SHERIFFS: Authority as conservator of the peace is county-wide, and includes violation of city ordinance if it constitutes an offense against the state. Allowed only such mileage as comes within Section 5, H.C.S.H.B. No. 872.

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March 11, 1947

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Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This is in reply to your letter dated February 28, 1947. Said letter reads in part as follows:

> "Please advise me as to the law governing the following situation as to the duty and legal authority of the Sheriff.
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> "The Village of Reeds Spring, 10 miles from Galena, incorporated as a village, has an ordinance against drunkness. On Saturday nights the city officers have a lot of trouble with men getting drunk. The Sheriff of the County is called in to handle the drunks. They have no city jail. The sheriff has been taking the prisoners to the County jail at Galena and locking them up for the night. The only charge being the violation of the village ordinance.
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> "Please advise me as to whether or not the Sheriff of the County has any legal right to take such action, or whether or not he can legally take the violators out of the town and bring them to the county jail and lock them up. Also whether or not he could collect mileage for such trips."

The problem presented involves the legal right, or duty and authority of the sheriff of a county, and how far that duty and authority extends as regards a city or town within the county and the enforcement of such city's ordinances.

Section 13136, R.S. Mo. 1939, in part reads:

> "Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. * * *"

The case of State v. Williams, 144 S.W. (2d) 98, 346 Mo. 1003, was a quo warranto proceeding by the state against the Sheriff of Jackson County to oust him from office for neglect of duty. The sheriff contended that he should not be charged with the failure of law enforcement in Kansas City as charged, because the duty to enforce the law there was upon the metropolitan police department. The court, in speaking of the county sheriff, said at l.c. 104:

> "His authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinance the cities and towns have their police departments or their town marshals. Even the state has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his responsibility under the law. Usage cannot alter the law. United States v. McDaniel, 7 Pet. 1, 8 L. Ed. 587. It is self evident that a custom or usage repugnant to the express provision of a statute is void. A policeman is an officer whose duties have been, for local convenience, carved out of the old duties of constable, and the constables were always part of the general force at the disposal of the sheriff. There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize. See Vickers

> on Police Officers. In every county there are a number of peace officers of varying authority. They and the sheriff must work in harmony. In the larger communities where dense population has increased the hardship of proper law enforcement police departments have developed scientific methods of crime detection and prevention. Larger means and a greater number of men are available to a local police department than to the county sheriff. Methods of rapid communication and transit are provided. Under these circumstances the sheriff may leave local enforcement in local hands, but only so long as reasonable efforts in good faith are made to enforce the law."

If the act complained of is an offense against the state as well as the city, in view of the above quoted authority, it would appear that the Sheriff of Stone County is responsible as the conservator of peace in the entire county, including the village of Reeds Spring, and this responsibility is not altered by the fact that Reeds Spring may have enacted city ordinances for its local police enforcement. Arrests for drunkenness, if such drunkenness constitutes any offense against the state, would be within the authority and duty of the county sheriff.

If such arrests were made for offenses against the state, and it was the duty of the sheriff as conservator of the peace to make such arrests, he, nevertheless, would not be entitled to collect mileage for the trips unless he could qualify under Section 5 of House Committee Substitute for House Bill No. 872, infra. Said Bill No. 872, passed by the 63rd General Assembly, which became effective July 1, 1946, provides for the salary and compensation of sheriffs in counties of the fourth class, which would be applicable to the Sheriff of Stone County. This County was listed as having in 1940 a population of 11,300. Section 1 of said Bill No. 872 in part provides:

> "The sheriff in counties of the fourth class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: * * * * in counties having a population of 10,000 and less than 11,500 the sum of $1300; in counties having a population of 11,500 and less than 13,000 the sum of $1900; * * * * "

Section 5 of said Bill No. 372 provides:

> "In addition to the salary provided in Section 1 of this act, the county court shall alow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

The provisions of the bill as to mileage seem clear of construction. Section 1 provides for the salaries, depending on population of the county, and says the sheriff shall receive such salary for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense. The only reference to reimbursement for mileage expense incurred in the carrying out of these official duties is Section 5, which provides for payment of actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile. The case of Maxwell v. Andrew County, 146 S.W. (2d) 621, 347 Mo. 156, involves the question of alleged overpayment of expenses to the Sheriff of Andrew County. The statutes relating to sheriffs at that time provided for certain fees as payment for their services, and a mileage allowance (similar to Section 5 of Bill No. 372), which provided ten cents "for each mile actually traveled in serving any venire summons, writ, subpoena, or other order of court, when served more than five miles from the place where the court is held * * *." The court, in the Maxwell case, supra, said at l.c. 625:

> "But our statutes do not provide any compensation for the work which the sheriff may have to do in thus preserving the public peace. Sections 11791, 11792, R.S.Mo. 1929, Mo. St. Ann. Sections 11791, 11792, pp. 7014, 7017. They do provide that the sheriff in executing a warrant placed in his hands by a court or magistrate shall be allowed certain fees and mileage, but in performing his duty as a conservator of the peace and in detecting and apprehending without warrant, as he may in certain cases, persons guilty of crime, he is not by statute allowed compensation.

> "It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. * * *
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> "The statutes regulating the compensation of sheriffs expressly provide for the payment of mileage in certain cases. For example, such provision is made when the officer is serving subpoenas or writs or transporting a prisoner to the penitentiary. The specification in the statute of instances when mileage is to be paid and money lawfully be received by the sheriff constitutes an implied prohibition upon its collection in other instances. Particularly is this true when we consider the provisions of Section 11793, specifically limiting the compensation to be received by sheriffs."

It may be that an act which constitutes an offense against a city ordinance is not an offense against the state. As was stated by the Supreme Court of Tennessee in O'Haver v. Montgomery, 111 S.W. 449, l.c. 450:

> "The word 'misdemeanor,' as employed in statutes conferring power upon municipal corporations, is not wholly synonymous with the same term as used at common law, or in general statutes defining offenses against the state of a grade less than felony, but has a more restricted meaning, being limited to offenses against the smaller local government. However, it may happen, and often does happen, that an offense against the city may also be an offense against the state, and both jurisdictions may punish (Greenwood v. State, 6 Baxt. 567, 573, 574, 32 Am. Rep. 539; State v. Mason, 3 Lea, 649; Ogden v. Madison, 111 Wis. 413, 87 N.W. 568, 55 L.R.A. 506); but there are many offenses against municipalities which are not offenses against the state, and which the legislative bodies of municipal corporations are

> authorized to define and declare by ordinance * "

If the act in question falls in such category, it is the duty of the local officials to enforce the ordinance. If such be the case, the enforcement of such ordinance would not be one of the official services which the sheriff is called upon to perform. However, by Section 7360, R.S. Mo. 1939, it may be the sheriff's duty to accept such offenders in the county jail. Said Section 7360 of Chapter 38, which are miscellaneous provisions applicable to all cities, towns and villages, provides:

> "If any city as in this chapter provided for have no suitable and safe place of confinement, the defendant may be committed to the common jail of the county by the mayor or police judge of such city, and it shall be the duty of the sheriff, upon the receipt of a warrant of commitment from the mayor or police judge, if he have room, to receive and safely keep such prisoner until discharged by due process of law. Such city shall pay the board of such prisoner at the same rate as may now or hereafter be allowed by law to such sheriff for the keeping of other prisoners in his custody."

CONCLUSION

It is, therefore, the opinion of this department that, if the act complained of is an offense against both the municipal ordinance and the state, it is the duty of the sheriff to act as conservator of the peace within his county, as provided for in Section 13136, R.S. Mo. 1939. In making arrests as such conservator of the peace, the sheriff is not entitled to mileage unless he comes within the provisions of Section 5 of H.C.S.H.B. No. 872, supra. If the offense is one against the local ordinance only, and not the state, it is not the county sheriff's duty to enforce such ordinance, but the offender may be committed to the county jail under the provisions of Section 7360, R.S. Mo. 1939, supra.

Respectfully submitted,

Wm. C. COCKRILL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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