

2613

REAL ESTATE SOLD BY SHERIFF:

1. WRIT OF SALE IN PARTITION TO ONE OF PARTIES TO PARTITION ACTION—PURCHASER MAY PAY ONE OR MORE OF OTHER PARTIES TO ACTION HIS, HER OR THEIR PROPORTIONATE SHARE OR SHARES OF PURCHASE PRICE—RECEIPTS MUST BE ACCEPTED BY SHERIFF IN LIEU OF PURCHASE MONEY.
2. WHERE ONE OF PARTIES TO PARTITION ACTION PURCHASES PROPERTY, SHERIFF ENTITLED TO COLLECT POUNDAGE ONLY ON THAT PORTION OF PURCHASE PRICE COMING INTO HIS HANDS.
3. WHERE ONE OR MORE PARTIES TO PARTITION ACTION ELECTS TO TAKE ESTATE AT ITS APPRAISED VALUE NO PORTION OF PURCHASE MONEY THEREFOR IS REQUIRED TO BE PAID INTO HANDS OF SHERIFF.
4. WHERE PARTY ELECTS TO TAKE ESTATE AT ITS APPRAISED VALUE, SHERIFF NOT ENTITLED TO COLLECT POUNDAGE ON ANY PORTION OF PURCHASE MONEY WHICH MAY BE PAID INTO HIS HANDS.

SYLLABUS:

1. Where real estate is sold by the sheriff in obedience to a writ of sale in partition to one of the parties to the partition action such purchaser may pay one or more of the other parties to the action his, her or their proportionate share or shares of such purchase price and receipts therefor must be accepted by the sheriff in lieu of purchase money.

2. Where real estate is sold by the sheriff in obedience to a writ of sale in partition to one of the parties to the partition action the sheriff is entitled to collect poundage only on that portion of the purchase price coming into his hands.

3. Where one or more of the parties to a partition action elects to take the estate at its appraised value no portion of the purchase money therefor is required to be paid into the hands of the sheriff.

4. Where one or more of the parties to a partition action elects to take the estate at its appraised value the sheriff is not entitled to collect poundage on any portion of the purchase money therefor which may be paid into his hands.

Columbus, Ohio, December 20, 1950

Hon. Harry C. Johnson, Prosecuting Attorney
Guernsey County, Cambridge, Ohio

Dear Sir:

This will acknowledge your request for my opinion which reads as follows:

“Will you kindly render me your opinion at your earliest convenience on the following statement of facts:

1. We interpret Section No. 2845 of the General Code of Ohio; 30 O Jur., p. 970, Sec. 148; 30 O. Jur. p. 929, Sec. 110; to mean that when a party elects to take the real estate at the appraised value under the provisions of G. C. Sec. 12034 and Sec. 12035, that the sheriff cannot require said party who elects to purchase the real estate and take it in at the appraised value to pay into the hands of the sheriff any amount that would be payable back by the sheriff to such party as his proportion of the appraised value as a co-tenant in the real estate or as the holder of a mortgage or other lien on the real estate involved in the partition, that is, if there be a co-tenant and party to the partition proceeding who elects to take the real estate at its appraised value of \$8,000.00, such co-tenant is seized of an undivided one-fifth interest in the real estate, the attorney fee and court costs deductible from the proceeds amount to \$500.00, and of the balance of the proceeds \$1500.00 would be distributable to each of the five co-tenants in case the purchase price of \$8,000.00 were paid in full to the sheriff, then we believe that the co-tenant who elected to take the real estate at its appraised value would pay into the hands of the sheriff only \$6500.00, which sum of \$6500.00 would be distributed by the sheriff placing on his books and paying out the attorney fee and court costs amounting to \$500.00 and \$1500.00 to each of the other four co-tenants. In other words the co-tenant who elected to take the real estate at the appraised value would actually pay into the hands of the sheriff on the purchase price the sum of \$6500.00 which would be distributed by the sheriff by paying therefrom attorney fee and court costs amounting to \$500.00 and the remaining \$6,000.00 equally to the other four co-tenants, amounting to \$1500.00 for each of the other four co-tenants.

2. In this same case, assuming that there was a public sale of this real estate and one of the co-tenants bought it in at \$8,000.00, would the same rule prevail and would the co-tenant purchaser be required to pay only \$6,500.00 into the hands of the sheriff and give the sheriff his receipt for the \$1500.00 due back to

the purchaser in lieu of paying the entire purchase price of \$8,000 into the hands of the sheriff?

3. In this same case, assuming that one of the co-tenants either elected to take the real estate in at the appraised value or purchased it at public sale and one of the other four co-tenants was willing to cooperate with the co-tenant purchaser by giving the co-tenant purchaser credit for the other co-tenant's one-fifth of the proceeds, in that case, under this law, can the sheriff be required to collect only \$5,000.00 of the proceeds of the sale and accept the receipt of the co-tenant purchaser for the \$1500.00 of his share of the entire purchase price and the receipt of the other co-tenant that is cooperating with the co-tenant purchaser for his share of the proceeds amounting to \$1500.00 and actually pay only \$5,000.00 into the hands of the sheriff on the purchase price?

4. In statement No. 1 above, and in No. 2 above, is it not the law that the sheriff would be required to accept the receipt of the co-tenant purchaser for \$1500.00 plus \$6500.00 in cash in lieu of the co-tenant purchaser paying into the sheriff the entire purchase price of \$8,000.00?

5. In Statement No. 3 above, is it not the law that the sheriff would be required to accept the receipts of the co-tenant purchaser and the other co-tenant for \$3,000.00 plus \$5,000.00 in cash in lieu of the co-tenant purchaser paying into the sheriff the entire purchase price of \$8,000.00?

In statements numbered 1, 2 and 3 above, is it not true that the sheriff is entitled under the law to charge poundage only on the money actually handled by him as follows, to wit:

Statement No. 1: Poundage on \$6500.00 only

Statement No. 2: Poundage on \$6500.00 only

Statement No. 3: Poundage on \$5000.00 only.

Will you kindly render me your opinion on these questions at your earliest convenience as the sheriff insists on collecting the full amount of the purchase price in all sales of land in partition cases and he also insists on collecting poundage on the entire purchase price in all such cases, under his interpretation of written instructions given to him by the Ohio Bureau of Supervision and Inspection of Public Offices."

Since your request relates primarily to poundage in partition actions, for the purpose of clarity and in order that I might discuss the questions in what I consider to be a logical sequence I wish to rephrase and rearrange your questions as follows:

1. Where real estate is sold by the sheriff in obedience to a writ of sale in a partition action to one of the co-tenants of the

partitioned real estate is such purchaser required to pay the full purchase price thereof into the hands of the sheriff?

2. If the answer to the first question is in the negative, what portion, if any, of the purchase price is required to be paid the sheriff?

3. What poundage fees, if any, is a sheriff who sells real estate in obedience to an order of sale in a partition action entitled to receive?

4. Where one or more of the parties to a partition action elects to take at its appraised value the real estate sought to be partitioned is such party or parties required to pay the full appraised value thereof into the hands of the sheriff?

5. If the answer to the fourth question is in the negative, what portion, if any, of the appraised value is required to be paid the sheriff?

6. What poundage fees, if any, is a sheriff entitled to receive where one or more of the parties to a partition action elects to take at its appraised value the real estate sought to be partitioned?

The pertinent portion of Section 2845, General Code, referred to in your letter, which relates to the collection of poundage by a sheriff, reads as follows:

“For the services, hereinafter specified *when rendered*, the sheriff shall charge the following fees, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those liable therefor: * * poundage on all moneys actually *made and paid* to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per cent.; on all sums over ten thousand dollars, one-half of one per cent, but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, except *in writs of sale in partition* he shall receive one per cent on the first two thousand dollars, and one-third of one per cent on all above that amount *coming into his hands*; * * *”
(Emphasis added.)

Sections 12034 and 12035, General Code, also referred to in your letter read, respectively as follows:

Section 12034. “When the commissioners are of opinion that the estate can not be divided according to the demand of the writ without manifest injury to its value, they shall return that fact to the court with a just valuation of the estate. If the

court approves of the return, and one or more of the parties elects to take the estate at such appraised value, it shall be adjudged to him or them, *upon his or their paying to the other parties their proportion of its appraised value, according to their respective rights, or securing it as hereinafter provided.*"

(Emphasis added.)

Section 12035. "If one or more of the parties elects to take the estate at the appraised value, unless on good cause shown by special order the court directs the entire payment to be made in cash, or all the parties in interest agree thereon, the terms of payment shall be one-third cash, one-third in one year, and one-third in two years, with interest, the deferred payments to be secured to the satisfaction of the court. On payment being made in full, or in part, with sufficient security for the remainder, as above provided, according to the order of the court the sheriff shall make and execute a conveyance to the party electing to take it."

As you will observe I have purposely separated for consideration those cases in which the property sought to be partitioned are actually sold by the sheriff and those in which one or more of the parties elects to take such property at its appraised value. The first three questions relate to the former situation and the last three relate to the latter situation.

The case of *Ruggles v. Bingham et al.*, 14 O. N. P. (N. S.) 333, 23 O. D. (N.P.) 572, involved a situation in which property was sold by the sheriff on an order of sale in a partition action to purchasers who were persons other than a party to the action. The purchasers of the property then paid the co-tenants in partition the purchase money direct and for the deferred payments executed notes to said co-tenants secured by mortgage on the property purchased. No money was paid into the hands of the sheriff or distributed by him. The opinion in said case deals principally with the question of poundage, however, the propriety of such direct payment of the purchase money was raised in said case and since I am of the opinion that the court in that case has clearly and ably related the legal principals involved, I quote his opinion as follows:

"In my opinion the sheriff is only entitled to poundage on the amount of money actually paid into his hands. Judge Crew in the case of *Major v. Coal Co.*, 76 Ohio St. 200, 209 (81 N. E. Rep. 240), speaking of the purpose for which poundage is allowed, says it 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.'

“The statute relating to the compensation of sheriffs was amended by an act passed May 31, 1911, 102 O. L. 277. This act repealed Gen. Code 2845. Gen. Code 2845 prior to its repeal and amendment by the act of May 31, 1911, on the subject of poundage provided as follows:

‘Poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, except on writs for the sale of real estate in partition, 1½ per cent on the first thousand dollars, and 1 per cent on all sums over one thousand dollars; but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage, except on the amount over and above the claim of such party; * * * Selling real estate under an order of the court in partition, three-fourths of 1 per cent where the amount of sales does not exceed two thousand dollars, and one-fourth of 1 per cent on the amount over and above that sum.’

“It will be observed that a somewhat radical change was made by the amendment of the statute. Prior to the amendment the sheriff’s fees for selling real estate on an order of the court in partition was not poundage at all. It was expressly excepted from the provisions of the statute relating to poundage under the statute as it stood before amendment. The sheriff was given a small amount as compensation for making the sale. That provision was eliminated by the amendment and the sheriff is now allowed poundage only for making such sales and the object and purpose of allowing poundage must have been within the legislative contemplation in making the change, i. e., compensation for the risk incurred in handling and disbursing money. That risk is, of course, not incurred if the sheriff is not called upon to handle and disburse the money. The language of the statute as it now stands provides that the sheriff shall be allowed the percentage therein provided on money ‘coming into his hands.’ This was not the provision of the statute before amendment. Under the statute as it stood before amendment, he was allowed the amount therein provided for making the sale, and it did not depend upon the money coming into his hands. The court can not disregard this change in the statute, but must give it effect. I think the language, ‘coming into his hands,’ is the same in effect as the language ‘actually made and paid’ applying to other sales than those in partition. In the statute as amended in my opinion the exception has reference to the amount to be paid the sheriff which is different in sales in partition from other judicial sales.

“There is nothing to prevent parties doing what they did in this case, and if the parties have given their receipts for the payment of the money the sheriff in my opinion should receive them in lieu of the receipt in disbursement of the money and that he is only entitled to poundage on the actual amount of money coming into his hands.”

This opinion was rendered in 1913 at which time Sections 12036, 12037, 12038 and 12039, General Code, relating to the conduction of sales and distribution of the proceeds therefrom in partition actions, were in force and effect in the identical form in which they appear today. The last paragraph of the above opinion, would therefore be as indicative of the law today as it was when written, unless by the subsequent amendment to Section 2845, supra, a different interpretation of that section of the General Code is required. Said Section 2845 has been amended once since the rendition of the above quoted opinion, which amendment appears in 108 Ohio Laws, Part II, page 1203 at page 1214. A comparison of that portion of the amended act relating to poundage to be collected by the sheriff to that in effect at the time the above quoted opinion was rendered indicates that it is identical as to form with the same portion of said section as it appeared in the prior enactment except for the abbreviation of the word "per centum" where it first appears in said phrase relating to poundage. It therefore follows that said opinion would be as indicative of the law today as that at the time it was written. It therefore follows that if a purchaser not a party to the partition action may pay the purchase price to the co-tenants in partition, where such purchaser has purchased the property pursuant to an order of sale in partition that the same reasoning and rule of law would apply to a purchaser who was a party to the partition action. It further follows that if such payment may be made to all co-tenants in partition payment could be made directly to any one or more of such co-tenants of his, her or their proportionate shares of such purchase price and receipts therefor accepted by the sheriff in lieu of purchase money.

With respect to the questions relating to the situation in which one or more of the parties elects to take such property at its appraised value, it will be observed that Section 12034, General Code, specifically provides that upon approval of the return of the commissioners by the court the estate shall be adjudged to one or more of the parties to the partition action at his or their election "upon his or their *paying to the other parties* their proportion of its appraised value, according to their respective rights, *or securing it* as hereinafter provided." If this wording were to be considered by itself it would deny the right of the sheriff to receive, under any circumstances, any portion of the proceeds of the purchase money paid by the party or parties electing to take the property. Such payment would be required to be made only to the other co-tenants. How-

ever, it must be remembered that a court exercises continuing control and jurisdiction over its judgments and orders, including their enforcement, and in the absence of a statute to the contrary could specify the manner in which they are to be carried out. Being apprized of no statute to the contrary the court could specify the payment of the appraised value of such property, or any part thereof into the hands of the sheriff, by the party electing to take the estate. This possibility is recognized in Section 12039, General Code, relating to the distribution of moneys received by him in partition actions, wherein it is provided as follows:

“The money or securities arising from a sale of, or an election to take the estate, shall be distributed and paid, by order of the court, to the parties entitled thereto, in lieu of their respective parts and proportions of the estate, according to their rights therein. All receipts of such money or securities by the sheriff are in his official capacity, and his sureties on his official bond shall be liable for any misapplication thereof.”

Further, I am apprized of no provision of law, which would prevent the party or parties electing to take the property at the appraised value from constituting the sheriff his or their agent for the distribution of the purchase money or so much thereof as he or they may desire in accordance with the provisions of Sections 12034 and 12039, *supra*.

With respect to the question of poundage to which a sheriff is entitled where property is taken at its appraised value upon the election of a party or parties to the partition action I should like to point out the general rule of construction applicable to statutory provisions allowing poundage to enforcement officers which is aptly stated in the case of *Trumbull Savings & Loan Company v. Jones et al.*, 27 N. P. (N. S.) 469, the syllabus of which reads as follows:

“The statutory provision for allowance of poundage to a sheriff requires strict construction and permits such an allowance only on money made and paid, and where property is sold at sheriff's sale to the second mortgagee, and by arrangement the first mortgagee accepts a new mortgage for the amount of its claim and no money at all is paid to the sheriff, there can be no allowance made for poundage.”

Further evidence of the strictness of the construction given these statutes is evidenced, though not stated in the case of *Union Joint Stock*

Land Bank v. Selden et al., 64 O. App. 182, 18 O. O. 28, 28 N. E. (2nd) 567, the syllabus of which reads as follows:

“Under Section 2845, General Code, the right of the sheriff to poundage is limited to ‘moneys actually made and paid to the sheriff’; and even on money actually made and paid to the sheriff, his right to poundage is limited to the amount ‘over and above the claim’ of a purchaser who is ‘entitled to a part of the proceeds’ of the sale. Where the facts bring a case within either of these limitations, the sheriff is not entitled to poundage.”

While both of the foregoing cases involve sales of real estate other than on orders of sale in partition actions they establish the principal of statutory construction by which one must be guided in construing the language of Section 2845 supra, relating to poundage in partition actions. It will be noted that said section reads: “except in *writs of sale* in partition he shall receive * * *”. It appears eminently clear, therefore, that the poundage allowable in partition actions is limited to only those in which the property is sold by the sheriff pursuant to a writ of sale and that no authority is conferred therein upon the sheriff to collect poundage on any sums coming into his possession as the result of the property being adjudged to a party or parties to the partition action pursuant to an election to take the same by such party or parties.

In conclusion, therefore, you are advised that it is my opinion that:

1. Where real estate is sold by the sheriff in obedience to a writ of sale in partition to one of the parties to the partition action such purchaser may pay one or more of the other parties to the action his, her or their proportionate share or shares of such purchase price and receipts therefor must be accepted by the sheriff in lieu of purchase money.
2. Where real estate is sold by the sheriff in obedience to a writ of sale in partition to one of the parties to the partition action the sheriff is entitled to collect poundage only on that portion of the purchase price coming into his hands.
3. Where one or more of the parties to a partition action elects to take the estate at its appraised value no portion of the purchase money therefor is required to be paid into the hands of the sheriff.
4. Where one or more of the parties to a partition action elects to take the estate at its appraised value the sheriff is not entitled to collect

poundage on any portion of the purchase money therefor which may be paid into his hands.

Respectfully,

HERBERT S. DUFFY,
Attorney General.