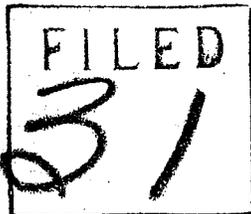


SUNDAY:
SHERIFF:
EXECUTIONS:

Writ of executions may be validly served on the first day of the week, commonly called "Sunday."



May 9, 1955

Honorable Herbert Funke
County Counselor
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Our County Counselor, Hon. Herbert Funke, has directed me to request your opinion on the following subject:

"Since the repeal of Section 907, R.S. Mo. 1939, by act of the legislature found at Laws of Missouri, 1953, page 353, is it permissible for the Sheriff to seize property under execution, on a Sunday, when the judgment debtor is a non-resident and comes into the County with a valuable automobile each Sunday, or may the Sheriff do so under any other circumstances?

"Under Sections 476.250 and 521.050 R.S. Mo. 1949, the sheriffs can apparently execute a writ of attachment on Sunday under similar circumstances.

"Sections 563.690 through 563.730, R.S. Mo. 1949, do not seem to expressly bar proceedings under an execution, on a Sunday.

"We shall appreciate your advice in this matter."

Through a typographical error you have referred to the repeal of Section 907, RSMo 1949, as having been

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effected by an act found Laws of Missouri, 1953, at page 353; it is to be observed that the correct citation to the act is Laws of Missouri, 1943, at page 353.

Under the statute mentioned, viz., Section 907, RSMo 1939, there was an outright prohibition against the service of process on the first day of the week, commonly called Sunday, except in certain specified instances. However, upon the repeal of this section it, of course, lost its effectiveness and no similar reenactment now appears in the current revised statutes.

We, therefore, must look to general principles of law to determine the propriety of service of a writ of execution on Sunday.

Under the common law only acts of a judicial nature could not be performed on Sunday. This principle was recognized by the St. Louis Court of Appeals in the case of *Said v. Stromberg*, reported 55 Mo. App. 438, wherein we find the following language, i.c. 441:

"* * * On the other hand, if the question is one to be determined by the common law, there would be no illegality in the sale or labor; because, while the common law declared that no judicial act could be legally performed on Sunday, as to all other acts it made no distinction between Sunday and other days of the week. 2 *Parsons on Contracts* '7 Ed.), 757, note n, and c.c. * * *"

(Emphasis ours.)

The interdiction of the performance of judicial acts on Sunday under the common law has been carried into the statute law of this state through the enactment of Section 476.250, RSMo 1949, which reads as follows:

"No court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging

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a jury; and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury; but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender, nor shall it prevent the issuing and service of any attachment in a case where a debtor is about fraudulently to secrete or remove his effects."

It, therefore, remains to be determined the nature of the acts involved in the service of a writ of execution. If determined to be a "judicial act" the service thereof is interdicted under the statute; on the other hand, if determined to be a "ministerial act," then it may be validly performed.

A definition of the term "ministerial act" appears in *State ex rel. Folkers v. Welsh*, reported 124 S.W. (2d) 636, from which we quote, i.e. 639-40:

"* * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *State ex rel. Jones et al. v. Cook*, 174 Mo. 100, 118, 119, 120, 73 S.W. 489."

Examination of the statutes applicable to the duties imposed upon a sheriff in the service of a writ of execution disclose them to fall within the above quoted definition of "ministerial acts." We are supported in our reasoning in this regard by the definitions of the term "ministerial officer" found Vol. 27, *Words & Phrases*, Perm. Ed., 272, particularly and as peculiarly applicable to the matter now under consideration by the statement of the court in *Thomasson v. Kennedy* S.C. 3 Rich. Eq. 440, to the effect that a sheriff is a ministerial officer required to execute the judgments of the courts by levy, sale and application of the proceeds according to fixed rules. Similar duties, of course, are imposed upon sheriffs

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with respect to the service of writs of execution and to return thereof under Missouri statute.

CONCLUSION

In the premises, we are of the opinion that a sheriff may validly serve a writ of execution on the first day of the week, commonly referred to as "Sunday."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

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