

No. 195

**COUNTY COMMISSIONERS—UNDERSHERIFF—
DEPUTY COUNTY OFFICERS, appointment of must be
approved by county commissioners.**

Held: In counties of the seventh class, having less than 2000 population, there shall not be appointed any deputy county officer or deputy designated by any county officer of such county, unless the appointment of such deputy, designating the term of service and compensation thereof, shall be first authorized by the board of county commissioners of such county.

August 4, 1941.

Mr. Nat Allen
County Attorney
Golden Valley County
Ryegate, Montana

Dear Mr. Allen:

You have submitted the following:

"The sheriff has asked me if Chapter 168 of the 1941 Session Laws in any way affects the decision reached in Opinion Number 14, page 16, Volume 17 of Attorney General's Opinions.

"In my opinion it does not. Our Statutes make a distinction between deputies and undersheriffs by having separate sections to treat with each one. There is a distinction between the two made, see Blacks Law Dictionary, third edition—Undersheriffs.

"Since our statutes treat them distinctly, and since Chapter 168 makes no mention of undersheriff, it must be taken that they meant the law to be the same on undersheriffs as it always was. Thus Opinion Number 14, referred to, is still the law."

Your query cannot be answered without first determining the classification of an undersheriff. Is he a deputy county officer? If the answer is "Yes," then the provisions of Chapter 168, Laws of 1941, prevail and should be observed by officers of any county of the seventh class, having less than 2,000 population, as will more fully hereinafter appear.

In the most ancient times of the English Common Law, the sheriff had his undersheriff; and **such deputy**, when appointed, was vested with authority to perform every ministerial act the principal sheriff could perform. (24 R. C. L. 979.)

Funk and Wagnall's New Standard Dictionary defines an undersheriff as "a deputy, especially one upon whom the sheriff's duties devolve in his absence." Webster's International Dictionary defines an undersheriff to be "a sheriff's deputy; specif., one on whom the sheriff's powers devolve in case of the latter's incapacity or a vacancy in the office."

"Under-sheriff" is "deputy sheriff" authorized by statute to sell mortgaged premises and execute deed. (Rev. St. 1931, Section 71-209-212.)

In the syllabus of *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 456, 462, it is said:

A sheriff's writ of execution and certificate of sale were not void although they purported to have been executed by the sheriff through an undersheriff, even conceding that there was no officer technically designated by statute as an undersheriff; it being a matter of common knowledge that one of the sheriff's deputies is always designated by the sheriff as an "undersheriff," meaning his chief deputy with authority by virtue of his appointment to execute all the ordinary duties of the office of sheriff.

"Undersheriff" is merely another name for a "deputy sheriff," so that a certificate of sale and deed of land executed in pursuance of a sheriff's sale by an undersheriff was sufficient to convey good title.

In the case of *Delfelder v. Teton Land and Investment Company*, 24 Pac. (2nd) 702, an under-sheriff was defined to be a general deputy. The court in that case said:

"An undersheriff has always, in every county of the state, performed the duties of a deputy and has always been regarded as qualified to act for the sheriff the same as a deputy. There can be no doubt, we think, that he is simply what has been termed a general deputy, slightly more important than a simple deputy, by reason of the fact that he is qualified and designated by law as the particular deputy who, under certain conditions, shall become the sheriff."

This language is used in *Tillotson v. Cheethan*, 2 Johns. (N. Y.) 63, 70:

"The deputy is an officer coeval in point of antiquity with the sheriff * * *. The creation of deputies arises from an impossibility of the sheriff's performing all the duties of his office in person. The powers of a deputy have consequently been extended at an early date. The general criterion by which to test his authority is declared in the case of *Levett v. Farrar Cro. Eliz.* 294, 78 Reprint 574, in which the court said that if a writ be directed to the sheriff by the name of his office, and not by particular name, and doth not expressly command him to execute it in person, the undersheriff may execute it."

In 57 C. J. 730, it is said:

"Deputy sheriffs are of two kinds: first, general deputy or undersheriff, who, by virtue of his appointment has authority to execute all the ordinary duties of the office of sheriff (*Comyns Dig. tit Viscount, P. 542*); one who executes process without special authority from the sheriff, and may even delegate authority in the name of the sheriff of its execution to a special deputy; and second, a special deputy, who is an officer pro hac vice, to execute a particular writ on some certain occasion, but acts under a specific and not a general appointment and authority. *Shirran v. Dallas*, 21 Cal. A. 405, 132 Pac. 454, 456, 462; *Allen v. Smith*, 12 N. J. L. 159; *Meyer v. Bishop*, 27 N. J. Eq. 141 (aff. 28 N. J. Eq. 239); *Com. v. Armstrong*, 4 Pa. Co. 5."

Thus it can be seen from the cases and authorities hereinabove cited the undersheriff is classified as a deputy. But let us go further and see what the statutes of Montana have to say with reference to the classification. Section 4873 of the Revised Codes of Montana, 1935, insofar as pertinent here provides for the annual **COMPENSATION ALLOWED DEPUTIES AND ASSISTANTS** and therein, under sixth and seventh class counties, you will find the undersheriff is listed as such a deputy. Section 4875 of the Revised Codes of Montana, 1935, gives the number of deputies allowed and therein is found the following: ". . . The whole number of deputies allowed the sheriff is one undersheriff, and in addition not to exceed the following number of deputies: . . ."

Classifying the undersheriff as a deputy county officer, let us turn to the provisions of Chapter 168, Laws of 1941, Section 1 of which provides:

"That from and after sixty (60) days after the passage and approval of this act, there shall not be appointed in any county of the seventh class having less than 2,000 population, any deputy county officer or deputy designated by any county officer of such county, unless the appointment of such deputy, designating the term of service and compensation thereof, shall be first authorized by the board of county commissioners of such county."

The remainder of the chapter need not be repeated here, for the same is not pertinent to the question raised, in view of the fact no undersheriff or deputy sheriff has yet been appointed in your county.

The provisions of Section 1 are mandatory and, therefore, before an undersheriff or deputy sheriff may now be appointed by the sheriff of your county, it will be necessary for him to have the appointment authorized by the board of county commissioners.

The Opinion No. 14, p. 16, Volume 17, Report and Official Opinions of Attorney General, which you referred to, was rendered January 11, 1937, and of course has been superceded by the provisions of Chapter 168, Laws of 1941.

Therefore it is my opinion that, in counties of the seventh class, having less than 2,000 population, there shall not be appointed any deputy county officer or deputy designated by any county officer of such county, unless the appointment of such deputy, designating the term of service and compensation thereof, shall be first authorized by the board of county commissioners of such county.

Sincerely yours,

JOHN W. BONNER
Attorney General