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Judges--Disqualificationn to Act Because of Stock Interest

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JUDGES — DISQUALIFICATION TO ACT BECAUSE OF STOCK INTEREST

I. Introduction and General Background

Aliquis non debet esse judex in propria causa.[1]

Disqualification to adjudicate a cause rests on this ancient maxim that no man should sit as a judge in his own case. At common law a judge was disqualified only for a direct pecuniary interest.[2] Bracton tried unsuccessfully to incorporate into English law the view that a mere suspicion of an interest by a party was a basis for disqualification.[3] Coke, however, by reference to cases involving the judge's pocketbook, first set the standard for his time in his injunction that "no man shall be a judge in his own case."[4] Since someone must hear a case which is properly before the court, there is a balancing view of necessity which dictates that a judge should not be disqualified if at all possible.[5] Notwithstanding the necessity doctrine, the disqualification rule existed at common law, was adopted by English jurists, and has been accepted by the American courts. The ultimate purpose of such a rule has been and is to further the best interests of justice by preserving the integrity and the impartiality of the courts and the respect and the confidence of the people for their decisions.[6]

The purpose of this article is to focus on the disqualification of a judge because of a stock interest, which is a small facet of

1. *See* Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947), *quoting from*: Co. Litt. *141a.

2. 46 Am. Jur. 2d *Judges* § 94 (1969) states that at common law the judge could not be challenged in the proceeding itself, but that he was expected to exercise sound discretion in refraining from trying cases involving circumstances which might cast doubt or suspicion on the fairness of the court.

3. *See* Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947), *quoting from*: 4 Bracton, De Legibus et Consuetudininibus Angliae (Woodbine's ed. 1942) 281.

4. *Id.* at 610, *quoting from* Co. Litt. *141a.

5. *See generally* Pollock, First Book of Jurisprudence 270 (6th ed. 1929); 29 Harv. L. Rev. 103 (1915); 42 Mich. L. Rev. 1127 (1944); Annot., 39 A.L.R. 1476 (1925) (all dealing with the doctrine of necessity).

6. Carr v. Duhme, 167 Ind. 76, 78 N.E. 322 (1906); *accord*, V'ren v. Bagley, 118 Or. 77, 245 P. 1074 (1926); Leonard v. Willcox, 101 Vt. 195, 142 A. 762 (1928).

the disqualification rule, but one of current public interest.[7] Other than a South Carolina statute concerning disqualification because of relationship to the parties,[8] the only guide for disqualification of a judge in this state is that portion of the South Carolina Constitution which provides:

> No judge shall preside at the trial of any cause in the event of which he *may be interested*, or when either of the parties shall be connected with him by affinity, or consanguinity, within such degrees as may be prescribed by law . . . .[9]

Since there are no South Carolina cases which interpret the word "interest," decisions from other jurisdictions with similar statutory language will be examined to aid in ascertaining what constitutes a disqualifying stock interest within the meaning of the above constitutional provision. Such examination, first, will suggest basic guidelines for interpretation of the constitutional provision by the state judiciary, and second, will suggest whether further legislative action, by amendment or statute, is necessary to define what the term, "interest," encompasses as that term relates to a stock interest. For purpose of discussion decisions from other jurisdictions may usefully be divided into two groups: those which adhere to a *strict* interpretation of the word, "interest," and make disqualification the general rule where the issue is raised; and those which espouse a *liberal* interpretation of the term and thus make disqualification the exception to the general rule.

II. Disqualification Because of Stock Interest

A. Strict Interpretation

In *Pahl v. Whitt*,[10] the Texas court announced what might be termed a strict interpretation of a constitutional provision which states that "[N]o judge shall sit in any case where he may be interested . . . ."[11] The case was initiated by appellants for them-

7. The current and continuing controversy over both judicial and legislative ethics at the national and at the state level prompted the original inquiry into this subject. See n.51 *infra*.

8. S. C. Code Ann. § 15-10 (1962) provides:
No judge or other judicial officer shall preside on the trial of any cause when he may be connected with either of the parties by consanguinity or affinity within the sixth degree.

9. S.C. Const. art. V, § 6 (emphasis added).

10. 304 S.W.2d 250 (Tex. Ct. Civ. App. 1957).

11. Vernon's Ann. St. Const. art. V, § 11 (1876) (cited by the court).

selves and every member of the cooperative, of which the judge was a member, to recover money that the cooperative had expended in defense of certain libel suits brought against directors of the cooperative as individuals. *Pahl* held that a stockholder in a corporation is disqualified to sit as judge in a case wherein the corporation is a party. Even though the court could have stopped with that statement, the court further evidenced its strict view of the cited language by stating that, although the judge is the proper one to pass on disqualification, the constitutional provision in question does not allow him much discretion in determining what amounts to a disqualifying interest. Whatever benefits might be gained from the pending litigation would inure to the benefit of the trial judge. Although the judge was only one of 5,000 members of the cooperative, the court construed the word, "interest," to be absolute and refused to delve into the degree of interest.

The trial judge had stated before the trial that he was a member of the cooperative, but felt that he could try the case with fairness and impartiality. The attorneys, therefore, agreed to waive any disqualification if there were in fact grounds for such. The court seized, nevertheless, upon the words, "may be interested," and concluded that a judge should be disqualified where there is any doubt about an interest. The court found, moreover, that there was no provision for waiver of disqualification. As the *Pahl* case demonstrated, under the strict view there is very little room for interpretation. Since there is no need to delve into degrees of interest, or to consider a waiver of disqualification, the Texas court appeared to have no problem with the constitutional language which is almost identical to that of South Carolina's constitution.

In *State ex rel. Central Farmers' Trust Co. v. Chillingworth*[12] the court disqualified the trial judge pursuant to its strict construction of the Florida statute.[13] The suit was against an insolvent bank to foreclose a trust deed. The bank owned a $500 bond secured by the trust deed. The judge was a creditor of the bank and was a minority stockholder in a corporation that was a debtor and creditor of the bank. Even though the judge knew nothing of the bank's ownership of the bond until after both the creditor-debtor relationships had ceased to exist, the totality

12. 107 Fla. 747, 143 So. 249 (1932).
13. REV. GEN. ST. § 2525 (Fla. 1920) [Presently F.S.A. § 38.02 (1961)] which in its older version read: "[O]r is interested in the result thereof . . . ."

of these facts made the judge "interested" in the foreclosure action. The court conceded that it was interpreting the word, "interest," but like the Texas court, it declared that there was little room for interpretation in determining what amounts to a disqualifying interest. The court stated:

> The terms of the statute are clear and unequivocal, permitting no exception or modification. Any other interpretation placed on it than the one here applied would open the way for endless qualifications never intended by its enactment and would doubtless result in many cases of a defect of the administration of justice.[14]

In another case,[15] the Florida court refused to delve into the degree of interest and held that a judge owning a majority of stock in a corporation which owned shares of stock in the receiver bank was deemed disqualified to determine the rights of that bank. The determination would necessarily affect the value of bank stock, and, in turn, the value of the corporation stock held by the judge. Even though the degree in which the value would be affected was very small, degree of interest was held to be immaterial.

Similar language in a California statue[16] was construed in *Adams v. Minor*[17] where the court held that a judge who owned stock in a bank, intervening in a proceeding before him involving the validity of bonds owned by the bank, was an "interested" party and was disqualified to sit. The fact that the trial judge, believing he was not disqualified, sat throughout the trial with the consent and at the request of the attorneys was immaterial to the question of disqualification under the statutory language. The fact that the judge had disposed of his stock pending a decision similarly did not remove his disqualification to render a decision, because disqualification attaches once the cause is submitted to the judge for decision. This court also followed the strict doctrine of no waiver of disqualification even though the parties agreed that the judge should hear the case even if there were grounds for disqualification. Strict construc-

14. State *ex rel.* Central Farmers' Trust Co. v. Chillingworth, 107 Fla. 747, —, 143 So. 294, 295 (1932).
15. State *ex rel.* First Am. Bank & Trust Co. v. Chillingworth, 95 Fla. 699, 116 So. 633 (1928).
16. CAL. CIV. PROC. CODE § 170 [Presently WEST'S ANN. CAL. CODE § 170 (1954)] which in its older version states:
> No justice, judge . . . shall sit or act as such in action or proceeding: (1) To which he is a party or in which he is interested. . . .
17. 121 Cal. 372, 53 P. 815 (1898).

tion was evidenced by the court's statement that it could not consider the amount or remoteness of the stock interest. Because interest affects different people in different ways and because it is impossible to draw an accurate line as to what constitutes a disqualifying stock interest, the court refused to go into the degree of interest.

The California court in *Vallejo v. Superior Court*[18] held the judge disqualified in a condemnation proceeding brought by the city of Vallejo to condemn certain land for a reservoir. The Bank of Napa, a banking corporation, was the owner and holder of a deed of trust pertaining to the property sought to be condemned. The judge was a stockholder in and director of the Bank of Napa, which had a proprietary interest in the determination as a creditor, and would have been entitled to have any condemnation award applied to its claim. In finding that the knowledge of the parties of the judge's interest did not amount to a waiver, the court, in following its strict construction of the statute, quoted from the New York case of *Oakley v. Aspinwall*[19] which stated:

> But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibitions of a law, which was not designed merely for the protection of the party to a suit, but for the general interest of justice.[20]

Placing added emphasis on the need for confidence and respect for judicial decisions, the court said: "[T]he judiciary shall enjoy an elevated rank in the estimation of mankind."[21] It made no difference to this court that the party's interest was small, because the decisions are for the protection of the public interest as well as of the parties.

In *Tatum v. Southern Pacific Co.*[22] and *Central Pacific Railway Co. v. Superior Court*[23] the courts were acting pursuant to statutory language which was much more definitive than the word "interest". The pertinent language in the statute construed in these two cases provided:

> No justice or judge shall sit or act as such in any action or proceeding:

18. 199 Cal. 408, 249 P. 1084 (1926).
19. *Id.* at 415, 249 P. at 1086 *citing* 3 N.Y. 547 (date unknown).
20. Vallejo v. Superior Ct., 199 Cal. 408, 415, 249 P. 1084, 1086 (1926).
21. *Id.* at 415, 249 P. at 1086.
22. 250 Cal. App. 2d 40, 58 Cal. Rptr. 238 (1967).
23. 211 Cal. 706, 296 P. 883 (1931).

. . . .

2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation.[24]

Tatum held that, even though the judge was a mere holder of corporate stock as trustee of a testamentary trust, his judgment in favor of the corporate defendant on the issue of liability in a personal injury case should be vacated. This court found it immaterial that neither the judge nor the parties were aware that the corpus of the trust contained stock of the corporate party, and that the judge's interest as trustee probably would not be affected by the outcome of the case. The court pointed out that no consideration of awareness, or knowledge of interest, is mentioned in the statute. The statute was construed so as to fulfill the object of guarding the impartiality of judges and of insuring public confidence in judicial decisions. Although the decision could have had very little effect on the judge's interest, the court found that the statute was cast in absolute form and that public confidence must be preserved by a strict construction of the phrase, "in which he is interested. . . ."[25]

Although the language in the California Code is explicit as to what amounts to a disqualifying stock interest, and thus, apparently conducive to a strict interpretation, the California court in *Central Pacific Railway Co. v. Superior Court*[26] reported what seems to be a somewhat liberal interpretation. The majority did delve into the degree of interest required to disqualify under the statute and decided that a judge was not disqualified where he was a stockholder in one corporation which in turn owned practically all the stock of a second corporation which was a party before the court. As might be anticipated, the dissenting opinion criticized this holding, stating that the interpretation was too narrow and that the interest involved was a disqualifying interest.

The New York courts have likewise strictly interpreted the New York statute,[27] and have held that a judge was disqualified where he was a stockholder in a corporation instituting an action

24. WEST'S ANN. CAL. CODE § 170 (1954).
25. Tatum v. Southern Pac. Co., 250 Cal. App. 2d 40, 58 Cal. Rptr. 238 (1967).
26. 211 Cal. 706, 296 P. 883 (1931). *See* Goodspeed v. Great Western Power Co., 65 P.2d 1342 (1937); Cohn v. Superior Ct., 57 P.2d 186 (1936).
27. N.Y. CONSOL. LAWS, ch. 30, § 15 (1909) provides:
A judge shall not sit as such in, or take part in the decision of, a cause or matter . . . in which he is interested.

in the county court, and that consent of the parties could not confer jurisdiction upon him to try the case.[28] It is interesting to note that the New York legislature has now provided for a waiver of disqualification by statute which states:

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, . . . or in which he is interested, ... No justice shall be deemed disqualified from passing upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided, that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge.[29]

Thus the New York and California courts have meritoriously responded to the interpretation problem by enacting statutes which spell out some of the aspects of the judge's stock interest.

B. Liberal Interpretation

Other jurisdictions interpreting the word, "interest," favor the necessity doctrine that a judge shall act if at all possible. As might be anticipated, such jurisdictions espouse a liberal construction of the term, "interest," and disqualification of judges is difficult.

The Georgia court in *Beasley v. Burt*[30] found that an interest was present, but, following its liberal inclination, the court held the judge not disqualified because of his remote interest. In an application for a charter by a new bank, the judge's wife owned an interest in stock of an existing bank which was not a party to the suit, and the only possible interest which the existing bank had in the case was the loss of business which it might suffer through legitimate competition if the proposed new bank was established.[31] This court was quite willing to delve into the degree of a judge's interest, whereas strict construction jurisdictions generally disqualify a judge once they find that there may be any interest.

In *Adams v. Overland-Madison Co.*,[32] the Georgia court held

28. Queens-Nassau Mortgage Co. v. Graham, 157 App. Div. 489, 142 N.Y.S. 589 (1913).
29. N.Y. JUDICIARY LAW § 14 (1968).
30. 201 Ga. 144, 39 S.E.2d 51 (1946).
31. *Id.* at 149, 39 S.E.2d at 53.
32. 27 Ga. App. 531, 109 S.E. 413 (1921).

that, according to statute,[33] the fact that the judge was one of the original applicants for a charter is not sufficient to show that he was a stockholder at the time when the case was tried. Quite unlike the courts which have been classified in the strict construction category, the Georgia court was willing to find a waiver of disqualification even though the statute makes no mention of such waiver. The waiver is implied by proceeding with the trial without objection by either party.[34]

The statutory language of various states having been discussed, it is advantageous at this point to consider the applicable federal statutory language in this area. The pertinent federal statute[35] before it was amended might well have been construed to be in the strict interpretation category. It is necessary to note the older version of the statute in order to ascertain the significance of the language as amended.

In the case, *In re Honolulu Consolidated Oil Co.*,[36] the United States government, as a part of a unitary scheme or plan of litigation, brought a series of suits against various oil companies to acquire possession of oil land and damages for the value of oil or minerals previously extracted therefrom. The judge owned stock in one of the oil companies and was disqualified to sit by the court of appeals. The judge had suggested his disqualification by disclosure of his ownership of stock, and the parties had waived it, but the circuit court said that the only question was whether the judge was in "any way concerned in interest in the pending suit . . . ."[37]

The federal statute has now been amended to read:

> Any justice or judge of the United States *shall disqualify himself* in any case in which he has a *substantial interest* . . . as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[38]

In construing the above language the court in *United States*

33. GA. ACTS 1880-1 p. 58 [Presently GA. CODE ANN. § 24-102 (1958)] provides:

> No judge or justice of any court . . . shall sit in any cause or proceeding in which he is pecuniarily interested. . . .

34. Adams v. Overland-Madison Co., 27 Ga. App. 531, 109 S.E. 413 (1921).

35. 28 U.S.C. § 455 (1965) before amendment read: "[C]oncerned in interest in any suit." This language was changed in the 80th Congress House Report No. 308.

36. 243 F. 348 (9th Cir. 1917).

37. *Id.* at 351-52 (emphasis added).

38. 28 U.S.C. § 455 (1965) (emphasis added).

Fidelity & Guaranty Co. v. Lawrenson[39] held that the judge was not disqualified where he had at one time owned stock in a corporation presently interested in the litigation pending before him since he had disposed of such stock prior to the commencement of the litigation. The interpretation given by this court indicates that the disqualification is left to the conscience of the judge.[40]

Although the courts in the strict interpretation group refused to go into the degree of interest once an interest was found to be present, the construction of the federal statutory language[41] in *Lampert v. Hollis Music, Inc.*[42] has resulted in a judge's not being disqualified where he owned twenty shares of common stock of a corporation with almost fourteen million outstanding shares. In the *Lampert* case the court distinguishes between the present statutory language, "substantial interest," and the older language, "any interest." There is no concrete rule as a guide as to what constitutes a "substantial interest," and each court must therefore interpret the term on a case by case basis.[43] Under South Carolina's present statutory language, it might be argued that it is not proper to delve into degree of interest, because the word, "interest" does not have any qualifying adjective, such as "substantial," as in the federal statute.

The interpretation of the federal statute has also reached the end of the liberal spectrum in that waiver is permitted even where there is a "substantial interest" as long as the judge decides within his own conscience that it is a proper case for him to hear. In the *Lampert* case a letter from the attorney requesting the judge to act was construed as a waiver. Disqualification is waived under the federal statute if not made the basis of a timely motion,[44] and even where there are affidavits attacking the qualification of the judge, the decision must be left to the informed discretion of the individual district judge.[45]

C. Judicial Ethics

The standards of conduct for members of the courts are spelled out in the Canons of Judicial Ethics adopted by the

39. 344 F.2d 464 (4th Cir. 1964).
40. United States v. Bell, 351 F.2d 868 (6th Cir. 1965); MacNeil Bros. Co. v. Cohen, 264 F.2d 186 (1st Cir. 1959); Voltman v. United Fruit Co., 147 F.2d 514 (2d Cir. 1945).
41. 28 U.S.C. § 455 (1965).
42. 105 F.Supp. 3 (E.D.N.Y. 1952).
43. *Id.*
44. Adams v. United States, 302 F.2d 307 (5th Cir. 1962).
45. Wolfson v. Palmiere, 396 F.2d 121 (2d Cir. 1968).

American Bar Association in 1923.[46] There are several Canons of Judicial Ethics[47] which might bear upon the topic of discussion, but three are especially applicable in connection with disqualification for interest.

Canon No. 25 states:

> A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprizes . . . .[48]

Canon No. 26 states:

> A judge should abstain from making personal investments in enterprizes which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss.[49]

Canon No. 29 states:

> A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.[50]

Although these Canons of Judicial Ethics set up guidelines for judges, they are not applicable to the judiciary of South Carolina as this state has never adopted them; and even if adopted, it appears there are no means of enforcement.[51] The Supreme Court of South Carolina apparently does not have any authority to discipline any judge as there is no provision in the rules of

46. A.B.A. CANONS OF JUDICIAL ETHICS (1923).
47. *See, e.g.*, A.B.A. CANONS OF JUDICIAL ETHICS (1923):
No. 2. Courts exist to promote justice, and thus to serve the public interest.
No. 4. A judge's official conduct should be free from impropriety; and the appearance of impropriety; he shall avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.
48. A.B.A. CANONS OF JUDICIAL ETHICS, No. 25 (1923).
49. *Id.* No. 26.
50. *Id.* No. 29.
51. Wickenberg, Ethics and S.C. Judges, The State (Columbia), Dec. 7, 1969, § B, at 1, Col. 1-3.

the court or in the law books for disciplining a judge for misbehavior or incompetence short of impeachment by the legislature.[52] South Carolina could begin its step forward by adopting the Canons of Judicial Ethics, and by providing authority and procedural means for policing the rules. The parties and their attorneys should have the means to challenge a judge's qualification; the public and anyone interested should also have an opportunity to register complaints with an investigative committee.

Bernard G. Segal, president of the American Bar Association, has appointed a panel of nine, chairmaned by former Chief Justice Roger Traynor of the California Supreme Court, to formulate a comprehensive new code of ethics to replace the forty-six year old Canons of Judicial Ethics. Segal stated:

> "[P]ublic confidence in the courts rests heavily upon the reliance of the people in the integrity of the judge. The canons must be clear and unequivocal to members of the judiciary and the public alike, and they must call for the high standards of fidelity and performance citizens expect of their judges."[53]

III. CONCLUSION

Two fundamental policies exist in the field of disqualification. All courts want justice, but if disqualification of judges is too strict, both the cost and the delay of justice increase because the case is postponed or another judge is brought in to hear it. If disqualification is too liberal and judges with substantial stock interests are allowed to sit, cases may, however, be decided with less delay, but unfairly. South Carolina could best approach these policies by following a balanced interpretation of "interest" rather than either the liberal or the strict interpretation. It would be advantageous to have a strong disqualification rule with provisions for consideration of degree of interest and waiver in the proper circumstances. Some positive action is needed in this area to maintain the public confidence in our judicial system. As an immediate step, it has been suggested that South Carolina adopt the present Canons of Judicial Ethics of the American Bar Association and provide adequate means to see that they are enforced. South Carolina should also be prepared to consider the new canons when they are compiled.

52. *Id.*
53. 14 AMERICAN BAR NEWS, No. 10 (October, 1969).

Presently, the only requirement for the judiciary of this state is that they not sit on a case in which they have an "interest," but the lack of any specific statutes relating to stock interest should not permit the judiciary to dismiss the idea of disqualification because of such interest. Judges still have a duty to disqualify themselves when they are "interested." Disqualification is discretionary in South Carolina, but with an absence of the needed guidelines, this discretion must not be allowed to cease to function if the public's confidence in judicial decisions is to be maintained. It is not suggested that a judge limit his financial speculations; rather, the suggestion is that there be alert recognition of situations which might warrant disqualification. Although judges possess human frailties, justice in its highest form is expected from members of the judiciary. This is an era of judicial scrutiny, and it is imperative to the quality of our judicial system that the scrutiny result in a finding that fundamental to American jurisprudence, even now, is the unblemished maxim:

Aliquis non debet esse judex in propria causa.

CODY W. SMITH, JR.