

Tappan
vs.
Bellows.

This construction is neither against the letter nor obvious intent of the statute; is not inconsistent with the perfect security of the creditor; defeats no object the makers of the statute could have had in view, and is most manifestly required by a due and proper regard to the safety of the sheriff.

Judgment for the defendant.

GRAFTON, NOVEMBER TERM, 1817.

DANIEL CLARK *versus* EBENEZER CARLTON.

A person cannot maintain trespass for goods unless he has the actual or constructive possession at the time of the tortious act.

THIS was an action of trespass, for taking a stud horse belonging to the plaintiff. It was proved at the trial at the last term of this court in this county, that the horse was the property of the plaintiff, and that he had been let for hire to one *Aldrich*, for nine days; that before the expiration of the nine days, the defendant, being a deputy sheriff, took the horse upon execution from the possession, and as the property, of *Aldrich*; and upon a demand made after the nine days had expired, refused to deliver him to the plaintiff; and the only question was, whether the plaintiff could maintain this action.

Per curiam. The plaintiff, at the time the horse was taken, had neither possession, nor the right of possession; an action of trespass, therefore, which is founded on possession, is not maintainable on the facts of this case. The plaintiff's remedy was by an action of trover founded on his property in the horse. 4 D. & E. 489, *Ward vs. Macaulay & al.*—8 *Johnson* 432, *Putnam vs. Wyley*.

Judgment for the defendant.