

TRESPASS TO PERSONAL PROPERTY.

The (state number) issue reads:

"Did the defendant trespass upon the (identify personal property)<sup>1</sup> of the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, two things:<sup>2</sup>

First, that, at the time of the alleged trespass, the plaintiff had [actual] [constructive] possession of the (identify personal property). [Actual possession consists of [physically possessing] [exercising dominion over] [making ordinary use of] [taking the profits or benefits from] the personal property in question].<sup>3</sup> [Constructive possession exists when a person does not have actual possession but has the right to take possession whenever so desired.]<sup>4</sup>

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<sup>1</sup>The applicability of this cause of action depends upon a preliminary determination that the property involved is personalty, not real estate. See *Fordham v. Eason*, 351 N.C. 151, 153, 521 S.E.2d 701, 703 (1999) ("Before the Court can analyze [Eason's] counterclaim for trespass, we must determine whether it is appropriate to evaluate this particular cause of action and claim for timber rights as a trespass to realty or a trespass to chattel.")

<sup>2</sup>*Fordham*, 351 N.C. at 155, 521 S.E.2d at 704. The essence of a claim for trespass to personal property is "injury to possession." *Motley v. Thompson*, 259 N.C. 612, 618, 131 S.E.2d 447, 452 (1963).

<sup>3</sup>*Fordham*, 351 N.C. at 155, 521 S.E.2d at 704; *Matthews v. Forrest*, 235 N.C. 281, 284, 69 S.E.2d 553, 556 (1952).

<sup>4</sup>*Fordham*, 351 N.C. at 155, 521 S.E.2d at 704; *Reader v. Moody*, 48 N.C. 372, 373-74 (1856) ("virtual possession" superior to the claim of another is sufficient); *White v. Morris*, 8 N.C. 301 (1821) (possession sufficient if goods are in hands of a servant, carrier or other bailee); *Carson v. Noblet*, 4 N.C. 136 (1814) (possession sufficient even in double bailment circumstance).

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And Second, that, without justification, authority or lawful excuse, the defendant interfered with the plaintiff's possession of the (*identify personal property*).<sup>5</sup>

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant trespassed upon the (*identify personal property*) of the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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<sup>5</sup>*Binder v. General Motors Acceptance Corporation*, 222 N.C. 512, 515, 23 S.E.2d 894, 896 (1943) (seizure of automobile when owner was in fact current in payments); *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 349, 100 S.E. 602, 605 (1919) (seizure of cows by someone who had no right to do so); *Reader*, 48 at 373 N.C. (carrying away of shingles cut and left by another on land subsequently acquired by defendant).