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Ely, Ely, Right to Change

RIGHT TO CHANGE OF VENUE OR CHANGE OF JUDGE UNDER THE MISSOURI CONSTITUTION

BEN ELY*

Since the adoption of the present Missouri Constitution in 1945, a number of interesting questions as to the effect of some of its provisions upon the right of litigants to obtain a change of venue or a change of judge have arisen. In the field of criminal law the entire subject has been dealt with by the rules of criminal procedure promulgated by the Supreme Court.¹ As yet, the court has not adopted similar rules for civil cases.² Some of the practical questions which remain unanswered or only partly answered by the decisions are these: (1) Where one of the parties to a civil suit has filed an affidavit alleging the prejudice of the inhabitants, may the judge transfer the entire case to a circuit court in an adjoining judicial circuit? (2) Assuming that the affidavit mentioned alleges the prejudice of both the judge and the inhabitants of the county, may such a transfer be made? (3) Is it still possible with the consent of the trial judge for the party filing an affidavit of prejudice against the judge and all other parties to the case to agree upon the choice of some attorney not interested in the trial and who possesses the qualifications legally required of a circuit judge to act as a special judge in the case?

I.

It is a fundamental principle of our jurisprudence that every litigant should have all of the issues of law and fact involved in his case decided

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1. The Rules of Criminal Procedure for the Courts of Missouri. These rules were adopted April 14, 1952, and became effective January 1, 1953. For general provisions applicable to circuit courts, courts of common pleas and the Court of Criminal Corrections see Rule 30. Rules 23.04 and 23.05 govern changes of judge upon preliminary hearings in felony cases. Rules 22.05 and 22.06 govern changes of venue and changes of judge in misdemeanor prosecutions before magistrates. These rules, however, for some purposes, incorporate the statutory law of change of venue in civil cases in the magistrate court. The incorporated statute is Mo. REV. STAT. § 517.520 (1949).

2. The proposed draft of rules of civil procedure prepared by the Missouri Supreme Court's advisory committee partially covered the matter in Rules 2.06 and 2.22. These proposals merely adopted the language of existing statutes with the exception of the provisions for agreement upon a special judge and for the election of a special judge. Their adoption by the court might not, it is believed, fully solve some of the problems to be discussed in this paper. However, the proposals have not as yet been accepted.

by an impartial and unprejudiced tribunal, body, or officer. A judge or juror is not impartial if his decision is in any manner affected by his emotional reactions for or against one or more of the parties produced by facts or circumstances outside of the evidence in the case and the law applicable thereto. No trier of law or fact can be unbiased if he permits himself to be swayed by a peculiar sympathy or aversion either to the individual litigant or to the social, economic, racial, or religious group to which one of the litigants belongs. The judge or juror is prejudiced if he permits himself to form a fixed opinion of a case in advance not based upon the evidence heard in court but upon other sources of information. It is quite true that every trier of the fact must, in weighing the evidence and in applying general standards such as reasonableness or ordinary care, make use of the general body of information which he has received throughout his life. But this is very different from deciding a particular fact question on the basis of rumor or of the general feeling of the community. Even in deciding questions of law the judge, while of course he must make use of his accumulated fund of legal knowledge, must keep his mind open to receive and fairly evaluate the arguments made by both sides.

Fairness and impartiality are far more apt to exist in the case of judges who, by their professional training and long experience, are necessarily impressed with the gravity of their responsibilities than in the case of jurors whose connection with the judicial process is a transient one. Yet legal history demonstrates the fact that cases have been decided by biased and prejudiced judges. The danger of such bias and prejudice in the case of our appellate courts is small and it is minimized by the fact that such courts are collegiate in their organization. If the chances of one appellate judge being prejudiced are exceedingly small, the probability that a majority of three or seven judges might be is almost infinitesimal. Where, as is true in our nisi prius courts, there is only one judge the chance of bias and prejudice is measurably increased.

When we are dealing with untrained jurors however, experience teaches that improper prejudice and influences are much more apt to exist.³ To secure an impartial jury certain procedural devices have come down to us from an early period of the common law.⁴ These

3. Cf. Hoffman and Brodley, *Jurors on Trial*, 17 Mo. L. Rev. 235 (1952).

4. 3 BLACKSTONE, COMMENTARIES 359; 4 *Id.* at 352.

include the right of the parties to examine the jury panel on *voir dire*, to challenge individual jurors for cause, and to make a certain number of peremptory challenges.⁵ There are also statutory provisions designed to insure that the members of the panel will be reasonably intelligent persons and as far as possible impartial in their attitude toward the case.⁶ Recently there has been some effort to give to the entire jury panel some preliminary education as to the nature and importance of their function. In spite of these safeguards, however, it not infrequently happens, particularly in counties of smaller populations, that fixed ideas about the justice of a given case of strong feelings for or against one of the litigants prevail throughout the community so that it is practically impossible to obtain a jury of fair persons.

Where the trial judge is biased or prejudiced in a particular case the only guarantee of a fair trial can be found in the substitution of another judge⁷ and it is logical to assume that if the judge is partial in the beginning he cannot impartially decide the issue of whether or not he is a proper person to try the case.⁸ The logical result is that which our own courts have reached, to wit: that if any party to the case files an affidavit stating that the trial judge is biased and prejudiced, the disqualification of the original judge and the substitution of another will follow automatically.⁹ Where bias and prejudice of the members of the

5. Cf. MO. REV. STAT. §§ 494.190, 494.200, 546.140, 546.150, 546.180 (1949).

6. MO. REV. STAT. §§ 494.240, 495.050, 495.060, 496.020, 496.150, 497.020, 497.030, 498.010, 498.020 (1949). These sections create boards of jury commissioners or supervisors. They are effective only where the members of such boards fully realize the grave importance of their duty and are able to devote sufficient time thereto.

7. BLACKSTONE says (l.c. note 4, *supra*) that the parties litigant originally had the right to challenge the judge for interest or prejudice but that they had lost this right by his time. The reasons given for depriving them of this right to wit, that the judge was sworn to try the case impartially and that oppressive conduct on his part would lead to his removal from office, seem hardly adequate.

8. Crumpacker, *The Change of Venue Problem*, 20 IND. L. J. 283 (1945).

9. *State v. Mitts*, 29 S.W.2d 125 (Mo. 1930); *State ex rel. v. Waltner*, 169 S.W.2d 697 (Mo. 1943). The federal cases also accept the doctrine that the affidavit of prejudice may not be controverted by other evidence. *Nations v. United States*, 14 F.2d 507 (8th Cir. 1926) *cert. den.* 273 U.S. 735, 71 L. Ed. 866, 47 Sup. Ct. 243 (1926). Under the state decisions the affidavit of prejudice need only state the ultimate fact that the judge is prejudiced but under the federal decisions it must state "the facts constituting the prejudice." This statement is difficult to understand. Prejudice is a mental state and it is impossible to describe any group of facts which constitute that condition of mind. What the federal cases really mean is that the affidavit must state evidentiary facts from which some one may draw the inference that the judge is prejudiced. Since the challenged judge must in the first instance decide whether or not this inference may be drawn, he is to that extent required to pass upon the issue of his own prejudice. It is a peculiar phenomenon of psychology that the more

community in general from whom the jury panel must be selected is shown, the only solution would seem to be either importing a jury from another community or transferring the case for trial to another county from whose inhabitants the jury may be selected. In practice, Missouri has long chosen the latter of these two alternatives and it has the advantage of being less expensive and of causing less inconvenience to the prospective jurors than the former.

In our statutes and in the earlier judicial cases the term "change of venue" has been used indiscriminately to refer to the substitution, in the original court, of one judge for another. Strictly speaking, however, the word "venue" refers to the county or district in which a case is to be tried.¹⁰ A change of venue therefore must involve the transfer of a trial from its original situs to another locality. As a practical matter it seems important to distinguish between the removal of a trial from one district to another district and the substitution of one judge for another judge without the removal of the case. The first will be referred to as a change of venue; the second as a change of judge. This terminology has recently been employed by our own supreme court.¹¹

It must be borne in mind that sometimes a change of venue will also effect a change of judge. If a case is pending in X county which is in a circuit presided over by Judge A and a change of venue is awarded to Y county in a circuit presided over by Judge B, an incidental result will be a substitution of a new judge.

II.

Some theoretical questions must receive our consideration before we direct our attention to the practical question with which we are primarily concerned. Section 5 of Article V of the Missouri Constitution expressly confers on our Supreme Court the power to make rules of practice and procedure for all the courts of the state.¹² Does this pro-

prejudiced an individual is the more sincerely he believes in his own fairness. Hence the Missouri rule is preferable to the federal rule.

10. BOUVIER'S LAW DICTIONARY, sub verb.

11. *State v. Mitts*, *supra*, note 9.

12. "The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury or the right of appeal. The court shall publish the rules and fix the day on which they take effect but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

vision empower the court to regulate changes of venue and changes of judges by rule? It is important to determine the extent of that power. If we examine the language of Section 5 we will see that it adopts the previously recognized dichotomy of the entire field of law into procedural rules and substantive rules. The former lie within, the latter without, the court's rule making power. But the line between procedure and substance is not one of clear demarcation. Between those rules which are indubitably procedural and those which are obviously substantive lies a vague penumbra in which rules are found which partake somewhat of both characteristics. A working definition may be attempted, however, which for present purposes may be deemed sufficient.

Substantive rules are those which create and define the primary rights, powers, privileges, and immunities which one person has against another. Procedural rules are those which prescribe the steps which a person whose primary right has been violated or threatened must take in order to invoke the aid of the political agents of society for the protection of his right or the redress of the injury he has suffered because of its violation.¹³ It may be objected that we have merely used many words to express the truism that procedural rules are procedural. We think this is not true. A person has a substantive right against another when and if conduct of that other which invades the interest of the possessor of the right will be followed by societal action against the actor. For every right there must be a remedy. But for the existence of the right it is immaterial what the nature of the remedy may be. As long as the possessor of the right may in any manner invoke the protective action of society through its political agents the right exists; and the right is not modified or destroyed by merely changing the steps which its injured possessor must take in order to obtain redress. Thus *A* has a substantive right against *B* that *B* will not intentionally inflict upon *A* a harmful or offensive bodily contact. *A* has this right simply because if *B* commits a battery upon him *A* can in some manner secure redress from the courts. The manner is immaterial. Therefore the rule creating and defining *A*'s right is substantive but the rules requiring *A* to file a petition, obtain service of process, and take certain other steps during and after the trial are procedural. A modification of these latter rules, so long as *A* is left with some form of remedy, does not destroy or modify his substantive right.

13. Corbin, *Rights and Duties*, 33 YALE L. J. 501 (1924).

Judged by this standard the rules which permit changes of venue or substitutions of judge are obviously procedural. They do not even lie in the debatable ground. They do not create, destroy, or modify anyone's primary rights.

To revert to the language of Section 5 of Article V, however, will demonstrate that there are certain exceptions contained therein to the court's power to make purely procedural rules. There are certain subclasses of the general category of procedure to which the rule making power does not extend, such as rules of evidence, rules respecting the oral examination of witnesses, rules defining the right of trial by jury, and the conduct of the jury and those granting the right of appeal. The matter of change of venue and change of judge in no way comes within any of these accepted subclasses unless it be that having to do with the right of trial by jury.

It has been said, although not directly decided, by the courts of this state that in criminal cases a change of venue may not be awarded unless it is requested by the defendant.¹⁴ The argument on which this rests is that the right to trial by jury guaranteed by Sections 18 (a) and 22 (a) of Article I of the constitution is a right to be tried by a jury of the *vicinage* or county and that this right would be interfered with if the state were permitted to take a change of venue. It is clear that the right to trial by jury is that right as it was known at common law¹⁵ and it is equally clear that at common law changes of venue were always permitted even in criminal cases and even when they were sought by

14. Thus *In re McDonald*, 19 Mo. App. 370, 377 (1885), the court said: "So, in criminal prosecutions, while the privilege is usually accorded to the accused to take a change of venue, in order that he may escape local prejudice and passion, and to secure a fair and impartial trial, it does not recognize the right of the state to change the venue." This case held unconstitutional a statute which permitted an offense committed within 500 yards of a county line to be indicted and prosecuted in either county. In *Ex parte Slater*, 72 Mo. 102 (1880), the court held unconstitutional a statute which permitted the circuit judge, upon finding that an unprejudiced grand jury could not be impaneled in the county in which an offense had been committed, to refer the matter to a grand jury in another county and which permitted a trial in the second county of an indictment returned by such grand jury. See also *State v. McGraw*, 87 Mo. 161 (1885); *State v. Hatch*, 4 S.W. 502 (Mo. 1887); *State v. Anderson*, 90 S.W. 95 (Mo. 1905); *State v. Meyers*, 90 S.W. 100 (Mo. 1905); *State v. Clarke*, 90 S.W. 100 (Mo. 1905); *State v. Gorman*, 90 S.W. 100 (Mo. 1905). A contrary view, however, has been taken by the courts in many jurisdictions which have constitutional provisions similar to our case. Annotation, 80 A.L.R., 355 (1932). The reasons, theoretical and practical, for permitting the state to take a change of venue are well stated in the case of *Commonwealth v. Davidson*, 91 Ky. 162, 15 S.W. 53 (1891).

15. *State ex rel. v. Coleman*, 152 S.W.2d 640 (Mo. 1941).

the Crown and not by the defendant.¹⁶ If we assume, however, that to permit the state to take a change of venue would deprive the defendant of his right to a jury trial, does it follow that any rule with respect to changes of venue is a rule affecting the "right to trial by jury"? Since changes of venue were universally recognized at common law this would not seem to follow.

It is to be noted that the rule-making power of the United States Supreme Court, while of statutory and not constitutional origin, is, like that of our state supreme court, limited to matters of practice and procedure. Yet in the rules of criminal procedure for the federal courts the subject of change of venue has been covered.¹⁷ The Supreme Court of Iowa, under similarly limited authority, has included in its rules changes of venue and changes of judge.¹⁸ Our own supreme court has made provision for these matters in its rules for criminal procedure.¹⁹

One other constitutional question needs to be noticed. In Article III, Section 40 the legislature is forbidden to pass any local or special law "changing the venue in any civil or criminal case". Under a similar provision of the Indiana constitution doubts were expressed as to the authority of the supreme court to make rules of procedure governing changes of venue.²⁰ This position must be based upon the following line of argument. If Section 6 gives to the supreme court the power to regulate changes of venue by rule, it necessarily deprives the legislature of the power to make similar regulation by any kind of statute whether general or special. But if this were true it would have been unnecessary to have included in the constitution the provision against any special statute changing the venue. The convention would not have done an unnecessary thing so it must have intended to exclude the subject of change of venue from the court's rule making power.

The validity of this argument depends upon the proposition that the legislature can make no statutory procedural rules upon subjects

16. *Rex v. Harris*, 3 Burr. 1330, 97 Eng. Rep. 858 (1762); *Rex v. Nottingham*, 4 East 208, 102 Eng. Rep. 810 (1803); *Rex v. St. Mary's on the Hill*, 7 T.R. 735, 101 Eng. Rep. 1226 (1798); And see *Rex v. Eaton*, 2 T.R. 89, 100 Eng. Rep. 49 (1787); *Rex v. Stannard*, 7 T.R. 162, 100 Eng. Rep. 950 (1791); *Rex v. Thomas*, 7 Maule and S. 442, 105 Eng. Rep. 897 (1815); *Rex v. Davies*, 5 T.R. 626, 101 Eng. Rep. 350, 5 Eng. Rul. Cas. 543, 8 Eng. Rul. Cas. 201 (1794).

17. Rules of Criminal Procedure for the Federal Courts, Rule 21.

18. Comment, *Change of Venue under the new Iowa Rules*, 29 IOWA L. REV. 108 (1943). Cf. New Jersey Rules of Civil Procedure, Rule 3:3-3.

19. *Supra*, note 1.

20. Crumpacker, *op. cit.* note 8, *supra*.

which lie within the scope of the court's rule making power. The soundness of that contention must be determined by the view to be taken of the relationship between the court and the legislature in the field of procedural rule making.

It would seem that there are three possible positions to take in regard to this relationship between court-made rules and procedural statutes:

(1) The court's rule-making power is limited to those matters which the legislature had not covered by statute. The rules to be adopted must be merely supplementary to the statutory law.

(2) The court's rule-making power is exclusive and the legislature may not in the future adopt any statute of a procedural nature.

(3) The power of the court and the legislature are concurrent although the former is superior to the latter. The legislature, under this theory, might adopt procedural statutes on any subject which at the time of their adoption had not been covered by court rule and such statutes, along with those procedural statutes which were in force in 1945, will remain in force until they have been abrogated by the promulgation of the court rules covering the subject. The history of procedural regulation by court rule prior to 1945 leads inevitably to the rejection of the first of these alternatives.²¹ Before 1840 legal procedure was largely governed by rules of the common law. But in the middle of the last century most American states adopted comprehensive codes of procedure enacted by the various state legislatures. There were two objections to the statutory regulation of procedure. First, the state legislatures were in large part made up of laymen who had little or no knowledge of the requirements of a just and efficient procedural system. Second, statutory rules were hard to change. Under the legislative codes procedure came to be regarded as an end in itself and not as only a means towards securing a just disposition of the case. Toward the end of the century Great Britain took the lead in remedying these defects by entrusting to the courts the power to make their own procedural rules. In 1910 began an agitation in this country for the grant of similar power to American courts. The first step came when the federal Supreme

21. BARRON AND HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE*, Chapter 1 (1950); Scott, *The Progress of the Law*, 33 HARV. L. REV. 236 (1919); Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court*, 13 U. OF MO. BULL., Law Series 3 (1916).

Court was given the power to make such procedural rules. The precedent thus set by the federal government was soon followed by many of the states. All of this history was well known to the constitutional convention of 1945 which adopted Article V, Section 5, conferring on the Missouri Supreme Court power to make rules of practice and procedure, as was the fact that these other courts, in adopting procedural rules, had not felt themselves to be bound by existing statutes but had in many respects completely changed statutory procedural machinery.

On the other hand it seems equally clear that the constitution did not repeal existing procedural statutes. Had it done so we would have been left without any system of procedure at all since it would obviously take years for the court to draft a complete set of rules and since the rules when promulgated could not take effect for six months. The same considerations would lead to the conclusion that where there is no rule of the supreme court governing a particular matter the legislature may regulate it by statute.²² We are left therefore with the third alternative. Under this interpretation procedural statutes which were in force in 1945 remain in force until they have been changed by court rule. In the same way where there is no court rule governing a particular matter a statute on the subject may be adopted. But whenever the court sees fit to promulgate a rule all then existing statutes which are in conflict therewith are superseded and in effect repealed or suspended until the court has withdrawn its rule or the legislature by a statute expressly so providing and limited to that one purpose shall have abrogated the rule.

This interpretation disposes of the question raised by the constitutional prohibition against changes of venue by special law. It also permits us to determine the effect of existing statutes of a general nature governing changes of venue and changes of judge.

To summarize: the supreme court has power to adopt rules governing changes of venue and changes of judge in civil and criminal cases so long as these rules do not violate other provisions of the constitution.

22. Consider the following possible case. The court adopts a rule—let us say defining the method of serving process—and thus annuls all existing statutes on that subject. The legislature then repeals the rule by specific act. We would be left without any law on the subject for at least six months unless the legislative repeal had the effect of automatically revising the old statute or unless the legislature had power to enact an *ad interim* statute on the subject.

Until such rules are adopted existing statutes not otherwise unconstitutional remain in full force and effect. When any rule is adopted all statutes which are in conflict therewith cease to have any operative effect.

III.

We now reach the heart of our problem. We must inquire what effect if any Section 6 and 15 of Article V have had upon the matters here under discussion. To understand the basic problems and to properly evaluate the court decisions it will be necessary briefly to summarize the scheme for changes of venue and changes of judge provided in the existing statute. Although, so far as criminal cases are concerned, the matter has been completely covered by court rule, the existing statutes must be noticed because some of the decided cases arose before the rules were promulgated.

The provisions for changes of venue and changes of judge in civil cases are principally confined to Chapter 508, *Missouri Revised Statutes* (1949). If both parties consent, a true change of venue or removal of the cause from one circuit court or common pleas court to another must be awarded without the filing of a formal application, the statement of any grounds, or the exercise of any discretion by the court.²³ By the terms of the section, the power of the parties by unanimous consent, to transfer the cause to another venue is not limited to transfers between the courts of the same judicial circuit. Thus the parties by agreement can, as an incidental result of changing the venue, also change the judge.

If the trial judge has a pecuniary interest in the case, is related to any of the parties, or (before going on the bench) was of counsel, it is made his duty to disqualify himself without any application having been made by any party and to award a change of venue.²⁴ Although this section clearly deals with the disqualification of the judge alone, it too effects a change of judge only through changing the venue in the case. This is shown by the fact that the proviso in this section relieves the judge of the duty of ordering a change of venue if all the parties agree upon his continuing in the case or upon some member of the bar as a special judge or upon the election of a special judge by the bar.

23. Mo. Rev. Stat. § 508.080 (1949).

24. *Id.* § 508.100.

There is no express provision in these cases of automatic disqualification for calling in another judge to preside at a trial in the original venue.

Changes other than those granted by consent of all parties or on the court's own motion are awarded when one of the parties has filed his affidavit alleging prejudice either of the inhabitants or of the judge (or of both).²⁵ Where the affidavit charges prejudice of the inhabitants only, the cause must be removed from the county. If the circuit consists of several counties it is sent to another county in the same, the adjoining, or the next adjoining circuit. If the circuit consists of one county only the case would of necessity have to be sent to another circuit and thus an incidental change of judge would be brought about. In counties having more than 75,000 inhabitants the applicant must, if his opponent files a counter-affidavit, make proof satisfactory to the original judge of existence of the prejudice.²⁶

Where the application alleges prejudice of the judge a different procedure is provided for multi-judge courts from that used in courts having a single judge.²⁷ In the case of the multi-judge courts the cause is simply transferred from the division in which it was originally pending to another division. It is in effect merely reassigned. Thus there is no real change of venue but merely a change of judge.

In the case of single judge courts, the procedure is slightly more complex. Here the judge must permit the parties to see if they can agree either on the choice of an attorney to act as special judge or upon the election of a special judge by the members of the bar. After the failure of the parties to so agree, but only after such failure, the original judge has the power and duty to order a true change of venue transferring the cause to another circuit.²⁸

The statutes are silent as to what course is to be followed if the applicant swears against both the judge and the inhabitants. In counties which comprise an entire judicial circuit, the answer seems to be that a charge of prejudice against the judge is usually superfluous. The removal of the case from the county will automatically bring about a change of judge. There might be exceptional cases, however, in which

25. *Id.* §§ 508.090, 508.130.

26. *Id.* § 508.140.

27. *Id.* § 508.110.

28. *Id.* § 508.140.

this is not true. Assume that the opponent has filed a counter-affidavit as to the prejudice of the inhabitants. It is plain that the original judge whose prejudice has been alleged in the application ought not to pass upon any question in the case and hence should not pass upon the existence of prejudice of the inhabitants. The only possible solution would be reassignment of the case to another division the judge of which would then pass upon the question of the prejudice of the inhabitants, and if he found such prejudice to exist he would order the transfer of the case to another division. It is in effect merely reassigned. Thus there is no circuit. It might seem that such a procedure would violate the statutory prohibition against granting two changes of venue to the same side.²⁹ This is not true. For the first transfer involved only a change of judge and the second a true change of venue. Any other solution would deprive the party who believes that both the judge and the inhabitants are prejudiced against him of his right to have both a new judge and a new jury.

In the case of single judge circuits the solution is somewhat difficult. Where the applicant has sworn against both the judge and the inhabitants, the matter might be simply disposed of by ordering a transfer to another circuit. But it might be said that this would violate the statutory requirement that the parties be permitted to agree upon a special judge before such transfer is made. If they are permitted to agree upon a special judge and the actual venue is then changed to another county it might be argued that two changes of venue were thereby allowed to the same side in the case. This reasoning would seem fallacious for the reasons advanced in our discussion of the multi-judge courts.

A somewhat connected question arises when one of the parties has first sworn against the judge and a special judge has been selected to try the case and the same party thereafter swears against the inhabitants. On the reasoning above advanced it would seem that the second application should be sustained and the trial removed to another county of the same circuit where the special judge already chosen would preside.

This exact question seems not to have been passed on by the courts. In one case, however, where one of the parties took change of venue and the case was sent out of the original judicial circuit, the same party was held not to be entitled to disqualify the judge of the second circuit.³⁰

29. *Id.* § 508.090.

30. *Graves v. Davidson* 68 S.W.2d 711 (1933).

The decision seems to be sound for in the first instance the party had secured both a change of venue and a change of judge and, since the opponent who resisted the second application would certainly not have agreed to a special judge, there would actually have been two changes of venue given to the same side. The court, however, relying on the statutory language, refused to make any distinction between change of venue and change of judge.

It is to be noted that these statutes make no mention of calling in a judge from some other circuit to sit in the trial of the case. While the statutes have on the whole worked with fair efficiency,³¹ they leave open many theoretical questions which can give rise to difficulties in practice. These difficulties, it is believed, all stem from the failure of the legislature to recognize the necessary distinction between change of venue and change of judge and the importance of permitting any party to have either a change of venue or a change of judge or both.

In criminal cases the entire subject of changes of venue and changes of judge is now dealt with by the Rules of Criminal Procedure. These rules completely supplant the statutes on that subject. Those statutes, which are contained in Chapter 545, *Missouri Revised Statutes (1949)*, must still be noticed for the reason that many of the decisions upon which we must later comment were rendered before the adoption of the rules.

The statutory scheme carefully distinguished between true changes of venue and disqualification of the judge. Nevertheless the legislature unfortunately applied the term "change of venue" to both situations.

The scheme provided for in the statutes may be briefly analyzed as follows. True changes of venue were to be allowed on application of the defendant only, and upon proof of the prejudice of the inhabitants.³² In smaller counties this proof was to be made simply by the filing of affidavits of five disinterested persons who were residents of different neighborhoods in the county. In larger counties the issue of prejudice

31. Complaint is sometimes made that litigants have made use of change of venue and change of judge procedure simply to secure a delay in the trial of a case. It would seem impossible, however, to avoid the occasional abuse of the procedure and at the same time preserve the important right of the parties to a hearing before an impartial tribunal. Where only one change of venue and one change of judge is allowed each side even in a multi-party case the delay in trial cannot be too important.

32. MO. REV. STAT. §§ 545.430 and 545.490.

had to be tried to the judge.³³ If the affidavit of the defendant and his proof showed prejudice only of the inhabitants of the county in which the case was pending, the case was to be transferred to another county in the same judicial circuit. If the affidavit charged prejudice of the entire circuit the cause was to be removed to another circuit.³⁴ Of course, if there were only one county in the circuit the removal had to be from the circuit.

An entirely different set of provisions governed changes of judge. If the judge knew of facts which disqualified him or if the defendant and two supporting witnesses swore that the judge was interested he must step aside.³⁵ In such event he was required to permit the defendant and the prosecutor to agree upon a special judge. If they did not so agree he was required to call in the judge of another circuit court.³⁶ In the case of multi-judge courts the substituted judge might be the judge of another division of the original court.³⁷ If after making at least two attempts to secure another judge to sit in the original court, he met with failure he was directed to change the venue to another circuit.³⁸ This latter provision was possibly unconstitutional because it brought about a change of venue without the specific consent of the defendant. Changes of judge, of course, could be awarded on application of the state as well as the defendant.³⁹

In addition to simplifying the statement of the grounds for both changes of venue and changes of judge the new rules have simplified the procedure when a change of judge is allowed. They provide that the disqualified judge may at his option request the supreme court to assign some other judge to that task.⁴⁰ They eliminate the provision for the agreement of a party upon an attorney to act as special judge and the provision for the election of a special judge by the bar.

33. *Id.* § 545.430. The same principle is continued in effect by Rule 30.04 (Unless otherwise indicated, all references herein to Rules are to Rules of the Supreme Court of Missouri). Under the statute it was held that the five supporting affidavits were insufficient if they merely stated the ultimate fact of prejudice. They were required to state evidentiary facts from which this ultimate fact might be inferred. *State v. Wilcox*, 44 S.W.2d 85 (Mo. 1931). This decision would probably still be followed.

34. *MO. REV. STAT.* § 545.450; cf. Rule 30.01.

35. *MO. REV. STAT.* § 545.660. This has been slightly modified by Rule 30.12.

36. *MO. REV. STAT.* §§ 545.670, 545.690.

37. *Id.* § 545.650.

38. *Id.* § 545.690.

39. *State ex rel. McAllister v. Slate*, 214 S.W. 85 (Mo. 1919).

40. Rule 30.13.

Both under the old statutes and under the new rules the defendant is entitled to have both a change of venue and a change of judge. The applications need not be simultaneous. If the change of venue is first ordered the substitute judge will appear and sit in the court to which the case was removed. If the substitution of the judge occurs first the new judge has power to order a change of venue.⁴¹ The only situation not directly covered seems to be that in which a change of venue has been awarded to a different judicial circuit, thereby by necessary implication substituting a different judge. Can the defendant then file an affidavit disqualifying the second judge? The answer probably should be that he can, for the law must consider the necessity of an absolutely fair trial for the defendant as out-weighting the slight additional delay which this procedure would involve.

There is a third group of statutes which have some bearing upon the change of venue problem. They are contained in Sections 478.027 to 478.060, *Missouri Revised Statutes* (1949). Most of the provisions now contained in these sections were adopted in 1877,⁴² more than half a century after the enactment of the first change of venue laws⁴³ and at a time when the systems of changes of venue in civil cases had been crystallized into its classic form.

Sections 478.027 and 478.030 are not particularly in point here.⁴⁴ They merely provide that when the governor shall receive satisfactory proof that a regular circuit judge is, by reason of physical or mental illness, incapable of performing his functions he may appoint a temporary judge to serve until the regular incumbent is restored to health.

There next follows a provision that whenever the circuit judge shall be "sick, absent, or for any reason unable to hold any term or part of any term" he may call in another circuit judge to hold such term or part of a term. The supreme court at first held that this provision and the constitutional section on which it was based authorized a disquali-

41. Rule 30.14.

42. Mo. Laws 1877, p. 218.

43. The first change of venue law in civil cases seems to have been enacted in 1807. 1 Terr. Laws, p. 117. In criminal cases the first statute seems to have been enacted in 1882. 1 Terr. Laws, p. 1017. Many interesting historical facts concerning these laws are set out in the opinion of Farris, J., in *State ex rel. McAllister v. Slate*, *supra*, note 39; see also *Jim (a slave) v. The State*, 3 Mo. 147 (1832).

44. Section 478.027 is probably unconstitutional in part as being in conflict with Section 27 of Article V of the Constitution of 1945.

fied circuit judge to call in another for the sole purpose of trying the case in which the judge was disqualified⁴⁵ and that this was true even though an application for "change of venue" based on the judge's disqualification had previously been filed. Later, in the case of *State ex rel v. Higbee*,⁴⁶ the court overruled these previous decisions and took the view that the disqualified judge against whom an application for change had been filed was required to proceed under the ordinary change of venue statute by first ascertaining if the parties could agree upon a special judge or upon the election of a special judge, and if they could not, ordering the removal of the cause to a court presided over by another judge. This case was followed and approved shortly before the adoption of the present constitution in *State ex rel. Nickerson v. Rose*.⁴⁷ The two last cited cases recognize that the provisions of the 1875 constitution granting to the circuit judge the power to call in another circuit judge were self-enforcing but apparently go upon the ground that to call in a judge for the trial of one case is to be distinguished from calling him in to hold a part of a term. This is probably a sound conclusion. Since the substituted judge would, where a change of judge had been properly applied for, retain jurisdiction until the case was finally disposed of even though this might carry through several terms of court.

The remaining sections in the group have to do with the mechanics of the selection of a special judge. In brief, such a judge is to be elected by a majority vote of the members of the bar then present in court, a quorum of five being required.⁴⁸ He is to possess the qualifications of a circuit judge. He has all the powers of a regular judge, must take an oath, and is to receive compensation fixed by statute.⁴⁹

The above survey summarizes the principal features of our statutory law as it existed in 1945. The legislature has since that date made no changes therein. It remains to see how far the constitutional changes adopted in 1945 have affected this scheme.

IV.

In addition to the provisions of Article V, Section 5, which we have discussed, we will also be concerned with Sections 6 and 15 in the same

45. *State ex rel. Lamm v. Mid-State Serum Co.*, 272 S.W. 99 (Mo. App. 1925).

46. 43 S.W.2d 825 (Mo. 1931).

47. 175 S.W.2d 768 (Mo. 1943).

48. Mo. Rev. Stat. § 478.037.

49. *Id.* §§ 478.037, 478.040, 478.050.

article. The former grants to the supreme court the power to transfer judicial personnel from one court to another.⁵⁰ The latter grants the same power to a limited extent to the circuit judges by providing that any circuit judge may call in another circuit judge to sit in his court.⁵¹ Before considering the effect of these sections on a theoretical basis, it would be well to examine the cases touching on the point which have heretofore been decided by the supreme court. Our examination will be limited to those cases decided under the provisions of the 1945 Constitution.

In *State v. Massey*⁵² the regular judge of the circuit court in which a criminal proceeding was pending had been counsel for the State before going on the bench. He therefore entered an order disqualifying himself and calling in the judge of another circuit to try the case. The record did not show that a notice of this action had been given to the supreme court as required by its rule.⁵³ On appeal, the convicted defendant contended that the substituted judge had no authority to hear the case because under Section 6, *supra*, the supreme court had power over the transfer of judicial personnel. The substitution of the second judge was, according to the defendant, a transfer of personnel and as the supreme court's power was exclusive, the regular circuit judge had no authority to make the transfer. The supreme court apparently accepted the view that this substitution in the court of original jurisdiction, a change of judge without change of venue, was a transfer of personnel within the meaning of the constitution. However, the court refused to accept the proposition that its power over such transfers was exclusive. It held that the constitution vested the power of transfer in such cases concurrently in the supreme court and the original nisi prius court. As will be seen later cases have adhered to this theory of concurrent power, laying down the limitation, however, that the supreme court's power is superior and that the trial court may act only when the supreme court has not acted. It will be noted that this case was decided before the promulgation of the new criminal rules but that, in apparent violation of the existing statute, the parties were not given a chance to agree upon a special judge.

50. Section 6, Article V: "The Supreme Court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto."

51. Section 15, Article V: "... Any circuit judge may sit in any other circuit at the request of the judge thereof. In circuits composed of a single county and having more than one judge, the court may sit in general terms or in divisions."

52. 219 S.W.2d 326 (Mo. 1949).

53. Supreme Court Rules, Rule 11.01.

The next case decided is *State v. Scott*.⁵⁴ This case, too, was decided before the new rules were promulgated. The regular judge, Moulder, had called in Judge Blair to sit in his place. Defendant filed an application for change of judge based upon the alledged disqualification of Judge Blair. Judge Blair then vacated the bench and, at the request of Judge Moulder the supreme court assigned Judge Maughmer to hear the case. The defendant objected to Judge Maughmer's jurisdiction on the ground that the parties had not been first given a chance to agree upon a special judge. In order to sustain Judge Maughmer's jurisdiction, two lines of reasoning were opened to the court. It might have held that the then existing statutory provision for the election of a special judge was entirely unconstitutional since it was an attempt by the legislature to regulate a transfer of judicial personnel and since that subject had been placed by the constitution entirely in the hands of the court. Some theoretical difficulties with this reasoning will be mentioned later. The Supreme Court, saying that the question had not been briefed before it but expressing serious doubts as to the constitutionality of the statute,⁵⁵ chose to place its decision upon another ground. This second theory which was adopted by the court is as follows. Even though the legislature had power to adopt a statute regulating a transfer of judicial personnel, such a statute could not possibly place any limitation or condition upon the exercise by the courts of the power granted to them directly by the constitution. The actual decision is this: That even where one party has filed a proper application for change of judge in the statutory form, the supreme court may order the transfer of a judge to try the case and such an order will deprive the party of his statutory right to agree with his opponent on a special judge.⁵⁶ The actual decision there-

54. 223 S.W.2d 453 (Mo. 1949).

55. "These sections would seem to be of doubtful validity under the 1945 Constitution, but as that question is not briefed, it will not be determined. It may be well enough to point out that under Section 29, Article VI of the 1875 Constitution, Mo. R. S. A. Const. 1875, certain provisions were made respecting substitute judges, and that the General Assembly was expressly authorized to 'make such additional provision for holding court as may be found necessary'. The new Constitution contains no such provision. On the contrary, its provisions are: 'Any circuit judge may sit in any other circuit at the request of a judge thereof.' §15, art. V. 'The Supreme Court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto. § 6, art. V.'" 223 S.W.2d l.c. page 455.

56. The affidavit of prejudice is personal to the challenged judge. *State ex rel. Kansas City Public Service v. Waltner*, 169 S.W.2d 697 (Mo. 1943). Therefore when the challenged judge is taken out of the case by the transfer of another judge the affidavit of prejudice becomes *functus officio*.

fore does not govern the situation in which neither the supreme court nor the trial court has exercised the Constitutional power of calling in another judge and the parties have actually agreed upon a special judge who has tried the case.

The next case did not advance the law beyond the position taken in the *Scott* case. It is *State v. Emrich*.⁵⁷ It was a criminal prosecution in which affidavit of prejudice of the original judge was filed. The opinion does not state that the record showed anything either way as to whether or not the original judge gave the parties a chance to agree on a special judge or as to whether they requested such procedure. It only states that the original judge called in another circuit judge and that the defendant in the supreme court objected to the jurisdiction of such substituted judge. The court held that the substituted judge did have jurisdiction. The court cited the dictum in the *Scott* case to the effect that statutory provisions for special judges were of doubtful constitutionality and it said that if the provision were constitutional they could not over-ride the self-enforcing provisions of Section 15. It will be noted that these cases were all criminal cases and hence each one of them involved a "Simon pure" change of judge and not a change of venue to which a change of judge was incidental.

*Hayes v. Hayes*⁵⁸ arose in the circuit court of Greene County, a multi-judge court. It involved an application for change of judge upon a motion to modify a divorce decree. The sole question presented in the supreme court was this: Is a proceeding to modify a divorce decree a "case" within the meaning of the existing statutes regarding "changes of venue" in civil cases? The supreme court held that it is and that a change of judge to the other division of the Greene County Circuit Court should have been awarded. In so holding the court impliedly said that the change of venue statutes, in so far as they prescribe the grounds of a change and in so far as they provide for subsequent procedure in a multi-judge court were constitutional. But the court repeated its doubts as to the constitutionality of other parts of the statute.⁵⁹

57. 237 S.W.2d 169 (Mo. 1951).

58. 252 S.W.2d 323 (Mo. 1952).

59. "It appears, therefore, that a circuit judge, who on a motion to modify a divorce decree, sustains an application for change of venue on the ground of his prejudice or on the ground of the influence of the opposite party over him may, irrespective of the provisions of Section 508.110 and 508.140, request another circuit judge to sit and hear the motion.

"Jurisdictional questions which might arise in the event that a circuit judge,

We must next note *Cantrell v. City of Caruthersville*.⁶⁰ In this case the regular judge, apparently on his own motion, had entered an order merely stating that he was disqualified and not setting out any of the statutory reasons for his disqualification. He therefore called in another circuit judge to try the case. In the supreme court the appellant objected to this procedure and to the jurisdiction of the substituted judge on the ground that the court's order must necessarily have been based upon one of the statutory grounds of disqualification, and that a statement of such grounds must have been contained in the record. The supreme court disallowed this contention. It held that the substitution of the new judge was a transfer of personnel within the meaning of the constitution. The constitutional grant of power to make such transfer is unconditional. Therefore, the legislature may not impose a condition upon the exercise of a power which it did not grant. The power of the circuit court is concurrent with that of the supreme court but may be exercised only where the Supreme Court has not acted. This reasoning seems unassailable.

*Pogue v. Swink*⁶¹ carried the development of the law one step further. The regular judge of the court of origin was the defendant. He therefore disqualified himself and ordered the case removed to another county outside of his judicial circuit. The court held that in so doing he acted erroneously. It ordered the case to be remanded to the court of origin, stating that another judge would then be transferred to hear the case in that court. The argument of the court was that the provisions for judicial transfer contained in Sections 6 and 15, *supra*, supplanted the statutory provisions for changes of venue based upon the prejudice of the judge. In so arguing the court called attention to the fact that the provisions for the election of a special judge had entered the law just

who sustained an application for change of venue on a motion to modify a divorce decree, on the grounds provided for disqualification of a judge and who, instead of exercising his constitutional right to call in another judge to sit in his circuit, transferred or attempted to transfer the proceeding to another county, are not before us. We express no opinion upon resultant hypothetical situations which might obtain in such instances. . . . It appears that a proper and timely application for 'change of venue' which seeks a 'change of judge' on the statutory grounds provided, should be sustained when filed in a proceeding to modify a decree of divorce; that in one county, multiple-judge circuits within the provisions of Section 508.110 the case should be transferred to another division of the court; that in all other instances the regular judge should call in another circuit judge to sit in the case, or request this court to transfer a circuit judge to sit in the case pursuant to Const., 1945, Art. V., Section 6, and Supreme Court Rule 11." 252 S.W.2d at p. 329.

60. 255 S.W.2d 785 (Mo. 1953).

61. 261 S.W.2d 40 (Mo. 1953).

two years after the adoption of the 1875 constitution, which had contained a provision to the effect that the legislature might by law provide for cases in which the judge was unable to hold a term or part of a term. This argument overlooks the fact that before these provisions were put in the constitution the legislature had provided for changes of venue to another circuit where the regular judge was interested or prejudiced.⁶²

In *State ex rel. Ellis v. Creech*⁶³ the holding was that after the disqualification of the regular judge and the transfer of another judge to try the case the former judge was without jurisdiction to issue a temporary injunction.

*Adair County v. Urban*⁶⁴ did not add anything new to the law but presented a peculiar situation. The case had been originally tried before Judge Brown. Upon a new trial the defendant sought a change of judge and Judge Higbee was called in. He presided over the trial in the court of origin which resulted in a verdict for the plaintiff. After overruling a motion for new trial, he set aside, *sua sponte*, the verdict on the ground that Judge Brown should have transferred the case to another circuit. The supreme court, following its decisions in the above cited cases, found that Judge Brown's action had been proper and the granting of a new trial by Judge Higbee was erroneous. The case does not necessarily involve the rule of *Pogue v. Swink* but might have been rested on the authority of the actual decisions in the *Hayes, Cantrell, and Scott* cases. But *Pogue v. Swink* was cited with approval. During the preparation of this article the supreme court handed down opinions in the cases of *State ex rel. v. Blain*⁶⁵ and *State ex rel. v. Meriwether*.⁶⁶ In both of these cases the rule of the *Swink* case was followed and applied.

V.

What, then, is the present state of the law?⁶⁷ The actual decisions of the court have clearly established three propositions:

1. Where the original judge is disqualified and no affidavit of pre-

62. Mo. GEN. STAT. Chap. 158, Page 633 (1865).

63. 259 S.W.2d 372 (Mo. 1953).

64. 268 S.W.2d 801 (Mo. 1954).

65. 270 S.W.2d 1 (Mo. 1954).

66. 270 S.W.2d 20 (Mo. 1954).

67. The discussion in this paper is limited to the procedures for changes of venues and changes of judge in the circuit and common pleas courts. It may be pointed out, however, that probate and magistrate courts are also courts of record of strictly constitutional origin and that their judges therefore come within the class of judicial personnel mentioned in Section fifteen of Article V. Hence many

judice has been filed the supreme court may assign another judge or the original trial judge may request another judge to sit in his place in the court of origin without first permitting the parties to agree upon a special judge or upon the election of a special judge.

2. Where an affidavit of prejudice of the judge has been filed the same procedure may be followed.

3. Where a disqualified trial judge has, *sua sponte*, noted his own disqualification or where an affidavit of prejudice has been filed, leveled at the disqualification of the judge and not containing the charge that the inhabitants of the county are prejudiced, the case may not be transferred to another circuit.

The actual decisions, as distinguished from dicta, have not yet answered certain other questions. We shall enumerate some of these, numbering them for convenience in sequence with the foregoing:

4. Where the original judge is disqualified and a substitute judge has not been sent in by the supreme court may the original judge, if he so desire, *permit* the parties to agree upon a special judge?

5. Where the application for a change merely alleges that the inhabitants of the county are prejudiced, may the trial judge order the case transferred to a county in an adjoining or next adjoining circuit?

6. Where the application for change alleges prejudice both of the inhabitants and of the judge, may he transfer the case to an adjoining or next adjoining circuit?

7. In the light of the *Swink*, *Blair*, and *Meriwether* cases, is the statutory procedure for substitution of judges in a multi-judge court, approved in the *Hayes* case, still to be followed?

Perhaps some aid in answering these questions may be obtained from a critical analysis of the rationale of the *Scott* and *Swink* cases. The reasoning which seems to underlie the cases under review is this. Section 6 and 15 of Article V grant to the courts the power to order "the transfer of judicial personnel". That grant of power is in its nature an exclusive one and this deprives the legislature of any power to limit

interesting problems will be raised if the reasoning underlying the cited supreme court opinions is rigorously applied to procedure in these courts. Even in the case of city police courts their judges or recorders are probably judicial personnel and existing ordinances and charter provisions providing for changes of judge in those tribunals may prove unconstitutional.

or qualify the way in which the courts act in this regard and also deprives the legislature of the power to prescribe alternative methods by which such a transfer of judicial personnel may be effected. Statutory provisions, for example, which would require a trial judge to give the parties the option of selecting a special judge before he called in another circuit judge or which would require him in all cases to order the transfer of the case rather than calling in another judge would therefore be a clearly unconstitutional interference with the power of the courts over transfers of judicial personnel. But how far does this reasoning tend to support the third proposition above enumerated which was established in the *Swink*, *Blair*, and *Meriwether* cases?

Is there, in fact, a transfer of personnel involved in those cases? The word "transfer" strictly means "to carry across" and thus refers to a change of position in space. In law, however, it often has a secondary meaning more or less equivalent to the verb "to substitute". Thus we speak of a transfer of title when we mean that the complex of jural relations constituting one man's ownership of a thing are destroyed and a similar complex of relationships in a new owner simultaneously created. But the constitutional provisions have to do with a certain particular kind of transfer. The object of the verb "to transfer" is "judicial personnel". When a substitute judge is called in from another circuit or from one of the appellate courts to sit in place of the original judge there is clearly a transfer of judicial personnel. But when a case is removed, let us say, from the first circuit to the second, the thing which is transferred is the case and not the judge. Of course if the secondary meaning of the word "transfer" is adopted it might be argued that the power of the first judge over the case has been destroyed and a similar power in the second judge has been created. But frankly, this would seem to be a somewhat strange interpretation of the constitutional language. Furthermore, if this interpretation and the rule of the *Swink* case were applied with rigorous logic, a grave, practical difficulty would be met. For if, under the circumstances of the *Meriwether* case, in which a disqualified judge ordered the transfer of an adoption proceeding to another circuit. The removal of a cause from the 10th circuit to the 37th circuit involves a change in judicial personnel, such a removal would still involve a change in judicial personnel if the case had been a damage suit instead of an adoption proceeding and the application for change had been based solely upon the prejudice of the inhabitants. If this be true there could never be a change of venue based upon the prejudice of the inhabitants where

the court of origin was in a single county circuit, since to get the case out of the circuit and into another an incidental change of judge would necessarily be involved. No true change of venue could ever be had from St. Louis City or from St. Louis, Jackson, Buchanan, Greene, or Jasper Counties. Furthermore, where a circuit contains only two counties the trial judge may often know that prejudice exists in both of those counties and he may desire to avail himself of his statutory power to secure freedom from prejudice by ordering the removal of the case to another circuit. If the rationale of the *Meriwether* case is carried out with strict logical consistency he could not do this. These results it is believed would be most unfortunate. They may be avoided only if the court should hold that whenever a properly supported claim of prejudice of the inhabitants is made the cause may be removed from the judicial circuit even though such removal necessarily involves an incidental change of judge.

Some logical difficulties are involved if we attempt to support the proposition that the original judge may not even in the absence of a transfer order by the supreme court voluntarily permit the parties to agree upon a special judge. Can it be said that such a substitution of the special judge involves a transfer of judicial personnel? In so far as the special judge himself is concerned it would require a somewhat strained interpretation to reach this conclusion. Before his appointment he is certainly not a member of the class of individuals described as judicial personnel. Of course it may be said that the regular judge has been transferred from his connection with the case in the sense that his power to hear and determine it has been destroyed and a similar power in the special judge has been created. But in every case where an affidavit of prejudice is filed against the regular judge his power to hear and determine the case is thereby terminated and the rule of law which brings about such termination is contained in the statute and is not to be found either in the constitution or in the present Supreme Court Rules. Therefore if the statute is unconstitutional as providing a rule whose application brings about a change of judge there would be no legal authority at all for removing the disqualified judge. But all of the cases have recognized the constitutional validity of that portion of the statute. The dicta in the decided cases, however, have so strongly intimated that the statutory provisions for special judges are unconstitutional that it would be highly unsafe for a trial judge to follow the same.

If the rationale of the *Swink* case be carried out logically the re-assignment of a case from one division of a multi-judge court to another

because of the prejudice of the judge presiding in the first division would constitute a "transfer of personnel." The provision for such reassignment is purely statutory. Thus the rule of the *Swink* case would seem to conflict with the decision in the *Hayes* case and the judge of such a multi-judge court would have an option of requesting the judge of some other division to sit in his division for the trial of the case or of calling in a judge from another circuit.

These many doubts and uncertainties can only be satisfactorily resolved if and when the supreme court adopts a comprehensive set of rules governing the subject of change of venue and change of judge in civil causes. It may not be presumptuous to suggest that such rules like the rules of criminal procedure should clearly distinguish between the two types of procedure and should clearly recognize the right of each litigant upon a proper showing of prejudice to obtain either a change of venue or a change of judge or both. In dealing with the matter of change of venue it would seem that the court should not feel itself bound to limit the transfer of the case to another court within the same judicial circuit. To do so would deprive litigants in the single county circuits of a right to any change of venue at all and might prevent the selection of a truly impartial forum in other cases.

Pending the adopting of such rules, it would seem that parties and trial judges should avoid the use of statutory procedure for agreeing upon or selecting special judges. Except in the case of single county circuits it would generally be advisable to limit changes of venue to transfers from one court in the circuit to another court in the same circuit. In no case should a change out of the circuit be awarded where the application alleges only the prejudice of the judge. Where both a change of judge and a change of venue are desired (except in single county circuits) the application should allege the prejudice of both the inhabitants and the judge. Perhaps the best practice here would be to order the removal of the case to another county in the same circuit and simultaneously to request the transfer of another circuit judge to sit in the court to which the cause was removed.