

Note from the Attorney General's Office:

1940 Op. Att'y Gen. No. 40-2521 was overruled in part by 2007 Op. Att'y Gen. No. 2007-046.

2521.

AUCTIONEER—SHERIFF MAY EMPLOY HIM TO CONDUCT JUDICIAL SALES OF REAL ESTATE ONLY BY APPOINTMENT AS DEPUTY SHERIFF—IF SO EMPLOYED, NO AUTHORITY FOR AUCTIONEER TO CHARGE FEES AS COURT COSTS — COMPENSATION — FIXED BY SHERIFF, PAID BY COUNTY TREASURER, UPON WARRANT BY COUNTY AUDITOR.

SYLLABUS:

1. *A sheriff may employ an auctioneer to conduct judicial sales of real estate only by appointing such auctioneer as a deputy sheriff.*

2. *If an auctioneer is appointed a deputy sheriff and thereafter conducts judicial sales of real estate, there is no authority for charging his fees for such services as court costs. His compensation should be fixed by the sheriff and paid by the treasurer upon warrant of the county auditor.*

Columbus, Ohio, July 12, 1940.

Honorable Paul D. Michel, Prosecuting Attorney,
Marion, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads:

"It has been the practice of this County for years for the Sheriff to hire auctioneers to auction off real estate sold on judicial sale. The auctioneer's fee has been charged as costs of the action and the charge approved by the Court in the entry of confirmation of the sale and distribution of the proceeds thereof.

The questions are, whether such hiring of an auctioneer by the Sheriff and the charging of the auctioneer's fee as court costs when confirmed and approved by the court, are legal."

Ordinarily, judicial sales of real estate are made by the sheriff, whose authority to make such sales I presume will not be questioned. As a public officer, the sheriff has only such powers as are expressly delegated to him by statute and such additional implied powers as are necessary to permit him to perform the duties expressly conferred. 32 Ohio Jurisprudence, §74, p. 933.

After a careful examination of the statutes, I have been unable to find any express power authorizing the sheriff to employ an auctioneer to conduct judicial sales for the sale of real estate, neither do I find that it is necessarily implied that an auctioneer be so employed to conduct such sales. In fact, the Legislature seems to have the contrary intent.

Section 5866, General Code, requires the licensing of persons who "exercise the occupation of auctioneer." I presume you refer to such a licensed auctioneer in your inquiry.

That it is unnecessary to employ a licensed auctioneer in conducting judicial sales is specifically provided in Section 5867 of the General Code, which reads as follows:

"The next preceding section 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."

Although there is no requirement, express or implied, that a licensed auctioneer be employed, the sheriff is not obligated to personally conduct judicial sales.

Providing for the appointment of deputies, Section 2830 of the General Code reads:

"The sheriff may appoint in writing one or more deputies.

If such appointment is approved by a judge of the court of common pleas of the sub-division in which the county of the sheriff is situated, such approval at the time it is made, shall be indorsed on such writing by the judge. Thereupon such writing and indorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The clerk's fees therefor shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No justice of the peace or mayor shall be appointed such deputy."

If a licensed auctioneer possesses the necessary qualifications, the sheriff under authority of Section 2830 of the General Code might appoint him a deputy and assign him to the duty of conducting judicial sales.

I have not here considered the right of an auctioneer to be appointed as a master commissioner or a special master commissioner, nor have I considered the question of compensating a master commissioner or special master commissioner for his services in connection with judicial sales of real estate, for the reason that such appointment, if made, cannot be made by the sheriff but must be made by the court.

In the determination of the propriety of including the auctioneer's fees as costs, it must be borne in mind that the term "court costs" has a definite legal, though not fixed, signification and includes only such items as are made taxable by statute. In *State ex rel Commissioners v. Guilbert*, Auditor, 77 O. S. 333, it is stated on page 338:

"Costs, in the sense of the word as generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed and included in the judgment or sentence. The word does not have a fixed legal signification. As originally used it meant an allowance to a party for expenses incurred in prosecuting or defending a suit. Costs did not necessarily cover all of the expenses and they are distinguishable from fees and disbursements. They are allowed only by authority of statute, and the word not having a fixed legal signification, it does not follow that the compensation of the expert, though an expense, is costs made in the prosecution. * * *"

I have been unable to find any statutory authorization for the allowance of auctioneer's fees as costs. Costs allowable to the sheriff are detailed in Section 2845 of the General Code. Included therein is an allowance for "poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate." But poundage, as stated in *Major, Sher-*

iff, vs. International Coal Company, 76 O. S. 200, at page 209, is allowed as "a compensation to the sheriff for the risk incurred in handling and disbursing money actually received by him in his official capacity," and would not cover fees of an auctioneer. Furthermore, an allowance made to the sheriff for his services are collected for the use of the county, as provided in Section 2977, General Code, which reads:

"All the fees, costs, percentages, penalties, allowances and other prerequisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereafter provided."

While the auctioneer cannot be compensated by fees charged as costs, if he be appointed as a deputy his compensation may be fixed by the sheriff and paid by the county treasurer under authority of Section 2981, General Code, which, referring to sheriffs and certain other county officers, reads as follows:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid semi-monthly from the county treasury upon the warrant of the county auditor. Each of such officers may require such of his employes as he deems proper to give bond to the state in an amount to be fixed by such officer with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of such officer, indorsed thereon, shall be deposited with the county treasurer and kept in his office."

Answering your questions specifically, I am of the opinion that a sheriff may employ an auctioneer to conduct judicial sales of real estate only by appointing such auctioneer as a deputy sheriff.

If an auctioneer is appointed a deputy sheriff and thereafter conducts judicial sales of real estate, there is no authority for charging his fees for

such services as court costs. His compensation should be fixed by the sheriff and paid by the treasurer upon warrant of the county auditor.

Very truly yours,

THOMAS J. HERBERT,
Attorney General.