[HIGH COURT OF AUSTRALIA.]

RYAN . . . . . APPELLANT;
PLAINTIFF,

AND

BRIGHT AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1939.

MELBOURNE, *Mar.* 6, 7; *May* 15.

Latham C.J., Rich, Starke, Dixon and Evatt JJ.

Pounds—Impounding of cattle—Escape of cattle—Recapture by poundkeeper—Fresh pursuit—Pounds Act 1928 (*Vict.*) (*No.* 3752), *secs.* 13, 20.

A poundkeeper appointed under the *Pounds Act* 1928 (Vict.), on discovering that certain impounded cattle were missing from his pound, made an immediate search for them and found them three hours later unattended on a road and on inadequately fenced land. He thereupon drove them back to the pound. The owner of the cattle sued the poundkeeper for trespass, conversion and detinue.

Held that such peaceable recapture of the cattle on fresh pursuit and before they had returned to the possession of the owner was justified as against the owner, whose action accordingly failed.

Quære whether fresh pursuit was essential to the justification of the recapture by the poundkeeper.

Decision of the Supreme Court of Victoria (Full Court): *Ryan* v. *Bright*, (1938) V.L.R. 260, affirmed.

APPEAL from the Supreme Court of Victoria.

The appellant, James Alphonsus Ryan, was the owner of certain cattle which were impounded for trespass damage feasant in the Meeniyan pound in the Woorayl Shire on 8th October 1937 by an officer of the State Savings Bank, who claimed to have found them trespassing on the bank's land. The respondent, William Bright,

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the poundkeeper, received them and held them in the pound until 10th October, when he removed them to another piece of land, which was treated as part of the pound. On the evening of 11th October the gates of the land where the cattle then were were securely fastened by chains and padlocks, but early next morning the respondent discovered that during the night the chains had been cut, the gates opened, and the cattle were missing. The respondent notified the police and began a search for the cattle and about three hours later found them unattended on a road and on neighbouring private property which was not adequately fenced. He drove the cattle back to the pound and locked them up again and held them. There was nothing to connect Ryan with the acts of cutting the chains and letting the cattle out. Ryan thereupon sued Bright and the president, councillors and ratepayers of the Shire of Woorayl for trespass, damages and conversion. The action was tried in the County Court at Melbourne and judgment was entered for the defendants.

Upon appeal the Full Court of the Supreme Court of Victoria affirmed this decision : *Ryan* v. *Bright* (1).

The plaintiff then appealed to the High Court.

Sawer, for the appellant. The *Gazette* notice as to the establishment of the pound should describe it by metes and bounds, as it is in the nature of market overt (*Pounds Act* 1928, sec. 4 ; *Jones* v. *Falvey* (2)). The poundkeeper's evidence that he acted as keeper is prima-facie evidence of due appointment, but is rebutted by his insistence on referring his appointment to a *Gazette* notice showing his appointment to another pound. The poundkeeper can take only trespassing cattle ; there was insufficient evidence that these cattle were trespassing. A poundkeeper has no authority to pursue and retake cattle which have been removed to a considerable distance from the pound. Possession remains in the owner (*Pollock and Wright* on *Possession in the Common Law* (1888), pp. 82, 202, 203). The poundkeeper and distrainor get no possession, but the distrainor may recover on a fresh pursuit (*Co. Litt.* 161*a*). On the cattle being taken from the pound, the right to bring trover rests in the

(1) (1938) V.L.R. 260. (2) (1879) 5 V.L.R. (L.) 230 ; 1 A.L.T. 23.

owner. No power to retake possession, at any rate at a distance, should be implied, as the poundkeeper's duties require his attendance at the pound (*Lodge* v. *Rowe* (1); *Walker* v. *Carton* (2); *Wilson* v. *Matthews* (3); *Law Quarterly Review*, vol. 28, at p. 262; *Repatriation Commission* v. *Kirkland* (4); *Bobb* v. *Bosworth* (5)).

[DIXON J. referred to *Always* v. *Broome* (6).]

Smith, for the respondent. At common law the distrainor had the right of recaption. The distrainor could not break and enter otherwise than as the owner could. He could retake cattle if it did not involve breaking and entering or if it were a fresh pursuit after pound breach (*Vaspor* v. *Edwards* (7); *Wood* v. *Nunn* (8)). At common law there was no office of poundkeeper. The pound was the pound of the man who used it. In some cases it was a common pound and if there was any person in charge of the pound other than the agent of the distrainor, his office was one existing by local custom. The distrainor's duties now devolve on the new officer, the poundkeeper, who has legal possession and not mere custody, which entitles him to recapture.

[DIXON J. referred to *R.* v. *Cotton* (9).]

The effect of the Act is that in a private pound the common law still applies and trespass rates are not recoverable. But the Act sets up an alternative system of impounding as contrasted with other systems at common law. A person can only impound cattle privately for three days (sec. 13). After that time the Act sets up an alternative system of impounding which is entirely different in its nature from a private pound. Under sec. 20 there is a duty and a right to retain custody until the cattle are released (*Badkin* v. *Powell* (10)). Sec. 20 involves the right of recapture as incident to the right of possession and to that extent alters the common law (*Jenk's Digest of English Civil Law* 3rd ed. (1938), vol. 1, sec. 189; *Law Quarterly Review*, vol. 28, p. 262; *Hudson* v. *Slade* (11);

(1) (1875) 1 V.L.R. (L.) 65.
(2) (1932) V.L.R. 97, at p. 101.
(3) (1913) V.L.R. 224; 34 A.L.T. 180.
(4) (1923) 32 C.L.R. 1.
(5) (1808) 12 Am. Dec. 273.
(6) (1695) 2 Lut. 1259 [125 E.R. 698].
(7) (1701) 12 Mod. Rep. 659 [88 E.R. 1585].
(8) (1828) 5 Bing. 10 [130 E.R. 962].
(9) (1751) Par. 112, at p. 121 [145 E.R. 729, at p. 732].
(10) (1776) 2 Cowp. 476 [98 E.R. 1195].
(11) (1862) 3 F. & F. 390 [176 E.R. 174].

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Patrick v. *Colerick* (1)). Having the right to possession the poundkeeper has the same right of recaption as an owner would have. A fresh pursuit is not necessary except as an excuse for a breach of the peace (*Giles* v. *Grover* (2)). Here there was a fresh pursuit, if fresh pursuit was necessary. Fresh pursuit merely means reasonable diligence on the part of the person concerned (*May* v. *Morris* (3)). Sec. 20, and the Act in general, whether it gives full legal right of possession or not, does at least impose a duty to detain during each and every moment of the time mentioned in sec. 20, and that duty carries with it powers reasonably necessary for its performance, which include at least a power to retake peaceably cattle which have escaped and are wandering in the highway.

Sawer, in reply, referred to *Doig* v. *Keating* (4).

Cur. adv. vult.

May 15.

The following written judgments were delivered :—

LATHAM C.J. The appellant's cattle were impounded in the pound at Meeniyan for trespass damage feasant. The chains on the gates of the pound were cut during the night of 11th October 1937 and in the morning the cattle were no longer in the pound. The respondent, the poundkeeper, made inquiry and search and within about three hours found the cattle unattended on a road and on neighbouring private property which was not adequately fenced. He drove the cattle back to the pound and the owner of the cattle sued him for trespass, detinue and conversion. The case was tried in the County Court and judgment was given for the defendant. Upon appeal to the Full Court of the Supreme Court of Victoria the plaintiff failed (*Ryan* v. *Bright* (5)). An appeal is now brought to this Court.

The Full Court held that a poundkeeper under the *Pounds Act* 1928 of Victoria has a duty to receive and detain in his custody animals brought to him for impounding, and that he has a right

(1) (1838) 3 M. & W. 483 [150 E.R. 1235].
(2) (1832) 9 Bing. 128, at pp. 189, 209, 216, 239 and 266 [131 E.R. 563, at pp. 586, 594, 596, 605, 615].
(3) (1930) 30 S.R. (N.S.W.) 355.
(4) (1908) V.L.R. 118; 29 A.L.T. 171.
(5) (1938) V.L.R. 260.

peaceably to recapture impounded animals which have got out of the pound and are wandering unattended. The *Pounds Act*, sec. 29 (1) (i), provides that a poundkeeper who impounds cattle shall be guilty of an offence. The defendant, therefore, cannot justify his action by alleging that he was impounding the cattle. He contends that he was entitled to recapture the cattle which had escaped from the pound.

The *Pounds Act* is not a code containing all the law with respect to impounding. The common law remains except in so far as it is limited and controlled by the Act (*Main* v. *Robertson* (1)). The owner of cattle distrained retains both the property in the cattle and the possession of them, notwithstanding the distraint. He is deprived only of the custody and use of them. The distrainor has neither property nor possession in the cattle. If the cattle escape he has no remedy by way of either trespass or trover against any person who is in possession of them. His remedies by way of legal proceedings are limited to an action of rescue or an action of pound breach (*R.* v. *Cotton* (2)). The owner of the cattle is still able to sue for any trespass to the cattle or for conversion of them, though he cannot complain of the detention of them by the poundkeeper as amounting to either a trespass or a conversion. If the cattle have been impounded in a common pound they are in *custodia legis* (*Pollock and Wright* on *Possession in the Common Law* (1888), pp. 82, 202, 203).

If the cattle escape the distrainor may retake them (*Vaspor* v. *Edwards* (3)). In *Coke upon Littleton*, 47*b*, the law is stated in the following terms: "If the owner breake the pownd, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impownd them again." In *Rich* v. *Woolley* (4) it was decided that the distrainor may retake the distress after rescue, certainly if he does it without breach of the peace and upon fresh pursuit. It is therefore clearly established that, though the distrainor has neither property nor possession in impounded goods,

(1) (1876) 2 V.L.R. (L.) 25.
(2) (1751) Par., at p. 121 [145 E.R. at p. 732].
(3) (1701) 12 Mod. Rep., per *Gould* J. at p. 661 [88 E.R., at p. 1587].
(4) (1831) 7 Bing. 651 [131 E.R. 252].

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and though he can bring neither trespass nor trover, he is entitled, if the distress escapes, to retake it peaceably upon fresh pursuit.

At common law the distrainor may impound the distress either in a pound overt or in a covert or close pound, that is, upon private premises (*Halsbury, Laws of England*, 2nd ed., vol. 1, pp. 552-553). At common law the poundkeeper was not a public officer: See *Vaspor* v. *Edwards* (1): "The distress is for his" (the distrainor's) "benefit, and the law appoints none else to take care of it; and though some pounds have haywards, who are officers in leets, yet the law takes not any notice of them."

The *Pounds Act*, sec. 13, provides that no trespass rates or other damages for trespass shall be payable to or recoverable by any person in respect of the trespass of any cattle if that person impounds or detains cattle for upwards of three days in any place which is not a pound within the meaning of the Act. Sec. 16 provides that no cattle shall be impounded under the provisions of the Act except in the nearest accessible pound. Sec. 20 provides that every poundkeeper shall receive and detain in his custody any cattle lodged in the pound until the trespass rates for which the cattle were impounded and all lawful fees and charges are paid, or until he receives notice of a decision or order of a Court of Petty Sessions (which may be made upon a complaint of illegal impounding (see sec. 25)) or receives an order in writing signed by the person impounding the cattle for their release without payment of the trespass rates.

When cattle are impounded in a pound established under the Act, the poundkeeper, and not the distrainor, has the custody of the cattle. The poundkeeper is entitled to retain that custody. Indeed, under sec. 20 of the Act, he is bound to receive and detain the cattle in his custody. It is urged that the poundkeeper has only the custody and not the possession, and certainly, of course, not the property, in impounded cattle. It is said that therefore, as he never had possession, he cannot justify recaption of cattle which have escaped from the pound under any principles relating to the right of an owner or possessor of goods to retake them.

The authorities to which I have referred show, however, that the distrainor may retake peaceably upon a fresh pursuit. The

(1) (1701) 12 Mod. Rep., at p. 664 [88 E.R., at p. 1588].

same principle should be applied to the poundkeeper who has simply been substituted in the manner and to the extent above stated for the distrainor in relation to the custody of the cattle. What a distrainor retakes after escape of the distress is not the possession but the custody of the cattle. So also the poundkeeper may retake, not the possession, but the custody, of cattle which have escaped from the pound—certainly if he does it peaceably and upon fresh pursuit.

To these considerations may be added the fact that the *Pounds Act* in sec. 20 imposes a duty upon the poundkeeper to receive and detain in his custody any impounded cattle. The section equally gives to him the right so to receive and to detain. This provision should be read as implying a power in the poundkeeper to do what is necessary to receive and detain, so long as he does not interfere with the right of any other person. If an impounded horse jumps the fence of the pound surely the poundkeeper can drive it into the pound again. So also if cattle escape and the poundkeeper follows them and retakes them without interfering with the rights of any other person, the poundkeeper in so acting is merely performing his statutory duty and exercising his statutory right.

It has been argued that, as soon as the cattle escape, they go into the possession of the owner and that the poundkeeper, being prohibited from himself impounding any cattle (sec. 29) must be regarded as interfering with the owner's right of possession when he retakes the cattle, so that he becomes liable in trespass and in trover. But the foundation of this argument is seen to fail when it is realized that the doctrine which the law has adopted for many years is a doctrine that the owner of impounded cattle retains both property and possession even while they are in the pound. He is deprived only of the custody and the use of the cattle. Accordingly, the action of a poundkeeper in re-assuming the custody of uncontrolled cattle which have escaped from the pound does not constitute any interference with the possession of the owner. The owner still has possession, as he had possession while the cattle were originally in the pound.

In my opinion, for these reasons, the judgment of the Full Court on the main question was right.

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A number of other points were raised, but it is not necessary to deal with them at length. It was contended that the impounding was illegal. But, even if this were the case, the right and duty of the poundkeeper to receive and detain the cattle in his custody would not be affected: See *Badkin* v. *Powell* (1). But there was ample evidence upon which it could be found in the present case that the impounding was lawful. It was said that there was no fresh pursuit, but again the evidence on this point is against the appellant. Questions were raised as to the appointment of the poundkeeper and the limits of the pound. The poundkeeper gave verbal evidence that he was the poundkeeper and there is no evidence to the contrary effect. Evidence that a person has acted as a public officer is sufficient to show that he is such an officer without proving his appointment by other evidence such as the Government *Gazette* (*Ross* v. *Costello* (2)). It was also urged that the limits of the pound and of the adjunct were not sufficiently described. But the evidence showed that the pound and its adjunct were situated upon certain specified allotments of land, and there is nothing to show that there was any difficulty or ambiguity in applying the description.

In my opinion the appeal should be dismissed. The appeal was *in forma pauperis*. There will be no order as to costs.

RICH J. Part of the argument before us in this case was interesting but somewhat irrelevant now that one realizes what the facts are. When pound breach and rescue were mentioned I plead guilty to citing *Fitzherbert*, *Natura Brevium*, *Coke* on *Littleton*, *Blackstone* and *Repatriation Commission* v. *Kirkland* (3). Greater effort at the trial on the part of the defendant might, I think, have established by circumstantial evidence pound breach and traced its author. However, all we know is that the chains and padlocks on the adjunct to the pound where the cattle were held were broken and the cattle wandered out. The poundkeeper, after search, found them on unfenced land. He drove them back to the pound and there detained them. In these circumstances it does not matter whether it was or was not a pound breach or rescue. Nor does the *Pounds Act* provide an answer

(1) (1776) 2 Cowp. 476 [98 E.R. 1195.]
(2) (1892) 13 A.L.T. 215.
(3) (1923) 32 C.L.R. 1, at p. 23.

to the plaintiff's case. That Act derives originally from 6 Geo. IV. No. 20 (N.S.W.). When discussing the later amending Act *Faucett* J. said: "It must be remembered that the provisions of the *Impounding Act* are different in many respects from the rules of the common law" (*Croaker* v. *Crozier* (1))—See also *Rand* v. *Williams* (2). But from beginning to end legislation has relied on the common law as the foundation of the distrainor's rights or privileges and the pound-keeper's duties. The pounds legislation amplifies and improves the position of these persons and to some extent protects the distrainee. In doing so, however, the legislation, whether by accident or design, has said nothing about recaption. Why I think it does not matter whether the cattle were taken from the pound by pound breach or merely escaped is that I do not find any reason to suppose that the common law treated the distress at an end merely because the cattle got out of the pound. If the distrainor did anything from which an intention to abandon the distress might be collected his rights were gone (*Knowles* v. *Blake* (3)). If without pound breach or rescue the distrainee reasserted his possessory rights and without breach of the law brought them from beneath the cloud in which the seizure under distress enveloped them then the distrainor's rights doubtless terminated. But the mere escape of beasts from effective control or custody for a short duration of time appears to me to leave the distress where it was. There is no limit in any of the cases to the view that without abandonment by the distrainor or return to the custody of the distrainee distress was lost by mere escape. There is a passage in *Coke* on *Littleton*: "But if a man distraine cattle for damage *feasant*, and put them in the pownd, and the owner that had common there make fresh suite, and finde the door unlocked . . . , he may justifie the taking away of the cattle in a *parco fracto*. . . . *Vid.* 30 E. 26, where defendant pleads that he found the cattle *sans nul manner de fermure ne serrure n'autre engine* (Hal. MSS. (note 303)" (*Co. Litt.*, 47*b*). *Coke's* statement, however, depends entirely on the distrainee having a right of common forming a justification for the supposed trespass cattle damage feasant. The Norman-

(1) (1879) 2 S.C.R. (N.S.) (N.S.W.) 35, at p. 37.
(2) (1877) Knox 350, at p. 355.
(3) (1829) 5 Bing. 499 [130 E.R. 1154].

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French note depends upon the absence of a lock (fermure), which enabled apparently the distrainee to retake his cattle without pound breach or rescue. In the present case the distress was not at an end; the plaintiff could have no rights inconsistent with the distress, and to my mind that necessitated the conclusion that the poundkeeper could recover custody of the cattle. The other points mentioned on behalf of the appellant were, I think, sufficiently dealt with during the argument. They illustrated the care and ingenuity with which the appellant's case was conducted rather than its inherent strength.

I agree that the appeal should be dismissed.

STARKE J. Trespass for seizure and detention of the appellant's cattle. Defence, a justification under the *Pounds Act* 1928 of Victoria.

Under this Act (sec. 4), the Shire of Woorayl had established a pound in the township of Meeniyan and had appointed a place near thereto in which cattle might be placed. It was a public pound, and the respondent was the poundkeeper, or at all events acted as such. A poundkeeper under the Act is regarded as a public official. His lawful appointment may therefore be presumed (*Jones* v. *Falvey* (1); *Ross* v. *Costello* (2)).

The pound book (see sec. 19) shows that the cattle were impounded by the State Savings Bank of Victoria (acting by one of its officers) for trespass on its lands: See *Jones* v. *Falvey* (1). The poundkeeper subsequently put the cattle in the authorized place near to the pound, which under sec. 4 was deemed to be in the pound, and locked the gate with three chains. Someone cut the chains in the night time and removed the cattle. The poundkeeper discovered about 7 a.m. or 8 a.m. that the cattle had been removed. He immediately looked for the cattle and found them about 11 a.m. in the vicinity, apparently, of some property in the occupation of the appellant. Most of them were on a public road and all but a few head were collected by him, driven back to, and locked up in, the pound or the "place near thereto" at some time after midday.

(1) (1879) 5 V.L.R. (L.) 230; 1 A.L.T. 23. (2) (1892) 13 A.L.T. 215.

The argument took us back to one of the oldest forms of self help known to the law, namely, distress damage feasant. A person who found cattle on his land doing damage might keep them or impound them until the owner paid for the damage done by them. "If the owner breake the pownd, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he may find them, and impownd them againe" (*Co. Litt.*, 47*b*; (L.1 C. 7 S. 58)). Recaption is confined, it is said, to cases where it can take place without a breach of the peace and upon a fresh pursuit (*Rich* v. *Woolley* (1)).

It was, however, argued that whatever right the distrainor might have at common law to recapture the cattle taken from the pound, still the poundkeeper under the *Pounds Act* 1928 had no right or duty to retake the cattle and restore them to the pound. The argument overlooks the history of public pounds in Australia and the provisions of the *Pounds Act* 1928 itself.

Originally it would seem that pounds were established by the Executive Government out of the public revenue: See Acts in Council of New South Wales, 6 Geo. IV. No. 20 (1825). But an Act of Council—9 Geo. IV. No. 11 (1828) (See *Callaghan's Acts*, pp. 265 et seq.)—authorized the establishment of public pounds. They were for the purpose of impounding and holding cattle and other quadrupeds trespassing upon any land public or private and also cattle and other quadrupeds at large in the streets of Sydney and other towns. The Act in Council provided that the poundkeeper should receive into his custody all such cattle and other quadrupeds as should be sent to him and the Act also allowed the detention and keeping of the cattle and other quadrupeds until the damage claimed or allowed under the Act as well as all the charges prescribed by the Act for keeping the same in pound and supporting the same while impounded had been paid or satisfied or the cattle or other quadrupeds replevied.

The subsequent history of the Act, so far as Victoria is concerned, may be found in the Act 18 Vict. No. 30 (*Adamson's Acts of Council*, p. 1142) and in the *Pounds Acts* of 1865, 1874, 1890, 1915 and 1928. The provisions of these Acts vary in detail but in effect they are

(1) (1831) 7 Bing., at p. 661 [131 E.R., at p. 256].

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much the same. It may be, as was said in *Main* v. *Robertson* (1), that the Acts do not give the right to impound in respect of cattle damage feasant, though that observation is hardly applicable to the case of cattle wandering on the public roads. The Acts clearly limited and controlled in many respects the rights given by the common law, e.g., *Pounds Act* 1928, secs. 8, 9 and 13.

But the important consideration in this case is the nature of the pound and the position and duty of the poundkeeper. It is a public pound and the poundkeeper, though an officer of the shire (sec. 6), is also nevertheless a public officer. It is his duty to " receive and detain in his custody any cattle lodged in such pound until the trespass rates for which the same were impounded and all lawful fees and charges are paid " or until certain other events happen (sec. 20). Pound fees, trespass rates, sustenance fees are all provided for by the Act (secs. 8, 9, 10), and these amounts are payable in the first instance to the poundkeeper, who holds the same for the person entitled thereto. Cattle not released within a certain time may be sold and the proceeds applied as directed by the Act (secs. 22 et seq.).

It thus appears that many duties are cast upon the poundkeeper, but his imperative duty is to receive and detain in his custody any cattle impounded. But if this is his duty then the remedy available to a party by his own act—self-help—of retaking cattle or goods of which he is the rightful possessor is equally available to the rightful custodian of cattle or goods. He may thus restore to his custody cattle or goods which he ought to have under the Act and so that he may perform the duties imposed upon him. A poundkeeper might, I apprehend, lawfully use any force necessary to repel rescue of cattle from his pound. So if cattle broke or jumped the fences of the pound and so escaped the poundkeeper might retake the cattle and restore them to the pound. So, too, if cattle are unlawfully rescued from the pound the poundkeeper is entitled to retake them and restore them to the pound. All these cases are but illustrations of the remedy of self help: Cf. *Pollock*, *Torts*, 10th ed. (1916), p. 189.

But in the exercise of this right of self help he could not justify the trespass on the land of another nor the exercise of this right if

(1) (1876) 2 V.L.R. (L.) 25.

it " must occasion strife and bodily contention, or endanger the peace of society " (*Rich* v. *Woolley* (1)). I see, however, no reason, as at present advised, to limit this right in the case of a poundkeeper to " fresh pursuit," as in the case of a distrainor at common law. The latter is a private person, whilst the poundkeeper is a public officer acting in exercise of his statutory duty.

But if such a limitation should be placed upon the right of a poundkeeper to recapture cattle, then the facts amply warrant the conclusion that he acted in " fresh pursuit ", which I understand to mean no more than such a present and earnest following as never ceases from the time the rescue was made or discovered until the cattle are retaken: See *Tomlin's Law Dictionary* (1835), " Fresh Suit ". And in relation to the Appeal of Larceny, it is said in *Hawkins' Pleas of the Crown*, 8th ed. (1824), vol. 2, ch. 23, sec. 51, p. 239 :—" It seems to have been anciently holden that to make a fresh suit, the party ought to have raised a hue and cry with all convenient speed and also to have taken the offender. But at this day it seems to be settled, that if the party have been guilty of no gross neglect, but have used all reasonable care and diligence in inquiring after, pursuing, and apprehending the felon, he ought to be allowed to have made sufficient fresh suit, whether any hue and cry were levied or not, and whether such offender were taken by means of such pursuit or without any assistance from it."

The evidence in this case amply warrants the conclusion that the poundkeeper made a " present and earnest " following of the cattle so soon as he discovered that they were missing and used all reasonable care and diligence in inquiring, pursuing and retaking them.

The appeal should be dismissed.

DIXON J. On 8th October 1937 a number of cattle of the plaintiff were impounded in the Meeniyan pound by an officer of the State Savings Bank who, as he claimed, had found them trespassing upon land of the bank. The defendant, who acted as poundkeeper, received them and held them in the pound proper until 10th October when he moved them to an adjunct of the pound. The gates of the adjunct were securely fastened by chains and padlocks ; but between

(1) (1831) 7 Bing., at p. 661 [131 E.R., at p. 256.]

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7 and 8 o'clock of the morning of 12th October the defendant discovered that overnight the chains had been cut and the gates opened. The cattle were missing. After communicating with the police, he set out an hour or two later on horseback and, at eleven o'clock, found the cattle on some unfenced land. He then communicated again with the police by telephone and, upon a constable arriving at about half past twelve, he drove them back to the pound where they were detained for some time.

The chief question in the case is whether the defendant was entitled to retake in this manner the cattle which had been let out of the pound and to replace them in the pound. It seems probable that the cattle were driven away, but this is not established by direct evidence. There is nothing to connect the plaintiff with the acts of cutting the chains and opening the gate to let out the cattle. The inference is that the object of opening the gate was to let out the cattle and it is an easy step to the conclusion that they were taken out of the pound by someone, which amounts to pound breach. But the case has been dealt with as one simply of escape. Accordingly I shall treat it as an escape, but an escape without the default of the poundkeeper or of the distrainor. On this footing the question is whether a poundkeeper may lawfully recapture animals which escape from the pound, not whether they may be retaken upon a pound breach or rescue. In my opinion the answer to the question does not depend upon the provisions of the *Pounds Act* 1928. That Act regulates pounds in a great many respects and makes important differences in the law relating to the impounding of beasts distrained damage feasant. But it does not appear to me to contain anything which covers the point raised for our consideration. The duty imposed by sec. 20 upon the poundkeeper to receive and detain in his custody cattle lodged in the pound is not new; though the events specified as those upon which the duty may be brought to an end are not the same as at common law. "It has been decided," said *Buller* J. in *Brandling* v. *Kent* (1), "in the case of a poundkeeper that he is bound to receive everything offered to his custody." And in *Badkin* v. *Powell* (2) Lord *Mansfield* said that the pound is the

(1) (1785) 1 T.R. 60, at p. 62 [99 E.R. 972].

(2) (1776) 2 Cowp. 476, at p. 478 [98 E.R. 1195, at p. 1196].

custody of the law and the poundkeeper is bound to take and keep whatever is brought to him at the peril of the person who brings it. The statute, therefore, in this respect does no more than state a common law duty. The question is what is the effect of the poundkeeper's failure to detain the distress, a failure due to an escape without his default. If the effect of an escape were that the owner's right to the beasts revived and they became free of the distress levied, it would be hard to believe that the poundkeeper had a right of recapture. If, on the other hand, the law continues in the distrainor the right to treat the animals as a pledge for the damage done by their trespass so that he may recapture them, it is easy to ascribe to the poundkeeper a corresponding right of recapture.

The common pound is no new thing. Indeed, Sir *Henry Maine* took occasion to " observe in passing that there is no more ancient institution in the country than the village-pound " an observation which may, perhaps, contain a little exaggeration (*Early History of Institutions*, (1880), p. 263). Pounds were set up early in the settlement of Australia and it was not long before the legislature provided for the establishment of public or common pounds. The statute law contained in the Victorian *Pounds Act* 1928 has been developed from the first enactment by a process of amendment and consolidation. The course of development may be seen from the following statutes : 6 Geo. IV. No. 20 ; 9 Geo. IV. No. 11 ; 4 Will. IV. No. 3 ; 4 Vict. No. 1 ; 9 Vict. No. 7 ; 14 Vict. No. 42 ; 16 Vict. No. 10 and 18 Vict. No. 30 (*Adamson's Acts of Council*, vol. 2, p. 1142).

A poundkeeper is now, perhaps, a public officer in a wider sense than at common law, where, although he served a common purpose and was under a duty to receive all distress brought to the pound, his independent authorities did not extend beyond the detention of the beasts as an indifferent person whose custody was that of the law. In *Jasper* v. *Eadowes* (otherwise *Vaspor* v. *Edwards*) as reported in the *Modern Reports* (1), in deciding that a distrainor, if the distress has been lost, cannot without negativing his own default maintain an action for trespass, *Holt* L.C.J. said :—" The plaintiff ought to show how the distress was lost ; for it must be presumed

(1) (1702) 11 Mod. Rep. 21, at pp. 23, 24 [88 E.R. 858, at p. 859].

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he can give the best account of it; and perhaps he put it into a pound that was out of repair; but whether in *a private*, or *a public*, or *a common pound* (*Co. Litt.* 47), it matters not; for the law has not appointed any such things as *a common pound*; they are only by the agreement of lords and tenants; and so are *haywards* and *keepers of pounds*. The distress is for the benefit of the distrainer; wherever he impounds the pound is his, and he only can have the *parco fracto*; and therefore the keeping the distress is at his peril. In the replication, the plaintiff ought to show what became of the distress. It might escape through his neglect, though *contra voluntatem*."

From this and other cases it appears that so long as the distress was held in a common pound as a pledge for the damage, the distrainor's right of action for trespass damage feasant was suspended. Unless he could show that the distress had died or had been rescued or had escaped without his default or apparently that of the poundkeeper, at common law his cause of action would not revive.

Further, the poundkeeper, although an indifferent person holding under the authority of the law, holds for the benefit of the distrainor. The possession of the cattle was conceived as still vested in the owner, upon whom fell the burden of feeding the cattle if they were impounded in a pound overt. If a stranger took the cattle from the pound the owner could maintain against him not only trover but trespass, and this appears still to be the law. Special remedies were, however, given to the distrainor, viz., writs of pound breach or *parco fracto* and rescue. "A writ of *parco fracto* lyeth, where a man distreyneth cattell for damage feasance, or for rent, or service, and put them into the common pound, or into another pound or place, which shall be said to be a lawfull pound; and he who hath property in the cattell or other person taketh the cattell out of the said pound, and driveth them where he pleaseth; he who distreyned them for etc. shall have the writ *de parco fracto*" (*Fitzherbert, Natura Brevium*, p. 228).

"The writ of rescous lyeth, where a man doth distreyn for rent or services, or for damage feasance, or would impeach or impound the cattell, and the other party doth rescous them, or taketh them from him, then he shall have this writ of rescous" (*Ibid.*, p. 230).

It was well established that, if the cattle be taken by rescue or pound breach, the distrainor might recapture them upon fresh pursuit. This right of recapture is dealt with at length in a passage in a judgment of *Tindal* C.J., delivered for the Court of Common Pleas, in *Rich* v. *Woolley* (1). The question before the court was the sufficiency of a plea of justification to an action of trespass for breaking the lock of the plaintiff's close, entering and driving away the cattle. The plea was one of recapture upon a rescue. *Tindal* C.J. said :—" That plea, in effect, states a retaking of cattle rescued after a distress, and therefore should have shewn some authority to go to the premises of the rescuer, and take the cattle from thence. The first material omission in that respect is, that this is not stated to have been done upon fresh pursuit. For aught that appears to the contrary, the retaking might have been at any distance of time. Now, what is the law on this subject ? The common law gave the party injured a writ of rescous. . . . Besides that, he had another remedy by which he might replace himself ; namely, a recaption ; but that is confined to cases where the recaption can take place without a breach of the peace, and upon fresh pursuit. Instances are pointed out in 2 *Roll. Abr.*, pp. 565, 566 ; and *Blackstone* says (3 Bl. Com. 5) : ' That this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use ; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law.' If the common law will not allow a party to resort to force for the purpose of retaking his own goods, there is no reason why a larger power should be extended to the case of goods distrained, at any rate, unless they are retaken upon fresh pursuit."

Is the distrainor entitled to recapture beasts which simply escape from the pound ? Or is the right of recapture described by *Tindal* C.J. confined to rescue and pound breach ? The answer is given by

(1) (1831) 7 Bing. at p. 661 [131 E.R., at pp. 255, 256].

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Gould J. in his judgment in *Vaspor* v. *Edwards* or *Jasper* v. *Eadowes*, as reported in the *Modern Reports* (1). He says:—"If the owner break the pound, and let distress go, the distrainor shall have a *parco fracto*, or may retake the distress (1 Inst. 45; 34 Hen. 6, 18). If one distrain, and as he is driving to pound they escape, I may pursue and retake them, or bring trespass, and the reason is the same here. If distress escape out of pound, the party may retake him (27 Ass. pl. 64), but he cannot tie, for that would be a misuser, and would amount to a conversion. If the distrainant suffer the distress to escape by his own consent, he discharges the trespass; or if the defendant had alledged any default in him, that perhaps would alter the case."

Gould J. dissented from the decision of the court that it lay affirmatively upon the plaintiff to exclude default on his part in suing for trespass after the distress had escaped. But the passage I have cited may, I think, safely be relied upon as correct. There is, as far as I can find, no other judicial statement as to the distrainor's right of recapture after a mere escape from the pound, or at all events none that is accessible. The law stated in these two authorities brings the matter to this point, viz., that after a rescue or the loss of the distress by pound breach or through a bare escape, the distrainor has a right of capture on fresh pursuit. They show further that, unless the loss of the distress occurs without the default of the distrainor or the poundkeeper, the distrainor's cause of action in trespass cattle damage feasant is gone. Moreover the poundkeeper holds the pledge for him, though his custody is that of law, and this is so though it be a public or common pound.

From all this it appears clearly to follow that, upon the escape of the beasts, the possession ascribed to the owner does not become real and unqualified, does not revive as an exclusive possession. If the owner obtained actual possession or control of beasts which had escaped, either because they returned to his land or because he found them at large, the distrainor's right might terminate. The distress might be at an end, but that did not happen here. Short of that, the legal right of the distrainor to treat the cattle as a pledge for the damage continues to exist, a right which is exercisable in the first instance only by impounding. The distrainor who retakes

(1) (1701) 12 Mod. Rep., at p. 661 [88 E.R., at p. 1587].

the distress after an escape must restore them to the pound. To my mind it is an almost necessary inference that the keeper of the pound from which the distress was lost might himself recapture the beasts on fresh pursuit. It is not the law that an escape means the loss of the distrainor's right to hold the pledge and, so to speak, the loss of all he had gained by the seizure. Had it been so, it would have been a natural corollary that no right of recapture existed in him or the poundkeeper. But, as the contrary is true, it should follow that such a right of recapture is exercisable not only by the distrainor but by the keeper of the pound from which the beasts have been lost. It is immaterial whether the matter is regarded as one of right or of justification. Perhaps the poundkeeper may best be considered as justifying under the right of recaption of the distrainor to whom he is or may be responsible and for whom he holds the distress as a pledge. But I think that he does not commit an actionable wrong against the owner of the cattle by retaking them.

There remains the question of fresh pursuit. It should be noticed that we are not here dealing with a justification for entering a third party's close in pursuit of the cattle nor for taking them out of the possession or custody of a third party. We are concerned only with the mutual relations of the owner of the cattle distrained damage feasant and the poundkeeper. The owner had not taken or assumed actual possession of the cattle. How far he can in these circumstances rely on absence of fresh pursuit may be a question, but it is one upon which it is unnecessary to enter. For I think that in fact the defendant retook the cattle upon fresh pursuit. The expression states an ancient condition which for various purposes the law attached to the lawful capture or recapture of men and things. *Recens insecutio* or fresh suit is the earlier form of the expression. What is sufficient to fulfil the requirement must vary not only according to the circumstances of the given case and locality, but also according to social conditions from period to period. In *Tomlin's Law Dictionary* (1835) are to be found definitions drawn from different sources which exhibit a diversity that might be expected. " Such a present and earnest following of an offender, where a robbery is committed, as never ceases from the time of the

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offence done or discovered until he be apprehended (*Termes de la Ley*)"; a definition with which *Tomlin's* concluding reference hardly accords: "And it has been said that fresh suit may continue for seven years (3 Rep. S.P.C.)." Probably the statement given from 2 *Haw. P.C.* (1824) c. 23, may be regarded as still holding: "But at this day, if the party hath been guilty of no gross negligence but hath used all reasonable care in inquiring after, pursuing, and apprehending the felon" (here in retaking the beasts) "he shall be allowed to have made sufficient fresh suit."

In the *Termes de la Ley* the head of "Fresh Suit" concludes: "Fresh suit is also when the lord comes to distrain for rent or service and the owner of the beasts makes rescous and drives them into another's ground, not holden of the lord and the lord follows presently and takes them, and so in other like cases." The present may be considered another "like case."

Among modern authorities the most useful discussion of "fresh pursuit" will be found in the judgment of *Harvey* C.J. in Eq. in *May* v. *Morris* (1).

I think that what the defendant did in pursuing the escaped cattle amounts to a fresh pursuit. It was not a pursuit "within the view" but it consisted of reasonable inquiry and preparation followed by an "*insecutio*" conducted with due expedition and a "*captio*" effected with a propriety and peacefulness which, perhaps, could not reasonably be secured without awaiting the arrival of a police constable.

I am, therefore, of opinion that the defendant, as a poundkeeper, was entitled to recapture the escaped cattle of the plaintiff and in doing so committed no unlawful act.

Counsel for the plaintiff, who is the appellant, raises some objections to the validity of the establishment of the pound, to the denomination and use of the adjunct and to the appointment of the plaintiff as the poundkeeper, or, in another view, the sufficiency of the proofs of all or some of these matters. I see no reason why any of the arguments upon which he relied should be considered closed to him by the form of the indorsement of the writ as amended, for I infer that an amendment was allowed. The action was remitted

(1) (1930) 30 S.R. (N.S.W.) 355; 47 W.N. (N.S.W.) 152.

to the County Court, where there are no pleadings, and so far as appears the defendant was put to his justification, and this he was bound to make out. But I think the further points so relied upon by the plaintiff fail in substance. There is a presumption in favour of the validity of the establishment of a pound in common use and of the appointment as its keeper of the man found filling that character *de facto*. The notice in the *Gazette* put in evidence gave, I think, sufficient particulars to escape invalidity. Under sec. 4 (2) of the *Pounds Act* 1928 I do not think that on each distinct occasion, when the pound proves inadequate, an adjunct must be appointed. It was, perhaps, unnecessary for his justification for the defendant affirmatively to prove that the cattle were trespassing when impounded. But he led enough evidence to discharge the burden, if it lay upon him.

In my opinion the appeal should be dismissed.

EVATT J. In my opinion this appeal should be dismissed. I am in agreement with the reasons fully elaborated in the judgments of the Supreme Court (*Ryan* v. *Bright* (1)).

Appeal dismissed. No order as to costs.

Solicitors for the appellant, *Francis Field & Wallis.*
Solicitors for the respondent, *Sutherland & Marshall.*

H. D. W.

(1) (1938) V.L.R. 260.