PROBATE COURT: Probate judge may sit in case in which he is witness to will unless there be objection in writing, verified by affidavit filed on behalf of any party in interest.

6-21

June 21, 1935.

FILED
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Hon. Lee Mullins,
Prosecuting Attorney,
Atchison County,
Rockport, Missouri.

Dear Sir:

This department is in receipt of your letter of May 25 requesting an opinion as to the following state of facts:

> "Our Probate Judge, Mr. S.F. Weir, has asked me to request that you give him an opinion, (or may be a better term would be to say directions) on just how to proceed in the situation here detailed, viz:
>
> "Several years ago Mr. Weir was asked to sign a man's will as witness to its execution, which he and one other person signed as such witness; just a few days ago, and since he became Judge of Probate in this county, said will was presented for probate. Now the Judge being called upon to pass upon the matter of the admitting same to probate, he believes that he, being a material witness, would not be qualified to make any order in the matter - rather that the provisions of Sec. 2053, 1929 Statutes would disqualify him. This is the reason for his request.
>
> "While I advised him as to what I think he should do in the matter, he insists that I get your opinion."

Section 2053, R.S. Mo. 1929 provides in part as follows:

> "* * * but no judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified gy affidavit; * * * "

This section of our statutes was construed in the case of In re Estate of Albert, 80 Mo. App. 557, wherein the Court, at page 561, said:

> "No formal objection was made in this case either in writing or otherwise to the newly elected probate judge acting on the report of sale, but the record shows that all the parties, the executor and heirs and legatees appeared and consented to the certification of the case to the circuit court. The statute is that no such disqualified judge of the probate shall determine any matter in the settlement of an estate, provided a party in interest objects in writing, verified by affidavit, etc., but the statute does not in terms prohibit the judge from so certifying such a case on his own motion. By fair and reasonable implication it recognizes this inherent right, for a disqualified judge ought not to be compelled to violate his judicial conscience by deciding a cause in which he is personally interested or has been of counsel. We therefore overrule the assignment of error that the circuit court was without jurisdiction to decide the matters in controversy."

CONCLUSION

In view of the foregoing, it is the opinion of this department that under the facts as submitted in your letter, the Probate Court has authority to pass upon the matter of admitting the will in question to probate in the absence of any objection in writing, verified by affidavit duly filed on behalf of any party in interest.

This, however, does not mean that the Court may not, because of being a material witness to the will, on its own motion certify the case to the Circuit Court as provided in Section 2053, supra.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH