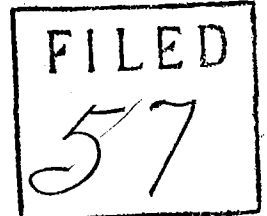


CONSTITUTIONAL LAW: Under Section 25, Article V, Missouri  
PROBATE JUDGE: Constitution 1945, incumbent probate judge  
cannot succeed himself if not in office  
when Constitution was adopted, unless  
licensed to practice law.

April 11, 1946



6/3

Honorable Gordon J. Massey  
Lawyer  
Third Floor Courthouse  
Ozark, Missouri

Dear Sir:

Receipt is acknowledged of your letter in which you requested to be advised if the incumbent probate judge would be eligible for the combined office of probate judge and magistrate.

Your letter reads as follows:

"Hon. W. L. Hixson is the present probate judge of this county he having been appointed by the Governor in November 1945 to finish the unexpired term of the Judge who resigned. Mr. Hixson took charge of the office December 1, 1945.

"Please advise me whether or not Mr. Hixson is eligible to fill the combined office of Magistrate and Probate Judge under the provisions of the new constitution and laws passed affecting said office."

Section 18, Article V, of the Constitution of Missouri of 1945, provides in part:

"\* \* \* In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. \* \* \* \* \*"

The effect of this section is to combine the offices of probate judge and judge of the magistrate court and it requires that the combined offices shall be held by one person, who shall be the probate judge. Consequently, in the instant case, for Mr. Hixson to be eligible for the combined office of probate judge

Hon. Gordon J. Massey

(2)

and magistrate he must be qualified for the office of probate judge.

We assume that your inquiry has partly been prompted by the fact that Mr. Nixson is not now licensed to practice law in Missouri. Were he so licensed, there would be no question as to his eligibility, because he undoubtedly fulfills the voting, residence and age requirements.

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

"\* \* \* Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, \* \* \* \* \*"

(Emphasis ours.)

This section in clear and unambiguous language requires a person to be licensed to practice law in this state to be eligible for the office of probate judge. However, the exception to this requirement is that the incumbent probate judge may succeed himself without being so licensed.

According to your letter, the incumbent probate judge was appointed by the Governor in November, 1945, and assumed the duties of his office on December 1, 1945.

We direct your attention again to the wording of Section 25, Article V, supra, where it says: "\* \* \* except that probate judges now in office may succeed themselves as probate judges without being so licensed, \* \* \*"

The word "now" refers to the time that the Constitution was adopted by the electors of the state of Missouri, which was February 27, 1945. In this connection we cite the case of Application of Marino, 23 N.J. Misc. 159, 42 Atl. (2d) 469, where there was involved the determination of a person's voting qualifications under the Constitution of New Jersey, which provided that no person convicted of a crime which now excludes him from being a witness shall

enjoy the right of an elector. The court, in construing the Constitution, stated the following at Atl. l. c. 471:

"\* \* \* The pertinent disqualification provision is of 'a person convicted of a crime which now excludes him from being a witness,' subject to other conditions here immaterial. And, this clause, by the use of the word 'now,' refers to the time of the adoption of the Constitution on September 2, 1844. \* \* \*"

Therefore, we are constrained to say that under the construction we must give to Section 25, supra, of our Constitution, only those probate judges who were in office February 27, 1945, (the date the present Constitution was adopted) could succeed themselves as probate judge, unless licensed to practice law.

#### Conclusion

In view of the foregoing, it is the opinion of this department that an incumbent probate judge not licensed to practice law could not succeed himself in office unless he held office at the time of the adoption of the present Constitution.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

RFT:CP