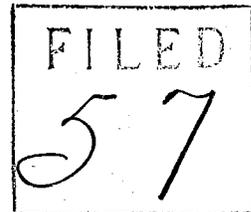


CONSTITUTION:
PROBATE JUDGES:

(1) Construction of Art. V, Sec. 27, Constitution of 1945 with respect to incumbents in the office of probate judge; (2) qualifications of persons appointed as judge of probate to fill vacancies occurring in current term.

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Honorable Gordon J. Massey
Prosecuting Attorney
Ozark, Missouri

Dear Sir:

Reference is made to your letter dated April 27, 1945, requesting an official opinion of this office, and reading as follows:

"We have a probate judge who is now sick and from present indications he will never be able to take charge of and handle his office. He has been out since December.

"Please advise me if he is unable to assume the duties of his office if he will, under the new constitution, be entitled to receive one half of his salary until his term expires.

"Also advise me whether or not the party appointed to take his place and fill the unexpired term must be a lawyer as provided in the new constitution."

With respect to the first question propounded in the second paragraph of your letter of inquiry, we direct your attention to Article V, Section 27, of the Constitution of 1945. It reads as follows:

"Any judge of a court of record or magistrate who is unable to discharge the duties of his office with efficiency by reason of continued sickness or physical or

mental infirmity shall be retired from the office by order of a committee composed of three judges of the supreme court, one judge of each of the courts of appeals, and three circuit judges, elected by the judges of the respective courts, after notice and a fair hearing and on a finding of two-thirds of the committee that the disability is permanent. The judge so retired shall receive one-half his regular compensation until the end of his term of office. The supreme court shall prescribe rules of procedure under this section."

That the office of judge of probate is within the purview of this constitutional provision appears from Article V, Section 17, of the Constitution of 1945, which reads, in part, as follows:

"Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, * * *."

Although the Constitution of 1945 became effective on March 30, 1945, yet the effectiveness of its provisions in many instances has been suspended by the Schedule appended thereto. We particularly direct your attention to Section 3 of the Schedule so-appended to the Constitution of 1945, which reads as follows:

"The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

The incumbent Probate Judge of Christian County has been elected under the provisions of Section 2438, R. S. Mo. 1939, which provides, in part, as follows:

"At the general election in the year 1878, and every four years thereafter, except as

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hereinafter provided, a judge of probate shall be elected by the qualified voters in every county. Said judge shall be commissioned by the governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified: * * * "

Under this statute, the incumbent judge of probate was elected at the general election held in 1942, assuming office on the first day of January, 1943. Consequently, his term of office will not expire until the first day of January, 1947. He, therefore, was an officer such as is referred to in Section 3 of the Schedule of the Constitution of 1945, quoted supra. Such being the case, it becomes pertinent to determine whether or not the provisions of Article V, Section 27, of the Constitution of 1945, if made effective with respect to such incumbent, would have the effect of vacating or otherwise affecting his term of office. It is clearly apparent that to apply the retirement provisions of the Constitution of 1945 to incumbents would affect their term by reason of the vacation of a portion thereof, and would further affect their office by reason of depriving such incumbents of one-half the emoluments now thereto appertaining.

From the foregoing, we reach the conclusion that inasmuch as retirement of the incumbent judge of probate under the provisions of Article V, Section 27, of the Constitution of 1945 would have the effect of vacating the term and affecting the emoluments of the present incumbent, such constitutional provision is not effective with respect to judges of probate elected or appointed prior to the effective date of the Constitution of 1945.

With respect to the second question which you have propounded in the third paragraph of your letter of inquiry, we direct your attention to a portion of Article V, Section 25, of the Constitution of 1945, which reads, in part, as follows:

" * * * Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Pro-

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bate 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, * * *."

The qualifications with respect to judges of probate at the time of the election of the incumbent are found in Section 1988, R. S. Mo. 1939, from which we quote:

" * * * Every judge of probate and of a county court shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election; * * *."

Upon comparison of the qualifications as set out in the Constitution of 1945 with the qualifications embodied in the statute in effect at the time of the election of the incumbent, it immediately becomes apparent that an inconsistency exists between the two. In the premises, we deem the provisions of Section 2 of the Schedule appended to the Constitution of 1945 to be pertinent. We quote from said Section 2:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

This provision has the effect of keeping in force the statute under which the incumbent judge of probate was elected, and such qualifications would apply to any person appointed to succeed the present incumbent. Inasmuch as said statute does not require that the person so appointed be a licensed attorney in order to qualify, we conclude that such qualification will be unnecessary.

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CONCLUSION

In the premises, we are of the opinion that the provisions of Article V, Section 27, of the Constitution of 1945, relating to the retirement of judges of courts of record and magistrates, and providing for compensation for such judges and magistrates so retired, are not applicable to the term of the present incumbent in the office of Probate Judge for Christian County, Missouri, for the reason that under the provisions of Section 3 of the Schedule appended to the Constitution of 1945, such constitutional provisions do not apply to the terms of such judges and magistrates as were elected or appointed prior to March 30, 1945, which was the effective date of the Constitution of 1945.

We are further of the opinion that in the event a vacancy occurs in the office of Probate Judge for Christian County, Missouri, the person appointed to fill such vacancy will not be required to be a licensed attorney.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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