

Opinion No. 71**Justice of the Peace—Disqualification—Venue, Change of**

Held: 1. A Justice of the Peace can be disqualified in criminal actions brought by the State under sub-division one, two and three of Section 8868 of the Revised Codes of Montana, 1935, but not under sub-division four of Section 8868.

2. A change of venue to another Justice Court in the same Township or to another Township in the same County can be obtained on a showing of bias and prejudice of such Justice, under Section 12307 of the Revised Codes of Montana, 1935.

November 25th, 1949.

Honorable Arthur M. Woods
Justice of the Peace
Hellgate Township
Missoula, Montana

Dear Sir:

You have asked my opinion on the question of whether a Justice of the Peace can be disqualified in cases brought by the State of Montana.

Section 8868 of the Revised Codes of Montana, 1935, provides in part:

“8868. Cases in which a judge may be disqualified . . .

Any Justice, Judge, or Justice of the Peace must not sit or act as such in any action or proceeding:

1. To which he is a party, or which he is interested;
2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to rules of law;

3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order or decision appealed from;"

The fourth sub-division of Section 8868, *supra*, does not apply to Justices of the Peace.

Sub-division 4 of Section 8868 is as follows:

"4. When either party makes or files an affidavit as hereinafter provided, that he has reason to believe and does believe he cannot have a fair and impartial hearing or trial before a **District Judge** by reason of the bias and prejudice of such judge. . . ." (emphasis supplied).

Sub-division 4 of Section 8868 is clear and unequivocal. It refers to District Judges and not to Justices of the Peace.

A Justice of the Peace cannot be disqualified by reason of his bias and prejudice under sub-division 4 of Section 8868. However, he may be disqualified for the reason included in one, two and three subdivisions of that section.

While a Justice of the Peace cannot be disqualified under sub-division 4 of Section 8868, the defendant can obtain **a change of venue** upon the showing that he cannot receive a fair trial due to the bias and prejudice of the Justice of the Peace.

Section 12307 of the Revised Codes of Montana, 1935, provides:

"If the action or proceedings is in a Justice's court a change of the place of trial may be had at any time before the trial commences . . ."

1. When it appears from the affidavit of the defendant that he has good reason to believe, and does believe, that he cannot have a fair and impartial trial before the Justice about to try the case, by reason of the prejudice or bias of such Justice the cause **must** be transferred to another Justice of the same or adjoining township;" (emphasis supplied).

The provisions of the law providing for a change of venue fulfills the same purpose as the law providing for the disqualification of a District Judge. The transfer may be made not only to another Township but also to another Court in the same Township.

State *ex rel. Gillet v. Cronin, et al.*, 109 Pac. 144, 41 Mont. 293, at page 295 holds:

"The provisions of our Constitution and other provisions of our Codes sufficiently demonstrate that a change of venue cannot be had from a Justice of the Peace court of one County to a Justice of the Peace court of another County . . ."

It is my opinion that a Justice of the Peace can be disqualified under sub-divisions one, two and three, but not under sub-division four of Section 8868. A change of venue can be obtained upon a showing of bias and prejudice on the part of the Justice of the Peace, under sub-division 1 of Section 12307, but the change of venue cannot be made to a Township outside of the County in which the action is commenced when the motion for change of venue is on the grounds of the bias and prejudice of the Justice of the Peace.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.