

CHANGE OF VENUE
MAGISTRATE COURTS:
COSTS:

(1) \$5 filing fee paid to clerk of Magistrate Court upon commencement of civil suit shall be paid by said clerk to Dir. of Revenue, or to county treasurer if magistrate court was created by order of circuit court, at end of month, not transferred to court receiving costs by reason of change of venue;
(2) circuit clerk may not demand payment of filing fee on change of venue from magistrate court, may not lawfully refuse filing case transferred from magistrate court to circuit court on change of venue;
(3) party taking change of venue shall be liable for costs, but magistrate is required to grant change of venue even though costs have accrued.

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J.C. JOHNSON

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JOHN M. DALTON



June 13, 1953

Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"A dispute has arisen or rather a difference of opinion, between our Magistrate Clerk and the Clerk of the Circuit Court on the matter of costs and filing fees in change of venue from Magistrate Court to Circuit Court.

"The Statute provides that change of venue may be taken from a magistrate court and in counties like Taney County the cause is transferred to the Circuit Court. Section 517.560 provides that costs be taxed against the party taking the change of venue.

"First Question: What happens to the \$5.00 filing fee? Does the Magistrate Clerk hold that and pay into the State.

"Second Question: Our Circuit Clerk has demanded a \$10.00 filing fee be paid on a change of venue being filed in his court from the Magistrate Court. That is not the law in my opinion. But the question is, can a filing fee be demanded by

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the Circuit Clerk? Or is he required to file and docket the case without a fee?

"Third Question: Upon change of venue (these are all on civil matters) being granted, what is meant by the term 'costs taxed against the party taking the change' as used in Section 517.560 R.S. 1949? Does that mean the costs must be paid up in full before the change is granted? We are all confused on this."

Your first question is: "What happens to the \$5.00 filing fee? Does the Magistrate Clerk hold that and pay it into the State?"

On March 5, 1948, this department rendered an opinion to Honorable W. L. Halbrook, Judge of the Magistrate Court, Salem, Missouri. The Conclusion of that opinion was:

"* * * the five dollar filing fee required to be paid to the clerk of the magistrate court upon commencement of any proceedings shall be paid by said clerk to the Director of Revenue or the county treasurer, as the case may be, at the end of each month and shall not be transferred to the court receiving the cause by reason of a change of venue."

A copy of the above opinion is enclosed. The answer to your first question is, therefore, that the \$5.00 is paid to the Director of Revenue, except where the fee is originally paid into a magistrate court which was created by order of the circuit court, in which case the fee is paid to the county treasurer.

Your second question is: "Our Circuit Clerk has demanded a \$10.00 filing fee be paid on a change of venue being filed in his court from the Magistrate Court. That is not the law in my opinion. But the question is, can a filing fee be demanded by the Circuit Clerk? Or is he required to file and docket the case without a fee?"

The procedure to be followed after filing of an affidavit for a change of venue in a magistrate court in which a cause is pending, is set forth in Sections 517.520 and 517.530, RSMo 1949, which reads:

"1. 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 immediately transmit all of the original papers and a transcript of all of his orders in the case 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.

"2. In which case the receiving court or magistrate shall be notified immediately by the magistrate granting the change of venue, by filing with the clerk of the circuit court or magistrate receiving the case on change of venue a certified copy of the order granting the change of venue, and upon receipt of such notice such magistrate or clerk of the circuit court to whom the change of venue is granted shall reset the case for trial on a day certain.

"3. If the change be allowed on account of bias or prejudice of the inhabitants of the county, all of the original papers and such transcript immediately shall be sent to a magistrate of some adjoining county for trial as herein provided; provided, that when such affidavit for change of venue shall be filed, the magistrate shall have no further jurisdiction in the cause except to grant such change of venue."

"The court or clerk thereof to which the cause is sent shall, when it becomes possessed of the cause, forthwith proceed with the same in like manner as if it had been originally commenced before it, and it shall set the same for trial and cause the parties to be notified thereof, in writing, which notice shall be served on the parties not less than five nor more than fifteen days before the day fixed for such trial, except as otherwise provided in this act. The

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notice may be served in like manner as an original writ of summons. Either party may waive such notice by voluntarily entering his appearance. Notice mailed by the court or clerk thereof, addressed to the parties or their attorneys of record at their respective addresses appearing in the files of the court shall constitute sufficient service of notice under this section."

It will be noted that paragraph 1 of Section 517.520, supra, states that "the case shall be certified to the circuit court for trial as if originally filed in the circuit court." (Emphasis ours).

Also, Section 517.530, supra, states that in instances of change of venue from magistrate court, the circuit court shall "forthwith proceed with the same in like manner as if it had been originally commenced before it"

From the above, we believe that any law regarding security for costs which would apply to a suit originally filed in the circuit court, would apply to change of venue cases from a magistrate court. With this in mind, we now refer to Section 514.010, RSMo 1949, which reads:

"In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators or guardians, qui tam actions, actions on penal statutes when the penalty is given to the informer, and in all civil cases when the plaintiff or person for whose use the action is to be commenced shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced shall, before he institutes such suit, file with the clerk of the court in which the action is to be commenced the written undertaking of some person, being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which said suit is brought, a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time, whenever the court may deem proper, and by its order of record require, the court, on motion, may dismiss the same, unless

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such undertaking be filed or sum of money be deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein."

Also, to Section 514.020, RSMo 1949, which reads:

"If, at any time after the commencement of any suit by a resident of this state, he shall become nonresident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money be deposited before the motion is determined."

The above sections, it will be noted, do not vest in the circuit clerk any power to demand the payment of a filing fee, or any authority to refuse the acceptance of a case for filing unless a filing fee shall have been paid.

Your third question is: "Upon change of venue (these are all on civil matters) being granted, what is meant by the term 'costs taxed against the party taking the change' as used in Section 517.560, R.S. 1949? Does that mean the costs must be paid up in full before the change is granted?"

Section 517.560, RSMo 1949, to which you refer, states:

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"When a change of venue is taken by the defendant, or by the plaintiff after the defendant has had a change of venue, such plaintiff or defendant shall be taxed with the costs which have accrued for witnesses and service thereof, and witness fees, in preparing for trial at the time and place fixed therefor, and the costs of the magistrate for transferring the cause to the other magistrate or circuit court and when taken by the plaintiff from the magistrate before whom he commenced his suit, he shall be taxed with all the costs which have accrued and shall accrue in the cause until the transcript and papers shall be delivered to the magistrate or circuit clerk, as the case may be, to whom the cause is sent for trial."

It seems to us that three situations are contemplated by the above section. One is that the defendant shall pay the costs which have accrued if he takes a change of venue. A second is that if the defendant takes a change of venue and the plaintiff then takes a change, the plaintiff shall pay the costs of the second change. The third is that the plaintiff shall pay the costs if he takes a change of venue from the magistrate court in which he commenced his suit.

Your final question is whether such costs must be paid before change of venue is granted. We believe not. In the case of *Endicot v. Hall*, 61 Mo. App. 186, the court stated:

"The plaintiffs sued the defendant upon an account before a justice of the peace. The defendant appeared, and filed an application for a change of venue properly verified, and based on the ground that the justice was prejudiced against him. The justice overruled the application for a change of venue, on the ground that the defendant refused to pay the costs which had accrued in the case up to the date of the application. Thereupon the defendant refused to proceed any further before the justice, and judgment was entered against him by default, which judgment, upon proof of the damages of the plaintiffs was made final. The defendant appealed in due time to the circuit court, and moved

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that court to remand the cause to the justice with directions to grant him a change of venue. The court overruled this motion, whereupon the defendant declined to appear in the case any further. The circuit court thereupon affirmed the judgment of the justice, and the defendant, after an ineffectual effort to set such affirmation aside, appealed to this court.

"As no brief is filed by the respondent, we are not advised on what theory this judgment is sought to be upheld. Section 6241 of the Revised Statutes of 1889 provides that, when an affidavit for a change of venue shall be filed, the justice shall have no further jurisdiction in the cause. This proviso was presumably added to the section as it formerly stood to obviate the effect of the rulings in Colvin v. Six, 79 Mo. 198, and State ex rel. v. Six, 80 Mo. 61, which were to the effect that a judgment entered by a justice after filing of an application for a change of venue was voidable merely, and not void. We decided in Jones v. Pharis, 59 Mo. App. 254, that the effect of the above proviso is to render a judgment entered by a justice after application made in due form for a change of venue absolutely void. Section 6244 of the statutes provides that, on such application, the justice shall tax costs accrued for subpoenas for witnesses and service thereof, as well as witness fees and costs of transfer, against the party filing the application, if a defendant, and, if a plaintiff, tax against him all the costs. It was also decided in Johnson v. Latta, 84 Mo. 139, that the justice who grants the change of venue may issue a fee bill for these costs. But there is no statutory provision, which makes the granting of the change of venue dependent on the payment of costs. The justice, therefore, was not warranted in imposing such a condition upon the defendant, and his subsequent entry of judgment against the defendant was absolutely void."

The same holding was made in the case of Doniphan v. Transue, 226 SW 635. At l.c. 636, the court stated:

"It is apparent that Justice Brown did not

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comply with the statute when he made the first entry shown supra. While the entry recites that the change of venue was granted, it did not specify to what justice the cause should go. While Justice Brown lost all jurisdiction of the cause except for the purpose of transferring the same, he had not complied with the statute and had not completed the granting of the change of venue until he had transferred it to some other justice, for which purpose he retained jurisdiction. * * *

In the case of State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, at l.c. 656, the court stated:

"The appellant refused to award a change of venue, except on payment in advance of his costs or fees therefor, which he placed at one dollar. The question now is, was the justice authorized to couple the performance of his official duties with this condition? We think he was not.

"It seems the general rule in the country, as announced by the decisions and text writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. Throop, on Public Officers, sec. 446, 450; Shed v. Railroad, 67 Mo. 687, 690; Gammon v. Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645; Ford v. Railroad, 29 Mo. App. 616. Such statutes, too, must be strictly construed as against the officer. Ford v. Railroad, supra; and Shed v. Railroad, supra.

"Our statutes have definitely provided for justice's fees and how they may be collected, etc. Sections 4980, 5005, 5007, 6244, R. S. 1892. Section 6244 stipulates, that when a change of venue is taken by the defendant (as in this case), * * * Such defendant shall be taxed with * * *

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the costs of the justice for transferring the cause to the docket of the other justice,' etc. Then section 5007 provides that 'the justice of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable, or proper officer within twenty days after the same shall have been demanded by such officer, he may and shall levy such fee bills on the goods and chattels of such person, in the same manner and with like effect as on a fieri facias.' And it has been held that the justice may issue and collect this bill of fees chargeable for the transfer of change of venue of a case, regardless of the further disposition thereof. Johnson v. Latta, 84 Mo. 139."

In the case of State v. Watkins, 253 SW 781, the court held that mandamus would lie to compel a justice of the peace to allow a change of venue.

We here note that Section 517.560, RSMo 1949, under which change of venue from magistrate court is allowed, is in substance similar to the section as amended under which aforesaid decisions were rendered so that aforesaid decisions would be applicable since the amendment of the above section and the substitution of magistrate courts for justice of the peace.

CONCLUSION

It is the opinion of this department that: (1) The \$5.00 filing fee required to be paid to the clerk of the magistrate court upon commencement of a civil suit shall be paid by said clerk to the Director of Revenue or to the county treasurer, if the magistrate court was created by order of the circuit court, at the end of each month, and shall not be transferred to the court receiving the costs by reason of a change of venue; (2) It is the further opinion of this department that a circuit clerk may not demand the payment of a filing fee on a change of venue from a magistrate court, and that he may not lawfully refuse to file a case transferred from magistrate court to circuit court on a change of venue unless a filing fee is paid; (3) It is the further opinion of this department that the party taking the change of venue shall be liable for the costs as set forth in Section 517.560, RSMo 1949, but that a magistrate is required to

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grant the change of venue even though the costs which have accrued are not paid at the time of the application for a change of venue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

Enclosure
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