

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF
UTAH.

PROVO RESERVOIR COMPANY,
A Corporation,
Plaintiff,
vs.
PROVO CITY, et al,
Defendants,)

No. 2888 Civil.
Contempt Proceeding
Answer Brief of the Defendants
on Plaintiff's Motion
for Change of Trial Judge

The defendants admit that the Honorable James B. Tucker, one of the Judges of the above entitled court, is disqualified to preside at the trial of said contempt proceeding because of the fact that he has been one of the attorneys' for the defendant Provo City and has counseled and advised said City and its officers with respect to their rights in the premises and has assisted in preparing the pleadings of the defendants in this matter.

Defendants, however, respectfully submit that the Honorable George P. Parker, one of the Judges of the above entitled Court, is not in any manner disqualified from presiding at the trial of the issues joined in this contempt proceeding.

The Utah Statutes with respect to the disqualification of judges is as follows:

Section 1785, Compiled Laws of Utah, 1917.

"1785. (692) When disqualified. Except by consent of all parties, no justice, judge, nor justice of the peace shall sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;

"2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law;

"3. When he has been attorney or counsel for either party in the action or proceeding.

"But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court."

While it is true that the Utah Statutes does not specify the interest that disqualifies a judge from presiding in the trial of an action, and while it is also true that no case is reported wherein the Supreme court of Utah has defined the interest that will disqualify a judge from presiding at the trial of a cause, the supreme courts of several states in the Union under state statutes similar to the Utah statutes have defined the interest that does disqualify and also the circumstances under which a judge is not disqualified from presiding at the trial of a cause.

A presiding judge in the trial of a cause may, or may not, be called upon to find the facts in a cause as well as to declare the law therein. Where a jury is called to assist in the trial of a cause the jurors are tryers of the facts. The Utah code, Section 6799 Compiled Laws of Utah, 1917, Sub-division 5, states one of the grounds of challenge for cause of any juror and is as follows:

"Pecuniary interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation."

It is true that nothing is said in the Utah Statutes as to whether or not the fact that any tryer of

the facts in a cause is a taxpayer in a municipal corporation is thus disqualified from hearing and determining the facts in any cause to which said municipal corporation is a party, and so far as we are aware the Supreme Court of the State of Utah has never had occasion to declare whether or not a taxpayer of a municipal corporation is disqualified to hear and determine the facts in a cause to which said municipal corporation is a party. However, the supreme courts of several of the states of our Union have decided cases under statutes similar to the Utah statutes in which said courts have decided that because a judge is a taxpayer in a municipal corporation that fact does not disqualify him to hear and determine the facts in a cause to which said municipal corporation is a party.

It is conceded, of course, that no cause should be heard and determined by any judge or tryer of the facts if in the mind of such judge or tryer of the facts there actually exists some bias or prejudice for or against either of the parties litigant; or if said judge or tryer of the facts has formed or expressed any opinion on the merits of the controversy. In the case at bar no contention is made by the plaintiff that there actually exists in the mind of Judge Parker any bias or prejudice against either of the parties litigant, and no contention is made by the plaintiff that Judge Parker has either formed or expressed any opinion as to the merits of the controversy. It is true that under our statute the existence of certain facts are presumptive of bias and prejudice, and therefore under our statute when such facts do exist a judge is presumed to be

disqualified to try the case.

We start out with the proposition that it is just as much the duty of a judge to retain and try the action if he is not disqualified as it is to remove it when the recusation is well founded.

Heinlen v. Heilbron, 31 Pac. 838 (Cal.)
Meyer v. City of San Diego, 53 Pac. 434 Cal.

This rule is founded upon the dictates of sound public policy because it is well known that a change of venue, or the calling in of another judge usually seriously interferes with the practical administration of justice. It also follows from said rule that no judge has any right to remove the action merely upon whim, or because of any personal inconvenience that will be suffered by him through retaining the action; nor because merely on account of the fact that one of the parties litigant has requested the removal of the action.

The affidavit of Joseph R. Murdock in support of plaintiff's motion recites, - that Judge Parker is disqualified by reason of his having been a member of the firm of Parker and Robinson, and that during the existence of said partnership J. W. Robinson, the former partner of Judge Parker, appeared as counsel for the Upper East Union Irrigation Company, and the firm of Parker and Robinson appeared as counsel for the defendant John W. Hoover in said action. Plaintiff's counsel in their brief do not seem to rely on said allegations of the affidavit, and we think that they cannot rely upon said allegations in this matter, which was formally brought under the cause of action in the above entitled Court known as No. 2888 Civil, because it is a con-

tempt proceeding in which the decree in said action is involved, for the reason that it appears from the pleadings that the Provo Reservoir Company complains against the defendants, and there is absolutely nothing to show that either the Upper East Union Irrigation Company, or John W. Hoover have the slightest interest in the outcome of this contempt proceeding. The provision of the statute disqualifying a judge, "when he has been attorney or counsel for either party in the action or proceeding," we submit is limited to the parties to the controversy presently before the Court, and does not include parties to the main action, which has already been heard and determined, who have absolutely no interest in the outcome of the present controversy. This contempt proceeding is a separate and distinct action, and it involves a controversy only between the parties to the proceeding, and the only reason that this action is initiated as a part of the main action No. 2888 Civil is because this is a contempt proceeding and the decree in the main action is pleaded as the foundation for the contempt charge.

The only serious contention made by counsel for the plaintiff is that Judge Parker is disqualified to hear and determine this contempt proceeding because he is interested in the outcome of the action.

The word "interested" as used by the code embraces only an interest that is direct, proximate, substantial, and certain, and does not embrace any remote, indirect, contingent, uncertain, or shadowy interest.

City of Oakland v. Oakland
Water Front Co. - 50 Pac. 268 (Cal.)

It is true that in the affidavit of Joseph R.

Murdock it is alleged that this action involves, in effect, the trial of rights of property amounting in value to approximately \$50,000.00, said property being water right to springs, some of which are now flowing in the pipe lines of the defendant Provo City in its general waterworks system, and it is alleged that if the plaintiff succeeds Provo City may have to purchase other waters which will necessitate the levying of a tax on the property in said city or the issuance of bonds, and that Judge Parker is a resident and property owner and taxpayer in the city and that as such, for the reasons stated, he has a material interest in the result of this action. We submit that there is nothing in the pleadings to inform the Court that this action involves water rights of the value of \$50,000.00. The allegations of the complaint are that the plaintiff has been damaged by the contemptuous acts of the defendant in the sum of \$1000.00 and judgment is prayed for for said amount. We contend that said allegations of the affidavit are wholly speculative and contingent and that the interest which it is claimed Judge Parker may have is too remote, indirect, contingent, uncertain, and shadowy to disqualify him from trying the controversy.

et al.

In the case of Higgins/v. City of San Diego, 58 Pac. 700, 59 Pac. 209, the plaintiff brought the action for themselves and all taxpayers of the city against the City and the San Diego Water Company to obtain a judgment declaring a certain lease from the Water Company to the city to be void and to enjoin the city and its auditor and treasurer from making any further payments to the

water company thereunder. The resident judges were residents, property owners, and taxpayers in the city. The California court held that their interest was too remotely involved to operate as a disqualification.

In the case of *Los Angeles v. Pomeroy*, 65 Pac. 1049, was an action by the city to condemn certain water bearing lands, the result of which, if successful, would be to impose upon the city the burden of paying the water company a large sum of money. The California court held that the fact that the judge was a resident, taxpayer and property owner within the city did not disqualify him.

In the case of, *Cuyamaca Water Company v. Superior Court*, 226 Pac. 604, the City of San Diego commenced an action to quiet title to the waters of the San Diego River. The water company contended that the judges of the county were disqualified because they were taxpayers of the plaintiff city. The California court held, "that to hold in such cases a taxpaying judge whose rights might be said theoretically to be effected the same as the rights of the plaintiff and all other taxpayers would be disqualified on the ground of interest would be an unwarranted extension of a rule."

The disqualifying interest must be a pecuniary or property interest in the action or its results. The distinction drawn in the cases goes to the extent that when a suit is instituted against a county or municipal corporation to establish a liability such as a suit to obtain a judgment for damages or liability against the corporation, the judge, though a taxpayer of the county or

municipality, is not disqualified to sit in the trial of a cause as his interest is not direct or certain. But when the suit is instituted to restrain collection of a tax fixed and ascertained and resting upon the taxable property of a county or municipal corporation then the judge who owns taxable property in the county or municipal corporation would be disqualified as having a direct interest in the litigation before him.

Sauls v. Freeman, 4 Southern 525
12 Am. St. Rep. 190 Fla.
Austin v. Nalle, 22 S. W. 960, Texas
City of Oakland, v.
Oakland Water Front Co. 50 Pac. 268 Cal.
Meyer v. San Diego, 53 Pac. 334, Cal.

Buy answer key at 33 Q & R 1316 note 1322
In the case of City of Los Angeles v. Pomeroy,

et al, 65 Pac. 1049, the California Court held that the fact that a judge owned real property within a city did not disqualify him to hear and determine condemnation proceedings of land for municipal purposes by the city.

In the case of Higgins, et al, v. City of San Diego, 58 Pac. 700, the California court held that where a water company had a claim against a city for the use of its plant contiguous on there having been funds in the treasury from which it could have been paid as it accrued that the judge was not disqualified merely by reason of being a taxpayer though the judgment might become the foundation of a special tax to meet it, or by some other means payment might be enforced, the judge's interest in any event being too remote, even where there had been a continuous controversy between the city and the water company engendering much feeling, and even where in the controversy between the water company and a person afterwards a judge in which both

parties aired their grievances in the papers and the company shut off the judge's water and he threatened to proceed to forfeit the company's charter.

In the case at bar there is no question wherein the validity of any tax or assessment which directly affects the taxpayers of Provo City is being litigated. There is no question here being litigated that in any manner directly affects any property right of Judge Parker. The only question involved is whether or not the defendants, or either of them, are guilty of a wilful contempt of the decree of this Court, and if said defendants, or either of them, are found guilty whether or not they, or either of them, should be punished by the imposition of a fine which, under the prayer of the plaintiff, in any event cannot exceed the sum of \$1000.00. We respectfully submit that any interest, as the term is used in our statute, of Judge Parker in the outcome of the controversy between the plaintiff and the defendants in this matter is so remote, speculative, uncertain, and shadowy that he is not disqualified to hear and determine the controversy.

We further submit that under the record of this case that the Honorable George P. Parker, as one of the judges of the above entitled court, is not disqualified in any particular to hear and determine the issues joined in this proceeding and that plaintiff's motion for change of trial judge should be denied.

Morgan and Coleman
Attorneys for Provo City