Cotsworth v. Bettison, 1 Ld. Ray 104 (decided in 1696), has never been questioned, and has been repeatedly confirmed by the more recent authorities. In that case it was argued, that if plaintiff had no title to the place where the animal was seized damage feasant, he could not distrain it, and consequently the distress was tortious, "and if the distress was tortious the impounding was tortious also, and then the defendant might well justify the breach of the pound." But per curiam, "if a distress be taken without cause and impounded, the party cannot justify the breach of the pound to take it out of the pound because the distress is now in custody of the law; that all other precedents in parco facto are in this manner."

Parrett Navigation Co. v. Stover, 6 M. & W. 564, decided in 1840, where the question came up on demurrer, upheld Cotsworth v. Bettison, holding that a declaration setting out only (without shewing right) a distress and an impounding was sufficient, as goods being alleged to have been impounded they were then in custody of the law, and the defendants had no right to retake them, and in doing so were wrong-doers. Castleman v. Hicks, 1 Car. & Mar. 266, Smith v. Wright, 6 H. & N. 820, Turner v. Ford, 15 M. & W. 212; and the late case of Jones v. Burnstein, [1899] 1 Q. B. 470, all confirm the law that goods impounded are "in custodia legis," without right on defendants part to retake.

Counsel for defendant cited two cases as opposed to this position, Browne v. Powell, 4 Bing, 230, and Berry v. Huckstable, 14 Jur. 718.

The decision in Browne v. Powell was, that a tender was not too late, as the facts shewed that the detainer on the premises was not an impounding, the cattle being on the way ultimately to a public pound. Best, C.J., it is true suggested that impounding in the pound of the Lord of the Manor was the only one sufficient to make a tender of amends too late, but he expressly refused to decide the case on that ground.

That distinction has never been revived in any subsequent decision. The authorities since the passing of 11 George II. ch. 19 (1738), whereby, in the interest of the tenant, the distrainer might impound the goods on the premises, recognize no difference in an impounding on the premises, or in a public pound, except that in the case of