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DISQUALIFICATION OF JUDGE—CHANGE OF VENUE.—Litigants in an action to vacate a default judgment did not make application for a change of judge after being informed by the judge that he had represented the opposing litigants in the original proceedings and that he was entitled to attorney's fees as result thereof. A statutory provision, Burns' Ann. Statutes 1933, sec. 2-1401, provides for a change of venue upon application of either party where the judge has been engaged as counsel in a cause prior to election or appointment, or is otherwise interested in the cause. Plaintiff petitions for a writ of prohibition alleging that the respondent was disqualified to sit as judge. Held, petition for writ denied. By proceeding to trial the plaintiff thereby waived the disqualifications of the respondent.[1]

There is a conflict in the authorities whether at common law there existed any ground for the disqualification of a judge.[2] However, the common law maxim that a person cannot be judge of his own cause[3] has been universally accepted.[4] This rule has been held to apply to direct pecuniary or direct property interest or to an interest involving some individual right or privilege in the subject matter of the litigation whereby a liability or pecuniary gain must occur on the event of the suit.[5] The English courts,[6] and a few American jurisdictions,[7] have followed this elementary maxim with logical consistency; not giving it a narrow, technical application, but applying it to all classes of cases. Thus, without a direct statute on the subject, these courts render a judge incompetent upon a showing of a real possibility of bias. In practically all of the states, however, there are statutory provisions by force of which one who has been of counsel in a case may not act as judge thereof.[8] Although there is no direct statute in Indiana which expressly disqualifies a judge from presiding in any civil case,[9] there is an express

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1 State ex rel. Krodel v. Gilkison (1935), — Ind. —, 198 N. E. 325.

2 Grounds for disqualification of judge recognized in 2 Bacon Abr. p. 621, Coke Litt. p. 141. Blackstone denies this, stating that "by the laws of England ., in the times of Bracton and Fleta, a judge might be refused, but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." 3 Blackstone Comm. (Cooley 4th ed. ——), p. 361.

3 Wharton, Legal Maxims (3rd. ed. 1903), p. 101.

4 Winters v. Coons (1904), 162 Ind. 26, 69 N. E. 458, State v. Ellis (1916), 184 Ind. 307, 112 N. E. 98, Meyer v. San Diego (1898), 121 Cal. 102, 53 N. E. 434, Pearce v. Atwood (1816), 13 Mass. 324; In re Conant (1907), 102 Me. 477, 67 A. 564.

5 33 Corpus Juris sec. 135, p. 992 and cases cited therein.

6 Queen v. Meyer (1875), 1 Q. B. D. 173, Frome United Breweries Co. v. Bath (1926), A. C. 586.

7 Tampa St. Ry. Co. v. Tampa Suburban R. Co. (1892), 30 Fla. 595, 11 So. 562; State v. Hocker (1894), 34 Fla. 25, 15 So. 581.

8 Bledsoe v. State (1917), 130 Ark. 122, 197 S. W 17, Lassen Ir. Co. v. Lassen County (1907), 151 Cal. 357, 90 P 709; Curtis v. Wilcox (1889), 174 Mich. 169, 41 N. W 863, Darling v. Pierce (1847), 15 Hun. 542 (N. Y.), Sewell v. Huffstetler (1921), 83 Fla. 629, 93 So. 162; Stevens v. Hall (1902), 8 Ida. 549, 69 P 282.

9 A judge is prohibited to try "any criminal cause where he has been of counsel in the cause, either for the state or for the defendant; and ., it shall be the duty of the regular judge to select a special judge to try such cause." Burns' Ann. Statutes, 1933, sec. 9-1303.

statutory provision which specifies causes for change of venue and the grounds upon which the change may be obtained. Having been of counsel in a cause pending before the judge is one of the grounds specified.[10]

While a common law right to a change of venue upon certain grounds has been recognized in some jurisdictions where no complete statute on the subject exists,[11] the general view is that this is a statutory privilege which can be asserted and exercised only in the manner provided by the statute.[12] This personal privilege has been granted to a litigant to promote the ends of justice, and unless abused it is reasonably calculated to secure that aim. Hence, change of venue statutes should not be employed to delay and obstruct the progress of litigation. In pursuance of this policy, the statutes are ordinarily construed to contemplate that a timely application for a change of venue shall be made.[13] A failure to make a timely objection, and voluntarily proceeding with the trial of a cause is deemed to be a waiver of the objection.[14] Cases are abundant which declare that "where a party goes to trial, without objection, before a judge who assumes to act under color of authority, he cannot after judgment or conviction successfully make the objection that the judge acted without competent authority in the trial of the case."[15] The disqualifications set out in the change of venue statute are not regarded as jurisdictional and the judgment of a court so interested is generally considered erroneous only, and not void, consequently, the objection might be waived by the parties either expressly or impliedly.[16] Since the causes for change of venue do not expressly forbid a disqualified judge to act, a party submitting a case before him must be regarded as having waived any objection when the facts were at all times known to the party.[17] Where the presiding judge discloses his relationship and gives the litigant ample opportunity to prepare a motion for a change of judge, and the party waives the objection and declares himself ready for trial, the court should not thereafter be embarrassed by the question.

Although the litigant in the instant case waived the disqualifications of the respondent to sit as judge in the cause of action, the judge's continuance

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10 Burns' Ann. Statutes 1933, sec. 2-1401.

11 Crocker v. Justices (1911), 208 Mass. 162, 94 N. E. 369.

12 Neal v. Superior Ct. (1931), 202 Ind. 456, 174 N. E. 732; Bowen v. Stewart (1891), 128 Ind. 507, 26 N. E. 168; Elliott v. Wallowa City. (1910), 57 Ore. 236, 109 P 130; Osborn v. State (1910), 143 Wis. 249, 126 N. W 737

13 O'Neill v. Pyle (1933), 204 Ind. 509, 184 N. E. 776; Thorn v. Silver (1909), 174 Ind. 504, 89 N. E. 943, Smith v. Smith (1852), 3 Ind. 303, Ickes v. Kelley (1863), 21 Ind. 72; Kirby v. Union Pacific (1912), 51 Colo. 509, 119 P 1042.

14 Terre Haute Brewing Co. v. Ward (1913), 56 Ind. App. 155, 102 N. E. 395, Smith v. Smith (1852), 3 Ind. 303, Howard v. Barbee (1863), 21 Ind. 221, McClelland v. McClelland (1898), 176 Ill. 83, 51 N. E. 559.

15 State v. Lane (1916), 184 Ind. 523, 111 N. E. 616, Perry v. Pernet (1905), 165 Ind. 67, 74 N. E. 609; Crawford v. Lawrence (1900), 154 Ind. 288, 56 N. E. 673, Schlunger v. State (1887), 113 Ind. 295, 296, 15 N. E. 515.

16 Atty. General v. Davenport (1927), 125 Okla. 1, 256 P 340; Conkling v. Crosby (1925), 29 Ariz. 60, 239 P 506, Phy v. Allen (1925), 115 Or. 168, 236 P 1056, Du Quoin Waterworks Co. v. Parks (1903), 207 Ill. 46, 69 N. E. 587, see Freeman on Judgments (1925, 5th ed.), sec. 330.

17 Kline v. State (1924), 194 Ind. 334, 142 N. E. 713, Carr v. Duhne (1906), 167 Ind. 76, 78 N. E. 322; Baldwin v. Runyan (1893), 8 Ind. App. 344, 35 N. E. 569· Coltrane v. Templeton (1901), 106 Fed. 370.

in that capacity was manifestly improper. Hughes, J., properly disapproved of the professional ethics of the respondent. Regardless of the fact that the relator did not file a formal application for a change of judge, the respondent, having represented a party in the original proceedings, should have declined to act in a judicial capacity. It is the ethical duty of a court to disqualify himself on his own motion when circumstances are such as may give cause for suspicion of bias or prejudice.[18]

A writ of prohibition is an attack to which a judgment should not be subjected when the reason for such attack could have been remedied at the time of trial. A party should not be permitted to sit quietly by and await the outcome of the trial, and then, in the event of an adverse decision, raise an objection to the qualifications of the judge. As the relator was fully aware of the alleged disqualifications it was his imperative duty to object. Having had an opportunity to request and obtain a change of venue and choosing not to do so, he must be held to have waived this privilege.[19]

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[18] Joyce v. Whitney (1877), 57 Ind. 550.

[19] Carr v. Duhne (1906), 167 Ind. 76, 78 N. E. 322; Smith v. Amiss (1902), 30 Ind. App. 530, 66 N. E. 501, Baldwin v. Runyan (1893), 8 Ind. App. 344, 35 N. E. 569.