THE RIGHT OF RECAPTION OF CHATTELS

R. R. STUART AND L. H. LEIGH*

Of all the many forms of self-help, probably the most ill-defined and indefinite is the right of recaption, which arises, in a general way, when a person who has somehow been dispossessed of his chattels seeks to retake them without recourse to law. In what situations, and in what manner he may do so, it is the purpose of this article to discover.

HISTORY

The right of recaption, broadly defined, has existed for a very long time, although the centuries have seen great changes in its application and scope. For instance, in the early Anglo-Norman period, and even as late as the fourteenth century, the right was only allowed when the owner was in fresh pursuit and the retaking accompanied with the most solemn legal and religious formulae.[1] Non-compliance with these requirements led to forfeiture of the chattels. In the words of Professor Maitland:[2]

> Our common law, which in later days has allowed a wide sphere to recapture . . seems to have started in the twelfth and thirteenth centuries with a stringent prohibition of informal self-help . . . .

By the time of Coke, the right of recaption was recognized in English law, although subject to real restrictions as to the amount of force permissible in retaking the chattels. The following quotation from Blackstone's Commentaries illustrates this point:[3]

> When any one hath deprived another of his property in goods or chattels personal . . . the owner of the goods may lawfully claim and retake them wherever he may find them, so it be not in a riotous manner, or attended with a breach of the peace.

By the middle of the nineteenth century the right had expanded considerably. The culmination of this expansion appeared *in Blades* v. *Higgs*,[4] where it was held that the owner of goods wrongfully witheld may use reasonable force in retaking them, whether the possession of the other party was rightful or wrongful in its inception. At about the same time the Supreme Court of New Brunswick[5] held that even were a breach of the peace to result from such a recapture, the retaker would not be civilly or criminally liable.

In our submission however, the right of recaption is once more being circumscribed by the courts, and the modern tendency seems away from self-help, except where it is obvious that removal of the right would give rise to real hardship.

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*R. R. Stuart and L. H. Leigh, first year law.

[1] Pollock and Maitland, History of English Law (2nd ed., 1911), vol. 2, p. 168.

[2] *Ibid.*, at p. 169.

[3] Blackstone's Commentaries (1902), 111, 3-4.

[4] *Blades* v. *Higgs* (1861), 10 C.B. (N.S.) 713.

[5] In *Graham* v. *Green* (1862), 10 N.B.R. 330.

THE PROBLEM

Before the right can be exercised at all, the chattels must be of a class subject to recapture. Animals detained *damage feasant* in a pound,[7] unbranded animals *ferae naturae*,[8] and goods distrainable either for rent or under hire-purchase agreement[9] fall outside this class. Another and obvious limitation is that title must still be in the owner. If title has passed, as to a third party by means of a voidable contract, the former owner may not retake the goods. Except where specifically stated below, the goods in all situations discussed will be regarded as generally subject to recapture.[10]

Any examination of the right of recaption must necessarily concern itself with three main topics:

1. Recaption not involving force or entry upon the land of another.
2. Recaption involving the use of force but not entry on another's land.
3. Recaption involving entry on the land of another.[11]

These three sections will be discussed primarily on a basis of the fault involved in the original taking, since that is the basis upon which most of the relevant decisions have been founded. There is, for example, a great difference between the right to recapture goods stolen and those taken only tortiously, or between the right to retake goods lost accidentally and those lost through the fault of the owner.

PEACEFUL RECAPTION NOT INVOLVING ENTRY ON ANOTHER'S LAND

If the "natural right of recaption" exists at all it must surely exist where the owner of the goods, having been wrongfully dispossessed, subsequently retake the goods peacefully.[12] As East put it in his Pleas of the Crown:[13]

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[7] Animals *damage feasant* may not be recaptured from a pound without payment for the damage done. The Domestic Animals Act (Municipalities), R.S.A., 1942, c. 91, s. 33, and the Domestic Animals Act (Unorganized Territory), R.S.A., 1942, c. 92 s. 41. Pound breach is made an offence punishable on summary conviction with a maximum fine of $100.

[8] Not all *ferae naturae* are the subject of a mere qualified property. The Game Act, 1946 (Alta.) c. 4, s. 4, provides that all branded animals shall remain the property of the brander wherever the animals may go in the province. On principle this would seem to give the owner of the animal the same right of recaption as he would have in regard to any other personal property.

[9] All seizures in Alberta are carried out by the sheriff under warrant and therefore a private person, even though entitled to the goods may not seize them. The Seizures Act, R.S.A., 1942, c. 143.

[10] When the owner's goods have been commingled in such a manner as to render them inseparable and indistinguishable, the wronged owner becomes a tenant-in-common if the commingling was done tortiously, and the sole owner if it was done criminally. If the commingling was done criminally the owner has the same rights of recaption as he has in the case of an ordinary chattel. *MacDonald v. Lane* (1884), 7 Can. S.C.R. 462. If the commingling was done tortiously and the chattels are separable, as in the case of two lots of logs mixed together, the owner may retake an amount equal in quantity and quality to the amount of which he was deprived. *Lawrie v. Rathbun et al.* (1877), 38 U.C.Q.B. 255.

[11] With special problems relating to the use of force in the situation.

[12] This is generally admitted. See, e.g., Blackstone's Commentaries (1902), at p. 111, 4; Salmond on Torts (10th ed., 1945), 191; Winfield on Torts (6th ed., 1954), 437-38; Pollock on Torts (15th ed., 1951), 293; and Branston, The Forcible Recaption of Chattels (1912), 28 L.Q.R. 262 ff.

[13] 11 East's Pleas of the Crown, 790.

> A person whose goods have been stolen has the right to retake them peaceably . . . unless, since the taking by the thief, something has occurred to divest the owner's title.

Much later, in *Rayson* v. *Graham*,[18] Richards C.J. said confidently:

> The rule that the owner of personal property might take it wherever he could find it if he did not commit a breach of the peace or trespass on the close of another is well established.

A similar expression of confidence is seen in *McMullin* v. *Campbell*,[14] a Nova Scotia decision.

So long as a person has an immediate right to possession, which could be enforced judically,[15] and retakes his goods peacefully, no-one has a right to complain, for he has harmed nobody, and by acting speedily has averted a real danger of possible injustice.[16] For instance, it has been held that where a landlord illegally takes money owing him from his tenant, the tenant has every right to retake it peacefully.[17] Similarly, the owner, if he uses no force, may retake the goods from an innocent third party who has not obtained a valid title,[18] and even if title has passed, the owner will be guilty of no crime if he retakes them in this way, believing himself entitled to do so.[19]

RECAPTION INVOLVING THE USE OF FORCE

The question as to when one may use force to retake one's chattels is by no means a settled point. The American Restatement of the Law of Torts[20] lays down several necessary prerequisites to its use which may be summarized as follows:

1. The possession must be wrongful. It is impossible to quarrel with this, since if the dispossessed party uses force in retaking goods held rightfully by another, he will be held liable for the battery, no matter how reasonable his mistake.[21]

2. The owner must have been dispossessed, as well as having a right to possession. This of course, is implict in the word "recaption".

3. The right to possession must be immediate. This is eminently reasonable, since if there is no immediate right to possession, as where goods are legally held for security, the owner does not even have the right to retake them peaceably. If he "reverts to man's primeval instincts", he does so at his own risk.[22]

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[13] *Rayson* v. *Graham* (1864), 15 U.C.C.P. 36, at p. 38.

[14] *McMullin* v. *Campbell* (1920), 54 N.S.R. 164, at p. 165

[15] *Phillips* v. *Murray*, [1929] 2 W.W.R. 314, approving Salmond on Torts [(10th ed., 1945). 191].

[16] The goods may have been destroyed or taken to some unknown place. These dangers are pointed out by Winfield and Pollock, *loc. cit.*

[17] As in *Austin* v. *Dowling* (1870), L.R.5C.P. 534.

[18] As in *Bowan* v. *Yielding*, M.T. 3 Vict., as reported in the Digest of Ontario Case Law, 111, 6904.

[19] A person taking back his goods under the impression that he has a right to do so cannot be convicted for theft, although he may be convinced of an assault perpetrated in so doing. *R* v. *Boden* (1844), 174 E.R. 863.

[20] Restatement, Torts, ss. 100-105.

[21] *Supra*, footnote 19.

[22] Branston, *op. cit.* 262. *Nykolyn* v. *R.*, [1949] S.C.R. 392.

4. The owner must first make a demand for the return of the chattels, unless such demand be unreasonable under the circumstances. Although there is no direct authority in English or Canadian law for this proposition, it is submitted that the extremely reasonable view of the Restatement ought to prevail as it might serve to lessen some of the dangers inherent in a too ready resort to force.

5. The owner must act promptly, and cannot use force if he is not in fresh pursuit of his chattels. American cases such as *State* v. *Dooley*[23] support this statement, although it is doubtful if it correctly expresses the law in Canada.

These propositions cannot too readily be accepted as the law in Canada, unfortunately, since against their clarity stands a mass of apparently conflicting *dicta*, both English and Canadian.

Originally, unless the pursuit was fresh, one could not in recapturing the goods, use any force at all, and if it were used, all right to the goods was immediately forfeit.[24] Even later cases like that of *Shingleton* v. *Smith*[25] contain statements to the effect that a servant may justify a battery in defence of his master, but not in defence of his master's goods. Blackstone expressed the view of the eighteenth century lawyers when he wrote:[26]

> As the public peace is a superior consideration to any one man's private property, and if individuals were once allowed to use private force as a remedy to private injuries, all social justice would cease, the strong would give law to the weak, and every man would revert to a state of nature: for these reasons it is provided that the natural right of recaption shall never be exerted where such exertion must occasion strife or bodily contention, or endanger the peace of society. . . . If for instance my horse is taken away . . . I cannot justify [retaking him forcibly] . . except he be feloniously stolen . . .

The validity of this statement was soon thrown into doubt. In *Goodhart* v. *Lowe*, Lord Eldon L.C. stated that "if the plaintiff has a right to the goods, he may lay his hands upon and recover them, if he can; indeed Buller J. used to say, by any means short of felony".[27] In *Rex* v. *Milton*,[28] where the defendant refused to give up a search warrant to the officer who had shown him it, and a violent fracas ensued, it was held that a person can retake goods wrongfully taken from him, and of which he has the right to custody, using no more force than is necessary. However, the court added the provisio that if unnecessary force was used, the other party might retaliate. Finally, in *Blades* v. *Higgs*,[29] where the defendant's servants had forcibly retaken rabbits from the plaintiff, a poacher, it was held that reasonable force might always be used against anyone wrongfully detaining one's goods, and perhaps even against an innocent third party. But as is pointed out by Pollock,[30] "if the test is that A must use no

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[23] *State* v. *Dooley* (1894), 26 S.W. 558. Held within a reasonable distance and therefore within a reasonable time were 100 rods in *State* v. *Elliot* (1841), 11 N.H. 540, and several miles in *Hodgeden* v. *Hubbard* (1846), 46 Am. Dec. 167. See generally: Restatement, *loc. cit.*; and Prosser on Torts (2nd ed., 1955), 100

[24] Pollock, *op. cit.*, 293.

[25] *Shingleton* v. *Smith* (1699), 2 Lut. 1482; 125 E.R. 816.

[26] Blackstone, *op. cit.*, 4.

[27] *Goodhart* v. *Lowe* (1820), 2 Jac. & W 349; 37 E.R. 661.

[28] *R.* v. *Milton* (1827), M.&M. 107; 173 E.R. 1097, at p. 1098.

[29] *Blades* v. *Higgs* (1861), *supra*, footnote 4.

[30] Pollock, *op. cit.* 293.

more force than is necessary, and as this necessarily varies with the facts of each case, self-help is likely to be just as dangerous a remedy here as elsewhere".

Yet the courts, at least in Canada, seem to have retreated from this nineteenth century attitude to the problem. In *Phillips* v. *Murray*,[31] a Saskatchewan decision, the court approved a dictum of Sir John Salmond's to the effect that recaption could not be tolerated unless the person forcibly recapturing the goods could have obtained specific restitution of the goods in judicial proceedings. Significantly, Haultain C.J.S. went on to say:

> It is a rather startling doctrine, and not at all conducive to the King's Peace, to hold that, in order to recover property, however unjustifiably retained, the owner may injure the wrongdoer as defendant injured the plaintiff (severely beating him).

In 1951 the Supreme Court of New Brunswick in *Devoe* v. *Long*,[32] held emphatically that the use of force was never justified unless the adverse possession was wrongful in its inception, and distinguished *Blades* v. *Higgs*[33] and the earlier New Brunswick decision of *Graham* v. *Green*[34] on the grounds that in both cases, the original possession was wrongful in the inception. Significantly also, the Canadian Criminal Code[35] only extends justification to the retaker if he "does not strike or cause bodily harm to the trespasser". Since the Code also states that the holder of goods under a reasonable claim of right may defend his possession as if he were the true owner,[36] it would be strange if the law were even impliedly to authorize two parties to attack each other simultaneously. Of course it is probable that if an assault is necessary in the first place, it is because the wrongful taker is about to resist, and if he does so, he is deemed to commit an unprovoked assault. Nevertheless, forcible recaption while probably authorized in this country if retaking was wrongful in its inception, is at best an uncertain and dangerous remedy, to be exercised only with extreme caution, as where the goods are in danger of being lost or carried away.

RECAPTION INVOLVING ENTRY ON THE LAND OF ANOTHER

We now turn to the third sphere of recaption, that is, recaption of chattels from the land of another. It is in this sphere that most of the uncertainty in the law exists.

We shall discuss the right of recaption in this situation on a basis of fault and in the following order: first, the right when the occupier is at fault; second, the right when the owner of the chattel is at fault or the possession of the occupier was rightful in its inception; third, the right when the chattel came on the land through the fault of a third party; and fourth when the chattel came on the land through one one's fault.

1. If the occupier himself places the goods of another on his close:

> he gives to the owner of them an implied license to enter for the purpose of recaption.[37]

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[31] [1929] 2 W.W.R. 314, at p. 316.
[32] [1951] 1 D.L.R. 203.
[33] *Supra*, footnote 4.
[34] *Supra*, footnote 5.
[35] 1953-54 (Can.) c. 51, s. 38(1).
[36] *Ibid.* s. 39.
[37] *Patrick* v. *Colerick* (1838), 3 M. & W. 483; 150 E.R. 1235 at p. 1236.

This statement is far too wide however, for the courts have hedged this license with restrictions, especially in regard to the use of force. For instance, if the taking was merely tortious, only reasonable force may be used and a breach of the peace is not permissible.[8] If the taking was criminal however, and the occupier resists the retaking, the owner of the chattels may use sufficient force to defend himself.[9] It is submitted that the retaker may not use force to retake his chattels if the occupier is acting under a claim of right, whether the goods were stolen or only taken tortiously.

2. When the occupier's possession was rightful in its inception, no force may be used to retake the chattel. This point, which has been the subject of contention ever since *Blades* v. *Higgs*,[10] has recently been decided by the Supreme Court of New Brunswick in *Devoe* v. *Long*.[11] The facts in that case were that the defendant had been in trouble with the Income Tax Department and had received a letter from them. The defendant suspected that the plaintiff, who had worked for him, had reported him, and took the letter over to the plaintiff's home to show it to the plaintiff. An argument ensued and the plaintiff ejected the defendant who forgot to take the letter with him. The defendant later came back for the letter with his son, and upon the plaintiff's refusing to give the letter up, the defendant broke into the plaintiff's home and violently assaulted him. In his judgment, Harrison J. said:[12]

> ... if the plaintiff's possession was originally lawful but has been terminated by a request from the defendant who is entitled to the possession of the chattel. In such cases the defendant may make an entry on the plaintiff's close to retake, but only if such entry can be made peaceably and not by committing a breach of the peace.

Thus it will be seen that if the chattel came on the land through the fault of the owner of the chattel, he may not make entry upon the land of another to retake it. This rule is the same whether the goods came on the land through intent or through the owner's negligence.

3. When the presence of the chattel on the land is due to the act of a third party, the right of recaption depends upon the manner in which the chattel was originally taken, and whether the occupier was or was not aware of the presence of the chattel on the land, and whether or not the occupier consented to the presence of the chattel on the land.

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[8] *Supra*, footnote 32.

[9] *Supra*, footnote 35, ss. 34, 35.

[10] *Supra*, footnote 29.

[11] *Supra*, footnote 32.

[12] *Ibid.*, at p. 222.

[13] *The Case of the Thorns* Y.B. 6 Ed. II, 7, pl. 18; *Anthony* v. *Haney* (1832), 8 Bing. 186, 131 E.R. 372.

If the chattel was taken criminally,[44] and the occupier permitted its deposit on his land, the owner of the chattel may enter the occupier's close to retake it.[45] It is immaterial whether the occupier knew that the taking of the chattel was criminal, for if he assents to its presence on the land, he:

> . . . though not cognizant of the felony, justly incurs the risk of the thing turning out to be stolen.[46]

Presumably reasonable force may be used to retake the chattel except where the occupier of the chattel acts under a claim of right. There should at all events, be prior demand to enter before force is resorted to. If the occupier was not cognizant of the presence of the chattel on his land, then the situation should be dealt with as if the chattels came on the land through the tort of a third party.

When the chattel came on the land through the tort of a third party, the situation is rather different. There are three possible approaches to the problem. The first, for which there is no authority, is that the owner of the chattel may enter on the land and retake it without incurring any liability. The second approach treats any such entry for the purpose of recaption as a trespass. The third approach, and the one favoured by many American jurisdictions, is that the owner has a license to enter for the purpose of recaption, but will be liable for any damage incidental thereto.

The view which treats entry on the land as a trespass was the first to be accepted. In 1519, the court in *Higgins* v. *Andrewes* said:[47]

> But if J.S. take my horse and put him in the land of J.D. it is not lawful for me to enter on the land and take him because it is no felony.

In the later case of *Patrick* v. *Colerick*,[48] the court was equally definite. Tindal C.J. said:

> The mere fact of the defendant's goods being on the plaintiff's close is no justification of the entry if it cannot be shown how they came there.

This rigid position is also supported by Blackstone who writes:[49]

> . . . if for instance my horse is taken away . . . I cannot justify breaking open a private stable or entering upon the grounds of a third person to take him except he be feloniously stolen.

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[44] It has been suggested that there is a difference in the use of force permissible when the chattel was taken by felony or misdemeanour. It is submitted that historically, there was no difference. All offences against the goods of man were felonies in Hale's time. Hale, Pleas of the Crown, p. 26. Before 1833 most offences dealing with property were felonies and by the time that many had been made misdemeanours by statute, criminal taking had been equated with tortious taking in regard to use of force. *Blades* v. *Higgs* 142 E.R. 634. Winfield draws a distinction on the grounds that trespass was a misdemeanour. While it is true that trespass was a quasi-criminal action at one time, and a fine was imposed by the crown, the fine was not imposed for the trespass to chattels or land but for a fictional battery which was always alleged to accompany the trespass, but was never proved. Maitland, The Forms of Action at Common Law, at p. 67. The Criminal Code has abolished the distinction between felonies and misdemeanours and replaced them with indictable and non-indictable offences and does not distinguish between them as to the use of force (see, Code, ss. 37-39.).

[45] *Chapman* v. *Tumblethorp*, Cro. Eliz. 330, 78 E.R. 579.

[46] *Cunningham* v. *Yeoman*, 7 N.S.W., 149; Bohlen, Cases on Torts, 104.

[47] *Higgins* v. *Andrewes*, (1619), 2 Rolle, 81 E.R. 656.

[48] *Supra*, footnote 36, at p. 1237.

[49] Blackstone's Commentaries (1902), 117-5.

The third approach, which we call the theory of Qualified License, is more modern in origin and derives its greatest support in the United States.[50] The doctrine was first set forth in decisive fashion in *Chambers* v. *Bedell*[51] a century ago. The most lucid exposition of this approach is in the Restatement of Torts which says in part:[52]

> The actor may come on the land for the purpose stated [the reception of chattels] but he is subject to liability . . . for any harm . . . his entering or remaining on the land or his removal of the chattel may cause.

The doctrine of Qualified License has also found some support in English and Canadian courts. In the case of *Anthony* v. *Haney*, Tindal C.J. in a dictum said:[53]

> A case has been suggested in which the owner might have no remedy where the occupier of the soil might refuse to deliver up the property . . . at any rate the owner might in such a case enter and take his property subject to the payment of any damage he might commit.

In the recent case of *Southport* v. *Esso*,[54] Devlin J. was prepared to hold that in cases of necessity, entry must be allowed, but that the licensee must pay for any damage he might do while on the land. It may be argued by analogy that Devlin J.'s dictum ought also to apply to cases where the presence of the chattel on the land is due to the tortious act of a third party, for in such a case, as in necessity, neither the owner nor the occupier is in any way at fault.

In Canada there are more dicta in favour of a qualified license that there are in England. In 1836 the Supreme Court of New Brunswick were faced with the problem in *Read* v. *Smith*.[55] In that case, timber came on the plaintiff's land through a sudden rise in the water level which set the defendants booms adrift. The defendant then entered the plaintiff's close to retake the logs. The court was not satisfied that the defendant had used sufficient care to prevent the logs from floating free, but Chipman C.J. said, that had the defendants not been at fault:[56]

> . . . there should in such a case have been a previous request to enter and they must at all events have been liable for any damage done to the land . . . it was their affair to take it away without doing wrong to the plaintiff.

This decision, strongly indicative of an approach to the qualified license theory was followed in *Hamilton* v. *Calder*[57] which decided that the owner of a

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[50] The American writers refer to Qualified License as Incomplete Privilege.

[51] *Chambers* v. *Bedell* (1841), 2 Watts & S. 225 (Pennsylvania).

[52] Restatement, Torts, s. 198(2).

[53] *Anthony* v. *Haney* (1832), 8 Bing. 187, at 192; 131 E.R. 372, at 374.

[54] *Southport Corp.* v. *Esso Petroleum Co. Ltd. et al.* [1953] 2 All E.R. 1204, at 1206. Devlin J.'s judgment was affirmed recently in the House of Lords, *sub. nom. Esso Petroleum et al* v. *Southport Corp.*, [1955] 3 All E.R. 865. In the House of Lords, Lord Morton, at p. 870, and Lord Radcliffe, at p. 872, were of the opinion that necessity would afford a complete defence to nuisance. This does not necessarily reject qualified license for in this case, as in *Mouse's case*, 77 E.R. 1341, the pleadings alleged that the goods were jettisoned to save life. Further the opinion of the House deals only with the original placing of the goods on the land. Devlin J. uses wider language for he says, at p. 1207, "I can see no reason why . . . if the defendant as a licensee or trespasser misuses someone else's land he should not be liable for a nuisance in same way as an adjoining landowner would be."

[55] *Read* v. *Smith* (1836), 2 N.B.R. 288.

[56] *Ibid.*, at p. 293.

[57] *Hamilton* v. *Calder*, 23 N.B.R. 373.

chattel which is in the land of another through no fault of his own, has a right if refused permission to enter, to go in and recover his goods. These cases would seem to indicate that in the Maritime Provinces at any rate, there is a trend towards a theory of qualified license.

Of the text-writers however, the only ones who favour this theory are the Americans, particularly Professor Bohlen and Dean Prosser. Their view is that:[58]

> . . . in such cases, the privilege resembles that of necessity, and since the plaintiff is not a wrongdoer, it seems fair to require the defendant to make good any actual damage he may do in the course of his entry . . . .

There is a solid foundation for this approach, which can easily be applied if the courts see fit and it affords in addition, the most equitable approach possible under the circumstances. The occupier is in no way harmed because any damage done to his land will be paid for by the owner of the chattels, while the owner's losses will be minimized by avoiding a costly suit for the recovery of the chattels. Delay in repossessing the chattels may wreak actual hardship on the owner while the occupier must render the chattels sooner or later. Thus the owners interest far outweighs that of the occupier and it should be so recognized.

It is submitted however, that demand to enter must first be made, and if permission to enter be refused, then the owner should not be allowed to provoke a breach of the peace.[59] The owner may not if refused permission to enter, make a clandestine entry to recapture his goods In the case of *Wentzell* v. *Vienot & Hall,*[60] where a wife sold her cow to the defendant Vienot, the husband refused to give the cow up and locked it in a stable. The defendant returned at ten p.m. with a police officer, Hall, broke into the plaintiff's stable and took the cow. The court held the defendants liable for trespass and strongly disapproved of the clandestine entry, saying that such a course was more fitting for a criminal than a police officer. Thus the qualified license would exist only when the occupier gave permission to enter or did not resist entry with force.

4. We shall now deal with two situations where the presence of the chattels on the land was due to no fault on anyone's part, that is, where the chattels came on the land through accident or necessity.

When the chattels came on the land by accident, the owner of them may enter for the purpose of recaption, but he must show that they came there through no fault of his own.[61] Since however, the occupier's possession was not wrongful in its inception, no force may be used against him.[62]

When the chattels were put on the occupier's close through necessity, the owner's rights are not clearly defined. It is settled that one may put his chattels

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[58] Prosser on Torts (1st ed., 1941), at p. 147.

[59] *Devoe* v. *Long, supra,* footnote 32. That case says nothing about accidence but here the occupier's possession was rightful in its inception which comes within the principle enunciated in that case.

[60] *Wentzell* v. *Vienot & Hall,* [1940] 1 D.L.R. 536, 14 M.P.R. 323.

[61] *The Case of the Thorns, supra,* footnote 43.

[62] *Devoe* v. *Long, supra,* footnote 32.

on the land of another if the chattels appeared to be in real and imminent danger, if it was the only way the chattel could be saved, and if the owner acted reasonably. It has been doubted however if the owner has any right of recaption at all.[63] The only authority on the subject is the previously noted dictum by Devlin J. in *Southport* v. *Esso*,[64] which would give the owner a qualified license to enter and remove his chattels.

CONCLUSION

At least one writer,[65] carefully surveying the history of recaption and the growth of its application from functional non-existence in early times to a wide and recognized right in the mid-nineteenth century, has concluded that the sphere of the right of recaption is steadily broadening. Yet at least as far as Canadian law is concerned, the passage of time has proved him wrong. There is a significant difference between the language of *R* v. *Milton*,[66] for instance, and that contained in *Phillips* v. *Murray*.[67] Once again, the right seems to be narrowing in scope.

However, at the present time, the right may probably be exercised in Canada in the following situations.

1. If the goods were stolen, the owner may retake them from the occupier or the thief without demand, using reasonable force if necessary, and can enter on the ground of the thief, or of one whose lands the goods have been placed, with his (the occupier's) privity or consent, even perhaps to the extent of creating a breach of the peace.[68]

2. If the goods were taken tortiously and the owner has an immediate right to possession, he can retake them from the wrongdoer, forcibly if the adverse possession was wrongful in its inception (although not perhaps, before a demand that they be surrendered), and otherwise only peacefully. He may come on to the wrongdoer's land to retake them, after a demand, on the same basis, but may in neither case create a breach of the peace.[69]

3. If the goods have come into the possession of or on to the land of another by accident, and are of a class generally subject to recapture as defined earlier, the owner may retake them peacefully only, may not enter on the occupier's land before a demand is made, and even then may be liable for any harm incidental to the carrying out of this license.[70]

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[63] Salmond on Torts (10th ed., 1945), p. 191. cf. Prosser on Torts (1st ed. ,1941) 147.

[64] *Southport* v. *Esso*, *supra*, footnote 54.

[65] Branston, *loc. cit.* which bases its reasoning on *Blades* v *Higgs*, *supra*, footnote 29 and was written over 40 years ago.

[66] *Supra*, footnote 28.

[67] *Supra*, footnotes 15 and 31.

[68] Based on *Cunningham* v. *Yeoman* (1868), 7 N.S.W. 149; *Anthony* v. *Haney*, 131 E.R. 372; *Read* v. *Smith*, 2 N.B.R. 288; *Hamilton* v. *Calder*, 23 N.B.R. 373 and the classic expositions on the subject like Blackstone who regarded the search for a felon and the goods in the public rather than private interest.

[69] Based on *Devor* v. *Long*, *supra*, footnote 32; and the persuasive authority of the Restatement, *supra*, footnote 20.

[70] Winfield, *op. cit.*, and the dictum of Devlin J. in the *Southport* case, *supra*, footnote 54.

4. If the goods have come into the possession or on to the land of another through necessity, and are generally subject to recapture, the owner may not retake them before demand, and at most will be allowed to enter the land to remove his goods only on the condition that he pay for any incidental damage.[71]

5. If the goods have been stolen, are in the possession of an innocent third party, without his consent, and are generally subject to recapture, no force may be used or entry made, at least before demand, and a breach of the peace will not be tolerated. The license to enter on the land may once again be a qualified one.[72]

6. If the goods have been taken tortiously, are in the possession of an innocent third party, and are generally subject to recapture, it is unlikely that the use of any force will be tolerated, especially if the adverse possession of the original miscreant was not wrongful in its inception. Entry on the possessor's land will not be permitted before demand, and then only peacefully, perhaps once more in the form of a qualified license.[73]

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[71] *Anthony* v. *Haney*, 131 E.R. 372; *Read* v. *Smith*, 2 N.B.R. 288; and *Hamilton* v. *Calder*, 23 N.B.R. 373.

[72] Conclusion 6 is based on the same authority as conclusion 5 with the addition of *Devoe* v. *Long*, *supra* footnote 32, and in the light of the Code.

[73] A plea might be made here that the value of the thing being recaptured be taken into account in considering the methods permissible to retake it. As Kennedy L.J. said in *Cope* v. *Sharp*, [1912] 1 K.B. 496, at p. 509 (a case where the plaintiff's property was destroyed in order to save the defendant's), "reasonableness . . . includes, when you are considering the legality of the destruction of another's property, the comparison (*inter alia*) of the value of that which is destroyed or damaged in order to preserve it." It would not seem unreasonable that an analogy be drawn to cases of recaption, another species of self-help and that things like the letter in *Devoe* v. *Long*, *supra*, footnote 32, no matter how unjustifiably detained, are never worth a resort to force.