

OPINION
56-140

November 1, 1956 (OPINION)

OFFICES AND OFFICERS

RE: Sheriff - Levy of Execution - Authority to Enter

We are in receipt of your letter of October 29, 1956, in which you request an opinion on the following questions:

1. Where a sheriff has received an execution which commands him to pick up and turn over to the plaintiff a certain cash register which is located inside of a locked building - in this case a service station which has been leased by the defendant from a third person - may he break into the building to obtain possession of the register.
2. If so, is it necessary to obtain a court order to do so?
3. If he has such authority, and does so enter and damage results from the breaking, must the sheriff see that it is repaired or repair it at his own expense?

The general rule, as stated in 21 Am. Jur., 70, 71, is that while a sheriff may not forcibly enter a person's dwelling house for the purpose of levying execution on goods therein he may do so on buildings other than dwelling houses. This rule is supported by many authorities and we have found none to the contrary. In the case of O'Connor v. McManus, 299 N.W. 22 (N.D. 1941) our court has quoted this rule with approval although the statement was in the broad sense a dictum since that case was concerned with the authority of a sheriff to open a safety deposit box in garnishment proceedings in aid of execution on a judgment.

We have found no requirement that a sheriff must first obtain a court order before entering the building. It is said that "in all such cases, a request must be first made for admittance." (21 Am. Jur. 72). Our interpretation of this statement is that if there is a person on or near the premises who could admit the sheriff to the building, he should first be asked to open the building to the sheriff so as to prevent unnecessary damage to the building, but that if the sheriff is refused after making such request he may use such force as is reasonably necessary to enter the building and obtain possession of the goods therein.

Certainly the sheriff should not be put to personal expense in carrying out an order which the law commands him to do. If the person in control of the buildings refuses to submit to the sheriff's request, he should be prepared to assume the burden of repairing any damage to the building which is caused by his refusal to allow the sheriff to enter. However, it is for this reason that the owner should first be given notice that the sheriff intends to enter the building. The owner may open the building for the sheriff when he receives such notice and if he does not, he at least knows that the

building will be opened and can thus take the necessary steps to see that it will be repaired.

LESLIE R. BURGUM

Attorney General