

BINGHAM, J. Formerly replevin would not lie unless there had been an unlawful taking as well as detention. A plea of property raised the issue of title, and admitted the taking and detention. *Dame v. Dame*, 43 N. H. 39; *Carter v. Piper*, 57 N. H. 217, 219. Subsequently the action was extended to the case of unlawful detention simply. G. L., c. 245, s. 2; *Kittredge v. Holt*, 55 N. H. 622. The effect of a plea of property cannot be different from what it formerly was. It raises the issue of title, and admits the detention. The referee found that the defendant detained the cow. This had been admitted by the plea. Ownership was the only question in issue, and was not decided. 2 Gr. Ev., s. 563. The case may be recommitted.

*Case discharged.*

FOSTER, J., did not sit: the others concurred.

---

EASTMAN v. JUDKINS.

A sheriff is not liable for the loss of property attached by his deputy, unless the loss is occasioned by the deputy's want of ordinary care. A creditor, at whose suit property is attached, assenting, with a full knowledge of the circumstances, to the attaching officer's leaving it in the care of a keeper, is estopped from claiming that a loss of the property thereby was from the negligent conduct of the officer.

CASE, against a sheriff for the negligence of his deputy in not safely keeping goods attached by him on a writ in favor of the plaintiff. When the goods were attached, they were not removed from the premises of the debtor, but were left there in the care of a keeper. Soon after, the deputy informed the plaintiff of what he had done, and the plaintiff assented. The keeper moved away, and the property was, some of it, taken by another officer, and some of it sold by the debtor; and when it was called for by an officer, having the plaintiff's execution by a demand upon the deputy who attached it, he could not produce it. Neither the deputy nor the plaintiff looked after or inquired about the property after it was placed in the hands of a keeper.

The plaintiff requested the court to instruct the jury, that, the deputy having attached the goods and not producing a receiptor, if he did not produce them on demand by an officer having an execution within thirty days after judgment, the defendant was liable. The court denied the request, and instructed the jury that the defendant was liable if the property was lost through any want of ordinary care of his deputy, either in the appointment of a

keeper or otherwise; and if the plaintiff, with full knowledge of how the property was left, and of all the circumstances connected with the appointment of the keeper, assented to it, he is estopped from claiming it as a negligent act. The plaintiff excepted to the refusal of the court to give the instruction requested. Verdict for the defendant, and motion for a new trial.

*A. F. L. Norris* and *Albin*, for the plaintiff.

*Mugridge* and *Blodgett*, for the defendant.

ALIEN, J. A sheriff is liable for the default of his deputy in not safely keeping property attached. *Morse v. Betton*, 2 N. H. 184. Unless the property is receipted for, it is the duty of the attaching officer to retain possession of it, or to secure it where it is found. And if this cannot be done, and the removal of the property is necessary for its safe keeping, it is the duty of the officer to remove it though the removal is attended with inconvenience. *Dunklee v. Fales*, 5 N. H. 527; *Chadbourne v. Sumner*, 16 N. H. 129, 132. But a sheriff is not liable, absolutely and at all events, for the loss of property attached and for not having it to apply on the execution, but only for a loss through want of ordinary care and prudence. He does not insure the property nor guarantee its safe keeping, but is under a duty to exercise ordinary care and diligence in looking after it; and if he does this, he is not responsible for the loss. *Runlett v. Bell*, 5 N. H. 435; *Richards v. Gilmore*, 11 N. H. 493; *Lovell v. Sabin*, 15 N. H. 29; *Kendall v. Morse*, 43 N. H. 553. If he delivers the property to a third person, not a receptor, for safe keeping, he is liable for a loss through such person's negligence, the same as he would be for a loss through his own want of care; for the keeper is his servant, and the servant's negligence is his own.

The officer is liable for the loss of the attached property, unless he has a legal excuse. Due diligence, or the exercise of reasonable care under all the circumstances, relieves him, and he cannot be charged with a loss which arises from obeying the lawful directions of the attaching creditor. In *Hamilton v. Dalziel*, 2 Wm. Blackstone 952, the sheriff appointed a special bailiff at the instance of the plaintiff, and was exonerated from default in not returning the writ. To the same effect is *DeMoranda v. Dunkin*, 4 T. R. 119. In *Donham v. Wild*, 19 Pick. 520, which was case against a constable for not levying an execution against the debtor on goods attached on a writ in favor of the plaintiff, the goods had been delivered by the defendant, when attached, to a third person named by the plaintiff, and afterwards, before judgment, disposed of by the debtor. In the opinion by *Morton, J.*, the English cases of *Hamilton v. Dalziel* and *DeMoranda v. Dunkin* are cited with approval, and it is said that the plaintiff need not give advice or

directions, but if he interfere, he could not recover for any loss arising by reason of following his directions.

An assent to the officer's acts by the plaintiff, given with a knowledge of all the circumstances, was a ratification of the acts, and equivalent to original authority and direction; and, if assent was so given, the plaintiff cannot now be heard to complain of a loss arising from acts assented to and ratified by him. There was no error in denying the instruction prayed for, nor in the instructions given.

*Judgment on the verdict.*

FOSTER, J., did not sit: the others concurred.

---

STEVENS v. ROWE & a.

An action at law cannot be maintained for a mere conspiracy to do a wrong.

An action for damages cannot be maintained against one for procuring false testimony in the trial of a suit, in which he is an adverse party, so long as the judgment obtained by the false testimony remains, nor against a witness for perjury in such trial.

CASE, for conspiring together to testify falsely in a material matter, in the trial before a referee of a suit between the plaintiff and the defendant Rowe, and that, in pursuance of the conspiracy, the defendant Chadwick did testify falsely in said matter, whereby the plaintiff was injured. The question reserved was on a demurrer to the declaration.

*Rolfe*, for the plaintiff.

*Wait* and *Albin*, for the defendants.

ALLEN, J. No special damage is alleged to have resulted from the conspiracy set up, nor from the false testimony claimed to have been given by the defendants. The award and consequent judgment must, in whole or in part, have resulted from the false testimony to enable the plaintiff to recover, if he could recover at all. The fact of conspiracy is not actionable, but only the acts of the confederated parties, and these only when they would be actionable if done by an individual. The ancient writ of conspiracy, as a civil process, is not now used in practice. It never had force beyond cases of conspiring to prosecute for treason and felony punishable with death; and the action used in modern practice does not differ