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EXECUTION OFFICER—LEVY OF EXECUTION—REAL AND PERSONAL PROPERTY—STANDARD OF CARE REQUIRED—NO AUTHORITY TO PADLOCK REAL PROPERTY UNDER LEVY OF EXECUTION—NO AUTHORITY IN EXECUTION OFFICER TO REQUIRE JUDGMENT CREDITOR TO MAKE DEPOSIT TO COVER ANTICIPATED EXPENSES OF TAKING AND STORING PROPERTY LEVIED UPON—COMPENSATION AS THE COURT MAY PROVIDE FROM PROCEEDS OF SALE OF PROPERTY.

SYLLABUS:

1. An officer levying upon property has the duty to exercise, in its care and preservation, that degree of diligence which an ordinarily prudent person would exercise towards property of a like nature if vested with complete ownership thereof, commonly called "due," "reasonable" or "ordinary" care, and while he is not responsible as an insurer, or for loss or damage by act of God, the public enemy, or inevitable accident, he is responsible for reasonably foreseeable happenings or contingencies which, with the exercise of care commensurate with the danger, having regard for the nature and the situation of the property, he could have prevented.

2. An officer levying execution on goods and chattels contained in a building or a portion thereof may not place a padlock on such real property or exercise exclusive dominion over it such as to exclude the owner, and if he does so he is liable for whatever damage his acts may cause, including loss of use or rent.

3. An execution officer may not require of a judgment creditor a deposit to cover the anticipated expense of taking or storing property to be levied upon but must depend for compensation on such allowance as the court may provide him from the proceeds of the sale of the property levied upon.

Columbus, Ohio, February 19, 1957

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

Dear Sir:

Your request for my opinion reads as follows:

"I would like to request a formal opinion from your office regarding the liability of a County Sheriff in levying executions under the following conditions.

"It is not uncommon for a Sheriff to levy executions against a business and business establishments, which, in some cases, requires the padlocking of such establishment by the Sheriff. In addition thereto, there is, at times, the necessity with due consideration to weather conditions, perishable materials, etc., to remove personal property from such establishments, and to store same, pending further legal procedure.

My questions are:

- (1) If the establishment is padlocked by the Sheriff, under execution, would he be liable if there was damage to merchandise, water pipes, water heaters, and any other chattels by freezing.
- (2) Would the Sheriff be liable for the rent due on such establishment, or any part thereof, during the period his padlock is on the business establishment under the execution.
- (3) Has the Sheriff any right or authority, statutory or otherwise, to demand of plaintiff, or plaintiff's attorney, a deposit at the time the execution or levy is filed, the amount to be set at the discretion of the Sheriff, sufficient to cover expenses anticipated to be incurred in taking and keeping goods and chattels under an execution, such as moving said goods for storage, storage cost, etc., keeping in mind that the Sheriff has no fund from which he may make immediate reimbursement to anyone who moves such goods and chattels, or stores them, at the request of the Sheriff,

under the execution. If the Sheriff does not have such authority to demand a deposit for the expenses incurred at any time during the process is in his hands.”

With regard first to liability for damage to personalty lawfully seized on execution, the law of Ohio has not been conclusively defined by the courts. I call your attention to a dictum in *Sammis et al. v. Sly*, 54 Ohio State, 511, at page 520:

“But as between the officer and the creditor or the debtor in the attachment suit, it seems well settled that the officer is not liable for the destruction of the property while in his custody by fire or other means, *unless guilty of a want of ordinary care.* * * * This rule is placed by Story on the ground that the officer is a bailee for hire and should not be held to a greater nor less degree of liability than is required by the ordinary rule in such case—ordinary diligence.” (Emphasis added.)

This case, of course, deals with attachment.

I refer you also to 138 American Law Reports Annotated, 711, where the law is stated in the following terms:

“It is a general rule that an officer levying upon property has the duty to exercise, in its care and preservation, that degree of diligence which an ordinarily prudent person would exercise towards property of a like nature if vested with complete ownership thereof, commonly called “due,” “reasonable,” or “ordinary” care, and that while he is not responsible as an insurer, or for loss or damage by act of God, the public enemy, or inevitable accident, he is responsible for reasonably foreseeable happenings or contingencies which, with the exercise of care commensurate with the danger, having regard for the nature and situation of the property, he could have prevented.”

Inasmuch as the quoted paragraph seems to me to express the law correctly, I adopt it as my opinion. Thus, in your case, if the sheriff through want of care allowed the personal property levied upon to be damaged, he is liable for that damage.

A second portion of your letter deals with damage to personal and real property occasioned by a sheriff having padlocked a business establishment. In my opinion an execution officer may not place a lock upon real property and deprive the owner of its use for the purpose of levying execution upon goods and chattels contained therein. Admittedly he may enter, and in some cases may break and enter, but I am unable to discover

how he may lawfully exercise exclusive dominion over such real property. Even if he is levying execution on the real property itself possession of it remains with the judgment debtor until after the sale. *Reynolds v. Rogers*, 5 Ohio Reports 169; 22 Ohio Jurisprudence 2d, 84. It appears to me that the sheriff who padlocks real property for the purpose of levying execution on personal property contained therein has no status other than that of trespasser and is consequently liable for whatever damage may result to the real property or to personal property therein other than that being levied upon. Such damage would include loss of the use or earnings of the real property wrongfully withheld from its owner.

As to the third portion of your request, inquiring whether a sheriff may demand of a judgment creditor a deposit at the time an execution levy is filed to cover the anticipated cost of taking and storing the chattels to be seized, I find no authority for such a demand. In *Ramsay v. Overaker*, 12 Ohio Dec. Rep., 803, the court said in dictum :

“Had the goods remained in the hands of the sheriff, and been sold under the order of the court, and the application was to be allowed for the storage as a charge on the fund, the court would have the power, and it would be its duty, as it has been the practice, to make the allowance. It is not a compensation to the sheriff for services, but for necessary expenses incurred in taking care of the property. The same principle applies in allowing for the keeping of horses, or stock, when taken under execution. A very general principle, frequently laid down, governs such cases.”

In my opinion a sheriff must rely on such allowance by the court to recover his expenses.

In sum it is my opinion, and you are advised that :

1. An officer levying upon property has the duty to exercise, in its care and preservation, that degree of diligence which an ordinarily prudent person would exercise towards property of a like nature if vested with complete ownership thereof, commonly called “due,” “reasonable” or “ordinary” care, and while he is not responsible as an insurer, or for loss or damage by act of God, the public enemy, or inevitable accident, he is responsible for reasonably foreseeable happenings or contingencies which, with the exercise of care commensurate with the danger, having regard for the nature and situation of the property, he could have prevented.

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3. An execution officer may not require of a judgment creditor a deposit to cover the anticipated expense of taking or storing property to be levied upon but must depend for compensation on such allowance as the court may provide him from the proceeds of the sale of the property levied upon.

Respectfully,
WILLIAM SAXBE
Attorney General
