

vided by law, I am approving this lease as is evidenced by my approval endorsed thereon and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

2308.

COURT CONSTABLES—AUTHORITY TO APPOINT AND TO FIX COMPENSATION—LODGED IN ALL COMMON PLEAS JUDGES -- NOT IN INDIVIDUAL JUDGE — AUTHORITY NOT DELEGATED TO ONE JUDGE-- WHEN COUNTY AUDITOR MAY REFUSE TO DRAW WARRANT.

*SYLLABUS:*

1. *The authority to appoint court constables is lodged in the court of common pleas and not in the individual judges of such court. In a county having four common pleas judges, all four of the judges comprise the court of common pleas of such county and all four of such judges must join in the appointment of court constables, as provided by Section 1692 G. C.*

2. *All four such judges of the court of common pleas in such county, must join in fixing the compensation to be paid to court constables of such court, as provided by Section 1693 G. C.*

3. *Where the law plainly states that the court, in the one instance shall make such appointment and the judges of the court, in the second instance shall fix their compensation, such authority is carried to all the members of such court and all members are required to act, nor can the judges of such court delegate such authority to one of their number.*

4. *Where and when, in a county the court of common pleas consists of four judges, and one of the judges appoints a court constable, fixes his compensation and executes a voucher to the county auditor for the payment of such salary, the county auditor may refuse to draw a warrant thereon.*

COLUMBUS, OHIO, April 14, 1938.

HONORABLE A. C. L. BARTHELMEH, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date as follows:

"This office is desirous of having your opinion on the interpretation of General Code Sections 1692 and 1693. The four judges comprising the Common Pleas Court of Stark County adopted the following resolution:

WHEREAS, for some years it has been the policy and practice of the judges of the Court of Common Pleas of Stark County, Ohio, the Judge of the Division of Domestic Relations included, in the employment of constables, stenographers, assistants and clerks who devote their services and time specially and in the main, to a particular branch or room of said Court of Common Pleas, to consider and recognize the Judge regularly presiding in said particular branch or room, duly authorized and empowered to employ said constables, stenographers, assistants and clerks, in so far as such authority and power is by the statutes vested in the Judges of said Court, and

WHEREAS, said policy and practice has not been made a matter of record.

NOW THEREFORE, be it resolved by said Judges of said Court, that in the employment of constables, stenographers, clerks, assistants and employees who regularly devote their time and services specially and in the main, a particular branch or room of said Court, but in the employment of other constables, stenographers, clerks, assistants and employees, the Judge regularly presiding in said particular branch or room, is authorized and empowered to employ from time to time, including fixing compensation, such constables, stenographers, clerks, assistants and employees, but not other constables, stenographers, assistants and employees in so far as such authority and power is by the statutes vested in the Judges of said Court, all until the further order of the Judges of this Court, in the matter aforesaid.

And be it resolved, further, that this resolution upon its adoption by the Judges of this Court, be ordered entered upon the Records of the Court.

Joseph L. Floyd,  
George N. Graham,  
Thomas H. Leahy,  
Frank N. Sweitzer,

Judges of the Common Pleas Court.'

December 31, 1937.

Thereafter one of said judges caused a journal entry to be placed upon the records which is as follows:

'STATE OF OHIO } STARK COUNTY, }	SS.	Common Pleas Court
In the Matter of the appointment of Frank Adams, as Court Con- stable of the Court of Common Pleas of Stark County, Ohio.	}	Journal Entry.

FRANK ADAMS is hereby appointed Court Constable for the Common Pleas Court of Stark County, Ohio, to be attached to Court Room Number 3, for the term of one year beginning on the 1st day of January, 1938, at a salary fixed at the sum of \$1980.00 as provided by law.

Jos. L. Floyd,  
Judge.'

The remaining three judges without entry other than such entry as is on record for the year 1937 have continued the salaries of the constables serving in their respective rooms which is namely, \$1800.00 annually.

The commissioners have appropriated a sum of \$7,200.00 for court constables, which will be noted is insufficient in view of the salary fixed by the Hon. Joseph L. Floyd for the bailiff serving in his court room, which said salary is fixed as \$1980.00, leaving in the Commissioners' appropriation a deficit of \$180.00.

Our inquiry is:

First: Is the resolution as adopted December 31, 1937, by the judges comprising the common pleas court of this county of any force and effect:

Second: Can an individual judge appoint a court constable and fix the salary?

Third: What are the duties of a county auditor when an insufficient amount has been appropriated by the commissioners for the payment of court constables? Is the auditor compelled by law to recognize the order of a single judge and pay out the total sum appropriated or shall he now refuse further payment?"

Your inquiry involves the power and authority of judges of the Court of Common Pleas when acting in a ministerial or administrative capacity. Such judges when acting in a judicial capacity have some inherent power, but when acting in an administrative capacity they are pure creatures of the statute, having such power as is expressly delegated by the General Assembly together with such implied power as is necessary to carry into effect the power expressly delegated.

These propositions are so elemental and fundamental as to need no authority for their support. Your inquiry is so comprehensive and involves the consideration of so much statutory law as to make a short, concise opinion impossible.

I note the following statement in the resolution you submit:

"\* \* \* for some years it has been the policy and practice of the judges of the Court of Common Pleas of Stark County, Ohio, the Judge of the Division of Domestic Relations included, in the employment of constables, stenographers, assistants and clerks who devote their services and time specially and in the main, to a particular branch or room of said Court of Common Pleas, to consider and recognize the Judge regularly presiding in said particular branch or room, duly authorized and empowered to employ said constables, stenographers, assistants and clerks, in so far as such authority and power is by the statutes vested in the Judges of said Court, \* \* \*"

Your judges realized that their "policy and practice" was limited by the statutory law, as they so state. Hence the question, to what extent does the law of Ohio warrant such policy and practice?

I take it that it was the purpose of your judges to clarify this policy and practice and make it a matter of record, but from the copy you submit, and which I quote verbatim, I can not discern the clarification. Of course, it may not be a correct copy. Of that I have no means of knowledge and must quote it as I find it, viz.:

"NOW THEREFORE, be it resolved by said Judges of said Court, that in the employment of constables, stenographers, clerks, assistants and employees who regularly devote their time and services specially and in the main, a particular branch or room of said Court, but in the employment of other constables, stenographers, clerks, assistants and employees, the Judge regularly presiding in said particular branch or room, is authorized and empowered to employ from time to time, including fixing compensation, such constables, stenographers, clerks, assistants and employees, but not other constables, stenographers, assistants and employees in so far as such authority and power is by the statutes vested in the Judges of said Court, all until the further order of the Judges of this Court, in the matter aforesaid."

It would seem that there are some omissions in this paragraph of the resolution that render it, not only not clear, but unintelligible, consequently I will consider your specific questions, viz.:

"First: Is the resolution as adopted December 31, 1937, by the judges comprising the common pleas court of this county of any force and effect?

Second: Can an individual judge appoint a court constable and fix the salary?

Third: What are the duties of a county auditor when an insufficient amount has been appropriated by the commissioners for payment of court constables? Is the auditor compelled by law to recognize the order of a single judge and pay out the total sum appropriated or shall he now refuse further payment?"

The pertinence of your question becomes apparent from the statement that three of your judges continued their constables at \$1800.00 per year and one appointed a constable for the year of 1938 and fixed his salary at \$1980.00 per year and that the county commissioners have appropriated the sum of \$7200.00 for the year for four constables.

As your inquiry is limited to a court constable, this opinion will be so limited and the sufficiency or insufficiency of the resolution in question will be considered only in so far as it refers to court constables.

Sections 1541 and 1692 G. C. evidence the grant of authority for the appointment of court constables. Section 1541 G. C. deals only

with the authority to appoint a *chief court constable*. Inasmuch as the appointment of a chief court constable is of no concern herein to you, I will advert to and quote Section 1692 G. C.:

“When in the opinion of the *court*, the business thereof so requires, *each court* of common pleas, court of appeals, superior court, insolvency court, in each county of the state and in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases.” (Italics the writer’s.)

This section was held constitutional in case of *State vs. Sayre*, 12 C. C. (N. S.) p. 268. But the court in the same case held that in so far as it was sought to be made applicable to probate courts, it was repealed by the subsequent enactment of Section 2977 G. C. known as the County Officers Fee Bill.

Section 1693 G. C. provides that each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. It will be noted that at first blush Sections 1692 and 1693 G. C. do not appear to be in perfect harmony, but by the application of a bit of common sense construction, it will be seen that both can and should be preserved. The apparent inconsistency arises from the fact that Section 1692 G. C. requires that court constables shall be appointed by the court and Section 1693 G. C. provides that their compensation shall be fixed by the judge or judges of the court making the appointment.

As I take it, it was the legislative intent that in counties where one judge comprised the court, that one judge could fix the compensation, but in counties wherein the court consisted of two or more judges, a majority of all the judges was required to concur in such appointment and fixing of compensation. There are good reasons why this should be true. It would be an anomaly to require the court in a particular county having more than one common pleas judge to appoint court constables and then empower one judge thereof to fix their compensation. If, as in your county, the court, which consists of four judges, appointed court constables and each

particular judge was authorized to fix the compensation of the court constable who served in his room, a continuous chaotic condition would necessarily result.

It will be noted that I have made a distinction between "courts" and "judges" herein. As authority for such distinction, I cite and quote 11 O. J. Section 3, pages 632 and 633:

"A distinction is recognized between courts and judges. The court is a tribunal organized for the purpose of administering justice, while the judge is the officer who presides over that tribunal. The terms are sometimes used interchangeably and synonymously, but they are never technically the same in meaning. The judges of courts, while an indispensable part thereof, are not the courts, although provided for by the same constitution, but are public officers selected to administer the law in and preside over said courts. The distinction between common pleas courts and common pleas judges is recognized by Article IV, Section 4 of the state constitution and the decisions of the supreme court" This text is made up from the cases:

*State, ex. rel. Hawke vs. Lee Blond*, 108 O. S. 126;

*Barner vs Barner*, 19 O. A. 458, in which motion to certify was overruled by the Supreme Court.

*Slaughter vs. State*, 18, O. A. 311; motion to certify overruled by the Supreme Court;

Section 4, Article IV of the Constitution of Ohio.

These authorities bear out and warrant the text.

If the authorities above cited need to be fortified, the fortification is found in 7 Ruling Case Law, Section 2, pages 973 and 974, which I quote:

"A court has frequently been defined as a place where justice is judicially administered, but other authorities have deemed incomplete this definition of a court merely as a place, and have accordingly held that a court consists of persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice. A time when, a place where, and persons by whom judicial functions are to be exercised, are essential to complete the idea of a court in the general legal acceptance of the term. A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists

only in legal contemplation, very similar to a corporation. While there is a well-defined and generally recognized distinction between a judge and a judicial tribunal yet the judge of a court while presiding over it is by common courtesy called 'the court' and the words 'court' and 'judge' are frequently used in the statutes of the various states as synonymous and convertible terms. Whether an act is to be performed by the one or the other is generally to be determined by the character of the act rather than by such designation. Whenever the duty imposed is found from a consideration of the cause and purposes of the act to be one which is more properly the function of the court, it will be so construed; and whenever it is manifest that the legislature meant the judge and not the court, that meaning will be applied to the words in order to carry out the legislative intent. 'Court' will always be construed to mean 'judge' and 'judge' to mean 'court' wherever either construction is necessary to carry into effect the obvious intent of the legislature. Whenever the word 'court' and the word 'jury' are used in contradistinction to each other, 'court' is used in the sense of 'judge'."

Applying this text in connection with our statutory law, I am unable to find a vestige of authority that would permit any one judge of the court of common pleas of your county to appoint a court constable and fix his compensation. The sections of the General Code dealing with this subject do not use the term "judge" and "court" interchangeably.

It surely was the intent of the General Assembly that court constables should serve the "court" and not a particular judge. Section 1692 G. C. defines the duties of court constables in your county. In substance it provides that court constables shall preserve order, attend the assignment of cases and discharge such other duties as the *court requires*—not the judge—and when so directed by the *court* they shall have the same power as sheriffs to call and impanel jurors, except in capital cases.

I do not know whether or not your judges rotate in the different rooms. If they do, a stronger argument is advanced against one judge making such appointment. If they do not rotate, it makes no difference, as the law is so unquestionably specific.

Section 1692 G. C. specifically provides that:



“When in the opinion of the court, the business thereof so requires, each court of common pleas \* \* \* shall appoint one or more court constables\* \* \*.”

If the General Assembly had intended that the judges of the court of common pleas should each appoint a court constable, it could have said so.

Your court of common pleas has four judges. All of them comprise the court and no less than all or a majority of them can appoint a court constable. Section 1693 G. C. provides that:

“Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment.”

This language is so plain as to hardly admit of restatement or elaboration. It simply means that in counties where one judge only holds the court, as judge of such court, he can fix the constable's compensation and in counties where more than one judge holds court, all the judges shall participate and a majority of such judges shall fix the compensation. The authority to appoint court constables and fix their compensation belongs to all four of the judges of your county and such authority cannot be delegated. Hence, I must hold that the first paragraph of the resolution you submit is of no effect in law in so far as it relates to court constables. No individual judge of your county has authority to appoint a court constable and fix his compensation.

The county auditor of your county is not compelled to recognize the order of a single judge of your county for the payment of a court constable's compensation. The appointment of the court constables and the fixing of their compensation being without warrant of law surely afford sufficient ground for the county auditor's refusal to draw the warrant in question.

I cite an opinion of one of my predecessors in which I concur, namely, Opinion No. 1913, Volume 1, O. A. G. 1928, page 787.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*