

**SHERIFF: TRUSTEE - WHEN SHERIFF IS APPOINTED BY THE COURT AS TRUSTEE TO FORECLOSE A DEED OF TRUST, DEPUTY SHERIFF CAN MAKE A LEGAL AND BINDING SALE.**

6-5

May 31, 1934.



Honorable Otto Theisen  
Sheriff, Buchanan County  
St. Joseph, Missouri.

Dear Sir:

This department is in receipt of your letter of May 1st, wherein you state in part as follows:

"For the past several weeks I have been able to be out, and accepted advertisements for Trustee's Sales, which are conducted by this office, as I have to make them personally. However, I caught some cold, and the doctor has forbade that I go outside until the sun is very warm again.

"On Thursday, May 3rd of this week, I have two Trustee's Sales to make, and due to the fact that I will be unable to get out, I am wondering if it will be Legal to have Mr. Cox, one of my deputy's, read the sale at the east front door of the Court House as is required, then bring them on over to the residence, which is East of the Front Door of the Court House, and have me announce the property sold to the purchaser, Mr. Cox would receive the bids at the East front door of the Court House.

"Also, I am told that by law, the Judges of the Circuit Court of Buchanan County could meet in banc, and authorize Mr. Cox to conduct these sales, while I am ill."

Section 11513, R. S. Mo. 1929, provides that,

"Any sheriff may appoint one or more deputies with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 11514, R. S. Mo. 1929, provides the power and duties of deputies and reads 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."

Section 3137, R. S. Mo. 1929, provides when the court is to appoint a sheriff or other suitable person, as trustee and describes his powers and duties. It reads in part as follows:

"If such court shall be satisfied that the facts stated in such affidavit are true, it shall, in the case of a deed of trust given to secure the payment of a debt or other liability, make an order appointing the sheriff, or some other suitable person of the county, trustee to execute such deed of trust, in the place of the original trustees; and thereupon such sheriff, or other suitable person appointed by said court, shall be possessed of all the rights, powers and authority possessed by the original trustee, under the deed of trust, and such sheriff or other person shall proceed to sell and convey the property and to pay off the debts and liabilities according to the directions of the deed of trust, \*\*\*\*"

Section 3138, R. S. Mo. 1929, provides when a trustee is to give bond and reads as follows:

"Every trustee appointed or who may

be appointed, by any last will, deed or other instrument of writing, to hold, manage or dispose of any property or estate, real, personal or mixed, for the use or benefit of any other person, may be required by the circuit court of the county in which any such will shall be proved and recorded, or in which such deed or instrument of writing shall be recorded, to give bond, in such sum and with such securities as the court shall direct, conditioned for the faithful execution of the trust, unless the will, deed or other instrument of writing, creating such trust, shall, in express terms, dispense with security."

Section 1198, R. S. Mo. 1929, provides as to how the sheriff shall proceed in selling real estate, that notice be given and where the sales are to be made and reads in part as follows:

"When real estate shall be taken in execution by an officer, it shall be his duty to expose the same to sale at the courthouse door, on some day during the term of the circuit court of the county where the same is situated, having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold and where situated, by advertisement in some newspaper printed in the county \*\*\*\*."

In the case of Tatum et al., v. Halliday, Adm'r., 59 Mo. 422, 1.e. 427, the Court said:

"This brings us to another branch of the inquiry, viz: Was the sale invalid because made by a deputy sheriff? If the sheriff acted in his official character as sheriff, then the sale was good, and could be legally performed by his deputy. But if he was simply a trustee, without regard to his capacity as sheriff, the sale would be void, because a trustee cannot delegate his trust.

"Where a trustee in any deed of trust

to secure the payment of a debt or other liability, dies, resigns or becomes disabled, the statute provides that the court shall make an order appointing the sheriff of the county trustee to execute the deed of trust, in place of the original trustee, and thereupon such sheriff shall be possessed of all the rights, powers and authority possessed by the original trustee under the deed of trust; and such sheriff shall proceed to sell and convey the property and pay off all the debts and liabilities, according to the terms and directions of the deed of trust, and with the same force and effect; and in case of a deed of trust given for the benefit and use of any person other than a deed of trust to secure payment of a debt or other liability, such court shall make an order appointing some suitable person as trustee in such deed of trust, in place of the original trustee, to hold the property or estate conveyed by such deed to the same uses and trusts, etc., (Wagn. Stat., 1347-8, Secs. 1, 2.)

"It will be perceived that provision is here made for the appointment of two classes of trustees. The first is where the sheriff is appointed to sell under a deed to pay a debt or other liability, and the second is where a suitable person, other than the sheriff, is appointed to hold property for uses and trusts.

"From the phraseology employed in the first, there might be some doubt as to the real character in which the sheriff acted, but we think the 4th section of the same law furnishes a solution and explains the legislative intent. It is there declared, that any person having a beneficial interest, present or future, absolute or contingent, in the trust property, may apply to the court for security to be given by the trustee. This applies to the appointment made under the second clause of the second section, and shows plainly

enough that it was deemed unnecessary to require any security of the sheriff when he was acting as trustee, and the only reason that can be assigned is, that it was supposed that his security as sheriff was sufficient. The sheriff, when making a sale under a deed of trust, must therefore be considered as acting officially, and what he can perform by himself, he can perform by his deputy."

Again in the case of State, ex rel. v. Griffith, 63 Mo. 545, l.c.549, the Court said:

\*\*\*\*\* 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. \*\*\*\*\*

In the case of State ex rel. v. Bus, 36, Mo. 636, l.c. 637, our Supreme Court held that deputy sheriffs were public officers and expressed itself in the following manner:

\*\*\*\*\* Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' Rev. St. 1889, Sections 8181, 8182. The right, authority, and duty are thus created by statute. He is invested with some portions of the sovereign functions of the government, to be exercised for the benefit of the public, and is, consequently, a 'public officer' within any definition given by the courts or text writers. It can make no difference that the appointment is made by the sheriff, or

that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state; the authority is derived from the law; and the duties are exercised for the benefit of the public. \*\*\*\*\* The statute requires a deputy sheriff to take 'the oath of office,' and his powers and duties are made equal to those of the sheriff, himself. The deputy sheriff is certainly a 'public officer,' under the laws of this state, and his power and authority are co-extensive with that of sheriff. State v. Dierberger, 90 Mo. 369, 2 S.W. 286."

In this opinion, we are not passing on the legality of the judges of the Circuit Court of the county to authorize a deputy sheriff to conduct trustee's sales. We have limited our opinion as to whether a sheriff, who has been appointed by the court as trustee to foreclose a deed of trust may have his deputy make the sale, and further whether same would be legal and binding.

#### CONCLUSION.

In light of these foregoing cases and sections, we are of the opinion that when the sheriff is appointed by the court as trustee to foreclose a deed of trust, the sheriff may have his deputy, who is a "public officer" (State v. Bus, supra,) make the sale and such sale will be valid and binding.

As stated in Section 11514, supra, "Every deputy shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

In the case of Tatum v. Halliday, supra, the court had before its consideration the identical problem that is now before us, namely "\*\*\*\*\* was the sale invalid because made by a deputy sheriff? \*\*\*\*\*" The court held that "\*\*\*\*\* The sheriff, when making a sale under a deed of trust, must therefore be considered as acting officially, and what

he can perform by himself, he can perform by his deputy."

Again in the case of State ex rel. v. Griffith, supra, the court had before it the same question, and in its opinion said: "\*\*\*\* It has been decided by this Court that when a sheriff has been appointed in the 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."

Respectfully submitted,

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WM. ORR SAWYERS,  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

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