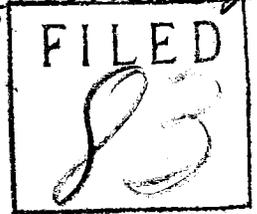


CRIMINAL COSTS:
ON CHANGE OF VENUE:

Reporter's fee of Three Dollars should
be paid in the county where the information
or indictment is filed.

May 1, 1941

*See 34-1954 under
Lab. of January 21, 1954
Arthur W. Goodman Jr.
5-10*



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. Robert K. Nutter

Dear Sir:

Answering your request for an opinion dated April
2, 1941, in reference to four questions concerning criminal
costs, we submit the following:

Your first question reads as follows:

"1. In auditing cost fee bills pay-
able by the State, our criminal cost
department deducts the stenographer
fee if one is charged where a bill
shows that a plea of guilty was
entered. This deduction is made
upon the assumption that the case
is not contested. Are we correct
in making this deduction?"

Section 13346, R. S. Missouri 1939, partially reads
as follows:

"In every contested case, * * *
in any circuit court or division
thereof, when an official court
reporter is appointed, the clerk
of said court shall tax up the sum
of three dollars, to be collected
as other costs, and paid by said
clerk into the county or city
treasury, toward reimbursing the
county or city for the compensation
allowed such court reporter as herein-
before provided."

It will be noticed in the above section that it
specifically states a contested case. According to 13

Corpus Juris, page 110, the word "contest" as a verb is defined as follows:

"To make a subject of dispute, contention, or litigation; to call in question; to challenge; to controvert; to oppose; to strive to win or to hold; to dispute; to defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate; to dispute the declared result of an election."

Under the above definition where the fee bill rendered to your office shows that a plea of guilty was entered it is not a contested case as set out under Section 13346, supra, and is a default case and, therefore, it is proper for your office to deduct the stenographer's fee, if one is charged, where the bill specifically shows that a plea of guilty was entered.

Your second question reads as follows:

"2. In some cases bills are presented to us to be audited, where a jury trial has been held and on account of a mistrial the cause is then set over to another term of court. In other words, two or more trials are had in the same case. Does this statute contemplate a charge for stenographer fee for each trial or should only one fee to taxed and allowed?"

Under Section 13346, supra, in plain and unambiguous language it specifically states "in every contested case." It does not say a trial. In the case of a mistrial the case is still pending and is the same case and only one cost of Three Dollars should be taxed up even if the case is tried more than one time.

In the case of Mechanics & Traders' Bank v. Glaser Bros., 40 Mo. App. 371, the court, in passing on the allow-

ance of the costs of Three Dollars to be taxed, said:

"The question for decision upon this record is, whether the fee of three dollars allowed by section 4 of the act of March 31, 1887 (Laws of 1887, page 146), can be taxed, in a proceeding by garnishment, as though it were a separate suit. The circuit court held that it could be so taxed, and the plaintiff has appealed from the decision. We are of opinion that it cannot be so taxed. Section 3 of the act provides for the payment of a salary to the court stenographers therein provided for, and also allows them compensation for writing long-hand transcripts of their notes. Section 4 is as follows: 'In every case (except in suits by the state for the collection of delinquent taxes), now or hereafter pending in any circuit court or division thereof, where an official stenographer is appointed, the clerk of said court shall tax up the sum of three dollars, to be collected as other costs, and thereupon to be paid by said clerk to the city treasurer to apply to the payment of salary of such stenographers as above.' This court is of opinion that a proceeding by garnishment in an attachment suit is not a 'case' within the meaning of the above statute. That it is a mere auxiliary proceeding, depending on the principal proceeding in which it is instituted, is abundantly shown by the statute creating and defining it. R. S. 1879, sec. 2531. It is not a suit or separable controversy within the meaning of the acts of congress allowing causes to be removed from the state courts to the federal courts. Weeks v. Billings, 55 N. H. 371; Pratt v. Albright, 9 Fed.

Rep. 634; Buford v. Strother, 10 Fed. Rep. 406; Poole v. Thatcherdeft, 19 Fed. Rep. 49. The right of costs is entirely conferred by statute. It is contrary to the policy of the law to enlarge such statutes by loose construction so as to build up constructive fees, since, as experience shows, the practice of taking these fees has a tendency to grow insensibly, even where the courts construe the statutes granting them strictly."

Under the holding in the above case it specifically sets out that other proceedings outside of the "case" was not a separate case but was merely auxiliary proceeding depending upon the principal proceeding in which it is instituted. It further held that a garnishment proceeding in an attachment suit was an auxiliary proceeding and was not a suit or separable controversy within the meaning of the statutes, acts of congress and proceedings for the removal from the state courts to the federal courts.

As set out in the second point of your request in case of a mistrial and the retrial of the same case, there was only one case and the second trial of the case was merely an auxiliary proceeding and a continuation of the filing of the first case.

Your third question reads as follows:

"3. Where a case is started in one county, and one or more trials are had and the cause is then taken on a change of venue to another county where the case is finally concluded by trial, should more than one \$3.00 stenographer fee be taxed and which county is entitled to same?"

Under Section 13346, supra, it specifically states, "In every contested case * * * the clerk of said court shall tax up the sum of three dollars, * * * " There is no question but that the clerk referred to means the clerk of the court where the case is originally filed for the reason that this

cost is a tax to be assessed by the clerk as a ministerial act and not by the court as a judicial act such as retaxing of costs.

In the case of Artophone Corporation v. Coale, 133 S. W. (2d) 343, pars. 2-4, the court said:

"* * * * Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10). * * * * *"

The holding in the above case was to the effect that to construe a statute it is necessary to ascertain the lawmakers' intent and the purpose of the passing of the act.

In Section 13346, supra, it specifically states that the Three Dollars was to be collected as other costs and be paid by the said clerk into the county or city treasury for the purpose of reimbursing the county or city for the compensation allowed the court reporter as set out in Sections 13341, 13342 and 13343, R. S. Missouri 1939. Under Section 13341, R. S. Missouri 1939, it provides for the payment of certain amounts out of the county treasury the salary of the court reporter in certain amounts payable in equal monthly installments according to the population of the county. The courts have construed the word "county" under this section to mean also "circuit." State ex rel. v. Walker, 302 Mo. 116, 257 S. W. 470. Also, under Section 13341, R. S. Missouri 1939, it provided that where a judicial circuit is composed of more than one county, such salary shall be divided among the counties and be paid by them proportional as the population of such counties bear to the entire population of the circuit.

In view of the fact that the Three Dollars taxed up

by the clerk as costs for the purpose of reimbursing the county or city for the compensation allowed such court reporter by the county or city, then it seemed to be the intention of the Legislature and the purpose of the Legislature that the Three Dollars taxed up costs should be paid to the county where the contested case is first filed.

The courts of this state have distinguished as to the payment of costs which are definite and fixed by law and costs which require judicial action in determining the amount. In the case of *In Re Thomasson*, 119 S. W. (2d) 433, pars. 5, 6, the court said:

"In the matter of taxing costs, there is a distinction between the costs which are definite and fixed by law, and costs which require judicial action in determining the amount. *State ex rel. O'Briant v. Keokuk & W. R. Co.*, 176 Mo. 443, 75 S. W. 636. Costs which are definite and fixed by law are required by statute to be taxed in the first instance by the clerk of the court, a purely ministerial duty, and the retaxing of such costs may be had at any term of the court, the court in such instances itself exercising purely ministerial duties in correcting the errors, if any, made by the clerk in taxing the costs. This is not the case however in regard to the taxation of costs which require judicial investigation and determination, for there the court alone can order the costs taxed and retaxed, which 'must be done upon judicial investigation and determination, and must be done during the term of the court at which the final judgment in the cause is rendered, for it is elementary that with the lapse of the term at which the final judgment is rendered the jurisdiction of the court over the cause ceases.' *Burton v.*

Chicago & A. R. Co., 275 Mo. 185,
204 S. W. 501, 504."

It will be noticed in the above holding that the court specifically said that costs which are definite and fixed by law are required by statute to be taxes in the first instance by the clerk of the court and said that it was a purely ministerial duty. The courts have even held that where it is the duty of the clerk to tax fees, such as stenographer's fees allowed and required by law to be taxed and which he fails to do, he is liable on his official bond. In the case of State ex rel. Christian County v. Gideon, 158 Mo. 327, 1. c. 341, the court said:

"* * * * * Under the statute it was the duty of the clerk to tax these fees, 'to be collected as other costs, and thereupon to be paid by said clerk to the county treasurer.' (R. S. 1839, secs. 8249 and 8250.) If he failed to tax them they could not be collected and paid to the county treasurer, and if by reason of such failure the county lost fees which could have been collected, if they had been taxed, the county was damaged by the failure of the clerk to discharge his duty in this particular, and has a right of action on his bond for such damages. * * * * *"

Your fourth question reads as follows:

"4. Where a case originates in one county and a trial which results in a mistrial is had and the cause is then taken on a change of venue to another county where the case is disposed of either by a plea of guilty by the defendant or dismissed by the State without a trial being had in the county to which the case venued, should one or more \$3.00 stenographer fees be taxed and which county should receive the benefit of same?"

In answer to your fourth question we have stated in our answer to your second question that only one stenographer's fee of Three Dollars can be allowed and that should be at the time of the trial of the first case even if it resulted in a mistrial. In your fourth question you inquire concerning a statement of fact where a mistrial is had and the cause is then taken on change of venue to another county. Section 4241, R. S. Missouri 1939, reads as follows:

"In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted; and in all cases where fines are imposed upon conviction under such indictments or prosecutions, or penalties or forfeitures of penal bonds in criminal cases, are collected, by civil action or otherwise, payable to the county, such fines, penalties and forfeitures shall be paid into the treasury of the county where such indictment was originally found or such prosecution originally instituted, for the benefit of the public school fund of the county."

This section specifically holds that the costs liable to be paid out of the county treasury shall be paid by the county in which the indictment was originally filed where a change of venue is taken from one county to another county.

Section 4242, R. S. Missouri 1939, provides that the bill of costs in any case which has been taken on a

change of venue from one county to another shall be presented to the county court in which the indictment was originally found or proceedings instituted and that the cost bill should be paid if the cause had been tried or otherwise disposed of in the first county.

In view of the above two sections commented upon, and in view of the fact that only one Three Dollar stenographer's fee can be taxed up, there is no question but the county where the case first originated is entitled to the Three Dollars taxed up by the clerk.

CONCLUSION

In answer to your first question, we hold that the state should not be compelled to pay the Three Dollars taxed up as reporters' fees, where the state is liable for the payment of the costs, unless it is a contested case, and under no circumstances should the state pay the Three Dollars taxed up as the reporter's costs where a plea of guilty was entered.

It is further the opinion of this department, in answer to your second question, that in case of a mistrial, and another trial is had which results in the state being liable for the criminal costs, only one cost of Three Dollars should be taxed up in the case as reimbursement to the county or city for the compensation allowed such court reporter by the county or city.

It is further the opinion of this department, in answer to your third question, that when a case is started in one county and one or more trials are had and the cause is then taken on a change of venue to another county where the case is finally concluded by trial, the Three Dollar stenographer's fee must be taxed up in the county of the origin of the case and should be paid to the county in which the indictment or information was originally filed.

It is further the opinion of this department, in answer to your fourth question, that where a case originates in one county and a trial results in a mistrial, and the cause is then taken on a change of venue to another county

Hon. Forrest Smith

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May 1, 1941

where the case is disposed of, either by plea of guilty by the defendant or dismissed by the state without a trial, the Three Dollar stenographer's fee should be taxed up in the county where the case originated and the county where it originated should receive the Three Dollar stenographer's fee when paid into the clerk's office.

The above conclusions, of course, are based upon the fact that in the above four questions the state only and not the county is liable for the payment of the costs in the criminal case in question.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA