *de novo* could be *eliminated* altogether by a self-help inclined landlord with padlock in hand.

As indicated above, summary ejectment is available to landlords when lease contract provisions have been violated. Disputes over "dog and cat" clauses, excessive "noise" clauses and clauses concerning "picture hanging devices" are matters over which reasonable people can disagree. It can be inferred that the General Assembly never envisioned, in such cases, that a landlord had the *option* of a hearing before a magistrate or *avoiding* a hearing altogether by locking out a tenant. Could the General Assembly have possibly intended that the landlord

50. N.C. GEN. STAT. § 14-126 (1981).

51. See generally, e.g., Annot., 6 A.L.R.3d 177, 182.

52. N.C. GEN. STAT. § 42-26 to 42-37 (1976 and Supp. 1981).

53. *Id.* § 42-28 (Supp. 1981).

54. *Id.* § 42-26 (1976).

55. *Id.* § 42-31 (1976).

56. *Id.* § 42-34 (Supp. 1981).

had the option of appearing *before* a judge, or *being* the judge? It seems doubtful.

The Retaliatory Eviction Act,⁵⁷ passed in 1979, also shows the intent of the General Assembly that eviction by judicial process be the exclusive remedy available to a landlord. The Act states that “[i]t is the public policy of the State of North Carolina to protect tenants and other persons”⁵⁸ who seek to protect their rights against landlords who retaliate against complaining tenants. The Act further states that “[i]n an action for summary ejectment pursuant to N.C. GEN. STAT. § 42-26 a tenant may raise the affirmative defense of retaliatory eviction and may present evidence. . . .”⁵⁹ Again, surely the General Assembly never envisioned giving affirmative defenses to those being evicted under the Summary Ejectment Act but provided no recourse to tenants evicted by self-help.

Two other acts worthy of note are the “Residential Rental Agreements Act”⁶⁰ and the “Tenant Security Deposit Act”,⁶¹ both passed in 1977. The Acts helped to clarify the obligations, rights and duties of both landlord and tenant in North Carolina. They are another clear example of the on-going role of the North Carolina General Assembly in the area of landlord/tenant law.

It should have come as no surprise to anyone that the Legislature responded quickly and decisively to the ruling of the North Carolina high courts in *Spinks v. Taylor* by passing the “Landlord Eviction Remedies Act,” which allows eviction “*only* in accordance with”⁶² (emphasis added) the Summary Ejectment Act. According to the Legislation Overreaction comment, “[the] General Assembly overreacted to landlord/tenant problems.”⁶³ In view of the work of the General Assembly over the years in protecting both landlord and tenant by promoting summary ejectment and not self-help, and the complete dearth of North Carolina landlord/tenant cases allowing or even mentioning self-help, the action of the General Assembly was necessary and very predictable, not an overreaction.

IV. CAN SELF-HELP BE PEACEFUL?

“Peaceful self-help” would most certainly work in a perfect world of

57. *Id.* § 42-37.1 (Supp. 1981).

58. *Id.* § 42-37.1(a).

59. *Id.* § 42-37.1(b).

60. *Id.* § 42-38 to 42-44 (Supp. 1981). See Fillette, *North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations*, 56 N.C. L. REV. 785 (1978).

61. *Id.* § 42-50 to 42-56 (Supp. 1981).

62. *Id.* § 42-25.6 (Supp. 1981).

63. Comment, *Legislative Overreaction*, *supra* note 2, at 40.

reasonable people and perfectly written procedures. Procedures to be followed by apartment managers set out in the facts of *Spinks* provide an example of what a landlord/manager/agent is supposed to do on padlocking day.

On that day scheduled for the padlocking, the apartment manager would go and knock loudly, announcing the purpose of the visit. If the tenant pays the rent, the procedure ceases; likewise if the tenant protests, the manager ceases padlocking and tells the tenant that court procedures will be begun. If the tenant is not at home, the manager checks the apartment to make sure no children or pets are present, and then proceeds to padlock the door. Notice of the padlocking is posted and the manager attempts to notify the tenant personally. According to the defendant's affidavit, if the tenant requests personal property from the apartment, he is permitted to enter and remove the property. At any time a tenant objects to the padlocking, the self-help procedures cease and resort is made to the courts.⁶⁴

Keeping these procedures in mind, the following hypothetical cases are offered. Assume that in each case the tenant has breached a lease condition under which the landlord reserves the power of eviction.⁶⁵

CASE 1: It is 1:00 a.m. on a cold (10° F) January night and Hazel, who works the evening shift at a textile mill, picks up her two children at her mother's house and is dropped off at her rented trailer by a friend. The trailer door has been padlocked during the afternoon for non-payment of rent. Hazel is a diabetic⁶⁶ and her insulin is inside. Her small children are very cold and a padlock stands between them and warmth. The landlord cannot be found.

CASE 2: At 12:00 noon the apartment manager of a large apartment complex is in the process of searching Don's apartment for "children and pets" before padlocking the unit for non-payment of rent. Don, an unemployed construction worker, expecting to find his wife at home, enters his apartment and sees a stranger with hammer in hand. He has never met the apartment manager. Don picks up a heavy glass paper weight on a table just inside the door and throws it at the intruder.

CASE 3: Larry, the landlord, and Tom, his tenant, have been arguing for several weeks about whether Tom's first payment to Larry of \$300 was for two months' rent at \$150 per month or one month's rent and the security deposit. While Tom is at work, Larry, who has "heard" that padlocking as a peaceful self-help measure is lawful,

64. 303 N.C. at 263, 278 S.E.2d at 506. For a more detailed description of the procedures, see 47 N.C. App. at 71, 72, 266 S.E.2d at 859.

65. 303 N.C. at 258, 47 N.C. App. at 70, 266 S.E.2d at 858. In *Spinks*, lease provisions existed which reserved to the landlord the right of entry "without process or by legal process from the court having jurisdiction over the premises." *Id.* at 258.

66. See Record at 8, *Spinks*. The case of *Richardson v. John R. Taylor Co.* was consolidated in *Spinks*. The plaintiff in that case was allegedly a diabetic.

padlocks Tom's apartment while he is at work. Several hours later Tom, who still claims he owes no back rent, confronts Larry after finding the lock and chain barring his entrance.

CASE 4: Ben lost his job because of a plant closing and has not worked for weeks. He has been drinking heavily and has disregarded several notices stating his rent is past due. He arrives home at 2:00 a.m. under the influence of alcohol and finds his house padlocked. Drunk and angry, he confronts the manager.

CASE 5: Tina, a five year old, has been told by her mother never to let a stranger in the house. Her mother has gone to the grocery store. Tina hears a strange voice at the door and does not answer. The stranger enters the house "to look for children and pets." Tina hides and the stranger leaves, padlocking the door as he departs. After finding her child locked in, the mother cannot find the landlord.

CASE 6: George, and Harry, his landlord, have had several discussions over the lack of heat in George's apartment. The heating system has been broken⁶⁷ for over two weeks. George has withheld rent in an effort to force repairs of the system.⁶⁸ Returning to his home one evening, George finds his door padlocked with a note giving non-payment of rent as the reason. George takes a lug wrench from his car and exercises his own version of "self-help" by prying the lock off and damaging the door frame. Harry finds George, wrench in hand, while in the process of reclaiming his home.

In these hypotheticals what the landlord has done is permissible under the *Spinks* rules. When followed to the letter, the rules state that the padlocking process is supposed to stop if the tenant objects.⁶⁹ It should be noted as shown in the hypotheticals above that the landlord will not always be around to hear the objection (cases 1 and 5) and violence is possible even if the landlord wants to follow the rules (cases 2, 4, 6).

When a tenant is blocked from warmth, food, clothing, and medicine; when confronted by a stranger inside his home; or when finding a child locked in, rationality will not always prevail.⁷⁰ In at

67. N.C. GEN. STAT. § 42-42(4). In North Carolina a landlord is required to maintain a heating system in good working order.

68. N.C. GEN. STAT. § 42-44(c). George's withholding of rent is a possible violation of this section since a "tenant may not unilaterally withhold rent prior to a judicial determination . . ." But see N.C. GEN. STAT. §§ 42-41 and Fillette, *supra* note 60, at 788-791 on whether George may rightfully withhold rent.

69. See *supra* note 1.

70. Amicus Curiae Brief for the State of North Carolina at 10, *Spinks*. "Few things are as important to a person as to his or her home. Whether rented or owned, the home provides not only a place to live, but also a repository for the family's personal belongings. The Attorney General can think of nothing short of a criminal act more likely to provoke violent anger and breaches of the peace than locking a person or family out of their home."

least two of the hypotheticals above it is far from clear whether rent is actually past due (cases 3 and 6). Would all but the most sophisticated landlords know when self-help procedures could be used? In cases 4 and 6, violence is almost inevitable, and in case 2 the tenant's throwing of the paperweight "in defense of his habitation" and family may even be justified under existing case law.⁷¹ Finally, in cases 1 and 5, under several theories, the landlord/manager may be civilly and criminally liable. In section V below potential liability of a landlord is discussed in detail.

It does not take a mystic or a psychologist to see the possibilities for violence and conflict in these scenarios. A lockout attempt, whether done face to face or like a thief in the night when the occupant is away, can be a provocative act. "It is difficult to imagine a more volatile situation from which extreme violence could be reasonably anticipated than the surreptitious removal of a man's home, whether it be a rented one or a mortgaged one."⁷² The hypotheticals above are dramatic, but they are not unrealistic. There is no question that many lockouts could be accomplished peacefully; but lockouts, however peaceful the intent, will not always be textbook affairs. If even a small percentage of peaceful self-help evictions in North Carolina were to involve an escalation from exchanges of harsh words to violence, could self-help be justified? The North Carolina Legislature, foreseeing such problems, acted quickly and responsibly in passing the Landlord Eviction Remedies Act.

V. LANDLORD SELF-HELP OR SELF HARM?

Would it be safe *for landlords* to give them the self-help powers of judge, jury and sheriff? Landlords must be able to collect rent in a timely fashion and must be able to make a fair return on investment. However, landlords attempting to use "peaceful self-help" in this state would be entering a mine field of civil and criminal liability almost too complex for all but the best, or luckiest, to negotiate. There are numerous reasons for which a landlord may evict a tenant—expiration of the lease term, non-payment of rent or breach of any number of clauses in a rental agreement.⁷³ Even if self-help were limited to situations involving non-payment of rent there would still be situations which are

71. *State v. Jones*, 299 N.C. 103, 261 S.E.2d 1 (1980). This case holds that the use of deadly force in defense of one's habitation to prevent a forcible entry by an intruder when the person reasonably fears great bodily harm to himself or his family, or believes that a felony will be committed, may be justified. In hypothetical case 2 *supra*, the presence of an intruder with hammer in hand would raise similar fears and elicit a violent response.

72. *Edwards v. C.N. Investment Co.*, 27 Ohio Misc. 57, 272 N.E.2d 652, 655 (1971).

73. N.C. GEN. STAT. § 42-26 (1976).

not clear-cut.⁷⁴ Even taking great care in using self-help a landlord could still find himself involved in lawsuits based on forcible entry,⁷⁵ conversion of personal property,⁷⁶ distress and distraint,⁷⁷ trespass,⁷⁸ breach of covenant of quiet enjoyment,⁷⁹ and unfair trade practices⁸⁰ and other grounds as limitless as the legal imagination. For the reasons set forth below, the Landlord Eviction Remedies Act is every bit as much a "landlord's bill" as a "tenant's bill." The Act serves not only to avoid clearly foreseeable breaches of the peace, but also keeps the landlord from unwittingly becoming the victim of self-help.

It is interesting to note that the *Legislative Overreaction* comment argues that "[t]he *Spinks* decision effected a compromise between welfare of the tenant and the property rights of the landlord. By recognizing the landlord's right to possession when the tenant's estate terminated, the court [North Carolina Supreme Court] allowed the landlord to use peaceful self-help *until* the tenant objected."⁸¹ It is therefore ironic that the plaintiff, Ms. Spinks, alleged that "she requested access to the apartment to get certain items of clothing but was denied admission."⁸² Without deciding on the truth of her allegations, the supreme court ruled that the granting of summary judgment by the trial court was improper because "such as refusal is a material issue of fact to be decided by a jury."⁸³ Even with detailed lists of "do's" and "don'ts" for managers, there is no guarantee that problems can be avoided. If a jury were to believe that Ms. Spinks was denied access to her apartment, the landlord could be held liable in two ways:

- 1) "A refusal by the landlord to permit a tenant to enter the premises for whatever purposes, would elevate the taking to a forceful taking and subject the landlord to damages."⁸⁴
- 2) "The landlord's action in denying plaintiff access to her personal goods, if believed by a jury, would constitute a conversion of those goods, and plaintiff would be permitted to recover at least nominal damages."⁸⁵

Thus, even in *Spinks*, the supreme court pointed out that the landlord could be liable for eviction by force and conversion. As indicated ear-

74. See *supra* hypothetical cases 3 and 6 in section IV.

75. See *supra* text accompanying notes 14-19.

76. See *supra* text accompanying note 20-21.

77. See *supra* text accompanying notes 22-23.

78. See *supra* text accompanying notes 24-26.

79. See *supra* text accompanying note 27.

80. See *supra* text accompanying notes 28-29.

81. Comment, *Legislative Overreaction*, *supra* note 2, at 34 (emphasis added).

82. 303 N.C. at 264, 278 S.E.2d at 506.

83. *Id.*

84. *Id.*

85. *Id.* at 265, 278 S.E.2d at 506.

lier, these are only two of a number of pitfalls facing a landlord in self-help situations.

The court's decision with regard to forceful taking or forcible entry was based on an Illinois case, *Reeder v. Purdy*,⁸⁶ which was also relied on by the *Mosseller* court.⁸⁷ The supreme court in *Spinks* quoted extensively from *Reeder*:

If the right to use force be once admitted, it must necessarily follow as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of a human life. . . . In this state it has been constantly held that *any entry is forcible*, within the meaning of this law, *that is made against the will of the occupant*.⁸⁸

In both *Mosseller*⁸⁹ and *Spinks*⁹⁰ the court concluded that a landlord can be liable for damages for forcible entry. If "peaceful self-help" were allowed, how many landlords would immediately cease self-help when a tenant objects? Further, how many tenants would *not* object to padlocking? The *Legislative Overreaction* comment argues that even under such circumstances peaceful self-help would still leave "the landlord with some power of coercion."⁹¹ It is submitted that the price to landlords for this "power of coercion" would be far too great.

The spector of damages for conversion of personal property, raised by *Spinks*, would undoubtedly face many landlords if self-help were allowed. When one assumes control of the personal property of another to the exclusion of that person's rights in the property, conversion may be found.⁹² If self-help padlocking were allowed in this state landlords would not always be around to give a tenant quick access to personal property.⁹³ Such actions could be viewed as conversion and subject the landlord to damages.

The seizure of personal property for back rent, another form of self-help, has been prohibited in this state since 1800.⁹⁴ This seizure of personal property, called distress and dstraint, "is contrary to the spirit of our laws and government. . . ." ⁹⁵ If *any* form of self-help such as padlocking were to be authorized, some overzealous landlords, attempting to give a tenant "extra" reason to pay back rent, may seize personal

86. 41 Ill. 279 (1866).

87. 106 N.C. at 496, 11 S.E. at 530.

88. 303 N.C. at 263, 278 S.E.2d at 505.

89. 106 N.C. at 498, 11 S.E. at 530.

90. 303 N.C. at 264, 278 S.E.2d at 506.

91. Comment, *Legislative Overreaction*, supra note 2, at 34.

92. 303 N.C. at 264-65, citing *Peed v. Burleson, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956).

93. See *supra* hypothetical cases 1 and 5 in section IV.

94. *Dalgleish v. Grandy*, 1 N.C. (1 Tay.) 213, 215 (1800). The Landlord Eviction Remedies Act prohibits distress and dstraint under N.C. GEN. STAT. § 42-25.7 (1981) and provides remedies against a landlord using distress and dstraint under N.C. GEN. STAT. § 42-25.9(b) (1981).

95. 1 N.C. (1 Tay.) at 215.

property thereby subjecting themselves to liability under the laws of distress and distraint.

Another pitfall facing landlords using self-help in this state would be trespass. It has long been held in North Carolina that a tenant has the right to sue his landlord for trespass.⁹⁶ Trespass may lie "even though the entry was made under a *bona fide* belief by the defendant that he was the owner of the land and entitled to possession. . . ."⁹⁷ This situation would certainly arise where a landlord attempting in good faith to exercise peaceful self-help would find himself guilty of trespass against his tenant.⁹⁸

During the term of the lease a tenant in North Carolina has an implied covenant of quiet enjoyment. "In the absence of a provision to the contrary, there is an implied covenant that the lessee shall have the quiet and peaceful possession of the leased premises during the term."⁹⁹ Again, it does not take a fertile imagination to think of scenarios where a landlord's attempted use of self-help would subject him to liability.

Finally, heavy-handed tactics or tricks used by a landlord attempting to use self-help would constitute unfair trade practices under the consumer protection laws of this state.¹⁰⁰ It has been held "that the rental of residential housing is 'trade and commerce' under G.S. 75-1.1."¹⁰¹ Thus, a landlord who somehow lures a tenant out of an apartment prior to padlocking may face yet another pitfall, violation of this state's consumer protection laws. The *Legislative Overreaction* comment asserts that because the Eviction Remedies Act "expressly prohibits an award of greater than actual damages . . . the treble damages provision of the unfair trade practices statute appears to be inapplicable."¹⁰² The contrary, however, may be true, and landlords should not assume that the treble damages provision of the unfair trade practices statute has been rendered impotent.¹⁰³

96. *Mosseller*, 106 N.C. at 498, 11 S.E. at 530; *Barrey Castle v. Walker*, 92 N.C. 198, 201 (1885); *Hatchell v. Kimbrough*, 49 N.C. 163, 164 (1856).

97. *York Industrial Center Inc. v. Michigan Mutual Liability Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 506 (1967).

98. See *supra* hypothetical case 3 in section IV.

99. *Andrews & Knowles Produce Co., Inc. v. Currin*, 243 N.C. 131, 135, 90 S.E.2d 228, 230 (1955).

100. N.C. GEN. STAT. § 75-1 to 56 (1981).

101. *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977), *cert. denied* 294 N.C. 441, 241 S.E.2d 843 (1978).

102. Comment, *Legislative Overreaction*, *supra* note 2, at 38.

103. The *Legislative Overreaction* comment assumes that the General Assembly intended to repeal treble damages under section 75-16 and other forms of exemplary damages. That view is difficult to support.

In the remedies section of the new Act, the tenant's damages are limited for any action brought "under this Article". N.C. GEN. STAT. § 42-25.9 (a), (b) (Cum. Supp. 1981) (emphasis added). The General Assembly appears to have carefully avoided overruling previous case law granting

If self-help were available, most landlords availing themselves of the process would make a good faith effort to follow the rules. As shown by the two problems in *Spinks*, even the most carefully drawn rules won't always keep a landlord from wandering into a legal quagmire with possible criminal or civil liability. The potential problems set out above are not meant to be all-inclusive, but merely illustrative of the problems in that quagmire.

VI. THE ATTORNEY GENERAL IN 100 COUNTIES?

The *Legislative Overreaction* comment acknowledged that peaceful self-help, if allowed, would have to be policed.¹⁰⁴ Had the General Assembly accepted "peaceful" self-help to be the public policy of North Carolina,¹⁰⁵ the comment suggests that

the General Assembly would have allowed the Attorney General to police landlord self-help under the authority of the unfair trade practices statute Tenants would be protected from violent self-help by the enforcement powers of the Attorney General, which include powers to investigate, criminally prosecute, enjoin, and obtain civil redress for wrongful self-help evictions.¹⁰⁶

A burden though it may be, there is a sheriff in every county and magistrates and court personnel in every corner of the state to handle summary eviction complaints. It is conceded that case loads could be reduced by some form of alternative forums, and such as those discussed in section I. To allow self-help, however, and then tell victims in Wilmington, Nags Head, Murphy and Bryson City to get their after-the-fact help from the Attorney General's staff in Raleigh¹⁰⁷ is almost unthinkable.

When summarily removed without a hearing from warmth, protection and belongings by a padlock, it would seem that knowing the Attorney General would help weeks or months down the road would be

punitive damages (e.g., *Love v. Pressley*, *supra* note 101) and the treble damages provision of section 75-16 when it provided that remedies under the new statute "are supplementary to all existing common-law and statutory rights and remedies." N.C. GEN. STAT. § 42-25.9 (c) (Cum. Supp. 1981). Thus, a tenant finding himself padlocked from his apartment can still sue for damages under common law trespass and seek exemplary damages. The same tenant can sue under sections 75-1.1 and 75-16 for treble damages. The new Act intends to supplement, not bar, other remedies. "An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together." In *Re Halifax Paper Company*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963).

104. Comment, *Legislative Overreaction*, *supra* note 2, at 41.

105. *Id.* at 40.

106. *Id.* at 40-41.

107. As of fall 1982, The Office of the Attorney General employed 100 attorneys in Raleigh and 13 attorneys elsewhere in the state.

of little solace. The number of *local* matters which could end up in Raleigh for investigation and prosecution would certainly be substantial.

The local, county and regional mechanisms now in place in the summary ejectment process have served us well. Perhaps there is room for improvement. What is not needed, however, are easily misunderstood and provocative laws allowing self-help.

CONCLUSION

The Landlord Eviction Remedies Act is good law. It is in keeping with the long history of non-self-help in North Carolina and with the active role over the years of the North Carolina General Assembly in the area of landlord/tenant legislation.

The Act protects tenants by guaranteeing a forum for hearing both sides of disputes between landlords and tenants under the summary ejectment statute. If, after an opportunity for hearing has been provided, a tenant is to be evicted under the statute, both parties are protected from unnecessary confrontation by the placing of a disinterested party between them. In prohibiting self-help, peaceful or otherwise, the Act eliminates uncertainty and provides needed clarity to enable landlords to avoid potential liability.

Self-help eviction has no place of honor in North Carolina's past. The Land Eviction Remedies Act makes it clear that it will not be part of this state's future.