

SHERIFFS:
DEPUTIES:
POWERS:
OFFICERS:
DEEDS OF TRUST:
PARTITION SUITS:
EXECUTION:
TRUSTEE:

Deputy sheriffs may act for sh riffs to levy and sell real estate in satisfaction of judgment; to sell real estate pursuant to order of circuit court in partition suits; and to sell real estate in foreclosure of deeds of trust when sheriff is ordered by circuit court to sell.

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March 11, 1953

JOHN M. DALTON



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J. C. Johnsen

Honorable Wm. O. Sawyers
Senator, 34th District
Missouri Senate
Jefferson City, Missouri

Dear Senator Sawyers:

Your letter of March 3, 1953, requesting an official opinion of this office was phrased, in part, as follows:

"Where the Circuit Court of Buchanan County pursuant to a judgment orders the sheriff to levy and sell real estate at public sale, and in such cases where the Circuit Court of Buchanan County orders real estate sold in a partition suit by the sheriff of Buchanan County, and in such cases where in a deed of trust the Sheriff of Buchanan County is authorized in case of default to sell real estate in lieu of a deceased or absent second party trustee named in said deed of trust, would it be legal for a deputy sheriff duly appointed and acting in Buchanan County, to act in lieu of the sheriff in performing the sales of real estate during the sheriff's absence while receiving medical treatment at Rochester, Minnesota."

Upon examination of various statutes setting forth the powers of sheriffs and their deputies, it is found that RSMo 1949, Section 57.100, states:

"Every sheriff shall . . . execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by magistrates."

RSMo 1949, Section 57.270, sets forth the powers of deputies as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

To determine the authority of a deputy in each particular instance you cite, it is necessary to ascertain whether the act or acts are "duties prescribed by law to be performed by the sheriff", or is a power of the sheriff.

In the matter of levy of execution directed by a circuit court pursuant to judgment, RSMo 1949, Section 513.040, provides that any party entitled to an execution from a court of record may have it directed to any sheriff in the State of Missouri; and such execution may be levied, served and returned by any sheriff in this state to whom it may be delivered and within the county of which he is sheriff. Thus, in addition to the general power given sheriffs by Section 57.100 to execute all process directed to him by legal authority, they are specifically empowered to levy execution in satisfaction of judgment of a court of record.

In regard to sales ordered by circuit courts in partition suits, RSMo 1949, Section 528.370, states that in partition suits (when duly ordered by the circuit court) the sheriff "shall in due time proceed to advertize and sell"; thus, specifically prescribing a duty of the sheriff in such cases, in addition to his general duty to serve process. Thus, a duly appointed deputy is empowered to make such sales.

In performing as trustee under a deed of trust, a sheriff may act in either his individual or official capacity.

RSMo 1949, Section 443.340, provides that a circuit court may appoint the sheriff or some other suitable person of the county, trustee to execute a deed of trust, if trustee named in the deed of trust shall not act because of death, insanity, removal out of this state, neglect or refusal to act, or inability to act because of sickness or other disability. If the sheriff is appointed trustee under Section 443.340, supra, he may make the sale through his deputy according to the ruling of State ex rel. Reid v. Griffith, 63 Mo. 545, deciding whether a deputy could act for the

sheriff who was appointed trustee by a common pleas court:
(l.c. 549).

"* * * It has been decided by this court that when a sheriff has been appointed in place of a trustee to execute the trust deed in selling the property, he is acting officially, and that in so acting, a sale, though made by his deputy, is valid and binding. (Tatum v. Holliday, Administrator, 59 Mo. 422.)"

In the case of Howard v. Thornton, 50 Mo. 291, the court made the following statement concerning the authority of an agent of the trustee, l.c. 292:

"2. A trustee in a deed of trust, or a mortgagee in a mortgage with power of sale, cannot act through an agent in the sale of the property. His own powers are delegated and are a personal trust, and unless the deed authorizes him to delegate his powers, he can not act through an agent. This was expressly decided by this court in the case of Graham v. King, ante, p. 22. * * *"

In Dunham v. Hartman, 55 S.W. 233, 153 Mo. 625, the following distinction is made as to whether a sheriff is acting officially or individually, l.c. 632:

"In the case at bar the sheriff was not appointed by the court nor in pursuance of the statute, but by an individual and in pursuance of the terms of a private deed. In such case he is no more acting in his official capacity nor liable as such, than he would be if he were employed to assist in any other private business. Whereas when he is appointed by the court, in the words above quoted, 'he acts simply in the execution of a judicial power,' but when he is employed by an individual he is simply a substituted trustee. * * *"

It should be noted that a sheriff's deed executed by a deputy must be in the name of the sheriff according to *Samuels v. Shelton*, 48 Mo. 444, 1.c. 450:

"*** The deed was acknowledged by the deputy sheriff in his own name as deputy and therefore was no acknowledgment at all. The deputy can only act in the name of his principals. (*Atwood v. Reyburn*, 5 Mo. 533; *Evans v. Wilder*, 7 Mo. 362; *McClure v. Wells*, 46 Mo. 311.)"

CONCLUSION

1. It is, therefore, the opinion of this office that a duly appointed deputy sheriff may act for the sheriff in selling real estate in (but is not limited to) the following instances:

- (a) In execution of judgments of circuit court.
- (b) By order of circuit court in partition suits, and
- (c) When the sheriff is appointed as trustee pursuant to Section 443.340, RSMo 1949, to execute a deed of trust.

2. It is further the opinion of this office that a deputy sheriff may not act for the sheriff as trustee of a deed of trust, when the "sheriff of ___ county" is named as substitute trustee in the deed of trust.

This opinion, prepared by my assistant, Mr. Paul McGhee, is hereby approved by me.

Very truly yours,

JOHN M. DALTON
Attorney General

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