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FORCIBLE TRESPASS TO PERSONAL PROPERTY

DAVID J. SHARPE*

In contrast to forcible trespass to real property, there is no case authority for the existence of forcible trespass to personal property in England,¹ and Chief Justice Ruffin said in 1837 that he found no authority in any textbook for it.² But this is not to suggest that forcible trespass to personal property was made up one day by the North Carolina Supreme Court out of whole cloth. The principle of an indictable trespass, a trespass with a strong hand against a person presently in possession of property, was firmly established in the English real property cases. And given the principle, there was no reason to confine its operation to real property. Forcible trespass to personal property was in use in North Carolina as early as 1792;³ and the North Carolina court, while regarding forcible trespass to personal property as confined to this state,⁴ has never shown concern whether the crime existed, or if so, upon what authority; rather, the court has toiled in its opinions to articulate the elements of the crime and the proper scope of its operation.⁵

The distinction in forcible trespass between real and personal property rests upon clear authority. In *State v. Graves*⁶ the property in question was a boundary fence, but the indictment described the

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¹ Compare Sharpe, *Forcible Trespass to Real Property*, 39 N.C.L. REV. 121-125 (1961).

² *State v. Love*, 19 N.C. 267 (1837).

³ *State v. White*, 2 N.C. 13 (Super. Ct. 1792).

⁴ *State v. Love*, 19 N.C. 267 (1837).

⁵ The term "forcible trespass" seems to have been first used in 1830 in *State v. Mills*, 13 N.C. 420 (1830). The earliest case on forcible trespass to personal property, *State v. White*, 2 N.C. 13 (Super. Ct. 1792), spoke of "indictment for trespass," a phrase which was repeated in two subsequent important cases. *State v. Trexler*, 4 N.C. 188 (1815); *State v. Flowers*, 6 N.C. 225 (1813). "Indictable trespass" was used in *State v. Simpson*, 12 N.C. 504 (1828). Since 1830 "forcible trespass" has been used consistently and exclusively in the criminal cases. A later attempt to confine "forcible trespass" to personal property and use "forcible entry" for real property originated in *State v. Jacobs*, 94 N.C. 950 (1886), was regarded as an occasional usage in *State v. Davis*, 109 N.C. 809, 13 S.E. 883 (1891), and was last mentioned in dictum in *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898). It cannot be taken seriously as law and it would not be convenient usage for this discussion.

⁶ 74 N.C. 396 (1876).

fence as personal property. Although the court held that the indictment was good in form, it ruled that the evidence offered did not support the indictment for a forcible trespass to personal property: the fence, which was real property, was taken down and carried away in a continuous transaction.

This distinction should not be read as separating forcible trespass into two crimes. To be sure, the distinction between real and personal property was quite significant in prosecutions for larceny—it meant the difference between life and death for the defendant, who could be hanged for larceny if a fence were found to be personal property. But if the fence were real property, the defendant was at most guilty of a misdemeanor (usually of malicious mischief); and quite probably he was guilty only of a civil trespass. Plainly this distinction has nothing to do with forcible trespass, which is a common law misdemeanor,⁷ punishable by fine or imprisonment or both.⁸ For another thing, drawing a firm distinction between forcible trespasses to real and personal property is false to the tradition of forcible trespass, the chief virtue of which has always been freedom from the technical refinements of property law. Indeed, there are cases, clearly on forcible trespass, in which it is not possible to say from the opinion whether the property was real or personal. For example, in *State v. Simpson*⁹ the defendants made off with both gathered corn and standing corn which they severed themselves. The indictment charged only forcible trespass in taking “one bushel of corn,” but nothing was made of the potential distinction, and the conviction was affirmed.

Frequently both types of property are involved—a forcible trespass to one’s personal property while he is on his own real property is quite possible. Whether this would constitute two crimes has never been squarely decided.¹⁰ It would seem that there is no merger of one property in the other, and provided there is a trespass to each type of property, it should be possible to indict for two forcible trespasses.

Today it would seem that mistaking the distinction between real and personal property would not be fatal to an indictment under

⁷ *State v. Mills*, 13 N.C. 420 (1830); *State v. Arrington*, 7 N.C. 571 (1819).

⁸ N.C. GEN. STAT. § 14-3 (1953). ⁹ 12 N.C. 504 (1828).

¹⁰ See *State v. Sneed*, 84 N.C. 816 (1881), where the forcible trespass indictment charged both unroofing a man’s house and throwing his furniture into the dooryard.

G.S. § 15-153,¹¹ which prescribes a tolerant attitude for the courts in weighing formal errors: the purpose of describing property is only to put the defendant on notice of his alleged crime; the identity of the property is the essential element rather than its legal characterization; and forcible trespass has never been formally split into two separate crimes. The moral of *State v. Graves* seems to be that the particular property should be named as specifically as possible, but not characterized in the indictment as real or personal.

As a matter of analytical convenience, however, there is considerable reason for treating forcible trespasses to real and personal property separately. The analogies and confusions of forcible trespass to real property with forcible entry and detainer and with entry after being forbidden have already been dealt with at length.¹² But the analogies and influences of forcible trespass to personal property have been felt in the law of larceny and robbery, and to some extent in the area of punitive damages for civil assault—quite different areas. Such a divergence of analogies seems to justify the separate treatments accorded forcible trespass by these two articles.

ANALYSIS

Defining forcible trespass to personal property tersely but completely is not easy. The court has occasionally tried a definition,¹³ and opinions have given a few indictments charging the crime.¹⁴ This composite definition is offered as reasonably compatible with the cases and sustained by the analysis which follows: *Forcible trespass to personal property is a trespass to personal property, in the peaceful possession of another, with sufficient force to breach the peace.*¹⁵

Force: The Aspect of Assault

Forcible trespass is a mixed crime which consists of a trespass

¹¹ N.C. GEN. STAT. § 15-153 (1953). It must be admitted, however, that this same statute, which dates from 1545, 37 Hen. 8, c. 8, was in force at the time of *State v. Graves*, 74 N.C. 396 (1876).

¹² See Sharpe, *supra* note 1, at 144-152.

¹³ See, e.g., *State v. Pearman*, 61 N.C. 371 (1867).

¹⁴ See, e.g., *State v. Elrod*, 28 N.C. 250, 251 (1846): "The indictment charged, that the defendant with force and arms, and with a strong hand, unlawfully took and carried away a mare from the possession of one David Miller, against the will of said Miller, who was then and there present, forbidding the same."

¹⁵ Time is not of the essence in forcible trespass and it need not be alleged. *State v. Caudle*, 63 N.C. 30 (1868).

to property in someone's possession and an assault to the possessing person.¹⁶ Understanding the aspect of assault in forcible trespass usually resolves the problem of choosing the proper person to name as victim in the indictment. In a larceny prosecution it is of the utmost importance to lay the "property in the goods" in the person in possession, but such possession as a question of property law can be either actual and present or quite remote and only constructive—indeed, most larcenies are committed in the absence of the possessor. But in forcible trespass, right to possess is irrelevant; present possession is the controlling factor, so long as the possession is peaceful.

For example, two children, James Somers and a slave, were in McDowell's field, which was five hundred yards away from James's sister, Sarah, who apparently owned the slave. McDowell took possession of the slave in spite of what resistance young James could offer. The forcible trespass indictment of McDowell laid the possession in Sarah. The conviction was reversed for a new trial because the proof showed that James was in possession.¹⁷ Analytically, the assault was directed at James, and therefore his sister's ownership, which the court made plain would have controlled in a civil action for trespass, was irrelevant.

One case appears to be flatly opposed to this analysis. A girl, thirteen, and a boy, eleven, were playing in the dooryard of the owner of a fierce dog. The defendant shot and killed the dog in front of the children while the owner was in a far distant field. In reversing the conviction for forcible trespass, the court said that a forcible trespass could only be committed in the presence of the dog's owner.¹⁸ If the opinion is an accurate reflection of the court's thought, the case is an anomaly.¹⁹ The easy explanation of the case, however, is to note that although the children bore the same surname as the owner of the dog, neither the special verdict nor the opinion

¹⁶ The "occupancy" of real property denoted the possessory relationship of the person assaulted to the property upon which the defendant trespassed. See Sharpe, *supra* note 1, at 126-27. In connection with personal property, the word "possession" will be used, accompanied throughout by the warning that it means the bare fact of peaceful control, without embracing any of the legal attributes of *right* to control involved in title.

¹⁷ State v. McDowell, 8 N.C. 449 (1821).

¹⁸ State v. Phipps, 32 N.C. 17 (1848).

¹⁹ The opinion does not cite State v. McDowell, 8 N.C. 449 (1821), and the reliance put on State v. Mills, 13 N.C. 420 (1830), is more literal than can be justified by the facts.

said that they were his children. If they were not his children, even though they were in the owner's yard they were not in possession of his independent-minded dog, and it would not be correct to lay the possession in them. This reading of the facts may be supported by the concluding sentence of the opinion: "The special verdict shows that James Perry [the owner] and wife were absent in the field at work, and it does not show that any member of his family was present."²⁰

Another opinion²¹ upheld a conviction through the unique and rather clumsy device of making a son, present and defending the possession of corn locked in a crib, his father's agent. As a question of trespass, laying the possession in the father was correct since the son had no possession of his own as against the father; but as a question of assault, the assault upon the son was not a vicarious assault upon the father, and the indictment therefore should probably have been quashed.

It should be possible generally to solve the parent-child problem and other relational situations by taking forcible trespass as a simple concept of fact, uncluttered with rules of ownership beyond bare possession. Then a child old enough to be both presently in possession of property—depending somewhat upon the nature of the property—and put in fear by an assault could be named in an indictment as the possessor, without regard for the undisputed fact that ownership lay in his parent. Surely the public peace protects children against assault and trespass no less than it protects their elders when they happen to be present.²²

As for the definition of "presence" in the sense of propinquity of the trespasser to his victim, there are no forcible trespass cases on how close the trespasser must be to his victim in order to put him in reasonable fear of a battery, but the abundant cases on the classic form of indictable assault are directly applicable.²³

On the closeness required between victim and property, however, there are several forcible trespass cases. If the property is too far separated from the victim, the result of the defendant's conduct will be, not forcible trespass, but an indictable assault and perhaps a civil

²⁰ *State v. Phipps*, 32 N.C. 17, 19 (1848).

²¹ *State v. Drake*, 60 N.C. 238 (1864).

²² A gratuitous bailee was properly named as in possession in *State v. Pearman*, 61 N.C. 371 (1867).

²³ *E.g.*, *State v. Martin*, 85 N.C. 508 (1881).

trespass. Fairly recently it has been held that there was no forcible trespass when a finance company agent repossessed a truck from the street in front of the would-be victim's house.²⁴ No one was present when the truck was entered and driven off, and hence it was impossible to imagine an assault.

The extent of the victim's "presence" seems to depend to some extent upon the nature of the property and its capacity to be possessed. A banknote, for example, can easily be held in the hand, but it is still within one's presence while it is in easy reach. Hence when a rough-and-tumble fight was being carried on over the possession of a banknote within the owner's bedroom, the owner did not need to touch the banknote in order to charge a forcible trespass against it. The court made much of the fact that the banknote was in sight, never out of reach, and was "to every substantial purpose *reduced* to possession. . . ."²⁵ This language seems consonant with the concept in robbery that "presence" of the victim does not require continual control of the property so far as its nature permits, and certainly not physical touching.²⁶

It follows that if victim and property are far separated, it makes no difference how violent the trespass to property alone may be; there is no assault to the victim, and hence there can be no forcible trespass. For example, a slave girl was forcibly detained while trespassing on the defendant's land, which was about a quarter mile from her mistress's house. In attempting to rescue the slave, the mistress had to trespass upon the defendant's land herself. The court found that the defendant had not committed a forcible trespass in taking possession of the slave.²⁷

The required propinquity of victim and property is often described in terms of "presence and forbidding." Forbidding a trespass to a distant field from within a farmhouse is too far away, but repeating the forbidding from the field itself has been held sufficient to render criminal the subsequent trespassory removal of seven stacks of fodder.²⁸ And a person can order his servants to commit

²⁴ *State v. Stinnett*, 203 N.C. 829, 167 S.E. 63 (1933).

²⁵ *State v. Trexler*, 4 N.C. 188, 191 (1815). (Emphasis is by the court.)

²⁶ No North Carolina robbery case seems to have turned upon this point, but the doctrine is generally accepted in the Anglo-American law of robbery. See, e.g., Annot., 123 A.L.R. 1099 (1939).

²⁷ *State v. Flowers*, 6 N.C. 225 (1813).

²⁸ *State v. Surles*, 74 N.C. 330 (1876).

the required assault and thereby vicariously move himself close enough to the victim and property to be guilty of forcible trespass.²⁹

Force: The Concept of Possession

The term "peaceful possession" used in the composite definition of forcible trespass means literally what it says. For example, a bailee, given possession of a bale of cotton by two of three tenants in common, was held not guilty of a forcible trespass in forcibly refusing to turn it over to the third tenant in common, who as a matter of property law probably had the right of immediate possession as against the bailee.³⁰ Still, the third tenant in common had no right as against the public to breach the peace in order to vindicate or exercise her property rights. Moreover, she was probably guilty of forcible trespass against the bailee. A trespasser himself may be in peaceful possession of goods, and if he defends his possession forcibly, even against the owner, he is not guilty of forcible trespass.³¹ Of course some period of uncontested possession must elapse before possession of the trespasser attaches. It would suggest that might makes legal right to admit that a fresh trespassory taking, contested at the time or shortly thereafter, gave immediate possession in the taker which the law should defend.³² On the other hand, due concern for the public peace should remit the victim to processes of the law rather than self-help after some lapse of time, when the wrongdoer's possession has been firmly established.

Peaceful possession is not necessarily conferred, however, by a taking without force. For example, where a trespasser took in his hand a banknote within reach of his victim, and then forcibly prevented the victim from retaking it, the court rightly held that the trespasser was never in peaceful possession and affirmed his conviction for forcible trespass.³³ In the same line of thought, a man committed a forcible trespass by surreptitiously cutting the rope by

²⁹ *Ibid.*

³⁰ *State v. Marsh*, 64 N.C. 378 (1870).

³¹ *State v. Flowers*, 6 N.C. 225 (1813). See also Sharpe, *supra* note 1, at 122.

³² A man may defend his property with force reasonably proportioned to the need, so long as neither death nor serious bodily harm is threatened. *Curlee v. Scales*, 200 N.C. 612, 158 S.E. 89 (1931).

³³ *State v. Trexler*, 4 N.C. 188 (1815). If the trespasser is considered as never having acquired possession, the fiction of trespass *ab initio* with regard to forcible trespass to personal property may be escaped. Justice Clark mentioned, but did not adopt, the fiction in *State v. Gray*, 109 N.C. 790, 14 S.E. 55 (1891). Compare Sharpe, *supra* note 1, at 138-139.

which his victim led a horse, taking possession of the horse himself, and defending his possession against his victim by brandishing a drawn knife and a large stone.³⁴

The trespassory taking and the force subsequently exerted are regarded in the law as one transaction.³⁵ In 1874 this question received its severest test. The defendants demanded a cow from the victim, who went away to find the man who he claimed had sold him the cow. The defendants had driven the cow some three hundred feet down the road before the victim returned to forbid the taking. Here the court found the defendants guilty of a forcible trespass, although the rationale of peaceful possession was not expressly used.³⁶

The sufficiency of alleging possession in the forcible trespass indictment has been tested in several cases. An indictment charging that the defendants "did seize, arrest, and take from" the victim certain slaves was held to charge that the slaves were in the victim's possession.³⁷ The court was careful to point out, however, that the proof must show that there was actual and not merely constructive possession. The word "possession" alone is not sufficient to give notice that actual possession will be proved,³⁸ and presence in possession cannot be inferred from an allegation of trespass with a strong hand or numbers of persons.³⁹ However, the expressions "actual possession"⁴⁰ and "presence"⁴¹ have been approved, and when both presence and the trespass with a strong hand are alleged, "no assault need appear in the indictment."⁴²

Force: The Quantum of Force

Alleging or proving only a technical trespass *vi et armis* is fatal to a forcible trespass prosecution: the force alleged and proved must

³⁴ State v. Love, 19 N.C. 267 (1837).

³⁵ "[I]t is certain that the doctrine of forcible detainer has never been extended to personal property." State v. Marsh, 64 N.C. 378, 379 (1870). At common law it never extended to real property either, although it was discussed extensively. See Sharpe, *supra* note 1, at 140-41.

³⁶ State v. McAdden, 71 N.C. 207 (1874).

³⁷ State v. Mills, 13 N.C. 420 (1830).

³⁸ State v. Love, 19 N.C. 267 (1837).

³⁹ State v. Mills, 13 N.C. 420 (1830).

⁴⁰ State v. McDowell, 8 N.C. 449 (1821).

⁴¹ State v. Trexler, 4 N.C. 188 (1815).

⁴² State v. Tuttle, 145 N.C. 487, 488, 59 S.E. 542 (1907).

be a trespass with a strong hand,⁴³ or *manu forti*,⁴⁴ or it must be described with some other term suggesting force sufficient to breach the peace.⁴⁵ A special verdict must also contain a finding of strong-handed force, and a finding only of "stratagem and fraud" will not suffice.⁴⁶ On the question of quantum of force the cases on forcible trespasses to real and personal property should be interchangeable and are so cited by the court.

The sufficiency of proof of force depends upon the quantum of force required to cause a breach of the peace. No case has ever said that putting in fear is itself a breach of the peace. On the contrary, there is some discussion of actual and constructive breaches of the peace. In *State v. Love*,⁴⁷ for example, the court said that the trespass must "manifestly and directly tend to" a breach of the peace. It would seem more economical of terms to permit a breach of the peace to be proved whether the force involved has been actual force—*i.e.*, touching either person or property forcibly, or only constructive force—*i.e.*, fear of an imminent forcible and trespassory touching.

A forcible trespass is sufficiently forcible whether an actual violent touching is trespassory to the person⁴⁸ or only to property in the person's presence.⁴⁹ Both rules are entirely sound. Surely a battery will qualify as evidence of strong-handed force, and a strong-handed trespass to property in the victim's presence is equally an assault upon the untouched but frightened victim.

The troublesome cases are those in which there has been no touching, but at most only an assault. Are these breaches of the peace? For example, an unlawful assembly by three persons accompanied by acts of violence constitutes a riot at common law, and surely a riot is a breach of the peace. Therefore the court concluded in *State v. Simpson*⁵⁰ that the trespass by four men upon the possession of two women must be not less than a riot, and hence that it was sufficient force to sustain a conviction of forcible trespass.

⁴³ *E.g.*, *State v. Simpson*, 12 N.C. 504 (1828).

⁴⁴ *State v. Flowers*, 6 N.C. 225 (1813).

⁴⁵ See, *e.g.*, *State v. Armfield*, 27 N.C. 207 (1844); *State v. Love*, 19 N.C. 267 (1837); *State v. Mills*, 13 N.C. 420 (1830).

⁴⁶ *State v. Ray*, 32 N.C. 39, 40 (1849).

⁴⁷ 19 N.C. 267, 268 (1837).

⁴⁸ *State v. Trexler*, 4 N.C. 188 (1815).

⁴⁹ *State v. Pearman*, 61 N.C. 371 (1867); *State v. Drake*, 60 N.C. 238 (1864).

⁵⁰ 12 N.C. 504 (1828).

Although it would have been more elegant reasoning for the court to use riot only by analogy, this opinion did establish at an early date that force could be proved without proving a battery.

The conventional way of charging a breach of the peace in the absence of any trespassory touching of the person is to charge the use of constructive force, that is, fear; and it is no defense that no actual force was applied: "[A]cts of extreme violence, as robbery, are sometimes committed under a very civil appearance."⁵¹ When the victim could achieve nothing but harm to himself by offering futile resistance, he may properly do nothing, so long as his forbidding is sufficiently plain to render trespassory the interference with his property.

Particular circumstances may influence whether a particular course of conduct arouses reasonable fear in a reasonable person. Factors such as the weight of numbers,⁵² men against women,⁵³ and whites against Negroes⁵⁴ create situations in which words alone, or words accompanied by actions on a comparatively modest scale, may assume menacing aspects outside of their ordinary appearances.

The offer of force sought to be proved must be real. There is no forcible trespass by weight of numbers or offer of force "where they neither put the owner in fear, nor provoke him to an immediate redress of his wrong by force, nor excite him to protect the possession of his chattel by personal prowess . . ."⁵⁵ Words alone do not constitute force unless they amount to threats of violence or lead to a demonstration of force.⁵⁶ Likewise fraud is not force. If a person is deceived into surrendering his property on the strength of a purported warrant, which it appears will be backed up by force in its execution, this is no forcible trespass unless and until the force is about to be brought into action.⁵⁷ But a forcible refusal to show the warrant in such a case, because it vitiates the lawfulness of the execution, would justify a conviction of forcible trespass.⁵⁸ And

⁵¹ *Id.* at 506.

⁵² See *State v. McAdden*, 71 N.C. 207 (1874); *State v. Armfield*, 27 N.C. 207 (1844); *State v. Simpson*, 12 N.C. 504 (1828).

⁵³ See *State v. Tuttle*, 145 N.C. 487, 59 S.E. 542 (1907); *State v. Gray*, 109 N.C. 790, 14 S.E. 55 (1891); *State v. Simpson*, *supra* note 52.

⁵⁴ See, *e.g.*, *State v. McAdden*, 71 N.C. 207 (1874).

⁵⁵ *State v. Mills*, 13 N.C. 420, 423 (1830).

⁵⁶ *State v. Tuttle*, 145 N.C. 487, 59 S.E. 542 (1907); *State v. Gray*, 109 N.C. 790, 14 S.E. 55 (1891); *State v. King*, 74 N.C. 177 (1876).

⁵⁷ *State v. Barefoot*, 89 N.C. 565 (1883); *State v. Armfield*, 27 N.C. 207 (1844).

⁵⁸ *State v. Armfield*, *supra* note 57.

when the victim knows the warrant is only a sham to cover the trespassory taking of his property with such force as need be, the court will not require a forbidding carried so far as to be an offer of resistance.⁵⁹

Finally, it has been clearly laid down that in forcible trespass, unlike the doctrine in robbery, the victim need suffer only the force implicit in an assault; he need not also be put in fear. The breach of the public peace is the same, whether the victim fights, falls back, or flees in the face of a threatened trespass, and the court has applied, though not stated, the "reasonable man" test with regard to fear in the presence of overwhelming force: "It is only necessary that the force should be such as was *calculated* to intimidate or alarm or involve or tend to a breach of the peace."⁶⁰

Trespass: The Personal Property

The types of personal property involved in forcible trespass prosecutions have been as miscellaneous as a mail-order catalog.⁶¹ Just as it is important to avoid a variance between pleading and proof as to real and personal property,⁶² there must be no significant variance between the object named in the indictment and the object proved to have been taken.⁶³ Apparently forcible trespass can even be charged in connection with the indirect taking of intangible prop-

⁵⁹ State v. Barefoot, 89 N.C. 565 (1883).

⁶⁰ State v. Pearman, 61 N.C. 371, 373 (1867). (Emphasis is by the court.)

⁶¹ *Banknote*: State v. Trexler, 4 N.C. 188 (1815); *promissory note*: State v. Ray, 32 N.C. 39 (1849); *due bill*: State v. Gray, 109 N.C. 790, 14 S.E. 55 (1891); *slaves*: State v. Armfield, 27 N.C. 207 (1844); State v. Mills, 13 N.C. 420 (1830); State v. McDowell, 8 N.C. 449 (1821); State v. Flowers, 6 N.C. 225 (1813); State v. White, 2 N.C. 13 (Super. Ct. 1792); *horses*: State v. Lutz, 65 N.C. 503 (1871); State v. Elrod, 28 N.C. 250 (1846); State v. Love, 19 N.C. 267 (1837); State v. Arrington, 7 N.C. 571 (1819); *mule*: State v. Tatom, 69 N.C. 35 (1873); *cow*: State v. McAdden, 71 N.C. 207 (1874); *hog*: State v. Barefoot, 89 N.C. 565 (1883); *dogs*: State v. Bogue, 31 N.C. 360 (1849); State v. Phipps, 32 N.C. 17 (1848); *deer*: State v. Hemphill, 20 N.C. 241 (1838); *sword*: State v. Sowls, 61 N.C. 151 (1867); *bolt of cloth*: State v. King, 74 N.C. 177 (1876); *bale of cotton*: State v. Marsh, 64 N.C. 378 (1870); *corn*: State v. Drake, 60 N.C. 238 (1864); *fodder*: State v. Surles, 74 N.C. 330 (1876); *blue stone*: State v. Pearman, *supra* note 60; *truck*: State v. Stinnett, 203 N.C. 829, 167 S.E. 63 (1933).

⁶² State v. Graves, 74 N.C. 396 (1876).

⁶³ In State v. Hemphill, 20 N.C. 241 (1838), the indictment named a slain deer whose carcass by agreement belonged to the defendant; the object proved taken was the severed deerskin, which by the same agreement belonged to the prosecutor. This was held a fatal variance between pleading and proof.

erty. In *State v. Tuttle*⁶⁴ the defendant had given the prosecutrix a note and chattel mortgage for one hundred dollars. He went to her, threatened and cursed her, and procured an order signed by her directing the register of deeds to cancel the mortgage, which was duly cancelled. The aspect of assault was plain; just what property was taken away from the prosecutrix was also plain—a chose in action worth one hundred dollars; but it is most doubtful that procuring the discharge of a debt by force would constitute robbery even today, because no tangible thing was both taken and carried away.

More than a hundred years ago forcible trespass could be used where neither larceny nor robbery could be charged, because the rules of “property the subject of larceny” did not confine forcible trespass. Real property was not the subject of larceny; but literally dozens of cases have been reported on forcible trespass to real property. A banknote, being the evidence of a chose in action, could not be the subject of robbery because it was intangible, and even its trifling value as paper was said to be merged in the chose in action which it represented. But since the banknote was capable of being possessed, it was personal property very much the subject of forcible trespass.⁶⁵ Today most of the limitations upon the subject of larceny, products of the days when larceny was a capital felony, have been removed by statute. However, statutes declaring gambling machines and non tax-paid liquor to be contraband and without property interests have raised a similar problem: does it violate the spirit of the statutes to sustain a conviction for larceny of contraband? Most decisions have simply smothered the question in judicial common sense—yes, it is larceny.⁶⁶ But it would be more workmanlike, if the question arose in North Carolina, to say that because title is irrelevant in forcible trespass, so is the statutory denial of property rights. Hence forcible trespasses to contraband could at least cover the worst forms of the crimes involving contraband, such as hijacking and other forms of robbery.

Trespass: Possession and Title

“Possession” has been defined as a neutral term representing the physical fact of peaceful possession without any aspect or hint of

⁶⁴ 145 N.C. 487, 59 S.E. 542 (1907).

⁶⁵ *State v. Trexler*, 4 N.C. 188 (1815). Other cases dealing with similar subject matter have not even raised this question.

⁶⁶ *E.g.*, *State v. Johnson*, 77 Idaho 1, 287 P.2d 425 (1955).

title. What constitutes a trespass to personal property involves the contemplation of what sorts of acts constitute the wrongful interference with the usual incidents of possession, which are principally continued possession and use. Taking and carrying away is the most obvious form of interference with possession in forcible trespass, and most of the cases involve this type of trespass. Damaging property is another form of trespass.⁶⁷ Interference with the use of a chattel is the mildest form of trespass found in these cases.⁶⁸ As a practical matter, any interference with the possession of personal property on the possessor's real property becomes magnified because the very entry may become trespassory: a trespass to real property aggravates the whole proceeding and increases the likelihood of a breach of the peace.⁶⁹

The trespasser has offered his title to personal property as a defense in several cases. This defense never succeeds because title is irrelevant no matter how well established. The very first case in North Carolina involved the taking and carrying away of slaves by order of the owner, who was in South Carolina. Judge Williams of the superior court excluded evidence of title, viewing the question as one of protecting the peaceful possession of property in North Carolina, and he insisted that title be tried out in civil actions, not by forcible self-help.⁷⁰ Claims of right to crops by tenant farmers and sharecroppers have also produced forcible trespass cases,⁷¹ and so has an ostensible tenancy in common.⁷² In all of the cases the court has followed the line of reasoning laid out in the earliest case: peaceful possession is ten points of the law of forcible trespass; disputes over title are to be litigated in the civil courts alone; title is no defense to forcible trespass.

Justifications

The reasonable and timely use of force in defending or re-

⁶⁷ *State v. Phipps*, 32 N.C. 17 (1848) (shooting a dog).

⁶⁸ *E.g.*, *State v. Tuttle*, 145 N.C. 487, 59 S.E. 542 (1907); *State v. Trexler*, 4 N.C. 188 (1815).

⁶⁹ See *State v. Pearman*, 61 N.C. 371 (1867); *State v. Trexler*, *supra* note 68.

⁷⁰ *State v. White*, 2 N.C. 13 (Super. Ct. 1792).

⁷¹ *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898) (dictum); *State v. Surles*, 74 N.C. 330 (1876).

⁷² *State v. Pearman*, 61 N.C. 371 (1867). And since felonious intent is not an element of forcible trespass, the absence of felonious intent shown by acknowledgment of the victim's title was held in *Pearman* to be no defense.

acquiring the possession of property in what amounts to an affray is neither a trespass nor an assault, provided the force is reasonably proportioned to the need and does not result in serious bodily injury or death;⁷³ hence this force needs no justification. But forcibly to repossess one's property from a peaceful possessor, no matter how wrongful his possession may be or how forcibly it was acquired, is itself a forcible trespass without justification.⁷⁴ Here forcible trespass offers a handy solution for an otherwise knotty problem in the law of robbery. If a man uses force to repossess his own property, he can hardly be said to have felonious intent, and there are cases elsewhere than North Carolina which hold that such a forcible repossession does not constitute robbery.⁷⁵ This misconduct can be punished as a forcible trespass, however, because felonious intent—the element missing in robbery—is not an element of forcible trespass.⁷⁶

The only legitimate justification for the use of force in taking possession of personal property is the execution of legal process, *feri facias*. As long as the place of execution is not a dwelling house,⁷⁷ such force as is necessary is justified if the writ is valid, even though the motive of the officer making the execution is bad,⁷⁸ and even if the sheriff makes a mistake in good faith as to the correct ownership of the property.⁷⁹ The process authorizing the levy can be fairly informal, and the forcible taking of a horse in satisfaction of a tax claim has been justified even though the deputy sheriff involved carried only a list of persons and property with him, not a copy of the list filed in the clerk of court's office, where it had the force of a judgment.⁸⁰ Only if the process is void on its face is the levying officer not justified in executing it.⁸¹

⁷³ *Curlee v. Scales*, 200 N.C. 612, 158 S.E. 89 (1931); *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898).

⁷⁴ *State v. Flowers*, 6 N.C. 225 (1813) (dictum).

⁷⁵ *E.g.*, *People v. Rosen*, 11 Cal. 2d 147, 78 P.2d 727 (1938).

⁷⁶ To be sure, a solution in robbery terms offers one benefit to law enforcement: robbery is a felony, whereas forcible trespass is only a misdemeanor. Unfortunately for the theory put forth, no case has used it either in North Carolina or elsewhere.

⁷⁷ See Sharpe, *Forcible Trespass to Real Property*, 39 N.C.L. Rev. 121, 142 (1961).

⁷⁸ *State v. Elrod*, 28 N.C. 250 (1846).

⁷⁹ *State v. Tatom*, 69 N.C. 35 (1873).

⁸⁰ *State v. Lutz*, 65 N.C. 503 (1871).

⁸¹ *State v. Barefoot*, 89 N.C. 565 (1883). See also Sharpe, *supra* note 77, at 142.

COMPARISONS, COMMENTS AND CONCLUSIONS

Merger and Lesser Included Offenses

By applying the doctrines of merger and lesser included offenses, forcible trespass to personal property can be compared with some of its close relatives, particularly larceny, robbery, and assault. It has been said that forcible trespass is merged in robbery, provided the article taken is the subject of larceny.⁸² By the same token, forcible trespass ought to be a lesser included offense to robbery in several situations: when the article taken is not the subject of larceny;⁸³ when the article is only trespassed upon, not taken away;⁸⁴ when there is no felonious intent;⁸⁵ when the taking precedes the force or fear;⁸⁶ or possibly when the taking is not *lucri causa*.⁸⁷

Forcible trespass is not, however, a lesser included offense to larceny, because even though a trespass is included in every crime against property, the trespass included is not automatically a criminal trespass: the trespass included in larceny is *vi et armis*, and that will not suffice in a forcible trespass indictment.⁸⁸

The Great Larceny Fiasco, 1857-1889

Forcible trespass to personal property has never included the vital element in larceny and its kindred crimes, felonious intent. For this reason, it has been possible to prosecute for forcible trespass in barefaced and defiant trespasses under claim of right in which no larceny or robbery charge could be brought.⁸⁹ But the availability of forcible trespass in this situation seems to have deflected the law of larceny for a time in the mid-nineteenth century, so that secrecy actually became an element of larceny.

The source of this unfortunate doctrine apparently was a highway robbery case⁹⁰ in which Justice Pearson attempted to con-

⁸² State v. Trexler, 4 N.C. 188 (1815).

⁸³ *Ibid.*

⁸⁴ State v. Phipps, 32 N.C. 17 (1848).

⁸⁵ State v. Surles, 74 N.C. 330 (1876); State v. White, 2 N.C. 13 (Super. Ct. 1792).

⁸⁶ State v. Love, 19 N.C. 267 (1837). See also State v. John, 50 N.C. 164 (1857).

⁸⁷ State v. Deal, 64 N.C. 270, 277 (1870) (dissent).

⁸⁸ State v. Stinnett, 203 N.C. 829, 167 S.E. 63 (1933). See also State v. Arrington, 7 N.C. 571 (1819). In 1819 conviction of a misdemeanor could not follow upon an indictment for a felony, but this rule has long since been changed.

⁸⁹ *E.g.*, State v. Surles, 74 N.C. 330 (1876).

⁹⁰ State v. John, 50 N.C. 164 (1857).

fine robbery to takings from the victim accomplished by force or fear, leaving to larceny takings accomplished by force directed solely against the property itself (larceny from the person), or takings accomplished by stealth but defended thereafter with force (larceny followed by assault). Justice Battle in effect dissented, showing the dangers involved in the distinction offered, but he concurred in the result so as to award the defendant a speedy new trial.^{90a} As Chief Justice, Pearson went further in concurring in a robbery case ten years later, saying: "Forcible trespass is the taking by force the personal property of another. Robbery is the fraudulent taking [*i.e.*, with felonious intent] by force the personal property of another."⁹¹ This left larceny as the secret taking of personal property with felonious intent, and in *State v. Deal*,⁹² this time speaking for the court, Chief Justice Pearson laid down the rule that secrecy indeed was an element of larceny. Justice Rodman, grandfather of the present Justice, dissented, arguing quite correctly that secrecy of taking was evidence of felonious intent, but that openness of taking, while tending to disprove felonious intent, was not conclusive against it.^{92a} Today *Deal* would be disposed of through the doctrine of larceny by trick.⁹³ *Deal* had acquired possession of a promissory note by pretending to examine it and had prevented the holder from recovering it by a show of force; however, Chief Justice Pearson apparently believed that a trick was not a larceny.⁹⁴

No sooner had the secrecy element been imposed by *Deal* in 1870 than its operation began to be limited. The following year a conviction of larceny for the open rolling of a drunk, conscious but incapacitated, was affirmed,⁹⁵ distinguishing *Deal* on the claim of

^{90a} *Id.* at 170 (separate opinion).

⁹¹ *State v. Sowls*, 61 N.C. 151, 157 (1867).

⁹² 64 N.C. 270 (1870).

^{92a} *Id.* at 275.

⁹³ *E.g.*, *The King v. Pear*, 1 Leach 212, 168 Eng. Rep. 208 (K.B. 1779).

⁹⁴ *State v. Deal*, 64 N.C. 270, 274 (1870). The term "larceny by trick" does not seem to have been used in any North Carolina case, although the principle of larceny from obtaining possession by means of a lie was mentioned in *State v. England*, 53 N.C. 399 (1861), and was used to affirm a conviction of larceny in *State v. Scott*, 64 N.C. 586 (1870), decided in the June term; *Deal* had been decided at the January term the same year. *State v. Bryant*, 74 N.C. 124 (1876), contained a learned discussion of the rationale of larceny by trick but still refused to use the term itself. *State v. McRae*, 111 N.C. 665, 16 S.E. 173 (1892), used the expression "trick or deception." Later cases have followed this practice. *E.g.*, *State v. Lyerly*, 169 N.C. 377, 85 S.E. 302 (1915); *State v. Ruffin*, 164 N.C. 416, 79 S.E. 417 (1913).

⁹⁵ *State v. Jackson*, 65 N.C. 305 (1871).

right in that case and the incapacity of the victim in this. A year later Chief Justice Pearson had to strain to find secrecy in the working of the tobacco-box trick, an ancient confidence game, in order to affirm a larceny conviction.⁹⁶ This was a serious problem—the victim's money was snatched out of his hands and the thief simply outran him. This was not robbery or forcible trespass; if it was not larceny, it was only a civil trespass—a result which could not be tolerated. Justice Boyden in the same year insisted that “the property must be taken feloniously, that is, fraudulently and secretly, so as not only to deprive the owner of the property, but also of the knowledge of the taker”⁹⁷ Justice Rodman dutifully distinguished *Deal* in 1874 by holding that the taking of a hog in the presence of a stranger was still secret as to the hog's owner and therefore was a larceny.⁹⁸ The zenith (or nadir) of this series of cases came in 1875 in a case appealed because the trial judge had left to the jury the question whether or not secrecy was an element of larceny. This was plainly error and the supreme court awarded a new trial. Without citing a single case in its entire opinion, the court did suggest that the capture and consumption of stray chickens from next door did not show felonious intent.⁹⁹

Fourteen years later *State v. Powell*¹⁰⁰ effectively, but without saying so, overruled *Deal*, relying heavily upon Justice Rodman's dissent in *Deal*. The defendant, who was well known to the victim, snatched away the victim's money without a pretense of claim of right. The defendant's companion held the victim to prevent retaking, and the defendant threatened to kill the victim if he followed. A larceny conviction was affirmed. Thereafter the overruling of *Deal* became regarded as a settled doctrine,¹⁰¹ and in a later chicken-stealing case, *Powell* was regarded as restoring the rule that openness of taking was only evidence tending to rebut felonious intent.¹⁰² This view of secrecy in larceny has persisted and has not subsequently been disturbed.¹⁰³

⁹⁶ *State v. Henderson*, 66 N.C. 627 (1872).

⁹⁷ *State v. Ledford*, 67 N.C. 60, 62 (1872).

⁹⁸ *State v. Fisher*, 70 N.C. 78 (1874).

⁹⁹ *State v. Gaither*, 72 N.C. 458 (1875).

¹⁰⁰ 103 N.C. 424, 9 S.E. 627 (1889).

¹⁰¹ *State v. Hill*, 114 N.C. 780, 18 S.E. 971 (1894).

¹⁰² *State v. Coy*, 119 N.C. 901, 26 S.E. 120 (1896).

¹⁰³ *E.g.*, *State v. Holder*, 188 N.C. 561, 125 S.E. 113 (1924).

Forcible Trespass as a Civil Action

The study of forcible trespass would not be complete without some attention to the fairly recent use which has been made of the term in civil actions. The actions themselves have been generally for assault, but they have possessed certain characteristics which make them strongly akin to the crime of forcible trespass: strong-handed force or fear; some connection with property, real or personal; and generally the twin aspects of bare-facedness rather than stealth, and some claim of right, ranging from a disputed right of way to complete title. This usage of forcible trespass in civil actions cannot be termed "improper," and even if it were so called, it would still be law. Analytically the usage seems to be another manifestation of disapproval of strong-handed trespasses, rather than a cause of action separate from assault and battery. As such, the civil action for forcible trespass is no more startling or illogical than the division of the crime of forcible trespass into personal and real property compartments.

The civil action for forcible trespass originated in 1890 with *Mosseller v. Deaver*.¹⁰⁴ The court there ruled that a criminal action for the strong-handed eviction of a tenant from a house, "a forcible entry under the statute [of forcible entry and detainer], if not indeed an indictable forcible trespass,"¹⁰⁵ supported a civil action for damages, adopting the then English position.¹⁰⁶ The court held that the plaintiff was entitled to recover nominal damages for the trespass and compensatory damages for actual harm to his person and personal property, and it said, "There may also be awarded exemplary damage if the unlawful act be done in a wanton and reckless manner."¹⁰⁷ The plaintiff was awarded a new trial in which the jury would be instructed that "the forcible entry was unlawful, without reference to the amount of force necessary"¹⁰⁸

Between *Mosseller* and the next case in a direct line, North Carolina made two important enlargements in its tort law. It accepted demonstrable nervous injuries as compensable harms.¹⁰⁹

¹⁰⁴ 106 N.C. 494, 11 S.E. 529 (1890).

¹⁰⁵ *Id.* at 495, 11 S.E. at 530. See also Sharpe, *supra* note 77, at 136.

¹⁰⁶ *Newton v. Harland*, 1 Man. & G. 644, 133 Eng. Rep. 490 (C.P. 1840). *Newton* was overruled by *Hemmings v. Stoke Poges Golf Club, Ltd.*, [1920] 1 K.B. 720 (C.A. 1919), discussed in Note, 36 L.Q. Rev. 204 (1920).

¹⁰⁷ *Mosseller v. Deaver*, 106 N.C. 494, 498, 11 S.E. 529, 530 (1890).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Kimberly v. Howland*, 143 N.C. 398, 55 S.E. 778 (1906).

It also allowed punitive or exemplary damages for intentional assault without any touching which resulted in such nervous injuries;¹¹⁰ and at the same term the court heard the first appeal to test the punitive damages aspect of *Mosseller*. Workmen for a telegraph company on its right of way intentionally and most obnoxiously bothered a pregnant woman, entering her home against her forbidding and causing her definite physical injuries. She was awarded punitive damages. The court viewed the case as a trespass *ab initio* to real property, accompanied by foreseeable consequential physical injuries to the plaintiff.¹¹¹ Nothing was said about forcible trespass, however.

In the next case¹¹² an assault and battery arose when the defendant drove off a cow with the plaintiff hanging onto its chain, dragging the plaintiff under a barbed wire fence and causing her to miscarry. There was a genuine dispute over the extent of the plaintiff's right to tie the cow where it was and possibly over the defendant's right to distrain the cow for damages, but the defendant used excessive force under the circumstances:

The cows, being securely tied to trees, were in the actual possession and under the immediate personal control of the plaintiff and her mother-in-law, and it was a forcible trespass to take them away against their will, they being present and forbidding.^{112a}

Not only is the language of the opinion that of criminal forcible trespass, but Chief Justice Clark also used the term and cited criminal cases in support of his decision.

During and after the Depression, over-zealous repossessions and evictions gave rise to a few civil forcible trespass cases. The general rationale of the action received some attention, but it was not worked out to a satisfactory scheme. The aspects of force were applied directly from the criminal law, however:

Where there is such a show of force as to create a reasonable apprehension in the mind of the one in possession of premises that he must yield to, avoid a breach of the peace,

¹¹⁰ *Saunders v. Gilbert*, 156 N.C. 463, 72 S.E. 610 (1911).

¹¹¹ *May v. Western Union Tel. Co.*, 157 N.C. 416, 72 S.E. 1059 (1911).

¹¹² *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 100 S.E. 602 (1919).

^{112a} *Id.* at 350, 100 S.E. at 605.

and he does so yield, this is yielding upon force, and constitutes forceable [*sic*] trespass.¹¹³

And the force must tend to a breach of the peace: words alone, unaccompanied by threats, were not enough.¹¹⁴

Although the damages rules were firmly established, the name and identity of the cause of action were not. For example, it was variously called "civil action to recover damages for alleged forcible trespass",¹¹⁵ "assault and forceable trespass",¹¹⁶ and finally "civil action for willful trespass to the person."¹¹⁷ Perhaps the direction of the terminology suggests the eventual fate of civil forcible trespass: merger in civil assault. Indeed *Kirby v. Jules Chain Stores Corp.*¹¹⁸ probably marked the end of forcible trespass as a distinct cause of action. No later case has turned upon its identity or has been labelled by the term, although the term itself has been used fairly recently to describe assaults civil and criminal.¹¹⁹ Perhaps Chief Justice Stacy expressed in *Kirby* the feeling which led to the disappearance of civil forcible trespass as a cause of action in itself:

It is true, the basis of the action in most of the cases has been forcible trespass, and it is contended that in the case at bar no forcible trespass has been shown, hence no liability exists. Without conceding the correctness of the syllogism as applied to the instant case, it is observed that much of the confusion on the subject seems to have come from worshipping at the shrine of words and formulas, rather than applying correct principles to the facts in hand.¹²⁰

It may be that since *Kirby* no plaintiff's attorney has felt that he really needed forcible trespass.

¹¹³ *Freeman v. General Motors Acceptance Corp.*, 205 N.C. 257, 258, 171 S.E. 63, 64 (1933), discussed in Notes, 47 HARV. L. REV. 884 (1934); 12 N.C.L. REV. 154 (1934).

¹¹⁴ *Kaylor v. Sain*, 207 N.C. 312, 176 S.E. 560 (1934); *Anthony v. Teachers Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934).

¹¹⁵ *Freeman v. General Motors Acceptance Corp.*, 205 N.C. 257, 171 S.E. 63 (1933).

¹¹⁶ *Anthony v. Teachers Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934).

¹¹⁷ *Martin v. Spencer*, 221 N.C. 28, 18 S.E.2d 703 (1942); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936).

¹¹⁸ 210 N.C. 808, 188 S.E. 625 (1936).

¹¹⁹ *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 23 S.E.2d 894 (1942) (*semble*); and see *State v. Goodson*, 235 N.C. 177, 69 S.E.2d 242 (1952).

¹²⁰ 210 N.C. at 812, 188 S.E. at 627.

CONCLUSION

A year ago this writer bemoaned the unnoticed eclipse of forcible trespass to real property.¹²¹ Is there any reason to mourn the disuse of forcible trespass to personal property? Probably not as a practical matter. Unlike the several crimes against real property, criminal trespasses to personal property are now well covered without forcible trespass: the antique refinements of things subject to larceny have been done away with by statute, and only the area of robbery without felonious intent might seem to be covered better by forcible trespass. Had North Carolina been tardy in awarding damages and even punitive damages for fright without impact or physical harm, the civil cause of action for forcible trespass might have become firmly established. This, however, has not been the case, and actions for civil assaults can accomplish all that the plaintiff needs.

Still forcible trespass to personal property is more than a historical curiosity: its acceptance and development demonstrate the common law at its most adaptable, filling lacunae in the common law of crimes until legislation took over, and serving especially in times of civil unrest¹²² to aid in suppressing the open lawlessness threatening the fabric of society. Perhaps the crime is not so much dead as dormant, the need for it having abated. This, then, is no obituary. Forcible trespass to personal property has never been overruled, merged, or even disapproved.¹²³ It is a good weapon to have in reserve.

¹²¹ See Sharpe, *supra* note 77, at 152.

¹²² Upwards of half of the opinions on forcible trespass bear dates between 1860 and 1885, for example.

¹²³ Forcible trespass was still a crime in good standing in its latest affirmed conviction. *State v. Tuttle*, 145 N.C. 487, 59 S.E. 542 (1907).