

CONSTITUTIONAL LAW:

Under Sections 18 and 25, Article 5, Constitution of 1945, justice of the peace not licensed to practice law cannot hold offices of probate judge and magistrate in counties with 30,000, or less, inhabitants.

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March 6, 1946

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Honorable Percy W. Gullic  
Prosecuting Attorney  
Oregon County  
Alton, Missouri

Dear Sir:

This department has received your letter requesting an official opinion, which reads as follows:

"I would like to have your opinion on Section 25, Article 5 of the new Constitution of Missouri relative to the qualifications of Probate Judges and Magistrates.

"I would like to know if a justice of the peace, now in office, would be eligible to the office of probate judge and magistrate in a county with a population under 30,000.

"This justice of the peace is not licensed to practice law. Section 25, Article 5 provides a probate judge may succeed himself in office, also that a justice of the peace, now in office is eligible to the office of magistrate.

"So the part in question is 'would a justice of the peace be eligible to the office of probate judge and magistrate in a county under 30,000 population, where the probate judge shall be judge of the magistrato court.'"

After studying the facts presented, the principal question involved in your request is whether, under the Constitution of 1945, a justice of the peace now in office is qualified to hold the offices of probate judge and magistrate in a county with a population under 30,000, although he is not licensed to practice law.

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

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

That portion of Section 25, Article V of the Constitution of 1945, pertaining to the question, 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 answering your question, certain principles of constitutional construction and interpretation must be observed in construing the relevant provisions of the Constitution. The following appears in 16 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.

Again, in 16 C. J. S., Section 14, page 49, it is stated:

"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."

Also, in Section 17 of 16 C. J. S., page 55, the following appears:

"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. 636, there was involved the construction of a constitutional provision relating to the people's power of referendum. At Pac. loc. cit. 677, the court 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."

Again, in 16 C. J. S., Section 18, page 55, the following is stated:

"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."

In State v. Missouri Workmen's Compensation Commission, 2 S. W. (2) 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. loc. cit. 802:

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

In 11 Am. Jur., Section 53, pages 661 and 662, it is stated:

"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 following appears at S. W. loc. cit. 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.' \* \* \* \*"

Another rule of constitutional construction that applies in the instant case is found in 16 C. J. S., Section 21, page 61, which is as follows:

"Ordinarily the enumeration of specified matters in a constitutional provision is construed as an exclusion of matters not enumerated, unless a different intention is apparent."

All of the rules of constitutional construction and interpretation herein cited have been used many times, and numerous citations can be found in the various legal digests.

In Section 18, Article V of the Constitution of 1945, supra, it is provided that in counties with 30,000 inhabitants or less the probate judge shall be judge of the magistrate court. However, the converse of this proposition would not be true. The clear and unambiguous expression of one proposition excludes the application of another.

Section 25, Article V of the Constitution of 1945, supra, provides the qualifications for probate judges, and among those stated it is necessary that the probate judges be licensed to practice law, except that those who are now in office may succeed themselves as probate judges without being so licensed. Therefore, in counties with 30,000 inhabitants or less, for a person not licensed to practice law to be probate judge he must already be holding the office or succeed himself as probate judge. This is the only exception to the provision that probate judges shall be licensed to practice law and excludes the expression of any other exception.

#### Conclusion.

In view of the foregoing, it is the opinion of this department that in counties with 30,000 inhabitants or less a person now holding the office of justice of the peace is not qualified to hold the offices of probate judge and magistrate if he is not licensed to practice law, because he is not qualified to hold the office of probate judge.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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