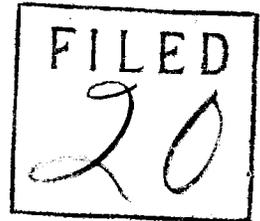


PROBATE COURT: Regular term in session ends upon death of the Judge.

January 24, 1945



Honorable Herbert J. Crosby  
Probate Judge  
Troy, Missouri

Dear Sir:

This department has your letter of January 2, 1945, requesting an opinion concerning your authority to hold Court prior to your next regular term incident to your appointment to succeed Judge Martin upon his death. Your letter states:

"Your writer has recently been appointed Probate Judge of Lincoln County, Missouri, to fill out the unexpired Term of Judge William C. Martin, now deceased.

"I am interested to have an opinion from your office concerning Section 2448, Revised Statutes of Missouri, 1939, as to whether or not I am entitled under said Section, or for that matter any other Section of our Statutes, to have the County Court to furnish a stenographer or rather pay for the costs of a stenographer in connection with the operation of my office, and if so, is it the duty of the County Court to pay the prevailing price that competent stenographers are receiving in this community?

"I am also interested in having an opinion from your office as to whether or not, upon my appointment by the Governor to the office of Probate Judge, that I have authority to proceed with the ordinary business of the office from date of appointment or does the death of the Probate Judge, William C. Martin, ipso facto, stop all proceedings in Court such as making orders, until the next Term of the Probate Court, which is the 2nd Monday in February, 1945. I might add that

Judge Martin did not close his November Term before his death, and it has been his practice to keep his Term open from Term to Term."

There is an opinion being written in the office, regarding the duties of the County Courts of the State to pay for the services of a stenographer for Probate Judges of the State. When this opinion is approved and promulgated, a copy will be sent you.

Section 34 of Article VI of the Constitution of this State provides that the General Assembly shall establish in every county a Probate Court which shall be a court of record.

Section 35 of the same Article of the Constitution, provides that Probate Courts shall be uniform in their organization, jurisdiction, duties and practice, \* \* \*.

The Constitution thus prescribing that Probate Courts should be uniform in their practice and procedure caused the Legislature to enact Section 2441, Article 11, Chapter 10, R.S. Mo. 1939, which is as follows:

"Said court shall hold four terms annually, commencing on the second Mondays of February, May, August and November and may hold special and adjourned terms at any time when required:  
\* \* \*"

There is much text authority and many decisions of the highest Courts in many States of the Union holding generally that when a Court of Record is convened at the beginning of a regular term it continues, unless it is adjourned until the opening day of the next regular term of such Court, and that the failure to adjourn during the term to a specific date does not end the term. In 15 C.J., page 881, in Section 231, it is stated:

"A term continues until it is adjourned or until it expires according to the time established by law. \* \* \*"

The same Section at the same page, and on page 882, further states:

"Where the time of beginning but not of ending a term is fixed, the term, when it has been duly begun, will continue, and may for all general purposes be considered as in session, until

it has been determined by some affirmative judicial act, such as an adjournment sine die, or until the next term, and after the term of a court has been opened, the questions how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall remain open for incidental business after the regular business of the term has been concluded are matters which rest in the discretion of the judge, \* \* \*

But such text and the cases cited in the notes thereto all seem to be treating of a condition where the Judge would still be living, and do not cover such a case as the instant case where the former regular Judge is deceased. You state in your letter that:

"Judge Martin did not close his November Term before his death, and it has been his practice to keep his Term open from Term to Term."

The writer has found no case in Missouri where the question of the death of a Judge was involved on the matter of the duration of a term of Court. Corpus Juris on page 883, in a sub-paragraph of Section 231, states:

"The death of the regular judge does not end the term where his successor qualifies on the same day, and a Fortiori the death of such judge during a term held by a special judge previously selected does not end such term."

This statement under note 47 cites the case of Franklin v. Vandervoort, 50 W. Va. 412, 40 SE 374. In that case the regular Judge was ill. The Attorneys of the Bar under a Statute in the State of West Virginia permitting them so to do, elected a Special Judge to transact the business of the Court. The Special Judge assumed the bench and was occupying the bench and Court was in open session on the day of the death of the regular Judge. The Governor of that State on that day appointed the person who was acting as Special Judge to fill the unexpired term of the regular Judge while the said Special Judge was actually holding Court. That, it appears, could very well be the case and supply the text of Corpus Juris above quoted, because the Court was kept alive and in session by the terms of the Statutes, by the election of a Special Judge. The Court never ceased to function for want of a Judge. Reasoning the matter it would seem that the converse of the text just cited from Corpus Juris would be that if a new Judge did not qualify on the day of the death of the regular Judge, and while Court actually was being conducted in open session, that the term of Court would end upon the death of the Judge.

January 24, 1945

In the case of State ex rel. Smith vs. Coleman, 182 Mo. App. Rep. 358, it is decided that when a Judge of a Court of Record (in that case, a Circuit Judge) left the bench without formal adjournment or closing of his Court and intending not to return, that this constituted an ending of his term. The question in that case came up on the point of the timeliness of a motion for a new trial filed in the case pending before that Court. It seems it had been the custom of the Judge to leave his Court, as he thought, in session for the accommodation of litigants and lawyers to file belated motions after the Judge would depart for his home, he not intending to return. He did not return in that instance. After his departure the motion for new trial which constituted the basis for the appeal was filed. The Kansas City Court of Appeals in an opinion by Judge Trimble held that the term of Court ended when the Judge left not intending to return and that the motion for new trial was filed out of time. The heart of that case is that where there is no Judge there is no Court. The case cites and quotes from North Carolina cases and other cases from other jurisdictions. In holding that when the Judge left the bench the term ended, in the above cited Coleman case, l.c. 362, it is said:

"Defendant does not controvert the foregoing proposition. His contention is over the question whether or not the February term was adjourned or had come to an end at the time the motion for new trial was filed.

"Under the admitted facts it must be said that the court had adjourned and the term had come to an end. Any other view would tend to the introduction of abuses, would give rise to distrust and confusion, would rob judgments and court records of their certainty and finality, and open the door to irregularities of many sorts. It is difficult to conceive of a court being in session and transacting business with no judge thereof present to preside over and give expression to its orders. Whether a court is adjourned or not depends upon the actual facts and conditions and not upon whether a formal order that effect has been made. We do not mean to say that every time a judge momentarily or temporarily leaves the bench there is an adjournment. But when, as in this case, the judge has held a term of court and has transacted business and has left the place and jurisdiction of the court and departed to his home with no intention of returning such act constitutes an adjournment for the term the same as if a verbal order and

January 24, 1945

proclamation to that effect had been made. In defining the meaning of adjournment, the Supreme Court of Wisconsin, in French v. Higgins, 45 N.W. 817, held it to mean that situation where the judge not only ceases to exercise his functions for the time being but leaves the place of trial and the officers separate so that there remains no court at such place. If that result is accomplished it is an adjournment no matter whether an order or proclamation to that effect was made or not. In Boyd v. Teague, 16 S.W. 338, the Supreme Court of North Carolina says 'the term expires when, the business being dispatched, the judge adjourns court or leaves . . . The term of court is held by the judge and there can be none after he leaves.' In Delafield v. Lewis Mercer Const. Co., 20 S.E. 167 the same court, in speaking of the idea that the term of the court extended beyond the time of the judge's departure, says: 'This idea of a court in session without a judge is not warranted by law.' In that case the trial judge, upon leaving, directed that the court should remain open after he left. But the Supreme Court held that the court could not be constructively open after the judge had left. And it also held that even if the judge omitted to make a formal order of adjournment or directed that court should be held open' still there was an actual adjournment when he leaves the bench for the term. There is no court when there is no judge to hold it, and there can be constructive session after he has left.'"

In the same case, l.c. 364, it is further said:

"\* \* \* The necessity for the personal attendance and presence of the judge at the place of meeting in order for the tribunal so meeting to constitute a court is recognized by our statutes which provide that if court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day, and if, at any time after the commencement of a term, it happen that the court shall not be held according to its adjournment, it shall stand adjourned from day to day until the evening of the third day. If during that time the regular judge appear, or if in the proper manner a special judge is elected, then there is a court at which business may be transacted, but if not, there is no court at that term.\* \*"

The Coleman case cites the case of State ex rel. Klotz v. Ross et al. 113 Mo. 23. This is a case where a special Judge was elected to hold Circuit Court and adjourned the term. Thereafter the regular Judge returned and undertook to open the term of Court again. Our Supreme Court held that where the term once ended the Judge had no power to reconvene the term. In the 118th Mo., l.c. 46, 47, Judge Gantt in writing the opinion said:

"Was there any power in Judge Wear to reopen court, and hold it, under these circumstances? We take it that it is immaterial whether Judge Houck ought to have waited or not. Inasmuch as he did adjourn the term, could Judge Wear reopen the court again as a part of the regular March term? The judicial power in this state can only be exercised at the times and places prescribed by law. Accordingly the statutes have, with great particularity, specified the day on which each court, whether circuit, county, probate or supreme court, shall meet. Out of abundant caution it is provided that, if the judge shall be detained, the sheriff may adjourn the court till the third day, when if the judge is still absent he may adjourn to the next regular term; and it is provided that the courts may upon notice call special terms, but the whole scope of the legislation on this subject as well as the common law, is to the effect that only at the stated times, and at the places specified, can a court lawfully meet. Revised Statutes, 1889, sections 3248, 3249, 3250.

"The mere coming together of the judge, and the other officers of the court, unless at a time fixed by law or on a day to which the court has been lawfully adjourned, does not constitute a court under our laws. Freeman on Judgments, section 121, and cases cited. This is so clear that we doubt whether any court or lawyer ever questions it. Galusha v. Butterfield, 2 Scam. 227; Brumley v. State, 20 Ark. 77; Dunn v. State, 2 Ark. 229; Stoval v. Emerson, 20 Mo. App. 322.

"Again and again this court held that, after a term closes, the judge nor the court has any power to change a judgment or entry. An adjournment to the next regular term concludes all further action by the officers at that term. \* \* \*"

These cases, it is believed, furnish sound authority to apply the reasoning that if the term ends by the Judge who is still living leaving the County, not intending to return, that when the Judge dies the term ends. Following the reasoning of Judge Trimble in the Coleman case, if the Court ends for lack of a Judge where the Judge is still living but is absent, would it not with greater force apply to the case where the Judge is deceased and the conclusion be sound that upon his death his Court ended? We think it does.

The propriety and legality of the action of the Judge appointed as the successor to the deceased Judge on such matters as the issuing of orders of publication and the ordering of the sale of real estate of a decedent would be to say the least, very doubtful. Taking the Coleman case as authority that no Court can exist without a Judge, and taking the Ross Case as the authority that when the Court is once ended it cannot be revived until the next regular term of Court, it would seem that the only sound view to be taken in this matter would be that when Judge Martin died his Court ended, and that the successor Judge upon his appointment could not revive the term or transact any unfinished business of that term until the next term of Court.

#### CONCLUSION.

Considering the facts submitted and the above authorities cited and quoted, it is the opinion of this department that when the Probate Judge of Lincoln County died his Court ended for want of a Judge to conduct the Court, and that the present Judge, appointed to fill the vacancy in that office, does not have the authority or power to reopen the term of Court which ended upon the death of the former Judge, or to transact unfinished business thereat as a regular Court until the next February Term, 1945, of said Court.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

HARRY H. KAY  
(Acting) Attorney General

GWC:ir