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THE EFFECT OF THE STATUTE OF LIMITATIONS ON SELF- HELP METHODS OF REDRESS.*

In the case of *Phillips v. Murray*,¹ decided recently in the Court of Appeal for Saskatchewan, it was held that where the defendant in an action of assault pleads as justification a right to possession of chattels in the possession of the plaintiff and an attempt to retake those chattels, he must show that the right to possession is one that is "specifically enforceable by judicial proceedings." In the judgment of the Court, which was delivered by Haultain, C.J.S., the Chief Justice quoted a section from Salmond's Law of Torts, saying that it "seemed to exactly meet the facts of the case." The section reads thus:

It seems clear on principle that the right of recaption does not exist, unless there is a right to the possession of the property, and that a right to possession means for this purpose, one that is specifically enforceable by judicial proceedings. If, therefore, the claimant cannot by way of judicial proceedings obtain specific restitution of the property, he cannot recover it by recaption either. For the Courts cannot suffer a man to take for himself that which he cannot obtain by way of an action.²

If this statement is correct it is because a dispossessed owner of property, whose right of action is barred by the Statute of Limitations, has no right to recover possession of his property by a self-help method of redress. Is it correct? In order to attempt an answer to that question, it is necessary to consider, first, what self-help methods of redress exist at common law, and second, whether the statute, by barring the remedy by action, takes away the right of a dispossessed owner to avail himself of these methods.

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¹[1929] 3 D.L.R. 770.

²Salmond. "Law of Torts," 6th ed., p. 211.

The early stage of the development of the common law is marked by a struggle to replace with judicial remedies the violent and forcible methods used by a dispossessed owner of land or chattels to recover his property. Thus, early in its history the common law prohibited any and every attempt to substitute violence for legal remedies. "Perhaps we may say that in its strife against violence it keeps up its courage by bold words. It will prohibit utterly what it cannot regulate."³ If the legal remedies supplied by the common law courts had been adequate it is probable that self-redress would have disappeared entirely from our law. As it was, however, redress by judicial proceeding was not easily available. The procedure was lengthy and cumbersome and the remedy was not effective in many cases; for, though the litigant risked his life in a possible wager of battle, he could not until the nineteenth century obtain specific return of his lost chattels. For this reason the resort to self-redress was frequent.

In late Anglo-Saxon and early Norman times the only method of "self-redress" allowed was a kind supervised by the courts, the pursuit of a thief, and this can hardly be termed self-redress. In Bracton's time the period during which self-redress was permitted was limited to four days, but by the end of the thirteenth century it had been extended to a year and a day. In the case of land, the Statute of Forcible Entry, 1381,⁴ and other later statutes, made entry *vi et armis* an indictable offence, but the effect of this was not to render the re-entry void, but merely to make the entering owner liable to an indictment for assault or breach of the peace.⁵ Where chattels were concerned there was no such statute prohibiting recaption, so that the right of self-redress or recaption of chattels expanded unhindered and now occupies a firm place in our law.

Self-redress is, of course, of two kinds, peaceable and forcible. The right to retake one's goods peaceably seems to be well established,⁶ and in order to justify the use of force to retake one's goods it is necessary only to show a demand for the return of the goods and a refusal to deliver them.⁷ Thus there are outside the law, but recognized by it, certain self-help methods of redress available to

³Pollock and Maitland, *Hist. Eng. Law.*, 2nd ed., vol. II, 574.

⁴Rich. II, Stat. I, c. 7.

⁵*Harvey v. Bridges* (1845), 14 M. & W. 437; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720.

⁶Litt. 497, 498; *Chapman v. Thumblethorpe* (1594), 78 E.R. 579; *McMullin v. Campbell* (1920), 54 N.S.R. 164.

⁷*Blades v. Higgs* (1861), 10 C.B.N.S. 713.

the dispossessed owner of land and chattels. He may retake his land or his chattels peaceably in all cases, and forcibly on certain conditions. There remains to be seen what effect the Statute of Limitations has on the dispossessed owner's right to use these methods.

The preamble of the Statute of Limitation of Actions (21 Jac. I, c. 16) contains the phrase, "for the quieting of men's estates and avoiding of suits." This is in keeping with the maxim, *interest republicae ut sit finis litium* and shows that the statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping on his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles and correct errors in conveyancing.⁸ This statute applied to both land and chattels and provided merely that the right of action of a dispossessed owner of chattels should be barred after the specified time for bringing the action had elapsed. But did this barring of his judicial remedy have the effect of so completely divesting him of title as to deprive him of his self-help remedy as well? At this point we may compare with this statute of 1623, the provisions of the Real Property Limitation Act of 1833,⁹ and the effect of those provisions on the right of a person dispossessed of land to retake possession after the barring of his remedy by action. The latter statute contained a provision, similar to that of 21 Jac. I, c. 16, barring the owner's right of action, but it also enacted that "At the determination of the period limited by this Act . . . the right and title of such person to the land . . . shall be extinguished."¹⁰ In *Doe dem. Jukes v. Sumner*¹¹ Parke, B., said that "The effect of the Act (of 1833) is to make a Parliamentary conveyance of the land to the person in possession after that time has elapsed." This statement has been widely criticized,¹² and it is submitted that no such transfer of title actually does take place. It is difficult to reconcile "extinguish" and "transfer" and to understand how a right or title which has been extinguished is capable of being conveyed. The better explanation seems to be that at common law a disseisor does acquire a legal estate which is wrongful against the disseisee or anyone having a better title, but rightful as against any

⁸32 Harv. L. Rev. 135.

⁹3 & 4 Wm. 4, c. 27.

¹⁰3 & 4 Wm. 4, c. 27, s. 34; R.S.N.S. 1923, c. 238, s. 21; R.S.N.B. 1927, c. 145, s. 26; R.S.O. 1927, c. 106, s. 15; R.S.M. 1913, c. 116, s. 17; R.S.B.C. 1924, c. 145, s. 41; P.E.I. Acts of 1837, c. 30, s. 25.

¹¹(1845), 14 M. & W. 39 at p. 42.

¹²3 Can. Law Times 521; 17 Can. Law Times 91; 32 Harv. L. Rev. 141; 34 Law Q. Rev. 253.

subsequent intruder. When the owner's right is extinguished by the statute, there ceases to be any person who has a better title than the disseisor. Cozens-Hardy, M.R., said in *Re Atkinson and Horsell's Contract*,¹³ that "The phrase 'statutory conveyance' and so on, is a loose metaphorical term, and that the true view is this, that whenever you find a person in possession of property that possession is *prima facie* evidence of ownership in fee, and that *prima facie* evidence becomes absolute when once you have extinguished the right of every other person to challenge it."

Although there has been this difference of opinion as to the manner in which the owner loses his title to the land, the courts have held that he is divested of all title to the land by the operation of the statute.¹⁴ It follows as a consequence of the extinguishment of his title that a dispossessed landowner cannot avail himself of self-help methods of redress, since they demand a right to possession as justification for their use.

In the Statute of Limitation of Personal Actions, however,¹⁵ there is no section which expressly extinguishes the right and title of the true owner, and it is hardly questionable that the statutory barring of the remedy by judicial action is not in effect an extinguishment of that right and title. Blackstone said¹⁶ that no title is completely good unless the right of possession be joined with the right of property, and that when to this double right the actual possession is added, the title is completely legal. Thus, when an owner of chattels having this complete title loses his actual possession he has remaining his right of property and right to possession. As has been seen, apart from statute, he may enforce this right to possession in two ways, by some self-help method of redress and by judicial proceeding. The conclusion would seem to be clearly logical that when the statute has barred the owner's right to use judicial proceedings, there remains the right to recover the chattel by self-redress.¹⁷ He has to support that right, the right of property and the right to possession, and it has been decided that "if a man has a right and several remedies, the discharge of one is not a discharge of the other."¹⁸

¹³[1912] 2 Ch. 1 at p. 9.

¹⁴*Owen v. De Beauvoir* (1847), 16 M. & W. 547; *Brassington v. Llewellyn* (1858), 27 L.J. Ex. 297; *In re Jolly*, [1900] 2 Ch. 616; *Percy v. Clissold*, [1907] A.C. 73 at p. 79.

¹⁵(1623), 21 Jac. I, c. 16.

¹⁶Bl. Comm. II, 199.

¹⁷3 Can. Law Times at p. 521; Williams: Personal Property, 17th ed., pp. 14, 50.

¹⁸*Hunt v. Burn* (1699), 2 Salk. 422; 91 E.R. 367.

This view, that the Statute, 21 Jac. I, c. 16, bars the remedy by action only and does not affect the right of recaption, was rejected by the late Dean Ames, who said that

The vice in the converter's title is the dispossessed owner's right to recover the chattel by recaption or action. The bar of the Statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process.¹⁹

To support this statement, Dean Ames cited the two cases of *Ex parte Drake*²⁰ and *Chapin v. Freeland*.²¹

In the case of *Ex parte Drake*, Jessell, M.R. said:

It is clear from what is said by Willes, J., in *Brinsmead v. Harrison*, that after a judgment in an action of detinue there is no right of action for the goods against a third party. If there is no right of action, what right have you to recover the goods by force?

The case of *Brinsmead v. Harrison*²² decided that satisfaction, not mere recovery of judgment barred the right of action against a third party. By "judgment" therefore, Jessell, M.R., must have meant "satisfaction of judgment." But satisfaction of judgment in an action of detinue is "a kind of involuntary sale of the plaintiff's goods to the defendant,"²³ which divests the judgment creditor of all title to the goods. Therefore, since he has no title to the goods, it could not be suggested that he might retake them by force, or by any other means. Furthermore, this statement was made during the argument and it cannot be considered very authoritative, even if it were possible to show that it supported the view that there can be no right to retake by force a chattel which can no longer be recovered by judicial means. Jessell, M.R. himself thought that the effect of the statute was to bar the remedy only.²⁴ In *Re Allison*²⁵ he said:

The difference between the Statute of William IV as regards Real Property, and the well known Statute of Limitations of James I as regards Personal Property debts and liabilities is well known. The Statute of James merely destroys the remedy, but the Statute of William IV destroys the title.

In the other case cited by Dean Ames, *Chapin v. Freeland*,²⁶ the

¹⁹3 Harv. L. Rev. 321.

²⁰(1877), 5 Ch. D. 866 at p. 868.

²¹(1886), 142 Mass. 383.

²²(1871), L.R. 6 C.P. 584; (1872), L.R. 7 C.P. 547.

²³(1877), 5 Ch. D. 866 at p. 871.

²⁴*Dawkins v. Penrhyn* (1877), 6 Ch. D. 318 at p. 322; *Re Allison* (1879), 11 Ch. D. 284.

²⁵(1879), 11 Ch. Div. 284 at p. 296.

²⁶*Supra*.

action was for the replevin of two counters of which the defendant had taken possession after her action had been barred by the statute. There the Court held that

Where the Statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea.

The only ground on which the majority of the Court based its decision seems to be an analogy to the Statute of Frauds as interpreted in *Carrington v. Roots*,²⁷ where it was held that, although the Statute of Frauds merely barred the remedy by action on certain contracts, those contracts were void. But, in *Morris v. Baron*²⁸ and other cases it has been clearly stated that the Statute of Frauds renders the contract merely unenforceable by action, not void. In *Chapin v. Freeland*, Field, J., delivered a dissenting judgment in which he reviewed the English and American authorities on the point and reached the conclusion that

There is no Statute and no law prohibiting the owner of personal chattels from peaceably taking possession of them whenever he may find them.

and that

The Statute only bars the remedy by action within the jurisdiction where the defendant has resided during the statutory period.²⁹

It is submitted that the majority judgment in *Chapin v. Freeland* is wrong. On what grounds this decision was arrived at does not appear, and it would seem to be contrary to the principles of the Common Law, as recaption has always been regarded as something essentially different in its nature from and not merely alternative to the judicial remedies available.³⁰

There is an old common law maxim to be found in Littleton: *dormit aliquando ius moritur nunquam*, for of such an high estimation is right in the eye of the law, as the law preserveth it from death and destruction; trodden down it may be, but never trodden out.³¹ The courts, in interpreting the Statute of Limitation of Personal Actions (21 Jac. I, c. 16) have followed this maxim. In the case of *Miller v. Dell*,³² Lord Esher, M.R., said, as *obiter dictum*: The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations (21 Jac. I c. 16) though more than

²⁷(1837), 2 M. & W. 248.

²⁸[1918] A.C. 1; *Leroux v. Brown* (1852), 12 C.B. 801; 138 E.R. 1119.

²⁹(1886), 142 Mass. 383 at p. 390.

³⁰28 Law Q. Rev. 272.

³¹Co. Litt. 279 (b).

³²[1891] 1 Q.B. 468 at p. 471.

six years may elapse, and if the rightful owner recovers them, the other man cannot maintain an action against him in respect of them.

Thus he recognized that the dispossessed owner has a right of recapitulation as well as a right of property, though his remedy by action is barred. In the case of *Williams v. Jones*,³³ where the plaintiff was suing in England to recover a debt for which the remedy by action had been barred in India, it was held that

Those Statutes (21 Jac. I c. 16; 4 Anne, c. 16) could only have the effect of barring the remedy—but they do not extinguish the right, for if so they could not be revived by a subsequent promise.³⁴

In opposition to this view, it has been argued that the right, as well as the remedy should be destroyed in personal actions by analogy to the Statute of Limitation of Real Actions. But the English Courts have refused to draw an analogy of this sort.³⁵ In *Mellersh v. Brown*,³⁶ Kay, J., refused to apply to personal property, by analogy, a provision of the Statute relating to real property. He said:

But the reasoning is that whereas the Legislature has enacted that in the case of a charge on real estate only six years' arrears of interest shall be recoverable against the estate, and whereas it has not enacted anything of the kind with regard to personal estate: therefore—what? I should have thought the result was inevitable that as to personal estate the rule is not to be observed, and the idea of there being any analogy is one which I do not understand.

The foregoing passage shows that section 34 of 3 & 4 Wm. IV, c. 27, cannot be applied by analogy to personal property and the omission of such a provision in the case of personal property is evidence of an intention on the part of the legislature that in such case the title to the property, with its incidental rights, should remain in the dispossessed owner. Cave, J., in *In re Hepburn*³⁷ said that

There is in law no right without a remedy; and if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist although the remedy by action is barred, and

³³(1811), 13 East 439; *Bryson v. Graham* (1849), Thom. Rep. 271; *Carvell v. Wallace* (1873), 9 N.S.R. 165; see also Darby and Bosanquet, *Limitations*, 2nd ed., 15; *Higgins v. Scott* (1831), 2 B. & Ad. 413; *Courtenay v. Williams* (1844), 3 Hare 539 at p. 551; *Spears v. Hartley* (1802), 3 Esp. 81.

³⁴Lord Ellenborough, C.J., 13 East. 439 at p. 450.

³⁵*London v. Mitchell*, [1899] 2 Ch. 161 at p. 166; *In re Stuckly*, [1906] 1 Ch. 67; *Weld v. Petre*, [1929] 1 Ch. 33.

³⁶(1890), 45 Ch. D. 225 at p. 229.

³⁷(1884), 14 Q.B.D. 394 at p. 399.

in that case the debt continues to exist as far as is necessary for the enforcement of this right of lien, but not for enforcing the remedy by action.

If the debt or right exists to support this remedy by lien it is difficult to see why it does not also exist in order to support the remedy by recaption, which, as has been shown, is a remedy available to the dispossessed owner of chattels. That it does is the effect of a decision on the Statute of 21 Jac. I, c. 16 which applied to chattels as well as to land, and which has not since been changed in respect of chattels. This was the case of *Burrough v. Reade*,³⁸ where it was held that an owner of land, whose right of action had been barred by the statute, could retake possession of the land and that the person in possession for the statutory period could not maintain an action of ejectment against him.³⁹

The dispossessed owner of chattels, therefore, whose remedy by action is barred, may peaceably retake his goods and successfully resist any attempt of the other person to recover them.⁴⁰ It has been suggested, however,⁴¹ that he cannot forcibly retake them since there must be a demand for return of the goods and refusal to deliver them before force may be used.⁴² But it is difficult to see why the barring of the action should affect the ability of the owner to demand the return of the goods. True, this demand is not enforceable in the courts, but it is equally as unaffected as the owner's right to possession after action barred, and it has been seen that the right to possession is not destroyed. Therefore, logically the right to demand the return of the chattels is not destroyed. The person against whom the force is used has an action for the assault,⁴³ but this does not affect the owner's possession once acquired, and does not prevent the combination of it with the right to possess—a right not extinguished though no longer enforceable by action—from constituting a full revival of the property in the true owner.⁴⁴ This right of the true owner to retake his chattels either peaceably or by force, although his remedy by action is barred, is good against a third party, for the third party gets from the adverse possessor of the chattel no greater title than the latter possessed.⁴⁵

³⁸(1807), 8 East. 353.

³⁹See, however, *Stokes v. Berry* (1699), 2 Salk. 421.

⁴⁰*Burrough v. Reade* (*supra*); Williams: Personal Property 17th ed., pp. 14, 50.

⁴¹Pollock & Wright: Possession, p. 114.

⁴²*Blades v. Higgs*, *supra*.

⁴³*Harvey v. Bridges* (1845), 14 M. & W. 437 at 442.

⁴⁴Pollock & Wright: Possession, p. 115.

⁴⁵*Miller v. Dell*, *supra*.

It would appear that Haultain, C.J.S.,⁴⁶ erred in accepting as settled law Salmond's contention that the right of recaption does not exist unless there is a right to the possession of the property, and that a right to possession means for this purpose, one that is specifically enforceable by judicial proceedings.⁴⁷ It has before been suggested that Sir John Salmond's views on the effect of the Statute of Limitations on the owner's title did not coincide with the true state of the law,⁴⁸ and it is to be noticed that in the last edition of Salmond's Law of Torts,⁴⁹ the section quoted with approval in *Phillips v. Murray*⁵⁰ has been omitted.

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⁴⁶*Phillips v. Murray, supra.*

⁴⁷*Supra.*

⁴⁸Holdsworth: Hist. of Eng. Law, vol. 7, p. 464, n. 8.

⁴⁹7th ed., W.T.S. Stallybrass.

⁵⁰*Supra.*
