NEPOTISM: It is not a violation of the nepotism section of the Constitution for a county court to appoint as janitor a first cousin of one of the judges' deceased wife, providing there are no living children of the marriage aforesaid.

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February 11, 1935. 2-16

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Hon. Thomas V. Proctor,
Prosecuting Attorney,
Monroe County, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of February 8 wherein you make the following inquiry:

> "Would it be in violation of the nepotism section if a janitor is hired by the county court who is a first cousin of the wife of one of the county judges, the wife of said judge being now deceased, and all of the judges concurring and voting for the appointment of the janitor?"

Your inquiry has reference to Sec. 13 of Article XIV of the Constitution of Missouri, which is 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."

This is usually referred to as the nepotism section and its terms have been strictly construed by the courts. In the case of State v. Whittle, 63 S.W. (2d) 100, the court had before it the question of a school teacher being employed by a school district

in which a member of the school board was related to the teacher within the prohibited degree of affinity or consanguinity. In discussing this matter the Court said:

> "Of course, there must be a substantial compliance with the statute. Otherwise the teacher is not employed. It follows that, as between the district and the teacher, the power to employ is lodged with the board. However, as between the public and a director, 'the right to name or appoint' a teacher is not determined by reference to the statute. To hold that said 'right' is so determined would convict the people of intending to eradicate only a small part of the evil. Furthermore, to so hold would be absurd. Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course,a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

It was held that the respondent Whittle had forfeited his office of school director of the district and an ouster was ordered against him.

A more recent case bearing on the constitutional section is that of State v. Ferguson, 65 S.W. (2d), l.c. 99. In that case the Mayor of Monett, Mo. was ousted by quo warranto proceedings under the nepotism section because he had appointed his

first cousin to the position of pumper for the city water system. Judge Hays, in discussing the case said:

> "Obviously, said appointee Cox, the first cousin, was within the express prohibition of the nepotism section of the Constitution quoted supra. Respondent, by making said appointment, was thereby guilty of abuse of his power and authority in the premises whereby he has forfeited his right and title to said office and its franchises, and is unlawfully usurping the powers and prerogatives thereof. Therefore judgment of ouster from said office should be entered against him and our final writ of ouster should issue. It is so ordered."

Under the above decisions and in view of the section of the Constitution itself, we would have no hesitancy in holding that the county judge, in appointing his wife's first cousin, would forfeit his office; however, the question must be considered as to the effect, if any, the death of said judge's wife prior to the appointment would have. It is a well recognized principle of law that relationship by consanguinity is in its very nature incapable of dissolution. Affinity is the relationship existing in consequence of marriage between each of the married persons and the blood relatives of the other and the degrees of affinity are computed in the same way as those of consanquinity. The husband is related by affinity to all the blood relatives of his wife and the wife is related by affinity to all the blood relatives of her husband.

There is no decision directly in point in Missouri on the question of what effect the death of the wife of the county judge would have on the appointment of her cousin. In 2 Corpus Juris, we find this terse statement:

> "Death of the spouse terminates the relationship by affinity. If, however, the marriage has resulted in issue who are still living, the relationship by affinity continues."

The effect of the death of a spouse is discussed in the case of Blodget v. Brinsmaid, 9 Vt. 30, wherein the Court said:

> "There the objection taken was founded upon an affinity arising out of a marriage between the party who was alleged to have performed a judicial function, and the sister of the real

> defendant in the execution, whose property he had appraised. The appraiser having intermarried with the sister of the party, there could be no doubt of the existence of an affinity so long as the marriage continued, and consequently the only question for the court to determine in that case was whether such marriage was undissolved at the time of the performance of the judicial act. The rule as applicable to the facts of that case, was there correctly laid down, and under it there could be no doubt of the affinity, in case the marriage still subsisted. It is there said that 'consanguinity is the having the blood of some common ancestor. Affinity arises from marriage only, by which each party becomes related to all the consanguinei of the other party to the marriage; but in such case these respective consanuiniei do not become related by affinity to each other. In this respect these modes of relationship are dissimilar: 1 Bla. Com., c. 15, p. 434, Christian's notes to same; 15 Vin. Abr. 246. The relationship by consanquinity is in its nature incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is by affinity brother to his wife's sister, yet upon the death of his wife he may lawfully marry her sister.

The following cases appear to hold that the death of a spouse does not sever the relationship of affinity:

> "The relation by affinity is not lost on the absolution of the marriage any more than a blood relation is lost by the death of those from whom it is derived. The dissolution of the marriage, once lawful, by death or divorce has no effect on the issue, and can have no greater effect to annul the relation by affinity." Spear v. Robinson, 29 Me. (16 Shep.) 531, 545.

> "Where a defendant during the life of her husband stood in the fourth degree of affinity to the chancellor, as her husband was related to him in the fourth degree of consanguinity, the death of the husband did not sever the tie of affinity where there was living issue of the marriage in whose veins the blood of both parties was commingled, since the relationship of affinity was continued through the medium of the issue of the marriage." Paddock v. Wells, 2 Barb. Ch. 331, 333.

The following cases appear to hold unequivocably that the relationship by affinity ceases with the dissolution of the marriage:

> "Relationship by consanguinity is in its nature incapable of dissolution, but relationship by affinity ceases with the dissolution of the marriage which produced it." Blodget v. Brinsmaid, 9 Vt. 27, 30; Kelly v. Neely, 12 Ark. (7 Eng.) 657, 659, 56 Am. Dec. 288. Hence though a man is by affinity brother to his wife's sister, on the death of the wife he may lawfully marry the sister. Kelly v. Neely, 12 Ark. (7 Eng.) 657, 659.

> "A justice whose brother's widow became the wife of plaintiff's brother, of which marriage there was no issue, the wife being dead at the time of trial, is not related by affinity to plaintiff." Carman v. Newell (N.Y.) 1 Denio, 25, 26.

Likewise, in the case of Bigelow v. Sprague, 140 Mass., l.c. 428-429, the Court said:

> "During the trial Bigelow moved that a juror should be withdrawn from the panel on account of his relationship to Sprague. It appeared that an uncle of Sprague married an aunt of the juror, and that two uncles of the juror married aunts of Sprague, but that each of these marriages had been dissolved by the death of one of the parties, and it did not appear that there was issue of any of them living. The court rightly ruled that the juror was not related to Sprague."

CONCLUSION

In view of the foregoing, it is the opinion of this department that if the county judge in question has no children born of the marriage aforesaid, and his wife passed away prior to the appointment, the relationship by affinity as contemplated by the constitutional section is dissolved and said county judge could not be ousted by quo warranto proceedings for a violation of Section 13 of Article XIV of the Constitution of the State of Missouri.

There are three ways in which a marriage may be dissolved, viz.: by death, by divorce or annulment, and we think they are on a parity. We are not unmindful of the fact that quite often the ties of affection for the husband's relatives or the wife's relatives remain intact after the dissolution of the marriage, and to all intents and purposes the status does not change.

Upon the death of either spouse, the living spouse may remarry and thereby contract new relatives by affinity. There are no limits to the number of marriages or dissolutions; hence, it might be said that during the course of years, by marriage and dissolution, a person could become related by affinity to half the population of his county, and he would thereby be precluded from making any appointments of any relatives by affinity for fear of forfeiting his office.

We therefore adopt the above conclusion, i.e., that the county judge in question will not forfeit his office by appointing his deceased wife's first cousin as janitor, providing there are no living children born of the marriage aforesaid.

Respectfully submitted,

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APPROVED:

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