STATE BOARD OF ACCOUNTS: Per diem of regular Judge in change of venue cases. Judge entitled to extra allowance only for days consumed in actual trial and not in closing issues—paid in the same manner as other costs in change of venue matters.

January 3, 1944.

Opinion No. 1

Hon. Otto K. Jensen,
State Examiner,
Department of Inspection and Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

I am in receipt of your letter dated December 23rd, which reads as follows:

"I desire to receive your official opinion on certain questions arising in connection with Chapter 51, Acts 1943, concerning the per diem of judges in change of venue proceedings.

"1. Is the per diem of Judge to cover days of actual trial, or each day or part of day on which there were proceedings in the case?

"2. If the Judge is allowed per diem for each day on which any proceedings in the case takes place, what fee would be collected if there were proceedings in two separate venued cases on the same day? Would two fees be collected or only one?

"3. Will the Judge collect his fee from his own county in the same manner as the Clerk collects his per diem at the end of each term, with the county to be reimbursed later by the county in which the case originated?"

Answering your first question, we find that Burns' 1943 Pocket Supplement, Section 2-1417, as amended by Section 1, Chapter 51, Acts 1943, reads in part as follows:
"* * * The regular judge of the court trying any cause on a change of venue shall be allowed the sum of five dollars ($5.00) per day or any part of a day for the time actually served in trying such cause, which shall be paid by the county from which such change of venue was originally taken the same as the other expenses of such trial are paid; such per diem shall be paid to the judge of the court so trying said cause and shall be in addition to the regular salary paid to said judge, provided, however, that the provisions of this act shall not apply to any regular judge, receiving a salary greater than the statutory salary of forty-two hundred dollars ($4,200), paid by the state. * * *.”

It will be noted that the language used by the Legislature is to the effect that the “regular judge of the court trying any cause on a change of venue.” The Legislature has defined the word trial in Section 2-1901, Burns 1933, as follows:

“‘Trial’ defined.—The trial is a judicial examination of the issues, whether of law or of fact, in an action.”

By this language the Legislature has clearly stated that a trial means only the proceedings which take place from the time that a cause is submitted to the court for hearing and determination until judgment is rendered, or from the time that a cause is submitted to the jury until the return of the verdict and judgment. The above section of the statute has been construed in many cases decided by both the Supreme and the Appellate Courts of Indiana. In the case of Jenks v. The State, 39 Ind. 1, the court on page 9 uses the following language:

“What does the phrase, ‘at the time of the trial,’ mean? The preposition ‘at’ primarily signifies near to, about, coexistent with, etc. It is very commonly used, however, as in the above section, in the sense of ‘during’. The bill of exceptions must be made out during the time of the trial. The word ‘trial’ has in the law and in legal language, a general and restricted meaning. In its general sense, it means the investigation and decision of a matter in issue between parties
before a competent tribunal. Burrill Law Dict. In its restricted sense, it means the investigation of the facts only. * * *.”

Again in the case of Lindley v. Kemp et al., 38 Ind. App. 355, at page 359, the court says:

“* * * by general acceptance or use, the word ‘trial’ includes ‘all the steps taken in the case from submission to the jury to the rendition of judgment.’”

See also:

Tyler et al. v. Bowlus, 54 Ind. 333-335;
Pitzer v. Indianapolis, etc., 80 Ind. 569 on 571;
Sturgeon v. Gray, 96 Ind. 166;

From the above authorities it is clear that the language used in Chapter 51, Acts 1943, refers to and includes only the days of actual trial of a cause and does not include any time occupied in the formation of the issues in the case, and for this reason the answer to your first question is that the per diem of the judge includes only days of actual trial, and not each day, or part of a day, on which other steps or proceedings are taken in the case.

Referring to your second question, it will be observed that Section 2-1417 refers only to the taxation of costs to be charged against the original county from which a cause has been venued. This section of the statute includes various items of costs which are required to be taxed and charged against the county from which a cause has been venued, and among such costs is the $5.00 per diem allowed to the regular judge of the court in which the case is tried, who actually tries the case. For the reason just stated and because of the language used by the Legislature stating “The regular judge of the court trying any cause on a change of venue,” it is my opinion that the regular judge is entitled to an allowance of $5.00 per day for each case actually tried upon a change of venue; and if two cases pending upon change of venue are tried on the same day by a regular judge, it is my opinion that he would be entitled to a fee in each case as his per diem
fee is taxable in each case, the same as any other taxable item of cost would be, under Section 2-1417, supra.

In answer to your third question, it should be noted that there is nothing in the statute which requires the county of trial to pay the per diem in the first instance and then obtain reimbursement from the county of origin of the cause. However, there is nothing to prohibit the county of trial from paying the per diem in the first instance and then collecting this cost from the county of origin in the same manner that the jury fees are customarily paid by the county of trial and then collected from the county where the cause originated.

STATE BOARD OF HEALTH: Nursing Home Act, construction of. Defining what constitutes a Nursing Home.

January 4, 1944.

Opinion No. 2

Hon. Thurman B. Rice, M. D.,
State Health Commissioner,
Indiana State Board of Health,
Indianapolis, Indiana.

Dear Dr. Rice:

This will acknowledge receipt of your letter dated December 22nd, 1943, requesting my official interpretation of Section 1 of Chapter 158, Acts 1943, which is Burns’ 1943 Pocket Supplement, Section 42-1401, et seq. Your specific question reads as follows:

“What is particularly needed is your opinion as to what constitutes a ‘nursing home for aged’ as it is used and defined by the above section. It has developed that many institutions have taken the position that they are not nursing homes for aged but are merely boarding homes and consequently not within the provisions of this law.”

Section 1 of Chapter 158, Acts 1943, supra, reads as follows:

“Definitions.—(a) The term ‘nursing home for aged’ is hereby defined as, and shall be construed to include any building, structure, institution or other place for the reception, accommodation, care or treatment of