

January 7, 1963



Honorable John M. Dalton
Governor, State of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Dalton:

You have requested that this office provide you with a memorandum setting forth our opinion as to whether Judge Emory E. Smith is qualified for appointment as special commissioner under the provisions of Sections 476.450 to 476.570, inclusive, RSMo 1959.

You have informed us that in January, 1949, Judge Smith was convicted in the United States District Court for the Western District of Missouri of the crime of willfully evading payment of a federal income tax, a felony under the provisions of Title 26, U.S.C.A., §145(b).

Section 476.450 provides that certain judges who have ceased to hold such office "shall if they so elect, be made, constituted and appointed" special commissioners or referees.

Section 476.500 provides that any person who desires to accept the provisions of the law shall notify the governor in writing of such fact, "and if he be qualified the governor shall certify such fact to the comptroller and state auditor and to the chief justice of the supreme court."

Under the facts submitted in your request, Judge Smith has served more than twelve years as Judge of the Circuit Court and is more than 65 years of age. He has notified you, as Governor, in writing of his desire to accept the provisions of the law and to be appointed as special commissioner or referee. Hence, unless his conviction of the federal offense

above mentioned disqualifies him, he would be eligible for such appointment.

Section 476.480 RSMo 1959 provides as follows:

"Sections 476.450 to 476.510 shall not apply to any person who has been convicted of a felony in any court or who has been impeached or removed from office for misconduct."

In our opinion, Judge Smith is disqualified by the plain and unambiguous provisions of Section 476.480. That section expressly provides that the law shall not apply to any person who has been convicted of a felony in any court. Judge Smith has been "convicted of a felony" in a United States District Court in Missouri. However, it is urged on his behalf that Section 476.480 should apply only if the conviction was in a court of this State or alternatively, only if the offense of which he was convicted is defined to be a felony by the laws of this State. To construe the statute in accord with either of these contentions would, in our view, be inconsistent with the plain language of Section 476.480, as well as with its obvious intent and purpose.

The disqualification results from a conviction of a felony in any court. The word "any" is broad and all-inclusive. In Hamilton Fire Insurance Company v. Cervantes, Mo.App., 278 SW2d 20, 1. c. 24, the Court stated:

"* * * The word 'any' is all-comprehensive and the equivalent of the words 'every,' State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 S.W.2d 785, and cases cited 228 S.W.2d 788, and 'all.' * * *"

In Adams v. Maryland, 347 U.S. 179, 98 L.Ed. 608, the Supreme Court of the United States said with reference to a federal Act forbidding use of certain testimony "in any criminal proceeding . . . in any court" : "Language could be no plainer." We agree.

The United States District Court for the Western District of Missouri is clearly a court comprehended within the phrase "any court" and the offense of which Judge Smith was convicted is a "felony" in the court in which such conviction was had.

Arguments similar to those advanced on behalf of Judge Smith were considered and ruled adversely by our Supreme Court in State ex rel Barrett v. Sartorius, 351 Mo. 1237, 175 SW2d 787. Under the statutory provisions there for construction, a person convicted of a felony was deprived of the right to vote unless granted a full pardon. The Court held that the statute disqualified from voting a person who had been convicted of the offense of attempting to evade payment of federal income taxes, a felony under the laws of the United States. In ruling that such person was disqualified, the Court stated that "anyone convicted for felony under United States law is excluded from the right of voting in this State."

A minority of the Court, concurring in the result of the Sartorius case, agreed that the disqualification was not limited to convictions in Missouri courts of felonies under the laws of Missouri and committed in Missouri. The minority took the further position that the statute there in question should be construed to disqualify the voter only if he was convicted of a felony in this State or of a felony in another jurisdiction which would also be a felony if the crime had been committed in Missouri. Note was taken of the fact that evasion of payment of state income tax in Missouri is only a misdemeanor. However, the majority of the Court refused to accept any such limitation. The Court quoted and adopted from the North Dakota case of State ex rel Olson v. Langer, 65 N.D. 68, 256 NW 377, the holding that it is sufficient that the act constitute a felony in the jurisdiction in which it was committed.

The Sartorius case rules the qualifications of a voter. The Court pointed out that provisions of the kind in question "are for the protection of the public by permitting only those who have lived up to certain minimum moral and legal standards (by not committing a crime classed as a felony) to exercise the high privilege of participating in government by voting."

The Sartorius case has been cited as authority in State v. Hermann, Mo. Sup., 283 SW2d 617, which involved the qualifications of a juror, the statute providing that no person "who has been convicted of a felony" shall be permitted to serve as such. With respect to the Sartorius case, the Court stated:

"We hold that such broad language without any stated limitation disqualified from voting one who had been convicted of a felony in a federal court."

In the Hermann case, it was held, 283 SW2d 1. c. 622, that the juror having been convicted in a federal court of sending obscene letters through the mail, it "conclusively" appeared that such juror was disqualified.

There is much to be said for the view advocated by the minority in the Sartorius case as applicable to the right to vote. Our courts have held on several occasions that election laws must be liberally construed in aid of the right of suffrage. Nance v. Kearbey, 251 Mo. 374, 158 SW 629, 631; Application of Lawrence, 353 Mo. 1028, 185 SW2d 818, 820. However, considerations of such nature which might be relevant in construing the disqualification provisions of election laws are of little aid in ascertaining the legislative intent to be derived from the language employed in Section 476.480.

The compensation provided for in Section 476.450 is payable only to those qualified persons who have elected to be made, constituted and appointed special commissioners or referees, and hence is not a mere gratuity. Such special commissioners or referees are subject to call for temporary duty in any court in the State to render such duties as may be directed by the Supreme Court or as may be prescribed by law. Section 476.460 RSMo 1959. These special commissioners constitute a part of our judicial system and are directly concerned with the administration of justice by the courts of this State.

In several disbarment proceedings, our Supreme Court has held that the offense of which Judge Smith was convicted involves moral turpitude. See In re Canzoneri, Mo.Sup., 334 SW2d 30, 33. Article VII, Section 1, Constitution of Missouri 1945, provides in part that judges of the circuit court shall be liable to impeachment for "any offense involving moral turpitude."

In view of the foregoing, we cannot attribute to the General Assembly an intent to limit the application of the general language used in this section in order to permit persons convicted of crimes of this nature to serve in a judicial capacity. The statute was enacted in 1951, long after the Sartorius case was decided, and it is to be assumed that the Legislature was aware of the broad construction adopted by the

January 7, 1963

Supreme Court in the Sartorius case, and believed that it would be equally applicable to the more specific language employed in Section 476.480, "convicted of a felony in any court." Had the Legislature intended to limit the application of the broad language of this section and adopt the view expressed in the concurring opinion in the Sartorius case, it could have readily done so, just as was done in the Habitual Criminal Act, Section 556.290 RSMo 1959.

In our opinion, the language of Section 476.480 was chosen for the very purpose and intent of including as a disqualification any felony conviction such as that of which Judge Smith was convicted. The provisions of this section do not constitute a penalty, retroactive or otherwise. See State ex rel Olson v. Langer, 65 N.D. 68, 256 NW 377, quoted with approval in the Sartorius case, 175 SW2d 1. c. 900. They merely provide a means of protecting the public and maintaining unblemished and free from any suspicion the judicial system of the State.

It is the opinion of this office that a conviction of the crime of willfully evading federal income taxes, a felony under the applicable federal law, disqualifies an otherwise eligible judge from the right to accept and be entitled to the benefits of Section 476.450 to 476.510, inclusive, RSMo 1959, and that a judge so convicted is not qualified for appointment as special commissioner pursuant to said statutes.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN: sr