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December 16, 1985

ATTORNEY GENERAL OPINION NO. 85- 177

William D. Rustin
County Counselor
Sedgwick County Courthouse, Suite 315
Wichita, Kansas 67203-3790

Re: Procedure, Civil, For Limited Actions -- Forcible
Detainer -- Execution of Writ of Restitution;
Disposition of Non-Exempt Property

Personal and Real Property -- Landlords and Tenants
-- Personal Property of Tenant; Disposition

Synopsis: Pursuant to K.S.A. 61-2311, a sheriff upon receipt of a writ of restitution issued in a forcible detainer action shall restore the landlord to possession of the premises. No statutes authorize the sheriff to take possession of any personal property which remains on the premises, and he or she should only do so at the direction of the court in the writ of restitution or a subsequent order. Failure to obtain such judicial authorization could subject the sheriff to an action for conversion, and would further leave him or her with no legal means of recovering the costs of removal and storage. Cited herein: K.S.A. 58-2565; 61-2309; 61-2311.

* * *

Dear Mr. Rustin:

As Sedgwick County Counselor, you request our opinion concerning the duty of the sheriff to move property of a tenant which remains on the premises following the execution

of a writ restoring possession to a landlord, and which is exempt from the terms of the judgment. Specifically, you inform us that it is the present policy of the Sedgwick County Sheriff to contact a moving company, which transports and stores the remaining possessions of the tenant until such time as the tenant claims them and pays storage costs. In view of the lack of clear statutory guidelines, you are concerned that this practice may expose the sheriff to unnecessary liability.

The removal of a tenant and his property from a leased or rented dwelling is governed generally by statute. Once a valid judgment has been granted and a valid writ of restitution obtained, the landlord may request the sheriff to execute the writ. K.S.A. 61-2311 provides: "The officer to whom the writ is addressed shall, within ten (10) days after receiving the writ, execute the same by restoring the plaintiff to the possession of the premises" The question then is what encompasses the "premises" to be restored? Does this require removal of all personal property of the tenant or merely the restoration of the physical dwelling, with all contents, to the landlord's control?

Kansas statutes do not define "premises." Case law as well offers little help. In the criminal context, premises means "[a]ll property necessarily a part of and appearing so inseparable as to be considered a portion thereof (citation omitted)." State v. McClelland, 215 Kan. 84 (1974). This definition implicitly gives a sheriff the authority to remove personal property of the departed tenant. While Kansas common law recognizes that a writ of execution in a forcible detainer action places a duty upon a sheriff to remove the tenant from the premises and restore possession to the landlord, the sheriff's duty as to removal of the personal property is less clear. See, e.g., Merchants Transfer & Storage Co. v. Landowners Co., 155 Kan. 394, 397 (1942), in which the sheriff's action in hiring a moving company to remove the tenant's belongings is indirectly criticized.

What becomes of the removed property is not statutorily clear. At common law, sheriffs removed personal property to a public right of way in front of the surrendered premises. R. Schoshinski, American Law of Landlord and Tenant, §6.18 (1980). However, if the writ states otherwise, the sheriff is bound by the terms of the writ.

Kansas statutes provide for a landlord of residential property to take possession of the tenant's personal property,

store it at the tenant's expense and sell or dispose of it after 30 days. K.S.A. 58-2565. In our opinion, this provision should be read in pari materia with the sheriff's execution statute, K.S.A. 61-2311, to provide the following procedure in the case of residential property. Upon writ of execution, the sheriff shall remove the tenant, if still present, from possession and turns possession over to the landlord. Any remaining personal property of the departed tenant should be inventoried by the sheriff, accompanied by the landlord. The landlord may then take possession of the personal property and is responsible for its removal and safe storage, and may recover any storage costs from the tenant.

In the case of commercial property not covered by a lease subject to K.S.A. 58-2565, it would be best for the sheriff to act pursuant to specific directions provided by the trial court in the writ of restitution. One sample writ, which you enclose in the materials which accompanied your letter, provides for the plaintiff (i.e. landlord) to be responsible for the removal of the personal property of the tenant from the premises, and further provides that any expenses be submitted to the court for its approval prior to their incorporation into the judgment previously rendered. This procedure, which is sanctioned by K.S.A. 61-2309, protects both the landlord and the sheriff from the threat of actions for conversion. Further, while this practice (i.e. acting under the direction of a court) should clearly be used for commercial leases, the protection it gives from liability extends to residential leases as well.

The above procedure avoids some problems the present system may encounter. First, it appears that the sheriff has no statutory authority to take possession of the remaining property, either directly or through a bailee. A procedure requiring the sheriff to take possession and store the goods could invite a lawsuit based on the tort of conversion. Additionally, the sheriff would be unable to exact any costs of storage upon the tenant, and no re-sale could be allowed. Expenses would have to come from the landlord or be absorbed by the sheriff or the moving company. In addition, with possession and storage taken by the sheriff, the landlord's rights under K.S.A. 58-2565(d) could be forfeited. For example, it is conceivable that a landlord, by failing to exercise his statutory rights, could lose his right of resale. Conversely, if properly held, a sale could result in proceeds to be used in satisfying an outstanding balance of unpaid rent and storage costs.

In summary, pursuant to K.S.A. 61-2311, a sheriff upon receipt of a writ of restitution issued in a forcible detainer action shall restore the landlord to possession of the premises. No statutes authorize the sheriff to take possession of any personal property which remains on the premises, and he or she should only do so at the direction of the court in the writ of restitution or a subsequent order. Failure to obtain such judicial authorization could subject the sheriff to an action for conversion, and would further leave him or her with no legal means of recovering the costs of removal and storage.

Very truly yours,

ROBERT T. STEPHAN
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RTS:JSS:crw