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CONSTITUTION, REVISED:
CONSTITUTIONAL LAW:
COURTS: Justices – Judges – elected or appointed.
ELECTIONS: Ballot designation of judicial office.
MUNICIPALITIES: Cities – villages – primary or general elections – judicial office.

Sec. 646 of the Mich. Election Law as amended by Act 56, P.A. 1963, Second Extra Session, is construed as applying only to primary or regular elections held in cities and villages at which candidates are to be nominated or elected to the office of judge and said section does not have state-wide application.

Under Article VI, Section 24, Constitution of 1963, the designation of the office on the ballot may be given only to an elected incumbent justice or judge who is a candidate for nomination or election to the same office and accordingly Section 646 of the Michigan Election Law as amended by Act 56, P.A. 1963, Second Extra Session, must be limited and applied only to those justices or judges who have been elected to the office and may not be given to an appointed judge running for election.

No. 4264 March 31, 1964.

Hon. Russell H. Strange, Chairman
House Committee on Elections
House of Representatives
Lansing, Michigan

You have directed my attention to Act 56 P.A. 1963, Second Extra Session, which inter alia amended Section 646 of Act 116 P.A. 1954, being the Michigan Election Law. In your letter you say:

> "It has been stated that this amended section grants all incumbent judges, whether elected or appointed, the right to request the designation of his office upon the ballot."

You state the questions to which you wish my answer in these words:

> "My question is—are all incumbent judges, whether elected or appointed, and regardless of what court they are a judge or justice of, entitled to the use of an incumbency designation under this section, or is this limited to incumbent judges of cities and villages?
>
> "If your answer to this question is that it applies to all incumbent judges, whether elected or appointed, and of whatever court, then is this amendatory language in conflict with section 24 or article VI of the new State Constitution?"

Section 646 as amended by Act 56 P.A. 1963, Second Extra Session, reads in its entirety as follows:

> "Regular elections shall be held in cities and villages at such times as are provided by the laws and charters governing the time of holding such elections, and such officers shall be elected at such elections and for such terms as are provided by the laws and charters governing such cities and villages: Provided, That in any primary or regular election at

> which candidates are to be nominated or elected to the office of judge, any incumbent judge who is a candidate, upon his request in writing, may have printed upon the ballot under the name of such candidate, the designation of that office."

Section 646 in its antecedent form appears as part of Chapter 28 of the Michigan Election Law of 1954. That chapter has to do with the holding of elections. The first two sections of Chapter 28, being Sections 641 and 642, fixed the time of holding the general November election and the biennial spring election. Next follows Section 643 which prescribes the state and county officers to be elected at the general November election. Appearing in the list of officers so to be elected are county judges of probate and circuit court commissioners. Section 644 designates the officers to be elected at the biennial spring election and within that list of officers appears two justices of the Supreme Court and circuit judges in the years when circuit judges are to be elected. Sections 642 and 644 were repealed by Act 56 P.A. 1963, Second Extra Session, and the election of two justices of the Supreme Court and the circuit court judges are now to be held at the general November election pursuant to amendment to Section 643 by Act 56, supra. There is presently no Section 645 in Chapter 28, it having been repealed by Act 192 P.A. 1958. By way of summary, it thus appears that under the election law of 1954 the provisions for holding of elections for state and county officers were set forth in Sections 643 and 644 of Chapter 28.

Section 646 does not contain a list of officers to be elected in cities and villages but instead it provides "such officers shall be elected at such elections and for such terms as are provided by the laws and charters governing such cities and villages: * * *." This quoted language appeared in the same form in the original enactment of Act 116 P.A. 1954. Section 646 was amended by Act 192 P.A. 1958 prior to the last amendment by Act 56 P.A. 1963, Second Extra Session.

What is now amended Section 646 appeared in different form as Section 15, Chapter I, Part 4, of the Michigan Election Law of 1925, being Act 351 P.A. 1925. At the time of its enactment in the 1925 law it read:

> "Regular elections shall be held in cities and villages at the times provided for by the laws and charters governing the time of holding such elections, and such officers shall be elected at such elections as the laws and charters governing such cities and villages provide for."

The same language appeared as Section 14, Chapter II of the Michigan Election Law of 1917, being Act 203 P.A. 1917.

Significant changes were made in 1939, both in the Constitution and the statutes, which affected the election of judges. In that year the people by initiatory petition and subsequent ratification amended the Constitution of 1908 by adding a new Section 23 to Article VII. The effect of that amendment was to change the selection of judges and justices of courts of record from nomination and election as partisan party candidates to selection by a nonpartisan election.[1] The 1939 constitutional amendment pro-

[1] *Elliott v. Secretary of State,* 295 Mich. 245, 247; *Lockwood v. Commissioner of Revenue,* 357 Mich. 517, 563 (concurring opinion of Justice Black).

vided for primary elections and general elections of justices of the Supreme Court, judges of the circuit court, judges of probate courts, and circuit court commissioners on a nonpartisan basis. The 1939 amendment contained the following words:

> "There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office."

By express language this new Section 23 of Article VII was made self-executing.[2]

In the same year the legislature amended Section 15, Chapter I, Part 4 of the Michigan Election Law (the antecedent of present Section 646) by the enactment of Act 213 P.A. 1939. The only change made in Section 15 by the 1939 act was to add the proviso in these words:

> "Provided, That in any primary or regular election at which candidates are to be nominated or elected to the office of judge of any court of record, candidates for renomination or reelection shall have, at their request, printed upon the ballot under the name of such candidate, the designation of that office."

At the same legislative session of 1939 an amendment was made to Act 260 P.A. 1929, the common pleas court act, by adding in Section 1 a provision that the common pleas court should be a court of record with a seal and adding in Section 2 a proviso in these words:

> "Provided, That an incumbent who is a candidate for re-election, may, upon his request in writing have printed below his name the designation, 'common pleas judge.' "[3]

Your first question may be reworded to ask whether the proviso clause of present Section 646 as it now appears in Act 56 P.A. 1963, Second Extra Session, and as it has appeared in similar form as a part of the Michigan Election Law since the date of its original enactment in 1939 applies to all elections for judicial officers throughout the state or is it limited to the election of judges in city and village elections.

The fact that the pertinent language first appeared as a proviso and has ever since been retained in that form must be given consideration. The intent of the legislature in enacting a proviso is to be gathered from the section of which it forms a part and from a general purview of the whole context. *Township of Clearwater v. Board of Supervisors of Kalkaska County*, 187 Mich. 516, 525. In the opinion of the Supreme Court in this case, the further statement was made that a proviso often restricts the section in which it appears, limits it, and takes something back from the power first declared. But this is not the only construction which may be given to a proviso. In

[2] Article VII, Section 23, Constitution of 1908, was amended at the April election in 1947 and was again amended at the April election of 1955. In the 1955 amendment the self-executing provision was deleted but the ballot designation was retained.

[3] These provisions modified as to Section 2 still appear in the common pleas court act. Section 1 was last amended by Act 226, P.A. 1952. Section 2 was last amended by Act 48, P.A. 1958.

the case of *People v. American Central Insurance Co.,* 179 Mich. 371, 376, the Supreme Court said:

> "It is true the office of a proviso in a statute is, usually, to explain, modify, qualify, the enacting clause, and not to enlarge it. While this is the appropriate and the presumed office of a proviso, it may be clearly designed to perform some other office. And so it has been held that a proviso may be construed to enlarge the scope of the act, or to be equivalent to an independent enactment."[4]

When the proviso clause was first added to Section 15, Chapter I, Part 4 of the Michigan Election Law by Act 213 P.A. 1939, it had already been made known to the members of the legislature at that session that the State Constitution had been amended by the people at the preceding April election by the addition of Section 23 to Article VII. A mere reading of the words of Section 23 as in effect at the time discloses the declaration that it was to be self-executing. There was, therefore, no necessity for the legislature to pass implementing legislation to the new constitutional amendment. Under that Section 23, in all primary elections and general elections, justices of the Supreme Court, judges of the circuit courts, judges of probate courts, and circuit court commissioners, if running as a candidate for nomination or election to the same office of which he was an incumbent was entitled to have printed on the ballot the designation of his office. Section 23 did not include municipal court judges or justices of the peace for the ballot designation but did say that "all primary election and election laws, including laws pertaining to partisan primaries and elections, shall, so far as applicable, govern primary elections and elections hereunder."

It seems plausible to assume that the legislature undertook to make provision for ballot designation to incumbent judges running for election or reelection in city and village elections by amending the Michigan Election Law in Act 213 P.A. 1939. Although the ballot designation was mandatory under the constitutional amendment, it was left permissive under Act 213. Having been drafted in the form of a proviso in Act 213, it must have been intended as being controlling in city and village elections, anything to the contrary notwithstanding in the laws and charters governing such elections. To assign to this language a legislative intent that it was state-wide is to distort the context of the statute which it undertook to amend and the other provisions of the Michigan Election Law appearing in the same chapter of which the new proviso became a part.

No sound reason has been found for the legislative act in also amending the common pleas court act by the passage of Act 158 P.A. 1939 to grant the ballot desgination to common pleas judges. Act 213 P.A. 1939 had granted the ballot designation if requested to candidates for renomination or reelection as a judge of any court of record. Act 158 P.A. 1939 made the common pleas court a court of record and this would appear to have been adequate to have made the provisions of amendatory Act 213 applicable to that court. Perhaps the legislature was concerned over the language used by our Supreme Court in construing the common pleas court act (Act 260 P.A.

[4] The quoted statement was set forth in full with approval in *Charter Township of Warren v. Municipal Finance Commission,* 341 Mich. 607, 613.

1929) when it said in *Kates v. Reading,* 254 Mich. 158, 166 (decided in 1931):

> "Such courts are not solely of municipal concern but are instrumentalities for exercise of sovereign power and of such interest to the whole State that, in the absence of express constitutional limitation, the legislative power cannot be subordinated to local considerations or authority."[5]

I answer your first question by saying in my opinion Section 646 of the Michigan Election Law as amended by Act 56 P.A. 1963, Second Extra Session, must be construed as applying only to primary or regular elections held in cities and villages at which candidates are to be nominated or elected to the office of judge; my answer, however, being qualified by my further opinion hereinafter expressed as to the restriction which must be placed on the scope and availability of Section 646 because of the implication of Article VI, Section 24, Constitution of 1963, that the ballot designation may be used by none other than an elected incumbent justice or judge.

Having reached the conclusion that Section 646 of the Michigan Election Law as amended by Act 56 P.A. 1963, Second Extra Session, applies only to elections held in cities and villages, it becomes unnecessary to answer your second stated question. However, in order to assure your clear understanding of the effectiveness of Section 646 in its amended form, I shall discuss briefly the application of Section 24, Article VI of the Constitution of 1963 to the language appearing in the section. Section 24, Article VI, in its entirety reads:

> "There shall be printed upon the ballot under the name of each elected incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office."

I have previously issued my Opinion No. 4244 under date of December 10, 1963 in which I concluded that the legislature had no power to provide by statute that "appointed" judges seeking election after January 1, 1964 should have a ballot designation as "incumbent" or have the designation of their office. My conclusion in Opinion No. 4244 was predicated upon the language of Section 24, Article VI, aforesaid, which by necessary implication excluded the use of any such designation to any justice or judge who was not an *elected* incumbent at the time of running for the office. Applying the reasoning of Opinion No. 4244 to instant Section 646, it is clear that the language of Section 646 in the proviso clause is too broadly stated to be in conformity with Section 24, Article VI of the Constitution. The designation of the office on the ballot is permissible under present Section 646 to "any incumbent judge who is a candidate." The broad generality of these words would include an appointed incumbent judge as well as an elected

[5] For a partial history of the origin of the common pleas court see *O.A.G. 1959-1960, Vol. 1, p. 102,* and *Pheney v. Letts,* 292 Mich. 435. In *Baird v. Detroit Election Commission,* 316 Mich. 657, the Supreme Court in construing Act 158, P.A. 1939 held that a common pleas judge who was an incumbent by virtue of an appointment and not by previous election would not be entitled to have the designation of his office printed on the ballot since he was not running for re-election.

incumbent judge and for that reason are not in strict conformity to Article VI, Section 24, supra. It is a fundamental rule in the construction of statutes that they shall be given an interpretation and application which will be constitutional if possible. It is not necessary to declare the proviso clause of Section 646 wholly unconstitutional and void. It can be constitutionally applied if read as restricted to use of the designation on the ballot only by an elected incumbent judge who is a candidate. So read, an appointed incumbent judge who is a candidate would not be entitled to the ballot designation and is precluded from the use of the designation on the ballot even though he should file the written request therefor.

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ELECTIONS: Nomination and election within a city of justices of the peace.

JUSTICES OF THE PEACE: Nomination and election.

In a city, the charter of which makes the state law applicable to the nomination and election on a nonpartisan ballot of justices of the peace, a primary election for that office should not be held where the number of candidates filing nominating petitions does not exceed twice the number to be elected.

Where but two candidates file nominating petitions for the office of justice of the peace, and through error of the election officials a primary election is held, the names of both candidates should be printed on the ballot for the election, irrespective of the number of votes received by them at the primary election.

No. 4265 April 1, 1964.

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Your request for opinion states:

> "Under date of September 3, 1963, the electors of the city of Hancock, at an election called for that purpose, adopted a new city charter known as the Council-Manager Form of Municipal Government. It is therein provided that a Primary Election be held on November 5, 1963, and a General Election on December 9, 1963, at which time there was to be elected seven councilmen and one justice of the peace. Nomination petitions were required to be filed on or before October 4, 1963. Both the Primary and General Elections were nonpartisan. Eighteen persons filed nomination petitions for the office of Councilman and qualified to have their names placed on the Primary ballots and to run for nomination to this office. Two persons filed nomination petitions for the office of Justice of the Peace and likewise qualified