

OPINION  
69-167

March 25, 1969 (OPINION)

Mr. Dale H. Jensen

State's Attorney

Burleigh County

RE: Executions - Wages - Disclosure by Employer

This is in reply to your letter of 20 February 1969 with regard to problems you have been having on executions under section 28-21-08 of the North Dakota Century Code wherein the sheriff is required to levy on property and money.

You ask: "When the sheriff levys by execution upon an employer for wages or moneys that the employee has due him, is there an obligation on the part of the employer to disclose, at that time, whether or not the employee has moneys due him. If there are moneys due the employee, should the employee hold the moneys or turn them over to the sheriff for his keeping?"

You inform us that the difficulty occurs in that you find no procedure set forth statutorily wherein the employer is required to disclose or do anything in answer to the execution, and this whole matter is a never-never land from the office of the sheriff as far as procedure is concerned.

You state further to the effect that under garnishment procedure, the method is set out quite specifically and under execution it is not. You therefore indicate you believe we should either by opinion or narrative on this clear this up as same is a problem with all the sheriffs' departments in the state.

Section 28-21-08 of the North Dakota Century Code provides:

PROPERTY SUBJECT TO EXECUTION - MANNER OF LEVY. All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action are subject to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, and any interest in real or personal property, and all other property not capable of manual delivery, may be taken on execution and sold as provided in this chapter. The levy of an execution shall be made in the same manner as a levy under a warrant of attachment."

Section 28-21-14 of the North Dakota Century Code provides:

WHAT NEED NOT BE SOLD. Money levied on may be appropriated without being advertised or sold. The same may be done with judgments, drafts, promissory notes, or other papers of like

character, if the judgment creditor will receive them at their par value as cash or if the officer can exchange them for cash at that value, and an assignment thereof by the officer shall have the same effect as if made by the execution debtor."

Prior to going into further detail on your specific question we think a definition of the term "levy" as used with regard to writs of execution is appropriate. We find in Black's Law Dictionary, Fourth Edition, page 1051, the following definition (not including the reference to levy of taxes therein):

LEVY, n. A seizure. *Farris v. Castor*, 186 Okl. 668, 99 P. 2d. 900, 902; *McBrien v. Harris*, 39 Ga. App. 41, 145 S.E. 919; *Radford v. Kackman*, 27 Ohio App. 86, 160 N.E. 875, 877; *Plaxico v. Webster*, 175 S.C. 69, 178 S.E. 270. An actual making the money out of the property; the obtaining of money by seizure and sale of property. *Farris v. Castor*, 99 P. 2d. 900, 902, 186 Okl. 668. The mental act of determination to sell. *Parker v. MacCue*, 54 R.I. 270, 172 A 725, 727. The raising of the money for which an execution has been issued. *Plaxico v. Webster*, 175 S.C. 69, 178 S.E. 270.

As used in Uniform Conditional Sales Act, 'levy of execution' means the setting aside of specific property from the general property of the debtor and placing it in the custody of the law until it can be sold and applied to the payment of the execution. *Bent v. H. W. Weaver, Inc.*, 106 W.Va. 164, 145 S.E. 594, 595. \* \* \* "

In this same regard we note in 25 Words and Phrases, Permanent Edition, page 19, under the word "levy" subheading "writs", among other statements, the following:

Object of 'levy' of execution is to bring property within custody of law and prevent judgment debtor from disposing of it to prejudice of creditor before sale can be made. *Winslow v. Klundt*, 201 N.W. 169, 171, 51 N.D. 808."

The "taking"; "seizure" or "bringing property within the custody of the law" is perhaps a relatively simple concept when it involves physical items of personal property. The concept becomes a bit more complex when it involves such items as debts or credits not yet due, particularly where there is no certificate, promissory note, or other instrument to evidence the obligation. Where, for example, the sheriff can obtain possession of a promissory note in the course of levying an execution, there is probably little question that the debt evidenced thereby has been seized, taken, and brought within the custody of the law, particularly if the promisor is informed of such levy. Where there is no such tangible evidence of wages owed, such taking, seizure, or bringing the property within the custody of the law may be more difficult to establish.

Prior to the date that the wages become due there would probably be no physical object then in existence that could be transferred to the sheriff to evidence the levy. After "pay day" we would assume that the physical object that could be transferred would be the money or pay check itself.

Whether wages were due or not as of the time of the levy of the execution on same we would assume something further than notifying the judgment debtor of the levy of execution on his wages would be necessary to prevent the judgment debtor from disposing of it to the prejudice of the judgment creditor before sale or other appropriate disposition of it could be made.

Where the sheriff has actually examined the books of the employer, ascertained the amount of wages owing, and made appropriate notations to show that a particular amount is taken, we would assume that there has been a sufficient bringing of the wages within the custody of the law and prevention of the judgment debtor's disposition of same to the prejudice of the creditor. On the other hand, where the levying officer has no information as to the amount of the wages due, or claimed, but merely gives a general notice that execution is levied on wages in no specific amount, there might very well be substantial legal questions as to whether there has been any seizure, taking, or bringing of any property within the custody of the law.

If information only is desired section 28-25-01 of the North Dakota Century Code provides for procedure for examination of the judgment debtor and section 28-25-04 of the North Dakota Century Code provides the procedure for the calling of other witnesses which might include the employer. The sheriff's duty in levying execution is not, however, basically to gather information, it is as specified in section 28-21-11 of the North Dakota Century Code, to-wit:

LEVY AND SALE. The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, by selling the same, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution."

We think the situation to which you refer is a parallel to that considered in *O'Connor v. McManus*, 290 N.W. 22, 71 N.D. 88, (June 23, 1941) as stated by our Supreme Court at page 91 of the North Dakota Reporter:

We think the issues thus stated by the defendant are too narrow. Both the motion to open the box and the order directing it to be opened were based upon the execution issued in the principal case as well as upon the garnishment proceeding. The question therefore is whether the order was a proper one either in the garnishment proceeding or in a proceeding directly under the execution. It will be noted that this order does not contemplate that the contents of the safety deposit box were to be left in the hands of the garnishee. The box was to be opened 'to disclose the contents thereof for levy by the sheriff.' The order therefore is properly to be considered as being primarily in direct aid of the execution. Its object was to pave the way for an actual seizure of the property and not to determine the extent to which the garnishee might be held liable. *Sargent County v. State*, 47 N.D. 561, 182 N.W. 270."

As your letter sets forth there is no procedure specified in the statute wherein the employer is required to disclose or do anything in answer to the execution. We do think section 28-21-15 of the North Dakota Century Code is of interest in this regard. It provides:

PAYMENT TO THE SHERIFF BY DEBTOR'S DEBTOR. After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be sufficient discharge for the amount so paid."

It seems entirely possible that a debtor's debtor might volunteer a disclosure of information and turning over of property sufficient to satisfy a judgment creditor which would constitute a sufficient levy. In the absence of the employer, in effect, volunteering to assist in leading the sheriff to the levy of the execution, we would assume that it would be up to the officers of the law to locate the property subject to the execution, by his own actions, take it into custody and prevent the judgment debtor's wrongful disposition of same. In some instances this could probably get quite difficult. In particular cases it seems possible that orders in aid of execution similar to that discussed in the McManus case, cited supra, might well be appropriate. We do agree with your conclusion that there is no procedure set forth statutorily wherein the employer is required to disclose or do anything in answer to the execution.

In reply to your second question, section 28-21-15 would appear to set out a procedure whereby moneys could be turned over to the sheriff. There is certainly not a mandatory requirement therein that same must be turned over to the sheriff if the employer did not feel his best interests and rights would be best served by such a procedure. As to completion of the levy proceedings, appropriate information as to the indebtedness and the moneys themselves in the hands of the sheriff, together with appropriate notices and other documentation, would most clearly establish that there has been a levy of the execution, though we would certainly not hold that a full disclosure plus obtaining physical exclusive possession of the moneys was in all instances necessary to constitute a levy of the execution.

Considering the theoretical and practical difficulties inherent in "levying" on the type of "property interest" involved in a wage claim, plus the lack of any requirements of a disclosure of the amount of wages due in a wage execution levy in this state (We note that other jurisdictions, notably, New York, for example, have adopted legislation providing for continuing disclosure in the case of wage executions), we are a bit surprised that the method is used in this state as widely as you indicate when the much more convenient method of garnishment is available. Garnishment would of course provide for disclosure of information plus in practical effect seizure of the amount permitted under the statutes. Obviously, on these executions exemptions as specified in chapter 28-22 could appropriately be claimed in a proper instance. It also seems quite possible that after the effective date of Title 15 USCA, section 1673, (Xerox copy enclosed), it will be held that the garnishment exemptions therein provided for would also be applicable

to "executions" i.e., that this execution process without garnishment exemption would constitute the state court making, executing, or enforcing an order or process in violation of said section 1673 of Title 15 USCA.

HELGI JOHANNESON

Attorney General