

N.D.A.G. Letter to Shockman (Nov. 12, 1985)

November 12, 1985

Honorable Kelly Shockman
State Representative
Route 3, Box 80
LaMoure, North Dakota 58458

Dear Representative Shockman:

I am responding to your letter received back in May of 1985 concerning three statutes of the North Dakota Century Code. I offer my apologies for the long and unreasonable delay in responding to you on this matter. I was not even aware that your letter had been received until today. When I heard about the letter (and delay), this response was immediately drafted.

Your letter essentially asks questions concerning three statutes of the North Dakota Century Code. Two of these statutes concern actions for claim and delivery (N.D.C.C. Ch. 32-07). Essentially, claim and delivery is an action to recover property which has been unlawfully taken. Where certain specific steps are taken by a plaintiff, the sheriff of a county is authorized to seek property belonging to the plaintiff and to take custody of same. Unless the defendant excepts to the sureties provided, to the amount of the undertaking, or seeks redelivery to himself, the property is returned to the plaintiff. In this manner, claim and delivery takes on the appearance of a prejudgment proceeding ancillary to the final outcome of the main proceeding involving title to the property.

Specifically, your first question pertaining to N.D.C.C. § 32-07-04 questions the amount of time which the sheriff may retain property. This particular statute allows the sheriff, upon the filing of appropriate papers, to take property belonging to the defendant and "shall retain it in his custody." Your question is how long does the sheriff retain such property in his custody.

Following the taking of the property of the defendant by the sheriff, the defendant may except the sufficiency of the sureties or the amount of the undertaking (N.D.C.C. § 32-07-05) or may seek the redelivery of the property to himself (N.D.C.C. § 32-07-06). Where the defendant does not take such steps within three days after the taking of the property by the sheriff, the property is not so required to be returned to the defendant and "it shall be delivered to the plaintiff" unless claims are made by third parties as provided for in N.D.C.C. § 32-07-10. Bingenheimer Mercantile Co. v. Horning, 249 N.W. 321 (N.D. 1933).

Your next question concerns N.D.C.C. § 32-07-05 and inquires as to whether the sheriff may take property belonging to the defendant where the defendant fails to approve the sureties. North Dakota law does not require the defendant to approve the sureties prior to

the taking of property. Instead, the taking of property occurs upon the filing of an affidavit by the plaintiff and an endorsement in writing upon the affidavit requesting the sheriff to take the property into custody. The taking occurs without further action. The defendant, within three days after the service of a copy of the affidavit and undertaking upon him, may then except to the sufficiency of the sureties or the amount of the undertaking.

Finally, your last question concerns N.D.C.C. § 28-23-07 which concerns the sale of property following a levy upon personal property by virtue of an execution. Your question is whether this is a sheriff's sale, whether the sheriff has possession of the property up to the time of sale, and who is the owner of said property up to the time of sale.

The sale of property under execution is provided for in N.D.C.C. § 28-23-07. Although this sale is not identified as a sheriff sale, it is usually the sheriff who performs the sale pursuant to N.D.C.C. §§ 28-21-05, 28-21-06, and 28-23-01. Up to the time of sale, the officer who levied upon the personal property by virtue of an execution (usually the sheriff) continues in possession. Title does not transfer until the sheriff's certificate is executed and recorded as required by N.D.C.C. §§ 28-23-11, 28-23-12.

Once again, however, I apologize for the delay. Please call me personally if this ever happens again.

Sincerely,

Nicholas J. Spaeth

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