

CIRCUIT CLERKS: Have authority without court order to file papers which the statute authorizes to be filed. Must have court order authorizing filing of any other paper. The legal effect is the same whether the paper is marked filed or whether the record proper shows filing, as the important act is the delivery of the paper to the clerk.

2-6-36
January 31, 1936



Mr. G. L. Heyde,
Circuit Clerk,
Cape Girardeau County,
Jackson, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

"Will you kindly give me your opinion as to when Court is 'In Vacation'.

"For example, on Saturday the Court adjourned until Tuesday next; in filing Motions, Answers, etc., after adjournment of Court, would it be correct to file same as of 'In Vacation' or 'In Term Time'? And does the Clerk have authority to file same without an order of the Court?"

Section 655, R. S. Mo. 1929, in part, provides as follows:

"Whenever any act is authorized to be done by or any power given to a court, or judge thereof in vacation, or whenever any act is authorized to be done by or any power given to a clerk of any court in vacation the words 'in vacation' shall be construed to include any adjournment of court for more than one day."

Section 1958 provides as follows:

"Each judge of the said circuit court, in vacation, shall have and exercise the same powers that he might have and exercise if he were the sole judge of said court."

This section is found under Article 3 of Chapter 9, entitled "Circuit Courts". It would seem, however, to be applicable particularly to cities which have more than one division of circuit court.

Section 1839 provides as follows:

"The courts, respectively, shall, by rule, direct the pleadings and other papers to be filed in such form as to admit their being conveniently attached together, as required by the preceding provisions, and shall direct their clerks in making up the rolls of the judgments rendered."

Section 1840 provides as follows:

"It shall be the special duty of every judge of a court of record to examine into and superintend the manner in which the rolls and records of the court are made up and kept; to prescribe rules that will procure uniformity, regularity and accuracy in the transaction of the business of the court; to require that the return, trial, judgment and execution dockets, and all indexes to the records, be correctly made out at the proper time-- that the papers be filed and the entries made, and that the duties of the clerks be performed according to law; and if any clerk fail to comply with the law, the court shall proceed against him as for a misdemeanor."

Under the Article entitled "Clerks of Courts of Record", Section 11674 provides that each clerk shall keep at his office "the records, papers, seal and property belonging to his office."

Section 11676 provides that "every clerk shall record the judgments, rules, orders and other proceedings of the court", and do other things therein set forth.

Section 11677 provides as follows:

"In all civil actions any party interested therein may, upon payment of the fees, have any or all of the following papers recorded in the office of the clerk of the circuit court in the county in which such action is brought: (naming various papers, petitions, summons, affidavit for publication, etc.), and any other paper or pleading tending to show the service on the defendants for their appearance in such case."

In the case of State v. Derkum, 27 Mo. App. 628, the court, speaking of the term "in vacation", said the following, l. c. 631:

"It is assumed by counsel that, since there is no record entry of the filing, and since the clerk has made the recital in the transcript before us, that the information 'was filed in the office of the clerk of the circuit court, in and for the county of Cole,' etc., the information was filed with the clerk, as distinguished from a filing with the court. But at whatever time an information may be filed, whether in term or in vacation, it is deposited with the clerk, as this one was, and receives his endorsement of its filing, as this one did. The place of deposit is the same, and the clerk's idea of his receiving it in vacation or term time cannot alter the fact. His erroneous idea that the court was in vacation does not make it so. But, as before stated, there was no record entry of the filing of the information. I do not think this renders it invalid. The date of its filing is properly endorsed and signed by the clerk on the back thereof."

In the case of *Hadley v. Bernero*, 97 Mo. App. 314, the court was considering an unlawful detainer suit and an appeal therein to the circuit court, and in construing the words "term" and "vacation" said, l. c. 319:

"As to the meaning of the sections of the statutes bearing on this question, we think they use the word 'term' to signify the entire period from the first day of a term as fixed by law to its final close, and the word 'vacation' to signify the period between the adjournment of any term and the beginning of another, not merely an interval when the court is not in session from having adjourned for more than a day but not to court in course."

In the case of *Downing v. LaShot*, 202 Mo. App. 509, the court, considering an unlawful detainer action, approvingly quotes from the case of *Hadley v. Bernero*, supra, and from the case of *Warner v. Donahue*, 99 Mo. App. 37, as follows:

"A term of court has been defined to signify the period from the first day of the term fixed by law until court is adjourned to the next court in course, and the word "vacation" has been held to mean the period between the day on which a term of court is adjourned to the next court in course, or until the day of the beginning of another term, and not the mere interval when, for any reason the court is not in session and is adjourned over for more than a day. (*State v. Derkum*, 27 Mo. App. (K. C.) 628; *Hadley v. Bernero*, 97 Mo. App. 314; *Bronson v. Schulten*, 104 U. S. l. c. 415; *Brayman v. Whitecomb*, 134 Mass. 525.)"

In the case of *Lumber Co. v. Keener*, 217 Mo. 522, the court, considering the authority of the clerk to act in getting an order of publication in a suit to quiet title, held that the clerk had authority so to do because it was in vacation of the court, when the facts were that the court on March 20, 1884, adjourned or recessed to June 16, 1884, without closing the term, and between those two dates the clerk issued the order of publication. The court said, l. c. 538:

"In our opinion the clerk of the Stoddard Circuit Court was authorized to make an order of publication in that suit, for the reason that there was a vacation of the circuit court of that county at the time he made the same."

In the case of State ex rel. Caldwell v. Cockrell, 280 Mo. 268, in considering the duties of the circuit clerk, the court said, l. c. 285:

"Pursuing the matter further, perhaps needlessly, we will inquire at this point as to the power of a judge over the entries in the record of the proceedings of his court, and the correlative duties of a clerk. A judge's supreme responsibility is in respect of the orders and judgments he makes; no one else can pronounce them, or amend, alter or impair them after they are given, except a court of review: this is the law by an express statute in which clerks are specifically mentioned. (R. S. 1909, sec. 1863.) The judge knows best what judgment he gave and should have authority to see that it is entered so the record will express and preserve it precisely as rendered. For this and other reasons, every judge of a court of record in the State is charged with the special duty of examining into and superintending the manner in which the rolls and records of his court are kept, the entries made, and with proceeding against the clerk as for a misdemeanor, if he fails to observe the law. (R. S. 1909, sec. 3859.) This court has said a judgment is the act of the court, its entry in the record the act of the clerk, the first being judicial, the second ministerial; and that though a judgment derives its force from its rendition by the court, yet one given by a court of record can only be proved by the record. (State ex rel. v. Henderson, 164 Mo. 347.) That being true, the importance

of having the record contain exactly the judgment given, is apparent, as is the necessity for the judge's supervision and control to insure an accurate record. Speaking upon this point the Supreme Court of California said:

"The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice Legislation which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt. The clerk, it is true, is a constitutional officer--not subject to appointment or removal by the court--but subject, in the control of the records, to its orders,' etc. (Houston v. Williams, 13 Cal. 24, 28.)

"In People to use of Howard v. Cobb, 10 Colo. App. 478, 483, a clerk and the sureties on his official bond were sued for a deposit of money left with him, and which he entered on the record of the court as having been paid to him as clerk, when in fact the court had made no order for its payment to him in that capacity. The court said, regarding the entry and its effect:

"An unauthorized entry by the clerk is no part of the records of the court. An order by virtue of which money is paid into court, must come from the court itself, and an entry by the clerk of money as being in court, no matter in what form or in what book, without such order is nugatory..... Orders, judgments and decrees are made and rendered by the court in the exercise of its judicial functions, and these cannot be delegated."

"In Mayor of Baltimore v. County Comm'rs, 19 Md. 559, the case was to recover fees paid by the plaintiffs in a criminal case for which it was asserted the county was

liable. The transcript showed these fees had been taxed as costs by the clerk of the court where the criminal cases were tried, but did not show they had been allowed by the judge of said court. It was contended the clerk was the hand of the court and every entry must be presumed to have been made by order or in the presence of the judge. The court said as to this at page 564:

"The clerk is the amanuensis, it is true, of the court, but he must profess to act by the authority of the judge in making his entries of the proceedings, to give them validity. The awarding of costs is the act of the court, their taxation or computation, according to the list of fees prescribed, is a duty imposed by law on the clerk, subject to the supervision of the judge; but the allowance of compensation to an officer of the court, in addition to the sum allowed by law (and not to exceed a certain sum, as the judge may deem just and proper, is a judicial, not a clerical act, which must be evidenced by some order entered under the authority of the judge, and purporting to be so."

"A text work of merit thus states the rule:

"In recording and making up the proceedings of the court he (viz. the clerk) may be said to act as its (viz. the court's) amanuensis and subject to its control.' (11 C. J. 887, citing 7 Cy. L. & P. 219, 223.)

"The powers and duties of a clerk are as well settled as those of a judge. We have seen that the statutes forbid him to alter or impair a record, and they expressly command him to 'record the judgments, rules, orders and other proceedings of the court' (Italics ours). (R. S. 1909, sec. 2685.) The authorities are uniform in declaring that in performing this duty he acts ministerially and subject

to the court's control. (11 C. J. 887; K. C. Pump Co. v. Jones, 126 Mo. App. 1. c. 540; LaCoste v. Eastland, 117 Cal. 673; Ex parte Brown, 166 Ind. 593, 602; Vanderkarr v. State, 51 Ind. 91; Comstock v. Gage, 91 Ill. 328; Baltimore v. Baltimore Co., 19 Md. 554; Hirsh v. Twyford, 40 Okla. 220, 223.) In the case last cited the rule is thus stated:

"The clerk's duties are ministerial and largely clerical. He is the arm of the court for which he is clerk, and it is his duty to make a record of the proceedings, orders, judgments and decrees of his court, but in so doing he acts as the amanuensis of his court and subject to its control. Record entries are valid only when made under the judicial sanction of his court."

"An appellate court of this State said in the first case cited above:

"A clerk is a mere ministerial officer, the hand of the court, and has no authority to enter a judgment not pronounced by the court. His entry of a judgment in the records is designed to stand as a perpetual memorial of the court's action, but the judgment itself is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict." The entry by the clerk of a judgment the court did not render was a nullity. (126 Mo. App. 1. c. 540.)

"This excerpt is taken from Ling v. King, 91 Ill. 573:

"The clerk, in all cases and in all his official acts, whether in term time or in vacation, performs them as a ministerial officer. He so acts in entering up a judgment in term time, under the direction of the judge, who considers and decides."

The Civil Code of Missouri provides that a party litigant has the statutory right to do certain things with reference to filing pleadings in the cause. For instance, it is made his duty to file his answer during the first day of the return term if he desires to answer. Certain other rights may be exercised by him by leave or order of the trial court. As to those rights of filing papers that the statute gives him, the same may be filed without an order or record leave from the court. As to those rights which are accorded him by the law, conditioned on the trial court making an order of record so authorizing him, it is the litigant's duty who seeks to file such papers to get permission and order of the trial court so to do. However, while it is discretionary with the trial court to grant or withhold permission to litigants on that class of orders, such discretion may not be arbitrarily exercised. It is rather a sound judicial discretion. Where the trial court is invested with the authority to exercise a sound judicial discretion, the appellate courts will not interfere with that exercise unless there appears to the appellate court an abuse of that discretion from the record in the cause. When such abuse does appear, and the record shows that the trial court arbitrarily exercised his judgment, the appellate court will reverse the cause where substantial rights have been affected thereby.

In the case of Cooney v. Murdock, 54 Mo. 349, the defendant had obtained leave to file an answer in vacation, but instead of doing this he filed a demurrer, which on motion of the plaintiff was stricken out on the ground that it is the well settled rule of practice in that court not to permit a party defendant to file any pleading in vacation different in character from that for which leave was granted. Exceptions were taken to such ruling and the defendant immediately tendered his answer and offered to file the same, which the court refused to permit, and entered judgment for the plaintiff. From that judgment, after proper steps, the cause was appealed to the Supreme Court. In ruling the case, the court said, l. c. 350:

"The trial courts undoubtedly have great latitude of discretion as to allowing or refusing permission to file pleadings out of time; and, unless that discretion be abused or unsoundly exercised, no case is made for the interference of this court. * * *

"If, however, the answer had been preserved and had disclosed a meritorious defense, we should have held it an abusive exercise of discretion to have refused permission to file it, as it was already prepared, and no particular delay or hardship would have been occasioned by permitting it to be filed in term instead of vacation."

In the case of Reuck v. Strickland, 222 Mo. App. 1171, speaking of the right to file an answer out of time, the court said, l. c. 1174:

"Where, however, there occurs, as in the case at bar, a palpable abuse of that discretion, we cannot remain silent. Granting that the accidental misplacing of papers served on a party, is not of itself a sufficient excuse for failure to answer, although such party may be involved in extensive litigation, and the papers and writs served numerous; granting that the defendants were lacking in promptitude, still it does not thence follow that the action of the trial court was correct. For it should be the policy of courts to try causes on their merits whenever such a course will not result in hurtful delay. * * *

"While defendant's ignorance of the law and rules of court governing the filing of answers, is not a sufficient reason for failure to file answer, yet that circumstance coupled with a showing that defendant had a meritorious defense; that no harm had resulted from the delay and that defendant appeared and asked leave to file answer before any default judgment as taken, entitled him to a hearing of his case on the merits, and the action of the court in refusing such hearing was arbitrary and amounted to an abuse of discretion."

The court reversed and remanded the cause.

It will be seen from the above that for some purposes the courts construe the term "in vacation" to mean only that time between the final adjournment of the term and the first day of the succeeding term, while in other cases in construing other statutes and rights they define the term "in vacation" to mean a portion of the time which elapses between one setting of the court and a subsequent adjourned setting thereof.

For the purpose of the issuance of an order of publication, other things being regular, under the authority of *Lumber Co. v. Keener*, supra, the circuit court is in vacation when in recess beyond the day of recessing.

For the purpose of an unlawful detainer suit, it appears that the courts have construed the term "in vacation" to mean only that portion of time which elapses between the final adjournment day of the term and the first day of the next subsequent term.

It appears to be impossible for a general definition of the term "in vacation" to be expressed. It must be construed with reference to the particular matters and facts at hand at the immediate time.

With reference to the filing by litigants with the circuit clerk of papers in pending litigation, the clerk does not have authority to file them if they may be only legally filed by leave of court. With respect to papers which the litigant has the legal right to file without procuring an order of court, the clerk has authority to file the same when, if and as presented to him, and regardless of whether he writes his record that they are filed in vacation or in term time, the legal effect of the filing of such papers is the same. As was said by Judge Ellison in the case of *State v. Derkum*, supra,

"But at whatever time an information may be filed, whether in term or in vacation, it is deposited with the clerk * * * and receives his endorsement of its filing * * *. The place of deposit is the same, and the clerk's idea of his receiving it in vacation or term time cannot alter the fact. His erroneous idea that the court was in vacation does not make it so."

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The important thing is the physically handing to the clerk at his office the paper for filing. When it is so deposited with him and is a proper paper for filing absent leave of court, and is indorsed by him filed, it becomes a part of the court records and roll. If it is in the class of papers which he is not authorized to file absent an order of court, and he does so accept, indorse and file the same, such acts by him do not change the legal effect of the paper nor give it weight which the law theretofore had not authorized to be given unless and until the court granted leave so to file the same.

The meaning of the term "in term time" is, of course, the converse of the term "in vacation".

Yours very truly,

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Assistant Attorney General.

APPROVED:

ROY MCKITTRICK,
Attorney General.

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