Sheriffs—Indemnity—Execution—Third Party Claims.

The sheriff is not entitled to demand an indemnity bond when levying an execution upon personal property unless a third party claim has been filed in the form provided by the statute. A third person claiming the property but refusing to file a claim as required by law may not maintain action for damages against the sheriff because of the levy. Indemnity bond given to the sheriff by the execution creditor though not demandable by the sheriff under the circumstances stated in the opinion held to be a valid obligation.

John S. Nyquist, Esq., June 21, 1929.
County Attorney,
Scobey, Montana.

My dear Mr. Nyquist:

You state that the sheriff has levied an execution upon an automobile and that a third party is claiming title to the car, but has failed to file a third party claim, and you inquire if under such a condition the sheriff may demand an indemnity bond from the judgment creditor to protect him in case he proceeds with the sale and it should develop that title to the car is in the person asserting title thereto.

Under the common law, the sheriff in levying upon property under an execution was bound at his peril, to do his duty and to judge of both the

law and the facts, being held liable to the plaintiff for false return if he failed to levy on property subject to the writ, while a levy on property not subject thereto rendered him liable to the person injured thereby in an action of trespass. (35 Cyc. 1757).

It seems also that at common law a sheriff levying an execution, on notice of claim by a third party to the property about to be seized or actually seized, could demand of the plaintiff indemnity for the seizure and of the claimant for releasing it. In the event both parties refused to give an indemnity bond the officer might make application to the court, out of which the writ issued, and if the court was satisfied of the bona fides of the officer's doubt as to the title to the property and the plaintiff still failed to give indemnity the court would postpone the return date of the writ until the officer had further time for investigation, and if reasonable grounds of apprehension continued the court would indefinitely defer the return unless the plaintiff gave indemnity. Another mode under the common law was for the officer, under the writ of **propriate probanda** to empanel a jury to inquire into the prima facie title to the property. If the jury found in favor of the claimant the officer might release to him the property and make return **nulla bona,** unless the plaintiff gave him indemnity. (State ex rel. O'Bryan vs. Koolantz, 83 Mo. 323).

In California, until the year 1891, the second method above mentioned existed by virtue of statute. In that year, however, the legislature of that state dispensed with the trial of property and enacted a statute reading as follows:

> "If the property levied upon be claimed by a third person as his property by a written claim verified by the oath of the claimant setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received or be notice of any rights unless made as above provided."

The California Supreme Court has held that under this statute before an officer can require any indemnity he must have received a third party claim in the manner set forth in the statute. (Arena vs. Bank of Italy, 228 Pac. 441). It has also been held by that court that no right of action against the sheriff at the instance of a third party claiming the property levied upon exists unless a claim had been filed as provided by the statute. (Stanley vs. Bedford, 265 Pac. 216).

In Montana the trial of property by the sheriff does not exist, nor has any decision of our Supreme Court ever declared that the practice of demanding indemnity and applying to the court in case of its refusal has ever existed in this state.

Section 9426 R.C.M. 1921 provides that if personal property, levied

upon, be claimed by a third person the same proceedings shall be had as is provided in attachment under Section 9273 of the code. The last mentioned section reads as follows:

> "If personal property attached be claimed by a third person, he shall give notice thereof to the sheriff, and deliver to him an affidavit, stating his claim, ownership, and a description of the property, and unless the plaintiff, within ten days after receiving notice thereof, give the sheriff a good and sufficient bond to indemnify him against loss or damage by reason of such retaining said property, the sheriff shall deliver the same to such person."

It will be observed that the foregoing statutes relate to the action of the sheriff after he has levied upon personal property and it is claimed by a third person, which is the situation that exists according to the letter of the sheriff above mentioned, and also apparently prescribe what shall be done by a person claiming the property levied upon. Our statute does not, in terms, state that no action shall be maintained against the sheriff by the claimant unless he makes the claim in the manner set out by the section, whereas the California statute does so state. The history of the legislation of the various statutes upon the subject discloses that the trend has been toward relieving the sheriff of the rigor of the common law liability upon him.

At the common law where a third person claimed property levied upon the sheriff was the judge of the law and the facts and he acted at his peril. If he decided wrongly against the claimant he was liable to him in trespass; if he decided wrongly against the judgment creditor he was liable to him for false return. These statutory enactments prescribe a method of procedure both by the sheriff and the parties in case a dispute arises over the ownership of the property levied upon. The two methods of protection above pointed out, which existed at the common law, are supplanted by statutory enactments. Instead of the sheriff demanding indemnity upon a mere assertion of title by a third person, he may not do so until the claim is made in the manner provided by the statute, and the statute requires that the claimant support his claim with something more than a mere assertion, to-wit, by the oath of the claimant relating to his claim and ownership. When such claim is made the judgment creditor cannot sit idle and require the sheriff to judge of the facts of ownership at his peril or require the sheriff to apply to the court for relief as the judgment creditor could at common law, but he must deliver to the sheriff an indemnity bond, failing which the sheriff shall deliver the property to the claimant.

The California court and others have held that such statutes are intended for the protection of the officer. (Paden vs. Goldbaum, 37 Pac. 758). If the property levied upon and claimed by a third person is subsequently established to be that of the third person and the sheriff has retained the same under the indemnity bond given by the judgment creditor, and sold it at execution sale, the sheriff is nevertheless liable to the owner of the property for the value of the same, but the sheriff has recourse upon the indemnity bond.

While our statute does not say that the sheriff shall not be liable for a conversion of the property unless a claim is made in the manner provided by law, nevertheless, if this statute is intended for the protection of the officer it would seem that it would have that effect. It would be unconscionable to permit the claimant to merely casually assert his claim and refuse to put it in the form required by the statute so that the sheriff would be in a position to claim an indemnity bond from the judgment creditor to protect him and yet hold the sheriff liable to the claimant for a conversion of the property. Unless the claimant is required to make his claim in the manner provided by the statute as a part of the procedure relating to his right to recover of the sheriff, then there is no protection to the sheriff in the statute.

Therefore, it would seem that the sheriff may not claim an indemnity bond of the judgment creditor until a third party claim has been filed as required by the statute. It would further seem that the plaintiff is required to make his claim in the manner provided by statute for the reason that the statute says he "shall" make the claim in the manner provided and for the further reason that unless he does so and is permitted to sue the sheriff, the statute affords the sheriff no protection whatever.

In the case of O'Brien vs. Quinn, 35 Mont. 441, 90 Pac. 166, it was contended that it was necessary for the plaintiff in an action of conversion against the sheriff to make a verified third party claim to the property and to allege that he made such claim as a condition precedent to maintaining an action. The court said:

> "We think it was not necessary for the plaintiff to make such third party claim, particularly since there is a distinct denial in the answer of plaintiff's claim of ownership to the property in controversy. (Richey vs. Haley, 138 Cal. 441, 71 Pac. 499)."

The California case cited by the court is no authority whatever for the position which would sustain the contention that the third party claim is not necessary. The California court in the above mentioned case said:

> "It is sufficient to say that the demand alleged in the complaint is not denied in the answer, and this question is raised here for the first time. If the form of the demand did not comply with the section, the defendant should have traversed the allegation in his answer and objected to proof when offered. It appears that any kind of a demand whatever would have been unavailing. Defendant denies plaintiff's title and alleged title in another."

It will thus be seen that the California court did not say that a third party claim in the form required by statute was not necessary, but held that a demand having been alleged in the complaint and not denied in the answer, the defendant could not raise the question for the first time on appeal in the supreme court; that his remedy was to have denied the allegation of demand and objected to proof when offered. As to the

statement by the court that any kind of a demand would have been unavailing because it appears that the defendant denied plaintiff's title and alleged title in another, the court, in order to make such a statement, would have to assume that if the demand had been made the plaintiff would have put up an indemnity bond, as under the California statute the sheriff is required to keep the property if the bond is given, but it does not say that he is bound to return the property if the bond is not given.

Our statute says that the sheriff shall deliver the property to the claimant unless bond is given. Certainly under our statute no court in an action of this kind would be justified in assuming that a demand would be unavailing to the claimant as the court could not know whether or not an indemnity bond would have been furnished; if it was not, the law makes it mandatory that the demand be complied with and the property delivered to the claimant. Furthermore, the California court in making that statement evidently did not bear in mind what the court has since declared, to-wit, that the statute is for the protection of the officer, and that while the demand may have been unavailing to the claimant it would have protected the officer by permitting him to demand an indemnity bond. As above stated, the California court has since held that such a claim is necessary in order to permit recovery of the sheriff.

In Moreland vs. Monarch Mining Co., 55 Mont. 419 the court made the statement:

> " * * * and, while it is true that the seizure, or even the sale, of A's property for B's debt does not affect the title of the true owner who may proceed under Section 6673, Revised Codes, (the third party claim statute) or have his appropriate remedy in conversion or replevin, he is not required to pursue any of these courses, and the fact that he has an alternative remedy does not reflect upon his right to intervene."

This decision dealt with the right of a third party claimant to intervene in the attachment action under other sections of the code. While the broad statement is made that the claimant is not required to pursue any of the remedies he has, including the filing of a third party claim, it is my opinion that this statement must be construed with relation to the right to intervene. Certainly under the intervention statute it is not a prerequisite to intervention that the claimant shall have filed a third party claim. I do not believe that the court, by this expression, intended to say that a third party claimant could sue the sheriff in conversion by merely making an informal assertion of title after the levy and prior to the sale, and refuse to give the claim the dignity and form required by the statute, and thereby, by disregarding the mandate of law, prevent the officer from demanding of the judgment creditor an indemnity bond which he might require if the claimant makes a claim in accordance with the statute. To do so is to deprive the sheriff of all protection and render the statute meaningless and without force or effect.

Under Section 4781 the sheriff is made liable to the plaintiff in the execution as follows:

> "If the sheriff to whom a writ of execution or attachment is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon or sold, he is liable to the creditor for the value of such property."

If the automobile in question is the property of the judgment debtor and the sheriff refuses to levy upon or sell the same, he is liable under this statute to the creditor, the creditor having required the sheriff to levy upon the same. In my opinion it is the purpose of the statute to permit the sheriff to indemnify himself against the judgment which may be rendered against him if the property is that of the claimant and to relieve himself of the liability under this section to the creditor by permitting him to deliver the property to the claimant unless the creditor gives him indemnity, and as above stated, according to the California court, he may not require this indemnity until the claim has been presented in the form required by statute.

As will be seen from what has been stated hereinbefore, the question is a novel one as far as judicial decisions are concerned in this state. There are certain expressions in the two Montana cases above cited which might indicate that the owner of the property need not assert his third party claim prior to maintaining an action for conversion against the sheriff, but it appears to me that none of the expressions contained in those opinions are direct expressions upon the subject. The better reasoning appears to be that the object of the third party claim, to-wit, the protection of the officer, can only be effected by holding that the person who makes an assertion of title to property levied upon must do just what the statute says, to-wit, serve a claim in accordance with the terms of the statute, or the officer will be protected from suit against him by the claimant for conversion. A holding to the contrary would render the statute a useless and impotent assemblage of words, without purpose, meaning, force or effect.

While I am of the opinion that the sheriff may not call upon the judgment creditor for an indemnity bond in the absence of a third party claim, filed in conformity with the statute, nevertheless, I am of the opinion that if such an indemnity bond is given that it would be enforceable in case the sheriff is held liable for conversion. It has been held that such a bond is good as a common law obligation. (Matheson vs. F. W. Johnson Co., 92 N. W. 1084).

Very truly yours,

L. A. FOOT,
Attorney General.