

SHERIFFS : Constables may not supplant sheriffs in performance
of duties imposed upon sheriffs under the law.
CONSTABLES: Constables may be used as elisors in the event the
sheriff is disqualified from acting.

January 18, 1939



Hon. Berry Wall Stanley
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an opinion reading as follows:

"The Probate Judge has brought to
my attention the fact that there
is some doubt as to whether or not
a Constable can act as an adminis-
trative officer of the Probate Court.

"I would appreciate it if you would
give me your opinion on the question
and also inform me if your office has
ever made any ruling in similar mat-
ters in the past, that is, whether
or not the Constable is empowered to
serve subpoenas, et cetera, and to
act as attending officer of the court
when in session."

Briefly, your precise question, otherwise stated
from your request, is whether or not the constable may
supplant the sheriff in respect to the duties imposed upon
the sheriff by law.

At the outset, we invite your attention to a con-
sideration of Section 34 of Article 6 of the Constitution
of Missouri, which reads in part as follows:

"The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected."

Under the provisions of Chapter 9, Article 1 of the Revised Statutes of Missouri, 1929, and more particularly under the provisions of Section 1870 of said chapter, it is provided that:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Obviously, after consideration of the constitutional provision and the section above quoted, it is the duty of the sheriff to attend courts of record in their particular counties except where it has been otherwise provided for by law. The statute imposing the duties upon the several sheriffs is plain and unequivocal in its terms, and when so, no room for construction exists. *Cummins v. Kansas City Public Service Commission*, 66 S.W. (2nd) 920.

Your attention is further directed to Section 11518, R.S. Missouri, 1929, relating to the duties imposed upon every sheriff. This section of the statute is found under the provisions of Chapter 73, Article 4, R.S. Missouri, 1929, and reads in part as follows:

"Every sheriff shall * * * execute all process directed to him by legal authority, * * * and he shall attend upon all courts of record at every term * * *."

Section 2068, R.S. Missouri, 1929, relates to the election of a probate judge of the county by the sheriff in the event there be no clerk of the court. This section of the statutes reads as follows:

"The election shall be held by the clerk of the court, if there be one, if not, by the sheriff of the county. And in the event of a tie, the clerk, if there be one, or if not, the sheriff of the county, shall cast the deciding vote. The clerk of the court, if there be one, if not, the sheriff of the county, shall enter the proceedings of such election on the probate records of that day; and the special judge shall, before entering upon the discharge of his duties, take and subscribe the same oath that the judge of probate is required to take, which oath shall be filed with the records of said court."

The above section of the statute would seem to contemplate that the sheriff should be in attendance in the probate court in the event such sheriff is needed to participate in the election of the probate judge.

Attention is further directed to Section 1845, R.S. Missouri, 1929, relating to when the court or any clerk of any court of record may appoint one or more persons to execute its process in the event there is no sheriff or ministerial officer qualified to act. This section reads as follows:

"Where there is no sheriff or other ministerial officer qualified to act, or where they are interested or prejudiced, the court, or clerk thereof in vacation, may appoint one or more persons to execute its process and perform any other duty of such officer, who shall be entitled to such fees for their services in each cause as are allowed by law to sheriffs in like cases."

If the probate court may appoint another person other than the sheriff to execute its process or perform any other duty of the sheriff, it must be first made to appear that the sheriff is interested or prejudiced. In the case of *State v. Young*, 286 S.W. 29, l.c. 32, the Supreme Court of this state held that it was a matter of discretion of the court with respect to disqualifying the sheriff, and so long as such discretion was not arbitrary or unjust, then any action of the court disqualifying the sheriff would still be sustained. The court said:

"It has long been the settled law of this court that the disqualification of the sheriff under this section is a matter of discretion with the court, and unless there is some showing that the discretion exercised was arbitrary and unjust, the action of the court will not be overruled."

In the case of *State v. Jeffries*, 210 Mo. 302, l.c. 323, the Supreme Court of Missouri quoted approvingly from *State v. Hultz*, 106 Mo., l.c. 49, as follows:

"a duly chosen officer ought not to be deprived of his office save and for the gravest reason. This is true because the people have reserved to themselves the right to name their officers, and have not, save in exceptional cases, left to any one man the power to select them. . . . And when a citizen is to be deprived of his life or liberty, one of his safeguards is that it can be done only by an officer duly elected, and who is under the obligation of his oath of office and a sense of responsibility to the public which elected him. . . . The statute does not prescribe how the court shall ascertain the prejudice of the sheriff, but it is left to the discretion of the court in what form the evidence shall be presented, and of course it is for the court to say

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when it is satisfied. This investigation the law has confided to the circuit judge. Of course, his action is subject to review, if it shall appear arbitrary and unjust."

While the above observations particularly relate to the disqualification of a sheriff by the circuit judge in criminal cases, it is believed that the probate judge also exercises a discretion as to the disqualification of the sheriff with respect to the duties imposed upon such officer in the probate court, when such sheriff is interested or prejudiced.

In an opinion directed to the Honorable L.L. Robinson, Presiding Judge of the County Court of Osage County, this department ruled that "it is the mandatory duty of the sheriff to attend, when in session, each court of record * * * held in his county, either in person or by deputy, whether his services be required or not at the time of his attendance". This opinion was written by the Honorable Tyre W. Burton, Assistant Attorney General, and approved by the Honorable J.E. Taylor, Acting Attorney General.

CONCLUSION.

In view of the above, it is the opinion of this department that constables may not supplant sheriffs in the performance of the duties imposed upon such sheriffs, but that a constable may be used when, in the opinion of the probate court, the sheriff is interested or prejudiced.

We further rule that the sheriff should not be deprived of his office except for the gravest reason, and from our considerations, it is the duty of the sheriff to attend each court of record held in his county whether his services be required or not, for which he is entitled to receive a fee as indicated from the opinion submitted.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED By:

(Acting) Attorney General