mounted to a distress, though it was not proved that the bailiff actually took hold of the horses or touched them. When the bailiff distinctly announced that he seized the horses then in view, and Upper forbade him to take them, it was not necessary for the bailiff to bring on a breach of the peace.

Not being able to take the horses away, which he had sufficiently distrained upon, as I think, the bailiff retired and went to a magistrate, and complained that Upper had rescued the horses after he had distrained upon them, but he did not succeed in obtaining a warrant from the view the justice took of the case. This accounts for the delay of two or three days, at the end of which time the bailiff went and got the horses. There is nothing in his conduct that could be construed into an abandonment of the seizure made on the first occasion, if what passed then amounted to a distress, as I think it did. If a person had come with a *fi. fa.* in the interval, and seized the goods, he would have had colour for insisting that the distress of the horses was abandoned by the bailiff going away and leaving no one in possession, but it is very different when the question of abandonment is discussed between the owner of the goods and the officer. The distinction is laid down in *Swann* v. *Earl of Falmouth*, (8 B. & C. 459). It is of no consequence whether we look upon what was done by the bailiff on the first occasion or on the second as the act of distraining, further than that on the first day the horses were at the very time undeniably in the possession of Upper, who was harnessing them and using them at the very moment when the bailiff told him that he seized them for the taxes.

Then if the bailiff had authority to distrain these horses and did distrain them, the plaintiff must fail in this action, which is founded on an allegation of an unlawful taking and detention, and not merely for reckless or negligent conduct in the manner of making the distress. I find no precedent or authority for an action for distraining the goods of a stranger *without necessity*, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made, and if an action lies for such an injury the declaration should be framed to suit the complaint, as it should have been if what the plaintiff complained of in the case, was the taking the two horses when one would have been sufficient.

As I think the plaintiff's action failed against both the defendants, it is immaterial to consider the question whether, when a bailiff in executing a warrant from a collector to distrain for taxes, seizes goods which do not belong to the party assessed, and which are not even in his possession, it can be held that the collector, who merely issued the warrant in proper legal form, can be held responsible for the trespass, though he neither directed the bailiff to do what he did nor was in any manner privy to it.

That is an interesting and important general question, on which at present I give no opinion. Undoubtedly where a bailiff under a warrant from a sheriff under a *fi. fa.* against the goods of A., seizes the goods of B., the sheriff is liable. There the writ is directed to the sheriff, whose proper and immediate duty it is to execute the process or see that it is executed. He is paid for doing it, and whoever is employed to execute the writ which he is himself commanded to execute, and is paid for executing, is looked upon as acting in his place, and as one person with the sheriff.

The collector, on the other hand, though he is authorised to demand the taxes and levy them by distress when they are not paid, stands perhaps in a somewhat different position. He is not commanded by any process to make the levy himself, and can scarcely be expected to do so. He is not therefore delegating to another the particular duty of seizing and selling which by any process of law has been imposed upon himself, and he has no claim to fees for what the bailiff does, any more than a magistrate has who grants a warant in a criminal matter. Neither is the levy made for his benefit, as in the case of a distress which a landlord authorises a bailiff to make for rent. He cannot be truly said to be ratifying and adopting an act done for his interest.

At present I do not say that I am clear he is not liable for what the bailiff does, though contrary to the command contained in his warrant, but it will require to be carefully considered whether he is liable or not. I have not found any decided case upon the point, though I should infer that the Court of Common Pleas in England, which gave judgment in the case of *Hall* v. *Smith* (2 Bing. 160, 161), would in a case like the present have held the collector not liable. In that case the Chief Justice says, "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive an advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to *public officers* by the statute of Westminster 2, ch. 11, from the words of which statute it is taken.—'*Si custos gaolæ non habeat per quodjusticietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.*' The terms of the statute of Westminster the second, embrace only those who delegate the keeping of gaols to deputies, and were intended only, as Lord Coke tells us, to apply 'to those who having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriff and bailiffs, but has not been applied to any other public officer. Although the office of sheriffs be now a burdensome one, yet they are entitled to poundage and other fees for acts done by their officers, which in old times might be a just equivalent for their responsibility."

This language is very applicable to the position of Page, in the the case now before us.

If the collectors of taxes appointed by the municipalities to serve for the year are to be regarded as "public officers," as I think they must be, and if the principle of "*respondeat superior*" is correctly laid down in this judgment, it would seem to decide that the defendant Page is not liable in the present case under the circumstances, though the case of *Hall* v. *Smith*, in which the judgment was given, is one very distinguishable from the present in its facts.

The collectors of taxes here are officers annually appointed to collect the taxes generally, which in far the greater number of instances it may be expected they will be able to do by merely calling upon those against whom they are charged. In those cases in which they may have to resort to compulsory measures, although the Legislature has enabled them to levy in person, and without the authority of any process, yet I do not imagine that it was contemplated that the collectors would themselves, as a matter of course, act the part of bailiffs and auctioneers in seizing and selling, for these are duties with which they can hardly be supposed to be familiar, being persons chosen from among the inhabitants to serve for the year.

Of course the collector would be liable for anything being done which he had authorised the bailiff to do, if that were alleged; but whether he is liable, like the sheriff, for anything done by the bailiff without the authority of or contrary to the direction given in the warrant, will be in this case the question, if it is eventually found that the horses distrained upon were neither the property of Upper nor at the time in his possession. It is a question of interest to the public. On the one hand, when a constable, having a warrant from a collector to seize goods of A, seizes the goods of B, it would be very desirable for the party whose goods are illegally taken by the mistake or wilful conduct of the bailiff, to have the collector to look to for indemnity, and not merely the bailiff only, who may be a man of no property. Yet where, as in this case, the person wronged, hearing of the matter in time, pursues his remedy by replevin, he is sure of getting back the property if he succeeds in the action, and the advantage he would have in being able to recover against the collector concerns only the costs of the suit.

On the other hand, if, when the authority given to the bailiff by the warrant is exceeded, the action should be found to be against the bailiff alone, and not against the collector, the party whose goods have been illegally taken would be in no other situation after all than parties clearly are in all the cases where a constable exceeds his authority in levying fines or penalties under a warrant from a justice of the peace.

The question is, whether a collector of taxes giving a warrant to a constable comes more clearly under that class of cases, or under that where a writ is given by a sheriff.

The point is a nice one; for though undoubtedly in such cases the collector is not, like the sheriff, employing a constable to do a duty which he himself has been commanded by writ to do, yet he employs him to do what he is in general terms authorised and directed by act of Parliament to do, whenever it may become