The Right of Recaption of Chattels by Force

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THE RIGHT OF RECAPTION OF CHATTELS BY FORCE

The courts appear to be in agreement that a person is privileged to use force in the recaption of chattels taken from his immediate possession by force or by fraud, but the amount of force used must not be excessive. It is often said, however, that if the right of possession is in dispute, force to retake may not be used, but resort must be made to civil remedies, not to self-help. There is also some disagreement as to the point at which the amount of force becomes excessive, some courts holding that the actor is privileged to use as much force as is reasonably necessary to accomplish the result, provided serious bodily harm is not threatened. The majority of decisions seem to follow the above rule, but a strong minority hold that the owner of a chattel may recapture it, whenever and wherever he can do so, only on condition that no breach of the peace occurs. The purpose of this note is to consider the divergence of these two views and to suggest considerations affecting the matter.

The privilege of an owner to retake by force a chattel of which he had been deprived arose out of the emphasis that the common law placed on the physical possession of property. This was due in part to the inability of the early courts to develop the conception of a right as a thing entirely separate from any physical evidence of it, and also in part to the necessity of preserving the general peace and order of the community. The privilege of the actor to use force has survived due to the necessity of a speedy remedy where a resort to the courts is slow and cumbersome and might be inadequate.

1 Restatement, Torts, sec. 101 and sec. 106.
2 Watson v. Rinderknecht, 82 Minn. 235, 84 N. W. 798 (1901).
3 Hemingway v. Hemingway, 58 Conn. 443, 19 Atl. 766 (1890); Commonwealth v. Donahue, 148 Mass. 529, 20 N. E. 171 (1889); State v. Dooley, 121 Mo. 591, 26 S. W. 558 (1894); Curlee v. Scales, 209 N. C. 612, 158 S. E. 39 (1931); State v. Scott, 142 N. C. 582, 55 S. E. 69 (1906).
6 Pollock and Maitland, Hist. of Eng. Law (1911) 41.
because such an appeal to law could not operate opportuneely or would not be able to compel the return of the specific chattel.\textsuperscript{7}

The following circumstances have been suggested as those under which the actor is privileged to use force in the recaption of his personal property: (a) the actor must have been in possession, (b) the property must have been taken either forcibly or by fraud or without claim of right, (c) the actor must be entitled to immediate possession, (d) the recapture must be effected promptly, (e) a request for its return must usually first be made, and (f) the force used must not be excessive.\textsuperscript{8} In the earlier period the courts recognized the privilege only when there was a momentary interruption of possession in view of the fact that it was not difficult to draw an analogy to the right of protection of real property. There the owner was regarded as defending his original possession rather than interfering with that of another.\textsuperscript{9} Later the privilege was allowed in a case where the wrong-doer had made his escape with the chattel but the actor was in fresh pursuit.\textsuperscript{10} How fresh the pursuit must be seems to depend upon the particular circumstances of each case. The interval between one event and another may in a particular instance be sufficient to destroy their relation as immediate in time, while as to other situations the same interval would not have such effect.\textsuperscript{11}

In the case of \textit{Hodgeden v. Hubbard}\textsuperscript{12} the plaintiff purchased a stove on credit from the defendant by fraudulent representations respecting his financial responsibility and proceeded to take it with him. Immediately after discovering the fraud the defendant started in pursuit of the plaintiff, overtook him

\begin{itemize}
\item \textsuperscript{7}Branston, \textit{The Forcible Recaption of Chattels} (1912) 28 L. Q. Rev. 262.
\item \textsuperscript{8}Restatement, Torts, secs. 101-106; Uniform Act on the Fresh Pursuit of Criminals, sec. 5; Wright v. Southern Exp. Co., 80 Fed. 85 (1897); McLean v. Colf, 179 Cal. 247, 176 Pac. 178 (1918); Baldwin v. Hayden, 6 Conn. 453 (1827); Spelina v. Sporry, 279 Ill. App. 376 (1935); State v. Dooley, 121 Mo. 591, 26 S. W. 558 (1894); Hodgeden v. Hubbard, 18 Vt. 504, 46 Am. Dec. 167 (1846).
\item \textsuperscript{9}Commonwealth v. Donahue, 148 Mass. 529, 20 N. E. 171 (1889).
\item \textsuperscript{10}State v. Elliott, 11 N. H. 549 (1841).
\item \textsuperscript{11}People v. Pool, 27 Cal. 572, 578 (1865), pursuit of felons three or four hours after felony was committed and for twelve miles was "fresh" pursuit; White v. State, 70 Miss. 253, 11 So. 632 (1892), felony committed at night, pursuit by owner upon discovery next morning, was "fresh" pursuit.
\item \textsuperscript{12}18 Vt. 504, 46 Am. Dec. 167 (1846).
\end{itemize}
about two miles from the store where the transaction occurred, and took the stove from him by force. The court ruled that the defendant was privileged to use such force as was reasonably necessary in retaking his property if plaintiff's taking was fraudulent and the pursuit was fresh. The court said further that the privilege was extended to the case where the wrong-doer resisted the defendant's attempt to retake the chattel. A recent case held that a butcher was entitled to use such force as was reasonably necessary to prevent a customer from carrying away meat for which she had paid but twenty cents of the twenty-three cent purchase price. The butcher reached for the meat with one hand and slapped the plaintiff's face with the other when she failed to pay or return the meat. The court said that since the plaintiff had failed to pay the additional three cents, which was the amount still due on the meat, title had not passed and the butcher was then privileged to use force in its recaption.

The earlier view taken by a minority of the courts assumed the position that the dispossessed owner must not take the law into his own hands, and could retake his property only so long as he did not commit a breach of the peace. The Michigan court, in an early decision, held that the owner of personal property would have no privilege to commit a breach of the peace in order to recapture his property from a wrong-doer, whose possession was tortious; but he would have a right to recapture personal property whenever and wherever he might peaceably do so, even though the original taking had been two months before. The Kansas court said that an owner does not have the right to retake his property by force, or violence, or in a riotous manner or by a breach of the peace.

A minority of the courts in this country once held to a rule that has since vanished from our decisions, that is to say, the owner of property, which property had been wrongfully taken from him, was not privileged to recapture it by such force as

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11 Donnell v. Great Atlantic and Pacific Tea Co. 229 Ala. 230, 156 So. 844 (1934). The court, however, said that the force used was excessive.
12II POLLOCK AND MAITLAND, HIST. OF ENG. LAW (1911) 41.
was reasonably necessary nor could he retake it even if he did not breach the peace, but must resort to his legal remedy.¹⁷

It seems from the majority of decisions that the better rule is that the owner of property wrongfully taken should be privileged to recapture it using such force as is reasonably necessary to make recapture possible, so long as death or serious bodily harm does not result. When pursuit of the wrongdoer is necessary, it must be begun within a reasonable time after the owner discovers the taking. The law should yield that much to the frailties of human nature.

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¹⁷Kunkle v. State, 32 Ind. 22 (1868); Ryerson v. Carter, 93 N. J. 1477, 105 Atl. 723 (1918), affirmed 108 Atl. 927 (1919).