

MAGISTRATES: If reason for change of venue is bias and prejudice of inhabitants of a county, venue must be awarded to magistrate in adjoining county. Magistrate has no authority to require proof of such bias and prejudice.

September 11, 1947



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Honorable Joseph H. Garrett
Judge of the Magistrate Court
First Division, St. Louis County
Clayton, Missouri

Dear Judge Garrett:

This is in reply to your letter of recent date requesting an opinion from this department, which reads as follows:

"As Magistrate, First District of St. Louis County, I respectfully request your office at its earliest convenience to give me an opinion on the following questions:

"I. In a county of 250,000 to 650,000, where change of venue is filed under Sec. 4 of Sec. 76, Sen. Bill 207 (i.e., bias and prejudice of inhabitants of the county), is cause to be sent

(a) to Magistrate of an adjoining County, as provided in general statewide provisions of Sec. 77 of said Act,

OR

(b) to the Circuit Court of same County, as occurs under Sec. 77 applying to changes of venue when there is no other Magistrate in the County where taken?

and

"II. In view of the provisions of Sec. 77 (that Magistrate where a change of venue is filed loses jurisdiction upon filing of the affidavit), where change of venue affidavit is filed under Sec. 4 of Sec. 76,

Sen. Bill 207 (as in I. above), has Magistrate any right or authority to require proof of such 'bias and prejudice of the inhabitants of the County' as in criminal cases in Circuit Court?

"This problem is becoming acute here because of efforts of attorneys for defendants in unlawful detainers to force cases into the already over-crowded dockets of the Magistrate Courts in the City of St. Louis, when such cases are filed, and the property lies in St. Louis County. If I.(a) above is the correct solution, such cases will have to be sent into the City Courts, or into surrounding rural counties, it would seem."

Section 76 of Senate Bill No. 207 of the 63rd General Assembly, Laws of 1945, page 789, providing for change of venue in civil cases pending before magistrates, reads as follows:

"Either party shall be entitled to change of venue in any civil cause pending before a magistrate, if he shall, before the jury is sworn or the trial is commenced before the magistrate, file an affidavit that the magistrate is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, or that he cannot have a fair and impartial trial before such magistrate on account of his bias or prejudice, or that he cannot have a fair trial in the county on account of bias and prejudice of the inhabitants of such county, which affidavit shall be made either by a party to a suit pending or by said party's agent or attorney."

If the affidavit requesting a change of venue states as cause for such change of venue that the magistrate is a material witness in the case, without whose testimony he cannot safely proceed to trial, or that the magistrate is near of kin to either party, stating in what degree, or that there cannot be

a fair and impartial trial before such magistrate on account of his bias or prejudice, the magistrate must award the venue to some competent magistrate in the county, if there be one, unless the party asking for a change of venue shall in his affidavit state that another magistrate in the county is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, in which case, or in the event there is no other magistrate in the county, the case shall be certified to the circuit court for trial as if originally filed in the circuit court. However, if said change is requested on account of bias or prejudice of inhabitants of the county, venue must be awarded to the magistrate of some adjoining county for trial.

Section 78a, Laws of 1945, page 790, is applicable only to counties having 250,000 to 650,000 inhabitants, but does not modify the foregoing with respect to those counties. Said section relates only to the procedure employed to effect a change of venue in and from those counties. In other words, the only change made by said section from the general sections relates to the time of transfer of the case and the notice to the parties involved.

With respect to the second question presented, we direct your attention to the language of the statutes. Section 77, Laws of 1945, page 789, provides that "Upon the filing of the affidavit in due time, requesting change of venue, the magistrate must allow the change of venue and enter an order accordingly," and Section 78a provides that "In all counties having 250,000 to 650,000 inhabitants, upon filing an application and affidavit for a change of venue in due time the magistrate must allow the change of venue and note same on his docket." We believe the above provisions are mandatory and require the magistrate to allow a change of venue when the proper application and affidavit requesting such change of venue are filed in due time. State v. Price, 111 Mo. App. 423, 85 S.W. 922; State v. Superior Court in and for City and County of San Francisco, 14 Cal. App. 2nd 718, 58 Pac. 2nd 1322; Morris v. Karr, 342 Mo. 179, 114 S.W. (2d) 962. Said change of venue is then a matter of right and not within the discretion of the court. Ralston v. Ralston, Mo. App., 166 S.W. (2d) 235, 1.c. 237; Dowling v. Allen and Company, 28 Mo. 293, 1.c. 299, 300; Douglass v. White, 134 Mo. 226, 1.c. 233, 234, 34 S.W. 367. This being the case, the magistrate has no authority to require proof of "bias or prejudice

of the inhabitants of the county" when said cause is stated to be the basis for such change of venue.

Conclusion.

Therefore, it is the opinion of this department that when the proper application and affidavit requesting a change of venue in a civil case pending before a magistrate, for the reason that the inhabitants of the county are biased and prejudiced, are filed in due time the magistrate must award the venue to a magistrate of some adjoining county for trial. It is further the opinion of this department that the magistrate has no authority to require proof of such "bias or prejudice of the inhabitants of the county."

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. H. TAYLOR
Attorney General

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