OFFICERS: County treasurer cannot be appointed court reporter in the 21st Judicial Circuit, and he cannot appoint a first cousin of his wife as deputy county treasurer. The nepotism statute affects the office of treasurer.

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Hon. W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We have your letter of January 5th requesting an opinion from this department, which reads as follows:

> "The man who just recently was elected and qualified as County Treasurer has been notified by the newly elected Circuit Judge of the 21st Judicial Circuit that he intends to appoint him Court Reporter for the circuit, and has asked him to attend court at Hillsboro Monday, January 9th, to serve temporarily as such reporter.
>
> "Ralph Keith, the Treasurer mentioned, has asked that I secure a letter of opinion from your office as to his right to serve in both capacities. He tells me that he intends to resign as Treasurer if the appointment as Reporter is made permanent but, while he is merely temporarily helping out, he does not feel like giving up the office to which he was elected.
>
> "I can find nothing in the law that covers the case. I read that the Treasurer shall maintain an office and be present during working hours for the transaction of the business, but I find nothing to indicate that he cannot at the same time do other county work, nor that he is prohibited from

holding two offices at the same time. At present he has, as an assistant paid by himself, a girl who is a cousin of his wife's in his employ.

"I should like an opinion from your office on the following points:

a. Can he accept the temporary work and keep his Treasurer's position?

b. Would he be permitted in law to transact the business of the Treasurer's office by agent?

c. Does the nepotism statute affect this office of Treasurer?

d. Is there anything in the law that would compel Keith to resign as Treasurer before he could do temporary stenographic work elsewhere on occasion?

"Since the matter is urgent and I would not like Keith's opportunity to fail him, I should appreciate an immediate reply so that I may advise him accordingly."

Section 12130a, Laws of Missouri, 1937, page 425, reads as follows:

"On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a county treasurer, who shall be commissioned by the county

> court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

Iron County, according to the 1930 census, has a population of 9,642 and comes within the bracket of this section.

As stated in your request, Ralph Keith was elected to the office of county treasurer at the last general election, and I am presuming that Iron County does not operate under township organization.

Section 12138, Laws of Missouri, 1937, page 427, reads as follows:

> "Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

Section 11202, R. S. Mo. 1929, 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, <u>who shall fail personally to devote his time to the performance of the duties of such office</u>, 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."

Under Section 11718, R. S. Mo. 1929, a court reporter is an officer of the court and is appointed for the same period that the judge is elected for who appoints him. It was so held in the case of State v. Coon, 295 S. W. l. c. 823, where the court said:

> "The decision in the McKay Case was handed down April 8, 1913. The Legislature of 1919 (Laws 1919, p. 713) repealed sections 11231 and 11244, R. S. 1909, and in lieu thereof enacted section 12668, R. S. 1919, which provides that the official court reporter 'shall hold his office during the term for which the judge appointing him was elected.' It was evidently the purpose and intent of the Legislature to remove the ambiguity referred to in the McKay opinion, and to fix definitely the term of office of the official court reporter as the term for which the judge appointing him was elected."

The law does not provide for the temporary appointment of a court reporter.

Section 11719, R. S. Mo. 1929, reads as follows:

> "It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings;

> to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

It will be noticed by this section that it is the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge. Under the duties as set out in this section, it would be necessary for the court reporter to leave the county in order to take the evidence in other counties in the judicial district.

It can readily be seen that the duties of both offices are incompatible and conflicting for the reason that the circuit would be outside of the county of Iron and the incumbent county treasurer could not attend personally to both duties.

In the case of State ex rel. Tilley v. Slover, 113 Mo. 202, l. c. 206, the court said:

> "In the light of the foregoing provision in the fundamental law of the state, it is immaterial whether the duties of stenographer of the circuit court of Buchanan county are so incompatible with those of the stenographer of division number 2 of the circuit court of Jackson county as that the acceptance of the former position by the relator would, at common law, have been held to have been such an abandonment of the latter as that the same became ipso facto vacant or not. 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."

And also at l. c. 208 the court said:

> "The phrase 'misconduct in office' is broad enough to embrace any wilful malfeasance, misfeasance or nonfeasance in office, and it cannot be doubted that an official stenographer who wilfully sets at naught this constitutional prohibition by refusing to personally devote his time to the performance of his official duties, whatever his reason therefor may be, is guilty of misconduct in office, within the meaning of the statute, and may be removed from office by the judge of the court of which he is such an officer."

In the case of State v. Yager, 250 Mo. l. c. 403, the court said:

"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."

A public officer of Iron County does not come within the prohibition of Article IX, Section 18, Constitution of Missouri, because this section only applies to cities or counties having more than 200,000 inhabitants.

Article IX, Section 18, Constitution of Missouri, reads as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In view of the opinion rendered in the case of State v. Slover, supra, and the case of State v. Yager, supra, the county treasurer cannot operate or carry out the duties of his office either by lawfully appointed deputies or by agents if he should absent himself from the county.

The appointment of the first counsin of the wife of the county treasurer as an assistant would be a violation of Article XIV, Section 13, of the Constitution of Missouri, which reads as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

It was so held in the case of State ex inf. Norman v. Ellis, l. c. 164, where the court said:

> "The entire trend of recent legislation, the recent interpretation of the relation of husband and wife, is to make them different persons, each having individual rights independent of the other; each responsible for his or her conduct, independent of the other. The old fiction of oneness in a legal sense has been entirely abrogated by the statutes and by judicial interpretation. The only reason for saying that a man is not related to his wife has disappeared. With the disappearance of the reason the thing disappears; when the reason for a rule of law fails, the rule fails. When the reason for a definition of a legal term ceases, the definition is obsolete. Since at common law the reason a man was not related to his wife was because his wife had no separate legal existence, and since under modern interpretations and modern statutes she has come into existence and at law she is as distinct and individual as he is, then the fiction of no relationship vanishes. She is related to him

by affinity by reason of the engagement before the marriage, and that relationship of affinity continues after the marriage. The absurd fiction that he could not be related to her, but is related to her blood kin by marriage, disappears entirely.

"It is suggested that in using common-law terms lawmakers are presumed to use them in their common-law significance, and intend to have them applied as understood at common law. There is another rule superior to that, which is that the intention of the lawmakers and Constitution-makers must be gathered when interpreting an act or a constitutional provision. Lawmakers and the people adopting a constitutional provision have a right to put an interpretation on the words they use which meets their intention. They can define their language as they please and, if they see fit, can give a common-law phrase or word a meaning entirely contrary to its ancient usage. This the Legislature has done in Section 6632, Revised Statutes 1919, and the Constitutional Convention of 1924 and the people have done in adopting Section 13, Article XIV. The debates in the Constitutional Convention show that it was intended to apply to wives of officials, and as a matter of common knowledge the voters in 1924 so understood it.

"These respondents, having the opinion of the Attorney-General upon which to proceed, are not to be blamed morally for appointing their wives as their deputies. Nevertheless they have forfeited their offices, and therefore ouster is ordered in each case."

Also, in the case of State v. Whittle, 63 S. W. (2d) l. c. 101, the court in setting out the statement of facts, said:

> "Original proceeding in this court. Information in the nature of quo warranto. In substance it is alleged that, at a lawful meeting of the board of directors of a common school district in Miller county, Logan Stone was by said board employed and contracted with as teacher of the school in said district; that Stone is a first cousin by affinity of respondent Otto Whittle, a director of said district; that he was so employed by said board as the result of respondent Whittle and another director of the district voting in favor of him for the position; that the other director of said district voted against the employment of Stone to teach the school; that respondent Whittle, by voting to employ Stone as teacher, violated section 13, art. 14, of the Constitution, and thereby forfeited his office as director of the school district. The case was submitted on respondent Whittle's demurrer to the information."

And at l. c. 102 the court said:

> "It follows that respondent, Whittle, has forfeited his office of school director of said district, and therefore ouster is ordered against him."

Section 3, Laws of Missouri, 1933, page 376, provides as follows:

> "Every county official mentioned in this article, except the Circuit Clerk, shall be entitled to such number of deputies and assistants, to be appointed by such official, as he or she may deem necessary for the prompt and proper discharge of the duties of his or her office. * * *"

Under this section, deputy county treasurers are appointed by the county treasurer himself, but the county court fixes the compensation and number of such deputies or assistants.

If the county treasurer should appoint the first cousin of his wife, he would be violating Article XIV, Section 13, of the Missouri Constitution.

CONCLUSION

(a) In view of the above authorities, it is the opinion of this department that a county treasurer, duly elected, cannot accept temporary work as a court reporter outside of his county and still hold the position of county treasurer. He would be subject to ouster proceedings as set out in Section 11202, R. S. Mo. 1929, supra.

(b) It is further the opinion of this department that the county treasurer cannot abandon his office or absent himself from the county and transact the business of that office either by lawfully appointed deputies or by an agent.

(c) It is further the opinion of this department that the nepotism statute affects the office of county treasurer for the reason that the county treasurer himself appoints the deputies as permitted by the county court.

(d) It is further the opinion of this department that if Ralph Keith should act as court reporter in another county other than Iron county, he would be subject to ouster as set out in Section 11202, supra, and for the further reason that the law does not provide for the temporary appointment of a court reporter, but he must be appointed for the same period of time as that for which the circuit judge who appoints him is elected.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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