THEFT BY A TRICK

I

The crime of theft or larceny began as a trespass vi et armis and its purpose was no more than to punish such dishonest dealings as took the violent and unmistakable form of a change of possession. The "taking and carrying away" upon which the common law insisted was from the first the very core of the English idea of theft.

These are the conclusions reached by Pollock and Maitland in their examination of the early development of the law of larceny.(1) The most conspicuous application of this principle was in the law relating to wrongful conversion of property of bailees. A man who at the outset acquired legal possession of property with the consent of its owner could not by subsequent conversion of the property make himself guilty of the felony of larceny. On a modern view this can only be regarded as an astonishing omission. It is not surprising that judicial ingenuity eventually provided a partial remedy. This was done in the eighteenth century in Pear's case.(2)

Pear had hired a horse for a day, saying that he wanted to ride to Sutton and giving a false address. He did not ride to Sutton but took the horse to Smithfield Market and sold it. Since he had received the horse by way of bailment with the express consent of the owner his subsequent sale of the horse without authority could not be brought within the definition of larceny unless some way could be found for eliminating the consent of the owner to his having possession of the horse in the first place. The Court proceeded to invent a fiction whereby the consent of the owner could be disregarded. It was decided that as the original intention of the prisoner in hiring the horse was fraudulent (as found by the jury) the parting with the horse by the owner had not changed the nature of the possession, but that it remained unaltered in the owner at the time of the conversion. The hiring for the journey to Sutton had been a mere pretence to get the horse into the prisoner's possession; he had no intention of taking such a journey, but intended to sell the

horse. In these circumstances, according to the decision of the Court, it was not a case of conversion by a bailee, but of larceny, as the apparent possession of the prisoner with the consent of the owner was not in law possession at all. When Pear sold the horse at Smithfield it was still in the possession of the owner from whom he had hired it!

Thus it became the law that if a person obtained possession of a chattel with the consent of the owner, but fraudulently intended to convert the property when received, the owner's consent to delivery of possession might be treated as a nullity with the consequence that the receipt of the chattel was an unauthorized and wrongful taking. This, coupled with proof of the intention to convert the chattel, made a complete case of larceny. So "larceny by a trick" was born.

In this way there was imported into the common law not, it is true, a new crime, but certainly a completely new variety of the crime of larceny. That it improved the substance of the criminal law there can be no question, but the improvement was achieved at a price: the decision was wholly at variance with principle, making criminal liability depend on a fiction and producing confusion in other branches of the law of larceny and inconsistency with the civil law. For example, if the consent of the owner to the delivery of possession may be disregarded because of the felonious intent of the recipient, it is difficult to see why it should not equally be disregarded where the owner transferred not merely possession but also ownership of the chattel: yet the doctrine was never so applied. "The decision of the judges in Pear's case, that the deceit which eliminated the consent which the owner intended to give when he regarded himself as parting merely with the possession of his chattel would not have the same effect when he regarded himself as parting with something greater, namely, the ownership of it, was firmly maintained by subsequent courts in a multitude of cases."(3)

It has been said that the decision in Pear's case was necessitated by the deficiencies of the law of larceny. It may also be said that it was necessitated by the deficiencies in the law relating to obtaining by false pretences. If a person obtained possession or ownership of a chattel by a false pretence this might well be regarded as a crime. To

prove such an offence it would generally be shown that the prisoner disposed of the chattel, but the offence of "obtaining" would be complete whether or not the subsequent disposal fell within the law of larceny. But in England at the time of Pear's case there was no such offence as obtaining possession by false pretences. A statute in 1757 (now represented by s. 32 of the Larceny Act 1916) made it a misdemeanour to obtain the ownership of goods by false pretences, but it was not (and still is not) a misdemeanour in England to obtain possession, without ownership, by such means.(4) The fiction employed in Pear's case, however, would usually make this a case of larceny. The effect of the doctrine was not to make the disposal of the goods a crime, nor to extend the scope of the misdemeanour of obtaining by false pretences; it simply treated the obtaining of the goods as larceny - as if it were a taking, without consent, with intent to steal.

. . . . . .

The basic deficiency in the common law of larceny, namely, that it did not cover conversion by a bailee, was eventually remedied by legislation in 1857.(5) The current provision (contained in the Larceny Act 1916, s. 1 (1)) is to the effect that a person may be guilty of stealing notwithstanding that he has lawful possession if being a bailee or part-owner of the property he fraudulently converts the same to his own use or to the use of any person other than the owner. On the enactment of this amendment to the law of larceny in 1857 the chief reason for the fiction adopted in Pear's case was gone. "If the true basis of the doctrine in Pear's case had been recognized (says the learned editor of Russell)(6) then after the statute of 1857 nothing further need have been heard of 'larceny by a trick'". The obtaining would not have been an offence, but the subsequent disposal would always have constituted larceny by a bailee. For various reasons, however, the opportunity so presented to abandon the fiction of Pear's case was not fully appreciated, and in the re-enactment of the legislation in 1916 doubts were perpetuated. The expression "takes" is defined in s. 1 (2) as including obtaining possession by any trick; but under s. 1 (1) the "taking" must always be "without the consent of the owner". If the case of larceny by a trick is to some within the statutory definition in England it would seem that the fiction of Pear's case must be retained.

II

Is Pear's case applicable in New Zealand? Under s. 20 of the Crimes Act 1908, conversion by a bailee is unambiguously declared to be a species of theft. The deficiency which led to the decision in Pear's case has not existed in New Zealand since the criminal law was codified in 1893. The retention of the common law fiction that the goods were taken without the consent of the owner was thus rendered unnecessary. It is in the highest degree objectionable that criminal liability should ever be based on legal fictions. The decision in Pear's case has been described as a piece of "shallow sophistry",(7) and there are strong reasons for thinking that the Crimes Act should be interpreted as dispensing with the common law fiction established in that case. But the Court of Appeal, possibly attaching less weight to these considerations,(8) held in 1910 that the doctrine in Pear's case does apply in New Zealand: R. v. Muir (1910), 29 N.Z.L.R. 1049; (1910) 12 G.L.R. 793.

Muir represented to the company which employed him that a man named Kerson had sold certain produce to the company. He made bogus returns showing delivery of goods by Kerson, upon which the company made out cheques payable to Kerson and forwarded them at Muir's request to an address given by him as the address of Kerson. There was in fact no such person, but Muir collected some of the cheques and converted them to his own use. Muir was convicted of theft, and the question before the Court of Appeal, on a case stated by the trial Judge, was whether the offence disclosed was theft or obtaining by false pretences.

The Court of Appeal unanimously held that the offence was theft and not false pretences. Three of the judgments are based on the common law doctrine from Pear's case, and the other two Judges concurred. Stout C.J. expressly followed Pear's case, briefly citing the facts and the decision though not mentioning the case by name. All the Judges were of opinion that Muir obtained possession (not ownership) of the cheques, with a prior intention to steal them; that this amounted to larceny at common law; and that the accused was rightly convicted of theft under the Crimes Act 1908. The learned Chief Justice said it was not necessary to rely on

s. 240 (3) of the Crimes Act (as to conversion by a person already in lawful possession).

The facts of the case no doubt brought it fairly within the scope of the principle of Pear's case, but the judgments contain no statement whatever of the reasons for holding that that principle is applicable in proceedings under the Crimes Act. If the Court was aware of any objections it ignored them. But the decision is clear and unanimous, it has been consistently followed, and it is pointless to question it now. Its effect was plain: it established that the word "taking" in the statutory definition of theft includes that constructive taking which was recognized by the common law in the case of possession acquired by fraud with criminal intent. The decision was so interpreted by Salmond J. in Cox, [1923] N.Z. L.R. 596, 605; [1923] G.L.R. 169, 174. In Bishop v. New Zealand Law Society, [1932] N.Z.L.R. 1516, 1533; [1932] G.L.R. 716, 720, Herdman J. in the Court of Appeal accepted Muir as an authority to that effect; and in Brownrigg, [1933] N.Z.L.R. 1248; [1933] G.L.R. 847, the Court of Appeal in a judgment delivered by Ostler J. followed Muir without hesitation.

III

Accepting that the decision is too firmly established to be disturbed, there remains the task of ascertaining its implications. These are now to be considered.

(1) Overlapping definitions of theft and false pretences.

In Muir's case the Court of Appeal held that the accused was guilty of theft of the cheques and was not guilty of obtaining them by false pretences. The Solicitor-General on behalf of the Crown had submitted (at p. 1050; 794) that "the distinction between larceny and false pretences is that in the former offence the owner does not intend to pass the property, while in the latter an intention to pass the property must exist." The Court of Appeal seems to have accepted this view, for Stout C.J. said (at p. 1052; 795): "It is not a case of false pretences where there was an intention to pass the property." So long as this distinction was maintained, theft and false pretences were mutually exclusive:

taking against the will of the owner was theft, obtaining possession with the consent of the owner (but with a fraudulent intent to convert the property) was also theft, whereas obtaining ownership (by false pretences) was not theft but obtaining by false pretences.(9)

The learned Judges could not have foreseen how their successors would interpret the latter of these two offences. In a series of cases culminating in Reg. v. Miller, [1955] N.Z.L.R. 1038 it came to be laid down that a person is guilty of "obtaining" (in the crime of obtaining by false pretences under s. 252 of the Crimes Act 1908) if he either (1) acquires ownership, or (2) acquires possession without ownership. It follows that a person who by false pretences acquires possession of a chattel, intending to steal it, commits thereby two distinct crimes. Under the doctrine of Pear's case as imported into New Zealand by the Court of Appeal in Muir, he is guilty of theft by taking. Under s. 252 of the Crimes Act as interpreted by the Court of Appeal in Miller, he is guilty of obtaining by false pretences.

It is a regrettable fact that in Miller three Court of Appeal decisions which have a direct bearing on the question there in issue were not even mentioned in the judgment. First there is Muir's case itself. It appears to have been overlooked that this was an express decision of the Court of Appeal that obtaining by false pretences is not an offence within s. 252 of the Crimes Act 1908. In Bishop v. New Zealand Law Society (supra) the trial Judge, Blair J., had drawn the usual distinction between theft and false pretences ("where things are obtained by false pretences the owner is induced to part both with the possession and ownership of the goods") and held that the defaulting solicitor had not committed theft but had obtained the documents by false pretences. Although this was reversed on appeal the reversal was mainly by reason of a different view of the facts. Two at least of the four Judges (Herdman and Kennedy JJ.) clearly accepted the view of the trial Judge that obtaining possession alone is not sufficient for the crime of obtaining by false pretences. In Brownrigg (supra) the Court of Appeal considered what it called (at p. 1252 [848]) "the two mutually exclusive crimes of obtaining money by false pretences and theft.". The decision, that the facts proved amounted in law to theft, was

based primarily on the fact that the money had been received by the accused on terms of holding the money in a trust account. The Court of Appeal held (at p. 1251 [848]) that the verdict of guilty of theft carried the necessary inference of not guilty of obtaining by false pretences.

None of these decisions can be reconciled with Miller, and as they were not considered by the Court of Appeal in Miller this decision can scarcely be regarded as "authoritatively settling the law in this country" as the Court of Appeal hoped.

This article will, however, proceed on the basis that the law is as stated in Miller. On this view the crimes of theft and obtaining by false pretences have ceased to be mutually exclusive. This is no new discovery. It has long been recognized that if obtaining possession constitutes an offence under s. 252 the two crimes may partly coincide. This was observed at least as early as 1923. In Cox (supra, at 605 [174]) Salmond J. said:

> The same act may constitute both theft by fraud and obtaining by false pretences. Where the accused has by fraud obtained the possession without the property he may be indicted either for larceny or for false pretences; but where he has obtained both the possession and the property he must be indicted for false pretences
> . . .

More recently, in Miller (supra, at p. 1047) North J. delivering the judgment of the Court of Appeal said:

> In this country, as has been said, we are not concerned with fine distinctions between theft by a trick and false pretences, and we wholly agree with the view expressed by Salmond J., in R. v. Cox (supra) that there is no reason in principle why a person should not be convicted of the offence of obtaining goods by false pretences where he secures the physical possession of the goods, though not their ownership, even although the same act may constitute both theft by fraud and obtaining by false pretences.

The decisions of the Court of Appeal in Muir and Miller inevitably involve this duplication, this overlapping of the otherwise dissimilar crimes of theft and false pretences. We are obliged to accept the Court's decisions, but, with respect, we are not obliged to accept the belated assurance that "in principle" this duplication is unobjectionable. Kenny once wrote:(10)

> That precisely the same action should thus occupy, simultaneously, two different grades in the scale of crime is indeed a singular juridicial anomaly.

The same comment may be made on the result of the decisions on theft and obtaining by false pretences. It is extremely undesirable that the same conduct should constitute both the crime of obtaining by false pretences and the crime of theft. The legislature has created and defined an offence of obtaining by false pretences which, as interpreted by the Court of Appeal, covers all circumstances in which possession or ownership is obtained by consent through the use of a false pretence. The plain meaning of s. 240, on the other hand, is that the crime of theft is committed by taking or conversion without consent. It is most unfortunate that this clear and basic distinction is blurred by introducing from the common law the fiction which there was not the slightest necessity to adopt. It cannot be supposed that the legislature in these two provisions of the Crimes Act, creating two distinct offences with differing maximum punishments, intended to include the same conduct in both. Had the fiction in Pear's case not been introduced there would have been no case in which the same conduct would have constituted both crimes.

The first consequence to be noted, therefore, is that these crimes now overlap, and that the distinctions traditionally drawn between theft and false pretences are no longer valid. Theft may be committed by obtaining possession of the property with the owner's consent; and a person may be guilty of obtaining by false pretences though the owner did not intend to pass the property.

In the second place it is to be observed that where, through the application of the doctrine in Pear's case, the accused has committed theft, it does not necessarily follow

that he will also have committed the crime of obtaining by false pretences. Pear's case applies where the accused obtained possession by consent, intending to convert the property when received. If, in order to induce consent, he made a false pretence, he may be guilty of obtaining by false pretences; but in some cases he will not have committed that offence. He may have used no false pretence, or none that actually operated as an inducement. "There is indeed nothing in the reports of Pear's case, nor of the numerous cases which have followed Pear, to show that any express lie on the part of the wrongdoer was essential. So long as the jury could be satisfied that the man's intent was felonious at the outset, that was enough."(11) Furthermore, he may have obtained possession by making false promises. These would not suffice for a conviction under s. 252, because the false pretence must be a representation of a matter of fact present or past: s. 251. It may be felt that herein lies a justification for the decision in Muir's case, which by adopting the fiction from Pear's case makes such conduct criminally punishable as theft. A more appropriate comment might be that the Court of Appeal has taken upon itself to make conduct criminal when the legislature has most distinctly excluded it from the crime of obtaining by false pretences. To say the least, this is a remarkable piece of judicial legislation.

(2) Restriction on the scope and application of the rule.

There are three important limitations on the operation of the rule in Pear's case.

First, it has no application where the owner has intentionally transferred the property in the goods to the recipient. This intention may have been induced by fraud, but his consent to the transfer of the property is not on that account treated as a nullity. As mentioned earlier in this article the fiction of Pear's case was not extended to any case where the property in the goods was intentionally transferred to the recipient. This limit on the scope of the rule continues to apply in New Zealand: see, for example, the judgment of Salmond J. in Cox (supra, at 605 [174]):

> The fact that his consent was procured by fraud did not render his consent inoperative. . . . The fact that the

> absolute ownership so acquired by him had been acquired by fraud would have been wholly irrelevant on a charge of theft: R. v. Jackson (1826), 1 Moo.C.C. 119, 168 E.R. 1208.

The recipient in such a case is guilty of obtaining by false pretences, but not of theft.

Secondly, the fiction applies in respect of a charge of theft. It does not operate to prevent a conviction for obtaining by false pretences. In the latter offence it is an essential ingredient that the false pretence induced the person in possession to part with possession, i.e. that possession was obtained from him with his consent, the consent being brought about by the false pretence. If the fiction in Pear's case required that the consent be always disregarded in such circumstances, it would be impossible to prove the ingredients of the crime of obtaining possession by false pretences, for the consent (induced by the false pretence) would be treated as a nullity. But the fiction has no place whatever in proceedings on a charge of obtaining by false pretences. Thus in McReynolds, [1935] N.Z.L.R. 944, [1935] G.L.R. 773 it was held that the evidence adduced was sufficient in law to support a conviction for obtaining by false pretences, although the principle of Pear's case would have been applicable if the charge had been theft.

Thirdly, the fiction has no place whatever in civil proceedings, and is strictly confined to the sphere of criminal liability. In civil cases it has been authoritatively established that consent to the passing of possession is effective, whether induced by fraud or not, and whether or not accompanied by an undisclosed criminal intent. As North J. said in Davey v. Paine Brothers (Motors) Ltd., [1954] N.Z.L.R. 1122, 1129:

> Until comparatively recent times there were conflicting decisions on the question whether an owner could ever be said to have consented to an agent having possession of a chattel when in fact the agent obtained possession by larceny by a trick, the agent having an animus furandi at the moment that he received possession of the chattel. It is, however, in my opinion clear that these doubts have been swept away by the decision of the Court of

Appeal in Pearson v. Rose and Young, Ltd., [1951] 1 K.B. 275; [1950] 2 All E.R. 1027, and it is to be noticed that the views expressed by the learned Judges in that case have since been applied in England in Du Jardin v. Beadman Brothers, Ltd., [1952] 2 Q.B. 712; [1952] 2 All E.R. 160, and in New Zealand in Paris v. Goodwin (ante, p. 823).

Sellers J. in Du Jardin v. Beadman Brothers, Ltd. (supra) accepted and adopted the view expressed in Russell on Crime (already cited) that the doctrine of Pear's case was anomalous and illogical, and that it created a new crime which was purely arbitrary and did not rest upon principle. The artificiality, said Sellers J., is on the side of the criminal law and not the common law [sc. the civil law]. He said he saw no reason to interpret "consent" in s. 9 of the Factors Act 1889(12) in an artificial way "in order to bring it into harmony with the criminal law based on such foundations." Both in England and in New Zealand, when questions of title have to be decided in a civil action, the courts refuse to apply this discredited fiction.

(3) Importing common law doctrines in the interpretation of the Crimes Act.

Even if Muir must now be accepted as a decision on the meaning of the word "taking" in s. 240 of the Crimes Act 1908, the case cannot be held to be a good authority on the more general question of the manner in which the Crimes Act is to be interpreted, for the procedure adopted in that case is inconsistent with the principles of interpretation that have long been established. It is hard to believe that four of the five judges who constituted the Court in Muir had constituted the Court of Appeal which, less than four months previously, had declared, in Hare (1910), 29 N.Z.L.R. 641, the proper principles to be applied in the interpretation of this Act. In that case Williams and Chapman JJ. had adopted the statement of Lord Herschell in Bank of England v. Vagliano Brothers, [1891] A.C. 107, on the interpretation of a "code": the court must only look at the words of the section and construe them according to their ordinary meaning. If on such a construction there is no obscurity or ambiguity, the task of interpretation is at an end, and prior statutes [and, one might add, previous doctrines of the common law] cannot be called in aid to raise a doubt or alter the construction.

With the exception of Muir the Courts have over and over again adhered to this principle. "Our Code must be interpreted in its plain meaning without reference to English cases or English criminal law": per Stout C.J. in Cox (supra, at 598 [171]; ". . . the question whether the offence of theft or false pretences has been committed must now be determined upon the language contained in the Crimes Act . . ."; per Hosking and Adam JJ. (ibid., 599 [171]); "Our statute is a complete code, and as was said by Stout C.J. in Cox, it must be interpreted in its plain meaning without reference to English cases and English criminal law": per Reed J. in McReynolds (supra, at 946 [773]); "There can, we think, be little doubt that the word 'obtain' in its primary meaning can as aptly be applied to possession as to ownership; and, therefore, unless on other and substantial grounds a gloss is required to be put on the word, there is really no justification as a matter of construction for giving the word a limited meaning": Miller (supra, at 1047). Dealing with the Criminal Code of the Gold Coast Colony Viscount Caldecote L.C. speaking for the Privy Council in Wallace-Johnson v. R., [1940] A.C. 231, said it "must . . . be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or Scotland".

How far the Court of Appeal departed from these principles in Muir must be at once apparent on a reading of the judgments. There is scant reference to the Crimes Act, no discussion of the word "taking" in s. 240, and little more than the unquestioning assumption that a common law doctrine was applicable to give to the language of the statute a meaning which it does not have in ordinary speech nor in the civil law. On no ordinary interpretation of language could fraudulent "taking" in a definition of theft be held to include the receipt of property which is voluntarily handed over by the owner. Muir may, indeed, be taken as a warning and an example of the evil consequences of neglecting to apply those principles of construction which the Court of Appeal and higher tribunals have long declared should govern the interpretation of a criminal code.

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(1) Pollock and Maitland, History of English Law vol. II, 498. These passages are cited in Kenny, Outlines of Criminal Law (1952), 16th ed., 204.

(2) (1779) 2 East. P.C. 685; 1 Leach 212; 168 E.R. 208.

(3) 2 Russell on Crime (1950), 10th ed., 1089. As to Jones, [1949] 1 K.B. 194; [1948] 2 All E.R. 964; (1948) 33 Cr.App. R. 11 see ibid. 1096-1098.

(4) Kilham (1870), L.R. 1 C.C.R. 261; 11 Cox C.C. 561.

(5) 20 & 21 Vict. c. 54 s. 4 replaced by 24 & 25 Vict. c. 96 s. 3; now re-enacted unaltered in substance in the Larceny Act 1916, s. 1 (1).

(6) Op.cit. 1102.

(7) The case has been so described by Beale, "The Borderland of Larceny" (1892), 6 Harv.L.R. 244, 252. Beale's view, that the reasoning was lamentably weak, is shared by the learned editor of 2 Russell on Crime (10th ed.) 1086, whose criticisms have been judicially adopted in Du Jardin v. Beadman Brothers Ltd., [1952] 2 Q.B. 712; [1952] 2 All E.R. 160. For an article suggesting that a different view may be taken by the House of Lords, and that Pear's case is sound, see Lowe, "Larceny by a Trick and Contract", [1957] Crim.L.R. 28, 96. Lowe's conclusions rest on the propositions (i) that a subsequent dishonest appropriation is not larceny if possession was acquired innocently, and (ii) that a person having the animus furandi when he acquired possession does not acquire innocent possession. Although he is able to cite authority for these propositions (both of which appear sound), it does not follow that Pear's case was rightly decided. The basic question in the law of larceny was not whether possession was innocent or not, but whether it was acquired against the will of the owner. To say that a person is not an innocent possessor does not necessarily imply that he obtained possession against the will of the owner. This is precisely the point that arises in regard to Pear's case. Whether a person acquired possession innocently depends mainly on his state of mind. Whether he acquired possession against the will of the owner depends on the owner's state of mind, and on this question the secret intentions of the recipient are irrelevant.

(8) It is pertinent to note that in the Court of Appeal the prisoner was not represented by counsel, and the arguments against following Pear's case were not adequately formulated for the consideration of the Court.

(9) The statement that theft and false pretences are mutually exclusive means that the same act (coupled with the necessary mens rea) cannot constitute both offences. But by successive acts a person could commit both crimes. For example, if Pear's case had not be followed, a person who was guilty of obtaining possession by false pretences might thereafter by disposing of the goods commit theft by conversion. Even after the adoption of the principle of Pear's case duplication might have been avoided if "obtaining possession" had not been held to be sufficient for the crime of obtaining by false pretences.

(10) Outlines of Criminal Law (1944), 15th ed., 317.

(11) 2 Russell on Crime (1950), 10th ed., 1113.

(12) Cf. Sale of Goods Act 1908, s. 27 (2).