

JONATHAN SINCLAIR vs. DAVID TARBOX.

Trespass and case are sometimes concurrent remedies; and though the latter would be more proper under certain circumstances, yet the former remedy, if attempted, is to be supported wherever a tort has been committed on property, in which the plaintiff has an interest and possession actual or constructive.

When a sheriff delivers property to a receiver, and the receiver delivers it to a third person, whose servant removes and leaves it at a distance, trespass lies against the servant, though ignorant, at the time of the removal, of the sheriff's interest in the property.

The rule of damage, however, is not the value of the property, unless the defendant converted it to his own use; but merely the injury caused by such removal of it.

This was trespass *de bonis asportatis*, for a sleigh and harness.

At the trial here in May last, on the general issue, it appeared in evidence, that the plaintiff, being a deputy sheriff, by virtue of a writ of attachment against one *Ford*, seized the property described in this declaration, and delivered it on receipt for safe custody to one *D. E.*: that a few months after, *D. E.* having occasion to be absent, requested his brother *J. E.* to keep this property for him till wanted by the plaintiff; and that thereupon, *J. E.* soon absconded to the state of New-York, and the defendant in his employ drove thither, and left the sleigh in dispute; but was altogether ignorant of the plaintiff's interest in the same.

On these facts a verdict was taken for the value of the sleigh, subject to further consideration.

J. Bell, counsel for the plaintiff.

Nelson, for the defendant.

WOODBURY, J. In this case the first objection is to the form of the action.

But the inclination of courts should be to prevent the delay, inconvenience and cost of another action, whenever the present one has merits, and can be supported on any fair construction of legal principles.(1)

On the facts of this case, trover is the more usual remedy, and would certainly have been safer.(2) But trespass also will lie if a tort has been committed, and the plaintiff having an interest in the sleigh, had also an actual, or the right to an actual possession of it. 1 *N. H. Rep.* 110, *Clark vs. Carlton*.—*Wells et al. vs. Odiorne, ante.*

His interest we have already settled in *Poole vs. Symonds*, (1 *N. H. Rep.* 289;) and his right to the actual possession of

(1) 5 Bos. & Pul. 448, ante.—2 Hen. and Mun. 444.

(2) 1 Chitt. Pl. 130.—Bac. Ab. "Trespass."—5 Mass. R. 104.—4 Maul. and Selw. 259, Stephens et al. vs. Elwall.

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David Tarbox. property, when received, in the case of *Wells et al. vs. Odiorne*, before cited.

But the defendant denies that he has committed any tort ; and his argument rests upon his innocence of intention, and upon the existence of a bailment at the time he removed the sleigh.

In respect to the intention, that is not, in cases of this sort, a subject of inquiry, except to prevent vindictive damage. In crimes, the intention is the essence of the charge ; but in civil actions, the injury caused to the plaintiff is the essence of the charge ; and whether committed through ignorance or malice, it is neither more nor less an injury caused to the plaintiff by the defendant. 1 *Chitt. Pl.* 67, 377.—5 *Bos. & Pull.* 448.—4 *Maul. & Selw.* 263.—10 *John.* 172.—11 *do.* 285.—14 *do.* 119.—7 *do.* 254.—5 *Mass. Rep.* 341.

In respect to the bailment, it may be conceded, for the purpose of this argument, to be well settled, that between the parties to it, trespass will not lie for a mere non-delivery of the property bailed. But the defendant was no party to the original bailment, neither was his employer. And if he had been a party to it, the use and removal of the sleigh to New-York were acts so foreign to the nature and design of the bailment as to prevent all protection under it, and to subject the person who thus removed and left the sleigh to an action of trespass. This may not be on the ground that a bailee in such case becomes a trespasser *ab initio*.(1) But that a destruction of the article bailed, or a conversion of it to purposes altogether different from those intended, is without the scope of the contract of bailment, and may be prosecuted in the same way as if no bailment existed.

(1) 3 *Coke* 290.
—1 *Chitt. Pl.*
32.—*Bac. Ab.*
"Trespass," B.

(2) 2 *East. C.*
L. 696.—2.
Mass. R. 580.

Thus it is, that such acts of a bailee, if accompanied by other circumstances, indicating a felonious intent, amount to larceny ;(2) and every larceny must involve a trespass. *Doct. & Stud.* 280.—4 *Reeve His. Eng. L.* 178.—2 *do.* 7.—4 *Bl. C.* 134.—1 *Hawk. P. C.* 134.—*McNall. on Ev.* 586.

We have before remarked, that the intent of the party may affect the damages ; and as this defendant appears

not to have been actuated by any bad motive, nor to have sold or converted the sleigh to his own use, he should pay only the actual injury caused by the removal of the sleigh to New-York.(1) That may be the full value of the sleigh, or it may be less.

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(1) 3 Wheat.
546.

The counsel can probably agree upon the damages, and in that event there will be no new trial, but

Judgment on the verdict.



JONATHAN HOWARD vs. SETH DANIELS.

In the return of a writ by which land has been attached, the description of the land is sufficient, if by such a description the land would pass in a deed. But in an extent, the description of the land set off must be more particular.

If the proceedings, in making an extent, are not stated truly, the redress is by an action against the sheriff for a false return; but the extent itself is valid as between the parties and their privies, unless defective on its face, or contaminated with fraud. If the appraisers were governed by the opinion of the parties in their estimate, and a small inadequacy appears to have existed between the debt and the value of the land, those circumstances alone are not competent evidence to avoid the extent for fraud.

When the extent alleges that the proceedings were commenced within thirty days after judgment, though some of them appear not to have been completed till afterwards, yet they all relate back to the time the first were commenced.

This was a writ of entry for a tract of land in New-Chester.

The cause was tried here November Term, 1818, on the general issue, as to a part of the demanded premises.

The demandant offered as evidence of title in that part the extent of an execution upon it, which had issued on a judgment in his favor against *Moses Lewis*, recovered November term, 1812, for \$4061 85 debt, and \$41 30 cost.

The return of the officer on the writ of attachment, which was the foundation of that judgment, bore date August 17th, 1808, and alleged that he had attached "the farm the defendant now lives on, with his tannery, &c. thereon."

It was admitted, that the premises in dispute then constituted a portion of said farm and tannery. The execution on the above judgment issued November 7th, 1812, and on the 27th of the same month, the officer returned, that the extent was commenced; and all the subsequent proceedings in legal form were inserted under that date, except the oath to the