IK THE SUPREME COURT OF MISSOURI EN BANC.

STATE OF MISSOURI, on the Information of Roy McKittrick, Attorney General, Relator, vs. WALLER W. GRAVES, Prosecuting Attorney of Jackson County, Missouri, Respondent.

NO. 36717.

SPECIAL COMMISSIONER'S REPORT.

Now comes Leon P. Embry, Special Commissioner in the above entitled action, and returns herewith all of the files received by him from the Clerk of this Court herein, together with the following papers which were filed with him as such Special Commissioner, to-wit:

1. Application filed by Respondent on November 6, 1939, for postponement of hearings.
2. Application filed by Respondent on December 12, 1939, for postponement of hearings.
3. Stipulation of parties filed January 24, 1940, for postponement of hearings to February 15, 1940.
4. Demurrer offered by Respondent at the close of the Relator's evidence.
5. Demurrer offered by Respondent at the close of all of the evidence.
6. Oath of Harry Wellington as the reporter herein.

The Special Commissioner herein was appointed by this Court on October 17, 1939, and thereafter, on October 21, 1939, duly qualified as such. Hearings were held by the Special Commissioner on November 6th, 16th and 24th, and December 12th and 14th, 1939, and on January 29th, 1940, with reference to the time for beginning the taking of testimony herein, all of which is more fully disclosed by the transcript herewith filed. Due to the illness of the Respondent and the apparent concurrence of the parties in the view that it would be error to proceed in the Respondent's absence, the taking of testimony did not begin until February 15th, 1940. Beginning on the last named date, the hearings before the Special Commissioner proceeded. Sessions for the taking of testimony were held on February 15, 16, 17, 19, 20, 21, 22, 23, 26, 27, 28 and 29, 1940, and on March 4, 5, 6, 7 and 8, 1940. All of the hearings referred to were held at Kansas City, Missouri. Oral arguments were heard before the Special Commissioner at Jefferson City, Missouri, on March 23, 1940.

Harry Wellington, of the Associated Shorthand Reporters, 1002 Walnut Street, Kansas City, Missouri, was designated by the Commissioner as the reporter herein and served as such.

The Special Commissioner files herewith a transcript of the testimony taken, evidence heard and proceedings of record had before him. Said transcript is in six volumes and, to identify such six volumes as those here referred to, the Special Commissioner has affixed his signature on the first sheet appearing in each of said six volumes.

And now said Special Commissioner, in further pursuance of his commission hereunto from this Court, respectfully submits his findings of fact and conclusions of law herein as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This is an original action in quo warranto instituted by the State of Missouri on the information of the Attorney General, ex officio, to determine the Respondent's title to the office of Prosecuting Attorney of Jackson County, Missouri.

The information was filed on May 10, 1939. Thereafter an amended information was filed charging, in substance, that: The Respondent was elected Prosecuting Attorney of Jackson County at the November election in each of the years 1934, 1936 and 1938, and that he is now, and has been at all times since January 1, 1935, the Prosecuting Attorney of said County; that it was his duty personally to devote his time to the duties of said office, and to investigate

complaints of law violations in said county, and to commence and prosecute all criminal actions in said county to final determination in the Circuit Court, and that it was his duty to investigate and prosecute all violations of the liquor control act; that notwithstanding his duties, Respondent has willfully, knowingly, continuously and corruptly failed and refused to investigate law violations and to commence and carry on prosecutions against law violators; that the laws prohibiting gambling, bookmaking, gambling houses, bawdy houses and brothels, were openly and notoriously violated in said county, and that the Respondent knew thereof but did not investigate such violations or prosecute the violators; that the same conditions prevailed with reference to liquor law violations; that the Respondent willfully and knowingly failed to prosecute persons guilty of violating the election laws of Missouri in Jackson County at the general election held in November, 1936; that certain persons named in the amended information did violate such laws, particularly Sections 3963 and 3977 R. S. Mo. 1929, and that these people were indicted in the United States Court for offenses in connection with said election and that some of them were convicted, some entered pleas of guilty and some entered pleas of nolo contendere, all of which is alleged to have been widely publicized in the county and to have been known to the Respondent, but that the Respondent knowingly and willfully failed and refused to institute prosecutions for violations of the election laws at said election. The amended information further alleges, in substance, that the Respondent has grossly neglected his duties in the handling of felony cases, and unreasonably delayed, and agreed to delays, in the trial of such cases; and that Respondent has willfully, knowingly and corruptly dismissed, or caused to be dismissed, certain criminal cases in which evidence sufficient to convict was available. The Relator further alleged that by reason of continuous and willful neglect of duties, the Respondent has forfeited his office, and prayed that he be adjudged to have forfeited the same, and that such office be declared vacant.

The Respondent, by his answer and return, aside from admitting that he is the Prosecuting Attorney of said county, and that he has held such office since January 1, 1939, both generally and specifically denies the allegations of the amended information herein, and further pleads that all matters and things alleged to have occurred prior to January 1, 1939 are barred, and could not be grounds for forfeiture of the Respondent's office.

At the outset, we may say that, with no intention of being profligate in the admission of incompetent evidence, the Special Commissioner proceeded on the theory, in his rulings on objections made during the hearings, that he should be more liberal than niggardly in the admission of evidence. This, for the reason that, as is pointed out by this Court in State ex. inf. v. Arkansas Lumber Co., 260 Mo. 212, l. c. 268-275, in a proceeding before a special commissioner, errors in the exclusion of evidence are without practical remedy, whereas evidence erroneously adduced may be disregarded, and, therefore, the latter type of error, if any, is not of proportionately serious consequence.

This Court has jurisdiction to determine the questions presented in and by this proceeding. The courts can not create a forfeiture of office, but they do have the power in proceedings for the ouster or removal of the officer, to determine the title to the office, and as a necessary incident to that power, where the fact of forfeiture, or non-forfeiture, has not theretofore been judicially determined, the courts may, in such proceeding, judicially determine whether or not there has, in fact, been a forfeiture by reason of misconduct, or otherwise, prior to the institution of the removal proceeding. Indeed, in this type of proceeding, the question of

whether or not there has been a forfeiture not having been previously determined, it must be determined before a judgment of ouster could be entered. See State ex inf. v. Wymore, 119 S. W. (2d.) 941, and cases there cited; and State ex inf. v. Wymore, 132 S. W. (2d.) 979.

The statutory procedure for removal of officers, Article 2, Chapter 68, R. S. Mo. 1929, is not exclusive, and does not deprive this Court of jurisdiction in quo warranto to determine the issues herein presented. State ex inf. v. Wymore. 119 S. W. (2d.) 941.

The Respondent herein was appointed Prosecuting Attorney of Jackson County, Missouri in the latter part of 1933. He entered upon the duties of that office at the very latter part of December, 1933. He has occupied the office continuously since that time, and now occupies the same, having been elected thereto at the November election in 1934, and re-elected thereto in 1936, and again reelected in 1938. The question here presented is, whether or not the Respondent has forfeited his said office by misconduct or dereliction in the discharge of his official duties, and, if he has, whether he should be removed from office.

The evidence in this case falls generally and largely into three groupings, or classifications, viz.: (1), evidence pertaining to gambling and gaming houses, vice conditions and violations of the liquor laws; (2), evidence with reference to the dismissal of certain criminal cases, which the Relator contends were wrongfully dismissed by Respondent; (3), evidence pertaining to the violation of the election laws at the general election held in 1936.

At the threshold of the hearings, while admitting his appointment to the office he now occupies in 1933, his election thereto in 1934, his re-election thereto in 1936, and again in 1938, and that he now occupies the same, the Respondent vigorously objected to the competency or materiality of the fact that he did hold this office prior to the present term, which began on January 1 1939. His contention was that, nothing occurring prior to the beginning of the present term could, under the law, work a forfeiture by him of his now current term of office, or render him subject to removal from his present term of office. Thereafter, and throughout the hearings, the Respondent objected to evidence of anything prior to January 1, 1939 for the same reasons. While we do not regard a determination of the question presented by these objections on the Respondent's part as controlling in this action, nevertheless, the question thus presented is of sufficient interest and importance, in our opinion, to justify its consideration and determination at the outset.

So, we now consider the question of whether or not a public officer may be removed or ousted from office during one term because of misconduct or derelictions occurring during a prior term, or prior terms, of office. If, under the law, he can not be, is the evidence offered and received herein as to matters and things occurring prior to January 1, 1939 competent for any purpose?

In the case of State ex inf. v. Wymore, 132 S. W. (2d.) 979, the information, in the nature of quo warranto, was filed, apparently, during respondent's first term of office, but the action was not finally determined until during his second term of office. Unlike the situation in that case, the situation here is, that the information was not filed until after the Respondent's present term of office had begun, and after the Respondent had occupied the office for several preceding terms. In the Wymore case, last referred to, the Court found it unnecessary to, and did not, pass upon the question of whether or not a public officer, such as the Respondent here, may be removed from office during one term for misconduct during a previous term in the same office; albeit, the Court's Language in that case, in discussing the question of punishment,

seems susceptible of the construction that an officer may be removed for misconduct during a prior term. However, we consider that question without reference to such possible implication because of the fact that the Court did specifically say in that opinion that such question was not being therein ruled upon.

As stated in the opinion in the case last referred to, the authorities on the question under consideration are divided. The diversity of judicial opinion is tersely and amply summarized in 17 A. L. R. page 279 (cited in the Wymore case), where it is said: "The cases on the present question are in conflict. This is due in part, to differences in statutes and constitutional provisions, but also in part to a divergence of views with respect to the question whether the subsequent election or appointment condones the prior misconduct. It can not apparently be said that there is a decided weight of authority on either side of the question, although the courts and the text writers have sometimes regarded the weight of authority as denying the right to remove one from office because of misconduct during a prior term; and some courts which have held to the contrary have considered that the larger number of cases favored this view. As will be seen from this annotation the cases, numerically considered, are nearly evenly divided."

As indicated in the quotation just set out, the diversity of opinion is due in part to differences in statutes and constitutional provisions, but also in part to a divergence of views with respect to the question whether the subsequent election or appointment condones the prior misconduct.

Can the voters, by re-electing an officer who has been guilty of misconduct or neglect of official duty, by such re-election condone the offense so that the officer may not be removed therefor during the term to which he has been thus re-elected? With all deference to the force and the logic of the decisions of courts of foreign jurisdictions holding that the voters can so condone official misconduct or derelictions, in such a case as the instant one, at least, we do not agree with such doctrine. Here we are considering one who has been elected by the voters of a county. The manner in which he has discharged his official duties is being called into question, not by Jackson County, but by the State of Missouri. Jackson County, albeit a highly important part, is but a part, a political subdivision, a creature of the State. Although elected by the voters of the county only, the Respondent is answerable, not alone to the voters of his county, but to the sovereign power which is the State of Missouri, for the faithful discharge of his official duties. We take the view, and such is our conclusion, that the voters of the county can not condone for the State. We therefore, conclude that if it be held that the Respondent can not now be removed from office because of misconduct and derelictions, if any, in office during a prior term, such holding can not be based on the doctrine that such misconduct and derelictions were condoned by the fact of his re-election.

But under the law, if the Respondent is found to have been derelict in the performance of his official duties during the previous terms, can he be removed from office during his now current term because of previous dereliction?

Section 11203, R. S. Mo. 1929, which section this Court has held to be the legislature's compliance with the mandate of Section 7, Article 14, Constitution of Missouri, sets out misconduct and derelictions which forfeit an office such as the Respondent's. Said section is 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, 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 oral argument before the Commissioner counsel for the Relator position that in Missouri there could be a forfeiture of office either under the provisions of said section of the Statutes or under the common law. However, assuming that such is the case, no common law rule has been pointed out to us that seems to provide that an officer may be removed during one term for offenses committed during a prior term. Neither do we know of such a common law rule. One of Relator's counsel, at the oral argument before the Commissioner, stated that he knew of no such rule of the common law. But whatever the common law rule in that particular may be, or may be said to be, we have concluded that the provisions of Section 11202, R. S. Mo. 1929, construed with, and in the light of, Section 11207 R. S. Mo. 1929, are controlling here, and that a proper construction of said sections 11202 and 11207 is determinative of the question under consideration. That great body of the law which we know as the common law, is surrounded with a halo of tradition and commands our deepest respect. Yet, we are persuaded that it is too often but a vast hinterland to which we flee in consternation, and through which we wander in confusion when in doubt as to just what the law is. The application of so-called common law doctrines, unless those doctrines are at least reasonably clear-cut and defined, open the way for development of judicial autocracy. But, as stated, no common law rule in the instant question has been called to our attention, and, be that as it may, as indicated, we consider a proper construction of said sections 11202 and 11207 controlling on this point.

This Court, in case of State ex inf. v. Wymore, 119 S. W. (2d.) 941, had said Section 11202 and subsequent sections under consideration. As we read the opinion just referred to, however, it goes no further than to hold that the statutory method of removing an officer set out in Article 2, Chapter 68 R. S. Mo. 1929, of which said Section 11202 is a part, is not an exclusive method, and that it does not preclude a proceeding in quowarranto. We do not construe that opinion to hold that in such cases as this there may be a forfeiture of office and consequent ouster therefrom independent of said Section 11202. With the exception of common law doctrines, we do not know of, and our attention has not been called to, any authority or provision other than said Section 11202 for forfeiture of an office such as Respondent’s for any of the causes or complaints here lodged against the Respondent by the State. Aside from the sections as to procedure therein contained, and which procedure has been held to be not exclusive, we conclude that Article 2, Chapter 68, R. S. Mo. 1929 is pertinent and controlling here.

Said Section 11202 contains the pertinent provisions as to matters which will work a forfeiture of office. Section 11207, in the same article and chapter, contains a provision which we construe to be the statutory consequence of removal from office, in the following language: "and he shall not be elected or appointed to fill the vacancy thereby created, but the same shall be filled as provided by law for filling vacancies in other cases." This appears to be the only consequence of removal from office contained in said article of the statutes. We do not know

of, and our attention has not been called to, any pertinent provision or authority announcing or providing any consequence of removal from office other than that quoted. So, even though the procedural provisions of said Article 2, Chapter 68, of the 1929 Statutes are not now pertinent, we are still confronted with the fact that the provision quoted from Section 11207 is the only consequence of a removal. Construing said sections 11202 and 11207 together, we can not escape the conclusion that the only disqualification consequent upon an ouster for any of the things mentioned in Section 11202 is the disqualification contained in, and above quoted from, Section 11207, that is, the disqualification for appointment or election to fill the vacancy occasioned by the removal of the incumbent.

Under the decision of this Court in State ex inf. v. Wymore, 119 S. W. (2d.) 941, and under the authorities therein quoted and referred to, we construe the law to be that when a public officer such as the Respondent here, is guilty of any of the misconduct or derelictions declared by Section 11202, R. S. Mo. 192S to work a forfeiture, the forfeiture in fact occurs when the officer is guilty of such misconduct or derelictions, without regard to the time when such forfeiture may be judicially determined to exist, and without regard to when the officer may be removed by reason thereof. As this Court said in the Wymore decision, last referred to, quo warranto "proceeds on the theory that the office has been forfeited by an act of misconduct on the part of the official." (Underscoring ours.) Again, as this Court approvingly quotes in the same decision from Mechem Public Officers, section 478, page 308, "The forfeiture must exist in fact before the action of quo warranto is commenced." (Underscoring ours.) So, taking the view that the forfeiture for any of the things mentioned in said Section 11202 in fact comes into existence when the forbidden thing is done, without regard to when the removal proceedings are instituted, and construing said sections 11202 and 11207 together, we reach the conclusion that the disqualification contained in said Section 11207, and above quoted, applies only to the remainder of the term during which the forfeiture in fact occurs and when the removal from office by reason thereof occurs during the same term of office. In this view of the question, we conclude that to hold that a public officer may be removed during a subsequent term because of an offense, or offenses, during a previous term would constitute nothing more nor less than a judicial creation of a disqualification to hold public office.

Again referring to the decision of this Court in State ex inf. v. Wymore, 119 S. W. (2d.) 941, it is the law, as is there said, that, "The courts are without authority to create and declare a forfeiture of office. Absent forfeiture at common law, the forfeiture can be created and declared only by either the Constitution or valid legislative enactments." By parity of reasoning, we conclude that the courts, being without power to create a forfeiture, the courts are necessarily without power to create a disqualification to hold office. Taking the view indicated, that the disqualification provision contained in Section 11307, R. S. Mo. 1939 is applicable only to the term during which the forfeiture in fact occurs, and then only if the removal by reason thereof occurs during the same term, we conclude that to say that the Respondent may be ousted from his present term for misconduct or derelictions during previous terms would be a judicial creation of a disqualification of the Respondent to hold the present term of office. We conclude that this is beyond the power of the courts. If such a holding defines an unfortunate or undesirable situation, it seems to us that the remedy must come by way of constitutional amendment or legislative enactment. The courts must deal with and construe the law without venom, fear or favor, as they find it to be, and not read into it what they might think that it

should be.

But, having concluded that the Respondent may not be ousted from his present term because of things occurring prior to his present terra under the record in this case, it does not necessarily follow that the evidence admitted as to occurrences prior to the present term of office is incompetent or immaterial. On the contrary, we believe that it is competent and material. The record contains evidence pertaining to matters and conditions during Respondent's present term to which we shall allude more fully hereafter in finding of facts. It is our conclusion that the evidence in the record of matters and things occurring prior to the present term of office was, and is, competent and may, and should, be considered as characterizing the Respondent's attitude toward his duties during his present term, and as showing his motive or intent with reference to matters and things shown by the record to have occurred or existed during his present term of office. The New York Supreme Court, in the case of Conant v. Grogan, 6 N. Y. S. R. 322, although holding that a court should not remove an officer for acts done during a prior term, recognized the principle just stated as follows: "We will not say that, on an application like the present, evidence of acts done prior to the term of office might not sometimes be admissible, where such acts would tend to characterize other acts committed during the existing term. In civil and in criminal actions there are a few rather exceptional cases in which proof of other acts of a party may be received in order to characterize the act which is the ground of action or defense. The object is generally to show intent or motive."

Has the Respondent forfeited his office because of misconduct or derelictions, if any, during his present term, whether the same be considered alone on the one hand, or considered on the other hand in the light of matters and things occurring prior to the present term?

At the oral argument before the Commissioner, Relator's counsel suggested that the Court could, and should, take judicial notice that Kansas City was a "wide open town", and that gambling and vice and liquor law violations were widespread and flagrant and notorious. Judicial knowledge, or judicial notice, comes into play only when the point of proving facts has been reached. We are of the opinion that inferences may, and should, be drawn from the evidence adduced, but we are further of the opinion that such inferences must be only such as appear fairly justified by the evidence adduced. We see no necessity in this case for invoking the doctrine of judicial knowledge or judicial notice. But in any event, to say the least, we doubt the applicability of such doctrine here. In 33 C. J., page 60, section 1810, we find, "it is necessary that the community throughout which a fact is supposed to be commonly known should be one whose extent bears some reasonable relation to the territorial jurisdiction of the court itself." The territorial jurisdiction of this Court is, of course, state wide. Whatever conditions may have been, and may hereinafter be found to have been, in Jackson County, it seems to us that it would be ignoring that degree of caution with which judicial knowledge and judicial notice should be used to say that such doctrine may be applied as suggested by Relator's counsel. "The doctrine of judicial notice rests, and properly so, upon the wisdom and discretion of the courts. The power to take judicial notice is to he exercised by the courts with caution; care must be taken that the requisite notoriety exists; and every reasonable doubt upon the subject should be promptly resolved in the negative." 23 C. J., page 173, section 2006. However, as indicated, we do not consider the application of the doctrine of judicial notice or judicial knowledge necessary in this action.

At the hearings herein numerous witnesses testified to the existence of gaming houses, prostitution and liquor law violations. Some of these witnesses were, or had been, inspectors in the State Department of Liquor Control, and some of them were men who were referred to at the hearings as the Governor's investigators.

The Respondent impeached, or sought to impeach, the good faith of the investigation made by one of the so-called investigators by eliciting from him the admission that in connection with the investigation he had sought and procured an affidavit from one whom he, the investigator, did not regard as worthy of belief. The Respondent further brought out the fact that one or two of the investigators were on the Jackson County pay roll and continued to draw salaries as employees in one of the county offices while engaged in their investigation of conditions in Jackson County. However, we regard these things as of no moment in the case, especially in view of the very considerable number of other witnesses who testified to substantially the same conditions to which the men referred to testified. The record discloses that an investigation was made by a member of the State Highway Patrol in 1937 with reference to slot machines in Jackson County, and that this man discovered a great number of such machines in operation. There were several hundred of them in Kansas City and several hundred in Jackson County outside of Kansas City. In the main, however, the investigations made and testified to by various witnesses for the Relator were made in 1938 and the early part of 1939. These witnesses testified to visiting numerous places, some of them in the neighborhood of the Jackson County Court House, where the liquor laws were being violated by Sunday sales of liquor, after-hour sales and sales of liquor at places not having licenses to sell the particular sort of liquor sold. These places appear to have been open to the public, and, from the evidence, we conclude that practically without exception in the places testified to, anyone could enter, without hinderance, and gamble and purchase liquor, in violation of the law. So far as gambling is concerned, the evidence disclosed that in several places referred to by the witnesses various forms of gambling went on, and various forms of gambling devices were in operation. Many specific places where gambling was carried on and liquor law violations occurred were referred to by witnesses for the Relator. The Relator's counsel at the oral argument before the Commissioner indicated that the evidence adduced showed that seventy-five night clubs were openly violating the laws as to gambling and indecent shows in 1937, 1938 and 1939; that there were sixty-five places in Jackson County outside of Kansas City, and fifty places in Kansas City in 1937, 1938 and 1939 where the liquor law was openly violated. On account of possible confusion as to the identity of some of the places referred to by the witnesses, we do not undertake to, and do not believe that it is important to, determine mathematically from the record just how many such places were mentioned in evidence. We do, however, find the fact to be that, in 1938 and in at least the early part of 1939, without interference from or action by the Respondent, the liquor laws were openly violated, and gambling devices were openly operated in a large number of places in Kansas City and Jackson County, which places were open to, and frequented by, the public. We find the fact to be that numbers of these places were frequented by large numbers of people. Without invoking the doctrine of judicial notice as the basis for finding that there were other such places in Jackson County in addition to the specific places testified to, we do feel justified in concluding that, as we read in the State ex inf. v. Wymore , 132 S. W. (2d.) 979, "there may have been, and no doubt were, other....." such places in the city and county.

The evidence as to vice conditions, in our opinion, justifies the conclusion that as a matter of fact, in an area of several blocks not far distant from the Court House, houses of prostitution were operated and that the inmates thereof often frequented the streets soliciting men who were passing by. There was also evidence that in some of the "clubs" open to the public indecent shows were given in which nude women dancers performed.

The evidence of gambling and liquor law violations and vice conditions was objected to by the Respondent on the ground, among others, that no knowledge thereof on Respondent's part was shown. However, as we read the decision in State ex inf. v. Wymore, 132 S. W. (2d.) 979, and cases there cited, knowledge of a condition may be imputed if the condition is notorious or, rather, the notoriety of a condition may be shown to prove knowledge thereof. Aside from any question as to whether the number of places referred to would, in and of itself, make the condition notorious, large numbers of newspaper articles and editorials about this condition were offered in evidence. The Respondent offered voluminous objections to the reception in evidence of such newspaper articles and editorials on the ground, among others, that they were hearsay. No doubt, as affording any proof of the statements therein contained, they would constitute hearsay. However, such articles were not admitted as evidence of the truth of the statements therein contained, and we do not consider them as proof of the statements therein made. "While newspapers may be admissible in evidence to impute to a party knowledge of a fact, , a newspaper account is merely hearsay evidence of the facts stated, and is not generally admissible in evidence to prove such facts, "22 C. J. page 929, section 1137. There are numbers of these newspaper articles which may be regarded as incompetent for any purpose. Parts of many more of them may be incompetent for any purpose. However, in the main, disregarding the apparently incompetent, we do regard them as competent evidence of the notoriety of the conditions therein and hereinabove referred to and shown by evidence other than the newspaper articles to exist. We find that the conditions hereinabove referred to were so notorious that the Respondent should have had knowledge thereof, and that knowledge thereof should be imputed to him for purposes of the questions under consideration in this action.

The Respondent's own testimony is in effect a disclaimer of knowledge, or plea of ignorance, of the conditions hereinabove referred to and found to exist.

The record discloses that in 1937 the Attorney General wrote a letter to the Respondent and inclosed a list of places in Jackson County where slot machines were in operation. Following that there were prepared in the Respondent's office numbers of applications for search warrants and complaints. Respondent and one of his witnesses testified that an effort was made by Respondent's office to get some one having knowledge of the existence of the slot machines to come in and sign complaints, and no one came. The Respondent requested the sheriff's office and the city police department to check up on the places referred to in the letter sent to the Respondent by the Attorney General, and received back reports from each of these sources that no such machines could be found. This, however, was all after this list and the fact of the Attorney General's letter had been made the subject of publicity in Kansas City and Jackson County. In our opinion such brief and fruitless activity on the part of the Respondent's office in the connection just referred to does not relieve Respondent of whatever responsibility may rest upon him for the fact that these machines by the hundreds had theretofore infested Jackson County and no action had been taken by him. This phase of the matter antedating the

Respondent's present term of office, however, is not a matter for any consideration herein except in so far as it may throw light on or characterize the Respondent's conduct during his present term of office.

The Respondent offered evidence showing that the Kansas City- Liquor Control Department issued 1121 licenses in 1936, 1115 licenses in 1937, 1121 licenses in 1938 and 1110 licenses in 1939; that there were from twenty to twenty-one thousand occupational licenses issued in the city of Kansas City; that in 1939 there were eighty-four pool hall licenses issued in Kansas City; that in 1939 there were 1285 restaurant licenses issued in Kansas City, and but slightly less than that number in the preceding years; that the county liquor license department issued 1057 licenses in 1936, 1509 licenses in 1937, 1479 licenses in 1938 and 1696 licenses in 1939. The Respondent further offered evidence to the effect that the area of Kansas City is 59.637 square miles; that the city is approximately 11 1/4 miles long at the longest north and south distance and 6 3/4 miles across at the longest east and west distance; that the area of Jackson County is 607.57 square miles, and that the county is approximately 27 miles east and west and approximately 25 miles north and south, in dimensions. Conceivably it might be a question whether or not the number of places where these various cases of law violations occurred, and specifically shown by the evidence to exist, is proportionately large in view of the areas and of the population of the city and the county. However, leaving out any inference that there may have been, and no doubt were, other such places in the city and county, it is our opinion that the Respondent's duty in the matter is not measured so much by the prevalence, or proportionate lack of prevalence, of such conditions as it is by the existence of such conditions in any degree if the Respondent had knowledge thereof, or if knowledge is to be imputed to him because of the notoriety thereof. And, as above stated, it is our conclusion, from the record, that such conditions did exist in a very substantial number of places, not only prior to 1939, but in 1939 as well, and that such conditions were the subject of sufficient notoriety that knowledge thereof should be imputed to Respondent for the purposes of this proceeding.

The Respondent, by his testimony, indicated that he depended, or had to depend, on the sheriff's office and the metropolitan police force to bring him evidence of law violations and that he was not equipped with a force of investigators of his own. His evidence, which is in effect a disclaimer of knowledge or information as to the existence of gambling and liquor law violations and vice conditions, must necessarily be construed as meaning that evidence of these things was not brought to him by the agencies referred to. But while it is apparent that in Kansas City and Jackson County the Respondent, with his limited force of assistants, could not pry into all of the violations of the law, yet, under the holding of this Court in the case of State ex inf. v. Wymore, 132 S. W. (2d.) 979 it is our opinion and conclusion that the Respondent can not hide behind the inferential inactivity of the police department and of the sheriff's office. If the Respondent had knowledge of these conditions, or if knowledge thereof must be imputed to him, as we believe it must, then, under the law as construed by this Court in the case last referred to, the Respondent was under the duty at least to try to do something about the situation. Had he made an active, persistent and well directed effort to enforce the law with reference to gambling and gaming devices, liquor law violations and vice conditions, no one could justly complain, even if such efforts failed. Upon the record before us, however, we can not escape the conclusion that the Respondent made no such effort in that direction, and that such failure on the Respondent's part existed during the Respondent's present term and prior

to the institution of this proceeding, as well as during previous terms. Such activity as there was on the part of Respondent's office during his present term with reference to any of the conditions referred to appears to have come only under what we might term the compulsion of the evidence produced by certain raids made after the beginning of the present term, and grand jury investigations carried on after the beginning of the present term.

The Relator offered in evidence the indictments and informations in a number of cases,which were filed at various dates in 1939 and up to October, 1939, charging a number of persons with keeping gaming houses and operating gaming establishments at various times from the latter part of 1938 up to and including the early part of 1939, together with the judgments thereon, showing that practically all of the defendants plead guilty. The Relator likewise introduced a number of indictments and informations, charging liquor law violations in 1938 and in January and February, 1939, with judgments, showing practically all of the defendants plead guilty. The indictments appear to have been signed by the Attorney General. The informations appear to have been substituted for indictments found by the same grand jury, and Respondent called attention to the fact that such "substitute" informations charged misdemeanors and were filed in lieu of indictments charging felonies. This indicated, so Respondent contended, that in such cases the charges were disposed of by agreement between the Attorney General and the several defendants. The Relator also offered in evidence judgments or decrees rendered in the Circuit Court of Jackson County, Missouri, in seven or more actions instituted by the Attorney General in March, 1939, pursuant to which several establishments were found to be nuiscances and were enjoined. These appear to have been places in which various forms of law violations occurred. We do not consider the evidence referred to in this paragraph as of any probitive force in this action, however, further than that it furnishes some corroboration of the other evidence offered by Relator as to violations of the gambling and liquor laws.

The Respondent, during the hearings, stressed the fact that the evidence gathered by the various investigators who testified was not turned over to the Respondent. He contended that the Attorney General should not gather such evidence and, while withholding it from the Respondent, charge Respondent with neglect of duty in not enforcing the laws which were the subject of the investigations. The record does disclose that in a negligibly few instances where complaints were made to Respondent, or to his assistants, action was taken. However, we know of no rule which requires that either the Attorney General or the Chief Executive of the State shall gather evidence of law violations and furnish it to the prosecuting attorney. The investigations by which the evidence was acquired, we take it as a necessary inference from the record, were made for the purpose of determining whether or not the Respondent was discharging his duties as Prosecuting Attorney. Without either commending or condemning the Attorney General for not turning over to Respondent any evidence that he may have accumulated concerning law violations, we consider the fact that he did not turn such evidence over to the Respondent wholly unimportant. This, for the reason that no matter how active the Respondent might have become if such evidence had been turned over to him, the Respondent's conduct must be measured by what he did, or did not do, on his own official responsibility, independent of the activities of the Governor and Attorney General who, to say the least, did not have the same immediate responsibility that Respondent had with reference to law enforcement in Jackson County.

So much for the facts concerning gambling and liquor law violations and vice conditions. We pass now to the question of the several prosecutions alleged by the Relator to have been wrongfully or unjustifiably dismissed by the Respondent.

As to the evidence in connection with these several prosecutions, objections, first from the Respondent and then from the Relator, on the ground that the evidence offered was hearsay, were repeatedly made. For instance, certain of the Relator's witnesses were permitted to testify as to what they had been told in the way of information concerning evidence available in these several criminal cases. Again, Respondent's witness McShane, an attorney representing a defendant in one of the cases dismissed, was permitted to testify that he told one of Respondent's assistants what his client had told him about the circumstances under which an alleged confession had been made by the client. While many of these things in connection with this particular phase of this case do appear to be hearsay, we have concluded that they are not hearsay for the purposes of this case. As we see it, while much of the evidence of the nature referred to would be rank hearsay for other purposes, it should not be considered hearsay for the purposes now under consideration. The question presented with reference to the propriety, or impropriety, of the several dismissals, is the Respondent's official diligence and good faith in dealing with the respective cases said to have been improperly dismissed. To measure his diligence and good faith in the premises, we must consider the situation with which he was confronted, the evidence which was before him, and the evidence which was available to him by reasonable investigation.

We have concluded that in almost every, if not every, instance this particular type of testimony, so far as a consideration of Respondent's conduct with reference to the dismissal of these cases is concerned, while hearsay for practically any other purpose, was not hearsay here. On the contrary, it was direct evidence here as to what information was before, and available to, the Respondent in the premises, even though that information may have been hearsay in the Respondent's hands, in his consideration of the proper disposition of the prosecutions. If it was hearsay in his hands, that is a fact to be considered in determining whether he properly evaluated and acted upon it in his consideration of the cases. The theory announced is recognized in Greenleaf on Evidence, 15th Ed. Vol. 1, Sec. 100, in the following language: "For it does not follow, because the writing or words in question are those of a third person not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens, in many cases, that the very fact in controversy is, whether such things were written or spoken, and not whether they were true; and, in other cases, such language or statements, whether written or spoken, may be the natural and inseparable concomitants of the principal fact in controversy. In such cases, it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue." So, as stated, we conclude that this type of testimony was direct and original evidence, for the purposes of this proceeding, to show what the information before, and available to, Respondent was with reference to these various prosecutions, even though much of it may have been hearsay in the Respondent's hands.

The Relator offered evidence that numerous criminal cases were dismissed. It appears to be the Relator's contention that there was sufficient evidence available in each of these cases to make a submissible case, and that the Respondent violated his official duties in dismissing the cases. In considering this question, we do not consider it necessary to say that there could or

would have been a conviction in each of these cases. The question is, whether or not the evidence before, and available to, the Respondent was such that,in a good faith performance of his official duty, he should have prosecuted the cases instead of dismissing them.

One of the cases referred to is State v. Joe Evola, who was charged by information filed July 24, 1936, with receiving stolen property on June 3, 1936. The record shows the case dismissed at the request of the Prosecuting Attorney. On March 7, 1939, Evola was indicted for the same offense, the indictment being signed by the Attorney General. A plea of guilty was entered to the indictment. An officer, or officers, had seen Evola coming out of an alley in which a stolen car was parked. The car had been "stripped" and the things missing from the car were in Evola's possession.

Another case was State v. Charles Forte, et al, charged in an information filed June 5, 1936, with second degree burglary, alleged to have been committed on May 12, 1936. The defendants were found by police officers inside the "A. I. D." warehouse, the rear window of which was broken. One of the defendants, John Caronia, appears to have been sentenced to serve two years in another case on a second degree burglary charge. This case against Forte, et al, was dismissed by an assistant prosecuting attorney on December 28, 1936. The assistant who handled this case testified that three of the defendants entered pleas of guilty to a charge of malicious destruction of property growing out of this incident. It was, apparently, this assistant's theory that there was no merchandise or property on the second floor of the warehouse which the defendants had entered, and that, therefore, a burglary charge could not be sustained. We find that evidence was available, however, that the defendants were trying to pry up some planks in the floor of the second story of the building in which they were found.

Another of the cases dismissed was that of State v. Willie Lugge et al, charged by information filed August 11, 1937, with attempted burglary, second degree, and under the habitual criminal act. This case was dismissed by one of the Respondent's assistants on December 6, 1937, the reason given in the record of dismissal being, "because of sentence imposed in No. C-17752." It seems that a screen had been pried off of a window, and that a bar had been pushed under the window, but that the window had not been raised; that the defendants were found at or near this window by police officers, and that there were burglar tools nearby. The defendants were also charged with possession of burglar tools, and were sentenced to two years on this latter charge.

Another of the cases dismissed was the case of State v. Willie Lugge, who was charged by information filed on July 24, 1936, with tampering with a motor vehicle on May 29, 1936. The case was dismissed at the request of the Prosecuting Attorney on December 31, 1936. The defendant was seen by police officers apparently tampering with an automobile. The assistant who dismissed this case explained that he did so because the owner of the car involved was a non-resident of Kansas City and was absent and never produced. It appears that no subpoena was ever issued for the owner of the car, and the assistant who handled this case testified that the defendant was a known thief.

Another of the cases dismissed was the case of State v. Matthew Beccina, et al, charged by information filed on October 15, 1935, with larceny of a motor vehicle on July 7, 1935. This case was dismissed on January 16, 1936 by the Respondent, or one of his assistants, the reason given being, "insufficient evidence". We may comment at this point that, as to this particular case, we believe that the record does not disclose sufficient evidence to make a submissible case.

Another case was that of State v. Matthew Beccina, et al, charged by information filed October 15, 1935, with larceny of a motor vehicle on June 26, 1935. This case was dismissed January 16, 1936 by the Prosecuting Attorney, or one of his assistants, the reason given being "insufficient evidence". The defendants were found by officers at a point near which a stolen car was parked, and near a garage in which another stolen car was parked. Defendant Beccina ran from the officers. Defendant McDowell stated to the officers, or to one of them, that he and the defendant Beccina had stolen the car.

Another case was that of State v. Pete Vittorino, who was charged by information filed August 26, 1936, with larceny of a motor vehicle on June 29, 1936. This case was dismissed on December 31, 1936 by the Respondent, or one of his assistants. This man was discovered by officers driving a stolen truck with a "jumper" on it, a "jumper" being a device which enables one to start a motor without the use of a switch key. The defendant, failing to stop, as expressed by the officer, was "shot out" of the truck. It appears that this truck was the property of the city. The assistant who handled the case explained that he dismissed the same because a bill of sale for the truck was never brought in and exhibited.

In case of State v. John Caronia the defendant was charged by indictment filed March 6, 1937, with robbery, first degree, alleged to have been committed on February 12, 1937. This case was dismissed on April 20, 1937, the reason given being a plea and sentence in another case. The defendant was sentenced to two years in the Intermediate Reformatory at Algoa in another case. As to the charge dismissed, it appears that the defendant held up and robbed the cashier of a theater, and that he was later identified by the owner and the cashier of the theater.

In the case of State v. Sam Bono, the defendant was charged by indictment filed November 7, 1936, with larceny of a motor vehicle on August 21, 1936. This case was dismissed on September 8, 1937, by the Respondent, or one of his assistants, the reason given being a plea and conviction in another case. It appears that this defendant was sentenced in the Circuit Court of Jackson County to ten years imprisonment on another charge, and that he was also under a sentence of three years in the Circuit Court of Ray County on yet another charge.

In the case of State v. Joe Cardello, et al, the defendants were charged by indictment filed in March 1936, with burglary, second degree, and larceny, on January 29, 1936. This case was dismissed April 17, 1936, the reason given being, "account of insufficient evidence". The facts appear to be that very early on the morning in question the glass in the front door of a warehouse was broken out and the door opened; that in this warehouse there were shoes; that parked near the warehouse was a stolen truck containing over 200 pairs of shoes such as were stored in the warehouse; that as police officers approached the place they saw several men, estimated by various officers to number from two to four, run from the front of this storeroom or warehouse; these men turned the corner and apparently passed momentarily out of the view of the police officers; the police officers having arrived at the street into which the fleeing men had turned, found the defendants standing in a doorway. It was not yet daylight at the time of the occurrence referred to. On the record, it appears, to say the least, to be a serious question whether or not the officers could or would undertake to identify the defendants as the men whom they had seen running.

Another case, and one about which there was a great deal of wrangling in the record here, was that of State v. Mike Lister and William White. These men were indicted on May 2, 1935, on

a charge of first degree robbery, alleged to have been committed on March 4, 1935. The Woodstock-Hoefer Watch and Jewelry Company was held up and robbed of jewelry and personal property which, including a small amount of property belonging to an individual, or individuals connected with said company, was of the aggregate value of approximately $15,000. Four men appear to have been arrested in connection with this robbery, viz., Couts, Radkay, and said Lister and White. Couts and Radkay were sentenced, one for five years, and the other for ten years. The firm of Meyer and Smith were employed by an insurance company to help prosecute the case against Lister and White, and it appears that the case was dismissed without their knowledge or consent. The evidence shows the case dismissed at the request of the Prosecuting Attorney on account of insufficient evidence. It appears that Lister and White were never identified by any of the people connected with the watch and jewelry company, and that the evidence against them consisted of confessions made by them and such testimony as the said Couts and Radkay might have given against them. Respondent's assistant, W. J. Burke, who is now an assistant attorney general, and who was a witness for the Relator herein, was in charge of the Lister and White case. The witness Burke testified that the Respondent had told him to dismiss the Lister and White case because the confessions had been obtained under duress. Mr. Burke's notation on the Prosecutor's file, however, indicates that the dismissal was because of insufficient evidence. Letters written by the witness Burke while still one of the Respondent's assistants, to the State parole authorities, indicated that Couts and Radkay, having been sentenced themselves, would not testify against Lister and White. We consider it a fair inference, from the record, that said Couts and Radkay did so refuse, or would have so refused, to testify. There is no direct evidence that the confessions of Lister and White were obtained under duress. The only evidence to that effect consisted of testimony of Respondent’s witnesses Modica and McShane, who represented the respective defendants, that their clients had told them that the confessions were obtained under duress, and that they had communicated such information to the Respondent’s office. Certainly such information was hearsay in the Respondent’s hands, and in our opinion should not have been acted upon without careful investigation of the facts and circumstances surrounding the making of the confessions. It does not appear from the record that such investigation was made.

Another case alleged to have been improperly dismissed is that of State v. Gargotta. An indictment was returned in 1933 against Gargotta, charging him with assault with intent to kill Mr. Bash, with malice aforethought. Mr. Bash was at that time the sheriff of Jackson County. This occurrence was prior to the Respondent’s appointment to the office of Prosecuting Attorney. The case was postponed at various times until the Respondent became Prosecuting Attorney in the latter part of December, 1933. It was thereafter reset and continued from time to time until December 19, 1938, when it was dismissed "at the request of the Prosecuting Attorney", and the defendant was discharged. Gargotta was again indicted for this same offense in an indictment signed by the Attorney General and returned March 4, 1939. The defendant entered a plea of guilty and was sentenced to three years imprisonment.

It appears that in the same affair out of which the assault charge grew, a man was killed, and Gargotta was tried for murder and acquitted. It also appears that some witness who testified in the murder trial was later sentenced for perjury in giving the same testimony elsewhere that he gave in the Gargotta murder trial. It does not appear from the record whether or not this testimony was of disadvantage to the State or whether the disadvantage, if

any, was to the defendant in the murder trial. The implication seems to be that it was to the disadvantage of the State.

The Respondent's explanation of the repeated delays in the Gargotta case is, in substance, that in view of the acquittal in the murder case, unless more evidence could be developed a conviction could not be expected in the assault case; that one or two parties connected with the affray had never been apprehended, and that, while keeping the case on the docket, he thought that perhaps during the course of the various delays this party, or these parties might be apprehended and additional evidence discovered; that Mr. Bash would not say that he knew Gargotta was shooting at him.

Mr. Bash testified in this proceeding to the facts and circumstances of the shooting, and that he certainly thought that Gargotta was shooting at him. It is difficult to see what more he could have done than to tell what happened and that, based on what happened, he thought the man was shooting at him. It would have been for a trial jury to say whether the defendant was in fact shooting at Mr. Bash or not. That Gargotta himself had less confidence in the State's inability to make a case against him than the Respondent had, is self evident from his plea of guilty when he was re-indicted.

It is alleged in the information herein that the manner in which the Respondent handled the Gargotta case was the result of the political influence of Gargotta, and of political friendship between Gargotta and the Respondent. The record is barren of any evidence in support of this allegation.

It is our opinion that the record here discloses that there was sufficient evidence in the hands of, or, with reasonable diligence, available to, the Respondent's office in the case of State v. Joe Evola; in the case of State v. Willie Lugge, et al, and in the case of State v. Willie Lugge. It is our opinion that the same is true as to the charge against McDowell, in the case of State v. Beccina, et al, charging larceny of a motor vehicle on July 7, 1935. It is our opinion that the same is true in the case of State v. Pete Vittorino, in the case of State v. John Caronia and in the case of State v. Sam Bono.

It is our opinion, on the record before us, that it is doubtful that there was sufficient evidence to make a submissible case against Beccina in the case of State v. Beccina, et al, last referred to. We are of a similar opinion as to the evidence in the case of State v. Joe Cardello, et al. On the record here, we are of the opinion that there was sufficient evidence to make submissible cases in the case of State v. Gargotta and in the case of State v. Lister and White. In view of the explanation given by one of Respondent's assistants as to the manner in which the case of State v. Charles Forte, et al, was handled, in the absence of more of a showing than the record here contains, we find it doubtful that the burglary charge could have been sustained.

Under Section 3951, R. S. Mo. 1929, it is an offense for a Prosecuting Attorney to dismiss a case corruptly. We find nothing in the record here to support any inference of corruption in the dismissal of any of the cases above referred to.

Aside from the Gargotta case, we take it from the record that the other cases above referred to were assigned to various of the Respondent's assistants and by them dismissed, without direction from the Respondent so to do. All of these dismissals were prior to the Respondent's present term of office. While some of the charges dismissed were not barred by limitations on January 1, 1939, since we have concluded that the Respondent can not be removed from office for anything prior to January 1, 1939, we believe that the only substantial

importance of the evidence as to dismissals lies in such color or characterization as may be thereby given to Respondent's acts during his present term. While, as indicated, it is our conclusion that the State could have made a case in each of several of the cases above referred to, and while it is our opinion that some of these cases should have been prosecuted, yet, in the absence of any showing of corruption in connection with these dismissals, and viewing the same on the cold record before us, we do not believe that the Respondent could be held guilty of neglect within the meaning of the statute on account of the dismissals referred to. Indeed, as we view the whole record, in our opinion the net result of the evidence pertaining to dismissal of the cases above referred to, is the indication that the Respondent was not so diligent as he might have been in supervising the affairs of his office.

We pass now to the question of the alleged failure or dereliction of the Respondent with reference to election law violations in the general election held in November 1936.

We find from the evidence that, following the 1936 election between 250 and 300 persons were indicted in the United States District Court for the Western District of Missouri on charges of conspiracy to injure and oppress divers citizens in the free exercise and enjoyment of the right of suffrage,and the right to vote for certain officers, and the right to have their votes accurately, honestly and truthfully counted, recorded, certified and returned as cast. These indictments were in two counts, the first count charging the conspiracy with reference to the election of presidential electors, and the second count charging the conspiracy with reference to the election of a representative in Congress. The indictments charged various overt acts in pursuance of the conspiracies charged. The persons indicted, as we understand from the record, were election judges and clerks, or at least included a large number of election judges and clerks. Numbers of the defendants entered pleas of guilty, some were convicted, and some entered pleas of nolo contendere. Some were granted probation without sentence. It seems that the United States Circuit Court of Appeals for the Eighth Circuit, in the case of Walker v. U. S. 93 Fed. (2d.) 383, held that the count of the indictments pertaining to presidential electors did not state a federal offense, because presidential electors are state officers and not federal officers.

We find the fact to be that the ballots, poll books and tally sheets involved in said election passed into the custody of the Federal authorities, and were impounded by orders of the United States District Court, aforesaid, in December, 1936, and that they were not released by said Court until in November, 1939.

That the Respondent knew of the proceedings in the Federal Court stands admitted by his own testimony, for he offered in evidence a lengthy document prepared by himself about that time, undertaking to defend his course of inactivity with reference to election law violations.

In a sense it may be said that these Federal indictments, and the judgments thereon, were hearsay as to Respondent. He was not a party to those proceedings, apparently was not present at any of the sessions of the Federal Court and, as voiced, in substance, in some of Respondent's objections, he had no opportunity to disprove the allegations of the indictments or recitals of the judgments. And yet, we cannot escape the conclusion that these indictments and judgments were competent evidence to show a condition, and they raise an inescapable inference that the State laws were flagrantly and widely violated at such election. At any rate, it is our opinion that such evidence was such as, not only to justify, but to demand, as well, that Respondent take vigorous and appropriate action.

Respondent contended, during the hearings, that, so far as any notoriety attending these "election fraud" cases was concerned, there could have been no notoriety inferred from the Federal Court proceedings until the first Federal indictments were returned, and that then, and until November 1939, the ballots and election records were impounded by the Federal Court and not available. It appears to be Respondent's theory that he could do nothing without the ballots and poll books and tally sheets.

In Re Turner, 3 Woods, 603, and In Re Leakin, 137 Fed. 680, do appear to be authority for the proposition that, the Federal Court having taken possession of the ballots and books, the same could not be wrested away from it by the State authorities. However, and assuming for the moment that the Respondent was powerless, without these ballots and election records, it appears that the Federal Court's impounding orders provided for the release of these things by court order.

There was a county grand jury in March, 1937. This grand jury was instructed by the judge to investigate the election. The Respondent testified that he advised the grand jury how it would have to proceed, and that, pursuant to his advice, the grand jury called United States Attorney Milligan as a witness. It appears from the Respondent's testimony that he left the jury room while Mr. Milligan was before the jury.

It appears from evidence of doubtful competency, viz., Respondent's oral testimony, which the Relator challenged as hearsay, that the grand jury reported to the Court that it had made something of an investigation, and recommended a further investigation when the evidence became available; and that the Government had impounded the evidence, and nothing was available. The Respondent, admitting that he was the advisor of the grand jury, the presumption is inescapable that the grand jury, in arriving at the conclusions referred to, was acting on the Respondent's advice as to what could, and could not, be done—as to what was, and was not, available.

The Respondent did not, either on his own responsibility, or in aid of a grand jury investigation, make any application to the Federal Court to afford the county grand jury access to the ballots and election records. The Respondent did not discuss the possibility of making the ballots and records available with the United States Attorney or any of the Federal authorities. It is clearly apparent that he did not advise the grand jury to ask permission of the Federal Court to examine the ballots and the books. Perhaps the Federal Court would have denied the county grand jury access to these things, but, in view of the fact that these ballots and records were subject to the control of the Federal Court, we conclude that no one can say, in the absence of any effort to have them made available, that they would not have been made available.

Had the Respondent made a diligent effort to aid the county grand jury, in demanding access to the ballots and records, a different situation would have presented itself, even though he failed in such effort. But on the record, we find that he made no effort to procure any such evidence for the information of the county grand jury. In this situation we conclude that the Respondent's contention that he was powerless because the ballots and election records were impounded by the Federal Court, and therefore not available, must fail for the reason that there is no showing that such evidence would not have been made available on proper application.

True it is that, under Section 3, Article 8 of the Missouri Constitution of 1875, as construed by this Court in In Re Oppenstein, 289 Mo. 421, the ballots could not have been available for

criminal prosecution, even if not in possession of the Federal Court. But said Section 3 of Article 8 was amended in 1924, and the decision in the case of In Re Oppenstein, supra, is no longer applicable.

But the Respondent further contends that, not only were the ballots unavailable because impounded by the Federal Court, but, that after one year from the date of the election the ballots became legally non-existent under Section 10315, R. S. Mo. 1929, as construed by this Court in State ex rel. v. O'Malley, 117 S. W. (2d) 319, and that, therefore, the ballots could not be used as evidence in a State prosecution after such one year. Be that as it may, the fact remains that no effort was made to get the ballots during that one year period. The more conspicuous fact remains that, as said by this Court in State ex rel. v. O'Malley, supra, loc. cit. 325, (referring to crimes against the election laws), "Sometimes they can be prosecuted without the use of the ballots as evidence." (Underscoring ours.) If, indeed, it were a demonstrated fact that the Federal Court would not have permitted inspection of the ballots and books for purposes of a State prosecution, and, assuming that the ballots did become legally non-existent one year after the election, we conclude that the situation presented was one wherein crimes against the election laws could have been prosecuted without the ballots, if other evidence of the crimes could be had. Could other evidence of the crimes have been had? We know not from the record. But from the record, we must conclude that the Respondent made no effort to obtain or discover other evidence.

Respondent says that the institution of State prosecutions would have frustrated the Federal prosecutions. Under our system of doing things, our elections are primarily matters of State concern. The election machinery is set up by State law. The election officials are appointed under authority of the State law. We can imagine nothing more destructive of the immortal doctrine that ours is a government "of the people, by the people and for the people" than election frauds. While it may be contended that the Federal Court records and indictments do not prove that State laws were violated, we do not see how, on the record before us, any reasonable person can doubt that they were violated. Certainly the record reveals a situation which, to say the least, demanded vigorous and well directed action on Respondent's part. Assuming that Respondent's contention, that a State investigation, or State prosecutions, would have frustrated the Federal prosecutions is well founded, we believe that the relatively greater importance of the State prosecutions would have justified even that. Elections are held in Kansas City in which no Federal officer is voted upon, and crimes in connection with which the Federal Government can not reach. Vigorous and well directed action by Respondent would have let it be known to those who would prostitute the ballot and the right of a citizen to vote and have his vote counted as cast, that all elections in Kansas City must be honestly and lawfully conducted. Such offenses should he the object of vigorous frontal assaults by the jurisdiction primarily interested in, and responsible for, honest elections. They should not be left to prosecution by the indirection of conspiracy charges in another jurisdiction. Indeed, we believe that the record almost, if not altogether, justifies the conclusion that the Federal authorities intervened only because of the inactivity of the State prosecuting authorities.

Respondent says that he did not have the unlimited funds and resources available which the Federal Government had, for investigation of election law violations. Here again, it would appear that had Respondent done all that he could do, with the means at hand and available to him, he could not be criticised. But the record indicates that he did nothing.

After scanning all of the Respondent's reasons for his inactivity in the "election fraud" matters, and considering all of his objections to the evidence adduced, the conclusion remains inescapable that he did not try to do anything about these matters. As stated, had he made a vigorous, persistent and well directed effort, and failed, no one could criticise. But as it is, upon the record before us, we conclude that the Respondent was guilty of a culpable neglect in the discharge of his official duties in this particular.

Having concluded that the Respondent can not be said to have forfeited his office by reason of things occurring before his present term, can it be said that he has forfeited his present term of office, and that he should be removed?

We have found that open violations of the gambling and liquor laws in Jackson County were widespread, not only before, but also during the early part, at least, of the Respondent's present term. We have concluded that such violations were so notorious that knowledge thereof must be imputed to Respondent. Respondent's virtual disclaimer of knowledge or information of these conditions, in and of itself, is indicative of blindness and deafness which amounts to neglect of official duty on the Respondent's part. This conclusion, as we view it, is supported by the decision in State ex inf. v. Wymore, 132 S. W. (2d.) 979. It is supported, in our opinion, by common sense and reason, as well.

Prosecutions for violations of the gambling and liquor laws prior to January 1, 1939, in many instances were not barred by limitations until after January 1, 1939. Although we have concluded, and do conclude, that things prior to January 1, 1939 were, and are, competent as tending to characterize Respondent's acts since that time, yet, independent of those things, on the record before us, we have concluded that Respondent's inactivities with reference to gambling and gambling devices and liquor law violations since January 1, 1939 should be held to have worked a forfeiture of office under Section 11202 R. S. Mo. 1929.

We conclude that the Respondent's inactivity with reference to the "election frauds" at the 1936 election, is an official dereliction which forfeits his office under Section 11202, for the reason that these matters were not barred by limitations when Respondent entered upon his present term, and therefore, his inactivity in this particular constitutes a neglect which carried over into the present term. It is our view that Section 10315 R. S. Mo. 1929, as construed in State ex rel. v, O'Malley, supra, does not have the effect of shortening the period of limitations to one year so as to confine this neglect and dereliction on Respondent's part to a prior term. That section of the Statute may operate as a special statute of limitations in the sense that the ballots could not be used as evidence after the lapse of one year, but we do not believe that it has the effect of shortening the period of limitations on prosecutions.

In the light of Respondent's official duties and responsibilities under the law, in the light of the decision of this Court in State ex inf. v. Wymore, 132 S. W. (2d.) 979, and the authorities therein referred to, and in the light of the evidence adduced and appearing in the record herein, it is our conclusion that the Respondent has been guilty of such willful neglect of official duty, and such willful failure in the performance of official duty, within the meaning of Section 11202 R. S. Mo. 1929 that at, and prior to, the time of the institution of this proceeding he has forfeited his office. It is, therefore, our conclusion that the office of Prosecuting Attorney of Jackson County, Missouri, should be declared vacant, and that a judgment should be rendered ousting the Respondent therefrom as of May 10, 1939; that a reasonable fine should be assessed; and that the costs of this action should be taxed against Respondent.

Respectfully submitted,
Leon. P. Enbury, Special Commissioner.
NO. 36717
IN THE SUPREME COURT OF MISSOURI
EN BANC.
STATE OF MISSOURI, on the Information of Roy McKittrick, Attorney General, Relator, vs.
WALLER W. GRAVES, Prosecuting Attorney of Jackson County, Missouri, Respondent.
Special Commissioner's Report, Findings of Fact and Conclusions of Law.
FILED
APR 6 1940

EPPA F. ELLIOTT
CLERK SUPREME COURT