

Clerk of Court—Fees of—Fee for Filing Petition for Letters of Administration when First Administrator has Withdrawn—Administrator.

If an administrator withdraws from an estate having paid the fee of \$5.00 for filing of his petition, the second administrator should not be required to pay a fee of \$5.00 for filing his petition.

Dec. 13th, 1917.

Hon. H. S. Magraw,
State Bank Examiner,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of recent date submitting the following:

1. If an administrator withdraws from an estate, having paid the fee of \$5.00 for filing of petition, is the second administrator required also to pay a fee of \$5.00 for filing of petition?
2. Does it change the aspect of the first question though there is a mutual understanding to the effect that the adminis-

trator withdrawing does so with the knowledge that the second administrator is to be appointed?

Section 3170, Revised Codes of 1907, provides that upon the filing of a petition for letters testamentary, or administration or guardianship the clerk shall collect from the petitioner the sum of \$5.00.

The filing of a petition for letters testamentary, or administration or guardianship is the institution or commencement of a probate proceeding in the same sense as the filing of a complaint in a civil action is the institution or commencement of a civil action.

If, after a petition has been filed for letters testamentary, or administration or guardianship and the court hearing said petition and acting thereon, appoints the petitioner as executor, administrator, or guardian, such executor, administrator or guardian should resign or die the filing of a second petition by another person for appointment as executor or guardian would not be the institution of a new probate proceeding but would be simply a step taken in the original proceeding, being somewhat analogous to the substitution of a party plaintiff or defendant in a civil action, and in such a case no fee for filing the second petition is required to be paid.

However, if, after the first petition is filed and before the same is heard or any action taken thereon by the court, the same is withdrawn and a second petition filed by another person, this would be the commencement or institution of a new probate proceeding, being somewhat analogous to the commencement or institution of a civil action by a plaintiff against a defendant, the dismissal of such action and the institution of a new action by a different party as plaintiff against the same defendant on the same cause of action, in which case a fee of \$5.00 should be required for filing the second petition.

Respectfully,

S. C. FORD,
Attorney General.