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JUDGES-DISQUALIFICATION -DOCTRINE OF NECESSITY

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JUDGES — DISQUALIFICATION — DOCTRINE OF NECESSITY — An original action in quo warranto was brought in the name of the state on the relation of the Attorney General who later became a justice of the Supreme Court and participated in the final decision. It was argued on motion for a rehearing that this justice was disqualified by his prior connection with the case and that his participation in the final decision made it erroneous. *Held*, he was not disqualified, but if he had been, he was nevertheless under a duty to act with the court when it appeared that without his participation no decision could be reached; "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." [1] *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 143 P. (2d) 652 (1943).

[1] Principal case, 143 P. (2d) 652 at 656 (1943).

There is an exception to the rule that a disqualified judge cannot act.[2] The exception may be stated as follows: A judge or an officer exercising judicial functions[3] may act in a proceeding wherein he is disqualified if the tribunal's jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent a determination of the proceeding.[4] Some courts have refused to apply this doctrine of necessity.[5] The reasons for the withdrawal of a disqualified judge are (a) the interest of the litigant in a fair trial[6] (b) the preservation of public confidence in the courts[7] and (c) personal reluctance on the part of the judge.[8] The reasons for participation by a disqualified judge where necessity requires it are (a) the constitutional right

[2] When the protested judge is a member of an inferior tribunal and there is a provision for a substitution of personnel or change of venue, a judge who may be directly affected in a pecuniary way by the result of the decision is disqualified. 42 L.R.A. (N.S.) 788 (1913).

[3] Brinkley v. Hassig, (C.C.A. 10th, 1936) 83 F. (2d) 351 (state medical board); Montana Power Co. v. Public Service Commission, (D.C. Mont. 1935) 12 F. Supp. 946.

[4] McCoy v. Handlin, 35 S.D. 487, 153 N.W. 361 (1915); after quoting from the constitution the court in Philadelphia v. Fox, 64 Pa. 169 at 185 (1870) made this oft-repeated statement, "The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be. The rights of the other party require it." See also State ex rel. Null v. Polley, 34 S.D. 565, 138 N.W. 300 (1914); and 1 ELLIOTT, GENERAL PRACTICE, § 157 (1894) and cases there cited.

Courts of last resort have heard appeals even though their members were interested in the result of the proceedings. Evans v. Gore, 253 U.S. 245, 40 S. Ct. 550, 11 A.L.R. 519 at 532 (1919) (federal income tax on all federal judges); McCoy v. Handlin, 35 S.D. 487, 153 N.W. 361 (1915) (application of statute providing for increase in judicial income); State ex rel Null v. Polley, 34 S.D. 565, 138 N.W. 300 (1914) (question concerning an extension of the judicial term of office).

[5] Anonymous, 1 Salk. 396, 91 Eng. Rep. 343 (1698) (Sole judge held disqualified who was lessor of plaintiff in ejectment); in United States v. Aluminum Co. of America, 320 U.S. 708, 64 S. Ct. 73 (1943) the court in a short statement said, "As four Justices have disqualified themselves from participating in the decision in each of these cases, the Court is unable to make final disposition of them because of the absence of a quorum of six Justices as prescribed by 28 U.S.C. § 321. These cases will accordingly be transferred to a special docket and all further proceedings in them postponed in each case until such time as there is a quorum of Justices qualified to sit in it, when it will be restored to the regular docket for such further proceedings as may be appropriate."

[6] State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (1930). (Every litigant includes the state.)

[7] Id. For a discussion of this matter, see 29 HARV. L. REV. 103 (1915); 13 CORN. L. Q. 454 (1928) and cases there cited.

[8] It would seem that there is a superior duty to the state which overshadows personal taste but the present Supreme Court of the United States has failed to achieve its statutory quorum due to voluntary disqualifications.

to a hearing [9] and the statutory right to an appeal [10] (b) special public interest in the expeditious trial of the particular case involved,[11] and (c) serious doubt that the presumption of impartiality is well founded.[12] There are varying ex-

[9] In addition to the principal case, the following cases contain statements to the effect that there is a constitutional right to have a matter litigated in spite of disqualified judges: Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 So. 112 (1894) (Statutory disqualification yields to a paramount constitutional right to administration of *justice*); in McCoy v. Handlin, 35 S.D. 487, 153 N.W. 361 (1915) the same disqualification was found in the only other forum where a delay would have been fatal to plaintiff's cause. The court at p. 495 quoted from the constitution the following: "All courts shall be open, and every man for an injury done him in his property, person, or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay." The court at pp. 495-496 then said, "Under such a constitution, can any one, simply because he chances to be the judge of a court, or because of any other situation in which he may be placed, be deprived of his property *'Without due process of law'? Can the doors of justice be closed or their opening even delayed to his appeal, and he be deprived or delayed of a remedy 'by due course of law,' and thus denied 'right and justice,'* simply because the only court in which a remedy can be sought is presided over by judges having an interest either like or adverse to that of the one seeking such remedy? The Constitution, the supreme law of this state, answers this question in the negative. The courts, provided by such Constitution, must open their doors to the call of all, and no court can refuse to hear a cause simply because its judges are interested and the law has made no provision for anyone to take their places." In State ex rel. Null v. Polley, 34 S.D. 565 at 570, 138 N.W. 300 (1914) the court said, "In such cases the rule of disqualification of judges is deemed of less importance than the denial of the constitutional right to a forum in which rights may be adjudicated. And, however embarrassing the situation may be to us, we are unanimously of opinion that this court should not abdicate its functions and duties in any case, where such action would, in effect, deprive the citizen of his constitutional rights."

Recusation offers a potent weapon to cause delay. See the dissenting opinion in People ex rel. Burke v. Dist. Ct., 60 Colo. 1 at 21, 152 P. 149 (1915) for such an expression; also 29 HARV. L. REV. 430 (1916).

[10] The right of appeal is not *essential* to due process of law under the federal constitution, Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421 at 426, 14 S. Ct. 114 (1894); Reetz v. Michigan, 188 U.S. 505 at 508, 23 S. Ct. 390 (1903).

[11] This very situation now confronts the Supreme Court of the United States which, because of voluntary disqualifications, coupled with the statute making six justices necessary to a quorum, 36 Stat. L. 1152, § 215 (1911), 28 U.S.C. (1940), § 321, and the judicially established practice of requiring a majority of the court to concur on constitutional questions, Briscoe v. Commonwealth Bank of Ky., 8 Pet. (33 U.S.) 118 (1834) has declared itself unable to hear two pressing matters, namely, North American Co. v. Securities and Exchange Commission, 318 U.S. 750, 63 S. Ct. 764 (1943) involving the so-called "death sentence" clause of the 1935 Public Utility Holding Company Act, and United States v. Aluminum Co. of America, 320 U.S. 708, 64 S. Ct. 73 (1943). See Cunningham, "The Problem of the Supreme Court Quorum," 12 GEO. WASH. L. REV. 175 (1944) for some proposed solutions for the problem. The expedient of compelling the justices to sit is not considered.

[12] At common law there is no disqualification for bias or prejudice not based on pecuniary interest. Elliott v. Hipp, 134 Ga. 844, 68 S.E. 736 (1910) [the case cites 17 AM. & ENG. ENC. LAW 738 (1900) and 23 CYC. OF LAW AND PRO. 582 (1908)];

pressions concerning what constitutes necessity.[13] The problem is made more acute by quorum requirements for appellate courts.[14] It would seem that to administer the law in a practical way, none of the various reasons above suggested for excluding or retaining a disqualified judge should be looked upon as an absolute test to be rigidly applied, but that they should all be assigned such values as appear reasonable and proper under the circumstances. The result reached in the principal case appears to be in harmony with this view.

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State ex rel. Germain v. Second Jud. Dist. Ct., 56 Nev. 331, 51 P. (2d) 219, 102 A.L.R. 393 at 397 (1935).

A judge is disqualified for a direct pecuniary interest. State ex rel. Williams v. Ellis, 184 Ind. 307 at 314, 112 N.E. 98 (1916). (The maxim of law that a person cannot be a judge of his own cause has become a universally recognized principle.) See also 30 AM. JUR. 771, 783 ff; 33 C. J. 991.

It appears that the rule of disqualification for prior participation in or connection with a cause grew out of voluntary recusation. 25 L.R.A. 114 at 117 (1894), Ann. Cas. 1913C, 251 at 254.

One wonders at the failure of the United States Supreme Court to distinguish between disqualification for *knowledge* of the subject matter and direct interests of the justices. The voluntary disqualifications of the Supreme Court Justices apparently rest on the former services rendered by the justices as federal administrators in the offices of Attorney General, Solicitory General, and the Securities and Exchange Commission. In the absence of statute it would seem that the common-law rule should be applied without question. See Barber County Commissioners v. Lake State Bank, 123 Kan. 10 at 13, 254 P. 401 (1927) to the effect that judicial notice will be taken of the fact that the Attorney General's office is a busy place and that a number of attorneys are there employed.

Cf. 36 Stat. L. 1087 at § 21 (1911), 28 U.S.C. (1940) § 25, a statute concerning interest which does not apply to appellate tribunals. It is quite possible that impartial training and the duty assumed under the solemn judicial oath serve to overcome human frailties, especially among justices of our higher courts.

[13] The classic statement seems to be that necessity does not exist simply because other justices cannot agree on a decision, or because a given result will not be attained, or because of public inconvenience, or of delay not resulting in injustice to a party. Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 at 193 (1920). The finding of exclusive jurisdiction coupled with a failure to provide for substitution has been held to show necessity without more. Montana Power Co. v. Public Service Commission, (D.C. Mont. 1935) 12 F. Supp. 946; see also 30 AM. JUR. 770 ff; L.R.A. 1915E, 858.

[14] One justice constituted the Supreme Court of Pennsylvania to hear Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961 (1904) when all the others became disqualified and there was no statutory or constitutional requirement as to number of judges.

A disqualified judge has been counted as a member of the court for purposes of constituting a quorum. Nephi Irrigation Co. v. Jenkins, 8 Utah 452, 32 P. 699 (1893).