CONSTITUTIONAL LAW:
OFFICERS:
MAGISTRATES:

Under Section 25, Article V, Constitution, 1945; and Section 3, Senate Bill 207, a de facto officer claiming the office of justice of the peace on February 27, 1945, cannot qualify for the office of magistrate where such officer is unlicensed to practice law.

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June 4, 1946

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Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

Receipt is acknowledged of your letter of recent date, which was submitted in connection with your original request for an official opinion of this department. Your letter, setting forth the facts pertaining to the question on which an opinion was requested, reads in part as follows:

> "As I understand the facts, they are as follows: That at the Democratic Primary of 1942, one M. F. Thurston, Jr., David V. Bear, and Temple H. Morgett were nominated, and were elected without opposition at the November election in that year and were commissioned for terms of four years.
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> "Prior thereto, Morgett had been commissioned for a four year term in 1938; Bear was appointed to serve as a result of the resignation of another justice of the peace; and Thurston was appointed to serve after the resignation of the third justice of the peace, prior to that time.
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> "After the election in 1942, Bear and Morgett entered the army and did not resign their offices. Thurston, on the 2nd day of January, 1943 resigned his office, and George S. Starrett was appointed and commissioned to fill his vacancy caused by this resignation on the 4th day of January, 1943 and to hold office until the next election, or to hold office until his successor was elected and qualified.

> "George S. Starrett and George F. Mansur filed declarations of candidacy in 1944 for the Democratic Nomination for Justice of the peace subject to the Democratic Primary to be held in August. The County Clerk put both names on the ballot with the instruction, 'Two to be elected'. The vote for the office in the Primary was Starrett 3,071 and Mansur 2997. Both names were placed on the ballot at the General Election as the Democratic Nominees for the office. Starrett received 6,034 votes and Mansur 6,031 for the General Election. Both were later qualified and commissioned for four year terms.
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> "Mansur now has filed for the office of Magistrate as has Morgett.
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> "The question raised is, whether or not Mansur may run for the nomination of Magistrate. It is understood that he is not a lawyer but has been acting as Justice of the Peace since his commission under which he now holds. The question, of course, comes up under the New Constitution of the State of Missouri and Section Three of Senate Bill Number 207, 63rd General Assembly."

In considering the question whether or not Mansur can qualify for the office of magistrate under Section 25, Article V of the Constitution of 1945, and Section 3 of Senate Bill 207, we must first determine what his status has been while he has been acting as justice of the peace.

There were no vacancies created when Bear and Morgett entered the army and did not resign. In the case of State ex inf. McKittrick v. Wilson 350 Mo. 486, 165 S. W. (2d) 499, 143 A. L. R. 1465, it was decided by the Supreme Court that a person holding a public office did not vacate his office by being inducted into the army or by volunteering. The tenure of office for Bear and Morgett, who were elected in 1942, was for four years. Consequently, their respective terms would run until 1946. Therefore, in the general election of 1944, there was only one justice of the peace to be elected to the office which had formerly been held by Thurston.

However, it appears that the county clerk and the county court believed that another vacancy existed which had to be filled in the election of 1944. This belief was manifested by the instruction placed on the ballot in the primary election, "Two to be elected," placing Mansur's name on the ticket in the general election after he had received a lesser number of votes in the primary and commissioning both Starrett and Mansur after the general election.

Prior to the August primary, both Starrett and Mansur had filed declarations of candidacy for nomination for the office of justice of the peace. Since there was really only one justice of the peace to be elected, only one of them could receive the nomination, and according to the returns of the primary election in August, Starrett won the nomination.

Although the county clerk had placed the erroneous instruction on the ballot, "Two to be elected," the election was valid.

In the case of Application of Lawrence, 185 S. W. (2d) 818, there was involved the interpretation of the election laws pertaining to absentee ballots. Regarding the interpretation of election laws in general, the following was said at l. c. 820:

> "* * * *'Election laws must be liberally construed in aid of the right of suffrage.' * * * *"

In the case of Nance v. Kearbey 251 Mo. 374, 158 S. W. 629, which was cited with approval in the Lawrence case, supra, the county clerk had placed certain nominees for office submitted by petition before the general election under a wrong heading on the official ballot. Later a suit was brought to contest the election because of the irregularities that appeared on the ballots. Regarding the interpretation of the election laws, the following appears at Mo. l. c. 383:

> "The very taproot and reason for any election at all among a free people, is that the majority may rule; hence there are two main settled and uniform rules of interpretation, thus:
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> "First: Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. l. c. 651; Hale v. Stimson, 198 Mo. 134.) The whole tendency of American authority

> is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40.) The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.
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> "Second: The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. l. c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through BARCLAY, J., in Bowers v. Smith, 111 Mo. l. c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth (1885), 16 Q. B. Div. 245.)' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (Ledbetter v. Hall (1876), 62 Mo. 422.) In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'"

We believe that there is nothing in our election laws that would make the irregularity which appeared on the ballot of the 1944 primary election so vital as to be fatal to the entire election. The result of that election gave Starrett the most votes; consequently, only his name should have been placed on the ballot in the general election. So far as Mansur was concerned, after being defeated in the primary election for the

one existing office of justice of the peace, he should have no longer been considered for that office in the general election. Although, through the error of the county clerk, Mansur's name was placed on the ballot in the general election of 1944, he was not elected to the office of justice of the peace, nor did this error vitiate the election in view of the reasons and authority cited for upholding the primary election of 1944.

Apparently Mansur has been assuming the duties of an office which was erroneously believed to be vacant due to the former holder's having entered the service. He has only been claiming the office under color of an election which did not legally seat him in office and entitle him to the lawful right or title to such office. As to him, the election was void; and, therefore, he is only a de facto officer.

In Volume 43 Am. Jr., Section 471, page 225, is the following definition of a de facto officer:

> "* * * * A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such. * * * *" (Emphasis ours.)

In the case of State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S. W. (2d) 929, there was a proceeding in mandamus to compel the State Auditor to register a bond issued by the City of Republic. The Board of Aldermen had passed an ordinance calling the election on the bond issue, and it was contended that the election was invalid because one of the aldermen who had voted for the ordinance was not legally entitled to the office; and, therefore, was not entitled to vote on the ordinance. He had been appointed by the mayor after one member had moved from the city but had not resigned, and it was conjectural whether or not a vacancy existed when the mayor made his appointment. In determining the status of the alderman who had been appointed by the mayor, the following was said at S. W. l. c. 933:

> "Moreover, we are of the opinion that Dr. Mitchell was at least a de facto alderman. 'An officer de facto is to be distinguished from an officer de jure, and is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold. He is distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office. Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility, want of power or defect being

> unknown to the public.' McQuillin Municipal Corporations, 2nd Ed., Revised Vol. 2, Sec. 500, Page 204.
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> "Dr. Mitchell held his office on the Board of Aldermen under an appointment of the mayor of relator, he exercised the duties of this office under this appointment, and he was held out to the public as an alderman. We are therefore of the opinion that, although Section 6957 may not have been strictly complied with, he was at least a de facto officer."

In the Smith case, supra, a person was holding an office which had not been vacated under color of an appointment, and in the case at bar Mansur is holding an office which was not vacated under color of an election. We believe that the rule applied in the Smith case to determine the status of the office holder is applicable in the instant case.

Although Mansur has been a de facto officer and has had no legal title to the office, the official acts which he has performed in connection with the office which he has been claiming have been valid. It has generally been held that the official acts performed by a de facto officer in connection with his office are valid, and cannot be attacked collaterally simply because he did not have legal title to the office he was claiming. The rule has been stated as follows in Fleming v. Mulhall et al., 9 Mo. App. 71 l. c. 72:

> "It is well settled that the acts of an officer de facto, whether judicial or ministerial, are valid so far as the rights of the public, or of third parties having an interest in such acts are concerned."

The reason for holding valid the acts of de facto officers is based on a necessity to preserve the rights of third persons, and to prevent a breakdown in organized society. Thus, it was stated in Adams v. Lindell, 5 Mo. App. 197 l. c. 202:

> "* * *The act of the so-called officer being thus contrary to law, as he has no right to the office, the de facto principle

> is applied, and thus an otherwise void act is validated, not because of any character or quality attached to the so-called officer or to his office, but because this is necessary to preserve the rights of third persons and keep up the organization of society. The rule is based merely on policy, and its origin and historical development show that it is founded in comparative necessity. If the citizen is in no way in fault, if in his dealings he trusts to the non-legal authorities in whom all believe, his rights are not to be destroyed. * * * *"

Section 25, Article V of the Constitution of 1945 provides the qualifications for magistrates, and in part reads as follows:

> "* * * * Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed." (Emphasis ours.)

Pursuant to the power vested in the General Assembly to provide for the administration of magistrate courts, Senate Bill 207 was passed, and Section 3 of that law, which prescribes the qualifications for magistrates, in part reads as follows:

> "Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court

> without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being licensed to practice law. * * * *" (Emphasis ours.)

It is a cardinal rule of constitutional and statutory construction that a constitutional or statutory provision must be construed in consonance with the intent of the framers of the Constitution and the people who adopted it, and with the intent of the lawmakers who enacted the law, as the case may be.

In the case of Graves v. Purcell, 85 S. W. (2d) 543, 337 Mo. 574, the rule was stated as follows at S. W. l. c. 547:

> "In determining the true meaning and scope of constitutional or statutory provisions, the intent and purpose of the lawmakers is of primary importance. * * * *"

In construing the language of a constitutional or statutory provision nontechnical words are to be understood in their usual and ordinary sense. In this connection, the following was said concerning the construction of constitutions in State v. Adkins, 225 S. W. 981, 284 Mo. 680, at Mo. l. c. 693:

> "Concerning the construction of constitutions it has been well said that:
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> "'Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt

> them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.' * * *"

Section 25, Article V of the Constitution of 1945, supra, provides that persons who are now justices of the peace shall be eligible to the office of magistrate although they are unlicensed to practice law. The language used contains no technical nor unusual words, and applying the usual and ordinary meaning of the words appearing therein, and by not attempting to apply any complex judicial interpretation, we believe that the framers of the Constitution and the people who adopted it intended that those persons who are now justices of the peace, meaning on the date that the Constitution was adopted, February 27, 1945, should be holding their offices by virtue of a valid appointment or election and must have the clear and legal title to such office before they can qualify for the office of magistrate, unless they are licensed to practice law.

The language of Section 3, Senate Bill 207, supra, is very similar to that language appearing in the Constitution and employs words of ordinary usage. The Legislature did not intend that a meaning be given to such language that would be contrary to the meaning of the similar language in the Constitution. Therefore, under the provisions of Senate Bill 207, a person not licensed to practice law must have been holding the office of justice of the peace on February 27, 1945, under a legal right and title to such office.

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that Mansur was not duly elected to the office of justice of the peace in the general election of 1944, and that during the time he has been acting as justice of the peace he has not had the legal right and title to such office, but has only been a de facto officer. Under Section 25, Article V of the Constitution of 1945, and Section 3 of Senate Bill 207,

for persons, who are not licensed to practice law, to be eligible for the office of magistrate they must have had the legal right and title to the office of justice of the peace on February 27, 1945, or, must have heretofore been a justice of the peace in the state for at least four years.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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