

704

EXECUTION, PROCEEDINGS IN AID OF — REQUEST FOR RETURN BY PLAINTIFF NOT BINDING ON SHERIFF — SHERIFF RELEASED FROM DUTY TO LEVY WHEN REQUEST IS MADE—SHERIFF MAY HONOR REQUEST—RETURN OF WRIT, CONTENTS — FOR DETERMINATION OF OFFICER MAKING RETURN; *NOT* PLAINTIFF OR HIS ATTORNEY . . .

SYLLABUS:

1. To expedite proceedings in aid of execution which require return of a writ of execution as unsatisfied, plaintiff in execution or his attorney, at whose request the writ was issued, have authority to request, but not to require, the return of such writ without the officer to whom the writ is directed first searching for goods and chattels, and without levy upon land and tenements of the debtor. Such request amounts to a waiver of levy under such writ, relieving such officer of any duty to make levy thereunder, and such officer may properly honor such request.

2. The contents of the return of a writ of execution cannot be controlled or determined by plaintiff in execution or his attorney but are for the determination of the officer making such return.

Columbus, Ohio, July 3, 1957

Hon. Calvin W. Hutchins, Prosecuting Attorney
Ashtabula County, Jefferson, Ohio

Dear Sir:

Your request for my opinion is as follows:

"I have been asked by the Sheriff's Department to request of you a formal opinion concerning what control, if any, plaintiff or judgment creditor's attorneys have over Writs of Execution.

"It is believed that this matter is not handled uniformly throughout the State, and your opinion would greatly contribute to standardization of practice in such problems of executions, there being no previous Attorney General's Opinions to our knowledge on the following question:

"To expedite procedure under Proceedings in Aid of Execution, do Judgment Creditor Attorneys have authority to request the Writ of Execution be returned "Nulla Bona" without the procedure of the Sheriff first searching for goods and chattels, and without further levy upon the lands and tenements of the debtor, as set forth in Section 2329.09 under execution. In other words, do such attorneys have authority to control return of such writ, if they so request, to avoid the lapse of time in making such search for personalty or realty by the Sheriff."

A writ of execution is a process of the court and it is a general and basic rule that a court having jurisdiction to hear and determine civil causes has control over its process of execution. The sheriff or officer to whom such a writ is issued is subject to the command or order of the court in the matter. The statutes indicate the duties of the officer to whom such a writ is issued.

Section 2329.09, Revised Code, is in part as follows:

"The writ of execution against the property of a judgment debtor issuing from a court of record shall command the officer to whom it is directed to levy on the goods and chattels of the debtor. If no goods or chattels can be found, the officer shall levy on the lands and tenements of the debtor. * * *"

Section 2329.53, Revised Code, reads:

"The officer to whom a writ of execution is directed shall return such writ to the court to which it is returnable *within* sixty days from its date." (Emphasis added.)

Section 2329.28, Revised Code, reads in part:

“The sheriff shall indorse on the writ of execution his proceedings thereon, * * *”

The foregoing mentioned sections of the Revised Code are mandatory in nature but I find nothing in the statutes to preclude the return of such writ on the same day it is issued or at any time within sixty days from its date. Since a writ of execution is generally issued at the instance or request of the judgment creditor or his attorney, it also follows that the same parties are generally entitled to control the writ, and to give the officer directions about executing it and particularly in regard to the selection of the time to set the machinery of the law in motion.

22 Ohio Jurisprudence 2d, 140, Sec. 194, states in part as follows:

“The plaintiff in execution as well as his attorney is generally entitled to control the writ, and to give the officer directions about executing it. Thus, there are examples in the reported cases of Ohio of directions by the execution plaintiff or his attorney in regard to the making of the levy and to returns of nulla bona. However, the plaintiff in execution has no right to insist on a fraudulent or oppressive use of the writ, or in any respect to compel the officer to exercise a severity which would seem to be actuated by malice toward the defendant as much as by desire to obtain satisfaction of the judgment. * * *”

In order for certain procedures in aid of execution to be invoked, a return of the writ of execution must first be made.

Section 2333.09, Revised Code, General Code 11768, which concerns examination of debtor in a proceeding in aid of execution, is in part as follows:

“When an execution against the property of a judgment debtor, * * * is returned unsatisfied, in whole or in part, the judgment creditor shall be entitled to an order * * *”

In the case of *Stern, et al. v. The Columbus Mutual Life Insurance Co., et al.*, 39 Ohio App., 498, the syllabus is as follows:

“In proceedings in aid of execution brought under favor of Section 11768, General Code, it is only required that it be shown that an execution has been returned unsatisfied. The judgment debtor cannot avoid the proceeding by showing that there was property on which the sheriff might have levied.”

The court in the opinion, at page 501, said :

“In a proceeding under this section the test is not whether the judgment debtor has property subject to levy ; *it is whether an execution has been returned unsatisfied.*” (Emphasis added.)

In order to expedite such proceedings in aid of execution, it is often desirable from the viewpoint of the judgment creditor and his attorney that the officer to whom the writ is directed make prompt return thereon. To accomplish such prompt return such creditor, or his attorney, will often request, as you suggest, that such return be made immediately without (1) an actual search for goods and chattels on which to levy, and (2) without a levy on the lands and tenements of the debtor.

Where such a request is honored, as we have noted in the Stern case, *supra*, proceedings in aid of execution may properly be had as provided in Section 2333.09, Revised Code.

It appears, however, that you are actually concerned with the question of whether the judgment creditor, or his attorney, may require the officer concerned to honor such a request.

As noted above, in the quotation from 22 Ohio Jurisprudence 2d, 140, it is suggested that such creditor or his attorney “is generally entitled to control the writ, and to give the officer directions about executing it.” This statement is based on the following language in 21 American Jurisprudence 54, Section 96 :

“Although an execution creditor is not considered the agent of the law in making a levy of execution, he has a large control as to the management thereof. He may say whether the officer shall levy the writ or shall return it without doing so. Indeed, a sheriff, especially in the case of a levy on real estate, is sometimes regarded as the plaintiff’s agent, in so far as he does not exceed the mandate of his writ.”

Cited in support of the first sentence quoted above is *Wade v. Pettibone*, 11 Ohio, 57, in which it was said by Lane, C. J., p. 60 :

“The attorney is retained for the purpose of doing all in his power to advance the client’s interests, and especially, that the property should produce enough, by sale, to pay the whole debt. For this purpose, although not the agent of the law in making sales, he has a large control as to the management of the execution. Without adverting to other means of influence, he can select his time to set the machinery of the law in motion, and

he can countermand or postpone it for the purpose of obtaining for his client a better price.” (Emphasis added.)

Also cited in support of this proposition is *Smith v. Hanson*, 70 N. D. 241, 129 A. L. R., 1356. The fifth headnote in that case, as quoted in 129 A. L. R., is as follows :

“Where the party for whose benefit an execution is issued instructs the officer charged with the duty of executing the same to abandon a levy that has been made under the execution, the officer is warranted in releasing such levy, and he cannot be held liable in an action for damages for releasing the levy and not making sale of the property.”

This statement obviously does not support the view that an officer to whom a writ is issued is under a duty to disregard that which the writ commands, and to follow instead the instructions of the judgment creditor, nor does this decision as a whole support that view.

Adverting again to the Ohio authorities it appears that a creditor cannot compel by mandamus the sheriff to levy under execution, the following statement being found in 25 Ohio Jurisprudence, 1098, Section 131 :

“It appears to be the general rule that, where there is another adequate remedy at law, mandamus is not the proper remedy of a creditor against a sheriff who fails to levy under execution, or to follow the creditor’s directions in that regard. Where the defendant is solvent, and is likely to retain the property, so that the sheriff may reach it during the life of the writ, and where the proceeding is to obtain satisfaction in money, a remedy is provided against the sheriff’s bond, and mandamus cannot issue. If a summons or execution is placed in the hands of a sheriff to be served, and he neglects or refuses to serve it, the party in whose favor it was issued has a remedy by action against the sheriff and, therefore, as an ordinary rule, a writ of mandamus would not lie to compel him to serve the same.”

On principle it would appear that if a sheriff could not be compelled to execute the command he could not be regarded as under any legal duty to forbear in the execution of a levy at the request, or even demand, of a creditor or his attorney.

It does appear, however, that where a writ of execution has been issued, and the creditor has requested its return without levy on particular property, the creditor is deemed to have waived compliance with the statu-

tory provisions relative thereto. Thus in *Coal Co. v. Bank*, 55 Ohio St., 233, the court held:

1. "Statutory provisions prescribing the order to be observed by an officer in subjecting the debtor's property to sale on a writ of execution, are directory in their nature, and for the benefit of the debtor, who may waive strict compliance therewith; and such waiver will be presumed unless he assert his right by a direct proceeding to set aside the action of the officer.

4. "Return of the writ by direction of the creditor, without a sale of the property, is not a discharge of the lien."

In that case William, C. J., said, pages 250, 251:

"* * * This claim is based upon section 5383, of the Revised Statutes, which provides that: 'The officer to whom a writ of execution is delivered shall proceed, immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found the officer shall indorse on the execution the words 'no goods,' and forthwith levy the same upon the lands and tenements of the debtor which are liable to satisfy the judgment.' This section of the statute, it is contended, precludes the making of a valid levy on lands, until the officer, after a proper search, has failed to find sufficient chattel property of the debtor to satisfy the writ; and the absence of an indorsement on the writ of the want of such property appearing in the entries on the execution docket, prevents their operation as constructive notice binding on subsequent purchasers or creditors. But it is generally held, that statutory provisions like those contained in the section referred to, prescribing the order to be observed by the officer in subjecting the property of the debtor to sale on writs of execution, are for the benefit of the debtor, and may be waived by him. They are directory in their nature; and though a failure to observe the order prescribed is an irregularity which may be corrected in a direct proceeding instituted by the debtor, the levy is not open to collateral attack on that ground. While the statute enjoins the duty on the officer, in making a levy of his writ, to first seize the debtor's personal property before resorting to his real property, it does not declare that unless that order is pursued a levy on the debtor's land shall be invalid, or ineffectual to create a lien; and the failure of the officer to proceed in the precise order directed should not deprive the creditor of the benefit of the levy, so long, at least as the debtor himself makes no objection to it. It may be to the advantage of the debtor to save his real property from sale, in preference to his chattel property; and this he may do by compelling resort first to be had to his chattel property when that is sufficient to satisfy the writ; but if he chooses not to exercise his right in that respect, a stranger who, at the time had no interest in the property, cannot be heard to

assert it for him, nor interpose it as a ground of objection to a levy on the debtor's real property; nor would he seem to have any just ground of complaint where he buys after the lien has attached, and with legal notice of its existence."

From these decisions it appears, therefore, that although an officer to whom a writ is issued is under no legal duty to forbear at the instance of the judgment creditor, in the levy which it commands, such request for forbearance relieves such officer from any duty to make the levy; and he may properly honor such request.

Your question of the contents of the return whether "nulla bona" or "no goods" or "unsatisfied" or some other wording is one for the sheriff or officer's determination as he is required by statute to indorse his proceedings thereon. The statutes do not prescribe the form of the return or the contents thereof.

Accordingly it is my opinion that:

1. To expedite proceedings in aid of execution which require return of a writ of execution as unsatisfied, plaintiff in execution or his attorney, at whose request the writ was issued, have authority to request, but not to require, the return of such writ without the officer to whom the writ is directed first searching for goods and chattels, and without levy upon land and tenements of the debtor. Such request amounts to a waiver of levy under such writ, relieving such officer of any duty to make levy thereunder, and such officer may properly honor such request.

2. The contents of the return of a writ of execution cannot be controlled or determined by plaintiff in execution or his attorney but are for the determination of the officer making such return.

Respectfully,
WILLIAM SAXBE
Attorney General