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Executions and Levies on Tangible Property

Graham Susman

EXECUTIONS AND LEVIES ON TANGIBLE PROPERTY*

GRAHAM SUSMAN
of the Denver Bar

The subject of "Judgment and Executions" covers nearly an entire volume in *Corpus Juris*, so that it is apparent that only the highlights of the Colorado law on this subject can be covered in an article of this length. The statutory law may be found in Chapter 93 of the Colorado Statutes Annotated (1935), and reference hereinafter made to specific sections are intended to refer to that chapter.

Section 2 provides that a transcript of judgment may be recorded in any county, and *from the time of filing* becomes a lien on the real property of such judgment debtor located in that county, not exempt from execution, then owned or which may thereafter be acquired, until the lien expires. The general lien created by the recording of the transcript is good for a period of six years *from the entry of the judgment* as distinguished from the date of recording. A transcript may be issued and recorded immediately after the judgment is entered, even before the filing of a motion for new trial. There is no necessity to wait for ten days, as in the case of an execution, and for that reason it is advisable to obtain the transcript and to record it as quickly as possible after the judgment is entered. There is no limit as to the number of transcripts that may be issued on the same judgment.

An execution may be issued on a judgment of record at any time within twenty years (within six years in the justice court), and not afterwards, unless the judgment is revived as provided by law. Section 11 provides that the execution may be issued to any county, so that it is possible to obtain an execution for each county in the state at the same time, but only one execution will be issued for any one county at any one time. If it is necessary to obtain another execution to the same county, the previous outstanding execution must be returned, together with the sheriff's return thereon.

Section 12 provides that when an execution has been issued, it shall be delivered to the sheriff, who must then endorse thereon the exact date, year and hour that it is received. This information is also entered in a book which he maintains for that purpose, and this record is open to the public. The effect of this entry by the sheriff is to make the execution a lien upon the personal property of the debtor from the date of such entry.[1] The sheriff must then make his return on the execution within 90 days "unless a sale is pending under a levy made."

* This article highlights the third part of the Denver Bar Association's institute on creditors' rights and was presented by Mr. Susman at the meeting on January 31, 1950.

[1] Joslin v. Spangler, 13 Colo. 491, 22 P. 804 (1889).

LEVIES ON REAL ESTATE

Section 40 provides that when an execution is issued from any district or county court, and a levy is made upon real estate, it is the duty of the sheriff to file a certificate of such fact with the recorder of the county where such real estate is situated. From and after filing the same, such levy takes effect as to creditors and *bona fide* purchasers without notice, and not before. The lien created by the recording of the levy is a specific lien upon the property therein described for a period of six years from the date of filing of the certificate. The attorney should make certain that the correct legal description of the property is contained in the certificate. It might be well here to point out that the general lien of the transcript is good for six years from the date of the judgment, but the specific lien of the levy is good for six years from the date of the filing of the certificate. This distinction should be kept in mind.

In order to proceed with the sheriff's sale, it is necessary that the sheriff then serve a "Notice of Levy" upon the judgment debtor, as required by Section 31. This notice must be served in the same manner as service of summons. If the debtor is not available for service, then the notice must be published in the county for ten days, and the clerk must mail a copy of the notice of levy to his last known address, postage prepaid, and make and file an affidavit of such mailing.

Within ten days after the service of the notice of levy, the defendant may file his written claim for exemption with the clerk of the court setting forth a description of the property levied upon and the grounds of such claim of exemption.[2] If the defendant fails to file his written claim for exemption within the ten days after date of service, he waives his claim for exemption, and thereafter he has no claim for damages against the officer making the levy or against the plaintiff for levying on such exempt property. This applies to personal property as well as real estate. On the other hand, if the defendant files a written claim of exemption within the ten days, then all further proceedings in connection with the levy, sale, etc., are stayed until the matter of the claim of exemption can be heard.

The court must immediately set the claim of exemption for hearing at a time not less than five nor more than fifteen days from the date of filing. If the district judge is not available to hear the claim of exemption, or if he is disqualified or otherwise unable to act, the county judge shall hear and determine the claim, and his findings shall have the same force and effect as those of a district court judge. If the court finds the property to be exempt, it will enter an order to release the property, otherwise it will enter an order that the property be sold. The order on the question of whether or not the property is exempt, having been entered by the

[2] For general exemption, *see* COLO. STAT. ANN., c. 93, §§ 13 to 22 (1935). For homestead exemptions, *see* COLO. STAT. ANN., c. 93, § 23 to 29 (1935).

court, it is a *final* judgment for the purpose of appeal or writ of error.

Assuming the property is held to be not exempt, the sheriff must then advertise the sale for at least twenty days in some daily or weekly newspaper in the county. If there is no newspaper in the county, then notice is given by a posting in "three of the most public places" in the county. The notice must contain a description of the property to be sold and a designation of the time and place of sale. The sale must be a public rather than a private sale, and it is usually held at the front entrance of the court house. It must be held between the hours of 9:00 o'clock in the morning "and the setting of the sun, the same day." There seems to be no statutory requirement providing for notice of sale to be given to the defendant other than the advertising for the twenty day period. However, many attorneys usually send a copy of the advertisement to the defendant by registered mail.

If the sheriff sells the property without advertising it, or otherwise giving notice as required by statute, "the sheriff or other officer so offending shall, for every offense, forfeit and pay the sum of $50.00, to be recovered, with costs of suit, in any court of record in this state by the person whose lands may be advertised and sold." [3]

As soon as the sale is completed, the sheriff then issues a certificate of purchase which contains a description of the property, the price bid, and the time within which the purchaser is entitled to a deed. He must also record a duplicate copy of such certificate with the recorder within ten days from the date of sale.

THE REDEMPTION FROM SALE OF THE PROPERTY

From this point, the procedure concerning redemption by the defendant or subsequent lienors is practically the same as redemption from sale under a trust deed by the public trustee. Upon the expiration of the period of redemption, if the property has not been redeemed, the sheriff must execute and deliver a deed to the then holder of the certificate of purchase. Such deed vests a title free and clear of all liens *recorded subsequent to the recording of the lien on which the sale was based.* This deed should then be recorded.

Questions have sometimes arisen regarding the payment of taxes, interest on prior encumbrances, water, insurance, etc. during the period of redemption. By Section 53 the holder of the certificate of purchase may pay any general or special taxes, water assessments, premiums on insurance covering the property, or interest or principal due on a prior encumbrance, and upon presentation to the sheriff of receipts for such payments, they become an additional claim in favor of the holder of the certificate of purchase. Before the redemption can be made, the debtor must pay

[3] *See* COLO. STAT. ANN., c. 93, § 47 (1935).

these additional amounts, together with lawful interest, in order to obtain a certificate of redemption.

Quite often an attorney will cause a levy to be made, have the defendant served with a notice of levy, and thereafter hold up the actual sale for one reason or another, usually to give the defendant an opportunity to make payment of the judgment. In the meantime, the creditor has a specific lien on the real estate, which is good for six years from the date of levy, and he is not particularly worried about the defendant disposing of the property. If he permits the ninety days under the execution to lapse before deciding to proceed with the sale, he cannot do so under the execution on which the levy was based because such execution has expired. It would serve no useful purpose to obtain a new execution because the levy was made under a previous one. The proper procedure, under such circumstances, is for the creditor to file a petition in court setting forth the facts of the execution, the levy, a description of the property levied upon, and the fact that the execution upon which the levy was made has now expired, and request the court for an order to sell. The court will then issue an order directed to the sheriff to proceed with the sale, and it then continues in the same manner as though the execution had not expired. This is the same procedure as the old common law writ of *venditioni exponas.*[4]

LEVIES ON PERSONAL PROPERTY

Much of the material contained in the foregoing discussion relative to the sale of real estate is equally applicable to the sale of personal property. It has already been pointed out that the entry of the execution in the sheriff's book constitutes a lien on the personal property of the debtor, although there cannot be a sale of such property until there has been an actual seizure and it is in the possession of the sheriff. The procedure for service of notice of levy is exactly the same whether it be real or personal property.

The sale of personal property must be advertised by the sheriff for a period of ten days, instead of twenty days as in the case of real estate, and the public sale then proceeds in the same manner. The only difference is the fact that there is no redemption period when personal property is sold. The buyer obtains a sheriff's bill of sale, and upon payment of the bid, the personal property is delivered to the buyer.

Generally speaking, any specie of personal property described as a chattel is subject to execution, provided that it is not exempt by statute, and provided that it is in being at the time of the levy and sale.[5] Under Section 8, the sheriff may levy upon "all current gold and silver coins, bank bills and other evidences of debt, used

[4] 66 C. J. 430.
[5] 23 C. J. 325.

or circulated . . . as money." Under this statute, the sheriff may levy upon the money in a cash register or strong box.

In the event that the value of the property seized is greater than the statutory exemption, the court may order the property sold, and out of the first proceeds of such sale, order that the defendant shall be paid the amount of his exemption. For example, tools in trade are exempt up to $200. If a creditor should attach a printing machine and sell it for $500, he must pay the first $200 to the defendant and apply the balance to the reduction of the judgment. On the other hand, if the property seized consists of a number of items and can be divided, the value of each item may be fixed by an appraiser appointed by the court, and the defendant may then choose such items as he pleases, not to exceed the amount of his exemption. The balance may then be sold to apply on the judgment.

REVIVAL OF JUDGMENTS

It has heretofore been pointed out that a transcript is only good as a general lien for a period of six years from the date of judgment, although an execution may be issued at any time within twenty years from the date of judgment in a court of record. This raises the practical problem of how to keep a transcript alive after the judgment is six years old. This can be accomplished by means of reviving the judgment.

Rule 54 C (h) sets forth the manner in which a judgment may be revived. A motion should be filed setting forth the date of the judgment and the amount remaining unsatisfied. The clerk then issues a notice directed to the defendant to show cause within ten days why the judgment should not be revived. This notice must be served upon the defendant in the same manner as a summons.

If the defendant answers, a trial may be held on the issue presented by the answer. If no answer is filed, a revived judgment is entered after the expiration of the ten day period. A new transcript should then be obtained and recorded.

The rules provide that if a judgment is revived before the expiration of a lien created by the original judgment, the filing of a transcript of "entry of revivor" with the clerk and recorded before the expiration of the lien continues that lien for the same period from the entry of the revived judgment as is provided for original judgments. A revived judgment may be again revived in a court of record but not in the justice court.

The important thing to keep in mind in connection with this subject is that the revived judgment must be entered *within* twenty years after the entry of judgment which it revives, six years in the justice court.[6] In other words, one cannot wait until five days before the expiration of the twenty year period, because a ten day

[6] COLO. STAT. ANN., c. 96 § 44 (1) and 44(2) (Supp. 1949).

notice is necessary, and time for service must be allowed. In such event the judgment of revival could not possibly be entered before the original judgment expired. Sufficient time must, therefore, be allowed for this purpose.

STATUS OF JUDGMENT CREDITOR IN COLORADO

One of the important phases of this subject and one upon which there is a decided difference of opinion, is the question of the status of the judgment creditor in Colorado. As will be presently indicated, even the decisions of the Colorado Supreme Court on this subject cannot be reconciled. In the case of *Zuckerman v. Gunther*,[7] our court made the unqualified statement that, "The law in this state is to the effect that a judgment creditor is in the same position as a *bona fide* purchaser for value."

It appears that Zuckerman had two cars that he desired to sell. He took them to a used car lot in Denver on Broadway where there was displayed a sign reading, "Consignment Lot". He left the cars there to be sold. The sheriff then seized the cars under an execution which he held against the owner of the car lot, and Zuckerman brought replevin against the sheriff. There had been no transfer of titles to the used car dealer. The court held that the execution creditor was entitled to the cars, and Zuckerman, although an innocent party to the transaction, lost his cars. The opinion further states that the court was "not impressed with the attempted distinction that the seizure of the cars was not in the usual course of trade in view of the legal status of the defendant as a *bona fide* purchaser for value. *Under our law, one connotes the other.* The record presents purely a question of estoppel."

It might be conceded that if a *bona fide* purchaser for value bought the cars in the usual course of trade, such purchaser would have a good title, but here, because of the theory of estoppel and the legal status of an execution creditor as a *bona fide* purchaser, the judgment creditor obtain a better title than the debtor himself, who had no title at all.

The Supreme Court has never overruled the *Zuckerman* case but it has refused to follow it in subsequent decisions. In *Wilson v. Mosko*,[8] both plaintiff and defendant were used car dealers. Wilson delivered a car to one Kelly, also a dealer, for the purpose of demonstration and sale. Kelly sold the car to Mosko and obtained payment therefor. Later, on a pretext, Kelly obtained possession of the car and returned it to Wilson's garage. Mosko learned that the car was there, retook possession, whereupon Wilson brought a replevin action against Mosko.

Here was a situation in which Wilson had placed the car in the possession of a dealer for purpose of resale, just as Zuckerman did

[7] 105 Colo. 176, 96 P. 2d 4 (1939).
[8] 110 Colo. 127, 130 P. 2d 927 (1942).

in leaving his cars at the consignment lot. If an attaching creditor of Kelly had seized the car while in Kelly's possession under an execution, then, presumably, the factual situation would be the same as in the *Zuckerman* case, and the execution creditor would have obtained a good title as against the real owner. Mosko was more than an execution creditor, he was a *bona fide* purchaser for value. But the court refused to follow the *Zuckerman* case and held in favor of Wilson. The court distinguished that case by saying that here there was no showing of an actual authority in Kelly to sell and transfer title to the car. The extent of his authority was to find a purchaser.

This case was immediately followed by *Gunthner v. Union Finance Co.*[9] There the loan company had a floor-plan chattel mortgage on a car owned by the used car dealer. Such a mortgage provides that the car is not to be sold for less than the amount of the encumbrance and that, upon sale, the proceeds are to be delivered to the finance company. A judgment creditor of the used car dealer seized the car under execution. The creditor claimed that it took the car free from the lien of the chattel mortgage.

The car was a part of the stock in trade, having been on the used car lot when taken. If a clear title could have been acquired by a *bona fide* purchaser for value, under the authority of the *Zuckerman* case the attaching creditor would also take it free from the chattel mortgage. The creditor relied entirely upon the *Zuckerman* case, but again the court refused to follow its previous decision. The only basis for distinction is pointed out by the court in this statement: "We think the *Zuckerman* case has no application as is indicated by one statement therefrom, viz: the record presents purely a question of estoppel."

In the opinion of the writer, this purported distinction has no basis in fact. The legal question involved in the two cases are identical, and the court could have clarified the law if it had come out openly and said that it had probably made a mistake in the *Zuckerman* case and that it was expressly overruled.

The Latest Colorado Case Returns to the General Rule

Many lawyers who handle this type of litigation were curious to know what the court would decide in a case involving a judgment creditor and where the element of estoppel was also present. Such a case was recently decided in *Susman v. Exchange National Bank.*[10] In that case the plaintiff had a judgment against one Taylor for about $2,000. Learning that he had a checking account in a certain bank, plaintiff obtained execution and garnisheed the bank. The bank answered that it had $728 on deposit in a checking account in the name of the defendant. Thereupon a third party

[9] 110 Colo. 449, 135 P. 2d 237 (1943).
[10] 117 Colo. 12, 183 P. 2d 571 (1947).

filed a petition in intervention, claiming that the money belonged to him.

The intervenor alleged that he had given Taylor $750 for the purpose of buying some cows; that Taylor had deposited his money to his account in his own name; and that before he had a chance to buy the cows, the garnishment impounded the funds. At the trial, it was established that there had been a deposit of $750 about the time of the transaction with the intervenor, but it also appeared that Taylor had paid amounts to a grocery store, a department store, and a music teacher by check drawn on this account and had thus actually used some of the $750 for these purposes.

It thus appeared that the intervenor had given the judgment debtor ostensible ownership of the fund, and the element of estoppel was present and was pleaded. If Taylor had bought his wife a new dress and paid for it by check drawn on this account, could it be successively urged that the intervenor could follow the fund and reclaim it from the merchant? The judgment debtor had full control of the account, and there was nothing to indicate that there had been a special deposit or that the money constituted a trust fund. Keeping in mind the status of a judgment creditor under the *Zuckerman* case, the plaintiff was in the same position as a bona fide purchaser for value. He was in the same position as the grocer and the department store who had accepted Taylor's checks in return for merchandise.

The court held for the intervenor saying:

> The garnishing creditor can reach funds of the depositor only in cases where the depositor is the true owner thereof . . . The creditor of a bank depositor who garnishes the money in the bank to the credit of his debtor is in no better position than the depositor. Consequently, funds cannot be attached or garnished in an action against the depositor where they have been deposited in trust or belonging to another. We regard Zuckerman v. Guther as distinguishable.

Under this latest decision, it would appear that the court has completely reversed itself, and instead of holding that a judgment creditor could obtain a better title than the defendant himself had, it now follows the doctrine that a judgment creditor acquires no better title than is held by the defendant. If this principal had been applied to the *Zuckerman* case, the results would have been different. This view is consistent with the general rule [11] and with the earlier Colorado decisions.[12]

But the *Zuckerman* case still stands on the books of this state as the law on this subject, though not always followed. Who knows under what circumstances the court may decide to follow it again? It should either be expressly overruled or declared to be the law of this state so that the uncertainty which now exists on this subject would be removed.

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[11] 23 C. J. 745 *et seq.*

[12] Ohio Co. v. Barr, 58 Colo. 116, 144 P. 522 (1914); Copeland v. Bank, 13 Colo. App. 489, 59 P. 70 (1899); Irwin v. Beggs, 24 Colo. App. 158, 132 P. 385 (1913); Hartstock v. Wright, 16 Colo. App. 48, 64 P. 245 (1901).