

OFFICERS: SHERIFFS: EXECUTIONS: Incoming sheriff may complete sale of property under execution where outgoing sheriff has levied but not completed sale.

March 12, 1937



Hon. Richard C. Ashby,
Prosecuting Attorney,
Livingston County,
Chillicothe, Missouri.

Dear Sir:

This department acknowledges receipt of your inquiry of February 27th, which is as follows:

"Bill Uhrmacher, Sheriff, has asked me to obtain a written opinion from the Attorney-General's office on a question involving an execution and transfer of title under the following circumstances. Roy, while he was Sheriff, received an execution on some land levied upon the land, and after the sale of the land to be held in the January term of Court, but after his term expired. Now, on the day Roy advertised the sale to be held, instead of Roy selling the land Bill went ahead and sold the land and issued a title to the purchaser of the land under that sale. On January 1, when Bill assumed the office, Roy turned over to him the written returns and assigned them over to Bill, stating what he had done and assigning all his claims to the fees in all those cases.

"Bill is very interested in obtaining the opinion from you that he can use for authority as there have been

a number of sales under the Drainage District which were made in this fashion, and the question has arisen up here on this. Bill asked me to write you about it.

"We would appreciate your opinion on this matter at your earliest convenience as Bill is in something of a quandary about it and would like to know what to do about it."

We understand your question to be the following: Mr. Uhrmacher is the present sheriff of your county and was inducted into such office the first of the year 1937, and at the time he qualified and became the sheriff, acting as such, there were turned over to him by the outgoing sheriff certain official actions and matters which had been started by the outgoing sheriff and were not completed until the first of the year when the new sheriff took office, among them being that an execution was issued and levied upon land by the old sheriff, and the land was advertised for sale by the old sheriff, but the date fixed in the notice for the sale was in January and after the old sheriff's term of office had expired. Is the present sheriff, who took office the first of the year 1937, the proper person to hold the sale and sell said land under said execution and execute a deed therefor to the purchaser?

Section 1215, R. S. Mo. 1929, provides as follows:

"Whenever the term of office for which any sheriff shall have been elected has expired, * * * it shall be his duty to deliver over all writs of execution not executed to such person as may have been elected or appointed and qualified to discharge the duties of sheriff; and such new sheriff shall receive

all such writs, and proceed to execute the same, in the same manner as if such writs had been originally directed to him; * * "

In the case of Porter v. Mariner, 50 Mo. 364, Burrus, who was the sheriff when the first executions were issued, made the levy and returned the executions without any sale of the property levied on, and then he died. The new executions were issued to Hayden, the then sheriff, but his term of office expired before he made the deed, and it was contended that no sheriff except the one who made the levy could make a deed after the expiration of his term of office. The statute at that time was very similar to the statute at present the law in this state and which is quoted above. The court there says, l. c. 367:

"If the deceased officer, in case he had lived, could have made a deed after his term had expired, so can the officer who makes the sale of the property levied on. And in fact he is the only party to make the deed, and can do so without any order of the court."

In the case of Ozark Land and Lumber Co. v. Franks, 156 Mo. 673, it is held that it is proper for a sheriff whose term of office has expired to make a deed to correct a mistake in a deed made by him as such officer while in office, the mistake being that the deed was signed by the circuit clerk, but acknowledged in open court by the sheriff, and also in a recital that the judgment for taxes was against M. Morby whereas the judgment itself recited that it was against M. Marley. At page 689 the following is stated:

" 'It is a well settled rule of law, however--and a rule of the common law, recognized and confirmed by statute-- that when an executive officer has begun the

service, or commenced the performance of a duty, and thereby incurred a responsibility, he has the authority, and indeed is bound to go on and complete it, although his general authority as such officer is superseded by his removal, or by the expiration of his term of office.'

* * *

"In Porter v. Mariner, 50 Mo. 364, it was held that a sheriff may after the expiration of his term of office, and without an order of court make a deed to land levied on by his predecessor."

In the case of Merchant's Bank of St. Louis v. Harrison, 39 Mo. 434, l. c. 443, the court says:

"It is insisted by the defendants that the sheriff, having made his endorsement of a levy before his resignation, had power and authority under the statute to go on and complete the levy, by an advertisement and sale, after his resignation, and notwithstanding that he had turned over the writ unexecuted to the coroner, his successor in office for the time being. The statute provides that it shall be the duty of a sheriff who has resigned 'to deliver over all writs of execution not executed to such person as may have been elected or appointed and qualified to discharge the duties of sheriff, and such new sheriff shall receive all such writs, and proceed to execute the same in the same manner as if such writ had been originally addressed to him;' * * * In Duncan v. Matney, 29 Mo. 368, where the former sheriff had not only endorsed a levy, but advertised the property, before turning over the writ to his successor, it was held that the

successor was bound to adopt the acts of his predecessor, without incurring the expense of a new levy and advertisement, unless satisfied that they were illegal and irregular. And in the case of Carr v. Youse, ante p. 346, where a new sheriff had been appointed, it was held to be entirely proper for the coroner to deliver over his unexecuted process to the new sheriff and that it was legal and proper for the sheriff to complete the execution of it. * * * But without determining the question, whether a valid levy had been made here, it is sufficient, we think, that the execution had been actually handed over to his successor, whereby his power over the execution and his whole function as sheriff had ceased and come to an end; he no longer had any authority to act in the matter."

These three cases are referred to just as throwing some light on the construction of statutes similar to the section here under consideration. However, we do not understand the inquiry in your instance to have reference to whether the former sheriff may proceed, and therefore do not express ourselves on that question.

In the case of Kane v. McCown, (1874), 55 Mo. 181, the court discussed a similar question to the one here presented, and said, l. c. 197:

"But upon the whole we think the intention of the law was to require executions not completely executed to be handed over to and completed by the sheriff in office at the time of the sales. The 59th section does not prohibit this in the case of levies by a previous sheriff, although the 60th section

undoubtedly authorizes the sheriff, who levies the writ, to go on and complete the various acts required under the original process. He is not required to do so, and the practice has been otherwise. This section is merely designed to give validity to, or rather to recognize the validity of, a title acquired in this way. The power of the officer, who makes the levy, to proceed with the advertisement, sale and deed is recognized. But the 59th section does not say that, if the original officer, who levies the writ, hands it over to his successor, who proceeds to make advertisement and sale, and deed, such sale and deed are void.

"Admitting that this section does not require the sheriff who makes the levy to hand over the writ to his successor, simply because his term of office has expired, and that the words 'not executed' have no application to a case where there has been a levy, still it does not prohibit the officer from so handing over to his successor writs which have been only partially executed; and in either event the sale is valid and the deed valid. The successor may adopt the levy of his predecessor and proceed with the advertisement, sale and deed; and so if the original sheriff who makes the levy, instead of handing over to his successor the writ, chooses to proceed under the 62nd section and make advertisement, sale and execute a deed, it is also valid. "

In the Kane case the judgments were rendered in April, 1864, and the executions on them were return-

able to the October Term, 1864. No October term was held. The executions were levied and as no sales could have been made in October, 1864, new executions were issued in February, 1865, returnable to the April Term, 1865, or the writs were handed over to the sheriff elected and acting in 1865, to be completed after levy.

By the provisions of Section 1215, supra, it is the duty of the former sheriff to deliver over "all writs of execution not executed" to his successor. It would seem that the fair meaning of the words "not executed" is that the writs have not completely run their course as contemplated in the law. The statute does not say all writs on which levy has not been made or has been made, and by the use of the term "not executed" it would seem that it is the duty of the retiring sheriff to turn over to the incoming sheriff all writs, speaking of them with reference to the sale of land under execution, where the land has not been actually sold under the advertisement had pursuant to the execution issued.

CONCLUSION

It is our opinion that the incoming sheriff was authorized under the statute to receive from the outgoing sheriff all writs of execution not executed at the time of the expiration of the term of office of the outgoing sheriff, and to proceed with such writs and the execution thereof in the same manner that the retiring sheriff should have proceeded if he had continued in office, and that a writ of execution is not executed and therefore is within the provisions of Section 1215, when it has been delivered by the clerk to the former sheriff during his term of office, and was by him levied and by him advertised for sale, but the sale had not yet occurred at the time his term of office expired, and the sale date as fixed by said notice of sale under execution was at a date after the incoming sheriff had been inducted into office and qualified

Hon. Richard C. Ashby

-8-

March 12, 1937

and was acting, and that it is the duty of such incoming sheriff to complete said sale and hold said sale and execute the deed therefor.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

DW:HR