WITNESS: Witness in criminal case once subpoenaed shall attend case until discharged. In change of
AND FEES: venue witness need not be resubpoenaed.

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May 6, 1943

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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 12, 1943, in which you request our opinion regarding subpoenas for witnesses in criminal cases. Your letter is set out in full, as follows:

> "We request your official opinion in regard to subpoenaes for witnesses in criminal cases.
>
> "1. If a witness has been once subpoenaed to appear before a court, is it necessary for the court to make an order requiring such witness to appear from time to time and term to term thereafter without further subpoena, and if such witness shall appear without such order of court is such witness entitled to his fees.
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> "2. If a witness has been once subpoenaed to appear before a court in a certain county and a change of venue is taken to another county, does such witness have to be resubpoenaed, where no recognizance has been taken.
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> "3. If a witness has been once subpoenaed to appear before a court in a certain county and a change of venue is taken to another county is it necessary for the

> court to make an order requiring such witness to appear in the court to which the change of venue is taken, and if he does so appear without such court order, is the witness entitled to his fees.
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> "The questions set forth in this request have arisen in auditing cost bills and other auditing procedure and, as above stated, refer to criminal cases. We request your official opinion on the various points listed."

At the outset we are assuming that no question is involved with respect to the subpoena itself. We assume that in all the questions propounded the proper service was had and correct returns were made by the officers, and the only matters involved are whether your office may tax as costs in criminal cases the fees for witnesses in attendance upon criminal trials in the situations set out in your three questions.

A witness must be regularly subpoenaed before he is entitled to his fee. This result is reached in the case of Lucas v. Brown, 127 Mo. App. 645, 106 S. W. 1089. We do not set out this decision in full as it is quoted elsewhere in this opinion. The chapter in our Revised Statutes devoted to criminal costs, and concerning itself with the matter of witnesses, would seem to require that a witness in a criminal case attend the case until he is discharged. We refer your attention to Section 4234, R. S. Mo. 1939, which is as follows:

> "Whenever a witness in a criminal case has been once subpoenaed or recognized to appear before any court or magistrate, he shall attend under the same as such witness, from time to time, and from term to term, until the case be disposed of, or he be finally discharged by the court or justice; and he shall be liable to attachment for any default or failure

> to appear as such witness, and adjudged to pay the costs and such fine as the court may properly impose; and no costs shall be allowed for any subsequent recognizance or subpoena for any such witness."

We also, on this situation, which requires that a witness once subpoenaed to attend in a criminal case shall attend the case until it has been disposed of, call your attention to the decision in State v. Wright, 76 S. W. (2d) 459, l. c. 461, 336 Mo. 135, l. c. 139:

> "The gist of the resistance of the state at the trial to the continuance seemed to be that Mrs. Wright was subpoenaed to appear on a day on which the case was not on the docket for trial. The record proper does not support this contention of the state. Nor should Mrs. Wright have been subpoenaed anew for October 3, the day on which the case finally went to trial after days given to the disposition of a motion for severance, motions to suppress evidence; a demurrer to the information, amendments of the information, and the like. She having been duly subpoenaed at her home in Excelsior Springs to appear, on September 22, at Carrollton, the county seat of Carroll county, she became subject to section 3839, R. S. Mo. 1929 (Mo. St. Ann., Sec. 3839, p. 3337), which provides: 'Whenever a witness in a criminal case has been once subpoenaed or recognized to appear before any court or magistrate, he shall attend under the same as such witness, from time to time, and from term to term, until the case be disposed of, or he be finally discharged by the court or justice.'"

Now, devoting ourselves to continuances, we find that when a criminal case has been continued the statutes provide the following with respect to the witnesses, as set out in Section 4045, R. S. Mo. 1939:

> "Whenever a criminal case shall be continued, all the witnesses in attendance shall be called by the court, and as many of them as the parties may desire shall be required to enter into recognizance for their appearance on the day of the next term on which such case shall be set for trial, which day shall be fixed and designated by the court at the time the continuance is granted; and if any such witness shall fail to appear in said court when so called, for the purpose of being recognized, such witness shall forfeit all his fees as witness in such cause, and may be compelled to appear by attachment."

You will note under this section that they shall be called by the court and as many as the parties may desire shall be required to enter into a recognizance for appearance. Now, if any witness fails to appear when so called for the purpose of being put under a recognizance, such witness shall forfeit all his fees. That portion of the statute requiring that they shall be called is mandatory and the word "may" is discretionary and we may have a situation where a witness has not entered into a recognizance yet he is still liable for an attachment against him if he does not appear for trial.

Directing our attention to those statutes providing for fees, their payment and the disposition of the same we find in Sections 13420 and 13421, R. S. Mo. 1939, all of the provisions upon this question. We do not set out these sections because of their length, but cite them for your convenience.

Now, looking to an answer to the question as to when a witness attends "under subpoena" we find, in the decision of

Wilson v. The St. Louis, K. and N. W. Ry. Co., 53 Mo. App. 342, l. c. 344, the following:

> "The question involves the construction of the statute pertaining to the fees of witnesses. That portion of section 5003, Revised Statutes of 1889, which is pertinent, reads: 'Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice, as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled.'
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> "The question is, did the witnesses attend the trial in obedience to a subpoena? If so, they are entitled to mileage. While the statute does not provide for acceptance of service of a subpoena, we know of no good reason why a witness could not dispense with the legal forms of service. In Pennsylvania it was expressly decided that he could. Feree v. Strome, 1 Yeater (Pa.) 303. A subpoena is not directed to an officer, but to the witness himself.
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> "In the case of Herson v. Railroad, 18 Mo. App. 439, subpoenas were not issued. The witnesses attended the trial at the request of the defendant. The Kansas City Court of Appeals held, and we think properly, that the attendance of the witnesses in that case was purely voluntary, and that they were not entitled to claim mileage. But this cannot be said of witnesses who have accepted service of subpoenas. Attendance by them should be regarded as in obedience to or 'under subpoena.' And we think this is true, although the witnesses live more than forty miles from the place of trial, and the legal

> fees have not been tendered or paid. The right to have fees paid in advance may also be waived."

Referring again to Section 13421, R. S. Mo. 1939, previously cited but not set out, which provides that a witness, upon application for allowance of fees, shall be put under oath by the clerk as to the truth of the facts contained in the entry on the clerk's records, we find a decision sustaining the proposition that before a clerk can tax per diem and mileage of a witness the latter must make oath to the truth of the record entry. See Veidt v. Railway Co., 109 Mo. App. 102, l. c. 103 for the following quotation:

> "The question thus arising is, whether or not the fees of the witness so allowed were taxable against the defendant as costs in the case. At common law no recovery of costs was allowable, and when statutes were passed authorizing their allowance they--the statutes--were always strictly construed. State ex rel. v. Seibert, 130 Mo. l. c. 213, and cases there cited. And this rule of statutory construction obtains in this State. Steele v. Wear, 54 Mo. 531; Shed v. Railroad, 67 Mo. 687; Sinclair v. Railroad, 74 Mo. App. 500; Houts v. McCluney, 102 Mo. 13; Thompson v. Elevator Co., 77 Mo. 520; St. Louis v. Meintz, 107 Mo. 611; Hoover v. Railroad, 115 Mo. 77; State ex rel. v. Oliver, 116 Mo. 188; State ex rel. v. Seibert, 130 Mo. 202.
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> "Applying this rule to the case before us, and we must conclude that as the witnesses were not first sworn to the truth of the fee-book entry by the clerk, he was neither authorized to allow the fees for which they applied, nor to tax the amount thereof as costs in the case. The judgment of the court denying the defendant's motion cannot be upheld."

Looking now to Lucas v. Brown, 127 Mo. App. 645, l. c. 651, the court said:

> "It would seem too plain for serious discussion that in order for the fees and mileage of a witness and the fees of the clerk and sheriff for issuing and serving a subpoena to be legally taxed as costs in the case, it must be made to appear that the attendance of the witness was compulsory and not voluntary and that the provisions of sections 3259 and 3260 of the statutes above quoted have been satisfied. The only method for compelling the attendance of the witness is that provided in section 4661, Revised Statutes 1899. 'In all cases where witnesses are required to attend the trial in any cause in any court of record, the summons shall be issued by the clerk of the court wherein the matter is pending, or by some notary public, or justice of the peace of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear.' The section following requires that the summons, or subpoena as it is called, 'shall contain the names of all witnesses for whom a summons is required by the same party, in the same cause, at the same time, who reside in the same county, and may be served in any county in the State.' The manner in which the subpoena may be served is prescribed in section 4671: 'Subpoenas shall be directed to the person to be summoned to testify and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person who would be a competent witness in the cause, and the sheriff, coroner, mar-

> shal or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held.'

The statutory provisions having to do with subpoenas are cited at this point for convenience only. They may be found at Sections 1897, 1898 and 1908, R. S. Mo. 1939, and, under this latter section we find authority for the proposition that where a subpoena was not lawfully issued a witness is entitled to his per diem fee only. This may be found in a decision of the Kansas City Court of Appeals in Knight v. Donnelly, 135 Mo. App. 105, l. c. 107, as follows:

> "As no instructions were asked or given, strictly speaking, there is nothing before the court to review. On the merits of the case, it may be said however, that the action of the court should be approved. The attendance of the witness was purely voluntary. 'A subpoena is a process of court and must be issued in the manner prescribed by the statute. It must contain the names of the witnesses to whom it is directed and be signed by the clerk and attested by the seal of his office.' (Lucas v. Brown, 127 Mo. App. 645.) The so-called subpoena was not such because it was not signed by the clerk or one of his deputies, which is an absolute requirement of the statute; therefore, the witness' attendance was voluntary and she was entitled to a fee only for attendance while testifying. Affirmed. All concur."

We do find in the statutes, at Sections 4229 and 4230, R. S. Mo. 1939, certain provisions requiring the endorsement of names on the indictment or information and the further provision that the circuit judge and prosecuting attorney shall certify on the fee bill the names of witnesses entitled

to fees and mileage.

Taking up the situation where a cause is removed from one county to another, we look to the statutes for the provisions in these situations and we find authority for the statement that witnesses shall attend the trial in cases of removal from the original county, at Section 4032, R. S. Mo. 1939, which reads as follows:

> "The defendant and all witnesses and others who shall have entered into any recognizance to attend the trial of such cause, having notice of the removal thereof, shall be bound to attend at the time and place of trial, in the county to which the cause is removed, and a failure to do so shall be deemed a breach of recognizance."

We are now concerned with the provisions as to the kind and character of notice to witnesses in the event of an order of removal of a cause. It would seem that the order of removal is all the notice the witness is entitled to receive, according to our statutes. This is covered in Section 4033, R. S. Mo. 1939, as follows:

> "When the order of removal is made in term, it shall be deemed a notice to every person who shall have entered into a recognizance to appear at such term; in other cases the notice shall be in writing, signed by the prosecuting attorney or clerk of the court, and served on the person so recognized, in the manner provided by law for serving notices."

We have further noted that under Section 4234, R. S. Mo. 1939, a witness shall attend the case until discharged. We

cite this section but do not quote it because it has been written in detail above. Section 4023, R. S. Mo. 1939, prescribes in detail how the order for removal is to be entered, and we have already noted that a change of venue cannot be made until such order has complied with this section and, further, we have indicated that this order of removal is deemed notice to every person who shall have entered into a recognizance. It would seem, therefore, that, the court having complied with all requirements relating to a removal of a cause, all parties involved in the criminal prosecution have notice; and, since we have already found that a witness shall attend the trial either in the original county or the county to which removed, there is no situation where he may appear without properly being subpoenaed, assuming, as we did in the first paragraph, that the question of the subpoena is not involved.

Before reaching a conclusion we wish to point out that the accused has the right of compulsory process and this is guaranteed him under our Constitution, Article II, Section 22, page 71c. And, further, the circuit court has inherent power in criminal cases to compel attendance or the production of witnesses and we cite as authority Article VI, Section 22, Missouri Constitution; State ex rel. Rudolph v. Ryan, 38 S. W. (2d) 717, 327 Mo. 728; and Ex parte Marmaduke, 4 S. W. 91, 91 Mo. 228, 60 Am. Rep. 250.

CONCLUSION

From the above and foregoing we conclude that a witness once subpoenaed in a criminal case shall attend that case until the case is ended and he is discharged. Further, that no court order other than the removal order is necessary. That the removal order is notice to the defendant, the witnesses and others, of the removal, and no further order is necessary. That upon a change of venue a witness once subpoenaed need not be resubpoenaed where no recognizance is taken.

Respectfully submitted,

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Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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