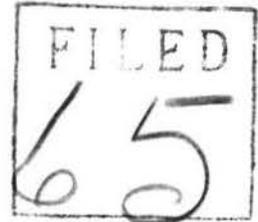


SCHOOLS: It is not necessary that the Circuit
COUNTY COURT: Court be in session to constitute a
valid sale under Section 9254 R. S.
Missouri, 1929.

December 1, 1939

12-5

Hon. C. Glen Murray
Clerk of the County Court
Jefferson County
Hillsboro, Missouri



Dear Sir:

This will acknowledge receipt of your
request for an opinion under date of October 27th,
which reads as follows:

"Recently the County Court order-
ed the Sheriff to sell a piece of
property on which Jefferson County
Capital School Fund held a mortgage.
The interest on this property was
in default about eight years. The
Sheriff advertised this foreclosure
sale by four consecutive publications
in a county weekly paper. The sale
took place while the County Court
was in session and as there were no
bidders, I bid this property in on
behalf of the County Court. After
the sale, there were some who con-
tend that the sale is illegal due to
the fact that the Circuit Court was
not in session at that time.

"I will greatly appreciate it if you
will enlighten me on this matter and
I would also like to know if the sure-
ties on a School Fund Loan would be re-

lieved of their obligation if a borrower from said fund should voluntarily sign a deed back to the county when in default of interest and principal."

Section 9252, R. S. Missouri, 1929, provides that every mortgage given to secure a school loan shall be in the ordinary form of a conveyance in fee and shall recite the bond and contain a condition that if default shall be made in any payments of the principal or interest, the sheriff may, under certain prescribed conditions, sell the mortgaged premises for an amount sufficient to satisfy the principal and interest.

"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."

Section 9254, R. S. Missouri, 1929, provides that whenever the principal and interest is secured by a mortgage with the power to sell as provided in Section 9252, supra, and any part becomes due and payable, the county court may make an order directing the sheriff to levy on said property. A copy of such order duly certified must be delivered to the sheriff for such sale to be valid.

"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.**"

Section 9256, R. S. Missouri, 1929, grants authority to the county court to purchase property mortgaged to secure a loan of school funds, when in its discretion it is for the protection of the interest of the school.

"Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

In *Benton County v. Morgan, et al.*, 163 Mo. 661, 1. c. 672, 675, the court upheld the validity of Section 9835 R. S. Missouri, 1899, which is Section 9254 R. S. Missouri, 1929, in every respect. While the county

court was no longer authorized to enter a judgment, the court held that the county court has the power to make an order to the sheriff and that when a copy of such order is duly certified and delivered to the sheriff it will have the effect of a fieri facias on a judgment of foreclosure. This is what the court had to say in so holding:

"Several questions are presented by the demurrer to the petition, especially by that portion of the demurrer which charges that the petition fails to state facts, etc.

"Section 9835, Revised Statutes 1899, has been on our statute books ever since 1852, and is to be found in 2 Statutes 1855, p. 1425, and is Section 30, and reads now as it did then, which is:

'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.'

"Of this section defendants assert that the Legislature in revising the school law, since the adoption of the present Constitution, cut out a part of the old

law and overlooked the quoted section, and that the county courts, under the present Constitution, had no power to enter judgments as provided for in the Acts of 1852, section 29, and no power to make any order, a certified copy of which would have the force and effect of a fi fa issued upon a judgment of foreclosure in the circuit court."

* * * * *

"Section 1 of article 6 of the document now in use is couched in these words: 'The judicial power of the state, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts.'

"And section 36 of that article says: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law.'

"Under the Constitutions of 1820 and 1865, respectively, it would seem that the Legislature had authority to enact such a section as that now under discussion; but if this were not so, that body certainly had that power of enactment under the Constitution of 1875. Section 1 of Article 6, aforesaid, evidently confers judicial power on the county courts of this State, and section 36, supra, says, that in each county such

a court 'shall have jurisdiction to transact all county and such other business as may be prescribed by law.' Under such a broad provision, there is no room for reasonable doubt as to the power of the Legislature to enact such a section as 9835; and their revision of the statutes, after the Constitution of 1875 went into force, amounted to a re-enactment of that section, and made it valid, if invalid before."

* * * * *

"Taking section 9835, then, as a valid law, did its provisions meet with compliance in the case at bar? It can not be affirmed that they did. It is immaterial about the judgment, for the county court was no longer authorized to enter a judgment; but it did have the power to make an order to the sheriff and a copy of such order duly certified being delivered to the sheriff, would have the effect of a fieri facias on a judgment of foreclosure."

In *Neil v. Tubb, et al.* 145 S. W. 766, l. c. 767, the procedure in question is clarified to some extent. This court in this case held that Sections 9833 and 9835, R. S. Missouri, 1899, which are now Sections 9252 and 9254, R. S. Missouri, 1929, respectively, are to be construed together, that if the sheriff would undertake to sell without a duly certified copy of the order of the county court, his act would be null and void.

"Under Section 9833, it is required that the mortgage contain an authorization to the sheriff, on condition broken, to proceed to advertise and

sell to foreclose without suit; while section 9835 requires the county court, on default of payment, to make an order reciting the amount of debt, principal and interest, and commanding the sheriff to levy the same, with costs, on the mortgaged property, describing it; and that a copy of the order, duly certified, be delivered to the sheriff, and have the effect of a fieri facias as on a judgment of foreclosure in the circuit court. This court has held that those two sections are to be construed together; that if the sheriff should undertake to sell without a duly certified copy of the order of the county court, delivered to him in accordance with section 9835, his act would be null and void. *Benton County v. Morgan*, 163 Mo. 661, 64 S. W. 119. In that case, the county court had made the order required by the statute; but a certified copy of it had not been delivered to the sheriff, for the reason that it was held that his deed was void."

The court in this case held that the certificate of the county clerk ordering the sheriff to sell the mortgaged property was not the order of the court and, therefore, the sale was void. The certificate issued by the clerk of the county court recited the findings of the county court and directed a sale by the sheriff of said mortgaged property.

We are quoting from a part of the county clerk's certificate. While same is no authority that it follows the correct procedure as provided by law, the court only criticises same for the reason it was the certificate of the clerk instead of the order of the court, and that the court in the first instance made no order of this kind. We believe had the court issued

such an order and delivered a certified copy of the same to the sheriff instead of the clerk's certificate, and the sheriff had sold said mortgaged property and made his proper return to the county court, it would have been a valid sale, and that part of the clerk's certificate referred to reads as follows:

"Now, therefore, you, the Sheriff of said Butler County, are hereby commanded to levy the said last-mentioned sum of money upon the real estate hereinbefore described, and to sell the said real estate according to law to satisfy said debt, interest and costs; and make return of your proceedings under this order to the next term of this court, to be held on the 7th day of August, 1905.

"Witness my hand and the seal of said court the 6th day of June, 1905. George C. Orchard, Clerk of the County Court of Butler Co."

"The sheriff executed a deed to Mrs. Baird and made a report of the sale to the county court at the November term, 1905, and an order was then made by the court approving the sale."

That part of Section 9254, supra, which reads that when this order is certified and delivered to the sheriff, it "shall have the effect of a fieri facias on a judgment of foreclosure by the Circuit Court, and shall be proceeded with accordingly," merely means that the order certified and delivered to the sheriff by the county court has the same effect as if a fieri facias had issued out of a circuit court on a judgment of foreclosure by the Circuit Court. If the Legislature had seen fit to they could have probably clarified this provision by adding thereto, "insofar as applicable." A fieri facias issues out of the circuit court and is returnable to that court.

December 1, 1939

In like manner, it is the natural conclusion that this order of the county court issues out of the county court and is returnable to the same court. The circuit court has no jurisdiction over such an order.

Therefore, it is the opinion of this Department that if the county court has complied with the foregoing provisions, having given the notice by publication, having delivered a certified copy of said court to the sheriff of the county while the county court was in session, and the sheriff, in response to said order, sold the said mortgaged property and made his return to the county court, such shall constitute a valid sale and the fact that the Circuit Court was or was not in session at the time of the sale in no manner affected the validity of such sale. The only court having jurisdiction under this article is the county court.

In answering your second inquiry, we are enclosing a copy of an opinion rendered by this Department under date of May 16, 1939, to Hon. Henry B. Hunt, Prosecuting Attorney of Atchison County, Missouri, which we believe sufficiently answers your request.

Respectfully submitted,

APPROVED:

W. J. BURKE
(Acting) Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:RV

Enc.