

1811.

LEVY—EXECUTION — PROPERTY — SHERIFF MAY REFUSE TO GIVE NOTICE OF SALE UNTIL PRINTER'S FEES PAID— NO EXCEPTION IN BEHALF OF STATE OR PUBLIC OFFICER.

SYLLABUS:

A sheriff who makes a levy upon property pursuant to the command of an execution, issued to him, may refuse to give notice of the sale of such property until the fees of the printer are paid, even though such execution is issued in behalf of the State of Ohio, or some officer thereof.

Columbus, Ohio, February 6, 1940.

Hon. Ralph J. Bartlett, Prosecuting Attorney,
Columbus, Ohio.

Dear Sir:

A recent request from your office, for my opinion, reads as follows:

“The sheriff’s office of this county has requested this office to obtain an opinion from you whether General Code, Section 11695 applies to the State of Ohio when the Department of Taxation of the State of Ohio causes an execution to be issued to the sheriff on a judgment obtained in a civil suit on which a levy is made by the sheriff upon certain chattels.

“Said section provides that the officer who makes the levy may demand of the plaintiff the fees of the printer for publishing

notice. In the case where the State of Ohio is the plaintiff, can the sheriff refuse to publish notice until the fees therefor are paid?"

Section 11695, General Code, to which reference is made in the request, is as follows:

"The officer who makes a levy, or holds an order of sale, before giving notice of the sale, may demand of the plaintiff, his agent or attorney, the fees of the printer for publishing such notice.

The officer shall not be required to make such publication until the fees are paid."

Your attention is also directed to Section 348, General Code, which provides as follows:

"No undertaking or security shall be required on behalf of the state or an officer thereof, in the prosecution or defense of any action, writ or proceeding. In an action, writ or proceeding it shall not be necessary to verify the pleadings on the part of the state or any officer thereof."

The language of this section is very broad in its scope and purports to absolve the state or any officer therefor from any obligation to deposit any security for costs or to pay costs in advance. The sheriff, therefore, can not lawfully insist on security for his fees being furnished before performing the duties of his office in the prosecution or defense of any action, writ or proceeding on behalf of the state or any officer thereof.

The sheriff is now paid a salary, fixed by law, and all fees collected by him in the discharge of his office are the property of the county and must be paid by him into the county treasury monthly. (See Sections 2977, 2983, and 2993, General Code). But even if such fees were the property of the sheriff and he were entitled to retain same as his own, he could not insist on security being furnished by the state or its officers as a prerequisite to his performing the duties of his office imposed upon him by law.

It is well settled that the state may impose upon its officers the obligation to perform services for the public, without receiving any compensation therefor.

In 32 O. Jur., 1012, it is said:

"Services performed for the public, where no provision is made by statute for payment, are regarded as a mere gratuity or as being compensated by the fees, privileges, and emoluments

accruing to such officer in matters pertaining to his office. The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the legislature may deem the duties imposed to be fully compensated by the privilege and other emoluments belonging to the office or by fees to be charged and collected for services connected with such duty or service and hence, provides no direct compensation therefor to be paid out of the public treasury."

Since the state can compel an officer to perform duties for the public without compensating him, a fortiori, he may be compelled to perform such duties without a deposit being made to secure his fees. It, therefore, seems clear that the sheriff must perform the duties connected with his office incident to the maintenance of an action, writ or proceeding by the state or its officers, and that he may not refuse to do so unless his fees are first secured.

However, the printing of the notice of sale is not the act of the sheriff, but that of the printer. He probably could lawfully refuse to print the notice, even if payment were tendered, although the case of *Uhlman v. Sherman*, 22 O. N. P. (N. S.), 225 seems to hold otherwise.

While it is not necessary for me to determine this question, I direct your attention to the following quotation from 30 O. Jur., 17:

"Contracts respecting newspaper advertising are governed by the same rules as govern other contracts. Further, it is the duty of the legislature, and not of the courts, to decide what businesses are affected, with a public interest. However, a common pleas court in Ohio, in the case of first impression in the state, specifically held that because of the great importance of newspapers, the favors extended to them by the law in providing for the publication of legal notices, and the general dependence, interest, and concern of the public therein, the newspaper business has become one clothed with a public interest, and in a class with public utilities, warehouses, wharves, inns, etc., and that therefore, a newspaper is bound to take advertising of a proper nature, and cannot discriminate between advertisers. This holding is opposed by the better and majority opinion, which is that the newspaper business is of a strictly private nature, and that publishers are free to contract and deal, with whom they please. That a newspaper may refuse to publish entirely proper public advertisements has been also recognized by the legislature in an enactment providing that if the only publisher within a town or county refuses to publish a notice on tender of the legal fees therefor, a publication in any paper of general circulation at the place shall suffice, and in the remedial part of the General Code there is a statute which provides that if a legal notice is tendered a newspaper in a county where there is but one paper, along with the usual charge,

and the publisher refuses to insert it in his newspaper, then publication in any paper of general circulation in the county or other municipal corporation shall suffice."

Also, see 46 C. J., 35, where it is said:

"Publishers of newspapers are not bound to publish legal notices. It is without the power of the legislature to make punishable the refusal of a newspaper publisher to publish the report of a public commission at its regular rates, such legislation being regarded as an interference with the right to contract. A statute so providing cannot be supported as an amendment to the charter of a newspaper company, it being generally in terms and applying both to individual and corporate publishers."

In any event, the printer is under no legal duty and could not be compelled to print the notice of sale without first being compensated therefor and the sheriff is, therefore, not required to cause the notice to be printed until he is furnished the fees of the printer.

Specifically answering your question, I am of the opinion that where the State of Ohio, or one of its officers, causes executions to be issued and levy to be made pursuant thereto, the sheriff may refuse to publish notice of sale until the fees of the printer are paid.

Respectfully submitted,

THOMAS J. HERBERT,
Attorney General.