

**OPINION
73-199**

April 16, 1973 (OPINION)

The Honorable Lawrence O'Connell

County Judge

County Court of Increased Jurisdiction

Williston, ND 58801

Dear Judge O'Connell:

This is in response to your request for an opinion on the question whether or not a county justice who has disqualified himself on a case as county justice in a criminal proceeding may order a change of venue to a county court with increased jurisdiction. For our consideration you provided us with copies of the 91) Transcript on Change of Venue, (2) Order for Change of Venue, (3) Disqualification by County Justice, and (4) Order. You also ask the question "does the County Justice have jurisdiction to transfer a civil action to a County Court with Increased Jurisdiction when he is disqualified to preside in such civil action?".

Change of venue from the county justice court is governed by Sections 33-12-12 and 33-12-13 of the North Dakota Century Code. Section 33-12-12 provides as follows:

"33-12-12. Change of venue. When the defendant in a criminal action in a justice court, or his attorney, or the state, by the state's attorney or any other attorney acting for the state, before the trial commences, files an affidavit in writing stating that he has reason to believe and does believe that a fair and impartial trial of the action cannot be had before the justice about to try the same, by reason of the bias or prejudice of such justice, the action must be transferred to a justice of the county agreed upon by or in behalf of the parties, or if there is no such agreement, to the next nearest county justice, and an order must be made transferring the same accordingly, but the place of trial cannot be changed more than once by each party under the provisions of this section."

Section 33-12-13 provides as follows:

"33-12-13. Duty of justice when venue changed. When a change of the place of trial of a criminal action in a justice court is ordered, the justice forthwith shall attach to the original papers a certified copy of his docket entries in the action and deliver the same to an officer, who must execute the order without delay by taking the defendant before the justice named and delivering to him the papers so received."

It should be noted that the provisions of Section 33-12-12 provide that the actions shall be transferred to a justice of the county agreed upon or to the next nearest county justice. The office of

county justice is of fairly recent development (1959) and actually is a replacement of what was formerly known as the justice of peace. In this respect Section 33-01-00.1 provides as follows:

"33-01-00.1. Office of justice of the peace abolished. The office of justice of the peace, as a separate office and as an office ex officio, is hereby abolished and the jurisdiction and powers thereof shall be conferred as provided in this title, and wherever justices of the peace, or the justice court is referred to in the laws of this state, the same shall mean the county justice and the county justice court, as the case may be."

It is specifically noted that this section provides that when the term "county justice" is referred to in the laws of this state, the same shall mean the county justice and the county justice court, as the case may be.

The justice of the county justice court is to hear, try and determine all cases of misdemeanors committed in the county from which he is elected or appointed and also in such actions where jurisdiction is conferred specially by law.

Section 27-07-02 in part provides that:

" * * * In a county not having a county court of increased jurisdiction, the jurisdiction and powers formerly vested in the justices of the peace are hereby conferred concurrently upon the county court, unless and until a county justice is appointed."

Section 27-08-20 as pertaining to county courts of increased jurisdiction in part provides as follows:

" * * * The jurisdiction and powers formerly vested in the justices of the peace are hereby conferred concurrently upon such county court." (meaning the county court of increased jurisdiction)

These provisions, however, are not dispositive of the issues. The question of jurisdiction alone is not persuasive. If it were, it would have application to district courts because they have original jurisdiction of all criminal matters. We do not believe that anyone would seriously contend that a transfer to District Court would be permissible. We cannot, therefore, rely upon these provisions to conclude that the county court of increased jurisdiction is the equivalent of a county justice.

The Criminal Rules Committee has prepared rules of criminal procedures for submission to the Supreme Court for adoption. These rules cover appeals from the county justice courts and municipal courts.

Rule 37 as proposed provides for appeals to the district court or county court of increased jurisdiction from county justice courts and municipal courts. These rules reflect the thoughts of the committee as to the relative standing of the courts involved and also recognize

that appeals from the county court of increased jurisdiction are directly to the Supreme Court in the same manner as appeals are made from the district court.

It is also the current practice in instances where the judge of a county court of increased jurisdiction is disqualified to call in a judge of another county court of increased jurisdiction. This is true even though the subject matter would be such that a county justice would have jurisdiction.

In counties with a county court with increased jurisdiction, it takes the place of a county justice court. However, we do not have a statutory provision which distinguishes a county court of increased jurisdiction sitting as a county justice court from its regular status. By permitting a transfer as a result of change of venue from a county justice court to a county court of increased jurisdiction, the defendant would have a means of having an appeal directly to the Supreme Court, whereas in all other situations the appeal would have to be to the District Court. Such procedures would create problems and other procedural matters which are not contemplated or governed by any statutes.

Section 33-12-12 provides for a transfer to another county justice. It does not provide for a transfer to another court having the same jurisdiction or "sitting" as a county justice. This provision cannot be ignored.

It is therefore our opinion that a county justice who has disqualified himself in a criminal proceeding may not order a change of venue to a county court with increased jurisdiction. A change of venue would have to be to the nearest county justice unless a different county justice is agreed upon by the parties.

It is our opinion that the same conclusion applies to civil actions for the same reasons even though the change of venue in civil actions are covered by Sections 33-03-11, 33-03-12, and 33-03-13.

I trust this answers your inquiry.

Sincerely yours,

ALLEN I. OLSON

Attorney General