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CONTINUING TRESPASS

(The Doctrine in England and in the United States)

BERNARD J. DAVIES

The author is a member of the law faculty of the University College of Wales, Aberystwyth, Wales, from which he received his LL.B. (Honours) in 1962. Prior to assuming his present position, he was Assistant Lecturer in Criminal Law at Queen's University, Belfast, Northern Ireland.

Mr. Davies received a Criminal Law Fellowship for graduate studies at Northwestern University School of Law in 1962, which fellowship was funded by a grant from The Ford Foundation. He was awarded a LL.M. degree by Northwestern in June, 1963.

Common law larceny required an intent to permanently deprive another of his property *coincident* with the act of taking. To prevent dishonest men from escaping criminal punishment in certain cases where the intent was formed subsequent to the taking, the English courts created the artificial doctrine of continuous trespass. While maintaining that this new fiction was implicit in the common law definition of larceny, the judges made the law of theft more indistinct and uncertain. The Larceny Act of 1916 apparently abolished the doctrine, but the English courts revived it and, unfortunately, they have subsequently extended its application. In the United States, however, two early decisions applied the doctrine to fact situations where it had never been used before, even in England, and they thereby caused the doctrine to fall into disuse, so that it is rarely invoked, except in Alabama, where its application is construed as broadly as it is in Britain.

I. INTRODUCTION OF THE DOCTRINE: THE RILEY DECISION

In 1853 *Regina v. Riley*[1] introduced the fiction of continuous trespass into the English law of theft. Riley had unwittingly and innocently driven to market with his twenty-nine black-faced lambs a white-faced lamb belonging to another.[2] He no doubt realized his error when a prospective buyer pointed out that the flock numbered thirty; nevertheless, he sold the white-faced lamb along with the rest. The Court for Crown Cases Reserved unanimously affirmed Riley's larceny conviction over the objection that the requisite *animus furandi* was not present at the time of the taking. In his opinion, Baron Parke said:

> The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along . . . and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent, that becomes a felonious trespass.[3]

Chief Baron Pollock added:

> The distinction between the cases is this: if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel animo furandi, it is larceny.[4]

Thus a trespass is said to be continuous so that when the actor forms the intent to steal, there is a coincidence of a taking and an intent to permanently deprive sufficient to satisfy the common law requirement. The fiction was born in a situation where the defendant was ignorant of the chattel's presence at the time of the taking. But one immediately wonders why the same rationale would not require conviction wherever the original taking was a trespass at civil law, pre-empting the common law requirement of act and intent in all cases except where the original taking was pursuant to a right under the civil law.

The *Riley* decision has been criticized by many of England's leading jurists of the criminal law,

[1] (1853) Dears. C.C. 149, 22 L.J.M.C. 48, 20 L.T.O.S. 228, 17 J.P. 69, 17 Jur. 189, 6 Cex, C.C. 88.

[2] There was a specific jury finding that the taking was unwitting.

[3] (1853) Dears. C.C. 149, 158.

[4] (1853) Dears. C.C. 149, 155.

including Mr. J. W. Cecil Turner,[5] who argues that the court rested its judgment upon inadequate authority and faulty logic. In the first place, Turner maintains, there was no precedent for the proposition that if the original taking be a trespass a subsequent *animus furandi* would be sufficient. Turner contends that it was Baron Parke's vigorous confidence that swept Chief Baron Pollock and the other members of the court into agreement with a proposition that had no previous authority and that, in essence, was contrary to the earlier law. Even Hale, Turner notes, was apparently unaware of the doctrine when he wrote:

> If the sheep of *A* stray from the flock of *A* into the flock of *B*, and *B* drives them along with his flock, or by pure mistake shears them, this is not a felony, but if he knew it to be another's, and marks it with his mark, this is evidence of a felony.[6]

Turner also points out that the premise upon which the fiction of continuous trespass rested in *Riley* was dubious. At no time did the court treat thoroughly the difficult issue of whether, in fact, a trespass at civil law occurs when a person innocently takes the chattel of another without awareness of its existence. As one writer has asked,[7] can I really be guilty of civil trespass when, as I push my way through a crowded store, an article falls from a counter into my coat pocket, shopping bag, or trouser cuff without my knowledge? Modern writers[8] in tort law acknowledge, as did Hale,[9] that sometimes inevitable accident is a good defense to a trespass action. On the facts of *Riley*, such a defense was a real possibility since the taking of the white-faced lamb was without the actor's knowledge. Yet the uncertainty that existed at the time of the *Riley* decision as regards such a defense was not even mentioned.[10]

Finally, Mr. Turner criticizes the court for confusing the concept of trespass with the concept of taking. Prior to *Riley*, judges had been quick to note that the "taking and carrying away" requirement in larceny was a physical fact and not the legal consequences of a physical fact. Common-law larceny required a coincidence of an *animus furandi* with a physical taking, not with some fictitious legal taking. As Turner says, guilt depended upon the intent being coincident with a taking, and not upon the intent being coincident with a civil trespass. A distinction of importance, because the *Riley* doctrine presupposes that a person who has tortiously taken possession of a chattel commits a fresh trespass against it each moment it remains in his possession. The doctrine of continuous trespass thus links the intent to deprive, once it is formed, to the ever-recurring trespass and finds a coincidence of intent and act sufficient to satisfy the definition of larceny. But, as Turner says, the doctrine cannot mean that there is a fresh taking since a taking is a physical occurrence. The court's facile association of "taking" with "trespass" deserves the criticism to which it has been subjected.

II. The Doctrine's Continued Vitality

Mr. Turner hoped to convince the judiciary to abandon the fiction of continuous trespass—a difficult task, he conceded, because many of the leading English and American criminal law commentators had accepted the doctrine,[11] even if some misconstrued the ratio decidendi of the *Riley* opinion.[12] With the Larceny Act of 1916,[13] it appeared that his hope had been fulfilled. The Act explicitly stated that a larceny conviction required proof that there existed the requisite "intent, at the time of such taking".[14] The Act neither expressly nor implicitly adverted to the continous-

[5] Turner, Modern Approach to Criminal Law 374–389 (1945). See also, 2 Russell, Crime 1137–41 (11th ed. Turner, 1958); and Edwards, *Possession and Larceny*, 3 Curr. L. P. 127 (1950).

[6] 1 Hale, Pleas of the Crown 507, cited with approval in People v. Devine, 95 Cal. 227, 30 P. 378 (1892).

[7] Edwards, *supra* note 5, at 141.

[8] Winfield, Tort 50–53 (6th ed. 1954); Salmond, Torts 28–29 (12th ed. 1957); Prosser, Torts 117 (2d. ed. 1955).

[9] 1 Hale, P. C. 506.

[10] See generally Pollock, Torts 96–105 (15th ed. 1951).

[11] Clark & Marshall. Crimes 743–46 (6th ed. Wingersky, 1958); 2 Bishop, Criminal Law 638 (9th ed. 1923); Kenny, Outlines of Criminal Law 300–02 (18th ed. Turner, 1962).

[12] Kenny advanced the proposition that if "the original taking of possession were in any way unlawful, then any subsequent determination to appropriate the thing will operate retrospectively, and will convert that taking into a larceny. Even if the original taking were no more than a trespass . . . a subsequent intent to appropriate the thing so taken will thus relate back, and render the act a larceny." Kenny, Outlines of Criminal Law 243 (15th ed. 1936). In *Riley* there appears no trace of any such doctrine of "relation back", for the decision states that the taking arises when the intention to misappropriate is formed, and that the intent does not relate back to the time when the original taking occurred.

[13] 6 & 7 Geo. 5, c. 50.

[14] Larceny Act of 1916, 6 & 7 Geo. 5, c. 50, §1 (I).

trespass fiction, while, at the same time, it did preserve many of the other common law fictions.[15]

The passing of the *Riley* doctrine was to be heralded not because dishonest men would now go free, but rather because it is a sound rule of criminal policy that the principles of the criminal law should be rigidly observed by the courts. If our system does not provide for treating as criminal a particular course of conduct, it is for the legislature, and not the judges, to remedy the defect.

Despite the criticism that *Riley* evoked, and despite the wording of the 1916 Act, the courts would not let the doctrine of continuous trespass die. With the approval of a unanimous court in *Ruse v. Read*,[16] this unprecedented theory became an integral part of the English law of larceny. In this 1949 case, the accused, having consumed a large quantity of beer one night, rode away another's bicycle. His defense was that at the time of the taking he had not the intention of permanently depriving the owner of his bicycle, but that upon seeing it the next morning he panicked and consigned the bicycle by Rail to York "to be collected" in his name.

The justices at first instance found him not guilty because they believed he was too intoxicated at the time of the taking to have formed the necessary criminal intent. However, the Divisional Court sent the case back to the justices for reconsideration. In delivering the judgment of the court, Mr. Justice Humphreys declared:

> It is clear that on the previous evening in taking away the bicycle he had committed a trespass since he had no permission from the owner.[17]

The Court cited with approval passages from the opinions of Chief Baron Pollock and Baron Parke in *Regina v. Riley* and continued:

> Being of the opinion that the decision in Riley's case is still good law and binding on this court, and the case is not distinguishable from the present one, our judgment is that the justices misdirected themselves and should have found the offence proved. The case must go back to them with that expression of opinion.[18]

One of the two alternative theories upon which the Divisional Court endeavoured to justify the *Riley* decision is noteworthy. The Court maintained that the accused *had not taken possession* of the white-faced lamb until he became aware of its presence.[19] Then, by forming an intent to appropriate it at that moment, he became guilty of a taking that was coincident with an intent to deprive and was, therefore, guilty of larceny.[20] At least this rationale pre-empts less of the common law definition of larceny since it is applicable only in those rare instances where the accused was unaware of the chattel's presence when in came into his "possession". This theory leaves untouched all those cases where an intent to deprive is formed subsequent to a *knowing* trespass.

III. An Unwarranted Extension of the Doctrine

Whatever one thinks of the doctrine of continuous trespass, the recent extension of that doctrine in *Regina v. Kindon*[21] cannot be condoned under any circumstances. The accused argued that when she and two friends had removed a large sum of money from a drawer in an apartment where they were being entertained, she had been too drunk to form an intent to permanently deprive the owner of the money. She conceded that such an intent was formed when the money was subsequently divided during a train trip to Doncaster. In giving the judgment of the court, Justice Byrne reaffirmed the doctrine of continuous trespass originally enunciated in *Riley:*

[15] "[T]he expression 'takes' includes obtaining the possession—
(a) by any trick;
(b) by intimidation;
(c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained;
(d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps." (Larceny Act of 1916, 6 & 7 Geo. 5, c. 50, §1 (2) (i).)
The preamble to the act, announcing a purpose to consolidate and to simplify, also supported the belief that the doctrine of continuous trespass had been abolished.

[16] [1949] 1 K.B. 377, 1 All E.R. 398.

[17] [1949] 1 All E.R. 398, 400.

[18] *Id.*, at 402.

[19] As, indeed, did Chief Baron Pollock in *Riley*, where he applied the doctrine enunciated by Baron Parke in R. v. Thurborn (1849) 1 Den. 387, 3 Cox, C.C. 453, as an alternative finding: "Here the taking of the lamb from the field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates the lamb to his own *use*." [emphasis added.] Reg. v. Riley (1853) Dears. C.C. 149, 158.

[20] This theory should be studied in connection with the doctrine of larceny by mistake.

[21] 41 Crim. App. R. 208 (1957). *See* Comment, 1957 Crim. L. Rev. (Eng.) 607; see generally, Prevezer, *Criminal Appropriation*, 12 Curr. L. P. 159 (1959).

> Applying the observations of Parke, B., in *Reg. v. Riley* and which was cited in the Divisional Court case of *Ruse v. Read*, it becomes plain that the taking from the desk in the dwelling-house, although not felonious, was tortious, and the subsequent conversion of it became larceny.[22]

The accused was deemed guilty not of simple larceny but of the more grievous offense of larceny in a dwelling house.[23] In other words, the offense was committed in the apartment and not on the train! But the *Riley* decision, the facts of which the *Kindon* court said are indistinguishable, postulates that the accused commits the crime at the moment he forms the felonious intent subsequent to the trespass. *Kindon*, on the other hand, made the subsequent intent retroactive, with the result that the woman became subject to fourteen years imprisonment instead of five.[24] It would seem that the justices in *Kindon* made a fiction of the fiction of continuous trespass. They went beyond connecting an intent with a prior taking, in accordance with the doctrine as previously developed, and manipulated the doctrine to propitiate their convictions of what conduct deserves a graver punishment. We are thus once more confronted with an example of the modern exercise of indirect legislative power by the judiciary, even to the extent of overriding the express words of a statute.

IV. Continuous Trespass in the United States

There are three principal cases[25] that are said to have introduced the doctrine of continuous trespass into the American law of theft. But these three, together with a series of Alabama decisions,[26] are about the only American cases that uphold the doctrine. This is surprising since in the United States the common law definition of larceny has either been adopted wholesale[27] or else has been absorbed by state statutes,[28] which would suggest that the common law fictions, including the doctrine of continuous trespass, are implicit within the provisions of each state where not expressly abregated by statute.[29]

The disparity in the number of people in the United States and in Britain, together with the correspondingly greater number of crimes in America, require the rejection of the suggestion that the dearth of continuous trespass decisions in America exists because facts analogous to the *Riley* facts rarely occur in the United States. It is the author's opinion, however, that the long sustained silence[30] on the subject in most American jurisdictions reflects a revulsion felt by the judiciary towards the gross fiction of continuous trespass.[31]

It is also suggested that the rejection of the doctrine in Maine and Massachusetts, which had produced two of the early decisions supporting the fiction, and its disuse elsewhere, has occurred because those early decisions applied the fiction to fact situations dissimilar to the *Riley* situation and wrongly extended the doctrine to cases where the original taking had been conscious. In Alabama, however, the doctrine has thrived because it has been limited to cases where the defendant, not conscious of the chattel's presence at the time of the taking, formed the intent to permanently deprive as soon as he became aware of its presence.

Thus, for example, in the original Massachusett case,[32] the defendant consciously drove away an-

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[22] 41 Crim. App. R. 208, 212 (1957).

[23] Guilty, that is, of violating Larceny Act of 1916, 6 & 7 Geo. 5, c. 60, §13 (with a maximum punishment of fourteen-years imprisonment) instead of §2 (with a five-years maximum).

[24] As to "relation back," the decision, in effect, approved the theory of continuous trespass as interpreted by Kenny, *supra* note 12.

[25] Comm. v. White, 65 Mass. (11 Cush.) 482 (1853); State v. Coombs, 55 Me. (4 Virg.) 477, 92 Am. Dec. 610 (1868); Dozier v. State, 130 Ala. 57, 30 So. 2d. 396 (1901).

[26] Dozier v. State, *supra* note 25; Fox v. State, 205 Ala. 74, 87 So. 623 (1920); Reynolds v. State, 245 Ala. 47, 15 So. 2d. 605 (1943).

[27] For example, PA. STAT. ANN. tit. 18, §4807 (1950) makes larceny a felony, but it "does not define larceny. It simply refers to larceny and the common law definition applies." Comm. v. Doran, 145 Pa. Super. 173, 20 A.2d 815, 816 n.2 (1941). *See also* ALA. CODE tit. 14, §331 (1958); ARK. STAT. ANN. 41-3901 (1947).

[28] *See, e.g.*, ILL. REV. STATS. ch. §16-1 (1965); ANN. LAWS OF MASS. ch. 266, §1956; N.Y. PENAL LAWS §1290 (McKinney 1944).

[29] This expectation is generally true, as is indicated by Wilson v. State, 96 Ark. 148, 131 S.W. 336 (1910), where the court conceded that the fiction of continuous trespass might be a part of the Arkansas law of larceny but found it inapplicable to the facts before it.

[30] Nor is there much literature in America on the doctrine of continuous trespass, except for a brief reiteration of the case law by some of the American commentators. See generally CLARK & MARSHALL, CRIMES 743-46 (6th ed. Wingersky, 1958P; 2 BISHOP, CRIMINAL LAW 638 (9th ed. 1923); 2 WHARTON, CRIMINAL LAW AND PROCEDURE 33-35 (12th ed. 1957); PERKINS, CRIMINAL LAW 220 (1957); INBAU & SOWLE, CRIMINAL JUSTICE 238-39 (1960).

[31] See, e.g., State v. Riggs, 8 Idaho 630, 642, 70 P. 947, 951 (1902), where the court held erroneous an instruction embodying the continuous trepass doctrine and insisted that a felonious intent must have existed at the time of the taking for a conviction to be sustained; *accord*, State v. Hopple, 83 Idaho 55, 357 P.2d 656 (1960).

[32] Comm. v. White, *supra* note 25.

other's horse and wagon with an intent to appropriate it for his own use but without an intent to permanently deprive the owner of its possession. Subsequently, however, he formed and executed an intention to sell the wrongfully obtained horse and wagon. In upholding a larceny conviction, the court purported to follow the rule of the *Riley* decision:

> In many cases the subsequent fraudulent appropriation and conversion of goods, the possession of which has been rightfully obtained, does not constitute a felony. But if a person by committing a trespass has tortiously and unlawfully acquired possession of property belonging to another, and afterwards conceives the purpose of fraudulently depriving the owner of it, and with felonious intent, carries away and converts it to his own use, he is guilty of the crime of larceny. While the defendant was on his way to Bridewater . . . he was only a trespasser; but he made himself a thief as soon as he drove away the horse, or made any disposition of it, with a felonious intent.[33]

Justice Merrick in the preceding passage no doubt adequately stated the rule of continuous trespass, but he then applied it to a fact situation analogous to none in which any English court has ever applied the doctrine. All the English decisions are concerned with situations where the original taking was innocent and unwitting. Neither Riley nor Read nor Kindon had knowledge of the chattel's presence—due to intoxication or otherwise—at the time of the taking. But in the two early Maine and Massachusetts cases, such knowledge was present at the time of the taking.[34]

It is my belief that the *Riley* judges intended the doctrine of continuous trespass to be applied only where the original taking is innocent and where the intent to deprive is formed at the time the chattel's presence becomes known. In England the broad language of *Riley* has, in fact, been applied only in such situations. The two early American decisions, on the other hand, made real Mr. Turner's fear that the common law requirement of a taking and a contemporaneous intent to deprive would be effectively destroyed by the use of the continuous-trespass fiction in all cases where the taking was wrongful. It is little wonder that after those early American decisions, the doctrine of continuous trespass fell into disuse in the United States, except in Alabama, where it has been more strictly construed.[35]

[33] *Id.* at 485.

[34] In State v. Coombs, *supra* note 25, the defendant took another's team for his own use and without permission, but with no intent to steal. He subsequently formed that intent and was deemed guilty of larceny on the continuous-trespass theory. The court correctly stated the doctrine but applied it to a case where the original taking was with the actor's knowledge, something not done in Britain.

[35] In Dozier v. State, *supra* note 25, the Alabama court correctly applied the doctrine to the only sort of situation where it should be invoked, that is, where the original taking is without knowledge. Even though the defendant had been too drunk to realized that he was taking a barrel of whisky, the court said his conviction for larcency was proper so long as he subsequently conceived and executed the purpose to convert it feloniously to his own use.