

**OPINION
61-133**

March 3, 1961 (OPINION)

JUDGMENTS

RE: Execution - Commissions on Levy

This office acknowledges receipt of your letter of February 28, 1961, and in your letter you request our opinion on the following question:

Are the commissions enumerated in section 11-15-08 of the North Dakota Century Code applicable where the Sheriff has levied on property of a judgment debtor pursuant to an execution but prior to any sale payment of the Judgment is made by the debtor?"

Further, you call our attention to the fact that subsection 8 of section 11-15-07 of the North Dakota Century Code requires the sheriff to collect a fee of one dollar for a writ of execution and making a return thereon.

Section 11-15-08 reads as follows:

SHERIFF'S COMMISSIONS. Except as otherwise provided in section 11-15-09, the sheriff shall receive commissions on all moneys received and disbursed by him on an execution, order of sale, order of attachment, or decree for the sale of real or personal property, as follows:

1. On the first four hundred dollars, three percent;
2. On all moneys in excess of four hundred dollars and not exceeding one thousand dollars, two percent; and
3. On all moneys in excess of one thousand dollars, one percent.

In all cases where personal property shall be taken by the sheriff on an execution or under a warrant of attachment and applied in satisfaction of the debt without sale, he shall receive the percentage specified in this section based upon the appraised value of the property."

Section 28-21-08 of the North Dakota Century Code provides, among other things, that "The levy of an execution shall be made in the same manner as a levy under a warrant of attachment."

It is our understanding that the sheriff levies upon the property and takes it into his custody and it is under his control. Therefore, it is difficult for us to see how the attorneys or parties to the action could make settlement without taking the sheriff into account. It goes without saying that in all probability the execution of the levy upon the property involved created the incentive to make a settlement.

While the sheriff actually received no money and disbursed none, yet the desired ends were achieved by the interested parties because levy had been made and all the remained was the holding of the sale. The parties made that unnecessary by consummating a transaction of their own.

Therefore, it is the opinion of this office that since a levy had actually been made the sheriff is entitled to the commission for which provision is made in section 11-15-08, the commission being based upon the amount of the settlement carried out by the parties to the action.

It is our view that the fee of one dollar for which provision is made in subsection 8 of section 11-15-07 simply covers the service of the writ and does not act as a substitute for the commission for which provision is made in section 11-15-08.

LESLIE R. BURGUM

Attorney General