CONSTITUTIONAL LAW: Probate Judge unlicensed to practice law may succeed himself in office and be magistrate.

Probate Judge:

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April 18, 1945

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Honorable Thomas G. Woolsey
Prosecuting Attorney
Boonville, Missouri

Dear Mr. Woolsey:

Under date of April 11, 1945, you wrote to the Honorable Vano Thurlo, Assistant Attorney General, requesting an opinion as follows:

> "I believe that the newly adopted constitution has some inconsistencies. For instance, Section 25 of Article 5 provides that magistrates shall be licensed to practice law as shall probate judges, - except, however, present probate judges, even though they are not licensed to practice law, may succeed themselves. Also, present justices of the peace, or those who have served as such for four years or longer will be eligible to be elected magistrate.
>
> "Cooper County has a population of less than 30,000 inhabitants. The two offices, probate judge and magistrate, must be held by the probate judge. Query: can our present probate judge, who is not a lawyer, succeed himself? He must be a lawyer to be the magistrate, and the magistrate must be probate judge.
>
> "Our probate judge, Don U. Wilson, is very officient, honest and reliable. We hope he can be re-elected. However, as I interpret the new document, I think he will be disqualified.

> "This inconsistency has caused a great deal of consternation among some of us and I wish you would give it some consideration and let me have your interpretation of the section quoted."

As Mr. Thurlo is on leave of absence from this office at this time, your request has been assigned to the writer for reply. While it is a bit early for people to be interested in running for office in 1946, the question you ask is one of importance and one which will be of interest in a great many counties in the State and should be answered.

Before proceeding to a discussion of the question asked, it is necessary to call your attention to certain provisions of the Constitution of 1945 which are not mentioned in your letter, as well as the provision you do mention.

Section 17, Article V, authorizes probate courts. This section is as follows:

> "Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act ex officio as his own clerk."

Section 18 of the same article creates the magistrate courts in each county. The first two sentences of this section are pertinent to your inquiry and are 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 portion of Section 25, Article V, referred to in your letter, is as follows:

> "* * * 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 now 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."

In order to arrive at the answer to your question it is necessary for us to refer to a few fundamental principles of law pertaining to the construction and interpretation of constitutions. Those fundamental rules are taken from Corpus Juris Secundum, Volume 16:

Section 23, page 62:

> "A constitution should be construed as a whole and effect given to every part, if possible."

Section 14, page 49:

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

Section 15, page 51:

> "Generally speaking, principles of construction applicable to statutes are also applicable to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn."

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."

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."

Section 18, page 55:

> "A clear and unambiguous constitutional provision cannot be evaded by construction because it works a hardship or absurdity, but a construction which will have such effect will be avoided if possible."

Bearing these rules in mind, we must also keep in mind the rule announced in the case of Law v. People, 87 Ill. 385, that "a strained construction or astute interpretation to a constitutional clause, such as will avoid the intent of the framers of the instrument, will not be permitted in order to relieve against any individual or local hardships."

The foregoing rules of construction are all well established and have been frequently applied in cases, and in connection we call your attention to the following brief quotations.

In the case of Mitchell v. Lowden, 123 N. E. 566, a case wherein the Supreme Court of Illinois was construing a constitutional amendment pertaining to the construction of highways, the court at l. c. 569 used the following language:

> "* * * A constitutional provision must be construed like a statute with reference to the object to be accomplished, and when the real purpose is apparent the language must be construed so as to carry the purpose into effect. It is not to be presumed that a provision was inserted in a Constitution or statute without reason or that a result was intended inconsistent with the judgment of men of common sense guided by reason. Not the letter of the law only, its mere words, but its spirit and object, must be taken into consideration, and when a particular intent to effect a specific purpose is manifest, respect must be paid to that intent. * * *"

And again in the case of Bakkenson v. Superior Court, 241 Pac. 874, the Supreme Court of the State of California, in

construing a constitutional amendment pertaining to the jurisdiction of justices of the peace, pronounced the following rule (1, c. 876):

> "* * * In order to determine what the framers of said amendment intended by the language employed in the foregoing portion thereof, the entire scope and purpose of said amendment as expressed in the terms thereof when read as a whole must be looked to and given effect, * * *"

Further, in the case of Watkins v. Duke, 82 S. W. (2d) 248, the Supreme Court of Arkansas in construing a constitutional amendment pertaining to taxation, ruled as follows:

> "The first sentence of the section just quoted, if it stood alone, would be decisive that no city in this state has the power or authority to levy any special tax thereunder for the purposes stated therein in excess of 5 mills on the dollar for any one year, but the language which immediately follows renders it somewhat uncertain. Under such circumstances, it becomes our duty to resort to well-known canons of construction. The primary intent of the framers of the amendment should be ascertained, Lybrand v. Wafford, 174 Ark. 298, 296 S. W. 729, and in case of ambiguity, such interpretation should be adopted as to avoid inconvenience and absurdity. Hodges v. Dawdy, 104 Ark. 583, 149 S. W. 656."

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 those 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 provisions of the Constitution, we must consider them all together, and the same section of the Constitution which prescribes 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.

Conclusion

It is, therefore, the conclusion of this department that in counties having a population of less than 30,000 inhabitants, a probate judge who is now serving, if re-elected, may succeed to the office of probate judge and may also serve as the magistrate.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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