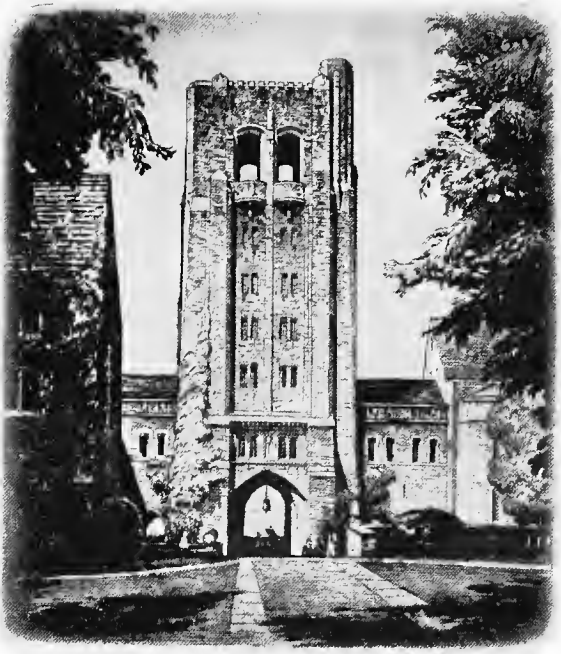

A

PRACTICAL TREATISE

ON THE

LAW OF REPLEVIN

IN THE

UNITED STATES;

WITH AN

APPENDIX OF FORMS,

AND A

DIGEST OF STATUTES.

BY

PHINEAS PEMBERTON MORRIS.

SECOND AND REVISED EDITION.

PHILADELPHIA:
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PREFACE TO THE SECOND EDITION.

A SECOND edition of the Treatise on Replevin has been long called for. It is now presented to the public, after a careful re-examination and correction of the text, and comparison of the authorities. The cases decided since 1849 have been examined, and whenever any new point has been made, or an old one received fresh illustration, the case has been added to the list of citations, and the point incorporated in the text. Some additional explanations of matters of practice have been introduced, which it is hoped will render the book more valuable to the practising lawyer. The Massachusetts and New York Statutes printed in the Appendix are the statutes as they now stand.

P. P. MORRIS.

AUGUST 3, 1869.

PREFACE TO THE FIRST EDITION.

THERE is no part of the law, unblended with public jurisprudence or politics, which has been more obviously improved in the United States than Replevin. From the cumbrous weapon, useful only in a narrow field, to which Coke and Gilbert were accustomed, it has, in more than one-half of the United States, been fashioned into the ready instrument for the adjustment of all disputes, in regard to the ownership of personal property. In some of the states, Pennsylvania, for instance, this improvement has been the result of time, operating upon early colonial customs, occasionally assisted by judicial legislation.

In other states, indeed in most of the northern and western states, the law has been codified, and the improvements which experience suggested, introduced; the framework of the action remaining unchanged.

The present work originated in the difficulty which the author experienced, on an occasion in

which he was called upon to use the action of replevin. The confused and unsatisfactory form in which the digests and reports left the subject, was not essentially relieved by a reference to the elementary writers. There is no American treatise on the subject. The works of Gilbert and Wilkinson, in England, have attained a just celebrity, and are well known in the United States. But, owing partly to the narrow sphere within which the remedy is confined in England, and partly to the dissimilarity of the proceedings in the two countries, they are not satisfactory guides to the American practitioner; yet much of the learning which they contain is of essential value here. The author has been a diligent seeker at the fountains of his subject in the English law, and has spared no labor in the exploration of the many branches from the main stream which abound in the United States, and has used the information thus obtained, principally, in illustration of the action as it exists in Pennsylvania.

The plan pursued will be understood at once by a glance at the table of contents. The work is divided into chapters, in each of which a different head is treated, carrying the reader from the issuing of the original writ to the execution; after which follows a consideration of the bond, and of

the liabilities and benefits accruing to the different parties thereto, and of the method of proceeding on the bond. To which is added an Appendix of Forms and of Statutes, including such parts of the Code of Procedure of New York as bear upon this action, and the chapter of the Massachusetts Revised Statutes relating to Replevin; which together give a very clear idea of the character of the changes which have generally been introduced by the legislation of the northern and western states.

The author does not suppose that he has exhausted the theme, or that he may not have fallen into errors; those who best understand the subject, will easily comprehend how improbable it is that he should have done either. But he hopes and believes, that he has placed within reach, and in a connected form, information which cannot elsewhere be obtained, but at the expense of much time and labor.

The works of Gilbert and Wilkinson have been freely drawn upon, and Mr. Hammond's Nisi Prius has furnished some valuable rules on the subject of avowries.

PHILADELPHIA, March, 1849.

ERRATA.

Page 72, *for* Zachrisson *v.* Alman, *read* Zachrisson *v.* Ahman.

After line 20, on page 107, *insert* "An amendment to the code has since introduced a provision on this subject." See appendix, page 385, § 216.

Page 160, *for* Crowther *v.* Barnsbotham, *read* Crowther *v.* Ramsbottom.

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THE

LAW OF REPLEVIN.

CHAPTER I.

REPLEVIN, ITS ORIGIN AND HISTORY.

REPLEVIN, as defined by Chief Baron Gilbert, is the remedy given the party to controvert the legality of a distress, in order to bring back the pledge to the proprietor, in case the distress were unlawfully taken and without just cause. Blackstone says, to replevy (replegiare, to take back the pledge), is where a person distrained upon, applies to the sheriff or his officers, and has the distress returned into his possession, upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainor. The definition of Spelman is more comprehensive and more accurate than either. He says: A replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels; commanding the sheriff to de-

liver back the same to the owner upon security given to make out the injustice of such taking, or else to return the goods and chattels.

Neither of these definitions is broad enough for replevin in Pennsylvania, which may be defined to be, the remedy for the unlawful detention of personal property, by which the property is delivered to the claimant upon giving security to the sheriff to make out the injustice of the detention, or return the property.[1]

This definition will apply to the action of replevin in the following named States; viz.: Maine,[2] New Hampshire,[3] Vermont,[4] Massachusetts,[5] New York,[6] Ohio,[7] Maryland,[8] Dela-

[1] Weaver *v.* Lawrence, 1 Dall. 157. Snyder *v.* Vaux, 2 R. 428.

[2] Revised Statutes of Maine, 587, A. D. 1857. Seaver *v.* Dingley, 4 Greenl. 315.

[3] Brown *v.* Fitz, 13 New Hamp. 283.

[4] Stat. of Vt., tit. Replevin.

[5] Badger *v.* Phinney, 15 Mass. 359. Baker *v.* Fales, 16 Mass. 147. Marsten *v.* Baldwin, 17 Mass. 606. See App. Stat. of Mass.

[6] See Appendix, New York Code.

[7] Revised Stats. of Ohio, p. 997, Ed. 1860. State *v.* Jennings, 14 Ohio State R. 73.

[8] Cullum *v.* Bevans, 6 Har. & J. 469. Smith *v.* Williamson, 1 Har. & J. 147.

ware,[1] Kentucky,[2] Missouri,[3] Wisconsin,[4] Arkansas,[5] Tennessee,[6] Michigan,[7] Indiana,[8] Minnesota,[9] and Rhode Island.[10]

In New Jersey,[11] Illinois,[12] Georgia and South Carolina,[13] the taking must be unlawful.

In Virginia,[14] Georgia,[15] Connecticut,[16] and Ala-

[1] Clark *v.* Adair, 3 Harrington, 115. See contra Johnson *v.* Johnson, 4 Harrington, 171, and Drummond *v.* Hopper, 4 Harrington, 327. Revised Code 1852, p. 379.

[2] Ky. Stat. p. 503, Act of 1842.

[3] Revised Stat. of Missouri, p. 921, 1845. See Rector *v.* Chevalier, 1 Mis. 345. Pilkington *v.* Trigg, 28 Mis. 95.

[4] Stat. of Wisconsin, p. 271. Swain *v.* Roys, 4 Wis. 150. Rong. *v.* Dawson, 9 Wis. 246.

[5] Revised Stat. of Ark. p. 658. Cox *v.* Grace, 5 Eng. 86.

[6] Act 15 Jan. 1846, Tenn. Rev. Stat., Part 3, Tit. 4, ch. 5.

[7] Michigan Stat., tit. Rep.

[8] Daggett *v.* Robbins, 2 Blackf. 415. Chinn *v.* Russell, Ib. 172. Burr *v.* Martin, 2 Ind. 229. Gavin and Hord's Stats. Vol. II. p. 127, Ed. 1862.

[9] Coit *v.* Waples, 1 Min. 134, 141. Oleson *v.* Newell, 12 Min. 186; Stat. Min. p. 512.

[10] Revised Statutes Rhode Island, p. 519, Ed. 1857.

[11] Bruen *v.* Ogden, 6 Halst. 370.

[12] Wright *v.* Armstrong, Breese, 130.

[13] Byrd *v.* O'Hanlin, 1 Rep. Con. Ct. 401.

[14] Vaiden *v.* Bell, 3 Rand. 488.

[15] Hewson *v.* Hunt, 8 Rich. 106.

[16] Watson *v.* Watson, 9 Conn. 140; but see Ormsbee *v.* Davis, 16 Conn. 568, and 18 Ib. 555. Revision Swift's Digest, Vol. I. p. 532.

bama,[1] this remedy is confined to distresses and attachments.

In Mississippi,[2] replevin lies only for a distress for rent.

The action of replevin is among the oldest known to the law. Glanvil speaks of it as well known in his time, and gives the form of the writ.[3] Bracton, Fleta, and Fitzherbert, treat of it at length. Bracton says: "The detention of a Namium (*i. e.*, the thing distrained) was a subject belonging to the jurisdiction of the king's crown; and cognizance thereof was rarely allowed to any except the king or his justices, but because questions of distress require despatch, on account of the nature of the subject taken, which was sometimes living animals, a special jurisdiction used to be given to the sheriff, who in this instance did not act in his office as sheriff, but as justiciarius regis."[4]

This special jurisdiction was conferred upon the sheriff by a justicial writ out of Chancery,[5]

[1] Smith *v.* Crockett, 1 Ala. 277.

[2] Wheelock *v.* Cozzens, 6 How. Miss. 279. Sharkey, C. J., dissented.

[3] Beame's Glanv. 294.

[4] Bracton, 155, 156. 2 Reeve's Hist. 47.

[5] 2 Inst. 139. Hallet *v.* Byrt, 5 Mod. 253. Gilb. Repl. 63.

giving the sheriff authority to replevy and deliver the goods, and to determine the point complained of in the county. The writ as to that matter running, "and after cause him (the defendant) to be brought to justice for the same, that we hear no more complaints for want of justice."[1]

This writ, unlike other original writs, did not contain a summons to the defendant to appear in any of the king's superior courts at Westminster, but left the matter to be determined in the county court. This proceeding by original was soon found too tedious for the distant parts of the kingdom, the office at Westminster being the only one for the issue of writs in all England.

To remedy this inconvenience, the 21st chapter of the statute of Marlbridge, 52 Henry 3d, was passed, by which it was provided, "That if the beasts of any man be taken and unlawfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him who took the beasts, if they were taken out of liberties, and if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for default of those

[1] Reg. Brev., Ed. 1687, p. 81.

bailiffs, shall cause them to be delivered."[1] This was called proceeding by plaint.

Besides the inconvenience as to time, which was felt by the plaintiff in the proceedings by writ, they were liable to a serious objection by the defendant, on the ground of security. The writ of replevin took the beasts from the possession of the defendant, and as the plaintiff was obliged to give no other security than the plegii de prosequendo to answer the amercement to the king, *pro falso clamore*, as in other actions, and even these having at an early day degenerated into the formal John Doe and Richard Roe, it might well happen that the plaintiff had sold the beasts delivered to him on the replevin, and become insolvent, by which the avowant would have no benefit from his suit. To remedy this, the statute, Westminster 2d, Ch. 2, 13 Edw. 1, A. D. 1285, provided, "That from thenceforth, sheriffs or bailiffs should not only receive from the plaintiffs pledges for the pursuing of the suit, before they made deliverance of the distress, but also for the return of the beasts, if return should be awarded." This act also remedied the evil of replevins in infinitum, which it was held the plaintiff might have by suffering a

[1] Statutes at large.

non-suit, when his case was reached for trial. The words of the act being, "And forasmuch as it happeneth sometimes, that after the return of the beasts is awarded unto the distrainor, and the party so distrained, after that the beasts be returned, doth replevy them again, and when he seeth the distrainor appearing in the court ready to answer him, doth make default, whereby return of the beasts ought to be awarded again unto the distrainor, and so the beasts be replevied twice or thrice, and infinitely, and the judgments given in the king's court take no effect in this case, whereupon no remedy hath been yet provided. In this case, such process shall be awarded, that so soon as return of the beasts shall be awarded to the distrainor, the sheriff shall be commanded by a judicial writ, to make return of the beasts unto the distrainor; in which writ it shall be expressed that the sheriff shall not deliver them without writ, making mention of the judgment given by the justices, which cannot be without a writ issuing out of the rolls of the said justices, before whom the matter was moved. Therefore when he cometh unto the justices, and desireth replevin of the beasts, he shall have a judicial writ, that the sheriff taking surety for the suit, and also of the beasts or cattle to be returned, or the price of them (if return be awarded), shall deliver unto him the beasts or cattle before re-

turned, and the distrainor shall be attached to come at a certain day before the justices, afore whom the plea was moved in the presence of the parties. And if he that replevied make default again, or for another cause return of the distress be awarded, being now twice replevied, the distress shall remain irrepleviable. But if a distress be taken of new, and for a new cause, the process abovesaid shall be observed in the same new distress."

This writ reciting the former judgment, was called the writ of second deliverance;[1] and though the avowant having judgment in the second deliverance, was entitled to a return irreplevisable of the beasts—yet this right was subject to redemption of the beasts by the tenant on payment of the rent, as they were still in the nature of a gage or pledge. Whether the replevin was by plaint or writ, the sheriff, before he granted the one or executed the other, was required to take from the plaintiff pledges de prosequendo, and pledges de retorno habendo.[2] If the pledges introduced by Westminster 2, Ch. 2, for the security of the avowant, in case he should have judgment for a return of the beasts were insufficient, the avowant had his remedy against the sheriff, who was made answerable by that statute

[1] Gilb. Repl. 67.

[2] Gilb. Repl. 67. Wilk. Repl. 10. Dalt. Sher. 277, 439.

for their sufficiency.[1] If the replevin was by writ, and the sheriff executed it, he might hold plea of it in his county court, but either party might remove it by *pone* or *recordari* into the courts above; the plaintiff without cause, and the defendant upon cause shown.

If the first writ was not executed, the plaintiff might have an alias, and after that a pluries replevin; in the pluries was always inserted the clause, "or certify your reason to us, why you would or could not execute our commands heretofore to you hereupon directed." The same clause, at the option of the plaintiff, might be inserted in the alias, and then it, as well as the pluries, was returnable in the king's bench or common pleas. The pluries always, and the alias whenever it had the clause, *vel causam nobis certifices*, in it, determined the power of the sheriff to hold plea of the replevin in the county; and the reason is said to be, that these proceedings compel the sheriff to return the writ, and having parted with it, he has no authority to proceed further in the court below.[2]

Before the proceedings by writ went into disuse, it was usual for the plaintiff to take out the replevin alias and pluries at the same time, and he

[1] Gilb. Repl. 67.

[2] Gilb. Repl. 73.

might, if he chose, deliver the alias or pluries immediately to the sheriff, and thus take the cause entirely from his jurisdiction.[1] On the return to the pluries that the cattle were eloigned, the plaintiff was entitled to a precept in the nature of a writ of withernam, to take other goods in lieu of those formerly taken and eloigned or withheld from the owner; or the plaintiff might proceed in the cause, and recover damages to the full amount of the goods, as well as for their detention.[2]

Replevin by writ, we are told by a late writer, is now quite obsolete in England, there being no instance of it since 1743. It is still in use in Ireland.[3] Replevin by plaint, the only kind now used in England, was created by the statute of Marlbridge, 52 Hen. 3d, Ch. 21. By force of this statute, the sheriff may hold plea in replevin of any value, and of all goods and chattels, notwithstanding the word "averia" is only used in the statute. The pledges pro retorno habendo under this statute may be by the bond of the plaintiff in replevin, himself and sureties, or sureties only,[4] in a sum proportional to the value of the goods,

[1] Gilb. Repl. 75. F. N. B. 68. E.

[2] Wilk. Repl. 20.

[3] Wilk. on Repl. 7.

[4] 1 Lord Ray. 279, and Bohun Inst. Leg. 442. Wilk. Repl. 11.

with a condition that the plaintiff shall prosecute the suit in replevin, and make return of the beasts, if return thereof be adjudged by law.[1] The sheriff, after taking the replevin bond, issues his precept to his bailiff to replevy the goods taken.[2] If the defendant claims property in the goods the sheriff's power is at an end, whether he be proceeding by writ or by plaint. If the proceedings are by plaint, the plaintiff must purchase a writ de proprietate probanda, as no controversy of property can be determined in the county court without the king's writ.

On this writ an inquest of office is holden, and if on such inquest the property be found for the plaintiff, the sheriff is to make deliverance; but the defendant may remove it by recordari facias loquelam, and put in his plea of property in the court above, and it shall be determined by a verdict. If the inquest of office find for the defendant, there is an end of the replevin by plaint, for the property is found for the defendant, and so no deliverance can be made by the sheriff: the plaintiff may, however, bring a new replevin by writ; for what is done on the plaint is no bar, nor has it any concern with the proceedings upon the writ.[3]

[1] Evans *v.* Brander, 2 H. Black. 550.

[2] Wilk. Repl. 16.

[3] Wilk. Repl. 17.

If the replevin were by original writ, and the defendant claimed property, the sheriff could not make deliverance any more than he could upon the plaint; but it was his duty to return the claim of property on the causam nobis significes (on the alias or pluries replevin), as a cause why he could not execute the writ. The plaintiff might then sue his writ de proprietate probanda, if he wanted possession of his goods; and if the title was found for him, the sheriff delivered the goods to the plaintiff, and gave the defendant a day in court; and the plaintiff went on to declare for the unjust caption, and also the subsequent injustice of the defendant, in claiming the goods as his own. The return of the inquest was no bar to the defendant, but he might still plead property, and have it determined by a verdict, at the peril, however, of an attaint. If on the inquest of office the property was found against the defendant, he was subject to a fine for his false claim, and to damages to the party from whom he had kept his goods in the mean time.[1]

If the defendant claims property, the sheriff cannot proceed;[2] but he returns that fact on his writ. Neither the defendant nor the sheriff has any further control over the cause, and, as a con-

[1] Gilb. Repl. 99.

[2] Co. Lit. 145.

sequence, it is said, in some places, that the claim of property is a determination of the suit.[1] This, however, is not altogether consistent with the practice, as stated by Chief Baron Gilbert, or with the form and character of the writ de proprietate probanda. This writ, all authorities agree, can only be issued at the instance of the plaintiff, upon which an inquest of office is held by the sheriff, and if they find against the claim of the defendant, then the sheriff is commanded at once to make deliverance to the plaintiff, the writ running, "et si per inquisitionem illam tibi constare poterit, quod averia vel catalla pdict sint pdict A, tunc ea, eidem A replegiari facias, juxta tenorem mandatorum nostrorum prius tibi ante directorum." The writ goes on to give the defendant a day in court, where he may plead property and have the right settled by a verdict. If, however, the inquest of office is found in favor of the defendant, then there is an end of the suit; for the sheriff is not, by the writ de proprietate probanda, to deliver the goods to the plaintiff, unless the jury find them to be the plaintiff's, and if the defendant has the goods, and possesses them as his own, they cannot proceed in an action, which supposes the goods to be re-delivered to the plaintiff.

[1] Gowen *v.* Ludlow, Moore, 403. Vin. Ab. Repl. F. 5. Lesher *v.* Pierson, 11 Wend. 61.

Pending this proceeding the property remained in the possession of the defendant, and if removed or secreted before the return of the inquest, the plaintiff had no other remedy than the capias in withernam, which, unless the defendant was a man of substance, was not a very secure dependence for the plaintiff.

The practice in Pennsylvania and some of the other States of requiring "a claim property bond," has, in this aspect of the matter, considerable advantage over the old proceeding, as will be more fully exhibited in the chapter on the claim property bond.

In England, Wilkinson tells us, all cases of the least importance are removed from the inferior to the superior courts, because the statute which creates the writ of second deliverance, extends only to the superior courts of justice; and, therefore, the defendant may, in many cases in the county court, be subjected to a new replevin; for as Chief Baron Gilbert expresses it, "as long as the caption and detention were not determined by the judgment of the court, so long they allowed the plaintiff, after his own non-suit, to take a new replevin."[1]

[1] Gilb. Repl. 170.

At common law the distress was merely a pledge to compel the payment of certain dues, or the performance of certain services. The distrainor had no right to sell it to satisfy his claim. And after an action of replevin, the effect of the judgment of retorno habendo, was merely to put him in the condition in which he was before the action was begun. That is to say, the beasts or chattels were returned to him merely as a pledge to be retained until the rent or duty for which they were taken was paid or satisfied. And it was often the case that pending the first writ of replevin, the distrainor would distrain a second time for the same rent or service, but since he had already security to have return upon making out the justice of his first caption, it was highly reasonable, that pending that suit, the tenant should be protected from further distresses, for the same rent or cause, for which the first distress was taken. For this purpose the writ of re-caption was framed; in which, if the defendant was convicted, he was fined to the king; because, by the second caption, he took upon him to determine the justice and legality of the first, while that very point was under the consideration of the court of justice in which the replevin depended. For if the first distress were lawful, he should have return of it; and, therefore, the second was unreasonable. If the first were

unlawful, much more so was the second taking for the same cause; so that the re-caption lay even where the cause of the first caption was just.[1]

This writ issued only when the second distress was for the same cause as the first; and, therefore, if A. distrained beasts damage feasant, and pending that suit, the same cattle or other cattle of the same proprietors, trespassed on the soil of A., A. might distrain again, pending the first suit; because each distress was for a distinct and several trespass or injury, for which A. was entitled to satisfaction.[1] For the proceedings on this writ see Gilbert, 180, &c., or Wilkinson, 132, &c.

In Maine, Vermont, Massachusetts, New York, New Hampshire, Ohio, Delaware, Kentucky, Missouri, Wisconsin, Arkansas, Tennessee, Michigan, Minnesota, Indiana and Rhode Island, the action of replevin is regulated by statute, and is free from much of the complication exhibited in the preceding pages.

In Pennsylvania all replevins are by force of the act of assembly of 1705, and are by writ returnable in the court of common pleas of the respective counties, *there* to be determined according to law.[2]

[1] Gilb. Repl. 180, 181. F. N. B. 71. [2] 1 Sm. Laws, 44.

The action is begun by a precept from the plaintiff or his attorney to the prothonotary of the court, requiring him to issue the writ for certain enumerated articles. The person in possession of the articles is made defendant.[1] The writ is addressed to the sheriff of the proper county, and commands him, if the plaintiff make him secure of prosecuting his claim against the defendant, to deliver to the plaintiff certain articles enumerated, of a certain value, his property, and to summon the defendant to appear at a certain day.[2]

Great changes, it will be perceived, were effected by the act of 1705, both in the form and character of the remedy. It does not recognize the replevin by plaint, and makes the replevin in all cases a returnable writ, to which the appearance of the defendant is required as in other actions. The action is not altogether an action in rem, for a summons to the defendant is always inserted, and a precise day given for his appearance in the court of common pleas, where writs of replevin are required to be determined.[3] If the officer is prevented from delivering the goods by the conduct

[1] English *v.* Dalbrow, 1 Miles, 160.

[2] See form of Precipe in Appendix.

[3] Weaver *v.* Lawrence, 1 Dall. 157.

of the defendant, from his having eloigned or otherwise disposed of them, the plaintiff may go on and recover against him in damages.[1] The proceeding by withernam appears never to have been resorted to, and it would seem that there never was much advantage from it, as a plea of non cepit or property would at once supersede it.[2] The writ is not liable to be defeated on a claim of property, but goes on to its regular termination, as in other cases. Instead of the claim of property arresting the proceedings, and throwing on the plaintiff the burden of the writ de proprietate probanda, the defendant on claim of property is allowed to retain the goods, only on giving bond to the sheriff to abide the judgment of the court, if on the trial the property should not be found in him.

If he fail to give bond, the property is delivered to the plaintiff. In this respect, the law of Pennsylvania is not as liberal to the defendant as the common law, which left the goods in his possession on claim of property, until the plaintiff by proceedings on the writ de proprietate probanda

[1] Bower *v.* Tallman, 5 W. & S. 561. Baldwin *v.* Cash, 7 W. & S. 426.

[2] Gilb. Repl. 93, 94. Moore *v.* Watts, 1 Lord Ray. 614. Delabastich *v.* Reynell, Carth. 287.

established the falsity of the claim. As, however, the goods were left in the possession of the defendant without security, and he might dispose of or consume them at his pleasure, reparation for which would depend upon his possession of property, justice is more likely to be done by the present mode of proceeding.

Neither the writ of recaption, nor the writ of second deliverance, is known in Pennsylvania practice.

A second replevin, and probably an action of trespass, would seem to be the only remedies for the oppressive conduct which the writ of recaption was designed to meet. While the liability of the sureties in the replevin bond, and of the sheriff, have hitherto been found a sufficient protection against the abuse, which gave rise to the writ of second deliverance.

Where the statute of Edward First, or a similar act, is not in force, there does not appear to be anything to prevent a second action of replevin after a non-suit.[1]

The revised statutes of New York prohibited the action under such circumstances, and also took

[1] Daggett *v.* Robins, 2 Blackf. 415.

away the writ of second deliverance, and all writs of withernam. The code of procedure has abolished the writ of replevin, as well as all other writs, and established a new method by which the same end is to be obtained. It will be found in the appendix.

In England it appears that notwithstanding the 2 W. and M., Ch. 5, the distress may still, at the landlord's option, be retained as a pledge, the provisions in that act for a sale not being imperative.[1]

In Pennsylvania a different construction has been put upon the similar act of the 21st of March, 1772, which, among other things, enacts, that where the tenant or owner of goods distrained for rent, shall not, within five days next after such distress taken, and notice thereof, replevy the same, then the person distraining, shall and may, with the sheriff, under-sheriff, or any constable, &c., cause the goods to be appraised by two respectable freeholders; and after such appraisement, shall or may, after six days' public notice, lawfully sell the goods for the best price that can be gotten for the same, for and towards satisfaction of the rent and charges

[1] Hudd *v.* Ravenor, 2 B. & B. 662. Lear *v.* Edmonds, 1 B. & Ald. 157. Lingham *v.* Warren, 2 B. & B. 36.

incurred, leaving the overplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use.

Judge Kennedy, in delivering the opinion of the court in Quin *v.* Wallace,[1] after citing numerous authorities to the point, that the word "may," when used in a statute, where the public interests and rights are concerned, is equivalent to must, and imperative—proceeds at some length in support of the position that the words of the act of 21st March, 1772, are imperative for a sale, and concludes as follows: "It must be admitted, however, that Chief Justice Dallas and Mr. Justice Bayley have expressed opinions in opposition to this. In Hudd *v.* Ravenor, 2 B. & B. 662, 6 Eng. C. L. R. 306, where it was ruled that a plea of a former distress for the same rent was not good, because it was not alleged that the rent was satisfied, Dallas, C. J., in delivering his opinion as to the plea, seems to have thought that unless the words *shall and may*, used in the statute 3 W. and M. sess. 1, ch. 5, s. 2, from which the section of our act under consideration is merely a copy, would be construed as giving only a discretionary power to the landlord to sell, the plea might have been

[1] 6 Whart. 452.

considered good. The main, and indeed only, objection mentioned by him, to its being considered compulsory on the landlord, is, that after a seizure he could never come to any terms of agreement with his tenant. But surely this is a great mistake, because the parties, by their agreement, may make the law what they please in this respect. And Mr. Justice Richardson seems to have thought so, when he said in the same case, 'I am not satisfied that the statute of W. and M. is imperative as to the sale; but suppose it is so, that statute never meant to preclude the parties from ending the proceedings.' And Mr. Justice Bayley, in Lear *v.* Edmonds, 1 B. & Ald. 157, where a similar plea was put in by the defendant, and considered not good, because the statute of W. and M., as he says, is that the party distraining *may* sell the goods, not that he *must* sell; and if so, then he asks, does not the landlord stand as he did at common law before the statute? for it is not averred that the goods were sold. It is sufficient answer to Mr. Justice Bayley, that he does not quote the words of the statute correctly; for he has omitted the word *shall*, as if it were of no import or force whatever. These opinions as to the construction of the statute W. and M., though coming from very highly respectable judges, would appear to have been advanced without much consideration, with-

out any satisfactory course of reasoning to support them, and in direct opposition to the principle laid down and established in the king's bench, in Vasper *v.* Edwards.[1] They therefore can have no influence upon our judgment in giving to our act, in relation to the same matter, a different construction, when its various provisions, as well as the language employed, would seem to require it. Considering, then, as we do, our act as to the sale of the goods, to be imperative on the landlord, it would seem, therefore, to give to the distress the character of an execution."

In New York, after the distress has been duly made, if the goods be not replevied within five days after notice, the revised statutes provide, that the goods *shall* be forthwith appraised and sold at public vendue, under the superintendence of a sheriff or constable, towards satisfaction of rent.[2]

[1] 1 Lord Ray. 719. 12 Mod. 658.

[2] 3 Kent 480. 2 Rev. Stat. N. Y. 504.

CHAPTER II.

FOR WHAT REPLEVIN WILL LIE.

REPLEVIN lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another,[1] and this whether the claimant has ever had possession or not,[2] and whether his property in the goods be absolute or qualified,[3] provided he has the right to possession.[4] One

[1] Weaver *v.* Lawrence, 1 Dall. 157. Snyder *v.* Vaux, 2 R. 428. Shearick *v.* Huber, 6 Binn. 3. Stoughton *v.* Rappalo, 3 S. & R. 562. Pearce *v.* Humphreys, 14 S. & R. 25. Bower *v.* Tallman, 5 W. & S. 561. Boughton *v.* Bruce, 20 Wend. 234. Roberts *v.* The Dauphin Bank, 7 Harris 71. Young *v.* Kimball, 11 Harris 193. Trapnall *v.* Huttier, 1 Eng. 18.

[2] Woods *v.* Nixon, Addison 134. Harlan *v.* Harlan, 3 Harris 507. Sayward *v.* Warren, 27 Maine 453. Beebe *v.* Du Baun, 3 Eng. 510. Osgood *v.* Green, 10 Foster (N. H.) 210.

[3] Whetwell *v.* Wells, 24 Pick. 25. Gordon *v.* Harper, 7 T. R. 9. Johnson *v.* Hunt, 11 Wend. 137. Rogers *v.* Arnold, 12 Wend. 30. Hunt *v.* Chambers, 6 Penn. Law Jour. 82. Smith *v.* Williamson, 1 Har. & J. 147. Mildrum *v.* Snow, 9 Pick. 441. Seibert *v.* M'Henry, 6 W. 303.

[4] Gilb. Repl. 119. Co. Lit. 145, b. Winch. 26. Haythorn *v.* Rushford, 4 Harr. R. 160. Harris *v.* Smith, 3 S. & R. 20.

who has the mere charge or custody of goods cannot maintain replevin.[1]

In Maryland this writ is used to recover the custody of an apprentice taken or detained against the will or consent of the master.[2]

Every possible facility appears, from the first, to have been given to the use of this action in Pennsylvania. So much so, that at the date of the earliest reports in that state, the practice of using it, in all cases where personal property was claimed, was so fully recognized and established, that it seems not to have been thought necessary to inquire exactly into the extent of the English law on the subject.[3] By the act of 1705, the power to grant writs of replevin is conferred in

Wheeler *v.* Train, 3 Pick. 255, 4 Pick. 168. Collins *v.* Evans, 15 Pick. 63. Mead *v.* Kilday, 2 Watts 110. Lester *v.* McDowell, 6 Harris 91. Lee *v.* Gould, 11 Wright 398. Hunt *v.* Chambers, 1 New Jersey 620. Bradley *v.* Michael, 1 Smith 346. Furguson *v.* Thomas, 26 Maine 499. Pierce *v.* Stephens, 30 Maine 184. Partridge *v.* Swaby, 46 Maine 184.

[1] Harris *v.* Smith, 3 S. &. R. 20.

[2] 1 Md. Code, Art. 5, sect. 9.

[3] Weaver *v.* Lawrence, 1 Dall. 157. Snyder *v.* Vaux, 2 R. 428. Shearick *v.* Huber, 6 Binn. 3. Stoughton *v.* Rappalo, 3 S. & R. 562. Pearce *v.* Humphreys, 14 S. & R. 25. Bower *v.* Tallman, 5 W. & S. 561. Boughton *v.* Bruce, 20 Wend. 234.

cases "where replevins may be granted by the laws of England." So firmly was the practice rooted, however, that to the attempts to show that in England replevin was confined to cases of unlawful taking, the judges of Pennsylvania satisfied themselves with saying, that, however it might be in England, it was well settled that in Pennsylvania the action lay in all cases where one man claimed personal property in the possession of another.[1]

[1] That this was the opinion with regard to the writ at a very early date in Pennsylvania appears by the following extract from the Minutes of Provincial Council, vol. 1, page 441, under date Sept. 24th, 1698. The lieut.-governor laid before council a case in which Anthony Morris, as judge of the court of common pleas, had granted a replevin for goods seized by the king's collectors for having been imported contrary to law. The council reproved the justices, who presented the following justification:—

May it please the governor and council, we, the justices of the county court of Philadelphia, understanding that some complaints have been made to you against our proceedings in a replevin lately granted by one of us to John Adams, merchant, returnable to our last court, do humbly offer this following answer for our vindication—

First. That we look upon a replevin to be the right of the king's subjects to have and our duties to grant, where any goods or cattle are taken or distrained.

Secondly. That such writs have been granted by the justices, and no other in this government, the parties giving bond with

In New York and Massachusetts the question, whether the unlawful detention of personal property, which had come lawfully to the possession of the defendant, could be remedied by replevin, seems to have presented itself unembarrassed by any settled practice on the subject. This led to a thorough investigation of the English doctrine; and the learned judges of these two states came to directly opposite conclusions. While New York

sureties, to the sheriff for redeliverance of such goods in case the plaintiff in the replevin be cast, according as is usual in England in such cases.

Thirdly. That since we understood how the goods in question were seized and secured in the king's store-house, we might have just grounds to conceive that the sheriff might be as proper to secure the same to be forthcoming in specie, as by the replevin he is commanded, as that they should remain in the hands of Robert Webb, who is no proper officer as we know of to keep the same, nor hath given any security or caution to this government to answer the king and his people in that respect, as we can understand.

Lastly. That we at our last court finding this matter to be weighty, though we did not know of any court of admiralty erected, nor persons qualified as we know of to this day to hold such court, yet we forbore the trial of the said replevin, and continued it until we further advised, and so the parties are to come before us again at next court, when we should be glad to receive some advice herein from you; and rest your loving friends, Anthony Morris, Samuel Richardson, James Fox. Philadelphia, 27th 7th month, 1698.

held that the action lay only for goods unlawfully taken and detained,[1] Massachusetts argued that even at common law replevin was the proper remedy for goods unlawfully detained, without reference to the mode by which the possession of the defendant had been acquired.[2] New York is supported by a goodly array of English authorities.[3] The able argument of the court of Massachusetts, upon the reason of the question, is fortified by many examples from the English books in support of their position. The well-known case of replevin, after tender of amends, for cattle taken damage feasant, when the original taking was lawful, but the detention became unlawful by reason of the tender. And the case in Siderfin,[4] of the colt foaled in the pound, which was never taken by the defendant, and yet was unlawfully detained;

[1] Pangburn *v.* Patridge, 7 Johns. 140. Barrett *v.* Warren, 3 Hill 348. But see Zachrisson *v.* Alman, 2 Sand. Sup. C. R. 68.

[2] Ilsley *v.* Stubbs, 5 Mass. 284. Badger *v.* Phinney, 15 Mass. 359. Baker *v.* Fales, 16 Mass. 147. Marston *v.* Baldwin, 17 Mass. 606.

[3] 3 Steph. Com. 524. Ex Parte Chamberlain, 1 Schoales & Lefroy's Rep. 320. Shannon *v.* Shannon, Ib. 324, per Ld. Redesdale. Galloway *v.* Bird, 4 Bing. 299. Gulliver *v.* Cosens, 1 Mann. Grang. & Scott 788. George *v.* Chambers, 11 M. & W. 149. And see Meany *v.* Head, 1 Mason's C. C. R. 319.

[4] Arundel *v.* Trevill, Sid. 81, 82. Gilb. Repl. 131.

also the cause in Lilly's entries,[1] where the defendant avowed that he had rescued the goods from the sea, and claimed salvage; and the very late case of replevin for taking and impounding, in which though a tender after the taking and before impounding was pleaded and demurred to because the lawfulness of the original taking was not disputed, Lord Denman held the plea good, and said every unlawful detention was a new taking,[2] afford some evidence that the action was not originally confined to cases of an unlawful taking, or of any taking from the possession of the plaintiff.

Judge Putnam argues as follows: "It is said that in the case put in Fitz. N. B. 69, 'That if a man take cattle damage feasant, and the other tender sufficient amends, and he refuses to deliver them back; if he sue replevin, he shall recover damages only for the detention, and not for the taking, for that was lawful;' the defendant became a trespasser ab initio, because he abused a license of the law; and so the original taking was to be considered as tortious: and thus this case is to be reconciled to the general doctrine requiring a tortious taking to enable the plaintiff to maintain replevin.

[1] Jacobsen *v.* Lee, Lilly's Entries 349.

[2] Evans *v.* Elliott, 5 Adol. & Ellis 142.

"But the writers who mention this case speak of it as one where replevin will lie; and where damages are recovered for the unjust detention, and not for the unjust taking; which certainly would be the rule, if the defendant was to be considered as a trespasser ab initio. Now I do not perceive how the distinction between the abuse of the license of the law, and the license of the party will be very material. The rule is very well stated in 12 Edw. 4, 8, pl. 20: 'Where a man does a thing by the authority of the law, and afterwards misdemeans himself, his first act shall be tortious.' In a subsequent case, 21 Edw. 4, 19, Pigot (who was a counsellor) contended that there was no difference between the license of the law and of the party; but the court adhered to it.

"To apply the rule to the case at bar: the goods came to the defendant's hands by the license of the law, or of the party. Suppose by the license of the law; then if, by detaining them unjustly, he becomes a trespasser ab initio, the plaintiff is to maintain his replevin on the ground of an original tortious taking. But suppose they came to the hands of the defendant by the license of the party, then he is to be punished only so far as he abused the authority. From that time only he becomes a trespasser, not from the beginning; but as Lord

Coke expresses it in the six carpenters' case, 'he shall be punished for his abuse of it.' The distinction, therefore, goes only to the damages to be recovered."

To which it may be added, that in the case put in Fitzherbert, the distrainor would not, according to the resolves in the six carpenters' case, be a trespasser ab initio. It was resolved per totam curiam,[1] that not doing cannot make the party, who has authority or license by the law, a trespasser ab initio, because not doing is no trespass, and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser ab initio. The same doctrine has been repeatedly recognized since.[2]

According to Bracton, "The questions arising on the detention of a Namium, related either to the *caption* or *detention* against gage and pledge. The caption might be just or unjust. It was just when taken for a service detained by a person who ac-

[1] 8 Co. 290.

[2] Gates *v.* Lownsbury, 20 Johns. 427. Hale *v.* Clark, 19 Wend. 498. Bell *v.* North, Littell's Rep. 133. Waterbury *v.* Lockwood, 4 Day 257.

knowledge the service to be due, and in that case the taker might avow the taking; but if the things justly so taken were detained against gage and pledge, after security was offered for payment for the service, and all arrears, then though the caption might be just, the detention was unjust."[1] And if the lord defended the unjust detention, the sheriff went on to hear and determine it.

In the case of Galloway *v.* Bird,[2] which was replevin for goods detained by a carrier, C. J. Best seems to narrow the exception, and says, "The authorities all lay it down that replevin can only be maintained where goods are taken, not where they are delivered upon a contract." But even this will hardly stand with Lord Denman's ruling, that every unlawful detention is a taking,[3] sufficient to support the averment in the narr., and this was the opinion of the supreme court of Pennsylvania in Mackinley *v.* M'Gregor.[4]

This whole question has been gone over by Mr. Justice Coleridge in the case of Mennie *v.* Blake, 6 Ellis and Black 843, and the conclusion reached

[1] Bracton 156, 2 Reeves' Hist. 47.

[2] 4 Bing. 299.

[3] Evans *v.* Elliott, 5 Adol. & Ellis 142.

[4] 3 Whart. 369.

that there must be a tortious taking to support replevin. In Delaware there must be a tortious taking.[1]

The question in both New York and Massachusetts was afterwards settled by statute. The revised statutes in each giving the remedy in cases of unlawful detention without reference to the mode by which the possession was acquired.

The courts of New York, however, carried their original view of the law to the construction of the statute,[2] and determined that there were two writs of replevin in that state: one in the cepit, which is the old action of replevin, and lies exclusively in cases where the taking has been unlawful; the other, in the detinet, to be used where the detention only is unlawful, and which takes the place of the old action of detinue. This division rests upon a distinction not recognized, except in New York, and has there been abolished by the code of procedure.[3]

If possession has been obtained by delivery or otherwise, lawfully, it has been held that a demand

[1] Drummond *v.* Hopper, 4 Harrington 327.

[2] Barrett *v.* Warren, 3 Hill 348.

[3] Zachrisson *v.* Ahman, 2 Sandf. Sup. Ct. 68.

and refusal are necessary before bringing the action,[1] but that they need not be proved, if the defendant pleads property. The fact of demand and refusal need not be alleged in the declaration, but is matter of proof on the issue of non cepit, and is implied in the allegation that defendant took and unjustly detained the property.[2] But where the owner of a horse bailed him to A. for use for a limited period, under expectation of purchase by the latter, and A., for a valuable consideration, and without notice, sold the horse to B., and he to the defendant, it was held that no previous demand was necessary to enable the owner to maintain replevin against the last purchaser.[3]

Nemo plus juris in alium transferre potest quam ipse habet, is the maxim of the common law. In England, if a man buy goods or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser, unless they have been sold in

[1] Seaver *v.* Dingley, 4 Green 306. Barret *v.* Warren, 3 Hill 348. Page *v.* Crosby, 24 Pick. 211. Boughton *v.* Bruce, 20 Wend. 234. Ingalls *v.* Buckley, 13 Ill. 315. Lewis *v.* Master, 8 Blackf. 244. Underwood *v.* Tatham, 1 Cart. 226.

[2] Seaver *v.* Dingley, 4 Green 306. Gargrave *v.* Smith, 1 Salk. 221. B. N. P. 81. Sir R. Bovey's case, 1 Vent. 217.

[3] Galvin *v.* Bacon, 2 Fairf. 28. McNeil *v.* Arnold, 17 Ark. 155.

market overt. With that exception, it is incumbent on the vendee to see that the vendor has a good title.[1] Thus, if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they were lent, yet if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which the auctioneer claims, he is guilty of a conversion.[2] And when goods are obtained on false pretences, and with a preconceived design not to pay for them, it is a fraud, and the property is not changed.[3]

The true owner of goods which have been stolen or found, or bought from one not having authority to sell, or obtained by false pretences and fraud, with the exceptions hereinafter stated, may recover them by replevin wherever he finds them, and

[1] Hill *v.* Perrott, 3 Taunt. 274. Bradbury *v.* Anderton, 1 Cromp. Mees. & Rosc. 490. Metcalf *v.* Lumsden, 1 Car. & K. 309. Peer *v.* Humphrey, 2 Adol. & Ellis 495.

[2] Loeschman *v.* Machin, 2 Starkie 276.

[3] Earl of Bristol *v.* Wilsmore, 1 Barn. & Cress. 521. Peer *v.* Humphrey, 2 Adol. & Ellis 495. Abbot *v.* Barry, 5 Moore 98. Kilby *v.* Wilson, R. & M. 178.

it is of no consequence that they have been sold at public sale.[1]

When a wagoner, by whom goods were sent to be delivered to A., sold them openly in a street of a city to B., it was held that the sale vested no property in the purchaser.[2] And C. J. Tilghman, in delivering the opinion of the court, says: "This is so plain a case that it is difficult to render it plainer by argument. The defendant's right to this property (the action was replevin) is just as good as his right would have been to a horse which he had purchased from a smith to whom he had been sent by the owner for the purpose of being shod; or to a coat, which he had purchased from a tailor, who had received it with orders to mend and return it. M'Dermott, who delivered the goods in question to the wagoner, was guilty of no imprudence, nor held out any false colors by which the world might be deceived." And Judge Rogers, in a subsequent case,[3] adopts the same view, and in deliver-

[1] Mackinley *v.* M'Gregor, 3 Wh. 396. Buffington et al. *v.* Gerrish, 15 Mass. 156. Mowrey *v.* Walsh, 8 Cow. 238. Thompson *v.* Rose, 16 Conn. 71. Porter *v.* Foster, 20 Maine 391. Rowley *v.* Bigelow, 12 Pick. 307. See Penna. Act 23 Sept. 1780, § 7, 1 Sm. Laws, p. 511.

[2] Lecky *v.* M'Dermott, 8 S. & R. 500.

[3] Rapp *v.* Palmer, 3 W. 178.

ing the opinion of the court says: "The rule of the common law is caveat emptor, and unlike the civil law, the possession of goods is but prima facie evidence of title, with some exceptions."

In Ohio it has been decided, that if a chattel be sold by a borrower of it, the owner may recover it in an action of replevin of whomsoever he may find in possession of it.[1] The same decision would probably be made in Pennsylvania, subject, of course, to an inquiry into the bona fides of the plaintiff's conduct.

When a sale and delivery, or exchange of property, has been procured by false representations amounting to fraud, the vendor may insist that no title passed to the vendee, and in such case he may maintain replevin without any previous demand. But before he brings his action, he must restore or offer to restore to the other party the whole of the consideration, whether money, goods, or security, received by way of consideration for the sale, which might be of any value to either party.[2] The note, whether negotiable or otherwise, of the fraudu-

[1] Roland *v.* Gundy, 5 Ohio 202.

[2] Frost *v.* Lowry, 15 Ohio 200, and 6 Penna. Law Jour. 326. Thayer *v.* Turner, 8 Met. 550. Johnson *v.* Peck 1 W. & M. 334. Pearsall *v.* Chapin, 8 Wr. 12. Per Lowrie, C. J.

lent vendee, not actually negotiated, is not such a thing of value as it is necessary to return.[1]

There are no markets overt known to our law by a sale in which the rights of the true owner can be bound.[2] Caveat emptor is the rule in all purchases of personal property, since no one can transfer a greater right therein than he himself has.

So completely is this doctrine of market overt repudiated, that replevin lies against the sheriff's vendee to recover the possession of chattels wrongfully taken in execution and sold.[3] To prevent the delay of public justice, and the unnecessary vexation of the officers charged with the execution thereof, the right to the writ is, in Pennsylvania, taken away so long as the goods are in the possession of any sheriff, naval officer, constable, collector

[1] Thurston *v.* Blanchard, 22 Pick. 18. Thayer *v.* Turner, 8 Met. 550. 15 Ohio 200.

[2] Hosack *v.* Weaver, 1 Yeates 478. Easton *v.* Worthington, 5 S. & R. 130. 2 Yeates 348. Dame *v.* Baldwin, 8 Mass. 519. Towne *v* Collins, 14 Mass. 499. Wheelwright *v.* Depeyster, 1 Johns. 471. Roland *v.* Gundy, 5 Ohio 203. Heacock *v.* Walker, 1 Tyler 341. Browning *v.* M'Gill, 2 Har. & Johns. 308. Act 23d Sept. 1780, § 7, 1 Sm. Laws p. 511.

[3] Shearick *v.* Huber, 6 Binn. 2. See George *v.* Chambers, 11 M. & W. 149.

of the public taxes, or other officer acting under the authority of the state.[1] The service of a foreign attachment on a transporter, in whose hands the goods are, does not so place them in the custody of the law as to prevent their stoppage in transitu by a replevin.[2] Replevin is not the proper remedy for disregard of a claim to exemption under the act of 1849.[3]

Independently of the statute, replevin will not lie for goods seized for non-payment of taxes.[4] Property seized for the non-payment of a militia fine is within this statute.[5] The court is required, at any time after service, on motion, to quash such writs on being ascertained of the truth of the fact by affidavit or otherwise. A sale under the act concerning strays of 13th April, 1807, and the supplement thereto, has the same effect as a sale in market overt;[6] as also proceedings under the act of 22d March, 1817, prohibiting horse-racing

[1] Act 3d April, 1799, 1 Sm. Laws 470. See Willard *v.* Kimball, 10 Allen 211, and New York Code.

[2] Hays *v.* Mouille, 2 Harris 48.

[3] 6 Bonsall *v.* Comly, 8 Wr. 442.

[4] Stiles *v.* Griffith, 3 Yeates 82. The People *v.* Albany, 7 Wend. 485. Marriott *v.* Shaw, Comyn's Rep. 275.

[5] Pott *v.* Olwine, 7 Watts 173.

[6] Patterson *v.* M'Vey, 7 Watts 482. See Act 22d March, 1817, § 7, 6 Sm. Laws 432.

upon the public roads within the city and county of Philadelphia.[1]

By the common law it would appear that replevin did not lie for goods taken by the sheriff by virtue of an execution from a superior jurisdiction.[2] But it has been held by some courts that a stranger might maintain replevin against the sheriff for goods taken by him on an execution against a third person.[3] In New York, before the present code, it was held, that goods taken by the sheriff out of the possession of the defendant could not be replevied even by a stranger; but if the sheriff undertook to levy an execution against one man upon goods in the possession of another, replevin might be maintained.[4] The Massachusetts statute expressly provides, that where goods of the value of more than twenty dollars, attached on mesne process, or taken in execution, are claimed by any person other than the defendant in the suit, such person may have a replevin.[5]

[1] Patterson *v.* M'Vey, 7 Watts 482. See Act 22d March, 1817, § 7, 6 Sm. Laws 432.

[2] Lev. Ent. 152. Lutw. 1191. Gilb. Repl. 121. Smith *v.* Huntington, 3 N. Hamp. Rep. 76. Aylesbury *v.* Harvey, 3 Lev. Rep. 304.

[3] Coursey *v.* Wright, 1 Har. & M'Henry 394. Ladd *v.* North, 2 Mass. 519.

[4] Thompson *v.* Button, 14 Johns. 84.

[5] Appendix VI. § 27.

But if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of ownership, or under circumstances which imply a right to sell, then a sale by such a person would bind the true owner.[1] Thus, in the case of Rapp *v.* Palmer, Judge Rogers says:[2] "I fully subscribe to the doctrine that an agent may bind his principal within the limits of an authority with which he has been apparently clothed by the principal in respect to the subject matter. If a principal send a commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. Thus, if the owner of a horse send it to a repository of sale, it must be intended that he sent it there for sale. Or if one send goods to an auction room, it cannot be supposed that he sent them thither merely for safe custody. When the article is sent in such a way and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound. In the cases referred to, the person and the place both indicate the nature of the business carried on. It would be a fraud on the purchaser, against which he could not guard himself

[1] Dyer *v.* Pearson, 3 Barn. & Cress. 38. Irving *v.* Motley, 7 Bing. 543. Barnes *v.* Bartlett, 15 Pick. 71. Boyson *v.* Coles 6 M. & Sel. 23.

[2] 3 W. 178.

with any ordinary care, which the depository was enabled to commit by the unwise conduct of the owner; it would, therefore, be but just that he should bear the loss."

In a previous case, where A. being indebted to B. had sold him a chariotee in payment, which was left in the possession of A., who gave to B. a receipt for it on storage, and afterwards it was sold by A. to a third person, without notice of the former sale, the same judge holds the following language: "Wherever there is a sale of property, and no actual possession delivered, it remains at the risk of the purchaser: as between him and the vendor the property is his; but when it passes into the hands of a bona fide purchaser, without notice, it would be against sound policy to permit a recovery. The maxim caveat emptor does not apply. I hold the law to be the same, whether the possessor be the immediate purchaser from the original vendor, or from his fraudulent vendee."[1]

Of late years a distinction in favor of innocent purchasers, founded upon the manner by which possession has been acquired, and the intention of the owner in parting with his property, has, on principles of policy and justice, and for the benefit

[1] Shaw *v.* Levy, 17 S. & R. 101.

of trade, been gaining ground. In this country, it is already well established in New York and Massachusetts.[1] By the rule, as there established, if one obtain possession of personal property with the consent of the owner, and with the intention, on his part, to change the property, no matter by what fraudulent representations this assent may have been obtained, the contract is not absolutely void, but voidable, and a bona fide purchaser for valuable consideration will be entitled to the property as against the original owner, if his purchase has been made before the original contract has been avoided. But if he, at the time of his purchase, had knowledge of the fraudulent intentions or misrepresentations by which his vendor obtained the property, the original owner may recover it from him.[2]

[1] Mowrey *v.* Walsh, 8 Cow. 238. Wheelwright *v.* Depeyster, 1 Johns. 471. Buffington *v.* Gerrish, 15 Mass. 156. Root *v.* Trench, 13 Wend. 570. See also, Hollingsworth *v.* Napier, 3 Caines 182. Trott *v.* Warner, 2 Fairf. 227. Cross *v.* Peters, 1 Greenl. 376.

[2] Williams *v.* Merle, 11 Wend. 80. Everett *v.* Coffin, 6 Wend. 609. Kindar *v.* Shaw, 2 Mass. 398. Lloyd *v.* Brewster, 4 Paige 537. Johnson *v.* Peck, 1 Wood. & Min. 336. Hall *v.* Gilmore, 40 Maine 578. Hunter *v.* The Hudson, 20 Barb. 493. Pringle *v.* Phillips, 5 Sandf. 157. Rowley *v.* Bigelow, 13 Wend. 570. Williams *v.* Given, 6 Grattan 268. Robinson *v.* Dauch, 3 Barb. S. C. 20.

As between the parties when the terms of the agreement make a sale for cash, if the purchaser after obtaining possession refuses to pay, the seller may immediately repossess himself by replevin.[1]

In Pennsylvania the point has not been explicitly ruled, but the course of decisions, and the dicta of her courts, warrant the conclusion that she will follow the doctrine of New York and Massachusetts. Thus, Judge Rogers, in the case of Mackinley *v.* M'Gregor, says: "It would be a dangerous doctrine to establish, that where a person purchases commodities, which, at the time, he is conscious he shall be unable to pay for, though these goods may have afterwards passed through other hands in the fair way of purchase, or third persons may have become, in the regular course of business, interested in them, the original seller shall have the right to recover them, in whomsoever's hands they may be." And again, "Replevin or trover will lie by the vendor, against the vendee, although not against a bona fide purchaser, without notice of the fraud.[2]

[1] Harris *v.* Smith, 3 S. & R. 20. Henderson *v.* Lauck, 9 Harris 359.

[2] Mackinley *v.* M'Gregor, 3 Wh. 396. Knowles *v.* Lord, 4 Wh. 506. Smith *v.* Smith, 9 Harris 369. Thompson *v.* Lee, 3 W. & S. 479. But see M'Mahon *v.* Sloan, 2 Jones 229. Hildeburn *v.* Nathans, 1 Phila. 567.

In England, the doctrine is unsettled: In the case of Parker *v.* Patrick,[1] one to whom goods, obtained from the true owner by false pretences, had been pawned for a valuable consideration, and without notice of the fraud, was held to be entitled to them; but Lord Denman, in Peer *v.* Humphrey,[2] expresses his disapprobation of that case, and rules against it. The goods in Peer *v.* Humphrey were feloniously taken from the real owner. Lord Abinger at Nisi Prius, in the subsequent case of Sheppard *v.* Shoolbread,[3] reasserts the doctrine of Parker *v.* Patrick, without referring, however, either to that case or to Peer *v.* Humphrey. In a subsequent case, Load *v.* Green,[4] Baron Parke says: "The case of Parker *v.* Patrick has been doubted, but I think it may be supported on the ground that the transaction is not absolutely void, except at the option of the seller. He may elect to treat it as a contract, and he may do the contrary before the buyer has acted as if it were such, and resold the goods to a third party."

It is said in an old case that replevin does not

[1] 5 T. R. 175.

[2] 2 Adol & Ellis 495, 4 Nev. & M. 430.

[3] 1 Car. & Marsh. 61. See Noble *v.* Adams, 7 Taunt. 59.

[4] 15 Mee. & W. 216. White *v.* Garden, 10 Common Bench 919. And see Irving *v.* Motley, 7 Bingh. 543.

lie for money,[1] or for leather made into shoes, This is founded on the supposed impossibility of identification. Money in a box, or leather made into shoes, if sufficiently identified, may no doubt now be recovered in this action. When the property has been so materially changed, a new right of action arises to reclaim it by replevin in that shape which it has assumed. And, in this case, it should be described in the writ as it existed at the time of the commencement of the suit.[2] Where there was an agreement for the sale of corn, to be paid for on the delivery of the last load, and the corn, as hauled to the buyer's mill, was, in the presence of one of the sellers, emptied in a heap with other corn, and after delivery of the last load the buyer failed to pay, it was held that the mixture did not prevent the reclamation of as much of the corn as the vendor delivered, and that replevin lay for it.[3]

Replevin will lie for a swarm of bees,[4] and for the increase of animals, though the increase were after the taking;[5] but not for animals *ferœ naturæ*, and unreclaimed.[6]

[1] Banks *v.* Whetstone, Moor. 394.

[2] Brown *v.* Sax, 7 Cowen 95. Betts *v.* Lee, 5 Johns. 348. Wingate *v.* Smith, 20 Maine R. 287. Snyder *v.* Vaux, 2 R. 427.

[3] Henderson *v.* Lauck, 9 Harris 359.

[4] F. N. B. 68.

[5] F. N. B. 69. Sid. 82.

[6] 2 Roll. Ab. 430.

In Maryland it is the proper remedy for the recovery of an apprentice.[1]

It was held in England that replevin did not lie for goods taken beyond the seas, though afterwards brought to England by the defendant.[2] Because, it was said, the taking, which was the gist of the action, was beyond the seas. In this country, where the unlawful detention is as much in question as the taking, this ruling of Pollexfen would hardly be recognized.

Replevin will lie for a ship and her sails;[3] but not after a decree of condemnation as prize by a court of Admiralty.[4]

A case of some interest, as involving the question of jurisdiction, has lately been before the district court of the United States for the Eastern District of Pennsylvania. The barque Royal Saxon was taken on a foreign attachment issued out of the supreme court of Pennsylvania, and under the regular proceedings in the action was sold by order

[1] 1 Dorsey's Stat. of Md. 827.

[2] Nightingale *v.* Adams, 1 Show. 91, Case 92.

[3] Marsh. 110. Prideaux *v.* Warne, Sir Thomas Raym. 232.

[4] W. B. *v.* Latimer, 4 Dall. Appx. I. Certain Logs of Mahogany, 2 Sumner 589.

of the court, on the 9th February, 1848, as a chargeable commodity, and purchased by Ward & Co., of New York. On the 22d January, 1848, after the issuing of the foreign attachment, and before the sale to Ward & Co., the barque was libelled in the United States district court for the Eastern District of Pennsylvania by the mariners for their wages, and was sold under process in that case to Robet Taylor, of Philadelphia, and delivered to him on the 15th February, 1848, Ward & Co. not intervening to oppose the proceedings. On the 24th February, 1848, Ward & Co. issued a writ of replevin from the supreme court of Pennsylvania, making Robert Taylor defendant, and giving a replevin bond to the sheriff in the usual form, in the sum of twelve thousand dollars, no satisfactory claim property bond having been tendered, the barque was delivered to the plaintiffs on the 1st March, 1848. On the following day, Taylor exhibited his libel in the district court of the United States for the property and possession of the said barque, upon which the barque was taken into the possession of the marshal, but subsequently delivered to Ward & Co. on their entering into stipulations in nine thousand dollars to abide the decree of the court. A plea to the jurisdiction, alleging the pendency of the replevin suit in the state court, was entered by Ward & Co., and over-

ruled; after which they put in their answer, setting out the foregoing facts at length, and insisting strongly on the pendency of the action of replevin in the state court, in which they had given bonds in twelve thousand dollars for a return, if a return should be awarded, and that the said court had complete jurisdiction thereof.

The learned judge of the district court overruled all the points made by the respondents, and concluded his opinion with the following observations: "A sale in the admiralty would lose much of its recognized efficiency and value, if the party whom it evicted could at once restore himself to possession by a common law writ, and if the admiralty, by force of the same writ, were precluded from reinstating its vendee. The suitor in this court would have less confidence of attaining the prompt and effective justice which he seeks, if after a decree rendered and even executed here the whole question might, at the election of his adversary, be submitted to review in another tribunal, constituted under different laws, proceeding by different forms, and recognizing other responsibilities: and the constitutional policy which has extended the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' would be frustrated, if the adjudications of such

cases by the courts of the Union were not in fact as in form, final and conclusive. It is therefore adjudged, ordered, and decreed, that possession of the said barque, the Royal Saxon, be delivered to the libellant, as the true and proper owner thereof, and that the costs of this proceeding and decree be paid by the claimants." The claimants carried the cause by appeal to the circuit court. The judgment was reversed on the ground that the state court had exclusive jurisdiction by virtue of the replevin which preceded the proceedings in admiralty.[1]

As a general proposition, title to land cannot be tried in an action of replevin,[2] nor can a house built on leased land be taken in replevin, nor will the writ justify the severance and delivery of fixtures.[3] One out of possession of land cannot try his title to it against one in the actual possession with claim of title by bringing replevin or trover against him for timber cut or slates quarried upon the premises.[4] This would not hold good if the

[1] 1 Wallace, J. Rep. 311.

[2] Eaton *v.* Southby, Willes 131. Snyder *v.* Vaux, 2 R. 427. Vausse *v.* Russel, 2 McCord 329.

[3] Roberts *v.* Dauphin Bank, 7 Harris 71.

[4] Brown *v.* Caldwell, 10 S. & R. 114. Powell *v.* Smith, 2 Watts 126. Mather *v.* Trinity Church, 3 S. & R. 509. Baker *v.* Howel, 6 S. & R. 476. De Mott *v.* Hagermann, 8 Cow. 220.

timber cutter or quarrier were a trespasser merely without permanent possession. But one in possession of land with claim of title, or having the constructive possession which the law casts upon the owner of the legal title of wild or unseated land, may maintain replevin for timber severed from it, and carried away by a trespasser, and this though the timber has been worked into posts and rails or shingles, or what not, since the severance.[1]

In the case of Elliott *v.* Powell,[2] which was replevin for eighty dozen of wheat in the sheaf, the plaintiff proved that he had cleared the ground, fenced it, and put in the crop of wheat, and was in the possession of the premises, and that the defendant cut and carried away the grain. The defendant offered to prove that the land was his, that the plaintiff in sowing the grain was a trespasser, that he (the defendant) entered upon the premises and took the actual possession thereof, which he had maintained ever since, and that while in possession he cut the grain. The supreme court, Judge Rogers delivering the opinion, say: "We are of opinion

[1] Snyder *v.* Vaux, 2 R. 427. Clement *v.* Wright, 4 Wright 250. Heaton *v.* Findley, 2 Jones 304. Brewer *v.* Fleming, 1 P. F. Smith, 102. Corbett *v.* Lewis, 3 P. F. Smith 322. Young *v.* Herdic, 5 P. F. Smith 172.

[2] 10 Watts 454.

that the evidence was admissible, because, if true, it is a flat bar to the action. It would show that the locus in quo was his freehold, that by the entry the possession of the plaintiff was divested, and the defendant was reinstated in the possession of the premises." "By the entry of the tenant of the freehold, he is in possession and the owner of the grain raised on the premises." "It is a mistake to suppose that the title to real estate may not be incidentally tried in a transitory action." If machinery, which is part of the freehold, as it is, whenever it is necessary to constitute the premises what they purport to be is dissevered by the former owner after a sale by himself or by the sheriff, the purchaser of the real estate may maintain replevin for the machinery, against the person who detached it, and this although he can only make title to the chattel by proving title to the land.[1]

The statute, 2 Will. & Mary, c. 5, enacts, "That sheaves or cocks of corn, loose or in the straw, or hay in any barn or granary, or in any hovel, stack, or rick, or otherwise in any part of the land, may be seized or secured for rent, and detained until the same be replevied." Since that statute, a replevin has always been allowed of such corn or

[1] Harlan *v.* Harlan, 3 Harris 507.

hay,[1] and subsequently by the statute 11 Geo. 2, ch. 19, sec. 8, a distress being permitted on corn, grass, hops, roots, fruits, pulse, or other produce growing, though such distress was of things annexed to the freehold, and though no words expressly authorize a replevin, yet it is the constant practice to try the legality of such distress in an action of replevin.[2] The seventh section of the Pennsylvania act of 21st March, 1772, seems to be a transcript of this last act, and will probably receive the same construction.[3]

It is said in England that replevin will not lie for title deeds, as they savor of the realty.[4] If a title paper, a lease for instance, is delivered to the plaintiff, no transfer of the possession of the premises is effected. The writ cannot be made to do the duty of a liberari facias possessionem.[5]

It will lie for the recovery of parish records,[6] and for the books of a corporation.

[1] Wilk. Repl. 3, 4.

[2] Wilk. Repl. 3, 4.

[3] Hellings *v.* Wright, 2 Harris 373.

[4] Brooke Abr. tit. Repl. 34.

[5] Clark *v.* Nevill, 1 Phila. Rep. 28.

[6] Sawyer *v.* Baldwin, 11 Pick. 492. Southern Plank Road Co. *v.* Hipon, 5 Ind. 165.

CHAPTER III.

THE WRIT OF REPLEVIN.

THE writ of replevin, as we have seen, was, in England, a justitial writ, commanding the sheriff to cause deliverance to be made of the property. There was no summons to the defendant, and the writ was not returnable. It was in this form:—

"The King to the Sheriff of Nottingham, health. We command you that justly and without delay you cause to be replevied to A. his cattle, which he complains that B. took, and unjustly detains: And after, cause him to be brought to justice for the same: That we hear no more complaint for want of justice."[1]

If the sheriff neglected or refused to execute this writ, an alias or pluries with a clause of return might be issued.[2] This writ is no longer in use in England.

In the United States, generally, the writ commands the sheriff to replevy and deliver certain

[1] Reg. Brev. 81.

[2] See ante, 53.

articles, enumerating them, the property of the plaintiff, and to summon the defendant.[1] In New York it seems not to be necessary to specify the property in the writ.[2] And in Tennessee, by the act of 15th January, 1846, if there be several defendants, living in separate counties, counterparts of the summons may, at the instance of the plaintiff, issue in each county. In New York, Kentucky, Missouri, Arkansas, Ohio, and Tennessee, the revised statutes require an affidavit to be filed, before the issuing of the writ, stating the justness of the claim, that the plaintiff is entitled to the possession, and that the property has been wrongfully taken or detained by the defendant. In the statutes of Missouri, Ohio, Kentucky, Maine, New Hampshire, Vermont, and Massachusetts, no provision is made for the course to be pursued, if a claim of property is made by the defendant. In Massachusetts and Missouri such claim is entirely disregarded. The same practice is believed to prevail in the other states above enumerated.

The statutes of Arkansas provide for an inquest in such case, to be summoned at the instance of the defendant, pending whose deliberations the property remains in the custody of the sheriff.

[1] See Appx. A., Snedeker *v.* Quick, 6 Halst. 179.

[2] Finehout *v.* Crain, 4 Hill 537.

In Pennsylvania the writ is in personam as well as in rem, and does not come under the term "summons" in the fee bill of 1821, but under the phrase "other writs," for which the prothonotary is entitled to charge seventy-five cents.[1] It is returnable on the first day of the term. In the city and county of Philadelphia, and county of Allegheny, the writ may be made returnable to the first day of the term next succeeding the time at which it is issued, or to the first Monday of any intermediate month at the election of the party suing out the same.[1] And it seems that the jurisdiction of the district court does not depend on the amount of the rent in arrear.[2]

It will be fatal to the writ, if the first day of the term come between the test of the writ and the day to which it is made returnable. Thus in New York a writ of replevin tested at one term, and returnable the next term but one, an entire term intervening, was held voidable.[3] In that state the revised statutes gave a clause of capias against the

[1] Baldwin *v.* Cash, 7 W. & S. 425. 7 Sm. Laws 367. Bower *v.* Tallman, 5 W. & S. 561.

[2] Hirst *v.* Moss, 3 Phila. 457. Ancora *v.* Burns, 5 Binney 522.

[3] Cayward *v.* Doolittle, 6 Cow. 602.

defendant, in case the goods could not be found. And the code of procedure contains a similar provision.[1] In Michigan an affidavit is required to accompany the writ, stating that the property was not taken for any assessment levied by virtue of any law of that state.[2]

The writ must be served upon the defendant as other writs are served, and the goods delivered to the plaintiff, unless their delivery is prevented by a claim of property, or they cannot be found. A symbolical delivery[3] is not sufficient unless with the consent of the plaintiff. By the statute West. 1, ch. 17, where one had taken the beasts of another and driven them into a castle or fortress to prevent the owner from having a replevin, the sheriff was authorized, after solemn demand and refusal to deliver, to break the castle or fortress to make replevin. And in Semayne's case,[4] it is said that this act is but an affirmance of the common law; for by the common law the privilege of a man's house extends only to him and his family, and to his own

[1] 2 Vol. Revised Stat. p. 430, title 12, 154th sect. 3d clause, code of procedure, which took effect on the first day of May, A. D. 1848.

[2] Phenix *v.* Clark, 2 Mich. 327.

[3] Hayes *v.* Lusby, 5 Har. & J. 485.

[4] 5 Coke 91, a.

proper goods, or to those which are lawfully and without fraud and covin there; but according to Lord Coke, the statute was necessary to justify the sheriff in breaking an outer door at the suit of a subject.[1]

In the New York revised statutes there was a provision similar to the statute West. 1, ch. 17.[2] It is also to be found in the new code. There is the same provision in the statutes of Wisconsin, Ohio, Arkansas, New Jersey, and Michigan. The seventeenth chapter of the statute Westminster first, is not reported by the judges to be in force in Pennsylvania. There is no similar enactment in that state. In the case of Kneas *v.* Fitler, the supreme court held that the sheriff had a right to enter the house of the defendant in replevin to search for the goods, but expressly declined saying anything as to his right to break the outer door in case of being refused admittance.[3]

To the clause of summons in the writ, the sheriff returns either summoned or nihil habet as in other cases. In England, and wherever the English law is unchanged by statute or custom, if there is a

[1] 2 Inst. 193.

[2] 2 Rev. Stat. p. 431, title 12, § 10.

[3] 2 S. & R. 263.

claim of property, the sheriff returns that fact to the writ, and it suspends further proceedings, unless the plaintiff purchase the writ de proprietate probanda. If a claim property bond has been given, he returns that fact. If the goods or part of them have been delivered to the plaintiff, his return will be in accordance, and will enumerate the goods replevied and delivered to the plaintiff;[1] and as to those not delivered, he will return eloigned, or he may return that no person came to show him the goods.[2] And it is a good return to say that the cattle are dead,[3] or the goods destroyed, as, for instance, by fire. The sheriff should not deliver more articles than are named in the writ. Thus, a writ requiring him to replevy four hundred tons of ore, will not justify him in delivering seven hundred and twenty tons.[4] He cannot return that the defendant did not take the goods, for that is supposed in the writ, and may be one of the matters in controversy, and he can neither falsify the writ, nor clear the defendant of the taking by his

[1] Bro. Ret. Brev. pl. 100.

[2] Dalt. Shff. 556. More *v.* Clypsam, Aleyn 32. Burn *v.* Mattaine, Cas. Temp. Hardw. 119. 1 Lord Ray. 613. Kneas *v.* Fitler, 2 S. & R. 266.

[3] Bro. Ret. Brev. pl. 125.

[4] Dewitt *v.* Morris, 13 Wend. 496. Gardner *v.* Lane, 9 Allen 492.

return.[1] And therefore it is said (in the second resolution in Moor *v.* Watts), case does not lie against the sheriff for a false return, if he returns eloigned; and for the same reason, the defendant shall not be concluded by it, but when he comes and denies the return by plea of non cepit, his denial shall be as good as the surmise of the writ, and rather better, because the proof is incumbent on the plaintiff.[2]

The above reason applies only to the case of a defendant. It would seem, therefore, that an action might be maintained by the plaintiff against the sheriff for a false return, if he should persist in a refusal to replevy the goods, and return eloigned.

Replevin is sometimes called a local action.[3] In some respects it is so. It cannot be sustained unless the defendant has had the goods in the place laid in the declaration, for the place is material and traversable.[4] But the action is so far transitory that it may be brought in any county in which

[1] Moor *v.* Watts, 1 Lord Ray. 613. Lutw. 581.

[2] 1 Lord Ray. 613.

[3] Gould's Pl. 118. 1 Chitty's Pl. 161. Atkinson *v.* Holcomb, 4 Cow. 45. Williams *v.* Welch, 5 Wend. 290.

[4] 1 Saund. 347, p. 1. Johnson *v.* Wollyer, 1 Stra. 507.

the defendant has had the articles since the taking.[1] And the safest course is to lay the place in the county where the writ issues. In Massachusetts it is said that this is necessary.[2]

A question may arise as to the duty and responsibility of the sheriff, when he finds the goods in the possession of a third party, not named in the writ, who has both the property and the possession. In England, the law on this subject is involved in some obscurity. In one case the sheriff was said not to be liable to an action of trespass, if he took the goods under such circumstances. And the taking in replevin was said by Holt not to resemble the taking of one man's goods on a fieri facias against another, because in the latter case the officer is commanded to take the goods of a particular person—in the former he is commanded to take specific articles enumerated in the writ. He said farther, that, if the owner claimed property in the goods, at the time of taking, and the sheriff, notwithstanding, took them away, without having the right of property determined, on a writ de proprietate probanda, he was liable to an action of

[1] Doc. Pl. 315. F. N. B. 69. Wilk. Repl. 40. Brown *v.* Caldwell, 10 S. & R. 114. Elliott *v.* Powell, 10 Watts 454.

[2] Robinson *v.* Mead, 7 Mass. 353.

trespass.[1] It is to be remarked, however, that the case does not seem to raise the question, and therefore Lord Holt's observations have not the weight which would otherwise attach to them.

In Rolle's Abridgment it is said, if the sheriff, on a replevin sued by J. D., deliver the beasts of a stranger, on the showing of J. D., the owner of the beasts can have an action of trespass against him.[2] But from Keilway's Reports it would rather seem that, in his opinion, the action in such a case should be against the plaintiff.[3] It is also said in Rolle that one who is not party to the replevin shall not have the writ de proprietate probanda, and the same thing is asserted in the argument of counsel in Miller *v.* Davies et al., Comyn's Rep. 596. Perhaps the true distinction was, that a stranger could not maintain the action of trespass when the goods were found in the possession of the defendant, but when they were found in the possession of the stranger he might; for the writ of replevin might then be no justification to the sheriff, which it was, if he obeyed it strictly, as

[1] Hallet *v.* Byrt, Carth. 381. Leonard *v.* Stacey, 6 Mod. 68, 138, 140. Shipman *v.* Clark, 4 Denio 446.

[2] 2 Roll. Abr. 552, § 6, and against the plaintiff, 2 Roll. 553 § 10.

[3] Keilway 119, pl. 64. Ib. 129, pl. 96.

appears from the case of Miller *v.* Davies et al.,[1] where it was held, that the writ was a justification to the sheriff for taking the goods from the possession of the defendant, without showing the property in the goods to be in the plaintiff.

But Gilbert says: "If the sheriff injures the defendant in the execution of the replevin, by taking some of his cattle, the defendant has his action of trespass against him, as in all other cases of trespass,"[2] and this is most in accordance with the general principles of law.

The New York revised statutes provided for this case by requiring the sheriff to summon a jury to try the right of property, whenever the defendant or *any other person* in possession of the goods specified in the writ claimed property therein. The new code of procedure has no similar provision, but would seem to confine the sheriff's right to make deliverance to cases in which the property is in the possession of the defendant or his agent.[3] In Pennsylvania, the writ de proprietate probanda is not in use. The claim property bond is the creature of practice, and is taken in all cases,

[1] Comyn's Rep. 590.

[2] Gilb. Repl. 73.

[3] Code Proc. § 184.

where property is claimed, from the party claiming the property, whether he be the defendant in the writ or the person in possession of the property, or an entire stranger. And there is no reason why the bond should not be good, if given with a condition to be responsible for the value of the goods, in case the plaintiff succeeds in his suit, and to indemnify the sheriff. Some such arrangement would seem to be required, in justice both to the claimant and to the officer. If the claim of property is of such grave importance as to prevent the goods being taken from the possession of the defendant, much more would it seem that such claim should prevent the possession of a third party from being violated. And though in England the writ as a proceeding in rem was said to shield the sheriff, it may be found not to have that effect here, where it is in personam as well as in rem.[1]

If the party in possession, not being the defendant, and claiming property, refuses or is unable to give a bond, the sheriff, under such circumstances, runs a risk in executing the writ, for it is by no means certain that the replevin bond protects him.

[1] English *v.* Dalbrow, 1 Miles 161. Morris *v.* Parker, 3 Mass. 310. Stimpson *v.* Reynolds, 14 Barb. 506.

It may be said, that taking the goods from the possession of a party, not named in the writ, is no execution of the writ, but a voluntary act of the sheriff. In such a case, it was held in Massachusetts that the owner might maintain his possession by force, in the same manner that he might against any trespasser not an officer.[1]

The statute of limitations applies to this action, and consequently the writ must be issued within six years from the unjust taking or detention; and in cases of distress the action may be brought at any time before actual sale, notwithstanding the statute 2 Wm. & M. ch. 5, or the act of 21st March, 1772.[2]

It has been held in New York, that a writ of replevin issued by a defendant, to obtain a redeliverance of property taken from him by virtue of a writ of replevin issued against him, is irregular, and will be superseded with costs, if the motion be made before the return of the writ, or set aside after the return.[3] The contrary doctrine is held in

[1] Commonwealth *v.* Kennard, 8 Pick. 133. State *v.* Jennings, 14 Ohio State R. 73. King *v.* Orser, 4 Duer 431.

[2] 1 Sm. Laws, 370. Jacob *v.* King, 1 Marsh. 135.

[3] Morris *v.* De Witt, 5 Wend. 71.

Pennsylvania, unless there has been a judgment in favor of the plaintiff in the first suit.[1] But if on replevin against A., the goods of B. are taken, it seems B. may repossess himself by replevin.[2]

[1] Lovett *v.* Burkhardt, 8 Wright 174. But see Lowry *v.* Hall, 2 W. & S. 129.

[2] Clark *v.* Skinner, 20 Johns. 465. See Revised Statues of Michigan, part 3, tit. 4, ch. 5. Rev. Stat. Missouri 1845, ch. 921.

CHAPTER IV.

THE PARTIES IN REPLEVIN.

GENERALLY every person of full age, entitled to the possession of personal property, and not under any disability, may maintain replevin therefor.

Executors and administrators may have replevin of goods taken in the lifetime of the testator or intestate.[1] If the goods of a feme sole are taken, and she afterwards marry, the husband alone must bring the replevin, in this case it has been held that she could not join ;[2] but if she hold the goods taken as executrix, then she may join.[3] If timber be cut on the joint property of husband and wife, the husband alone can bring replevin for it.[4] These

[1] Gilb. Repl. 123. Bro. Abr. tit. Repl. pl. 59. Sid. 80. Arundel *v.* Trevyll, Rast. Ent. 560. Act 24th Feb. 1834, § 28, Pamph. Laws 70. M'Knight *v.* Morgan, 2 Barb. 171.

[2] Bull. N. P. 53. F. N. B. 69. Bac. Ab. tit. Repl. G. Seibert *v.* M'Henry, 6 Watts 301.

[3] Bro. Baron & Fem. pl. 85.

[4] Fairchild *v.* Chaustelleux, 8 Watts 412.

decisions rest upon the ground that the wife has no interest whatever in the subject matter of the action. And the reason of them fails in Pennsylvania since the act of the eleventh of April, 1848,[1] relating to the rights of married women.

There is in the act of 1848 no appearance of an intention to change the rules of pleading, as applied to the relation of husband and wife. It would seem, therefore, the safest course, in all actions concerning the wife's estate, to join the husband.[2] The husband can neither release nor discontinue the action. If the wife sue in her own name, advantage can only be taken of it by plea in abatement.[2] The husband since the act certainly cannot sue alone.

Several persons cannot join in one replevin for several goods where the property is several.[3]

All the joint owners of a chattel must join.[4]

[1] Pamph. Laws, 1848, p. 536.

[2] Perry *v.* Boileau, 10 S. & R. 208. Jameson's Exs. *v.* Brady and Wife, 6 S. & R. 466. Cro. Car. 69. Hatchett *v.* Baddeley, 2 W. Black. R. 1079. Co. Lit. 112, a.

[3] Wilk. Repl. 4. Co. Lit. 145. Hart *v.* Fitzgerald, 2 Mass. Rep. 509.

[4] 2 Saund. 116, n. 2. Decker *v.* Livingston, 15 Johns. 479. Bank *v.* Stubbs, 6 Mass. 422. 9 Mass. 427. D'Wolf *v.* Harris, 4 Mason 515. M'Arthurs *v.* Lane, 3 Shep. 245. Low *v.* Martin, 18 Ill. 286.

A tenant in common, or joint tenant, or partner, cannot maintain replevin against his co-tenant[1] or co-partner for taking the common property.

A mere servant who, as such, has charge of goods cannot maintain replevin.[2]

A father is the natural guardian of his children, and when they have no other guardian may maintain replevin for their personal property.[3]

In general, any one in possession of the goods may be made defendant. If goods are taken by A. at the command of B., the replevin may be against both or either.[4] Replevin will not lie against any sheriff, naval officer, lieutenant of the city of Philadelphia, or of any county constable, collector of the public taxes, or other officer, for goods taken or detained by them, acting in their several offices under the authority of the state;[5] not so in Massa-

[1] Barnes *v.* Bullett, 15 Pick. 71. Wills *v.* Noyes, 12 Pick. 324. Reeves *v.* Morris, 2 Jebb & Symes, 344. Co. Lit. 199 b. Whitesides *v.* Collier, 7 Dana 283.

[2] Harris *v.* Smith, 3 S. & R. 20.

[3] Smith *v.* Williamson, 1 Har. & Johns. 147.

[4] Gilb. Repl. 162.

[5] Act of April, 1779, 1 Sm. Laws 470. Pott *v.* Olwine, 7 Watts 173. Shaw *v.* Levy, 17 S. & R. 99.

chusetts.[1] Replevin lies, however, after sale, against the vendee of the sheriff or other officer.[2] But the action cannot be maintained against the marshal for goods held by him under a writ from a federal court.[3]

[1] Ilsley *v.* Stubbs, 5 Mass. 280. See Appx. Mass. Stat.

[2] Shearick *v.* Huber, 6 Binn. 2. Lamb *v.* Johnson, 10 Cushing 126.

[3] Freeman *v.* Howe, 24 Howard 450. Buck *v.* Colbuth, 3 Wallace 335. Booth *v.* Ableman, 18 Wis. 495.

CHAPTER V.

OF THE DECLARATION.

The defendant having appeared, the plaintiff must file his declaration, subject as to time, &c., to the same rules of court which govern other actions. If the goods were taken as a distress, the place, in that case, being material and traversable,[1] and a new assignment not being allowed in replevin,[2] the plaintiff must state the place of taking within the town or county, accurately in his declaration. If the goods were taken in a dwelling-house in the city, he should state the street and number of the house; if in a store or factory, it should be so stated, and the locality given; if on a farm, that statement should be accompanied by some words of description by which the place may be readily identified, such as the road upon which

[1] Gilb. Repl. 124. Ward *v.* Laville, Cro. Eliz. 896. Hill *v.* Bunning, 1 Sid. 20. Ward *v.* Lakin, Moore 678. 1 Saund. Rep. 347, n. 1. 2 Saund. Pl. & Ev. 761. Gardiner *v.* Humphrey, 10 Johns. 53. Jackson *v.* Rogers, 11 Johns. 33.

[2] Potter *v.* North, 1 Saund. Rep. 347. Cockley *v.* Pagrave, Freeman 238.

it is situate, and its name, if it has one.[1] When the action is not for goods distrained, but is founded on a claim of property, it will be sufficient to lay the taking in the county, as in this case the place is no longer material.[2] The venue may be laid wherever the goods are, as they may be considered to have been taken at any place into which the defendant may at any time have carried them.[3] The declaration must allege the chattels to be the property of the plaintiff.[4]

By the statutes of Wisconsin, where the action is for goods distrained for any cause, it shall be laid in the county in which the distress was made: in other cases the action shall be laid and tried in like manner as actions of trespass for injuries to personal property.[5]

In Tennessee, if the goods cannot be found, the defendant may declare in trover or detinue without issuing a new writ.[6] This would seem to be a

[1] Potten *v.* Bradley, 2 Moo. & P. 78. See Kenny *v.* Simpson, Jebb & Bourke 17.

[2] Muck *v.* Folkrod, 1 Browne 60.

[3] Walton *v.* Kersop, 2 Wils. 354. Anon. 2 Mod. 199.

[4] Pattison *v.* Adams, 7 Hill 126. Hill *v.* Denio, 7 Hill 426.

[5] Statutes of Wisconsin 271.

[6] Act 15th January, 1846.

substitute for the declaration in the detinet in use elsewhere. The same law prevails in Illinois.[1]

The declaration in Hoskins *v.* Robins and Others, 2 Saunders 320, contains an averment of the price or value of each article taken, on which Mr. Williams, the annotator, remarks: "It is not usual to insert the price of the cattle or goods taken, in a declaration in replevin, and the reason seems to be, because if the plaintiff obtains a verdict, he is only entitled to damages for the wrongful taking and costs, but not to the value of the goods taken, as he is in trespass, for they were delivered to him when replevied." This is manifestly an insufficient reason even in England, where we have seen the case may go on, and a recovery be had in damages for the value of the property, if the sheriff is prevented from delivering it.[2]

The practice, as stated by Mr. Williams, would no doubt be sustained, where the goods have been delivered to the plaintiff. Where this is not the case, the value must be stated. In the United States, indeed, in all the modern British precedents, the value is inserted, not of each individual article, but in the aggregate, as in the forms in the appendix.

[1] Dart *v.* Howe, 20 Ill. 212.

[2] Ante, p. 54.

The declaration should contain a description and enumeration of all the articles taken, or intended to be replevied.[1] The strictness of the old rule on this subject is now somewhat modified, and it is held that certainly to a general intent is sufficient, particularly after verdiat.[2] Thus, in a case in which the declaration, among other things, was for a lot of sundries, the defendant pleaded property; and when the sheriff came to replevy the lot of sundries, gave a property bond for them, and retained possession. The defendant assigned for error that this description in the declaration was too general—Judge Rogers says: "The declaration, in this case, would undoubtedly have been ill upon demurrer; but then upon the error being pointed out, the court, under our act of assembly, would have given leave to amend." "How can the defendant now say that he does not know what the plaintiff meant by a lot of sundries, after he has claimed property in them, to the sheriff, and on the records of the court, and after he has retained, and has now, the possession of the very articles for which this suit is brought. But it is

[1] Pope *v.* Tillman, 1 Moore 386. 7 Taunt. 642. More *v.* Clypsam, Aleyn 33. Snedeker *v.* Quick, 6 Halst. 179. Sanderson *v.* Marks, 1 Har. & Gill. 252.

[2] Warner *v.* Aughenbaugh, 15 S. & R. 1. Wilson *v.* Grey, 8 Watts 38. Taylor *v.* Wells, 2 Saund. 74, n. 1.

said, the description must be so certain, that the sheriff can tell how to make deliverance of the property. This, however, will not avail the defendant; for the sheriff is not bound to redeliver, unless the goods be shown to him by the party; and in case of a defendant, it has been ruled to be a good return to say, Nullus venit exparte defendentis ad ostendendum bona et catalla."[1] And if the defendant avows the taking, in the place named, it cures the defect in the declaration.[2]

If standing corn is replevied, it should be described as follows: "In a certain field there, called ——, took the corn of the said plaintiff, to wit, —— acres of standing corn then and there growing, and being of great value, to wit, of the value, &c."[3] If fixtures be taken, they are well described, according to Chitty,[4] as goods, chattels, and effects. When it can be conveniently done, the better way is to name the article.

The declaration in England, and wherever the law is not changed by statute, charges the de-

[1] Warren *v.* Aughenbaugh, 15 S. & R. 11. Kempster *v.* Nelson, 2 Wheat. Sel. 913. 2 Saund. 74, a, note 1.

[2] Banks *v.* Angell, 3 Nev. & P. 94.

[3] 2 Chitty Pl. 844. See Appendix, general forms of narr.

[4] 2 Chitty Pl. 844. Pitt *v.* Shew, 4 B. & A. 206. Niblet *v.* Smith, 4 T. R. 504.

fendant with having taken the goods of the plaintiff, and unjustly detained them against sureties and pledges.[1] If the goods have been taken in two or more places, it ought to appear what number have been taken in each;[2] property not mentioned in the writ should not be included,[3] and the damages claimed should be stated,[4] and when the gist of the action is the unlawful detention, it is not necessary that a demand and refusal before bringing the action should be alleged.[5] Leave to amend will be given as in other cases.[6]

Declarations in replevin are either in the detinuit, or in the detinet, or both forms may be joined. Where the goods have been delivered to the plaintiff in the replevin, the declaration is in the detinuit; where the goods are eloigned, or for any other cause are not delivered by the sheriff to the plaintiff, it is in detinet, and complains that the defendant took the chattels and detains them; where part of the goods are delivered, and part not, the

[1] Evans *v.* Brander, 2 H. Black. 541.

[2] Littleton's Rep. 37.

[3] Sanderson *v.* Marks, 1 Harris & Gill 252.

[4] Faget *v.* Brayton, 2 Har. & J. 350.

[5] Seaver *v.* Dingley, 4 Greenleaf 306.

[6] Garner *v.* Anderson, 1 Str. 11. Warner *v.* Aughenbaugh, 15 S. & R. 10.

two forms are combined.[1] Where there are separate writs in the cepit, and in the detinet, as is the case in Wisconsin, and was formerly the case in New York, the declaration must conform to the writ.

Sometimes when the plaintiff in replevin is a tenant who has not paid his rent, and whose principal object in bringing the action is to gain time, he strives to embarrass the landlord by taking no further steps in his cause, and paying no regard to the defendant's rule on him to declare—the proper course in such case is to take judgment by default for want of a declaration, but as the defendant in such a case is in fact the actor or plaintiff, being the party who is seeking to recover money; he will of course not be satisfied with a judgment by default. His most expeditious course is to file a suggestion in the nature of an avowry by which he will inform the court that he distrained the goods in question for rent due, and

[1] Com. Dig. tit. Pleader, 3 K. 10. "If the cattle taken are returned, the declaration shall say, quare cepit, &c., et ea detinuit contra vad. et pleg. quousque, &c.; if they are not returned, it shall be quare cepit, &c., et adhuc detinet contra vad. et pleg, omitting quousque, &c. So if only part are returned, it shall say, as to that detinuit quousque, and for the residue, adhuc detinet." See Appendix.

in arrear from the plaintiff to the defendant for certain premises, describing them, stating the rent, and how much was due at the time of the distress, that it still remains due and for it the distress was made, and pray the court for a writ of inquiry of damages. This is of course given, and then having ascertained the amount to which the judgment entitles him, the defendant may either have an execution at once against the plaintiff, or may take an assignment of the bond from the sheriff and sue on it.[1]

[1] See Appendix.

CHAPTER VI.

OF THE PLEAS IN REPLEVIN.

THE action of replevin is in some respects anomalous. In certain positions of the pleadings the plaintiff and defendant change places; and the rules which, in other actions, govern the plaintiff, here control the defendant, and vice versa. There is nothing, however, in this, which exempts the parties from an observance of the common rules, or excuses the absence of proper pleadings in replevin. It was formerly held in the supreme court of Pennsylvania, that even after a trial on the merits, the want of a plea was fatal, and it was said that nothing would cure its absence.[1] This is no longer the law, and it is now held, that an omission to compel the opposite party to perfect the pleadings beforehand, ought to be considered, what it is in justice and truth, a tacit agreement to waive matters of form, and try the cause on its merits; just as going to trial on a short plea is a

[1] Lecky *v.* M'Dermot, 5 S. & R. 331.

waiver of the right to demand a plea in full form.[1] So also informalities in an avowry are cured by going to trial.[2] But where an objection is made, there is no room for presumption of any kind, and it would be against right and justice to infer an agreement to waive form, in opposition to the protestation of the party against the trial.[3]

The writ in Pennsylvania and Maryland does not abate by the death either of plaintiff[4] or defendant.[5] In New York, prior to the new code, the suit abated by the death of the plaintiff, and in such case the defendant had no remedy on the bond, but he might retake the goods.[6] In Massachusetts the action does not survive the death of the defendant.[7]

There is a difference between pleas in abatement in replevin, and in other actions. In other actions

[1] Thomson *v.* Cross, 16 S. & R. 350. Sauerman *v.* Weckeriey, 17 S. & R. 116. Baxter *v.* Graham, 5 Watts 418.

[2] Kessler *v.* M'Conachy, 1 Rawle 435.

[3] Bratton *v.* Mitchell, 5 Watts 70.

[4] Act 13th April, 1791. Reist *v.* Heilbrenner, 11 S. & R. 131. 1 Dorsey's Laws Md. 463, Act 1801, ch. 74, § 38.

[5] Keite *v.* Boyd, 16 S. & R. 300.

[6] Barkle *v.* Luce, 6 Hill 558. See Weber's Exs. *v.* Underhill, 19 Wend. 447.

[7] Petts *v.* Hale, 3 Mass. 321. Mellan *v.* Baldwin, 4 Mass. 480.

enough for a plea in abatement to show that the writ was improperly issued and should be quashed: this will not put the defendant in statu quo. The plea in abatement must go further, and show the defendant to be entitled to a return of the property.[1]

Chief Baron Gilbert says, in replevin "pleas in abatement, differ from pleas in bar only in this; that in abatement they do not avow or acknowledge the caption and detention, which is the gist of the action; but they must go so far as to entitle the defendant to a delivery, or else they do not take away the force and effect of the writ of replevin, which is always executed by the delivery."[2] The well-known rule, that a defence which denies that the plaintiff has any cause of action at any time, must be pleaded in bar, while matter which merely defeats the present proceeding must be pleaded in abatement, it would seem from many authorities, both ancient and modern, does not in all instances, extend to the action of replevin. Thus, it is held that property either in the defend-

[1] Gilb. Repl. 126.

[2] Gilb. Repl. 126, 127.

ant or in a stranger, may be pleaded either in bar or in abatement, and without conusance.[1]

The only reason I have met with for this distinction, is given in the old edition of Gilbert on Replevin (but omitted in the later ones), where he says, "The defendant may plead property in himself in abatement; for by such plea he doth not deny or confess, and avoid the caption, and therefore it is not a bar; but only shows that the plaintiff hath not a right to a deliverance; and by showing that the goods ought to be returned to the defendant on such abatement, as they were before the writ was taken out."[2] However satisfactory this might have been in England, it cannot be received as a sufficient reason here, where every unlawful detention is held to be a caption, and of course is denied by the plea of property.[3] Besides the plea of property wants another characteristic of a plea in abatement, as it gives no better writ to the plaintiff. Authority, however, seems to have settled

[1] 1 Chitty Plead. 481. 2 Lev. 92. Presgrave *v.* Saunders, 1 Salk. 5. Butcher *v.* Porter, 1 Salk. 94. Harrison *v.* M'Intosh, 1 Johns. 380. Wilson *v.* Gray, 8 Watts 35. Rogers *v.* Arnold, 12 Wend. 30. De Wolf *v.* Harris, 4 Mass. 515.

[2] Gilb. Repl. 128.

[3] Mackinley *v.* M'Gregor, 3 Whart. 369.

that property is a good defence either in bar or in abatement.

If the plea is property in the plaintiff and J. S., then the plea is in abatement of the replevin, as it is in other actions; for though it admits a right of deliverance in the plaintiff, yet it does not allow it by a writ under the present form; but gives a better writ to be brought by the plaintiff and J. S. But here the defendant ought to make a conusance; because, this plea not disaffirming the property, it leaves a right in the plaintiff to have his beasts, unless such conusance be made.[1] Cepit in alio loco with conusance is a good plea in abatement. Thus, if one declare of a caption in Blackacre, and the defendant pleads in abatement that he took them in Whiteacre absq. hoc that he took them in Blackacre, this will abate the count under that form. But then he must make conusance; because, not disaffirming the plaintiff's title to the chattels, he leaves the plaintiff a right to retain. In this and every other case in abatement, where the property is not disaffirmed to be in the plaintiff, the defendant must make avowry or conusance of a just cause of return; for otherwise he does not destroy the force and effect of the writ, by which

[1] Gilb. Repl. 128.

the deliverance was made, but leaves the plaintiff a right to retain his own property.[1] The avowry or conusance cannot be denied, but only the plea; for to traverse the conusance would be a discontinuance.[2]

Property in defendant or a stranger, and cepit in alio loco, also property in plaintiff and defendant, may be pleaded in bar as well as abatement.[3] In Presgrave *v.* Saunders,[4] Holt, Chief Justice, said, he remembered to have heard Hale make the difference, that if property be pleaded in defendant, it may be either pleaded in bar or in abatement; if in a stranger, only in abatement: but that, upon great deliberation, it had been held since, that there was no difference at all; for both might be pleaded in bar, according to 2 Cro. 519. It must be pleaded with a special traverse.[5] Cepit in alio loco is not a good plea, if the defendant or his bailiff has ever had the property in the place mentioned in the declaration, though it be merely on their way to the pound. And if he had them there, but took them

[1] Gilb. Repl. 128, 9. Cross *v.* Bilson, 6 Mod. 102, n.

[2] Cross *v.* Bilson, 6 Mod. 102. 1 Wms. Saund. 347, n. 1.

[3] Wilk. Repl. 47, 50. Wilson *v.* Gray, 8 Watts 25.

[4] 6 Mod. 81.

[5] Chambers *v.* Hunt, N. J., 3 Harrison 339. Rogers *v.* Arnold, 12 Wend. 30. Anderson *v.* Tallcott, 1 Gilman 365.

damaged feasant in another place, he should plead that specially.[1]

Properly speaking, there is no general issue in replevin.[2] The general issue is so called because the issue that it tenders involves the whole declaration, or the principal part of it.[3] The declaration in replevin, as we have seen, alleges that the defendant "took certain cattle or goods of *the plaintiff*, in a certain place called, &c., and unjustly detained or detains them," as the case may be. There is no plea known in this action which alone puts in issue the whole of the above allegations. In the old books non cepit is called the general issue in replevin.[4] This plea merely states that the defendant "did not take the said cattle or goods in manner and form as alleged," not traversing the material allegation of the property being in the plaintiff.

The caption and detention only are in issue, and not the property. In this, replevin differs from

[1] 1 Wms. Saund. 347, n. 1. Abercrombie *v.* Parkhurst, 2 B. & P. 480. Maltravers *v.* Fosset, 3 Wils. 295. Walton *v.* Kersop, 2 Wils. 354. Chitty Pl. 1046.

[2] Wilk. Repl. 49.

[3] Stephens Pl. 172.

[4] Gilb. Repl. 130. Stephens Pl. 175.

trespass; for in trespass, where the general issue is not guilty, the defendant may, on evidence, show property in himself, because he cannot be guilty of trespass in taking his own goods;[1] but in replevin, upon non cepit, the property by the plea is admitted to be in the plaintiff,[1] and therefor is not in question at all; but whether the defendant took the goods mentioned in the declaration. And he cannot be admitted on the trial to show whose the property was, because he has put it in issue only, before the jury, whether he took the goods or not, and not whose they were.[1] In Mackinley *v.* M'Gregor,[2] Judge Rogers uses the following language: "By the plea of non cepit, the caption and detention only are put in issue, and not the property which is admitted. The only point to which the evidence applies under that plea, is, whether the defendant took the goods or not, or whether if he came rightfully into possession, he has, and continues wrongfully to detain them." "In point of form, it denies the taking only, and is pleaded without any suggestion for a return, and consequently there cannot be judgment for a return, on

[1] Gilb. Repl. 130. Vickery *v.* Sherburne, 20 Maine 34. Holmes *v.* Wood, 6 Mass. 3. Trotter *v.* Taylor, 5 Blackford 431. Whetwell *v.* Wills, 24 Pick. 25. Ely *v.* Ehle, 3 Comst. 506. Carrol *v.* Harris, 19 Ark. 237.

[2] 3 Whart. 398.

that plea. But although it denies the taking only, yet on that plea the unlawful detention may also be inquired into; and this has been the invariable and constant practice, not only in England, but in this state, from the first settlement of the province."

The defendant may plead in justification, both where he disclaims, and where he allows property in the plaintiff. Thus, if the defendant acknowledges the caption, and claims property in himself; this is a good bar, because it confesses the caption, which is the gist of the action, but avoids the injustice thereof, by showing that he had a right to take them; and this not only will abate the writ of the plaintiff, whereby the deliverance was made, but also destroy all right of complaint for such caption and detention; and therefore goes in bar to the action, and consequently gives a return without conusance pro retorno habendo.[1]

If the defendant confesses the caption, and pleads property in J. S., this is in bar of the action as well as in abatement of the writ; for this not only shows that the plaintiff had no right to a deliverance upon the writ, but also that he has no cause to complain of the caption and detention against

[1] Gilb. Repl. 132. 6 Mod. 81.

his pledges, which is in bar of the action. And this is not only a justification to cover the defendant from damages, but for the return of the beasts; because he doth not admit property in the plaintiff, but disaffirms it; and therefore the beasts ought to come back to the defendant, who ought to retain the beasts against every one but J. S.[1] And a plea that the property in dispute is in the succession of A. and not the property of the plaintiff, without naming the persons in the succession of A., has been held good on demurrer.[2]

Justifications that affirm property in the plaintiff, cover the defendant from damages only, because the plaintiff is entitled to his beasts or chattels, as having property in them; and the defendant in such pleas not making title to the beasts or chattels as a pledge to answer any demand, he ought not to have the beasts or chattels back, but may cover himself from the damages only for the caption.[3]

Thus (to cite an old example), if the lord distrained for homage, and the tenant died, and his

[1] Gilb. Repl. 132. Wilson *v.* Gray, 8 Watts 35. Quincy *v.* Hall, 1 Pick. 357.

[2] Anderson *v.* Dann, 19 Ark. 650.

[3] Gilb. Repl. 132, 133.

executors sued replevin. Here the defendant might justify, and cover the damages, because the distress was rightfully taken at first, though by the death of his tenant, he could no longer retain it as a pledge for his homage, and therefore could not be entitled to a return; because the homage was a service to be performed by the tenant in person, and the distress being to compel him to it, could not be detained longer than his life; therefore the lord must have distrained the heir de novo.[1] Yet defendant may plead property in himself, and in the plaintiff, and if found for him it will entitle him to a return of the property, because having had the possession of it coupled with an interest, which makes his case the stronger, until improperly deprived thereof by the sheriff, under the plaintiff's writ, which he had no right to use for such purpose, he has a right to be placed in statu quo, that is, restored to the possession of the property as the joint owner thereof.[2]

The defendant may plead the statute of limitations, if there is one in force. In Pennsylvania, the act of 27th March, 1713. It is a plea in bar, and in form should be actio non accrevit infra sex

[1] Gilb. Repl. 132, 133.

[2] Wilson *v.* Gray, 8 Watts 36.

annos. In a case in Siderfin, where the replevin was for a mare and colt, plea not guilty of the taking aforesaid within six years. The plea was overruled, because it gave no answer to the unjust detention, which the replevin complains of, as well as the caption; for the caption may be just, and the detention unlawful:[1] as where the defendant eloigns the beasts, or drives them to a castle, so that the sheriff cannot replevy them at all, this is an unlawful detention, however just the caption might have been. And in the present case, it might be that the colt was foaled in the pound, and then was never taken by the defendant, yet it may be unlawfully detained; and though he might not have taken it within six years, yet he might have detained it until the day of purchasing the writ, and that detention is complained of by the writ, and not barred by the statute.

Non cepit, and property in defendant, may be pleaded together; and non cepit, property in a stranger, and other pleas, have been allowed to be pleaded together.[2]

It is not a good plea to say that the defendants *had a lien* on the goods and chattels in the declara-

[1] Gilb. Repl. 131. Arundel *v.* Trevil, 1 Sid. 81.

[2] Shuter *v.* Page, 11 Johns. 196. Com. Dig. Plead. E. 2. Whetwell *v.* Wells, 24 Pick. 25.

tion mentioned, for a certain sum, for freight and storage. The existence of a lien is a conclusion of law from certain facts which should be pleaded,[1] presenting to the opposite party the option of admitting them, and contesting their sufficiency in point of law by demurrer, or of denying them by a proper plea to the country, and so a plea which alleged that at and before the taking declared upon, one P. was in the possession and apparent ownership of the property (certain watches) replevied with the knowledge and consent of the plaintiff, and that being so in possession and ownership he pledged them to the defendant, and that from the time of pledging until the delivery to the sheriff the defendant retained them as pawns unredeemed, was held to be insufficient by the district court.[2]

In several of the states, not guilty is made the general issue by statute, and puts in issue the right of the plaintiff to the possession, and also the wrongful taking and detention;[3] and in Tennessee any special matter of defence may be given in evidence under it.

[1] Weed *v.* Hill, 2 Miles 123.

[2] Hildeburn *v.* Nathans, 1 Phila. Rep. 567.

[3] Rev. Stat. Missouri, 1845, 921. Stat. Kentucky, 1842, 503. Tennessee Act, 15th January, 1846. Rev. Stat. Mass., see Appx.

CHAPTER VII.

OF THE AVOWRY.

The defendant is not bound to plead in confession and avoidance, and go for damages. He may choose to avow the caption, as having a right to the property, and then he always goes for a retorno habendo. When he adopts this course, he becomes plaintiff as well as defendant. Plaintiff, in as much as he seeks to recover the goods; defendant, in that he seeks to prevent a recovery in damages by the plaintiff. And so the plaintiff by this proceeding is made defendant as well as plaintiff; plaintiff, as his object is to recover damages for the taking; defendant, as he seeks to prevent a return of the property to the avowant. Avowries are either for rents, services, tolls,[1] or for damage feasant, and for heriots, and such rights wherever they exist.

The avowry or cognizance on a distress for rent is the most usual, as well as the most important

[1] State *v.* Patrick, 3 Dev. 478.

form of this class of pleas: the former term applying to the case where the defendant sets up right or title in himself; the latter being used where he alleges the right or title to be in another person, by whose command he acted.[1]

The avowry or cognizance is, in fact, a declaration,[2] several may be filed in the same action, and to each, several pleas in bar are allowed to be pleaded; for though not within the words, it is within the meaning of the statute 4th and 5th Anne, ch. 16. But it seems a party is not estopped by his avowry from pleading at the last moment property, if he has the leave of the court.[3]

If the defendant took the chattels in his own right, he should in terms avow the act; but if as bailiff, to and in right of another, he should use the word acknowledge. The mistake of the one term for the other is, however, only a formal defect. Where both are made defendants, the one avows, and the other makes cognizance. It was necessary at common law, for an avowry or cognizance for rent, to show that the defendant, or some person,

[1] Com. Dig. Plead. 3 K. 13, 14.

[2] Co. Lit. 303, a. 6 Mod. 103. Wilk. Repl. 63. Wright *v.* Williams, 2 Wend. 632. Pike *v.* Gandall, 9 Wend. 149.

[3] Hellings *v.* Wright, 2 Harris 373.

from whom the reversion came to him, was seized, and the quantity of estate that he was seized of, and that he made a lease to the plaintiff for life, or years, and the descent or grant of the reversion to the defendant; so if a tenant for years had let the estate to another for a less term, at a certain rent, and distrained for the rent, it was incumbent upon him, in his avowry, to show the commencement of his estate, by laying the fee in some person, who granted the term, and then deducing the title to it down to himself, which was often a difficult and impracticable thing, especially in long terms for years, which were generally assigned to a great number of persons.[1] Thus, an avowry for rent, stating that A. *habens titulum*, demised to the defendant, and that he made an under lease to the plaintiff, was held bad on demurrer.[2] It was not necessary to trace the title from its remotest source. The law was satisfied if a seizin was alleged somewhere. If the plaintiff was seized, it was enough. If not, he must allege the latest previous seizin, and thence deduce his title.[3]

To remedy these inconveniencies, the statute 11 Geo. 2d, ch. 19, was passed, which reciting in the

[1] Wilk. Repl. 54.

[2] Reynolds *v.* Thorpe, 2 Str. 796.

[3] 2 Wms. Saund. 284. Wright *v.* Williams, 5 Cowen 338.

twenty-second section, "That great difficulties had often arisen in making avowries or conusance upon distresses for rent, quit rents, reliefs, heriots, and other services," enacted "that it should, and might be lawful to and for all defendants in replevin to avow or make conusance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise, at such a certain rent during the time wherein the rent distrained for incurred, which rent was then, and still remained due; or that the place where the distress was taken, was parcel of such certain tenements, held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was, at the time of such distress, and still remained due; without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners, of such manor, any law or usage to the contrary notwithstanding. And if the plaintiff or plaintiffs in such action should become non-suit, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover double costs of suit." In the same spirit the Pennsylvania act of the 21st of March, 1772, was passed in these words: "Whereas great difficulties often arise in

making avowries, or conusance upon distresses for rent, Be it enacted, that it shall and may be lawful for all defendants in replevin to avow and make conusance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise, at such a rent or service, during the time wherein the rent or service distrained for incurred, which rent or service was then and still remains due, without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, any law or usage to the contrary notwithstanding; and if the plaintiff or plaintiffs, in such action, shall become nonsuit, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover double costs of suit."

The English statute has been construed to extend to an increased rent for every acre of the land converted into tillage,[1] and to furnished lodgings;[2] but not to a rent charge or annuity.[3] They are, however, embraced in the benefits conferred by

[1] 2 H. Black. 563.

[2] 5 Bos. & Pul. 224.

[3] Lindon *v.* Collins, Willes Rep. 429. Bulpit *v.* Clarke, 4 Bos. & Pul. 56.

other parts of the statute. Thus, in replevin for goods taken as a distress for a rent charge, if the defendant succeeds, he is entitled to an assignment of the bond under the provisions of the act.[1]

The Pennsylvania act has, however, been construed to extend to ground-rents.[2] Judge Kennedy thus expresses himself: "And although it has been decided in England in the cases of Lindon *v.* Collins, Willes's Rep. 429, and Bulpit *v.* Clarke, 4 Bos. & Pull. 56, that a rent charge is not embraced by the terms of the 22d sect. of 11 Geo. 2d, ch. 19, which is somewhat similar in its terms to the tenth section of our act of 1772, because the grantor of the rent, who was the party bound to pay it, *enjoyed no land under a grant or demise from the grantee*, who was to receive the rent, which seems to be requisite in order to bring the case within the terms of the section; yet a ground-rent, seems to come very fairly within its terms, for the tenant of the lot, of whom the rent is demanded here, has occupied and enjoyed it under a grant from one under whom the party demanding the rent claims as assignee. The section runs thus: 'It shall and may be lawful for all defendants in replevin, to

[1] Short *v.* Hubbard, 2 Bing. 349.

[2] Franciscus *v.* Reigart, 4 Watts 117.

avow and make conusance generally, that the plaintiff in replevin, or other tenant of the lands and tenements wheron the distress was made *enjoyed the same under a grant* or demise, at such a *rent* or service during the time wherein the *rent* or service distrained for incurred, which *rent* or service was then and still remains due, without further setting forth the grant, tenure, &c.' Now, although the terms of this section may not literally embrace what was called a rent charge before the passage of the statute quia emptores, yet it is evident that ground-rents may well be included in the terms used; and as the evil intended to be remedied was quite as great in cases of distress for them as for any other rents; we ought therefore, to conclude that they were intended to be embraced. Indeed this ought to be the conclusion, unless it were clear that they were intended to be excluded. And upon this principle, it would seem that the statute of 11 Geo. 2d, ch. 19, has been held in some of its provisions to extend to a rent charge as well as other rents. For instance, the twenty-third section, which authorizes sheriffs in the execution of writs of replevin founded upon distresses for rent, to take bonds with sureties of the plaintiff, and to assign the same to the defendants in cases where the plaintiffs fail to prosecute their writs successfully, has been decided to embrace the case

of replevin sued out for goods distrained on account of a rent charge, and that the sheriff in such case may take a bond and assign it as in case of a distress for any other species of rent. Short *v.* Hubbard, 2 Bing. 349. So in practice, the first section of the act 1772, which authorizes the sale of goods distrained for rent, has ever been considered as embracing ground-rents."

The fact that the statute quia emptores was never in force in the state of Pennsylvania, seems to have been overlooked by the learned judge in this case. Afterwards, in deciding the case of Ingersoll *v.* Sergeant,[1] the same judge mentions this fact, and concludes from it that ground-rents in Pennsylvania are not rents charge: a conclusion which would have relieved him from some of the embarrassment which he appears to have felt in Franciscus *v.* Reigart.

It is also necessary to state the demise under which the plaintiff holds as lessee or assignee, and to name the real tenant,[2] and the amount of the

[1] 1st Wharton 337.

[2] Banks *v.* Angell, 7 Adol. & Ell. 843. Innes *v.* Colquhon, 7 Bing. 265. Smith *v.* Walton, 1 Moore & Scott 380. In the case of Kensil *v.* Chambers, 5 Phila. R. 64, where the goods of a stranger which had been taken on a distress for rent were replevied, and the lessor avowed without saying who was

rent,[1] and when payable, but a variance as to the amount of the rent due will not be material, if the terms of the holding are proved as laid.[2] Though in some cases it is said that this is true only when the amount laid is less than the amount proved, Waltman *v.* Allison, 10 Barr 465; but see Barr *v.* Hughes, 8 Wright 516, and Phipps *v.* Boyd, 4 P. F. Smith 344. In this case it is said there is an inaccuracy of expression by the court in Waltman *v.* Allison. According to Gilbert, it was an easy thing, as the old law stood, to name the tenant, as fines were paid on every alienation, and the alienee was presented by the next homage. But when these small fines for alienation were not gathered, nor the courts regularly kept, the lords were at a loss to find their real tenants, and consequently to know whom to avow upon.[3]

Where the avowant is the assignee in reversion of part of the demised premises, he may avow as

tenant. The district court said it was enough the question was whether rent was owing on the premises when the distress was made, and not of the person who owed it.

[1] Cossey *v.* Diggons, 2 B. & A. 546. Brown *v.* Sayce, 4 Taunt. 320. Tice *v.* Norton, 4 Wend. 663. Philpott *v.* Dobbinson, 6 Bing. 104.

[2] Forty *v.* Imber, 6 East 434. Harrison *v.* Barnby, 5 T. R. 248. Johnstone *v.* Hudleston, per Bayley, J., 4 B. & C. 938.

[3] Gilb. Repl. 134.

at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury—or he may avow in the general form given by 11 Geo. 2d, ch. 19, § 22, as upon a holding at a certain rent, and if he avow under the statute for the entire rent, or with a deduction from the entire rent, greater or less than the proportion properly belonging to his interest in the reversion, the judge at nisi prius may direct the avowry to be amended.[1]

The statute 21st Henry 8th, ch. 19, after reciting that as well the noblemen of the realm, as divers other persons, by fines, recoveries, grants, and secret feoffments, and leases made by their tenants to persons unknown, of the lands and tenements holden of them, have been put from the knowledge of their tenants, upon whom they should, by order of the law, make their avowries for their rents, customs and services, to their great losses and hinderances, enacted, that "wheresoever any manor lands, tenements, and other hereditaments, be holden of any manor, person or persons, by rents, customs or services, that if the lord of whom any such manor lands, tenements or hereditaments be so holden, distrain upon the same manors, lands, or tenements, for any such rents, customs or ser-

[1] Roberts *v.* Snell, 1 Manning & Granger 577.

vices, and replevin thereof be sued, that the lord of whom the same lands, tenements or hereditaments, be so holden, may avow, or his bailiff or servant make conisance, or justify for taking of the said distresses upon the same lands, tenements or hereditaments, so holden, as in lands or tenements, within his fee or seigniory. Alleging in the said avowry, conisance and justification, the same manors, lands and tenements, to be holden of him, without naming of any person certain to be tenant of the same, and without making any avowry, justification or conisance, upon any person certain. And likewise the lord, bailiff or servant, to make avowry, justification or conisance, in like manner and form upon every writ sued of second deliverance."

It was requisite for the avowant to choose between this statute, and the statute 11 Geo. 2, ch. 19, § 22, for he was not allowed to frame an avowry under both, in such a way as to avoid the necessity as well of setting out his title, as of naming his tenant. And it was held that as these statutes dispensed with the common law, one or other must be followed. Thus an avowry stating that J. S. held the locus in quo as tenant to the defendant, under a demise thereof by A. to W. at a certain rent for a term not expired, J. S. being assignee of

all W.'s estate and interest, and that rent was in arrear from J. S., is not good, either by virtue of 11 Geo. 2d, ch. 19, § 22, or 21 H. 8, ch. 19, or by the two conjointly. And the court, by Littledale, J., say, The object of the statute 21 H. 8, was to avoid the inconvenience arising from secret assignments, which prevented the landlord from knowing how he ought to avow. But the statute requires the landlord to avow taking, "as in lands or tenements within his fee or seigniory," perhaps it may be sometimes unnecessary to aver seizin, as in the case put in Roll. Abr. 314 (Avowry, A,) where it is said, "that if a man makes a gift in tail rendering rent, he may avow without laying any seizin, because the reversion gives him a sufficient privity, and he shall count upon the reservation." The privity shown in such a case might be sufficient, without any allegation of seizin; but it is unnecessary to decide that point, because here no privity is shown between A. and the defendant. The avowry and cognizance is therefore bad under 21 H. 8, and it is not sustainable under 11 Geo. 2, ch. 19; for that requires the defendant in replevin to allege that the plaintiff, or other tenant, held under a grant or demise, or that the place was parcel of such tenements, as there stated, which is not done here. And without this, the plaintiff in replevin cannot know how to plead. Nor can the avowry

and cognizance be good under the two statutes taken together; for, if that were so, a defendant in replevin might, in his pleading, leave out both tenant and landlord. Of two statutes dispensing with the requisites of the common law, as these do, one or other must be followed.[1]

The statute 21st Henry 8th is not reported by the judges, nor do I find in the decisions in Pennsylvania any trace of its ever having been adopted. The same thing may be said, so far as I have been able to discover, of most of the states. By the revised statutes of New York, the 21st Henry 8th, and 11th George 2d were amalgamated, and it was not necessary to set forth the grant, tenure, demise, or title of the landlord or lessor, or to name any person certain as the tenant. The new code of procedure is believed to be equally liberal. We have escaped the evils which produced that statute, by reason of the short terms for which our leases are commonly made, and the comparative infrequency of assignments which has been a consequence. The want of a similar enactment is at times felt, particularly in cases where the original lease has been assigned, and there is a question as to whether the assignee has been recognized as his tenant by the lessor.

[1] Banks *v.* Angell, 7 Adol. & Ellis 854. See another report of this case, 3 Nev. & P. 94.

Where there is no doubt as to the recognition, the avowry should be against the assignee, laying the terms of tenancy, as to the amount of the reserved rent, and time of payment according to the original lease, but alleging the tenancy to be "by virtue of a demise thereof to A. B. (the original tenant) theretofore made."

If the lessor has not recognized the assignee, it is said the avowry may state that the premises are held by the original lessee. Chitty advises the insertion of two avowries in this case, one on the holding of the lessee, and the other of the assignee.[1] If it is at all doubtful to whom the original letting was, the allegation of tenancy should be "by virtue of a demise thereof, theretofore made," omitting the words "to him the said plaintiff," or to "A. B."[2] And this general form of avowry would probably be good in all cases, for proof of an original demise to somebody, with title deduced to the plaintiff, would support this averment, but not an averment of a direct demise to the plaintiff.[3]

[1] Bull *v.* Sibbs, 8 T. R. 327. Boot *v.* Wilson, 8 East 316. Wadham *v.* Marlowe, 8 East 314, in note. Auriol *v.* Mills, 4 T. R. 94. Chitty's Pl. 1047, n. *u*. Beaumont *v.* Wood, 10 S. & R. 433.

[2] Chitty's Pl., 1047, n. *z*.

[3] Chitty's Pl., 1047, n. *y*. Bristow *v.* Wright, Doug. 665.

Where the defendant avows in a place, which, on the face of the avowry, appears to be a different one from that mentioned in the declaration, he must traverse the place laid in the declaration. As when the taking is alleged at the parish of St. Martin, in the Fields, in a place there called Maiden Lane, and the defendant says, in his avowry, that the said place contains one messuage in the parish of St. Paul's, Covent Garden, the avowry is ill, without a traverse of the place in the declaration. 2 Lutw. 1147, 1151. Peter *v.* Duke. Herein replevin differs from trespass; for no traverse is necessary in the latter, and the plaintiff may make a new assignment; but there can be no new assignment in replevin. If the defendant avows in a place, which apparently agrees with that in the declaration, but is in fact different, the plaintiff must set it right in his bar. As when the plaintiff states the taking in Blackacre, and the defendant says the place contains a certain number of acres, and is called Greenacre, whereof the place in the declaration is parcel, and avows for damage feasant in his freehold, &c., there, in case Blackacre and Greenacre, are different places, the plaintiff may allege that he took the cattle in Blackacre, and traverse that it is parcel of Greenacre; or, if the avowry should not state Blackacre to be parcel of Greenacre, the plaintiff may demur, or he

may waive the defect, and traverse the taking in Greenacre.[1] If the parties agree in the place, but vary in the quantity of land it contains, the plaintiff may state the true quantity in his bar, and proceed in his justification without any traverse.[2]

Where the replevin is for goods taken as a distress for the arrears of ground-rent; we have seen that in Pennsylvania the owner of the rent is within the act of assembly of the 21st March, 1772, and there is no reason to suppose that an avowry stating the assignee to be tenant of the premises to the avowant, "by virtue of a certain demise thereof, theretofore made," would not be good, as in ordinary cases. In Franciscus and Reigart, however, we have the form of an avowry in such case, which was pronounced good by the supreme court; as it may, on that ground, be preferred, it is given at length in the appendix. In that case, Franciscus was the plaintiff in replevin, and Reigart, as bailiff of Newman, made cognizance, and acknowledged the taking for rent-arrear; and averred that Franciscus enjoyed the lot as tenant of Newman, by virtue of a certain demise or grant thereof from James H. to Thomas C. his heirs and

[1] Treverton *v.* Hicks, Carth. 185.

[2] 1 Wms. Saund. 347, n. 1.

assigns, under a yearly rent. (The said Franciscus being the assignee or alienee of the said Thomas C., the grantor of the said lot and premises; and the said Newman being the grantee or alienee in fee simple of James Hamilton, the grantor of the said lot.)[1]

If a building is erected upon two lots, out of one of which a ground-rent issues, and the ground-rent is in arrear, and distrained for, and the tenant brings replevin, and declares for a taking in the building generally. The avowant must state his ground-rent, and out of what part of the premises it issues, and allege the distress to have been made there. If this last allegation is omitted, the avowry may be demurred to as containing no justification, for the taking may have been in the part of the house not subject to the ground-rent. If the allegation is made, the plaintiff must take issue upon it, and the evidence upon this point will decide the cause.[2]

The statute 11 Geo. 2d, ch. 19, does not extend to avowries and cognizances for taking cattle damage feasant, and the act of 21st March, 1772, is equally narrow. They must therefore state the title correctly, as that the defendant, or the person

[1] Franciscus *v.* Reigart, 4 Watts 98.

[2] Phillips *v.* Whitsed, 2 Ellis, and Ellis Q. B. 804.

for whom he acts as bailiff, was seized in fee, or was entitled under a person who was himself seized in fee; and it is said to be enough to say, "that the place in which, &c., was his soil and freehold, and that he took the cattle damage feasant,"[1] although contrary to the common rule of pleading, long practice having sanctioned it in this case.

If the defendant had the chattels in the place mentioned in the count, this satisfies the averment that they were taken there, though in reality the fact was otherwise; and if the taking at such place would have been justifiable, the defendant may in his avowry admit that he seized them there; but if it would not, he must necessarily show where he took them and aver that he had them in the place alleged by the count in his way to the pound, or show by what other accident they came there, and then proceed with the avowry.[2] A formal traverse that the defendant did not take them in the place named by the plaintiff, must not be added, for he has admitted what in contemplation of law amounts to taking there, and so there is no inconsistency

[1] Wilk. Repl. 59, 60. 1 Wms. Saund. 347 *d.* n. 6. 2 Wms. Saund. 206 *a.* Jones *v.* Kitchen, 2 Bos. & Pul. 359. 2 Wms. Saund. 284 *d.*

[2] Abercrombie *v.* Parkhurst, 2 Bos. & Pul. 480. Potter *v.* North, 1 Wms. Saunders 347, note. Hammond Nisi Prius. 465.

between the declaration and the defence.[1] It is not necessary to traverse the number of acres stated to be in the locus in quo.[2]

If there are two or more defendants, they must all avow for one and the same cause, notwithstanding they may each have taken the chattels on a different account; because if one, for example, avows for rent due to himself alone, and another for rent due to himself alone, and both the avowries are true, neither of them can have judgment for a return, inasmuch as the one is not more entitled to the chattels than is the other, and as the goods ought by law to be restored to the defendants, (for it appears that the plaintiff had no right to get possession of them), the court are unable to carry the law into effect by pronouncing the proper judgment.[3] But one defendant may plead non cepit as to so many of the chattels, and avow taking the residue for one cause, whilst the other defendant may plead non cepit to the latter, and avow seizing the former goods for another cause, inasmuch as no difficulties can arise by this mode of proceeding.

[1] Ryley *v.* Parkhurst, 1 Wilson 219.

[2] 1 Leon. pl. 277, p. 193.

[3] Slingsby's case, 5 Co. 19. Basset *v.* Manxel, 2 Plowd. at end of Reports, 10 a.

If the avowant states his title incorrectly, he must fail upon a traverse taken to it, although in reality he is entitled to the demand for which he distrained;[1] but if he sets out his title truly, and claims more than is his due, he shall have a return for so much as he can prove himself justly entitled to, and shall be amerced for his false claim of the residue. If two or more defendants avow and the proof is of a demise by one only, it will not support the issue.[2]

Thus, if one avows for rent, and claims the whole of it, whereas he is proprietor of two parts only, he must fail if his title is put in issue modo et forma by the replication; but supposing that he is proprietor of the whole, and he alleges that he distrained for twenty pounds arrear, whereas it turns out that five pounds only is due, he shall have a return for five pounds, and be amerced for his false claim of the remaining fifteen.[3] So if he avows for rent and a nomine pœnæ, and does not show that the rent was demanded, the avowry, though bad for the nomine pœnæ, is good for the rent, and for that

[1] Brown *v.* Sayce, 4 Taunt. 320. Cossey *v.* Diggons, 2 B. & A. 546.

[2] Ewing *v.* Vanarsdall, 1 S. & R. 370.

[3] Harrison *v.* Barnby, 5 T. R. 248. Forty *v.* Imber, 6 East 434.

a return shall be awarded. It has been held by some, that if the defendant avows for two distinct causes, and it appears from his own showing, that the one is a just claim, but that the other is not a sufficient cause in law to warrant the taking, the avowry shall abate altogether:[1] It is elsewhere affirmed, that there is a difference of opinion in the books, whether in such case the avowry is bad in all or for parcel only.[2] If the avowry is for a parcel of a demand shown to have accrued due, as for a quarter's rent, the rent being payable half yearly, it should appear that the residue has been satisfied, because a distress for the parcel could only have been made under those circumstances.[3]

If the plaintiff has declared for a less number of chattels than were really taken and replevied, the defendant, after avowing the seizure of those mentioned in the count, may (though he is not obliged)[4] aver that he distrained such and such goods in addition to those alleged by the plaintiff, and which have been restored to him, and pray that a writ may be directed to the sheriff, com-

[1] Godfrey's Case, 11 Co. 45.

[2] 1 Roll. Rep. 77.

[3] Holt *v.* Sambach, Cro. Car. 104. Shepherd *v.* Boyce, 2 Johns. 446.

[4] French *v.* Kent, T. Raym. 33, in note.

manding him to ascertain the fact, and if true, cause the surplus chattels to be returned to the defendant; and this without disclosing the cause for which they were taken, for quoad these goods the plaintiff is non-suited. If he omits so to do, he is without remedy.[1] If the plaintiff has declared (in the detinuit), for a greater number of chattels than were taken, the defendant need not set the matter right; because notwithstanding the number is thereby quodam modo admitted (not being denied), yet the truth may be shown to the jury, who, should the plaintiff succeed, will measure the damages accordingly.[2]

Should the plaintiff have replevied fewer chattels than were actually taken, the defendant may avow for all, and if he succeeds, will have judgment pro retorno habendo of those mentioned in the count, and likewise judgment to retain the others which are already in his possession irrepleviable.[3]

Surplusage will not vitiate an avowry: thus, where one made cognizance as bailiff of A., administrator to B., and it appeared that A. had a

[1] Snelgar *v.* Henston, Cro. Jac. 611.

[2] Wood & Foster's Case, Leon. pl. 54, p. 42. Snelgar *v.* Henston, Cro. Jac. 611.

[3] 35 Hen. VI., Hil. 1, p. 40. Hammond's N. P. 467.

right, but not as administrator, this allegation was rejected as surplusage.[1]

The statute, 11 Geo. 2d, ch. 19, allowing distress for rent on goods clandestinely removed, does not apply to strangers' goods, or the goods of a subtenant, and the avowry must show that the goods were the tenant's. The same construction has been put upon the Pennsylvania act of 25th March, 1825.[2]

An avowry of taking goods off the demised premises, for rent arrear, should show affirmatively that possession continued on the part of the tenant if the lease has expired, or it will be bad on general demurrer.[3]

An avowry by executors or administrators for a distress, under the 29th sect. of the act 24th February, 1834,[4] ought to show that the lands and

[1] Browne *v.* Dunnery, Hob. 208. Browne *v.* Dunnery, Mo. 887. Bowles *v.* Poor, Cro. Jac. 282.

[2] Thornton *v.* Adams, 5 M. & S. 38. Postman *v.* Harrell, 6 Car. & Payne 225. Fletcher *v.* Marillier, 9 A. & E. 461. Frisby *v.* Thayer, 25 Wend. 396. Acker *v.* Witherill, 4 Hill N. Y. R. 112. Adams *v.* LaComb, 1 Dall. 440. Poole *v.* Longuevill, 2 Wms. Saunders 284, *b.* n.

[3] Burr *v.* Vanbuskirk, 3 Cow. 263.

[4] Pamph. Laws 1834, p. 78.

tenements, whereon the distress was made, were, at the time of the distress, in the seizin or possession of the tenant, who ought to have paid such rent, or in the possession of some other person, claiming the same from or under said tenant by purchase, gift, or descent, and that the rent fell due before the decedent's death.[1]

Where a distress has been made in several places, in some of which the defendant had no right to distrain, he will be allowed to pay into court the damages for taking in the places in which he had no right, and to avow for the rest.[2] A man may take a distress for one cause, and avow for another.[3] In one case the declaration charged that the defendant in close A., and also in close B. took the goods of plaintiff. Defendant avowed that he took the goods in A., for arrears of rent of that close, and the goods in B. for arrears of rent in that close. Plea in bar that defendant did not make a separate and distinct distress upon A., and another upon B., for the separate rent in arrear, but illegally took a joint distress. Demurrer which was

[1] Wright *v.* Williams, 5 Cow. 338.

[2] Lambert *v.* Hepworth, 2 Gale & Davidson 112.

[3] Groenvelt *v.* Burwell, Com. Rep. 78. Butler *v.* Baker, cited Carth. 44. 1 Ld. Ray. 466.

sustained, J. Blackburn saying:[1] "The avowries are perfectly good as they stand. The plaintiff's plea in bar to them admits in effect that there was, as stated in the avowries, rent in arrear in respect of each of the separate demises, but objects that the defendant did not make a separate and distinct distress upon the one close for the rent in arrear for it, but made and took one joint distress for the several arrears. This raises the question whether the defendant having full right and power to distrain on the goods in each close as he did, the whole proceeding was nevertheless invalidated because he at the time of distraining declared a reason different from the proper one, and probably at that time thought the reason given to be the true and sufficient reason. The authorities are clearly against such a proposition."[2]

[1] Phillips *v.* Whitsed, 2 Ellis & Ellis Q. B. 804.

[2] Greenville *v.* The College of Physicians, 12 Mod. 386. Crowther *v.* Barnsbotham, 7 T. R. 654.

CHAPTER VIII.

THE PARTIES TO AN AVOWRY.

JOINT tenants must join in an avowry for rent, or one may avow for himself, and make cognizance as bailiff of the others; the avowry and conusance must comprehend the entire rent, and as one joint-tenant may distrain for the whole in point of interest, and needs no authority so to do; so he may make cognizance as bailiff of his co-tenants, without any express authority from them, and his being bailiff is not traversable on account of his interest in the rent.[1] The same rule prevails with regard to parceners, and it will be fatal if one of several joint-tenants or co-parceners distrains and avows for his individual share of the rent; for the tenant is not tenant to the co-parcener or joint tenant for his share of the estate, but his tenancy is a tenancy of the whole, held under all the joint-tenants or co-parceners as one landlord.[1]

[1] 15 Hen. VII., 17 a. Stedman *v.* Bates, 1 Lord Ray. 64. Leigh *v.* Sheppard, 2 Bro. & Bing. 465. Pullen *v.* Palmer, 5 Mod. 72.

Tenants in common must sever in an avowry,[1] and the avowry of each must be de una medietate of the whole rent, and not of a certain sum, which amounts to a moiety. When the action is against one of several tenants in common, he should avow for his own proportion, and in general he makes cognizance, as bailiff of his companion, for the residue; or he may avow only for his undivided share of the rent.[2] If the action of replevin be against two tenants in common, they should join, one avowing, and the other as his bailiff making cognizance for an undivided moiety of the rent; and the one who first made cognizance avowing in his own right, and the other who first avowed making cognizance, as his bailiff, for the other undivided moiety.[2] One tenant in common cannot avow alone for taking cattle damage feasant; but he ought also to make cognizance as bailiff of his companion.[3] An avowry for a rent charge devised to the wife, may be made by the husband and wife, in right of the wife.[4]

The executors and administrators of a deceased landlord may avow for rent due in the lifetime of the landlord.[5]

[1] Co. Lit. 198, b. [2] Harrison *v.* Barnby, 5 T. R. 246.

[3] Cully *v.* Spearman, 2 H. Bl. 386.

[4] Wynne *v.* Wynne, 2 Mann. & Grang. 8.

[5] 32 Hen. VIII., ch. 37. Act 24th Feb. 1834, sect. 8, 29. Wright *v.* Williams, 5 Cow. 338.

If several defendants appear by attorney and make conusance as bailiffs, and one of them is an infant; yet it is no error; for they all make but one bailiff, and appear in auter droit.[1]

[1] Coan *v.* Bowles et al., 1 Show. 165.

CHAPTER IX.

OF THE REPLICATION, AND OF PLEAS TO THE AVOWRY.

THE plaintiff replies to the plea in abatement, to the plea in bar, or justification, and when the issue is reached, the cause is ready for trial. To the avowry or cognizance, he pleads either in bar or in abatement, and as has been said, may plead several pleas to each avowry or cognizance.

Pleas in bar, to an avowry for rent, either deny that the defendant was bailiff, or deny the demise, by pleading non-tenant,[1] or non-demisit,[1] or allege that the demise was bad in law by reason of the coverture, or infancy[2] of the plaintiff; or, if the said rent became due, that it was tendered;[3] or, in England, that the defendant had been satisfied by a

[1] Rogers *v.* Pitcher, 1 Marsh. 541. 6 Taunt. 209. Wheeler *v.* Branscomb, 5 Adol. & Ellis N. S. 373.

[2] 1 Marsh. 74.

[3] John *v.* Jenkins, 1 Cr. & Meeson 227. Niblet *v.* Smith, 4 T. R. 504.

former distress:[1] in Pennsylvania a former distress, without alleging satisfaction, is sufficient,[2] or payment, or that nothing is in arrear.[3]

Set-off cannot be pleaded in replevin.[4] But the tenant may avail himself of anything in bar, to the avowry for rent in arrear, which goes to show that the rent claimed by the avowant, or any portion of it, is not due.[4] And if, in the lease, certain things are stipulated by the landlord to be done on his part, which form the consideration for the rent to be paid by the tenant, and the landlord neglects or refuses to fulfil his covenant, such breach of contract may take away his right to receive the rent, or so much of it as is equivalent to the loss sustained by the tenant; and this may be given in evidence under the issue of no rent in

[1] Lingham *v.* Warren et al., 4 Moore 409. 2 Brod. & B. 36. Hudd *v.* Ravenor, Ib. 662.

[2] Quin *v.* Wallace, 6 Whart. 452.

[3] Albright *v.* Pickle, 4 Yeates 264. Hill *v.* Miller, 5 S. & R. 357. Williams *v.* Smith, 10 S. & R. 202.

[4] Barnes 450. Fairman *v.* Fluck, 5 Watts 516. Beyer *v.* Fenstermacher, 2 Whart. 95. Peterson *v.* Haight, 3 Whart. 150. Warner *v.* Caulk, 3 Whart. 193. Phillips *v.* Monges, 4 Whart. 226. Anderson *v.* Reynolds, 14 S. & R. 439. But see Clay *v.* Ins. Co., 5 Phila. R. 72. Jones *v.* Morris, 3 Exch. 742.

arrear;[1] or it may be specially pleaded.[2] The plaintiff cannot plead de injuria, &c., to an avowry.[3]

If the goods are privileged from distress, that fact may be pleaded. If the goods are on the premises in the way of trade, and belong to a stranger, or if they are the goods of a lodger in an inn, or a boarding-house, he may bring replevin for them if they are distrained, and plead these facts to an avowry for rent.[4] If a cabinet-maker rents furniture to a tenant, it is not protected by this rule from the landlord's distress.[5]

Nil habuit in tenementis is not pleadable to an avowry under the statute 11 Geo. 2d, it being held that the tenant is estopped thereby to call upon the landlord to show his title. This statute, says

[1] Fairman *v.* Fluck, 5 Watts 516. Jones *v.* Morris, 3 Exch. 742.

[2] Warner *v.* Caulk, 3 Whart. 193.

[3] Crogate's Case, 8 Co. 66, b. Jones *v.* Kitchin, 1 Bos. & Pul. 76. Willes 99. Little *v.* Lee, 5 Johns. 112. Hopkins *v.* Hopkins, 10 Johns. 369.

[4] 1 Inst. 47, a. Adams *v.* Grane, 3 Tyrwh. 326. Horsford *v.* Webster, 5 Tyrwh. 409. Brown *v.* Sims, 17 S. & R. 138. Riddle *v.* Welden, 5 Whart. 9. Simpson *v.* Hartop, Willes 512. 1 Smith's Leading Cases 301, Am. edition.

[5] Henkels *v.* Brown, 4 Phila. R. 299.

Gould, Justice, in Syllivan *v.* Stradling,[1] was not calculated for demises by deed, but aimed at other demises: enjoyment was the matter in the contemplation of the makers of the statute. It meant that a landlord, in cases of distress for rent, when there has been an enjoyment, shall not in cases of replevin, be obliged to set out his title in his pleadings, though they should go as far as a surrebutter. But the tenant is permitted to show that the landlord could not justify the distress, by showing that his title has expired since the demise,[2] and in this case the proper plea is non-tenuit;[3] or that he has been compelled to pay sums which he was entitled to deduct from the rent, and thus it was held a good plea, that before the lessor had any thing in the land, a termor granted an annuity or rent charge, and granted and covenanted, that the grantee might distrain on the premises; that the annuity was in arrear, and the grantee demanded it, and threatened distress; and the plaintiff paid the amount of the rent then due to the avowant, and so nothing in arrear.[4] The

[1] 2 Wilson 208.

[2] England *v.* Slade, 4 T. R. 682. Robins *v.* Kitchen, 8 Watts 390. Hill *v.* Miller, 5 S. & R. 355.

[3] Hill *v.* Miller, 5 S. & R. 355.

[4] Taylor *v.* Zamira, 6 Taunt. 524. Rogers *v.* Pitcher, 6 Taunt. 203. Sansford *v.* Fletcher, 4 T. R. 511. Neave *v.* Moss, 1 Bing. 360. 8 Moore 389.

same is true of interest paid on a mortgage given before the lease.[1] The defence, it seems, would have been equally available under the plea of no rent arrear. A lessee for years, who transfers all his interest to a third person, whether by words of lease or assignment, and with a reservation of rent, cannot distrain for the rent when due, unless the instrument by which the transfer is affected contains an express power of distress, but it is not enough for a plea to an avowry in such case to say that the defendant has parted with all his estate in the premises. It must go on and aver that the estate so parted with was an estate for years, for a reservation of rent on a grant in fee leaves the right of distress in the grantor.[2]

The rule that a tenant shall not, during his possession of premises, dispute the title of the landlord under whom he entered, is now constantly recognized in ejectment. The origin of the rule is involved in some doubt. It did not prevail at common law, for Littleton says the lessor may either distrain or have an action of debt, "but in such case it behooveth that the lessor be seized in the same tenements at the time of his lease; for it

[1] Johnson *v.* Jones, 9 Adol. & Ellis 809.

[2] Manuel *v.* Reath, 5 Phila. Rep. 11.

is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease he made by deed indented, in which case such plea lieth not for the lessee to plead."[1] In replevin we trace its origin clearly to a statute.[2] The difficulties to the landlord, without any corresponding benefit to the tenant, which the want of some such rule occasioned, produced in England the statute of the 11 Geo. 2d, ch. 19, and in the State of Pennsylvania the corresponding statute of the 21st of March, 1772, § 10.[3] They apply to the action of replevin only. New York introduced the same enactment in her revised code, prior to which the common law rule prevailed.[4] The rule as it prevails in ejectment is supposed in the very able and satisfactory note, by the American editor, to the Duchess of Kingston's case, and Doe *v.* Oliver, in the American edition of Smith's Leading Cases, to be referable to the doctrine of equitable estoppel by matter in pais.[5] It is not

[1] Co. Lit. lib. 1, ch. 7, sec. 58.

[2] Silly *v.* Dally, Carth. 445. 1 Lord Raymond 334. Poole *v.* Longueville, 2 Wms. Saund. p. 284. Harrison *v.* M'Intosh, 1 Johns. 380. 5 Comyn's Digest, Pleader, 3 K. 20.

[3] Syllivan *v.* Stradling, 2 Wilson 208.

[4] Harrison *v.* M'Intosh, 1 Johns. 380.

[5] 2 Smith's Leading Cases (American edition) 472. See Naglee *v.* Ingersoll, 7 Barr 185.

improbable that the rule was suggested by the statute 11 Geo. 2d, ch. 19, which takes away the plea in replevin; for as late as the year 1815 we find Dampier, Justice, in Knight *v.* Smyth, using the following language: "It has been often ruled, that neither the tenant, nor any one claiming by him, can dispute the landlord's title. This, I believe, has been the rule for the last *twenty-five* years, and, I remember, was so laid down by Buller, J., upon the western circuit."[1]

Eviction may be pleaded, but a plea that the defendant pulled down a summer house, whereby the plaintiff was deprived of the use thereof, was holden insufficient: it was a mere trespass.[2] The plea must aver that the evictor entered upon the defendant's possession by virtue of a lawful title, acquired before or at the time of the grant to the defendant, and that the lessee was in consequence evicted.[2] If the defence is eviction by the lessor, the plea must state an eviction or expulsion of the lessee by the lessor, and a keeping him out of possession until after the rent became due.[3]

[1] 4 M. & S. 347. Delaney *v.* Fox, 2 Com. Bench, Rep. N. S. 768.

[2] Hunt *v.* Cope, Cowp. 242. Naglee *v.* Ingersoll, 7 Barr 185, 205. Taylor *v.* Zamira, 6 Taunt. 530. 2 Wms. Saund. 181, n. 10.

[3] 1 Wms. Saund. 204, n. 2.

In Pennsylvania, plaintiff may plead that he has paid taxes under the eighth section of the act of 6th April, 1802,[1] and under sixth section of the act of the 3d of April, 1804.[2] If an indenture of demise be specially stated in the avowry, the plaintiff may plead non est factum.[3]

There may be a plea in abatement to an avowry,[4] but Wilkinson says it is unheard of in modern practice.[5]

To a plea of property in a stranger, a replication that the defendant entered the house of the plaintiff in the night-time and took the goods, will not be allowed.[6] When this is the plea the plaintiff must prove property in himself.[7]

When the defendant justifies the taking of the beasts damage feasant, or avows for rent, the plaintiff may reply that the avowant, after taking the distress abused it, so as to render him a tres-

[1] 3 Smith's Laws 516.
[2] 4 Smith's Laws 203.
[3] Adam *v.* Dimcalf, 5 Moo. 475.
[4] Cowne *v.* Bowles, 1 Salk. 93. See 3 Mod. 248.
[5] Wilk. Repl. 74.
[6] Harrison *v.* M'Intosh, 1 Johns. 380.
[7] Simcoke *v.* Frederick, 1 Ind. 54.

passer ab initio.[1] This plea to an avowry for rent is taken away in England by the 11 Geo. 2d, ch. 19, sec. 19. This section of the statute is not reported as in force in Pennsylvania.

To the avowry or cognizance for damage feasant, the plaintiff may reply by denying the defendant's title, his seizin in fee, or the demise stated in the avowry or cognizance, or that the plaintiff is seized in fee of other premises, in respect of which he is entitled to a right of common on the locus in quo —or that the cattle escaped by reason of the defect of fences which the defendant is under an obligation to repair.[2]

[1] Hopkins *v.* Hopkins, 10 Johns. 369.

[2] Wilk. Repl. 77.

CHAPTER X.

THE TRIAL, EVIDENCE, ETC.

THE cause being at issue, and regularly on the trial list, will be tried in its turn. As in other cases, the party on whom lies the affirmative of the issue will be entitled to begin and conclude. In an avowry for rent arrear, and the plea of non tenuit, the avowant begins.[1] But if any plea is pleaded by which the affirmative of the issue is thrown upon the plaintiff, he is entitled to open and conclude.[2] In England, on the plea of no rent arrear, the plaintiff begins.[3] The contrary practice is understood to prevail in the city and county of Philadelphia. Some contrariety of opinion has been entertained as to who is entitled to begin on the plea of property. In a case where property in a third person was pleaded, it was held in England

[1] 3 Chit. Gen. Prac. 876.

[2] Curtis *v.* Wheeler, 4 C. & P. 196. Williams *v.* Thomas, 4 C. & P. 234.

[3] Cooper *v.* Egginton, 8 C. & P. 748. Williams *v.* Thomas, 4 C. & P. 234.

that the defendant had a right to begin.[1] In Pennsylvania, the opinion of Judge Kennedy, as expressed in Marsh *v.* Pier,[2] has been followed. The learned judge, speaking for himself alone, after admitting that a plea purely affirmative gives the defendant the right to conclude, denies that the plea of property produces that effect in replevin. The plaintiff must first prove that he has a right to maintain his writ of replevin, by showing that he has either an absolute or special property in himself. It will not be enough for him to show the mere fact of the naked possession of the property.[3] And in a subsequent case, Judge Rogers, expressing the opinion of the *court*, says: "The plea of property throws the burden of proof upon the plaintiff in replevin, to prove property in himself. And this was the opinion of Justice Kennedy, in Marsh *v.* Pier (4 R. 283), with which, for the reasons there stated, we fully concur."[4] The same doctrine is held in Maryland,[5] Massachusetts,[6] and Indiana.[7]

[1] Colstone *v.* Hiscolls, 1 Moo. & Rob. 301.

[2] 4 Rawle 273. See Clemson *v.* Davidson, 5 Binn. 399.

[3] Co. Lit. 145, b. Seibert *v.* M'Henry, 6 Watts 301.

[4] Mackinley *v.* M'Gregor, 3 Whart. 398.

[5] Cullum *v.* Bevans, 6 Harr. & Johns. 469.

[6] Waterman *v.* Robinson, 5 Mass. 303.

[7] Simcoke *v.* Frederick, 1 Ind. 54.

Where the plea was that the distress was not made within twenty years next after the time when the right to distrain first accrued, and replication, that the distress was made within twenty years next after the time when the right to make a distress for the said rent first accrued. It was held that the plaintiff was entitled to begin.[1] One test on the question who is entitled to begin is to consider who would be entitled to the verdict in the event of no evidence being given on either side. The burden of proof would be on the party not entitled to the verdict, and he should begin.[2]

The party having the right to begin must support his case by evidence. He should be prepared to prove the issue raised by the pleadings, and also to show the amount of damages to which he is entitled. See ante, page 44, for cases in which he will be required to prove a demand before suit brought.

The plea of non cepit admits the property; the taking, or unlawful detention only is in issue, and to this question the evidence must apply.[3] A

[1] Collier *v.* Clark, 5 Adol. & Ellis, N. S. 467.

[2] Huckman *v.* Fernie, 3 M. & W. 505. Leete *v.* Gresham Life Ins. Co. 7 Eng. L. & Eq. Rep. 581, s. c., 15 Jurist, 1161.

[3] 2 Stark. Ev. 714. Mackinley *v.* M'Gregor, 3 Whart. 391. Carroll *v.* Harris, 19 Ark. 237.

general order, before the commencement of the suit, to a servant, not to deliver the goods to the plaintiff, is admissible in evidence, as tending to prove an unlawful detention.[1] But it is said special matter in justification cannot be given in evidence under this plea.[2] If the sheriff returns that he has replevied the property, it is conclusive; evidence will not be received to contradict it, either in whole or in part.[3] The averment of an unlawful taking is made out by proof that the defendants obtained possession of the goods from a person not authorized to sell them.[4]

The plea of cepit in alio loco obliges the plaintiff to prove either that the cattle or goods were taken in the place mentioned in the declaration, or that they were in the defendant's possession in that place; for, as the defendant took them wrongfully at first, the wrong is continued and repeated in every place in which he afterwards detains them.[5]

[1] Johnson *v.* Howe, 2 Gilman 342.

[2] M'Farland *v.* Barker, 1 Mass. 153. Ely *v.* Ehle, 3 Comst. 506.

[3] Phillips *v.* Hyde, 1 Dall. 439. Knowles *v.* Lord, 4 Whart. 504.

[4] Gray *v.* Nathans, 1 Pike 557.

[5] Walton *v.* Kersop, 2 Wils. 354. Johnson *v.* Wolyer, 1 Str. 507. Abercrombie *v.* Parkhurst, 2 B. & P. 481.

Upon issue taken on a plea of non-tenuit modo et forma, or of non demisit, &c., in bar of an avowry for rent in arrear, the defendant must prove the holding as alleged in the plea; and a variance as to the amount of annual rent will be fatal.[1] So if there is a misstatement of the day on which the rent becomes due;[2] but not if the amount due is misstated. Where the defendant made cognizance for rent for two years and a quarter, ending on a day specified, it was held to be sufficient to prove that he was entitled to rent for two years, ending on that day.[3] Where the declaration was for taking cows in four closes, and the avowry stated the holding at a certain yearly rent, and the evidence was that the four closes, and also two others, were held at that rent, it was held to be no variance.[4] Although the tenant may not plead nil habuit in tenementis, or prove the landlord's inability to demise under the plea of non tenuit, or non demisit; he may show that the landlord's title has expired subsequently to the lease,

[1] Cossey *v.* Diggons, 2 Barn. & Ald. 546. Brown *v.* Sayce, 4 Taunt. 320. Ryder *v.* Malbon, 3 C. & P. 594. Tice *v.* Norton, 4 Wend. 663. Ewing *v.* Vanarsdale, 1 S. & R. 370.

[2] 2 Starkie Ev. 716.

[3] Forty *v.* Imber, 6 East 434.

[4] Hargreave *v.* Sherwin, 6 B. & C. 34. Page *v.* Chuck, 10 Moore 264.

and that he has been compelled to pay rent to another.[1]

When, by misrepresentation and fraud, the owner of land has been induced to execute a lease whereby he admits himself to be a tenant, upon the issues of non demisit and no rent in arrear it will be competent for him to show these facts, and the fact that he was persuaded to give up his estate by it, is the strongest evidence of misrepresentation and fraud.[2]

If the tenant, prior to the time at which the rent distrained for became due, purchased the premises, with the assent and by the advice of the landlord, that fact may be given in evidence under the plea of non tenuit or non demisit, for the plaintiff may traverse the tenancy.[3]

Proof that the plaintiff was let into possession of land under an agreement for a lease before the lease was executed, is not, of itself, evidence of a tenancy.[4] But where a person had been in posses-

[1] England *v.* Slade, 4 T. R. 682.

[2] Robins *v.* Kitchen, 8 Watts 390.

[3] Syllivan *v.* Straddling, 2 Wils. 208. Hill *v.* Miller, 5 S. & R. 355.

[4] Hegan *v.* Johnson, 2 Taunt. 148. Dunk *v.* Hunter, 5 Barn. & Ald. 322. Hayward *v.* Haswell, 5 Adol. & Ellis 265.

sion for more than a year under an agreement for a lease, and had paid rent, it was said a valid distress might be made, and these facts, given in evidence, were enough to support an avowry.[1]

The plea of no rent in arrear admits the tenancy as alleged in the avowry;[2] and the plaintiff must prove that the rent has been paid;[2] obtaining judgment for the rent, or giving a note for it does not take away the right of distress unless it is so expressly agreed;[3] and, in England, it has been held that a plea of a former distress, for the same rent, is not sufficient, unless it allege that the rent was satisfied thereby,[4] the onus of proving the satisfaction being on the plaintiff. The supreme court of Pennsylvania has refused to recognize this doctrine, and it seems with great reason, as the landlord, especially since the act 3 Wm. and Mary,

[1] Knight *v.* Bennet, 3 Bing. 361. Hamerton *v.* Stead, 3 Barn. & Cress. 478. Mann *v.* Lovejoy, 1 Ry. & Mo. 355. Chapman *v.* Cluck, 4 Bing. N. C. 188. Staniforth *v.* Fox, 7 Bing. 590.

[2] 2 Stark. Ev. 717. Hill *v.* Miller, 5 S. & R. 357. Alexander *v.* Harris, 4 Cranch 299.

[3] Snyder *v.* Kunkleman, 3 Penna. 487, 490. But see Warner *v.* Forney, 13 S. & R. 52; also Davis *v.* Tyde, 4 Nev. & M. 462; Bailey *v.* Wright, 3 M'Cord 484.

[4] Hudd *v.* Ravenor, 2 B. & B 662. Lear *v.* Edmonds, 1 B. & Ald. 157.

sess. 1, ch. 5, and the act 21st March, 1772,[1] has the sole control of the distress, and is bound thereby to sell.[2] Where the goods of a sublessee were taken by the paramount landlord as a distress for rent, it was held that, on the plea of no rent arrear, it was competent for the sublessee, plaintiff in replevin, to prove that the defendant had previously distrained the goods of the mesne tenant for the same rent, and sold the same; and that the defendant must show that the distress first taken was insufficient.[3] Of course a plea of former distress for the same rent would have been good, without alleging satisfaction. Judge Kennedy, after reviewing the opinions in Hudd *v.* Ravenor, and Lear *v.* Edmonds, says, "These opinions, as to the construction of the statute W. and M., though coming from highly respectable judges, would appear to have been advanced without much consideration, without any satisfactory course of reasoning to support them, and in direct opposition, as I think I shall show in the sequel, to the principle laid down and established in the King's Bench, in Vaspor *v.* Edwards. They, therefore, can have no influence upon our judgment in giving to our act, in relation to the same matter, a different construction, when its various provisions, as well as the

[1] 1 Sm. Laws 370. [2] Quin *v.* Wallace, 6 Whart. 452.
[3] Quin *v.* Wallace, 6 Whart. 464.

language employed, would seem to require it. Considering then, as we do, our act, as to the sale of the goods, to be imperative on the landlord, it would seem, therefore, to give to the distress the character of an execution. The only difference which now exists between goods taken by the landlord as a distress for rent, and those taken in execution by the sheriff is, that the former are repleviable, whereas the latter are not. But this is entirely immaterial in regard to the legal effect of a distress in discharging the rent, as long as the goods are not taken from the landlord by a replevin; and even if they are it can make no difference, because they must be restored to him again, provided the distress was lawfully taken. The legal effect of the sheriff's taking goods of the defendant in execution, to the amount or value of the debt, is well settled to be a discharge of the defendant from the judgment, and all further execution, although he does not satisfy the plaintiff;[1] or has not returned the writ; and it will be a bar to a scire facias on the judgment, so that the plaintiff cannot have a second execution.[2] And why should not the same

[1] Slie *v.* Finch, 2 Roll. Rep. 57. s. c. Cro. Jac. 514. Clerk *v.* Withers, 6 Mod. 292, 299. s. c. 1 Salk. 323.

[2] Mountney *v.* Andrews, 1 Cro. Eliz. 237. s. c. 4 Leon. 150, and s. p. in Clerk *v.* Withers, 2 Ld. Raymond 1072. 2 Wms. Saund. 47 a, note 1.

doctrine and principles be applied to goods distrained by the landlord, when of sufficient amount to pay the rent? If there be any difference in reason between the two cases, it is against the landlord, for he either distrains himself in person, or by a bailiff of his own appointment, and therefore has the goods in his own hands, and under his own control, so that he can, by a sale thereof, satisfy the rent; whereas the execution creditor is in some degree dependent upon the sheriff's movement, for obtaining actual satisfaction of his debt. In Mountney *v.* Andrews, the defendant pleaded to a scire facias upon a judgment against him, that upon a fieri facias directed to the sheriff of the county of Leicester for levying the debt, he, by force thereof, took divers sheep of the defendants for the debt, and detaineth them. And this was held by the court to be a good plea, notwithstanding it was not alleged that the plaintiff was thereby satisfied. The value or sufficiency of the sheep to satisfy the debt is not set forth; and it is plainly inferable that they had not been sold or disposed of by the sheriff, but still remained with him. The principle of this case is recognized and approved by three of the judges in Clark *v.* Withers; first, by Gould, J.; second, by Powell, J.; and, third, by Holt, C.J.: seeing then, it is not requisite that the defendant should set forth in his

plea, the value or sufficiency of the goods taken in execution to satisfy the judgment, it follows, of course, that he cannot be required to prove more than what is contained in it; so that if the goods have been found insufficient to satisfy the judgment, it will lie upon the plaintiff to prove it. Besides, as it has ever been considered oppressive, and, therefore, unlawful, to make a second seizure of the defendant's goods for the same debt, or a second distress of the tenant's goods for the same rent, without some necessity or good cause for it; the presumption is, that goods sufficient were taken, in either case, in the first instance, and therefore it is that it rests upon the plaintiff in the judgment, or the landlord claiming the rent, to repel this presumption by evidence, and to show some justifiable cause for resorting to a second seizure or distress. This doctrine is laid down and established by the decision of the court of King's Bench in Vasper *v.* Edwards or Eddowes, 12 Mod. 658, 1 Ld. Raym. 720. 1 Salk. 248. A cause that was spoken to several times by counsel at the bar, and one in which the judges, after great consideration, delivered their opinions seriatim; Gould, J., dissenting (not as to the goodness of the plea, but in regard to the replication), from Holt, C. J., and Powis and Turton, Justices. The action was trespass, quare clausum fregit, and feeding on the

plaintiff's grass with a pig. The defendant pleaded not guilty as to all, except the trespass by the pig; and as to that, that the plaintiff had taken the pig doing the damage, and impounded it in a common pound at J., and there the said pig ex causa predicta detinuit. The plaintiff, by his replication, confessed the taking and impounding, but alleged that afterwards the pig, without his consent and will, did escape out of the pound; to which the defendant demurred. The plea was held good, and the replication of the plaintiff bad, because he did not undertake to show thereby that the escape was without his default. The distress, it will be observed, being taken damage feasant, was taken merely as a pledge, and could not be sold by the plaintiff; which made the case stronger for him than it would have been, could he have satisfied himself by the sale of the distress. The court held that before the distress is made in such case, the plaintiff has choice either to distrain or bring his action of trespass; but having made his election, and taken a distress in that case, he could never have recourse to any other remedy, till that which he had adopted proved ineffectual through the act of God, or the wrong of the defendant, neither of which was alleged by the plaintiff in his replication. It is clear that the judges, in delivering their opinions as to a distress being prima facie, a

bar to a second distress, or another remedy, make no distinction between a distress for rent and a distress damage feasant; so that if a distress be taken for rent, an action of covenant or debt, or case for use and occupation, cannot be supported for it afterwards, without the landlord's showing that he had lost the benefit of the distress without any default upon his part; or that it had, upon a sale thereof, proved insufficient to pay the whole of the rent, and that his action was only brought for the residue. "It is enough," says Lord Holt, "for him that is distrained, to show a distress taken, and it behooves the other side to show how the possession of it happened to be lost; and since he has lost the possession, he knows best how." And so it may be said in the case before us, that it was enough for the plaintiff to show a prior distress taken for the same rent, but after that was shown, it behooved the defendant, who had the possession and control of the distress, to show what had become of, or been done with it, and if he has parted with it, he best knows, and ought, therefore to show it. He has evidence of its value within his knowledge, or, at least, must be presumed to have, which the plaintiff cannot be expected to have, as it was his duty to have it appraised: and if he sold it, he ought to give an account thereof, by showing the price at which the articles distrained on were

respectively sold; otherwise the fair presumption is, that he is fully paid the amount of his rent; and especially, as would seem from the paper book here, that instead of evidence being given, going to repel this presumption, evidence was given on the part of the plaintiff showing that the former distress was of sufficient value to satisfy the whole amount of the rent claimed. And these are the principles which would seem to govern in the case of a sheriff, who has taken goods under an execution placed in his hands, and would make it his duty to show by proof, after evidence given of his having taken the goods, how he had disposed of them, and what they had brought at sale, if any appeared to be made.[1] We, therefore, think that the district court was wrong in charging the jury, that the plaintiff was bound to show that the goods first distrained had been converted into money, and were sufficient to pay the whole rent. On the contrary, we are of opinion, that it was incumbent on the defendant, in order to justify his making the second distress, to show how, and in what manner the first had been disposed of by him, as it was entirely under his control, and to show that, upon a lawful disposition made of it by him, it had proved insufficient to pay the whole of the rent.

[1] Beale's Exs. *v.* The Com. 11 S. &. R. 299, 304. Little *v.* Delancey, 5 Binn. 272–3.

We consider Lear *v.* Edmonds, Hudd *v.* Ravenor, noticed before, and Lingham *v.* Warren (2 B. & B. 36. E. C. L. R. Vol. 6, p. 10), containing the same principle, as repugnant to the principle of Vasper *v.* Eddowes, which may be regarded as a binding authority upon us, it having been decided before the revolution, and which settles the principle that a party having a right to distrain, cannot, after having made a distress, resort to any other remedy for the same cause, without showing that the distress has been rendered unproductive either by the act of God, or the act of the person from whom it has been taken."[1]

A failure upon the part of the landlord to comply with stipulations in the lease which enter into the consideration therefor, as, for instance, to do certain repairs, takes away his right to receive the rent, or so much of it as is equivalent to the loss sustained by the tenant, and this failure may be given in evidence under the plea of no rent in arrear.[2] Not so where the promise to repair forms no part of the original contract,[3] and the proper measure of damages in such a case is the difference between the worth of the premises in the condition in which

[1] Quin *v.* Wallace, 6 Whart. 452, 464.

[2] Fairman *v.* Fluck, 5 Watts 516.

[3] Phillips *v.* Monges, 4 Whart. 226. Jones *v.* Morris, 3 Exch. 742.

they remained, and that which they would have been in, had the landlord's covenant been performed; or, in other words, so much less as they would have rented for without the covenant.[1]

Where the replevin is by a stranger, the tenant is not a competent witness under the plea of no rent arrear to prove that no rent is due,[2] unless the disability of interest has been removed by statute; but he is competent to prove that the property belonged to the plaintiff, and not to himself, the tenant.[3]

Where issue was joined upon non tenuit, and also upon the plea of nothing in arrear, it was held that the first issue being found for the plaintiff, the second became immaterial; and that the proper course was to discharge the jury from giving a verdict, but that if any verdict was entered, it must be for the plaintiff.[4] If the fact of the defendant being bailiff is put in issue, evidence of a subsequent ratification and approval will be sufficient, although there was no prior command given.[5]

[1] Fairman *v.* Fluck, 5 Watts 517.

[2] Kessler *v.* M'Conachy, 1 Rawle 435. Rush *v.* Flickwire, 17 S. &. R. 82.

[3] M'Conachy *v.* Kessler, 3 Penna. 467.

[4] Cossey *v.* Diggons, 2 Barn. & Ald. 546.

[5] Trevilian *v.* Pine, 11 Mod. 112.

If it is intended to proceed under 17 Car. II., ch. 7, the avowant should be prepared to prove the amount of rent in arrear, and also the value of the distress.

Where issue is taken on a plea of tender of amends to the person entitled to receive them, it seems that evidence of a tender to the bailiff making the distress, the principal being present, is insufficient. But if a distress be made by a bailiff, in the absence of the principal, and the bailiff be proved to be his usual receiver, a tender to the latter seems to be equivalent to a tender to the principal.[1]

Under the plea of property, the defendant is at liberty to show either a general or special property in himself, either by bill of sale, delivery from the plaintiff, or otherwise.[2] And the place of taking is not material. As to what constitutes a delivery see Winston *v.* Leonard, 12 Harris 14.

In England it seems to have been held that this was purely an affirmative plea, and threw the onus

[1] Gilb. Repl. 60. Pilkington *v.* Hastings, 5 Co. 75. Browne *v.* Powell, 4 Bing. 230.

[2] 1 Yeates 197. Emmett *v.* Briggs, 1 New Jersey 53.

upon the defendant. In Pennsylvania,[1] and Maryland,[2] on the contrary, it has been held that this plea throws the burden of proof on the plaintiff in replevin, to prove property in himself. Possession is prima facie evidence of title.[3]

If a person procures the delivery of goods under a fictitious pretext of a purchase upon credit, without intending that the seller shall be paid for them, this is such a fraud as will vitiate the sale, and prevent the property from being changed by the pretended purchase.[4] In order to prove such a fraud, it is not absolutely necessary to prove a false pretence, or other direct artifice, in respect to the individual purchase sought to be avoided.

[1] Marsh *v.* Pier, 4 Rawle 283. Clemson *v.* Davidson, 5 Binn. 399. Mackinley *v.* M'Gregor, 3 Whart. 398.

[2] 6 Harris & Johns. 471.

[3] Lynch *v.* Welsh, 3 Barr 297. Johnson *v.* Neale, 6 Allen 227. Simcoke *v.* Frederick, 1 Ind. 54. Ingersoll *v.* Emmerson, 1 Ind. 76. Chambers *v.* Hunt, 2 New Jersey 552.

[4] Noble *v.* Adams, 7 Taunt. 59. Abbotts *v.* Barry, 5 Moore 98. Peer *v.* Humphrey, 2 Ad. & El. 495. Earl of Bristol *v.* Wilsmore, 1 B. & C. 514. 2 D. & R. 755. Reed *v.* Hutchinson, 3 Camp. 352. Ferguson *v.* Carrington, 9 B. & C. 59. Taylor *v.* Plumer, 3 M. & Selw. 562; 1 M. & Selw. 517. Irving *v.* Motley, 7 Bing. 543. Buffington *v.* Gerrish, 15 Mass. 156. Palmer *v.* Hand, 13 Johns. 434. Mowry *v.* Walsh, 8 Cow. 238. Williams *v.* Merle, 11 Wend. 80. Root *v.* French, 13 Wend. 570. Hodgden *v.* Hubbard, 18 Vt. 504.

It may be shown that the transaction immediately in issue was one of a series of acts, which, taken together, evince the existence of a preconceived design to obtain possession, without paying for them, of a quantity of goods, of which those in question are a part. Thus it may be shown that the quantity of goods purchased on credit from many persons was inordinately large, in proportion to the regular purposes of the apparent business of the party obtaining them; that they were not kept or dealt with in a place or in a manner to indicate that they had been fairly acquired, for the purpose of regular business; that forced sales were made at an under value, of goods bought shortly before upon credit; that the subsequent conversations and deportment of the party were indicative of a design to evade payment, and to make unjust appropriations of the property.[1] The effect of such evidence is for the jury. But this doctrine ought not to be extended so far as to enable the original vendor, who has been imposed upon, to follow goods into the hands of purchasers who have become interested in them, bona fide, in the regular course of business.[1]

[1] Mackinley *v.* M'Gregor, 3 Whart. 370. Rowley *v.* Bigelow, 12 Pick. 307. Buffington *v.* Gerrish, 15 Mass. 156. Mowrey *v.* Walsh, 8 Cow. 238. Knowles *v.* Lord, 4 Whart. 500.

A verdict and judgment between the same parties or their privies, on the same subject matter, whether in the same or in a different form of action, is admissible and conclusive. Therefore, if P. brings an action for the price of goods against N., the record of the judgment is admissible and conclusive on the issue of property, in replevin for the same goods, brought by P. against a purchaser under N.; and this, whether the judgment be for the plaintiff or the defendant in the first action. It need not be specially pleaded, but under the general plea of property is admissible and conclusive;[1] though it is sometimes held that to be conclusive it should be specially pleaded in bar.[2] And where goods have been taken on replevin in one state, and removed by the plaintiff to another, and the defendant in the original suit, or one claiming under him, seeks to regain the possession of the goods by a counter replevin in the new jurisdiction, the record of the prior replevin may be given in evidence under the plea of property, without being specially pleaded, and will entitle

[1] Marsh *v.* Pier, 4 Rawle 273. Penrose *v.* Green, 1 Miss. 774. Bower *v.* Tallman, 5 W. & S. 556.

[2] Cleaton *v.* Chambliss, 6 Randolph 86. Souter *v.* Beymore, 7 Barr 417.

the defendant to a verdict.[1] In Lowry *v.* Hall, C. J. Gibson assigns as one reason for this the fact, that the law requires a present right of possession to support a replevin, and argues that the law has placed the present right of possession with him to whom it has caused the property to be delivered. Hall *v.* Lowry is not referred to by judge or counsel in the case of Lovett *v.* Burkhurst, in which the contrary rule seems to be laid down.[1] Under this plea the defendant will not be allowed to prove that he has made advances on the goods as factor, in order to establish a special property in them by way of lien.[2]

Where the property has been delivered to the plaintiff, and the jury find for him, they should assess the damages for the detention, and he is entitled to compensation for any deterioration in value of the goods replevied, while they were in the hands of the defendant,[3] and also for his time lost and expense incurred in searching for his property,[4] and to the hire of slaves.[4] Where the

[1] Lowry *v.* Hall, 2 W. & S. 129. Morris *v.* De Witt, 5 Wend. 71. Taylor *v.* Royal Saxon, 1 Wall. Jr. 331. But see Lovett *v.* Burkhurst, 8 Wright 174.

[2] Buckley *v.* Handy, 2 Miles 449.

[3] Gordon *v.* Jenney, 16 Mass. 465.

[4] Bennett *v.* Lockwood, 20 Wend. 223. Dorsey *v.* Gassaway, 2 Har. & Johns. 413.

property has *not* been delivered to him, the jury should also find the value of the property. In this case the damages for detention are usually interest on the value from the time of taking, but in proper cases exemplary damages may be given.[1]

If the plaintiff intends to take a verdict under the statute 17 Car. II., he must see that the jury find distinctly the *amount* of the *rent arrear*, and also *the value of the distress*. Both branches are absolutely necessary to entitle him to a judgment on the verdict under the statute.

The verdict for the defendant is simply for the defendant, assessing damages for the unjust caption and detention under the writ. The jury should not value the property when they find for the defendant.[1] This rule has an exception in New Hampshire, where the judgment of retorno habendo seems to be abolished. And in Delaware, in some cases, the defendant is entitled to recover the value of the property replevied in damages.[2]

In Michigan, Tennessee, and Arkansas, under their statutes, the defendant is entitled to have

[1] M'Donald *v.* Scaife, 1 Jones 385. Balsley *v.* Hoffman, 1 Harris 603; Schofield *v.* Ferrers, 10 Wright 438; Jenkins *v.* Steanka, 19 Wis. 126.

[2] Easton *v.* Worthington, 5 S. & R. 132. See post, Ch. "Judgment in Replevin."

the value of the goods, and damages for their detention, found by the jury. In Tennessee, the damages are to be assessed at six per cent. on the value from the time of taking. In Michigan, damages may be given to any amount not exceeding fifty per cent.

Where the goods have been delivered to the plaintiff in replevin, he will not be allowed to discontinue, and there may be cases in which the same rule would be adopted where the goods remained with the defendant. The avowant, though an actor, cannot discontinue.[1] But it seems the plaintiff is not obliged to take a verdict, but may suffer a non-suit.[2] If he does, the defendant may take an assignment of the bond. The defendant, however, cannot non-suit the plaintiff, because he neglects to have his case put down for trial.[3]

[1] Broom *v.* Fox, 2 Yeates 530. Long *v.* Buckeridge, 1 Str. 106, 112.

[2] Murgatroyd *v.* M'Clure, 4 Dall. 342. Gibbs *v.* Bartlett, 2 W. & S. 33. Berghoff *v.* Heckwolf, 26 Mo. 511.

[3] Jones *v.* Concannon, 3 T. R. 661. Barrett *v.* Forrester, 1 Johns. Cas. 247. Poltz *v.* Curtis, 9 Wend. 497.

CHAPTER XI.

OF THE JUDGMENT.

THE judgment in replevin is a matter of some nicety, and should always be entered under the direct supervision of counsel. Where the property has been delivered to the plaintiff in the replevin, and he succeeds, he has judgment in his favor, with damages for the detention. If this judgment be upon demurrer, the amount of the damages must be ascertained by a writ of inquiry. If on verdict, the jury assess the damages.[1] Compensation for time lost, and expense incurred in searching for property wrongfully taken or detained, ought to be included in the sum found.[2] If the defendant claims property, and puts in a claim property bond, by which the delivery of the property to the plaintiff is prevented, and the issue of property is found in favor of the plaintiff, he has judgment in his favor for the value of the goods which the jury must find, and damages for

[1] Gilb. Repl. 160.

[2] Bennett *v.* Lockwood, 20 Wend. 223.

the detention. And such, it is apprehended, must be the judgment for the plaintiff in all cases where the goods have not been delivered to him by the sheriff in the first instance.[1]

If the plaintiff declared in the detinet, and the defendant appears and makes default, the plaintiff shall have judgment to recover all in damages, as well the value of the chattels as damages for taking them.[2] And this, it is said, is a shorter way than to sue a withernam and capias for a return of the beasts.[3]

The 186th section of the Code of Procedure in New York seems to contemplate a judgment of retorno habendo in favor of the plaintiff in such a case, though no provision is made for entering such a judgment.

The judgment for the defendant at the common law is pro retorno habendo. And, it is said, if the

[1] Gilb. Repl. 126. Bro. Abr. Repl. 15, p. 208. Easton *v.* Worthington, 5 S. & R. 130. Etter *v.* Edwards, 4 Watts 68. Moore *v.* Shenk, 3 Barr 20. Philips *v.* Harriss, 3 J. J. Marshall 121. Fisher *v.* Whoollery, 1 Casey 197. Frazer *v.* Frederick's, 4 Zabr. 162.

[2] Fitz. N. B. 159, c. 7th edit. Easton *v.* Worthington, 5 S. & R. 131. Marsh *v.* Pier, 4 Rawle 290. Hosack *v.* Weaver, 1 Yeates 478. Hardy *v.* Metzgar, 2 Yeates 347.

[3] Gilb. Repl. 126.

defendant avows, and hath judgment, he shall have return of the beasts awarded; because the avowry allows the caption, but avoids the injustice thereof, by showing he had good cause of taking such distress; and, consequently, if such cause of caption be approved of by the court, they must, in justice, return the pledge to the avowant.[1] But on tender or payment of damages, satisfaction would be entered on the judgment, or the plaintiff might, after the goods returned, bring detinue on tender of damages, because notwithstanding the judgment for return irreplevisable, the goods still remain as pledge: and if the defendant refuse to make restitution of the pledge, upon tender of the rent, his detention then is unlawful.[2]

In Delaware, on an avowry for rent, the jury find the sum due for rent arrear, and judgment is given for any sum so found or ascertained, as debt, with costs of suit; and like execution is had as on judgments for debt:[3] in that state interest is not allowed on rent arrear.[4]

Where the goods have not been taken by way of distress, but the action is founded on the right

[1] Gilb. Repl. 167.

[2] Gilb. Repl. 172. Easton *v.* Worthington, 5 S. & R. 132.

[3] Clark *v.* Adair, 3 Harring. 113.

[4] Caldwell *v.* Cleadon, 3 Harring. 420.

of property, and the goods have been delivered on the replevin to the plaintiff, and there is a verdict for the defendant, he shall have judgment pro retorno habendo, without an avowry, because the finding of property in the defendant destroys all right in the plaintiff, and if he have no right he ought to have no benefit from his unjust complaint; and, therefore, the court award restitution to the defendant, out of whose possession the goods were taken:[1] and so of the judgment on all pleas that disaffirm property in the plaintiff. If the jury find the value of the property, it is merely surplusage, and may be disregarded in entering the judgment, which should be a judgment of retorno habendo.[2]

But, according to Sir Matthew Hale in his Commentary on Fitzherbert, the jury would have done right in valuing the property, if the beasts had died after the caption, or were sold, so that the defendant could not have a return, in which case he would be entitled to recover all in damages.[3] In a case in Delaware in which corn had been reple-

[1] Broom et al. *v.* Fox, 2 Yeates 530. Easton *v.* Worthington, 5 S. & R. 132. Moore *v.* Shenk, 3 Barr 10.

[2] Easton *v.* Worthington, 5 S. & R. 132.

[3] Fitz. N. B. 159, note c. Hale's edition.

vied, it was held this was the true course to pursue on a verdict for the defendant on a plea of property; the article being perishable in its nature, the presumption, unless the contrary was shown, was, that it could not be delivered on the retorno habendo, and therefore judgment should be given for the defendant for its value.[1]

Under the statutes of New Hampshire there is no judgment of retorno habendo; but on a verdict for defendant the jury are required to find the value of the property in damages, for which the defendant is entitled to judgment and execution in the ordinary form.[2] A like judgment for the defendant is allowed by the statutes of Maine, Vermont, Massachusetts, New York, Kentucky, and Arkansas sometimes in the discretion of the court and sometimes of the defendant.

The law, as held in Delaware, has some advantages over that of Pennsylvania, as laid down in Easton *v.* Worthington, if the doctrine of that case is to be considered as restricting the judgment for the defendant, in all cases, to a judgment of retorno habendo. The Delaware law avoids the delay and

[1] Clark *v.* Adair, 3 Harring. 113.

[2] Bell *v.* Bartlett, 7 N. Hamp. 178.

expense incident to a proceeding on the bond, where the plaintiff has the means of satisfying the judgment: a great point, as the judgment of retorno habendo is practically of little use in obtaining a restitution of the property in specie, and after a proceeding on the bond, a sum for damages is all that the defendant receives.

If the defendant, by his pleading, admits the property to be in the plaintiff, he cannot have a judgment of retorno habendo without an avowry or cognizance, or a suggestion in the nature of an avowry or cognizance, because he leaves the plaintiff a right to retain his goods, when he neither denies the property to be in the plaintiff, nor shows any cause why he should take them as a pledge.[1] If the tenant offers his rent at the time of his distress taken, or before impounding, and the lord refuse to accept it, he shall never after have return of the beasts, though the rent be in arrear; because the distress is but a pledge for the rent, and when the rent is offered, the pledge ought to be restored; consequently, the court will never award the return of the pledge to the lord, which he ought to

[1] Gilb. Repl. 168. Wilk. Repl. 92. Simpson *v.* M'Farland, 18 Pick. 427. Whitwell *v.* Wells, 24 Pick. 25. Bonner *v.* Coleman, 3 B. Munroe 464.

have restored to the plaintiff before the replevin was taken out.[1]

Where the defendant has removed the goods, so that they are not taken on the replevin, or where he retains them by a claim of property, he is not entitled to a judgment of retorno habendo. That judgment has no existence except in a case where the goods have been replevied and the verdict is for the defendant. If such judgment is entered, it is erroneous,[2] and a remittitur of the damages will not cure the error, as that is no release of the judgment for a return.[2]

By the statute 7 Henry VIII., ch. 4, the defendant in replevin is entitled to damages for the unjust detention; when the cause comes to trial the jury assess these damages, and they form part of their verdict.[3] When the judgment is by default, a writ of inquiry must be issued to ascertain the damages and costs, upon the return whereof, final judgment is entered up for the defendant to recover as well the damages and costs assessed by the jury as the

[1] Gilb. Repl. 169.

[2] Moore *v.* Shenk, 3 Barr 20. Harrod *v.* Hill, 2 Dana 165. Schofield *v.* Ferrers, 10 Wright 438.

[3] 1 Wms. Saund. 195, n. 3. Smith *v.* Aurand, 10 S. & R. 92.

costs adjudged by the court,[1] and this is in addition to the retorno habendo for the goods.[1]

In replevin for several articles where the plea is property, and the jury find property, in some of the articles, to be in the plaintiff, and in the others to be in the defendant, assessing to each the proper damages; separate judgments must be entered in favor of each.[2] If the articles were delivered to the plaintiff, the judgment in his favor will be the ordinary judgment for the plaintiff, and will cover the damages found for the caption and detention of the articles, as to which the property has been found for him. The judgment for the defendant will be a judgment of retorno habendo for the articles, the property of which is found in him, together with damages for their caption and detention on the writ.[3]

The following observations, on this subject, are translated from Lutwich, page 1197, "I find that there is great variety, and sometimes (as it appears) some contrariety in the judgments in re-

[1] 1 Wms. Saund. 195, n. 3. Smith *v.* Aurand, 10 S. & R. 92.

[2] Clark *v.* Keith, 9 Ohio R. 72. Powell *v.* Hinsdale, 5 Mass. 343. Poor *v.* Woodburn, 25 Vt. 334.

[3] Winnard *v.* Foster, Lutw. 1190. Clark *v.* Keith, 9 Ohio R. 72. Powell *v.* Hinsdale, 5 Mass. 343.

plevin, when part is found by verdict, or adjudged on demurrer for the plaintiff, and part for the defendant. As the precedents which I have met with are in two books, in private hands, and it may be of service to others to have an account of them, I insert a brief note of them. More especially, as I find no similar judgments in any other books of precedents.

In a book printed in 1655, called judgments, &c., or, commonly, the First Book of Judgments, page 115, there is a precedent, Trin. 9, Car. I. Rot. 1360, where, in a replevin against A. and B., verdict was obtained by the plaintiff against A., and damages and costs taxed, and B. was acquitted of the caption, and damages and costs taxed for him, and judgment was given for the plaintiff for his damages, and costs taxed by the jury, and the plaintiff was fined as to the defendant B. But no judgment for damages or costs was given for him, because, by the law, no such damages and costs are allowed.

In the same book, page 220, is another precedent, Trin. 11, Car. I. Rot. 1293, where property in a heifer, part of the chattels taken, was found to be in defendant, and damages and costs taxed by the jury for him. And the other issues were found

for the plaintiff, and damages and costs taxed for him. But no regard was had to the damages and costs taxed by the jury for the heifer, because such damages and costs are not allowed by the law, and the plaintiff had judgment for his damages, and costs taxed for him, &c. And the defendant had judgment given for him to recover his damages, by reason of the premises, and in such sum, by the discretion of the justices, to the defendant on his request. And it was sustained, according to the form of the statute, and so adjudged by the court, which (as it seems) is to be intended of the statute 4 Jac. I., ch. 3, 2 Cro. 520. Samuel and Hodder's case, p. 204.

And in another book called A Second Book of Judgments, &c., p. 204, No. 9, there is a precedent where judgment was given for the plaintiff for damages and costs taxed by the jury, when the property of part of the goods was found to be in the plaintiff as administrator, and for the residue, that the property was in the defendant, and for this residue the plaintiff was amerced, and the defendant acquitted. But no return was adjudged to him, or damages and costs given to him, but it does not appear whether this judgment was before or since the statute 4 Jac. I., ch. 3.

And in the same book, page 210, No. 28, is another, Hill. 14 Eliz., Rot. 1502, where an issue, as to part of the goods, was taken on non cepit, and another issue as to the residue; and the issue on non cepit was found for the plaintiff, and the other issue for the defendant; and several judgments were given for each for the damages and costs assessed by the jury, before the Stat. 4 Jac. C. 3.

And on the same page, No. 29, Pach. 36 Eliz., Rot. 1316, there is a precedent where an avowry was for a rent and an amercement, and the verdict was for the defendant, as to the rent, and for the plaintiff as to the amercement; and judgment was given that the plaintiff should take nothing as to the rent, and that the defendant should be amerced as to the amercement, and that the defendant should have a return, and his damages assessed by the jury; but no damages or costs were given to the plaintiff.

In the same book, page 211, No. 31. There is a precedent, Mich. 43 and 44 Eliz., Rot. 918, between Parsham *v.* Norton, in which a joint avowry was made for the taking of all the beasts, for 10*s.* for an amercement, 12*s.* 1*d.* for rent, and 24*s.* 2*d.* for relief; and for the relief and amercement two several

demurrers were joined, and an issue taken as to the rent; and on the demurrer as to the amercement judgment was for the plaintiff. And as to the relief for the defendant, and he had judgment for a return as to the 24*s.* for relief; and the plaintiff recovered no costs or damages, because the avowry was joint, and the defendant had cause of distress.

And in the same book, page 215, No. 40, Trin. 41 Eliz., Rot. 1812, where two several avowries were made for two several causes, one for an amercement in a court leet, the other for another cause, and the issue on the amercement was found for the avowant, and it was adjudged that he should have a return of his goods taken on the amercement, but no damages and costs, because they were not due by the statute on an avowry for an amercement in a court leet. The other issue was found for the plaintiff, and he had judgment for his costs and damages assessed by the jury.

N. B.—The judgment, in the principal case of Winnard *v.* Foster, for the plaintiff and defendant to have several costs is different from that of any of the precedents above mentioned, because the avowry is joint, and a joint issue taken as to the property in all the goods, and as to part, the property was found in defendant, and as to part, in plaintiff."

By the 17 Charles II., ch. 7, it is enacted that "Wherever the plaintiff in replevin, upon a distress for rent, shall be non-suit before issue joined in any court of record, the defendant making a suggestion, in nature of an avowry or cognizance for the rent in arrear, to ascertain the court of the cause of the distress—the court, upon his prayer, shall award a writ to the sheriff, to inquire of the sum in arrear, and the value of the goods or cattle distrained, and that upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of rent, in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount to that value, then so much as the value of the goods or cattle distrained shall amount unto with his full costs of suit; and shall have execution for the same by fieri facias, elegit, or otherwise." And by the same statute, the like proceeding may be had where judgment is given for the avowant, or for him that maketh cognizance for any kind of rent. And it is thereby further enacted, that "in case the plaintiff shall be non-suit after cognizance or avowry made and issue joined, or if the verdict shall be given against the plaintiff, then the jurors that are impanelled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum in arrear, and the value of the

goods or cattle distrained. And thereupon the avowant, or he that maketh cognizance, shall have the like judgment," &c., as before.[1] Under this statute the defendant or avowant is still entitled to his judgment of retorno habendo, for the statute has not altered the judgment at common law, but has only given a further remedy to the avowant. When the jury who try the issue omit to inquire of the rent in arrear, or of the value of the goods, pursuant to the statute, no writ of inquiry can be afterwards awarded to supply the omission.[2]

If the jury proceed under the act, they must not only find the amount of the rent, but the value of the goods. They must find both, for the act must be strictly complied with.[3] If through mistake or otherwise any of the requirements of the statute are omitted, so that the defendant cannot take judgment under it, he is still entitled to his judgment of retorno habendo at common law.[4]

[1] Gilb. Repl. 163, 164.

[2] Gilb. Repl. 165. 1 Lev. 255. 1 Salk. 205. Cas. Temp. Hardw. 297, 298. 1 Wms. Saund. 195, b. n. 3. Rees *v.* Morgan, 3 T. R. 349. Williams *v.* Smith, 10 S. & R. 206.

[3] Williams *v.* Smith, 10 S. & R. 206.

[4] Gilb. Repl. 165. 1 Lev. 255. 1 Salk. 205. Cas. Temp. Hardw. 297, 298. 1 Wms. Saund. 195, b. n. 3. Rees *v.* Morgan, 3 T. R. 349. Williams *v.* Smith, 10 S. & R. 206. Gamon *v.* Jones, 4 T. R. 509.

We are told by Kennedy, Justice, in Quinn *v.* Wallace, 6 Wharton 458, that this statute has never been in force in Pennsylvania, either by adoption or otherwise. The dicta of Gibson, C. J., in Kemmel *v.* Kint, 2 Watts 431, and of Duncan, J., in Williams *v.* Smith, 10 S. & R. 206, would seem to imply the contrary. The statute is not reported by the judges. Ever since the decision in Albright *v.* Pickle, 4 Yeates 264, however, the jury has been allowed, in an issue of no rent in arrear, to find the amount of rent in arrear, and also to value the goods. This is the prevailing practice in the city and county of Philadelphia.[1] Whether the statute, as such, is in force or not, its provisions seem to be recognized as part of the common law of Pennsylvania.

Both parties in replevin are entitled to rules to declare and plead, &c., as in other actions. The judgment by default for the plaintiff, where the goods have been delivered to him, is for damages for the detention to be ascertained by writ of inquiry. Where the goods have not been delivered, it is for the value of the goods and damages for the detention to be ascertained in the same way.

[1] Howard *v.* Johnson, 1 Ash. 58.

The judgment by default in favor of the defendant was at common law a judgment of retorno habendo,[1] to which the statute 7 Hen. VIII., ch. 4, added damages for the unjust caption and detention under the writ. The judgment of retorno habendo is, that the plaintiff take nothing by his writ, but that he and his pledges to prosecute be in mercy, and that the defendant have a return of the goods, &c., and that he recover his damages on occasion of the premises according to the form of the statute, followed by an award of a writ 1st, de retorno habendo, and 2d, to inquire of the damages; or the defendant may enter remittitur damna for the damages, and by the final judgment on those statutes, claim his costs only.[2] The statute 7 H. VIII., ch. 4, is reported by the judges to be incorporated in Pennsylvania.

The statute 17 Car. II., ch. 7, applies to four cases. 1st. Where the plaintiff shall be non-suit before issue joined, in which case, the statute, except where the non pros. is after avowry or cognizance, requires a suggestion in the nature of an avowry or cognizance. This is usually made after judgment.[3] After such judgment and suggestion,

[1] Comyn Dig. Pleader, 3 K. 30.

[2] Wilk. Repl. 72.

[3] Wilk Repl. 68 Comyn Dig. Pleader, 3 K. 30.

a writ of inquiry issues, to inquire of the sum in arrear at the time of the distress, and of the value of the goods distrained; and after the writ of inquiry is executed, the defendant is entitled to a final judgment, to recover the arrearages of such rent, if the goods be of that value, or to the value of the goods, if less than the rent. 2d. When the plaintiff shall be non-suit after cognizance or avowry, and issue joined. 3d. When there shall be a verdict against the plaintiff, the jury impanelled to try the issue, and they only, at the prayer of the defendant, may in this and the preceding case, where the non-suit is at the trial, inquire of the arrears of rent, and the amount of goods, and find the same by their verdict. The judgment is in both cases for the arrears of rent, or so much thereof as the goods distrained shall amount to.[1] 4th. Where there shall be judgment on demurrer against the plaintiff, there must be a writ of inquiry; but the inquiry need not be of the arrears of rent, but of the goods only, for the statute directs the writ of inquiry to be awarded to inquire only of the value of the distress; the judgment in such case is to recover the arrears of rent, if the goods or cattle amount to that value; if not, the amount of the goods or cattle distrained.

[1] Wilk. Repl. 69. Comyn Dig. Pleader, 3 K. 30.

The costs in all these cases are stated in the statute to be full costs of suit.

If there is a service of the writ, and the defendant does not appear within the regular time, there will be judgment for the plaintiff by default;[1] or the better practice is to enter a common appearance for the defendant, and rule him to plead.[2]

The statute in Maryland provides that if the defendants shall be returned summoned, and shall not appear in person or by attorney on or before the fourth day of the next term to that at which the return shall be made, the court are authorized and required to enter up judgment for the plaintiff, for the property replevied and nominal damages.[3]

If there be error both in the declaration and in the avowry, the defendant shall not have judgment for a return.[4]

The effect of the judgment for the plaintiff in replevin, where the goods have not been delivered

[1] James *v.* Moody, 1 H. Bl. 281.

[2] See ante, page 121, and post, Chapter XV. Crofut *v.* Chichester, 3 Phila. 457.

[3] 1 Dorsey's Laws of Maryland, 827.

[4] Allen *v.* Darley, 1 Show. 99.

to him, and where no claim property bond has been filed, but where he has obtained a verdict in damages for their value, is perhaps not settled in Pennsylvania.[1]

The doctrine, in England, is asserted to be, that the recovery of a judgment in trespass, trover, or replevin, for the value of a specific article, changes the property and vests it in the defendant, without regard to the satisfaction of the judgment.[2] The dictum, in Brown *v.* Watton, in which the doctrine is asserted as regards the judgment in trepass, is opposed, by what is said in Jenkins' Centuries, to wit, "A. in trespass against B. for taking a horse, recovers damages, by this recovery and execution *done thereon*, the property of the horse is vested in B., solutio pretii emptionis loco habetur."[3] And the Touchstone is to the same purpose, "where one doth take my goods as a trespasser, and I recover damages for them upon a suit in law; in this case the law doth give him the property of the

[1] Taylor *v.* The Royal Saxon, 1 Wall. Jr. 317. Fisher *v.* Whoollery, 1 Casey 198. Lovett *v.* Burkhardt, 8 Wright 174.

[2] Brown *v.* Watton, Cro. Jac. 73. Adams *v.* Broughton, Stra. 1078, Andr. 18. Moor *v.* Watts, 1 Ld. Ray. 613. Morris *v.* Robinson, 3 B. & C. 196, per Littledale, J. Keyworth *v.* Hill, 3 B. &. A. 685, per Holroyd, J

[3] Jenk. 4 Cent. case 88.

goods, because *he hath paid for them*,"[1] which could only be if satisfaction were had upon the judgment, which would seem to be the meaning of "recover damages." In Adams *v.* Broughton,[2] and in Brown *v.* Watton,[3] the doctrine is applied to trover; but these cases are so brief as to leave the reader in doubt, whether there was not satisfaction of the judgment in both instances. The report in Cro. J. indeed makes one of the judges say, that the judgment changes the property, but it would seem that the defendant in the first suit was actually in execution, which was no doubt a satisfaction. The report in Yelverton, it is true, asserts that the judgment is conclusive, but apparently on other grounds than a change of property. Metcalf, in a note to this case, in his edition of Yelverton, has shown clearly that the reasoning in that case is fallacious. In Moor *v.* Watts,[4] Lord Holt is made to say, "In replevin for cattle with adhuc detinet, damages given for the cattle will change the property;" but in the report of the same case in

[1] Shep. Touch. Ch. 9, of a gift, 227.

[2] Strange 1078. Andr. 18.

[3] Yelv. 67, 68. Cro. Jac. 73.

[4] 1 Ld. Ray. 614. 12 Mod. 428. In Knowles *v.* Lord, 4 Whart. 505, Judge Sergeant seems to adopt what is said in Lord Raymond; but the point was not involved, and does not seem to have been argued.

12th modern, the important words, "on payment thereof," occur between the words "cattle" and "will:" thus, "damages given for the cattle *on payment thereof* will change the property.

In Drake *v.* Mitchell,[1] a case indeed arising ex contractu, Lord Ellenborough said, that he always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment was recovered, operating as a change of remedy, from its being of a higher nature than before; and that a judgment recovered, in any form of action, was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and, until then, it would not operate to change any other collateral concurrent remedy which the party might have. This is now the recognized law in the Courts of the United States, New York and Maryland.[2] And Kent says, it is the more reasonable, if not the more authoritative conclusion on the question.[3] In South Carolina and Maine, the opposite doc-

[1] 3 East 251.

[2] Curtis *v.* Grout, 6 Johns. 168. Osterhout *v.* Roberts, 8 Cowen 43. Livingston *v.* Bishop, 1 Johns. 290. Hepburn *v.* Sewell, 5 Har. & Johns. 211. Lovejoy *v.* Murray, 3 Wall. 1.

[3] 2 Kent Com. 389.

trine is held.[1] It is doubtingly held in Maine; but there execution must be issued, which is said to be a determination of the plaintiff's election to seek his satisfaction in that particular quarter.[2]

In Pennsylvania the question has been approached in several cases. First in the case of Floyd *v.* Browne administrator of Truxton.[3] This was an action of assumpsit, against the administrator of a sheriff, to recover a certain sum of money, raised by the sheriff by the sale of personal property of the plaintiff, on an execution against a third party. Floyd had brought a previous action of trespass against the plaintiff in the execution and others, upon which he had obtained a verdict, and sued out execution, which, however, was stayed by special injunction. The defendant pleaded a special plea of former recovery, which set forth the proceedings in the action of trespass. To this plea the plaintiff demurred, and the court gave judgment for the defendant on the demurrer; and on writ of error, the supreme court affirmed the judgment. It is difficult to say exactly upon

[1] Rogers *v.* Moore, 1 Rice 60, 87. Thompson *v.* Rogers, 2 Brevard 410. Carlisle *v.* Burley, 3 Greenl. 250.

[2] White *v.* Philbrick, 5 Greenl. 147. See Elliott *v.* Potter, 5 Dana 300. Campbell *v.* Phelps, 1 Pick. 62.

[3] 1 Rawle 121.

what ground the case is decided. But it seems to rest principally on the position that the plaintiff having brought trespass in the first instance, against some of the parties, he could not afterwards put such a face on the transaction as would enable him to support assumpsit against others; and the learned judge concludes, "that having recovered in trespass, the plaintiff cannot again recover in an action which is not a concurrent remedy; a recovery in trespass, producing the same bar that is produced by a recovery in trover, against a recovery in *assumpsit* of the price of the same goods." In a word, that a party cannot make the same transaction to suit his purpose at one time a tort, and at another a contract.

In Marsh *v.* Pier,[1] Judge Kennedy considers the question at length, and inclines to the opinion that, by the English authorities, the property is changed by the judgment. But the question did not arise.

In Fox *v.* The Northern Liberties,[2] the question, though not arising in the case, is again elaborately argued, by Judge Kennedy, and the same opinion avowed, which he had previously expressed in

[1] 4 Rawle 273. [2] 3 W. & S. 103.

Marsh *v.* Pier. Judge Kennedy supports his opinion, with the ability for which he was so distinguished. But, as the point, not being involved, cannot be considered as settled in that case, it may, perhaps, be as well to point out what appear to be the defects in the judge's argument. After stating that the joint trespassers are liable, either jointly or severally, to the party injured, and that he may sue each separately, at the same time, or consecutively, and prosecute his suit against each, to judgment; and having obtained judgment against each, he has a right to elect to proceed by execution, to enforce payment of any one of the judgments he pleases; and that a judgment of recovery against one would not bar the plaintiff in his action against another, without payment or satisfaction having been made to the plaintiff in some way. He goes on, "but where the trespass consists in forcibly taking the personal property from the owner thereof, by one who sells it to a third person, and the owner sues the trespasser, and recovers judgment against him for the value of the property, as also for the tortious taking of it, he cannot, I apprehend, afterwards either retake the property, or sue the vendee of the trespasser, for, or on account of it; because his recovery of the judgment against the trespasser, for the value of the property, is regarded as the price

thereof, which he has sought the law to allow him, and may, therefore, be considered as a sale and transfer of his right in the property to the defendant."

"By obtaining the judgment, he acquires a right to demand and receive, from the defendant, a specific sum of money in lieu and in satisfaction of his right to the property, and ought not, therefore, to be permitted to seize or claim the property itself afterwards."

This is ingenious, certainly; but as the property has been taken from the plaintiff against his will, and no price has or can be fixed upon for it by the parties, the proceeding in the action of trespass would seem to resemble more the agreement for a sale than the sale itself; being the method for ascertaining the price, when the parties cannot agree, and resulting in what the law might regard as a contract to sell for cash, at the sum settled by the judgment. But, like any other agreement for a sale for cash, it would be in fieri, and confer no title till the money was paid.

Besides, it is not perceived why there should be a distinction in the effect of the judgment in this case, and the judgment against one of several joint

trespassers. In the latter case, the judgment, confessedly, is no defence, until satisfaction, to any number of actions against others for the same trespass. Why may it not as well be said, that the judgment first obtained, is a compensation for the injury which he has sought the law to allow him, and may, therefore, be considered as a settlement of the matter? By obtaining the judgment, he acquires a right to demand and receive, from the defendant, a specific sum of money in lieu and satisfaction of his injury, and ought not, therefore, to be permitted to seek redress from anybody else.

But, however, this theory of purchase and sale, through the instrumentality of the court, may hold in trespass, where the party knows, when he begins his action, that he can only recover the value of the goods, not the goods themselves, it does not seem to apply, with equal force, to the action of replevin, where the plaintiff, by his form of action, disclaims any intention to acquiesce in the loss of his property, but goes expressly for a return of it in specie, which he is only prevented from obtaining by the success of the defendant in secreting it from the officer. As regards the purchaser, the hardship is no greater in allowing an action to be brought against him when he has purchased after the commencement of the action against the origi-

nal wrong-doer, than it is in allowing such action to be brought against him in the first instance, which, without doubt, may always be done, subject to the exceptions before stated in chapter second.

The practical difficulties are strongly urged by Judge Kennedy, in a subsequent part of his opinion. The answer which occurs to me is that the cases suggested by him must be treated like several judgments against joint trespassers, the satisfaction of any one of which will discharge the others; with the further observation, that in replevin there seems to be no objection to finding the value and damages in separate sums. The point is said by Judge Rogers to be no longer an open one in Pennsylvania.[1]

[1] Merrick's Estate, 5 W. & S. 17.

CHAPTER XII.

OF THE COSTS IN REPLEVIN.

Costs were not recoverable at common law by either plaintiff or defendant. The statute of Gloucester, 6 Edw. I., ch. 1, § 2, gave the plaintiff a right to costs in all cases where he was entitled to damages. Under this statute, the plaintiff in replevin is entitled to costs.[1]

The defendant or avowant in replevin, although he was in fact an actor, was not within the words of the statute of Gloucester, and was not entitled to costs until the statute 7 Henry VIII., ch. 4, which gives damages and costs to every avowant, and to every person making cognizance, or justifying as bailiff in replevin, for any rent, custom, or service, if his avowry, cognizance, or justification be found for him, or the plaintiff be otherwise barred. The statute 21 Henry VIII., ch. 19, extends the same benefit to defendants avowing, making cognizance, or justifying, for damage feasant.[2] These statutes

[1] Gilb. Repl. 165. Tidd 979. Comyn's Dig. Tit. Costs, A. 1.

[2] See Appendix.

have been held to extend to the case of an estray,[1] and to an avowry by an executor under the statute 32 Hen. VIII., ch. 37, although that statute is silent as to costs.[2]

The case of a defendant claiming property is said to be casus omissus under the statutes Henry VIII., so that he is not thereby entitled to costs.[3] But the statute 4 James I., ch. 3, remedies the omission by giving costs to the defendant in all cases where they could have been claimed by the plaintiff, had he succeeded.[4] Where the suit abates, these statutes do not give costs to the defendant.[5]

The statute 17 Car. II., ch. 7, gives full costs when the defendant proceeds on that statute. The statute 11 Geo. II., ch. 19, which gives the common avowry, enacts, that, "If the plaintiff should become non-suit, discontinue, or have judgment against him, the defendant should recover double costs of suit." The same phraseology is used in the Pennsylvania Act, 21st March, 1772, sec. 10.

[1] Haselip *v.* Chaplen, Cro. Eliz. 257, 329.

[2] Gilb. Repl. 166. Farvell *v.* Keightly, 2 Roll. Rep. 457.

[3] Turner *v.* Gallillee, Hard. 153. Gilb. Repl. 166.

[4] Gilb. Repl. 166.

[5] Comyn's Dig. Tit. Costs, A. 4. Comyn's Rep. 122. 2 Lord Raymond 788.

The defendant in replevin who avows generally under 11 Geo. II., is entitled to double costs in his judgment, notwithstanding he may have pleaded many other avowries, with a view merely to try a title.[1]

The statute is confined to three specific cases, non-suit, discontinuance, and judgment; and, therefore, where, in replevin, the cause not being at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favor of the defendant, it was held by the court of king's bench, that he was not entitled to double costs.[2] It has been held by the district court for the city and county of Philadelphia, that the judgment against the plaintiff to entitle the defendant to double costs of suit, must be a final judgment.[3] An award of arbitrators, therefore, in favor of an avowant, does not require payment of double costs by the plaintiff on appeal from the award.[3] In taxing the costs under this act, it should be remembered that costs and fees are altogether different: costs being an allowance to the party for

[1] Johnson *v.* Lawson, 2 Bing. 341. Leominster Canal Company *v.* Cowel, 1 B. & P. 213. Staniland *v.* Ludlam, 4 Barn. & Cress. 889.

[2] Gurney *v.* Buller, 1 Barn. & Ald. 670.

[3] Hartley *v.* Bean, 1 Miles 168.

expenses actually paid, or for which he is responsible to the officers of the court, and fees being a compensation to the officers for services due by the party to whom they were so rendered. The question whether the plaintiff in replevin is bound to pay double fees to the officer employed by himself, is entirely different from the question whether he is bound to pay his successful antagonist double the amount of his costs and charges laid out and expended about the suit. The rule is, that as between a party and the officer, charges for services rendered to him are fees; as between the parties to the cause, charges actually paid by the successful party, or for which he is responsible to the officer, are costs. The latter only being considered costs, of course those only are to be doubled.[1] The costs are recoverable from the sureties in the replevin bond.[2] If the plaintiff be nonprossed, the defendant shall have his costs as in other cases.[3]

Under the statute 4 Anne, ch. 16, sect. 4, 5, which allows several pleas, and which has been construed to extend to avowants in replevin,[4] the

[1] Musser *v.* Good, 11 S. & R. 248; but see Staniland *v.* Ludlam, 4 Barn. & Cress. 889.

[2] Tibbal *v.* Cahonn, 10 Watts. 232.

[3] Davies *v.* James, 1 T. R. 372.

[4] Stone *v.* Forsyth, Dougl. 708, 9, note 2.

costs of double pleadings are left in the discretion of the court. The form for entering judgment for costs states it to be by discretion of the court.[1]

Where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause for pleading the matter on which these issues are joined; and in such case it is the practice in England not only to allow the costs of the pleadings, but also the costs of the trial of the issue.[2] And the costs of such parts of the pleadings and briefs, and of such witnesses as are not applicable to the points on which the verdict for the successful party proceeds, must be deducted from the general costs.[3]

In replevin for several articles, if the jury find for the plaintiff as to part of them, and for the defendant as to part, assessing to each the proper

[1] Wilk. Repl. 106.

[2] Brooke *v.* Willet, 2 H. Black. 435. Dodd *v.* Joddrell, 2 T. R. 235.

[3] Penson *v.* Lee, 2 Bos. & Pul. 335. 2 Fox & Smith's Irish Rep. 47. Cook *v.* Green, 1 Marsh. 234. Cook *v.* Green, 5 Taunt. 594.

damages, separate judgments will be entered in favor of each with full costs.[1] The act of 3d April, 1799, declaring illegal a replevin for goods and chattels, levied, seized, or taken in execution, or by distress, or otherwise, by any sheriff, &c., in case of its violation gives treble costs to the defendant.[2] The avowant in replevin, residing out of the jurisdiction of the court, may be compelled to give security for costs.[3]

[1] Winnard *v.* Foster, Lutw. 1190. Clark *v.* Keith, 9 Ohio R. 72. Powell *v.* Hinsdale, 5 Mass. 343. Poor *v.* Woodburn, 25 Vt. 234.

[2] 1 Sm. Laws 470.

[3] Selby *v.* Crutchley, 4 Moore 280. s. c. 1 Bro. & Bing. 505.

CHAPTER XIII.

OF THE EXECUTION.

The plaintiff in replevin is entitled to execution by fieri facias, and capias ad satisfaciendum, and in England by elegit.

There are several executions for the defendant. First, on the judgment of retorno habendo, at common law, he is entitled to his writ of retorno habendo,[1] by which the sheriff is commanded to cause the goods and chattels to be returned to him. This it is seldom possible for the sheriff to do. The distress creates no lien upon the goods, and they remain in the hands of the plaintiff in replevin, liable to any subsequent distress, or to any disposition which he may choose to make of them.[2]

[1] A doubt is expressed by the supreme court, in Gibbs *v.* Bartlett, 2 W. & S. 34, as to whether this writ was ever issued in Pennsylvania: there are numerous instances of it on the records of the courts of the city and county of Philadelphia.

[2] Woglan *v.* Cowperthwaite, 2 Dall. 68. Bradyll *v.* Ball, 1 Brown's Ch. Rep. 427. Frey *v.* Leeper, 2 Dall. 131. See Appendix, Stat. West. II., 13th Ed. I., ch. 2, § 2 at close. Ex parte Devine, 1 Cook's Bank. Law 176, &c.

The writ of retorno habendo will not justify the sheriff in taking them from the possession of any third person, who has acquired a right to their possession since the replevin. In this case, the proper return for the sheriff to make is that the goods have been eloigned.

In Maryland, when the property replevied was either a mulatto negro or a negro slave, it was by statute declared unlawful for either plaintiff or defendant, or any other person, in whose possession the said property might be, to sell such property until the action was determined: the sale was declared void, unless ordered by the court, and it was declared felony to sell or transport such property out of the state, pending the suit.[1]

Upon the return of "eloigned," the practice in England was, formerly, to issue what was called a capias in withernam to the sheriff, by which he was commanded to take other goods of the plaintiff of equal value with those eloigned, and deliver them to the defendant, to be by him detained irreplevisable, until the goods first taken should be forthcoming. If the plaintiff had no cattle or goods which could be so taken, the sheriff returned nihil

[1] Act April, 1833, ch. 274. 2 Dorsey's Laws 1129.

to that writ: and the defendant, thereupon, sued out a scire facias against the pledges, who had undertaken to the sheriff, in pursuance of the statute of Westminster II., that the cattle, &c., should be returned to the defendant, to show cause why *their* cattle, &c., to the value of the cattle, &c., eloigned, should not be delivered to the defendant;[1] and if no cause were shown, a writ issued to take their cattle, &c.; but if they had none, the sheriff returned nihil also to that writ, and then a scire facias was awarded against the sheriff himself, that he render to the defendant so many cattle, &c.[1]

It is no longer necessary to sue out a capias in withernam against the plaintiff, or a scire facias against the pledges or sheriff; but the defendant may proceed on the replevin bond, or bring an action on the case against the sheriff, on the construction of the statute of Westminster II., if, contrary to that act, the sheriff have taken no pledges at all, or if the pledges be insufficient.[2]

Second, under the statutes of Henry VIII., if the cause comes to trial, the jury assess the dam-

[1] 1 Wms. Saund. 195, a. N. 3.

[2] 1 Wms. Saund. 195, a. Note 3. Rous *v.* Patterson, 16 Viner Abr. 399, 400. Mayser *v.* Gray, Cro. Car. 446. Sir W. Jones 378. Bradyll *v.* Ball, 1 Bro. Ch. Rep. 427. Wilk. Repl. 121. See Post, ch. xvi.

ages, and then the retorno habendo is accompanied by the fieri facias and capias ad satisfaciendum, for the damages and costs. If, however, the judgment against the plaintiff is by default, a writ of inquiry must be issued to ascertain the damages and costs, either in the same or by a separate writ.[1] Upon the return thereof by the sheriff, final judgment is entered up for the defendant to recover as well the damages and costs assessed by the jury, as the costs adjudged by the court, and for these a capias or fieri facias may issue.[2] It is said, that after a judgment for a return, there is no necessity for damages under the statutes of Henry VIII., except to entitle the defendant to costs, and, therefore a remittitur may be entered for the damages under those statutes, and the defendant may have judgment for the costs.[3]

Where the defendant proceeds under the statute 17 Chas. II., ch. 7, he shall have execution on his judgment for damages and costs by fieri facias. The terms of the act must be strictly pursued, to entitle him to judgment under it. Thus, if the jury inquire of the rent in arrear, but omit to find the value of the goods, or vice versa, the omission

[1] 1 Wms. Saund. 195, note 3.

[2] Thes. Brev. 56, 221. 1 Wms. Saund. 195, N. 3.

[3] Wilk. Repl. 71.

cannot be supplied by a writ of inquiry. The defendant may, nevertheless, have his common law judgment of retorno habendo, and the corresponding execution. If the statute is strictly pursued, he will be entitled to his fieri facias for the amount of the arrears, or for so much thereof as the value of the goods and chattels distrained shall amount unto. It is said to be unsettled whether he is entitled to a capias.[1] In the case of Weidel *v.* Roseberry and Miller,[2] which was replevin for goods taken on a distress for rent; the defendant, Roseberry, made conusance under Miller, who avowed for rent arrear, replication, no rent arrear, and issue. The jury found for the defendant one hundred and twelve dollars and ninety-five cents, on which judgment was entered in short, and it was supported as a judgment of retorno habendo. The goods levied upon were the goods of a third person on the premises. In delivering the opinion of the court, Judge Duncan uses the following language: "If this was a judgment on which the defendant might take out execution against the plaintiff for the rent found to be in arrear by Crouse, as the plaintiff was not the tenant, it would be erroneous; and even against the tenant, where the jury had only found the rent in arrear, without

[1] Wilk. Repl. 111.

[2] 13 S. & R. 178.

finding the value of the goods distrained, such judgment could not be enforced by execution." If the judge meant, what the language would seem to imply, that if the statute 17 Chas. II., ch. 7, was strictly pursued, and the value of the goods, and the amount of rent arrear, respectively found, that it would make any difference, in issuing the fieri facias for the rent, if the goods were of that value, whether the plaintiff was a tenant or a stranger, it would seem that he was mistaken. The goods of a stranger, upon the premises, are, with some exceptions, liable to a distress for rent. If, on his replevin, he cannot bring them within one of the exceptions, and so judgment is given against him, there can be no injustice in compelling him to a restitution of the goods, or their value, by the same means which would be used against the tenant. The law restricts the fieri facias to the value of the goods taken, to which amount he is clearly liable ultimately through his bond to the sheriff, unless he defeats the defendant in replevin. The only effect of giving the fieri facias is to shorten the time during which the landlord may be deprived of his rent. But as failure to pay rent is a pretty sure indication of want of property, the fieri facias is but little, if ever, resorted to. It being considered the safest and most expeditious course

to proceed against the sureties in the replevin bond.[1]

In Massachusetts a writ of reprisal similar to the capias in withernam, is given by statute. In New York, New Hampshire, Pennsylvania, Delaware, Wisconsin, it is not known in practice. If judgment is given against the plaintiff for a sum of money, he is entitled to stay of execution, as in other cases.[2]

[1] See Post, ch. xv.

[2] Roe *v.* McCrea, 1 Ash. 16.

CHAPTER XIV.

OF THE WRIT DE HOMINE REPLEGIANDO.

Before the habeas corpus act, replevin was the principal remedy for an illegal imprisonment It is now very rarely used in England; but in several of the United States it is the remedy pointed out by statute for an illegal attempt to hold a slave.

In Pennsylvania, the supreme court at an early day recognized the common law writ as an existing remedy, and quite recently it has been resorted to successfully as an expedient for freeing a fugitive from justice. Under these circumstances, it seemed that a brief outline of the proceedings on this writ would not find an inappropriate place in the present volume.

Reeve, in his History of the Common Law, says that, "The writ de homine replegiando lay where a man was imprisoned, but was by law replevisable; a writ therefore for his being replevied issued to the sheriff to the following effect: 'We command you that justly and without delay you cause A. to

be replevied, whom B. took, and taken doth hold, (or whom B. took and you hold captive), unless he was taken by our special precept, or that of our chief justice, or for the death of a man, or for some other act for which, according to the laws of our realm of England, he is not replevisable, &c.;' this was a justicies, and not returnable.

"If the sheriff did not obey this writ, there issued a sicut alias, or causam nobis significes, and then a pluries; and if the sheriff still disobeyed, then an attachment followed against the sheriff, directed to the coroner, who was also to see the first writ executed."[1] Security was given to the sheriff that the man should be forthcoming to answer any charge against him.[2] In fact, the proceedings upon the homine replegiando were very much the same as in the common cases of replevin for goods. If the sheriff returned elongatus which he might do, a capias in withernam issued to detain the defendant without bail or main prize until he produced the party.

If the defendant came in and pleaded non cepit, before the issuing of the capias in withernam, he was entitled to be discharged without putting in

[1] 3 Reeve's Hist. 83.

[2] 3 Black. Com. 129.

bail. If he had been taken on the withernam, he was entitled to be bailed, notwithstanding the return of elongatus, or the surmise in the writ, for his plea was said to be better than the surmise in the writ, because the proof was incumbent on the plaintiff; and the sheriff's return was not conclusive, because it was the only return which he could make, as he was not allowed to contradict the writ by returning non cepit.

It was a good return to a homine replegiando to say that the defendant claimed the man as villein, but upon the return of the writ to the court, if any persons came into the court and gave security to have the plaintiff in court at a day certain, a writ issued to the sheriff to deliver the plaintiff; and upon the coming of the plaintiff into court at the day, he was required to give new security to appear in court de die in diem, until the plea was determined, and if judgment should be given against him, then his bail was to bring him in and deliver him to the defendant, and if he could not find such bail, then he was committed to the custody of the marshal, and at the end of the suit was brought by him into court and delivered to the defendant, if such was the judgment.[1]

In one case where a wife had left her husband,

[1] Moor *v.* Watts, 1 Lord Raym. 615.

he issued a homine replegiando, and after an alias and a pluries, the sheriff returned that the defendants (her father and mother) had eloigned her to places unknown; and upon the day of the return of the pluries, the defendants entered their appearance, but notwithstanding this appearance, the plaintiff sued out a capias in withernam against the defendants. C. J. Holt stayed the withernam, whereupon they moved for a supersedeas of it, because they had entered their appearance, and offered to plead non ceperunt, which they were allowed to do.[1]

In New York, before the revised statutes (which especially provide for the writ de homine replegiando, in case of negroes detained as slaves), in the case of Skinner *v.* Fleet,[2] which was an action of trespass on the case against a sheriff for suffering a slave, taken on homine replegiando, to go at

[1] Delabastide *v.* Reynell, Carth. 287. In this case the plaintiff was said to be a Switzer. It presents rather an odd instance of the retaliation supposed to be the consequence of a capias in withernam, as the abduction of the wife would hardly be recompensed by the capture of the mother-in-law. There is one case, 3 Mod. 120, in which the party, an Indian, is said to have turned Christian and been baptized; whether the decision was influenced thereby is not expressly stated.

[2] 14 Johns. 263.

large without sureties, whereby he was lost to his master. The court state the proper course of practice in such cases. They say, "We consider the case of Covenhoven *v.* Seaman, 1 Johns. Cases 23, as having established the practice and proceedings of this court upon this writ, in conformity with the course of proceedings in England, as laid down in Fitz. Nat. Bre. 68 and 155. The party suing out the writ, and claiming to be free, should enter into a recognizance in court, with sufficient sureties to the party claiming him to be a slave, to prove his liberty, personally to appear in court, and to prosecute his suit with effect. In the case of Covenhoven *v.* Seaman, the suit was on such a recognizance, and the person alleged to be a slave had not proved his liberty, or prosecuted his suit with effect, but had been non-suited, and the court held that the suit was maintainable. In Moor *v.* Watts (12 Mod. 428), Lord Holt said, 'If a homine replegiando be brought, and the defendant claims the party to be his villein, that will be a good return for the sheriff to make, and there shall be no replevin until the plaintiff give security, and that in court, and then there shall go a writ, reciting the security entered into in court, to the sheriff to deliver the plaintiff; and when the plaintiff comes in upon that security so entered into in court, he is not at large, but to find

new security that he shall appear from day to day, pending the cause; and if judgment go against him, he shall render himself to the defendant, and he takes him out of court.' The judge, at the trial, ruled correctly that the sheriff ought to have brought Primus (the slave and plaintiff) into court, on the homine replegiando, and returned that he was claimed as slave. Instead of doing so, it was admitted that he replevied him, and set him at liberty, as mentioned in the declaration of the plaintiff; and the declaration charges that the defendant, as sheriff of the city and county of New York, under the writ of pluries homine replegiando, voluntarily permitted Primus, being in his custody upon the said writ, and claimed by the plaintiff as his slave, and taken from his possession, to escape from his custody, and go at large without sureties, &c. It appeared, however, that the sheriff took a bond to himself with sureties for the prosecution of the writ with effect, and that Primus should prove his liberty, and for the return of Primus, if return should be adjudged. This bond we consider of no avail, as the sheriff has no power or right to take it; and, consequently, it affords no proof that an escape of Primus did not take place; nor is it any answer to the allegation, that the sheriff suffered Primus to escape and go at large without sureties; for this means

sureties in the mode prescribed by law; and we have already seen that this must be by a recognizance in court. It appears that the defendant assigned this bond to the plaintiff, with the assent of his attorney. But it is not stated or proved that it was accepted in discharge of this suit; and in no other way can the assignment bar the plaintiff's recovery. The bond is not so assignable as to enable the assignee to sue in his name, and the assignment and acceptance of the bond are not pretended to have been by way of accord and satisfaction."

In Pennsylvania the practice does not seem to be settled by any decision. In ex parte Lawrence,[1] in 1812, the court say that the writ de homine replegiando may be resorted to. In 1819, the writ was resorted to in the case of Wright *v.* Deacon,[2] but was quashed under the following circumstances. The writ was sued out by the plaintiff, a colored man, against the defendant, who was the keeper of the county prison; and the defendant's counsel moved to quash it, on the ground of its having issued contrary to the constitution and laws of the United States. The facts were submitted to the court, in a case stated, by which it appeared,

[1] 5 Binn. 304.

[2] 5 S. & R. 62.

that the plaintiff having been claimed by Raisin Gale, of Kent county, in the state of Maryland, as a fugitive from his service, was arrested by him in the county of Philadelphia, and carried before Richard Renshaw, Esq., justice of the peace, who committed the plaintiff to prison, in order that inquiry might be made into the claim of the said Gale. The plaintiff then sued out a habeas corpus, returnable before Thomas Armstrong, Esq., an associate judge of the court of common pleas. Judge Armstrong, having heard the parties, gave a certificate, that it appeared to him, by sufficient testimony, that the plaintiff owed labor or service to the said Gale, from whose service, in the state of Maryland, he had absconded, and the said judge, therefore, in pursuance of the act of the congress of the United States, in such case made and provided, delivered the said certificate to the said Gale, in order that the plaintiff might be removed to the state of Maryland. C. J. Tilghman, in delivering the opinion of the court, says: "The certificate was a legal warrant to remove the plaintiff to the state of Maryland. But if this writ of homine replegiando is to issue from a state court, what is its effect, but to arrest the warrant of Judge Armstrong, and thus defeat the constitution and law of the United States? The constitution and the law say, that the master may remove his slave

by virtue of the judge's certificate: but the state court says, that he shall not remove him. It appears to us that this is the plain state of the matter, and that the writ has been issued in violation of the constitution of the United States. We are, therefore, of opinion, that it should be quashed."

A copy of the writ issued will be found in the appendix. The docket entries, in that case, have been examined, but they present no evidence of bail having been given, or a recognizance entered into by the plaintiff, or any one on his behalf. The return to the writ is summoned and replevied, the inference from which would be, that the party was set at liberty by the sheriff. But the subsequent proceedings, on the motion by defendant to quash the writ, and on the case stated, would rather imply that the plaintiff remained in custody, or, at all events, under the control of the defendant and the sheriff, otherwise there would seem to be no reason for the defendant's effort (which proved successful) to quash the writ. By inquiry from the counsel engaged in the case, it has, however, been ascertained, that an ordinary replevin bond was given to the sheriff, and that the plaintiff was by him immediately set at large.

In the case of Brown *v.* Freed, in the supreme court of Pennsylvania for the eastern district, of July term, 1857, the writ was issued to take the prisoner out of the custody of the keeper of the county prison. He had been committed as a fugitive from justice, to await the requisition of the governor of Maryland. On the arrival of the warrant of the governor of Pennsylvania, Brown was brought into court on a habeas corpus, and after full discussion, the governor's warrant was declared informal and insufficient for its purpose. But, instead of discharging the prisoner, the court remanded him to the custody of Freed, the keeper of the county prison, to await the arrival of a more formal warrant. In the interval, the writ de homine replegiando was sued out in the name of the prisoner, against the keeper of the prison; an ordinary replevin bond was given to the sheriff, and the party was set at liberty. The writ has not been returned, and no further proceedings have been had in the case. Under the act of assembly of the state of Pennsylvania, of March 3d, 1847,[1] neither the keeper of the county prison, nor any other state officer, is allowed to hold in custody a fugitive from labor; he would, therefore, in such a case, have nothing to interpose to the writ of

[1] Pamph. Laws 1847, 206.

homine replegiando. But where the fugitive from labor is in custody of a United States officer, or of the party claiming him, or where the prisoner is a fugitive from justice, and duly committed to await a requisition, it would seem to be a dangerous course for the sheriff to set him at liberty on the homine replegiando, without bringing him into court, and stating the claim upon which he is detained; and an equally dangerous course for the custodian, if an officer, to permit him to be removed without asserting the cause of detention, and claiming to retain him.

CHAPTER XV.

OF THE REPLEVIN BOND.

THE sheriff never executes a writ of replevin without taking a bond from the plaintiff, usually with two sureties, in double the amount of the value of the goods taken, conditioned to prosecute the suit with effect, and without delay, and to return the goods, if a return shall be awarded, and to indemnify the sheriff. The clause for the indemnification of the sheriff is not required by statute.

The statute, Westminster II. (13 Ed. I.), c. 2, s. 3, provides, "that the sheriff or bailiffs from thenceforth shall not only receive the plaintiff's pledges for the pursuing of the suit, before they make deliverance of the *distress*, but also for a return of the beasts, if the return be awarded." The statute 11 Geo. II., c. 19, sec. 23, enacted, "that all sheriffs, and other officers, having authority to grant replevins, may and shall in every replevin of a *distress for rent*, take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond

in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witnesses), and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress; and that such sheriff, or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant, or person making cognizance, assign such bond to the avowant or person aforesaid, by endorsing the same, and attesting it under his hand and seal by two or more credible witnesses; and if the bond so taken and assigned be forfeited, the avowant or person making cognizance, may bring an action and recover thereupon in his own name, and the court, where such action shall be brought, may, by a rule of the same court, give relief to the parties upon such bond, as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeasance to such bond."

The Pennsylvania act of the 21st March, 1772, sec. 11, is as follows: "And to prevent vexatious replevins of distresses taken for rent, Be it enacted, that all sheriffs and other officers, having authority to serve replevins, may and shall in every replevin of a distress for rent, take, in their own names, from the plaintiff, and one responsible person as

surety, a bond in double the value of the goods distrained (such value to be ascertained by the oath or affirmation of one or more credible person or persons, not interested in the goods or distress; which oath or affirmation the person serving such replevin is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress, and such sheriff or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant or person making cognizance, assign such bond to the avowant, or person aforesaid, by endorsing the same, and attesting it under his hand and seal, in the presence of two credible witnesses; and if the bond so taken and assigned be forfeited, the avowant or person making conusance may bring an action, and recover thereupon in his own name; and the court where such action shall be brought may, by a rule of the same court, give such relief to the parties upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond."

The statute Westminster II., ch. 2, is not reported by the judges to be in force in Pennsylvania; and the act of March 21st, 1772, applies

exclusively to cases of replevin of a distress for rent. It has, notwithstanding, always been the practice, in that state, to take a bond from the plaintiff in replevin, in every case, whether on a distress for rent or otherwise; a course which, with the condition for the indemnification of the sheriff, was no doubt adopted in imitation of the English practice under the statute of Westminister, and has been sanctioned by long practice and many decisions,[1] and is justified by the words of the writ, which command the sheriff to deliver the goods if the plaintiff makes him secure of prosecuting his claim with effect.

In Massachusetts and Vermont, the statutes forbid the service of the writ, unless the plaintiff, or some one on his behalf, shall execute and deliver to the officer a bond to the *defendant*, with sufficient sureties, to be approved by the officer, in a penalty double the value of the property to be replevied, with condition to prosecute the replevin to final judgment, and to pay such damages and costs as the defendant shall recover against him, and also to return the said property, in case such shall be the final judgment. A sum must be

[1] Dunbar *v.* Dunn, 10 Price 61. Whiteman *v.* Jones, 5 N. Hamp. 362. Gibbs *v.* Bartlett, 2 W. & S. 29. Neville *v.* Williams, 7 Watts 421. Short *v.* Hubbard, 2 Bing. 348. Opinion Park, J.

stated, it is not enough to say "double the value the goods to be replevied."[1] In Missouri and Arkansas, the bond is given to the sheriff. In Kentucky, it is taken in the name of the commonwealth. In all the states, indeed, in which the law has been codified, a bond is required in every case before the execution of the writ.

It has been held that the sheriff is not bound to pursue strictly, the terms of the statute 11 Geo. II. And that the bond will be good, although it do not require that the suit should be prosecuted without delay, and although it contains an undertaking to indemnify the sheriff, and although it be executed by one surety only.[2] And it seems a warrant to confess judgment would be binding,[3] though the sheriff might not be justified in insisting on such a provision.

[1] Case *v.* Pettee, 5 Gray 27. Clark *v.* Connecticut R. R. Co., 6 Gray 363. Purple *v.* Purple, 5 Pick. 226.

[2] Dunbar *v.* Dunn, 10 Price 54. Austen *v.* Howard, 7 Taunt. 28. 2 Marsh. 352. 1 Moore 68. De Bow *v.* Applegate, 3 M'Cord 44. Rider *v.* Edwards, 3 Mann. & Grang. 202. See Morris *v.* Matthews, 2 Adol. & Ellis, N. S. 293. Lamden *v.* Conoway, 5 Harring. 1. Claggett *v.* Richards, 45 N. Hamp. 360. Cady *v.* Eggleston, 11 Mass. 282. Korse *v.* Waterhouse, 30 Conn. 129. Shaw *v.* Tobias, 3 Comst. 188.

[3] Neville *v.* Williams, 7 Watts 421. Shaw *v.* Tobias, 3 Comst. 189. Short *v.* Hubbard, 2 Bing. 348. Franciscus *v.* Reigart, 4 Watts 98.

The Pennsylvania statute requires but one surety. Two may be taken;[1] and, indeed, are always required by the sheriff. Under the Maine statute, which requires a bond with sureties, a bond with one surety is void.[2] But a mere clerical error, by which the name of the plaintiff is inserted in a recital where that of the defendant should be, will not vitiate the bond.[3]

If the plaintiff make default in any of the proceedings, or do not prosecute the suit with effect, or with success, which is the same thing, the defendant may take an assignment of the bond;[4] for the conditions of the bond are distinct and independent of each other, and a breach of any one of them will occasion a forfeiture.[5] The plaintiff cannot pay into court the penalty of the bond in discharge of the sureties, and so make them witnesses.[6]

[1] Saeltzer *v.* Ginther, 2 Miles 87.

[2] Greely *v.* Currier, 39 Maine 516.

[3] Green *v.* Walter, 37 Maine 25.

[4] Turnor *v.* Turner, 2 Brod. & B. 107. Ex parte Boyle, 2 D. & R. 13. Perreau *v.* Bevan, 5. B. & C. 284. Jackson *v.* Hanson, 8 M. & W. 477.

[5] Perreau *v.* Bevan, 5 B. & C. 284. 8 D. & R. 88. Gibbs *v.* Bartlett, 2 W. & S. 33.

[6] Cummings *v.* Gann, 2 P. F. Smith 488.

Some hesitation seems to have been felt, as well in England as in America, as to the effect, upon the liability of the sureties in the bond, of an election by the defendant to proceed under the statute 17 Car. II. It seems finally settled in England, that the sureties are not discharged by such an election; and the same conclusion, it is presumed, must follow in Pennsylvania from the decision in Gibbs *v.* Bartlett. It has been so held in New York.[1]

It was held by Lord Hardwicke, that, if the defendant proceeded on the statute, the court of king's bench would not compel the sheriff to deliver up the replevin bond to enable the avowant to sue the sureties, and he said he did not remember one instance of that being done.[2] Wilkinson, commenting on this, adds, "It seems since to have been a very general opinion, that if the defendant in replevin proceed upon the statute, for the arrearages of rent and costs, he cannot have a writ of retorno habendo, nor proceed against the pledges;" but he cites the late case of Turnor *v.* Turner,[3] as a decision to the contrary.

[1] Gould *v.* Warner, 3 Wend. 54.

[2] Combes *v.* Cole, Rep. Temp. Hardwicke 352.

[3] 2 Brod. & B. 107. See Dunbar *v.* Dunn, 10 Price 59.

The whole question was subsequently reviewed by the court of king's bench, in the case of Perreau *v.* Bevan,[1] where the court, by very satisfactory reasoning, maintain the position that the condition of the bond is broken and the bond forfeited, as well by not prosecuting the suit with effect, as by a default of making a return of the distress on such return being adjudged, each part of the condition being independent of the other, and the bond forfeited by a failure in either. The court go on to say, "The case of Turnor *v.* Turner, we think, has rightly established that the avowant, by having elected to proceed under the statute 17 Ch. II., c. 7, is not confined to his execution under the statute, but might proceed upon the replevin bond, if it had been assigned, and may proceed against the sheriff for his negligence in the loss of it, notwithstanding what is stated to have been said by Bathurst, J., in Cooper *v.* Sherbrooke, 2 Wils. 116, that 'by statute 17 Car. II., the legislature intended that the proceeding upon that statute by writ of inquiry, fieri facias, and elegit, should be final for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a writ de retorno habendo, which is a right judg-

[1] 5 Barn. & Cress. 284.

ment, for the statute has not altered the judgment at common law, but only gives a further remedy to the avowant.' The court of common pleas, however, had that case urged to them as in point to that effect; but after taking time to consider, upon deliberation and reasons stated at length in the report, decided contrary to that doctrine of Bathurst, J.; and it may be observed, that on adverting to the preamble, as well as to the provisions of that statute, the legislature meant only to facilitate the landlord's remedy against his tenant, and give him additional aid, without in any respect depriving him of the benefit of any remedy, or of any proceeding he was entitled to pursue before; and the very circumstance of the old judgment de retorno habendo remaining (which Bathurst, J., allows, and which is allowed on all hands to be the right judgment), notwithstanding the avowant has upon the verdict, and before the giving of that judgment, elected to proceed, and actually proceeded upon that statute, seems to show, that as the old judgment of the common law was not gone or taken away by that election, so the consequences resulting from it still remained, if the avowant should have occasion, or should still choose to crave them in aid. A subsequent case of Dunn *v.* Dunbar, in this court, in Hilary term, 1820, was cited. That was stated to

be an action against the surety in a replevin bond, after judgment in the replevin suit for the arrears of rent under the statute. On a motion by Mr. Marryat, to set aside the proceedings on the bond, because the surety is discharged by proceeding under the statute, and on citing Tidd's Practice 1078, where there is a dictum to that effect, but no reference to authority, Abbott, C. J., is stated, in a note of that case, to have said, that the statutable remedy has not taken away the sureties' responsibility, and in the absence of authority the rule was refused; but if authority was found, it might be mentioned again; Holroyd and Best, justices, were present. It does not appear to have ever been mentioned again. Supposing this to be a correct note of that case, and that it did not come on again, it is in support of our present opinion. The case indeed of Combes *v.* Cole, Rep. Temp. Hardw. 352, was cited, but that case was not only before the stat. 11 Geo. II., where the avowant had no right to have the replevin bond assigned or delivered over to him, as he has since that statute; and that case, though it determined that the only mode of proceeding against the sheriff, before the statute 11 Geo. II., was in the mode there pointed out, does not establish that the proceeding under the statute 17 Car. II., without avail, would have been a defence to an action

on the replevin bond, if the sheriff had permitted the avowant to sue on it in his own name, or that, if it would, it would be so now, since the statute 11 Geo. II., ch. 19; but if it would go to this extent, it has in effect been since overruled."[1]

The supreme court of Pennsylvania at one time held, that it was a discharge of the replevin bond to take a judgment by confession in a sum certain, or on the statute 17 Car. II., without a judgment of retorno habendo at the common law, and it was said that the condition of the replevin bond was to prosecute with effect, and return the goods, in case a return was awarded; that the extent of the obligation was that he should succeed, or comply with a judgment of redelivery; that the bond contained a condition, with alternate branches coupled disjunctively, and that the effect of rendering one of them impossible was to discharge the obligor, and that the surety did not undertake that his principal should answer the statutory part of the judgment.[2]

But in the later case of Gibbs *v.* Bartlett, this ground was abandoned.[3] In this case the action

[1] See Morgan *v.* Griffith, 7 Mod. 380.

[2] Kimmel *v.* Kint, 2 Watts 431.

[3] Gibbs *v.* Bartlett, 2 W. & S. 33. See Moore *v.* Bowmaker, 7 Taunt. 97.

of replevin was tried, and a verdict and judgment rendered for plaintiff, which was removed to the supreme court by writ of error, where the judgment was reversed, and no venire de novo was awarded. The plaintiff Gibbs defendant in the replevin suit obtained an assignment of the replevin bond, and brought his action upon it. The defendants relied upon the fact, that although the judgment was reversed, yet no further or other judgment or order of the said court was rendered or made in the said suit; and on demurrer to this plea, the court below gave judgment for the defendant, but the judgment was reversed. In the argument before the supreme court, the case of Kimmel *v.* Kint was relied upon by the defendant in error, who also argued that he had prosecuted his suit with effect, as he had everything he sought to recover. He was in possession of the property, and no remedy given to his adversary to deprive him of it. The opinion of Judge Rogers is so full upon this point, that it is given entire. "The condition of the replevin bond is," said he, "to prosecute the suit with effect, and make return of the goods and chattels, if a return thereof shall be adjudged. It is not, as is erroneously supposed, in Kimmel *v.* Kint in the alternative, with alternate branches coupled disjunctively, but they are distinct and independent of each other, and a breach

of one of them will occasion a forfeiture. Thus it has been ruled, that if the plaintiff neglect to levy his plaint at the next county court, or if he make default in any of the subsequent proceedings, or do not prosecute the suit with effect, the defendant may take an assignment of the bond.[1] The term prosecuting *with effect*, means with success,[2] and extends to one continued prosecution from the commencement until the termination of the suit. Thus, where to debt on bond the defendant pleaded that he had prosecuted the suit with effect in the county court, but that a writ of error had been brought in the court above, where the judgment had been reversed; and the plaintiff replied, that the judgment in the court above also was, that the plaint in the court below should abate, and that there should be a return irreplevisable; upon demurring to this replication the court held that the words, 'to prosecute with effect' in the court below, were not confined to the prosecution in that court only, but extended also to the prosecution of the writ of error, as that was part of the suit commenced below.[3] So where the plaint is removed

[1] Turnor *v.* Turner, 2 Brod. & B. 112. Ex parte Boyle, 2 D. & R. 13. s. c. 4 Moore 616.

[2] Perreau *v.* Bevan, 5 B. & C. 284. Jackson *v.* Hanson, 8 M. & W. 477.

[3] Chapman *v.* Butcher, Carth. 248, 519. Butcher *v.* Porter, 1 Show. 400. Gwillim *v.* Holbrook, 1 Bos. & Pull. 410.

into a supreme court, the condition of the bond is not satisfied by having prosecuted the suit with effect in the county court; but the plaintiff must follow it into the court above.[1] It has also been held that the bond may become forfeited, by not prosecuting the suit without delay. Thus, where the plaint was levied in the county court, and two years were allowed to elapse without any further steps being taken, it was held the obligee might recover, although judgment of non pros was never signed in the county court;[2] and where the plaintiff in replevin is guilty of a breach of the condition, by not prosecuting his suit without delay, it need not appear that the suit is determined.[3] The same rule holds good where a suit has been discontinued.[4] In the cases cited, no judgment of de retorno habendo was entered. Of course such a judgment is not indispensable to warrant a recovery on the replevin bond,[5] as seems to have been the opinion of the court in Kimmel *v.* Kint. It is admitted, that the writ of de retorno habendo is not in use. Indeed it is doubtful whether such a writ was ever

[1] Vaughan *v.* Norris, Cas. Temp. Hard. 137. 7 Comyn's Dig. 269.

[2] Axford *v.* Perrett, 4 Bing. 586.

[3] Harrison *v.* Wardle, 5 B. & Adol. 146.

[4] Hurlstone on Bonds 68. Badlam *v.* Tucker, 1 Pick. 286.

[5] Waterman *v.* Yea, 2 Wils. 41.

issued in this state.[1] It would, therefore, seem to be perfectly nugatory to send this case back, that such a judgment may be entered; it would increase the trouble and expense for no manner of advantage to any person; for although it is said, that the surety should not be deprived of an opportunity to discharge himself by a return of the goods, yet it seems very questionable whether, at any time, the defendant could save the forfeiture by a tender of return of the goods. The judgment de retorno habendo is not intended for the benefit of the defendant, but of the plaintiff in the replevin bond, who, in some cases, perhaps, might prefer a return of the goods to the damages assessed by a jury. It would be anything but an act of justice to permit a person, who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better situation than the principal. But, be this as it may, we think it very clear that the

[1] See Com. *v.* Rees, 3 Whart. 124. In the case on which that was founded, a retorno habendo is said to have issued; and indeed, there are numerous instances of the writ on the dockets of the courts in the city and county of Philadelphia.

judgment of the court, in the case at bar, was erroneous. The case is this: Alexander Neely & Co. brought replevin against Eli Gibbs, who is the present plaintiff. Neely obtained judgment against Gibbs in the court of common pleas, which was removed by writ of error to the supreme court. On argument, the judgment of the court of common pleas was reversed, but no venire de novo was awarded. And the reason of this entry appears, in the report of the case (7 Watts 305), to have been because, upon the admitted state of facts, the plaintiff could not recover. The judgment was advisedly entered 'judgment reversed,' without more; for, according to our practice, which saves expense and trouble, such a judgment is a final judgment. Either party was at liberty to ask for a venire de novo; but both were content with the judgment. How, then, with this entry on the record, can the defendant say that he has performed the condition of his bond, which obliges him to prosecute his suit with effect, and without delay? The case comes directly within the principles of the cases cited above."[1]

In the same spirit it has been also held, that, if the plaintiff in replevin gives bond in the usual form, and the defendant claims the property and

[1] Gibbs *v.* Bartlett, 2 W. & S. 33.

retains it, giving bond, and afterwards arbitrators award no cause of action, the plaintiff's surety is liable on the bond for the costs of the replevin suit.[1] If the plaintiff's neglect to prosecute the suit has been occasioned by the act of the defendant, as by his not appearing to the summons;[2] or, if the proceedings have been stayed by injunction, and during that period the plaintiff dies, the defendant will not be entitled to an assignment of the bond.[3]

An agreement between the plaintiff, and defendant in replevin, entered of record, by which the plaintiff, who had been tenant to the defendant, agreed that all proceedings in the suit should cease, that the plaintiff should pay the defendant a certain sum, that each party should pay their own costs, and that the replevin bond should stand as a security for the observance of these terms, is evidence of the determination of the suit, and that the plaintiff did not prosecute it with effect. And on failure to comply on the part of the plaintiff, the sureties in the bond are liable. But they are not bound by the amount agreed to be paid by the plaintiff in replevin.

[1] Tibball *v.* Cahoon, 10 Watts 232.

[2] Seal *v.* Phillips, 3 Price 17.

[3] Ormond *v.* Brierly, 12 Mod. 380. s. c. Carth. 519.

[4] Hallett *v.* Mountstephen, 2 Dow. & Ry. 343.

Upon the neglect of the plaintiff to comply with the conditions of the bond, it may be assigned either to the avowant or to the person making cognizance, when there is no avowant; or to both the avowant and the person making cognizance, who may sue jointly upon it. The assignment may be to the avowant only, though there be a conusor: but it seems doubtful whether there can be an assignment to the conusor alone, where there is an avowant.[1]

Where the replevin is of a distress for rent, and the bond is taken under the 11 Geo. II., or under the Pennsylvania act 21st March, 1772, and is assigned by the sheriff under hand and seal in the presence of two credible witnesses, the assignee may sue thereon in his own name. But where the replevin is not of a distress for rent,[2] or where the bond is not taken under the acts above named, the action should be brought in the name of the sheriff.[3]

[1] Page *v.* Eamer, 1 Bos. and Pul. 378. Archer *v.* Dudley, 1 Bos. & Pul. 381, n. a. Phillips *v.* Price, 3 M. S. 180.

[2] Knapp *v.* Colburn, 4 Wend. 616. Tibbal *v.* Cahoon, 10 Watts 232. City Council *v.* Price, 1 McCord 299. Waples *v.* McIlvaine, 5 Har. 381. Acker *v.* Finn, 5 Hill 293.

[3] Austen *v.* Howard, 7 Taunt. 28. Wilk. Repl. 116.

The authority given by the 11 Geo. II. to the assignee to sue in his own name, does not apply to those cases. And the bond, not being a bond for the payment of money, is not within the act of 28th May, 1715, and so it has been ruled in the district court, and at nisi prius in the county of Philadelphia.

When the plaintiff in replevin is guilty of a breach of the condition, by not prosecuting his suit without delay, it need not appear that the suit is determined.[1]

Damages may be recovered against the sureties to the amount of the penalty in the bond for the value of the property, and for the damages found in favor of the defendant, and for costs,[2] and after some discussion, the English courts appear to have agreed that in the action for taking insufficient sureties, the sheriff is liable to the same extent; Eyre, C. J., saying: "The justice and good sense of the case seem to be, that the sheriff should be liable no further than the sureties would have been,

[1] Harrison *v.* Wardle, 5 B. & Adol. 146. Axford *v.* Perrett, 4 Bing. 586.

[2] Bramscombe *v.* Scarborough, 6 Adol. & Ellis. N. S. 13. Gainsford *v.* Griffith, 1 Wms. Saund. 58, n. 1. Balsley *v.* Hoffman, 1 Harris 603.

if the sheriff had done his duty, that the responsibility of the sureties was limited by 11 Geo. II., to double the value of the goods distrained, and that sum ought to be the measure of damages against the sheriff."[1] In a previous case, in the court of king's bench, it had been held that damages could not be recovered beyond the value of the distress;[2] and in an intermediate case, Lord Loughborough held that damages might be recovered beyond the penality of the bond.[3] In Pennsylvania the courts seem to have followed the court of common pleas in Evans *v.* Brander, and have decided that the measure of damages in an action against the sheriff for taking insufficient sureties,[4] and also in an action against the sureties in the replevin bond, is the value of the property, and damages for the detention, usually interest from the time of the taking and costs.[5] In cases of fraud, or wanton injury, damages beyond the value and interest may be

[1] Evans *v.* Brander, 2 H. Bl. 548. Jeffrey *v.* Bastard, 4 Adol. & Ellis 823. Paul *v.* Goodluck, 2 Bing. N. C. 220.

[2] Yea *v.* Lethbridge, 4 T. R. 433.

[3] Concanen *v.* Lethbridge, 2 H. Bl. 40.

[4] Murdoch *v.* Will, 1 Dall. 341.

[5] Gibbs *v.* Bartlett, 2 W. & S. 29. M'Cabe *v.* Morehead, 1 W. & S. 513. Balsley *v.* Hoffman, 1 Harris 604. Arnold *v.* Bailey, 8 Mass. 145.

given,[1] and in Gibbs *v.* Bartlett they held that the value in the writ was only prima facia evidence of the value of the goods.[2]

By the statute of Westminster, the liability of the sheriff for not taking pledges according to its provisions, is confined to the price of the beasts. The statute of Geo. II., it is believed, was intended rather as an improvement and modification of the old security, than as the creation of a new one. As the real damage, which the defendant has sustained, is the deprivation of his property from the time of the replevin, or if the replevin is of a distress for rent, the deprivation of so much property from application to the payment of his rent, the true measure of that damage, it would seem, is the value of the property at that time of the replevin, with interest from that date, and the costs of suit; or, if the replevin is of a distress for rent, and the goods taken exceed in value the rent due, then for the amount of the rent. On the payment of that sum, the courts will stay the proceedings on the bond.[3]

[1] M'Cabe *v.* Morehead, 1 W. & S. 513. Brizsee and Torrence *v.* Maybee, 21 Wend. 144.

[2] 2 W. & S. 35.

[3] Gingell *v.* Turnbull, 3 Bing. N. C. 881. Bramscombe *v.* Scarborough, 6 Adol. & Ellis, N. S. 13. Gould *v.* Warner, 3 Wend. 54.

The confusion, if any there be, seems to have arisen from confounding the extent of the sureties' liability with the amount the defendant in replevin, the plaintiff in the suit on the bond, is damnified. The plaintiff in the suit on the replevin bond, as against the plaintiff in replevin, is entitled to the value of his property with damages for its detention, usually equal to the interest on its value and costs; except in cases where the replevin is of a distress for rent, in which case he is entitled to the value of the distress, if his rent arrear equalled that amount, if not to the value of his rent arrear with damages and double costs of suit. If his rent arrear was greater than the value of the distress, he was not entitled to anything beyond that value. The liability of the surety in replevin is limited by the penalty of his bond; the preceding observations show that his liability may be less than that amount; it cannot exceed it.[1]

In an action on the replevin bond, where the replevin was of a distress for rent, the district court for the city and county of Philadelphia held, that the rent in arrear was the real subject of contro-

[1] Hunt *v.* Round, 2 Dowl. 558. Ward *v.* Henley, 1 Y. & J. 285. Hefford *v.* Alger, 1 Taunt. 218. Gould *v.* Warner, 3 Wend. 54.

versy; where that was under one hundred dollars, the court had not jurisdiction.[1]

In the case of Gingell *v.* Turnbull, a rule nisi after judgment by default in an action on a replevin bond taken in the penalty of 125 pounds, to stay proceedings upon payment into court of 62 pounds, at which the goods distrained had been valued by a surveyor employed by the sureties, together with the costs; the rent in arrear was 104 pounds. Plaintiff showed cause on affidavit that the goods were worth more than enough to cover the rent and all charges, but objected to try the value of the goods on affidavit; whereupon, the court made the rule absolute, on paying into court the value of the goods, together with the costs; the value of the goods to be ascertained by the prothonotary.[2]

Under the clause in the act which declares that the court in which the action on the replevin bond shall be brought, may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defea-

[1] Freedenburg *v.* Meeter, 7 Penn. Law Jour. 244.

[2] Gingell *v.* Turnbull, 3 Bing. N. C. 881.

sance to such bond; the courts will interfere to prevent the accumulation of costs, where several actions are brought against the principal and sureties. In a case where three actions were brought on one replevin bond against the principal, and each of the two sureties, and a rule had been obtained to stay all proceedings in the three actions, on payment of costs in the first action only, or upon such other terms as the court should direct; the court made a rule, that all proceedings in the three actions should be stayed on payment of the rent and costs; otherwise, the rule to be discharged, and the plaintiff to proceed in one action, and the defendants in the other two actions to be bound by the event of that one.[1]

The court will not stay the proceedings on a replevin bond, unless it clearly appears that the application is made on behalf of the sureties and not of the principal.[2] Where one of the sureties in a replevin bond was a material witness in the cause, the court allowed another to be substituted on his being approved of by the prothonotary, and notice given to the defendants' attorney.[3]

[1] Bartlett *v.* Bartlett, 4 Mann. & Grang. 269.

[2] Wharton *v.* Blacknell, 12 Mees. & Wells. 558.

[3] Bailey *v.* Bailey, 1 Bing. 92. Amos *v.* Ginnet, 4 Scam. 440.

CHAPTER XVI.

OF THE DECLARATION AND PLEADINGS IN THE ACTION ON THE REPLEVIN BOND.

The declaration on the replevin bond concisely states the proceedings in replevin, the failure in fulfilling the condition of the bond, and the assignment of the bond. If the distress were made by the plaintiff as bailiff of another, it is usually so stated;[1] but in a declaration by two persons, it is not necessary to state that the one distrained as bailiff,[2] nor need the declaration set out the goods distrained; and if it state the bond was conditioned for making a return of the goods in the condition mentioned, and thereupon the sheriff replevied the same, it sufficiently appears the bond was conditioned for a return of the goods distrained.[3] The condition should be correctly stated.[4] The declaration is not double, although both parts of the condition are negatived, and if a sufficient breach appear, the plaintiff will be entitled to recover, although the breach is not formally assigned.[5]

[1] Dias *v.* Freeman, 5 T. R. 195. See appendix for form.

[2] Phillips *v.* Price, 3 M. & S. 180.

[3] Phillips *v.* Price, 3 M. & S. 180.

[4] Halhead *v.* Abrams, 3 Taunt. 81. Glover *v.* Coles, 1 Bing. 6.

[5] Perreau *v.* Bevan, 5 B. & C. 284.

Non est factum, which puts in issue the execution of the bond or the validity of its execution in law, is the general issue.[1] Under the plea of payment with notice, any equitable defence may be given in evidence in Pennsylvania. Thus, where two sureties are named in the body of the bond, and but one executes it, this fact may be given in evidence under the plea of payment, and is a defence, unless it appear that the defendant waived the execution by the other surety.[2] In Austen *v.* Howard,[3] a plea that the bond purported to be entered into by two sureties, but was executed only by one, was held to be bad, but by Burrough, justice, this was from a defect in pleading.[4]

Non damnificatus is a proper plea when the condition of the bond is merely to indemnify and save harmless. It is not so when the condition is to discharge or acquit the plaintiff from liability as from a bond or other thing done or given by him creating a liability. In this latter case, the defendant, in pleading, must set forth affirmatively the special manner of performance, and show that

[1] Steph. on Plead. 116. Zeigler *v.* Sprenkle, 7 W. & S. 175.

[2] Sharp *v.* United States, 4 Watts 21.

[3] 7 Taunt. 28.

[4] Austin *v.* Howard, 7 Taunt. 327.

the plaintiff has been acquitted of his liability, and in what way it has been effected.[1]

All matters of defence may be pleaded specially. Plea by surety that the judgment was obtained against the principal by fraud, namely, by the plaintiff in that suit fraudulently procuring the defendant to confess, and by the defendant falsely and fraudulently confessing the action, is bad on demurrer, unless it allege it was for the purpose of defrauding the sureties.[2] It is not a good plea, to an action on the bond brought after an award, that the proceedings in replevin were suspended by agreement during an arbitration, to which were referred the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them, when awarded from the rent.[3] It seems that it would be ground for relief in equity, or if the application was by motion.[4]

When the declaration stated the judgment in the replevin suit to have been a retorno habendo, awarded for want of a plea to an avowry, a plea

[1] Neville *v.* Williams, 7 Watts 421.

[2] Moore *v.* Bowmaker, 7 Taunt. 97.

[3] Ib. Aldridge *v.* Harper, 10 Bing. 118.

[4] Archer *v.* Hale, 4 Bing. 464. Aldridge *v.* Harper, 10 Bing. 118. See Donnelly *v.* Dunn, 2 Bos. & Pul. 45.

that, after the judgment for a return, a writ to inquire of the arrear of the rent, and the value of the cattle, goods, &c., distrained, was prayed by the avowant, granted, and executed, and that thereupon avowant had judgment to recover the arrear of rent found, together with a sum for his costs and damages, was held ill on demurrer; and the execution of such a writ is no discharge of the sureties.[1]

By the act of the 11th of April, 1848, where a judgment has been obtained since the passage of the act, against two or more joint or several obligors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone.[2] This does not seem to reach the case of a death pending the action, in which case the remedy against the assets of the deceased will still be gone.[3]

[1] Turnor *v.* Turner, 2 Brod. & B. 108. See Gibbs *v.* Bartlett, 2 W. & S. 29. Perreau *v.* Bevan, 5 B. & C. 284, and see ante, pages 252, 253, &c.

[2] Pamph. Laws of Pa., 1848, 536. Brewster's Admr. *v.* Sterrett, 8 Casey 115. Moore's Appeals, 10 Casey 411.

[3] Walter *v.* Ginrich, 2 Watts 204. Finney *v.* Cochran, 1 W. & S. 112.

CHAPTER XVII.

OF THE PROCEEDINGS AGAINST THE SHERIFF FOR TAKING INSUFFICIENT PLEDGES.

If the sheriff neglect to take a bond, the court will not grant an attachment against him,[1] neither will they order him to pay the costs recovered by the defendant in replevin, but the proper remedy is to proceed against him by an action on the case.[2] The same action lies for taking insufficient pledges.[3] And this action is maintainable even after the avowant or person making cognizance has taken an assignment of the replevin bond, and sued the principal and sureties: for such assignment is no waiver of any proceedings against the sheriff.[4] The supreme court of Pennsylvania have restricted this rule so far, as to suspend the action against the sheriff, while proceedings towards satisfaction by judgment and execution against the sureties are in progress.[5] The conusor must bring

[1] Twells *v.* Colville, Willes 375. Rex *v.* Lewis, 2 T. R. 617.

[2] Tesseyman *v.* Gildart, 4 Bos. & Pul. 292. Cro. Car. 446. Sir Wm. Jones 378.

[3] 2 Inst. 340.

[4] 1 Wms. Saund. Rep. 195; or Myers *v.* Clark, 3 W. & S. 539.

[5] Commonwealth *v.* Rees, 3 Whart. 124.

the action if there is no avowant.[1] In Pennsylvania, instead of proceeding by action on the case, the sheriff and his sureties may be sued on his official bond.[2]

There is, in Pennsylvania, as we have seen, no legislative provision by which the sheriff is required to take a bond from the plaintiff in replevin, before executing the writ, except in cases of replevin of a distress for rent. This fact seems to have been overlooked in part of the reasoning in the case of Cummings *v.* Gann.[3] The sheriff, nevertheless, always takes such bonds, and they have been frequently assigned and sued upon, where the replevin was not of a distress. Whether the sheriff would be liable to an action on the case, if he omitted to take such a bond, or if the sureties proved insufficient, does not appear to have been agitated. In Pearce *v.* Humphreys, where the plaintiff was allowed to recover in such an action, the objection was not taken; on the contrary, the sheriff's obligation to take the bond seems to have been assumed on all hands.[4]

[1] Archer *v.* Dudley, 1 Bos. & Pul. 378.

[2] Act 21st March, 1803, 4 Sm. Laws 45. Act 14th June, 1836, Pamph. L. 637. Myers *v.* Com., 2 W. & S. 60. Com. *v.* Rees, 3 Whart. 124.

[3] 2 P. F. Smith, 484, 488.

[4] 14 S. &. R 23.

According to the more recent authorities in England, and in some of the United States, the sheriff is not responsible for the sufficiency of the sureties in replevin at the end of the proceedings. It is enough if they were apparently responsible at the time of taking them.[1] But he is responsible if either of the sureties is insufficient,[2] and is also liable for negligence if he lose the bond.[3] Notice of the insufficiency of the sureties, and general reputation of their want of credit in the neighborhood, are alike evidence against him.[2] In Pennsylvania, the sheriff is held to a much more rigid accountability, for he is answerable for the sufficiency of the sureties in the replevin bond, at the termination of the suit. It is not enough that they were sufficient when they were taken,[4] and it is incumbent on the sheriff to furnish proof of the execution of the bond.[5] It is not necessary for the plaintiff, as against the sheriff, to prove the execution by the sureties, proof of the assignment by

[1] Hindle *v.* Blades, 5 Taunt. 225. Sutton *v.* Wayte, 8 Moore 27. Commonwealth *v.* Thomson, 3 Dana 301. Jeffrey *v.* Bastard, 4 A. & E. 823.

[2] Scott *v.* Waithman, 3 Stark. 168.

[3] Perreau *v.* Bevan, 5 Barn. & Cress. 284.

[4] Oxley *v.* Cowperthwaite, 1 Dall. 349. Pearce *v.* Humphreys, 14 S. & R. 23. Myers *v.* Clark, 3 W. & S. 535.

[5] Baxter *v.* Graham, 5 Watts 418.

him is sufficient.[1] The declaration in the action on the case, states the distress, and the replevin, and the proceedings in the replevin suit, terminating with the judgment of retorno habendo. Where the replevin was of a distress for rent, it is said that in the action against the sheriff for taking insufficient sureties it is not necessary to aver a judgment of retorno habendo:[2] but that such averment is necessary where the replevin was of cattle distrained damage feasant.[3] The declaration then states the duty of the sheriff to take a replevin bond, but that he neglected to take such bond, and that the plaintiff hath not obtained a return of the goods or their value, or payment of the arrears of rent; and in the case of taking insufficient pledges, it is stated, that the sheriff did take a bond from certain persons as sureties, and that they were not good, sufficient, or responsible sureties. The general allegation of insufficiency is enough in Pennsylvania; in England, the modern precedents allege insufficiency at the time of taking—special damage is generally added.[4] If

[1] Barnes *v.* Lucas, Ryan & Moody 264.

[2] Perreau *v.* Bevan, 5 Barn. & Cress. 284. Gibbs *v.* Bartlett, 2 W. & S. 29.

[3] Hucker *v.* Gordon, 1 Cromp. & Mees. 58.

[4] See Appendix for form. Pearce *v.* Humphreys, 14 S. & R. 23.

there is any difficulty in proving that the sheriff did not take a replevin bond, add a count for his not having assigned the bond upon request, if that is the fact. In New York it has been held that under the revised statutes it is necessary to aver that a writ of retorno habendo has been issued, and a return of elongata made thereon.[1] The general issue is not guilty, which puts in issue the whole of the allegations on the record which must be proved as alleged. The record of the replevin suit is evidence of the result, and if the sureties have been sued ineffectually, the record in that suit is generally given in evidence; a return of nulla bona to a fieri facias upon a judgment against a surety in replevin is, however, only prima facie evidence of his insufficiency.[2] The sureties themselves are witness as to their sufficiency.[3] Evidence of general reputation as to their want of credit in the neighborhood of their respective residences,[4] will be received in proof of their insufficiency, as well as particular acts of default.[5] If

[1] Gibbs *v.* Bull, 18 Johns. 435.

[2] Myers *v.* Clark, 3 W. & S. 535.

[3] Archbold on Land. & Ten. 250. Myers *v.* Clark, 3 W. & S. 535.

[4] Scott *v.* Waithman, 3 Stark 168. See Saunders *v.* Darling Bul. N. P. 60.

[5] Gwyllim *v.* Scholey, 6 Esp. 100.

the plaintiff have taken an assignment of the bond, it must be produced;[1] but it is not necessary to prove it, proof of the assignment from the sheriff being sufficient as against him.[2]

If the plaintiff has not taken an assignment of the bond, he must give the defendant notice to produce it at the trial; if he produce it, it may be put in evidence without proof.[3] If he do not, then secondary evidence must be given of its contents.[4]

[1] Jeffrey *v.* Bastard, 4 Ad. & El. 823.

[2] Barnes *v.* Lucas, Ry. & M. 264.

[3] Scott *v.* Waithman, 3 Stark. 168.

[4] Archbold Pl. & Ev. 386, 387. Arch. on Land. & Ten. 250.

CHAPTER XVIII.

OF THE CLAIM PROPERTY BOND.

The claim property bond is unknown in English practice, and in this country is confined to Pennsylvania and Delaware. In England, a claim of property on the part of the defendant, as we have seen, puts a stop to the proceedings, until a writ de proprietate probanda is issued.[1] That writ is not in use in Pennsylvania. The practice, under the act of 1705, has created what may be called the common law on this subject in that state. Where the writ of replevin issues, the defendant may put in a claim of property, and on giving bond to the sheriff in double the value of the goods to answer for their value if he shall not succeed in the suit, he is entitled to retain the goods. The sheriff will return this fact to the writ of replevin.

It is the duty of the sheriff, before he removes the goods, to allow the defendant reasonable time to obtain security. If he does not, he cannot, in an action of trespass, justify under the writ in replevin.[2] The obligation entered into is called a

[1] See ante, p. 56.

[2] Hocker *v.* Striker, 1 Dall. 225. Pearce *v.* Humphreys, 14 S. & R. 23, 25.

claim property bond, and is in form a bond to the sheriff in double the value of the goods conditioned that the defendant shall establish his claim of property on the trial, and abide by the judgment of the court in all things relating to the premises, and to indemnify the sheriff.[1] There is no statute prescribing the form of this bond; it will not, therefore, be void, if it contain some conditions contrary to law, and some that are good and lawful; but the conditions which are against law will be void ab initio, while the others will stand good. Thus, where a claim property bond contained a condition to make a return of the goods, if a return should be awarded, it was held that, although this condition was erroneously in the bond, as it looked to a judgment which could never be entered for the plaintiff in replevin, to wit, the judgment of retorno habendo, yet it was simply void as being harmless and without effect;[2] and that the plaintiff might recover on the bond for a breach of the conditions which were good. A warrant to confess judgment is inserted in the bond as used in Philadelphia, and is binding on the obligors,[3] and then

[1] See form in the Appendix.

[2] Chaffee *v.* Sangston, 10 Watts 265. Moore *v.* Shenk, 3 Barr 13.

[3] Neville *v.* Williams, 7 Watts 421. Shaw *v.* Tobias, 3 Comst. 189. Short *v.* Hubbard, 2 Bing. 348. Gingell *v.* Turnbull, 3 Bing. N. C. 881.

in cases in which the prothonotary would not be competent to assess the damages, a scire facias or an issue might be necessary. Giving the bond has the effect of vesting the property in the defendant, and he cannot tender the property afterwards in satisfaction pro tanto of the damages claimed.[1]

The bond may be assigned to the plaintiff in the replevin, but the action upon it must be brought in the name of the sheriff to his use. The omission to set out in the declaration the proceedings and judgment in the replevin, though good cause for demurrer, is cured by verdict.[2]

The sureties in the claim property bond are liable to the full amount of the penalty of their bond, and they cannot contest the judgment against their principal.[3] In Miller *v.* Foutz,[4] the court repudiate the idea that the plaintiff should recover the value of the goods only, and they ask, "Suppose a family picture, or piece of plate, or (as this case turned out in the evidence on the trial) the produce of a farm for one whole year, unlawfully

[1] Taylor *v.* The Royal Saxon, 1 Wall, Jr. 327. Fisher *v.* Whoollery, 1 Casey 198. Moore *v.* Shenk, 3 Barr 13.

[2] Chaffee *v.* Sangston, 10 Watts 265. Eldred *v.* Bennett, 9 Casey 183.

[3] Hicks *v.* M'Bride, 5 Phila. 377.

[4] Miller *v.* Foutz, 2 Yeates 418.

taken and detained by a wrong-doer, shall the mere value of the property be the sole measure of damages?" This reasoning would apply equally well to the sureties in the replevin bond. There may be cases, undoubtedly, in which the market or money value of an article could not be considered as an equivalent for its loss to the owner, and this whether he be deprived of it by writ of replevin, or kept out of it by the claim property bond. In the former case we have seen that interest upon the value of the article, when taken, from the time of taking, is the regular measure of damages, where there has been no wanton, vexatious, oppressive, or culpable conduct, and that the defendant is not entitled to any special damages he has sustained by the interruption of his business, caused by the replevin.[1] It is difficult to discover any good reason for a difference, and perhaps Miller *v.* Foutz would now be construed as propounding the same doctrine.[2]

In New York, under the revised statutes, a proceeding somewhat analogous to the writ de proprietate probanda prevailed. There, if a claim of property were made by the defendant, or any other person in possession of the goods, and the fees of

[1] M'Cabe *v.* Moorehead, 1 W. & S. 513. Gibbs *v.* Bartlett, 2 W. & S. 35.

[2] M'Donald *v.* Scaife, 1 Jones 385.

a jury for trying such claim were paid to the sheriff, he was required to take the goods into his possession, and detain them in his custody, and, forthwith, to summon a jury to appear before him, at such time and place as he might specify, which time was required to be within two days thereafter, to try the validity of such claim.

The new Code of Procedure has superseded this system, and introduced a proceeding very similar to the claim property bond in Pennsylvania. The most material difference being, that a re-delivery to the plaintiff is stipulated for by the claimant, if such delivery shall be adjudged by the court. The code does not provide for any change in the judgment for the plaintiff, which, as we have seen, was at common law for the value of the property, and not a judgment of retorno habendo. But under the revised statutes, the plaintiff was allowed, in addition to the judgment for the value of the chattels, a judgment that they should be delivered to him without delay,[1] and as the new code only touches the process, it is to be presumed that he is still entitled to this judgment. The statutes of Arkansas have followed the revised statutes of New York. The statute law of the

[1] Rev. Stat. New York, Title Replevin, Sect. 49.

other states attaches no importance to the claim of property by the defendant. Such claim does not, in any manner, interfere with the operation of the writ of replevin, and the writ de proprietate probanda is not allowed. The affidavit of property and right of possession, exacted from the plaintiff before he is entitled to the writ, and his bond to prosecute with effect, are looked upon as sufficient protections to the defendant.

The Pennsylvania practice has some features which recommend it in preference to any other. And this seems to have been felt by the authors of the new code in New York who have adopted it, with an alteration, derived from their revised statutes, giving the plaintiff the benefit of a judgment for a return if he wishes it, which is in theory, at any rate, an improvement. The Pennsylvania practice is but a recognition of the familiar maxim, "melior est conditio possidentis." The plaintiff before trial is but a claimant of the property. If the defendant assumes the same attitude and gives security to establish his claim, it is but in accordance with general principles that he should retain the possession during the pendency of the action. In England, where replevin was used chiefly to test the right to distrain, and was generally held not to apply to other cases, the

property was regarded as prima facie belonging to the plaintiff; and that he might not be debarred from the possession of his property pending the action, by a vexatious claim of property on the part of the defendant, the writ de proprietate probanda was devised to try this preliminary question at once, that, if the property was the plaintiff's, he might have possession of it pending the suit. In this country, where the action is used to try the right of property and possession as well as to test the right to distrain, the property is not prima facie in the plaintiff, but in the defendant, as being the party in possession, hence the propriety of not disturbing his possession, where he claims property, and is willing to give security to abide the judgment of the court. It might be an improvement in the Pennsylvania practice to adopt the Delaware construction of the law, and allow the defendant in all cases to take judgment for the value of the goods as well as a retorno habendo. And to extend to the plaintiff, where the goods have not been delivered to him in the first instance, the benefits of a judgment of retorno habendo, if he desires it. The revised statutes of New York provided, in a measure, for both these changes; we have seen that they gave the plaintiff the benefit of a retorno habendo, or order for delivery, which was equivalent thereto. They

also authorized the defendant when he was entitled to a judgment of retorno habendo, exeept in eases where the property replevied had been distrained, to take, instead thereof, a judgment for the value of the property, to be assessed by the jury, or by writ of inquiry, as the case might be.[1]

[1] Rev. Stat. New York, tit. Replevin, Sect. 55.

APPENDIX.

APPENDIX I.

Forms of Process.

Præcipe.

A. B. } In District Court,
v. } Sept. T. 1848.
C. D. } Value $3000.

Issue writ of replevin for twenty boxes of merchandise, marked as follows: returnable 1st Monday of October, 1848.

W. E. M.
W. B.

S. &c.

E. F.
Atty. for Pl'ff.
Sept. 10, 1848.

To Prothonotary,
D. C.

Writ of Replevin.

City and County of Philadelphia, *ss.*

The Commonwealth of Pennsylvania, to the sheriff of Philadelphia county, greeting: If A. B. make you secure of prose-

cuting his claim with effect against C. D., then we command you that the said A. B., twenty boxes of merchandise, marked, &c., to be replevied and delivered, you cause, and that you put by sureties and safe pledges the said C. D., so that he be and appear before our judges at Philadelphia, at our District Court for the City and County of Philadelphia, there to be held the first Monday of next to answer the said A. B. of a plea, wherefore he took the goods and chattels aforesaid, the property of the said A. B., and the same unjustly detains against sureties and safe pledges, &c. And have you then there this writ. WITNESS the Honorable THOMAS M. PETTIT, President of our said Court at Philadelphia, the day of in the year of our Lord one thousand eight hundred and forty-

Prothonotary.

N. B. The value of the goods is indorsed on the writ.

Writ of Homine Replegiando.

Pennsylvania, *ss.*

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, greeting: We command you that justly and

without delay you cause to be replevied William Wright, otherwise called Ben. Hall, whom Israel Deacon, late of your county, took and taken doth hold as it is said, unless the aforesaid William Wright, otherwise called Ben. Hall, was taken by our special precept, or of our Chief Justice, or of the death of any man, or of any other right whereof, according to the laws and usages of this Commonwealth, he is not repleviable that no more clamor thereof we may have for defect of justice, and how you shall execute this our writ you make appear to our justices of our Supreme Court at our Supreme Court to be holden at Philadelphia, in and for our Eastern District, on the second Monday of December next, and have you then there this writ. Witness the Hon. William Tilghman, Esquire, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the twenty-seventh day of July, in the year of our Lord 1818.

Return. JOHN CONRAD, Proth'y.

Replevied, Sept. 25th, 1818, Summoned.

Replevin Bond as used in New York.

Know all men by these presents, that we are held and firmly bound unto sheriff of the

in the sum of dollars, lawful money of the United States, to be paid to the said sheriff, or to his assigns: For which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated day of one thousand eight hundred and

The condition of this obligation is such, That if the above bounden shall prosecute the suit to effect, and without delay, which *ha* commenced in the against the *defendant*, for unjustly detaining (name the goods) and that if the *defendant* recover judgment against in such action, will return the same property, if return thereof be adjudged, and will pay to the *defendant* all such sums of money as may be recovered against by such *defendant* in the said action, for any cause whatever, then the above obligation to be void.

Sealed and delivered in the presence of

State of New York, City and County of New York, *ss.* of the said city, being duly sworn, says, that he has examined and appraised the property specified in the above bond; that he has no interest therein, nor in the suit commenced therefor, and believes the same to be of the value of

Sworn before me and examined, this 9th day of March, 1848.

Sheriff,

Replevin Bond as used in Pennsylvania in 1849.

Know all men by these presents, that we A. B., C. D., and E. F., are held and firmly bound unto Henry Lelar, Esq., Sheriff of the City and County of Philadelphia, in the just and full sum of lawful money of Pennsylvania, to be paid to the said Henry Lelar, Esq., his certain attorney, executors, administrators, or assigns: to which payment well and truly to be made and done, we do bind ourselves, and each of us, our heirs, executors and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this day of in the year of our Lord one thousand eight hundred and forty-

The condition of this obligation is such, That whereas the above bounden A. B., having obtained a certain writ of replevin issued out of the tested at Philadelphia, the day of against a certain J. K., of the county aforesaid, commanding the said sheriff, that he should replevy,

and cause to be delivered to the said A. B. (*enumerate the articles*).

Now if the above bounden A. B. shall and will prosecute his suit against the said J. K. with effect, and shall and will make return of the said goods, if return of the same shall be adjudged, and shall and will, also, from time to time, and at all times hereafter, well and sufficiently keep and save harmless and indemnified the above named sheriff and his officers, and his or their heirs, executors, and administrators, and every of them, of and from all manner of suits, action and actions, costs or charges whatsoever, that shall and may accrue to him or them, by reason of the replevy and delivery aforesaid, that then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue; and we hereby authorize the prothonotary of the proper court to enter judgment hereon, upon the recovery of judgment against the said sheriff, upon any of the foregoing accounts.

Sealed and delivered in the presence of us,

A. B. (SEAL.)
C. D. (SEAL.)
E. F. (SEAL.)

Replevin Bond as used in Philadelphia in 1869.

Know all men by these presents, that we are held and firmly bound unto Peter Lyle, Esq., Sheriff of the City and County of Philadelphia, in the just and full sum of dollars, lawful money of Pennsylvania, to be paid to the said Peter Lyle, Esq., his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made and done, we do bind ourselves, and each of us, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such, That whereas, the above bounden having obtained a certain Writ of Replevin, issued out of the for the City and County of Philadelphia, as of Term, 18 No. tested at Philadelphia, the day of 18 against of the county aforesaid, commanding the said sheriff, that he should replevy, and cause to be delivered to the said plaintiff (*enumerate the articles*). Now if the above bounden plaintiff shall and will prosecute suit against the said defendant with effect, and shall and will make return of the said goods,

if return of the same shall be adjudged, and if the said obligors shall and will, also, from time to time, and at all times hereafter, well and sufficiently keep and save harmless and indemnified the above named sheriff and his officers, and his or their heirs, executors and administrators, and every of them, of and from all manner of suits, action and actions, costs or charges whatsoever, that shall and may accrue to him or them, by reason of the replevy and delivery aforesaid, that then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue; and we hereby authorize the prothonotary of the proper court, to enter judgment hereon for the above mentioned sum of dollars.

Sealed and delivered }
in the presence of us, }

(SEAL.)
(SEAL.)
(SEAL.)
(SEAL.)

Form of Claim Property Bond used in Philadelphia in 1869.

Know all men by these presents, that we are held and firmly bound unto Peter Lyle, Esq., Sheriff of the City and County of Philadelphia,

in the just and full sum of dollars, lawful money of Pennsylvania, to be paid to the said Peter Lyle, Esq., his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made and done, we do bind ourselves, and each of us, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such, That whereas, having obtained a certain Writ of Replevin, issued out of the for the City and County of Philadelphia, No. Term, 18 tested at Philadelphia, the day of against of the county aforesaid, commanding the said sheriff, that he should replevy, and cause to be delivered to the said plaintiff

And whereas, The said defendant ha claimed property in the said goods and chattels, whereof delivery of the same cannot be made to the said plaintiff . Now if the above bounden defendant shall and do well and truly deliver up the said goods and chattels to the said plaintiff if the property thereof shall be adjudged in the said plaintiff, and shall and do well and truly abide by the judgment of the said court in all things relating to the premises, and if the said

obligors shall also save and keep harmless, and indemnify the said sheriff in the premises, then this obligation to be void and of none effect, otherwise to be and remain in full force and virtue, and the said obligors hereby authorize the prothonotary of the proper court to enter judgment hereon for the above mentioned sum of dollars.

Sealed and delivered }
in the presence of us, }

(SEAL.)
(SEAL.)
(SEAL.)
(SEAL.)

Claim Property Bond as used in the county of Philadelphia in 1849.

Know all men by these presents, that we, A. B., C. D., and E. F., are held and firmly bound unto Henry Lelar, Esq., Sheriff of the city and county of Philadelphia, in the just and full sum of lawful money of Pennsylvania, to be paid to the said Henry Lelar, Esq., his certain attorney, executors, administrators or assigns: to which payment well and truly to be made and done, we do bind ourselves, and each of us, our heirs, executors and administrators, and every of them, jointly and severally firmly by these presents. Sealed with our

seals, dated this day of in the year of our Lord one thousand eight hundred and forty-

The condition of this obligation is such, That whereas, J. K. having obtained a certain writ of replevin, issued out of the tested at Philadelphia, the day of against the above bounden A. B. of the county aforesaid, commanding the said sheriff, that he should replevy, and cause to be delivered to the said J. K. (certain articles, enumerating them).

And whereas the said A. B. hath claimed property in the said (goods and chattels) wherefore delivery of the said (goods and chattels) cannot be made. Now if the above bounden A. B. shall and do well and truly deliver up the said (goods and chattels) to the said J. K., if the property thereof shall be adjudged in the said J. K., and shall do and well and truly abide by the judgment of the said court in all things relating to the premises, and shall also save and keep harmless, and indemnify the said sheriff in the premises, then this obligation to be void and of none effect, otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of us.

A. B. (SEAL.)
C. D. (SEAL.)
E. F. (SEAL.)

Writ of Retorno Habendo.

Philadelphia, *ss.*

The Commonwealth of Pennsylvania to the Sheriff of the said County, greeting: Whereas A. B., lately in our District Court at Philadelphia, was summoned to answer E. F. of a plea wherefore he took three horses, of the value of three hundred dollars, lawful money, &c., of the goods and chattels of him the said E. F., and the same unjustly detained against sureties and pledges, &c., as he alleged, and the said E. F. afterwards made default in our said court, before our judges at Philadelphia: Wherefore, it is considered in our same court, before our said judges, that he and his pledges for prosecuting should be amerced, and that the said A. B. might depart the court without day, and should have return of the horses aforesaid. Therefore we command you, that, without delay, you return the said three horses to the said A. B., and you shall not deliver the said horses at the complaint of the said E. F., without our writ, which shall expressly mention the said judgment. And in what manner you shall execute this writ, make known to our judges at Philadelphia, at our District Court there to be held for the said city and county of Philadelphia, the first Monday of

next. And have you then there this writ. Witness, &c.

Notice of claim of Property.

To H. L., Sheriff of the City and County of Philadelphia. Sir,—I hereby claim property in the goods and chattels (or beasts, or if a part only be claimed, state the part particularly) sought to be replevied by A. B. on a writ of replevin, issued out of the District Court for the city and county of Philadelphia, of March Term, 1849, No. against C. D., and to you directed. And I offer M. N., No. Walnut Street, and O. P., No. Vine Street, as sureties in the bond.

Dated, &c. Signed by claimant.

APPENDIX II.

Forms of Pleading.

Declaration in the detinuit when the sheriff returns summoned, replevied, and delivered.

In the District Court for the City and County of Philadelphia.

Philadelphia, *ss.*

A. B. was summoned to answer C. D. of a plea wherefore he took the goods and chattels of the said C. D. and unjustly detained the same against sureties and pledges, &c., and thereupon the plaintiff, by E. F. his attorney, complains for that the defendant on the day of at in the county aforesaid, in a certain dwelling-house, No. Walnut street (or farm, or store-house, as the case may be), took the goods and chattels, to wit (here enumerate the articles as in the writ), of him the plaintiff of great value, to wit, of the value of , and unjustly detained the same against sureties and pledges, until, &c.; to the damage of the plaintiff of ; and thereupon he brings his suit, &c.

Declaration in the detinet when the sheriff returns eloigned, or that a claim property bond has been taken.

In the District Court for the city and county of Philadelphia.

Philadelphia, *ss.*

A. B. was summoned to answer C. D. of a plea wherefore he took the goods and chattels of the said C. D. and unjustly detained the same against sureties and pledges, and thereupon the plaintiff, by E. F. his attorney, complains for that the defendant on the day of at in the county aforesaid, in a certain dwelling-house, No. Walnut Street (or farm, or storehouse, as the case may be), took the goods and chattels, to wit (here enumerate the articles as in the writ), of him the plaintiff, of great value, to wit, of the value of , and unjustly detains the same against sureties and pledges, to the damage of the plaintiff of ; and therefore he brings his suit.

Declaration in the detinuit and detinet, where the sheriff returns replevied and delivered, as to some of the goods, eloigned as to others.

In the District Court for the city and county of Philadelphia.

Philadelphia, *ss.*

A. B. was summoned to answer C. D. of a plea wherefore he took the goods and chattels of the said C. D. and unjustly detained the same against sureties and pledges, and thereupon the plaintiff, by E. F. his attorney, complains for that the defendant on the day of at in the county aforesaid, in a certain dwelling-house, No. Walnut street (or farm, or store-house, as the case may be), took the goods and chattels, to wit (stating the goods as enumerated in the writ), of him the plaintiff of great value, to wit, of the value of $, and parcel thereof, to wit, one hundred barrels of flour, unjustly detained against sureties and pledges, &c., until, &c., and the residue or remainder thereof still doth detain against sureties and pledges. Wherefore he, the said C. D., saith he is injured, and hath damage to the value of $ and therefore he brings suit, &c.

Plea, non cepit.

In the District Court for the city and county of Philadelphia.

Philadelphia, *ss.*

And the said defendant, by E. F. his attorney, comes, &c., and says that he did not take the said goods and chattels, in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff has above thereof complained against him; and of this the defendant puts himself on the country, etc.

Plea, cepit in alio loco.

And the said defendant, by E. F. his attorney, comes, etc., and says that he took the said cattle, in the said declaration mentioned, in a certain close (dwelling-house, store, as the case may be), called , in the county aforesaid, without this, that he took the said cattle, or any or either of them, in the said place called the , in the county aforesaid, as the plaintiff has in his said declaration in that behalf alleged: and this the defendant is ready to verify, etc. And for having a return of the said

cattle, the defendant well avows the taking of the said cattle, in the said declaration mentioned, in the said close called , and justly, etc., because he says that before the said time when, etc., and at the time of making the demise hereinafter mentioned, one C. D. was seized of, and in the said close called , in which, etc., with the appurtenances in his demesne as of fee: and being so seized, he, the said C. D., before the said time, etc., to wit, on demised the said close called , in which, etc., with the appurtenances to the defendant to have and to hold the same to the defendant, for the term of years thence next ensuing, and fully to be complete and ended: by virtue of which said demise, he, the defendant, afterwards and before the said time when, etc., to wit, on the day and year last aforesaid, entered into the said close called the , in which, etc., with the appurtenances, and became, until and at the said time when, etc. was lawfully possessed thereof: and because the said cattle in the said declaration mentioned at the same time when, etc., were wrongfully and injuriously in the said close called , and treading down and depasturing the grass and herbage then and there growing, and doing damage there to him the defendant, he, the defendant, well avows the taking of the said cattle in the said close called , and justly and as for and in the name

of a distress, for the said damage so there done and doing as aforesaid.

Plea admitting defendant had the cattle in the locus in quo, but took them damage feasant in another.

And the said defendant, by E. F. his attorney, comes and defends the wrong and injury when, etc., and well avows the taking and having the said (mare) in the said piece or parcel of land called , as in the said declaration mentioned, and justly, etc., because he says that, etc. (Here state a seizin in fee of another close, and a demise thereof to the defendant and his entry, and the distress damage feasant, as in the last form, to the end, and then proceed as follows.) And the said defendant afterwards, and immediately before the said time when, etc., took and led the said mare from the said close, piece, or parcel of ground so demised to him as aforesaid, to the said place in the said declaration mentioned, called the , in which, etc., and at the said time when, etc., had the same there in the way from the said close, piece, or parcel of ground, so demised as aforesaid, to a certain pound at , in the county aforesaid, there to be impounded for the damage so done in the said close,

piece, or parcel of ground, so demised as aforesaid; and this etc. (conclude with verification).

Plea, property in another.

And for a further plea in this behalf, with the leave of the court first had and obtained, the defendant says that the property of the said goods and chattels in the said declaration mentioned, at the said time when, etc., was in him the defendant (or in one A. B., as the case may be), without this that the property of the said goods and chattels, or any part thereof, at the said time when, etc., was in the said plaintiff as by the said declaration is above supposed, and this the defendant is ready to verify; wherefore he prays judgment, etc.

Plea, statute of limitations.

And for a further plea in this behalf, the defendant says that he did not take or detain the said goods and chattels in the said declaration mentioned, or any of them, or any part thereof, in manner and form as the plaintiff has above thereof

complained against him, at any time within six years before the commencement of this suit; and this he the said defendant is ready to verify.

Replication to the above.

And the plaintiff, as to the said plea of the defendant by him above pleaded says, that the defendant did take and detain the said goods and chattels, in the said declaration mentioned, in manner and form as he the plaintiff has above thereof complained against him, within six years before the commencement of this suit, and this he the said plaintiff prays may be inquired of by the country, etc.

Avowry or Cognizance for rent.

The defendant, by E. F. his attorney, well avows (or in a cognizance as bailiff of R. S., well acknowledges) the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house in which, etc., and justly, etc., because he says, that the plaintiff (or one J. K.) for

a long time, to wit, for the space of years, next before and ending on and from thence until and at the time when, etc., held and enjoyed the said dwelling-house in which, etc., with the appurtenances, as tenant thereof to the said defendant (or G. H.,) by virtue of a certain demise thereof to him the said plaintiff,[1] (or, the said J. K.) theretofore made at and under a certain yearly rent of payable quarterly on (state the days of payment), in every year, by even and equal portions; and because the sum of of the rent aforesaid, for the said space of ending as aforesaid on the said day of in the year aforesaid, and from thence until, and at the same time when, etc., was due and in arrear from the plaintiff to the defendant (or G. H. in a cognizance), he the defendant well avows (or if a cognizance, "as bailiff of the said G. H., well acknowledges") the taking of the said goods and chattels, in the said dwelling-house in which, etc., and justly, etc., as for and in the name of a distress for the said rent, so due and in arrear to the defendant (or G. P. as aforesaid); which said rent still remains in arrear and unpaid; and this the defendant is ready to verify; wherefore he prays judgment, and a return of the said

[1] If it be doubtful to whom the original letting was, the words "to him the said plaintiff," should be omitted.

goods and chattels, together with his damages, according to the form of the statute in such case made and provided to be adjudged to him, etc.

Suggestion in nature of an avowry on a judgment against the Plaintiff by default for want of a declaration.

A. } In District Court,
v. } June Term, 1869.
B. & C. } No.

Whereas, a judgment by default for want of a declaration has been entered against the said plaintiff. It is suggested that the defendant C., or bailiff of the defendant B., distrained the goods and chattels in question for rent due, and in arrear by the plaintiff to the defendant B. for certain premises demised by the said B. to the plaintiff, and by the plaintiff enjoyed under the said demise at a certain rent, to wit, at a rent of $ per annum, the said premises being No. Street, which rent was payable quarterly (or as the case may be), to wit, on the and at the time of the said distress, there was due of the said rent, one quarter's rent (or as the case may be), to wit, that which came due on the day of A. D.

18 , being $, and that which came due on the day of A. D. 18 being also $, together $ due and unpaid, and the same still remains due to the said B. and unpaid, and to recover which he caused the said distress to be made as aforesaid, and he prays the court to award a writ of inquiry of damages to assess his damages by reason of the premises.

Plea in bar. Traverse of the demise.

And the plaintiff, as to the (avowry or cognizance) of the defendant, says, that the defendant, by reason of anything by him in his said (avowry or cognizance) above alleged, ought not to avow (or, as bailiff of the said G. H. acknowledge) the taking of the said (goods, etc.), in the place in which, etc., and justly, etc.; because, he says, that the plaintiff (or E. F.) did not hold or enjoy the said dwelling-house in which, etc., with the appurtenances, as tenant thereof to the defendant (or the said G. H.), under the said supposed demise thereof in the said avowry or cognizance mentioned, in manner and form as the defendant has above in his said avowry (or cognizance) in that behalf alleged; and this he, the plaintiff, prays may be inquired of by the country.

Plea in bar, no rent in arrear.

Commencement as above. Because he says, that no part of the said supposed rent, in the said avowry (or cognizance) mentioned, was or is in arrear from the plaintiff to the defendant (or G. H.), in manner and form as the defendant has in avowry (or cognizance) in that behalf alleged; and this the plaintiff prays may be inquired of by the country, etc.

Plea, eviction.

Commencement as before. Because he says, that the defendant, after the making of the said demise in the said avowry mentioned, and before any part of the said rent therein mentioned became due or in arrear, to wit, on , with force and arms, etc., entered into a certain messuage or dwelling-house, parcel of the said demised premises, in the said avowry alleged to have been demised, in and upon the possession of him the plaintiff thereof, and him, the said plaintiff, from his possession thereof, ejected, expelled, put out, and amoved, and kept and continued the plaintiff so ejected, expelled, put

out and amoved from his possession thereof, from thence, until, and upon and after the said day of , A. D. 1848; and this the plaintiff is ready to verify; wherefore, inasmuch as the said defendant has above acknowledged the taking of the said (cattle, etc.), in the said place in which, etc., he, the plaintiff, prays judgment and his damages, by reason of the taking and unjustly detaining the same, to be adjudged to him, etc.

Plea by a lodger in a tavern or boarding-house, whose goods have been distrained for rent due by the tenant.

Commencement as before. Because, he says, that at the said time when, etc., he, the said plaintiff, was a boarder with O. P. (the tenant) at the said place in which, etc., and had been such boarder for a long time before, to wit, for the space of six months, and that, as such boarder, he had the said goods and chattels in the said place in which, etc., and that during all the said time, and at the said time when, etc., the said O. P., in the said place in which, etc., kept a boarding-house; and this the plaintiff is ready to verify.

Avowry, damage feasant.

The defendant, by A. B. his attorney, well avows (*or in a cognizance*, as bailiff of G. H. well acknowledges) the taking of the said goods and chattels in the said declaration mentioned, in the said (close) in which, etc., and justly, etc.; because he says, that the said place, in which, etc., now is, and at the same time when, etc., was the close, soil, and freehold of him the defendant, and because the said cattle at the said time when, etc., were in the said place in which, etc., eating up the grass there then growing, and doing damage there to the defendant, he the defendant well avows the taking of the said cattle in the said place, in which, etc., and justly, etc., as for and in the name of a distress for the said damage so there done and doing as aforesaid; and this the defendant is ready to verify; wherefore, he prays judgment and a return of the said goods and chattels, together with the damages, according to the form of the statute in such case made and provided, to be adjudged to him, etc.

Plea in bar, tender of amends before impounding.

And the plaintiff as to the (avowry or cognizance) of the defendant, says, that the defendant,

by reason of any thing by him in his said (avowry or cognizance) above alleged, ought not to avow (or as bailiff of the said G. H. acknowledge) the taking of the said (cattle, etc.) in the place in which, etc., and justly, etc. Because he says that after the taking of the said cattle in the said place in which, etc., by the defendant, and before the impounding of the same, to wit, on the same day and year in the said declaration mentioned, he, the plaintiff, tendered and offered to pay to the defendant a certain sum of money, to wit, the sum of $, as amends for the said damage done to him, the defendant, by the said cattle in the said place in which, etc., as aforesaid, and which was then sufficient amends for the same, which said sum of $ the defendant then wholly refused to accept from the plaintiff, and unjustly detained the said cattle against sureties and pledges, etc., until, etc., in manner and form as the plaintiff hath above thereof complained against him the defendant: and this he, the defendant, is ready to verify. Wherefore, inasmuch as the said defendant has above acknowledged the taking of the said (cattle) in the said place in which, etc., he, the plaintiff, prays judgment and his damages, by reason of the taking and unjustly detaining the same, to be adjudged to him, etc.

Plea in bar, denial of title.

(Commencement as above.) Because he says that the said place in which, etc., now is, and at the said time when, etc., was the close, soil, and freehold of him the plaintiff, and not the close, soil, and freehold of him the defendant (or G. H.), in manner and form as the defendant hath above in his said avowry (or cognizance) in that behalf alleged: and this he, the plaintiff, prays may be inquired of by the country, etc.

Plea that the cattle escaped through defect of fences.

(Commencement as above.) Because he says that the plaintiff, before and at the said time when, etc., was lawfully possessed of, and in a certain close with the appurtenances, situate, lying, and being in the county aforesaid, and contiguous and next adjoining to the said close of the defendant, in which, etc., and that the defendant and all others, the tenants and occupiers of the said close in which, etc., for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have used and been accustomed to repair and amend, and of right

ought to have repaired and amended, and the plaintiff before and at the said several times when, etc., of right ought to have repaired and amended, and still of right ought to repair and amend the fence between the said close of him the plaintiff, and the said close in which, etc., where and as often as occasion hath required, and shall and may require to prevent cattle lawfully feeding and depasturing, or being in the said close of the plaintiff, from erring and escaping thereout through the defects and insufficiency of the said fence, into the said close in which, etc., and doing damage there; and the plaintiff further says, that the said fence, before and at the said several times when, etc., was ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary making, repairing, and amending thereof; by means whereof the said cattle, in the said declaration mentioned, at the said several times when, etc., then lawfully feeding and depasturing in the said close of the plaintiff, without the knowledge of the plaintiff, and against his will, erred and escaped thereout into the close in which, etc., through the defects and insufficiency of the said fence, and remained therein until the defendant, before the plaintiff had or could have any notice that the said cattle were in the said place in which, etc., to wit, at the said time when, etc., of his own wrong, took the said

cattle in the said place in which, etc., and unjustly detained the same against sureties and pledges, in manner and form as he the plaintiff hath above thereof complained against him the defendant: and this the plaintiff is ready to verify. Wherefore, inasmuch as the said defendant has above acknowledged the taking of the said cattle, in the said place in which, etc., he, the plaintiff, prays judgment and his damages, by reason of the taking and unjustly detaining the same to be adjudged to him, etc.

Replication, denial of liability to repair the fences.

And the defendant, as to the said plea in bar of the plaintiff to the avowry of him the defendant above pleaded, says that he, by reason of anything by the plaintiff in his said plea in bar alleged, ought not to be barred from (avowing) the taking of the said cattle in the said declaration mentioned in the said place in which, etc., and justly, etc.: because he says that he, the defendant, and all others, the tenants and occupiers of the said close in which, etc., for the time being, from time whereof the memory of man is not to the contrary, have not repaired and amended, nor have been used and accustomed to repair and amend, nor of right ought

to have repaired and amended, nor ought the defendant before, or at the said several times when, etc., of right to have repaired and amended, nor still of right ought to repair and amend the said fence between the said close of the defendant and the said close in which, etc., when and as often as occasion hath required to prevent cattle feeding and depasturing, or being in the said close of the defendant, from erring or escaping thereout, through the defects or insufficiency of the said fence, into the said close in which, etc., and doing damage there, in manner and form as the plaintiff hath above in his said plea in bar in that behalf alleged; and of this he, the defendant, puts himself upon the country, etc.

Replication, denial of defect of fences.

(Commencement as above.) Because, he says, that the said fence, in the said plea in bar mentioned, before or at the said time when, etc., was not ruinous, prostrate, or fallen down for want of needful or necessary making, repairing, or amending thereof, in manner and form as the plaintiff has above in his said plea in bar in that behalf alleged; and of this, he, the defendant, put himself on the country, etc.

Avowry of distress for arrears of ground rent, from the case of Franciscus v. *Reigart.* 4 *Watts* 98.

And the said Emanuel C. Reigart, by William Norris his attorney, comes and defends the wrong, etc., and injury, etc., when, etc., and as the bailiff of John B. Newman, well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said place which, etc., justly, etc.; because he saith that the said George Franciscus, continually, from and after the first day of May, A.D. 1820, until the first day of May, A. D. 1831, and at the same time, etc., enjoyed a certain lot of ground, situate, etc., and that the said George Franciscus, the plaintiff, so continually enjoyed the same lot for all the time aforesaid, as the tenant of the said John B. Newman, by virtue of a certain demise or grant thereof from James Hamilton to Thomas Cookson, his heirs and assigns theretofore made, at and under the yearly rent of eighty shillings, sterling money of Great Britain, equal in value to seventeen dollars and seventy-eight cents, lawful money of the United States, payable yearly on the first day of May, in each and every year for ever, unto the said James Hamilton, his heirs and assigns. (The said George Franciscus being the assignee or alienee of the said

Thomas Cookson, the grantor of the said lot and premises; and the said John B. Newman, being the grantee or alienee in fee simple of James Hamilton the grantor of the said lot), and because one hundred and ninety-five and fifty-eight-one-hundredth of the rent aforesaid, due and payable by the said George Franciscus to the said John B. Newman, for eleven years' rent of the said lot of ground, etc. etc., as in the usual form.

Plea in bar to an avowry for rent, that plaintiff had paid an equal sum to the original ground rent landlord.

And the plaintiff says, that the said D., notwithstanding anything by him above pleaded, ought not to avow the taking of the said goods, etc., to be just, because he says, "that A. A., deceased, in his lifetime and at the time of his death, and the said D., from the time of his death, until and at the time when, etc., held the said dwelling-house in which, etc., with the appurtenances, as tenants thereof to B. B., at and under the yearly rent of fifty dollars, to be paid in quarterly payments in each and every year, to wit, on, etc. etc., by even and equal portions; and that before the said time

when, etc., the sum of twenty dollars of the said last mentioned rent for four years ending on, etc., became due and in arrear from the said D. to the said B. B., and thereupon the said B. B. on the said, etc., demanded payment of the said arrears of rent from the said D., but the said D. then and there refused to pay the same; whereupon the said B. B. afterwards, and before the time when, etc., demanded the payment of the said arrears of rent from the said C. C., as the occupier of the said dwelling-house, and threatened to distrain upon the goods and chattels in and upon the said dwelling-house and premises; whereupon the said C. C., in order to prevent the said goods and chattels, in and upon the said dwelling-house and premises, from being distrained, long before the said time when, etc., to wit, on, etc., paid to the said B. B. the said twenty dollars of the rent aforesaid, so being in arrear and unpaid as aforesaid; and so the plaintiff says, that nothing of the said twenty dollars of the rent aforesaid was in arrear to the said D., in manner and form as the said D. hath above in his said avowry alleged; and this the plaintiff is ready to verify; wherefore, etc." See Sapsford *v.* Fletcher, 4 T. R. 511.

Avowry by one tenant in common.

(*Usual commencement of avowry.*) Because, he says, that the plaintiff for a long time, to wit, for the space of years, next before and ending on and from thence until, and at the time when, etc., held and enjoyed one undivided moiety (the whole into two equal moieties to be divided), of the said dwelling-house in which, etc., with the appurtenances, as tenant thereof to the said defendant, by virtue of a certain demise thereof to him the said plaintiff theretofore made, at and under a certain yearly rent of payable quarterly, on the etc. (stating the entire rent, and the days of payment), in every year by even and equal portions; and because one undivided moiety of the sum of dollars, of the rent aftersaid, for the space of ending as aforesaid, on the said day of in the year, etc., was due and in arrear from the said plaintiff to the said defendant; he the said defendant well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, etc., and justly, etc., as for and in the name of a distress for the said undivided moiety of the said rent so due, and in arrear, and unpaid as aforesaid, and which said rent still remains in arrear and unpaid; and this

the defendant is ready to verify; wherefore he prays judgment, and a return of the said goods and chattels, together with his damages, etc., according to the form of the statute in such case made and provided, to be returned to him. (Cognizance of him as bailiff of the other tenant in common.) And for a cognizance in this behalf the said defendant, by leave of the court here, for this purpose had and obtained, according to the form of the statute in such case made and provided, as bailiff of S. M. well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, etc., and justly, etc.; because, he says, etc. (Cognizance as bailiff of the other tenant in common for an undivided moiety of the rent due to him, similar to the foregoing avowry.

Declaration on replevin bond against one surety.

In the District Court for the City and County of Philadelphia. June Term, 1848, No.

Philadelphia, *ss.*

A. B., assignee of Henry Lelar, Sheriff of the City and County of Philadelphia, according to the form of the Act of Assembly, in such case made

and provided, complains of J. S. being, etc., of a plea that he render to the said plaintiff, as assignee as aforesaid, the sum of one thousand dollars which he owes to, and unlawfully detains from him, the said plaintiff, assignee as aforesaid, for that whereas heretofore, to wit, on the day of A. D. 184 , at Philadelphia aforesaid, the said plaintiff and one C. R. distrained the goods and chattels of one C. D. and one E. F., late partners trading as D. & F., for a certain sum of money then due to the said plaintiff for rent, and the said goods and chattels being so distrained, the said C. D. and E. F., afterwards and within the space of five days then next ensuing, to wit, on the day of A. D. 184 , at Philadelphia aforesaid, sued forth and obtained out of the District Court for the City and County of Philadelphia, returnable to the said District Court, a writ of replevin commanding the said sheriff that he should replevy and cause to be delivered the said goods and chattels to the said C. D. and E. F. trading as D. & F., and thereupon the said H. Lelar, so being Sheriff of the City and County of Philadelphia, according to the form of the Act of Assembly in such case made and provided, did take from the said C. D. and E. E., and the said defendant and one O. P. as sureties, a bond in double the value of said goods and chattels, so distrained as aforesaid; and the said C. D. and

E. F., and one O. P. and the said defendant, on the day of A.D. 184 , by their certain writing obligatory, sealed with their respective seals, and now shown to the court here, the date whereof is, to wit, the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said Henry Lelar, Esquire, Sheriff of the City and County of Philadelphia, in the said just and full sum of one thousand dollars lawful money of the United States, to be paid to the said Henry Lelar, Esquire, his attorney, executors, administrators, or assigns, with a condition thereunder written that if the said C. D. and E. F. should and would prosecute their suit against the said A. B. and C. R. with effect, and should and would make return of the said goods, if return of the same should be adjudged, and should and would also from time to time, and at all times hereafter, well and sufficiently keep and save harmless and indemnified, the above named sheriff and his officers, and his and their heirs, executors, and administrators, and every of them of and from all manner of suits, action or actions, costs or charges whatsoever that shall or may accrue to him or them by reason of the replevy and delivery aforesaid, that then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue; and thereupon the

said sheriff afterwards, to wit, on the day and year last aforesaid, according to the exigence of said writ, so as aforesaid sued forth and obtained at the prayer of the said C. D. and E. F., replevied and made deliverance of the said goods and chattels to the said C. D. and E. F., according to the duty of his said office, and afterwards, to wit, at the term of , A. D. 184 , in the District Court for the City and County of Philadelphia, the said C. D. and E. F., by their attorney, complained that the said plaintiff and C. R., on the day of A. D. 184 , at Philadelphia aforesaid, in a certain dwelling-house in the said declaration described, took the goods and chattels of the said C. D. and E. F., in the said declaration more fully and particularly described, and them unjustly detained against sureties and pledges, to the damage of the said C. D. and E. F. one thousand dollars; and therefore they bring suit. And such proceedings were had thereupon in the said plea in the said court at Philadelphia aforesaid, that afterwards, to wit, on the day of A. D. 184 , in the said District Court for the City and County of Philadelphia, and by force of the statute in such case made and provided, it was considered and adjudged in and by the said court that the said plaintiffs take nothing by their writ aforesaid, but that they and their pledges to prosecute be in mercy, etc.,

and that the said defendants do go thereof without day, etc., and that they have a return of the goods and chattels taken, and it was also considered that the said defendant A. B. do recover against the said plaintiffs the sum of $, being the sum of the arrears aforesaid in the form aforesaid assessed, and also $ for his costs by the court then adjudged to the said defendants, and with their assent according to the form of the statute in such case made and provided for their costs and charges by them laid out about their defence in that behalf, which said arrears, costs, and charges in the whole amount to $, and that the said defendants have execution thereof, as by the record and proceedings thereof now remaining in the said District Court at Philadelphia aforesaid, more fully appears; and the said plaintiff in fact saith, that the said C. D. and E. F. did not prosecute their said action with effect against the said plaintiff for the taking and unjustly detaining the said goods and chattels, and have not made a return thereof, according to the form and effect of the said condition of the said writing obligatory, but have hitherto wholly neglected and refused, and still do neglect and refuse so to do, whereby the said writing obligatory became forfeited to the said H. Lelar, Esq., being Sheriff of the said City and County of Philadelphia as aforesaid; and the same being so forfeited,

the said sheriff afterwards, to wit, on the day of A. D. 184 , at Philadelphia aforesaid, at the request and cost of the said plaintiff by indorsement assigned the said writing obligatory to the said plaintiff according to the force and effect, etc., as by the said assignment indorsed on the said writing obligatory as aforesaid, and to the said court now here shown, the date whereof is the day and year last aforesaid, may more fully appear. By means whereof, and by force of the Act of Assembly in such case made and provided, an action hath accrued to the said plaintiff, as assginee of the said H. Lelar, so being Sheriff of the City and County of Philadelphia, to demand and have of and from the said defendant the said sum of one thousand dollars above demanded; yet the said defendant, although often requested so to do, hath not as yet paid the said sum of one thousand dollars above demanded, or any part of them, to the said Henry Lelar, before the said assignment, or to the said plaintiff as assignee as aforesaid, or either of them since the said assignment, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same or any part thereof, to the said plaintiff, assignee as aforesaid.

Declaration against the sheriff for taking insufficient sureties, when the replevin was not of a distress for rent.

For that, whereas, the said plaintiff on, etc., at etc., was possessed of one wagon, etc., of the value, etc., of his own proper goods and chattels, and that the said defendant, on the day and year aforesaid, was sheriff, etc., and the said plaintiff so of the goods and chattels possessed, and he the said defendant so as aforesaid being sheriff, etc., the duty of his said office not considering, but contriving and fraudulently intending the said plaintiff of his goods and chattels aforesaid to deprive and defraud, on the day and year aforesaid, at, etc., by color of his office aforesaid, and under the pretence of a writ of replevin to him directed and delivered, the goods and chattels aforesaid, at, etc., being found, at the plaint of one J. R., pretending the same goods and chattels were the proper goods and chattels of the said J. R., and to the said J. R. of right to belong, and that the said plaintiff had taken the goods and chattels aforesaid, and the same unjustly detained, against sureties and pledges, the goods and chattels aforesaid to be replevied from the possession of the said plaintiff, to be delivered to the said J. R., did cause and pro-

cure, without sufficient surety and pledges, or any sufficient surety, had or taken to prosecute the said suit and plaint of him the said J. R. against the said plaintiff, for the caption and unjust detention of the goods and chattels aforesaid, and to make a return of the said goods and chattels to the said plaintiff, if a return should be adjudged to the said plaintiff, as by the law and custom of the commonwealth of Pennsylvania, and the duty of his office, and the tenor of the writ aforesaid, he ought to have done. And whereas afterwards, to wit, on the same day and year aforesaid, at, etc., he the said plaintiff was summoned into the court of Common Pleas of the said county, to appear on the first Monday of March, then next following, to answer the said J. R. of a plea, why he took the goods and chattels aforesaid, and thereupon it was in such manner proceeded, that by the said court it was considered that the said plaintiff should have a return of the said goods and chattels aforesaid, to be delivered to him, which said judgment remains, and is in full force and vigor, not reversed or annulled; and the said plaintiff in fact saith, that the goods and chattels aforesaid, to the aforesaid J. R., by reason of the replevin aforesaid, so as aforesaid delivered, to places obscure and unknown were eloigned, whereby they cannot be returned or delivered to the said plaintiff, and the said plain-

tiff the goods and chattels aforesaid, by the occasion aforesaid, hath wholly lost, and is without remedy, to the damage of the said plaintiff, etc.[1]

Declaration against the sheriff for taking insufficient sureties.

"For that whereas the said plaintiff heretofore, to wit, on, etc., at, etc., in a certain close, situate, etc. (describe it briefly), took and distrained divers goods and chattels, to wit (here state the articles), of great value, to wit, of the value of $ lawful money of the United States, as a distress for certain arrears of rent, to wit, for the sum of $ of like lawful money, then due and owing from one A. B. to the said plaintiff, for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof theretofore made to the said A. B., rendering rent for the same; and the said plaintiff then and there detained the said goods and chattels (enumerate them) so taken and distrained for the cause aforesaid, according to the laws and customs of this commonwealth, until the said defendant, then being the sheriff of

[1] Pearce *v.* Humphreys, 14 S. & R. 23.

the county of Philadelphia, afterwards, to wit, on the day and year last aforesaid, and within his bailiwick as such sheriff, to wit, at, etc., caused the said goods and chattels to be replevied and delivered to the said A. B., and then and there made deliverance thereof to the said A. B., under color of his said office as such sheriff as aforesaid; and under pretence of a certain writ of replevin issuing out of, and under the seal of (state the court), and by which said writ, the said writ reciting therein that the said A. B. also therein named, had complained that the said plaintiff in this suit had taken and unjustly detained the said goods and chattels above mentioned, and which in the said writ were alleged to be the goods and chattels of the said A. B., the said defendant, as sheriff as aforesaid, was in and by the said writ, and in the name of the Commonwealth of Pennsylvania, commanded, that if the said A. B. should make him secure of prosecuting his claim with effect against E. F., the present plaintiff, then the said defendant as sheriff aforesaid, was commanded by the said writ to cause the said goods and chattels to be replevied and delivered to the said A. B., and also to put by sureties and safe pledges the said E. F., so that he should be and appear before the judges at Philadelphia, etc., to answer the said plaintiff wherefore he took the goods and chattels afore-

said, the property of the said plaintiff, and the same unjustly detained against sureties and safe pledges, and to have then there that writ, which said writ duly bore test the day of as by the said writ remaining of record in the said court of at, etc., may fully and at large appear, which said writ had been duly delivered to the said defendant as sheriff as aforesaid, to be executed according to law, to wit, at, etc., on, etc. And although it was the duty of the said defendant before his making deliverance of the said distress to the said A. B. as aforesaid, in pursuance of the Act of Assembly in such case made and provided, to take from the said A. B. and one responsible person as surety, a bond in double the value of the said goods and chattels so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said A. B. for the taking of the said goods and chattels with effect, and without delay, and for duly returning the goods and chattels so distrained, in case a return should be awarded. Nevertheless the said defendant so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the benefit of his said distress, and of the means of obtaining satisfaction for the said arrears of rent so due and owing as aforesaid, did not, nor would,

before his making deliverance of the said distress to the said A. B. as aforesaid, take from the said A. B. and one responsible person as surety as aforesaid, such a bond aforesaid, conditioned as aforesaid; but wrongfully and injuriously wholly omitted and neglected so to do, to wit, at, etc., aforesaid, and on the contrary thereof, he the said defendant, sheriff as aforesaid, wrongfully and unjustly before the replevying and delivery of the said cattle, goods and chattels as aforesaid, to wit, on, etc., at, etc., aforesaid, did take in the name of him the said defendant sheriff as aforesaid, of the said A. B. and two other persons, to wit, G. H. and J. K., a certain bond, conditioned for the prosecuting of the said suit of the said plaintiff with effect, and without delay, and for duly returning the said cattle, goods and chattels, so distrained as aforesaid, in case a return thereof should be awarded as a bond taken in pursuance of the said statute: Nevertheless the plaintiff in fact saith, that the said G. H. and J. K., so taken as sureties as aforesaid, were not good, able, sufficient or responsible sureties for prosecuting the said suit with effect, and without delay, or for duly returning the said cattle, goods and chattels so distrained as aforesaid, in case a return thereof should be adjudged; but the said G. H. and J. K. were wholly insufficient for that purpose, nor have the said

cattle, goods and chattels, or any or either of them, or any part thereof, as yet been returned to the said plaintiff in this suit, nor have the said arrears of rent, or any part thereof, been as yet paid or satisfied to the said plaintiff in this suit, nor hath the said judgment been yet in any way satisfied, nor hath the said A. B. hitherto answered to the said plaintiff in this suit, for the value of the said cattle, goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, by means of which said premises he the said plaintiff in this suit hath been and is wholly deprived of the said cattle, goods and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the said costs and charges by him in that behalf expended, in and about his said suit in that behalf, and in and about the endeavoring to obtain a return of the said cattle, goods and chattels, to wit, at, etc., aforesaid.

Declaration on the claim property bond.

In the District Court for the City and County of Philadelphia.

Philadelphia, *ss.*

C. D. was summoned to answer Henry Lelar,

Sheriff of the city and county of Philadelphia, of a plea that he render unto the said plaintiff, sheriff as aforesaid, the sum of $ lawful money of the United States, which he owes to and unjustly detains from him, and thereupon the said plaintiff, sheriff as aforesaid, by E. F. his attorney, complains, For that, whereas, heretofore, to wit, on the day of , A. D. 1848, at Philadelphia aforesaid, A. B. sued forth and obtained out of the District Court for the city and county of Philadelphia, returnable to the said District Court, a writ of replevin, commanding the said plaintiff, sheriff as aforesaid, that he should replevy and cause to be delivered certain goods and chattels to the said A. B., which one L. M. unjustly detained from him, and thereupon the said Henry Lelar, so being sheriff of the city and county of Philadelphia, did take from the said A. B., and J. K., and O. P., as sureties, a bond in double the value of the said goods and chattels so directed to be replevied as aforesaid, with a condition thereunder written that if the said A. B. should and would prosecute his suit with effect against the said L. M., and should and would make return of the said goods, if return of the same should be adjudged, and should and would also from time to time, and at all times thereafter, well and sufficiently keep and save harmless and indemnified the said plaintiff, so be-

ing sheriff as aforesaid, and his officers, and his and their heirs, executors, and administrators, and every of them, of and from all manner of suits, action or actions, costs or charges, whatsoever, that shall or may accrue to him or them, by reason of the replevy and delivery aforesaid, that then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue. And thereupon the said sheriff afterwards, to wit, on the day and year last aforesaid, according to the exigence of said writ so as aforesaid sued forth and obtained at the prayer of the said A. B., attempted to replevy and make deliverance of the said goods and chattels to the said A. B., but was prevented from making such replevin and deliverance of the said goods and chattels, by a claim of property in the said goods and chattels interposed by the said L. M., and thereupon the said plaintiff, so being sheriff as aforesaid, did take from the said L. M., and the said defendant, and one R. S. as sureties, a bond in double the value of the said goods and chattels, as by the law and custom of the commonwealth of Pennsylvania, and the duty of his office, he ought to have done. And the said L. M., and one R. S., and the said defendant, on the

day of , A. D. 1848, by their certain writing obligatory, sealed with their respective seals, and now shown to the court here, the date whereof

is, to wit, the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said Henry Lelar, Esq., Sheriff of the city and county of Philadelphia, in the said just and full sum of one thousand dollars, lawful money of the United States, to be paid to the said Henry Lelar, Esq., his certain attorney, executors, administrators, or assigns, with a certain condition thereunder written, that if the said L. M. should and would appear at the next term of the said court, and then and there make good his claim to the said goods and chattels,[1] *and should and would well and truly deliver up the said goods and chattels to the said A. B., if the property thereof should be adjudged in the said A. B.*, and should and would well and truly abide by the judgment of the said court in all things relating to the premises, and should also save and keep harmless, and indemnify the said sheriff in the premises, then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue, and afterwards, to wit, at the term of , A. D. 1848, in the District Court for the city and county of Philadelphia, the said A. B., by X. Y., his attorney, complained, that the said L. M., on the

[1] This condition is not in the bond as used in Philadelphia. The words in italics are improperly in the Philadelphia bond, and should not be declared on. See ante, 282.

day of 1848, "at Philadelphia aforesaid, in a certain dwelling-house, in the said declaration described, took the goods and chattels of the said A. B., in the said declaration more fully and particularly described, and them unjustly DETAINED against sureties and pledges, to the damage of the said A. B. of one thousand dollars, and therefore he brought suit, and such proceedings were had thereupon in the said plea, in the said court at Philadelphia aforesaid, that afterwards, to wit, on the day of , A. D. 1848, in the said District Court for the said city and county of Philadelphia, it was considered and adjudged, in and by the said court, that the property in the said goods and chattels was in the said plaintiff, and it was also considered that the said plaintiff do recover against the said defendant, the sum of $ for the value of the said goods and chattels, and also the sum of $ as damages for the detention of the said goods, and also $ for his costs, by the court then adjudged to the said plaintiff for his costs and charges by him laid out about his defence in that behalf, which said value, damages, costs and charges, in the whole, amount to the sum of $, and that the said plaintiff have execution thereof, as by the record and proceedings thereof now remaining in the said District Court at Philadelphia aforesaid, more fully appears; and the said plain-

tiff in fact saith, that the said L. M. *did not make good his claim to the said goods and chattels, nor did he deliver up the said goods and chattels to the said A. B.*,[1] or well and truly abide by the judgment of the said court in all things relating to the premises, or save and keep harmless and indemnified the said sheriff, according to the form and effect of the said condition of the said writing obligatory, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, whereby the said writing obligatory became forfeited to the said plaintiff, so being sheriff of the said city and county of Philadelphia as aforesaid; By means whereof an action hath accrued to the said plaintiff, so being sheriff of the city and county of Philadelphia, to demand and have of and from the said defendant the said sum of one thousand dollars above demanded; yet the said defendant, although often requested so to do, hath not, as yet, paid the said sum of one thousand dollars above demanded, or any part thereof to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse to pay the same or any part thereof to the said plaintiff, sheriff of the city and county of Philadelphia as aforesaid.

[1] See note to page 342, ante.

APPENDIX III.

Statutes.

ENGLISH STATUTES.

Statute of Marlbridge, 52 *Henry* 3*d*, *ch.* 21, *A. D.* 1267.

It is provided, also, that if the beasts of any man be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties, and if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered.

Statute of Gloucester, 6*th Ed.* 1, *ch.* 1, *sect.* 2, *A. D.* 1278.

And, whereas, before-time, damages were not taxed, but to the value of the issues of the land.

It is provided that the demandant may recover against the tenant, the costs of his writ purchased, together with the damages above said. And this act shall hold place in all cases where the party is to recover damages. And every person, from henceforth, shall be compelled to render damages, where the land is recovered against him, upon his own intrusion or his own act.

Statute Westminster 2d, ch. 2, 13 *Ed.* 1, *A. D.* 1285.

Forasmuch as lords of fees, distraining their tenants for services and customs due unto them, are many times grieved, because their tenants do replevy the distress by writ or without writ. And when that lords, at the complaint of their tenants, do come by attachment into the county, or unto another court, having power to hold pleas of withernam, and do avow the taking good and lawful by reason that the tenants disavow to hold aught, nor do claim to hold anything of him (which took the distress, and avowed it), he that distrained is amerced, and the tenants go quit. To whom punishment cannot be assigned for such disavowing by record of the county, or of other courts having no record.

II. It is provided and ordained from henceforth, that where such lords cannot obtain justice in counties, and such manner of courts against their tenants, as soon as they shall be attached at the suit of their tenants, a writ shall be granted to them to remove the plea before the justices, before whom, and none otherwhere, justice, may be ministered unto such lords. And the cause shall be put in the writ, because such a man distrained in his fee for services and customs to him due. Neither is this act prejudicial to the law commonly used, which did not permit that any plea should be moved before justices at the suit of the defendant; for though it appear at the first show that the tenant is plaintiff, and the lord defendant, nevertheless, having respect to that, that the lord hath distrained, and sueth for services and customs being behind, he appeareth indeed to be rather actor or plaintiff, than defendant. And to the intent, the justices may know upon what fresh seizin the lords may avow the distress reasonable upon their tenants. From henceforth it is agreed and enacted, that a reasonable distress may be avowed upon the seizin of any ancestor or predecessor since the time that a writ of novel disseizin hath run. And because it chanceth sometimes that the tenant, after that he hath replevied his beasts, doth sell or alien them, whereby return cannot be

made unto the lord that distrained, if it be adjudged.

III. It is provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded. And if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distraineth shall have his recovery by writ, that he shall restore unto him so many beasts or cattle; and if the bailiff be not able to restore, his superior shall restore. And forasmuch as it happeneth some time, that after the return of the beasts is awarded unto the distrainor, and the party so distrained, after that the beasts be returned, doth replevy them again, and when he seeth the distrainor appearing in the court ready to answer him, does make default, whereby a return of the beasts ought to be awarded again unto the distrainor, and so the beasts be replevied twice or thrice, and infinitely, and the judgments given in the king's courts take no effect in this case, whereupon no remedy hath been yet provided. In this case, such process shall be awarded, that so soon as return of the beasts shall be awarded to the distrainor, the sheriff shall be commanded by a judicial writ to make return of the beasts unto the

distrainor, in which writ it shall be expressed that the sheriff shall not deliver them without writ, making mention of the judgment given by the justices, which cannot be without a writ issuing out of the rolls of the said justices before whom the matter was moved. Therefore when he cometh unto the justices, and desireth replevin of the beasts, he shall have a judicial writ, that the sheriff taking surety for the suit, and also of the beasts or cattle to be returned, or the price of them (if return be awarded), shall deliver unto him the beasts or cattle before returned, and the distrainor shall be attached to come at a certain day before the justices, afore whom the plea was moved in the presence of the parties. And if he that replevied make default again, or for another cause, return of the distress be awarded, being now twice replevied, the distress shall remain irrepleviable. But if a distress be taken of new, and for a new cause, the process above-said shall be observed in the same new distress.

Statute 7th, Henry 8th, ch. 4, A. D. 1516.

(The act concerning avowries for rents and services.)

Sect. III. And also that every avowant, and every other person or persons that make avowry, conizance, or knowledge, or justify as bailey to any other person or persons in any replegiari or second deliverance, for any rent, custom, or service, if their avowry, conizance, or justification be found for them, or the plaintiffs in the said actions otherwise barred, shall recover their damages and costs that they have sustained, as the plaintiff should have done, if they had recovered in the said replevins.

Statute 21st, Henry 8th, ch. 19, A. D. 1531.

(Avowries shall be made by the lord upon the land, without naming his tenant.)

Whereas, as well the noblemen of this realm, as divers other persons, by fines, recoveries, grants, and secret feoffments, and leases made by their tenants to persons unknown of the lands and tenements holden of them, have been put from the knowledge of their tenants, upon whom they should by order

of the law make their avowries for their rents, customs, and services, to their great losses and hinderances.

II. Be it therefore enacted, established, and ordained, by authority of this present parliament, that wheresoever any manor lands, tenements, and other hereditaments be holden by any manner person or persons, by rents, customs, or services, that if the lord of whom any such manor lands, tenements, or hereditaments be so holden, distrain upon the same manor lands or tenements, for any such rents, customs, or services, and replevin, thereof be sued, that the lord of whom the same lands, tenements, or hereditaments be so holden, may avow, or his bailiff or servant make conusance, or justify for taking of the said distress upon the same lands, tenements, or hereditaments so holden as in lands or tenements within his fee or seignory, alleging in the said avowry, conizance, and justification, the same manors, lands, and tenements to be holden of him without naming any person certain to be tenant of the same, and without making any avowry, justification, or conizance upon any person certain. And, likewise, the lord, baily, or servant to make avowry, justification, or conizance in like manner and form upon every writ sued of second deliverance.

III. And also be it enacted by the said authority, that every avowant, and every other person and persons that make any such avowry, justification, or conizance, as baily or servant to any person or persons in any replegiare, or second deliverance, for rents, customs, services, or for damage feasant, or other rent or rents, upon any distress taken in any lands or tenements, if the same avowry, conizance, or justification be found for them, or the plaintiffs in the same be non-suit, or otherwise barred, that then they shall recover their damages and costs against the said plaintiff, as the same plaintiffs should have done or had, if they had recovered in the replegiare or second deliverance found against the said defendants.

IV. And be it also ordained, that the said plaintiffs and defendants in the said writs of replegiare, or writs of second deliverance, and in every of them, shall have like pleas and like aid prayers in all such avowries, conizances, and justifications (pleas of disclaim only except), as they might have had before the making of this act, and as though the said avowry, conizance, or justification had been made after the due order of the common law.

V. And it is further enacted by the said authority, that all such persons as by order of the com-

mon law may lawfully join to the plaintiffs or defendants in the said writs of replegiare or second deliverance, as well without process as by process, shall from henceforth join unto the said plaintiffs or defendants, as well without process as by process, and to have like pleas and like advantages in all things (disclaim only except), as they might have done by the order of the common law before the making of this act.

Statute 4th, James 1st, ch. 3, A. D. 1607.

(An act to give costs to the defendant upon a non-suit of the plaintiff, or verdict against him.)

Whereas, in the three and twentieth year of King Henry the Eighth of famous memory, a good and profitable law was made, whereby it was enacted, that in cases where the plaintiff in any action, bill, or plaint of debt, trespass upon the case, detinue, accompt, and in some other actions therein especially mentioned, should become non-suit, or a verdict should be had against the said plaintiff: that then, in such cases, the defendant should have judgment to recover his costs against every such plaintiff, as by the said law appeareth; which law hath been found to be very good and beneficial for the common-

wealth, and thereby many have been discouraged from bringing frivolous and unjust suits, because such parties are to make recompense to the parties unjustly vexed, for the said unjust vexations.

II. And forasmuch as actions of trespass, and actions of ejectione firmæ, and many other actions real and personal, are within the same mischief, as the said other actions were at the common law, and yet were omitted out of the provision of the said law. For remedy whereof, be it enacted by the king's most excellent majesty, the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, that if any person or persons, at any time after the end of this present session of parliament, shall commence or sue in any court of record, or in any other court, any action, bill, or plaint of trespass, or ejectione firmæ, or any other action whatsoever, wherein the plaintiff or defendant might have costs (if in case judgment should be given for him), and the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, after appearance of the defendant or defendants be non-suited, or that any verdict happen to pass by any lawful trial against the plaintiff or plaintiffs, demandant or demandants in any such action, bill, or plaint, then the defendant and defendants, in

every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff and plaintiffs, demandant and demandants, to be assessed, taxed, and levied in manner and form as costs in the said actions are to be assessed, taxed, and levied in and by the said law of the three and twentieth year of King Henry the Eighth.

Statute 17, *Charles* 2*d*, *ch.* 7, *A. D.* 1665.

(An act for a more speedy and effectual proceeding upon distresses and avowries for rents.)

Forasmuch as the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith; and yet, nevertheless, by reason of the intricate and dilatory proceedings upon replevins, that remedy is become ineffectual:—

II. For remedy thereof, It is enacted by the king's most excellent majesty, with the advice and assent of the lords spiritual and temporal, and commons in this present parliament assembled, and by authority of the same, That whensoever any plaintiff in replevin shall be non-suit before issue joined in any suit of replevin by plaint or writ lawfully returned, removed, or depending in any of the king's courts at Westminster, that the defend-

ant making a suggestion in nature of an avowry or cognizance for such rent to ascertain the court of the cause of distress; the court upon his prayer shall award a writ to the sheriff of the county where the distress was taken, to inquire by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained; and thereupon notice of fifteen days shall be given to the plaintiff or his attorney in court of the sitting of such inquiry. And thereupon the sheriff shall inquire of the truth of the matters contained in such writ, by the oaths of twelve good and lawful men of his county: and upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value: and in case they shall not amount to that value, then so much as the value of the said goods and chattels so distrained shall amount unto, together with his full costs of suit, and shall have execution thereupon by fieri facias or elegit, or otherwise, as the law shall require; and in case such plaintiff shall be non-suit, after cognizance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff; then the jurors that are impanelled or returned to inquire

of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained: and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution for the same by fieri facias or elegit, or otherwise as the law shall require.

III. And be it further enacted by the authority aforesaid, that if judgment in any of the courts aforesaid be given upon demurrer for the avowant, or him that maketh cognizance for any rent, the court shall, at the prayer of the defendant, award a writ to inquire of the value of such distress; and upon the return thereof, judgment shall be given for the avowant, or him that makes cognizance, as aforesaid, for the arrears alleged to be behind in such avowry or cognizance, if the goods or cattle so distrained shall amount to that value. And in case they shall not amount to that value, then for so much as the said goods or cattle so distrained amount unto, together with his full costs of suit, and shall have like execution as aforesaid.

IV. Provided always, and be it enacted, that, in all cases as aforesaid, where the value of the

cattle distrained as aforesaid, shall not be found to be to the full value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears.

Statute 11, *Geo.* 2*d*, *ch.* 19, § 22, 23, *A. D.* 1738.

And whereas great difficulties often arise in making avowries or conuzance upon distresses for rent, quit rents, reliefs, heriots, and other services, Be it further enacted by the authority aforesaid, that from and after the said twenty-fourth day of June, 1738, it shall and may be lawful to and for all defendants in replevin to avow or make conuzance generally, that the plaintiff in replevin or other tenant of the lands and tenements, whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of such honor, lordship, or manor, for which tenements, the rent, relief, heriot, or other service distrained for, was at

the time of such distress, and still remains due; without further setting forth the grant, tenure, demise, or title, of such landlord or landlords, lessor or lessors, owner or owners of such manor, any law or usage to the contrary notwithstanding. And if the plaintiff or plaintiffs in such action shall become non-suit, discontinue his, her or their action, or have judgment given against him, her or them, the defendant or defendants in such replevin shall recover double costs of suit.

XXIII. And to prevent vexatious replevins of distresses taken for rent, Be it enacted, by the authority aforesaid, that from and after the twenty-fourth day of June, 1738, all sheriffs, and other officers, having authority to grant replevins, may and shall in every replevin for a distress for rent take in their own names from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded before any deliverance be

made of the distress; and that such sheriff or other officer as aforesaid taking any such bond, shall, at the request and cost of the avowant or person making conuzance, assign such bond to the avowant or person aforesaid, by endorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so endorsed be duly stamped before any action be brought thereon; and if the bond so taken and assigned be forfeited, the avowant or person making conuzance may bring an action and recover thereupon in his own name; and the court where such action shall be brought may, by a rule of the same court, give such relief to the parties on such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond.

PENNSYLVANIA STATUTES.

Act of 1705. 1 *Smith's Laws* 44.

Sect. XII. It shall and may be lawful for the justices of each county in this province to grant writs of replevin in all cases whatsoever, where

replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law.

Act of 21*st March*, 1772. 1 *Smith's Laws* 370.

(An act for the sale of goods distrained for rent, and to secure such goods to the persons distraining the same, for the better security of rents, and for other purposes therein mentioned.)

Whereas, the most ordinary and ready way for recovery of arrears of rent is by distress, and no provision hath yet been made by the laws of this province, that such distresses may be sold, and by the common law the same may be only detained, as pledges for enforcing the payment of such rent, and the persons distraining have little benefit thereby. For the remedying whereof,

I. Sect. I. Where any goods or chattels shall be distrained for any rent reserved and due, upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken,

and notice thereof, with the cause of such taking, left at the mansion house, or other most notorious place on the premises, charged with the rent distrained for, replevy the same with sufficient surety to be given to the sheriff, according to law, then and in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may with the sheriff, under-sheriff, or any constable in the city or county where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two reputable freeholders, who shall have and receive for their trouble the sum of two shillings per diem each, and shall first take the following oath or affirmation: I, A. B., will well and truly, according to the best of my understanding, appraise the goods and chattels of C. D., distrained on for rent by E. F., which oath or affirmation such sheriff, under-sheriff, or constable are hereby empowered and required to administer; and after such appraisement, shall or may, after six days' public notice, lawfully sell the goods and chattels, so distrained, for the best price that can be gotten for the same, for and towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus, if any,

in the hands of the said sheriff, under-sheriff, or constable, for the owner's use.

Sect. V. In case any lessee for life, or lives, term of years, at will, or otherwise, of any messuages, lands, or tenements upon the demise whereof any rents are or shall be reserved or made payable, shall, from and after the publication of this act, fraudulently or clandestinely convey or carry off or from such demised premises, his goods and chattels, with intent to prevent the landlord or lessor from distraining the same for arrears of such rent so reserved as aforesaid, it shall and may be lawful to and for such lessor or landlord, or any other person or persons, by him for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same may be found, as a distress for the said arrears of such rent, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord in and upon such demised premises, for such arrears of rent.

Sect. VI. Provided, that nothing herein contained shall extend, or be deemed or construed to

extend, to empower such lessor or landlord to take or seize any such goods or chattels, as a distress for arrears of rent, which shall be bona fide, and for a valuable consideration, sold before such seizure made to any person or persons not privy to such fraud as aforesaid, anything herein to the contrary notwithstanding.

Sect. VII. It shall and may be lawful to and for every lessor or landlord, lessors or landlords, or his, her, or their bailiff, receiver, or other person or persons empowered by him, her, or them, to take and seize as a distress for arrears of rent, any cattle or stock of their respective tenant or tenants, feeding or depasturing upon all or any part of the premises demised or holden; and also to take and seize all sorts of corn and grass, hops, roots, fruits, pulse, or other products whatsoever, which shall be growing on any part of the estate or estates so demised or holden, as a distress for arrears of rent, and to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of; and the purchaser of any such corn, grass, hops, roots, fruits, pulse, or other products, shall have free

egress and regress to and from the same, when growing, to repair the fences from time to time; and, when ripe, to cut, gather, make, cure, and lay up and thrash, and after to carry the same away, in the same manner as the tenant might legally have done, had such distress never been made.

Sect. X. And whereas great difficulties often arise in making avowries or conusance upon distresses for rent, *Be it enacted*, That it shall and may be lawful for all defendants in replevin to avow and make conusance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise, at such a certain rent or service, during the time wherein the rent or service distrained for incurred, which rent or service was then and still remains due, without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor, or lessors, any law or usage to the contrary notwithstanding; and if the plaintiff or plaintiffs, in such action, shall become non-suit, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover double costs of suit.

Sect. XI. And to prevent vexatious replevins of

distresses taken for rent, *Be it enacted*, That all sheriffs and other officers, having authority to serve replevins, may and shall, in every replevin of a distress for rent, take in their own names from the plaintiff, and one responsible person as surety, a bond in double the value of the goods distrained (such value to be ascertained by the oath or affirmation of one or more credible person or persons, not interested in the goods or distress; which oath or affirmation the person serving such replevin is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress, and such sheriff, or other officer, as aforesaid, taking any such bond, shall, at the request and costs of the avowant or person making cognizance, assign such bond to the avowant or person aforesaid, by endorsing the same and attesting it under his hand and seal, in the presence of two credible witnesses; and if the bond so taken and assigned be forfeited, the avowant or person making cognizance may bring an action and recover thereon in his own name; and the court, where such action shall be brought, may, by a rule of the same court, give such relief to the parties upon such bond, as may be agreeable to justice and rea-

son; and such rule shall have the nature and effect of a defeasance to such bond.

Act of 3*d April*, 1779, 1 *Smith's Laws* 470.

(And act declaring replevins, attachments, judgments and executions, in certain cases to be erroneous and void.)

Sect. I. Whereas divers writs of replevin have of late been granted and issued for goods and chattels taken in execution, and for fines and penalties legally incurred and due to this commonwealth, to the delay of public justice, and to the great vexation of the officers concerned in taking and levying the same:—

Be it enacted,—

Sect. II. All writs of replevin granted or issued for any owner or owners of any goods or chattels, levied, seized or taken in execution, or by distress, or otherwise, by any sheriff, naval officer, lieutenant, or sublieutenant of the city of Philadelphia or of any county, constable, collector of the public taxes, or other officer, acting in their several offices under the authority of the State, are irregular,

erroneous, and void; and all such writs may and shall at any time after the service, be quashed (upon motion) by the court to which they are returnable, the said court being ascertained of the truth of the fact by affidavit or otherwise.

Sect. III. The court, besides quashing the said writs, may and shall award treble costs to the defendant or defendants in such writs; and also, according to their discretion, order an attachment against any prothonotary or clerk, who shall make out or grant any such writ, knowing the same to be for goods or chattels taken in execution, or seized as aforesaid.

Act of 25th March, 1825, *Pamph. Laws* 114.

(A supplement to an act entitled, "An act for the sale of goods distrained for rent, and to secure such goods to the persons distraining the same, for the better security of rents, and for other purposes therein mentioned.")

Sect. I. In case any lessee for life or lives, term of years at will, or otherwise, of any messuages, lands or tenements, situate in the city or county of Philadelphia, upon the demise whereof any rents

are or shall be reserved or made payable, shall, from and after the first day of August next, before such rents as aforesaid shall become due and payable, fraudulently convey away or carry off or from such demised premises, his goods and chattels, with intent to defraud the landlord or lessor of his remedy by distress, it shall and may be lawful to and for such landlord or lessor, to consider his rents so reserved as aforesaid, as apportioned up to the time of such conveying away or carrying off, and for him or any other person or persons, by him for that purpose lawfully authorized, within the space of thirty days next ensuing such conveying away or carrying off such goods and chattels as aforesaid, to take and seize such goods and chattels, wherever the same may be found, as a distress for such rents so apportioned as aforesaid, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had been distrained by such lessor or landlord, in and upon such demised premises, for rents actually due agreeably to the existing laws. Provided that such landlord or lessor, before any such goods or chattels are seized as aforesaid, shall make oath or affirmation before some judge, alderman or justice of the peace, that he verily believes that said goods or chattels were carried away for the purpose of defrauding as aforesaid: And, provided, that nothing herein

contained shall extend, or be deemed or construed to extend, to empower such lessor or landlord, to take or seize any such goods or chattels, as a distress, for such rents so apportioned as aforesaid, which shall be bona fide and for a valuable consideration, sold before such seizure made, to any person or persons not privy to such fraud as aforesaid, any thing herein to the contrary notwithstanding: And provided also, that nothing herein contained shall be construed to apply to contracts made before the passage of this act.

MASSACHUSETTS REVISED STATUTES.

Chapter 143.

OF REPLEVIN OF PROPERTY.

Replevin of cattle distrained.

Sect. 1. Any person, whose beasts are distrained or impounded, in order to recover a penalty or forfeiture, supposed to have been incurred by their going at large, or to obtain satisfaction for damages, alleged to have been done by them, may maintain a writ of replevin therefor, to be sued out, and prosecuted before a justice of the peace or police court for the county, in the same form,

substantially, as heretofore established and used in such cases.

2. The writ shall be sued out, served, returned, and the cause shall be heard and determined, in like manner as is provided in other civil actions before a justice of the peace, or police court, in all particulars in which a different course is not prescribed.

3. The writ shall not be served, unless the plaintiff, or some one in his behalf, executes and delivers to the officer a bond to the defendant, with sufficient sureties, to be approved by the officer, in a penalty double the value of the property to be replevied, with condition to prosecute the replevin to final judgment, and to pay such damages and costs as the defendant shall recover against him, and also to return the said property, in case such shall be the final judgment.

4. The writ shall require that the bond shall be given in double the value of the property to be replevied, but shall not express the sum or amount for which it shall be given. When the parties do not agree as to the value of the property, it shall be ascertained by three disinterested and discreet persons, to be appointed and sworn by the

officer, and the penalty of the bond shall be equal to double the value ascertained by such persons, or any two of them.

5. The officer shall return such bond with the writ, to be left with the justice or court for the use of the defendant; he shall also include in his return, indorsed on the writ, a certificate of the appointment of the three appraisers, the appraisal, and the expenses thereof.

6. If it appears upon the non-suit of the plaintiff, or upon a trial or otherwise, that the beasts were lawfully taken or distrained, the defendant shall have judgment for the sum found to be due from the plaintiff, for the penalty or forfeiture, or for the damages, for which the beasts were impounded, together with all the legal fees, costs, charges, and expenses, incurred by reason of the distress, and also the costs of the action of replevin; or instead thereof a judgment for a return of the beasts, to be held by the defendant irrepleviable by the plaintiff, and for the damages for the taking thereof by the replevin, and for his costs.

7. When the beasts are returned to the defendant, pursuant to such judgment, they shall be

held and disposed of in like manner as if they had not been replevied.

8. If it appears upon the default of the defendant, or upon a trial or otherwise, that the beasts were taken or distrained, without any sufficient or justifiable cause, the plaintiff shall have judgment for his damages caused by the unjust taking and detaining of the beasts, and for his costs of the suit.

9. When it appears that the sum demanded for the penalty, forfeiture, or damages, exceeds the sum of one hundred dollars, or that the property of the beasts is in question, and that their value exceeds one hundred dollars, or that the title to real estate is concerned or brought in question, the case shall, at the request of either party, be transferred to the Court, and be there disposed of, in like manner as is provided in chapter one hundred and twenty with respect to actions brought before a justice of the peace, in which the title to real estate is concerned or brought in question.

Replevin of other property.

10. When any goods exceeding in value twenty dollars, are unlawfully taken or detained from the owner or person entitled to the possession, or when any goods of that value attached on mesne process, or taken on execution, are claimed by a person other than the defendant in the suit, in which they are so attached or taken, such owner or other person may cause them to be replevied.

11. When the property alleged to be detained does not exceed in value one hundred dollars, the writ may be sued out from, and returnable to a justice of the peace, or police court for the county in which the goods are detained; and in all cases the writ may be sued out of the superior court, and shall in such case be returnable to the same court for the county in which the goods are detained; it shall be substantially in the form heretofore established and used, and in all particulars, in which a different course is not prescribed, shall be sued out, served and returned like other writs in civil actions.

12. The officer, before serving the writ, shall take from the plaintiff or some one in his behalf,

a bond to the defendant, with sufficient sureties, in double the value of the goods to be replevied, conditioned like the bond hereinbefore described to be taken on a writ of replevin, for beasts distrained or impounded; and the officer shall, in the appraisal of the goods, and the return of the writ, in the manner provided with respect to such action for beasts distrained or impounded, except that when the writ is returnable to the superior court, the bond shall be left with the clerk of the court for the use of the defendant.

13. If it appears upon the non-suit of the plaintiff, or upon a trial or otherwise, that the defendant is entitled to a return of the goods, he shall have judgment therefor, with damages for the taking by the replevin, and his costs.

14. If the goods, when replevied, were taken on execution, or if they were then attached, and judgment is afterwards rendered for the attaching creditor, and if in either case the service of the execution is delayed by means of the replevin, the damages to be assessed for the defendant, in case of judgment for a return, shall not be less than at the rate of twelve per cent. a year, on the value of the goods, for so long as the service of the execution is so delayed.

15. All sums, recovered in an action of replevin by an officer, for or on account of goods attached or taken in execution by him, or recovered in an action upon the bond given upon the replevin of such goods, shall be applied and disposed of, as far as they will go, in the following manner: First, to pay the lawful fees and charges of the officer, the reasonable expenses of the action of replevin, and the action on the bond, so far as they are not reimbursed by the costs recovered. Second, to pay to the creditor, at whose suit the goods were attached or taken on execution, the sum, recovered by him in that suit, or as much thereof as remains unpaid, with interest therefor, at the rate of twelve per cent. a year so long as the money has been withheld from the creditor, or the service of his execution delayed by reason of the replevin. Third, if the attaching creditor, in such case, does not recover judgment in the suit in which the attachment was made, or if any balance remains of the moneys so recovered by the officer, after paying what is due to the creditor, the same shall be applied and disposed of, in the same manner as would and ought to have been done with the surplus, if any, of the proceeds of sale, in case the same goods had been sold on execution.

16. All sums received by such creditor from the proceeds of the sale of goods attached or taken on execution, and afterwards returned, or received for the value of any goods not returned, or recovered from the officer for the insufficiency of the sureties in the bond, shall be applied towards the discharge of the judgment recovered by the creditor; and all sums, received as interest or damages for the delay of his execution, shall be applied one-half to the sole use of the creditor, and the other half in discharge of the judgment.

17. If it appears, upon default or otherwise, that the goods were unlawfully taken or attached, or unlawfully detained by the defendant, the plaintiff shall have judgment for his damages caused thereby, and for his costs of the suit.

General Provisions.

18. If the goods which are replevied had been attached, they shall, in case of judgment for a return, be held liable to the attachment, until final judgment in the suit, in which they were attached, and for thirty days thereafter, in order to their being taken on execution. If such final judgment is rendered, before the return of the goods, or if the goods when replevied were seized and held

on execution, they shall be held subject to the same attachment or seizure for thirty days after the return, in order that the execution may be served thereon, or the service thereof completed, in like manner as it might have been, if the goods had not been replevied.

19. The damages, in replevin, whether for the plaintiff or for the defendant, shall be assessed by the jury, by which the cause is tried, if there is a trial by jury; otherwise, they shall be assessed upon an inquiry by the court, or justice, or by a jury impanelled for that purpose, as damages are assessed in other civil actions.

20. The writ of return, in all actions of replevin, shall be substantially in the same form that has been heretofore established and used in the like case, and the writ of reprisal shall be substantially in the same form with the writ heretofore called a writ of withernam.

21. The foregoing provisions shall not preclude the defendant from his remedy on the replevin bond, or against the officer for the insufficiency of the sureties in the bond, to recover the value of the goods, together with the loss or damage caused by the replevin, notwithstanding he has

endeavored to recover the same by the writs of return and of reprisal, as before provided.

22. If the officer, to whom the writ of return is committed, cannot find the beasts or other goods that were replevied, so as to deliver them to the defendant, he shall make a return of that fact upon the writ of return, and the defendant shall, upon motion, be entitled to a writ of reprisal, to take the beasts or goods of the plaintiff and deliver them to the defendant, to be held and disposed of according to law.

23. No action shall be maintained against any person, as surety in a replevin bond, unless the writ is served on him within one year after the final judgment in the action of replevin; or if the action is not entered within one year after the end of the term at which the action of replevin ought to have been entered.

NEW YORK CODE.

TITLE V.

Of the manner of commencing civil actions.

§ 106. Civil actions in the Courts of Record of this state shall be commenced by the service of a summons.

§ 107. The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

§ 108. The plaintiff should also insert in the summons a notice in substance as follows :—

1. In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court at a specified time and place (after the expiration of the time for answering), for the relief demanded in the complaint.

§ 109. A copy of the complaint shall be served with the summons.

TITLE VII.

CHAPTER SECOND.

Claim and delivery of personal property.

§ 206 (181). The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

§ 207 (182). Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property

claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein; the facts in respect to which shall be set forth:

2. That the property is wrongfully detained by the defendant:

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief:

4. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or if so seized that it is by statute, exempt from such seizure; and,

5. The actual value of the property.

§ 208 (183). The plaintiff may, thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

§ 209 (184). Upon the receipt of the affidavit and notice, with a written undertaking, executed by one

or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall, also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

§ 210 (185). The defendant may within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so he shall be deemed to have waived all objection to them; when the defendant objects, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objec-

tion to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted, and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

§ 211 (186). At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum, as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.

§ 212 (187). The defendant's sureties, upon a notice to the plaintiff, of not less than two nor more than six days, shall justify before a judge or justice of the same manner as upon bail on arrest; and upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be respon-

sible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time. But if they or others in their place fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

§ 213 (188). The qualifications of sureties, and their justification, shall be as prescribed by sections 194 and 195, in respect to bail upon an order of arrest.

§ 214 (189). If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

§ 215 (190). Where the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

§ 216. If the property taken be claimed by any

other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking executed by two sufficient sureties accompanied by their affidavit that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and freeholders and householders of the county, and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.[1]

§ 217. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

The following note is appended by the commissioners to this chapter:—

[1] See Voorhies' Code, 9th Revised Edition, 1867, p. 390, &c.

This chapter is intended to supply the provisional relief, which is now obtained in the action of replevin. We think it will be found much simpler than the statute for which it is a substitute.

The most material change which will be observed, is in sections 186 and 187,[1] which provide a means for the defendants' retaining the property, on giving an undertaking equal to that which the plaintiff has given. This seems but just. The defendant being in possession, is presumed to be rightly so, until the contrary is proved; and if he is willing to give as good security as the plaintiff, he should be allowed to retain the property during the litigation.

[1] These are the original numbers.

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