SHERIFFS: Deputies employed as private watchmen.

December 20, 1941

FILE

Mr. Richard Arens
Secretary to the Governor
State Capitol Building
Jefferson City, Missouri

Dear Mr. Arens:

Under date of December 15, 1941, you wrote this office requesting an opinion upon several questions concerning the guarding of industrial plants, utilities and transportation facilities by persons commissioned as deputy sheriffs. For convenience in replying, the letter and questions are herein set out:

> "It has been deemed advisable during the National Emergency and war period to guard certain industrial plants, utilities and transportation facilities. The plan under consideration provides that the necessary guards shall be furnished and paid by the owners and operators of such properties and that they will be commissioned deputy sheriffs.
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> "Your opinion is requested upon the following questions:
>
> "1. Are the sheriffs of the respective counties required to protect the above mentioned properties?
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> "2. May the respective sheriffs of the various counties be required to deputize suitable and proper persons for the purpose of protecting the essential industrial, utility and transportation propert

"3. By what particular statutory authority and proceedings should such deputies be commissioned?

"4. Are the respective sheriffs and their bondsmen liable for the acts of such persons as may be deputized while guarding the properties sought to be protected?

"5. May each respective sheriff require the persons he may deputize to indemnify him by a suitable bond?

"6. May such persons to be deputized be paid by the owners or operators of such property?

"7. Would persons so deputized have any claim against the county or state for compensation?

"8. May such deputies use physical force and firearms in preventing attempted or actual molestation of and damage to such property, or in apprehending persons who

(a) are apparently about to damage such property

(b) are in the act of damaging such property

(c) have damaged such property

and, if so, to what extent may such force and firearms be used?"

Before proceeding to answer specific questions, it is considered advisable to make a few general remarks upon the duties of a sheriff and his deputies and the guarding of private property.

The office of sheriff is a constitutional one, being created by Section 10 of Article IX of the Constitution. The Constitution does not prescribe the duties of the sheriff. These are found in Sections 13136 and 13138, R. S. Missouri, 1939. Briefly summarized they are, to conserve the peace, to cause all offenders against law, in his view, to enter into recognizance, to keep the peace and appear at the next term of court, to quell and suppress assaults and batteries, riots, routs, affrays and insurrections and apprehend and commit to jail all felons and traitors, and execute all legal process directed to him and attend upon the courts of record. He is authorized, by Section 13133, R. S. Missouri, 1939, to appoint one or more deputies with the approval of the judge of the circuit court and in addition thereto, by Section 13136, R. S. Missouri, 1939, is authorized, in any emergency, to appoint deputies who shall serve not to exceed thirty (30) days, and who shall be paid not to exceed Two Dollars ($2.00) per day from the county treasury. At no place is there any express direction to the sheriff to guard private property.

In carrying out the duties enumerated by statutes, it would be incumbent upon the sheriff to be diligent and vigilant in order that he might act promptly, and he would also have the duty implied of preventing breaches of the peace, riots, routs, affrays, felonies and treason, as far as it is within his power to do so. However, the only method of proceeding the sheriff has is by arrest, and no arrest can be made until some overt act towards the commission of an offense has been committed.

In this country it has been always recognized that the first duty of the guarding of private property rests upon private individuals. The Constitution of the State of Missouri recognizes this and by Section 17 of Article II, guarantees to the citizens the right to keep and bear arms in defense of their homes, persons and property. Of course a corporation, not being a natural person, could not bear arms but it could act by its agents in protecting its own property to the same extent that a natural person in protecting his property.

In the performance of this duty upon the citizens, the practice has become quite common to employ watchmen to guard

private property, and having the watchmen commissioned as police officers, deputy sheriffs, special police officers, deputy constables, et cetera, and the paying of these special watchmen by the owner of the property. These watchmen, when so commissioned as police officers, function in a dual capacity. When they are guarding the property and acting within their scope of employment, they are merely employees of the person who has hired them and the employer is liable for their wrongful acts, done within the scope of their employment. In functioning as police officers and making arrests they step outside of their function as private employees and are public officers charged with the duties of a public officer and are liable for wrongful acts, just as any other officer of the same classification is liable for is wrongful acts. It is a question of fact to be determined by the circumstances of each case whether or not the watchmen commissioned as police officers are functioning in their private capacity or in their public capacity.

In replying to your question Number One, the duties of a sheriff are set out in Sections 13136 and 13138, R. S. Missouri, 1939, and these sections are as follows:

> "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. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

> "Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace; and he shall attend upon all courts of record at every term, and in all cities which now have or shall hereafter have a population of three hundred thousand inhabitants or more, he may employ counsel to aid and advise him in the discharge of his duties and to represent him in court, and may fix the compensation to be paid such counsel, not, however, to exceed the sum to two thousand dollars per annum: Provided, the whole compensation is paid out of the fees of his office of sheriff; and the court shall have power to audit and allow such compensation as other fees and expenses are allowed by law."

No case has been found construing these sections with regard to the guarding of private property by a sheriff. In the case of State ex inf. McKittrick v. Williams, 144 S. W. (2d) 98, a case in which ouster was sought against a sheriff for neglect of duty in failing to arrest persons violating the law, the Supreme Court, at l. c. 104, used the following language in discussing the duties of a sheriff:

> "* * * His is an important office and one of the oldest known to law. Under the common law he was the conservator of the peace within the county, had the safe keeping of the county jail and commanded the posse comitatus. One author says that 'for a thousand years the sheriff has been the principal conservator of the peace in his county, with full power to command, whenever necessary, the power of the county.' Murfree on Sheriffs. He has also been

> referred to as the chief executive officer of his county. By statute (Secs. 11516, 11518, R. S. 1929, Mo. St. Ann. Secs. 11516, 1518, p. 7435) as well, he is made the conservator of the peace within his county. His duties are described in Farmers' Mutual Fire A. v. Hunolt, Mo. App. 81 S. W. (2d) 977, 981: 'Sheriffs are given power, and it is made their duty, to preserve the peace arrest and commit to jail all felons, traitors, and other misdoers, to execute all process, and to attend upon courts of record. The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace, and it has been held that the duty of a sheriff in the enforcement of the law implies initiative on his part, and that he must be reasonable alert with respect to possible violations of the law, and is not entitled to wait until they came to his personal knowledge, but must follow up information received from any source.'"

And, again, in the case of Maxwell v. Andrew County, 146 S. W. (2d) 621, a case involving compensation paid to a sheriff, in discussing the duties of a sheriff, at l. c. 624, the Supreme Court spoke in the following manner:

> "Respondents, however, contend that it was the duty of the sheriff to investigate complaints as to alleged criminal law violations. They say that since this duty is imposed by law on the sheriff, and since the statute makes no provisions for compensation to be paid him for the performance of such duty, he is entitled to be reimbursed

> for his reasonable expenses in connection with such activities. It is true that the sheriff is under a legal duty to investigate alleged crimes and to suppress crime and arrest felons. In speaking of the duties of the sheriff at common law Blackstone says (1 Com. 344): 'He may and is bound ex officio to pursue and take all traitors, murderers, felons and other misdoers and to commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose as well as for keeping the peace and pursuing felons, he may command all of the people of his county to attend him.' Our statute, sec. 11518, R. S. Mo. 1929, Mo. St. Ann. sec. 11518, p. 7435, reiterates this rule in the following language: 'Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors.'"

In an early Arkansas Case, St. Louis I M & S Ry. Co. v. Hackett, 24 S. W. 81, the Supreme Court of Arkansas flatly stated:

> "* * * An officer of the law cannot engage as such officer to guard the property of a private individual and, or corporation not in the custody of the law."

This statement seems to have been based upon the duties of the officer as prescribed by the laws of the state and, in the case of Texas N. O. Ry. Co., et al., v. Parsons, cited by the Court of Civil Appeals of Texas, reported in 109 S. W. at page 240, a suit brought to collect damages for alleging wrongful

acts of persons who had been commissioned deputy sheriffs and who were guarding railroad property, it was held that such persons were private employees of the railroad company and not deputy sheriffs when they are functioning in the capacity of watchmen.

In another Texas case, Lancaster et al. v. Carter, et al., 255 S. W. 392, also a case where damages were being sought because of alleged wrongful acts of persons who had been commissioned deputy sheriffs and were acting as watchmen for railroad property, the Commission of Appeals of Texas spoke in the following manner:

> "* * * The sheriff had no authority to appoint or detail a deputy to guard and watch the property of the railroad except in specific cases of threatened injury. T. & N. O. Ry. Co. v. Parsons, 102 Tex. 157, 113 S. W. 914, 132 Am. St. Rep. 857. * * *."

Many cases of similar import for numerous jurisdictions could be cited. Among these are Hudson v. St. Louis Southwestern Ry. Co., also a Texas case, 286 S. W. 766; Kusnir v. Pressed Steel Company, 201 Federal 146, decided by the District Court of New York, Southern District and Seymoure v. Director General of Railroads, 290 Federal 291, decided by the Court of Appeals of the District of Columbia. No Missouri cases bearing directly on the point have been found, but the doctrine stated in these cases seems to be partially recognized in at least two Missouri cases. In the case of Brill v. Eddy, 115 Mo. 596, a case in which damages were sought for the alleged wrongful act of a person who was guarding railroad property, and who had been commissioned as a special police officer of the City of Sedalia, the Supreme Court spoke as follows at l. c. 604:

> "It is no uncommon thing for corporations and individuals to employ duly appointed police officers to watch their property; and if such an officer so employed make an arrest for disorderly con-

> duct, the presumption is that he acted in his official capacity as the agent of the state, and not as the agent of his employer. Being an officer whose duties are prescribed by law, it should be presumed, until the contrary is made to appear, that his employment contemplates only the exercise of such powers as the law confers upon him. 2 Wood's Railway Law, 1212; Tolchester Beach Improvement Co. v. Steinmeier, 20 Atl. Rep. 188; Jardine v. Cornell, 14 Atl. Rep. 590. The presumption is, however, one of fact, and it may be shown that in making the arrest he acted under orders of his employer, in which event the employer would be liable for the unlawful acts of the officer. Under the ordinance before mentioned McMahan as a police officer had a right to arrest the boy on view for hanging to the car; and if the evidence tended to show that he committed the negligent act when making or attempting to make an arrest, it would follow from what has been said that the question whether he acted under the orders of defendant or their authorized agent would be one for the jury."

And again, in Murphy v. Railroad, 168 Mo. App. 588, l. c. 593:

> "The authorities cited by both appellant and respondent agree in holding that an amusement company, railway company, or any person or persons engaged in handling the public at their places of business have a right to employ servants to maintain order and protect their property and eject objectionable characters; this person so employed may or may not be a regularly commissioned officer of the law; and

> the mere fact that such person is paid by the defendant would not, standing alone, make the defendant responsible. (Brill v. Eddy, 115 Mo. 596, 605, 22 S. W. 488; Sharp v. Erie R. Co., 76 N. E. (N. Y.) 923; Deck v. Baltimore & O. R. Co., 59 Atl. (Md.) 650; Tolchester Beach Improvement Co. v. Steinmeier, 8 L. R. A. (Md.) 846; Foster v. Grand Rapids Ry. Co. 104 N. W. (Mich.) 380; McKain v. Baltimore & O. R. Co., 64 S. E. (W. Va.) 18, 23 L. R. A. (N. S.) 289; Healey v. Lathrop, 50 N. E. (Mass.) 540; Cordner v. Boston & M. R. Co., 57 Atl. (N. H.) 234; Tucker v. Erie Ry. Co., 54 Atl. (N. J.) 557; Pennsylvania R. Co. v. Kelly, 177 Fed. 189.) The authorities further agree that when an assault occurs, if the person (when an employee as well as an officer) acts within the scope of his employment and under instructions either express or implied, general or special, of his employer, then any wrongful act in his conduct is chargeable to the employer. If his act, on the other hand, does not fall within the scope of his employment and is without direction of his employer, then of course his conduct is not chargeable to his employer. In this case, the plaintiff by his instructions assumes that the evidence shows that Coates was acting under the direction of the railway company and that what he did was within the line of his duty as such employee. The defendant by its instructions assumed the very opposite, namely, that under the state of facts presented Coates was acting without the scope of his authority and as a deputy sheriff, for which the company would not be responsible."

From the above cited cases and statutes, and other cases toward same, there is no duty placed upon a sheriff to guard

private property unless some law violation is imminent. At the present time, with our Nation at war and our population containing as it does many persons who might be sympathetic towards some of the other Nations with which we are at war, it would seem that it be the duty upon a sheriff to be extremely diligent and watchful in order that he might promptly arrest persons who would damage property vital to defense industries and take such steps as are within his power to prevent any injury to such property.

In reply to your question numbered two, there is no method by which a sheriff could be required to deputize persons for the purpose of protecting essential industries. If, under the circumstances, a failure to deputize persons would be a neglect of duty, the only remedy would be an ouster proceeding against the officer so offending. Section 12828, R. S. Missouri, 1939, and State ex inf. McKittrick v. Williams, 144 S. W. (2d) 98.

In replying to question numbered three, the method of appointing deputies is set out in Section 13133, R. S. Missouri, 1939, which is as follows:

> "Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

And it is not absolutely imperative that the appointment of the deputies be filed in the office of the Circuit Clerk. City of Festus v. Kausler, et al., 77 S. W. (2d) 197, l. c. 199:

> "We think the provision of the statute (Mo. St. Ann. Sec. 11513, p. 7433), requiring the appointment of one as deputy sheriff to be filed in the office of the clerk of the circuit court of the county,

> is directory, and that the failure to file his appointment did not deprive him of the right to claim on trial that he was a deputy sheriff at the time of the shooting. State v. Dierberger, 90 Mo. 369, 2 S. W. 286; State v. Underwood, 75 Mo. 231; State v. Muir, 20 Mo. 303."

As to your question numbered four, a sheriff deputizing persons to function as watchmen, the sheriff and his bondsmen would be liable for the wrongful acts of the deputies committed while acting in the capacity of public officers. Evans v. Hays, 1 Mo. 697, Maxwell v. Andrew County, 146 S. W. (2d) 621, l. c. 625:

> "* * * In this connection we may point out in passing that the sheriff's deputies are public officers who perform the duties and are subject to the liabilities imposed upon the sheriff himself by law. Scott v. Endicott, 225 Mo. App. 426, 38 S. W. 2d 67."

For wrongful acts committed in their private capacity, the respective employers would be liable. Cases cited above in answer to question number one.

Answering question numbered 5, there is no provision of law which would authorize a sheriff to require persons he might deputize to indemnify him by bond.

Answering question numbered 6, it is perfectly proper for private employers to pay their private employees who are commissioned as public officers. This is recognized in all of the cases cited above.

Answering question numbered 7, we fail to see where persons privately employed and paid as watchmen would have any claim against the state or county for the performance of their private duties. There is no statutory provision authorizing payment for the performance of such private duties.

The only general statute authorizing compensation to be paid deputy sheriffs out of the public funds is found in Section 13136, R. S. Missouri, 1939, and that only in an emergency not to exceed thirty (30) days.

In response to your question number 8, answering section a, such persons would have authority to do all that was reasonably necessary, under the circumstances, to prevent injury to the property they are guarding. Adams v. St. Louis-San Francisco Ry. Co., 251 S. W. 124, l. c. 125:

> "* * * That meant that it was his duty to remove trespassers. To accomplish that purpose, he was authorized to use such force as was reasonably necessary, but if, while engaged in that service, he went beyond what was reasonably necessary, the master would then be liable notwithstanding the act done by the servant should amount to a felony. Haehl v. Railroad, 119 Mo. 325, 24 S. W. 737; Whiteaker v. Railroad, 252 Mo. 438, 160 S. W. 1009."

In answer to your questions b and c, under those circumstances, the persons damaging property, or who had damaged property, would be subject to immediate arrest, and the rules of law governing the duties and powers of officers in making arrests would apply. In this case your attention is called to the case of State v. Ford, 130 S. W. (2d) 635, a case in which a town marshal was convicted of murder in the second degree for killing a prisoner when the latter made an assault upon him and attempted to seize his pistol, from which we quote at length, l. c. 639-640:

> "We need not determine here what kind or amount of force an officer may use to effect an arrest when a misdemeanant flees, because this record deals only with a situation where the prisoner forcibly <u>resisted</u> <u>arrest</u>. But as to that,

we think the doctrine of the Dierberger case is right and that of the McGehee, Salts and Roth cases, reviewed above, is wrong; and that the latter should no longer be followed. The third subdivision of sec. 3985, supra, says a homicide shall be justifiable 'when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed.' That language is broad enough to justify a homicide resulting from force (shooting, a blow or the like) necessarily exerted in effecting the arrest of an accused felon in flight. But it is not necessarily a negation of the right to use all force reasonably necessary to effect and maintain against resistance the arrest of a misdemeanant, especially in view of the provisions of Sec. 3571, supra.

"If the latter doctrine were not the law, then, as Judge Sherwood said in State v. McNally, supra, 87 Mo. 644, loc. cit. 653, 'it is patent to the most casual observation that a peace officer "would be of all men the most miserable," compelled by his duty to press forward and make arrests when ordinary misdemeanors were being committed, or where, as in the case at bar, some violent and dangerous man was "making night hideous" with the most flagrant breaches of the peace, the officer would proceed with the consciousness that though the law imperatively demands at his hands the arrest of the law breaker, yet it gave no adequate powers for the accomplishment of the end commanded, but while placing the officer in position of extreme peril took from him all protection arising from his official character and the performance of his official duty and placed him on the same plane as an ordinary individual when engaged in a private quarrel,

and invoking the doctrine of self-defense. The bare statement of such a proposition constitutes its own ample refutation. The law never requires an impossibility, and having made it the duty of peace officers to make arrests, to quell disturbances and breaches of the peace, it is not so unreasonable, as to deny the means to compass the end commanded.'

"State ex rel. and to use of Kaercher v. Roth, supra, 330 Mo. 105, loc. cit. 110, 49 S. W. 2d 109, loc. cit. 110, looks to 5 C. J. Sec. 62, p. 426, note, 95a(2), and State v. McClure, 166 N. C. 321, 330, 81 S. E. 458, for the reason behind the rule forbidding the use of a deadly weapon in making arrests on misdemeanor charges. These are quoted as follows: 'As the law-making power itself could not inflict the death penalty as a punishment for a misdemeanor, "it would ill become the 'majesty' of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest and dismissed with a nominal fine."'

"That may be true when the accused flees, but how can it be thought the majesty of the law is served by subjecting peace officers to invited personal violence in the apprehension of misdemeanants and making the arrest contingent on which is the 'better man.' Sec. 3985, supra, expressly covers felonies. The punishment in all but a few is less than death. As to some the maximum punishment is only two years in the penitentiary and may even be graduated down to a fine of $100. For instance, see Sec. 4029, R. S. 1929, Mo. St. Ann. Sec. 4029, p. 2835, forbidding the carrying of concealed weapons. Sec. 3985, also expressly covers rioting and breaches of the peace, both of which are

misdemeanors, Sec's 4222, 4247, Mo. St. Ann. pp. 2958, 2965. The footnotes to 5 C. J. p. 426, note 95 and 30 C. J. p. 41, note 90, indicate the weight of authority is against the view we have taken in this case. But the analysis of the decisions in 3 A. L. R. page 1170, 1175, note and 42 A. L. R. 1200, 1203, note, shows that many well reasoned decisions support it."

Respectfully submitted,

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APPROVED:

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