

SHERIFF: A sheriff appointed trustee to execute a
COMPENSATION: deed of trust pursuant to Section 433.340,
RSMo 1959, acts in his official capacity and
must pay all fees and compensation collected by reason thereof
into the county treasury in counties of the third and fourth class
under the provisions of Paragraph 3 of Section 57.407 and Paragraph
3 of Section 57.409, both as amended by House Bill No. 165 of the
75th General Assembly. When a deed of trust provides that in the
event the named trustee shall refuse or fail to act, the then
sheriff of the county shall execute the trust, the sheriff is not
acting officially but in his private capacity, and such compensa-
tion as he receives for the services is not required to be paid
into the county treasury.

OPINION NO. 304

May 7, 1970

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your request which is as follows:

"1. When a sheriff is appointed trustee by the Circuit Court to execute a deed of trust, as provided in Section 443.340, R.S.Mo., 1959, are the commissions earned and collected for his services, under the provisions of Section 443.360, RSMo., 1959, considered to be fees in civil matters and to be paid into the county treasury under the requirements contained in paragraph 3 of Sections 1 and 2 of Senate Bill No. 165 (now Sections 57.407 and 57.409)?

"2. When parties in a deed of trust provide that in the event the trustee named therein shall refuse or fail to act and that the then sheriff of the county shall execute the trust, would the commissions earned and collected by the sheriff acting as trustee, under this circumstance, be deemed fees collected in his official capacity and payable

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into the county treasury or as fees earned in an individual capacity and same retainable by him?"

Section 443.340, RSMo 1959, to which you refer states:

"If such court shall be satisfied that the facts stated in such affidavit are true, it shall 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, and shall do all other acts the original trustee had power to do, and with the same force and effect."

Paragraph 3 of Section 57.407 (as amended by Senate Bill No. 165 of the 75th General Assembly) states:

"3. In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

Paragraph 3 of Section 57.409 (as amended by the 75th General Assembly) states:

"3. In counties of the fourth class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

In our Opinion No. 78, 3/11/53, Sawyers, (copy enclosed) we noted that the courts have made a distinction as to whether a sheriff is acting officially or individually as trustee under a

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deed of trust. Of course it is clear that Section 443.340 provides that the court shall make an order appointing the sheriff or some suitable person trustee to execute such deed of trust in the place of the original trustees. When the sheriff is appointed by the court in place of a trustee to execute the trust deed, he is acting officially. State ex rel v. Griffith et al, 63 Mo. 545 (1876). The State to the Use of v. Taylor, 6 Mo. App. 277, 278 (1878).

However, it is held that when parties by private contract appoint beforehand whosoever at an indefinite time in the future may happen to be sheriff, to sell land under a deed of trust, such parties can not by such an appointment engage the liability of third persons who happen to be the sureties on the bond. State ex rel Chase v. Davis, 88 Mo. 85 (1886).

It is our view that a sheriff appointed by the court to execute a deed of trust under Section 443.340 is acting in his official capacity and the fees or compensation he receives by reason thereof constitute "fees collected by him in civil matters and which were previously retainable by him" within the meaning of Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409. As a result, sheriffs of third and fourth class counties must pay such fees into the county treasury. The compensation collected by such sheriffs as trustees under a provision in a deed of trust providing that the then sheriff of a county shall execute the trust when the named trustee refuses or fails to act are not fees collected by them officially and are not required to be paid into the county treasury.

CONCLUSION

It is therefore the opinion of this office that a sheriff appointed trustee to execute a deed of trust pursuant to Section 443.340, RSMo 1959, acts in his official capacity and must pay all fees and compensation collected by reason thereof into the county treasury in counties of the third and fourth class under the provisions of Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409. When a deed of trust provides that in the event the named trustee shall refuse or fail to act, the then sheriff of the county shall execute the trust, the sheriff is not acting officially but in his private capacity, and such compensation as he receives for the services is not required to be paid into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,


JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 78
3/11/53, Sawyers