CONSTITUTIONAL LAW:
OFFICERS:
SHERIFF:

IN RE: Section 4, Article IV, Constitution of 1945 does not permit the Governor to fill vacancy in office of sheriff. Such vacancy filled by County Court.

FILED
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September 16, 1946

Honorable Paul Boone
Prosecuting Attorney, Ozark County
Gainesville, Missouri

Dear Mr. Boone:

This will acknowledge receipt of your letter requesting an official opinion of this department, which reads:

> "I desire your opinion in connection with a vacancy in the office of Sheriff of Ozark County, created by the resignation of the Sheriff elected at the last general election.
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> "Section 4 of Article IV, of the Constitution of 1945, provides, that the governor shall fill all vacancies in public offices unless otherwise provided by law.
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> "Section 13143, R. S. Mo. 1939, provides that in case of vacancy in office of Sheriff, the same shall be filled by the county court.
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> "Section 13143 does not seem to be inconsistent with Section 4, of Article IV, of the Constitution of 1945, however since there has been some controversy about the matter, please give me your opinion as to whether the appointment should be made by the County Court, or by the Governor."

In connection with your question, regarding the filling of a vacancy in the office of sheriff, we must look to the appropriate constitutional provision. Article IV, Section 4, of the Constitution of 1945 provides:

> "Power of Appointment to Fill Vacancies--Tenure of Appointees.-- The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

The above section, in substance, is the same as Article V, Section 11 of the Constitution of 1875, which provides:

> "Vacancies in office--Governor may fill
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> "When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

In the case of State ex rel. Wayland v. Herring, 106 S. W. 984, 208 Mo. 708, the Supreme Court said that Section 11, Article V, supra, was intended to prevent vacancies in office and to provide a method for filling them when no other provision is made by law. At S. W. l.c. 988, the following appears:

> "* * *The framers of our Constitution, when they drew Section 11, art. 5, thereof, were considering vacancies in public offices. They foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for these vacancies as far as possible, in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law. * * *"

Section 11509, R. S. Mo. 1939, provides for filling vacancies in state and county offices which were originally filled by election by the people, and reads as follows:

> "Vacancies, how filled
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> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such

> term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date." (underscoring in first part of section ours.)

In the case of State ex rel. Wayland v. Herring, supra, the constitutionality of Section 7028, R. S. Mo. 1899, which is the same as Section 11509, supra, was attacked as being in conflict with Section 11, Article V, of the Constitution of 1875, supra. In ruling on the question and declaring Section 7028 to be constitutional, the Supreme Court said, at S. W. l.c. 989:

> "* * *There has been a uniform legislative construction of section 11 of article 5 of the Constitution since its adoption. That construction has been that the Legislature could not only provide who should make appointments to fill vacancies in office, but might also prescribe the term of the persons so appointed to fill vacancies, whether made by the Governor or some other officer or body. While courts are not bound to follow legislative construction yet when such construction has been contemporaneous and long continued, it is entitled to great weight. Ry. v. Brick Co., 85 Mo.. loc. cit. 332; State ex rel. v. Stonestreet, 99 Mo. 361, 12 S. W. 895; Amer. & Eng. Enc. of Law, vol. 6, p. 931." (underscoring ours.)

* * * * *

Such is the construction which has been given to Section 11, Article V of the Constitution of 1875, which, in substance, is the same as Section 4, Article IV of the 1945 Constitution.

The effect of a later Constitution adopting the words and context of a provision in a former Constitution, which had been judiciously construed, was stated by the Supreme Court en banc in the case of Ludlow-Saylor Wire Co. v. Wollbrinck, 205 S. W. 196, 275 Mo. 339, at S. W. l.c. 199:

* * * *

> "The rule is firmly settled that the

> adoption in a later Constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning. * * *"

The Legislature has provided for filling a vacancy in the office of sheriff. Section 13143, R. S. Mo. 1939, in part, provides:

> "Vacancy in office, how filled--private person may execute process, when
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> "Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; * * *Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

While it is true that Section 11, Article IX of the Constitution of 1875 provided that a vacancy in the office of sheriff would be filled by the County Court, it does not necessarily follow that Section 13143, supra, is unconstitutional and, therefore, inoperative

because the provisions of Section 11, Article IX of the 1875 Constitution have been omitted from the Constitution of 1945. Unless Section 13143, supra, is inconsistent with our present Constitution it shall remain in full force and effect.

Regarding the repeal of existing statutes by the adoption of a new Constitution, the rule is stated in Volume 16, C.J.S., Section 43a at page 91:

> "While a new constitution is, by its very nature intended to supersede a prior constitution, as shown above in Sec. 42, it is not intended to supersede the entire body of statutory law. To the extent that existing statutes are not expressly or impliedly repealed by the constitution, or by constitutional amendments, they remain in full force and effect. * * *"

Also on page 92 of Volume 16, the following appears:

> "* * *It is a generally accepted rule, however, that repeals by implication are not favored; in fact there is a presumption against such a repeal. A constitutional provision does not repeal a statute on the ground of repugnance or inconsistency unless they are clearly repugnant and so inconsistent that they cannot have concurrent operation, and, in order to effect a repeal by revision, a constitutional provision must be a revision of the entire subject matter so that the intention that the provision will be a substitute for the prior statute is apparent. * * *"

In the case of State ex rel. Aquamsi Land Co. v. Hostetter et al., 79 S. W.(2d) 463, 336 Mo. 391, a judgment rendered by the Cape Girardeau Court of Common Pleas was attacked on the ground that at the time the judgment was rendered that Court was no longer in existence. It was contended that prior to 1924 the Cape Girardeau Court of Common Pleas was provided for by Section 5 of the old Schedule of the Constitution of 1875, but that in 1924 the adoption of Constitutional amendment 21, entitled "Schedule" made no mention of the Court of Common Pleas and repealed the old Schedule and since no provision for the continued existence of that Court was included in the newly adopted Schedule it, therefore, became extinct. There was also a provision in the new Schedule which said that all laws, not inconsistent with the Constitution so amended,

would continue in force until amended or repealed. The Supreme Court of Missouri in ruling on the question said, at S. W. l.c. 468:

> "The plain intent of the foregoing is that the provisions of this amendment should become operative only to the extent that new provisions of fundamental law submitted therewith were adopted and embodied in the Constitution itself. Nowhere in this amendment do we find an expression that any provision of the old schedule was repealed unless in conflict with the purposes and provisions stated in the new schedule, and no such conflict appears. Neither do we find therein any provision that the authorization of certain courts of common pleas appearing in section 5 of the old schedule was repealed. As for the other twenty amendments proposed, the only one with which this authorization in section 5 of the old schedule could have been in conflict or superfluous was proposed Amendment No. 7 relating to the judicial department, and this amendment was defeated. No new fundamental law affecting the prior existing constitutional authorization of the class of common pleas courts within which the Cape Girardeau court of common pleas falls having been embodied in the Constitution itself, and the entire subject having been omitted in Amendment No. 21, it would seem that this provision of the old schedule is not within the scope of the new schedule, and was not affected thereby. Repeals by implication are not favored (Cooley's Constitutional Limitations (8 Ed.) p. 316; Black on Interpretation of Laws (2 Ed.) Sec. 107, p. 351; 12 C.J. p. 710, note 54; Endlich on Interpretation of Statutes, Sec. 210, p. 280). At page 281 in the authority last cited it is said: 'A rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.'

> The same authority at page 731, holds that the same presumption against unnecessary change of law exists in the construction of a constitutional provision. Also see Tackett v. Vogler, 85 Mo. 480, 483."

* * * * *

A careful study of Sections 11509 and 13143, fails to disclose any conflict with any provision of the new Constitution. Section 4, Article IV of the new Constitution says that the Governor shall fill all vacancies in public office unless otherwise provided by law, and the Legislature has enacted a law for filling a vacancy in the office of sheriff which provides that such vacancy shall be filled by the County Court. In the absence of any inconsistency with the Constitution, that law remains operative and in full force and effect as is provided in Section 2, of the Schedule of the Constitution of 1945, which, in part, provides:

> "Effect on Existing Laws.--All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. * * *"

CONCLUSION

In view of the foregoing, it is the opinion of this department that a vacancy in the office of sheriff shall be filled by the County Court as provided by Section 13143, R. S. Mo. 1939, which does not conflict with any provision of the Constitution of 1945.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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