AFFIDAVITS OF BIAS AND PREJUDICE DISQUALIFYING FEDERAL JUDGES

BY ROBERT E. ROSENWALD

I. INTRODUCTION

Section 21 of the Judicial Code, 28 U.S.C.A. Sec. 25, prescribes the conditions under which a party litigant may file an affidavit of bias and prejudice disqualifying the judge from proceeding with the cause. While the language of the statute is clear, the law has been invoked so frequently that an imposing array of cases has appeared. Careful analyses of every phrase and word mark the decisions, but owing to the fact that the statute only twice has been scrutinized by the Supreme Court,[1] the ultimate judicial precedent is lacking, and there is a mild divergence between the courts in the several circuits.[2] The trend of the opinions, however, is clear. The statute is subject to the rule of strict construction, and litigants may lose those privileges conferred unless they carefully adhere to the law.[3]

II. PROCEDURE

The recused judge may pass upon the legal sufficiency of an affidavit of bias and prejudice.[4] In the event that the affidavit is legally sufficient, the almost uniform practice has been for the judge to certify his withdrawal to the senior circuit judge of his circuit, and for the case to be reassigned.[5] In the case of *Lewis v. United States*, the Circuit Court of Appeals of the Eighth Circuit said:

---

[1] Ex parte American Steel Barrel Co. (1913) 230 U. S. 35; Berger v. United States (1921) 255 U. S. 22.

[2] cf. Nations v. United States (C. C. A. 8, 1926) 14 Fed. (2d) 507, and Johnson v. United States (Dist. Ct., Wash. 1929) 35 Fed. (2d) 355, with respect to names of informants, circumstances, and time and place of statements constituting prejudice.

[3] Keown v. Hughes (C. C. A. 1, 1920) 265 Fed. 572, l. c. 576; Benedict v. Seiberling (Dist. Ct., Ohio, 1926) 17 Fed. (2d) 831, l. c. 836; and Cuddy v. Otis (C. C. A. 8, 1929) 33 Fed. (2d) 577, l. c. 578.

[4] Berger v. United States supra note 1, l. c. 36; Cuddy v. Otis, supra note 3, l. c. 578; Johnson v. United States (Dist. Ct. Wash. 1929), 35 Fed. (2d) 355, l. c. 356-357; Benedict v. Seiberling, supra note 3, l. c. 836; Nations v. United States, supra note 2, l. c. 509, and Morse v. Lewis (C. C. A. 4, 1932) 54 Fed. (2d) 1027, l. c. 1029.

[5] American Brake Shoe & F. Co. v. Interborough R. T. Co. (Dist. Ct. N. Y. 1933, Opinion by Manton, Circuit Judge) 6 Fed. Supp. 215, l. c. 218, et cas. cit. With respect to the right of the senior judge to determine which district judge shall hear the case on reassignment, see In re De Ran (C. C. A. 6, 1919) 260 Fed. 732, l. c. 741.

> "It is thus the settled law * * * that, upon the filing of a proper affidavit, if the affidavit for disqualification is in proper form, the truth of the allegations therein are indisputable, and the duty of the judge, after the filing of the affidavit is to proceed no further."[6]

It has been held, however, that a judge need not pass upon the legal sufficiency of the affidavit, but may refer the matter for determination to the senior circuit judge,[7] or to another district judge.[8]

If the judge concludes that the affidavit does not comply with the statute, and orders it stricken from the files, an exception may be taken to his action, and the point is thereby preserved for appellate review.[9] The proper procedure is to permit the filing of the affidavit, and then if insufficient, to strike it, but as long as the trial judge proceeds with the hearing, and an exception is saved, it is immaterial that the affidavit is not stricken.[10] The action of the judge in refusing to disqualify himself is not appealable, and may be reviewed only when the case is before the appellate court after a final judgment has been rendered.[11] The timely filing of a legally sufficient affidavit does not divest the *Court* of jurisdiction either of the subject-matter of the action or of the parties, but voids the power of the judge against whom it is directed to proceed further with the case.[11a] The writs of mandamus and prohibition are unavailing to prevent the recused judge from hearing the case because the alleged error may be reached when the case is finally appealed.[12]

---

[6] (1926) 14 Fed. (2d) 369, l. c. 371.

[7] Parker v. New England Oil Corp. (Dist. Ct. Mass. 1926) 13 Fed. (2d) 497.

[8] Craven v. United States (C. C. A. 1, 1927) 22 Fed. (2d) 605, l. c. 607.

[9] Ex parte American Steel Barrel Co. supra note 1, and Minnesota & Ontario Paper Co. v. Molyneaux (C. C. A. 8, 1934), 70 Fed. (2d) 545, l. c. 547, Morris v. United States, (C. C. A. 8, 1928) 26 Fed. (2d) 444, l. c. 449; Nations v. United States, supra note 2, l. c. 508; and Benedict v. Seiberling, supra note 3, l. c. 836. See, also, Duncan v. United States (C. C. A. 9, 1931) 48 Fed. (2d) 128, l. c. 134.

[10] Shea v. United States (C. C. A. 6, 1918) 251 Fed. 433, l. c. 435, Benedict v. Seiberling, supra note 3, l. c. 836, and cases cited under note 9, supra.

[11] Baltuff v. United States (C. C. A. 1929) 35 Fed. (2d) 507.

[11a] Carroll v. Zerbst (C. C. A. 10, 1935) 76 Fed. (2d) (Adv. Ops.) 961, l. c. 962.

[12] Ex parte American Steel Barrel Co., supra note 1, Minnesota & Ontario Paper Co. v. Molyneaux, supra note 9, l. c. 546 and 547, and In re Equitable Trust Co. of New York (C. C. A. 4, 1916) 232 Fed. 836, l. c. 840.

III. STATUTORY LIMITATION AND CONSTRUCTION

The statute does not pertain to an appellate tribunal,[13] nor to a territorial court. In the case of *Tjosevig v. United States*, the Circuit Court of Appeals of the Ninth Circuit held that the statute "is by its terms made applicable only to the District Courts of the United States, and it does not extend to a territorial court."[14]

The law is expressly limited to "any action or proceeding, civil or criminal," but whether it relates to bankruptcy matters has not been determined. Affidavits of bias and prejudice have been filed in bankruptcy cases,[15] but the Supreme Court has carefully refrained from deciding whether such affidavits are proper.[16] The statute does not extend to referees in bankruptcy.[17] Nor should it be invoked in a contempt and disbarment proceeding arising out of a case before the same judge whom it is sought to disqualify.[18]

The affidavit must be that of "any opposite party to the suit." The courts have frequently held to be insufficient an affidavit of a person not a party to the cause,[19] but have never determined who is an "opposite" party. The terms "real party" and "substantial party" have been employed, but not inclusively defined.[20] An indemnitor of a bond given by a bankrupt and the alleged actual owner of claims allowed to a creditor is not a party in the contemplation of the statute.[21] Neither is an attorney in fact,[22] nor the bankrupt corporation and its officers.[23] The statute also provides that no party may file more than one affidavit.[24]

It is imperative that the affidavit be "accompanied by a certifi-

---

[13] Kinney v. Plymouth Rock Squab Co. (C. C. A. 1, 1914) 213 Fed. 449.

[14] (C. C. A. 9, 1919) 255 Fed. 5, l. c. 6; *Ibid.*, Fleming v. United States (C. C. A. 9, 1922) 279 Fed. 613.

[15] Ex parte American Steel Barrel Co., supra note 1; In re De Ran, supra note 5; DeRan v. Killits (C. C. A. 6, 1925) 8 Fed. (2d) 840; Anchor Grain Co. v. Smith (C. C. A. 1924) 297 Fed. 204.

[16] Ex parte American Steel Barrel Co., supra note 1.

[17] In re McFerren (Dist. Ct. Ill. 1933) 5 Fed. Supp. 180, l. c. 181.

[18] In re Ulmer (Dist. Ct. Ohio, 1913) 208 Fed. 461, l. c. 467-468; and Bowles v. United States (C. C. A. 4, 1931) 50 Fed. (2d) 848, l. c. 850-851.

[19] Berger v. United States, supra note 1; Anchor Grain Co. v. Smith (C. C. A. 5) 297 Fed. 204, l. c. 205; Cuddy v. Otis, supra note 3; and Benedict v. Seiberling, supra note 3.

[20] Benedict v. Seiberling, supra note 3, l. c. 836.

[21] DeRan v. Killits, supra note 15.

[22] Cuddy v. Otis, supra note 3, l. c. 578.

[23] Anchor Grain Co. v. Smith, supra note 15, l. c. 205.

[24] Berger v. United States, supra note 1, l. c. 36; Saunders v. Piggly

cate of counsel of record that such affidavit and application are made in good faith."[25] And "counsel of record" means a licensed attorney, authorized to practice law in the district court, and counsel for the affiant prior to the filing of the affidavit.[26] It is insufficient that the person executing the certificate is "attorney of record" as long as he has not been counsel for the affiant.[27] In the case of *Morse v. Lewis,* the Circuit Court of Appeals of the Fourth Circuit, speaking of an affidavit of bias and prejudice certified by an attorney who had not been admitted to practice in the district court in which the case was tried, said:

> "The Texas attorney who signed the certificate in this instance had not been admitted to practice in the trial court and therefore was not qualified to practice as an attorney in the case. * * * This requirement is not merely technical, but is one of the safeguards provided by the act to insure as far as possible that no affidavit of prejudice will be made except in good faith. It is important that the court, which has no means of protecting itself from unjustified attack, shall at least have the protection afforded by the certificate of a responsible member of the bar."[28]

It is said in *Ex parte N. K. Fairbank Co.:*

> "The certificate of good faith is not made by any 'counsel of record' of this court. The gentleman who makes the certificate has never been admitted as an attorney of this court. He has never signed the roll of its attorneys or taken the oath as required by its rules, and has never been recognized by the court as a counselor thereof in any proceding had in this or any other cause in this court."[29]

The purpose of the certificate of a counsel of record to an affidavit of bias and prejudice is to give credence to such affidavit, to prevent parties litigant from practicing frauds upon courts, and to subject the attorney as an officer of the court to disbarment and contempt proceedings in the event that he makes a false and fraudulent certificate.[30]

Wiggly Corp. (Dist. Ct. Tenn., 1924) 1 Fed. (2d) 582, l. c. 585; and In re McFerren, supra, l. c. 181.

[25] Klose v. United States (C. C. A. 8, 1931) 49 Fed. (2d) 177, l. c. 179; Keown v. Hughes, supra note 3, l. c. 576.

[26] Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 588; Morse v. Lewis, supra, note 4, l. c. 1032.

[27] Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 588.

[28] Supra note 4, l. c. 1032.

[29] (Dist. Ct. Ala. 1912) 194 Fed. 978, l. c. 985.

[30] Minnesota & Ontario Paper Co. v. Molyneaux, supra note 9, l. c. 547;

The certificate must be executed by individual attorneys, not by a law partnership. Thus, it was stated in the case of *Benedict v. Seiberling:*

> "We are forced to hold that the word 'counsel' used in the statute denotes a human being, having individual intelligence, conscience, and power of discrimination necessary to witness to a fact into whose constituency these attributes must enter. An artificial entity, one a creature of law or custom, as a partnership or corporation, has, as such, none of these attributes. It is not capable, as such, of giving testimony—i. e., of certifying to the existence of any fact—much less to such as a state of good faith."[31]

The mandate of the statute is that the affidavit "shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." This provision is perhaps the most troublesome feature of the law. Since the enactment of the statute in 1911, many cases have been handed down construing the clause, and these cases are essentially *sui generis.* In the case of *Morris v. United States* the defendent filed an affidavit of bias and prejudice on the day of trial, claiming that certain vital facts upon which the affidavit, in part, was predicated had come to his knowledge the day before the date when the affidavit was executed. In concluding that the affidavit was timely, the court said:

> "Assuming that until the 20th day of July, 1927, defendant in the face of persuasion of his counsel was hesitant or in doubt, we think we cannot say as a matter of law that the additional alleged information was not calculated to confirm a doubtful belief upon the subject, and if it was sufficient and did have that effect, defendant could not well have acted more promptly in preparing his application and affidavits and filing the same than the following morning. In these circumstances we are of opinion that the application should not have been held untimely."[32]

Berger v. United States, supra note 1, l. c. 33; Nations v. United States, supra note 2, l. c. 509; Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 587-588; Benedict v. Seiberling, supra note 3, l. c. 836; Cuddy v. Otis, supra note 3, l. c. 578; American Brake Shoe & F. Co. v. Interborough R. T. Co., supra note 5, l. c. 219; and Johnson v. United States, supra note 2, l. c. 357. See also, Bowles v. United States, supra note 18, l. c. 851, and Hertz v. United States (C. C. A. 8, 1927) 18 Fed. (2d) 52, l. c. 54, 55.

[31] Supra note 3, l. c. 838

[32] (C. C. A. 8, 1928) 26 Fed. (2d) 444, l. c. 449. Ibid., Nations v. United States, supra note 2, l. c. 509.

The contrary conclusion was reached by the same court in the case of *Bommarito v. United States* in which the facts are clearly distinguishable. It was said:

> "It will be noted that the affidavit was sworn to on the third day of April, 1931, but was not presented to the court until the 7th day of April, 1931. If the appellant in good faith believed and had reason to believe on April 3, 1931, that the judge who was to try this case was prejudiced, it was his duty to present his affidavit and application promptly and he could not wait four days and until the case was called for trial, and then insist upon the judge disqualifying himself and delaying the trial until some other judge was available. The court was entirely justified in overruling the application for that reason alone."[33]

In the case of *Bishop v. United States* an affidavit was filed on the day of trial, after many witnesses had been subpoenaed. The reasons set forth in the affidavit as the basis of the complaint of prejudice were known to the parties long prior to the date set for trial, except one, which came to their knowledge four days before the affidavit was filed. The court said it would have been impossible to file the affidavit ten days prior to the beginning of the term because the case was set at the same term at which the indictment was returned, but held the affidavit untimely for the reason that—

> "It is the intent of the statute that the affidavit must be filed in time to protect the government from useless costs, and prevent useless delay of trials, and parties filing such affidavits should be held to strict diligence in presenting the claims of disqualification. There is no reason why this affidavit could not have been filed previous to the morning of trial, and at a time when the facts upon which it was to be based were fully known to defendants' counsel."[34]

An affidavit was held to be untimely when it was filed during foreclosure proceedings while the motion of the plaintiff to fix an up-set price was pending, and did not deprive the district court of jurisdiction.[35] In the case of *Ex parte Americal Steel Barrel Co.*, the Supreme Court said:

> "Neither was it (the statute) intended to paralyze the action of a judge who has heard the case, or a question in it,

---

[33] (C. C. A. 8, 1932) 61 Fed. (2d) 355, l. c. 356.
[34] (C. C. A. 8, 1926) 16 Fed. (2d) 410, l. c. 411.
[35] In re Equitable Trust Co. of New York, supra note 12, l. c. 840.

by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."[36]

The principles of law to which reference has been made are abundantly supported by other cases.[37]

While an affidavit may be predicated upon information and belief,[38] it must state the facts and reasons for the belief that bias or prejudice exists.[39] The rule is stated by the Supreme Court in the case of *Berger v. United States.*

"Of course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."[40]

It is essential that the bias or prejudice alleged shall be personal.[41] Mr. Justice Lurton in the American Steel Barrel case aptly summarized this statutory requirement.

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may

---

[36] Supra note 1.

[37] Minnesota & Ontario Paper Co. v. Molyneaux, supra note 9, l. c. 547; Rossi v. United States (C. C. A. 8, 1926) 16 Fed. (2d) 712, l. c. 716; Ex parte Glasgow (Dist. Ct. Ga. 1912), 195 Fed. 780, l. c. 782; American Brake Shoe & F. Co. v. Interborough R. T. Co., supra note 9, l. c. 217-218; Chafin v. United States (C. C. A. 4, 1925) 5 Fed. (2d) 592, l. c. 593-595; Shea v. United States, supra note 10, l. c. 434-435; Lipscomb v. United States (C. C. A. 8, 1929) 33 Fed. (2d) 33, l. c. 34; De Ran v. Killits, supra note 15, l. c. 841; Bowles v. United States, supra note 18, l. c. 851; Klose v. United States, supra note 25, l. c. 179; Anderson Coal Co. v. Waban Rose Conservatories, (Dist. Ct. Mass. 1921) 278 Fed. 945, l. c. 947; and Duncan v. United States, supra note 9, l. c. 134.

[38] Berger v. United States, supra note 1, l. c. 35; Nations v. United States, supra note 9, l. c. 509; and Benedict v. Seiberling, supra note 3, l. c. 836.

[39] Minnesota & Ontario Paper Co. v. Molyneaux, supra note 9, l. c. 547; Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 584; In re McFerren, supra note 17, l. c. 581 and 582; Keown v. Hughes, supra note 3, l. c. 577; and Klose v. United States, supra note 25, l. c. 179.

[40] Supra note 1.

[41] In re Equitable Trust Co. of New York, supra note 12, l. c. 840; and Henry v. Speer (C. C. A. 5, 1913) 201 Fed. 869, l. c. 871; and Johnson v. United States, supra note 4, l. c. 357.

> be right or wrong, but facts and reasons which tend to show personal bias or prejudice."[42]

It has been held consistently that the trial judge's unfavorable judicial expressions of a litigant, comments in previous litigation, judicial rulings in the course of trial, and prejudging the case do not constitute bias or prejudice in the contemplation of the statute.[43]

In the case of *Craven v. United States* the Circuit Court of Appeals of the First Circuit said:

> "At most, then, the affidavit charges a 'bias and prejudice,' grounded on the evidence produced in open court at the first trial, and nothing else. We hold that such bias and prejudice * * * is not personal; that it is judicial. 'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence."[44]

Accordingly, in those cases in which the facts have been stated, and in which they are legally sufficient, the courts have held the presiding judge to be disqualified.[45] Thus, in a criminal case under the Espionage Act, the Supreme Court concluded that the district judge erred in presiding at the trial of a defendant who alleged in his affidavit that he was born in Germany and that the judge because of his public utterances which were set forth in the affidavit was prejudiced against the defendant on account of his nativity.[46]

In a case in which the defendant was charged with the violation of the National Prohibition Act, an affidavit was ruled to be

---

[42] Supra note 1.

[43] Minnesota & Ontario Paper Co. v. Molyneaux, supra note 9, l. c. 547; Benedict v. Seiberling, supra note 3, l. c. 836; Henry v. Speer, supra note 41, l. c. 872; Parker v. New England Oil Corp., supra note 7, l. c. 498; Craven v. United States supra note 8, l. c. 607; Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 585-586; Morse v. Lewis, supra note 4, l. c. 1031; Cuddy v. Otis, supra note 3, l. c. 578; American Brake Shoe & F. Co. v. Interborough Rapid Transit Co., supra note 5, l. c. 218; United States v. Fricke (Dist. Ct. N. Y. 1919) 261 Fed. 541, l. c. 545; and Sacramento Suburban Fruit Lands Co. v. Tatham (C. C. A. 9, 1930) 40 Fed. (2d) 894.

[44] Supra note 8, l. c. 607-608.

[45] Berger v. United States, supra note 1; Morris v. United States, supra note 9, l. c. 446-449; and Chafin v. United States, supra note 1, l. c. 593-594. c. f. Nations v. United States, supra note 2.

[46] Berger v. United States, supra note 1, l. c. 28-38.

sufficient in alleging that the trial judge had said that the accused was one of the worst bootleggers in the country.[47]

There appear to be no reported cases in which an affidavit has been filed for and in behalf of the United States. However, such an affidavit recently was filed in the District Court of Kansas. It appears that one Shepard, a major in the United States army, was accused of poisoning his wife on a military reservation. He was found guilty and sentenced to life imprisonment by District Judge Hopkins. Shepard's conviction was reviewed by the Supreme Court on a writ of certiorari; the judgment was reversed and the cause remanded to the district court.[48] Thereafter, and before the re-trial, the defendant filed an affidavit alleging that Judge Hopkins was prejudiced against him. The judge then certified his withdrawal to the senior circuit judge of the Tenth Circuit, and District Judge Pollock was assigned to hear the case. Thereupon the United States District Attorney filed an affidavit of bias and prejudice against Judge Pollock who in turn certified his withdrawal, and the case finally was assigned to a third judge for trial.

It is the law that an affidavit is frivolous which alleges that the judge in charge of a criminal docket indecorously conducts himself by conferring with a United States Attorney, and that such a conference cannot be considered as grounding an inference of improper scheming against the right of a defendant to a fair and impartial trial.[49] Social and business intimacy of the judge with parties to an action must be alleged with particularity before disqualification results.[50] Personal bias and prejudice do not arise merely because it is alleged that the judge has expressed himself in condemnatory terms of affiant, and by such expressions has unjustly ascribed and imputed to affiant "unlawful and base motives and purposes."[51] In considering allegations of this

[47] Morris v. United States, supra note 9, l. c. 449. With respect to the necessity of alleging facts in war risk insurance cases, see Johnson v. United States, supra note 2.

[48] Shepard v. United States, 290 U. S. 96.

[49] Craven v. United States, supra note 8, l. c. 607.

[50] Morse v. Lewis, supra note 4, l. c. 1031.

[51] Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 585. To the same effect are Morse v. Lewis, supra note 4, l. c. 1031, and Duncan v. United States, supra note 9, l. c. 134.

character the court may take judicial notice of record entries and written opinions in the cause.[52]

> "Mere rumors, gossip, general statements that affiant by some person is informed and believes that at some time, some place, some occasion, the judge expressed sentiments manifesting bias or prejudice, are not enough, but informant, and time, place, occasion of, and the judge's expressions * * * must be set out in the affidavit."[53]

Aptly, it has been said that it was not "the intention of Congress to put it within the power of an oversensitive litigant, however honest he might be in his belief, to remove a judge merely because there existed in the mind * * * some imaginative reason or belief that the judge had formed a dislike for him, or within the power of a litigant to avail himself of this section by adroitly drawn and carefully considered insuative statements, which apparently upon their face would show bias or prejudice."[54]

The courts have practically applied the rule that an affidavit is insufficient unless upon its face it convinces a reasonably prudent judge that bias or prejudice does in fact exist.[55] Thus the Circuit Court of Appeals in the case of *Henry v. Speer* concluded that the statute is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist.[56] In the case of *Ex parte N. K. Fairbank Co.*, it is said:

> "The impressions, whether favorable or unfavorable, of men, which a judge receives, or his convictions about them growing out of his contact or acquaintance with them in the ordinary walks of life, cannot fall within the evil the statute designs to suppress, unless they are so strong that they result in personal bias or prejudice as to individual suitors, dominating the judge to such an extent that they beget a mental or moral condition which makes the judge willing to do wrong although he sees the right, * * *."[57]

---

[52] Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 586; and Benedict v. Seiberling, supra note 3, l. c. 836.

[53] Johnson v. United States, supra note 2, l. c. 357.

[54] Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 585.

[55] Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 585; Henry v. Speer, supra note 41, l. c. 871; Benedict v. Seiberling, supra note 3, l. c. 836; Keown v. Hughes, supra note 3, l. c. 577; and Ex parte N. K. Fairbank Co., supra note 29, l. c. 989-990.

[56] Supra note 41.

[57] Supra note 29.

While in some instances judges have voluntarily withdrawn from cases after ruling affidavits of bias and prejudice to be legally insufficient,[58] they generally have been reluctant to retire and have continued to preside at the trial because a judicial officer against whom an insufficient showing for recusation has been made owes it to his oath of office and to the litigant who invokes the jurisdiction of the court over which he presides not to withdraw from the case.[59] Coupled with this are the further reasons that to do so would greatly prejudice the dispatch of the business of the court, result in delays in the disposition of cases, and compel some other judge to do a vast amount of work which the disqualifying judge already has done.[60]

IV. CONCLUSION

The prophecy of the Supreme Court that litigants and their attorneys would abuse the privileges which the statute conferred[61] has been confirmed. In the vast majority of reported cases the courts have held the affidavits to be inadequate and insufficient to divest the trial judges of jurisdiction to proceed with the hearings. In most instances the cases were decided after the courts had defined the fundamental requirements of the law. These decisions lead to the conclusion that the statute has been employed to procure delays, to obtain hearings before a judge whose views litigants believed to be less harsh than those of the judge originally assigned to the case, and to make records for appellate tribunals in order to obtain reversals because of the failure of district judges to retire from proceedings. Judges are naturally reluctant to institute contempt or disbarment actions, and they prefer to protect fellow members of their profession. The statute, however, has been construed strictly. This construction is the only practical relief afforded against the evil of affidavits which are not filed in good faith. It may be hoped that in the future the same rule of strict construction will be followed to the end that judges may exercise their legitimate functions in the trial of cases.

[58] See American Brake Shoe & F. Co. v. Interborough R. T. Co., supra note 5, l. c. 220,.221, and Saunders v. Piggly Wiggly Corp., supra note 24, l. c. 588.

[59] In re McFerren, supra note 17, l. c. 182; Benedict v. Seiberling, supra note 3, l. c. 840-841; United States v. Fricke, supra note 43, l. c. 545.

[60] Bommarito v. United States, supra note 33, l. c. 536; Bishop v. United States, supra note 34, l. c. 411.

[61] Berger v. United States, supra note 1.