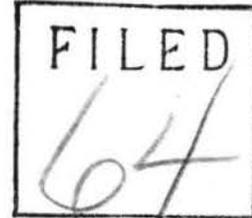


SCHOOL FUND MORTGAGE:  
SALES OF FORECLOSURE:

Sales under foreclosure of school fund mortgages can only be had on some day during the term of the circuit court.

March 22, 1938

3-27-38



Mr. L. I. Morris,  
Prosecuting Attorney,  
Lafayette County  
Lexington, Missouri.

Dear Sir:

This is to acknowledge receipt of yours of March 19, 1938, requesting an official opinion from this department which is as follows:

It is respectfully requested that your office supply me with an opinion based on the following set of facts referring to Revised Statutes of Missouri, 1929, Sections 9252 and 9254.

John J. Price, County Clerk, Lafayette County, Missouri, wishes an opinion on the question of the necessity of holding foreclosure sales under school fund mortgages during a term of the circuit court of the county. Under the above sections he wishes an opinion whether or not such foreclosure sale can be held at a time when the circuit court is not in session."

Section 9252 R.S. Mo. 1929 provides for the form of school fund mortgage and the legal notice is necessary for foreclosure of school fund mortgages and is as follows:

"Form of mortgage--notice of sale-- fees, how paid.--Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or

any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

When the county court determines that it is necessary to sell lands under foreclosure which have been mortgaged for school funds, it proceeds by virtue of the provisions of Section 9254 R.S. Mo. 1929, which is as follows:

"County court may make order of sale, when.--Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the

effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

The foregoing section provides that a certified copy of the order of the county court directed to the sheriff to sell the mortgaged lands shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court and shall be proceeded with accordingly. Section 1198 R.S. Mo. 1929 which sets out the procedure to be followed by the sheriff in selling real estate under executions, is as follows:

"Sheriff in selling real estate shall proceed how--notice to be given--sales, where made.--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 which may be designated by the plaintiff or his attorney of record, if there be one regularly published, weekly or daily, and if not, by at least six printed or written handbills, signed by such sheriff, and put up in public places in different parts of the county; and the printer's fee for such advertisement shall be taxed and paid as other costs:" \* \* \* \* \*

If the certified copy of the order of the county court for the sale under foreclosure of the lands under the school fund mortgage has the effect of a fieri facias on a judgment of foreclosure by the circuit court and the proceedings for such sale are in accord with circuit court proceedings on judgments, then it would seem that the sheriff shall follow the proceedings set out in said Section 1198, supra, that is, sell the land on some day during the term of the circuit court.

In the case of McClurg v. Dollarhide, 51 Mo. 347, 1.c.

349, the court had under consideration Section 30, Laws of 1855, page 1425, which section is almost identical to Section 9254 R.S. Mo. 1929, and there the court said:

"\* \* \* \* Section 30, same page, provides for the foreclosure of a Mortgage, before the County Court, and provides that a copy of the order, foreclosing the Mortgage, shall have the same effect as a fieri facias on a judgment of foreclosure in the Circuit Court, and shall be proceeded on accordingly by the Sheriff." \* \* \* \* \*

And on page 350 of the same case in speaking of the provisions of said Section 30, Laws of 1855 (now Section 9254 R.S. Mo. 1929) the court said:

"The other executions, authorized to be issued from the County Court, have the force and effect and must be proceeded on in like manner, as executions issued by the Circuit Court. It is so well known that lands cannot be sold on executions except during the sessions of the Circuit Court, that a notice to sell at a County Court would be wholly disregarded, and a sale under such notice might be ruinous to all parties for want of bidders." \* \* \* \* \*

In the case of Grant v. Huston, 105 Mo. 97, l.c. 101, the court, in discussing said Section 30, page 1425, R.S. Mo. 1855, now Section 9254 R.S. Mo. 1929, said:

"It is agreed there was no court in session at the date of the sale. Where the county court by virtue of section 30, page 1425, Revised Statutes 1855, orders the sheriff to sell the mortgaged premises, he should make the sale during a session of the circuit court, and it has been held that a sale not thus made under such an order is void. McClurg v. Dollarhide, 51 Mo. 347; Wilcoxon v. Osborn, 77 Mo. 622-632." \* \* \* \* \*

Mr. L. I. Morris

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March 22, 1938

In our research on the foregoing points, we fail to find where the courts have changed the above rulings.

CONCLUSION

By virtue of the provisions of the foregoing statutes, and of the cases cited, supra, this office is of the opinion that the sheriff can only sell lands under foreclosure of school fund mortgages on some day during the term of the circuit court of the county in which such lands are located.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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