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Rescous and Pound-Breach: Re-Discovering Two Archaic Statutory Torts in Alberta

By: Joe Sellman

Decisions Commented On: Alberta Law Reform Institute, *Residential Tenancies: Distress for Rent*, Final Report 122; *Distress for Rent Act* (England), 1689 2 Will & Mar, c 5

If, upon hearing "pound-breach", your mind conjures images of a dog escape reminiscent of *The Great Escape* or *Chicken Run*, you are not alone and you're not entirely wrong.

The term "pound" in this context is referring to a public pound, historically frequently used for the temporary detention of animals. Unfortunately (or fortunately?), the "breach" in pound-breach is committed by people, rather than the animals themselves.

Why are we Talking about Rescous and Pound-Breach?

As part of the Alberta Law Reform Institute's (ALRI) Residential Tenancies Act project, we have published a standalone final report recommending that distress for rent be abolished for residential tenancies in Alberta (*Residential Tenancies: Distress for Rent*, Final Report 122).

Distress for rent is unusual as the majority of this remedy remains unchanged since the reception date of English law in Alberta (July 15, 1870, for more information about received law in Alberta, see my previous post: Untangling Received Law in Alberta). During our research into distress for rent, we uncovered two statutory torts arising from an English statute that appear to still be in effect in Alberta; the torts of rescous and pound-breach.

Distress for Rent, Rescous, and Pound-Breach

The statutory torts of rescous and pound-breach were created in the *Distress for Rent Act* (England), 1689 2 Will & Mar, c 5 (*Distress for Rent Act*, 1689). However, to understand these torts and what they do, we first need to understand distress for rent.

Distress for rent is an ancient common law self-help remedy. In feudal England, when a tenant failed to perform their feudal obligation or pay rent, distress for rent allowed a landlord to seize personal property from the rental premises and impound it in the custody of the law, where it would be held until the obligation was completed or rent paid.
The landlord had no ownership or possessory interest in the personal property seized. Instead, the landlord only ever had (and then used) their legal authority to seize the personal property upon

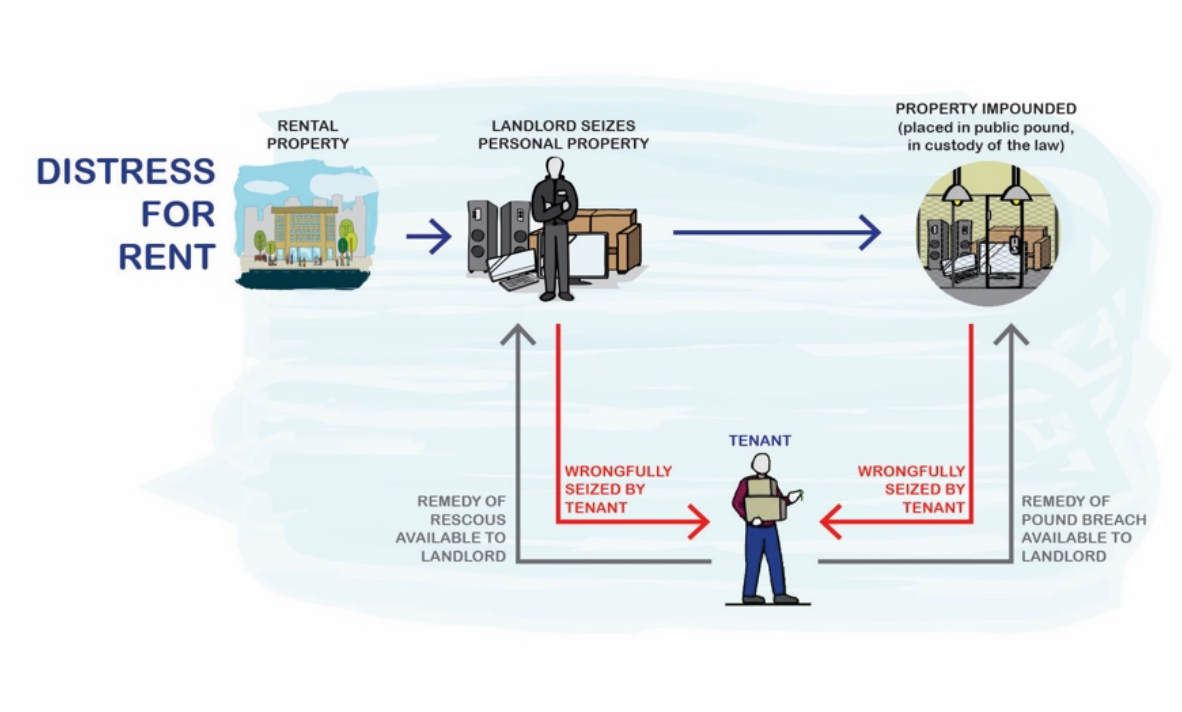
the failure to perform the obligation or pay rent. Then, once the property was impounded, literally put into the public pound, the property was in the custody of the law.

Later, also in the *Distress for Rent Act*, 1689, a power of sale was added allowing the landlord to sell the seized and impounded personal property. When personal property was sold, the purchaser then received ownership of the property.

The landlord's lack of ownership and lack of legal possession became problematic if a tenant wrongfully seized back their personal property (that is, in situations where the landlord had legally seized/impounded the property). In this situation, the landlord was without a remedy to re-recover this property from the tenant. This is because the torts relating to wrongful interference of property rely on a claim of legal ownership or possession (for example the torts of trespass to chattel, detinue, and conversion would not assist the landlord).

It is this potential wrong that the statutory torts of rescous and pound-breach aim to remedy. **Rescous** (or rescue) allows for the recovery of the property when there has been wrongful interference with property that was lawfully seized by the landlord via distress for rent but had not yet been impounded. **Pound-breach** allows for the recovery of property when there has been wrongful interference with property that was lawfully seized by the landlord via distress for rent and that had been impounded (i.e., the property was in the custody of the law).

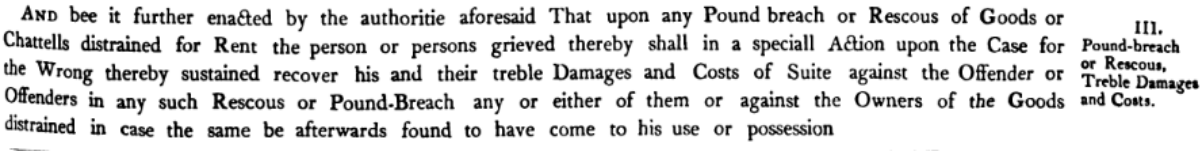
Figure 1: Rescous and Pound-breach
(Source: ALRI, created by Barry Chung)



The *Distress for Rent Act,* 1689

In England, before 1689, rescous and pound-breach existed only as indictable criminal offences at common law (as criminal offences, these are no longer applicable in Canada. See section 9(a) of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*)).

However, section 3 of the *Distress for Rent Act,* 1689 created the statutory torts of rescous and pound-breach for distress for rent:



III. Pound-breach or Rescous, Treble Damages and Costs.

And bee it further enacted by the authoritie aforesaid That upon any Pound breach or Rescous of Goods or Chattells distrained for Rent the person or persons grieved thereby shall in a speciall Action upon the Case for the Wrong thereby sustained recover his and their treble Damages and Costs of Suite against the Offender or Offenders in any such Rescous or Pound-Breach any or either of them or against the Owners of the Goods distrained in case the same be afterwards found to have come to his use or possession

There are two reasons it is almost certain that these statutory torts continue to exist and apply in Alberta:

1. The *Distress for Rent Act,* 1689 continues to be generally understood as the basis for the power of sale (allowing landlords to sell seized and impounded property in distress for rent proceedings); and
2. Pound-breach and the *Distress for Rent Act,* 1689 were considered in *Westchester Equities v Thorne Riddell Inc.,* 1988 CanLII 3432 (ABQB) (*Westchester*).

In *Westchester*, goods that were initially seized in distress for rent proceedings were subsequently seized and sold pursuant to a debenture granted to a bank. At issue was whether the subsequent seizure and sale constituted pound-breach per the *Distress for Rent Act,* 1689. The Court found that while the *Distress for Rent Act,* 1689 was still in force in Alberta, the elements of the tort had not been met.

Note that after *Westchester,* and since 2012, the legislative framework dealing with seizure of already seized goods has changed. Section 48.2 of the *Civil Enforcement Act*, RSA 2000, c C-15 (which governs procedural requirements that apply to distress for rent) now specifically allows the seizure of property that has already been seized.

Required Elements of the Pound-Breach

There appears to be no subsequent or relevant case law since *Westchester* that considers these torts. However, from the scant information and sources available, it appears that the elements of pound-breach require the plaintiff (i.e., the landlord) to prove:

- They are the landlord;
- Rent was in arrears;
- The distress for rent proceedings were conducted legally;
- The defendant knew of the seizure and/or impounding; and
- That the property was unlawfully taken by the defendan

While *Westchester* does not consider rescous, considering the two torts were created together, we assume rescous equally applies in Alberta based on the reasoning in *Westchester*.

Law Reform Options

Historically, there was a clear difference between seizure of personal property and impounding (for example, seized animals were literally taken to, and held in, a public pound).

Contemporarily, this distinction is much less clear, with impounding being much less formal to the extent it is arguable the distinction no longer exists (as raised in obiter in *First City Shopping Centre Group Inc. v Gleddie*, 1991 CanLII 5825 (AB KB) at para 75).

Similarly, the contemporary distinction between rescous and pound-breach is artificial, and a logical reform would be to combine these two remedies into a broader remedy for wrongful interference with distress for rent (see for example The Law Commission (England and Wales), *Distress for Rent*, Working Paper no 97 (1986) at pages 109-110).

Such a reform would clarify and simplify these statutory torts. However, distress for rent is a remedy in need of a much more holistic and comprehensive reform and this type of piecemeal reform alone would provide little value.

Even if ALRI's recommendation for abolishing distress for rent in residential tenancies is followed, distress for rent would continue to exist for other types of tenancies in Alberta (for example, commercial tenancies, or mobile home site tenancies). Therefore, we suggest that any codification or reform of distress for rent in these other types of tenancies should take the opportunity to address rescous and pound-breach.

Concluding Remarks

While the statutory torts of rescous and pound-breach are limited to the wrongful seizure of personal property taken in distress for rent proceedings, they continue to apply in Alberta. More detail about distress for rent can be found in our recent report *Residential Tenancies: Distress for Rent*, Final Report 122.

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