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SOME PHASES OF THE EXEMPTION LAWS

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"THE General Assembly shall pass liberal homestead and exemption laws." Colorado Constitution, Article XVIII, Section 1.

This has been done, the bulk of the exemption laws pertaining to personal property appear in sections 5913-5923, C. L. Colo. 1921.

However, no statutory method, except to a limited extent, has been provided whereby the debtor whose property has been seized can make claim for his exemption. Referring to this subject, our Supreme Court has said: "Our statutes are silent on the subject." Blum vs. Kasnik, 10 Pac. (2nd) 384. But by statute a debtor whose property is seized under writ of attachment issued out of the Justice Court may make claim of exemption before the Justice of the Peace. Sections 6107-6108, C. L. Colo. 1921. Such claim may be made orally. Bassett vs. Inman, 7 Colo. 270; 3 Pac. 383.

Certainly in fairness and justice to a debtor a plain, simple method should be provided by statute whereby the debtor may make claim of exemption to property seized which he may claim to be exempt, and have the issue tried immediately.

While sections 6107-6108, C. L. Colo. 1921, provide a debtor may, in cases of writ of attachment issued out of a Justice Court, make claim of exemption to property in such court, he is not obligated to do so, but may make demand for its return and if not returned wait until the property is sold and then bring suit for treble damages. Collard vs. Hohnstein, 64 Colo. 478; 174 Pac. 596.

"If any officer or other person, by virtue of any execution or other process, or by any right of distress, shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit." Section 5921, C. L. Colo. 1921.

The application of this particular statute has resulted in considerable litigation. The space allotted me does not per-

mit an extensive discussion of all of such cases, so I shall only call attention to a few of them.

An early Colorado case dealing with the question of treble damages was that of Wymond vs. Arnsbury, 2 Colo. 213. A constable had seized certain wearing apparel and certain household goods and was sued for three times the value thereof. Our Supreme Court in deciding this case uses the following language: "Defendant in error testified he was the owner of the goods taken. As to the wearing apparel, this was probably sufficient, for as to such goods, the ownership may show the use to which they were applied. But in household goods, such as beds and bedding and the like, the statute protects only such as are kept for the use of the debtor and his family, and these must be of certain kinds, which are described, or if of other kinds, not exceeding $100 in value. The evidence is silent as to the use of the goods by the defendant in error, and his family, and the value of those not enumerated in the statute, points upon which it should be explicit."

In Klug vs. Corder, 82 Colo. 318; 259 Pac. 613 (the same case coming again to the Supreme Court and being reported in 15 Pac. (2nd) 621), it was held that a motor vehicle could, in some cases, dependent upon the nature of its use, be held exempt as a farm wagon. The facts in this case being that Corder as sheriff of Weld County had seized a Buick automobile under writ of execution, and Klug claimed the same as exempt as a farm wagon and on his demand for its return being refused, he brought suit for damages in the sum of approximately $3,500, being three times the value of the automobile. It was finally determined by the jury that the automobile, not being used as a farm wagon, was not exempt.

A reference to the statute will show that in certain cases property to a certain value is exempt, and on passing some of these sections it has been held: "Where the debtor only has the amount, kind and *value* of property which is exempt, a levy and sale thereof is illegal unless exemption be waived and the officer seizing the same is liable for damages to three times the value of the property." Sanberg vs. Bordstadt, 48 Colo. 96; 109 Pac. 419.

In the case of Duncan vs. Burchinell, 14 C. A. 471; 61

Pac. 61, the Court in a very lengthy opinion goes into the respective rights of the debtor and of the officer arising out of claims for property seized which the debtor claims as exempt, and I desire to give a few of the points as laid down in this decision. They are:

(1). Our statutes do not require a debtor to claim exemption if the property be wholly exempt, but where the officer is not chargeable with knowledge of the debtor's right to retain specific property and makes levy in good faith, upon settled principles in order that the duty of returning the property may be cast upon the officer, demand must be made for it.

(2). Such demand must be made within a reasonable time and what is a reasonable time must be determined from the facts and circumstances in each case.

(3). The right to make such demand may be waived, and such waiver may be by conduct as well as by words.

(4). If demand is made for the return of the goods the officer must return the goods within a reasonable time, or be subject to an action for treble damages, but what is a reasonable time depends upon all of the facts and circumstances of each case.

I wish to give particularly the facts in the court's decision in brief in the case of Smith vs. Pueblo M. & C. Co. et al., 260 Pac. 109. The facts were one Thomas, sheriff of Pueblo County, seized, under writ of attachment, an automobile belonging to Smith. Smith demanded the return of the auto as exempt property on the grounds that it was a tool in trade and that he had to use the same as a necessary means of transportation of himself and his carpenter tools to and from his work. The sheriff refused to return the property until the question as to whether or not said property was exempt was first tried by the court. The issue was then tried and the property found to be exempt by the court and the automobile was returned to Smith. He then brought suit against the sheriff and the Pueblo company, as attaching creditor, for three times the value of the car. The District Court ruled against him and on appeal to Supreme Court the following points were raised by the Pueblo company, defendant in error:

First: That as the property was not specifically made exempt under the statute and it took a judicial decision to

decide whether or not the property was exempt that the sheriff could not be held for treble damages. The Supreme Court held that under the statutes the property having been declared to be exempt, even though it was not specifically set out in the statutes as exempt, nevertheless it having been determined to be exempt the sheriff was liable for treble damages.

Second: It was argued that inasmuch as the sheriff had a reasonable length of time in which to return the property and as he only held it until the claim of exemption was tried in the court and then returned it, he should not be held for treble damages. The Supreme Court held that whenever an officer compelled the debtor to go into court to prove the property exempt that the holding of the property was for an unreasonable length of time as a matter of law.

I wish also to call your attention to the case of Blum vs. Kasnik, 90 Colo. 414; 10 Pac. (2nd) 384. The facts in this case were one Venuti obtained judgment against Kasnik in the District Court of the City and County of Denver. Execution on such judgment was issued to Blum, sheriff of Boulder County, who seized an automobile belonging to Kasnik. Kasnik claimed the auto was exempt as he was using it in selling Watkins Products and also as a means of transportation as a coal miner to and from his work. The attorneys for Venuti then issued a citation upon Kasnik demanding that he appear before the District Court of Denver at a time certain so that the question of whether or not said car was exempt could be tried. Kasnik refused to appear. The Denver District Court then determined on the evidence introduced by Venuti that the auto was not exempt and issued an order demanding Blum to proceed with the sale thereof, which was done. Kasnik then brought suit against Blum for three times the value of the car. The court said: "Upon the question of the method of disposition of claims for exemption the following appears in 25 C. J. 148, No. 279. 'Express provision is made by statute in some jurisdictions for the determination of the right to exemption in a summary manner and the debtor may avail himself of such remedy without resorting to his ordinary remedy by action, and on the contrary such a remedy is not exclusive unless the statute so provides. But in absence of statute where the facts are not admitted, the court cannot

assume the prerogative of a jury, and pass upon the debtor's right to an exemption in a summary manner.' " The net result of the decision in this case was that Blum, as sheriff, was held for treble damages.

In the case of Pappas vs. Capps, 263 Pac. 411, being an action in mandamus to compel the sheriff of Huerfano County to levy upon an automobile owned by one Kartas, a judgment debtor. The sheriff refused to make the levy and this action was brought to compel him to do so. The sheriff's defense was that the car was exempt and therefore he should not be compelled to seize the same. The court held that the right of exemption is a personal privilege that may be asserted or waived by the judgment debtor and held for the plaintiff and said that the writ of mandamus should have been issued.

This creates a situation in Colorado which seems to be serious. The officer must levy upon property whether he deems it exempt or not, and even if the issue is tried in the court without the consent of the defendant and the property is found not to be exempt and the sheriff is ordered to sell the property, he is liable for treble damages, or in the event he refuses to return the property on demand and insists that the issue of exemption be first tried and then returns the property, in the event the property is found by the court to be exempt, he is nevertheless liable for treble damages, a situation which is most unjust to the officers of the law.

From a study of the cases above cited and others such as (Schwartz vs. Birnbaum, 21 Colo. 21; 39 Pac. 416; Weil vs. Nevitt, 19 Colo. 10; 31 Pac. 487; Madera vs. Holdrege, 4 C. A. 126; 35 Pac. 52: Note 28 A. L. R., page 74), it appears very plainly that the question of whether or not property is exempt is not always an easy one to determine. Several factors such as the nature of use, value, whether debtor is living with family, etc., must be taken into consideration in determining the problem, and to subject an officer to treble damages in the event of a wrong guess as to the outcome of the trial of the issue is certainly unfair and unjust.

To correct the situation which has been discussed, a bill has been introduced in the Legislature, the same being Senate Bill No. 33 (an identical measure being introduced in the House as House Bill No. 173). This bill in short provides:

Where property is seized under writ of execution or attachment or other order of court, notice of such seizure must be given to the debtor, the debtor within ten days after being so served must make claim in the court out of which the process was issued, his claim of exemption, describing the property he claims to be exempt with the grounds for such exemption. Thereupon the issue of whether or not the property is exempt is set down for trial in not less than five or more than fifteen days. Notice of such trial is served on the officer either personally or by leaving a copy thereof with his deputy at his office and upon the plaintiff creditor either personally or by mailing a copy of notice to his attorney of record. The trial of the issue may be continued within the discretion of the court or Justice of the Peace. If on trial of the issue the property is found to be exempt, then it is ordered returned and if the officer returns it within forty-eight hours, he can only be held for actual damages. If he refuses to return it for any reason, then he becomes liable for treble damages. The bill also provides that if the debtor does not make his claim of exemption within the ten days after being served of notice of seizure he shall conclusively be deemed to have waived his right of exemption and has no action against the officer for damages for seizure.

The bill also provides that where property is seized and the court finds a portion thereof is exempt and the property consists of various items which may be divisible the court fixes the value of each item and requests the defendant to choose such property as he desires to claim to be exempt up to the aggregate value of his exemption, the balance being held for further order of court, or if the property is such that it is not divisible, then the court may order the property sold and out of the first proceeds of sale, the debtor is allowed the amount of his statutory exemption.

This measure will, I believe, correct the situation which has been discussed in this article, first, by giving to the debtor a plain, simple remedy where he can make his claim of exemption and have a speedy trial as to whether the same is exempt; and second, the officers of the law in making seizure of property under process of court in good faith will be protected against suits for treble damages if the property having been found to be exempt by the court is returned immediately.