

Opinion No. 555**Mortgages—Chattel Mortgages—Foreclosure—Sheriff—Replevin.**

HELD: Section 8286, R. C. M., 1921, permits power to be given the sheriff in a chattel mortgage, to sell mortgaged personal property. But where the mortgagor is in actual possession and refuses to deliver the possession of the chattel the sheriff may not take same by force. In such case the mortgagor or the sheriff should proceed by replevin.

June 18, 1934.

You ask for information as to your authority in connection with chattel mortgage sales, and an interpretation of Section 8286 Revised Codes, as to such authority. This section provides in part: "It is lawful for the mortgagor of personal property to insert in his mortgage a clause authorizing the sheriff of the county in which said property, or any part thereof, may be, to execute the power of sale therein granted to the mortgagee, his legal representative and assigns, in which case the sheriff of such county, at the time of default, at the request of the mortgagee, must, and it is hereby made his duty to advertise and sell the whole or any part of the mortgaged property, wherever it may be, in the manner provided in such mortgage; * * *."

Provisions in chattel mortgages which authorize the mortgagee, or his agents, to sell property on default, are common and authorized by the laws of many states. The authority of a mortgagee does not include a right to use force or violence in foreclosing his mortgage and this limitation has been expressed as follows by the Supreme Court of South Carolina:

"The right to seize carries with it by necessary implication the right to do whatever is reasonably necessary to make the seizure, including the right to peaceably enter upon the premises of the mortgagor. There is one restriction, however, which the law imposes upon this right. It must be exercised without provoking a breach of the peace; and, if the mortgagee finds that he cannot get possession without committing a breach of the peace, he must stay his hand, and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it." (Willis v. Whittle, et al., 64 S. E. 410.) See also: 57 A. L. R., 26, note; 11 C. J. 560; Baer v. Colonial Finance Co., 182 N. E. 521.

Your question includes a determination of what greater rights you may have as sheriff in connection with such foreclosure sales than exists in the mortgagee or his agent. Undoubtedly a sale made by a sheriff is conducted in his official capacity. (Vose v. Whitney, 7 Mont. 385). Also undoubtedly a

sheriff has a right to go upon the premises of the mortgagor and remove the property and may not be interfered with by third persons. Also the return of the sheriff on such foreclosures is given certain evidential value under the statute. (Section 8288, R. C. M. 1921.)

A sheriff with a certified copy of a chattel mortgage and instructions to foreclose, has not the same authority as with a writ of replevin or attachment, which constitute court orders. Where a mortgagor is in actual possession of property and refuses to deliver same unless it is taken by force or violence, a very serious question exists as to your authority. In that regard I cannot find that this statute nor one similar to it has been construed.

As statutes which give the mortgagee the right to sell are not construed to give him of the right to take property by force, I would conclude that a similar statute which places the duty upon a sheriff to sell does not authorize him to take same by force and that under those circumstances the mortgagee or sheriff should proceed by replevin.