COSTS:
PROBATE COURT:
CIRCUIT CLERKS:

The clerk of the circuit court is not entitled to charge the $25 fee for each civil case instituted in circuit court in a probate case heard by the circuit court because of disqualification of the probate judge.

OPINION NO. 106

March 21, 1973

FILED
106

Honorable Gary Wallace
Assistant Prosecuting Attorney
Shelby County Courthouse
Shelbyville, Missouri 63469

Dear Mr. Wallace:

This opinion is in response to your question asking:

> "Does the provision of Section 483.540 VAMS (1972), relating to Clerks of Circuit Courts, which provides for a fee of $25.00 for 'each civil case instituted in that court' apply to cases instituted in Probate Court and certified to the Circuit Court upon disqualification of the Probate Judge."

Section 483.540 (H.C.S.S.B. No. 496, 76th General Assembly) provides:

> "1. The clerks of the circuit courts and of the courts of common pleas, shall charge and collect in all civil proceedings the following fees to aid in defraying the expenses of judicial administration:
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> |---|---|
> | Each civil case instituted in that court. . . . . | $25.00 |
> | Each additional summons issued for additional defendants. . . . . | 1.00 |
> | Each alias summons issued. . . . . | 1.00 |
> | Each pluralis summons issued . . . . | 1.00 |
> | Each third party defendant issued. . | 1.00 |
> | Each appeal from municipal courts. . | 20.00 |
> | Each appeal from magistrate courts . | 20.00 |

> In circuits where there is more than one section or division of the court, costs in any case shall be charged in only the division or divisions in which the case may be carried.
>
> "2. Fifty percent of all fees collected shall be paid into the county treasury in the manner provided in section 483.560 or in the case of the city of St. Louis, paid into the city treasury in the manner provided in section 483.545, and the remaining fifty percent of the fees shall be paid to the director of revenue in the manner provided in section 483.541."

We note by comparison that the pertinent provision of Section 483.540, RSMo 1969, which was repealed provided "Each civil case, with one defendant . . . . . $12.00." Therefore, it is clear that the language "instituted in that court" was added in lieu of the language "with one defendant."

The provision respecting disqualification of the probate judge and certification to the circuit court is Section 472.060, RSMo, which provides:

> "No judge of probate shall sit in a case in which he is interested, or in which he is biased or prejudiced against any interested party, or in which he has been counsel or a material witness, or when he is related to either party, or in the determination of any cause or proceeding in the administration and settlement of any estate of which he has been executor, administrator or guardian, when any party in interest objects in writing, verified by affidavit; and when the objections are made, the cause shall be certified to the circuit court, which shall hear and determine same; and the clerk of the circuit court shall deliver to the probate court a full and complete transcript of the judgment, order or decree made in the cause, which shall be kept with the papers in said office pertaining to said cause."

On filing of the proper application, the probate judge is without authority to proceed other than to certify the cause to the

circuit court. State ex rel. Musser v. Dahms, 458 S.W.2d 865 (K.C. Ct.App. 1970). The circuit court acquires jurisdiction as a circuit court although the proceeding retains its probate character and the judgment is the judgment of the circuit court and not of the probate court. In re Schwidde's Estate, 363 S.W.2d 585 (Mo. 1963). And, as to substantive matters, the circuit court is governed by the laws of administration or guardianship; but as to procedural matter, it is subject to the rules of civil procedure. In re Boeving's Estate, 388 S.W.2d 40 (Spr.Ct.App. 1965).

In our Opinion No. 33 dated February 11, 1970, to Lauderdale (copy enclosed), we considered many of the numerous questions which arose out of the repeal of Section 483.540, RSMo 1959, and the enactment of the flat fee provisions in lieu of the itemized fee allowances. We concluded therein that the legislature has withdrawn the authority of such circuit clerks to charge for certain services with some exceptions and that such clerks still have the obligation to perform such services but have no right to levy charges not expressly granted by statute.

It has long been the rule that the entire subject of costs in both civil and criminal cases is a matter of statutory enactment and such statutes must be strictly construed. Ring v. Charles Vogel Paint & Glass Company, 46 Mo.App. 374 (St.L.Ct.App. 1891). While it is possible that this rule might not have the force today that it had at a time or in circumstances where the fee inured to the personal benefit of the claimant, which is not the case in the premises, the fact remains that although we are bound to interpret the legislative intent we cannot read into a statute an intent contrary to the legislative intent made evident by phraseology. City of St. Louis v. Crowe, 376 S.W.2d 185 (Mo. 1964). Likewise, it is recognized that the courts in interpreting statutes have nothing to do with the wisdom or propriety of the statute, such matters being for the legislature. State v. Knapp, 33 S.W.2d 891 (Mo. 1930).

With the foregoing in mind, we note that the precise language of Section 483.540, as amended, clearly restricts the $25 fee to "[e]ach civil case instituted in that court." We find no applicable Missouri cases with respect to the word "institute"; however, we view it similar to the word "commence" which has been held to mean when the petition is filed and the summons delivered to the sheriff. Emanuel v. Richards, 426 S.W.2d 716 (St.L.Ct.App. 1968). Other jurisdictions have held that "institute" when applied to legal proceedings signifies the commencement of the proceedings. "Institute" means to begin, to commence, to initiate, to originate. Wales v. Tax Commission, 412 P.2d 472 (Ariz. banc 1966); Kennie v. City of Westbrook, 254 A.2d 39 (Me. 1969); Rucks-Brandt Const. Co. v. Price, 23 P.2d 690 (Okla. 1933).

In sum, it seems clear that if there were no cause "instituted" in the probate court, there would be no grounds for removal of the probate judge as the latter must necessarily come after the cause or claim is instituted.

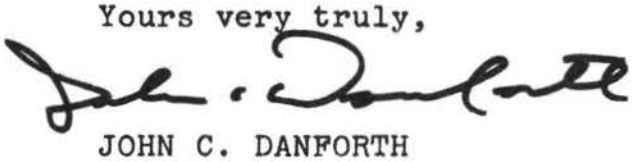
While it is our view that the legislature omitted provisions for payment to the circuit clerk in the premises (as also was apparently done with respect to appeals from the probate court), it is also our view that we do not have the right to supply the omission as such is the exclusive province of the legislature.

CONCLUSION

It is the opinion of this office that the clerk of the circuit court is not entitled to charge the $25 fee for each civil case instituted in circuit court in a probate case heard by the circuit court because of disqualification of the probate judge.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 33
2-11-70, Lauderdale