

## Opinion No. 44-4538

June 29, 1944

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mr. Richard F. Rowley, Acting District Attorney, Clovis, New Mexico

We are in receipt of your letter of June 20, 1944, in which you ask our opinion as to what procedure should be followed by the Sheriff of De Baca County in handling the alias executions issued out of the Supreme Court in the case of Janes v. Herrin, found in 46 N.M. 431.

In your letter, you, in fact, ask two questions; first, as to the procedure to be followed when an execution is issued out of the Supreme Court, and second, what procedure should be followed in levying a writ of execution when a claim of exemption is made.

I have checked the Supreme Court files with Mr. Gerhart, and find that the writs were issued to enable the Appellant to recover his costs in connection with the appeal to the Supreme Court.

You will observe that by Section 21-101 of the 1941 Compilation, that the party in whose favor any Judgment, Order or decree **in any court** may be returned shall have execution. By Rule 17, Paragraph 4 of the Rules of the Supreme Court, provision is made for writs of execution to be issued out of the Supreme Court. You will observe that by this rule when garnishment is issued in aid of the execution, that questions arising therein are to be determined, in the District Court from which the cause originated, but that no such provision is made with respect to hearings upon the execution itself.

In view of the foregoing, it is my opinion that the identical procedure followed when a writ of execution is issued out of a District Court must be followed when it is issued out of the Supreme Court, and that the Supreme Court can and should do all things that would have been done in the District Court.

In answer to your second question, it is noted that no specific provision is made in our execution statutes directing the Sheriff to take possession of personal property. However, at common law, to make a levy, "It is well-settled that the officer must reduce the property to possession or bring it within his immediate control," 23 C. J. 435. That this is the intention of our legislature in enacting the execution laws is borne out by Sec. 21-107 of the 1941 Compilation which provides that the person whose goods are taken on execution may retain possession thereof until the day of sale by giving bond.

Having taken possession, the next step required of the Sheriff is to advertise the property for sale pursuant to Sections 21-201 or 21-204 of the 1941 Compilation. At some time before the sale, the Sheriff must ascertain the value of the property to be

sold as required by Sec. 21-206 through an appraisement made in conformity with Sec. 21-207.

What, then, should the Sheriff do in the event a claim of exemption in lieu of homestead is made? While no procedure is provided in Sec. 61-607 as to how the exemption in lieu of homestead should be effected, yet this section together with Sections 21-601 to 21-607 are part of a common plan of homestead exemption set up by Chap. 37 of the Laws of 1887 and so must be read together as is borne out by the cases hereinafter cited. Sec. 21-607 provides that a qualified person "may **hold** exempt from **levy** and sale real or personal property to be selected by such person." It thus appears that a debtor has two rights: First, to hold the property selected exempted from levy and, Second, from sale. This interpretation is strengthened by *Corn vs. Hyde* 26 N.M. 36 where our Supreme Court held that the words "may hold exempt from sale" found in Section 21-601 were equivalent to "keep or retain or preserve exempted from sale."

It therefore follows if the claim is made prior to the Sheriff's making the levy by taking possession, that the Sheriff should not make the levy on such property not to exceed \$ 500.00 in value.

One other question remains: How should the Sheriff determine the value of the property upon which exemption is claimed? First, it is noted that as to homestead, this is done by "the inquest of appraisers." Second, attention is directed to the case of *Heisch vs. Bell*, 11 N.M. 523 wherein the Court held on page 530, that, where a claim of exemption in lieu of homestead was made the duty was cast upon the Sheriff to ascertain the amount and value of the property by appraisement under Sec. 21-511. It is to be remembered that this appraisement is a different thing and for a different purpose than that provided by Sec. 21-206 and 21-207 which apply only to appraisement after the writ of execution is levied. Having taken this step, the Sheriff should comply with Sec. 21-604 wherein it is provided that along with his return the Sheriff shall report as to the property held exempt. If no further complaint is made by either party as to the exemption, the exemption is final. Otherwise, it would, of course, be subject to the decision of the Court.

As a word of caution, observe the case of *Meyers Co. vs. Mirabal*, 27 N.M. 472 where the Court held that a claim of exemption was effective only as to the writ against which it was directed, and not as to subsequent alias writs.

I trust the foregoing will be of some assistance to yourself and the Sheriff. However, I would like to remind you that nothing said herein would be in any way binding upon the parties litigant if they should place a different construction on any of the statutes involved.

By ROBERT W. WARD,

Asst. Atty. General