

Opinion No. 38

ATTACHMENT—Exemptions—claims served on sheriff as levying officer. JUSTICE COURTS—Attachment—power to determine validity of claimed exemption. SHERIFFS—Exemptions—liability for wrongfully seizing claimed exempt property. SECTION 16-2709, RCM, 1947; SECTION 93-4313, RCM, 1947; SECTION 93-5814, RCM, 1947

- Held: 1. Sheriffs seizing claimed exempt property may require an indemnity bond from the attachment creditor.**
- 2. Sheriffs attaching property claimed as exempt may request attachment debtors to file their exemption affidavits in the Justice Court which has power to determine their validity.**
- 3. A debtor's refusal to file his exemption affidavit in court forces the sheriff to determine the validity of the claim. If the claim is questionable the sheriff may require a bond of indemnity from the attachment plaintiff.**

October 27, 1959

Mr. Malcolm MacCalman
County Attorney
Powell County
Deer Lodge, Montana

Dear Mr. MacCalman:

You have requested my opinion on the proper procedure to be followed by a sheriff presented with an exemption affidavit by the debtor in an attachment proceeding. I am advised that such exemption claims are frequently served upon the sheriff as the levying officer who is then compelled to determine their validity.

Although our codes contain a number of particular exemptions, there are no specific provisions with reference to the manner and mode of claiming exempt property. An examination of Montana statutes and decisions, however, indicates that sheriffs attaching property according to the directions of the creditor may have conflicting duties when presented with an exemption affidavit by the debtor.

Sheriff's Duties to the Attachment Creditor.

Under Montana law, a sheriff must levy an attachment according to the instructions of the attaching plaintiff or his attorney.

Section 93-4313, RCM, 1947, states:

"Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control, any credits or other personal property belonging to the

defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits or other property, or debts, as the case may be, are attached in pursuance of said writ."

Further, a sheriff who refuses to levy an attachment according to the demands of the creditor faces possible civil liability to the attachment plaintiff. Section 16-2709, RCM, 1947, provides:

"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."

Sheriff's Liability to the Attachment Debtor.

On the other hand, decisions of the Montana Supreme Court have held a sheriff liable in damages to the attachment debtor for seizing property which has been rightfully claimed as exempt under Montana statutes.

In McMullen v. Shields, 96 Mont. 191, 29 Pac. 2d 652, a sheriff attached the property of a farmer and seized a Model A Ford which the farmer claimed was exempt under Section 9428, RCM, 1921, (now 93-5814, RCM, 1947) which provides in part:

"In addition to the property mentioned in the preceding section, there shall be exempt to all judgment debtors who are married, or who are heads of families, the following property:

1. To a farmer: Farming utensils or implements of husbandry, not exceeding in value six hundred dollars; also . . . one cart or wagon . . ."

The sheriff decided the vehicle was not a **cart or wagon** within the meaning of the statute and ignored the claimed exemption. The officer's liability for conversion was upheld by the Montana Supreme Court. Under such circumstances, the sheriff determines the validity of the claimed exemption at his own peril.

Sheriff is Entitled to Indemnity from Attachment Creditor.

Although the sheriff may be liable for damages to the attachment debtor for wrongfully seizing exempt property, he is generally entitled to indemnity from the attachment creditor.

In Weir v. Hum Tong, 100 Mont. 1, 46 Pac. 2d 45, a sheriff was directed by the plaintiff to attach all the furniture in a hotel owned by the defendant. The defendant served exemption documents on the sheriff who notified the creditor of the debtor's claim. The creditor

promised but failed to execute a bond of indemnity. The debtor's asserted exemption proved valid and the sheriff was held liable for conversion. On appeal from a judgment for the sheriff in a suit against the creditor, the Supreme Court said:

"The general principle is well established when a sheriff makes a levy in accordance with the instructions of the plaintiff in an attachment suit, or a judgment creditor in the case of an execution, he may, if he does not knowingly act in an unlawful and illegal manner, recover damages from the attachment plaintiff, or the judgment creditor, to indemnify him in the absence of a bond of indemnity or an express contract to indemnify."

Validity of Claimed Exemption Determined by Court.

The Montana Supreme Court has approved a procedure which seemingly protects the sheriff from liability to the attachment debtor for wrongfully seizing claimed exempt property.

In *Hale v. Justice of the Peace Court*, 102 Mont. 1, 55 Pac. 2d 691, a writ of attachment was issued from the justice court and the specified property was seized. The defendant moved the court to have alleged exempt property released from the attachment and filed affidavits in support of his motion. The plaintiff, after being notified of the debtor's claim, filed counter-affidavits in opposition to the motion. The justice of the peace, after hearing evidence and examining the opposing affidavits, ordered the exempt property returned to the debtor. This procedure was upheld by the Supreme Court as a proper exercise of justice court jurisdiction.

However, the court also recognized service of the exemption affidavit upon the sheriff as a proper method of claiming one's statutory exemptions.

It is therefore my opinion that a sheriff served with an exemption claim has two alternatives.

1. Since the sheriff must attach the debtor's property according to the instructions of the plaintiff, he may require the creditor to furnish a bond or contract of indemnity in the event the debtor's claim of exemption proves valid. Assuming the sheriff acts in good faith in seizing the designated property, recovery may be had from the attachment creditor on an implied contract even in the absence of the express bond or contract of indemnity.
2. Under Montana decisions, the sheriff may **request** that attachment debtors file their exemption claims in the court from which the writ was issued. After notice to the plaintiff, the validity of the claimed exemption may be decided upon the evidence and opposing affidavits.

3. If the debtor refuses to file his exemption claim in court, the sheriff has no other alternative than to summarily determine the debtor's claim for a statutory exemption. The sheriff may if the debtor's claim is questionable, demand a bond or contract of indemnity from the attachment plaintiff before seizing the specified property.

Very truly yours,
FORREST H. ANDERSON
Attorney General