PROBATE COURT:
INDIGENT INSANE:
COUNTY COURT:

In instances where the probate court appoints an attorney to represent an indigent insane in a proceeding before the probate court, the fixing of the fee of such an attorney is a matter solely within the authority of the probate court; such fee so fixed is a part of the cost which should be paid by the county when payment cannot be obtained out of the estate of the insane person; refusal to pay the full amount of the fee fixed by the probate court constitutes a rejection on the part of the county court, from which an appeal can be takem, to the circuit court within ten days; although no appeal is taken from the action of the county court, the county court may, at a subsequent term, change its order regarding this matter and make an additional payment in those cases where the $10.00 payment was not received by the claimant as full payment of his claim against the county.

FILED
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August 23, 1955

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Courthouse
Richmond, Missouri

Dear Sir:

Your recent request for an official opinion raises three questions, the first of which is:

> "1. Whether the Probate Court of the County Court sets the fee allowed to Attorneys who are appointed by the Probate Court to represent indigent alleged insane persons in insanity proceedings before the Probate Court?"

There can be no question but that the probate court sets the fee of the attorney who is appointed to represent an indigent insane person in sanity proceedings before the probate court.

As noted by you, paragraph 2 of Section 458.060 RSMo 1949, states:

> "1. In proceedings under this chapter, the alleged insane person must be notified of the proceedings by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the court, and that such person is entitled to be present at said hearing and to be assisted by counsel, such notice to be signed by the judge or clerk of the court under the seal of

> such court, and served in person on the alleged insane person a reasonable time before the date set for such hearing.
>
> "2. If no licensed attorney appears for the alleged insane person at such hearing, then the court shall appoint an attorney to represent such person in such proceeding, and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

You also correctly state that this fee shall be taxed as part of the cost, and paid by the county, if the estate of the insane person be not sufficient for this purpose.

Section 458.080, RSMo 1949, reads:

> "When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

On November 22, 1949, this department rendered an opinion, a copy of which is enclosed, to W. A. Despain, Judge of the Probate Court of Shannon County, in which we held as above.

Your second question reads as follows:

> "Assuming that the Probate Court does have the sole authority and discretion in the setting of Attorneys' fees for Attorneys appointed by him to represent indigent alleged insane persons, the second question is whether the County Court shall reissue Warrants in the amount of $25. (which sum was allowed by the Probate Court as an Attorney fee) to replace two Warrants in the amount of $10. each which were issued by the County Court and refused by members of the local Bar, and which checks have never been cashed to date?"

Since we received your letter you have informed us, orally, that the situation set forth in your second question is that two sanity hearings were held, in each of which the indigent insane was represented by an attorney appointed by the probate court; that in each instance the probate court allowed a fee of $25.00, which was taxed as cost in the case, but that the county court, disregarding the amount of the fee fixed by the probate court, issued warrants for $10.00 each, neither of which has been cashed.

In view of our answer to your first question, it follows that the county court should have issued these two warrants for $25.00 each, the amount fixed by the probate court, which had sole authority to fix these fees, which authority should have been respected by the county court. We believe that the issuance of the two $10.00 warrants was error on the part of the county court. However, in regard to any present or future action in the matter, we direct attention to Section 49.240 RSMo 1949, which reads:

> "If any account shall be presented against a county, and the same, or any part thereof, shall be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to the circuit court; and the circuit court shall proceed to hear, try and determine the case anew, without regarding any error, defect or other imperfections in the proceedings of the county court."

Also to Section 49.250 RSMo 1949, which reads:

> "An appeal in any such case may be taken within ten days after the rejection of the claim by the county court, and upon such appeal being taken, the clerk of that court shall certify the case and the papers connected therewith to the circuit court, in the manner prescribed by law for certifying appeals in probate cases."

The issuance and attempted presentation of the two $10.00 warrants constitute, we believe, a rejection by the county court of a "part thereof" of the $25.00 account presented to it for payment. We further believe that the attorneys in whose favor the warrants were drawn could have appealed to the circuit court within ten days after the warrants were presented to and rejected by the county court, according to Section 49.250, supra, but that having failed to do so within that time they cannot now do so. However, we do believe that the county court has the authority to reconsider its action in this respect, and to correct any error which it may feel that it has committed, and that such correction could take the form of recalling the $10.00 warrants and issuing $25.00 warrants in their stead.

In the case of Boggs v. Caldwell County, 28 Mo. 586, at l.c. 589, the court stated:

> "We do not see any objection to an appeal from the rejection of this account at the March term in 1858, although it had been previously rejected at a prior term. The county court permitted

> the plaintiff to introduce new proof, and gave him to understand that, by such permission, they were still open to conviction. He could have appealed from the original order of rejection, but when he presented his claim a second time by leave of the court, no objection was interposed of res adjudicata. The objection, if it would have been available, may be considered as waived. The rejection of the claim was not like a judgment in a suit between individuals, which the court could not on its own motion open at a subsequent term, but the county court were the commissioners or agents of the county, and could, on behalf of the county, waive any advantage the county might have."

The above is an old case, but so far as we can find it has never been repealed or modified by subsequent decisions.

Your third question is:

> "The third question concerns seven Warrants issued by the County Court in the amount of $10. each, where the Probate Court has allowed a fee of $25., which Warrants have already been accepted and cashed by the Attorneys appointed by the Probate Court to act in insanity matters?"

In regard to this, we direct attention to the case of Noll v. Harrison County Bank, 11 S.W.(2d) 1076; at l.c. 1077 of its opinion the court stated:

> "It is well settled that payment of a part of a debt does not discharge the whole. Part payment operates only as a discharge pro tanto in the absence of a consideration for the release of the residue."

Also to page 246, Section 39, C.J.S., Vol. 70, which states in part:

> "Part payment of a debt ordinarily does not bar a claim for the balance unless it is accepted with knowledge that it is not the full amount due and with the intention that the debt be thereby discharged."

In the case of Jones v. Southern Natural Gas Co., 36 Southern (2d) 34, at l.c. 38, the court stated:

> "* * * There is nothing to prevent a creditor from accepting from his debtor in full payment

> of the debt due an amount less than is due, provided, of course, that the acceptance is made with full knowledge that it is not the full amount due, and with the intention that it shall discharge the debt.* * *"

In the case of Skinner v. Johnson, 74 S.W.(2d) 71, at l.c. 73, the court stated:

> "This court, in the case of Union Biscuit Company, appellant, v. Springfield Grocer Company, respondent, 143 Mo. App. 300, loc. cit. 306, 126 S.W. 996, 998, specifically and clearly defined the word 'payment' in its legal sense, as follows: 'The word "payment", in its legal sense, has a well-defined meaning. In order to constitute payment, as that word is used in law, there must be (1) delivery; (2) by the debtor or his representatives; (3) to the creditor or his representatives; (4) of money or something accepted by the creditor as the equivalent thereof; (5) with the intention on the part of the debtor to pay the debt in whole or in part; and (6) accept as payment by the creditor.'* * *"

In the case of Temple v. Jones, Son & Co., 19 S.E.(2d) 57, at l.c. 63, the court stated:

> "'Payment of a debt involves both tender by the debtor and acceptance by the creditor, with the intention on the part of the debtor to pay the debt in whole or in part, and so accepted as payment by the creditor;* * *' Hall Building Corporation v. Edwards, 142 Va. 209, 128 S.E. 521, 523."

Therefore, if the persons, or any of them who received and cashed these seven $10.00 warrants, accepted them without protest, and indicated by their words and actions that the warrants were received in full payment, although with knowledge that the probate court had allowed a fee of $25.00, then we believe that the matter is closed and that the county court would not be authorized to make any adjustment as to them. If, however, they, or any of them, protested the amount of the warrants and indicated by their words and actions that they were accepting the $10.00 payment merely as part payment on the $25.00 claim, we do not believe that the county court is precluded from paying them an additional $15.00.

Honorable Dick B. Dale, Jr.

CONCLUSION

It is the opinion of this department that in instances where the probate court appoints an attorney to represent an indigent insane in a proceeding before the probate court, that the fixing of the fee of such an attorney is a matter solely within the authority of the probate court; that such fee so fixed is a part of the cost which should be paid by the county when payment cannot be obtained out of the estate of the insane person; that refusal to pay the full amount of the fee fixed by the probate court constitutes a rejection on the part of the county court from which an appeal can be taken to the circuit court within ten days; that although no appeal is taken from the action of the county court, the county court may, at a subsequent term, change its order regarding this matter and make an additional payment in those cases where the $10.00 payment was not received by the claimant as full payment of his claim against the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

Enc. W. A. Despain
11-22-49