

C. L. Chain.]

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or conviction made final by a statute, to *seize back* the goods by replevin, and so delay the plaintiff in his recovery of the fruits of his judgment. The reason then given for the courts in England, holding it to be a contempt of court for a party to proceed, and consequently for their not permitting him to proceed by replevin, in respect of a seizure under an execution issued out of a superior court, applies only to the case of a replevin brought or attempted to be brought by him against whom the execution issued. While adopting the same principle, there have been, in the supreme court of the State of New York, several cases of replevin being maintained even against a sheriff in respect of goods taken in execution.

In *Clark v. Skinner*, 20 Johnson, 465, it was held that replevin lies at the suit of the owner of a chattel against a sheriff, constable, or other officer who has taken it from the owner's servant or agent while employed in the owner's business, by virtue of an execution against such servant or agent, the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant in the execution. Platt, J. giving judgment says, "Suppose John Clark (against whom the execution was and from whom the goods were taken) had taken the horse and sleigh as a trespasser himself, would they be in the custody of the law as to the true owner, because the constable happened to find them in the hands of a person against whom he had an execution? If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *fi. fa.* against the watchmaker or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on execution, against the master of the vessel? It seems to me indispensable for the due protection of personal property. In many cases it would be mockery to say to the owner—Bring an action of trespass or trover against the man who has despoiled you. Insolvency would be both a sword and a shield for trespassers. Besides there are many cases where the possession of chattels is of more value to the owner than the estimated value in money, and the action of detinue is so slow and uncertain, as a specific remedy, that it has become nearly obsolete." "The rule," he proceeds, "I believe is without exception, that wherever trespass will lie the injured party may maintain replevin. Baron Comyns says, 'Replevin lies of all goods and chattels unlawfully taken.' (6 Com. Dig. Replevin A.) 'Though,' he says, (Replevin U) 'replevin does not lie for goods taken in execution. This last proposition,' he adds, 'is certainly not true without important qualifications. It is untrue as to goods taken in execution where the *fi. fa.* is against A. and the goods are taken from the possession of B. (being the property of the latter, is plainly intended). 'By goods,' he proceeds, 'taken in execution, I understand goods rightfully taken in obedience to the writ, but if, through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were taken in execution, in the true sense of the rule laid down by Baron Comyns.'"

In *Thompson v. Button*, 14 Johnson, 84, it is laid down that goods taken in execution by a sheriff out of the possession of the defendant in the execution, being in the custody of the law, cannot be replevied, *but if the officer having an execution against A. undertakes to execute it on goods in the possession of B. the latter may bring replevin for them*. The chief justice in giving judgment says, "As a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, when the officer has found them in and taken them out of the possession of the defendant in the execution." This judgment is in precise accord with the law of England, as I understand it.

In *Hall v. Tuttle*, 2 Wend. 476, the law is laid down in precisely the same language. The court, in giving judgment, adds, "The sheriff levies at his peril, if the property does not belong to the defendant in the execution."

In *Dunham v. Wyckoff*, 3 Wend. 279, the case came up on demurrer, which admitted that the property in the goods seized under execution was in the plaintiff in replevin, although when seized they were in the possession of the person against whom the judgment and execution was had. Judgment was given for the plaintiff on the demurrer, as the pleadings admitted the property to be his. A similar point was decided on error in *Acker v. Campbell*, 33 Wend. 372.

The principle upon which these cases proceed seems to be in accord with that stated by Chief Baron Gilbert as the principle upon which the courts in England refused to permit replevin to be brought in respect of goods seized under an execution issued upon a judgment recovered in the superior courts.

Our law of replevin in this country would seem to have its foundation in 4 Wm IV. cap 7; for the sheriff in this country, having no county court, it is difficult to see how the action could have been brought before that statute. (See *Hull v. Keith*, 1 U C Q B 478). By that Act, the remedy seems to have been limited to the case of a wrongful distress, probably because of there having been an opinion prevalent that it was only in such case that replevin lay in England. The Act provides that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may, on filing a procipe, obtain from the crown office a writ of replevin in a form given by the statute.

This law was amended by 14 & 15 Vic cap. 64, A.D. 1851, whereby it was enacted "that whenever any goods, chattels, deeds, &c., valuable securities or other personal property or effects has been or shall be wrongfully distrained or otherwise wrongfully taken, or has been or shall be wrongfully detained, the owner, or person or corporation who by law can now maintain an action of trespass or trover for personal property, shall have and may bring an action of replevin for the recovery of such goods, chattels or other personal property aforesaid, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress." The writ was to be