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## DISQUALIFICATION OF JUDGES

JOHN P. FRANK†

THE recently published statement of Mr. Justice Jackson criticising Mr. Justice Black for participating in a case<sup>1</sup> argued by a man who twenty years before had been Black's law partner has brought the subject of judicial disqualification sharply into the focus of public and professional attention.<sup>2</sup> Although Justice Jackson's views on the sub-

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Perhaps an article on judicial disqualification warrants a note on "author disqualification." In the October, 1942 term, I was law clerk to Justice Hugo L. Black. That relationship bred affections which may be reflected in this article. I have attempted to present this subject as dispassionately as possible; but of this the reader must judge for himself. I have been aided toward impartiality and in countless other ways by the many Yale students who assisted me in seminar during the summer of 1946. Particular debt is owing to Yale students William Coblenz, Gersten Rappaport, and Barbara Scott. Likewise I would like to acknowledge the assistance given me by Mr. Eustace Seligman, of the firm of Sullivan and Cromwell in New York, who contributed a memorandum on the practice of the late Chief Justice Stone in cases presented by that firm, and by the more than forty state chief justices and federal circuit judges who personally contributed to the study of current practice presented here.

Of course none of those mentioned is responsible in any way for the points of view and judgments expressed. J.P.F.

1. *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161, 897 (1945).

2. The facts involved in the dispute are these: From approximately 1923 to 1925 Black and Mr. Crampton Harris engaged in the practice of law in Birmingham, Alabama. In 1925 the association was terminated and both attorneys continued to practice separately. In 1926 Black was elected to the Senate, where on one occasion he caused Harris to be retained as counsel in a particular case for a Senate Committee of which Black was chairman. *Hearst v. Black*, 87 F. (2d) 68 (App. D. C. 1936). In 1937, Senator Black was appointed to the Supreme Court, and became a permanent resident of Alexandria, Virginia. In the past five years he has seen Harris socially perhaps once or twice for a few minutes.

Meanwhile Harris continued in Birmingham practice with a mixed clientele including several labor unions. During the coal strike of 1943 he was special counsel for the United Mine Workers before the National War Labor Board. Somewhat earlier he instituted in Birmingham the first "portal to portal" case, presenting the question whether travel time underground of iron ore miners required payment under the Fair Labor Standards Act. The case was successfully prosecuted by Harris to the United States Supreme Court where Mr. Justice Black participated in the decision. *Tennessee Coal, Iron, & Railroad Co. v. Muscoda Local*, 321 U. S. 590 (1944).

A year later Harris brought a second case involving portal to portal pay, this time for his coal miner clients, to the Supreme Court. This case had been instituted in West Virginia

ject are not at all points clear,<sup>3</sup> his statement shows an enormous difference of opinion in the Supreme Court on the subject of disqualification of its members. This article undertakes to survey the present American disqualification practice, to study its origins, and to explore the support for the varying views on the immediate subject of justices and their ex-partners.<sup>4</sup>

In the preparation of this article an Inquiry has been submitted to the chief justices of the various states and to judges of each federal

and the 4th Circuit Court of Appeals declared it to be covered by the *Muscoda* case. Local No. 6167 v. Jewell Ridge Coal Corp., 145 F. (2d) 10 (C. C. A. 4th, 1944). On certiorari to the Supreme Court Harris again appeared and Black again participated. Mr. Harris and his miners prevailed again, but this time three Justices dissented, seeing a difference in the application of the law to coal miners. *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161, 897 (1945).

In neither the iron case nor the coal case had counsel suggested that Mr. Justice Black be disqualified by reason of his association 19 years previously with Mr. Harris or for any other reason. Nor had it been raised in previous Harris cases, as for example *Carolene Products Co. v. United States*, 323 U. S. 18 (1944), in which all members of the Court had decided against Harris' client. But on petition for rehearing in the coal case, counsel for the Company contended for the first time that Black should have been disqualified for reason, among others, of the Harris association.

The petition for rehearing was denied, with Justices Jackson and Frankfurter filing a short memorandum noting that they did not consider it within their province to express any view whatsoever on the merits of the disqualification controversy. This was an unusual procedure since motions for rehearing raising an alleged disqualification are normally passed upon by the whole court without comment. For example in *United States v. Jacobs*, 306 U. S. 363, 620 (1939), the whole court denied a motion for rehearing based on the ground that Black was disqualified because he was a member of the Senate when the judges' retirement bill was passed and thus could not participate under Art. I, § 6, cl. 2 of the Constitution. Moreover, in *Ryan v. Newfield*, 302 U. S. 650, 777 (1937) the whole court denied a motion and a second motion for rehearing in which it was alleged that Black was disqualified on personal grounds.

The *Jewell Ridge* rehearing incident, which had never had any public attention, appeared forgotten until it was casually mentioned in a news story at the time of the recent vacancy in the Chief Justiceship, *Washington Evening Star*, May 16, 1946. The subject was again apparently forgotten until Justice Jackson's statement to the Judiciary Committees, *N. Y. Times*, June 11, 1946, p. 2, col. 3. Justice Jackson stated that in his absence columnists had implied "that offensive behavior on my part is responsible for the feud on the court." He referred to the *Star* story as "the most specific attack on me" and stated his determination to "reveal the undisclosed part of my story."

3. Originally Justice Jackson declared, in his opinion in the *Jewell Ridge* case, that Black's conduct was not his concern. Subsequently, moreover, he emphasized in his letter to the Congressional committees that "I do not want it inferred that Justice Black's sitting in the *Jewell Ridge* case involved lack of 'honor.'" Nevertheless, Jackson continued in the statement to say that he "wanted the practice stopped," and concluded with the threat that "if it is ever repeated while I am on the bench I will make my *Jewell Ridge* opinion look like a letter of recommendation in comparison." See letter of Associate Justice Robert H. Jackson to Congressional Judiciary Committee, *N. Y. Times*, June 11, 1946, p. 2, col. 3.

4. This article will not attempt encyclopedic detail of citation. With perhaps 2500 case entries in the Digest system on disqualification, with code provisions in every state, and with at least 60 articles in the law reviews, each footnote would be an article were it to trace

Circuit Court of Appeals to find out from appellate judges themselves when they disqualify, particularly in situations which may not be reflected in cases or statutes. The information obtained from the Inquiry is utilized in sections of this article, but in order that the reports of the thirty-nine participating state and federal courts may speak for themselves, the totals on various points are included in an appendix.

The subject of judicial disqualification is one of consequence considerably broader than the superficial question of whether Mr. Justice Jackson is a patriot among sinners, as some imply, or a fool among wise men, as his critics may contend.<sup>5</sup> The Jackson charge raises a substantial issue of whether judges should disqualify themselves in cases presented by former partners. There is no statute governing disqualification of federal appellate judges, and the various Circuit Courts of Appeal judges must decide whether to follow Black's practice or Jackson's recommendation. State judges, too, to the extent that they are not governed by statute, must make the same decision. The federal district judges also must face the problem, for under the statute governing

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the details. Notes and comments in legal periodicals will be cited for the reader who may desire detail on a particular point, and cases and statutes selected for citation are chosen either because they are typical or unusual, and not for the sake of completeness. The subject of waiver of disqualification will not be treated beyond this notation that the views on waiver are divided into three: that disqualification is generally waivable, that it is never waivable because it is jurisdictional, and that it is waivable as to some grounds and not others. For examples of the latter view, see *Cadenasso v. Bank of Italy*, 214 Cal. 562, 6 P. (2d) 944 (1932) and *Collins v. Nelson*, 26 Cal. App. (2d) 42, 78 P. (2d) 758 (1938) (both holding that where a judge sits who is disqualified for interest, relationship, or prior participation in a case, the defect is jurisdictional and the judgment void); *Wooley v. Superior Court*, 19 Cal. App. (2d) 611, 66 P. (2d) 680 (1937); *Rohr v. Johnson*, 65 Cal. App. (2d) 203, 150 P. (2d) 5 (1944) (both holding that disqualification for prejudice may be waived). Where the doctrine of waiver is applied, the objection may be too late if not seasonably raised even though the bias of the judge is gross. *Foreman v. Hunter*, 59 Iowa 550, 13 N. W. 659 (1882) (waiver where judge contributed to fund to procure witnesses for plaintiff). For extended annotations on waiver see *Notes* (1920) 5 A. L. R. 1588; (1928) 57 A. L. R. 292.

Nor does this article deal with corruption of judges or any forms of money payments to judges by attorneys. See, e.g., (1937) 62 A. B. A. REP. 756 (attorney pays judge \$5,000 of receiver's fee); *Legal Ethics and Professional Discipline* (1938) 24 A. B. A. J. 1017, 1018 (loan by attorney to wife of judge); Frank, *Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 33-5.

5. The following instances typify the press reaction to the Jackson charges: David Lawrence expressed gratitude that Jackson had the courage to "expose the irregular situation," N. Y. Sun, June 17, 1946, p. 17, col. 1. On the other hand the Macon, Ga. News, June 17, 1946, took the position that "Justice Jackson is an ass." In an editorial thus headed the News said: "Mr. Justice Black . . . has done no wrong and has been guilty of no impropriety in the particular case, except in the perverted imagination of a disappointed aspirant for the post of Chief Justice. . . ." The extremely conservative Republican press took the opportunity to say "A plague on both your houses"; see, e.g., Chicago Tribune editorial, June 12, 1946. A substantial minority of the more temperate press took the view that it did not know when judges should and when they should not disqualify and therefore remained neutral; see, e.g., editorial Richmond Times-Dispatch, June 12, 1946.

their conduct they may be required to decide whether hearing an ex-partner will constitute "prejudice" within the law.<sup>6</sup>

But the enormous body of disqualification law<sup>7</sup> raises many questions quite removed from the extremely unusual ex-partner issue. While disqualification only occasionally attracts widespread public attention—as it did early in this century in Montana<sup>8</sup> and very recently in Delaware—it is much before the courts and legislatures. Each state has some statutory or constitutional law on the subject, but all shadings of view on particular grounds for disqualification are discovered. The traditional grounds of disqualification for interest, for relationship, or for bias, set a general framework for most states; but within that framework there is room for wide variety.

The divergencies stem from two fundamentally different policies which govern the field. All courts want justice done, but the conflict of values comes over method: if disqualification of judges is too easy, both the cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly, but unfairly. Nowhere is that conflict of values more glaring than in the United States Supreme Court, where the cases are usually important. If a justice sits who should not, great interests may be jeopardized; but if a justice disqualifies who should not, vital questions may be needlessly left without authoritative decision. For under existing law, there is no procedure for replacing a disqualified justice of the Supreme Court even

6. 36 STAT. 1090 (1911), 28 U. S. C. § 25 (1940), discussed in text, *infra* pp. 626-630.

7. The best general articles are Putnam, *Recusation* (1923) 9 CORN. L. Q. 1 (an historical account); Notes (1920) 20 COL. L. REV. 594; (1927) 41 HARV. L. REV. 78; (1941) 51 YALE L. J. 169. For detailed discussion of narrower aspects of the problem, see (1931) 65 U. S. L. REV. 68; (1933) 67 *id.* 487; (1928) 13 CORN. L. Q. 454 (all dealing with federal practice); (1914) 2 VA. L. REV. 147; (1920) 6 CORN. L. Q. 117; (1943) 21 TEX. L. REV. 790; (1938) 72 U. S. L. REV. 241 (all dealing with relationship between judges and attorneys); (1915) 29 HARV. L. REV. 103; (1944) 42 MICH. L. REV. 1127 (both dealing with necessity); (1927) 15 CALIF. L. REV. 263; (1926) 5 TENN. L. REV. 106 (both dealing with waiver); (1920) 4 MINN. L. REV. 301 (disqualification of stock owners); (1920) 8 CALIF. L. REV. 344 (interest); (1918) 31 HARV. L. REV. 1167 (effect of participation of disqualified judge); (1938) 36 MICH. L. REV. 985 (appointment by governor of substitute for disqualified judge); (1928) 23 ILL. L. REV. 394 (disqualification where judge receives part of fine); (1942) 16 TULANE L. REV. 627 (Louisiana practice); (1923) 8 VA. L. REG. (N.S.) 801 (Virginia practice); (1922) 20 OHIO L. REP. 47 (Ohio practice); (1916) 29 HARV. L. REV. 430 (disqualification of Judge Hillyer in Colorado strike cases).

8. Disqualification created a serious political controversy in Montana in 1903. In a controversy between copper companies, a judge friendly to a company party issued an injunction against the adversary. The state supreme court held that there could be no disqualification for bias, *State ex rel. Anaconda Co. v. District Court*, 28 Mont. 590, 76 Pac. 1133 (1903). The legislature was called into special session and passed the present law. MONT. REV. CODE ANN. (1935) § 8868(4); *cf.* Mont. Laws 2d Ex. Sess. 1903, c. 3. See HOWARD, MONTANA: HIGH, WIDE, AND HANDSOME (1943) 66 *et seq.* particularly at p. 80. For the Delaware incident, see note 54 *infra*.

when his non-participation deprives the litigants of the statutory quorum necessary for decision.<sup>9</sup>

The polar views are expressed thus:

By New Mexico, an "easy" disqualification state:

"Our Legislature in effect has said that a judge, even though blessed with all of the virtues any judge ever possessed, shall not be permitted to exercise judicial power to determine the fact of his own disqualifications, not because the judge in doing so would attempt to act otherwise than conscientiously, but because in their legislative judgment it is not fitting for him to make such an attempt, and it is better that the courts shall maintain the confidence of the people than that the rights of judge and litigant in a particular case be served." <sup>10</sup>

By Pennsylvania, a "hard" disqualification state:

"Due consideration should be given by him [the judge] to the fact that the administration of justice should be beyond the appearance of unfairness. But while the mediation of courts is based upon the principal of judicial impartiality, disinterestedness, and fairness pervading the whole system of judicature, so that courts may as near as possible be above suspicion, there is, on the other side, an important issue at stake; that is, that causes may not be unfairly prejudiced, unduly delayed, or discontent created through unfounded charges of prejudice or unfairness made against the judge in the trial of a cause." <sup>11</sup>

The cases and statutes reflect, as might be expected, a mixture of these two views. All jurisdictions have some disqualifications <sup>12</sup> and all draw a line where they believe the privilege of disqualification may be abused.

#### ORIGINS

The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else. Although Bracton tried unsuccessfully to incorporate into English law the view that mere "suspicion" by a party was a basis

9. See the discussion *infra* p. 626 describing the recent impasse in which a number of cases of importance could not be decided by the United States Supreme Court because of lack of quorum due to disqualifications.

10. *State ex rel. Hannah v. Armijo*, Judge, 38 N. M. 73, 28 P. (2d) 511, 512 (1933). For similar views see *Callaham v. Childers*, 186 Okla. 504, 99 P. (2d) 126 (1940); *State ex rel. Bennett v. Childers*, 188 Okla. 14, 105 P. (2d) 762 (1940); *U'Ren v. Bagley*, 118 Ore. 77, 245 Pac. 1074 (1926).

11. *In re Crawford's Estate*, 307 Pa. 102, 160 Atl. 585, 587 (1931).

12. The conflict of values indicated by the *Crawford* and *Hannah* cases can exist within a state. Compare *City of Palatka v. Frederick*, 128 Fla. 366, 370, 174 So. 826, 827-8 (1937), with *State ex rel. Davis v. Parks*, 141 Fla. 516, 520, 194 So. 613, 615 (1940).

for disqualification,<sup>13</sup> it was Coke who, with reference to cases in which the judge's pocketbook was involved, set the standards for his time in his injunction that "no man shall be a judge in his own case."<sup>14</sup> Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest.<sup>15</sup>

Pecuniary interest took many forms. A judge might be disqualified, as in *Dr. Bonham's Case*,<sup>16</sup> because he received the fine which he had the power to inflict; and the Mayor of Hertford<sup>17</sup> was "laid by the heels" for sitting as judge in an ejectment case in which he was lessor of the plaintiff. A similar charge of interest arose where the judge's status as citizen and taxpayer of a unit of society might be affected by his decision. Thus, for example, in a case involving a pauper, a judge was disqualified for interest because the decision affected his taxes.<sup>18</sup>

13. "Causa vero recusationis unica est, scilicet suspicio, quae consurgit multis ex causis, scilicet si iustitarius sit consanguineus petentis, homo vel subditus, parens vel amicus, vel inimicus tenentis, affinis, familiaris vel commensalis, consiliarius, vel narrator suus extiterit in causa illa vel alia ex huiusmodi." 4 BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* (Woodbine's ed. 1942) 281. Bracton's views as thus expressed are close to the most advanced modern practice; a judge should disqualify, says Bracton, if he is related to a party, if he is hostile to a party, if he has been counsel in the case. However his inclusion of the phrases "amicus" and "consiliarius . . . in causa illa vel alia," if it refers to a judge-party relationship as we know it, is not present practice; that is, judges very rarely disqualify because a party is a friend or because they were counsel for a party in a different case. Both questions are discussed in the text, *infra*. For discussion of the sources of Bracton's views and for elaborate citation to the principal authorities on medieval recusation practice see Schultz, *A New Approach to Bracton* (1944) 2 SEMINAR (Catholic University) 41, 42-50, and particularly p. 45 n. 9.

14. "*Aliquis non debet esse iudex in propria causa.*" CO. LITT. \*141a.

15. "By the laws of England, also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose the possibility of bias or favor in a judge. . . ." 3 BL. COMM. \*361. This conclusion is sharply criticized in *Sanborn v. Fellows*, 22 N. H. 473, 481 (1851).

16. 8 Co. 107a, 77 Eng. Rep. 638 (K. B. 1608). See also *Day v. Savadge*, Hobart 85, 87, 80 Eng. Rep. 235, 237 (K. B. 1613), declaring it to be "against natural equity" to let a city participate in decision of case effecting it. For an extended statement see opinion of Holt in *City of London v. Wood*, 12 Mod. 669, 687, 88 Eng. Rep. 1592, 1601 (K. B. 1702).

17. Anon., per Holt, C. J., 1 Salk. 396, 91 Eng. Rep. 343 (K. B. 1698); and similarly *Earl of Derby's Case*, 12 Co. 114, 77 Eng. Rep. 1390 (K. B. 1614). Cf. *Company of Mercers v. Bowker*, 1 Strange 639, 93 Eng. Rep. 751 (K. B. 1725), in which a member of the Company became judge after verdict and before judgment, and the decision was held reversible because of his participation. It was also held that a judge could not pass on his own qualifications as bondsman, *Sir Nicholas Bacon's Case*, 2 Dyer 220b, 73 Eng. Rep. 487 (K. B. 1563). The earliest significant discussion of bias of this type is a case concerning the right of the Chancellor of Oxford to hear a trespass case in which he was involved, *M. of H. 6*, 18-21, pl. 6. For a detailed exposition of the case see EGERTON, *A DISCOURSE UPON THE STATUTES* (Thorne ed. 1942) 71-3. Mr. Thorne has collected other year book citations at the conclusion of his note 154, p. 73. For summary of early cases see 2 ROLL. ABR. 93, 94, and BROOKE ABR., Tit. Judges, Justices. See also 4 COM. DIG. 6.

18. Between the Parishes of Great Charte and Kennington, 2 Strange 1173, 93 Eng.

The last-mentioned cases went too far, for if judges were disqualified as taxpayers some suits could scarcely be decided. Mindful of this difficulty Parliament in 1743 provided that taxpaying justices of the peace might sit in these local government cases.<sup>19</sup> Thus grew the modern rule of "necessity," that judges should not decline to sit where no substitute was readily available. As Pollock later expressed it, "the settled rule of law is that, although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may, but must do so if the case cannot be heard otherwise."<sup>20</sup> And this remains American practice.<sup>21</sup>

A variant of "interest" is "relationship," the problem posed where a judge participates in a case involving his relative. Oddly enough, the English courts, over-influenced by Coke, early held that a judge was not disqualified by relationship, but that a jury was.<sup>22</sup> In the latter connection, courts were faced with deciding what degree of relationship necessitated disqualification, a problem which in its modern context remains as perplexing today as it was then. As was noted in 1572, "all the inhabitants of the earth are descended from Adam and Eve, and so are cousins of one another," but "the further removed blood is, the more cool it is." The line was drawn in that case at the ninth degree.<sup>23</sup>

In short, English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges

Rep. 1107 (K. B. 1726), and see *Case of Foxham Tithing*, 2 Salk. 607, 91 Eng. Rep. 514 (K. B. 1705).

19. 16 Geo. II., c. 18, § 1 (1743).

20. POLLOCK, *FIRST BOOK OF JURISPRUDENCE* (6th ed. 1929) 270.

21. Thus federal judges must pass on the applicability to themselves of an income tax, *Evans v. Gore*, 253 U. S. 245 (1920), although Taney earlier expressed the view in a letter denouncing such a tax as invalid that the matter could not be considered in a case because "... all the Judges of the Courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it." TYLER, *MEMOIR OF ROGER B. TANEY* (1872) 433. For annotation on the general subject of necessity, see Note (1925) 39 A. L. R. 1476. Chancellor Kent accepted the doctrine of necessity to the extent of sitting in a case in which his brother-in-law was plaintiff because there was no method of choosing an alternate chancellor. *Moers v. White*, 6 Johns. Ch. 360 (N. Y. 1822), explained in *In re Leefe*, 2 Barb. Ch. 39 (N. Y. 1846). Other modern cases in point are *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 143 P. (2d) 652 (1943), and *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S. E. 872 (1919). With a little ingenuity, a situation of "necessity" can occasionally be avoided. Thus in a case in which all the members of the Texas Supreme Court were Woodmen of the World and hence the entire court was disqualified in a case involving that group, the Governor appointed a special court of three women. For the resultant three opinions see *Johnson v. Darr*, 144 Tex. 516, 272 S. W. 1098 (1925).

22. *Brookes v. Rivers*, 1 Hardres 503, 145 Eng. Rep. 569 (Ex. 1668) (judge need not disqualify in his brother-in-law's case "for favour shall not be presumed in a judge"). *Contra: Becquet v. Lempriere*, 1 Knapp 376, 12 Eng. Rep. 362 (P. C. 1830) (Isle of Jersey decision). Yet an entire jury would be stricken if the sheriff who called its members was related to a party. *Vernon v. Manners*, 2 Plowden 425, 75 Eng. Rep. 639 (K. B. 1572).

23. *Vernon v. Manners*, 2 Plowden 425, 75 Eng. Rep. 639 (K. B. 1572).



disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.

### GENERAL AMERICAN PRACTICE

The contemporary disqualification practice of both federal and state courts is broader than that of the common law. Not only has the principle of pecuniary interest been extended to keep pace with changing economic institutions, but relationship between judge and litigant, and a variety of other types of judicial bias have been prohibited in modern practice by the common law.<sup>24</sup>

Expansion of common law concepts has been brought about in the federal appellate courts, where no statute controls, largely through the exercise of their own discretion. In the Supreme Court disqualification has always been the prerogative of each individual Justice, and prior to the *Jewell Ridge* incident no member of the Court has ever pronounced public judgment on the practice of another.<sup>25</sup> From the beginning the practice seems to have been founded upon a mixture of common law notions, individual judgments of propriety, and practicability. While statutes do not explicitly apply to Supreme Court practice, the impulse of individual justices has generally been to adopt their principles.<sup>26</sup>

State judges have more often been subjected to limitations imposed by statute. In this respect older states have generally adhered fairly closely to the common law with only slight doctrinal and statutory variations. Newer states, on the other hand, have tended to adopt elaborate codes which fall into three categories: (1) disqualification for specified grounds in addition to those recognized at common law;<sup>27</sup> (2) mandatory change of venue statutes, themselves of several distinct types, which often supplement the first method listed;<sup>28</sup> and (3) au-

24. See, e.g., *People ex rel. Rusch v. Cunningham*, 308 Ill. App. 63, 31 N. E. (2d) 369 (1941) (political bias); *Petrey v. Holliday*, 178 Ky. 410, 199 S. W. 67 (1917) (relationship).

25. In some jurisdictions, the matter of disqualification of a judge can be decided by the whole court. *Board of Justices v. Fennimore*, 1 N. J. L. 190 (1793); *State ex rel. Short v. Martin*, 125 Okla. 24, 256 Pac. 681 (1927); *State ex rel. Mitchell v. Sage Stores*, 157 Kan. 622, 143 P. (2d) 652 (1943). The Inquiry shows that in almost all courts, disqualification in doubtful cases is at least informally discussed with other judges.

26. "I think there is no statute which excludes a Supreme Court Justice from sitting even in these cases, but statutes would have prevented a district judge, and I think also a circuit court of appeals judge sitting in these cases under like conditions.

"And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position." Testimony of Chief Justice Stone, *Hearings before Committee on the Judiciary on H. R. 2808*, 78th Cong., 1st Sess. (1943) 24. The Chief Justice's memory played him false in his inclusion of the Circuit Court of Appeals judges under the statutes.

27. See LA. CODE PRAC. (Dart. 1942) art. 338, listing six grounds of disqualification.

28. An example is the federal provision, 36 STAT. 1090 (1911), 28 U. S. C. § 25 (1940).

thorization of optional recusation, largely at the discretion of the judge.<sup>29</sup>

*Interest.* The current practice in cases involving interest is a logical extension of common law principles to cover modern situations. Thus it is now almost universal practice for judges not to sit in cases involving corporations in which they own stock.<sup>30</sup> Doubts concerning the wisdom of this practice have been expressed,<sup>31</sup> but have been quashed except in a few instances where the holdings are extremely small and the corporation so large that the decision is quite unlikely to be affected.<sup>32</sup>

29. An example is the federal provision, 36 STAT. 1090 (1911), 28 U. S. C. § 24 (1940). In sharp contra-distinction to the view that recusation may be optional with the judge is the very common position that judges must sit, unless a common law or statutory ground of recusation precludes. *Hamilton v. Pendleton*, 111 Okla. 55, 237 Pac. 611 (1925); *Love v. Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (1930), holding that judge must sit no matter how embarrassing if there is no common law or statutory ground for disqualification. See also *Ex parte State Bar Association*, 92 Ala. 113, 8 So. 768 (1891); Note (1935) 96 A. L. R. 546.

The extreme view that disqualification outside a statutory ground is discretionary with the trial judge is typified by expressions in *Boswell v. Flockheart*, 8 Leigh 364 (Va. 1837); *Ex parte Bowles*, 164 Md. 318, 165 Atl. 169 (1933); and *Musser v. 3rd Judicial District*, 106 Utah 373, 148 P. (2d) 802 (1944). This discretion may be used to opposite effect, i.e., to permit judges to disqualify at will although statutes do not command it, *Cooke v. United States*, 267 U. S. 517 (1925).

30. *Dimes v. Grand Junc. Canal*, 3 H. L. Cas. 759, 10 Eng. Rep. 301 (1852); (1920) 4 MINN. L. REV. 301.

31. Compare views of Lord Chancellor Cranworth in *London and N. W. Ry. v. Lindsay*, 3 Macq. H. L. Cas. 99, 114 (1858), with the view there attributed to Lord Eldon that a judge might appropriately sit in a case concerning a corporation in which he owned stock.

32. Two state chief justices, in their responses to the Inquiry, state the judges of their court disqualify in stock holding situations unless the corporation is very large and the judge's holding very small. Two of the federal circuit judges also state that members of their court have sat where the holding is "infinitesimal." A judge was not disqualified where he was a shareholder in a bank, only indirectly interested in litigation, *In re Farber*, 260 Mich. 652, 245 N. W. 793 (1932); and the judge was not disqualified as shareholder in a corporation holding most of shares in bank which was party defendant in eminent domain proceedings. *Central Pac. Ry. v. Superior Court*, 211 Cal. 706, 296 Pac. 883 (1931); but compare with the latter case *City of Vallejo v. Superior Court*, 199 Cal. 408, 249 Pac. 1084 (1926). A judge is generally not disqualified if a relative holds shares in a corporation. *Goodman v. Wisconsin Elect. Power Co.*, 248 Wis. 52, 20 N. W. (2d) 553 (1945), 162 A. L. R. 649, 654 (1946). For general notes on the relative-shareholder disqualification, see Note (1927) 48 A. L. R. 617.

Large corporations face a very similar problem because their directors are customarily barred from passing upon corporate transactions with other concerns in which the directors may have an interest. The U. S. Steel Corporation includes in its by-laws a clause recognizing that its directors "are men of large and diversified interests" and provides that none of the U. S. Steel contracts shall be affected by interlocking relationships between the U. S. Steel directors and the other contracting party if there is present at the U. S. Steel meeting passing on the contract "a quorum of directors not so interested." 1 FLETCHER'S CORPORATION FORMS (3d Ed. 1938) 736.

In Scotland, judges are relieved of disqualification where their stock holding "interest" is very slight as where they are partners in joint stock insurance companies or where they hold stock as trustees. See Lamond, *Of Interest as a Disqualification in Judges* (1907) 23 SCOT. L. REV. 152.

Where the judge has an interest other than direct ownership the issue becomes the remoteness of the interest. For example, where a judge is executor of an estate owning shares in a corporation appearing before him, is the interest so remote as to make disqualification unnecessary?<sup>33</sup> Analogous problems are presented where the judge is a creditor<sup>34</sup> or guardian<sup>35</sup> of a party; where his political career may be affected by an election fraud case;<sup>36</sup> where he is an officer of a corporation defending or prosecuting the action;<sup>37</sup> and where a relative from whom he may inherit is a shareholder in a corporate litigant.<sup>38</sup> While disagreement as to the danger of judicial prejudice is understandable in the foregoing situations, the reasoning of the court which refused to disqualify a judge in a case against a cemetery corporation merely because his relatives were buried on its property seems incontrovertible.<sup>39</sup>

The interest problem frequently recurs in cases where the outcome may slightly affect taxes or utility rates in the judge's home community. Under common law, as noted above, that circumstance would disqualify. But today such an interest is considered too remote to justify application of the principle, and courts have generally rejected the strict common law doctrine.<sup>40</sup>

33. See *Knight v. Hardeman*, 17 Ga. 253 (1855) (judge held disqualified under rather unusual circumstances of that case).

34. Not disqualified in *Fuller v. Davis*, 73 Me. 556 (1882); *Dial v. Martin*, 37 S. W. (2d) 166 (Tex. Civ. App. 1931), *rev'd on other grounds*, 57 S. W. (2d) 75 (Comm. App. 1933); but cf. *Burks v. Bennett*, 62 Tex. 277 (1884). A judge was disqualified where he was legal adviser to a bank creditor of a party in *Jones v. American Central Ins. Co.*, 83 Kan. 44, 109 Pac. 1077 (1910).

35. See *Richter v. Leiby's Estate*, 107 Wis. 404, 83 N. W. 694 (1900) (considering the effect of various guardian relationships).

36. See *People ex rel. Rusch v. Lidovsky*, 308 Ill. App. 60, 31 N. E. (2d) 372 (1941).

37. In New Hampshire, a judge who is an officer in a railroad corporation is disqualified by statute, N. H. REV. LAWS (1942) c. 373, § 12. A judge who terminates his interest in a party before trial was held qualified to sit in *Table Mountain Gold Co. v. Waller's Co.*, 4 Nev. 218 (1868). And see note 32 *supra*.

38. Not disqualified in *Texas Farm Bureau Cotton Ass'n v. Williams*, 117 Tex. 218, 300 S. W. 44 (1927). That this is the general rule see cases and annotations cited *supra*, note 32.

39. *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S. W. 802 (1896). But a probate judge was disqualified where he was vestryman and trustee of a church left money in a will. *State ex rel. Colcord v. Young*, 31 Fla. 594, 12 So. 673 (1893).

40. Statutes permitting judges to sit in such situations have been considered necessary in several jurisdictions. See, e.g., *Peck v. Freeholders of Essex*, 21 N. J. L. 656 (1847), disqualifying a judge for residence, and the reversing statute, N. J. REV. STAT. (1937) § 2:26-193; *Waters v. Day*, 10 Vt. 487 (1838) and Vt. PUB. LAWS (1933) § 1237. Such a statute may be very narrowly construed. Compare W. VA. CODE (Michie, 1937) § 5212, with *City of Grafton v. Holt*, 58 W. Va. 182, 52 S. E. 21 (1905).

However the same result is often reached without a specific statute, *Prawdzik v. Grand Rapids*, 313 Mich. 376, 21 N. W. (2d) 168 (1946). For early American hesitant acceptance of this view see *Board of Justices v. Fennimore*, 1 N. J. L. 190 (1793) with which compare the *Peck* case, *supra*. The result may be reached by narrow construction of the statutory

Supreme Court Justices have from the earliest times disqualified themselves in cases involving direct pecuniary interest. The practice was initiated in 1813 by Justice Livingston in *Livingston & Gilchrist v. Maryland Insurance Co.*<sup>41</sup> and immediately followed by Chief Justice Marshall in *Fairfax's Devisee v. Hunter's Lessee*,<sup>42</sup> decided the same year.

*Relationship.* The relationship cases present two distinct problems—that of the party relative and that of the attorney relative. Where it is the litigant who is a kinsman the proximity of the relationship is the decisive factor in determining whether disqualification is necessary. Brothers, uncles and cousins merely begin the possibilities, for the judge's relatives by marriage may also appear as parties. The English view that judges might hear cases brought by relatives was quickly abandoned in America by statute, but these laws vary widely in prescribing the degree of relationship necessary to exclude a judge from hearing a case.<sup>43</sup>

Of far greater consequence in the law today are the cases in which the

word "interest," *City of Henderson v. Fields*, 258 S. W. 523 (Tex. Civ. App. 1924); but *cf. Nalle v. City of Austin*, 85 Tex. 520, 22 S. W. 668 (1893). For a note discussing the general rule that a judge is not disqualified by reason of residence in a community party, see (1924) 33 A. L. R. 1322. Typical modern English cases permitting participation in such cases are *Queen v. Handsley*, 8 Q. B. D. 383 (1881); *Ex parte Overseers of Workington*, [1894] 1 Q. B. 416.

In California a statute forbids judges to sit in cases involving the irrigation districts in which they live, *Lindsay-Strathmore Irrigation Dist. v. Superior Court*, 182 Cal. 315, 187 Pac. 1056 (1920); but *cf. Cuyamaca Water Co. v. Superior Court*, 193 Cal. 584, 226 Pac. 604 (1924). For a case of disqualification for interest where the case involves the judge's community, see *Mackey v. Crump*, 49 Okla. 578, 153 Pac. 1128 (1915).

41. 7 Cranch 506 (U. S. 1813).

42. 7 Cranch 603 (U. S. 1813). See also *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816); 4 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1929) 145-161. Justices have continued to disqualify in cases of direct pecuniary interest. In *Blagge v. Balch*, 162 U. S. 439 (1896), in which Gray's father was involved, Gray did not sit. White, as recipient of a sugar bounty, disqualified in *United States v. Realty Co.*, 163 U. S. 427 (1896). A letter by Mr. G. E. Morrison to the "Everybody's Ideas" Column of the *Minneapolis Star Journal*, July 16, 1946, relates an anecdote about Chief Justice White which Mr. Morrison stated had been told him by "an aged New Orleans newspaper man who said he had personal knowledge of the facts." According to the Morrison letter White furnished his first law office on a \$1,000 prize which he won in the Louisiana lottery. The \$5.00 with which White bought his lottery ticket had been paid him as a legal fee by his first client. Many years later White joined in the opinion terminating the Louisiana lottery by Federal Statute, *Champion v. Ames*, 188 U. S. 321 (1903).

43. Statutes such as the first federal act, 1 STAT. 278 (1792), in modern form as 36 STAT. 1090 (1911), 28 U. S. C. § 24 (1940), early permitted disqualifications in relative cases. A systematic review of the general field of disqualification, with detailed citation on relationship problems, is contained in *Moses v. Julian*, 45 N. H. 52, 56 (1863). A New York case which draws logical but unfortunate conclusions from the fact that relationship was not disqualifying at common law and that the statute must be strictly construed is *Matter of Dodge and Stevenson Mfg. Co.*, 77 N. Y. 101 (1879). An excellent opinion which engrafted

attorney, rather than the party, is the possible object of nepotism. In a substantial number of jurisdictions the relationship of the attorney is not *per se* grounds for disqualification. The common law admitted of no such disqualification, and statutes frequently confine disqualification to cases in which the parties are related. In most jurisdictions, therefore, a judge need not disqualify himself unless the attorney can be considered a "party."

The question of whether or not the attorney is a "party" is often, but not always,<sup>44</sup> made to depend on whether or not he receives a contingent fee. If he does, or if his fee is set by the court, the judicial relative is disqualified in many jurisdictions.<sup>45</sup> The opposite result is usual where the fee is not contingent.<sup>46</sup> This practice lends itself to the drawing of some exceedingly fine lines. Thus in Mississippi a judge is disqualified if his kin receives a fee fixed by a percentage of the recovery by his client, but not if he receives a lump sum contingent upon his prevailing in the cause.<sup>47</sup>

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the usual principles of relationship into the common law of the jurisdiction is *Petrey v. Holliday*, 178 Ky. 410, 199 S. W. 67 (1917).

For examples of the variations, relationship is measured to the third degree in Nevada, NEV. COMP. LAWS (1929) § 8407. California also sets the relation at the third degree, CAL. CODE CIV. PRO. (Deering, 1937) § 170(3), but adds relationship to an officer of a corporate party as a ground of disqualification. *Lynip v. Alturas School Dist.*, 29 Cal. App. 158, 155 Pac. 109 (1915). As degrees are counted in some third degree states, a judge may properly sit in the case of his first cousin. REV. STAT. WASH. ANN. (Rem., 1932) § 54 (3). In New Hampshire, disqualification is through the fourth degree by common law, *Sanborn v. Fellows*, 22 N. H. 473, 488 (1851). In Indiana, relationship to the 6th degree disqualifies, ANN. IND. STAT. (Burns, 1933) § 9-1303.

The disqualification may also be stated in the most general terms, as "connected with him by affinity or consanguinity" without specification of a degree, MISS. CODE ANN. (1942) § 1651, discussed in *Nimocks v. McGehee*, 97 Miss. 321, 52 So. 626 (1910); WIS. STAT. (1945) § 261.06; and it may also be stated in terms of named relationships, such as cousins or nieces, REV. CODE OF DEL. (1935) § 4410.

While relationship runs both by consanguinity and affinity the view is fairly common that these disqualifications are removed upon the death of the wife; *Blodget v. Brinsmaid*, 9 Vt. 27 (1837). For a collection of cases on this latter point see Note (1938) 117 A. L. R. 800.

44. In a number of states the judge related to an attorney is not disqualified whether or not the attorney receives a contingent fee. *Atlantic Coast Line R. R. v. McDonald*, 50 Ga. App. 856, 179 S. E. 185 (1935); *Sjoberg v. Nordin*, 26 Minn. 501, 5 N. W. 677 (1880); *King v. Security Co.*, 241 Pa. 547, 88 Atl. 789 (1913); *Postal Mut. Indemnity Co. v. Ellis*, 140 Tex. 570, 169 S. W. (2d) 482 (1943) (holding that the judge is not disqualified where his son receives a contingent fee, but is disqualified if he must set that fee).

45. *Callaham v. Childers*, 186 Okla. 504, 99 P. (2d) 126 (1940); *Vine v. Jones*, 13 S. D. 54, 82 N. W. 82 (1900); *Tharp v. Massengill*, 38 N. M. 58, 28 P. (2d) 502 (1933).

46. *Ex parte Bowles*, 164 Md. 318, 165 Atl. 169 (1933) (son). It was held not to disqualify when a judge had given legal advice to an attorney brother-in-law in a case before him, *Ewing v. Haas*, 132 Va. 215, 111 S. E. 255 (1922). For a note showing that in a number of jurisdictions the judge is not disqualified if the party is a relative and does not receive a contingent fee, see Note (1921) 11 A. L. R. 1325.

47. Compare *Yazoo & M. V. R. R. v. Kirk*, 102 Miss. 41, 58 So. 710 (1912) with *Norwich Union Fire Ins. Co. v. Standard Drug Co.*, 121 Miss. 510, 83 So. 676 (1920).

The problem of attorney relationship is further refined by introducing a distinction between cases where the relative personally participates and those where he is merely associated with a law firm appearing before the judge. The latter situation was recently denied as ground for a retrial by the Second Circuit Court of Appeals on the theory that the trial judge had in no way abused his statutory discretion. The Court, however, noted that the question had not been raised until after the trial had been in progress for nine days, and remarked that the judge would doubtless have disqualified himself had he sooner been aware of the plaintiff's objection to his sitting.<sup>43</sup>

There is an increasing tendency in the Supreme Court for Justices to disqualify themselves in cases argued by relatives. Solicitor General Hughes resigned when his father took office and Chief Justice Stone would hear argument by his son only upon the consent of the parties.<sup>44</sup> Nineteenth century practice appears to have been less strict. Apparently no objections were made to the practice of Justices Curtis<sup>45</sup> and Field<sup>51</sup> who, on various occasions, sat in cases presented by their respective brothers. Similarly, Justice Miller heard his brother-in-law and close friend, W. P. Ballinger, in at least two cases.<sup>52</sup>

It is quite possible that at least in those jurisdictions where judges

43. *Voltmann v. United Fruit Co.*, 147 F. (2d) 514 (C. C. A. 2d, 1945) (son-in-law). Cf. *Boyer v. Backus*, 282 Mich. 701, 280 N. W. 756 (1938) in which the judge was not disqualified for several reasons where a first cousin was a member of the firm presenting the case.

49. *Ex parte Quirin*, 317 U. S. 1, 5 (1942). As the text indicates, styles shift in propriety. For example, the Supreme Court Reporter used to practice before the Court. BRIGANCE, JEREMIAH SULLIVAN BLACK (1934) c. 18, 19. Reporter Howard put an advertisement in the first volume of his own reports: "The Reporter avails himself of this opportunity to tender his professional services, in arguing causes before the Supreme Court. . . . The daily presence of the Reporter in court will ensure his attention to any cases that may be confided to him." 1 How. v (U. S. 1843—T. & J. W. Johnson, pub., Phila.; not in other editions). As further example of changing notions of propriety, compare Mr. Justice Jackson's participation in the Nuremberg Trial with Chief Justice Stone's refusal, as incompatible with his responsibilities as a Justice, to accept the chairmanship of an atomic energy commission. Stone said, "As I am already committed to the former, it is clear to me that I could not rightly undertake the latter." Letter, Stone to Senator Vandenberg, 91 CONG. REC. 8951 (1945). And see Powell, *Harlan F. Stone* (1946) 94 U. OF PA. L. REV. 355, 357. See also letter of refusal of Mr. Justice Cardozo while Chief Judge of the New York Court of Appeals to accept membership in the Permanent Court of Arbitration at the Hague: "After many inward struggles I have come to the conclusion that a Judge of the Court of Appeals best serves the people of the State by refusing to assume an obligation that in indeterminate, if improbable, contingencies might take precedence of the obligations attached to his judicial office." N. Y. Times, Sept. 13, 1927, p. 16, quoted in FRANKFURTER AND SHULMAN, CASES ON FEDERAL JURISDICTION (Rev. Ed. 1937) 12 n. 3.

50. *Scott v. Sandford*, 19 How. 393 (U. S. 1857).

51. *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866); *Cummings v. Missouri*, 4 Wall. 277 (U. S. 1867); *ex parte McCordle*, 6 Wall. 318 (U. S. 1868).

52. *Hitchcock v. Galveston*, 96 U. S. 341 (1878); *Cowdrey v. Galveston*, H., & H. R. R., 93 U. S. 352 (1877).

are plentiful and cases may be conveniently transferred from one docket to another the attorney-judge relationship will be increasingly considered a basis for disqualification. Opinions of New York Bar Associations,<sup>53</sup> as well as a recent Delaware incident,<sup>54</sup> foreshadow such a trend in state courts. That the same may be true of federal courts is indicated by a resolution of the Judicial Conference of Senior Circuit Judges in 1942.<sup>55</sup>

*Bias.* Disqualification for bias represents a complete departure from

53. Opinion No. 346 of the Committee on Professional Ethics, N. Y. County Lawyers Ass'n, reported N. Y. COUNTY LAWYERS ASS'N YEAR BOOK (1938) 160-1, puts these two questions: Is it proper for a judge to sit at a trial (a) where a near relative is an attorney for a party? (b) where a near relative is in the employ of an attorney for a party? The committee denied the right to sit in the first case and said that the second "depends on the facts in each particular case." The Association of the Bar of the City of New York, confronted with two similar questions in its opinion No. 136, May 4, 1938, answered question (a) as did the County Bar Association, and replied to a similar question (b) that the judge should "strain every effort" to avoid sitting. The City Bar noted its agreement in No. 136 with opinion 346 of the County Bar. (Letter of Forrest S. Drummond, Ass't Librarian, Ass'n of the Bar of the City of N. Y., to author August 13, 1946.)

54. In 1945 Governor Walter W. Bacon of Delaware nominated Chief Justice Daniel J. Layton for reappointment. Critics of the appointment, led by former Federal Judge Hugh M. Morris, opposed confirmation, contending that Layton had two sons and a brother practicing law in Delaware and that he had sat in cases presented by them. Judge Morris asserted that in no state but Delaware was such practice tolerated and he also contended that the A. B. A. Canons of Judicial Ethics "unequivocally disqualify a judge from sitting (either alone or with other judges) in any case in which his son, brother, or other near relative is attorney for a party to the cause." Chief Justice Layton was supported by the State Attorney General and two past Attorneys General. The nomination was withdrawn by the Governor when it became apparent that it could not be confirmed. *Wilmington (Del.) Morning News*, Aug. 14, 1945, and *Wilmington Journal*, Aug. 17 and 18, 1945. The quoted passage is from the *Journal* of August 18.

The A. B. A. Canon 13, to which reference was made, forbids judges to sit where a near relative is a *party*, and provides further that "he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person." CANONS OF PROFESSIONAL ETHICS, CANONS OF JUDICIAL ETHICS, ADOPTED BY THE AMERICAN BAR ASSOCIATION (1937) 31. As originally proposed to the American Bar Association this Canon specifically provided as follows: ". . . if such a course can reasonably be avoided, he should not sit in litigation where a near relative appears before him as counsel . . .," but this clause was stricken on motion of Mr. Charles A. Boston for the Committee on Judicial Ethics on the ground that it did not conform with practice in some states. 49 A. B. A. REP. (1924) 66-7.

In Opinion No. 200, involving the propriety of a judge hearing an attorney relative, the Committee on Judicial Ethics held that Canon 13 does not "preclude" his sitting but that it would be "wise" for a judge to withdraw. (1940) 26 A. B. A. J. 234.

55. See *The Judicial Conference of Senior Circuit Judges* (1942) 28 A. B. A. J. 817; 820. The resolution adopted by the judges began as follows: "That it is the sense of the Conference that federal judges should avoid sitting in cases in which their near relatives are of counsel, as contrary to the spirit of Canon 13 of the Canons of Ethics of the American Bar Association. . . ." Certainly the modern trend in at least some Federal Courts is to go very far to avoid any contact with cases in which judges have any connection with counsel. For

common law principles. Despite Blackstone's denial that bias could exist as a ground for disqualification a more recent humility has prompted recognition that human judges may deny justice not only for profit or to benefit a kinsman, but for less tangible prejudices for or against a party, a lawyer, or a cause.

Although in many states a party cannot charge "bias" and thereby have another judge assigned to hear a case,<sup>55</sup> the development is toward that end in the trial courts. This tendency is exemplified by the increasing popularity of two basic statutory devices. The first is an extension of the usual statutory grounds for disqualification to include additional situations where, in the opinion of the legislature, a likelihood of judicial partiality exists. The second is in the form of disqualification by affidavit, which amounts simply to mandatory change of

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example, Mr. Samuel Clark of Washington, D. C. was from 1939 to 1946 the United States Assistant Attorney General in charge of the Tax Division. During that period his brother, Judge Charles E. Clark of the Second Circuit Court of Appeals, avoided hearing any Department of Justice tax cases whether or not orally presented by the Assistant Attorney General. The signature of the Assistant Attorney General on briefs, though frequently purely formal, was thought to be disqualifying.

A somewhat similar situation arises when a judge has a relative on a lower court or administrative agency whose decision is being reviewed. In all cases involving the Federal Communications Commission Justice Black has disqualified because his brother-in-law, Mr. Clifford Durr, is a member of the Commission. See, e.g., *FCC v. WOKO, Inc.*, 67 Sup. Ct. 213 (U. S. 1946). However Judge Learned Hand considered it appropriate to review decisions of his cousin, Judge Augustus Hand, when the former was a circuit judge and the latter a district judge. See, e.g., *New York & Albany Lighterage Co. v. Bowers*, 4 F. (2d) 604 (S. D. N. Y. 1925), *aff'd*, 10 F. (2d) 1017 (C. C. A. 2d, 1926).

56. *Hutchinson v. Manchester St. Ry.*, 73 N. H. 271, 60 Atl. 1011 (1905); *Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539 (1894) (where justice of peace issued warrant for arrest of newspaper man who slandered the arresting justice, tried, and sentenced him; held "indecorous and unwise"—but not reversible); *In re Hague*, 103 N. J. Eq. 505, 143 Atl. 836 (Ch. 1928); *County Commissioners v. Wilmer*, 131 Md. 175, 101 Atl. 686 (1917); *Boswell v. Flockheart*, 8 Leigh 364 (Va. 1837); *Garrett v. State*, 187 Miss. 441, 193 So. 452 (1940). Trial judges may be given particularly wide discretion in bias cases, *King v. Grace*, 293 Mass. 244, 200 N. E. 346 (1936); *Batchelder v. Nourse*, 35 Vt. 642, 643 (1863) (where the upper court found itself powerless over the trial judge "if neither taste nor sense is operative and effectual to restrain him from such an impropriety.") But compare *Leonard v. Willcox*, 101 Vt. 195, 142 Atl. 762 (1928) for a comprehensive statement of the modern Vermont view. Cf. *Appeal of Askounes*, 144 Pa. Super. 293, 19 A. (2d) 846 (1941).

Frequently, as noted above, the statutes do not contain a general disqualification for bias as an abstraction as distinguished from specific types of bias, and in jurisdictions of this type bias and prejudice are not generally grounds for disqualification unless of a sort named in the statutes. *Galveston & Houston Inv. Co. v. Grymes*, 94 Tex. 609, 64 S. W. 778 (1901); *State v. Flynn*, 31 Ark. 35 (1876).

Cases recognizing disqualification for bias are *State ex rel. McAllister v. Slate*, 278 Mo. 570, 581, 214 S. W. 85, 88 (1919); *State ex rel. Anaconda Copper Min. Co. v. Clancy*, 30 Mont. 529, 77 Pac. 312 (1904); *Moore v. O'Dell*, 16 Ohio O. 460 (C. P. 1939), where change of venue was allowed when judge refused to allow party to file a pleading on the ground that he had no sound case. Modern English law recognizes this disqualification. *Frome United Breweries Co. v. Bath Justices* [1926] App. Cas. 586.



venue at the request of either party. Affidavit statutes sometimes require the party requesting the change to establish grounds indicating bias, while in others a simple affidavit without supporting evidence is sufficient to effect a transfer of the case.<sup>57</sup> Although some affidavit statutes have been held unconstitutional as encroachments upon judicial power,<sup>58</sup> they are generally accepted without question.<sup>59</sup>

The more significant situations involving possibility of judicial bias may, for convenience of analysis, be classified into those arising from the judge's "attorney contacts," his "party contacts" and his "government contacts."<sup>60</sup> Although the judge's relationship with his former law partners is logically a part of the first category, the public interest stim-

57. Examples of automatic disqualification statutes in operation are *Davis v. Irwin*, 65 Idaho 77, 139 P. (2d) 474 (1943); *Stephens v. Stephens*, 17 Ariz. 306, 152 Pac. 164 (1915); *State ex rel. Hannah v. Armijo*, 38 N. M. 73, 28 P. (2d) 511 (1933). Cases holding that some showing of bias must be made even with affidavit type statutes are *Crowley, Milner & Co. v. Reid*, 239 Mich. 605, 215 N. W. 29 (1927); *People v. Emmett*, 123 Cal. App. 678, 12 P. (2d) 92 (1932); *Nelson v. Hoskinson*, 106 Kan. 601, 189 Pac. 165 (1920); *Foley v. Utterback*, 196 Iowa 956, 195 N. W. 721 (1923). For an excellent analysis of the affidavit statutes in terms of their various degrees of imperiousness see Note (1941) 51 YALE L. J. 169.

58. *Diehl v. Crump*, 72 Okla. 108, 179 Pac. 4 (1919); *Austin v. Lambert*, 11 Cal. (2d) 73, 77 P. (2d) 849 (1938); Notes (1920) 5 A. L. R. 1275, (1938) 115 A. L. R. 855.

59. *U'Ren v. Bagley*, 118 Ore. 77, 245 Pac. 1074 (1926); *Berger v. United States*, 255 U. S. 22 (1921), assuming the validity of the 1911 Act of Congress providing for use of affidavits, 36 STAT. 1090 (1911), 28 U. S. C. § 25 (1940); (1938) 51 HARV. L. REV. 1118.

60. There are, of course, other situations involving disqualification for bias. For some of the many examples: where judge on first trial expresses opinion defendant is guilty, judge is disqualified on second trial, *State v. Atterbery*, 134 S. C. 392, 133 S. E. 101 (1926); and premature indication of decision was disqualifying in *Wendel v. Hughes*, 64 Ohio App. 310, 28 N. E. (2d) 686 (1940). *Contra*: *Jones v. State*, 61 Ark. 88, 32 S. W. 81 (1895). Strongly opinionated remarks in passing sentence at a previous trial of the same case, *Kolowich v. Ferguson*, 264 Mich. 668, 250 N. W. 875 (1933), or participation in early stage of case as one man grand jury, *People v. Roxborough*, 307 Mich. 575, 12 N. W. (2d) 466 (1943), were both held not to disqualify.

Needless to say, the judge should not practice in his own court, *Cady v. Lang*, 95 Vt. 287, 115 Atl. 140 (1921), and see *Professional Ethics Committee Op. No. 2* (1942) 28 A. B. A. J. 626; and it is preferable that he not be a witness before himself, *Burlington Ins. Co. v. McLeod*, 40 Kan. 54, 19 Pac. 354 (1888); *People v. Connors*, 77 Cal. App. 438, 246 Pac. 1072 (1926). For early firm expression of an opposite view, see remark of Sir John Hawles, Solicitor General, on Cornish's trial, 11 How. St. Tr. 455, 459 (ca. 1688). Compare Steerforth, in DICKENS, *DAVID COPPERFIELD*: ". . . and you shall find the judge in the nautical case, the advocate in the clergyman's case, or counterwise. They are like actors; now a man's judge, and now he is not a judge; . . ."

A special problem arises in connection with punishment of contempt of the judge in open court. The almost universal rule is that the judge can hear such cases; See Note (1928) 52 A. L. R. 1291; *but cf.* *Cooke v. United States*, 267 U. S. 517 (1925); and see *Poff v. Scales*, 36 Idaho 762, 213 Pac. 1019 (1923) (holding that a judge sued for damages for having punished plaintiff for contempt cannot sit in the damage case).

One type of bias has been held to be so serious that its presence results in violation of the due process clause of the 14th Amendment. If a judge receives a portion of a fine which he levies, the trial is invalid, *Tumey v. Ohio*, 273 U. S. 510 (1927); *but cf.* *State v. Schelton*, 205 Ind. 416, 186 N. E. 772 (1933), which attempts to distinguish away the *Tumey* holding.

ulated by the Jackson-Black controversy has made its separate consideration in a later section seem desirable.

A judge, of course, is often closely associated with attorneys not in the ex-partner class. Close friendships formed at the bar with other practitioners naturally outlive elevation to the bench.<sup>61</sup> And, presumably, if the ex-practitioner judge is intimate with former partners, the ex-teacher judge is equally intimate with former faculty colleagues. The ex-law clerk occupies a position not unlike that of the former junior associate, and an even closer association is found where a judge resigns from the bench and later appears before his former judicial colleagues.

None of these grounds, however, is usually considered sufficient to warrant disqualification. For example, Justice Frankfurter does not disqualify himself when his former Harvard colleague and good friend, Paul Freund is of counsel,<sup>62</sup> nor does Justice Douglas decline to sit when he finds the names of his old Yale associates Thurman Arnold, Abe Fortas, and Walton Hamilton on briefs.<sup>63</sup> Moreover, Justice Rutledge has frequently heard oral arguments by Ralph Fuchs, a former associate at Washington University.<sup>64</sup> Indeed, no one has ever suggested the desirability of disqualification in such instances.

In the United States Supreme Court ex-law clerks are barred from appearing before the Court for two years after they leave the employ of the Justices, a rule which suggests that the prejudicial effects of close association wear off rather quickly.<sup>65</sup> Few other courts limit in any way the practice of ex-law clerks.<sup>66</sup>

The ex-judge may well be the most intimate with the court of any of the "ex's", for his association has been not merely with one judge but with the group. Thus on the theory that association breeds intimacy

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61. The American Bar Association explicitly recommends that the judge not withdraw into his shell after appointment. See *Judicial Canon No. 33*, CANONS, *op. cit. supra* note 54, at 38.

62. *Muschany v. United States*, 324 U. S. 49 (1945).

63. *Bruce's Juices, Inc. v. American Can Co.*, No. 27, Oct. Term 1946, is the most recent example of an Arnold and Fortas case in the Supreme Court. In patent—anti-trust litigation Professor Hamilton is probably the most effective attorney whose briefs are regularly before the Court. See *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U. S. 661 (1944), in which Professor Hamilton was of counsel *amicus curiae*, and *Special Equip. Co. v. Coe*, 324 U. S. 370, 380 (1945), in which Professor Hamilton was not of counsel.

64. Professor Fuchs, until recently in the office of the Solicitor General of the United States, and presently Professor of Law at Indiana University, appeared in numerous cases in the 1944 and 1945 terms of the Supreme Court. His most recent United States Supreme Court case is *United Public Workers v. Mitchell*, No. 20, Oct. Term 1946.

65. SUP. CT. R. 3, 11 U. S. SUP. CT. REP. DIG. (1939) 6. The Supreme Court Rule, however, suggests a method for avoiding some of the results of a too-free disqualification of Justices. Rather than postpone decision of cases, it may be preferable to disqualify the counsel.

66. The Inquiry shows that only two of the state and one of the federal courts have any practice of disqualification in cases of ex-clerks.

and intimacy breeds influence, argument by a former judge might disqualify an entire bench. But the notion has never been pushed to that extreme and in the United States Supreme Court, for example, ex-Justices Curtis, Campbell, and Hughes often appeared before their former colleagues.<sup>67</sup>

The most difficult situation, and one which permits no rule of thumb, is disqualification in cases argued by an intimate personal friend. All judges have close friends at the bar, and perhaps on rare occasions a judge might be swayed in his decision by the presence of such a friend in court. Nevertheless the overwhelming American practice is against disqualification for this reason, although occasionally a judge does feel bound to disqualify himself. Judicial response to the Inquiry indicates that in almost half the states and federal circuits there is occasional disqualification for the reason of intimate friendship with counsel.<sup>68</sup> It is, for example, well-known that Judges Learned Hand and Jerome Frank of the Second Circuit Court of Appeals avoid sitting in cases presented by certain close friends.

A second possible source of bias is the judge's "party contact." The propriety of a judge's sitting on a case involving a former client seems to depend upon whether or not the case in question was in his office prior to his going on the bench. When the judge has had prior contact with both the client and the case, disqualification is universal for the obvious, but seldom articulated, reason that a judge would seldom have an open mind under such circumstances, and to sit would invite charges of corruption.<sup>69</sup> But where the judge's firm has been retained subsequent to his elevation to the bench a closer question is presented. Reference to current practice discloses a dominant view that judges should not disqualify under such circumstances, but it is reasonable to suppose that the practice in any given situation may

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67. Curtis is recorded as having argued 46 cases before his former colleagues, 5 LEWIS, GREAT AMERICAN LAWYERS (1908) 450-1. Campbell's most famous argument was in the *Slaughter-House Cases*, 16 Wall. 36 (U. S. 1873). Some of Hughes' cases are *Harriman Nat. Bank v. Seldomridge*, 249 U. S. 1 (1919); *United States v. Los Angeles R. R.*, 273 U. S. 299 (1927); *United States v. Trenton Potteries*, 273 U. S. 392 (1927); *Beech-Nut Packing Co. v. P. Lorillard Co.*, 273 U. S. 629 (1927). No one can say that Hughes had undue influence with his brothers—he lost the last three cases cited.

One writer has suggested that when elective trial judges are turned out of office, they may have a very difficult time re-establishing themselves at the bar. To alleviate this condition he proposed that Cook County trial judges specialize in particular matters while on the bench so that the training thus acquired would give them a base for practice. Note, *THE POSITION OF THE EX-JUDGE* (1913) 8 ILL. L. REV. 331. The Inquiry shows it to be general practice in state and federal courts for ex-judges to appear before their former associates.

68. A more obvious case arises where the party is a close friend of long standing and rather publicly claims influence; disqualified in such circumstances in *Callahan v. Callahan*, 30 Idaho 431, 165 Pac. 1122 (1917); *Cottle v. Cottle* [1939] 2 All E. R. 535.

69. Typical statutes are N. J. STAT. ANN. (1939) § 2:26-193; CAL. CODE CIV. PRO. (Deering, 1937) § 170(4); REV. STAT. WASH. (Rem., 1932) § 54.4.

depend upon the nature of the case and closeness of relationship with the client.<sup>70</sup> Despite the opinion of the late Chief Justice Stone that disqualification in cases involving former clients is desirable,<sup>71</sup> the practice of Supreme Court Justices has been to sit in such cases. Justice Roberts, for example, was a director of the American Telephone and Telegraph Company and counsel for the Pennsylvania Railroad before his appointment to the Court, but subsequently participated in decisions involving both.<sup>72</sup> Similarly, Justices Lurton and Van Devanter occasionally passed judgment on their former clients.<sup>73</sup>

A judge's former "government contacts" present a third possibility of grounds for bias. The young lawyer with political ambitions follows a familiar path to fame: a prosecuting attorney to begin with, election to the legislature or Congress, perhaps a stopover in the executive branch of the state or federal government, and finally a judgeship. The present Supreme Court affords several examples. Chief Justice Vinson has served in both the executive and legislative branches of government. Justices Burton and Black were Senators, and Justices Reed, Murphy and Jackson have held executive positions, including variously the Solicitor Generalship and the Attorney Generalship. Justice Douglas headed the Securities and Exchange Commission, while Justice Frankfurter was once an assistant United States Attorney. Only Justice Rutledge held no previous federal non-judicial post. It is, of course, possible that any of these past experiences may influence the judge in a case involving personalities and problems with which he has had prior contact.

A judge might disqualify himself for bias because of his government

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70. The Inquiry shows that disqualification is universal in cases which were in the judge's office when he left practice. Where the case involves a former client but the particular matter was not in the office when the judge went on the bench, the Inquiry shows that in about three-fourths of the State and Federal Courts, the judge does not disqualify.

The statutes are usually construed extremely strictly against disqualification. *Blackburn v. Craufurd*, 22 Md. 447 (1863) (judge could sit where only "some of" the issues were similar to those in his prior case as attorney); and see *Stevens v. Hall*, 8 Idaho 549, 69 Pac. 282 (1902); *Trinkle v. State*, 59 Tex. Cr. Rep. 257, 127 S. W. 1060 (1910). Disqualification is usually sharply limited to "the same matter." *Stewart v. Mix*, 30 La. Ann. 1036 (1878). California has absolute disqualification for two years in any case of any kind brought by a former client, CAL. CODE CIV. PRO. (Deering, 1937) § 170(4).

71. See note 121 *infra*.

72. *American Tel. and Tel. Co. v. United States*, 299 U. S. 232 (1936); *Georgia v. Pa. R. R.*, 324 U. S. 439 (1945).

73. Lurton was attorney for the railroad in *Louisville & N. R. R. v. Campbell & Richards*, 54 Tenn. 254 (1872); *Louisville & N. R. R. v. Gardner*, 69 Tenn. 688 (1878). On the Tennessee Supreme Court, the Circuit Court of Appeals, and the United States Supreme Court, he heard a number of cases involving that Company. See MYERS, HISTORY OF THE SUPREME COURT (1912) 718 *et seq.* Van Devanter represented the Union Pacific in many cases collected by Myers, *id.* at 769, and sat, for example, in *Union Pacific R. R. v. Hadley*, 246 U. S. 330 (1918).

experience (1) if he participated personally as a government lawyer in the case under consideration; (2) if the case is presented by his former government associates; (3) if he participated in formulating the policy which the case involves; and (4) if he is a former legislator and the case involves construction of a statute he supported.

That the same man should not assume the roles of prosecutor and judge at different hearings of the same case needs hardly to be said. The impropriety is obvious, and prosecutors who become judges almost invariably disqualify themselves in these situations. The case of the Tennessee prosecutor who, after his election as trial judge, sat on the retrial of an action originally instituted by him is exceptional, and reversal in that case was swift.<sup>74</sup> But there is no impropriety where the judge's role as prosecutor has been largely formal, as in the case of Attorneys General, who have only theoretical responsibility for minor cases in their departments. Thus, although the *Schneiderman* denaturalization case<sup>75</sup> was in the Department of Justice during Justice Murphy's tenure of office as Attorney General, he presumably had no direct connection with it and felt free to vote against the Department he had formerly headed. On the other hand, Justice Jackson, who succeeded Murphy as Attorney General, felt sufficiently involved in the same case to disqualify himself. But Justice Jackson, too, has, on other occasions, recognized that his previous contact with a matter was too slight to be prejudicial. Although as Attorney General he decided not to institute litigation concerning coverage of the insurance industry by the anti-trust laws, he nevertheless felt free to participate in the decision of a subsequent action on the subject begun by his successor, Mr. Biddle.<sup>76</sup>

Supreme Court Justices have not hesitated to hear their former government colleagues. Again current examples are furnished by the practice of Justices Murphy and Jackson who regularly sit on cases presented by their former associates in the Justice Department.<sup>77</sup> Although

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74. *Wilson v. State*, 153 Tenn. 206, 281 S. W. 151 (1926). See also *State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162 (1899); *Fisher v. State*, 206 Ark. 177, 174 S. W. (2d) 446 (1943). But in *Eastridge v. Commonwealth*, 195 Ky. 126, 241 S. W. 806 (1922) the judge was not disqualified although he had signed the indictment as commonwealth attorney.

75. *Schneiderman v. United States*, 320 U. S. 118, 807 (1943).

76. *United States v. South-eastern Underwriters Ass'n*, 322 U. S. 533 (1944). Chief Justice Stone also recognized that an Attorney General's contact with a case might be so formal as not to require disqualification. See note 121 *infra*. Chief Justice Taney made an odd compromise in *Bank of the United States v. United States*, 2 How. 711 (U. S. 1844). As Attorney General he had given the Secretary of Treasury an opinion on the subject of the case. He did not sit in the case, but filed in the appendix of Howard's Reports an opinion which is an unofficial dissent. 2 How. 745 (U. S. 1844).

77. An example is Mr. Samuel Clark who served as an Assistant Attorney General with both Murphy and Jackson and frequently appeared before them after they went on Court. A recent instance is *Commissioner v. Court Holding Co.*, 324 U. S. 331 (1945).

Supreme Court practice in this respect has evoked no criticism, there is a minority view in the state and circuit courts which regards presence on the bench as inappropriate under such circumstances. As the Inquiry shows, the problem appears to have arisen in only about half the state and federal courts polled.

When a judge has been involved with a case or its underlying policy in a capacity other than that of prosecutor there is precedent in the United States Supreme Court for the view that he may sit. Chief Justice Marshall wrote the opinion of the Court in *Marbury v. Madison*<sup>78</sup> although he was the Secretary of State who had failed to deliver the papers in question, and Chief Justice Chase voted to invalidate the legal tender laws which were the basis of his own fiscal policy as Secretary of the Treasury.<sup>79</sup> But responses to the Inquiry indicate that many state judges take a different view.

The ex-legislator as state judge may occasionally pause to consider whether he may interpret statutes he supported in his former capacity, but federal judges have no hesitation in participating under similar circumstances.<sup>80</sup> An explanation for this divergency in practice may be found in the fact that federal judges are so regularly appointed from Congress that disqualification for this reason might paralyze the entire judicial machinery. Three members of the present Supreme Court are ex-congressmen, and 25 out of the 75 appointed prior to 1937 had served in the legislative branch.<sup>81</sup> So far as is known, Supreme Court Justices have never disqualified on this ground, and other federal judges have very seldom done so. State judges, on the other hand, are more nearly divided as to the proper practice. While this problem has not arisen in a majority of the states responding to the Inquiry, there is a variance of views in those in which it has.

It is apparent from the foregoing discussion that the Supreme Court is less inclined to disqualification than some of the state courts. In an appreciable minority of states judges disqualify themselves if a case is presented by a former government associate, if a judge participated in formulating the policy involved in a case, or if a judge is a former mem-

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78. 1 Cranch 137 (U. S. 1803).

79. *Hepburn v. Griswold*, 8 Wall. 603 (U. S. 1870); *Legal Tender Cases*, 12 Wall. 457 (U. S. 1871).

80. In the *Jewell Ridge* case, the motion for rehearing on the ground that Mr. Justice Black was disqualified included as a ground in addition to his former association with Mr. Harris that Black had been Senator-sponsor of the Fair Labor Standards Act. However, this point has been given no subsequent attention. In one of the few cases on this or a related point, it was held that a judge who as an attorney had drafted the ordinance involved in a case was not disqualified. *Ex parte Largent*, 144 Tex. Cr. Rep. 592, 162 S. W. (2d) 419 (1942), *rev'd on other grounds*, 318 U. S. 418 (1943).

81. Thirty-seven of the seventy-five had been members of state legislatures and thirty-one had previously held federal administrative positions, usually cabinet. EWING, *THE JUDGES OF THE SUPREME COURT, 1789-1937* (1938) 84 *et seq.*

ber of the legislature which passed a statute now presented for judicial consideration. Yet the Supreme Court practice appears invariably to the contrary. Similarly, no case is known in which a Supreme Court Justice has disqualified himself because an intimate friend presented the argument, although in almost half the states responding to the Inquiry at least occasional disqualification occurs for this reason.

Explanation for this discrepancy may be found in the impossibility of obtaining substitutes for Supreme Court Justices and the importance of having issues of national consequence determined by the full Court whenever possible. If disqualification came too easily and Justices frequently declined to sit, the entire federal judicial machinery might be seriously handicapped.

Within the past five years three instances have arisen which serve to dramatize the result of numerous disqualifications. A statute provides that six Justices are required for a quorum of the Court,<sup>82</sup> and in three recent cases (or groups of cases) disqualification by four Justices resulted in a loss of that quorum and made it impossible for the Court to act.<sup>83</sup> Since one of these cases was a crucial anti-trust case and another involved the constitutionality of the Public Utility Holding Company Act, a serious impasse resulted. Several bills were introduced in Congress attempting to solve the problem by reducing the quorum from six to five, by calling upon a retired Justice to sit in the emergency, or by some combination of these devices.<sup>84</sup> Congress, however, was unable to agree on any of these proposals, and the bill finally adopted disposed only of the antitrust case by referring it to the Second Circuit for decision. Chief Justice Stone broke the deadlock in the Holding Company case by withdrawing his disqualification, but the third case had to be dismissed for lack of a quorum.

#### STATUTORY DISQUALIFICATION OF DISTRICT JUDGES

The two basic federal disqualification statutes, Sections 20 and 21 of the Judicial Code,<sup>85</sup> apply only to the practice of district courts. Sec-

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82. 36 STAT. 1152 (1911), 28 U. S. C. § 321 (1940).

83. *Chrysler Corp. v. United States*, dismissed for lack of quorum, 314 U. S. 583 (1941); *North American Co. v. SEC*, finally decided April 1, 1946, 327 U. S. 686; *SEC v. Engineers Public Service Co.*, Nos. 1 and 2 at the present term, having been first argued Nov. 15 and 16, 1945, 14 U. S. L. WEEK 3190, continued in May, 1946, for lack of a quorum, 14 U. S. L. WEEK 3405; *United States v. Aluminum Co. of America*, transferred 322 U. S. 716 (1944) and decided by the Second Circuit Court of Appeals, 148 F. (2d) 416 (1945).

84. H. R. 2808 and S. 1135 (identical) reduced the quorum to five; H. R. 2926 reduced the quorum to five and provided for calling upon a retired Justice if the quorum of five could not be obtained; H. R. 3456 left the quorum unchanged and provided for calling a retired Justice. All four were in the 78th Cong., 1st Sess. (1943). For general discussion of the quorum problem and of proposals to meet it, see Cunningham, *The Problem of the Supreme Court Quorum* (1944) 12 GEO. WASH. L. REV. 175.

The anti-trust case was transferred to the Second Circuit Court of Appeals by H. R. 3054, 78th Cong., 2nd Sess. (1944), 58 STAT. 272 (1944), amending 32 STAT. 823 (1903), 15 U. S. C. § 29 (1940).

85. 36 STAT. 1090 (1911), 28 U. S. C. §§ 24-5 (1940).

tion 20, dating from 1792, permits disqualification, if requested by a party, on four separate grounds: (1) interest; (2) previous representation of a party; (3) prospective participation in the case as a material witness; and (4) relationship or connection with a party. But none of the above situations presents an absolute ground for disqualification. A judge must disqualify himself only if circumstances will "render it improper, in his opinion" to sit, and his determination is reviewable, if at all, only for abuse of discretion.<sup>86</sup>

Although for one hundred and twenty years Section 20 remained the only important federal law on disqualification<sup>87</sup> its operative effect was sharply confined by judicial construction. Direct reference was made to the English common law for definition of "interest,"<sup>88</sup> and this rationale restrictively applied to new fact situations.<sup>89</sup> "Has been of counsel" was soon limited by addition of the phrase "in this case," and an attorney-client relationship prior to the case in dispute was never considered by itself sufficiently prejudicial to require disqualification.<sup>90</sup> Disqualification of a judge on the ground that he was a material witness was confined to situations where the party could find no

86. The question of capacity to review has sometimes gone by unnoticed, *Carr v. Fife*, 156 U. S. 494 (1895); *Epstein v. United States*, 196 Fed. 354 (C. C. A. 7th, 1912), but when squarely faced has been held to be outside the power of an appellate court, *Coltrane v. Templeton*, 106 Fed. 370 (C. C. A. 4th, 1901).

87. A less important statute is 36 STAT. 1132 (1911), 28 U. S. C. § 216 (1940) providing that no judge who hears a case in the trial court shall pass upon the same case in the Circuit Court of Appeals. This section, which originated in § 4, of the Judiciary Act of 1789, 1 STAT. 75 (1789), is applied in *Cramp & Sons Co. v. International Curtiss Co.*, 228 U. S. 645 (1913); and state and federal cases on judges rehearing their former cases either on appeal or new trial are collected in Note (1913) 57 L. Ed. 1003.

Supreme Court Justices are not bound by the federal statute, but practice early developed whereby Justices who had heard a case on circuit would participate only where their presence was necessary for a clear majority decision on the appeal. In *Talbot v. Janson*, 3 Dall. 133, 168 (U. S. 1795), Mr. Justice Wilson disqualified because he had sat below and noted that the unanimity of sentiment among his brethren made it unnecessary for him to sit. See also *Hylton v. United States*, 3 Dall. 171 (U. S. 1796). At a later date it appears to have been customary for the Supreme Court Justices to hear cases both on trial and on appeal. In the case of *Mitchell v. Harmony*, 13 How. 115 (U. S. 1852), Mr. Justice Nelson tried the case and also sat on the appeal. Pending the appeal he also gave informal expression of his views on the underlying problem in litigation to a member of Congress who relayed it to the House of Representatives. CONG. GLOBE, 32d Cong., 1st Sess. (1856) 663.

88. *Spencer v. Lapsley*, 20 How. 264, 266 (U. S. 1857).

89. For example, the creditor of a bankrupt could sit in bankruptcy proceedings, *In re Sime*, 22 Fed. Cas. 145, No. 12,860 (C. C. D. Cal. 1872); that the judge was a county taxpayer did not disqualify him in a case involving the county, *Wade v. Travis County*, 72 Fed. 985 (C. C. W. D. Tex. 1896); only a party to litigation could complain of the judge's interest, *In re Milwaukee & Sawyer Bldg. Corp.*, 79 F. 2d 478 (C. C. A. 7th, 1935). In one of the wisest of the cases it was recognized that where a series of interrelated suits are pending and that a judge has a substantial interest in one of them, he should not sit in any. *In re Honolulu Consol. Oil Co.*, 243 Fed. 348 (C. C. A. 9th, 1917).

90. *Carr v. Fife*, 156 U. S. 494 (1895). *Duncan v. Atlantic Coast Line R. Co.*, 223 Fed. 446 (S. D. Ga. 1915) contains citations of federal and analogous state cases.



adequate substitute,<sup>91</sup> and the proximity of relationship required was held to be measured by the law of the state in which the court sat.<sup>92</sup>

A statute so limited was not enough. The extreme discretion left in the trial judge, the narrow grounds for disqualification, and the complete lack of disqualification for bias were obvious shortcomings. Hence when the Judicial Code was under consideration in 1911, Representatives Cullop of Indiana and Sherley of Kentucky jointly persuaded Congress to add Section 21, the most significant federal disqualification statute now in force. Modeled directly upon the Indiana practice with which Cullop was familiar, and revised on the floor of the House, Section 21 was intended to fill the need for a federal change of venue statute.<sup>93</sup>

Thus disqualification for bias and prejudice, excluded from the common law by Blackstone, finally found its way into the federal system in 1911. The statute provides that whenever a party files an affidavit affirming that the trial judge has a "personal bias or prejudice" against him or in favor of the opposing party, a new judge shall be appointed in a specified manner. The affidavit, however, must state facts and reasons to substantiate the belief that prejudice exists, and it must carry a certificate of counsel that it is made in good faith. A party is limited to one affidavit in a case and must file it within a prescribed time.

The most serious question arising under the new statute was whether the trial judge<sup>94</sup> should pass upon the truth of the charges against his own qualification, or should automatically disqualify himself when the affidavit raising the issue complied with the statutory requirements. Initial doubts as to whether the statute was to be broadly or narrowly construed<sup>95</sup> were set at rest by *Berger v. United States*.<sup>96</sup> The defendants in that case, charged with espionage, alleged that District Judge Landis was so biased against German-Americans as to preclude possibility of a fair trial. Judge Landis' phrase that "One must have a very

91. *Borgia v. United States*, 78 F. (2d) 550 (C. C. A. 9th, 1935), *cert. denied*, 296 U. S. 615 (1935).

92. *In re Eatonton Elec. Co.*, 120 Fed. 1010 (S. D. Ga. 1903); *cf. In re Fox West Coast Theaters*, 88 F. (2d) 212, 226 (C. C. A. 9th, 1937), holding a son-in-law shareholder and corporate officer not a relative for this purpose since a shareholder is not technically a "party."

93. The Cullop Amendment was proposed generally and discussed in the 61st Cong., 3rd Sess., 46 CONG. REC. 305-7 (1910), and passed the House after further discussion, *id.* at 2626-2630. The House amendment was accepted with slight modification in conference. The present Indiana change of venue statute governing criminal cases is very similar to the federal statute, IND. STAT. ANN. (Burns, 1933) § 9-1316 *et seq.*

94. The act does not apply to appellate judges. *Kinney v. Plymouth Rock Squab Co.*, 213 Fed. 449 (C. C. A. 1st, 1914).

95. *Ex parte N. K. Fairbank Co.*, 194 Fed. 978 (M. D. Ala. 1912), broadly hinted that the Act would be unconstitutional unless closely confined; and *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 43 (1913) suggested that the Act would be rarely used.

96. 255 U. S. 22 (1921).

judicial mind, indeed, not to be prejudiced against the German-Americans in this country" <sup>97</sup> lent considerable support to the claim. A majority of the Supreme Court held that the trial judge could do no more than make sure that the affidavit was "legally sufficient," in compliance with the statute, and that its factual assertions were not frivolous. Under no circumstances, the Court continued, should the trial judge pass on the truth or falsity of the charges; perjury statutes and disbarment proceedings were sufficient safeguards against abuse of the privilege.

The *Berger* decision, therefore, gave full breadth to the legislative intent behind the statute. Indeed, one may be more than a little shocked by the realization that for over a century of our history there was no statute which would make such evident bias a ground for judicial disqualification. But the clear *Berger* decision, the clear statute, and its clear legislative history have not been followed in practice, and federal trial practice still does not provide a litigant with the automatic change of venue to which he is apparently entitled upon filing an affidavit in good faith.

Frequent escape from the statute has been effected through narrow construction of the phrase "bias and prejudice." Affidavits are found not "legally sufficient" on the ground that the specific acts mentioned do not in fact indicate "bias and prejudice," a reasoning which emasculates the *Berger* decision by transferring the point of conflict. While lower courts do not assess the truth or falsity of the charge, a similar result is reached by holding that even if the facts stated are true, no "prejudice" is shown.

Examples of such evasion are numerous.<sup>98</sup> In a bankruptcy proceeding an affidavit was filed by the protective committee charging judicial bias in favor of the General Electric Company, which had made a conditional sale to the debtor. That the judge desired continuation of electric lines so as to prevent disaffirmance of the sale was supported by evidence that he had told the trustee he would not allow the Committee's petition to set aside the sale; that he had requested the trustee not to testify; and that he had turned over documentary evidence relating to the petition to an officer of the General Electric Company without the knowledge or consent of the committee. The Second Circuit Court of Appeals held *per curiam* that the "District Judge satisfactorily explains" his action and had committed no sin but that of "indiscreet expressions," and hence was not disqualified.<sup>99</sup> Another case held in-

97. *Berger v. United States*, 255 U. S. 22, 28 (1921).

98. *Craven v. United States*, 22 F. (2d) 605 (C. C. A. 1st, 1927); *Johnson v. United States*, 35 F. (2d) 355 (W. D. Wash. 1929); *United States v. Parker*, 23 F. Supp. 880 (D. N. J. 1938). For extended discussion of federal disqualification practice, see Notes (1928) 13 CORN. L. Q. 454; (1931) 65 U. S. L. REV. 68.

99. *In re Lisman*, 89 F. (2d) 898, 899 (C. C. A. 2d, 1937).

sufficient an affidavit which charged that a party had manipulated matters to have a case tried before a particular judge who had been given financial opportunities by an associate of the party.<sup>100</sup> Similarly, a judge alleged to have "expressed himself in condemnatory terms of affiant" searched the evidence and concluded that the statement made could not "by any stretch of the imagination be considered as giving any evidence of any personal feeling on the part of the court toward the affiant." Although he disqualified himself as a matter of discretion, he denied that he was compelled by the statute to do so.<sup>101</sup>

An analysis of the cases leads to the conclusion that unless and until the Supreme Court gives new force and effect to the *Berger* decision the disqualification practice of federal district courts will remain sharply limited.<sup>102</sup> While Section 21 of the Judicial Code may appear to provide a federal change of venue statute, it has not in operation attained this result.

### JUDGES AND EX-PARTNERS

Cases in which judges come into contact with former partners can be divided into those in which the case presented by a former partner was in the office at the time the judge left the firm, and those in which the case arose after the judge had severed his partnership connection. The *Jewell Ridge* case falls into the second category: portal-to-portal pay cases did not come to Justice Black's former partner until at least 16 years after dissolution of the partnership.

Judicial practice in both these situations is clear. Judges invariably disqualify themselves when the case was in the office prior to dissolution of the partnership;<sup>103</sup> otherwise it is the common practice to sit in cases argued by ex-partners.<sup>104</sup> Indeed, in the entire literature on

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100. *Benedict v. Seiberling*, 17 F. (2d) 831 (N. D. Ohio 1926).

101. *Saunders v. Piggly Wiggly Corp.*, 1 F. (2d) 582, 586 (W. D. Tenn. 1924).

102. Further limitations arise from interpretation of other passages of the statute. Hence the prejudice must be "personal" toward a party, and the extreme bias on a "legal issue," as neatly dissociated from a "party," is not a ground for disqualification. In this view, not even a prejudgment by the judge in a newspaper article is "bias," *Henry v. Speer*, 201 Fed. 869 (C. C. A. 5th, 1913). While a judge should not be disqualified for having opinions on a legal subject, *Scott v. Beams*, 122 F. (2d) 777, 788 (C. C. A. 10th, 1941), he ought to retain an appearance of impartiality, for appearances are important if the litigant is not only to receive justice, but to think that he has received justice, *Whitaker v. McLean*, 118 F. (2d) 596 (App. D. C. 1941); *Van Schaick v. Carr*, 159 Misc. Rep. 873, 289 N. Y. S. 495, 502 (Sup. Ct. 1936). Most of the federal cases cited above overlook this factor entirely. The English cases make no such error, *Cottle v. Cottle* (1939) 2 All Eng. L. R. 535; *Amar Singh v. Sadhu Singh* (1925) 6 Ind. L. R. Lahore 396.

103. This is not significantly different from the category of former client cases, in which disqualification is generally required. See for example *Slaven v. Wheeler*, 58 Tex. 23 (1882); but cf. *Merch. Nat. Bank v. Cross*, 283 S. W. 555 (Tex. Civ. App. 1926) making an exception if the judge was merely an employee and not a member of the firm.

104. Where the judge's former law partner was attorney for plaintiff and still owed the

disqualification, some twenty-five hundred cases and sixty articles, not a single instance has been found in which it is suggested that ex-partnership, by itself, should be a ground for disqualification.<sup>105</sup> Similarly, no mention of this basis is made by the American Bar Association in its code of judicial ethics.<sup>106</sup>

If a judge is to be disqualified from hearing cases argued by a former partner, disqualification must be founded on the theory that the previous association creates an intimacy which causes the arguments of counsel to have excessive weight with the judge. The difficulty with this argument, however, is that it is almost impossible to draw any rational distinction between the relationship of a judge with a former partner and that with a former faculty colleague, a former government associate, a former law clerk, a former bench associate, or simply an old friend. As has been noted above, these relationships are almost never treated as grounds for disqualification.

The practice of Justice Holmes on the Massachusetts Supreme Court may be taken as one measure of the attitude of a sensitive justice in his relations with ex-partners. A study of a dozen volumes of the Massachusetts reports picked at random from the period of Holmes' tenure shows that his principal legal associates before going on the bench, George Shattuck and W. A. Munroe,<sup>107</sup> appeared before him no less than nine times.<sup>108</sup> During this period it seems to have been normal

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judge money, the judge was held not disqualified since there was no connection between the case and the former partnership, *Schwartz Showell Corp. v. Bonfiglio*, 261 Mich. 407, 246 N. W. 162 (1933). Nebraska provides that a judge is disqualified to hear a former partner with whom he continues to office, 2 NEB. REV. STAT. (1943) c. 24, § 24-315. Some states provide that a judge may not maintain a partnership after going on the Bench. IDAHO LAWS ANN. (Anderson, 1943) c. 1, § 1-1804. Of course if a judge continues a partnership after he goes on the Bench, he cannot hear partnership cases. *Coleman v. Fisher*, 68 Fla. 56, 66 So. 290 (1914).

105. One of the few cases raising the problem of ex-partners is *Dickenson v. Parks*, Judge, 104 Fla. 577, 140 So. 459 (1932), where an ex-partner of the judge was to be a principal witness for a party on an issue of fact. The adversary party alleged that the testimony of the ex-partner would have undue weight, and also alleged that the trial judge was so prejudiced against her that he could not give a fair trial. The combination of circumstances required disqualification. In *State ex rel. Wilcox v. Bird*, 179 Okla. 594, 67 P. (2d) 966 (1937), the combined circumstances of former partner representation and the fact that the party was a former client was held sufficient to sustain a change of venue. An example of a similar holding where former partnership is but one of a very complicated set of circumstances is *State v. Marshall*, 123 Ohio St. 586, 176 N. E. 454 (1931). Cf. note 115 *infra*.

106. Canon 13 of the Amer. Bar Ass'n Code is perhaps the most nearly relevant. Its brief "legislative history" before the A. B. A. shows that the notion of possible disqualification of judges from hearing ex-partners never occurred to the delegates. See note 54 *supra*.

107. In the Pollock correspondence, Holmes refers to "my late partner Shattuck, a big fellow, to whom I was much indebted and attached." 1 HOWE, HOLMES-POLLOCK LETTERS (1941) 75-6.

108. *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699 (1897); *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764 (1887); *Snow v. Alley*, 151 Mass. 14, 23 N. E. 576 (1890); *Smyth v.*

practice in the Supreme Judicial Court for five justices, rather than the full bench of seven, to hear most cases, and Holmes could, therefore, have absented himself had he desired.<sup>109</sup>

In hearing cases presented by ex-partners Holmes followed standard Massachusetts practice. Precedent was set by Lemuel Shaw, the great early Chief Justice of Massachusetts, who, though associated with Sydney Bartlett for ten years prior to being appointed to the bench, twice heard cases in which Bartlett was counsel.<sup>110</sup> In the twelve volumes of Massachusetts reports studied there appear at least 18 instances in which members of the Holmes court sat in cases argued by former law partners.<sup>111</sup>

There is much evidence that Justices of the United States Supreme Court have taken the same view. Justices have repeatedly heard argument by former partners where the case in question was not in the office at the time of termination of the partnership, and not a single instance of disqualification for this reason has been uncovered. While there may be exceptions—data of this nature is almost impossible to search out systematically—it is certainly true that an overwhelming number of cases support Justice Black's practice.

Examples illustrative of Supreme Court custom in this respect are numerous. Justice Field sat in cases argued by David Dudley Field,

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Phillips Academy, 154 Mass. 551, 28 N. E. 683 (1891); *Day v. Worcester R. R.*, 151 Mass. 302, 23 N. E. 824 (1890); *Oliver v. Oliver*, 151 Mass. 349, 24 N. E. 51 (1890); *Townsend Bank v. Jones*, 151 Mass. 454, 24 N. E. 593 (1890); *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. 6 (1891); *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114 (1891).

109. In at least some Shattuck-Munroe cases Holmes did not sit, presumably because it was not his "turn." However the number of such cases in his first two or three years on the bench suggests that he disqualified in cases in his office at the time of his appointment. *Kansas Construc. Co. v. Topeka R. R.*, 135 Mass. 34 (1883); *Denney v. Kettell*, 135 Mass. 138 (1883); *Smith v. Brown*, 136 Mass. 416 (1884); *Sears v. Fuller*, 137 Mass. 326 (1884); *Haley v. Bellamy*, 137 Mass. 357 (1884). It seems likely that all of these cases were in the office before Holmes was appointed. In some, suit had been formally instituted before the appointment. See, for example, *Smith v. Brown*, *supra*.

110. For an incident concerning one such appearance see 1 RENO, MEMOIRS OF THE JUDICIARY AND THE BAR OF NEW ENGLAND (1900) 58; and for an example see *Boston & W. R. R. Co. v. Dana*, 67 Mass. 83, 91 (1854).

111. Chief Justice Field was a former partner of William Gaston, an ex-Governor who appeared before Field frequently, as in *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34 (1890); *Marsh v. Scituate*, 153 Mass. 34, 26 N. E. 412 (1891). In some cases both Holmes' former partner, Shattuck, and Gaston appeared, and both Holmes and Field participated; *Oliver v. Oliver*, 151 Mass. 349, 24 N. E. 51 (1890); *Smyth v. Phillips Academy*, 154 Mass. 551, 28 N. E. 683 (1891). D. W. Bond, a former partner of Judge William Allen, appeared before Judge Allen on several occasions; *Dickenson*, appellant, 152 Mass. 184, 25 N. E. 99 (1890); *Brigham v. Hunt*, 152 Mass. 257, 25 N. E. 468 (1890); *Searl v. Dwelling House Ins. Corp.*, 152 Mass. 263, 25 N. E. 290 (1890). There is, of course, possibility of making an error in compiling a list of this sort since there may be duplication of names by coincidence, and fathers may be confused with sons of the same name; but on the basis of analysis of a few volumes, it is believed that a list of 70 to 100 appearances of ex-partners could be made for the period Holmes sat on the Massachusetts Bench.

his brother and living companion, and also his former law associate.<sup>112</sup> Justice Harlan heard his former partner and close friend, Benjamin Bristow, on at least one occasion<sup>113</sup> and Justice Pierce participated in denying certiorari in a case presented by his former firm.<sup>114</sup> Similarly Justice Blatchford seems to have seen no impropriety in hearing cases argued by an ex-partner.<sup>115</sup> Justice Brandeis did not disqualify himself when his former associate, Edward F. McClennan appeared before the Court.<sup>116</sup> Almost exactly the same amount of time intervened between the termination of the Brandeis-McClennan partnership and the latter's argument in Court as had intervened between the Black-Harris partnership and the *Jewell Ridge* decision. The former partnership had, moreover, endured for a much longer time.

The practice of Justice Cardozo in hearing argument by his former associate Walter Pollak also supports Black's position. Pollak, who graduated from law school in 1910, was in the firm of Cardozo and Engelhard from 1911 to 1914. As a young man he formed an intimate friendship with Cardozo which lasted until death. Despite his youth, Pollak achieved almost instantaneous distinction in New York and is credited with having managed Cardozo's selection for his first judicial position in 1914.<sup>117</sup> On many occasions thereafter Pollak argued for the firm, then Engelhard and Pollak, before Judge Cardozo on the New York Court of Appeals,<sup>118</sup> and after the latter's appointment to the

112. See note 51 *supra*. This is not to suggest that Field offers a model of judicial decorum. It was necessary for Chief Justice Waite to remind Field on one occasion that Field was so intimately connected with certain western railroad interests as to make it undesirable for Field to write the opinion of the Court in one of their cases. TRIMBLE, CHIEF JUSTICE WAITE (1938) 260-2.

113. *Burgess v. Seligman*, 107 U. S. 20 (1882). He did not sit in *Pollard v. Vinton*, 105 U. S. 7 (1881), a case presented by Bristow which began before Harlan was appointed. For brief discussion of the affectionate relationship of Harlan and Bristow see Frank, *Appointment of Supreme Court Justices*, [1941] Wis. L. Rev. 172, 207.

114. *Minnesota Mutual Life Ins. Co. v. Marshall*, 279 U. S. 851 (1929).

115. The firm of Blatchford, Seward & Griswold was an antecedent of the present Cravath firm in New York. Prior to his Supreme Court appointment, Samuel A. Blatchford was on the Federal District bench and there was some criticism of Seward's appearances before him. To these criticisms Blatchford responded to Seward, "I hope you will decline no case before me for no reason other than such as would induce you to decline it, if it were before any other tribunal." Seward himself said: "I do not let the newspapers annoy me for I know in my own conscience, that such attitudes are utterly unjustifiable and, in such cases I have good precedents for living them down in silence." 1 SWAINE, *THE CRAVATH FIRM* (privately printed, 1946) 237-8. Cases in which Seward appeared before Blatchford in the Supreme Court are *Ames v. Kansas*, 111 U. S. 449 (1884); *St. Louis, I. M. & S. R. R. v. Southern Express Co.*, 108 U. S. 24 (1883); *Missouri, K. & T. Ry. v. Dinsmore*, 103 U. S. 30 (1883). See also SWAINE, *supra*, at 337.

116. *Helvering v. Davis*, 301 U. S. 619 (1937). Mr. Justice Jackson, then Assistant Attorney General, presented this case for the Government.

117. HELLMAN, BENJAMIN N. CARDOZO (1940) 53.

118. An example of a Pollak appearance is *Fauchogue Land Corp. v. Long Island Park*

United States Supreme Court, Pollak was counsel in the two *Scottsboro* cases.<sup>119</sup>

Precedent in the Supreme Court would, therefore, seem to indicate that Justice Jackson's position in criticising his colleague is at best tenuous. But, says Justice Jackson in his letter to the Congressional Committees, there is an exception: "I pointed out that to imply approval of his sitting would put the Court, and especially the Chief Justice, in a most inconsistent position. At that very moment the Court was disabled from hearing an important case because Chief Justice Stone declined to sit for the reason that the case was being presented by his former law partners, although he had not been associated with them for many years (the North American Co. and SEC and SEC vs. Engineers Public Service Co.)."<sup>120</sup>

Three years before, however, Chief Justice Stone had given his own public explanation of why he did not choose to participate in the *North American* case, and the reason he gave before the same Congressional Committee to which a copy of the Jackson letter was addressed was wholly different. According to his own statement the Chief Justice felt disqualified not because of a former relationship with North American's counsel but because North American itself was a former client of his.<sup>121</sup> After Congress refused to reduce the statutory quorum, the Chief Justice withdrew his disqualification and in fact did sit in the case.<sup>122</sup>

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Comm., 243 N. Y. 15, 152 N. E. 451 (1926). For an account of Pollak with a discussion of his cases see Stern, *Memorial of Walter H. Pollak (1940-41)* YEARBOOK, ASS'N OF THE BAR OF THE CITY OF N. Y. 507-13.

119. *Powell v. Alabama*, 287 U. S. 45 (1932); *Patterson v. Alabama*, 294 U. S. 600 (1935) was presented orally by Mr. Pollak, and he filed a brief in the companion case of *Norris v. Alabama*, 294 U. S. 587 (1935).

120. Letter of Associate Justice Robert H. Jackson to Congressional Judiciary Committees, N. Y. Times, June 11, 1946, p. 2, col. 6.

121. "In these cases, the disqualifications were due to one of two causes. As you know, we have a number of ex-Attorney Generals and an ex-Solicitor General on the Court, and in these particular cases, a number of members of the Court have had something more to do with the case than the mere pro forma relations which an Attorney General often has with cases in the Department of Justice.

"In one of the cases, the *North American Company* case also, that company is an old client of the law firm of which I was formerly a member. As a youngster in the office, I ran errands for it. It was one of our important clients after I became a partner in the firm. It so happened, I think, that I never had any particular personal relations with that particular client, but you can readily understand how undesirable it would be for a member of the Supreme Court to sit in the case of the client of his former firm, even though his relations with the client had not been at all personal."

*Hebrings before House Judiciary Committee on H. R. 2808*, 78th Cong., 1st Sess. (1943) 124. At another point the Chief Justice reiterated that the Court might lose its quorum because of the presence of a large number of ex-Department of Justice officials on the Bench and because "there is always the chance that a Justice who has been in active practice will have someone before him who has been a client." *Id.* at 25.

122. *North American Co. v. SEC*, 327 U. S. 686 (1946) (finally decided April 1, 1946).

Furthermore, in several other cases arising both before and after the *Jewell Ridge* case and before the Jackson letter, Stone did participate in decisions though Sullivan and Cromwell, his former firm, was counsel.<sup>123</sup>

The practice of state supreme courts and federal circuit courts is substantially in accord with that of the Massachusetts court at the time of Holmes and of the United States Supreme Court. Although judges responding to the Inquiry without exception disqualified themselves when a former partner presented a case which was in the office on termination of the partnership, more than eighty percent of the state and federal courts reporting a Yes or No answer do not disqualify merely because the attorney in a case is a former partner.

### CONCLUSION

So general a subject and one with so many facets as disqualification scarcely permits of any conclusion more rounded than the obvious one that the law grows apace. There is near unanimity of opinion among courts as to the major situations which require disqualification on the founding ground of interest; in the newer fields of relationship and bias there is somewhat more division. The fastest growth today is in connection with relationship of judge to attorney, and there it may be

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123. The inconsistency of Chief Justice Stone's practice in cases where his former firm was counsel suggests that he may have weighed each situation separately and not applied a mechanical rule of thumb. He participated in decisions where the firm was representing a former client in two cases. *New York Life Ins. Co. v. Sliosberg*, 275 U. S. 526 (1927); *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943). Under similar circumstances he did not participate in two cases. *United States v. Goldman*, 277 U. S. 229 (1928); *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936). He did not participate in the petition for certiorari by the *North American Co.*, *North American Co. v. SEC*, 318 U. S. 750 (1943), and in the first decision in which four justices disqualified themselves, *North American Co. v. SEC*, 320 U. S. 708 (1943). As noted in the text he later withdrew his disqualification and participated in the decision. *North American Co. v. SEC*, 327 U. S. 686 (1946).

Where the party was not a former client he participated in *Helvering v. Watts*, 296 U. S. 387 (1935); *Ripperger v. Allyn*, 311 U. S. 695 (1940); *Vinson v. Washington Gas Co.*, 321 U. S. 489 (1944); *FTC v. A. P. W. Paper Co.*, 326 U. S. 704 (1945). Although the party was not a former client he disqualified himself in *Banque de France v. Supreme Court of New York*, 316 U. S. 646 (1942).

The foregoing data was collected by Mr. Eustace Seligman, a former partner of Stone. Mr. Seligman adds the following comment: "It does not seem possible from the above list [of cases] to ascertain any consistent policy on Justice Stone's part. The explanation of why he participated in Cases 1 and 7 [the *Sliosberg* and *Perkins* cases] may be that owing to the large number of clients of Sullivan and Cromwell, Justice Stone did not know in these cases whether they had been clients of the firm at the time that he was a member of it. However, there may have been other considerations present in his mind such as for example whether or not he himself had any personal relationship with the client while he had been a member of the firm, as to which facts cannot now be ascertained.

"Also in Case 6 [the *Banque de France* case] he appears to have followed a different and stricter rule than in the other cases."



noted that the trend has turned toward more general disqualification. The whole series of distinctions based on presence or absence of a contingent fee would seem at best a little silly, a reduction of the Yes or No of disqualification to a level of grossness quite out of keeping with the real moral values involved; and the sooner law based on such distinctions disappears, the better.

On the momentarily spectacular problem of hearing ex-partners, there is little that need be said when the evidence is in. Justice Black heard an ex-partner twenty years after termination of the association. In so doing he seems to have done pretty much what all judges do. Not a case can be found to say him wrong, and over 80% of the state and federal judges responding to the Inquiry follow the same rule. Black's practice is at one with that of Justices Field, Harlan, Blatchford, Butler, Holmes, Brandeis, Cardozo, and Stone. Indeed it is doubtful that any Supreme Court Justice has decided this question differently. Had Black disqualified, he would have departed from the traditions of 150 years.

## APPENDIX

### THE INQUIRY INTO CONTEMPORARY PRACTICE

IN studying disqualification in appellate courts, it should be apparent that what judges do is a more real source of knowledge than what they say; for disqualification by appellate judges seldom calls for formal opinions. This is particularly true in matters of considerable delicacy of judgment, as in the case of the intimate friend as counsel where the decision concerning judicial conduct is unquestionably a matter of discretion.

To the end of determining what appellate judges actually do, the following Inquiry was submitted to the forty-eight state chief justices and to at least one judge—usually the senior circuit judge—of each federal court of appeals. Thirty-one state courts and eight of the eleven federal courts answered the Inquiry.

One point must be strongly emphasized in presenting the answers: these judges were asked, not for their opinions as to what might be desirable for others, but for their practice. The questions were presented deliberately to avoid asking the judge of one court what he thought about the practice of any other.

The Inquiry was circulated with the assurance that if any contributing judges desired that their reports be kept confidential, they would be so held by the Yale Law School Library for a twenty-year period. A very small proportion indicated that they preferred that their reports be kept confidential; and this proportion is so small that were their names omitted from listings it would be quite apparent which they were. In order to insure that their

reports would be kept confidential, it has appeared desirable to list the results by total only.

The state courts contributing are: Alabama, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming. All responses were by the chief justices except in the case of North Carolina where the response was made by the marshal. Not every question was answered by each court, and hence totals are not quite uniform. The New York Court of Appeals, after consideration of the Inquiry in conference, concluded that their practice is so entirely personal that most of the questions could not be answered. The questions thus designated by that court have been recorded in the totals under "no uniform practice."

The federal courts responding were the First, Second, Third, Fourth, Seventh, Eighth, and Tenth Circuit Courts of Appeals and the District of Columbia Court of Appeals. A member of the Ninth Circuit Court of Appeals explained the practice in his Circuit did not permit of categorization sufficient to permit answers to the specific questions. In some cases, notably in the Second and Fourth Circuits, responses to the Inquiry were made by the senior circuit judge and one or more other judges and occasionally there was some deviation among these answers. In such instances the response of the senior circuit judge is used for the totals published.

The replies of state courts are listed under "S" and those of federal courts under "F."

# I. INTEREST

	Yes		No		No uniform practice		Problem has not arisen	
	S.	F.	S.	F.	S.	F.	S.	F.
Is it the practice of judges of your court to disqualify in any of the following situations?								
1. Judge owns stock in corporate party <sup>1</sup>	26	7	0	1	2	0	3	0
2. Judge has other pecuniary interest in party	27	5	0	0	1	1	3	2
3. Outcome of case may affect taxes in judge's local community	0	0	26	5	2	0	3	3
4. Outcome of case may affect public utility rates in judge's home community	1	1	20	4	2	0	8	3

1. Two state and two federal courts stated that judges have participated, usually because the disqualification was waived, where a judge's stock ownership was extremely small. The one federal answer in the NO column on this question is entered there because the only instance in which the problem has arisen in recent years was in a case of an extremely slight holding; and the judges of that court would presumably disqualify if their holdings were material.

## II. RELATIONSHIP

	Yes		No		No uniform practice		Problem has not arisen	
	S.	F.	S.	F.	S.	F.	S.	F.
Is it the practice of judges of your court to disqualify in any of the following situations?								
1. Party is relative <sup>2</sup>	26	5	0	1	0	1	2	1
2. Attorney directly participating is relative and:								
(a) receives contingent fee	19	5	2	1	3	0	5	2
(b) receives no contingent fee	14	5	6	1	4	0	6	2
3. Attorney not directly participating is relative and another member of his firm or office is directly responsible for case; and:								
(a) firm or office receives contingent fee	10	2	5	2	4	0	10	4
(b) firm or office does not receive contingent fee	7	2	7	2	6	0	9	4

## III. BIAS

Is it the practice of judges of your court to disqualify in any of the following situations?

## A. Attorney Contact

1. Attorney in case is former partner and:								
(a) case was in office at time of termination of association	26	6	0	0	1	0	2	2
(b) case was not in office at time of termination of association <sup>3</sup>	4	1	21	5	4	1	1	2
2. Attorney in case is former faculty colleague	0	0	7	5	1	0	22	3
3. Attorney in case is former law clerk	2	0	16	6	2	0	11	2
4. Attorney in case is intimate personal friend <sup>4</sup>	3	0	17	6	10	2	1	0

2. The one federal court answering this question NO added "unless the relation is close." The same court answered that the judges would disqualify in the case of an attorney relative if the attorney were a son, but not if he were a more distant relative.

3. One state added that in this and several situations the judge whose qualification is in question does not write the opinion. One federal judge who specifically emphasized that he could not describe the practice of his associates, answered that he disqualified in cases of appearance by former partners. His senior circuit judge gave the contrary answer for the circuit.

Another state court, having no uniform practice, replied that its members disqualify "usually but not always. In some instances there is participation, where the association was terminated many years before—e.g., 20 years, and the judge feels he can act fairly."

One federal judge, responding that neither of the former partner situations has arisen, added: "In my opinion a judge would disqualify in (a) but would not do so in (b) unless either (1) the partnership was of recent date or (2) there was reason to think the partner had been retained because of the former connection."

4. One federal court answered NO, but indicated that the answer would differ if the judge were "conscious of a burden in throwing off such feelings."

	Yes		No		No uniform practice		Problem has not arisen	
	S.	F.	S.	F.	S.	F.	S.	F.
<i>B. Party Contact</i>								
1. Party in case is former client and:								
(a) case was in office prior to judge going on Bench	27	7	0	0	1	0	3	1
(b) case was not in office prior to judge going on Bench <sup>5</sup>	5	2	16	5	6	1	2	0
<i>C. Government Contact</i>								
1. Judge is former government attorney (federal, state, or local) and:								
(a) case is one in which judge personally participated for government; or	19	3	0	0	2	0	10	5
(b) case is presented by attorneys with whom judge was associated in government; or	5	1	10	3	2	0	14	4
(c) judge participated in formulation of policy which case involves	10	1	1	1	4	1	16	5
2. Judge is former member of Legislature or Congress, and case involves Act in passage of which he played significant part	5	1	4	2	6	1	16	4

#### IV. GENERAL

1. Do ex-members of your court on occasion practice before it? <sup>6</sup>	26	2	4	2	0	0	1	4
2. Do individual judges when doubtful concerning their own disqualification consult the other members of the Court?	27	6	1	0	3	2	0	0
3. Do judges disqualify at the suggestion of counsel in cases in which the judge himself considers the allegations of counsel baseless? <sup>7</sup>	3	3	8	1	5	1	15	3

5. One state court answering NO reserved the question of a long-time attorney-client relationship.

6. One state court answering YES noted that the ex-members of the court file briefs but do not usually appear before it.

7. The federal court answering in the negative notes that the problem has arisen only once.