COUNTY OFFICERS:--Need not devote all of their time to office unless necessary to fully discharge duties. Forfeits office by appointing relative to render service to the State.

January 4, 1938

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Honorable Lloyd C. Stark
Governor of Missouri
Jefferson City, Missouri

Dear Governor Stark:

We wish to acknowledge your request for an opinion under date of December 30, 1937, as follows:

> "Will you please give me your opinion on the following questions:
>
> 1. Is a County Treasurer, or any other elective county officer, required by law to devote all of his or her time in the performance of the duties of the office?
>
> 2. Am I correct in my belief that a county officer forfeits the office if he or she appoints a relative within the fourth degree, either by consanguinity or affinity, to render service to the State in his or her office?"

We have examined the statutes with respect to all elective county officers and fail to find any provision requiring that they devote all of their time to the performance of the duties of their office.

In 46 Corpus Juris, Section 307, page 1037, we find the following statement with reference to officers engaging in other occupations.

> "Officers need not, in the absence of a provision of law to that effect, devote all their time to the performance of their official duties, but may engage in other occupations."

In the case of State vs. Hinshaw, 197 Iowa 1265, l. c. 1272, 198 N.W. 634, l. c. 637, the Court in holding that a public officer is not required to give every instant of his time to public service said:

> "There is no contention here that appellee neglected any of his official duties whatever, nor is there any claim that he misappropriated any of the property of the state. A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office, but he is not barred because he holds public office from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest."

In the case of Fairly vs. Western Union Tel. Company, 73 Mississippi 6, 18 So. 796, l. c. 797, the Court in holding that a constitutional provision that no person shall hold an office of profit "without personally devoting his time to the performance of the duties thereof", must be given a reasonable construction, and did not prohibit a physician who was Superintendent of a State Hospital from leaving the same on his own private business when he could do so without neglect of official duty, said:

> "Section 267 of the constitution is in these words: 'No person elected or appointed to any office or employment of profit under the laws of this state, or by virtue of any ordinance of any municipality of the state,

shall hold such office or employment without personally devoting his time to the performance of the duties thereof.' It requires neither philological research and definition, nor legal interpretation, to property interpret this language and ascertain its meaning. It forbids not only the farming out of a public office, but it requires that the official shall give his own time and personal services to the performance of the duties of his office. Having been elected or appointed to a public office because of his supposed fitness for the proper performance of the duties of his place, the official himself shall be required to give his time, his attention, and his services to the discharge of his official duties. This is eminently wise and just, and it involves no hardship upon the official who seeks and accepts public station. But will the voluntary absence of an officer for two or three days from his place of official residence or business, when his sole public duty consists in the general care of the public property, over which he has the superintendence, violate either the letter or spirit of the constitutional provision we are considering? Must the superintendents of all our charitable institutions never leave their official residences or offices? Must the nearly four score sheriffs of the state, who are charged with the care of the various courthouses, never depart from their several county seats, either when the public service seems to require such absence, or when a brief absence may be had without any detriment to the public good? Shall the secretary of state never leave the capitol building and grounds, of which he is the keeper by law? These questions must have reasonable answers.

> If the public duties of an office require all the time of the public servant, then the whole time must be given. If all the time of the officer be not required for the complete and faithful execution of his trust, then he shall give such time and devote such service as shall suffice for the full and faithful discharge of the duties of his office."

Our State Constitution, Article II, Section 18, contains a provision similar to the one in the instant case, 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."

In Section 11202, R. S. Missouri 1929, we find a provision for the removal of county officers who fail to personally devote their time to the performance of the duties of their office:

> "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."

In the case of The State ex rel. Tilley vs. Slover, 113 Mo. 202, l. c. 206, 207, the Court in holding that the failure of an official stenographer to devote his personal attention to the duties of his office was a proper cause for his removal from office, 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."

In the case of State vs. Yager, 250 Mo. 388, l. c. 404, the Court in holding that the fact that the deputies of the sheriff properly performed the duties of his office will not excuse his absence from the County while the Circuit Court was in session, said:

> "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)."

From the foregoing, we are of the opinion that the elective officers of the County must personally devote their time to the duties of their office but need not devote all of their time to the office unless it is necessary to fully discharge their duties.

II

Section 13 of Article XIV of the Constitution of Missouri, commonly called the Nepotism law, provides 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."

In the case of State v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154, the Court, in construing the above amendment, said:

> "Section 13 provides that any official violating its provisions '***** shall thereby forfeit his ***** office or employment.'
>
> "He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. l. c. 511, 91 S.W. 477."

In the case of State ex inf. McKittrick v. Whittle, 63 S.W. (2d) 100, l. c. 101, the Court points out the reasons for the passage of the above amendment, declaring that for a long time prior to its passage many officials had made it a practice to appoint their relatives to official positions, many of them being inefficient and rendering no service to the public.

The Court, in its opinion, further points out that

> "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."

And in defining a public officer the Court further states, l. c. 102:

> "The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder,still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State ex rel. v. Bus, 135 Mo. 325, loc. cit. 331, 332, 36 S.W. 636,637, 33 L. R. A. 616. To the same effect, State ex rel. Zevely v. Hackmann, 300 Mo. 59, loc. cit. 66, 67, 254 S. W. 53; Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S.W. 700."

Persons holding county offices receive their authority from the law and discharge functions of government. They are, therefore, clearly, public officers.

Under the rule laid down in 12 Corpus Juris, 511, there are two methods of computing the degrees of relationship, as follows:

> "One by the canon law, which has been adopted into the common law of descents in England and the other by the civil law which is followed both there and here in determining who is entitled as

> next of kin to administer personalty of a decedent. The computation by the canon law . . . is as follows:'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, both ascending and descending."

We do not find that the courts of this State have laid down any rule as to how the relationship under the anti-nepotism provision of the statute or constitution shall be computed. In other states where anti-nepotism provisions are in force the courts have generally applied the civil rule. We believe that the courts of this State, when the matter is presented for a consideration, will adopt the civil rule and we have consequently applied that rule in computing the degree of relationship prohibited under the Constitution.

From the foregoing, we are of the opinion that county officers being public officers they would, under the above constitutional provision, forfeit their offices if, by virtue of said office, they had at the time of slection the power to and did name or appoint a relative within the fourth degree, either by consanguinity or affinity, to render service to the State.

Respectfully submitted

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APPROVED:

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