about the office from which execution is under such circumstances to issue.

In order to determine this, it is important to remember that the first practice was to have but one office for this court, where its rolls were kept, whence its writs issued, where its rules were made out, costs taxed, and papers and proceedings filed. Such was our original practice founded on and derived from the practice in England, and step by step altered here, and even now though more clearly expressed in the earlier statutes, each deputy's office is a limited portion of the principal office in which certain specified things may be done because the legislature has permitted them to be done.

The enquiry seems limited therefore to this—is this one of the things authorised by the statutes? and in answering the question it appears to me that the maxim *expressio unius est exclusio alterius* must apply.

It cannot be supposed that the C. L. P. Act was intended to confer the power of issuing executions on the deputy clerks of the crown in this particular case, because when it was passed no such executions could be issued out of the court at all. And as the act which authorises their being issued, is silent on this subject, we must, in my opinion go back to the old practice by which the various proceedings in a cause were governed; and according to that I think it is too clear for question that the execution must in cases of this kind issue as under the English Statute, from the principal office. The proceedings were all in term at first. Then the costs were taxed in the principal office, and from that office and that office only, as appears to me, could the execution to enforce obedience to the rule go. The previous proceedings were neither instituted nor carried on in the outer office.

It is objected, however, that the summons is confined to setting aside the execution, and that it should go higher and apply to set aside the proceedings taken in the outer office, on which the execution was founded. But beyond filing the rule, the allocatur and the præcipe, nothing appears to have been done in the outer office. There is no step or proceeding actually rendered necessary to be taken, after the rule is made for the payment of costs, as a further preliminary to issuing the executions unless the filing a præcipe for the writ. The rule is the authority, and all the proceedings terminating with the rule are in the principal office. The filing of these papers in the outer office I look upon as a nullity.

On the whole I think the order should issue as asked.

Ordered accordingly.

McCollum v. Kerr et al.

Interpleader—Duty of Sheriff as to restoration of goods when issue determined in favor of claimant—Effect of interpleader order.

It is no part of the duty of a sheriff, under an ordinary interpleader issue, which has been determined in favor of the claimant, without tender of his costs for so doing, to restore the goods seized to the custody of the claimant in the same state as they were at the time of the seizure.

The proper mode, however, of raising such a question would be in an action against the sheriff for withholding the goods and not on an application to a judge for an order on him to restore them.

The interpleader order being for the sheriff's protection only, an action would be at the suit of the claimant to recover from the execution creditor the damages incident to, or arising out of the seizure.

(6th January, 1862.)

An interpleader order was sued out on 11th October, 1861, in a cause, Kerr et al v. Fullerton et al, the plaintiff, McCollum, being claimant.

It ordered that the sheriff of Kent, on payment of appraised value of goods seized into court by claimant, or as much as might be sufficient to satisfy the execution within seven days, or on claimant's giving security within seven days, for the payment of the same amount, the sheriff should withdraw from possession. That until such payment or security he should remain in possession, and the claimant should pay possession money for the time he shou'd continue in possession from the date of the seizure, unless the claimant should desire the goods to be sold by the sheriff, in which case he was to sell the same and pay the proceeds into court, after deducting the expenses thereof and the possession money. If no payment were made, or security given by claimant within seven days, it was provided that the sheriff might sell and pay proceeds into court. Then the order provided for the trial of an issue, and reserved the question of costs and repayment of possession money, and all further questions.

From the affidavits filed, it appeared that the goods in question were seized in a store in the village of Morpeth, which store was in the occupation of the claimant That claimant requested the sheriff's officer to take away the goods and allow her to carry on her business in the store, and said she thought it advisable, and desired him to take the goods to Chatham, as she thought in the event of a sale they could not be well sold in Morpeth, and she did not intend to bid. Her attornies also requested the sheriff to have the goods removed to Chatham, as they would, in the event of a sale, bring a better price there, and they threatened to bring an action against the sheriff on behalf the claimant, if he did not forthwith remove the goods out of the store. As there was no place in Morpeth to which the sheriff could remove them so as to be safe, or where they could be insured, the sheriff removed them to Chatham and got them insured. No payment into court or security was given by claimant, but on 14th October claimant's attornies gave the sheriff notice to sell the goods seized The sheriff advertised for a sale on 31st October—could not sell, and adjourned to the following Saturday, but there were no bidders, and the sale was further adjourned till the 9th November.

On the 4th November the issue was tried and found in favour of the claimant, and the defendants on the interpleader order notified the sheriff not to sell, as they would deliver them up, and there was no sale.

It appeared that on the 7th November the defendants' attorney notified the claimant's attorney that they would give up all claim to the disposal of the goods and pay the costs. The claimant was willing to take back the goods, subject to her right for damages for the seizure and resulting therefrom, and thereupon claimant applied for and obtained a summons calling on the sheriff and on the defendants to shew cause why the sheriff should not forthwith return the goods and forthwith place them in claimant's shop whence they were taken in the same manner as he found them when he made the seizure.

The defendants appeared, but offered no opposition to the restoration of the goods.

The sheriff appeared, representing he had been put to great expense in keeping the goods, in removing them from Morpeth, in insuring them, advertising for sale, &c., &c., for all which he received nothing, and he resisted being required to take the goods back to Morpeth.

Draper, C. J.—The interpleader is meant for the protection of the sheriff, though the relief and indemnity he thereby acquires is deemed so beneficial that, generally speaking, the costs of making and attending the application will not be allowed him. As to poundage, I do not understand any claim is advanced. If it were I could not sustain it, but the expenses which occurred after the interpleader order was made is a different matter.

His continuing in possession was contemplated by the interpleader order, at least until the claimant had resolved whether she would entitle herself to have the goods at once restored.

Instead of this she directed their removal to Chatham, and their sale, and now she asks for their return.

I can see no reason or justice in compelling the sheriff, under these circumstances, to carry back the goods to Morpeth—and as to so much of the summons, I think clearly it should be discharged, and as I read it, the return asked for is really a return to the claimant's store at Morpeth, and in refusing to order that, I discharge the summons.

At the same time, I think that on tender of the costs of removal to Chatham, of the expense of insuring and safe keeping, the sheriff should at once restore the goods.

I was in some doubt whether I could not with propriety, order the insurance and expenses of keeping possession to be paid by the execution creditors, but if the claimant pays them I do not see why she may not claim these, or such portions of them as are attributable to the execution creditor's conduct, in an action against them. The interpleader order though it protects the sheriff against any action, extends its protection no further.

I think, therefore, the soundest conclusion is, that the claimant should pay them; but this, is an opinion, not an order. On