CONSTITUTIONAL LAW: Law providing circui judges shall
OFFICERS: approve compensation and appointment
INHERENT POWER OF COURT: of deputy sheriffs and deputy circuit clerks is constitutional.

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Mr. Wayne T. Walker
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"We have some new problems confronting us regarding the operation of the new Constitution and certain sections of the statutes enacted thereunder.

"Under Section 15547.209--The circuit judges of the counties of the second class are given the duties of setting the number of the sheriff's deputies and also their compensation.

"Under Section 13408.3--The circuit judges are given the duties of fixing the number and salaries of the deputies of the circuit clerk.

"Article 2 of the Constitution provides that the powers of the government shall be divided into three distinct departments--the legislative--executive and judicial--and further provides that one of these departments shall not exercise any power properly belonging to another unless specifically directed by the Constitution to do so.

"Section 11, Article 6--further provides that the compensation of all county

> officers except those which adopt and amend a charter for their own government shall be compensated and paid as provided by law.
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> "The judges of our circuit court have temporarily approved the appointment of deputy sheriffs and circuit clerks for a period of three months and have also set their salaries but they have informed the writer that they think such appointments do not belong to them as judicial officers, and by doing so they are invading the province of another department of government in violation of Article 6, Section 11 and Article 2 of the Constitution as aforesaid.
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> "The judges contend it is not their duty or within their province to fix salaries because the salaries should be fixed by the legislature, in other words, it is their contention that the phrase of 'as provided by law' means that only the legislature can make laws, and therefore, the salaries should be set by the legislature."
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> "We shall greatly appreciate your opinion concerning these matters."

Replying thereto, it seems that the Section 15547.209 to which you refer is apparently an error. We are unable to find any new bill passed by the present Legislature having such a section. However, House Bill No. 939, which was approved by the Governor on April 11, 1946, appears to be the bill regulating sheriff's salary in counties of 75,000 to 200,000 inhabitants, and Section 9 thereof provides as follows:

> "The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office. Such deputies shall be appointed by the sheriff, but no appointment shall become effective until approved by the judges of the circuit court of the county.

> The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

The section recently enacted affecting the deputies and assistants to the clerk of the Circuit Court in counties of the second class is House Bill No. 893, which was approved by the Governor on March 15, 1946, and Section 13408.3 thereof is as follows:

> "The clerk of the circuit court, in all counties of the second class, shall be entitled to such a number of deputies and assistants, to be appointed by said clerk, as the judges of the circuit court may deem necessary for the prompt and proper discharge of the duties of the office. Such deputies and assistants shall receive such salaries as may be fixed by the circuit court, to be paid out of the county treasury, in the same manner as the salary of the circuit clerk is paid."

It is observed that said last section provides that the clerk of the Circuit Court is entitled to such number of deputies and assistants, to be appointed by said clerk, "as the judges of the circuit court may deem necessary for the prompt and proper discharge of the duties of the office."

Section 9 of House Bill No. 939, above quoted, has a similar provision with reference to the deputy sheriffs, and the further provision that the judges of the Circuit Court, by agreement with the sheriff, shall fix the salaries of such deputies. In other words it appears that both of said above set forth sections require the affirmative approval of the judiciary as to the number of deputy circuit clerks and the number of deputy sheriffs, and their compensation, and your question is whether such provision is violative of the Constitution.

The 1945 Constitution of Missouri is identical with the 1875 Constitution insofar as the separation of power is concerned. See Section 1 of Article II of the 1945 Constitution, which is as follows:

> "The powers of government shall be divided into three distinct departments- the legislative, executive and judicial- each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Article II of the 1945 Constitution was Article III of the Constitution of 1875.

The case of State ex rel. Allen v. Dawson, 284 Mo. 427, 224 S.W. 824, Supreme Court of Missouri, en banc, 1920, was an injunction suit instituted by two of the judges of the County Court of Buchanan County, and Buchanan County as plaintiff against the three circuit judges of said county, seeking to enjoin the judges from fixing the number of deputies in each of the offices of Buchanan County there concerned and to classify such deputies. It was there urged that the statute so authorizing was unconstitutional and was violative of Section 1 of Article VI, because the power conferred upon the circuit judges by the statute was not a judicial power. Other constitutional questions were also raised and the court had a beautiful opportunity to clarify the law on this point, but they did not pass on the constitutionality of the act. The court indicated that injunction was not the proper remedy, because the parties had an adequate remedy by law by quo warranto, on the theory that the power to appoint an officer was a franchise and sustained a writ of prohibition against the injunction suit. That case was commented on analytically in State ex inf. Walsh v. Thatcher in 1937, 102 S.W. (2d) 937, l.c. 938.

In State ex inf. v. Washburn, 167 Mo. 680, 67 S.W. 592, 90 Am. St. Rep. 450, our Supreme Court, en banc, in 1902 decided an interesting case which dealt with the power of appointment with reference to the Constitution and the division of powers. At page 695 (Mo.) the court said:

> "When, therefore, the General Assembly undertook to confer the power to appoint the third election commissioner of Kansas City on a body of men not officially connected with the State government, it undertook in effect to create an office to exercise the governmental function of filling by appointment another public office and not only to create such office but to name by description the men who were to fill it, in effect creating the office and appointing the incumbents, making the law and executing it. Section 9, Article 14, gives no such power, and article 3 forbids it."

At page 696 the court said:

> "The act of filling a public office by appointment is essentially an administrative or executive act, and, under the Constitution, can be exercised only by an officer charged with the duty of executing the laws. There is, however, an exception to this rule which does not conflict with the meaning of article 3. Courts and the General Assembly may appoint such officers or agencies, as are necessary to the exercise of their own functions. This power is essential as a right of self-preservation, and is necessary to preserve that very independence in the several departments of the government, which article 3 is designed to guard. (Mechem Publ Off., secs. 104 and 105.)"

In the Washburn case, supra, the Legislature enacted a law that one of the three election commissioners should "be chosen from three eligible citizens from the leading political party opposed to that to which" the other two commissioners belong. The court held that provision was not valid, on the ground it was an encroachment by the Legislature on the executive department. However, the facts of that case were not parallel to the facts of this case in that respect, because in the facts before us we are dealing with the authority of the court to approve its own officers and to fix their compensation.

It was further said in the Washburn case, and we grant that it was dictum and not necessary to be said in the decision of the case, that an exception to the rule exists, in that "Courts and the General Assembly may appoint such officers or agencies, as are necessary to the exercise of their own functions." They there state this inherent power is essential as a right of self-preservation and is necessary to preserve that very independence in the several departments of the government which the separation of power section of the Constitution is designed to guard and protect.

Mechem on Public Offices is likewise given as authority for the last above utterance, and such expression as last above made by the court appears to us to be sound and we have not seen it criticized in any later utterance.

In 15 C. J., page 871, par. 203, is this:

> "The legislature may provide for ministerial officers with power to perform ministerial duties necessary in the administration of the law, and it is proper that the power to appoint such officers should be delegated to the courts. * * *"

In the same volume, page 873, par. 211, the law is thus stated:

> "The right to compensation may rest upon the statute, or upon the inherent power of a court of record to appoint. * * *"

57 C. J., page 730, par. 1, declares the law to be that the sheriff "is an officer of the court and subject to its orders and directions."

11 C. J., page 848, par. 1, declares the law, with reference to the clerk, as follows:

> "A clerk of court is an officer of a court of justice who has charge of the clerical part of its business, who keeps its records and seal, issues process, enters judgments and orders, gives certified copies from the records, etc. * * * * *"

We would prefer laying our fingers on a Missouri decision squarely deciding this question, but being unable to do so we rely upon the Washburn case and the authority there cited, the reasonableness of said view with reference to the inherent power of the court, the support given to said view by the law writers, and the inclination to follow what we believe to be our duty in upholding the constitutionality of statutes unless they appear to be clearly unconstitutional.

Conclusion.

It is our opinion that the statutes enacted by the recent Legislature, making the compensation and number of deputy circuit clerks and deputy sheriffs dependent upon the approval by the circuit judges of the courts in which said officials function, are constitutional.

Very truly yours,

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APPROVED:

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