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SALE, JUDICIAL

1. ADMINISTRATOR MAY EMPLOY AUCTIONEER FOR A FEE; WHEN AUTHORIZED BY THE COURT.
2. PERSON EMPLOYED BY AN ADMINISTRATOR MUST BE A LICENSED AUCTIONEER NOTWITHSTANDING EXCEPTIONS OF §4707.02, RC.

SYLLABUS:

1. An administrator in conducting a judicial sale of real estate at public sale may employ an auctioneer for a fee when such employment is authorized or approved by the court.

2. A person specifically employed by an administrator for a fee to auction or sell by public outcry at a judicial sale must be a licensed auctioneer notwithstanding the exceptions provided in Section 4707.02, Revised Code.

Columbus, Ohio, August 28, 1957

Hon. John F. DeMuth, Prosecuting Attorney
Paulding County, Paulding, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Sec. 4707.02 of the Revised Code provides that the provisions of Sec. 4707.01 R. C. ‘shall not extend to an officer or person executing a process or order of a court, or selling property directed by law, or by a process or order, to be sold by public vendue, auction, or outcry.’ Does this section extend to an agent

of an administrator hired for a fee to conduct a sale under order of court?

“In Vol. 24, O. Jur., Sec. 33, page 32, it is stated that the provisions of the licensing section ‘do not apply to judicial sales’ but it appears to me that R. C. 4707.02 applies not to the sale itself but to the officer or person executing a process.

“My question is: Can an administrator employ a person not licensed as an auctioneer to conduct a judicial sale?”

To answer your question it is necessary to first determine whether an administrator has authority to employ an auctioneer to conduct a public sale under order of the court or must the administrator personally conduct such sale.

In sales of personal property at public sale by an administrator the statute specifically authorizes employment of an auctioneer. Section 2113.41, Revised Code, relating to public sales of personal property by administrators is in part as follows:

“* * * The executor or administrator, if he deems it for the best interests of the estate may employ an auctioneer or clerk, or both, to conduct such sale, and their reasonable fees and charges shall be deducted from the proceeds of the sale. The court for good cause may extend the time for sale.”

I assume that your question is as to judicial sales of real estate at public auction by an administrator. It has been held in the case of *Ingham v. Lindemann*, 37 Ohio St., 218, that no allowance should be made to an assignee for the expense of employing an auctioneer, unless the court directing the sale is of the opinion that the services of an auctioneer were necessary. At page 221, the opinion states as follows:

“* * * A trustee, whose duty it is under the direction of a court to make sale of property, should perform the duties of auctioneer himself, unless in the opinion of the court the services of a professional auctioneer are deemed necessary. The presumption is that every one charged, by law, with the performance of a duty, is capable of performing the same. * * * It may be, no doubt, that peculiar circumstances will justify, in some cases, the employment of an auctioneer; but in such cases, the authority to make the employment should be obtained from the court directing the sale. * * *”

In *Klimper v. Klimper*, Admrx., 12 Ohio App., 332, it was held that payment of compensation of an auctioneer in a sale of realty by an ad-

ministrator to pay debts was proper. A like holding was made in *Lida West, Admr. v. Sylvia W. Child, et al.*, 16 O. O., 31. No statute expressly authorizes the employment of an auctioneer by an administrator to conduct a public sale of real estate but when the court is of the opinion that the services of an auctioneer are necessary or would be proper, it is customarily authorized.

Since it appears from the foregoing cited cases that employment of an auctioneer in public sale of real estate by an administrator is proper if authorized by the court, attention is now directed to your question of whether a person not licensed as an auctioneer under the provisions of Chapter 4707, Revised Code, may be so employed by an administrator to conduct a judicial sale.

Section 4707.01, Revised Code, is as follows:

“Whoever exercises the occupation of auctioneer or sells or attempts to sell, by public vendue, auction, or outcry, any property or effects, without a license, shall forfeit and pay not less than one hundred nor more than five hundred dollars, to be recovered in the name of the state.”

Section 4707.02, Revised Code, is as follows:

“Section 4707.01 of the Revised Code shall not extend to an officer or person executing a process or order of a court, or selling property directed by law, or by a process or order, to be sold by public vendue, auction, or outcry.”

An administrator in conducting a public sale of real estate is executing a process or order of the court and in conducting such judicial sale is authorized by Section 4707.02, Revised Code, to sell by auction or outcry without being licensed as an auctioneer. This exception in judicial sales extends only to an officer or person to whom the order of sale is issued and cannot be extended to any one specifically employed for a fee to sell by auction or outcry other than one licensed to so sell under the provisions of Section 4707.01, Revised Code.

The language of Section 4707.01, Revised Code, is plain and specific and states that whoever sells or attempts to sell any property or effects by public vendue, auction, or outcry without a license as an auctioneer shall be subject to forfeiture and penalty. The legislature, by enacting Section 4707.02, Revised Code, clearly created a statutory exception to

the provisions of Section 4707.01, Revised Code, when an officer or person is executing a process or order of the court in judicial sales. If said person does not personally conduct the auction but employs an agent for a fee for the specific purpose of auctioning or selling by outcry then such agent or auctioneer must be subject to the terms of Section 4707.01, Revised Code, and be regularly licensed as an auctioneer and the exceptions contained in Section 4707.02, Revised Code, do not apply.

It is worthy of note that in Opinion No. 4356, Opinions of the Attorney General for 1935, page 711, in which opinion I concur, it was the opinion of the then Attorney General that an attorney at law representing a client, as an incident of his representation and rendition of legal services, could sell or negotiate a sale of real property without being licensed as a real estate broker and by analogy it would appear that, as an incident of his representation and rendition of legal services to an administrator, such attorney at law could aid in selling at public auction without being licensed as an auctioneer under provisions of Section 4707.01, Revised Code.

In specific answer to your question, it is my opinion that:

1. An administrator in conducting a judicial sale of real estate at public sale may employ an auctioneer for a fee when such employment is authorized or approved by the court.

2. A person specifically employed by an administrator for a fee to auction or sell by public outcry at a judicial sale must be a licensed auctioneer notwithstanding the exceptions provided in Section 4707.02, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General