

## **N.D.A.G. Letter to LaQua (Aug. 3, 1987)**

August 3, 1987

Mr. Vincent A. LaQua  
Wells County State's Attorney  
P.O. Box 347  
Fessenden, ND 58438

Dear Mr. LaQua:

Thank you for your letter dated July 14, 1987, in which you inquire whether N.D.C.C. § 11-15-08 authorizes a sheriff to charge a fee based on the appraised value of the personal property when directed by an execution to only take it into his possession. You have stated that the sheriff of your county has received an execution to take into his possession certain real estate and personal property and deliver that property to the judgment creditor.

N.D.C.C. § 11-15-08 provides:

11-15-08. COMMISSIONS COLLECTED BY SHERIFF. Except as otherwise provided in section 11-15-09, the sheriff is entitled to collect commissions on all moneys received and disbursed by him on an execution, order of sale, order of attachment, or decree for the sale of real or personal property, as follows:

1. On the first four hundred dollars, three percent.
2. On all moneys in excess of four hundred dollars and not exceeding one thousand dollars, two percent.
3. On all moneys in excess of one thousand dollars, one percent.

In all cases where personal property is taken by the sheriff on an execution or under a writ of attachment and applied in satisfaction of the debt without sale, the sheriff is entitled to collect the percentage specified in this section based upon the appraised value of the property. The sheriff shall deliver the commissions to the county treasurer in accordance with section 11-15-14.

North Dakota state law recognizes two kinds of executions; one against the property of the judgment debtor and another for the delivery of a possession of real personal property or for such delivery with damages for withholding the same. N.D.C.C. § 28-21-03. This distinction between the two types of executions continues with the amendments recently adopted to N.D.C.C. § 28-21-06 which provide for information which must be included within an execution for the delivery of the possession of real or personal property, such information including a description and value of the property to be delivered.

Although this office has not issued a formal opinion and there is no case law pertaining to the specific question raised in your letter, it appears that N.D.C.C. § 11-15-08 does, for purposes of authorizing the collection of a commission, recognize the distinction between the two types of executions. The first portion of N.D.C.C. § 11-15-08 sets forth the fee for the collection and disbursement of moneys pursuant to an execution and the second portion of that section authorizes a sheriff to collect the same commission upon the appraised value of personal property which has been taken by the sheriff on an execution or under a writ of attachment and applied in satisfaction of the debt without sale

N.D.C.C. § 11-15-08 is clear in that if a sheriff takes personal property pursuant to an execution or under a writ of attachment and such personal property is applied in satisfaction of a debt without sale, the sheriff will be entitled to collect the percentage set forth in N.D.C.C. § 11-15-08 based upon the appraised value of the property. Therefore, the sheriff may charge a fee based upon the appraised value of the personal property taken by him pursuant to the direction in an execution or a writ of attachment.

I do note, however, that the property must be "taken" by the sheriff pursuant to the execution or writ of attachment. Until the levy has been made as required in N.D.C.C. § 28-21-08, the sheriff has not "taken" the personal property. In addition, no writ of execution will be a lien on personal property before its actual levy. Until such time as the sheriff has "taken" the personal property which is the subject of the execution or writ of attachment, he may not be entitled to collect the commission set forth in N.D.C.C. § 11-15-08.

I trust that this has adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

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