

SHERIFFS : Deputy sheriff may foreclose mortgages in the absence
MORTGAGES: of the regular sheriff.

February 4, 1944



Honorable Thomas V. Proctor
Prosecuting Attorney
Monroe County
Paris, Missouri

Dear Mr. Proctor:

We are in receipt of your request for an opinion under date of January 26, 1944, which request reads as follows:

"Monroe County has a number of School Fund Mortgages that the County Court desires to foreclose, Section 10385, R. S. Mo. 1939, provides that the sheriff of the county shall proceed to sell the property secured by said mortgages by order of the County Court.

"The duly elected, qualified Sheriff of Monroe County is now in the U. S. Navy and his office is being conducted by a deputy sheriff.

"Will you please give me an opinion as to whether the deputy sheriff can foreclose these mortgages in the absence of the regular sheriff and provided in the above mentioned section."

Section 10385, R. S. Mo. 1939, referred to in your letter, was repealed and a new section enacted, known as Section 10385, Laws of Missouri, 1943, page 882. The new section does not affect the question stated in your request, said section reading as follows:

"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 severely become due and payable, according to the tenor and effect of the bond recited, and shall contain the further condition that if the borrower fail at any time during the existence of the loan to keep the buildings, if any, on the real estate insured against loss by fire and windstorm, with loss payable or mortgage clause attached to policy in favor of the county, that the sheriff of the county may, upon giving twenty days' notice of the time, place and property to be sold, 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 to 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 borrower respectively."

Section 13134, R. S. Mo. 1939, provides:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

If the foreclosure of mortgages under Section 10385, Laws of Missouri, 1943, is one "of the duties prescribed by law to be performed by the sheriff," then under Section 13134, R. S. Mo. 1939, a deputy sheriff would possess the power and authority necessary to foreclose.

Section 10387, R. S. Mo. 1939, provides:

"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."

This section states that when the principal and interest become due and are not paid, the county court may make an order to the sheriff commanding him to levy upon the property conveyed by the mortgage. A copy of this order is delivered to the sheriff and has the effect of a fieri facias on a judgment of foreclosure by the circuit court.

Section 13138, R. S. Mo. 1939, reads as follows in so far as pertinent:

"Every sheriff * * shall * * execute all process directed to him by legal authority * * *."

It is his official duty to carry out the order of the county court.

In *Tatum et al v. Holliday et al.*, 59 Mo., l. c. 427, the present question was involved, the court stating:

"This brings us to another branch of the inquiry, viz: was the sale invalid because made by a deputy sheriff? If the sheriff acted in his official character as sheriff, then the sale was good, and could be legally performed by his deputy. But if he was simply a trustee, without regard to his capacity as sheriff, the sale would be void, because a trustee cannot delegate his trust.

"Where a trustee in any deed of trust to secure the payment of a debt or other liability, dies, resigns or becomes disabled, the statute provides that the court shall make an order appointing the sheriff of the county trustee to execute the deed of trust, in place of the original trustee, and thereupon such sheriff shall be possessed of all the rights, power and authority possessed by the original trustee under the deed of trust; and such sheriff shall proceed to sell and convey the property and pay off all the debts and liabilities, according to the terms and directions of the deed of trust, and with the same force and effect; and in case of a deed of trust given for the benefit and use of any person other than a deed of trust to secure payment of a debt or other liability, such court shall make an order appointing some suitable person as trustee in such deed of trust, in place of the original trustee, to hold the property or estate conveyed by such deed to the same uses and trusts, etc., (Wagn. Stat., 1347-Secs. 1, 2.)

"It will be perceived that provision is here made for the appointment of two classes of trustees. The first is where the sheriff is appointed to sell under a deed to pay a debt or other liability, and the second is where a suitable person, other than the sheriff, is appointed to hold property for uses and trusts.

"From the phraseology employed in the first, there might be some doubt as to the real character in which the sheriff acted, but we think the 4th section of the same law furnishes a solution and explains the legislative intent. It is there declared, that any person having a beneficial interest, present or future, absolute or contingent, in the trust property, may apply to the court for security to be given by the trustee. This applies to the appointment made under the second clause of the second section, and shows plainly enough that it was deemed unnecessary to require any security of the sheriff when he was acting as trustee, and the only reason that can be assigned is, that it was supposed that his security as sheriff was sufficient. The sheriff, when making a sale under a deed of trust, must therefore be considered as acting officially, and what he can perform by himself, he can perform by his deputy."

This case has been cited a number of times as authority for the proposition that the sheriff, acting under statutory appointment as trustee, does so officially.

Conclusion

It is the opinion of this department that a deputy sheriff may foreclose mortgages under Section 10385, Laws of Missouri, 1943, in the absence of the regular sheriff.

Respectfully submitted,

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APPROVED:

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