

"Change of Venue" in criminal) State may ask for substitution of
case by State:) Judge in criminal case.

PROSECUTING ATTORNEY:) Prosecuting Attorney not required to
deposit \$10 docket fee for substitution
of Judge.

September 24, 1937.

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is to acknowledge your letter as follows:

"Is there anything in the law or the cases that gives me, as prosecuting attorney, the right to take a change of venue away from the judge in the circuit court on account of the bias and prejudice against the state is a state criminal case? I realize that I have no right to take a change of venue away from the county, but what about the bias and prejudice of the judge on the bench, against the State of Missouri, in a criminal case pending for trial in the Circuit Court? These demurrers to the evidence at the close of all evidence substitutes the judgment of the court for my judgment, for the judgment of the sheriff, and the jury. It seems to me that these too common demurrers to the evidence as against the state handicaps the prosecution, and there should be some remedy afforded the state in case of such bias and prejudice. Would the state of Missouri have to put up a \$10.00 filing fee, in case of a change of venue against the judge? As the prosecuting attorney does not have a contingent fund, out of whose pocket would such a \$10.00 change of venue come?"

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While your letter asks the right of the state to take a change of venue, yet what you really desire is a substitution of judges to sit in a criminal case. The difference between a change of venue and a substitution of a trial judge was pointed out by the Supreme Court in *State v. Rosegrant*, 93 S. W. (2) 961, wherein the Court said (p. 966):

"While the application is technically one for the substitution of a trial judge * * * the statutory designation of the application as one for a change of venue is a legislative assignment of such applications to the class of applications designated applications for a change of venue."

Change of venue, as well as a substitution of judges, is one of statutory enactment and the statute must be strictly complied with. *State v. Bryant*, 24 S. W. (2) 1008, 1010; *State v. Duckworth*, 297 S. W. 150, 151.

In *State v. Bryant*, supra, the court said (p. 1010):

"Defendant's affidavit was not supported by the affidavit of two reputable persons as sections 3991 and 3992 provide. These two sections relate to the disqualification of the judge of the court in criminal causes. If the statute is complied with, the judge must disqualify himself. On the other hand, he must deny the application where it does not comply with the statute."
(Emphasis ours)

Sections 3991 and 3992, referred to by the Court in the above case, are Sections 3648 and 3649, R. S. Mo. 1929. Sections 3648 and 3649 relate to the disqualification of the judge when the defendant seeks to disqualify him. When the state seeks to disqualify the judge, then only Section 3648 applies and Section 3649 has no application. *State ex rel. v. Slate*, 214 S. W. 85, 278 Mo. 570.

Section 3648, R. S. Mo. 1929, reads in part as follows:

"When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or, fourth, * * *"

The case of State ex rel. v. Slate, supra, was an original proceeding in prohibition before the Supreme Court of Missouri, in banc, and was decided June 14, 1919. The facts in said case reveal that the state announced ready for trial and subsequently obtained leave of Court to withdraw its announcement, and the state then filed "a formal, verified motion alleging the disqualification and incompetence of respondent to sit in the trial of the case of State v. Scott on account of the alleged prejudice of said respondent against the state (p. 86)." The trial court ruled the motion for substitution against the state and thereupon a writ of prohibition was applied for. The Court held that the state was entitled to a substitution of a trial judge in a criminal proceeding. The Court said (p. 89):

"Which brings us to the point of law strenuously and most ably presented by respondent's learned counsel. This point, as forecast supra, is not whether the state is ever entitled to a change of venue. There is no question of a change of venue in this case. The question of law is: Can a trial judge, absent his

own voluntary disqualification. lose jurisdiction of a criminal case because of his interest or prejudice therein against the state? We agree with the conclusion of law upon this point of our learned commissioner, and are constrained upon both reason and authority to hold the affirmative of the question stated."

The Court also analyzed Section 3648 by adopting the reasoning of its commissioner as follows (p. 91):

"Our learned commissioner in his conclusions upon the law construing Section 5196 (8) says: '* * * * The language of the section is general, and there is nothing stated expressly or impliedly that limits the first three subdivisions of the section to applications on behalf of a defendant. It is remembered that the fourth subdivision expressly relates to application upon the part of the defendant.'"

It is therefore seen that only the first three subdivisions of Section 3648, R. S. Mo. 1929, are applicable to the State when it seeks a disqualification of a trial judge. Subdivision 4 of Section 3648 and all of Section 3649, R. S. Mo. 1929, particularly relate to defendant when he files an application for a substitution of judges.

The Court in *State ex rel. v. Slate*, supra, concluded its opinion as follows (p. 92):

"No difficulties or embarrassments can arise in the administration of the criminal law from the view that a circuit judge may be disqualified by reason of prejudice against the state from sitting in the trial of any criminal case, and that, being so disqualified, such judge may be by our writ of prohibition prevented from sitting therein. The situation thus brought about by a compulsory disqualification is in no wise different than the situation which would have existed had the learned respondent of his own volition

declared his own disqualification. Automatically the applicatory statutes will, as in case of a voluntary disqualification, apply and solve all the problems presented, and thus the resultant situation presents no difficulties either insuperable or insolvable."

From the above and foregoing it is our opinion that when the prosecuting attorney files a formal verified motion alleging the disqualification of the trial judge for any of the reasons enumerated in the first three subdivisions of Section 3648, R. S. Mo. 1929, that the trial judge does not have further jurisdiction to proceed to sit in the trial of a criminal case. It is our further opinion that the state may, by complying with Section 3648, supra, be entitled to a substitution of judges in any criminal case.

Your second question relates to the paying of a \$10.00 "change of venue fee." Section 3651, R. S. Mo. 1929, relates to the compensation to be paid when there is a substitution of judges. Nowhere in said section is it provided that either the state or the defendant has to advance any fee. There is a fee allowed to the person taking the trial judge's place, but such fee is taxed as costs and "paid out of the state treasury upon the certificate of the clerk of the court in which such cause is pending" or "is tried."

Therefore, it is our opinion that the prosecuting attorney or the State would not have to advance any fee to a substituted trial judge in the event of a disqualification of the trial judge.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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