

2143

COURTS; COUNTY — JUDGES — DISQUALIFICATION FROM PRACTICE OF LAW—PROCEDURES WHEN JUDGE IS MATERIAL WITNESS, BIASED, PREDJUDICED OR INTERESTED — §§1911.68 *et seq.*, 1907.061 R.C.

**SYLLABUS:**

1. Judges of the county court, as provided in Section 1907.081, Revised Code, are disqualified from the practice of law as to matters pending or originating in any "area of jurisdiction" of the county court to which such judges were elected or appointed during their terms of office, notwithstanding the fact that in certain cases such judges are limited in their jurisdiction to causes of action arising in their "area of jurisdiction" as provided in Section 1907.071, Revised Code.

2. Where a judge of a county court is a material witness, in a case or matter pending before him, Section 1911.68 *et seq.*, Revised Code, provides for the transfer of such cause for trial.

3. Bias, interest or prejudice of a county court judge in a cause pending before him amounts to a legal incapacity, within the meaning of Section 1907.061, Revised Code, to act as judge in such cause, thereby authorizing the common pleas court to appoint a substitute during the incapacity of the incumbent as provided in that section. The existence of such bias, interest or prejudice is a matter for determination by the common pleas court of the county concerned upon application of the party who advances the claim of such bias, interest or prejudice.

Columbus, Ohio, May 22, 1958

Hon. John D. Sears, Jr., Prosecuting Attorney  
Crawford County, Bucyrus, Ohio

Dear Sir:

You have presented for my consideration and opinion a question relating to the procedure to be followed when a judge of a county court is interested in and thus is biased with respect to a case required to be filed in his area of jurisdiction. I am also in receipt of a request from the Honorable Ralph A. Hill, Prosecuting Attorney, Clermont County, Batavia, Ohio, relating to the practice of law by a judge of the county court in cases in another area of jurisdiction of the same county court district. Due to the similarity of these questions and in the interest of providing a complete discussion of them I shall treat both in a single opinion.

It is to be noted initially that judges of the county courts are not required to be attorneys at law. See Section 1907.051, Revised Code.

Therefore, only judges of the county courts who are attorneys are affected by the following provision found in Section 1907.081, Revised Code:

“A judge of a county court shall be disqualified from the practice of law only as to *matters pending or originating in said county court* during his term of office.” (Emphasis added.)

This provision could hardly be more clear. There is but *one* county court in *any county*. All judges are judges of the county court despite their individual assignment to an “area of jurisdiction” under the provisions of Section 1907.071, Revised Code. The indiscriminate use of the terms “county court district” and “district” instead of the proper term “area of jurisdiction” is the focal point of this particular problem. There is but *one* county court and *one* county court district in any county wherein county courts have been established under the provision of Section 1907.011, Revised Code. The fact that *the* county court district may have been divided into areas of separate jurisdiction under the provisions of Section 1907.071, Revised Code, and that one judge has been assigned to each “area of jurisdiction” does not alter the fact that there is but *one* county court district and all judges are judges of *the* county court.

Other provisions of the county court legislation confer certain county-wide jurisdiction upon *all* judges of *the* county court despite the language of Section 1907.071, Revised Code, *i.e.*, Sections 1909.02, 2931.02, and Chapters 2931 to 2953, inclusive, Revised Code. Also, Sections 1911.68 and 1911.69, Revised Code, provide for the transfer of cases for trial before other judges of the same county court. See also Section 1917.17, Revised Code, providing for any judge of the county court to issue executions on judgments on the docket of a judge of the same district.

It is clear, therefore, that judges of the county court, as provided in Section 1907.081, Revised Code, are disqualified from the practice of law as to matters pending or originating in the county court, to which such judges were elected or appointed, during their terms of office, notwithstanding the fact that in some cases a judge of the county court is limited in jurisdiction to causes of action arising in his “area of jurisdiction” as provided in Section 1907.071, Revised Code.

In cases wherein the judge of the county court before whom an action is required by law to be commenced is a material witness, Section 1911.68, Revised Code, provides:

“On return of process, or at any time before the trial has begun, if it appears to the judge of the county court before whom a cause is instituted or pending for trial, by the affidavit of either of the parties in the case, that such judge is a material witness for either party, or if a jury is demanded by the adverse party, that the person making such affidavit believes that he cannot have a fair and impartial trial before the judge of the county court because of the bias or prejudice of the citizens thereof, a change in the place of trial shall be granted.”

Section 1911.69, Revised Code, further provides:

“If the place of trial is changed because the county court judge before whom a cause is instituted or pending for trial is a material witness in such cause, such cause shall be transferred for trial before some other judge of the same county court district, if there is such a judge competent to try the cause. If there is no such judge within the district, or if such change is granted because of the bias or prejudice of the citizens of such district against the party making the affidavit under Section 1911.68 of the Revised Code, or because the adverse party has an undue advantage over him therein, the case shall be taken to the court of common pleas, of the county.”

These sections make no provision applicable to those cases wherein the judge of the county court is an attorney appearing as such in a case pending or originating in the county court during his term, but provide only for a transfer of the causes in those cases wherein the judge of the county court is a material witness.

Section 1907.061, Revised Code, provides in pertinent part:

“When a judge of a county court is temporarily absent or *incapacitated*, a substitute having the qualifications required by Section 1907.051 of the Revised Code shall be appointed by the common pleas court of such county to serve during the absence or incapacity of the incumbent. Such appointee shall have the jurisdiction and powers conferred upon the judge of the county court, and shall be styled “acting judge”. During his term of service the compensation of an acting judge shall be in the same amount and payable in the same manner as the compensation paid to the incumbent judge during the same period.” (Emphasis added)

The use of the term “incapacitated” in the above context would appear to include “legal incapacity” as well as physical incapacity. *Black’s Law Dictionary*, Fourth Edition, defines “incapacity” as “want of capacity:

want of power or ability to take or dispose: want or legal ability to act. \* \* \*  
Inefficiency, incompetency: lack of adequate power.”

In 42 *Corpus Juris Secundum*, 499, “incapacity” is defined as:

“The lack of legal qualification; that condition of a person which forbids a given act on his part and makes the act legally inefficacious even if he does it; lack of ability, capacity, or qualification; \* \* \*.”

This legal incapacity arises from the common law rule and the elements of due process of law which declare that every litigant has the right to a trial before an impartial judge.

The first paragraph of the syllabus in *Tari v. State*, 117 Ohio St., 481, reads:

“1. Interest of a judge in the decision of a cause pending before him disqualifies him from hearing and determining the cause.”

To the same effect is the syllabus in *State, ex rel., v. Marshall*, 123 Ohio St., 586:

“A judge is disqualified to preside in the trial of a case when his relation to the parties therein or to the subject—matter of the action is such that a natural inclination to prejudge the case arises therefrom.”

See *Moore v. State*, 118 Ohio St., 487, 23 Ohio Jurisprudence, 446 Section 98, and *Tumey v. Ohio*, 273 U.S. 510, 73 L. ed. 749. See also Section 2937.20, Revised Code.

The failure of the legislature to provide specifically for the filing of affidavits of prejudice in cases involving judges of the county courts cannot be viewed in any manner contrary to the above quoted declarations of the Supreme Court of Ohio upon such fundamental principles of the administration of justice. Since the interest, bias or prejudice of a judge of a county court disqualifies him from acting and rendering a valid judgment in the case, a definite legal incapacity to perform the duties of the office arises.

When such a capacity is lacking the General Assembly has provided that a substitute judge, designated as “Acting Judge” be appointed. Section 1907.061, *supra*.

Further, the legislature, in Section 1907.071, Revised Code, provided for the designation of one judge of the county court to serve in another "area of jurisdiction" in the same county court district when a judge within the county court district is "absent or incapacitated". Section 1907.071, Revised Code, provides in pertinent part:

"In counties having more than one county court judge, the court of common pleas of such county shall divide the county court district into areas of separate jurisdiction and shall designate the area in which each judge shall have jurisdiction to the exclusion of any other judge of such district, *except as provided in Section 1907.061* and the location where each judge shall hold court. Each such area shall be made up of one or more townships. In assigning areas, the court of common pleas shall make each area as equal in population to others in the district as is possible under existing conditions." (Emphasis added.)

By this reference other judges of the same county court district are permitted to act in other "areas of jurisdiction" within the same county court district upon appointment by the court of common pleas as provided in Section 1907.061, Revised Code.

Although the statute does not expressly so provide, Section 1907.061, Revised Code, rather clearly implies that the common pleas court concerned would be required to determine the existence of such bias, *etc.*, upon the application of one of the parties for the designation of an "acting judge."

Therefore it is my opinion and you are advised that:

1. Judges of the county court, as provided in Section 1907.081, Revised Code, are disqualified from the practice of law as to matters pending or originating in any "area of jurisdiction" of the county court to which such judges were elected or appointed during their terms of office, notwithstanding the fact that in certain cases such judges are limited in their jurisdiction to causes of action arising in their "area of jurisdiction" as provided in Section 1907.071, Revised Code.

2. Where a judge of a county court is a material witness, in a case or matter pending before him, Section 1911.68 *et. seq.*, Revised Code provides for the transfer of such cause for trial.

3. Bias, interest or prejudice of a county court judge in a cause pending before him amounts to a legal incapacity, within the meaning of

Section 1907.061, Revised Code, to act as judge in such cause, thereby authorizing the common pleas court to appoint a substitute during the incapacity of the incumbent as provided in that section. The existence of such bias, interest or prejudice is a matter for determination by the common pleas court of the county concerned upon application of the party who advances the claim of such bias, interest or prejudice.

Respectfully,

**WILLIAM SAXBE**

**Attorney General**