OFFICERS: Conviction in Federal Court does not create vacancy.
VACANCY : Service can be had on officer at usual place of abode.

March 17, 1942

3-18

Hon. J. R. Gideon
Prosecuting Attorney
Taney County
Forsyth, Missouri

FILE
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Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

"Sherman R. Bray, County Treasurer of Taney County, entered a plea of guilty of using the mail to defraud. You probably are familiar with the case as the trial was in the Federal Court in Jefferson City.

"Bray has not resigned, although he is now serving time in a Federal Prison, but is attempting to hold said office and has installed a deputy in said office who is acting for said treasurer.

"When he was sentenced and incarcerated did that create a vacancy in said office, or will it be necessary to institute quo warranto proceeding to have the office declared vacant? This man, so I understand, is incarcerated outside the state of Missouri and if an action must be filed what method would have to be used to obtain service?"

Your first question is whether or not the fact that Sherman R. Bray was sentenced and incarcerated would create a vacancy in the office.

Section 2, Article VIII of the Constitution of Missouri, provides, as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people: Provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 4561, Article 5, Chapter 31, R. S. Mo., 1939, reads as follows:

> "Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Pro-

> vided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

Section 4796, Article 8, Chapter 31, R. S. Missouri, 1939, reads as follows:

> "Every person who shall be convicted of any felony, punishable under any of the provisions of this article, shall be thereafter disqualified from holding any office of honor, profit or trust, or of voting at any election eithin this state."

In construing the above section of the Constitution, and the two sections as enacted by the legislature by reason of said Article VIII of the Constitution of Missouri, this office, on October 3, 1938, rendered an opinion to the Honorable J. E. Woodmansee, Chairman of the Board of Election Commissioners in Jackson County, Kansas City, Missouri, in which we held that persons convicted in the Federal Court, or in the courts of other states, are not disqualified to vote in Missouri. The question of holding office is also taken up in the sections which refer to the qualifications to vote, and for that reason we hold that the conviction in a Federal Court does not disqualify a person from holding office in this State. We are enclosing a copy of the opinion herein described.

Section 18, Article II of the Constitution of Missouri, reads as follows:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

By reason of the above section of the Constitution, the legislature enacted Section 12828 R. S. Missouri, 1939, which reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

The above section is not applicable to proceedings for the removal of an officer under a particular statute,

for the reason that this section applies where there is no such particular statute. (State ex rel v. Peters, (App.) 94 S. W. (2d) 930; State ex rel v. Sartorius, 95 S. W. (2d) 873.)

Section 12828, supra, declares that the officer shall forfeit his office if he fails to personally devote his time to the performance of the duties of such office. Under this section of the statutes it makes no difference if the officer has a competent deputy in charge of the office, he must personally devote his time to the office. It was so held in the case of The State ex rel Tilley v. Slover, 113 Mo. 202, l. c. 206, where the court said:

> " * * * The grave abuses that could, and did creep into the public service under that law, by which the honors and emoluments of an office could be accepted by one person and the performance of its duties 'farmed out' to another, for convenience or profit, furnished a cogent and sufficient reason for this constitutional enactment. The wholesome doctrine that 'public office is a public trust' was fortified by its provision, declaring it also a personal trust, and that no person should thereafter hold office in this state who did not personally devote his time to the performance of his official duties. That he may have deputies, who, under his supervision and control, may assist him in the performance of his official functions, does not dispense with, nor in any way lessen his obligation to personally devote his time to their performance. That this wise and salutary provision of the constitution may be enforced through the provisions of the statute under consideration as to this particular class of officers, we have no doubt."

Also, in the case of State v. Yager, 250 Mo. 388, l. c. 403, where the court said:

> " * * * The defendant was the sheriff of Pike county. It was his duty under the law to be and remain in attendance upon the circuit court of his county when the same was in session (Sec. 11212, R. S. 1909), unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom. In other words, defendant had no right wilfully, without cause, to absent himself from his county and State, as the record shows that he did, during the two days mentioned in the instruction complained of in this case. If he had the right to so absent himself for two days, without any excuse whatever, and wilfully, as he did, then he had the right to absent himself for two months or two years, and it is no excuse that during his absence his deputies may have performed as well, or better than he, the duties made incumbent upon him by law. Especially upon the facts in this case was this instruction properly refused and the converse thereof properly given. This is so for the reason that the proof shows that the absence of the sheriff from his attendance on the court was due to the fact that he had fled to a foreign State with the intention and solely for the purpose of avoiding arrest upon a warrant for a criminal offense, to-wit, for assault and battery, which warrant was, as he well knew, in the hands of the coroner of

> Pike county for service on him. What is here said will dispose of the exceptions taken by defendant to the refusal of the court to permit him to show that during his absence certain deputy sheriffs properly performed the duties of his office. As we have said, it was no excuse for his dereliction that certain deputies appointed by him may have done the work for which he was elected. There are certain elements of personal selection and personal responsibility imputed as dominating the minds of the voters in the election of officers who shall perform the statutory duties in the several counties. To take the view of defendant would be tantamount to saying that the selection of the voters is transferable and delegable on the part and at the unrestricted will of the elected, a thing which the Constitution itself specifically negatives, by providing generally that officers shall devote their time personally to the duties of the several offices to which they have been elected. (Constitution of 1875, art. 2, sec. 18.) We must therefore rule these objections and all of them against defendant."

You also inquire how to obtain service upon the defendant, or officeholder, who is now serving time in a federal prison outside the State of Missouri.

Section 12829 of Article 3, Chapter 83, reads as follows:

> "When any person has knowledge that any official mentioned in section 12828 of

> this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

In the filing of the complaint against Sherman R. Bray, County Treasurer, this section of the statute should be specifically followed. The procedure under this section of the statute is the same as the civil procedure in civil actions, or suits. It was so held in State v. Yager, 250 Mo. 388, at l. c. 401, where the court said:

> "Turning to the other objection, that this is not such a case as contemplates the granting of a change of venue, we find that the statute which prescribes some at least of the procedure required to be followed in actions under this article to remove derelict officers, provides that 'all actions and proceedings under this article shall be in the nature of civil actions, and tried as such.' (Sec. 10209, R. S. 1909.) We thus observe that the Legislature itself has seen fit, for reasons no doubt sufficient to the lawmakers, to prescribe specifically the nature of this proceeding, and that they have denominated it in express language a 'civil action.' * * * * * * *."

Also, Section 12833, Article 3, Chapter 83, R. S. Missouri, 1939, partially reads as follows:

> "* * * All actions and proceedings under this article shall be in the nature of civil actions, and tried as such."

Since the procedure under Section 12829, supra, is the same as in other civil actions, service can be had upon the officeholder, or defendant, in the same manner as in other civil actions. The service can be obtained by personal service as set out in Section 880 R. S. Missouri, 1939, which partially reads as follows:

> "A summons shall be executed, except as otherwise provided by law, either:

> * * * * * by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years; * * * * * * * * * * *."

By leaving a copy of the petition, which is the same as the complaint, and a copy of the writ, with his wife, or child over the age of fifteen years, proper service could be had. If he has no usual place of abode, where the above service can be had, it will be impossible to file any proceedings, for the reason that the service in this action cannot be had by order of publication as set out in Section 891 R. S. Missouri, 1939.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that the conviction in a Federal Court of Sherman R. Bray, County Treasurer of Taney County, does not create a vacancy in the office of County Treasurer.

It is further the opinion of this department that service can be had upon Sherman R. Bray, who is now confined in a Federal Prison outside of the State by leaving a copy of the complaint and writ at his usual place of abode, with a member of his family over the age of fifteen years.

Respectfully submitted

APPROVED:

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