

MAGISTRATES:
PROBATE JUDGES:

Section 481.140, RSMo 1949, relating to the power of the members of the county bar to elect a probate judge, and Section 482.120, relating to the power of a circuit judge to appoint a magistrate, in case of disability, are both rendered null and void by Section 6 of Article V of the Constitution of Missouri, and by Supreme Court Rule 11.05.



January 18, 1955

Honorable John J. Stegner
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

On January 8, 1955, you wrote to this department the following opinion request:

"This is a request from Cooper County, Missouri, for an opinion regarding the election and duties of a Special Probate Judge elected under Section 481.140 and also questions arising under the qualifications of a Magistrate and of the appointment of a Magistrate under Section 482.120.

"In Cooper County, Missouri, the Probate Judge is ex officio Magistrate. The question then arises if a person elected Probate Judge under Section 481.140 or appointed Magistrate under Section 482.120, does the constitutional and statutory provisions prohibiting elected judges from practicing law apply to the Special Magistrate or the Probate Judge? Since there are different provisions provided by the statutes for election (481.140) of the Probate Judge, and the appointment of a Magistrate (482.120) the question arises if a Special Probate Judge is elected does he become ex officio Magistrate, or if the Circuit Court appoints a Special Magistrate does he become ex officio Probate Judge?

"We would also like to know if the Circuit Court is empowered to appoint a different person as Special Magistrate from the person elected Special Probate Judge by members of the bar under Section 481.140 and vice versa?

Honorable John J. Stegner

"Due to the fact that the regular elected Probate Judge is now ill and we anticipate some difficulty in electing a Special Probate Judge due to the fact that the constitutional and statutory provisions prohibit him from practicing law, we would appreciate a reply from your office on the above question as soon as possible."

On January 10th, following, you wrote as follows:

"In addition to the questions outlined in my letter of January 8, we are confronted with an additional problem of whether an attorney who is serving as City Attorney may be elected Special Probate Judge and may be appointed Special Magistrate; in view of Article IV, Section 24, Constitution of Missouri, and Section 482.030 (L. 1945, page 765, Section 3.)"

We will here consider all of the matters set forth by you in the above two letters, in the order of their reception by us. In your request you cite Section 481.140, RSMo 1949, which reads:

"Whenever the judge of probate, from any cause, shall be unable to hold any term or part of term of court, the attorneys of the court who are present, but not less in number than five, may elect one of their members then in attendance, having the qualifications of a judge of probate, to hold the court for the occasion, or to hold the court for a part of a term."

Also Section 482.120, RSMo 1949, which reads:

"If the judge of the magistrate court in any county which has only one magistrate court is incapacitated and unable to act or to dispose of the business pending before him for any reason, or is absent from the county, for a period of five days or more, the judge of the circuit court of such county, may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the

Honorable John J. Stegner

county to act as judge of the magistrate court of such county until such magistrate resumes his duties, and such magistrate or special judge, when so appointed shall possess all the powers and shall be subject to all the responsibilities of the regular judge of the magistrate court during the time of his appointment. Any person so appointed shall, before acting as judge of the magistrate court, take the oath required of magistrates. Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge which shall be paid by the state and charged against the salary of the regular judge of the magistrate court of such county. Any attorney appointed to act as magistrate shall be entitled to one-thirtieth of the monthly salary of the regular judge of the magistrate court of the county for each day he shall act as magistrate to be paid by the state and charged against the salary of the regular magistrate. Such payments shall be made upon the certification of the circuit judge and the clerk of such magistrate court that the person or magistrate was duly appointed and acted as magistrate of such court."

It is our view that both of the above sections are now void, by reason of being in conflict with Section 6 of Article V of the Constitution of Missouri, and Supreme Court Rule 11.05, promulgated under the authority of the aforesaid Section 6 of Article V of the Constitution of Missouri. Section 6 of Article V, as aforesaid, reads as follows:

"Assignment of judges - authority of supreme court. The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto."

Supreme Court Rule 11.05 reads as follows:

"Under Section 6 of Article 5 of the Constitution, the Supreme Court may temporarily

Honorable John J. Stegner

transfer to the probate court or magistrate court of any county either a circuit judge, a probate judge, a judge of a magistrate court or a probate judge who is also judge of the magistrate court of his county. When any judge is so transferred he shall have the same powers and responsibilities as judge of the court to which he is transferred and may hold court at the same time either with or separately from the regular judge or judges of said court."

In this regard we also direct attention to the case of Pogue v. Swink, 261 S. W. (2d) 40. In its opinion in that case, the Missouri Supreme Court stated at l. c. 42:

"Provisions for special judges to preside in the circuit courts arose under Sec. 29, art. VI, Mo. Const. 1875, reading: 'If there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court, in any county in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court or part of term in his circuit may be held by the judge of any other circuit, and in all such cases, or in any case where the judge cannot preside, the General Assembly shall make such additional provision for holding court as may be found necessary.'

"The General Assembly, proceeding under said sec. 29, enacted Laws 1877, pp. 217, 218, R.S. 1879, secs. 1106-1113; now secs. 478.033, 478.037, 478.043-478.060, relating to the agreement upon or the election of an attorney of the Bar to act as special circuit judge. Sections 2, 3 and 6 of said act are now secs. 478.037, 478.043 and 478.053, respectively. We quote the material provisions of said sections.

"Section 478.037: 'Whenever * * * the judge is interested or related to, or shall have

Honorable John J. Stegner

been counsel for either party, or when the judge, if in attendance, for any reason cannot properly preside in any cause or causes pending in such court, and the parties to such cause or causes fail to agree to select one of the attorneys of the court to preside and hold court for the trial of cause or causes, the attorneys of the court who are present, but not less in number than five, may elect one of its members then in attendance having the qualifications of a circuit judge, to hold the court for the occasion.'

"Section 478.043: 'The election shall be held by the clerk of the court* * *.'

"Section 478.053: 'The parties to an action may agree upon one of the attorneys of the court to preside and to hold the court for the trial of such action * * *.'

"Section 508.100, upon which the parties rely, was Sec. 3730, R.S. 1879, and reads: 'If the judge is interested or related to either party, or shall have been of counsel in the cause, the court or judge shall award such change of venue without any application from either party, unless all the parties in the cause consent that such judge may sit on the trial thereof, or a special judge for the trial thereof be agreed upon by the parties, or elected in the manner provided by law.'

"Our Constitution of 1945 adopted a different plan with respect to this subject matter. The applicable provisions follow.

"Article V, sec. 6: 'The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto.' (Supreme Court Rule 11 was adopted pursuant to said sec. 6.)

"And art. V, sec. 15: '* * * Any circuit judge may sit in any other circuit at the request of the judge thereof.* * *'

"The Constitution of 1945 also provided, so far as material, that the Constitution of 1875 was superseded by the Constitution of 1945, Schedule, sec. 1, and that all laws inconsistent with the Constitution

Honorable John J. Stegner

of 1945 ceased to be effective on July 1, 1946, Schedule, sec. 2.

"Some cases considering secs. 6 and 15, supra, are:

"State v. Scott, 359 Mo. 631, 223 S.W.2d 453, 455 (1), held that a circuit judge transferred to another circuit under sec. 6, art. V, Mo. Const. 1945, had jurisdiction; and stated that prior criminal procedure statutes (secs. 545.670 and 545.690) providing for calling in another judge could not override the later constitutional provisions relating to the subject matter, and expressed doubt as to the validity of said sections.

"State v. Emrich, 361 Mo. 922, 237 S.W.2d 169, 172 (1), where a circuit judge had been called in under sec. 15, art. V, Mo. Const. 1945, followed State v. Scott, supra, stating: 'And we hold it (sec. 15) was self-enforcing.'

"(1) The authority of the Supreme Court to make temporary transfers of judicial personnel under sec. 6 of said Article likewise is self-enforcing."

At l.c. 44, the court stated:

"A proper procedure for defendant would have been to disqualify and request this court to transfer a judge to try the case. Consult Kansas City v. Knotts, 78 Mo. 356, 358 (1); State ex rel. Allen v. Trimble, 317 Mo. 751, 297 S.W. 378."

As we stated before, we believe, for the reasons given, that Sections 481.140 and 482.120 RSMo 1949, are no longer of any force and effect. If this be true, then all of the questions propounded by you to us are automatically resolved, since the person assigned is prohibited from practicing law. There would no longer be any question of a probate judge being elected by the members of the bar in the county in which the incapacity of a probate judge occurred, or of a circuit judge appointing a magistrate, insofar as neither of these things would be any longer done.

This situation would also, of course, preclude any possibility that the person who is now serving as your city attorney would be elected special probate judge, since we held that such elections are no longer valid.

Honorable John J. Stegner

CONCLUSION

It is the opinion of this department that Section 481.140 RSMo. 1949, relating to the power of the members of the county bar to elect a probate judge, and Section 482.120, relating to the power of a circuit judge to appoint a magistrate, in case of disability, are both rendered null and void by Section 6 of Article V of the Constitution of Missouri, and by Supreme Court Rule 11.05.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

HPW/lđ

JOHN M. DALTON
Attorney General