

## DEVOE V LONG AND LONG

An important question that has always been a source of arbitration is the right of recaption of chattels by an owner. *Devoe V. Long*, a recent case in the New Brunswick Supreme Court, Appeal Division has done a great deal to shed a clearer light on this heretofore confusing issue. The judgments of Richards, C. J. Harrison and Hughes J. J., go to great lengths reviewing the history of recaption, and give a distinct view of its application and scope. This case is especially beneficial to students who are pursuing the laws of Choses in possession.

The basic facts of the case are clearly outlined by Anglin J. and briefly they are as follows: The plaintive had once worked for the defendant J. Long as a clerk. In November 1947 Long received a letter from the Income Tax Department advising him that the inspectors had found he was not keeping a proper set of books. Long went to the plaintiff's house, handed him the letter to read and accused him of reporting him. The plaintiff vehemently denied this and ejected Long who forgot to take the letter with him. Long sent a man for the letter, but the plaintiff refused to surrender it because he wanted to have the date of the letter in order to write the Department to confirm that he had not so reported Long. The latter then took his son Rodolphe to the plaintiff's house where they forced their way in and demanded the letter. When he refused to give it up, they assaulted the plaintiff, and took it from his coat pocket. No reference was made to the letter in the pleadings, but the point of law is whether in the circumstances recaption of the letter by self-help was justified.

The case brings out three basic questions that seem to govern the decision of this recaption case. First, the defendant's right to possession of the chattel. Second, the trespass of the defendant in his recaption. Thirdly, the amount of force that might be used in recaption.

The first question can be readily dealt with. While the plaintiff had been given the letter by the defendant, he had lost his right to it by the defendant's request for its return. Thus the defendant had a legal right to his chattel.

The second question is intrinsically linked to the third one. The defendants were undoubtedly trespassers. Recaption through trespass may not be predicated on the mere fact that the defendant's chattel is on the premises of the plaintiff. The circumstances under which it happened to be there must be shown, and they may or may not justify self help: *Anthony V. Hanev* (1832) 8 Bing. 186, *Sweeney V. Staviat* (1931) 2 D.L.R. 473. From the evidence it seems as though Long through his own negligence left the letter at the home of the plaintiff. That alone would render Long's trespass unlawful, but the plaintiff's own action subsequent to Long's carelessness seems to have intervened. The plaintiff refused to surrender the letter first to Long's messenger and then to Long himself.

The final question as to the amount of force a person may employ in recaption, seems to be the main issue of the case. Was Long's right to recaption outweighed by the force he employed? There are several cases and authorities that deal with this point.

Regarding this subject Salmond on Torts, 10th Ed., p. 191, states "There are two circumstances where a man is entitled to another's land for recaption of his own goods: If they came there (1) by accident e.g. if a fruit tree grows in a hedge and the fruit falls on another's land; (2) by the felonious act of a third party. Winfield on Torts P. 369 seems to give a broader scope; he thinks that when the owner of goods was under no tortious liability for their appearance on the occupier's land, he ought to be able to retake them in any event provided he does no injury to the premises. However self help ought to be strictly limited even against a wrongdoer and forbidden altogether against one who is not a wrongdoer. However, in *Hamilton V. Calder* (1883) 23 N.B.R. 373. Fraser J. stated "I think the

right of the owner to enter and remove his goods from the soil of another does not depend upon a wrongful taking of the goods by the owner of the soil but upon the fact whether the owner of the goods has a present right of property in and a present right to be permitted to enter for the purpose of taking them away then his entry is justifiable: This argument is carried on further by the same Fraser J. in *Turner V. Smith* (1888) 29 N.B.R. 567 " . . . if there was a demand and a refusal that would constitute a wrongful detention of the goods, and the party would enter upon the land for the purpose of taking them away.' ' Mr. Justice Harrison supported the view of Clerk and Lindsell on Torts, 10th Ed., P. 219. "He who is entitled to the immediate possession of a chattel may commit an assault to receive it from anyone who has it in his actual possession and wrongfully detains it, provided that such possession was wrongful in its inception."

In Blackstone's Commentaries, Book 3, pp. 4-5 he states " . . . But 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 for private injuries all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nation.

In *Read V. Smith*, 7 N.B.R. 288, Chipman C. J. said "where there has been any fault or neglect on the part of the owner of the goods he cannot justify entering the soil of another to take them and he is bound to show that there has been no such fault or neglect on his part."

In the present case the entry of the defendant was not justified because the plaintiff's original possession was lawful and the entry was not peaceable, the plaintiff being present and having refused entry to the defendant who then broke the door of the plaintiff's house thus endangering the peace. The assault upon the person of the plaintiff causing a breach of the peace, was quite unjustifiable. The defendants were found liable in trespass for breaking into the plaintiff's house, damages of \$1000.00 were awarded to the plaintiff.

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