

making the levy shall *distrain* as well for the amount of the rent claimed and costs, as the money he is directed to levy under the warrant, and section 178 provides what costs shall be charged "for every additional *distrress* for rent in arrear."

The exemption act relates only to goods seized under process of execution. The words of section 4 are: "the following chattels are exempt from seizure *under any writ, out of any court whatever* in this Province," &c.; and the 151st section of the Division Court Act as altered by the act of last session is to the same effect.

Now under a distress by a landlord for rent in arrear, the goods mentioned would be liable to be distrained, and the question arises, would a bailiff of a Division Court, after making a levy under a writ of execution upon the premises leased by a defendant, and on receiving after such levy, a claim for rent from the landlord of such premises in proper form under the 176th section of the act, be justified in distraining the chattels exempted under section 4 of the act of last session, to satisfy the rent so claimed? Our opinion is that he would. The bailiff's authority in distraining for the rent is *not the writ of execution* but the written *claim made by the landlord*. Indeed, such claim is only another name for an ordinary landlord's warrant. The 180th section of the D. C. Act provides in effect, that the landlord's claim shall be first paid, and postpones the judgment creditor. And there seems to us nothing in any of these enactments that takes away the right of general distress which the landlord undoubtedly has in the ordinary way in cases where the bailiff levies under execution.

REPLEVIN IN THE DIVISION COURTS.

(Continued from page 205.)

We gave in our last issue a sketch of the usual proceedings and course of a Replevin suit, and a correspondent furnished us with the two most necessary forms to be used by the officers of Division Courts, or suitors, which we also published.

We will now advert to cases which would take officers out of the ordinary routine of proceedings in suits of this nature, and which although of rare occurrence are nevertheless necessary to be understood.

After the bailiff has replevied the property, or such portion of it as he can find, he must then and not before serve a copy of the writ on the defendant, personally, if he can be found; but if not, by leaving the copy at his usual or last place of abode, with his wife or some other grown person, *being a member of his household or an inmate of the house wherein he resided*. It will be observed that personal service is not absolutely necessary, but care should be taken where the service is not personal to ascertain that the person to whom the writ is given comes within the description given above in italics and in the words of the Statute.

If the property or any portion thereof be concealed or secured in any dwelling house or building or enclosure of the defendant, or of any other person holding it for him, the bailiff should publicly, or in presence of two or more persons, demand from the defendant or other owner or occupant of the premises a deliverance to him of the property to be replevied, and if it be not delivered to him within

twenty-four hours after such demand he may break open such house, building or enclosure, for the purpose of replevying such property, or any part thereof; or if the property be concealed about *the person* or on the premises of the defendant, or of any person holding the same for him, a like demand can be made, and if not complied with he may search and examine the person and premises of the defendant or of such other person.

The Statute does not say that the demand should be in writing, but it would be advisable that it should be so, especially in the instance where it was intended in the event of non-compliance therewith to break open any house or building. The bailiff should keep a copy of such notice, and the property claimed or the portion thereof secured or concealed ought to be specified therein.

There is a distinction made between cases where property is secured or concealed in a house, and where it is known to be on the person or premises of the defendant or other person holding it for him. In the first instance, 24 hours must elapse after demand made before any further action can be taken, whereas in the second a search may be instituted if the demand is not at once complied with—that is within a reasonable time. Great care should be taken by the bailiff in either of such cases to satisfy himself that the property was so concealed or secured, as he would not by any means be justified in availing himself of the powers conferred on him by the statute without good reason for doing so, and too much caution cannot be exercised in dealing with such matters.

Before the act of last session it was not necessary to obtain a judge's order in any instance before issuing a writ of replevin, but the cases in which it may now be issued without such order are made the exceptions, and we now come to refer to them.

The form of affidavit given in the last number is that to be used on application to the judge, but where it is necessary for the protection or security of the claimant to obtain the writ without a judge's order it must be stated in the affidavit, in addition to any general facts as set forth in the form given before, "that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order the delay would materially prejudice the just rights of the claimant in respect to the property."

The only other exception to the rule is where the property was distrained for rent or damage feasant, "in which case the writ of replevin may issue without an order if the affidavit states" (in addition to the general facts as before) "that the property was distrained and taken under color of a distress for rent or damage feasant," and the writ issued in such case shall state "that the defendant hath taken and unjustly detains the property under color of a distress for rent or damage feasant (as the case may be)."

Where the writ thus issues without an order, the claimant is not entitled to obtain possession of the property replevied, but it must remain in the custody of the bailiff until he (the claimant) obtains an order from the judge to have it delivered to him. The bailiff, before parting with the pro-