

SCHOOLS: Sale under mortgage without suit, circuit court need not be in session.

February 17, 1942

2-27

Mr. Ramey Smith
County Clerk
Douglas County
Ava, Missouri

FILE
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Dear Sir:

This department is in receipt of your letter of February 12, 1942, requesting an opinion, which is as follows:

"A problem has come up with reference to the sale of real estate that was given as security on a School Fund Mortgage. Your assistant, Mr. Roberts, will recall that I was in and discussed this problem with him and that he asked me to state the problem in writing and that a written opinion would be sent to us with regards to the matter.

"The circumstances leading up to our problem are as follows: A school fund loan was made by the Douglas County Court on a certain 80 acres of land in the sum of \$400.00 secured by a School Fund Mortgage and Bond as is required by Section 10384. The Interest became delinquent and the Douglas County Court made order directing the Sheriff to sell the said 80 acres of land for payment of the \$400.00 loan. (Sec. 10387) This order was delivered to the Sheriff on November 5, 1941. The Sheriff gave the notice by Legal Publication in the Douglas County Herald for three consecutive issues and sold said tract on the 20th of December. We feel certain that the Notice as given by the Sheriff was

regular in that it gave the proper description and the required 20 days notice. Upon the sale of the land the Sheriff made and delivered deed to the purchaser of said tract of land,

"Since that time, however, a question has been brought up in that this deed might be void and the sale set aside because the Sheriff did not conduct the sale while Court was in session.

"Our question is this: Should Sheriff conduct sale of this kind (Foreclosure under School Fund Mortgage) while County Court or Circuit Court is in session?

"If, in your opinion, the answer to the above question is in the affirmative, could the sale mentioned be set aside on that ground only?"

The sections of the 1939 statutes which are applicable to your request are Sections 10384, 10385 and 10387.

Section 10384, R. S. Mo. 1939, mainly sets out the security that must be included in bonds secured by mortgage for the loan of school funds.

Section 10385, R. S. Mo. 1939, reads 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 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."

It is very noticeable under the above section that the following words are used: "* * * without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, * * *." In other words, under the above section it is not necessary that a suit be filed either in the circuit court or the county court to foreclose the mortgage, but the same can be foreclosed under the same procedure as set out in the foreclosure of deeds of trust, providing that the notice set out in said section is properly followed.

Section 10387, R. S. Mo. 1939, reads as follows:

"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 question involved in your request refers mainly to the above section in that it says: " * * * shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly." The question involved in your request also is whether or not a foreclosure on a school mortgage is valid if the sale is made while the circuit court or county court is not in session. This question, as above set out in the partial quotation, only applies when a judgment has been had either in the circuit court or the county court upon the mortgage, and in that event the sale under the execution must be made, if the judgment is either in the county court or in the circuit court, while the circuit court is in session.

The first case on the subject is McClurg v. Dollarhide, 51 Mo. 347, where the court, at l. c. 349, said:

"The defendant then offered a Sheriff's deed for the same premises, made under an execution issued from the County Court upon a judgment of the County Court, given for the principal and interest of a School debt under the statute of 1855, which was excluded because the sale appeared to have been made at the County Court and in vacation of the Circuit Court. The exclusion of this deed is the only point raised by this record.

"Whilst it is the duty of the courts to protect purchasers at Sheriff's sales, it is also their duty to see that no injustice is done to the parties to the execution. We know of no provisions in our statutes authorizing a sale to be made of a debtor's land, under an execution like this, during the session of the County Court, and whilst the Circuit Court is not sitting. This execution was issued on a judgment of the County Court, recovered under section 29, Revised Laws of Missouri 1855, page 1425, by which such judgment is to have like effect as a judgment of a Circuit Court. 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 Courts, and shall be proceeded on accordingly by the Sheriff. Section 27, on same page, provides for the recovery of interest on School debts, by issuing a warrant in the nature of a fieri facias, a judgment of a Circuit Court, except that such warrant shall be returnable in thirty days from its date, and except also, that such Sheriff shall have power to sell during the sitting of the County Courts, etc.

"These provisions taken together, clearly show that the only execution under which a Sheriff can sell lands during the sessions of a County Court, is the one in the nature of a fi. fa., issued under section 27.

"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. If a Sheriff can disregard the plain provisions of the statute, by selling at a County Court, he might do so when no Court at all is in session, or at a place where Court is never held."

It is very noticeable under the above case that there was a judgment given by the county court on the foreclosure of the mortgage and an execution issued.

The above case is set out in the case of Grant v. Huston, 105 Mo. 97, l. c. 101, where the court said:

"The plaintiff also objected to the sheriff's deed on the ground that there was no court in session at the time of the sale. The mortgage provides that, in case of default in the payment of the bond, the sheriff of the county may, without suit, sell the land to the highest bidder for cash at the courthouse door in said county, after giving twenty days' notice of the time, terms and place of sale by handbills, or advertisement in some newspaper published in said county; and it is also provided that the deed shall be as effectual as if made by virtue of a judgment of a court of competent jurisdiction. The debt not having been paid, the county court by its order made in February, 1860, directed the sheriff to sell the property, and he sold the same pursuant to the terms of the mortgage.

"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. These cases are cited by the plaintiff as authority for the contention that the sale made by the sheriff in this case is void; but in our opinion they do not sustain the proposition. Section 22 of the last-named statute provides what recitals and conditions these mortgages given to secure school funds shall contain, and among others they must contain a provision that in case of default the sheriff of the county may sell the mortgaged property, but the mortgage need not say where the sale shall be made or what notice shall be given, for all that is provided for by the subsequent sections of the statute.

"In this case the mortgage contains stipulations not required by the statute. Thus it provides for a sale at the courthouse door, after giving notice of the time, terms and place of sale for twenty days, in either of the two specified methods. It is, therefore, more than a statutory school-fund mortgage. In short, it provides for all the details of a sale, and is a good common-law mortgage with power of sale. In Mann v. Best, 62 Mo. 490, the mortgage authorized the county to appoint an agent for the purpose of selling the land after giving a specified notice,

and was not a statutory mortgage; but it was held, a sale made in compliance with the powers contained in the instrument would be valid. The statute was held to be directory only. As the mortgage in the present case provided for the place of sale and all the terms thereof, a sale made pursuant to its provisions should be upheld. It is a good common-law mortgage with power of sale, and may be enforced as such. The order of the county court directing the sale is no more than a demand upon the sheriff that he proceed to execute the powers specified in the mortgage. The fact that the sale was not made during the sitting of any court is, therefore, immaterial; for the sale was made under the stipulations of the parties as set forth in the mortgage, and not under the provisions of the statute, and the mortgage contemplates a sale at the courthouse door at any time after giving the specified notice. The defendant, therefore, has a good title, and it is unnecessary to examine the questions suggested in the brief, based upon the theory that there was no valid foreclosure of the mortgage."

In the above case the Supreme Court specifically stated: "The fact that the sale was not made during the sitting of any court is, therefore, immaterial; for the sale was made under the stipulations of the parties as set forth in the mortgage, * * *." In other words, the holding in this case, which is the last case on the subject, is to the effect that the powers of the sheriff as set out in the mortgage should be followed, and it is immaterial whether the circuit court or the county court, in any event, is in session. This case mentions and is construing Section 30, page 1425, R. S. Mo. 1855, which is now Section 10387, R. S. Mo. 1939, which includes the same phrase, that is, " * * *

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

The above case was approved in the case of *Walters v. Senf*, 115 Mo. 524, l. c. 531, where the court said:

"It is first insisted that the deed to plaintiff is of no force, because based on orders of the county court in the nature of a foreclosure which that court had no jurisdiction to make. Those orders were evidently designed to follow the procedure marked out for the enforcement of mortgages of school funds. Revised Statutes, 1889, secs. 8057-8059. But in the law governing the management of the road and canal fund, nothing is said as to the necessity or propriety of such orders.

"By section 7782 (Revised Statutes, 1889, identical with Revised Statutes, 1879, sec. 6925) the county is authorized to loan such funds, 'taking care in every instance to require good and ample security.' No form is prescribed. The bond and mortgage in the case before us followed the form appropriate for school fund loans. It is evident that one of these blanks intended for those loans was used, after changing the recitals so as to apply it to the road and canal fund, instead of to the school fund.

"A grant of power is generally supposed to tacitly comprehend a grant of such incidental powers as may be necessary to make the principal grant effective. Broom's Legal Maxims (8 Am. Ed.) pp. 479, 486.

"The power to loan this fund and to 'require good and ample security,' clearly

implied the right to accept a mortgage on real estate as security for the loan. When it was executed, the property become subject to the terms and power of sale expressed in that instrument. Mann v. Best (1876), 62 Mo. 491; Grant v. Huston (1891), 105 Mo. 97. The county acquired thereby the right to resort to the security to realize the amount of the loan, to the extent, and in the manner defined in the mortgage."

In this case the court specifically held: "When it was executed, the property become subject to the terms and power of sale expressed in that instrument."

In rendering this opinion we are assuming that the mortgage or deed of trust does not require a suit in either the circuit court or county court for foreclosure, but merely follows the notice as set out in Section 10385, supra. The whole question as to whether or not the property should be sold while the circuit court or county court is in session is a question of fact as to the powers of the sheriff that are set out in the mortgage or deed of trust itself.

CONCLUSION

In view of the above authorities, it is the opinion of this department that if the mortgage or deed of trust set out in your request does not require a suit, judgment or execution to be issued out of the county court or circuit court, a sale by the sheriff upon the order of the county court is valid if it follows the procedure and powers as set out in the original mortgage or deed of trust.

Respectfully submitted

W. J. BURKE
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APPROVED:

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Attorney General

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