

PROBATE COURTS: Instructions to jury should not be given by probate judge.

April 20, 1943

Hon. A. J. Bolinger
Judge of the Probate Court
Versailles, Missouri



Dear Judge Bolinger:

We acknowledge receipt of your letter of April 6, wherein you request an opinion from this department. Your letter is as follows:

"Please give me your opinion whether or no, in light of what is said in Davis v. Johnson, 58 S. W. (2d) 748, it is proper for a Probate Judge to give a jury instructions in the like manner as instructions to a jury in Circuit Courts."

The case of Davis v. Johnson, referred to in your letter did not involve the question of giving instructions to a jury in a probate court, however, the court did hold as a general proposition that in practice, when not otherwise provided, the probate court may borrow from the code. In so holding, the court stated:

"The procedure authorized by those statutes 'is a summary and quick method of bringing property into the estate. The probate court is a court of record, and in practice, when not otherwise provided, may borrow from the Code.' Clinton v. Clinton, 223 Mo. 371, 338, 123 S. W. 1, 5.
* * * * *"

In the case of Clinton v. Clinton, cited in the above quotation, the issue was not whether or not a probate judge should give instruction to the jury in the probate court, but involved only a question of pleading. In holding that a reply to the interrogatories should be permitted, the court held:

"We concur in all that he has said in his opinion. We believe that property rights are to be tried in such cases. It is a summary and quick method of bringing property into the estate. The probate court is a court of record, and in practice, when not otherwise provided, may borrow from the Code. Whilst perhaps in the case at bar it was not necessary for a reply to be filed to the answers of the interrogatories, and the cases seem to indicate that the issues to be tried were upon the interrogatories and the answers thereto, yet we are of the opinion that to sharpen and shorten the real issues a reply should be permitted."

Section 66, Revised Statutes of Missouri, 1939, provides that:

"The issue upon the interrogatories and answers thereto shall be tried by a jury, or if neither of the parties require a jury, by the court, in a summary manner, * * * * *"

Section 200, Revised Statutes of Missouri, 1939, providing for the trial of issues founded upon demands in the probate court, provides that the trial shall be "conducted in a summary manner" before the court, or before a jury if one is required.

Section 447, Revised Statutes of Missouri, 1939, providing for inquiries on sanity, provides that the probate court:

"* * * * shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Section 1118, Revised Statutes of Missouri, 1939, being the provision of the code with reference to instructions, is as follows:

"When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence; which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case."

It will be noted that, except in insanity proceedings, the statutes, authorizing trial by jury in the probate court, provide that it be "conducted in a summary manner." In discussing the law concerning the proceedings in discovering assets in the probate court, the Kansas City Court of Appeals in the case of *In Re Parker's Trust Estate*, 67 S. W. (2d) 115, 1. c. 119, held:

"However, the further proceedings were not according to the course of the common law and constituted a form of trial disregarding the established course of proceedings, and, being summary in character, were such as required an express statute for their exercise. This seems to be the accepted view. 60 C. J. 1014; *Cohen v. Atkins*, 73 Mo. 163, loc. cit. 166; *Gunn v. Sinclair*, 52 Mo. 327, loc. cit. 332; *Nolan v. Johns*, 27 Mo. App. 502, loc. cit. 508; *Keary v. Baker*, 33 Mo. 603, loc. cit. 612. When such proceedings are authorized they are governed wholly by the provisions of the statutes authorizing them; and, in the prosecution of

such, the provisions of such statutes, being in derogation of common right, must be strictly complied with. Owens v. Andrew County Court, 49 Mo. 372, loc. cit. 378; Judson v. Smith, 104 Mo. 61, 15 S. W. 956; 60 C. J. 1015. * * * * *

In the case of Central Republic Bank & Trust Co. et al., v. Caldwell et al., 58 Fed. Rep. (2d) 721, l. c. 731, the court held:

"The main characteristic differences between a summary proceeding a plenary suit are: The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal pleadings. In the former, the necessary parties are cited in by order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had.

"It is apparent that the differences are largely procedural rather than substantive.* * * * *

In the case of Canepari v. State, 89 S. W. (2d) 164, (l. c. 165), 169 Tenn. 472, the court said:

"Summary proceedings' is a form of trial in which the established course of legal proceeding is disregarded, especially in the matter of trial by jury."

Probate courts are of statutory, and not common law origin, and all proceedings in the probate court must be founded upon the statutes. Except in insanity proceedings, the statutes specifically provide that the proceedings shall be summary, and, therefore, when the requirements of the statutes providing for the procedure are satisfied, any other procedure would be superfluous and without legal foundation. It seems that the court, in holding that the general code may be referred to for proceedings in a probate court, meant that the general code could be called upon only in cases where proceedings in the probate court would be incomplete and could not be exercised without such authority.

One of the most persuasive facts against the probate judge giving instructions to a jury is that the law does not require that he be learned in the law. Section 1983, Revised Statutes of Missouri, 1939, is as follows:

"Every judge of the supreme court and of the several courts of appeals shall be a citizen of the United States, not less than thirty years old, and shall have been a citizen of this state five years next preceding his election or appointment, and shall be learned in the law. Every judge of the circuit court shall be not less than thirty years of age, shall have been a citizen of the United States for five years, a qualified voter of this state for three years next before his election or appointment, and shall be learned in the law. 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; and every judge of any court of record shall be commissioned by the governor, and, whether elected or appointed, shall hold his office until his successor is elected and qualified."

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CONCLUSION

It is, therefore, the opinion of this department that it is not proper for a probate judge to give a jury instructions in like manner as instructions are given to juries in circuit courts.

Respectfully submitted,

LEO A. POLITTE
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APPROVED:

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