

## Louisiana Law Review

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Volume 19 | Number 3

April 1959

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### Repository Citation

Ralph Slovenko, *"Je Recuse!": The Disqualification of a Judge*, 19 La. L. Rev. (1959)

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# “Je Recuse!”: The Disqualification of a Judge

Ralph Slovenko\*

“O, what may man within him hide,  
“Though angel on the outward side!”

— Shakespeare, *Measure for Measure*,  
Act III, Scene ii, lines 251-2.

## I. IN GENERAL

Socrates postulated that “Four things belong to a judge: To hear courteously, to answer wisely, to consider soberly, to decide impartially.”<sup>1</sup> The well-advertised slogan through the ages of the “cold neutrality of an impartial judge”<sup>2</sup> has given rise to the belief that a judge must not be anti-anything.<sup>3</sup> When, in 1956, Jean-Paul Sartre in a letter to the *New York Times* expressed his view that Morton Sobell was innocent of the charge of conspiracy to commit espionage, the United States Attorney in the case replied to Sartre’s letter with the sententious rebuke: “Philosophers should be careful not to substitute emotion and prejudice for true inquiry and objectivity.”<sup>4</sup>

A judicial decision is a decision by a human being called a judge. More often than not, it is forgotten that a judge is a human being, and that, as a human being, his action is shaped by his heredity and by his environment. Among those influences which affect judicial decisions are the judge’s education and associations, his political and economic and social philosophy,

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1. Quoted, among many places, in Lazarus, *In Memory of Charles A. O’Neill*, 219 *La.* xxxix (1951); Yankwich, *The Art of Being a Judge*, 105 *U. PA. L. REV.* 374, 385 (1957).

2. This expression of Burke’s is employed in *State v. Bordelon*, 141 *La.* 611, 75 *So.* 429 (1917). See also *Palmer v. Atkinson*, 116 *Fla.* 366, 156 *So.* 726 (1934).

3. See, e.g., Lummus, *Our Heritage of Impartial Justice*, 19 *B.U.L. REV.* 2 (1939); Pound, *Justice According to Law*, 13 *COLUM. L. REV.* 696, 710 (1912). It was “Blackstone’s axiom that the judge is a mere passive oracle or mouth-piece of a somewhat called Law, a sort of a speaking-tube through which Law talks to the laity.” Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORNELL L.Q.* 568, 582 (1932).

4. Letter of Mr. Paul W. Williams, United States Attorney for the Southern District of New York, to *New York Times*, June 26, 1956, p. 28, col. 6, in reply to Sartre’s letter of June 15, 1956.

and his economic and social status.<sup>5</sup> The act of becoming a judge does not convert a person into an individual without emotion and prejudice. Human motives and mental processes are not transformed when one assumes the judicial function. As Judge Frank put it, "Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."<sup>6</sup> In a similar vein, philosopher Morris Cohen wrote: "The dogma that judicial decisions follow logically from the provisions of the Constitution involves the unbelievable psychological assertion that when men mount the judicial bench they become, unlike all other human beings, altogether free from personal or class bias or the prejudices of their limited education and experience. History, however, indicates that their actual decisions do depend upon their personal, social, and economic opinions."<sup>7</sup> Professor Alban Win-

5. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); DIENSTEIN, *ARE YOU GUILTY?* 93-97 (1954); Chafee, *Economic Interpretation of Judges*, 31 *NEW REPUBLIC* 36 (June 7, 1922); Davidson, *Judge Goldsborough Takes the Stand*, 122 *COLLIER'S* 20 (Aug. 7, 1958); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929); Schroeder, *The Psychologic Study of Judicial Opinions*, 6 *CALIF. L. REV.* 89 (1918). See also Armstrong, *What Do the Justices Read? Books of Interest to Supreme Court Members*, 35 *A.B.A.J.* 295 (1949).

6. Frank, J., in *In re Linahan*, 138 F.2d 650, 652 (2d Cir. 1943). See also Frank, *The Cult of the Robe*, 28 *SAT. R. LIT.* 12 (Oct. 13, 1945): "[N]o . . . change occurs in a man with the donning of a robe. At least in my case it didn't. When I woke up one morning a federal judge, I found myself just about the same person who had gone to bed the night before an S.E.C. Commissioner. My intimate acquaintance with judges confirms my impression that the robe works no major transformation."

"Frank believes that . . . the process of making decisions is in reality a *gestalt* or composite of the psychological, environmental, and socio-economic factors that go into the development of the personality of the individual judge." Paul, *Jerome Frank's Contributions to the Philosophy of American Legal Realism*, 11 *VAND. L. REV.* 753, 754 (1958).

Compare what Justice Frankfurter said in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 466-67 (1952): "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. [The robe may affect or change the emotion and prejudices of the man, but it does not transform him into a man *without* emotion and prejudice.] The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

7. COHEN, *THE FAITH OF A LIBERAL* 180 (1946). See also CARDOZO, *THE*

spear in his two books, *Who Was Socrates?* and *The Genesis of Plato's Thought*, points out that what Plato found in his ethereal realm of ideas concerning the nature of justice and right was what an Athenian gentleman of the old land-owning class, in his struggle against the alliance of commercial and artisan elements, might have put there.<sup>8</sup> The philosophical and social outlook of the judge, held consciously or unconsciously, is one of the three elements which Roscoe Pound considers to make up the law.<sup>9</sup>

The celebrated Cartesian method of doubt recommends that every man of serious intellectual aims should, at least once in life, make the experiment of doubting everything that he has believed hitherto. It is impossible, however, to begin with com-

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NATURE OF THE JUDICIAL PROCESS 12 (1921): "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought — a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter." SINCLAIR, *THE CONDITIONS OF KNOWING* 134 (1951): "None of us can see the lenses of our spectacles though we see everything else through them. Yet the lenses of our spectacles through which we see are most important as everything is judged through them."

8. "The robe . . . gives the impression of uniformity in the decisions of the priestly tribe. Says the uniform black garment to the public mind: Judges attain their wisdom from a single, superhuman source; their individual attitudes never have any effect on what they decide. Patently that belief is delusional. Else no judge would ever write a dissenting opinion — a practice not of recent vintage, as many persons believe, but in the Supreme Court dating back to 1793, three years after that Court's creation." Frank, *The Cult of the Robe*, 28 *SAT. R. LIT.* 12, 13 (Oct. 13, 1945). When man's conceptions are outdated, when old values are confused with new, forgetting that times change, the result is illustrated by the tale of Don Quixote, who, full of the romances of noble knights rescuing fair ladies from villainous marauders, dons his armor for a crusade of righteousness.

Professor Mitchell Franklin in an article in the *Tulane Law Review* emphasizes "interests" as the subject matter of law: "A source of confusion in current jurisprudence has been the failure of jurists to take account of the interests that are secured by the legal order, and of the manner of adjusting these interests, as they arise from the press and struggle of life and impress themselves in various ways upon the law-maker, legislative and judicial. The effect of the failure to recognize that interests are the subject-matter of law has given, on one hand, a theory that law-making or law-judging is entirely capricious, so that the results reached by the legal machine are either the effect of the environment upon the law-maker or judge, which is a behavioristic interpretation, or of the effect of unconscious intellectual elements upon the law-maker or judge, which is a psycho-analytical psychological interpretation. In either event, theories of irresponsibility in law-making and judging obtain." Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 *TUL. L. REV.* 589 (1932).

9. According to Roscoe Pound, three elements make up the whole of what we call law: (1) "a number of legal precepts more or less defined"; (2) "a body of

plete doubt.<sup>10</sup> An individual must begin with all the prejudices which he actually has when he enters into a certain purpose, and these prejudices are not to be dispelled by a maxim, for they are things which it does not occur to him can be questioned. A person may, it is true, in the course of his learning, find reason to doubt what he began by believing; but in that case he doubts because he has a positive reason for it, and not on account of the Cartesian maxim.

It must be conceded then that the law is not administered by a non-personal being without emotion and prejudice.<sup>11</sup> The judge's mind is not, as it were, *tabula rasa*. If general attitudes were grounds for disqualification, it would be impossible to fill the bench. Professor Jaffe expresses it this way: "It may well be that a sincere conviction as to public policy predisposes the mind where it might otherwise be in a position of doubt or balance on a conflict of fact or a choice of applicable principle. But to announce out of hand that such a state of mind constitutes a 'disqualification' is in part Quixotic and in part non-sequitur. . . . If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial-constitutional law non-existent. Nor is this entirely a matter of necessary evil. Certain persons give thanks for the predispositions of Mr. Justice Butler and certain others looked upon Mr. Justice

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traditional ideas" as to the method of application of these legal precepts and "a traditional technique of developing and applying" these legal precepts; and (3) "a body of philosophical, political, and ethical ideas as to the end of law," held consciously or unconsciously, "with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique" are shaped and applied. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923).

See also GAUDET, *ENCYCLOPEDIA OF CRIMINOLOGY* 450 (1949): "[M]ost laymen and many legal writers state, as was the case in some of our early state constitutions, that *we have a justice of laws, not of men*. More sophisticated scholars, however, agree with the assertion of Chief Justice Hughes that this is a fallacy and that instead of the dichotomy of laws versus men we should state it thus: *we have a justice of laws through men*."

10. As the until recently ignored American philosopher Charles Sanders Peirce (1839-1914) has pointed out. 5 COLLECTED PAPERS OF CHARLES S. PEIRCE 265 (1931-35). It was only in the 1930's after the collection of his scattered papers into six volumes, that Peirce's pre-eminence as a philosopher could be recognized. Some people now claim that Peirce ranks as the most original philosopher of the nineteenth century. Commentaries of Peirce's philosophy include BUCHLER, *CHARLES PEIRCE'S EMPIRICISM* (1939); FEIBLEMAN, *AN INTRODUCTION TO PEIRCE'S PHILOSOPHY, INTERPRETED AS A SYSTEM* (1946); GALLIE, *PEIRCE AND PRAGMATISM* (1952); GOUDGE, *THE THOUGHT OF C. S. PEIRCE* (1950); WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM*, ch. IV (1949); *STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE* (a collection of essays by various authors in honor of Peirce, sponsored by the Peirce Society of America, 1951).

11. Dr. Lucien Mehl, a French lawyer, mathematician and one-time judge, recently put before an international "electronic brains" conference in England a proposal for an electronic judging machine. He suggested that someone could con-

Holmes' prejudices in favor of free speech as the most precious of safeguards."<sup>12</sup>

What, then, is the "impartiality" required of a judge? Judges are characterized as "tough" or "lenient," "conservative" or "liberal." These attitudes or characteristics do not constitute a disqualification for cause. To determine the meaning of "impartiality" which serves to disqualify a judge for cause, it is necessary to distinguish a *generalized* attitude or ideological characteristic on the one hand from a *personal* (individual-to-individual) bias on the other. A personal bias may be the result of a pecuniary interest in the outcome of the trial, an individual antagonism, a relationship to one of the parties, or a corrupt conspiracy. The distinction between a general attitude or ideology and a personal bias is important for two reasons. First of all, unlike the case of personal bias, a judge without an ideology, explicit or implicit, is non-existent. Every person, whether he admits it or not, has a philosophy of life. Secondly, the reason that personal bias is a ground for disqualification, whereas general attitude is not or cannot be, is that personal bias cannot be overcome by evidence at the trial, no matter how persuasive, because the bias is purely capricious and fortuitous and has no relation to the merits of the issues.<sup>13</sup> There is the possibility, on the other hand, of overcoming or changing a previous attitude or ideology by evidence.<sup>14</sup>

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struct an electronic brain able to "learn" all the laws and legal precedents, sort out the ones applying to a particular case, and arrange them in logical order to arrive at a conclusion. New Orleans Times-Picayune, Dec. 22, 1958, p. 16, col. 2. See WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1955), which is the fountain-head of logical positivism with regard to its most important tenets, for a presentation of a philosophy that the world consists in a discrete number of brute facts. The conception of the mechanical function of the judge, and also that "facts" are out there to be picked like grapes off a vine, is implicit in the contemporary criticism of the segregation and communism decisions of the United States Supreme Court. See, e.g., Schweppe, *Court Rewrites Constitution in its own Image*, 88 AMERICAN MERCURY 60 (Feb. 1959).

12. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1218-19 (1939). For one man's "dream-court," see Rodell, *A Gallery of Justices*, SAT. REV. 9 (Nov. 15, 1958).

13. The distinction between general attitude and personal bias is the age-old one between the general and the particular. Thus, a judge who is anti- or pro-Negro or anti- or pro-Communist is not subject to recusation for cause when a party in the case is a Negro or a Communist. The bias is not restricted to a particular party, but is general in nature. It applies to a class, and the fact that this party is a member of the class against whom the judge is prejudiced is not ground for recusation for cause. If, on the other hand, it should happen that the party at one time swindled the judge, he could demand the recusation of the judge for reason of personal bias.

14. See Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1219 (1939). This analysis is also relevant to the disqualification

## II. LEGAL CAUSES FOR RECUSATION

The remedy of recusation is found in the Codex of Justinian: "Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue joined, so that the

of officers of administrative agencies, prosecuting attorneys, and prospective jurors.

*On disqualification of administrative officers*, see Federal Administrative Procedure Act, § 7(a), 60 STAT. 237 (1946), 5 U.S.C. § 1001 (1952); Godman, *Disqualification for Bias of Judicial and Administrative Officers*, 23 N.Y.U.L.Q. REV. 109 (1948); Scott, *Bias of Trial Examiner and Due Process of Law*, 30 GEO. L.J. 54 (1941); Sedgewick, *Disqualification on the Ground of Bias as Applied to Administrative Tribunals*, 23 CAN. B. REV. 453 (1945); Note, 41 COLUM. L. REV. 1384 (1941).

*On disqualification of district attorney*, see LA. CODE OF CRIM. PROC. arts. 310, 311 (1928). Article 310 provides: "Any district attorney shall be recused by the judge in criminal cases: (1) If said district attorney be related to the party accused or to the party injured within the fourth degree, or be his father-in-law, or his son-in-law, or his brother-in-law, or be the husband of the accused or of the party injured; (2) If said district attorney shall have been employed or consulted as attorney for the accused before his election or appointment as district attorney; (3) If said district attorney shall have a personal interest adverse to that of the prosecution."

In the case of *State v. Tate*, 185 La. 1006, 171 So. 108 (1936), the defendant filed a motion to recuse the district attorney in an arson trial on the ground that the district attorney at the same time represented, on a contingent basis, an insurance company suing the defendant for damage to the property, and that therefore it was to be to the district attorney's advantage to secure a conviction of the defendant. The Supreme Court stated that a district attorney should not be involved or interested in any extrinsic matters which might, consciously or unconsciously, impair or destroy his power to conduct the accused's trial fairly and impartially. Ruling that the district attorney shall be recused under Article 310(3), the court said that the provision is broad enough to cover the case where the district attorney is of counsel in a civil action against the accused based substantially on the same or on closely related facts. See also *State v. Marcotte*, 229 La. 539, 86 So.2d 186 (1956).

Compare the French procedure for recusation of prosecuting attorney: "The causes of recusation set out in Article 381 of the Code of Civil Procedure are applicable to judges and can be invoked against the prosecuting attorney when he is a *joint party* in a civil matter. But, in penal matters, the prosecuting attorney is always a principal party. A litigant cannot recuse his adversary." DE VABRES, *PRÉCIS DE DROIT CRIMINEL* § 783 (1953).

*On disqualification of a prospective juror*, see LA. CODE OF CRIM. PROC. arts. 351, 352 (1928). Three causes are provided in Article 351 for challenging a prospective juror: "(1) That he is not impartial, the cause of his bias being immaterial; but an opinion as to guilt or innocence of the accused, which is not fixed, or has not been deliberately formed, or that would yield to evidence, or that could be changed, does not disqualify the juror; (2) That the relations, whether by blood, marriage, employment, friendship or enmity, between the juror and the accused, or between the juror and the person injured, are such that it must be reasonably believed that they would influence the juror in coming to a verdict; (3) That the juror served on the grand jury which found the indictment, or on a petit jury which once tried the defendant for the same offense, or on the coroner's jury that investigated the homicide charged against the accused." Article 352 provides causes for challenge based on certain general attitudes or philosophy which are exercisable only on the part of the prosecution. They are: "(1) That the juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is unconstitutional; or (2)

cause go to another."<sup>15</sup> In England, on the other hand, judges, being differently appointed and not being triers of the facts, have not been subject to recusation.<sup>16</sup> There was one exception: a judge could not sit in his own cause and therefore he was disqualified for direct pecuniary interest.<sup>17</sup> It was Louisiana, with its civil law procedure, which introduced the remedy of recusation to the common law world of the United States.<sup>18</sup> The rule for the disqualification of a judge at common law, originally only for pecuniary interest, was widely changed in the various states by statute during the nineteenth century.

Personal bias or prejudice, in the ordinary sense of the term, may result from innumerable conditions in life. The number of factors which might cause a judge to be prejudiced is inconceivable. The Louisiana legislature, however, in Article 338 of the Code of Practice of 1825, the first statutory provision on the subject in the state, did not concisely and comprehensively provide that "personal bias or prejudice" is cause for recusation of a judge. Instead, it listed four sub-implicant propositions as grounds for disqualification. They are: (1) His being interested in the cause; (2) His being in any way related to one of the parties; (3) His having been employed, or consulted as advocate in the cause; and (4) His being a material witness in the cause for either party.<sup>19</sup> In 1858 a statute was passed which pro-

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That the juror tendered in a capital case has conscientious scruples against the infliction of capital punishment; or (3) That the juror would not convict upon circumstantial evidence." See Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LOUISIANA LAW REVIEW 655, 696 (1957). See also FRANK, *LAW AND THE MODERN MIND* 170-85, 302-09 (1930); Redmount, *Psychological Tests for Selecting Jurors*, 5 KAN. L. REV. 391 (1957).

15. JUSTINIAN CODE 3.1.16.

16. Putnam, *Recusation*, 9 CORN. L.Q. 1, 4 (1923).

17. *Ibid.* See also Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).

18. See Putnam, *Recusation*, 9 CORN. L.Q. 1, 7 (1923).

19. LA. CODE OF PRACTICE art. 338 (1825). Subsequent legislation has been more detailed. Act 35 of 1882 provided: "Section 1. . . . That Article 338 of the Code of Practice [of 1870], be so amended and re-enacted as to read as follows: The causes for which a Judge shall be recused are: 1. His being interested in the cause; *provided*, that in all civil and criminal causes in which the State, the parishes, or political or religious corporations are interested, it shall not be sufficient cause to challenge the Judge or Justice of the Peace who may have cognizance of the case (nor the Sheriff or the executive officer, or any of the jurors who are called to serve in the cause), to allege that they are citizens or inhabitants of the State, or of the parishes, or members of the said political or religious corporations, or that they pay any State, parish or city tax. 2. His being related to one of the parties within the fourth degree. 3. His having been employed, or consulted as advocate in the cause. 4. His being father-in-law, son-in-law, or brother-in-law of one of the parties. 5. His having performed any judicial act in the cause, in any other court."

Act 203 of 1918 added a sixth cause to Article 338 of the Code of Practice:



vided for the recusation of judges in criminal cases.<sup>20</sup> Prior to 1858, the only statutory law on recusation in Louisiana was the aforementioned article of the Code of Practice, which by its terms was confined in its application to civil cases.

It was not until 1950 that the Louisiana legislature provided identical causes for recusation in civil and criminal cases. There is no reason for a distinction in the law of recusation between civil and criminal procedure. The principles of law which determine whether a person has a fair and impartial judge are the same whether the case be civil or criminal.<sup>21</sup> Article 337 of the Code of Practice, as amended by Act 336 of 1948, and Article

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"6. His being the father, brother, or son of any one of the attorneys employed in the cause."

By Act 336 of 1948, the provisions on recusation in the Code of Practice were completely rewritten on the recommendation of the Louisiana State Law Institute. See discussion page 652 *infra*.

20. By the Crimes Act of 1805, Louisiana adopted the crimes and procedures of the common law. Act 303 of 1858, the first statute on recusation in criminal cases, provided: "That any judge may be recused or may recuse himself in criminal cases if said judge be connected by blood or marriage with any person charged with any offense against the laws of the State." This provision appears as LA. R.S. § 1067 (1870), as amended by La. Acts 1877, No. 35, which reads in part: "Section 1. That section . . . [1067] . . . of the Revised Statutes . . . be amended and re-enacted so as to read as follows: 'Any Judge may be recused or recuse himself in criminal cases — First — If said Judge be connected by blood or marriage with the accused. Second — If said Judge be related to the party injured by the accused within the fourth degree, or if he be the father-in-law, son-in-law or brother-in-law of the party injured by the accused. Third — If said Judge has been employed as prosecuting attorney, or for the defense, before his election or appointment as Judge.'"

By Act 40 of 1880, it was provided: "Section 1. . . . That any judge of the district court elected, or who may hereafter be elected, under the Constitution adopted and ratified in 1879, shall be recused for either of the following causes: First — His being interested in the cause; *provided*, that in all civil and criminal causes, in which the State, the parishes or political or religious corporations are interested, it shall not be sufficient cause to challenge a judge, who may have cognizance of the case, to allege that he is a citizen or inhabitant of the State or the parish, or a member of said political or religious corporation, or that he pays any State, parish or city tax. Second — His being related to one of the parties within the fourth degree. Third — His having been employed or consulted as advocate in the cause. Fourth — His being the father-in-law, son-in-law, or brother-in-law of one of the parties. Fifth — His having rendered definitive judgment in the cause in any other court."

LA. CODE OF CRIM. PROC. art. 303 (1928) provided the following causes for recusation: "First — His being interested in the cause; *provided* that in all causes in which the State, the parishes or political or religious corporations are interested, it shall not be sufficient cause to challenge the judge, who may have cognizance of the case, to allege that he is a citizen or inhabitant of the State or of the Parish, or a member of said political or religious corporation, or that he pays any State, parish or city tax; Second — His being related to the accused or to the party injured within the fourth degree; Third — His having been employed or consulted as advocate or counsel in the cause; Fourth — His being the husband, the father-in-law, son-in-law, or brother-in-law of the accused or of the party injured; Fifth — His having rendered definitive judgment in the cause in any other court."

21. See *Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721 (1955).

303 of the Code of Criminal Procedure, as revised in 1950, provide the following causes for recusation:

"(1) His being interested in the cause; but in any cause in which the state, or one of its political subdivisions, or any religious corporation, is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereto, or that he is a member of the religious corporation, shall not constitute a ground for recusation.

"(2) His being the spouse of one of the parties or one of the attorneys; his being related to one of the parties or to the spouse of one of the parties within the fourth degree, or to one of the attorneys or to the spouse of one of the attorneys within the second degree."<sup>22</sup>

"(3) His being a material witness in the cause.

"(4) His having been employed or consulted as an attorney in the cause or his having been associated with an attorney during the latter's employment in the cause.

"(5) His having performed any judicial act in the cause in any other court."<sup>23</sup>

The following is a brief examination of each of the five causes for recusation listed in the Louisiana statute.

1. *Interest.* The most litigated ground and also the broadest basis for recusation is "his being interested in the cause."<sup>24</sup> A

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22. LA. CODE OF CRIM. PROC. art. 303 (1928) makes the appropriate substitute in clause 2 of the words "the accused or the party injured" for the term "the parties" of the Code of Practice: "(2) His being the spouse of the accused or the party injured or one of the attorneys; his being related to the accused or to the party injured or to the spouse of the accused or the party injured within the fourth degree, or to one of the attorneys or to the spouse of one of the attorneys within the second degree."

23. The materials for the Code of Practice Revision presented at the January 24, 1958, meeting of the Council of the Louisiana State Law Institute, recommend merely an editorial revision of its source provisions. The grounds for recusation are listed as follows: "A judge of any court, trial or appellate, may be recused when he: (1) Is a material witness in the cause; (2) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause; (3) Has performed a judicial act in the cause in another court; (4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or to the spouse of a party, within the fourth degree; or is related to an attorney employed in the cause, or to the spouse of the attorney, within the second degree; or (5) Is interested in the cause. In any cause in which the state, or a political subdivision thereof, or a religious body or corporation is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereon, or is a member of the religious body or corporation, is not a ground for recusation."

24. See Bennett, *Louisiana Criminal Procedure — A Critical Appraisal*, 14 LOUISIANA LAW REVIEW 11, 26 (1953).

judge who has only an indirect interest, say, of a general taxpayer or property owner is not disqualified to try a case involving taxes or assessments.<sup>25</sup> The Code specifically provides that no challenge lies where the interest results only from the judge's being a citizen or an inhabitant of an interested state or parish, a member of an interested political or religious corporation or a taxpayer of any state, parish or city.<sup>26</sup>

What facts are necessary to show the "interest" required by the Louisiana statute? The "interest-in-the-cause" as a ground for a change of judge has been restricted by the jurisprudence to the situation where the judge has a personal and direct "material interest or advantage" to be derived from the outcome of the case. A judge who is a major stockholder in a business corporation which is a party to the suit would clearly be disqualified by reason of "interest." Beyond such situations, the problem becomes difficult. The statutory provision, according to the jurisprudence, includes only the situation where the judge for reason of "personal advantage or material gain" has evidenced a definite hostility or antagonism towards the party. Personal feeling (animosity or favoritism) on the part of the judge is not enough for recusation.<sup>27</sup> The interpretation given to the statutory phrase "interest in the cause," as meaning "to the judge's personal advantage" and that an allegation of bias or prejudice does not describe interest sufficient to recuse the judge, is, it almost goes without saying, a hazy limitation on the right to recuse.<sup>28</sup>

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25. See *Rathe v. Jefferson Parish School Board*, 206 La. 317, 19 So.2d 153 (1944).

26. LA. CODE OF CRIM. PROC. art. 303(1) (1928); LA. CODE OF PRACTICE art. 337(1) (1870). See *State v. Livaudais*, 161 La. 882, 109 So. 536 (1926).

27. See cases cited in *State v. Laborde*, 214 La. 644, 655, 38 So.2d 371, 375 (1948).

28. A general statement to the effect that the judge is prejudiced and biased against the party, or a naked allegation of interest, permits the judge-to-be-recused to overrule the motion. See *State v. Laborde*, 214 La. 644, 38 So.2d 371 (1948); *State v. Phillips*, 159 La. 903, 906, 106 So. 375, 376 (1925); *State v. Davis*, 154 La. 928, 98 So. 422 (1923). See discussion page 661 *infra*, for procedure for recusation.

In the New York case of *People v. McDonald*, 8 Misc.2d 50, 167 N.Y.S.2d 394 (1957), defendants were charged with unlawfully removing a gravestone from a cemetery. The gravestone was left on the lawn of the judge who tried the case. The defendants contended that the judge was disqualified because the accusation charged that the gravestone was left on his lawn. The court said: "Section 14 of the Judiciary Law of the State of New York provides in part that 'a judge shall not sit as such in, or take any part in the decision of an action \* \* \* in which he is interested \* \* \*.' It has been held that this interest must be an interest in a pecuniary or property right, and one from which the judge might profit or lose. See *Matter of Hancock's Will*, 91 N.Y. 284. The question of when a judge should disqualify himself is generally one of conscience. Some judges disqualify themselves

The decisions of the Louisiana Supreme Court in *State v. Hutton* and *State v. Laborde*, among others, serve to illustrate the rule that personal feeling or opinion on the part of the judge is not cause for recusation in Louisiana. In the case of *State v. Hutton*,<sup>29</sup> the defendant, aged 30, and his 19-year-old brother were charged with burglary. The younger brother was tried first, and at this trial, the judge said that he thought that the older brother should receive a heavier sentence in case of conviction than that which he proposed to inflict upon the younger brother. Subsequently, at the trial of the older brother, counsel for the defense moved for the recusal of the judge. The court held that the judge's statement at the trial of the younger brother did not reveal an interest which would require the judge to recuse himself in the present trial of the older brother.<sup>30</sup>

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only when in their own mind their connection with the case is such that they feel they cannot be fair and unbiased. The practice which impresses me is that a judge should disqualify himself whenever there might be the slightest impression upon the part of a litigant that his decision might be swayed by his connection with the case or his interest in the case, for it is important in the administration of justice not only that our courts be presided over by judges who are fair and impartial, but it appears to this court that it is equally important that litigants believe that they are being tried by a judge who is fair and impartial and not influenced by any personal interest in the case. The circumstances surrounding this case were such that if the Judge had been asked to disqualify himself, had refused, and had then tried and decided the case adversely to the defendants, the judgment of conviction would necessarily have to be reversed. It is quite apparent that if the Judge had been drawn as a juror for the trial of the case, the tombstone having been placed upon his property, a challenge for implied bias by a defendant would have been sustained. But here the defendants did not object to the jurisdiction of the . . . [Judge] . . . and they entered a plea of guilty." 167 N.Y.S.2d 394, 396-97 (1957). *Query*: In the above case what was the pecuniary or property interest? Was it the fact that a conviction of the defendants would absolve the person on whose lawn the gravestone was found? Compare the rule in the law of evidence on "declarations against interest" as an exception to the hearsay prohibition that the declaration must endanger the declarant's pocketbook if the statement were true, and that even a declaration confessing a crime committed by the declarant is not receivable as a declaration against interest. See MCCORMICK, EVIDENCE 546, 549 (1954).

Contrast the disqualification in Louisiana of a prospective juror with that of a judge. A prospective juror is disqualified from jury service even though he says he is biased for some nonsensical reason. A juror's disqualification for bias can arise from race prejudice, religious prejudice, or simply because he is hostile or friendly to the defendant. See Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LOUISIANA LAW REVIEW 655, 696 (1957).

29. 198 La. 174, 3 So.2d 549 (1941).

30. Similarly, a Kentucky court stated: "[T]he mere fact that the trial judge had indicated or stated his belief in the guilt of the defendant is not enough to disqualify the judge." *White v. Commonwealth*, 310 S.W.2d 277, 278 (Ky. App. 1958) (dicta). See also *Nelson v. Commonwealth*, 202 Ky. 1, 258 S.W. 674 (1924). In the case of *State v. Morrison*, 67 Kan. 144, 72 Pac. 554 (1903), in dealing with the question of an entertained opinion by the court of the defendant's guilt of the crime with which he was charged, and in denying the sufficiency of that fact to require a vacating of the bench, the court said: "[T]he belief or disbelief of a trial judge in the guilt of a defendant put upon trial before him is not a test of his qualification to preside at such trial. A trial judge may be convinced from his personal knowledge of the case, or what he has heard from others, of the

In the case of *State v. Laborde*,<sup>31</sup> which is noteworthy for its dictum, the defendant had stated that he wished to waive trial by jury, whereupon the trial judge remarked that the defendant would have a better chance before a jury than before this court. The court, holding that the trial judge was not interested or biased in the cause, said: "Since *State v. Morgan* . . . [which held that a judge is competent although he has expressed a premature opinion of the merits of the case and is hostile to one party], it has been unequivocally held that, inasmuch as the statute does not provide that bias and prejudice of the judge is a ground for recusation, the accused must offer additional proof to show that the judge has an interest in the case which means that 'it is to the judge's personal advantage, whether he would be influenced by such advantage or not, to decide the case or to seek to bring about a decision therein, for or against one of the parties to it, without reference to the law and the evidence.'"<sup>32</sup>

Even in the absence of a statute that provides that bias and prejudice is ground for recusation, it would appear that bias and prejudice of a judge, regardless of its cause, is sufficient to warrant his recusation under the constitutional provision that "In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury."<sup>33</sup> Indeed, it would appear that an allegation and description of the bias or prejudice of a judge, without more, can properly be the basis for recusation under the present statutory phrase "his being interested

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guilt of one put upon trial before him, and yet, with the utmost fairness and impartiality conduct the trial, and give the defendant a fair and impartial hearing." *Id.* at 149, 72 Pac. at 556. *But see* *Wendel v. Hughes*, 64 Ohio App. 310, 311, 28 N.E.2d 686, 686 (1940) (the affidavit alleges "that the judge was prejudiced against her and had already indicated the decision he would render in the case against her," and therefore the judge was without authority to proceed with the trial); *State v. Atterberry*, 134 S.C. 392, 397, 133 S.E. 101, 103 (1926) (the judge "expressed at the first trial, after the defendant was convicted and in passing sentence a decided opinion of the guilt of the accused, and should not have presided at the second trial of the defendant when objection was made, as he had disqualified himself by expressing that opinion. . . . [B]y his remarks in sentencing the defendant at the first trial he indicated his opinion of the defendant's guilt, and thereby disqualified himself to preside at the second trial").

31. 214 La. 644, 38 So.2d 371 (1948).

32. 214 La. 644, 656, 38 So.2d 371, 375-76 (1948). See *State v. Morgan*, 142 La. 755, 77 So. 588 (1917).

33. LA. CONST. art. I, § 9. See *Payne v. Lee*, 222 Minn. 269, 24 N.W.2d 259 (1946). "As to the several requirements of due process, probably the most basic one is that the tribunal be impartial. A biased judge cannot accord a fair trial." PARKER, ADMINISTRATIVE LAW 58 (1952). The United States Supreme Court in *In re Murchison*, 349 U.S. 133 (1955) said: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *Id.* at 136.

in the cause." It was so held in 1908 in *State v. Banta*.<sup>34</sup> In *Banta*, a motion to recuse the judge on the ground that he was a personal enemy of the accused and was so biased and prejudiced as to be incapable of giving him a fair and impartial trial was held to be well taken and to exhibit that the judge had an interest in the cause.<sup>35</sup> Fifteen years later, however, the case was overruled in *State v. Davis*.<sup>36</sup> Justice Land dissented in *Davis*, contending that, even without a statute on recusation, a biased or prejudiced judge is subject to disqualification under the constitutional provision requiring a speedy public trial by an impartial jury.<sup>37</sup>

A quarter of a century after *Davis* the constitutional argument was again advanced, in the *Laborde* case, discussed above,<sup>38</sup> but the court was able to avoid the issue by its holding that the remark of the trial judge (that the defendant would have a better chance before a jury than before the court) did not indicate that the judge was biased or prejudiced against the defendant. The court said: "We do not find it necessary in the case at bar to consider whether the provisions of Section 9 of Article I of the Constitution affect the soundness of the pronouncements that bias or prejudice of a judge is not, of itself, sufficient to warrant his recusation in a criminal case — for, assuming that it is, we do not think that the remark of the judge in this matter authorizes the conclusion that he was biased or prejudiced against appellant or that he was unable to give him a fair and impartial trial."<sup>39</sup>

2. *Relationship*. The law restricts the right to obtain recusation to the party who is not related to the judge. The party related to the judge may not obtain his recusation.<sup>40</sup> The law

34. 122 La. 235, 47 So. 538 (1908).

35. See also *State v. Doucet*, 199 La. 276, 5 So.2d 894 (1942), 16 TUL. L. REV. 627 (1942); *The Work of the Louisiana Supreme Court for the 1938-1939 Term — Criminal Law and Procedure*, 10 LOUISIANA LAW REVIEW 214 (1950). The *Doucet* case is a relatively liberal holding. The case involved an indictment of the defendant for embezzlement of public funds, allegedly committed by a system of overpayment of deputies and subsequent "kickbacks" by the deputies for political purposes. The Supreme Court ordered the recusal of the trial judge, who had been the leader of a rival political faction interested in securing the defendant's conviction in order to prevent his re-election to the office of sheriff. The fact that the activity of the judge occurred prior to his induction into judicial office was considered immaterial.

36. 154 La. 928, 98 So. 422 (1923).

37. Quoted in *State v. Laborde*, 214 La. 644, 655 n.3, 38 So.2d 371, 376 n.3 (1948).

38. See note 31 *supra*.

39. 214 La. 644, 657, 38 So.2d 371, 376 (1948).

40. See *Bonnefoy v. Landry*, 4 Rob. 23 (La. 1843).

naively presumes that the relations between a judge and his relatives are always sympathetic.

By an affinity relationship, a judge is disqualified when he is the spouse of one of the parties (or of the accused or injured party in a criminal case), or of one of the attorneys.

By a consanguinity relationship, a judge is disqualified when he is related within the fourth degree to one of the parties (or the accused or injured party in a criminal case) or to the spouse of either. It is true that "all the inhabitants of the earth are descended from Adam and Eve, and so are cousins to one another," but "the further removed blood is, the more cool it is."<sup>41</sup> The judge is also disqualified when he is related within the second degree to one of the attorneys or to the spouse of one of the attorneys. This provision does not allow disqualification when the attorney in the case is a former partner of the judge, a former faculty colleague, a former law clerk, or an intimate personal friend. Consanguinity relationship within the second degree is the test. It is problematical whether a judge can be disqualified when the attorney who is the relative is not directly participating in the case but another member of his firm is directly responsible for the case.<sup>42</sup>

In the case *State v. Standard Oil Co.*,<sup>43</sup> the father of an assistant attorney general representing the state in litigation was held competent to sit as judge. The court held that the

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41. *Vernon v. Manners*, 2 Plowden 425, 75 Eng. Rep. 639 (K.B. 1572) (case involved jury relationship).

42. Prior to Act 203 of 1918, amending LA. CODE OF PRACTICE art. 338 (1870), there was no statutory provision expressly recusing a judge because of relationship to the attorney. See note 19 *supra*. However, the court, prior to the 1918 act, held that the term "parties," in the provision "His being related to one of the parties within the fourth degree," means every person who has a substantial pecuniary interest in the result of the lawsuit, whether mentioned in the pleadings or not. See *White v. McClanahan*, 133 La. 396, 63 So. 61 (1913). In this case, the trial judge's son was prosecuting a civil action under an agreement for a contingent fee. The Supreme Court cited Act 124 of 1906, which confers upon attorneys a special first privilege on all judgments obtained by them, and on the property recovered under the judgments, for the amount of their professional fees, and which also permits an agreement to be made giving the attorney joint control over the disposition of the suit or claim. The court said: "The party in interest, though not a party to the record, is even more surely within the meaning of the law [disqualifying a judge who is related to a party] than the party to the record who is without interest . . . 'Any other construction totally disregards the spirit and defeats the purpose, of the constitutional prohibition; for if a judge may be influenced at all in his judgment by the fact that a person who is directly interested in the result of the suit, is related to him, the potency of the influence is not lessened by the absence of the related story from the record.'" 133 La. 396, 399, 63 So. 61, 62 (1913). See Notes, 21 TEX. L. REV. 790 (1943), 72 U.S.L. REV. 241 (1938).

43. 164 La. 334, 113 So. 867 (1927).

statute has no application where the son of the judge is simply a public officer representing the state. The case involved Article 338 of the Code of Practice, as amended by Act 203 of 1918, providing as a cause for recusation "His being the father, brother, or son of any one of the attorneys employed in the cause."<sup>44</sup> The court stated: "The statute above quoted has no application where the father, brother, or son of a judge is simply a public officer representing the state or a public body by virtue of his said office. Such an officer is not *an attorney employed in the case*; he is only exercising the functions *imposed upon him by law*, and appears before the court *not* as an attorney at law, but as an officer discharging his duty of representing the state or a public body before the courts. . . . Our conclusion is that a judge is not required, or permitted, to recuse himself in a case wherein his father, brother, or son appears before him in his capacity of public officer representing the state or a public body; that such an officer is not 'an attorney employed in the case,' within the meaning of the act above mentioned." The present statute omits the phrase "employed in the case," providing simply "his being related . . . to one of the attorneys or to the spouse of one of the attorneys within the second degree."<sup>45</sup> In *State v. Lea*,<sup>46</sup> involving this later statute, the court held that a trial judge is not required to recuse himself because he is the father of the assistant district attorney who participated in the preparation of the case. The court stated: "This question was heretofore presented to this Court under a similar statute and it was held that the statute had no application where an attorney was a public officer representing the state by virtue of his office. This Court held that the judge is not required or permitted to recuse himself in a case wherein his father, brother, or son appears before him in his capacity as a public officer representing the state or a public body. *State v. Standard Oil Co.* . . ."<sup>47</sup> The court is apparently of the opinion that the omission in the present statute of the phrase "employed in the case," upon which the court in 1927 in *Standard Oil* placed emphasis, is of no consequence.

3. *Witness in the cause.* The provision setting forth, as a cause for recusation of the judge, his being a material witness

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44. See note 19 *supra*.

45. See LA. CODE OF CRIM. PROC. art. 303 (1928); LA. CODE OF PRACTICE art. 337 (1870).

46. 228 La. 724, 84 So.2d 169 (1956).

47. *Id.* at 730, 84 So.2d at 169.



in the cause, stands for the principle that one who is acquainted with a cause should be a witness and not a judge at the trial.<sup>48</sup> A judge is not to be a witness before himself. This ground was originally included in the Code of Practice of 1825, repealed in 1828, and was reinstated in the Code in 1948 at the recommendation of the Louisiana State Law Institute, and was included in the 1950 revision of the Code of Criminal Procedure.

4. *Previous employment.* The provision of the Louisiana Constitution forbidding judges to practice law precludes a judge from representing a party in a lawsuit.<sup>49</sup> Article 337 of the Code of Practice and Article 303 of the Code of Criminal Procedure provide further that previous employment or consultation of the judge as advocate or counsel in the cause is a ground for recusation.<sup>50</sup> The challenge may even be made by the party for whom the judge acted as counsel.<sup>51</sup> When the judge has had prior contact with a client and the case, it is unlikely that he will have an open mind when deciding the case on the bench. Disqualification under the law is limited to the "same matter."<sup>52</sup> The fact that one of the parties employed the judge in a separate and distinct cause is not ground for his recusation.<sup>53</sup>

5. *Previous judicial act in cause.* This provision stands for the principle that prejudgment of an issue by the judge is a ground for disqualification. The judge is disqualified for having performed any judicial act *in the cause* in any other court. The fact that a judge, while district attorney, prosecuted the defendant for other offenses is not a ground for recusation, inasmuch as it is not the same cause.<sup>54</sup> In the case of *State v. Tanner*,<sup>55</sup> the court held that the fact that the judge had awarded alimony to the defendant's wife and children in a civil action did not furnish legal cause for his recusation in the prosecution of the husband for wilful neglect to provide for support of his family. The court reasoned that in the civil action the judge

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48. See *State v. Riviere*, 225 La. 114, 72 So.2d 316 (1954).

49. See LA. CONST. art. VII, § 3.

50. See *Bryan v. Austin*, 10 La. Ann. 612 (1855).

51. See *State ex rel. Trimble v. Judge*, 38 La. Ann. 247 (1886).

52. *Stewart v. Mix*, 30 La. Ann. 1036 (1878). There is absolute disqualification for two years in California in any case of any kind brought by a former client. CAL. CODE CIV. PROC. § 170(4) (Deering, 1937).

53. See *State v. Laborde*, 214 La. 644, 38 So.2d 371 (1949); *Stewart v. Mix*, 30 La. Ann. 1036 (1878). A judge in a criminal case would be disqualified for previous involvement as attorney in civil litigation based on the same facts as the prosecution. *State v. Perkins*, 124 La. 947, 50 So. 805 (1910).

54. See *State v. Laborde*, 214 La. 644, 38 So.2d 371 (1949).

55. 224 La. 374, 69 So.2d 505 (1954).

simply determined that the wife and children were in necessitous circumstances and were entitled to support, whereas in the criminal action the judge determined whether the father was guilty of criminal neglect of his family, the intentional failure to furnish support.

Two or more offenses may arise out of the same factual situation.<sup>56</sup> The court has held that the expression of opinion by a district judge subsequent to one of several prosecutions of the *same* defendant on the same state of facts furnishes no legal ground for his recusation.<sup>57</sup> The previous-judicial-act provision is inapplicable because the causes or offenses are different.

All of any number of *several* persons who join in the commission of an offense may be jointly indicted for the crime (a severance of trial is in the discretion of the judge), or each of them may be indicted separately.<sup>58</sup> In *State v. Hutton*, discussed above,<sup>59</sup> the defendant, who was jointly indicted with his younger brother and had obtained a severance of trial, sought recusation of the trial judge because of his statement at the prior trial of the younger brother that a heavier penalty should be inflicted upon him than upon the younger brother. The court denied recusation on the ground that the judge was not "interested in the cause." The court did not consider the previous-judicial-act provision as a ground for disqualification. In law, the cause is not the same, and consequently, the provision is not applicable, but, in fact, it cannot be denied that at the second trial the judge had prejudged the issues.

A judge is competent, after a mistrial, to sit again in the case. A judge is competent to sit in the case until the prosecution be at an end.<sup>60</sup> It is also generally recognized that the judge can hear a case of open-court contempt of himself.<sup>61</sup>

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56. For example, a person who sells intoxicating liquor from his store on Sunday could, by this single act, be guilty of violating two statutes of the jurisdiction. One statute may prohibit the sale of liquor on Sunday, and a second may proscribe the sale of liquor to a minor. There can be two convictions if the dealer sells liquor to a minor on Sunday. Multiple prosecution for several offenses arising out of the same set of facts is not a violation of the constitutional protection against double jeopardy. See Slovenko, *The Law on Double Jeopardy*, 30 TUL. L. REV. 409 (1956).

57. See *City of Lafayette v. Milton*, 129 La. 678, 56 So. 635 (1911).

58. See Slovenko, *The Accusation in Louisiana Criminal Law*, 32 TUL. L. REV. 47, 81 (1957).

59. See note 29 *supra*.

60. *State v. Bill*, 15 La. Ann. 114 (1860).

61. See Annot., 52 A.L.R. 1291 (1928).

### III. PROCEDURE FOR RECUSATION

The effort to secure a change of judge in early procedure was called an "application" or a "petition," and it still, at times, carries such a label, as in the Louisiana Code of Criminal Procedure.<sup>62</sup> Essentially, however, it is a motion.<sup>63</sup> This motion, or application, must be in writing, and must set forth one of the five statutory causes for the recusation of a judge.<sup>64</sup> When a motion for recusation setting forth a legal cause has been filed, the judge-to-be-recused has the power to grant the application,<sup>65</sup> but not to refuse it. If the judge is unwilling to admit his disqualification, when the facts stated, if accepted, constitute a cause for recusation, he must refer the question to another judge of the same district, if there be one, or to a judge of an adjoining district, for determination. At this time the allegations must be established by the recusing party by competent evidence.<sup>66</sup>

The judge need not refer the application for recusation to another judge for determination when the facts stated, if proved, would not constitute a legal ground for recusation.<sup>67</sup> A judge

62. See LA. CODE OF CRIM. PROC. arts. 303.1, 309 (1928).

63. See *State v. Hayes*, 199 La. 549, 6 So.2d 657 (1942). See also LA. CODE OF PRACTICE art. 338 (1870), as amended, La. Acts 1948, No. 336.

64. See LA. CODE OF CRIM. PROC. art. 309 (1928); LA. CODE OF PRACTICE art. 338 (1870). The partiality of the trial judge is not cause in Louisiana for a change of venue. The remedy is recusation. A change of venue is authorized when "an impartial trial cannot be obtained in the parish wherein the indictment is pending" due to "prejudice existing in the public mind, or for some other sufficient cause." LA. CODE OF CRIM. PROC. art. 292 (1928). See Comment, 44 CALIF. L. REV. 108 (1956). ALI MODEL CODE OF CRIM. PROC. § 255 provides: "On a prosecution by indictment or information the State or the defendant may apply for removal of the cause on the ground that a fair and impartial trial can not be had for any reason other than the interest or prejudice of the trial judge." In some states the prejudice of the trial judge is a ground for changing the venue. See *State v. Morrison*, 67 Kan. 144, 72 Pac. 554 (1903); 4 WHARTON, CRIMINAL LAW AND PROCEDURE 107 *et seq.* (Anderson, 1957).

65. Furthermore, the Code of Practice provides that a "district judge may recuse himself without any motion for recusation being filed, but only in causes where a litigant would have grounds for recusing him; and until either the judge shall have recused himself or a motion for his recusation has been filed, he shall have full power to act in the cause." LA. CODE OF PRACTICE art. 338 (1870), as amended, La. Acts 1948, No. 336.

66. See LA. CODE OF CRIM. PROC. art. 309 (1928); LA. CODE OF PRACTICE art. 338 (1870): "[W]here the petition or the motion for the recusation of the judge alleges facts which constitute a cause of action, the judge must refer it to another judge for trial, and where on the trial thereof, the allegations are proved by competent evidence, the judge must be recused." *State v. Doucet*, 199 La. 276, 289, 5 So.2d 894, 898 (1942). The burden of proof falls on the party who alleges incapacity. *Simon v. Haifleigh*, 21 La. Ann. 607 (1869). A decision on the truth or falsity of the application would be a decision of a question of fact, and in criminal cases not reviewable, except for abuse of discretion.

67. See cases cited in *State v. Laborde*, 214 La. 644, 655, 38 So.2d 371, 375 (1949). It was early held that an application for recusation which fails to state

may be recused before trial, or as soon as the defendant becomes aware of a cause for recusation, but not after trial and judgment.<sup>68</sup>

The argument has been advanced that recusation of a judge should not be allowed when the defendant is to be tried by a jury, inasmuch as it will be the jury which will determine his guilt or innocence.<sup>69</sup> This was a reason for the English rule of no recusation of a judge except for direct pecuniary interest. The contention (if it ever did) no longer has merit. The judge plays an important part even in a jury trial, and, after the verdict, it is he who imposes sentence.

#### IV. APPOINTMENT OF SUBSTITUTE

The Louisiana Constitution authorizes the legislature to provide for trial of cases where the regular judge has been recused.<sup>70</sup> In districts having only one district judge, a district judge who is recused for cause of interest appoints for the trial of the case a district judge of an adjoining district, or on application of the party opposing the judge, appoints a lawyer having the qualifications of a judge of the district court in which the case is pending.<sup>71</sup> The party opposing the judge, if he so desires, may make application to the Supreme Court for the appointment of a judge to try the case.<sup>72</sup> A judge who is recused for any cause other than interest appoints for the trial a lawyer having the qualifications of a judge of the district court in which the recused case is pending.<sup>73</sup> The member of the bar who is chosen

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one of the grounds specified in the Code will be considered as frivolous. *State v. Chantlain*, 42 La. Ann. 718 (1890).

68. See LA. CODE OF PRACTICE art. 338 (1870); *State v. Bordelon*, 141 La. 611, 75 So. 429 (1917); *State v. Clark*, 142 La. 305, 76 So. 722 (1917).

69. See *State v. Doucet*, 199 La. 276, 298, 5 So.2d 894, 901 (1942).

70. "Except as otherwise provided in this Constitution, the Legislature shall provide for the trial of recused cases in the District Courts by the selection of licensed attorneys-at-law, by an interchange of judges, or otherwise; said lawyers sitting for recused judges to have all the qualifications required for district judges except that of residence in the district." LA. CONST. art. VII, § 38.

71. LA. CODE OF CRIM. PROC. art. 303.1 (1928); LA. CODE OF PRACTICE art. 340 (1870). LA. CONST. art. VII, § 38, provides that lawyers sitting for recused judges shall have the qualifications required for district judges except that of residence in the district.

72. LA. CODE OF CRIM. PROC. art. 303.1 (1928); LA. CODE OF PRACTICE art. 341 (1870).

73. LA. CODE OF CRIM. PROC. art. 305 (1928); LA. CODE OF PRACTICE art. 340 (1870). If no such lawyer can be obtained at the term of the court at which the recusation is declared, the judge immediately appoints some district judge of an adjoining district to try the case.

as acting judge has full judicial power as to that particular matter.<sup>74</sup>

In those parishes in which the district court is presided over by two or more judges, one of the other judges presides at the trial of the case.<sup>75</sup>

#### V. RECOMMENDATIONS

Disqualification law, as we have seen, requires of necessity a distinction between "general attitude" and "personal bias or prejudice." A judge without attitudes or ideology, a judge without a philosophy of life, does not grace this earth. Hence, in one sense of the word, it can properly be said that all judges are partial. The impartiality and intellectual honesty required of a judge can by the nature of things only mean the absence of a personal or particular bias or prejudice towards a party (or his attorney) in the case.

The phrase "personal bias or prejudice" covers the widest ambit of individual-to-individual situations. The scope given to the term and the procedure for recusation varies among the states. There are "easy" disqualification states and "hard" disqualification states. There is involved a conflict of values. As Judge Frank put it, if disqualification of judges is too easy, both the cost and delay of justice go out of bounds, but if disqualification is too hard, cases may be decided quickly, but unfairly.<sup>76</sup>

The five grounds for disqualification listed in the Louisiana statute are situations where, in the opinion of the legislature, a likelihood of judicial partiality exists. It would seem appropriate for the legislature to add the situation of personal enmity or favoritism, nothing more required, as a cause for recusation, or, in the alternative, for the judiciary, to include the situation within the meaning of the existing statutory phrase "his being

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74. See LA. CODE OF CRIM. PROC. art. 302 (1928); LA. CODE OF PRACTICE art. 342 (1870).

75. LA. CODE OF CRIM. PROC. art. 304 (1928); LA. CODE OF PRACTICE art. 339 (1870). If all the judges of a district are recused in any single case, a lawyer having the qualifications of a judge of the district court in which the case in question is pending is appointed. *State v. Varnado*, 207 La. 1049, 22 So.2d 587 (1945). When a Supreme Court Justice is recused, he selects a judge of the courts of appeal or district courts "who shall not be personally interested in the matter in contestation and shall otherwise be qualified to sit in the trial of the case." LA. R.S. 13:101 (1950).

76. See Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 608 (1947).

interested in the cause."<sup>77</sup> A judge who bears a personal prejudice towards a party, for any reason or for no reason, is not a proper person to decide the case. Personal animosity or favoritism deprives a judge of the impartiality which he should possess.

It is also recommended that legislation be enacted which allows one challenge, automatic in nature, in the case of a naked allegation of personal animosity or favoritism. To put it in other terms, it is recommended that the *mere filing* of an affidavit of personal bias should be sufficient to oust the judge from the cause.

These proposals are supported by the following considerations. The first proposal, which recommends a broad basis for disqualification, can be adopted without the second, which recommends a peremptory procedure.

(1) *Basis for recusation.* The Codex of Justinian,<sup>78</sup> the French Code of Procedure,<sup>79</sup> the statutes of a number of American states,<sup>80</sup> the federal law<sup>81</sup> and the Model Code of Criminal Procedure<sup>82</sup> provide that "personal bias or prejudice," in the

77. "The principle of disqualification is to have no technical or strict construction, but is to be broadly applied to all classes of cases where one is appointed to decide the rights of his fellow citizens. . . . Disqualifying statutes are not to be construed in a strict, technical sense, but broadly, with liberality." Quoted by the court in *White v. McClanahan*, 133 La. 396, 63 So. 61 (1913).

78. JUSTINIAN CODE 3.1.16.

79. FRENCH CODE OF CIVIL PROCEDURE § 378. See also GERMAN CODE OF CIVIL PROCEDURE § 41.42.

80. See statutes cited ALI MODEL CODE OF CRIMINAL PROCEDURE 720 *et seq.* (1930). See also Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947).

81. See Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. PITT. L. REV. 415 (1950). "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." 63 STAT. 99, 28 U.S.C. § 144 (1949). See *United States v. Rosenberg*, 157 F. Supp. 654, 662 (E.D. Pa. 1958). Under the federal law the mere filing of an affidavit of the judge's prejudice does not automatically disqualify him, but he has authority to decide whether the claim of bias is legally sufficient. *Behr v. Mine Safety Appliances Co.*, 233 F.2d 371 (3d Cir. 1956), cert. denied, 352 U.S. 942 (1956). The judge against whom an affidavit of bias and prejudice is filed must accept as true the alleged facts and can proceed no further if the alleged facts support the conclusion of bias and prejudice. See *United States v. Lattimore*, 125 F. Supp. 295 (D. D.C. 1954); *United States v. Pendergast*, 34 F. Supp. 269 (D. Mo. 1940),

82. ALI MODEL CODE OF CRIM. PROC. § 250 (1930).

broad sense of the term, is cause for recusation. The trend among the various states is toward more general disqualification. It is curious to observe that while certain facts which fall within the Louisiana statute will disqualify, because they raise the *presumption* or *likelihood* of bias, in some instances an *actual* showing of bias will not.<sup>83</sup> Moreover, as one writer put it, it is an irrational distinction to hold that interest is a sufficient ground for disqualification, but that prejudice is not.<sup>84</sup>

(2) *Procedure for recusation.* Some states provide that a judge determines the legal sufficiency of the affidavit. A number of other states, however, have so-called peremptory statutes which disqualify a judge *ipso facto* upon the filing by a party litigant of an affidavit of belief in his prejudice. Nothing more is required. The facts supporting the belief need not be alleged. Just as a number of prospective jurors can be challenged and excused from service without giving any reason, so can a judge be challenged peremptorily. "It is the challenge of and not the fact of prejudice that *ipso facto* disqualifies the judge from acting in a particular cause."<sup>85</sup> Proving actual bias and prejudice of a judge is a difficult and distasteful task. It strikes too close to the man. Counsel, mindful of their future trial career, desire to keep on good terms with the judge and, as a result, refrain from challenging a judge for cause. It seems sound to allow the recusation of a judge on the bare assertion by litigant or attorney that he has reason to believe that the judge is prejudiced. A peremptory challenge law, in effect, would afford real opportunity for merited attacks on a judge for personal bias. It would also permit the recusation of a judge for his ideology. The peremptory statute has been sustained against attack made on the ground that it delegates to litigants the function of determining the disqualification of a judge.<sup>86</sup> As in anything else,

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83. Note, 41 HARV. L. REV. 78 (1927). Compare, *e.g.*, the Louisiana cases of *White v. McClanahan*, 133 La. 396, 63 So. 61 (1913) and *State v. Morgan*, 142 La. 755, 77 So. 588 (1917).

84. Note, 41 HARV. L. REV. 78, 79 (1927).

85. *U'Ren v. Bagley*, 118 Ore. 77, 245 Pac. 1074 (1926).

86. See *Murray v. Thomas*, 80 Ariz. 378, 298 P.2d 795 (1956); *Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721 (1955); *Johnson v. Superior Court*, 329 P.2d 5 (Cal. 1958); *Howell v. State*, 77 Fla. 119, 81 So. 287 (1919); *State v. Hoist*, 11 Minn. 325, 126 N.W. 1090 (1910); *State ex rel. Anaconda Copper Min. Co. v. Clancy*, 30 Mont. 529, 539, 77 Pac. 312, 315 (1904) ("this proceeding to disqualify a judge is analogous to a proceeding for change of venue, and no one has yet denied the right of the legislature to provide for a change of venue upon such terms as it may propose"); *State ex rel. Clover Valley Lumber Co. v. Sixth Judicial District Court*, 58 Nev. 456, 83 P.2d 1031 (1938); *State ex rel. Beach v. Fifth Judicial District Court*, 53 Nev. 444, 5 P.2d 535 (1931); *Moruzzi v. Federal Life & Cas.*

there is in the peremptory disqualification statute the possibility of abuse by the filing of trivial accusations of prejudice. It is true that a peremptory statute affords opportunity for unmerited attacks on a judge and needless delay of trial. However, a limitation of one free challenge for personal bias, perjury statutes, and the honor of the attorney are safeguards against abuse of the privilege.<sup>87</sup> At any rate, a desirable rule should not be rejected because of the possibility of abuse.

An easy disqualification statute will allow the parties to obtain relief from judges in whom they have confidence in their freedom from prejudice.<sup>88</sup> As the Louisiana Supreme Court itself said on one occasion, "Next in importance to the duty of rendering a righteous judgment is that of doing it in such manner as will beget no suspicion of the fairness or integrity of the judge."<sup>89</sup> It is interesting to observe that today a number of

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Co., 42 N.M. 35, 75 P.2d 320 (1938); State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 76, 28 P.2d 511, 512 (1933) ("It is no invasion of judicial power for the Legislature to say that such power shall not be exercised by judges who are believed by litigants to be partial"); State *ex rel.* Bushman v. Vandenberg, 203 Ore. 326, 280 P.2d 344 (1955); U'Ren v. Bagley, 118 Ore. 77, 245 Pac. 1074 (1926); State v. Thompson, 43 S.D. 425, 180 N.W. 73 (1920); State *ex rel.* Nissen v. Superior Court, 122 Wash. 407, 210 Pac. 674 (1922); State *ex rel.* Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481 (1919); Murdica v. State, 22 Wyo. 196, 137 Pac. 574 (1914).

87. See *Berger v. United States*, 255 U.S. 22, 35 (1921).

88. See 46 CONG. REC. 2627 (1911).

89. *White v. McClanahan*, 133 La. 396, 63 So. 61, 62 (1913), quoting *Crook v. Newberg*, 124 Ala. 479, 27 So. 432 (1900). The following language of the California Supreme Court is noteworthy: "It is important, of course, not only that the integrity and fairness of the judiciary be maintained, but also that the business of the courts be conducted in such a manner as will avoid suspicion of unfairness. . . . Prejudice, being a state of mind, is very difficult to prove, and, when a judge asserts that he is unbiased, courts are naturally reluctant to determine that he is prejudiced. In order to insure confidence in the judiciary and avoid the suspicion which might arise from the belief of a litigant that the judge is biased in a case where it may be difficult or impossible for the litigant to persuade a court that his belief is justified, the Legislature could reasonably conclude that a party should have an opportunity to obtain the disqualification of a judge for prejudice, upon a sworn statement, without being required to establish it as a fact to the satisfaction of a judicial body. . . . The possibility that the section may be abused by parties seeking to delay trial or to obtain a favorable judge was a matter to be balanced by the Legislature against the desirability of the objective of the statute. Moreover, [the section] contains safeguards designed to minimize such abuses. It permits only one challenge to each side, requires that the party or his attorney show good faith by declaring under oath that the judge is prejudiced, and provides for timely making of the challenge before trial, for strictly limited granting of continuances, and for reassignment as promptly as possible. We cannot properly assume that there will be a wholesale making of false statements under oath, and the fact that some persons may abuse the section is not a ground for holding the provision to be unconstitutional." *Johnson v. Superior Court*, 329 P.2d 5, 8 (Cal. 1958).

It is interesting to note that the arbitrator, who is selected by the parties in dispute, enjoys a very high reputation for fairness. The growing practice of arbi-



common law states are more willing than Louisiana to follow the procedure of the Justinian Code.<sup>90</sup>

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tration might be looked on as part of a swing back to the medieval custom by which members of the mercantile community adjusted their disputes among themselves, without recourse to the general judicial system. See GILMORE AND BLACK, *THE LAW OF ADMIRALTY* 227 (1957).

90. See statutes listed p. 720 *et seq.* of the ALI MODEL CODE OF CRIMINAL PROCEDURE (1930). The Model Code recommends:

"Section 250. *Change of Judge.* On a prosecution by indictment or information the State or a defendant may apply for a change of judge on the ground that a fair and impartial trial can not be had by reason of the interest or prejudice of the trial judge.

"Section 251. *Application for change of judge—how made.* The application for change of judge shall be in writing and shall be presented in open court and then filed. It shall state the ground on which it is based. When made by the State it shall be verified by affidavit of the prosecuting attorney. When made by the defendant it shall be verified by his affidavit and shall also be accompanied by a certificate of counsel of record that it is made in good faith.

"Section 252. *Number of applications for change of judge.* Neither the State nor any defendant in the same cause may make more than one application for change of judge.

"Section 253. *Application for change of judge—when made.* The application for change of judge may be made only before or at the time the cause is called for trial.

"Section 254. *Duty of judge upon application for change of judge.* When an application is made to a judge for a change of judge he shall proceed no further in the cause, but a judge who is competent to act shall be substituted for him."