NEPOTISM: Right of City Council in Louisiana, Missouri, to appoint a brother of one of their members as an election judge in a city election.

3-13

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Honorable F. D. Wilkins
City Attorney
Louisiana, Missouri

Dear Sir:

We are in receipt of your letter dated March 1, 1934, which reads as follows:

> "The situation concerning the approaching city election is this, E. M. Sizemore, who is at present, councilman-at-large is candidate for mayor on the Republican ticket, Dr. J. W. Crewdson, who is the present mayor and who has been the mayor of the city for sixteen years is the candidate on the Democratic ticket.
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> "Under our City ordinances, the council selects six judges for each ward and there are four wards in the city, three of these judges are Democrats and three Republicans. E. M. Sizemore lives in the second ward, likewise his brother, Chas. Sizemore lives in the second ward. At the last council meeting the Republican members handed up their list of judges, likewise the Democrats and the council confirmed and appointed these judges. It so happens that Chas. Sizemore, on of the Judges in Ward No. 2 selected by the Republicans and appointed by the council is a brother of E. M. Sizemore, candidate for mayor on the Republican ticket.
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> "The question involved is, is Chas. Sizemore a competent judge in ward No. 2 under the circumstances, his brother being a candidate for mayor?"

We also acknowledge receipt of a copy of the City Charter for the city of Louisiana, Missouri, incorporated under a special act of the Legislature. Section one, Article II of said charter provides:

> "The corporate powers and duties of the inhabitants hereby incorporated under the name and style of 'City of Louisiana,' shall

> be vested in and exercised by a city council, to consist of two members from each ward, to be chosen by the qualified voters of the several wards, on Tuesday after the first Monday in March, annually, except as hereinafter provided."

Section 6, of Article II of said charter provides:

> "The council shall be the judge of election returns and qualifications of its own members, and shall determine contested elections."

Section 12, of Article II of said charter provides:

> "Each member of the council shall, before entering upon the duties of his office, take and oath that he will support the Constitution of the United States and of this state, and that he will faithfully demean himself in office."

Section 2, of Article III of said charter as amended, provides in paragraph 31:

> "To provide for the election of all elective city officers, and to provide for removing from office any person holding an office created by this act, or by ordinance, not otherwise provided for."

Section 3, of Article V of said charter provides:

> "Judges of elections shall be appointed by the city council; they shall take an oath to faithfully and impartially discharge their duties; they shall open the polls at 6 o'clock in the morning, and continue them open until 6 o'clock in the afternoon, when they shall proceed at once to ascertain and certify the result of the election in the presence of so many candidates or other persons who may see proper to be present as can conveniently be accommodated in the room; provided, that there shall never be less than ten voters present at any count."

The last decennial census for Louisiana, Missouri, shows its population as 3,549, hence it would be governed by the laws relating to cities of that size, operating under special Charters.

It is our understanding that Louisiana, Missouri, has never elected under the provisions of 6092 R. S. Mo., 1929, to become a city of the third class.

You state that your city ordinance authorizes the City Council to select election judges for the general election of your city elective officers, authorized by law. These offices are the offices set out in Section 7294 R. S. Mo., 1929, which provide:

> "At the next general election for municipal officers in all cities and towns under special charters and having three thousand inhabitants and not more than ten thousand inhabitants, and at each general election for municipal officers thereafter, there shall be elected a mayor, a councilman-at-large, one councilman for each ward, a constable, an attorney, a treasurer, who shall be, by virtue of his office, collector of the revenue of such city, an auditor, and a clerk, each of whom shall hold their respective offices for two years, and until their successors are elected and qualified. And the city council shall provide by ordinance for the election or appointment of the following officer, to-wit: an assessor. (R. S. 1919, 8709. Amended, Laws 1927, p. 357.)

The service of an election judge in your city election is a service to a political subdivision of the State of Missouri, and by your City Ordinance the City Council has the right to name persons to render this service, in your general election for city officers, that is, within constitutional limitations.

Section 13, of Article XIV of the Missouri Constitution provides:

> "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."

State ex rel. v. Whittle 63 S. W. (2d) 100, provides:

"It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions.

"It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, designated therein section 13, art. 14, * * * *

"It was adopted by the people on February 26, 1924. The submission and adoption of the amendment conclusively shows that the abuse of said power was statewide.* * * * * * * * *"

"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. * * * *."

State v. Ellis , 28 S. W. (2d) 363, 325, Mo. 154, provides:

"Section 13 provides that any official violating its provision, '* * * shall thereby forfeit his * * * office employment.'

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477.

"The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from Corpus Juris above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect!' That was clear in the debates.

"No doubt that idea was prominent in the minds of the voters who adopted it. As a matter of common knowledge it was so agitated in the newspapers.

Thus we see that our Supreme Court has reasoned that it is against public policy for a public officer to name his relative, within the prohibited degree, to perform a service for a political subdivision of the State. The office of councilman-at-large is provided for by Statute, and the courts will take judicial notice that it is a public office, and also that the City of Louisiana, which is operating under a special charter is a political subdivision of the State. In State v. Whittle a school district was held a political subdivision of the State and we submit how much more so a city must be. We also note in State v. Ellis and State v. Whittle, that our Supreme Court held that this constitutional provision is self enforcing. It is true that in those cases the court was only concerned with the effect of the constitutional inhibition upon the officer naming the person to perform the legal service, and they have consistently held that the office of the appointor was forfeited by such conduct.

Our Appellate Courts have never applied this constitutional inhibition to the officer or servant who was the intended beneficiary of the act <u>appointing or naming</u> him. In our opinion we think that the mischief intended to be eliminated and the evils sought to be eradicated should be kept in mind in order to determine what was intended by the people when they voted this Constitutional Amendment on Nepotism. The reasoning applied in the

Whittle and Ellis cases, above set out, for forfeiting the office of the officer making the appointment should apply with equal force in determining the status of the officer or servant who happens to be appointed or named, by his presumptive relative. As was said in the Ellis case, this constitutional amendment does not require an enabling act by the Legislature in order to be in force. Since it be self enforcing, in voiding the office of the appointor, it should be ~~chiefly~~ equally self enforcing, in its application to the status of the intended beneficiary, the nominee or appointee. When the people said in the amendment, "shall thereby forfeit his or her office or employment," we find no limitation in that phrase, especially when construed together with the whole amendment, which would limit its application to the nominating or appointing officer.

As heretofore set out we see, that in the city of Louisiana, election judges are provided for by ordinance, as is their oath, duties and fees. We submit that any person named or appointed as an election Judge in Louisiana, Missouri, in a manner provided by law, is a public officer. As was said in Zevely v. Hackman, 300 Mo., 59, l. c. 69:

> "In the most general and comprehensive sense a 'public office' is an agency for the State and a person whose duty it is to perform this agency is a 'public officer'. Stated more definitely a 'public office' is a charge or trust conferred by a public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law. (State ex rel. Smith v. Theus, 38 So. 870 - 72, 114 La. 1098; cited in State ex rel. v. Maroney, 191 Mo., l. c. 545)."

We reason that since it is against public policy for one to appoint his relative contrary to the constitutional inhibition, and the appointor forfeits his office by this self enforcing act, it is equally against public policy for one who has been named or appointed to have any official status by reason of the overture of his ex officio relative. The appointor being automatically subject to ouster from office by reason of his ultra vires and unconstitutional act, done contrary to what our Supreme Court reasons to be the public policy of this State, the appointee should not be tolerated to benefit by the bad conduct of the appointor. The act being grave enough to forfeit the office of the appointor, then it

is grave enough to leave the appointee without any legal rights to his office based upon the appointment by the appointor. The appointee finds himself without any title to the office which was the same status as he was in before the appointing officer acted or spoke. To reason otherwise would nullify the constitution and allow an office holder by a nepotistical appointment to perpetuate his relative in office merely upon a forfeiture of office on his part after a suit of ouster be ajudicated. Such was not the intention of the people for it would allow nepotism, the very thing the people voted to abolish, by a constitutional self enforcing amendment.

CONCLUSION.

It is the opinion of this office that Louisiana, Missouri, is a political subdivision of the State of Missouri, and that E. M. Sizemore, the councilman-at-large of said city, is a public officer of a political subdivision of this State. It is our opinion that he and his acts are subject to the consitutional inhibition relating to Nepotism.

It is our further opinion that when he as a member of the City Council, voted to name and appoint his brother, Chas. Sizemore, as election judge for Ward No. 2, in Louisiana, Missouri, and the Council pursuant thereto did name and appoint him to this public office, he was named and appointed contrary to the Missouri Constitution as it relates to Nepotism, and he has subjected himself to having his office forfeited.

We are further of the opinion that the letter and spirit of the Nepotism law was violated by your councilman-at-large and his appointment is a mullity and the office remains as vacant as it was before the Council named him. Cases like this where a man names his own brother as an election judge to sit in an election booth and collect his fee while counting votes in an election where his name heading the ticket as candidate, was the very thing the people thought they had eliminated when they passed this amendment on Nepotism. We say that the office of election judge in Ward No. 2 at Louisiana, Missouri, is vacant, and that the City Council should be forced to fill the vacancy in a manner prescribed by law and the Consitution of this State.

Respectfully submitted

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Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

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