

DIVISION COURTS.

OFFICERS AND SUIITORS.

Clerks and Bailiffs.

Questions for the *Law Journal*, with reference to Attachment:—

1. From the words, "It shall be lawful for such Clerks, Judge or Justice of the Peace forthwith to issue a warrant," &c., &c., (section 64, D. C. Act, 1850) I infer that it is not absolutely compulsory on the Clerk, Judge or Justice, to issue such warrant, but that unless such Clerk, Judge or Justice positively knows that the affidavit filed is without sufficient ground, the warrant should be issued; if therefore such warrant is issued, handed to the bailiff or a constable, the property seized, brought to the Clerk, appraised and kept in custody till Court day; there appears no plaintiff; if defendant pleads illegal prosecution on the part of the plaintiff, and if the plaintiff hath absconded, where is the redress for the defendant's loss sustained by detention of his goods?

2. If after perishable goods seized and appraised, a third party claims such goods as his property, can Clerks legally sell such perishable property before judgment rendered? And if he can do so, by what authority may he require the plaintiff to indemnify him for so doing?

The condition of Bond (form No. 23) being only, "in case judgment be not obtained by plaintiff"; but in this instance, although judgment be obtained afterwards and at the same time third party proving his claim, such a bond would be insufficient. Such Bond also is required to be given to the defendant; it may, however, happen that such defendant had none of his goods seized; he therefore may not appear nor care anything about the attachment.

Should the Clerk decline selling the perishable property for want of sufficient security, and such property remain in his custody, it might very easily happen that the cost of keeping the same would amount to double its value.

The above questions came up in a certain case, which I will briefly state as follows:—

A. made affidavit against B., upon which warrant of Attachment was issued; the constable seized a horse and sundry other articles; the goods being brought to the Clerk's custody, were duly appraised—the horse at \$20; next day C. appeared and claimed the horse. Interpleader Summons now issued according to Act; C. wanted to take horse—offered bail; Clerk had no authority to take bail, nor had he a form of bond; he found that form 24 is not applicable. Constable not having taken bond from plaintiff before seizing perishable property, (which he said he was not obliged to take, since the Act only says, "it shall not be compulsory upon the bailiff or constable to seize, until the party seizing out such warrant shall have given a bond," &c.; hence it is optional with the constable to demand such bond or not.) Clerk declined to give up the horse—also, found it advisable not to sell the same as perishable property; but abide the decision of the Judge at next Court.

In the event now of claimant proving the horse to be his property, the next question arises:

3. Who indemnifies the claimant for his damages sustained by the loss of the use of the horse?

The Clerk?—he will justify himself by the Act for what he has done, and by that which is not in the Act for that which he has declined to do.

The Constable?—he will justify himself by the Act, which makes the taking of a bond optional with him; and although the warrant commands him to take the effects of defendant, not saying anything about other effects, even not of such that

are supposed to be defendant's, yet, nevertheless, if the constable did all in his power, if he seized the horse which was generally supposed to be defendant's property, and pointed out to him by plaintiff as such, it would be very hard if Constable should be obliged to pay any damage.

The Plaintiff?—he may say, "I was under the impression it was defendant's horse"; but he very probably will decline paying any damage, and if suit entered against him, plead for a non-suit on the ground that there is no authority for such claim.

4. And since neither Clerks, nor Bailiffs, or Constables are authorized to substitute laws or forms where the Act is deficient, would it not therefore be advisable for our Legislature to pass an Act whereby Clerks, Judges, and Justices of the Peace are authorized, before the said warrant is granted, to demand from plaintiff a bond, with surety conditioned, as in the 10th section, and also conditioned that the plaintiff will pay all costs, damages and claims that may be incurred in consequence of any seizure or sale of goods that the constable or bailiff may be directed by the plaintiff to seize, and which will afterwards be proved the property of a third party.

Your opinions in answer to the above questions will be thankfully received. O. K.

Answers to the above:—

No. 1. However it may be with respect to Justices of the Peace, who are not entitled to make any charge for issuing a warrant of Attachment, the Clerk is clearly bound to issue such warrant upon a proper affidavit being filed with him.—What should appear in such an affidavit, has been explained in a former number of this Journal.

The Clerk, as an officer of Court, is entitled to a fee, and the only discretion he can exercise is in respect to the sufficiency of the affidavit. O. K. wrongly infers from the words, "it shall be lawful," &c., that it is not compulsory on the Clerk to act upon a regular affidavit. When a duty is cast by Statute, upon officers of Courts whatever they may do, they must do on reasonable request. Whatever it is lawful for them to do, it would be illegal for them to refuse doing when an applicant has complied with the terms of the Act.

The officer's own knowledge, or supposed knowledge of facts, cannot excuse him from performance; the latter part of this query relates to a defect in the law, we will notice presently.

No. 2. He can, holding the proceeds.

If the claimant be anxious to obtain his property, there seems no objection to the Clerk's surrendering it to him on obtaining a Bond or other security to save him harmless in the matter: but if the plaintiff desire to have the property sold and will indemnify Clerk for so doing, the sale may be carried out. There is no provision for this in the Act, but a similar practice prevails with Sheriffs.

The best course is to sue out an Interpleader at once.

The Bailiff is liable, should he seize the property of a third party. In seizing perishable property, he may require a bond from the plaintiff, and he should