CONSTITUTIONAL LAW: Sections 18 and 25, Constitution of 1945; Senate Bill 207.

PROBATE JUDGES:

MAGISTRATES: In counties of 30,000 or less, persons seeking office of probate judge and magistrate must qualify for probate judge. There is no conflict as to qualifications for magistrates by the Constitution and Senate Bill 207.

April 23, 1946

F I L E D

6

FILED 6

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

We acknowledge receipt of your letter requesting an official opinion of this department, which reads as follows:

> "I would like to have your opinion upon the following: Crawford county is a county of less than 30,000 inhabitants. Section 18 of article 5 of the new constitution provides that in a county of less than 30,000 inhabitants the probate judge shall be judge of the magistrate court. Section 25 of article 5 of the new constitution prescribes the qualifications for the probate judge and also the magistrate judge. As I construe it the probate judge must be a licensed attorney at law, except that the probate judge now in office may succeed himself as probate judge without being so licensed; and that a person is qualified to be a magistrate judge if he is a licensed attorney, or if he has heretofore been a justice of the peace in this state for at least four years.
>
> "It would appear that in a county under 30,000 that the magistrate judge and probate judge must be one and the same person, yet different qualifications are prescribed.
>
> "At the present time we have had one man file for the office of magistrate judge, and one man file for judge of the probate court. Both

> of these men are justices of the peace and have been for four years, but neither is licensed to practice law. It would appear to me that there is a direct conflict between the constitution and Senate Bill 207, which also sets out the qualifications of a magistrate judge. Will you please advise me as to whether or not in a county of this size the probate judge and magistrate judge must be one and the same person, or can there be two separate offices, and please advise me as to the qualifications that each must have, or if one man must be both, what his qualifications must be."

In your request you have propounded certain questions pertaining to the offices of probate judge and judge of the magistrate court in counties with a population of 30,000 or less.

The first question that we shall endeavor to answer is whether in such counties the probate judge and the magistrate must be one and the same person.

We direct your attention to Section 18, Article V, of the Constitution of 1945, which provides for the magistrate courts, and which, in part, reads as follows:

> "There shall be a magistrate court in each county. 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 magistrate in counties with 30,000 inhabitants or less, and to invest one person with the duty and authority to perform the functions of both offices. That one person shall be the probate judge. In this regard the wording of the Constitution is clear and unambiguous and there is no room for a different interpretation. Your conclusion regarding this question is correct.

The second question that logically follows is, what qualifications must such person possess to be eligible for the combined office of probate judge and magistrate.

Section 25, Article V, of the Constitution of 1945, provides for the qualifications for probate judges and magistrates, 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, and except that persons who are not justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

Since we have concluded that in counties with a population of 30,000 or less the offices of probate judge and magistrate are not separate but are combined, and that the probate judge shall perform the functions of both offices, it is, therefore, necessary that any person seeking the combined office of probate judge and magistrate must qualify for the office of probate judge.

Section 25, supra, sets out the age, voting and residence qualifications necessary to hold the office of probate judge and further, requires that probate judges must be licensed to practice law. The exception to this qualification is that probate judges now in office, (meaning on the date the Constitution was adopted, February 27, 1945), may succeed themselves as probate judges without being so licensed.

You have stated that in your county two men, who are presently the justices of the peace, have filed for office; one has filed for the office of judge of the probate court and the other has filed for judge of the magistrate court. In view of the foregoing, we conclude that there is only one office to file for and that is judge of the probate court, who also will be the magistrate. Neither man can qualify for the office of probate judge because he is not licensed to practice law in this state, or is not presently the incumbent probate judge.

In answering these first two questions we have adhered to certain principles of constitutional construction and interpretation in construing the relevant provisions of the Constitution. The following appropriate rules appear in Vol. 16 of C.J.S.,:

Section 16, page 51:

> "A constitution should be construed so as to ascertain and give effect to the intent and

> purpose of the framers and the people who adopted it."

This rule is pronounced in Graves v. Purcell, et al., 337 Mo. 574, 85 S.W. (2d) 543, l. c. 547.

Section 14, page 49:

> "A constitution should be construed as fundamental law and should be interpreted in such a manner as to carry out the broad general principles of government stated therein."

Section 17, page 55:

> "Unless the meaning of the terms employed is not clear, questions as to the wisdom, expediency, or justice of a constitutional provision play no part in the construction thereof."

In Stockburger v. Jordan, 76 Pac. (2d) 671, 10 Calif. (2d) 636, there was involved the construction of a constitutional provision relating to the people's power of referendum. The Pacific citation, 677, expressed the following:

> "* * * We have nothing to do with the policy of the law as expressed in this section of the Constitution, and can neither approve nor condemn the same. Our duty begins and ends with the interpretation of the language so used in the Constitution, and with ascertaining the meaning thereof. This we have attempted to do, regardless of the reasons which may have prompted those responsible for the enactment of this provision of the Constitution."

The two men who have filed and are now justices of the peace, and have been for four years, may feel that they are qualified for the respective offices to which they aspire. In this connection, the rule of constitutional construction that a constitutional provision cannot be evaded because it works a hardship has been observed.

In State v. Missouri Workmen's Compensation Commission, 2 S.W. (2d) 796, 318 Mo. 1004, the question of when the Workmen's Compensation Act went into effect was involved. In ruling on the constitutional question, the court said at S.W. l.c. 802:

> "Nor can we change the Constitution by mere force of our opinion, just because some hardships may be occasioned by following the Constitution. * * * * * * *"

It might appear that there is some inconsistency existing between Section 18, supra, of our Constitution, which provides that in counties of 30,000 or less the probate judge shall also be the magistrate, and Section 25, supra, which provides for separate qualifications for probate judge and magistrate. In other words, an incumbent probate judge not licensed to practice law can succeed himself and, under Section 18, supra, can also be the magistrate, though it does not appear that he possesses the qualifications for magistrate as set out in Section 25, supra.

In this regard, we quote the following from 11 Am. Jur., Section 53, pages 661 and 662:

> "In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision, and if there is an apparent repugnancy between different provisions, the court should harmonize them if possible. The rules of construction of constitutional law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each.
>
> "It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. * * * * * * * * * * * * *"

In connection with the above quotation we cite the case of Jones v. Williams, 121 Tex. 94, 45 S.W. (2d) 130, 79 A.L.R. 983, where there was involved the problem of the Legislature having the power to release persons from payment of taxes. In ruling on certain constitutional provisions the court stated the following, at S.W. l. c. 137:

> "* * * The rule is that a Constitution is to be construed as a whole, and 'effect is to be

> given, if possible to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. * * * It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. Every provision should be construed, where possible, to give effect to every other provision.' * * * * * "

Although the problem has not been specifically presented in your request, we would like to take this opportunity to briefly discuss the question whether a probate judge now in office can succeed himself as probate judge and also be the judge of the magistrate court, when he is not licensed to practice law. An opinion was rendered by this office on this very question, to the Honorable Thomas G. Woolsey, Prosecuting Attorney of Cooper County. We quote the words of Mr. W. O. Jackson, Assistant Attorney General, as follows:

> "The Constitution provides for probate courts and magistrate courts. It also provides that in counties having a population of 30,000 inhabitants or less the probate judge shall be the magistrate. It further provides that probate judges and magistrates shall be lawyers, except that probate judges now in office may succeed themselves if they are not lawyers and that persons who have previously been justices of the peace in this state for at least four years, shall be eligible for the office of magistrate. At first glance it would seem that there may be a conflict in these provisions, for in one place the provision requires magistrates, with the one exception that the persons who have served as justices of the peace for at least four years, must be lawyers. However, in construing the pro-

> visions of the Constitution, we must consider them all together, and the same section of the Constitution which prescribed the qualifications for judges of the probate courts and for magistrates also permits a judge of the probate court, who is now in office and who is not licensed to practice law, to succeed himself. To hold that the Constitution authorizes a probate judge, who is not a lawyer, to succeed himself to the office of probate judge, but that the provision of the Constitution relating to magistrates forbids him to be a magistrate, when the Constitution further specifically provides that the judge of the probate court in counties having a population of 30,000 inhabitants or less, shall be the magistrate, would be the height of absurdity and would place an interpretation upon the Constitution which would convict the framers of the Constitution of gross carelessness.
>
> "Inasmuch as the Constitution specifically declares that in counties having a population of 30,000 inhabitants or less, the judge of the probate court shall be the magistrate, and further provides that a probate judge who is not a lawyer may succeed himself as probate judge, it necessarily follows that he may also be the magistrate."

The remaining question before us is to determine if there is a conflict existing between Senate Bill 207 and the Constitution. Section 3 of Senate Bill 207 provides for the qualifications for judge of the magistrate court and, in part, reads as follows:

> "Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next, preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be

> eligible to the office of magistrate without being licensed to practice law. * * * * * *"
>
> (Emphasis ours.)

We have concluded that in counties of 30,000 inhabitants the probate judge serves as judge of the magistrate court, and have construed Section 25, supra, to mean that in such counties a probate judge may succeed himself as probate judge and be judge of the magistrate court though he is not licensed to practice law. The same is clearly provided in the underscored portion of Section 3 of Senate Bill 207, supra.

The remaining portion of Section 3, supra, pertaining to the qualifications for magistrate, would only apply in such counties where the office of judge of the magistrate court is separate, as in counties with a population over 30,000, or in counties with a population of 30,000 or less, where additional magistrate courts have been created by order of the circuit court.

Section 6 of Senate Bill 207 provides as follows:

> "In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court and his failure or refusal to do so shall constitute a vacancy in both the office of probate judge and the office of judge of the magistrate court."

Under this section anyone holding the office of probate judge who is licensed to practice law, a fortiori would qualify as judge of the magistrate court. A person holding the office of probate judge may succeed himself although not licensed to practice law. The fact that he was holding the office on the date the Constitution was adopted qualifies him for the office of probate judge. And, since the Constitution says that in counties of 30,000 inhabitants or less, the probate judge shall be the magistrate, a person who qualifies for probate judge a fortiori qualifies for judge of the magistrate court.

Conclusion

It is, therefore, the opinion of this department that under our present Constitution in counties of 30,000 inhabitants or less, the office of probate judge and judge of the magistrate court shall be held by one person, who shall be the probate judge; that in such counties any person seeking the combined office of probate judge

and judge of the magistrate court must qualify for the office of probate judge. There is no conflict between our present Constitution and Senate Bill 207 so far as the qualifications for judge of the magistrate court are concerned.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General