

## Opinion No. 39-3156

May 29, 1939

**BY:** FILO M. SEDILLO, Attorney General

**TO:** Mrs. Pearl V. Dearth, Deputy Clerk of the District Court, Las Vegas, New Mexico.

{\*56} We have your letter dated May 22 wherein you make inquiry as to the right of clerks of district courts to charge and receive a docket or filing fee in the case of a will not admitted to probate by the probate court and certified under the statute to the district court.

I presume you have reference to cases arising under Sections 154-209 and 154-210, New Mexico Statutes Annotated, 1929 Compilation.

Most pertinent of these is Section 154-209, which provides as follows:

"If the probate judge finds the due {\*57} execution and validity of the will to be proved, he shall render a judgment approving it as the last will and testament of the decedent, which shall be entered of record in the case. If such judge shall be of the opinion that the will is not valid, he shall endorse such opinion on the will and transmit the same, with all the testimony taken before him, and a transcript of the proceedings, to the clerk of the district court for his county. The matter shall then stand for hearing de novo in the district court the same as on appeal, but either party, on demand therefor, shall have the right to a trial by jury on such appeal; and the judgment of the district court declaring the will valid or void, shall, when the same becomes final, be certified by the clerk of the district court to the clerk of the probate court, and shall be entered of record in the latter court as a part of the proceedings in the case."

The foregoing section says nothing about filing or docketing fees and, as a matter of fact, the action of transmitting the will and transcript to the Clerk of the District Court is the act of the Probate Judge required by the statute and is not the act of any of the parties.

Section 34-343, New Mexico Statutes Annotated, 1929 Compilation, provides in part that clerks of the district court shall be entitled to receive the following fees in civil matters:

"For docketing each cause, **to be paid by the party bringing the suit or docketing the same**, \$ 7.50, which shall include cost of original summons, but not of copies."

Since there is not here the docketing or bringing of any suit by any "party," but rather the action is that of the Probate Court required by statute, and since I find no statute authorizing clerks of the district court to charge and receive any docket or filing fee in

such cases, I must of necessity hold that in the case outlined in your letter, the clerks of the district courts are not entitled to charge and receive any filing or docketing fee.

Trusting the foregoing sufficiently answers your inquiry, I am,

By: FRED J. FEDERICI,

Asst. Atty. Gen.