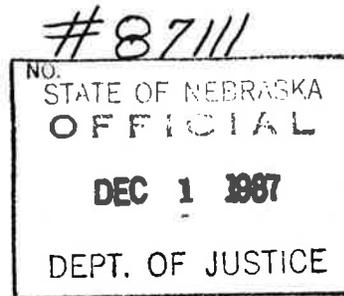


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE: November 19, 1987

SUBJECT: Procedure for the Sale of Personal Property Under  
Distress Warrants Pursuant to Neb.Rev.Stat. §77-  
1724 (Reissue 1986).

REQUESTED BY: Ronald D. Moravec  
Cass County Attorney

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the procedure to be followed by a county sheriff in selling personal property under a distress warrant issued by the county treasurer.

The procedure to be followed with respect to the sale of personal property pursuant to a distress warrant is contained in Neb.Rev.Stat. §77-1724 (Reissue 1986). Section 77-1724 provides, in pertinent part:

When any goods and chattels have been taken on any distress warrants, they shall be returned to the owner by the officer having distrained them immediately upon payment of the taxes due with interest and costs, but upon such owner's refusal or neglect to make such payment, or to give a good and sufficient bond for the delivery of the goods and chattels, the officer distraining shall keep them at the expense of the owner and shall give notice of the time and place of their sale within five days after the taking, in the same manner as upon execution in justice court. The time of sale shall not be more that twenty days from the day of taking, but he may adjourn the sale from time to time not exceeding five days in all. . . . (Emphasis added).

While, at first reading, the determination of the appropriate procedure to be followed under this provision seems relatively clear, some difficulty is presented by virtue of the statutory requirement that notice of the sale be given "in the same manner as upon execution in justice court." As you note in your

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request, the justice court system has been eliminated in Nebraska, and the statutes providing for notice of sale upon execution in justice court were repealed in 1972. Laws 1972, LB 1032, §287. The question which arises, then, is whether the appropriate notice procedure to be followed by a sheriff acting pursuant to §77-1724 continues to be the procedure outlined in the prior statutory provision relating to notice of sale upon execution in justice court.

The answer to this question, we believe, is provided by the Nebraska Supreme Court's decision in Hanson v. City of Omaha, 157 Neb. 768, 61 N.W.2d 556 (1953), in which the court held that, where one statute refers to another statute, which is subsequently repealed, the statute repealed becomes part of the statute making the reference and remains in effect so far as the adopting statute is concerned. In reaching this conclusion, the court stated:

'Where the provisions of a statute are incorporated, by reference, in another; where one statute refers to another for the powers given or rules or procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment.'

Id. at 770, 61 N.W.2d at 557.

Indeed, in Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N.W.2d 855 (1975), the court applied this principle to the interpretation of a statutory provision making reference to justice court procedures, holding the procedure and manner of appealing from an action of a county board of equalization continued to be the procedure prescribed for an appeal from a judgment of a justice court, notwithstanding the repeal of the statutes establishing the justice court system.

Thus, under the principle enunciated in Hanson v. City of Omaha and Knoefler Honey Farms v. County of Sherman, it is our view that the procedure to be followed with respect to the notice and manner of sale of personal property pursuant to a distress warrant under §77-1724 continues to be the procedure established under the justice court system upon execution of a judgment. Thus, the appropriate procedure to be followed under §77-1724 may be determined by reference to the former statute establishing the procedure and manner of the sale of property upon execution in

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justice court, which provided:

All property taken in execution under the provisions of sections 27-1601 to 27-1616 shall be advertised for sale in some legal newspaper published in the county or by posting a notice thereof at four of the most public places within the county where such property was seized, at least ten days previous to the time appointed for such sale, which shall be held within the hours of ten o'clock a.m. and four o'clock p.m., at the house or on the premises, where such property was taken, or at one of the most public places within the county.

Neb.Rev.Stat. §27-1617 (Reissue 1964) (Repealed 1972). See also, Krug v. Hopkins, 132 Neb. 768, 273 N.W. 221 (1937) (holding that sheriff must proceed in same manner as upon execution sales in justice court in selling personal property pursuant to a distress warrant under the statutory predecessor to §27-1617).

Therefore, in construing the provision of §77-1724 establishing the manner of the sale of personal property under a distress warrant to be the same as that utilized upon execution in justice court, it is our opinion that the appropriate procedure to be followed is that contained in former §27-1617 relating to the manner of sale upon execution in justice court. While the statutes establishing the justice court system and its procedures have been repealed, the procedures outlined in §27-1617 remain in force to the extent they are adopted by the reference contained in §77-1724.

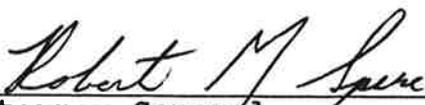
Very truly yours,

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APPROVED:

  
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Attorney General