The right to an impartial adjudication under English and American law

Bhuiyan, Rabia

THE RIGHT TO AN IMPARTIAL ADJUDICATION UNDER ENGLISH AND AMERICAN LAW

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PREFACE

This thesis relates to a topic which is frequently the concern of lawyers and judges and a subject of great controversy in both England and America. What is attempted is a comparative study of the Rule against Interest and Bias in England and in the United States in the light of modern developments. The thesis has been divided into seven chapters. The first chapter starts with the meaning and a short introduction of the principle followed by a historical background of the rule. In the second chapter, I have tried to outline the present scope and application of the rule. Chapter III concentrates on the particular cases on pecuniary interest both under English and American law. While in the fourth chapter, I have tried to deal with the various types of bias and application of the rule in particular cases. The fifth chapter concentrates on the exclusion of the rule by factors such as Departmental Bias, Rule of Necessity and so on. Effects of the breach of the rule and remedies available are dealt with in the sixth chapter. In the seventh and concluding chapter, I have concentrated on certain problems arising in the subject and suggested some answers. So far as the American portion of my work is concerned, necessities of time and space and availability of materials have forced me to concentrate mainly on federal law, and to confine within reasonable limits the references to American primary materials. I pursued my research in the Durham University Library, Middle Temple Library and the Institute of Advanced Legal

Studies, University of London.

I am greatly indebted to my Supervisor, Mr. Colin R. Munro, for his constant guidance, advice and encouragement throughout the progress of my work here in this Department. I am also grateful to Professor M.J. Goodman, who initially supervised my work, for his valuable suggestions and advice and to all the Staff who encouraged me throughout the progress of my work here. I should also like to express my sincere appreciation and thanks towards Dr. P. St. J. Langan, Barrister, Professor D.J. Bentley of the University of East Anglia, Mrs Carol Harlow of the University of London for the suggestions and advice I received from them. I also wish to thank my parents for their support and my husband for being the source of inestimable encouragement and for giving so freely his time in helping to bring this work to fruition.

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Rabia Bhuiyan.

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ABSTRACT

Deeply rooted in Anglo-American Jurisprudence is the concept that when factual issues arise in an adjudicatory proceeding whether before a court or an administrative authority, they must be tried impartially i.e. without any interest or bias. Impartiality is essential not only for safeguarding the rights, liberty and property of citizens, but also for maintaining their faith in the due administration of justice. The rule that "no man shall be a judge in his own cause" is a fundamental principle of natural justice and has become the rule against interest and bias. Once it was regarded as immutable, universal and even as being supreme over statute law. Now it is considered as no more than a principle of common law applied in the interpretation of statutes which often authorities or Parliament itself will try to exclude whenever it frustrates their wishes. English judges try to uphold this rule by means of prerogative writs and private-law remedies, though the effectiveness of these is limited by technicalities and procedural difficulties. Further, the judges are powerless when the legislature denies the rule.

On the other hand, the Americans who inherited this principle as a part of English common law have preserved its supremacy through their Constitution. Building upon the "due process" concept and strengthened by particular statutes, the American courts have constructed an

important edifice of impartiality. Their statutory procedure and guidelines for disqualification and comprehensive judicial review have added a strength and character to the concept distinct from English law. Despite these differences, English and American courts are producing substantially similar results. The basic principle is the same, the limitations upon it are similar but American procedures are more formalised, and more effective. For the proper development of English law, the existing remedies should be reformed and the introduction of disqualifying statutes on the American model should be considered.

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CHAPTER I : INTRODUCTION

A) THE MEANING OF THE RULE : ENGLAND

"For the same reason no man in any case ought to be received for Arbitration, to whom greater profit or honour or pleasure ariseth out of victory of one party, than of the other; for he hath taken (though an unavoidable bribe, yet) a bribe, and no man can be obliged to trust him".

- Thomas Hobbes -

A concept which is fundamental to English and American law is the right of a litigant to have his case determined by an impartial judge. The rule that a judge must be free from interest or bias is often expressed in the form of the maxim that "no man should be a judge in his own cause" or "nemo judex in re sua". Under English law this rule is hallowed by usage as one of the basic principles of natural justice.(1) Though the use of the term natural justice has been subject to criticism,(2) it has been held in a recent

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1. Leeson v. General Council of Medical Association (1889) 43 Ch.D. 366, 383 (Bowen L.J. in emphasizing that the substantial elements of natural justice must be found to be present in the inquiry expressly referred to two basic principles of procedure i.e. that the tribunal must be honest and impartial in arriving its decision (nemo judex in re sua) and must give the party an opportunity of being heard (audi alteram partem).

2. Lord Shaw said that the term "natural justice" is "a high sounding expression" "harmless", if it "means that a result or process should be just" but otherwise "confusing or "vacuous" (Local Government Board v. Arlidge, [1915] A.C. 120 at P.138. According to Professor Dowrick the use of the term natural justice in referring to the nemo judex in re sua and audi alteram partem principles which have evolved as canons of fair trial by the common lawyers and judges would be misleading, Justice According to the English Common Lawyers, Chap. 3 p.41 et seq.

case that "there is no better rule of natural justice than the one that a man shall not be a judge in his own cause".(3)

U.S.A.

In the United States, the Constitutional gurantee of due process embodies the right of a litigant to have his controversies resolved by an impartial adjudicator.(4) The American Constitution does not define due process of law. The courts have defined it in a number of ways. Due process means according to the settled course of judicial proceedings,(5) or in accordance with natural, inherent and fundamental principles of justice.(6) The concept of due process under American law has two aspects, substantive and procedural.(7) Procedural due process is the American counterpart of English natural justice. The requirement of an impartial decision maker is an essential component of procedural due process.(8) "A fair trial by a fair tribunal is a basic requirement of due process .... To this end no man can be a judge in his own cause and no man is permitted to try cases in which he has an interest in the outcome".(9)

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3. Per Lord Widgery C.J. in R.v.Altrincham Justices Ex parte Pennington 1 Q.B [1975] 549 at P. 552. (D.C.).

4. Fifth and Fourteenth Amendments to the USA constitution (discussed later).

5. Murray's Lessees v. Hoboken Land and Improvement Co. 18 How. 272, 276. (1856).

6. Holden v. Hardy, 169 U.S. 366.

7. 16 Am. Jur. 2d § 548. Procedural due process includes the two principles of natural justice, impartiality and hearing.

8. Hortonville Education Association v. Hortonville Joint School Dist. No.I.(Wis. 1975), 225 N.W. 2d 658 reversed on other grounds 49 Led 2d I. (U.S.Sup.Ct.).

9. In re Murchison, 349 U.S. 133, 136.(1955).

However it would be inappropriate to say much about the meaning or extent of the rule against impartiality at the opening of the inquiry, since this must be established at more length later. Before doing this, the development of the rule under English and American law has to be discussed.

B) THE DEVELOPMENT OF THE RULE IN ENGLAND AND THE UNITED STATES

ENGLAND

The idea of impartial trial has been propounded by English judges and jurists from an early Period. The contemporary version of a fair trial by an impartial tribunal that exists under the English and American legal systems is the culmination of a long development that took place in these two countries. Impartiality on the part of judges was considered to be essential in order to protect citizens' rights and interests. Thus there is some early authority to the effect that even the King could not be a judge in his own case i.e. in cases of high treason (where he was prosecutor, or at least the offended Party.(1) In an assize by two justices when pending the assize one justice died and one of the parties himself became judge, it was held that he could not be a judge in his own cause.(2)
It was decided in the Earl of Derby's(3) case that the Chamberlain of Chester, being sole judge of equity, could not decree anything wherein he himself was party, for he could not be a judge, in propria causa, but in such cases where he

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1. L. Ehrlich, Proceedings Against the Crown (1216 - 1377) 47-49.

2. (1371) 45 Lib.Ass. 3.

3. Earl of Derby's case (1613) 12 Co. Rep. 114.

was a party, the suit should be heard in Chancery, coram domino rege.(4) In Foxham Tithing's case an order of sessions was quashed because one of the justices was surveyor of the high way, and he joined in making the order and his name was put in the caption.(5)

The litigant's right to have an impartial judge was also propounded by mediaeval jurists. The author of "Glanvill" in the 12th century conceived that trial in the King's court should be conducted in accordance with justice and truth and that there no man would be driven away because of judge's partiality to friends.(6) As early as the 13th century Bracton wrote in his "De Legibus" that a judge was not to hear a case if he was suspected of partiality because of consanguinity, affinity, friendship or enmity, or any other relationship which might influence his judgment.(7) It appears that under canon law also judges could be recused on similar grounds.(8) Again Bracton writes that jurors can be challenged because they are friends or enemies of the parties, or if they have themselves made some claim in the subjectmatter of the suit or are related to either party by

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4. Earl of Derby's case op. cit.

5. 2 Salk 607; 14 Vin. Ab. 576. Similarly in Company of Mercers v. Ironmongers of Chester v. Bowker 1 Stra. 639 a member of the company became mayor and member of the court before judgment and for that reason the judgment was reversed in the Court of Quarter Sessions and the reversal was affirmed in the Kings Bench.

6. De Legibus et Consuetudinibus Regni Angliae (circa 1187) ed. Woodbine (1932) pp. 23-24.

7. De Legibus, f412.

8. Codex Juris Canonici; (Canons 1613 - 1614 Recusal of judges on grounds of pecuniary interest kingship, friendship, enmity, advocacy etc.).

ties of affinity or consanguinity, or are treated as one of the family of either of the parties, or are their counsellors, and so on.(9) Salmond is of the opinion that the list of causes for which a juror could be challenged given by Bracton has obviously been influenced by the canon law.(10) Nevertheless, Holdsworth observes that the English lawyers and judges neither borrowed the rules wholesale nor tried to apply them in their entirety, as the jury were more than witnesses and with the development of jurors the rules as to the competency of jurors also developed on native lines.(11)

How far canon law principles influenced English judges and lawyers is hard to say. On the other hand it is clear that English judges and lawyers were moving independently towards the idea of a fair and impartial trial by applying their own commonsense and reason. Earlier decisions show that under common law jurors were disqualified for relationship, but judges were not. Because of the principle

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9. Bracton, De Legibus, f.118a.

10. Salmond, Essays in Jurisprudence, 29; "canon law rejected the testimony of infamous persons .... of persons connected with either party by consanguinity and affinity, or belonging to the household of either party, of enemies of either party ..."; see W.S. Holdsworth, A Hist. of English Law-Vol. IX p.186 (citing Salmond, op.cit.)

11. The development of the rules to ensure that the jury came de vicineto i.e. that the jury must come from the immediate neighbourhood of the place in which the facts in issue occurred. They gradually cease to be witnesses and had become judges of the facts. - W.S. Holdsworth, A History of English Law, Vol - I p. 332. The canon law rules were later applied in a modified form to ensure competency of witnesses at common law - History of English Law, Vol. IX p. 186 et seq.

that "favour shall not be presumed in a judge",[12] it was not until 1866 in R. v. Rand that relationship as a ground for disqualification of judges was finally settled.[13] In Brett and Rowley the report records that: "Brett of Newcastle commenced a suit in the court, and afterwards made judge of the court of the town and good, because he was not the sole judge, for the court was holden before Brett".[14] The judgment was given by the court and not by him. In Sir Nicholas Bacon's case, a recognizance was made to Sir Nicholas Bacon and to two others and it was taken and recognized before him. The recognizance as to him was held void because of his pecuniary interest but to the other two it was held good enough.[15] On the other hand, in City of London v. Wood[15a] where an action of debt for fine was brought in the Lord Mayor's court for a refusal to serve in the office of Sheriff, though the Lord Mayor's interest in the fine was indefinitely small, it was held that the action could not be maintained of which he was even nominally the Chief Judge, even though it was proved that the Lord Mayor did not actually sit in the court and sittings in fact took place before the Recorder. Hatsell, one of the Barons of the Exchequer, ruled that an action cannot be brought by mayor and commonalty in a court held before the mayor and alderman; for though the mayor be not sole plaintiff nor sole judge, yet is

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12. Brookes v. Earl of Rivers (1668) Hard 503, a brother in law relationship existing between the judge and one of the parties did not disqualify. But in an earlier case Vernon v. Manners (1572)2 Plow. 425, the entire jury were struck out because the Sheriff who summoned the jurors was related to one of the parties in the 9th degree.

13. (1866) L.R. 1 Q.B.

14. 2 Dyer 220b, 14 Vin. Ab. 574.

15. (1563) 2 Dyer 220b.

15a. (1701) 12 Mod. 669.

he essentially plaintiff and judge - "a thing against natural justice".(16) Holt C.J. said:

"It is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the judge and the judge is to hear the party; the party endeavours to have his will, the judge determines against the will of the party and has authority to enforce him to obey his sentence; and can any man act against his will or enforce himself to obey?"(16)

On the other hand in Marwick v. City of London it was held that an appeal properly lay from the Sheriff's court in London to the Court of Hustings though the Lord Mayor was the chief judge of the court and the action was brought on a bond given to the Lord Mayor who was plaintiff in the original cause. The Court of Hustings in London is the only court where a writ of error of a judgment given in the Sherriff's court lies. The Lord Mayor of London is not the sole judge of the Court of Hustings, for by the constitution of that court it may be held by six aldermen in his absence.(17) The rule of necessity was also recognised by the judges. If an action be sued in bank against all the judges there; in such case for necessity be their own judges.(18) Nevertheless in earlier cases judges differed in their opinion. It is interesting to note that in an unnamed case Lord Holt said that the Mayor of Hereford was laid by the heels for sitting in judgment in a case involving the rights of his own lessee though by charter he was the sole judge of the court and no other party was competent to sit. The Mayor was in effect acting as judge in his own cause and upon complaint of this

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16. 12 Mod. 669, 672, per Holt C.J. at 687.
17. Marwick v. City of London (1707) 2 Brown P.C. 409.
18. 8 H.6. 19.b; 14 Vin. Ab. 573.

matter to the court, it granted an attachment and committed the Mayor for the proceedings.(19)

In fact the attention of the earlier judges was directed primarily to the attainment of a practical and legally sound result in the case at hand. Even Acts of Parliament were read in the light of reason and convenience i.e. to be so understood that neither injustice nor absurdity ensued. In certain instances the courts had disregarded the express words of the statutes. In Dr. Bonham's case, a clause in a patent confirmed by statute had conferred upon the Royal College of Physicians power to fine and imprison unlicensed physicians practising in London - half the fine to go to the college and half to the King. Acting under this statutory authority the censors of the college had fined and imprisoned Dr. Bonham who retaliated by bringing an action of false imprisonment against him. The words of the first clause of the act were straightforward. Such a provision Coke and his companion judges considered as injustice since censors were at the same time, judges, ministers and parties. The powerful sense of justice led Lord Coke to declare:

"The censors cannot be judges, ministers and parties; judges to give sentence or judgment; ministers to make summons;

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19. Mayor of Hereford's case referred to in Anon. (1697) 1 Salk 396. Until 1938, the High Court could direct a criminal information to issue against a magistrate who corruptly adjudicated a matter in which he showed wilful partiality or had pecuniary interest. Criminal information (other than ex-officio) was abolished by statute(S.12 of the Administration of Justice (Miscellaneous Provisions Act 1938) and ex-officio information by Section 6(6) of the Criminal Law Act 1967.

and parties to have the moiety of the forfeiture, quia alequis non debet esse judex in propria causa, imo iniquum est aliquem suae rei esse judicem: and one cannot be judge and attorney for any of the parties ... when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void".(20) Likewise Hobart C.J. declared in Day v. Savadge that "even an Act of Parliament made against natural equity, as to make a man judge in his own cause is void in itself, for jura naturae sent immutabilia and they are leges legum".(21)

In the last two cases, the rule that no man should be a judge in his own cause was regarded as universal and immutable, and a link was drawn between the rule and the concept of natural justice.

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20. Dr. Bonham's case (1610) 8.Co.Rep. 107 a, 118 a. According to some authorities, Coke's use of the word "void" in the sense of "ineffective" is more frequent - e.g. S.E. Thorne, A Discourse . The section of an act which is inconsistent with another portion of it need only be considered as ineffective-see pp-86-88 (n.186, 187). According to some authorities it is doubtful whether a court ever held a statute void only because it made a man judge in his own cause e.g. T.F.T. Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Review 30.

21. Day v. Savadge (1614) Hobart 85, 87.

The term natural justice in its widest sense was formerly used as a synonym for natural law, law of reason or laws of God. Its origin may be traced back to the Greek philosophers. Natural justice or natural law was thought to be universal, unchanging and everlasting.(22) However, the theories of natural justice as propounded by Greek and Roman Philosophers had little effect on English lawyers.(23)

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22. A Stotic philosophical conception as early as 312 B.C; see Cicero (106-43B.C.) De Republica-III(XXII,33). In classical Rome "Jus Naturale" or natural law played a decisive part in adopting positive law to changing situations. See A.P. D'Entrèves, Natural Law, (1951) p. 21 et seq. For a historical survey of natural justice see H.H. Marshall, Natural Justice Chapter 4. (1959). Throughout the middle ages this law of reason which was sometimes equated with law of God, was regarded by the civil and canon lawyers as the basis of all laws. Whenever they faced with any problem for which the positive law was silent they resorted to law of nature. Similar practice was adopted by the English Common law judges and lawyers. Yelverton C.J. said in 1470 (Y.B.8 Edw. IV 21) "We shall do in this case as the canonists and civilians do where a new case comes up concerning which they have no existing law, than they resort to the law of nature which is the ground of all laws and according to what they consider to be most beneficial to the common weal they do, and so also we shall do....." Here the identity between the use made by canon and civilians of the law of nature and the use made by the common lawyers and judges of reason is in terms admitted. Judges decided cases according to i.e. what they thought to be fair and beneficial to all concerned. In some English cases, natural law was identified with the laws of God, e.g. in Calvin's case (1607) 7 Co.Rep. 1a, 13a.

23. F.E. Dowrick, Justice according to English common lawyers, Chap. 4 P.47.

Gratian equated natural law with divine laws,[24] St. Thomas Aquinas thought that natural law was nothing else than the participation of eternal law in the rational creatures - "Et talis participatio legis aeternae in rationali creatura lex naturalis decitur"[25] and comprises those precepts that mankind is thus able to formulate, namely, the preservation of one's own good, the fulfilment of those inclinations "which nature has taught to all animals" etc. But unfortunately none of the great exponents of natural law included this rule that "no man should be a judge in his own cause" as a precept of natural law.[26] According to Professor Dowrick the principles of "natural justice" as employed by the High Court when it supervises the exercise of judicial and quasi-judicial powers by administrative tribunals "are not demonstratively deductions actually made by the judges in the last two hundred years from the precepts of the natural law or the old and new testaments, but are more obviously the historical deposits of those considerations which go to make the common lawyers' notion of fair trial".[27] Nevertheless it may be submitted that some

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24. Decretum Gratiani I,VIII,2.

25. St. Thomas Aquinas, Summa Theologica; A.P.D. Entrèves, Aquinas selected political writings, 114, 115, (Art 2. concl.): P. 123. (Art.2.concl).

26. See F.E. Dowrick. op.cit. chap.3 "Justice as Fair trial" - p.42.

27. op.cit. chap. 4 "Natural Justice" p. 66.

earlier judges such as Coke,[28] Hobart,[29] and even Holt[30] tried to link this rule with natural justice and held it as being supreme over the Acts of Parliament. But this contention that an Act of Parliament was not binding if it was contrary to reason did not survive far into the nineteenth century. The inroads that parliamentary sovereingty had made by the eighteenth century are clearly visible in Blackstone.[31] Judges have since then been unwilling to accept the view that if an Act of Parliament makes a man judge in his own

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28. Dr. Bonhams case, supra.

29. Day v. Savadge, supra.

30. Holt C.J. said in City of London v. Wood "And what my Lord Coke says in Dr. Bonham's case .... is far from any extravagancy, for it is a very reasonable and true saying that if an Act of Parliament should ordain that the same person should be party and judge or ..... judge in his own cause it would be a void Act of Parliament" (1701) 12 Mod. 669 at 687.

31. "Thus if an act of Parliament gives a man power to try to all causes that arise within his manor of Dale, yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the Parliament to enact that he should try as well his own cause as those of other persons, there is no court that has power to defect the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the interest of legislature or no" (Comm.,I.91)

cause, the courts might disregard it. "We sit here as servants of the Queen and the Legislature ..... If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the courts are bound to obey it".(32) Finally, it may be submitted that the early common law rule of disqualification was clear and simple. A judge was disqualified for pecuniary or proprietary interest.(33) But the first suggestion that a judge can be disqualified because of bias itself, whatever its source, other than those recognised under common law, was made by Blackburn J. in R.v. Rand. The learned judge said that a judge would be disqualified "whenever there is a real likelihood that the judge would from kindred or any other cause, have a bias in favour of one of the parties it would be very wrong in him to act: and we are not to be understood to say, that where there is a real bias of this sort this court would not interfere ..."(34)

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32. Lee v. The Bude and Torrington Junction Railway Company (1871) L.R. 6.C.P. 576 at 582 (Per Willes J). English cases have consistently supported this view to the present time: Pickin v. British Railways Board [1974] 1 All E.R. 609. (H.L.).

33. Dimes v. Grand Junction Canal (Proprietors of) (1852) 3 H.L.C. 759.

34. R.v. Rand (1866) L.R. 1.Q.B. 230, 232-33. Judges were disqualified under the new doctrine when they were "substantially" even though not pecuniarily interested: R.v. Meyer (1875) I Q.B.173. The doctrine has been developed and used liberally and flexibly by the English Courts, e.g. Frome United Breweries Co. v. Bath Justices [1926] A.C. 586. (justices who opposed renewal of licences took part in the hearing of the application for licences.

U.S.A.

The rule against interest and bias is as deep-rooted under American law as under English. The key to the development of this rule is the provision of due process clauses in the federal and state Constitutions.(35) ~~The~~ The restriction imposed upon the congress by the due process clause in the Fifth Amendment has been extended to limit the powers of the States by the Fourteenth Amendment which declares that no state shall "deprive any person of life, liberty or property without due process of law".(36) The due process concept as it has been interpreted by the American courts imposes certain procedural requirements which must be followed not only by judges but also by administrative adjudicators whether or not they are made mandatory by statute.

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35. Besides the provision of the "due process clause" in the Federal Constitution many of the State Constitutions have clauses like "without due process of law". For example, the constitution of the State of Illinois states: "No person shall be deprived of life, liberty or property without due process of law" - Art.I, Bill of Rights, Section 2 of the Constitution of the State of Illinois (1970). Many state constitutions use the phrase "due course of law" (constitution of the State of Kansas, Bill of Rights S.18 (as amended); and Art I, Bill of Rights, Section 12, Constitution of the State of Indiana 1851 (as amended). Extracts taken from Constitutions of the United States, National and State.

36. The Fifth Amendment of the U.S.A. Constitution states that no man shall be "deprived of life, liberty or property without due process of law". The amendment was proposed by the Congress in September 1789 and ratified in December 1791. The Fourteenth Amendment, applying the same rule to the states was proposed in June 1866 and declared ratified in July 1868.

The concept of due process of law did not, of course, originate in the American system of constitutional law. It was brought from England to America as a part of the English common law. The clause has been repeatedly declared by the American courts to be the exact equivalent of the phrase "law of the land" as used in Magna Carta.(37) Due process of law means process according to the law of the land. Mr. Justice Curtis said "The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Carta.(38) As the American Constitution does not contain any further definition of what due process of law is, the courts generally consider two factors - firstly, whether the act complained of violates the constitutional provisions: and secondly, whether it violates the settled

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37. Dent V. West Virginia 129 U.S. 114, 124. (1889) The paraphrase of the words of the famous 39th chapter of King John's charter of liberties (sometimes called 29th chapter) reads as follows: "The body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed-nor banished, nor destroyed in any way and the King shall not go or send against him by forces except by the judgment of his peers and by the law of the land".

38. Murray's Lessees v. Hoboken Land and Improvement Co. 18 How. 272, 276 (59 U.S. 272 1856) Coke in his commentary on these words said that they meant "due process of law" - (Coke - 2 Institute, 50, commentaries on the 29th chapter of Magna Carta. It is said that when first adopted in Magna Carta, the phrase "law of the land" had reference to the common and statute law then existing in England, and when embodied in the constitution in America, it referred to the same common law as previously modified and as far as suited to the wants and conditions of the people - Knoxville Iron Co. v. Harbison 183 U.S. 13. (1901)

usages and principles of judicial procedure which existed under English law and were recognised by the colonial courts prior to the adoption of the Federal and State Constitution. "The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be construed as to leave Congress free to make any process "due process of law" by its will ... we must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country".(39) The principle that no man should be a judge in his own cause along with the settled usages and procedures existing in the common law of England at the time of adoption were introduced into the American system. In order to ascertain whether a particular procedure fulfilled the due process requirement, the courts examined the usages and procedure prevalent under English law. So trial before a tribunal financially interested in the result of its decision constituted a denial of due process of law just as it constituted a breach of natural justice under

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39. Per Mr. Justice Curtis in Murray's Lessees v. Hoboken Land and Improvement Co, (supra) approved and quoted in many later cases e.g. Holden v. Hardy 169 U.S. 366 at p. 390 (1898).

English law.[40] The Supreme Court said in Tumey v. Ohio:[41]

"There was ..... no usage at common law by which justices of the peace or inferior judicial officers were paid fees on condition that they convicted the defendants, and such a practice certainly cannot find support as due process of law in English precedent", then, after reviewing a number of English and American cases the court continued:

"From this review we conclude, that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex". The writings and commentaries of Coke, Blackstone and other English legal scholars exerted great influence over American judges and lawyers.[42]

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40. Tumey v. Ohio 273 U.S. 510; Landfear v. Mayor 4 La. 97.

41. Tumey v. Ohio 273 U.S. 510, 526, 531.

42. For example in Tumey v. Ohio, Supra at 526, reference to Blackstone (Book 3rd page 400) was made by the Supreme Court of the United States: "Blackstone's commentaries are accepted as the most satisfactory exposition of the common law of England" - 195 U.S. Schick v. United States, 65, 69. (1904).

The principle enunciated in Dr. Bonhams case was followed in American cases. Under American law, quite apart from the statutory provisions, it is the general rule that officers acting in a judicial or quasi-judicial capacity are disqualified from adjudging because of their interest in the controversy to be decided.(43) According to the opinion of an American writer: "This maxim persists today even without the aid of statute. Recently the impartial tribunal seems to have become a part of that standard known as due process".(44)

However it should not be supposed that every form of procedure settled in English law at the time of emigration to America and practised by the early colonists is an essential element of due process of law today. "The strict common law rule was adopted in this country as one to be enforced where nothing but the common law controlled, and citizens and taxpayers have been held incompetent to sit in suits against the municipal corporation of which they have been residents ..... however, ... the strict rule seemed to be inconvenient, impracticable and unnecessary and the view was taken that such remore or minute interest in the litigation might be declared by the legislature not to be a reason for disqualification of a judge or juror".(45) So it cannot be said that every form of procedure settled in English law at the time of emigration to America and

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43. For example City of Naperville v. Wherle 173 N.E. 165 (1930) Sup.Ct. of Illinois (at p.166).

44. Robert N. Covington 13 Vanderbilt Law Review 712, 727 (1960).

45. Tumey v. Ohio, supra: at 529.

practised by the early colonists is an essential element of due process of law. In that case the procedure of the early colonists would be fastened upon American jurisprudence like a "straight jacket" rendering it incapable of progress or improvement.(46) As a member of the United States Supreme Court has stated:

"..... Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization," due process cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man and more particularly between the individual and government "due process" is compounded of history, reason, the past course of decisions and stout confidence in the strength of the democratic faith which we profess".(47) The American judges arrived at a conclusion using their own sense of justice or notion of a fair and impartial trial. Therefore, while the basic principle is the same, its application and the detailed rules derived from it sometimes differed in the two countries, as we shall see. In many cases, the American courts did not follow English path.

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46. Twining v. New Jersey 211 U.S. 78, 101 (1908). Due process does not require a proceeding according to the common law or any particular form, matters of procedure being subject to legislative regulation provided the essential elements of due process are preserved: Kessler v. Thompson (ND) 75 N.W. 2d 172.

47. Joint Anti-Fascist Refugee Comm., v. McGrath, 341 U.S. 123, 162-3 (1950).

Early common law in the United States adopted the grounds for disqualification then existing in England such as pecuniary interest[48] or relationship.[49] But while the English courts disqualified judges for bias and prejudice[50] almost all American courts refused to recognise a general right of disqualification when a judge is prejudiced.[51] Accordingly, statutes came to be enacted enabling litigants to disqualify biased judges in situations not covered by earlier law.[52] In analogizing from courts to administrative bodies, the tendency has been to apply the same rules formulated for judges. This has meant that administrative decisions have been overturned when the adjudicator is pecuniarily interested[53] or was

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48. Commonwealth v. McLane, 70 Mass. (4 Gray) 427 (1855).

49. Paddock v. Wells, 2 Barb, 331 N.Y. Ch. (1847).

50. For example: R.v. Rand L.R. 1 Q.B. 230, 232, 233 (1866 - real bias), R.v. Meyer 1 Q.B.D. 173 (1875 - real bias).

51. E.g. (1895) Jones v. State 61 Ark, 88, 32 S.W. 81:

52. (1894) Clyma v. Kennedy, 29 Atl.539(1894) Congress in 1911 granted the right to litigants to disqualify judges for personal bias or prejudice in the United States district courts by adding section 21 to the Judicial code of 1911. The current provision is 28 U.S.C.§ 144.

53. For example, in Re city of Rochester, 208 N.Y. 188, 101 N.E. 875 (1913) commissioners were disqualified from acting in eminent domain proceedings whose lands would be assessed for purchase price.

so biased for other reasons that his decision demanded reversal.(54)

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54. National Labour Relations Board v. Phelbs (1943) 136 F.2d 562: "... a fair trial by an unbiased trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge ....." (Hutcheson, Circuit Judge U.S. Ct. of Appeals, 5th circuit) at p. 563.

CHAPTER II

MODERN APPLICATION OF THE RULE : ENGLAND

Today, the rule that no man should be a judge in his own cause has become a rule against bias and pecuniary interest. The rule applies whether the adjudicator is a judge or an administrative official. It has been held that the same rule prima facie applies to members of administrative tribunals as applies to judges when judicial functions are carried out. One guiding principle adopted for the application of the rule to the administrative bodies was that the members were in a similar "judicial position" to judges, so that they must not be both accuser and judge,(1) or must not have any pecuniary interest or real bias.(2)

Consideration of the extent of the application of the rule against bias and interest to the exercise by ministers, administrative tribunals or other bodies of their powers under statutory authority, is a question of some difficulty. The question arises whether such an authority in arriving at its decision acted or ought to have acted impartially and fairly i.e. in accordance with the rules of natural justice.

The rule against bias and interest is merely a common law doctrine for the interpretation of statutes. Unlike American law, the rule has no specific constitutional or statutory safeguard. So while American judges act with

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1. R.v. London County Council, Ex P. Akkersdyk, Ex P. Fermenia [1892] 1 Q.B. 190.

2. R.v. London County Council, Re Empire Theatre (1894) 71 L.T. 638.

constitutional and statutory authority, English judges seek to carry out the true intention of Parliament. English judges contend that Parliament intends that power should be exercised in a fair and impartial manner and that in the absence of any statutory provision as to how the person who to decide is to proceed "the justice of the common law will supply the omission of the legislature".(3)

In order to apply the rules of natural justice, some courts have emphasized that a duty to act judicially in accordance with the rules of natural justice arises by implication in the exercise of administrative power affecting the rights and interest of subjects.(4) On other occasions courts have treated the essential criterion as a procedural one: anybody with a duty to determine a dispute between two parties by means of a procedure analogous to a court is acting judicially and so must conform to the rules

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3. Byles J. in Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, at P. 194. Nevertheless "before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and to require additional steps would not frustrate the apparent purpose of the legislation" - Wiseman v. Borneman [1971] A.C. 297 at 308 (Per Lord Reid).

4. Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. In R.v. Electricity Commissioners [1924] 1 K.B. 171, 205, Atkin, L.J. suggested that "any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially" [emphasis added] was subject to rules of natural justice. However, this notion of superadded duty to act judicially was criticised by Lord Reid in Ridge v. Baldwin: [1964] A.C. 40 at P. 74 at seq., (discussed later).

of natural justice.[5] In Errington v. Minister of Health, it was held that the Minister's function under the Housing Act 1930 in confirming a clearance order after a public local inquiry was made was quasi-judicial in nature and he was bound by the rules of natural justice.[6] But the meaning of "judicial" or "quasi-judicial" in this context was very imprecise, and both were criticised as suffering from obscurity of meaning. Thus Prof. H.W.R. Wade commented:[7]

"The administrative function had to be miscalled 'judicial' for the supposed reason that it was only to judicial functions that the principles of natural justice applied ..... In the sphere of natural justice it was ... . a meaningless and dangerous shibboleth. The argument goes round in a circle; natural justice must be observed when the function is judicial; and the function is called judicial where natural justice is required to be observed". Diplock L.J. observed that even a town clerk could be said to exercise a "quasi-judicial" function because in attending meetings "like a judge he wears a wig".[8]

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5. Errington v. Minister of Health [1953] 1 K.B. 249.

6. Ibid. This case has made it clear that minister and inspector's function under the Housing Acts are quasi judicial; they are bound by the rule against bias and interest (See Griffith and Street, Principles of Administrative Law, 5th ed. 1973, p. 183).

7. H.W.R. Wade, Administrative Law (2nd ed.) pp. 171-72.

8. Wednesbury Corporation v. Ministry of Housing and Local Government No. 2. [1966] 2 Q.B. 275, 305.

In Franklin v. Minister of Town and Country Planning the House of Lords threw doubt on the applicability of the rule against bias to any kind of administrative acts at all. Lord Thankerton said:

"My Lords, I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator".(9) In later cases, courts arrived at various anomalous decisions, where, for example grant or revocation of licences by administrative authorities was thought not to be subject to the rules of natural justice. In Nakkuda Ali v. Jayratne(10) the Privy Council held that a textile trader could be deprived of his trading licence in breach of natural justice. The authority was not determining a question but simply withdrawing a privilege and there was no ground for holding that the authority was acting judicially or quasi-judicially.

The uncertainty thus prevailing over this area of law was cleared away in 1964 by Ridge v. Baldwin, a most remarkable decision on natural justice which dealt at large with natural justice problems.(11) The case concerned the

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9. [1948] A.C. 87 at p. 103 discussed in chapter on "Exclusion of the Rule".

10. [1951] A.C. 66.

11. [1964] A.C. 40. Normally if one rule of natural justice applies, both apply. But see note 32 - 34 of this discussion.

dismissal of a Chief Constable by a Watch Committee under Section 191 (4) of the Municipal Corporation Act 1882, who neither informed him of the charges nor gave him any hearing. His appeal to the Home Secretary was dismissed. His claim for a declaration that his dismissal was void for breach of natural justice failed both in the High Court and Court of Appeal. In the Court of Appeal Harman L.J. said:

"The defendants were not deciding a question between the two opposing parties ..... The defendants were acting in exercise of their administrative functions just as they were when they made the appointment under Section 191(I) (of the Act of 1882)".[12] But the House of Lords held that the Watch Committee was under an obligation to observe the rules of natural justice which they had failed to observe in this case. The meaning of 'judicial' was re-interpreted. According to Lord Reid, power to make a decision affecting the rights of a subject carries with it a corresponding duty to act judicially. There is no superadded duty to act judicially. His Lordship emphasised that any exercise of power which affects the rights, property or tenure of an office or membership of a union is subject to the rules of natural justice. This case is a landmark in the process of judicialization of administrative

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12. [1963] 1 Q.B. 539, 577.

acts. In later cases the scope of the rule was further extended.(13) However courts are no longer concerned with the meaning of "judicial" or "quasi-judicial" but have turned their attention instead to the concept of "acting fairly". The observance of the rule is now thought to be essential to ensure "fair play".(14) In recent years, the term natural justice has been made synonymous with "fairplay" or "fairness" and the courts prefer to use the term "duty to act fairly" or "with fairness" instead of "duty to act judicially" (or "in accordance with rules of natural justice") in relation to functions that are not analytically judicial but administrative.(15) There is some authority to suggest a degree of difference exists between the two terms "natural justice" and "fairness". For example, in Pearlberg v. Varty(16) Lord Pearson said that a body with judicial or quasi-judicial function is required

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13. Lord Denning emphasised in R.v. Gaming Board, Ex p. Benaim and Khaida (1970) 2 Q.B. (C.A.) 417 at P.430 that former"heresy" that the principles of natural justice apply only to judicial proceedings was "scotched" by Ridge v. Baldwin. The rules of natural justice apply generally in licensing cases and in particular to the Gaming Board. In Schmidt v. Secretary of State for Home Affairs [1969] 2Ch. 149, 170 (application for extension to stay was rejected without hearing). Lord Denning held that the rules of natural justice apply to a case where a person's 'right' 'interest' or 'legitimate expectation'is at a stake.

14. Edwards v. S.O.G.A.T. [1971] Ch. 354, 382.

15. R.v. Birmingham City Justice, Ex p. Chris Foreign Foods (Wholesalers) Ltd. [1970] 1 W.L.R. 1428.

16. [1972] 2 ALL.E.R. 6 at 17(concerned a decision of the Income Tax Commissioners). But fairness obviously includes rules of natural justice, at least impartiality. See Re Godden [1971] 2 Q.B. 662 (C.A.). Such a distinction has been criticised by Professor Paul Jackson. See Paul Jackson, Natural Justice, P. 36, 37.

to act with rules of natural justice whereas in case of a body performing administrative function, there is no presumption of acting with rules of natural justice, though there is an obligation to act with "fairness". But the consensus of opinion is to regard these phrases as synonymous. It is said that natural justice, after all, "is but fairness writ large juridically".(17) Again in Re Godden, the Court of Appeal used these phrases synonymously. Lord Denning M.R. said:(18)

"The decisions leading to a compulsory retirement are of a judicial character and must conform to the rules of natural justice ..... when a medical practitioner is making a decision which may lead to a man being compulsorily retired he must act fairly".

This case also illustrates that a duty to act fairly essentially includes a duty to act impartially. Fairness (or natural justice) was not observed as the doctor could not act impartially. Another example is R.v. Birmingham City Justice Ex parte Chris, Foreign Food (Wholesalers) Ltd.,(19) a justice of the peace had ordered food to be destroyed as unfit for human consumption. Lord Parker C.J. said that it was quite unnecessary to classify the justices' function in deciding whether he had acted fairly, and added

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17. Furnell v. Whangarei High Schools Board [1973] 1 ALL E.R. 400 at P. 412 (Per Lord Morris).

18. R.v. Kent Police Authority Ex p. Godden [1971] 2 Q.B. 662, 669 (C.A.).

19. [1970] 1 W.L.R. 1428, 1432, 1433.

that the rules of natural justice were in a case such as this limited to openness, fairness and impartiality.

In short it may be submitted that at present the rule against interest and bias not only applies to courts and judicial bodies[20] but also to administrative bodies and tribunals.[21] It may be said that the rule is applicable to any administrative authority dealing with a person's "right", "interest" or "legitimate expectation".[22] Natural justice has no application "to what have been called pure master and servant cases in which there is no element of public employment, or service, no support by statute nothing in the nature of an office or a status which is capable of propection".[23] But pure master and servant cases should be distinguished from those cases where some incidents of relationship is governed by statute or

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20. Dimes v. Grand Junction Canal (Proprietors of) (1852) 3H.L.C. 759 (Pecuniary interest); R.v. Altrincham Justices Ex parte Pennington [1975] 1 Q.B. 549 (likelihood of bias as the Justice had an active interest in the organisation which was the victim of the offence).

21. Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon [1969] 1 Q.B. 577 (C.A.) (bias of Chairman of the rent tribunal). See also R.v. Preston Supplementary Benefits Appeal Tribunal Ex p. Moore; R.v. Sheffield Supplementary Benefits Appeal Tribunals, Ex p. Shine [1975] 1 W.L.R. 624 (C.A.).

22. For example, a local authority cannot take away a common law right except in accordance with natural justice (complainant present at the deliberations of the committee) R.v. Barnsley Metropolitan Borough Council Ex p Hook [1976] I W.L.R. 1052 (C.A.). Dictum of Lord Denning in Schmidt v. Secretary of State for Home Affairs, supra.

23. Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578, 1596 (H.L.).

some element of status is involved. In Malloch v. Aberdeen Corporation, the dismissal of a teacher was held void by the House of Lords as being in breach of natural justice. Though the teacher could be dismissed at pleasure under the statute, the statute provided that the dismissal should be preceeded by three weeks' notice. The majority of the House of Lords implied into the provision the requirements of natural justice.(24) Similarly the requirement of impartiality applies to an educational institution(25) just as it does to a trade union.(26) Courts have frequently expressed their view about the impossibility of excluding rules of natural justice by contract. Such a contract was held to be contrary to public policy.(27) Now the Trade Union and Labour Relations Act 1974 provides the Statutory Safeguard to the rules of natural justice which must be observed by every trade union and employers' association in hearing or determination of any question whether in relation to an alleged offence, an appeal or a dispute.(28) Similarly, the inspectors carrying on

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24. Supra.

25. Ward v. Bradford Corporation (1971) 70 L.G.R.27 (Expulsion of a student on disciplinary ground). The rule is less rigidly applied here. See discussion in Chap. IV and n. 39 of this Chapter.

26. Taylor v. National Union of Seamen [1967] 1 ALL E.R. 769 (Union Secretary was infact prosecutor and judge). Here too, the rule seems to apply less rigidly, see discussions in Chapter III & IV.

27. E.g. Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 342. In Edwards v. S.O.G.A.T. [1970] 3 ALL E.R. 689, 695, Lord Denning denied that a union "can give itself by its rules an unfettered discretion to expel a man or to withdraw membership. The reason lies in the man's right to work".

28. Trade Union and Labour Relations Act 1974 S.6 (13). Schedule I Part II deals with unfair dismissal.

investigations under the Companies Act 1948 are required to act fairly although their functions are not judicial or quasi-judicial but only administrative.(29) In Re Pergamon Press, the Court of Appeal emphasized the gravity of the consequences of the publication of the inspector's report which required the inspectors to act fairly.(29) However the conceptions which are indicated when natural justice is invoked or referred to are not comprised within, nor to be confined within, certain hard and fast rigid rules.(30) "Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But ..... the requirement of natural justice must depend on the circumstances of each particular case and the subjectmatter under consideration".(31)

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29. In Re Pergamon Press Ltd., [1970] 3 ALL E.R. 535 (C.A.). But see Maxwell v. Department of Trade and Industry [1974] 2 ALL E.R. 122, (C.A.): "That which fairness calls for in one kind of inquiry may not be called for in another ....." (Per Lawton L.J. at 132).

30. Wiseman v. Borneman [1971] A.C. 297, 308, 309.

31. Furnell v. Whangarei High Schools Board [1973] 1 ALL E.R. 400, at P. 412 (P.C., per Lord Morris). The Privy Council held that natural justice did not apply to the suspension by the defendant of a teacher pending proceedings. Although suspension might involve a hardship, it was not a penalty. There was opportunity for the teacher to present his case at the subsequent hearing, albeit after his suspension. The procedure laid down in the regulation was not unfair. For a criticiam of this case see M.J. Grant, "Natural Justice and Prima Facie case", N.L.J. (1973) p. 694.

At present some reports of professional persons also come under the scope of this rule.[32] It now seems that the scope of the rule against bias and interest is wider than the principle of audi atteram partem. For example, a person is entitled to get an impartial decision from a professional expert[32] even if he has no right to a hearing before such person.[33] In a recent case Megarry J. said: "It is the position of independence and skill that affords the parties the proper safeguards, and not the imposition of rules requiring something in the nature of a hearing".[34] Conversely where a hearing is required by statute or under law it is essential that the hearing must be impartial. The requirement of a hearing is not met if the adjudicators sit with blinded eyes or cottoned ears, nor is it satisfied if their eyes are open but their minds are shut. Perhaps the present law could be accurately explained in this way:

" ..... there is a tendency for the court to apply [this principle] to all powers of decision unless the

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32. E.g., R.v. Kent Police Authority, Ex p. Godden, supra.

33. Hounslow L.B.C. v. Twickenham Garden Developments Ltd. [1971] Ch. 233.

34. Ibid, pp. 259 - 260.

circumstances suffice to exclude them".(35)

Finally it may be submitted that the rule against interest and bias is flexible in its application, like the due process clause under American law.(36) English Courts sometimes give more importance to public policy rather than the question of actual bias. The object is to clear everything which might engender suspicion or distrust from people and to promote a public feeling of confidence in the administration of justice. "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".(37) The rule varies according to the facts and circumstances of each case. If a Social worker involved in an adoption proceeding retires with the justices, their determination will be quashed - because justice was not seen to be done.(38) But the strict procedure applicable to a court does not apply so rigidly in other cases, for example, in the case of an educational institution taking disciplinary action.

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35. Gaiman v. National Association for Mental Health [1971] Ch. 317, 333. The above comment was made by Megarry, J., with regard to both principles of natural justice. The expression is subject to certain exceptions - [See chapter on "Exclusion of the Rule"]. It also does not apply to legislative acts. Megarry, J., himself held in a recent case that the rules of natural justice did not apply to legislative acts: Bates v. Lord Hailsham [1972] 1 W.L.R. 1373 (Ch.D.)

36. American law discussed in the next section.

37. R.v. Sussex JJ., Ex parte McCarthy [1924] I K.B. 256, 259.

38. Re B. (a minor) [1975] 2 ALL E.R. 449. Professor Paul Jackson suggests that it was not necessary even if it were possible, to establish whether the social worker gave further evidence in the absence of the parties or participated with the justices in deciding the case, or both: 1976 Public Law I, at p. 4.

What is important is that the body which takes such a step should be fair and unbiased.(39) The rule is not stereotyped; it is flexible and must be adjusted to the particular case, so it is impossible to lay down any rigid rule as to when the principle would apply or as to its extent. "Everything depends on the subjectmatter of the case".(40)

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39. Ward v. Bradford Corporation (1971) 70 L.G.R. 27. It may be noted that participation of an assistant director of education in the committee's deliberation did not invalidate the decision, (discussed later).

40. R.v. Gaming Board Ex parte Benaim and Khaida [1970] 2 Q.B. 417 at 430. (The above comment was made by Lord Denning M.R, with regard to the scope, and application of the rules of natural justice. In the recent case R.v. Home Secretary Ex parte Hosenball [1977] 1 W.L.R. 766 the Court of Appeal held that in a case where national security was involved, the ordinary rules of natural justice were modified for the protection of the realm.

MODERN APPLICATION OF THE RULE : UNITED STATES.

Under American Law, the rule against bias and interest enjoys constitutional[41] and statutory safeguards. Unlike English law, the disqualification of judges in the United States is now governed by statute at both federal and state level. For example federal statute such as 28 U.S.C. Section 455[41a] provides for judicial disqualification for interest, bias and other specific grounds. Again 28 U.S.C. Section 144[42] empowers litigants to disqualify federal district judges for personal bias or prejudice. Similarly in the States, for example in California, disqualification of judges for interest, bias and other specific grounds is provided by statute.[42a]

Again federal statutes such as Administrative Procedure Act has provided for disqualification of administrative adjudicators for bias and interest.[43] The Act has also made provision for judicial review.[44] In many States review of administrative decision on grounds of procedural

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41. "In the United States, the rules of fair administrative procedure are embedded in the Constitution; the legislature itself consequently does not possess the authority to relieve the administration from their demands" - B. Schwartz, An Introduction to American Administrative Law, (1962) p. 106.

41a. 28 U.S.C. §.455 (as amended) Dec.5, 1974, Pub 4. 93-512 1, 88 stat. 1609.

42. 28 U.S.C. § 144 (1970).

42a. California Civil Procedure Code (West Supp) S.170 (as amended by Stats. 1969,C.446, P.995 1; Stats 1971, C.807, P.1563 1; Stats 1975, C.1240 P —— , § 2.

43. Administrative Procedure Act 5 U.S.C. §.556(b).

44. Ibid, § 706.

unfairness is provided by statute.[45] Besides the due process clause in the U.S. Constitution itself imposes an obligation to be impartial on those who decide anything. In a leading case the United States Supreme Court emphasized that "when the constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality".[46] The Court observed that the Administrative Procedure Act requirements of a hearing by an impartial tribunal were also applicable to deportation proceedings where a full hearing was required by due process even though not by the deportation statute.[47] The right to an impartial tribunal has become a constitutional as well as statutory right of a litigant. Impartiality is to be observed by a trier of a fact when the decision is made by an administrative authority just as when it is made by a judge in a court.[48] It was held in Tumey v. Ohio that "every procedure which would offer a possible temptation to the average man as a judge ..... not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law".[49]

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45. E.g., Revised Model State Administrative Procedure Act, §.15. See Chapter VI "Remedies".

46. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (an alien held for deportation on a charge of being unlawfully in the United States). At the time when the case was decided, there was no requirement of a hearing in the deportation statute.

47. Ibid, at 49,50.

48. N.L.R.B. v. Phelbs, 136 F.2d. 562, U.S. Circuit Court of Appeals, Fifth Circuit, (1943).

49. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

A State is free to regulate its court procedure, nevertheless, the United States Supreme Court will interfere if it fails to provide an impartial tribunal which is an essential requirement of of due process of law. A procedure which violates the due process clause is held to be unconstitutional.(50) Administrative authorities, agencies, and statutory bodies, as well as bodies exercising disciplinary functions, are all under an obligation to observe impartiality. Impartiality is an essential requirement of due process.(51) It was formerly held that due process protects only property rights and was not applicable when the administrative action affected only a "privilege". Government and welfare benefits were all considered mere privileges. But the courts have fully and finally rejected the distinction between "rights" and "privileges" as the relevant criterion governing the applicability or otherwise of procedural due process rights. As Mr. Justice Blackmun has declared in a recent case that "this court now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterised as a "right" or as a privilege".(52) Even more significant is the opinion of circuit judge Berger in Gonzalez v. Freeman.(53) It has been long held that a person may be

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50. Tumey v. Ohio, op.cit.

51. Hortonville Education Ass'n v. Hortonville Joint School District No.I. Wis [1975] 225 N.W. 2d 658. (reversed on other grounds - 49 Led 2dI, (Sup.Ct.1976).

52. Graham v. Richardson 403, U.S. 365, 374, (1971). Denial of Welfare benefits to resident aliens held unconstitutional under the Equal protection clause of the Fourteenth Amendment.

53. 334 F.2d 570 (D.C. cir. 1964).

debarred from eligibility for government contracts without compliance with the procedual requirements. In this case the plaintiff who had a contractual relation with a Commodity Credit Corporation (a federal government corporation) for many years was debarred from doing business pending an investigation into possible misconduct on his part, and, after investigation, the business was suspended for five years without giving any reason. The circuit court observed that no one has a legal right to do business with the government, "but use of such terms as "right" or "privilege" tended to confuse the issues presented by the debarment action.(54) Even if there was no right to government contracts that did not mean that the government "can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared inelligible for government contracts".(55) In another case involving the liberty of parolees, it was observed that whether this was a "right" or a "privilege", by whatever name it was called, the liberty was valuable, so that its termination called for some orderly and impartial process.(56) The Fourteenth

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54. Ibid, 574.

55. Ibid, 574.

56. Morrissey v. Brewer, 408 U.S. 471 (1972), (determination that reasonable grounds exist for revocation of parole be made by someone not directly involved in the case).

Amendments' procedural safeguard in protection of property is a safeguard of the security of interests that a person has already acquired in receiving specific benefits. A person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in the continued receipt of those benefits that is safeguarded by procedural due process. Although the pretermination hearing need not take the form of a judicial or quasi-judicial trial, it has to meet the minimum procedural safeguards demanded by rudimentary due process which included inter alia, the right to an impartial decision maker.(57) Likewise,college professors or school teachers dismissed during the terms of their contracts have interests in continued employment during such a period so that their termination must be made by an impartial authority.(58) Whether or not due process requirement of impartiality applies depends, then, on whether the nature of the interest is one within the contemplation of the "right", "liberty" or "property" language of the Fourteenth Amendment. It has been held in Board of Regents of State Colleges v. Roth(59) that to have a "property interest" in an employment, a person must have more than an abstract need or desire for it. He must have a legitimate claim of entitlement to it. Procedural due process applies only when such an interest exists. However

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57. Goldberg v. Kelly 397, U.S. 254, (1970). 271.

58. E.g., Hortonville Education Association v. Hortonville Joint School District No.I, Wis 225 N.W.2d 658 (1975) reversed on other ground 49 Led 2d I, U.S.Sup.Ct. (1976).

59. 408 U.S. 564 (1972).

there is some authority to suggest that procedural due process does not require that grounds for removal from government employment be initially considered by an impartial agency official. In a recent case,(60) brought by a discharged non-probationary federal employee, the Supreme Court of the United States held that the removal procedures established by the Lloyd La Follette Act (5 U.S.C. § 1501) did not violate due process of law in failing to provide a trial-type hearing before an impartial body i.e. other than the one making the charges against the employee even where, as in that case, the charges involved statements of the employee accusing the official of misconduct, since the Act afforded a post-removal trial type of hearing on administrative appeal.(61)

As under English law, the rule against bias is subject to certain exceptions. For example it is held to be inapplicable to ministers and administrative authorities who may be predisposed in favour of some policy.(62) Similarly, it also does not apply to legislative acts. Courts have refused to disqualify administrative officials called on to act in a legislative capacity, reasoning that the courts should not inquire into the motives of the legislators.(63)

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60. Arnett v. Kennedy 416 U.S. 134 (1974).

61. Ibid.

62. Both English and American cases on this point are discussed in the later chapter on "Exclusion of the Rule".

63. E.g., City of Miami Beach v. Schauer 104 So.2d 129, 132 (Fla. 1958).

Finally it may be observed that procedural due process has been made synonymous with the term "fairness" as with natural justice in England.(64) The due process requirement of a fair trial in a fair tribunal applies to both administrative agencies which adjudicate as well to courts.(65) Again, like natural justice due process is a flexible procedure and calls for such procedural protection as the particular situation demands. Due process is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation".(66) It would be wrong to suppose that situations which call for procedural safeguards necessarily call for the same kind of procedure. In determining whether a process fulfils the due process requirement of impartiality in a particular case, the court takes into account the individuals' stake in the decision at issue as well as the states' interest in a particular procedure for making it.(67) Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances".(68)

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64. See In re Murchison (discussed earlier).Fairness requires absence of bias and interest.

65. Withrow v. Larkin, 43 Led 2d 712, 723. U.S. Sup.Ct.(1975).

66. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961). A Short-Order cook in a cafeteria who operated on the premises of a Navy Ordance installation was refused permission to enter without hearing.

67. Hortonville District v. Hortonville Education Association 49 Led 2d I,10,11. U.S. Sup.Ct. (1976).

68. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951); Cafeteria and Restaurant Workers Union v. McElroy - supra.

CHAPTER III

PECUNIARY INTEREST: ENGLAND: A) COURTS

It is an unquestioned point of law both in England and the United States that a man has the right to trial before a disinterested judge. A direct pecuniary or proprietary interest, however small, would disqualify a judge or a magistrate under English law. No matter if the pecuniary interest is "less than ¼d. but it is still an interest" which is enough to vitiate the decision of a judge in a given case.(1)

If a judge is a shareholder in a corporation litigant, he is financially interested and is therefore disqualified for that reason. The most remarkable case in this connection is the Dimes v. Grand Junction Canal Co.(2) The facts of the case were that a public company which was incorporated filed a bill in equity against a land owner. The Lord Chancellor (Cottenham) was a shareholder in that company. This fact was at first unknown to the defendant in the suit. The case was heard before the Vice Chancellor and the company was granted relief. The Lord Chancellor on appeal, affirmed the order of the Vice Chancellor. Lord Chancellor's decree was set aside by the House of Lords. It was held that the Lord Chancellor was

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1. R.v. Hammond (1863) 9 L.T.(N.S.) 423 per Blackburn J.
2. Dimes v. Grand Junction Canal Co. (1852) 3 H.L.C. 759.

disqualified, on the ground of interest, from sitting as judge in the cause, and that his decree passed in the case was therefore voidable and consequently must be reversed. It was also held that the Vice Chancellor as he was not dependant but a judge subordinate to the Lord Chancellor, the disqualification of the Lord Chancellor did not affect him but his decree might be made subject to appeal to the House of Lords. Lord Campell said in this case (at p. 793):

"I take exactly the same view of this case as do my noble and learned friends ..... No one can suppose that Lord Cottenham could be in the remotest degree, influenced by the interest that he had in this concern; but my Lords, it is of the last importance that the maxim that no man is to be judge in his own cause should be held sacred. And that is not he confined to a cause in which he is a party, but applies to a cause in which he has an interest ..... And it will have a most salutary influence on these tribunals when it is known that this high court of last resort, ... considered that his decree was on that account a decree not according to law, and was set aside". When the disqualifying interest is direct pecuniary or proprietory interest, the disqualification is automatic and in "such case the law assumes bias".(3) The dictum of Blackburn J. in R.v. Rand on the law of bias is still considered to be

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3. R.v. Camborne JJ Ex p. Pearce [1955] 1 Q.B. 41 (per Slade, J. at 47).

authoritative on the point.[4] The facts of the case in short were that the Corporation of Bradford were the owners of the waterworks and were empowered by Statute to take the water of certain streams without any permission of the mill owners, on obtaining a certificate from the Justices that a certain reservoir was completed of a given capacity and completed with water. An application was made by the Corporation which was opposed by the mill-owners. After due inquiry, the certificate was granted to them. Now two of the justices were trustees of a friendly society and a hospital respectively, each of which had lent money to the corporation charging the Corporate fund. Neither of the justices could by any possibility have any pecuniary interest in these bonds, other than that the security of the "cestuiqui" trusts would be improved by anything improving the borough fund and the granting of the certificate would indirectly produce that effect as increasing the value of the waterworks. A rule nisi was obtained for certiorari to quash the certificate on the ground that the justices who granted it were interested in the subject matter. The opinion of Blackburn J. was expressed in the following way:

"There is no doubt that any direct pecuniary interest, however small,in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the

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4. R.v. Rand (1866) L.R. 1 Q.B. 230.

question different from what it is; for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour for those for whom they were trustees; and it is an objection not in the nature of interest, but a challenge to the favour".(5) This case also lays down the principle that a mere trusteeship is not such a pecuniary interest as to disqualify a judge. The pecuniary interest, in order to be a disqualification, must be directly connected with the issue in question and must not be remote or indirect.

The principle enunciated in R.v. Rand was approved in later cases.(6) The rule has been held to be so important that a century later Ormond L.J. in R.v. Barnsley Licensing JJ., where the particular pecuniary disqualification was invalidated by the provision in the statute, said:

"Of course, if the justices had some direct pecuniary interest in the premises, other than an interest in the profits of the premises, than the principle in R.v. Rand would still apply and the act would be invalidated in spite

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5. Ibid, at p. 232. This case suggested that when the interest is not a direct pecuniary interest, challenge is possible not for interest but for bias i.e. whether or not there is a real likelihood of bias - ibid, p. 233. (discussed later).

6. E.g. R.v. Meyer (1875) 1 Q.B. 173 at p. 177; Frome United Breweries Co. v. Bath Justices [1926] A.C. 586 at p. 591 (discussed in the later section on "Prosecutor-Judge cases").

of the provisions of section 48(5) of the Licensing Act of 1953".(7)

In R.v. McKenzie,(8) in a prosecution under section 7 of the Conspiracy and Protection of Property Act 1875, against a union leader, the prosecutor was the local agent of a shipping federation. The justices were shareholders in the shipping companies whose ships were insured in Societies which were members of the Federation. It was held by the Court that the justices' pecuniary interest was too remote to justify disqualification. The matter of remoteness of interest plays a decisive part in disqualifying for pecuniary interest. Another example where pecuniary interest was held to be too remote to disqualify is R.v. Middlesex JJ.(9) In it a company appealed against a poor rate to Middlesex Quarter Session. Some of the justices who were members of the Court of Quarter Sessions were also members of the County Council who were the owners of the tramways and had leased them to the tramway company on the terms that the council were to receive (inter alia) 45% of the net revenue of the tramway company. It was held that there was no pecuniary interest on the part of the justices. They were only trustees for the ratepayers of the money received from the tramways company. "[The Justices'] interest, if any, is only the

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7. R.v. Barnsley Licensing JJ. [1960] 2 Q.B. 167 at p. 182.

8. R.v. McKenzie [1892] 2 Q.B. 519.

9. R.v. Middlesex JJ. (1908) 72 J.P. 251 (K.B.D.)

interest of trustees, they are not precluded from sitting on the hearing of the appeals".[10] Courts have adopted the principle that when pecuniary interest exists in any member of the adjudicating body, and even where it is shown that such members took no part in the decision, nevertheless the body is held to be inproperly constituted.

Williams J. said in R.v. Cheltenham Commissioners:

"I am strongly disposed to think that a Court is badly constituted of which an interested person is a part, whatever may be the number of disinterested members. ..... (We) cannot go into a poll of the Bench."[11]

In R.v. Hertfordshire Justices, a magistrate who sat at Quarter Sessions to hear an appeal from his own decision was held to be interested because of his contingent liability for costs if the appeal was allowed. It was held that the Bench was improperly constituted by reason of his participation and the whole decision was vitiated. In such cases it was held to be no answer that there was a majority of the justices presiding in favour of the decision arrived at without counting the vote of the interested Justice, nor was it of any effect that he withdrew himself before the decision was arrived at, "for it is quite consistent with this that he may have joined in the

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10. Ibid, at P. 252.

11. R.v. Cheltenham Commissioners (1841) 1 Q.B. Rep. 467, 478-480. The same view was taken in R.v. Hertfordshire JJ. (1845).6 Q.B. 753.

discussion so far as to affect the result".[12] According to Patteson J: "The real question is, has an interested person taken any part at all?"[12a]

The rule is that even if the pecuniary interest of the deciding authority is invalidated by provisions in a statute, then the invalidating effect will be only as regards the particular provision and the courts are ready to disqualify for another interest not covered by the statute.[12b] An important case on this point is R.v. Barnsley Licensing JJ. Ex parte Barnsley and District Licensed Victuallers Association [13] in which the facts arose in the following way:

An application for a spirits off-licence at a drug department was granted to a Co-operative Society by seven licensing justices, six of whom were members of the Co-operative Society. An appeal against an order rejecting an application by the Licensed Victuallers' Association for an order of certiorari to quash the decision of the

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12. (1845) 6 Q.B. 753, 756-757 Per Lord Denman C.J. But a judge was not disqualified merely because he was sitting on appeal from his own decisions. Discussed in a later section, "Participation in Appeal against own decision".

12a. Ibid, P. 757.

12b. Disqualification will lie, apart from pecuniary interest, if the circumstances give rise to a real or reasonable likelihood of bias - Discussed in Chapter IV - "Bias".

13. [1960] 2 Q.B. 167. (C.A.).

Licensing Justices was made before the Court of Appeal on the ground that the justices had a pecuniary interest in the matter and therefore were disqualified under Section 48 of the Licensing Act of 1953. The Court of Appeal held, dismissing the appeal, that the dividend received by the members of the Society in respect of their purchases did not amount to a discount, but they were interested in the "profits of the premises" for which a licence was sought within sub-section 4 of section 48 of the Licensing Act 1953. Lord Evershed M.R. said:

"It therefore follows that if the disqualification is limited to the fact that the person concerned had an interest in the profits in the kind stated in subsection (4), then that alone does not render the decision invalid ..... to that extent the subsection ousts the rule of law enunciated in Reg. v. Rand. That conclusion does not mean, however, that the general rule of law is altogether superseded. All it means is that in a case which falls within the rule in Reg. v. Rand but also within the scope or limit or sub-section (4), the pecuniary interest will of itself, not withstanding the common law rule, not render invalid the justices' determination by reason of the words of sub-section(5) ..... I think that the construction put upon sub-section (3) of section 60 of the Act of 1872[14] is authority for the view

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14. Section 60 of the Licensing Act 1872 created disqualification whereas sub-section 3 of section 60 provided "No act done by any justice disqualified by this Section shall by reason only of such disqualification be invalid" -(a similar provision was provided in sub-section 5 of the section 48 of 1953 ACT.)

which I take of the meaning and effect here of sub-section (5) of section 48 of the Act of 1953":[15]

But such an approach might well lead to anomalies and Devlin L.J. commented:[16]

"On this view, a rather arbitrary situation may arise if a man is pecuniarily interested in the result of the application but not interested in the profits of the premises. In that case the underlying rule in Reg v. Rand applies, whereas if his interest is of a character which comes within the sub-section, then it will not apply. I cannot regard that as a satisfactory distinction, but I think it inevitably follows from the construction which we have put upon the section".

Now the Licensing Act 1964, section 193, provides for the statutory disqualification of Licensing Justices for pecuniary or proprietary interest.[17] There is some authority to suggest that a pecuniary or proprietary interest of a judge's spouse in a party before him would

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15. Lord Evershed M.R., supra, at pp. 179, 180.

16. Devlin L.J., supra at p. 185.

17. The invalidating effect of such interest has been removed by section 193 (6) (discussed in a later section on "Waiver") but provision for penalty up to one hundred pounds has been made under sub-section (7). And again, even though the invalidating effect is removed by statute, disqualification is possible on the ground of bias. - E.g., R.v. Barnsley Licensing Justices (op.cit.,) discussed further in Chapter IV.

not disqualify a judge.[18] In an Australian case, R.v. Industrial Court[19] a dispute arose concerning the reemployment of miners of Mount Isa Mines Ltd., and the company being dissatisfied with the order of the Industrial Commission appealed to the Industrial Court. The President of the Industrial Court, Hanger, J., allowed the appeal and set aside the order. The wife of the President held shares in the Mount Isa Mines Ltd, though the President did not own and had never owned any stock in the company and had no pecuniary interests in the units held by his wife. It was held by the Full Court that a judicial officer whose wife held shares in a company which was party to the proceedings before him did not on that account himself had a disqualifying interest, the question being whether in all the circumstances of the case it had been shown that there was a real likelihood of bias.

It may, therefore, be stated that unless there is statutory exemption, a direct pecuniary interest however small or insignificant always disqualifies a judge or justice under English law. The Courts always consider it as a "serious dereliction" of duty for a justice to adjudicate on a matter in which he or she has got a pecuniary or proprietary interest.[20]

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18. Further discussion on this point has been made in a later section - Pecuniary Interest: U.S.A.: Courts.

19. R.v. Industrial Court [1966] Qd. R. 245. It was held further, that as there was no real likelihood of bias, the president was not disqualified from determining the appeal.

20. Per Lord Widgery C.J. in R.v. Altrincham JJ. Ex p. Pennington 1 Q.B. [1975] 549 at p. 552 (D.C.).

PECUNIARY INTEREST (B) BODIES OTHER THAN COURTS : ENGLAND

The rule applicable to courts applies, with appropriate modifications, to other non-judicial bodies acting judicially and to administrative tribunals whose functions are analogous to those of courts. As has been observed, a direct pecuniary interest always disqualifies a judge under common law and there is no difficulty in applying the rule to bodies when their proceedings are in the nature of a judicial type of proceedings. In such cases although the statute was silent on the principles of natural justice, nevertheless the court was ready to infer that in providing for a judicial type of proceeding, the statute certainly imported that the substantial elements of natural justice must be observed by the deciding authority. As Bowen L.J. observed in Leeson v. General Council of Medical Education:(21)

"These proceedings were in the nature of judicial proceedings, although the forum is a domestic one ..... The jurisdiction is defined by the statute. There must be an allegation before the General Medical Council of imfamous conduct ..... and adjudication must be arrived at after inquiry. The statute says nothing more, but in saying so it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry". The learned judge continued:

"[Nothing] can be clearer than the principle of law

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21. Leeson v. General Council of Medical Education (1889) 43 Ch.D (C.A.) 366 at P. 383.

that a person who has a judicial duty to perform disqualifies himself from performing it if he has a pecuniary interest in the decision which he is about to give or a bias which renders him otherwise than an impartial judge".(22)

Existence of pecuniary interest makes disqualification automatic. In such a case the law will not enquire "whether or not the mind was actually biased by the pecuniary interest".(22)

In this century, of course, many kinds of tribunals have been set up by Acts of Parliament to decide disputes which would otherwise have gone to courts of law.(22a) These have their own procedure for the determination of the disputes with which they are appointed to deal.

In many cases, the chairman of the tribunal must be legally qualified. The members of these tribunals are required to act impartially i.e. without any interest and bias. As Professor Wade remarked:

"Here we meet the highest possible degree of judicialisation of administration."(23) The rule against pecuniary interest is applied to members of administrative tribunals in the same way as it applies to judges. Direct

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22. Supra at P. 384.

22a. See for general surveys of this growth, Harry Street, Justice in the Welfare State; H.W.R. Wade, Towards Administrative Justice; N.D. Vandyk, Tribunals and Inquiries.

23. H.W.R. Wade, Administrative Law, (3rd ed.) P. 5.

pecuniary interest disqualifies a member of the tribunal just as it disqualifies a judge. In the same way disqualification will not lie when pecuniary interest is indirect, too remote or uncertain. In a leading case, Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon, Lord Denning M.R. said[24] that there was no evidence that the Chairman of the Rent Assessment Committee had any direct pecuniary interest in the suit since he had no interest in the appellant landlord's flats in Oakwood Court (whose rents were in dispute). The only possible interest was his father's pecuniary interest in having the rent of his flat reduced which was also too remote. If the assessment committee reduced the rent of the Oakwood flats those rents might be used as "comparable" for the rent of his father's flat at Regency Lodge which belonged to the same group of companies as the appellants. "Even if we identify the son's interest with the father's, I think this is too remote. It is neither direct nor certain. It is indirect and uncertain".[25]

However, difficulty arises with regard to the application of the rule to domestic tribunals, which are purely voluntary organisations, such as clubs and trade unions formed by contract. Maughan J. in Maclean v. The Workers Union refused to accept that the principles of natural justice had any application to a domestic tribunal which

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24. [1969] 1 Q.B. 577, at p. 598.

25. Ibid. However the Chairman was held disqualified for bias.

according to him is in general a tribunal composed of "lay men".(26) The facts of the case in short were that the plaintiff, Neil Maclean, was a member of the defendant union, the rules of which provided, inter alia, that members who issued addresses or circulars not approved by the executive committee or by the general secretary should be fined and were subject to certain disqualifications. The plaintiff broke union rules more than once and the committee resolved that he be excluded from membership of the union. The plaintiff sought a declaration that the resolution was ultra vires and void and an injunction to restrain the defendant union from enforcing it, the grounds for his claim being that the executive committee could not be an impartial body.

The learned judge after discussing the principles formulated in earlier decisions such as R.v. Rand(27) said:(28)

"In my opinion, however, these cases have no real application to the case of a domestic tribunal established by private contracts and acting ..... on a system and by methods so entirely different from those of courts of justice. If we consider first the case of pecuniary interest it is impossible in general to imply from the terms of the rules such a disqualification as regards the members

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26. Maclean v. The Workers' Union [1929] 1 Ch.602, 625.

27. (1866) L.R. 1 Q.B 230 (discussed before).

28. Per Maugham J. Supra, at pp. 625, 626.

of a domestic forum ..... when members of a club expel another member under their rules, generally speaking, they all have a small pecuniary interest in the matter". The consensus of judicial opinion is to hold that a trade union is bound by the rules of natural justice and to refuse to accept that the rules of trade unions can oust these principles.(29) Now the Trade Union and Labour Relations Act 1974 provides a statutory embodiment of the rules of natural justice which must be observed by trade unions before expelling a member from the union. The Act says: "In making provision for any hearing or a determination of any question, whether in relation to an alleged offence, an appeal or a dispute the rules [of every trade union] shall be so framed, as not to depart from, or permit any departure from, the rules of natural justice".(30)

The rule against interest is difficult to apply to the decisions of arbitrators on the ground that parties themselves choose their own judge, and so there is nothing for the court to do. As Lord Cranworth observed in

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29. E.g., Edwards v. S.O.G.A.T. 1970 3 All E.R. 625. Lord Denning refused to accept that the rules of trade unions could oust the principles of natural justice and could give the union "an unfettered discretion to expel a man or withdraw his membership".

30. Trade Union and Labour Relations Act 1974 S.6 (13) It is difficult to say whether the rule against interest can be applied with the rigidity of a court of law in case of a trade union when it fines or expels its members. As it will be seen later, the rule against bias cannot be applied with the rigour of a court of law in trade union expulsion cases. (Discussed in a later section "Bias", see also de Smith, Judicial Review of Administrative Action, (3rd ed.) P. 232.

Ranger v. Great Western Ry.:[31]

"I think the principle (Dimes case) has no application here; a judge ought to be and is supposed to be indifferent between the parties ..... when it is stipulated that certain questions shall be decided by the engineer appointed by the company ..... the principle on which the doctrine as to a judge rests, wholly fails in its application to this case".[32] In the instant case, a contract was made between a contractor and a railway company. The terms of the contract provided that the payment to the contractor would be made from time to time by the company on certificates granted by the "Principal Engineer of the Company or his Assistant Resident Engineer". In case of any dispute pending the progress of the contract, the decision of the Principal Engineer would be final. At the completion of the work, if the contractor and the Principal Engineer differed in their opinion, that would be settled by arbitration. A difference arose between the contractor and the company and the contractor discovered that the Engineer was a share holder in the company. But the court held that the fact that the engineer was a share-holder formed no ground for relief as the company's engineer was not intended to be an impartial person but an organ of the company. When the parties select their own tribunal the case is very different, and such a position though

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31. Ranger v. Great Western Ry. (1854) 5 H.L.C. 72.

32. Ibid, at P. 89.

"prima facie raises some surprise in a judicial mind; but that is the contract of the parties".(33) If the parties to a contract agree that a person, who may be suspected of bias or deciding in his own cuase yet shall be the judge in a dispute between the parties, the Courts will not interfere.(34) However, the Courts did not hesitate to intervene in a case where the circumstances relating to bias or interest of the arbitrator was completely unknown to either of the parties.(35)

At present a party is entitled under the Arbitration Act 1950, Section 24 (1), notwithstanding the agreement between the parties, before an arbitrator proceeds to arbitration, to apply to the High Court for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, and it shall not be a ground for refusing the application that such party at the time when he made the agreement knew or ought to have known that the arbitrator might not be impartial.(36) Moreover by section 23(2) a party is entitled to challenge an award before the court on the ground of bias or interest and to get it set aside.

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33. Eckersley v. Mersey Docks and Harbour Board [1894] 2 Q.B.667 (C.A.) at P. 673 (Per Davey L.J.).

34. Jackson v. Barry Railway Co. [1893] 1 Ch. 238, discussed later in Chapter IV.

35. Kemp v. Rose (1858)I Giff 258 (discussed further in a later section "Waiver").

36. Arbitration Act 1950 24(1) Statutory arbitrators are excluded from the operation of this section, by S.31 of the same Act.

The rule applies to the decisions of local authorities acting judicially i.e. hearing disputes or determining questions affecting the rights of the subjects. In R.v. Hendon Rural District Council,(37) the decision of a rural district council to permit development under section 4 of the Town Planning Act 1925, pending the approval of its town planning scheme by the Minister of Health, which permission would safeguard a third party's right to compensation under section 10 in the event of his property being affected by the scheme, was held to be sufficiently near a judicial decision. In that case a local authority unanimously decided to permit development of certain premises pending the final approval of a scheme by the Minister of Health. One of the Councillors voting in favour of the resolution to grant permission to develop, was acting as an agent for the existing landowner for sale to the proposed developer. It was held that he had such an interest in the matter as to disqualify him from taking part or voting, on account of bias, and an order nisi for a writ of centiorari to quash the decision of the Council was made absolute. In this case the dicta of Atkin L.J. in R.v. Electricity Commissioners, ex parte London Electricity Joint Committee were applied. Lord Hewart C.J. said:(38)

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37. R.v. Hendon Rural District Council, Ex parte Chorley. [1933] 2 K.B. 696.

38. Per Lord Hewart C.J. supra at p. 702.

".... I will refer only to the following words of Atkin L.J.(as he then was) in Rex. v. Electricity Commissioners[39] ..... wherever any ..... of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs".

Presence of pecuniary interest even in one single administrative adjudicator was held sufficient to vitiate the decision of the whole body. It was said that if any of the member of a county council had a pecuniary interest in the subjectmatter, such adjudication could not stand.[40] The rule against interest applies equally to statutory bodies. But the rule, being common law principle for the interpretation of statutes may be excluded by statute. The legislature can depart from the general rule and make a person judge in his own cause. In Jeffs v. New Zealand Dairy Production and Marketing Board,[41] the respondent Board was established by the Dairy Production and Marketing

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39. [1924] 1 K.B. 171 at P. 205. This dictum of Lord Atkin L.J. was criticised by Lord Reid in Ridge v. Baldwin [1964] A.C.40 at P. 79. According to Lord Reid when there is a legal authority to determine questions affecting the rights of subjects, there is also a corresponding duty to act judicially and there need not be any additional duty to act judicially for the application of the rules of natural justice (discussed in Chapter II, Modern Application of the Rule).

40. R.v. London County Council Ex P. Akkersdyk [1892] 1 Q.B. 190, 195. (discussed in a later section "Prosecutor Judge").

41. Jeffs v. New Zealand Dairy Production and Marketing Board [1967] 1 A.C. 551, 565 (P.C.).

Board Act 1961, and was concerned with the production and marketing of dairy products. One of its powers was to define areas from which particular factories could get cream and milk. The board inherited a right to the repayment of a loan made by the predecessor to the R.Co. and held a debenture securing a further loan made to that company. Notwithstanding their financial interests, the board made a zoning order covering, inter alia, the R. Co. In 1963, a committee set up by the board to investigate questions of supply, and consisting of three if its members, held a public inquiry at which the appellants, all farmers in the district, gave evidence. The Committee made a written report to the board, recommending certain zonings conditional upon compensation being paid to the R.Co. for the loss of supply it would suffer. The board accepted the committee's recommendations without alteration and made the orders. The appellant farmers sought a writ of certiorari to quash the zoning orders contending inter alia that in view of the Board's pecuniary interest it should not have adjudicated upon the zoning applications and that it had acted as a judge in its own cause contrary to the principles of natural justice. The Supreme Court of New Zealand first gave judgment for the board. The Court of Appeal of New Zealand dismissed the farmers' appeal. On further appeal to the Privy Council, it was held that in the Act of 1961 the legislature had shown a clear intention to make an exception to the general rule that a person should not be a judge in his own cause and that the Board was required to decide zoning questions even though its pecuniary interests might

be affected.[42] Since, however, it is contrary to the general rule of law to make a person judge in a case in which he is interested, such a legislative intention must be clearly expressed in the statute.[43] Sometimes on the other hand, disqualification for pecuniary interest is specifically provided by the legislature in a statute. For example, the Local Government Act 1972, Section 94 (subject to Section 97) states that "if a member of a local authority has any pecuniary interest, direct or indirect, in any contract, proposed contract or other matter and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration he shall at the meeting and as soon as practicable after its commencement disclose the fact and shall not take part in the consideration or discussion of the contract or other matter or vote on any question with respect to it". If any member fails to comply with the above provision, he shall be liable for a criminal offence. Section 95 provides a detailed explanation of "indirect pecuniary interest" as stated under section 94. In the case of married persons living together the interest of one person shall, if known to the other, be deemed for the purpose of section 94 to be also an interest of the other.

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42. Supra. Appeal allowed on other grounds.

43. Mersey Docks Trustees v. Gibbs (1866) L.R. I H.L. 93, 110.

PECUNIARY INTEREST (A) COURTS : UNITED STATES

At present every State in the United States has some statutory provision for the disqualification of judges for pecuniary interest.(1) Direct pecuniary interest in a party or in the subjectmatter of controversy have been regarded as a disqualifying factor by the justices and judges from an early period. Supreme Court justices beginning with Justice Livingston(2) and Chief Justice Marshall(3) have consistently disqualified themselves in such circumstances.(4) Earlier decisions such as Tumey v. Ohio(5) shows that a direct and substantial personal pecuniary interest of a court in its decision constituted that court an unfair and partial tribunal within the prohibition of the Fourteenth Amendment. In Tumey v. Ohio the question arose whether certain statutes of Ohio in providing for the trial of one Tumey who was convicted and committed to jail by the Mayor for unlawfully possessing

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1. E.g., Cal. Civil Proce. Code (West Supp) § 170; Utah Code Ann. (1953)§78-7-I. N.Y. Judiciary Law § 14 and see 42 N.Y. University Law Review (1967) P. 484.

2. Livingstone& Gilchrist v. Maryland Insurance Co. 11 U.S. (7 Cranch) 506 (1813).

3. Fair Fax Devisee v. Hunter's Lessee 11 U.S. (7 Cranch) 603 (1813).

4. Frank "Disqualification of Judges", 56 Yale Law Journal 605, 615.

5. 273 U.S. 510 (1927).

intoxicating liquor in violation of the Ohio Prohibition Act, deprived the accused of due process of law and violated the Fourteenth Amendment to the Constitution because of the pecuniary and other interest with which the statutes provided the Mayor in the result of the trial. Under Ohio law, the Mayor received his fees and costs for his service as a judge in addition to his salary only when he convicted the defendant but not otherwise. When the case came before the Supreme Court of the United States, it discussed many authorities(6) and concluded that there had been no usage at common law by which an inferior judge was paid for his services only when he convicted, and nor could such a system be regarded as within due process of law unless the costs usually imposed were so small that they might "be properly ignored as within the maxim de minimis non curat lex".(7) In that case the Mayor received for his fees and costs $ 12 which he would not have received if the defendant had been acquitted. "We cannot regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a loss by the Mayor should weigh against his acquittal".(8) The Supreme

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6. E.g. Dr. Bonham's case (1610) 8 Co.Rep., 107a 118a; City of London v. Wood (1701) 12 Mod. 669, 687 Day v. Savadge (1614) Hobart 85, 87; R.v. Rand (1866) L.R. 1 Q.B. 230, and so on.

7. Ibid, 531.

8. Ibid, 532.

Court held that to subject the accused to trial before a judge who had a direct, personal and substantial pecuniary interest in reaching a particular conclusion amounted to a denial of due process of law under the Fourteenth Amendment.

The principle enunciated in Tumey v. Ohio was extended further in Ward v. Village of Monroeville[9] disqualifying a mayor though he did not gain personally from imposing fines.

In that case the Mayor before whom the petitioner was compelled to stand trial for traffic offences was responsible for village finances, and the mayor's court through fines, forfeitures, costs and fees, provided a substantial portion of village funds. Thus the petitioner was denied a trial before a disinterested and impartial judicial officer as guaranteed by the Fourteenth Amendment of the U.S. Constitution. The court feared that the Mayor might be tempted to be unfair because he had large official responsibilities related to the financial affairs of the village.

The question whether the court has any direct and personal pecuniary interest in the case has been perceived to be a due process question. In another case it was held that a justice of the peace who got an additional fee in a civil case of $ 5 to be paid by the plaintiff and who was entitled, if he found infavour of the plaintiff to an additional fee of $ 2.50 for issuing execution of judgment

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9. Ward v. Village of Monroeville, Ohio, Ohio 1972, 409 U.S. 57, (1972).

in order to satisfy judgment for the plaintiff had a financial interest in finding judgment for the plaintiff, which was violative of the due process clauses of the Federal and State Constitutions.(10)

It may be noted that under English law there is the greatest sensitivity over the existence of any direct, pecuniary interest however small or insignificant.(11) In Parishes of Great Charte of Kennington(12) where a pauper removal order was made by two justices, one of whom was an inhabitant of the parish from which the pauper was removed, the order was quashed on the ground that the justice who was an inhabitant was interested as being liable for the poor rate, because the fundamental rule was that a party interested could not be a judge. Earlier cases show that the American courts similarly adopted the strict principle of common law; citizens and tax payers have been held to be disqualified from hearing cases against the municipal corporation of which they were residents.(13) But in time, the strict common law doctrine seemed to be impracticable, inconvenient and unnecessary with other courts and with legislature. The courts took the view that such remote or minute interest in the litigation might be declared by the legislature not to be a ground for

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10. State ex rel. Reece v. Gies (W.Va.1973) 198 S.E. 2d 211.

11. R.v. Rand (1866) L.R. 1Q.B. 230; R.v. Barnsley Licensing JJ [1960] 2 Q.B. 167.

12. (1742) 2 Strange 1173 Burr. S.C. 194. To remedy such a situation, the Justices Jurisdiction Act 1742 was passed removing disqualification.

13. For example, Diveny v. Elmira, 51 N.Y. 506.

disqualification of a sheriff, juror, or judge.(14) Federal statute 28 U.S.C. Section 455 (unamended) required any judge or justice to disqualify himself in any case in which he has a "substantial interest". Substantial interest normally contemplated pecuniary or beneficial interest and the section was not applicable in the absence of it being shown that the judge had such an interest in the case.(15) Again when direct pecuniary interest was de minimis, it did not disqualify a judge and until late 1974, this was the standard followed by the courts. The rule was that is a judge owned stock in a party, he was not disqualified when his holdings were an "infinitesimal portion of the sharesoutstanding".(16) However, the A.B.A. code, by contrast, prescribed a strict per se disqualification rule for judges even in the case of a very small and insignificant pecuniary interest, but the code did not have legal force.(17)

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14. E.g., City Council v. Pepper. I Richardson (S.C.) 364 (see also Tumey v. Ohio Supra, 529, 530) Statutes permitting judges to sit in such situations have been considered necessary in several jurisdictions e.g. Peck v. Freeholders of Essex, 21 N.J.L. 656 (1847) disqualifying a judge for residence and the reverseing statute N.J. Rev. Stat. (1937) § 2 : 26 - 193.

15. U.S. v. Bell, 351 F.2d 868 Cert. denied 383 U.S. 947.

16. Kinnear Weed Corp, v. Humble Oil Refining Co., 403 F.2d. 437 (5th cir. 1968) (100 of 36 million shares)

17. A.B.A.Code of Judicial Conduct (1972) canon 3C(1) (c); Harv. L.R. Vol.86 (1973) 736, 742 et seq.

A significant departure from the past has been made by the recent amendment of section 455 of the federal judicial procedure. Previously pecuniary interest used to disqualify when it was substantial but under the present amendment any justice, judge, magistrate or referee in bankrupty shall disqualify when "[he] knows that he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding".(18) It is submitted that the new amendment to Section 455 has provided a most comprehensive guideline for judicial disqualification on a very wide range of matters for some of which a counterpart is lamentably lacking under English law. Sub-Section (d) (4) explains "financial interest", which means ownership of a legal or equitable interest, however small, or relationship as director, adviser or other active participant in the affairs of a party, with the following exceptions:

> "(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
>
> (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organisation.

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18. 28 U.S.C. § 455 (b) (4) as amended Dec. 5, 1974, Pub.L. 93 - 512 § 1, 88 Stat. 1609.

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organisation only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities."

The statute also provides for disqualification when such a judge has in his fiduciary relationship as executor, administrator, trustee or guardian has a "financial interest" as defined under Sub-Section (d) (4) in a party or in the subject matter in controversy. The statute covers a very wide range of circumstances. The standard of disqualification has been drawn from "substantial interest" to one of "de minimis" financial interest. Disqualification will lie for financial interest, however small. The standard adopted for disqualification for pecuniary interest now appears to be the same as that which now exists under English law.

Nevertheless, there are differences. Under English law pecuniary interest disqualifies when the interest is direct as well as personal. It is not clear whether the interest of a minor son as under American law would also disqualify a judge under English law. However the pecuniary interest

of a spouse does not disqualify a judge.(19) So there is even less chance of disqualification for interest of a minor son. Therefore, the most accurate description of English law would be that pecuniary interest disqualifies when such an interest is not only direct, but also personal,(20) though a recent decision suggests that a judge's interest may be identified with his father's pecuniary interest, but only when such interest is direct and certain.(21)

Most difficult is the situation where the litigation may affect an indirect but substantial financial interest of the judge. English law has made no provision so far for the disqualification of judges for indirect financial interest, however substantial. On the other hand, 28 U.S.C. Section 455(b) (4) makes it explicit that disqualification will lie for indirect pecuniary interests. The first clause of Sub-Section (b) (4)

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19. E.g., R.v. The Industrial Court and Others [1966] Qd.R. 245 (Full Court) a judicial officer whose wife holds shares in a company which a party to the proceedings before him does not on that account himself have a disqualifying interest. Statute may provide for disqualification - see Local Government Act 1972 ss. 94, 95(3) providing disqualification of a member for his own as well as his Spouse's pecuniary interest.

20. However "personal" is used to include certain shared interests as well. See Dimes v. Grand Junction Canal Co. (1852) 3 H.L.C. 759 - (discussed earlier in Chap. III: Pecuniary Interest)

21. Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577 at P. 598 (discussed in the earlier section in Chap. III:"Pecuniary Interest".

prescribes disqualification for any "Financial" interest in a party or the subject matter, while the second clause refers to "any other interest" which could be substantially effected by the outcome. It is not easy to ascertain what is meant by the term "any other interest",(22) because unlike "financial interest" this term is not defined in terms of ownership or in any manner at all. An application of it has been made in a recent case: In Virginia Electric and Power Co. (VEPCO) v. Sun Shipbuilding and Dry Dock Co.(23) In that case a motion was made for the disqualification of the presiding Judge in litigation involving The Electric Company which serviced the area in which the judge resided. The District Judge Warriner held, inter alia, that although under other grounds the judge was not required to disqualify himself because of the fact that if the electric utility were successful in action there might be a general electric rate reduction which could personally benefit him to the extent of approximately $ 100, nevertheless under the test of "any other interest" in Section 455(b) (4) the District Judge felt compelled to disqualify himself.(24) When the case

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22. Virginia Electric and Power Co. v. Sun Shipbuilding and Dry Dock Co. 539 F.2d 357,367. (U.S. Ct. of Appeals, Fourth Circuit, 1976).

23. Supra.

24. 407 F.Supp. 324 (D.C. Va.1976).

went to the Court of Appeal, the Court held, inter alia, that the only interest the judge had was the remote contingent possibility that he might in future share in any refund that might be ordered for VEPCO customers in general. "Such a contingent interest does not presently exist ..... Neither Judge Warriner nor any other customer of VEPCO will have a claim for refund until, if ever, there occurs an intervening and independent decision of a state agency, the Virginia State Corporation Commission, which regulates public utilities".(25) The interest of Judge Warriner in that refund was speculative and the Judge lacked the ownership of a legal or equitable interest, however small, in the subjectmatter of litigation, so he had no "financial interest" in the subjectmatter in controversy within the meaning of the Code Section warranting disqualification. The Court contended, though finding it difficult to ascertain the meaning of the term "any other interest", that "it must have been the congressional intent to make an interest of lesser degree than ownership disqualify ..... otherwise there would be no purpose in defining financial interest in terms of ownership and failing to apply such a limitation on "any other interest".(26) The words "however small" referred, it was thought, only to a financial interest i.e. when a judge has an ownership interest in a party or in the subjectmatter.

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25. 539 F.2d 357, 366.

26. Ibid, p. 367.

The test "however small" would be applicable in the case of a "financial interest" only but that test would not apply to "any other interest". "[A] judge who is a customer of a company must necessarily consider the remoteness of the interest and its extent or degree".(27) Though $ 70 to $ 100 cash in hand was not necessarily "de minimis", when the possibility of recovering that amount was spread over the next forty years and was dependent upon factors which included the Electric Company winning the law suit, and the Virginia State Corporation Commission requiring the company to return the increased fuel costs to its customers, then the district judges' interest in such speculative recovery was de minimis, and his finding to the contrary on which he recused himself was clearly erroneous.(28) The recusal order was therefore vacated and remanded with appropriate instructions.

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27. The Court referred to a Commentary [See Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 753 (1973) with regard to a similar provision in the ABA.Code of Judicial conduct Canon 3C (1) (C). Ibid pp. 743, 744, 753] that "any other interest" to be a disqualifying factor would depend on the interaction of two variables - "the remoteness of the interest and its extent or degree". If the interest strongly resembles a direct interest, say, stock held in a subsidiary (or parent) company of the corporate party, then any amount would disqualify; when the interest is less direct then "only if the extent of the interest is itself substantial can the judges' impartiality reasonably be questioned" - Ibid, p. 368.

28. The Court of Appeal also pointed out that the amended Section 455 was not applicable in that case since it had been filed before the amendment became effective.

PECUNIARY INTEREST (B) BODIES OTHER THAN COURTS : UNITED STATES

Similarly under American law as with English law "it is the general rule, even apart from statute, that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided".(29) In City of Naperville v. Wherle,(30) the City of Naperville filed its petition in the county court of Du Page county to levy a special assessment for a local improvement and to acquire by condemnation certain land and easements. The Court in pursance of a statutory provision(31) appointed two commissioners to act with the President of the Board of Local Improvements to investigate and report to the Court what would be just compensation for the respective owners of the private property to be taken or damaged for the said improvement, together with real estate benefitted and the amount of such benefits to each parcel. One statute also provided that such persons "shall be disinterested persons".(32) One of the persons who acted as a commissioner was a Secretary of the Naperville Board of Education, receiving financial compensation for his services in such capacity. It was

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29. City of Naperville v. Wherle 173 N.E. 165, 166.

30. Supra.

31. Cahills' Rev. St. 1929, c.24, par.136.

32. Ibid.

held by the Supreme Court of Illinois that the Commissioner was neither "competent" nor "disinterested", and that his participation infected the action of the whole body.(33) A direct pecuniary interest if substantial is ordinarily held to disqualify an administrative decision maker. Thus, a member of a Zoning Board who voted for a variance which would benefit his property was held to be disqualified. The court set aside the decision of the Board even though his vote was not necessary for the decision, on the ground that the decision might have been influenced by him.(34)

Similarly in Daly v. Town Plan and Zoning Commission of the Town of Fairfield,(35) an action of the Zoning Commission in approving a zoning amendment permitting the erection of a radio broadcasting antenna on land was held to be invalid by the Supreme Court of Errors of Connecticut. One of the members of the commission who participated in the hearing was an officer of a cemetery association which had contracted to sell land to the radio broadcasting company if variance in zoning regulations could be obtained to permit the erection of the broadcasting antenna. The member had earlier unsuccessfully argued before the Zoning Board of Appeals in support of the company's application for variance in zoning regulation to permit the erection of broadcasting antenna. Such an act on the part of the member violated the statutory provision prohibiting a member of any zoning commission board or board of appeals

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33. City of Naperville v. Wherle, supra, at p. 166.

34. Piggot v. Borough of Hopewell, 22 N.J. Super. 106, 91 A.2d. 667 (1952).

35. 191 A.2d (1963) 250.

from participating in the hearing or decision upon any matter in which he was directly or indirectly interested in a personal or financial sense.(36) In Wilson v. Iowa City,(37) a city council's action with regard to an urban renewal project was considered as void under a statute because of the interest of some of its members in the property under the project. The court held that a vote cast by a member of the city council on any resolution relating to the urban renewal project, if in violation of conflict of interest provision of urban renewal law, was void and the result reached by the council in such a matter was also void, whether such votes actually determined the issue before the council or not. Though there had been no evidence of any improper motives or actions on the part of any councilmen, "[however], actual dishonesty is not decisive. The fact that there is opportunity for dishonesty is what may disqualify. It is the potential for conflict of interest that becomes vital".(38)

A mere combination of prosecuting and adjudicating function does not constitute a violation of due process.(38a)

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36. C.G.S.A.§ 8-11, (supra at p. 252).

37. 165 N.W. 2d 813, (1969), Sup.Ct. of Iowa.

38. Ibid, at p. 824.

38a. See discussion in Chapter IV, Bias.

Nevertheless where the administrative adjudicator has a pecuniary interest in the outcome, disqualification will lie. In a recent case, the Supreme Court declined to rule on the question of whether an Alabama State Board of Optometry was biased when, having lodged charges of "unprofessional conduct" against some licensed optometrists, it then passed on the validity of the charges which the Board had framed itself. But the court did decide that because in this case the Boards' members might personally benefit from action adverse to the respondents in the license revocation proceeding, so they were barred from being the adjudicators - "those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes".(38b) The Court's decision hinged on possible "pecuniary interest", not on "bias" resulting from prejudgment.

Thus the due process requirement of a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision maker constitutionally unacceptable but even any probability of unfairness should be prevented. Where an administrative decision maker has a pecuniary interest in the outcome, the probability of the actual bias on the part of such a decision maker is too high to be constitutionally tolerable under due process of law.(39) Apart from constitutional provision, statutes such as Administrative procedure Act provides for disqualification of administrative adjudicators for pecuniary interest. The Administrative

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38b. Gibson v. Berryhill 411 U.S. 564 at 579, (1973).

39. Withrow v. Larkin, 43 Led 2d 712, 723, (1975) U.S. Sup.Ct. (discussed later).

Procedure Act 5 U.S.C. S.556(b) states in part that any officer who presides over a hearing (or who formulates an initial or recommended decision) "may at any time withdraw if he deems himself disqualified". The statute contemplates that hearing officer will withdraw on his own if he deems himself disqualified, for example, if he were a shareholder in a company which is a party in the proceedings.(40) If the officer decides that there is no sufficient ground for his disqualification, his conclusion in that regard will be deemed as one of the issues before the agency when the case is finally decided. The agency's final decision is subject to judicial review.(41)

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40. Gellhorn and Byse, Administrative Law : Cases and Comments (6th ed.,) 1974, p. 964.

41. Administrative Procedure Act 5 U.S.C. §.706.

CHAPTER IV : BIAS

(A) TEST OF BIAS

The principle that no man should be a judge in his own cause in its simplest form means that a man shall not be a judge where he has a direct pecuniary or proprietory interest or he himself is a party. But the rule has been extended to include cases where the judge has some interest in the parties or in the subjectmatter of the dispute thereby making it difficult or impossible for him to give an impartial judgment on the matter.(1) There may be circumstances such as friendship towards a party or enmity towards the other, or prior contact with a case as counsel which may cause "bias" or "prejudice" in the literal sense of the word, that is, prejudgment of the merit of a case. Of course, in one sense no judge will be altogether free of bias or prejudice unless he has no prior knowledge or workings of the world. As judge Frank observed:

"If however "bias" of "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will .... we are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices".(2)

So it is necessary to consider how much bias or prejudice infact does disqualify under English and American law.

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1. R.v. Altrincham JJ., Ex Parte Pennington, [1975] 1 Q.B. 549, 552 (D.C.).

2. In re Linahan, Inc., 138 F.2d. 650, 651 (2d Cir., 1943).

TEST OF BIAS : ENGLAND

English courts have differed considerably in their opinion as to the criterion which will be followed to disqualify for non-pecuniary bias. Some courts have given more stress to public policy rather than actual bias while some courts have followed a real likelihood test of bias. In 1866, a frequently cited dictum of Blackburn J. laid down the principle that though direct pecuniary interest, however small, disqualifies a person from judging the matter yet the mere possibility of bias did not ipso facto avoid the justice's decision but "wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this court would not interfere".(3)

On the other hand the contention that mere suspicion of bias would suffice to disqualify a judge perhaps found its strongest support from the statement of Lord Esher M.R. in Eckersley v. Mersey Docks and Harbour Board(3a) According to him the doctrine of 'nemo judex in re sua' requires that the judges "not only ..... be not biased, they ought not to act as judges in a matter where the circumstances are such that people not necessarily reasonable people, but many people would suspect them of being biased".(4) The reason is plain. Impartiality on the part of adjudicators

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3. Blackburn J. in R.v. Rand (1866) L.R. I Q.B. 230, 232, 233.

3a. Eckersley v. Mersey Docks and Harbour Board [1894] 2 Q.B. 667, (C.A.).

4. Ibid at 671.

has been thought to be essential to bring about the public confidence in the administration of justice which is essential to social order and security.

The test of Lord Esher M.R. was not followed in R.v. Sunderland Justices.[5] According to Stirling L.J., the test should be the one that applied in R.v. Rand (supra).[5a] The mere possibility of bias would not disqualify a judge but if there was a real likelihood of bias "then it is clearly in accordance with natural justice and common sense that the justices likely to be so biased should be incapacitated from sitting".[6] Similarly O'Brien C.J. in R.v. Justices of County Cork[7] considered the view of Lord Esher M.R. as going too far because it "makes the mere suspicions of unreasonable persons a test of bias". The same judge held in an earlier case that "the mere vague suspicions of whimsical, capricious and unreasonable people ..... mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision".[8]

However a mere suspicion test has also been followed in many cases. Lord Hewart C.J. in R.v. Sussex JJ., Ex parte McCarthy made the famous statement that is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" and that judges are not allowed to do anything "which

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5. R.v. Sunderland JJ [1901] 2 K.B. 357 (C.A.).

5a. Ibid, at p. 373.

6. Ibid, per A.L. Smith M.R. at p. 364.

7. R (Donoghue) v. Cork County Justices [1910] 2 I.R. 271, 275.

8. R (De Vesci) v. Justices of Queens County [1908] 2 I.R. 285, 294.

creates even a suspicion that there has been an improper interference with the course of justice".(9) However, Slade J. thought it necessary to draw a line of distinction between the genuine cases and cases on the "flimsiest pretext of bias", because continuous application of this principle to all cases irrespectively might create the wrong impression that "it is more important that justice should appear to be done then it is in fact be done".(10)

Therefore for the interest of justice, such cases should be dismissed by the court. There seems to be another test. In Frome United Breweries, while Lord Cave(11) spoke of the real likelihood test, Lord Sumner(11) and Lord Carson(11) thought of a simple test i.e. whether there was such a likelihood of bias as would cause the court to interfere.

The real likelihood test has been applied in many later cases.(12) Real likelihood does not necessarily require that an actual bias should be proved but it "depends on the impression which the court gets from the circumstances in which the justices were sitting".(13) In a recent

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9. R.v. Sussex JJ., Ex parte McCarthy [1924] 1 K.B. 256, 259.

10. R.v. Camborne JJ. and Another Ex-parte Pearce [1955]1 Q.B. 41, 52.

11. Frome United Breweries v. Bath Justices [1926] A.C. 586. Lord Cave at p. 591, Lord Sumner at p. 615 and Lord Carson at p. 618.

12. For example, R.v. Meyer (1875) 1 Q.B.D. 173 Blackburn J. at p. 177;
R.v. Grimsby Borough Quarters Sessions [1956]1 Q.B. 36.

13. R.v. Barnsley Licensing JJ. [1960] 2 Q.B. 167, 187, (Per Lord Devlin).

Commonwealth case, Sallah v. Attorney General, the majority of the Court of Appeal concluded that the proper test to be adopted was whether or not a "real likelihood of bias" existed. A mere allegation against a judge was not enough to disqualify him and the maxim "justice must not only be done but must manifestly be seen to be done" should not mean that every step is to be taken to satisfy the views of unreasonable people. In that case frivolous objections would render it impossible to do justice at all.[14]

The Dictum of Lord Hewart C.J. in R.v. Sussex Justices[15] was applied in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon. In that case the Master of the Rolls said that even if a judge, chairman of the tribunal or anyone who sat in a judicial capacity was as impartial as could be, yet "if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit ..... There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. ..... Justice must

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14. Sallah v. Attorney General S.C. April 17, 20, 1970; (1970) C.C. 54. 55. University of Ghana Law Journal (1970) P. 142, 144. The majority of the judges rejected the dicta in certain cases which suggested that suspicion of the unreasonable person would suffice for disqualification (e.g. per Lord Esher M.R. in Eckersley v. Mersey Docks and Harbour Board [1894] 2 Q.B. 667, 671 C.A.).

15. Supra.

be rooted in confidence".(16) It is thought there is really very little difference between the two tests. If a reasonable person thinks "that there might well be bias then in his opinion a real likelihood of bias" exists, the question is not whether or not a tribunal is actually biased but whether a reasonable man who has no inside knowledge might well think that it might be biased.(17)

This reasonable suspicion test was followed in many later cases.(18) Disqualification will lie only when reasonable suspicion and not fanciful bias exists.(19) The real likelihood and reasonable suspicion tests very often overlap, of course. The former test may be appropriate in one situation and in another situation the latter test becomes more appropriate.(20) It may be that in many or most of the cases the result would be the same whichever test is followed. When a licensing authority had already reached a conclusion on the basis of a public inquiry and before the subsequent prejudicial evidence was heard, then whichever test is adopted, "the answer is

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16. Per Lord Denning M.R. [1969] 1 Q.B. 577 at 599 (C.A.). "This dictum runs together two tests ..... in a way which supports the suggestion made here that there is in fact only one test" Paul Jackson, "Natural Justice" p. 31.

17. Hannam v. Bradford Corporation (C.A.) [1970] I W.L.R. 937, Per Cross L.J. at 949 (C.A.)

18. E.g., R.v. Eastern Authority, Ex parte Wyatt [1974] R.T.R., 480, R.v. Peacock, Ex-Parte Whelan (1971) Qd.R. 471, 477.

19. R.v. Peacock, Ex parte Whelan, supra.

20. R.v. Eastern Authority, Ex p. Wyatt, supra.

that it is positively proved that there could be no prejudice, and that to my mind is an end of the matter".(21)

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21. R.V. Eastern Authority, Ex.P. Wyatt, Supra, Per Lord Widgery C.J. at 486, 487 followed in R.V. Altrincham JJ. Ex parte Pennington (D.C.) 1 Q.B. [1975] 549, 553.

TEST OF BIAS : UNITED STATES

Federal courts have adopted statutory procedures for disqualification of judges. Congress passed the first statute for disqualification of federal judges for interest in 1792.(22) The statute was re-enacted in 1911(23) and codified in section 455 of the Federal Judicial Code.(24) Section 455, prior to amendment, failed to provide a sufficiently detailed and well defined standard for disqualification which could help a judge to decide whether to disqualify himself in cases which are not covered by the first portion (i.e. first three mandatory grounds) of the section.(24)

The final clause of the statute was by its terms discretionary. The statute did not define what is "improper", so that excessive discretion was left in the trial judge. The statute required the judge to disqualify only when it was improper "in his opinion". The American Bar Association in their canons of judicial ethics implored all judges to keep their conduct "free from impropriety and the appearance of impropriety" but the canons were not

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22. Act of May 8, 1792. ch. 36 § 11, 1 stat. 278.

23. (1911) ch. 231 § 20, 36 stat, 1090 (1911)

24. 28 U.S.C. § 455 (1970) which provided that :
"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper in his opinion for him to sit on the trial appeal or other proceeding therein".

officially adopted in the federal courts.(25) In 1972, the American Bar Association replaced the old canons by a new code of judicial conduct. Certain standards of disqualification have also been prescribed, such as, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned".(26) In 1974, Congress amended section 455 on the pattern of the ABA code, and adopted a similar standard for disqualification. Under the amended section besides disqualifying on certain specified grounds, a judge, justice, magistrate or referee in bankruptcy must disqualify himself whenever "his impartiality might reasonably be questioned".(27) Therefore in contrast to the previous section 455, an underlying standard is articulated to guide the judge when the circumstances do not fall within one of the mandatory grounds for disqualification. The standard of the general disqualification provision of the new federal statute on disqualification of judges is one of reasonableness, and should not be intepreted to include a spurious or loosely based charge of partiality.(28) A judge is required to disqualify himself only when his impartiality "might

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25. ABA canons of Judicial Ethics No. 4. See 86 Harvard Law Review (1973) PP. 741 - 742.

26. American Bar Association, Code of Judicial Conduct (1972) canon 3C.

27. 28 U.S.C. §455 (a) as amended Dec 5, 1974. Pub.L. 93-512 §1, 88 stat. 1609.

28. Mavis v. Commercial Carriers. Inc., 408 F. Supp. 55 (1975).

reasonably be questioned".[29] On the other hand 28 U.S. C. § 144 permits a litigant to disqualify a district court judge for personal bias or prejudice. This section which was originally enacted as section 21 to the judicial code of 1911,[30] is still considered as the most significant statute for disqualification of federal district judges for personal bias and prejudice. Under it, the litigant has to submit a timely and sufficient affidavit alleging bias of the trial judge before whom the matter is pending. The Supreme court of the United States held in Berger v. United States that the trial judge cannot go into the truth or falsity of the allegations. But the facts alleged must be legally "sufficient" i.e. "must give a fair support to the charge" of bias or prejudice.[31]

The principle that a judge cannot make any inquiry into the truth of the allegations in the affidavit for disqualification has been followed in later cases.[32] But the courts differ as to the requirement of a "sufficient affidavit" in order to disqualify for personal bias under Section 144. Some of the courts have adopted a strict standard (that is, a real prejudice rule) and laid down that actual bias must be shown. In deciding the question of how strong the inference of bias must be, the courts have

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29. Turner v. American Bar Association 407 F. Supp. (1975); 28 U.S.C. § 455, 455 (a).

30. Act of March 3, 1911, ch 231. §. 21; 36 stat. 1090. 28 U.S.C. §.21 (1911).

31. Berger v. United States 255 U.S. 22 (1921) at 34.

32. U.S. v. Sciuto(C.A. Ill 1976), 531 F.2d 842.

very often analogized the allegations in the affidavit to evidence and assumed that the facts, taken as true, must prove that the judge is actually biased.(33) This approach has similarity with the "real likelihood" of bias test adopted in R.v. Rand.(34) An affidavit for disqualification of a judge, though accepted as true, must clearly delineate circumstances showing personal bias in order to be "legally sufficient" under the Section.(35) This actual showing of bias standard has also been adopted in many states.(36)

On the other hand some of the courts have interpreted liberally the meaning of "sufficient affidavit". Focussing on the "fair support" language used in Berger case, these courts adopted a less strict standard, i.e. the"appearance of bias" test, to disqualify a judge even though there was not actual bias on the part of the judge.(37)

In Whitaker v. McLean, a Federal Court of Appeal in reversing the district judge's refusal to disqualify for bias, stated that the policy in implementing section 144 is that the courts of the United States "shall not only be

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33. United States v. Gilboy, 162 F.Supp.384, 393, (M.D.Pa 1958),"A prima facie case will not suffice".

34. R.v. Rand. (1866) L.R. 1 Q.B. 230 (discussed earlier).

35. Hirschkop v. Virginia state Bar Ass'n, D.C. Va.1975, 406 F.Supp. 721.

36. Norman v. State 236 Ark.476, cert. denied 375 U.S. 933 (1963).

37. Whitaker v McLean, 118. F.2d.596 (D.C. Cir) 1941.

impartial in the controversies submitted to them, but shall give assurance that they are impartial".(37) This assertion is very similar to Lord Hewart C.J.'s statement in R.v. Sussex JJ.(38) under the appearance of bias" test disqualification would be made where there is evidence from which the court could find that the litigant's allegations appear to be reasonable although insufficient to prove the existence of bias.(39) The public and the litigant must have faith in the administration of justice which is essential for the social order and stability of a democratic government. The Supreme Court has stated that while the absence of actual bias is essential to a fair trial, nevertheless,

"our system of law has always endeavoured to prevent the probability of unfairness ... such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice".(40)

Many of the state courts have preferred the reasonable inference test to disqualify judges. One court applying

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37. Whitaker v McLean, 118. F.2d.596 (D.C. Cir.) 1941 same view held in Berger v. United States 255 U.S.22 at 36. (1921).

38. [1924] 1 K.B. 256, 259, supra.

39. Minnesota Law Review - vol 57, 749, 759 at seq (1973).

40. In re Murchison, 349 U.S. 133, 136 (1955); same view held in Offutt V. United States, 348 U.S. 11. 14 (1954).

this test stated that "when circumstances and conditions surrounding litigation are of such a nature [that] they might cast doubt and question as to the fairness or impartiality of any judgment the trial judge may pronounce, such judge, even though he is not conscious of any bias or prejudice"(41) should be disqualified.

It has been held in a recent case that in order that the affidavit for the disqualification of a judge to be legally sufficient under Section 144, the facts and reasons set out in the affidavit must give fair support to the allegation of bias. The legal question of the sufficiency of the affidavit for disqualification of a judge is determined by applying a reasonable man standard to the facts and reasons stated in affidavit. The facts must be such, their truth being assumed, as would convince a reasonable man that a bias exists.(42)

A litigant has a constitutional right to an impartial trial. The "bias in fact" or actual bias test reduces the number of successful disqualification motions by putting a high burden of proof of bias on the litigant and so may fail to secure the same public confidence which is the intention of Section 144. In Pfizer Inc. v. Lord, following some incidents of alleged bias during pretrial proceeding, the petitioners filed an affidavit to disqualify the judge under Section 144. The court found that the judge's adverse comments regarding the petitioners' witness

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41. In re Estate of Hupp, 178 Kan. 672. 676; 291, P 2d 428, 432 (1955).

42. Parrish v. Board of Commissioners of Alabama State Bar - 524 F. 2d. 98 (1975) at p. 100.

as "inappropriate, perhaps even unfair to the witness", yet these remarks failed to show "any personal bias or prejudice" against the petitioners".(43) Relying on the actual bias test, the court denied the application for disqualification.

The Administrative Procedure Act, 5 U.S.C. § 556 (b) provides for the voluntary disqualification of a presiding or participating employee. He may at any time disqualify himself. "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case".(44) It has been said that, unlike federal district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit, but "the truth and sufficiency of the charges must be established before the agency to force a disqualification of an administrative officer".(45) If the adjudicator refuses to disqualify himself, his refusal will be considered as one of the issues before the agency when the

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43. Pfizer Inc. v. Lord 456 F.2d. 532, 539 544 (8th cir.) cert. denied, 406 U.S. 976 (1972).

44. Administrative Procedure Act 5 U.S.C. §.556(b). Parallel Section of Administrative Procedure Act 1946. S. 7(a).

45. K.C. Davis ; Administrative Law Treatise §.12.05 p. 167. (Vol.2).

case is finally decided. The agency's final decision, if adverse to the affiant, will be subject to judicial review. The court will set aside an agency decision, findings or conclusion if it is not supported by substantial evidence. In the case of administrative adjudicators, the standard of disqualification seems to be less rigidly applied in American law than in English law. Personal bias or prejudice of administrative adjudicators is a ground for disqualification when it is substantial.(46) It is difficult to prove bias on the part of an administrative officer. Uniform rulings favouring one party or against the other do not alone prove disqualification: " Total rejection of an opposed view itself cannot impugn the integrity or competence of the trier of fact".(47) In another case, the Second Circuit Court held: "Even assuming ..... that the examiner was biased against the respondent, we would find no reason, merely because of that fact, for upsetting the Boards' order, since the respondent does not assert that the examiner committed any error in the admission or exclusion of evidence, nor is there any indication that he conducted himself in a manner which was either likely to intimidate any of the witnesses ..... There was, at most, error without prejudice; such error is harmless and no ground for reversal".(48) In Local No. 3 v. National Labor Relations Board, the court said: "the

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46. Ibid.

47. N.L.R.B. v. Pittsburgh S.S.Co. (1949) 337 U.S. 656, 659.

48. N.L.R.B. v. Air Association Inc., 121 F.2d. 588, 589 (2d cir. 1941).

uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility ....."(49) Upon this decision, two eminent American writers observed that if what the court said was true, the administrative order was reversible because not supported by substantial evidence. The reason for the errors, whether bias or incompetence, does not make any difference. "The errors and not the trial examiner's frame of mind, are what count in the end. ....."(50) It appears that the findings of an administrative agency would be affirmed even if prejudice were deemed to exist if supported by substantial evidence. On the other hand some courts have preferred to adopt a test even stricter than that for courts. For example, in National Labor Relations Board v. Phelbs the court of Appeal for the Fifth circuit said: "[The] rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have in the interest of expedition and a supposed administrative efficiency, been relaxed. Nor

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49. Local No. 3 v. N.L.R.B. 210 F.2d. 325 (8th cir). Cert. denied 348 U.S. 822 (1954)

50. Walter Gelhorn and Clark Byse, Administrative Law : Cases and Comments, (1974) 6th ed. P. 966.

will the fact that an examination of the record [of an administrative adjudication by a reviewing court] shows there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding ..... Once partiality appears ..... it taints and vitiates all of the proceedings, and no judgment based upon them may stand".(51)

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51. N.L.R.B. v. Phelbs (5th cir. 1943) 136 F.2d. 562, 563 - 564.

(B) FAMILY RELATIONSHIP : ENGLAND

The law on disqualification of judges for relationship presents an uneven development. Oddly enough, the English courts early held that a judge was not disqualified by relationship but a jury was.(1) In the latter case the whole panel of jury was quashed and withdrawn by the court when one Henry Vernon challenged it on the ground that the Sheriff who summoned the jury was related to one of the parties. There the court was faced with deciding what degree of relationship necessitated disqualification, a problem which in its modern context remains as perplexing today as it was then. It was said "that those who are so remote in Blood are so remote in Affection also, for else there would be no Bounds put to challenges, for the whole world is of one Blood, and 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".(2) The line was drawn in that case at the ninth degree.

On the other hand, a brother-in-law relationship existing between the judge and one of the parties was held not to be a ground for disqualification. In Brookes v.

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1. Brookes v. Earl of Rivers, 1 Hardres 503, 145 E.R. 569. (1668), discussed below; c.f. Vernon v. Manners (infra).

2. Vernon v. Manners 2 Plow. 425; 75 E.R. 639, (1572).

Earl of Rivers, a prohibition was prayed to stay a suit because the Earl of Derby who was the Chamberlain of Chester and also the judge had an interest in the suit property. Since it did not appear to the court that the Chamberlain had such an interest in the suit property, the prohibition was refused. It was also clear, however, that the judge was related to the Earl of Rivers, but the court said "favour shall not be presumed in a judge".(3) This case seems to be singular, and its rationale has not been favoured by English judges. Because shortly after this decision, in 1693, Holt C.J. withdrew from a case in which his brother was a party.(4) Again in 1830, the Judicial Committee of the Privy Council decided in an appeal from Jersey(5) that the relationship which is formed by marriage is not dissolved by the death of one of the spouses without issue, so a husband even though his wife died without issue cannot afterwards act as a judge in a cause in which her nephew is a party.

In 1866, Blackburn J. in R.v. Rand specifically referred to kinship as a ground for disqualification. The learned judge said:

"Whenever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him

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3. 1 Hardres 503, 145 E.R. 569 (1668).

4. Bridgmen v. Holt (1693) 1 Show P.C. 111.

5. Becquet v. Lempriere (1830) 1 Knapp. 376; 12 E.R. 362.

to act, and we are not to be understood to say, that where there is a real bias of this sort, this court would not interfere".(6) The rule applicable to courts applies equally to bodies other than courts. Relatively few cases deal with administrative officials who are related to those interested in the proceedings. Disqualification for relationship lies when the near relatives are party themselves or belong to a body bringing collective action before a tribunal. A Board is improperly constituted when there is a likelihood of bias or prejudice on the part of a member: "A Board improperly constituted is a Board without jurisdiction".(7) The Court of Appeal in Manitoba held in one case that the Chairman of the Municipal Board who with another member set aside an order of the Winnipeg Zoning Board was disqualified from sitting in view of the fact that his wife was an executive officer of one of the litigants (Armstrong's Point Association). The court said that in such a case "it is difficult to see how Mr. Scott could bring to the discharge of his task that impartiality which is demanded of anyone who undertakes to perform a judicial function".(7a) Though jurisdiction was largely concerned with the subject-matter of a case, the court

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6. R.v. Rand (1866) L.R. I Q.B. 230, 232-233.

7. Ladies of the Sacred Heart of Jesus v. Armstrong's Point Association (1961) 29 D.L.R. 2d 373 (Manitoba Court of Appeal, Canada).

7a. Ibid, p. 382.

observed that: "it may also relate to personnel - to those who assume to exercise the jurisdiction in question".[8] Unlike American law, a relationship between judge and counsel does not appear to be a ground for disqualification of the judge under English law. The English Bar has formulated certain rules of professional conduct to be observed by a barrister which inter alia restrict a barrister from appearing before a judge who is related to him under certain circumstances.[9] These rules of conduct state that no barrister should habitually practise in any county court or court of Quarter Sessions of which his father or near relative is the judge[9a] or Recorder,[10] or habitually undertake undefended divorce cases before his father who is a county court judge and Divorce Commissioner;[11] but there is no objection to a barrister practising in a court where his father is one of several judges. The reason is that in such a case it is impossible to know beforehand which judge will in fact try a case. It has never been considered improper for a barrister to appear before his father in the High Court, Court of Appeal, or House of Lords,[12] and it has long been recognised that there

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8. Ibid at p. 382.

9. A.S. = Annual statement of the General Council of the Bar - Conduct and Etiquette at the Bar (5th ed.) pp. 37-38.

9a. A.S. 1895 - p.5. The expression "near relative" includes a father-in-law: A.S. 1955. p. 21.

10. A.S. 1956 p. 29.

11. A.S. 1963 p. 25.

12. A.S. 1923 p. 7.

is no rule preventing counsel from practising at a court of Quarter Sessions of which his father or a near relative is Chairman or Deputy Chairman, or one of the Justices; though if in any particular case counsel feels that it would be better for him not to appear, he should not do so.(13)

Relationship with a witness is a ground for disqualification under American law. Statute has clearly set out the circumstances where relationship with the witness as well as with the party acts as disqualification.(14) Under English law there is no similar statute on disqualification for relationship with a witness, though a magistrate should not sit in a case where his wife is a witness. If in any case he sits through oversight, and then it is discovered that there was the mere possibility of his being biased, his decision would not stand even though such a decision was unexceptionable because "justice must not only be done, but it manifestly and undoubtedly be seen to be done".(15)

It is difficult to lay down any principle about the kinds of family relationship with a party that ipso facto disqualifies a judge or an administrative adjudicator under English law. There seems to be no clear decision on this point. In an Irish case it was held that neither the connection by marriage between the magistrate and complainant nor his yielding to the objection on a previous hearing of

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13. A.S. 1956 p. 29.

14. 28 U.S.C. §.455, discussed below.

15. A.T. Denning, 71 S.A.L.J. 345, 355.

the summons on the ground of bias was sufficient to disqualify the magistrate from adjudicating.(16) "Each case had to be carefully scrutinised ..... The court could not say that mere yielding to the objection itself showed bias ..... on the whole, it was not established that there had been a real likelihood of bias ....."(17) Real likelihood test was followed in a recent commonwealth case.(18) In that case an objection was raised by the defendant inter alia, against two members of the panel of the judges alleging that one of the judges was an intimate friend of the plaintiff and another judge was a brother in law to some one similarly affected by the construction of the statute which was under consideration before the judges. The same judge was further alleged to have made representations to a Minister of State on behalf of his brother in law. But the contention was rejected on the ground that there was no real likelihood of bias on their part.(18) On the other hand there is some authority to suggest that relationship would disqualify when it gives rise to a reasonable suspicion of bias. In a recent case,

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16. R.v. Justices of County Armagh (1915) I.L.T. 56 (K.B.) (A brother of the magistrate was married to a sister of the complainant).

17. Ibid, at p. 57.

18. Sallah v. Attorney General, S.C. April 17, 20, 1970; (1970) C.C. 54, 55. See University of Ghana Law Journal (1970) 142, 144.

Metropolitan Properties Co. Ltd v. Lannon, the Court of Appeal held that there was a reasonable impression of bias on the part of the Chairman of the rent assessment tribunal and quashed the decision. The reason was that the Chairman of the Committee, a Solicitor, lived with his father in a flat owned by a company in the same group as the appellant landlords, and he had advised tenants in connection with that other company over their rents.(19)

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19. Metropolitan Properties Co. Ltd. v. Lannon [1969] 1 Q.B. 577 (C.A.). However the ground of relationship was mixed with other grounds i.e., as he also advised his father and other tenants about their rents.

FAMILY RELATIONSHIP : UNITED STATES

In America, every state has currently some statutory provision for disqualification of judges for relationship. The two common law grounds for disqualification i.e. interest in the litigation and relationship to one of the parties, however, have been recognised by every state.(20) However, the degree of relationship which will disqualify the judge varies from state to state but is generally between third to sixth degree as calculated by civil law. In California, a justice or judge is disqualified from sitting or acting in any action or proceeding when he is related to either party, or to an officer of a corporation, which is a party, or to an attorney, counsel or agent of either party by consanguinity or affinity within the 3rd degree, computed according to the rules of law.(21) In Utah, a justice, judge or justice of the peace shall not sit in any proceeding when he is related to either party by consanguinity or affinity within the 3rd degree

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20. E.g., N.Y. Judiciary Law § 14, Ark. Stat. Ann § 22-113 (1962), Cal. Civil. Proce (West Supp) § 170, Utah code Annotated (1953)§ 78-7-1.

21. Cal. Civil Proce. Code op. cit.

computed according to the rules of common law[22] whereas in Arkansas relationship to the 6th degree disqualifies.[23] Proximity of the relationship is the decisive factor in determining whether disqualification would lie. In re Eatonton Electric Company[24] it was held that a federal judge should not sit in a case in which he is related to one of the parties within fourth degree of consanguinity. In contrast with the English law relationship with the counsel, has also been considered as a ground for disqualification of the judges. Justice Black disqualified himself in cases involving the F.C.C. during the period when his brother in law was a member of the commission.[25] Chief Justice Stone heard argument by his son only upon the consent by the parties.[26] On the other hand Justice Miller did not disqualify himself when his brother in law and close friend W.P. Ballinger argued cases before him.[27]

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22. Utah Code Annotated. op. cit.

23. Ark. Stat. Ann. op. cit.

24. In re Eatonton Electric Co., D.C. Ga. (1930), 120F. 1010.

25. F.C.C. v. Woko. Inc., 329, U.S. 223 (1946).

26. Ex parte Quirin 317 U.S. 1,5 (1942).

27. E.g. Hitchcock v. Galveston, 96 U.S. 341 (1878) See Frank: Disqualification of Judges 56 Yale L.J. 605, 617 (1947).

The disqualification of justices and judges of the United States is now governed by Section 455 (as amended) of the Judicial Procedure.[28] Originally this Section provided for disqualification of a judge or justice when he was so related to or connected with a party or his attorney as to render it improper in his opinion to sit on the trial, appeal or other proceeding. However, relationship was not an absolute ground for disqualification as a judge challenged under Section 455[29] was able to determine for himself whether the circumstances would prevent him from sitting. It may be argued that since a biased tribunal is repugnant to due process of law, the constitutional guarantee od due process implicitly incorporates an additional basis for disqualification. Quite surprisingly the Supreme Court initially had indicated in Tumey v. Ohio that relationship might not affect any constitutional

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28. 28 U.S.C.§ 455 (as amended Dec. 5, 1974) Pub. L. 93-512,§ 1, 88 stat. 1609.

29. 28 U.S.C. §.455 (unamended).

requirement of impartiality of the court:

"All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, ... would seem generally to be matters merely of legislative discretion".(30)

The amended Section 455 provides mandatory disqualification for a justice, judge, magistrate or referee in bankruptcy of the United States where he or his spouse, or a person within the third degree of relationship (as calculated under civil law) to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

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30. Tumey v. Ohio, 273 U.S. 510, 523. (1927). But the Supreme Court in later cases suggested that a biased tribunal is violative of due process - In re Murchison 349 U.S. 133 (1955): and in Holt v. Virginia (381 U.S. 131, 1965). In the later case the Supreme Court held "that motions ..... to escape a biased tribunal raise constitutional issues both relevant and essential" (Ibid at p. 136). This ratio appears to indicate, at least inferentially, the recognition of a constitutional right to a trial before a judge who is not biased or prejudiced.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.(31)

Administrative officials are also disqualified in similar circumstances. In Low v. Town of Madison it was held that a husband was ineligible to cast a ballot in proceedings to re-zone his wife's land.(32) Similarly it was decided in Beck v. Biggars(33) that a statute requiring viewers appointed to lay out a road and assess damages to land owners to be disinterested persons precluded near relations by affinity and consanguinity such as a father in law or brother of the principal petitioner from acting as viewer.

Where the possibility of prejudice is too slight or remote, the court seems to be reluctant to disqualify. In one case a board of adjustment granted Neiman Marcus, Inc. a variation in zoning to allow the department store to construct a parking lot. The Court of Appeal refused to disturb the decision even though the wife of one of the board members worked for the firm, and another member was a cousin of the President of the corporation as "their interest being characterized in law as too remote" to amount to a disqualification.(34)

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31. 28 U.S.C. §.455 (b) (5)

32. Law v. Madison, 135 Conn 1;60. A 2d. 774 (1948).

33. Beck v. Biggers 66 Ark. 292(Supreme Court of Arkansas) 50 S.W. 514 (1899).

34. Moody v. City of University Park, 278 S.W. 2d 912, 919 (Tex. Civ. App. 1955).

(C) PARTICIPATION IN APPEAL AGAINST OWN DECISION[1] : ENGLAND

The general principle is that no judge who has once decided a question in any previous judicial proceeding should again sit, "or is even qualified to sit, in the tribunal which has to determine whether the decision is right or wrong".[1] This general rule was not without exception. Just as the legislature may make a man judge in his own cause so it may also authorise the person to hear appeals from his own decisions. In R.v. Cheshire Justices,[2] it was held by the court that a justice of a borough who had been appointed a member of the quarter sessions under Section 5(5) of the Licensing Act 1904 was not disqualified from hearing a licensing case on the ground that he presided at the meeting of the licensing justices of the borough where the decision was taken to refer the question of renewal of licence to quarter sessions under Section 1(2) of the Act. Section 5(5) gave to all the justices of a borough, not being a county borough, but having a separate commission of the peace, the power to appoint one of their number to act on the committee of quarter sessions. "Legislation makes an absolute exception to the ordinary rule governing judicial

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1. However cases where the judges were alleged to have participated in prosecution or investigation of a case and afterwards took part in the adjudication are dealt in a separate section "Prosecutor Judge Cases".

2. R.v. Cheshire JJ. [1906] 1.K.B. 362.

proceedings ..... There is nothing to say that he is not to be a justice who has already considered the matter; on the contrary, ... the whole object of the Act would seem to be that the justice should be a justice who was conversant with the matter".(3) Now the Licensing Act 1964(4) prohibits a licensing justice from taking part in the hearing or determination of an appeal from any decision in which he took part.

The general principle that persons who had once decided a question should not take part in reviewing their own decisions was not followed by the courts of old. Before the Supreme Court of Judicature Act 1873, the judges of the Superior Courts, i.e. Queens Bench, Common Pleas and Exchequer, often sat with other judges of the same court on appeals from their own decisions. So legislation has been necessary to take away the power formerly possessed by the judges of the old common law courts to review their own decisions.(5) It is now specifically provided that in civil cases no judge of the Court of Appeal shall sit as a judge on the hearing of an appeal from a judgment or other made in any case by himself or by any Divisional Court of the High Court of which he was a member.(6) In criminal cases, until recently there was no

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3. Ibid, P. 372 (Per Darling J.).

4. Licensing Act 1964, S. 22(7).

5. R.v. Cheshire Justices, supra, p. 370.

6. Supreme Court of Judicature (Consolidation) Act 1925, S. 68 (4).

rule that the trial judge should not sit on the hearing of appeal against his own decision in the Court of Appeal. The courts were reluctant to disqualify a fellow judge on this ground. In R.v. Bennett, R.v. Newton[7] on an application that the sentence might run from the date of conviction, Darling,J. said:

" ..... the case was in the list, but defendants wished it to be postponed because the trial judge was then a member of the court. There was, of course, no statutory objection to the judge sitting, and it would almost be impracticable to prohibit this unless there were more judges in that Division. There was always an investigation by a single judge before a case came into that court, and there must be at least two other judges with the trial judge. It was a great mistake to suppose that the trial judge would be inclined to set up his view against the opinions of his brethren or 'to fight for his own hand'. The trial judge in this case at once assented to the adjournment".[8] In R. v. Lovegrove, the applicant was convicted before Lynskey J. at Bedford Assizes and his application for leave to appeal, which had been refused by the single judge, came before the Court of Appeal of which Lynskey J. was a member. The question arose whether in the circumstances he should sit while the application was being heard. Lord Goddard, C.J.

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7. (1913) 9 cr. App. Rep. 146.

8. Ibid, p. 157.

said that "There are cases in which, no doubt, it would be desirable that the trial judge should not sit, but where the ground of appeal is nothing but an argument by the appellant that the verdict was wrong, there is no reason whatever why the trial judge should not sit".(9) However, such a situation is now governed by the Criminal Appeal Act 1966. By Sestion 2(3) it states that "[no] judge shall sit as a member of the criminal division of the Court of Appeal on the hearing of, or shall determine any application in proceedings incidental or preliminary to — (a) an appeal against a conviction before him or a court of which he was a member or a sentence passed by him or such a court; or (b) an appeal from a judgment or order of that judge when sitting in the High Court or of a court of the High Court of which he was a member." Besides, Crown Courts Rules 1971(10) disqualifies a justice of the peace from sitting in the Crown Court on the hearing of an appeal in a matter on which he adjudicated or of proceedings on committal of a person to the Court for sentence under Section 28 or 29 of the Magistrates' Courts Act 1952 by a court of which he was a member.

In administrative law, one who is in fact or in substance the respondent cannot sit to hear appeal against his own decision. Generally rules applicable to courts are also applied to bodies other than courts. In view of

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9. Lord Goddard C.J. in R.v. Lovegrove [1951] 1 All E.R. 804 (C.A.) at 805.

10. Crown Court Rules 1971 (S.I. 1971 No. 1292) R.5.

the attitude of the courts towards appeals from justices and of the statutory disqualifications provided in such cases, it would be reasonable to suppose that an administrator exercising judicial functions cannot in any circumstances take part or appear to take part in hearing an appeal against his own decision, unless he is so authorised by statute .

The general principle that no man should be a judge in his own cause prevents administrative authorities hearing appeals against their own decisions. In Cooper v. Wilson, a police sergeant was dismissed by the Chief Constable of Liverpool. He appealed to the Watch Committee where his appeal was also dismissed. It was found that the Chief Constable who dismissed him was also present in the Watch Committee. The Court of Appeal declared that the presence of the Chief Constable invalidated the Watch Committee's decision. Lord Justice Scott said:

" The risk that a respondent may influence the court is so abhorrent to English notion of justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive the decision of all judicail force to render it a nullity".(11)

Greer L. J. said, at p. 324:

"I ask myself what would anyone have thought who came into the room where the committee were sitting, after the plaintiff had gone out while they were considering their

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11. Cooper v. Wilson [1937] 2 K.B. 309 Per Lord Justice Scott at p. 344

decision, and found sitting with the committee one of the respondents to the appeal who had opened the case ..... such a person, if reasonable, would have been likely to say to himself "There has been an opportunity here for one of the parties to influence the judgment of the committee, and it looks as if justice may seem not to have been done".(12)

However, every case of this kind depends upon its own particular facts and circumstances. It appears that the fundamental point which the Lord Justices had considered was that a man was acting in a double capacity i.e. being in the capacity of a respondent to the appeal was also present with the watch committee before the case came on and as well as during the time of deliberations.

The mere fact that a Chief Constable was present in the room with the Watch Committee prior to an appeal (from his decision) coming on was not alone sufficient to invalidate the subsequent appeal provided that he had nothing to do with it, and that he did neither act as a prosecutor nor remain present with the committee during their deliberations. In Kilduff v. Wilson, ... which came shortly after Cooper's case, the Chief Constable who dismissed K.was present with the Watch Committee at the earlier stage(i.e. while they were discussing the procedure to be followed in such appeal). But the Chief Constable was not so present when, at an adjourned hearing, the merits of K's appeal were examined. It was held that there had been no irregularity in the proceedings of the

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12. Supra.

Watch Committee in K's case. Had the appeal been heard on the first day when the Chief Constable was present, the proceeding might have been invalidated by his presence. In such a case "there is no ground for saying that the proceedings before the watch committee are invalidated on the ground that justice had not been compiled with, in the sense that justice had not been manifestly seen to have been done".(13)

Similarly the mere fact that a clerk who was present at the deliberation of the appeal tribunal was also present at the deliberations of the other committees at the earlier stage of the case but did not take any part in any of those deliberations could not be regarded as a ground for challenge for bias. In R.v. Architects' Registration Tribunal,(14) the applicant appealed to the tribunal of Appeal against refusal of the Registration Council to register him as an architect. The tribunal dismissed his appeal. He then sought to quash the decision, alleging inter alia, that the person who acted as the clerk of the admission committee and of the registration council and so acted when the applicant's application was considered by those bodies respectively, improperly acted as clerk of the appeal tribunal at the hearing and determination of the applicant's appeal. The applicant's contention was turned down by the court. "Mr. Wicks (the clerk), although present, took no part whatever in the deliberations I

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13. Kilduff v. Wilson [1939] 1 All E.R. 429, 440 - 441 (C.A.).

14. R.v. Architects Registration Tribunal Ex parte Jaggar [1945] 2 All E.R. P. 131.

cannot see how either by reason of his position or his conduct, Mr. Wicks can be said to have anything which can be said to have given colour to a reasonable man to think that justice was not "seen to be done".[15]

An appeal board is improperly constituted when an interested person sits on it. In R.v. Mullins[16] one L. who as acting Chairman of the Fire Brigade Board suspended and terminated the applicant's service then again acted as a member of the Fire Brigade Appeal Board. It was held in such circumstances that the decision of the Appeal Board could not stand. A reasonable person might well have thought that L. might be biased and in addition there was a real likelihood of bias. Justice had not manifestly and undoubtedly been seen to be done as L had been a judge in his own case. Certiorari should issue, and the clause[17]

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15. Ibid at p. 137 (per Lewis, J.) However there are cases such as R.v. Essex JJ. Ex p. Perkins [1927] 2 K.B. 475; R.v. Sussex JJ. Ex p. McCarthy [1924] 1 K.B. 256, which illustrate the principle that the court will quash by certiorari a case in which it is found, that the clerk to the tribunal is a person who has either given some advice, or his firm without his knowledge has given some advice, to one of the parties in the matter before the magistrates - those cases are discussed in a later section:"Professional & Vocational Relationship".

16. R.v. Mullins, Ex p. Sten House [1971] Qd. R.66 (Full court) and a Board improperly constituted is a Board without jurisdiction - Ladies of the Sacred Heart of Jesus (convent of the Sacred Heart) v. Armstrong's Point Association (1961) 29 D.L.R. (2d) 373 discussed in the section,"Family Relationship".

17. Fire Brigade Act of 1964, Second Schedule S.19(1) (4).

prohibiting certiorari in relation to appeal would not apply since the Appeal Board is improperly constituted. Similarly in a Canadian case, the Ontario High Court held that the participation by two members of a Discipline Committee (of the Law Society of Upper Canada) who earlier found a solicitor guilty of professional misconduct, in the proceedings of the Convocation which was in the nature of an appeal amounted to denial of natural justice. No person may sit on an appeal from his own decision and as the Convocation was in fact sitting in appeal, the members of the committee should not have participated in the Convocation's deliberations.(18)

The presence of the prosecutor at all the deliberations of the appellate body is enough to vitiate the proceedings.(19) In a recent case a stall holder's licence was terminated by the market manager. His appeals to the council committees were also dismissed. It appeared that the market manager was present with the Committees throughout the proceedings. The stall holder's application for certiorari was dismissed by the Divisional Court on the ground that the Council's decision was administrative and within its powers. The Court of Appeal held that where the council was exercising its discretionary power under the

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18. Re French And The Law Society of Upper Canada 25 D.L.R. (3d) 692.

19. R.v. Barnsley Council, Ex p. Hook [1976] 1.W.L.R. 1052 at P. 1057 (C.A.). In Taylor v. National Union of Seamen [1967] I W.L.R. 532 (Ch.D.) The plaintiff was dismissed by the general Secretary of the Union who later on took part in the appeal hearing as Chairman of the Executive Council. It was held that the decision could not stand as he acted both as prosecutor and judge. Discussed further on the Section on "Prosecutor Judge Cases".

statute to regulate the common law public right to buy and sell in a market, it was not merely dealing with the contractual relationship but also with the common law right of a man to earn his living in the market. In such circumstances it was under a duty to act judicially. The appeal hearings had been conducted in breach of the rules of natural justice as the market manager was present throughout the proceedings while the applicant was not.(19a)

In administrative cases, it happens sometimes that a body exercising a disciplinary function refers a case to a committee for hearing and to report and then proceeds to make a final decision. Disqualification will not lie unless the members of the subcommittee makes a "decision" and then take part in the proceedings before the parent body which is in effect an "appeal" from their own decisions. So in a case where the Council making adjudication and the committee carrying on an investigation and recommendation were part of the same adjudicatory process simply divided into two stages, it was held that the council was not hearing an appeal from the investigatory committee, for under the Act the only appeal lay to the court.(19b) In those circumstances the members carrying out the investigation were not making any "decision" and therefore were not precluded from taking part in the adjudication by the Council. There was no foundation for a finding of bias that would prevent members

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19a. R.v. Barnsley Council, Ex p. Hook (op. cit.).

19b. Re Dancyger and Alberta Pharamaceutical Association (1971) 17 D.L.R.(3d) 206.

of the Committee from sitting with the Council.[20] Where an initial decision is taken by a body, and some of its members (who were not present when such a decision was taken) participate in the so called appeal then their position will be as Sachs L.J. explained in Hannam v. Bradford Corporation:

"No man can be a judge of his own cause. The (School) governors did not upon donning their sub-committee hats, cease to be an integral part of the body whose action was being impugned, and it made no difference that they did not personally attend the governors' meeting".[21] In the above case, the school governors decided to dismiss H. a teacher. His appeal to the staff sub-committee of the education committee also failed. The Court of Appeal held that the decision could not stand, because three members (out of ten) of the sub-committee, including the chairman were governors of the school and although they had not been present at the meeting of the governors which decided to dismiss H., there was a real likelihood (or a reasonable suspicion) of their being biased in favour of the original decision. The Chairman was a member of the Governors against whose decision the "so-called appeal" was brought. If the facts had been disclosed everyone would have thought that "some

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20. Re Dancyger and Alberta Pharmaceutical Ass'n 17 D.L.R. (3d) 206 (1971).

21. [1970] 1 W.L.R. 937, per Sachs L. J. at p. 942 (C.A.).

real likelihood of bias existed".[22] When a person "is used to working with other people there must be a built in tendency to support the decision of that committee",[22] even though the person was not present at the time when the decision was made. In Ward V. Bradford Corporation the Court of Appeal came to an apparently anomalous decision. The distinction between initial decision and "appeal" was obscured. The disciplinary committee recommended the expulsion of W., and the governing body approved its recommendation. The counsel for W. submitted that under the terms of the articles of government W. should have been given a right of appeal from the disciplinary committee. Lord Denning refused to accept this contention. According to him, the word "appeal" was used in a loose sense which meant that when the governing body came to decide whether or not to accept the recommendation of the committee, the governors who sat in the disciplinary committee must not participate in that decision. "Natural justice does not require the provision of an appeal. So long as the party concerned has a fair hearing by a fair-minded man or body of men that is enough".[23] It is also hard to reconcile this case with the Court of Appeal's decision in Hannam v.

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22. Supra, per Widgery L.J. at p. 946. (Widgery L.J. opined that whichever of the tests adumbrated in Metropolitan Properties Co. Ltd. v. Lannon [1969] 1.Q.B. 577 (real likelihood or reasonable suspicion) is properly to be applied in this case, the plaintiff had made out his allegation - p. 946.

23. Ward v. Bradford Corporation (1971) 70 L.G.R. 27, 34, 35. Facts stated in the section on "Prosecutor Judge".

Bradford Corporation. What Widgery L.J. described as a "built in tendency"[24] in a body to support the original decision of the fellow members found no foothold in this case. The chance was greater here because the governing body also acted as complainants and in a sense judge in there own cause. But the court found nothing unjust or unfair in their procedures. Professor de Smith suggested that the court's moral disapproval of W's conduct was also a factor in the rejection of the appeal.[25]

However what constitutes bias depends upon the facts and circumstances of each case. It is impossible to lay down any fixed principle.

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24. Hannam's case, supra.

25. de Smith, Judicial Review of Administrative Action, (3rd ed.) p. 224.

PARTICIPATION IN APPEAL AGAINST OWN DECISION : UNITED STATES

Under American law, in the absence of a constitutional or statutory provision, a judge is not disqualified from sitting in an appellate court in a case tried by him in a lower court. In Galveston & H. Inv.Co. v. Grymes[26] on a motion for rehearing of the case on the ground that one of the justices was disqualified from participating in the decision of the case by reason of the fact that he took part in the decision of the cause in the Court of Civil Appeals for the first supreme judicial district, while a member of that court, the Supreme Court said:

"It has been the uniform practice in this court for a judge who tried the case in the court below and subsequently became a member of this court to decline to sit in the case upon appeal. This has, however, proceeded from motives of delicacy, and not because it has ever been thought that the justice is disqualified to sit. The grounds of disqualification of the judges of the courts in this state are specified in the constitution, and they are exclusive of all others; and the fact that a judge may have tried the case in a lower court, or participated in the decision in such court, is not made one of them ....."[26] The court took the clear opinion that the judge was not disqualified and the motion was overruled.

However the constitutions and statutes of many states disqualify a judge of an appellate court from sitting in

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26. Galveston & H. Inv.Co. v. Grymes (Sup.Ct. of Texas, 1901) 64 S.W. 778.

a case which has been tried by him as judge of a lower court. For example, in Case v. Hoffman[27] the Supreme Court of Wisconsin held that the decision of a case on appeal was void as it was participated in by a judge who was disqualified under a statutory provision. The particular statute prohibited a judge of an appellate court from taking part in the decision of any case or matter which had been determined by him while sitting as a judge of any other court, unless there could not be a quorum without him. So the judge who, at circuit court, ruled on a demurrer to a complaint, was held disqualified from participating in a review of the same case by the Supreme Court where the same question was involved, even though the decision reviewed was rendered by another judge.[28]

The disqualification of federal judges is provided for by statute. The federal statute 28 U.S.C. §.47[29] provides that no judge of the Court of Appeals shall hear an appeal from the decision of a case or issue tried by him. Similar provisions were contained in various predecessor statutes. For example in a 1891 statute (26 stat, 826, 827) establishing circuit Courts of Appeals and providing that such courts could be composed of Supreme Court justices, circuit judges, or district judges, it was provided that "no justice or judge before whom a cause or

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27. Case v. Hoffman (Su.Ct. of Wisconsin, 1898) 74 N.W. 220.

28. Ibid.

29. 28 U.S.C §47 (1970).

question may have been tried or heard in a District Court or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." A similar prohibition was provided in S.120 of the Judicial Code of 1911 (36 stat 1087, 1132). The purpose of Congress in enacting S.47 and similar predecessor statutes was to preclude any member of a court of appeals panel from being in the position of having to pass upon his own rulings in the District Court and thereby to ensure that no member of an Appeals panel would be committed or influenced by having previously expressed or formed an opinion in the District Court. A judge is disqualified who has once heard a cause upon its merits in the court of first instance from sitting in the court of appeals on the hearing and decision of any question, in the same cause, or involving any question considered in the lower court.

In Moran v. Dillingham[30] it was held that a judge who appointed a receiver in a foreclosure suit and made an order allowing him a monthly sum for services and also rendered the final decree of foreclosure and decrees for delivery of possession, was prohibited from sitting in the Court of Appeals on an appeal from the decree of another judge concerning the monthly compensation of the receiver after a certain compromise between him and purchasers on the foreclosure. The statute disqualifies a member of a Court of Appeals from hearing or determining an appeal because he had decided in the District Court the same

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30. Moran v. Dillingham 174 U.S. 153. (1899).

"case or issue" or "cause or question" as was presented on appeal. The trial and disposition of a case by a court organised in violation of a direct provision of statute is a grave error and involves considerations of such public importance as to make it the duty of the court to allow a writ of certiorari without questioning the merits. In William Cramp and Sons Ship and Engine Building Company v. International Curtis Marine T. Co.[31] it was held that, under section 120 of the judicial code, a judge who has heard the case in the first instance may not sit in the circuit court of appeals for the purpose of reviewing his own action, even though in the court below he merely entered a decree pro forma without expressing any opinion on the merits and no objection was raised by either party to his sitting in the Court of Appeals. The Supreme Court said that "the comprehensive and inflexible character of the prohinition (in the statute) was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the circuit Court of Appeals, when without such consent, because of the prohibition of the statute, he would be disqualified from so doing, a purpose whose public policy is not difficult to understand".[31] In Swann v. Charlotte - Mecklenburg Board of Education[32] a circuit

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31. William Cramp and Sons Ship and Engine Building Co. v. International Curtis Marine T. Co. 228 U.S. 645,650 (1913).

32. Swann v. Charlotte - Mecklenburg Board of Education 431 F.2d135(CA 4 NC) (1970).

judge held that he was disqualified by §.47 from participating in the hearing and disposition of an appeal in a school desegregation case. The judge noted that when he had been a District Judge, he had tried a school desegregation case between the same parties. In later proceedings before a different judge whose decision was presently being appealed to the Court of Appeals, the same ultimate question as had been involved in the earlier proceedings was raised. The judge therefore concluded that §.47 prevented him from sitting on the appeal. The manifest purpose is to require that the circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the circuit Court of Appeals to consider and pass upon. That the parties may consent to the judge's participation in appeal would not make any difference at all, "for the sole criterion under the statute is, does the case in the circuit Court of Appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?"(33)

On the other hand a district judge who had earlier

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33. Rexford v. Brunswick - Balke - Collender Co. 228 U.S. 339.(1913).

presided over the dismissal of a different indictment against the defendant on the motion of a federal attorney was not disqualified from sitting as a member of a court of Appeals to review a conviction under Section 47 of 28 U.S.C.(34) The reason was that the petitioner was never tried in that case and that the indictment as to petitioner was dismissed by the judge (who was now sitting as a member of the Court of Appeals). Therefore, the judge was not called upon to "hear or determine an appeal from the decision of a case or issue tried by him".(34) The Administrative Procedure Act 5 U.S.C. § 554 (d)(35) states that "[an] employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This sub section does not apply (A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities, or practice of public utilities or carriers; or (C) to the agency or a member or members of the body comprising the agency".

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34. Noah v. United States 316 F. 2d, 159 at 160 (1963); cert. denied 375 U.S. 855.

35. The parallel section in Administrative Procedure Act 1946 is Section 5(c).

In agency proceedings the initial decision is made by a hearing examiner,(36) who is very much like a judge who presides over a trial. After the hearing, the examiner prepares his proposed report, what the Administrative Procedure Act calls "initial" or "recommended decision". The document is served upon all the parties to the case and becomes the basis for exceptions and briefs addressed to the agency and usually for oral argument before the agency heads. The filing of the initial or recommended decision does not necessarily end his participation. After oral argument, the examiner may help in the preparation of the final report and when the agency heads confer with each other for making a decision he may be available to answer their questions.(37) It is provided under §. 557(b):

" ..... When the presiding employee makes an initial decision that decision then becomes the decision of the agency without further proceedings unless there is an appeal to or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except it may as it may limit the issues on notice or by rule".(38)

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36. Previously known as hearing commissioners: K.C. Davis, Administrative Law Text,(3rd ed.)§10.02 p. 220. The term used in the Administrative Procedure Act §.556 and §.557 is now "presiding employee".

37. K.C. Davis op. cit.§10.01 - p. 219.

38. Administrative Procedure Act 5 U.S.C. §.557(b).

The final decision is made by the agency. The "agency" means the body of Commissioners as distinct from the staff. The statute also requires that an employee or agent engaged in the investigative or prosecuting functions for an agency may not participate or take part in the initial decision or recommend decision as well as in the agency review.(39) But, surprisingly, this condition does not apply to the agency or members of the body comprising the agency.(40) One of the very exceptional cases is Amos Treat & Co. v. Securities and Exchange Commission(41) where the Court of Appeals Danaher, Circuit Judge, held that federal courts had jurisdiction, on due process grounds, to entertain an action on allegations that persons who had participated in the investigation or prosecution had later, as member of the commission, participated in the decision, and that the commission had ruled that the person was not disqualified, while denying evidentiary hearing on disqualification. The court thought that the Administrative procedure Act provision excepting an agency or its members was intended to permit one who is a commissioner to participate in a decision of the commission that an investigation go forward and even that charges be filed to the end that an adjudicatory proceeding might be initiated and in such circumstances it was the purpose of

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39. Ibid §.554 (d) , further discussion in section on "Prosecutor Judge".

40. Ibid.

41. Amos Treat & Co. v. Securities and Exchange Commission 306 F.2d. 260 (1962).

Congress to permit a Commissioner to participate in the ultimate decision. But,

"[we] are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency".(42)

Courts have expressed the view that it is not contrary to due process of law to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time round. As Justice Black remarked in the Cement Institute case,(43) a judge can try a case, render judgment in it, be reversed by a higher court and then hear the same case anew - the matter having been remanded "for further proceedings not inconsistent with this opinion". The United States Supreme Court has also ruled that a hearing examiner who has recommended findings of fact after rejecting certain evidence as not being probative was not disqualified from presiding at further hearings that were required when reviewing courts held that the evidence had been erroneously excluded-[NLRB v. Donnelly Garment Co. 330 U.S.

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42. Ibid, 266.

43. FTC v. Cement Institute 333 U.S. 683. (1948).

219, 236 - 237 (1947)]. In this case, the Court of Appeals had decided that the examiner should not again sit because it would be unfair to require the parties to try "issues of fact to those who may have prejudged them...." [151 F. 2d, 854, 870 (CAB 1945)] But the United States Supreme Court unanimously reversed this, holding:

"certainly it is not the rule of judicial administration that, statutory requirements apart ..... a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing": Donally Garment Co. 330 U.S. 219. 236-237.

One may conclude, by parity of reasoning, that repeated appearances of the same cases before administrators would not necessitate a change of personnel in the absence of personal involvement, relationship bias or prejudice. In Withrow v. Larkin, a state examining board which carried out an investigation and issued a "decision" finding that a physician had engaged in conduct prohibited by statute, was not held to be disqualified from holding a later adversary hearing of the same matter:

"No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing".(44)

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44. Withrow v. Larkin 43 L.Ed.2d 712, 728. (U.S. Sup.Ct., 1975).

Nevertheless where the court is satisfied that bias exists on the part of an individual adjudicator the case is remanded for fresh consideration by the agency without the participation of that adjudicator. In American Cynamid Company v. F.T.C. where Chairman Dixon was held disqualified for bias, the Court of Appeals, sixth circuit, vacated the order and decision of the Federal Trade Commission and remanded the case for a de novo consideration of the record without the participation of Chairman Dixon.(45)

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45. American Cynamid Company v. F.T.C. 363 F.2d. 757 (6th cir. 1966). Similary in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon C.A. [1968] 1 Q.B. 577. when the court found a reasonable impression of bias on the part of the Chairman of the Rent Assessment Committee, it quashed the decision and the case was remitted to another rent assessment committee for rehearing.

(D) PREJUDGMENT, FAVOURITISM OR HOSTILITY: ENGLAND

Prejudgment may occur in various ways. The disqualifying factors denominated as friendship, hostility, or prejudged opinion frequently occur in concert and usually shade into each other. It is often very difficult to distinguish between them. Cases where the judge or the adjudicator was instrumental in bringing charges against the party whose interests were involved have been dealt with under the heading "prosecutor judge".(1) An attempt has been made to arrange the various cases under each heading according to the emphasis indicated by the court.

In R.v. Kent Police Authority Ex P. Godden(2) a medical practioner expressed an opinion adverse to police Chief Inspector Godden that he was "suffering from a mental disorder of paranoid type" and the applicant was put on sick leave. However, the applicant saw his own doctor who sent him to a consultant psychiatrist who reported that he was "psychiatrically completely normal". The police authority took further steps compulsorily to retire the applicant and selected the same chief medical officer to determine whether the applicant was "permanently disabled"

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1. There may be another type of prejudgment, prejudgment of law or policy which does not disqualify. It is discussed in the chapter on the exclusion of the rule. The remaining cases where prejudgment apparently occurred, but cannot be appropriately categorised under any other heading are dealt with here.

2. Re Godden [1971] 2 Q.B. 662 (C.A.).

under regulation 70(2) of the Police Pensions Regulation, 1971.[3] The applicant sought orders of prohibition and mandamus. The Divisional Court dismissed his application, but his appeal was allowed by the Court of Appeal. It was there held that a doctor's report made in connection with proceedings for the compulsory retirement of a person causing serious consequences was of "judicial character" and in such a case a person "must beyond doubt act fairly".[4] The medical practioner had already expressed an opinion adverse to the patient, and so committed himself to an opinion in advance of the inquiry. "If he was to decide the matter justice would not be seen to be done".[5] The court issued prohibition to prohibit Dr. Crosbie Brown from determining whether the appellant was permanently disabled, and mandamus to the police authority to supply all materials and papers in connection with the appellant's mental illness formerly placed before their doctor to the appellant's medical consultant, in spite of the regulations in force. On the other hand if a decision is reached on the basis of a public inquiry and laid in draft and remains unaffected or unchanged in spite of subsequent prejudicial evidence, then disqualification will not lie. In R.v. Eastern Authority

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3. Police Pensions Regulations 1971, reg. 70: (2) "where the police authority are considering whether a person is permanently disabled they shall refer for decision to a duly qualified medical practioner selected by them. ....."

4. Supra. Per Lord Denning at p. 669.

5. Supra, p. 670.

Ex parte Wyatt,[6] the applicants, who were goods carriers, held an operator's licence authorising the use of vehicles and trailers. The licensing authority held a public inquiry concerning the applicants and his decision was put in draft. Before the decision was promulgated the authority held an inquiry into the conduct of one of the applicants' drivers. The applicants were not present at that inquiry and at which evidence prejudicial to them was given. Afterwards the authority published his decision and curtailed their licence by reducing the number of vehicles and trailers. The decision was challenged on the ground that the authority did, or there was a reasonable suspicion that he did, have regard to the prejudicial evidence given in their absence at the driver's inquiry. The court held that whatever test he applied whether real probability of bias or reasonable suspicion of bias, the conclusion would be that there could be no possibility of the driver's inquiry having prejudiced the authority's decision on the applicants' inquiry, because before he heard the evidence on the driver's inquiry, he had not merely made up his mind but had committed to paper and did not subsequently alter his decision. Therefore, the possibility of subconscious bias or prejudice could not arise, for the authority "did not have the two cases fluid in his mind at the same time..."[7]

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6. [1974] R.T.R. 480.

7. Ibid at p. 487.

A close personal friendship has always been regarded as a disqualification. "Clearly a member of the tribunal who was a friend of the tax payer or has been personally concerned in his affairs is disqualified from sitting on the tribunal ..... This exception is founded on an overriding consideration of natural justice ....."[8] In Cottle v. Cottle, a matrimonial suit was brought by a wife against her husband. The Chairman of the bench of the justices was a friend of the wife's mother. It was proved that the wife had said that she would obtain a summons to be set down for hearing, when this particular justice was presiding, and that he would "put him [the husband] through it". The Divisional court held that it was not necessary to show that the justice was in fact biased, and there was sufficient evidence upon which the husband might reasonably have formed the impression that this justice could not give this case an unbiased hearing. Bucknill, J. wrote, "The test which we have to apply is whether or not a reasonable man, in all the circumstances, might suppose that there was an improper interference with the course of justice" if the challenged judge sat.[9] The case was remitted for a new trial before a bench of which this justice was not a member. The court will not allow a decision influenced by prejudice

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8. Howard v. Borneman (No.2) Ch.D. [1974] I W.L.R.15 (Pennyqick V.C.) at P. 22. On appeal reversed on other grounds.

9. [1939] 2 All E.R. 535, 541 (P.D.A.) Similarly in an American case a judge was held to be disqualified for long standing friendship with a party and where the party publicly claimed influence - Callahan v. Callahan 30 Idaho 431; 165 Pac.1122 (1917).

or partiality to stand. Personal animosity to a party disqualifies a judge when it gives rise to a real likelihood of bias. In R.v. Cork County JJ.[10] a conviction by a magistrate was quashed when it was found that enmity existed between the magistrate and the defendant's family. But there must be a real bias to disqualify for animosity or favour. In R.v. Nailsworth Justices[11] it was held that although it was undesirable for a justice who had signed a petition in favour of a matter to sit as a member of a committee adjudicating thereon, it had not been established that there was any real bias on the part of the justice concerned as would make her unfit to sit. "It is not anything that raises doubt in somebody's mind that is enough to set aside an order or a judgment of justices; there must be something in the nature of real bias".[11] On the other hand in R.v. Abingdon JJ. a decision of the justices was quashed because the Chairman of the bench was a headmaster of the school where the applicant had been an unsatisfactory pupil and had earlier signed an unfavourable report about the applicant. Certiorari was issued to quash the decision even though the court was satisfied that the chairman was

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10. R.v. Cork County JJ. (1910) 2 I.R. 271.

11. R.v. Nailsworth Licensing Justices, Ex Parte Bird [1953] 1 W.L.R. 1046, 1048 (Q.B.D.).

in no way prejudiced against the applicant.(12)

Personal hostility between the judge and one of the parties is to be distinguished from antipathy to a general class. An English judge is not disqualified for his activities or opinions tending to show animosity or favouritism for or against a class of persons to which a party belongs unless such expressions or feelings are so vehement as to make it clear that he will not be able to judge the matter impartially. But it is extremely difficult to ascertain when such feelings would amount to disqualification and when not. In R.v. Halifax Justices,(13) the renewal of a licence having been refused by a majority of a compensation authority, one of the justices wrote a letter to a local authority giving the names of those who voted for and against the granting of renewal and amongst the latter, gave the name of one W. Thereupon W. wrote a letter stating that he would be nothing less than a traitor, given his position, if he had voted for the renewal. W. had been secretary of a branch of the Order of Rechabites, who abstain from drinking and discountenance the use or selling of liquor. Though he (W.) filed an affidavit that his reference to treachery in the letter was to his position as a magistrate and had no reference to his office in the Order of the Rechabites, it was held that the circumstances were such as to make bias on his part so probable that he ought not to have taken part in the case.(13)

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12. R.v. Abingdon JJ. Ex parte Cousins, [1964] 108 S.J. 840.

13. R.v. Halifax JJ. Ex parte Robinson (1912) 76 J. P. 233.

On the other hand, a very active teetotaller or a constant subscriber to bodies having the objective of opposing the grant of new licences, or a licensing justice who had already signed a petition to grant a licence may sit as judges in licensing cases. " It is impossible to suppose that any justice coming on to the bench at a licensing meeting ..... has not formed his own provate views as to whether the licence ought to be granted or refused as the case may be ..... it cannot be said that because an application is refused the justice necessarily acted improperly because he happens to be a total abstainer. In all these cases it must be a question of degree".(14) What amounts to a necessary degree for disqualification varies from case to case. In R.v. Caernarvon Licensing JJ.(15) certiorari was granted to set aside a decision of justices refusing a licence because one of the justices was a deacon of a chapel which had called a meeting for the express purpose of considering whether the grant of the licence should be opposed and, although the justice did not actually vote at the meeting, he was present at the meeting. It was held that in such circumstances certiorari must be issued as it was of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. The court took the view that where a man has practically made himself a party to the

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14. R.v. Nailsworth Licensing JJ., supra, at P. 1048.

15. R.v. Caernarvon Licensing JJ., Ex parte Benson and Another (1948) 112 J.P. 796.

group formed to oppose the licence it was not right for him to sit on the bench. The rule against bias does not apply so rigidly in arbitration or trade union cases. Bowen L.J. observed in Jackson v. Barry Railway Co. that there was no requirement of "the icy impartiality of a Rhadamanthus" in the case of a company's engineer acting as arbitrator, "who must necessarily be a somewhat biased person".(15a) Similarly it would indeed be an error to demand from the members who sit in a trade union committee the strict impartiality of mind with which a judge should approach and decide an issue between two litigants. A mere allegation that the committee members were prejudiced or hostile would not be sufficient to invalidate a decision. An expelled member has to show more than that, for example, a person who decided his case was in form and substance both accuser and judge.(15b)

15a. [1893] 1 Ch 238, 248 discussed later in the section on "Professional and Vocational Relationship".

15b. Taylor v. National Union of Seamen [1967] 1 W.L.R. 532 Ch.D. discussed in a later section "Prosecutor Judge". Similarly the strict procedure applicable to courts is relaxed in case of educational institutions carrying out disciplinary actions - E.g. Ward v. Bradford Corporation (1971) 70 L.G.R.27 discussed later in the section on "Prosecutor-Judge cases".

PREJUDGMENT, FAVOURITISM OR HOSTILITY: UNITED STATES

The common law in the United States for the most part has not followed the English path. While English judges have disqualified themselves for personal bias, on the other hand, the American courts early refused to disqualify judges for bias and prejudice.

In Clyma v. Kennedy,(16) a justice of the peace was not held disqualified, by reason of interest, from trying and sentencing a person on the complaint of a grand juror for criminal libel, though the justice was the person libelled. It was held that though "it was doubtless indecorous and unwise for him to try the case, because it exposed him to the appearance of seeking to revenge an insult to himself", nonetheless "there is no statute by the terms of which he was forbidden to act in the case, and we are not able to see that he had any such interest in it as made his action void".(17)

Accordingly statutes had to be enacted enabling litigants to disqualify biased judges in situations not covered by earlier law. Congress in 1911 granted such power to litigants in the United States district courts to disqualify judges for personal bias and prejudice by adding

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16. Clyma v. Kennedy 64 Conn. 310; 29 Atl. 539 (1894). Allegations that the judge was prejudiced but which did not allege any of the disqualifying causes mentioned in the constitution should be denied - Jones v. State 61 Ark. 88; 32 S.W. 81 (1895) Supreme court of Arkansas.

17. Clyma v. Kennedy, supra.

section 21 to the judicial code of 1911.(18) The relevant provision reenacted in 1948, is currently known as 28 U.S.C. § .144. It states that : "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 favour 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 reasons for the belief that bias or prejudice exists, ... 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". [28 U.S.C. § 144 (1970].

Now disqualification lies when a judge is biased or prejudiced either in favour of or against a party. Bias may arise from the activities or expressions of a judge which clearly show that the judge is biased and prejudiced against one of the parties. In Berger v. United States(19) the defendants, who were German Americans, were charged with espionage. The defendants sought to disqualify the District judge Landis, alleging that he was so biased against German Americans as to preclude any possibility of an impartial trial. The judge had been outspoken in condemning German American elements in the country during the First World War. The Supreme Court held by a majority that such remarks were sufficient to disqualify the judge from presiding at that trial. The court said that(19)"the

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18. Ch 231, 36 Stat, 1090.

19. 255 U.S. 22, 34 (Su.Ct.), 1921.

reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of the defendants has that character. The facts and reasons it states are not frivolous or fanciful, but substantial and formidable, and they have relation to the attitude of judge Landis' mind toward defendants".

However the statute expressly states that a judge is disqualified for "personal bias or prejudice". Bias is not personal unless it evinces animosity towards a party or favouritism towards the other. In Pfizer Inc., v. Lord,[20] the petitioners sought to disqualify the trial judge on the ground of bias alleging, inter-alia, that the judge had made adverse comments regarding the petitioners' deposition witness. The Court of Appeals denied the petitioners' contention and held that such comments failed to show any personal prejudice towards the petitioners. The problem may arise, as under English law, whether a judge should be disqualified if his expressions tend to show bias not against a party before him but against a class of persons of which the party is a member. Under English law, as has been seen, such bias does not disqualify unless such expressions are so vehement as to make it clear that he will not be able to deal with the matter with impartiality.[21] In Berger v. United States, Mr. Justice Day with two other

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20. Pfizer Inc. v. Lord. 456 F.2d. 532 (8th cir.) cert. denied 406 U.S. 976 (1972).

21. R.v. Halifiax JJ. Ex p. Robinson, (supra).

judges refused to accept that the anti-German statements of the trial judge did disclose any personal bias against the defendants. Mr. Justice McReynolds considered that the affidavit failed to show "that personal feeling existed against any one of them ..... Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members".[22] On the other hand, the majority of the Supreme Court justices seem to have concentrated on the underlying policy behind section 21[23] - "[We] may say that its (Section 21) solicitude is that the tribunals of the country shall not only be impartial ..... but give assurance that they are impartial, free to use the words of the Section, from any "bias or prejudice" that might disturb the normal course of impartial judgment".[24]

Bias may arise from many factors. The fact that for many years a judge had had a close personal and political relationship with a United States Senator whose political interests in the past had been and in the future may be in conflict with the defendants, and that the defendants directly and openly opposed the judge's nomination to the federal bench was held to be legally sufficient to justify a judge in recusing himself on ground of bias.[25] The issue presented by the affidavit under Section 144 that the judge should disqualify himself because of prejudice is not

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22. Berger v. United States, supra. at 42-43, (Per Mr. Justice McReynolds, dissenting).

23. Now 28 U.S.C.§ 144.

24. Berger v. United States, supra. at 36.

25. U.S. v. Moore, (D.C.W.Va. 1976) 405 Fed. Supp. 771.

whether the judge has bias or prejudice against a party but whether the affidavits recite sufficient facts to support allegations of bias and prejudice; that is, do the allegations contained in affidavits provide a fair factual support for belief that bias or prejudice exists.(25a) However mere political conviction will not give rise to the appearance of bias unless it has been vehemently expressed and may directly affect the outcome of the case. Justice Douglas, for instance, disqualified himself in a case challenging the grant of oil drilling permits by the Army Corps of Engineers in the aftermath of the Santa Barbara oil spill, because he had publicly expressed his views on the matter.(26) Similarly strong views or expressions of emotions for or against a matter require disqualification when such a matter is the subject of the dispute. Justice Frankfurter once felt obliged to disqualify himself from a case involving the practice of the Washington street car line in transmitting radio programmes in its vehicles, because he considered his emotions "so strongly engaged as a victim of the practice".(27)

Another provision which permits disqualification is

25a. U.S. v. Moore, (D.C.W.Va. 1976) 405 Fed. Supp. 771;28, U.S.C. § 144.

26. County of Santa Barbara v. Malley 400 U.S. 999 (1971) denying certiorari to 426 F.2d.171 (9th cir. 1970).

27. Public Utility Comm'n v. Pollack, 343 U.S. 451, 467 (1952).

28 U.S.C.§ 455.[28] Until recently Section 455 was held to be inadequate. According to Judge Frank, a "statute so limited was not enough. The extreme discretion left in the trial judge, the narrow grounds for disqualification, and the complete lack of disqualification for bias were obvious shortcomings".[29]

The amended Section provides for the disqualification of any justice, judge, magistrate or referee in bankruptcy of the United States in any proceeding in which his impartiality might reasonably be questioned and such person shall also disqualify where he has a personal bias or prejudice concerning a party.[30] Besides disqualification is also mandated where any such person has "personal knowledge of disputed evidentiary facts concerning the proceeding".[31] The reason seems to be that judge's personal knowledge of the facts may have led him to evaluate their legal significance and hence to prejudge

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28. Sec.455 of Title 28 United States Code (1970) designated as 28 U.S.C. § 455. The predecessor statute of Section 455, Act of May 8, 1792, ch 36, § 11, I Stat. 278 applied only to federal district judges. It was reenacted and expanded several times. It is amended and expanded recently on Dec. 5, 1974, Pub.L. 93 - 512 § 1, 88 Stat. 1609. The unamended Section 455 permitted disqualification on four grounds only: (1) Interest; (2) Previous representation of a party; (3) Participation in the case as a material witness; or (4) relationship or connection with a party or his attorney.

29. Frank, Disqualification of Judges, 56 Yale L.J. 605, 628.

30. 28 U.S.C. §.455 (a).

31. Ibid §.455 (b) (1).

the application of law to those facts. Also there is the possibility of danger that the judge will consider facts not as they are presented in a trial or appear in the record on appeal, but in accordance with his own recollections of them. In United States v. Parker,(32) decided a few years ago, a judge who had presided over a trial in which alleged perjury was committed also tried the perjury trial. The Defendant's motion to have the perjury case transferred to the Executive Committee for reassignment to a different judge was denied. The Court of Appeals held that such a denial was not an error but it would have been better practice to forestall the charge of bias, or appearance thereof, by sending the case back to the Executive Committee for reassignment and "failure to do so, although not error, increased the risk of prejudice to the accused".(32) Such a situation is now expressly covered by Section 455 (b) (1).

Besides, a fair trial in a fair tribunal is an essential requirement of due process of law. Where the judge or adjudicator has been the target of personal hostility, criticism or abuse from the party, then the probability of bias on the part of the judge or decision maker is too high to be constitutionally tolerable under due process of law.(33) In Mayberry v. Pennsylvania,(34) Mayberry

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32. U.S. v. Parker. 447 F.2d 826 (1971) 829.

33. Withrow v. Larkin 421 U.S.35, 43 L ed 2d 712, 723, (1975).

34. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

was charged with having participated in prison disorder and was convicted. Throughout the trial he had engaged in slandering the court and call the judge, amongst other things a "fool" and a "stumbling dog". When he was brought in for sentencing, the judge sentenced him for the crime of which he had been convicted but before doing so, found him guilty of one or more criminal contempts on eleven of the twenty one days of trial and sentenced him to not less then one year for each of the eleven. The court concluded that by reason of the due process clause of the Fourteenth Amendment, a defendant in criminal contempt proceedings should be afforded a public trial before a judge other than the one reviled by the contemnor.

In analogizing from the courts to administrative bodies, the tendency has been to apply the rules formulated for application to judges. "Cabinet officers charged by congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances".(35) The court apparently reaffirmed this position in the case of F.T.C. v. Cement Institute(36) and Hortonville District v. Hortonville Education Association.(37) In the latter

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35. United States v. Morgan, 313, U.S. 409, 421. (1941).

36. F.T.C. Cement Institute 333 U.S. 683, 702-3, (1948).

37. Hortonville District v. Hortonville Education Association 49 Led 2d I,9 (1976).

case, the respondents, Hortonville Education Association, (HEA) argued that the decision of the School Board to dismiss the teachers engaged in a strike was not an impartial decision and therefore was a denial of the due process clause of the Fourteenth Amendment because of the Board's previous participation in negotiations with the teacher. The Wisconsin Supreme Court held that this involvement, without more, disqualified the Board from deciding whether the teachers should be dismissed. This contention was rejected by the Supreme Court. Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decision maker.[37a] Neither is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute in the absence of showing that he is incapable of judging that particular controversy fairly on the basis of its own circumstances.[37a] Wisconsin statutes vested in the Board the power to discharge its employees. The Fourteenth Amendment permits a court to strip the Board of that power which the Wisconsin Legislature had given it only if the Board's prior involvement in negotiating with the teachers means that it cannot act with due process.[38] In Texaco Inc. v. F.T.C. the court held that a speech by the Chairman of the F.T.C. which showed that he prejudged the merits of the case disqualified him from participating in a proceeding against Texaco for unfair trade practices.

37a. Hortonville District v. Hortonville Education Association 49 Led 2d I,9 (U.S. Sup.Ct., 1976).

38. Ibid.

While proceedings against Texaco were still in progress, Chairman Dixon delivered a speech before the National Congress of Petroleum Retailers and commented in a way that showed the Texaco coerced its dealers into purchasing tyres, batteries and accessories exclusively from a particular supplier. In proceedings to review a final order directing Texaco to stop the promotion of Goodrich products, the court said that the speech of Chairman Dixon plainly revealed that he had already concluded that Texaco and Goodrich were violating the law and that he would protect the interest of the petroleum retailers. The court concluded that the Chairman's participation in the hearing of the case amounted to the denial of due process and invalidated the order.(39) In American Cynamid Company v. Federal Trade Commission when one of the decision makers had already formed an opinion regarding the matters under consideration (that prices on certain drug quoted by petitioners were artificially high and collusive) as a result of prior investigation and dealing with the matter as counsel for the Senate Judiciary Committee Sub-Committee then "any opening so formed were conclusions as to facts, and not merely an 'underlying philosophy' or 'crystalized point of view on questions of law or Policy'" and his participation vitiated the whole decision.(40) The Administrative

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39. Texaco, Inc., v. FTC. 336, F.2d. 754, 760. (D.C. cir. 1964) vacated and remanded on other grounds 381, U.S. 739 (1965).

40. American Cynamid Company v. Fed. Trade Commission (U.S. Ct. of Appeals, Sixth Circuit, 1966) 363 F.2d 757.

Procedure Act 5 U.S.C. §.554(d)[40] states that an "employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title", and "such an employee may not (1) consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency". The statute contemplates that the hearing officers (now called presiding employees) who are to preside over cases should be free from all possible influences. Again S.556(b)[41] provides for the disqualification of hearing officers for bias or other disqualification. Such an officer may at any time disqualify himself, "On the filing of a timely and sufficient affidavit the agency shall determine the matter as a part of the record and decision in the case".[41] The agency's final decision is subject to judicial review. There are a number of cases involving the National Labour Relations Board and its trial examiners which deal with personal hostility manifested during the trial. In Inland Steel Co. v. NLRB,[42] in a proceeding against an employer

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40. The parallel section of Administrative Procedure Act 1946 in Sec. 5(c).

41. The parallel section of 1946 Act (supra) is Sec. 7(a).

42. Inland Steel Co. v. N.L.R.B. 109 F.2d. 9, (9th cir., 1940).

for unfair labour practices the record disclosed that the trial examiner by hostile and co-ercive examination of witnesses demonstrated that he was acting as a partisan on the side of the National Labor Relations Board rather than in a judicial capacity. The court held that there must be "a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration. There is perhaps no more important right to which litigants are entitled than they be given such a trial".[42a] This is not possible when the trial examiner becomes hostile to one party or favourable to the other. The Fifth circuit court refused enforcement of orders issued after a hearing in which the examiner become incensed by the testimony of one of the employees (Jewell Sanders) of the Company. The court said:"A careful comparison of the report with the evidence leaves us in no doubt that the examiner, relying on her was carried away with his justified wrath toward Fier, which he mistook for righteous indignation toward all the respondents".[43] Usually contentions of partiality against administrators are rejected by the courts. For example, without setting aside an order, in one case a court criticised an examiner because he interrupted a witness sixty times to ask questions and displayed "an

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42a. Inland Steel Co. v. N.L.R.B. 109 F.2d, 9, 20 (9th cir. 1940).

43. N.L.R.B. National Paper Co., 216 F.2d. 859, 868 (5th cir 1954).

attitude closely bordering on partisanship or even hostility".[44]

Similarly in a recent case[45] the Supreme Court expressed the view that mere exposure to evidence presented in a non-adversary investigative procedure is insufficient in itself to impugn the impartiality and fairness of the state examining board members at a later adversary hearing. In the above case the Supreme Court held that the fact that the State Medical Examining Board, being prevented by temporary injunction from the District Court from going forward with the contested hearing regarding suspension of the appellee physician's licence proceeded to formal findings of fact and conclusions of law that there was probable cause to believe that the physician had engaged in various prohibited acts, did not show bias and prejudgment, and the board stayed within accepted bounds of due process by issuing such findings and conclusions after investigation. The initial charge or determination of probable cause and the ultimate

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44. Tele-trip Co. v. NLRB. 340 F.2d 575 at 581 (4th cir., 1965). A similar view was held by the 7th circuit court, where it was admitted that "trial examiner's hostility detracts from the weight to be accorded his findings" yet the hearing was not so unfair as to demand remand - A.O.Smith Corporation v. NLRB 343 F.2d 103, 110 (7th cir.,1965).

45. Withrow v. Larkin 43 Led 2d 712, 728 (1975).

adjudication have different bases and purposes and the fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. "The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position".(46)

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46. Ibid at 729.

(E) PROSECUTOR -JUDGE CASES: ENGLAND

Nobody is allowed to adjudicate when he himself is the prosecutor or one of the parties to instituting the proceeding in question. The principle has for long been recognised in English common law and is applicable to judges, magistrates and administrative adjudicators. In Dr. Bonham's case[1] Lord Coke struck at the power of the College of Physicians to summon, fine and imprison Dr. Bonham, a doctor of physics of Cambridge University for practising without the licence of the College. He then made the famous statement, quoted earlier, which has been referred to in many later cases.

The reason is plain enough. It is most natural that a person will favour his own cause and the possibility is most when the judge is the complainant or one of the parties in instituting the case. Holt C.J., in City of London v. Wood, said:

"It is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the judge and the judge is to hear the party; the party endeavours to have his will, the judge determines against the will of the party .... can any man act against his will or enforce himself to obey?"[2]

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1. Dr. Bonham's case (1610) 8 Co.Rep. 107 a. 118 a. (Discussed earlier). The censors of the Royal college of physicians had not only pecuniary interest in fining Dr. Bonham but in fact were prosecutors. This case is discussed earlier.

2. City of London v. Wood (1701) 12 Mod.669, 687.

The rule is that a person shall not act as a judge in a case in which he is in fact the accuser. Where a judge took an active part as a chairman of a local board in the institution of the proceedings against a party by the local board of health and then sat as one of the judges to decide in spite of the objection taken against him and convicted the person, there was certainly "substantial" or "a real bias" on his part. He ought not to have sat as a judge and it was immaterial what part he really took in the matter.(3) Blackburn J., in delivering judgment, said: "We cannot go into the question whether the interested justice took no part in the matter (i.e. in the discussion of the case). The question is, was he so interested in the matter as that he ought not to have sat?"(4) So in R.v. Gaisford, a justice of peace moved a resolution calling upon the defendant to remove the obstruction of a highway, which the defendant failed to do. A summons was brought against the defendant by the district surveyor on the same matter and the justice took part in the adjudication. It was held that the justice was disqualified from adjudication.(4a) The fact that he moved the resolution afforded ground for a reasonable suspicion of bias on his part. "It is well known that the same person shall not act both as accuser and judge".(4a)

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3. R.v. Meyer (1875) 1 Q.B.D. 173.

4. Ibid, p. 177.

4a. R.v. Gaisford [1892] 1 Q.B. 381, 384.

A statute may remove the disqualification of members of a local authority from sitting as judges in matters where the local authority is also a party but such a statute "has not the effect of enabling a person to act as prosecutor and judge in the same matter. It would require express terms in an Act of Parliament to produce that effect."(5) In R.v. Lee(5) where a member of the Sanitary Committee of a town council who had taken part in directing a prosecution sat and adjudicated upon the charge, the conviction was quashed. It was held, that Section 258(6) did not remove the disqualification which attached to the justice by reasons of his having acted as a member of the Sanitary Committee in directing the prosecution. However, by the provision of a statute a "justice is clearly entitled to sit unless he is a prosecutor in the sense of having taken an active part in directing the prosecution".(7) The mere fact that a judge was present at the premises when some of the members took the resolution to prosecute would not ipso facto disqualify him unless he "made himself an active prosecutor in the case".(8)

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5. R.v. Lee (1882) 9 Q.B.D. 394, 395 et seq, per Field, J.

6. Ibid, S. 258 of Public Health Act, 1875, "No Justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of a local authority".

7. R.v. Pwllheli Justices Ex parte Soane and others [1948] 2 All E.R. 815, 817.

8. Ibid.

No man can be a plaintiff or prosecutor in any action and at the same time adjudge that case. In R.v. London County Council,(9) the presence of the three Councillors, who instructed counsel to oppose application for music and dancing licences, at the hearing was held to have vitiated the proceedings. It was held to be no defence that they did not take part in the decision. The court will not see whether such interested parties took part in the deliberation.

The administrative process often involves the conbined functions of investigating, prosecuting and adjudicating. As a result, the adjudicatory body cannot pass an unbiased judgment because of its relation with the prosecution and its interest in the result of the dispute. This separation of power is fundamentally needed, in the Lord Chancellor's words "not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which in no sense to be called courts, have to act as judges of the rights of others".(10) In Frome United Breweries v. Bath JJ.,(10a) the licensing justices of Bath referred certain old licences for renewal to the Compensation Authority (the whole body of borough justices). Later they decided to oppose the renewal of the licences and instructed a solicitor to act for them.

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9. R.v. London County Council Ex parte Akkersdyk, Ex parte Fermenia [1892] 1 Q.B.D. 190.

10. Frome United Breweries Co. v. Bath JJ. [1926] A.C. 586, at p. 590 (viscount cave L.C.).

10a. Ibid.

At the meeting of the Compensation Authority, the solicitor appeared and opposed the renewal of one of the licences which was refused, but the Compensation Authority included three licensing justices who were present when the decision to oppose the licences was taken. The House of Lords held that the acts of the licensing justices invalidated the decision. In the absence of a statutory provision that the justices who took part to oppose the licences could also sit as judges, the general rule that no one can be both party and judge would apply and the justices would be subject to the principle laid down in R.v. Rand, i.e. whether or not there is a real likelihood of bias on their part. Lord Cave L.C. declared:(11)

"If there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial procedure must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal".

In Taylor v. National Union of Seamen,(11a) the Plaintiff was dismissed on the ground of insubordination by the general Secretary of the Union and on his appeal to the executive Council of the union, the general secretary acted as Chairman of the executive Council. It was held that in

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11. Ibid, p. 590.

11a. [1967] 1 All E.R. 767 (Ch.D).

such circumstances the executive council was under a duty to act judicially and that at the appeal meeting for that purpose the general Secretary, whilst in the chair, had presented the case against the plaintiff and such a doubling of the roles of prosecutor and judge was contrary to the requirements of natural justice. "In form and in fact his role included that of presenting the case against the plaintiff; and in fact his role was of pressing the case against the plaintiff at that meeting and, apparently, not considering the case in any judicial sense at all".(11b) In Law v. Chartered Institute of Patent Agents the Council of the defendant institute approached the Board of Trade to erase Law's name from the Register of Patent Agents on the ground of "disgraceful professional conduct" under rule 31 of their charter. Having failed in this, the council proceeded under another rule (i.e. rule 32) upon the same allegations and finding him guilty of such conduct, resolved to expel him from the membership of the Institute. It was held that their decision was viliated by the fact that the Council now acting as judge, had earlier been the accuser. Such conduct gave rise to a reasonable suspicion of bias on their part.(12)

Since Ridge v. Baldwin, the application of the rules of natural justice has been considerably extended. The rule

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11b. Taylor v. National Union of Seamen [1967] 1 All E.R. 767, 774 (Per Ungoed - Thomas, J.).

12. Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276.

of bias is applicable not only to authorities making judicial and quasi-judicial decisions but also to executive decisions. A justice acting under the procedure of Food and Drugs Act 1955, even though acting in an administrative or executive capacity, was obliged to act with "openness, fairness and impartiality.(13) In R.v. Birmingham Justices a local authority seized some sweet potatoes as unfit for human consumption. At the conclusion of the applicants' case the justice acting under the Food and Drugs Act, 1955, retired with the local authority officials (public analyst and chief veterinary officer) before the decision was given and then announced his decision without indicating what advice he had received from them. It was held that the decision could not stand. James J. observed:

"To leave the room with the protagonists of the applicants, the man who had brought in the justice to adjudicate, with the person who has provided the evidence, namely, the certificate of analysis and then to return and announce a decision without indicating to the applicants what if any, further evidence had been given by those persons, in my judgement was a breach of the requirements that the procedure should be carried out seemingly openly with fairness".(13)

The court has always regarded it as contrary to natural justice that a person "who is in the position of a

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13. R.v. Birmingham City Justices, Ex parte Foreign Foods (whole salers), Ltd. [1970] 3 All E.R. 945, 949.

prosecutor should be present at the (subsequent) deliberations of the adjudicating committee".[14] In Ward v. Bradford Corporation, several woman students in a teacher training college were found to have men in their rooms in breach of the articles of government. The Principal of the college was unwilling to refer the case to the disciplinary committee, and the governing body amended their rules so that they themselves should be entitled to refer cases to it. The discuplinary committee recommended that the plaintiff W. be expelled. In the committees' deliberation an officer of the local education authority took part and expressed strong views hostile to W. The governing body (members of the disciplinary committee not taking part) approved their recommendations. The governing body was the complainant as well as the judge but the Court of Appeal held that the governing body acted fairly. There should be "no reason why the governing body should not make a rule by which they themselves can refer cases to the disciplinary committee so long as they are careful themselves to see that justice is done ..... they may lay themselves open to the criticism that they are acting as prosecutor and judge - as prosecutor in referring a case to the disciplinary committee and as judge in deciding whether the recommendation of the disciplinary committee should be accepted or not ..... But we have seen the minutes. These show that the governing body, when they decided to

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14. R.v. Barnsley Metropolitan Borough Council, Ex parte Hook [1976] 1.W.L.R. 1052, 1057; Cooper v. Wilson [1937] 2 K.B. 309 (discussed in the section on "Participation in Appeal Against own Decision".

refer these cases, were careful not to discuss the merits of any individual case".(15) About the presence of the local education officer, the court held that the general rule that no person ought to participate in the deliberations of a judicial or quasi-judicial body unless he is a member of it, is subject to exceptions, and that in this case his participation did not invalidate the proceedings of the committee. These dicta suggest that the courts do not want educational institutions performing quasi-judicial functions in administering internal discipline to be fettered by the strict rules applicable to a court of law. It is enough that the body which tries the case is fair and unbiased.

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15. Per Lord Denning in Ward v. Bradford Corporation and others (1971) 70.L.G.R.27. 32, 33.

PROSECUTOR-JUDGE CASES : UNITED STATES

Due process is violated where a judge acts as a grand jury and then tries the very persons accused as a result of his investigations. In Re Murchison, Murchison and White were called as witnesses before a "one man judge - grand jury" and were interrogated at length about gambling and bribery in Detroit. The judge then charged both of them for criminal contempt, tried and sentenced them. The petitioners objected to being tried before the same judge, contending, inter alia, that trial before judge who was the complainant, indicter and prosecutor constituted a denial of due process of law. Their objection was rejected by the trial judge who held that due process did not forbid him to try contempt cases. The state's Supreme Court affirmed the trial judge's contention but was reversed by the United States Supreme Court, where Mr. Justice Black laid down the famous principle: "A fair trial in a fair tribunal is a basic requirement of due process ..... No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered".(16) Having been a part of the accusatory process a judge cannot be wholly disinterested in the acquittal or conviction of the accused.(17)

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16. In Re Murchison 349 U.S. 133, 136, (1955).

17. Similar view held in R.v. London County Council Ex parte Akkersdyk, [1892] 1 Q.B. 190 (supra).

In NLRB v. Phelbs,[18] where a charge was brought against Phelbs, Trustee of Atlas Pipeline Corporation, the examiner forsook his role as an impartial trier of facts and took the role of an investigating accuser and prosecutor and then caused the Chief trial examiner to order the hearing re-opened for the purpose of making Atlas Oil and Refining Corporation a respondent in the proceeding. Notwithstanding that no charges had been brought against Atlas, the examiner on his own motion entered a show cause order why the complaint against the trustee should not be amended as to make Atlas a Party. The proceedings went forward over the objections of the trustee and Atlas and their motions to disqualify him. The examiner showed resentment and spleen against them and expressed his predetermined will as to their guilt. But "Such an attitude, excusable if not commendable in a prosecutor, is a wholly improper one in a judge or an examiner who sits in judicial place to hear and determine facts, draw conclusions of law and make reports and recommendations based thereon".[19] The order of the Board was set aside and matter remanded to the Board for a fair and impartial trial. "When the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding".[20] Even if the record shows that there was evidence to support the judgment, that would not save a trial from the charge of partiality.

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18. U.S. Cir.Ct. of Appeals:136 F.2d 562 (5th cir. 1943).

19. Ibid, p. 567.

20. Ibid,pp. 563-564.

An administrative official may likewise be instrumental in bringing charges against the party whose interests are involved. In such cases it is generally held that the official is disqualified for bias unless he merely brought them formally in the name of the group simply as a matter of procedural form. In Brinkley v. Hassig,[21] Brinkley's licence to practise medicine had been revoked by the Kansas State Medical Board on the ground of violation of professional standards. Brinkley sought to set aside the revocation because the board members were prejudiced and had been active in instigating the proceedings. The court agreed that "doubtless all were in fact prejudiced". Still it refused to give Brinkley the relief he sought, partly on the ground of necessity as the statute provided "but one tribunal with power to revoke a doctor's license".

The combination of prosecuting and adjudicating functions in the same hand is repugnant to the spirit of just administration and as we have seen was vigorously criticised by the courts in England. On the other hand American courts are of the opinion that the combination of investigative and judicial function within an agency does not, of itself, violate due process.[22] The Administrative Procedure Act 554(d)[23] provides that no

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21. Brinkley v. Hassig, 83 F.2d. 351(10th cir. 1936).

22. U.S. v. Litton Industries, Inc. (U.S.Ct. of Appeals, Ninth Circuit, 1972) 462 F.2d.14.

23. Administrative Procedure Act 5 U.S.C. 554(d).

employee or agent engaged in investigating or prosecuting for an agency in a case may, in that case, participate or advise in the decision, recommended decision or agency review except as witness or counsel in public proceedings. But this section expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency".(23a) So it is not surprising to find that "[the] case law, both federal and State, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process ....."(24) The decision of a Court of Appeal touching upon this question of bias arising from a combination of functions may be noted. In Pangburn v. CAB,(25) the Board had the responsibility of making an accident report and also reviewing the decision of a trial examiner that the pilot involved in the accident should have his airline transport pilot rating suspended. The pilot claimed that his right to procedural due process had been violated by the fact that the Board was not an impartial tribunal in deciding his appeal from the trial examiners decision since it had previously issued its accident report finding pilot error to be the probable cause of the crash. The Court of Appeals found the Board's procedures to be constitutionally permissible:

"[We] cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing.

23a. See § 554 (d).

24. K.C. Davis, Administrative Law Treatise, vol 2, § 13.02.

25. 311 F.2d 349(CA1 1962).

We believe that more is required. Particularly is this so in the instant case where the Boards' prior contact with the case resulted from its following the congressional mandate to investigate and report the probable cause of all civil air accidents".(26) In a recent case the Supreme court of the United States has held that the processes utilised by a state medical examining board empowered to warn or reprimand physicians, to suspend their licences, and to institute criminal actions or revoke licences do not in themselves contain an unacceptable risk of bias violative of due process of law. The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in the administrative agency must overcome a presumption of honesty and integrity in those serving as adjudicators. "[It] must convince that under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented".(27)

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26. Ibid at P. 358.

27. Withrow v. Larkin 43 Led 2d 712, 723-4 (U.S. Sup.ct. 1975).

(F) PROFESSIONAL AND VOCATIONAL RELATIONSHIPS: ENGLAND

Bias may arise out of professional or vocational relationship with any party in a dispute. It is improper for the same person to act as an advocate and a judge. "One cannot be judge and attorney for any of the parties".(1) However, in Thelluson v. Rendlesham the House of Lords said that a counsel in a case, after being elevated to the Bench, is not prevented from taking part in the hearing and decision of the case. Otherwise "it might produce terrible delay and expense to the suitor" and sometimes "even an absolute denial of justice, especially if applied to a judge of the court of chancery".(2) The views of the House of Lords are echoed in the modern rule of necessity which requires judges to decide who might well have been disqualified for bias, if otherwise the case may remain altogether unheard, especially when a full court hearing is needed or where a specified number of justices are required for a quorum of the court.(3)

The Thelluson case cannot be said to lay down any principle generally applicable to every situation. In Ex parte Whelan, a justice of the peace was also an

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1. Dr. Bonham's case (1610) 8.Co.Rep.113 b. 118.
2. Thelluson v. Rendlesham (1859) 7.H.L.Cas. 429, 431.
3. The Rule of Necessity is discussed in a later chapter.

employee of a firm of solicitors who, acting on behalf of a local authority, made a complaint before the justice who issued a summons upon it. It was held that a reasonable suspicion of bias existed in that case. "[The] position of the employee may be "compared with that which would arise if a member of the firm of solicitors being himself a justice had issued his summons",(4) and the order for certiorari was made absolute.

Professional relationship of the Justices' clerk with one of the parties also invalidates the decision. Just as the justices may not have any professional relationship with any of the parties, similarly the justices' clarks also are precluded from any relationship with any party. In R.v. Sussex Justices, Ex parte McCarthy, a summons was taken out by the police against the applicant for dangerous driving. At the hearing of the summons the acting clerk to the justices was a member of the firm of solicitors which was acting for one W. in a claim for damages against the applicant for injuries received in the collision. At the end of the evidence, the justices retired to consider their decision, and the clerk also retired with them. The justices convicted the applicant. It was held that the conviction must be quashed, as it was improper for the acting clerk, though he in fact refrained from referring to the case in any way,

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4. Per Mathew J. in R.v.Peacock, Ex parte Whelan (1971) Qd.R. 471, at p. 479.

to be present with the justices when they were making their decision having regard to his firm's connection with the case. Because "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done",(5) one should not do anything "which creates even a suspicion"(5) that justice has been improperly interfered with. Therefore, when a firm of solicitors had acted for one of the parties and then later the solicitor, as clerk to the justices, sat with the justices on the hearing of the same matter and advised them, then "the necessary, or at least the reasonable impression on the mind of the applicant would be that justice was not being done" even though neither the justice nor the clerk was aware of the fact that his firm had previous dealings with the party.(6) On the other hand in R.v. Camborne JJ. the applicant was prosecuted by a county council under the Food and Drugs Act 1938. The clerk to the justices went to advise the justices on a point of law and having given his advice he returned to the court without discussing the case with them. The clerk was at that time a member of the council but not a member of the council's health committee before which the proceedings against the applicant had been discussed. An application to quash the conviction on the ground of bias failed as the facts did not disclose

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5. Lord Hewart C.J. in R.v. Sussex JJ. Ex parte McCarthy [1924] 1.K.B. 256 at p. 259.

6. R.v. Essex JJ. Ex parte Perkins [1927] 2 K.B. 475, per Avory,J. at p. 489.

any real likelihood of bias. Slade J. warned that the continued citation of Lord Hewart's dictum to cases on the "flimsiest" grounds of bias would certainly lead to error.(7) Clerks to licensing justices are now prohibited by statute from acting as solicitor for a party.(8)

When the facts give rise to a real likelihood of bias, then a judge is certainly disqualified. In a case where the clerk passed a police report about the previous conviction of the applicant to the recorder before he arrived at his decision, the recorder was disqualified from acting as judge in that case.(9) Again an adjudicator may be biased because of his personal advancement which might be frustrated if he makes an adverse decision against a party in dispute. In R.v. Barnsley Licensing Justices, the applicants, besides an allegation of pecuniary interest, also contended that the fact that the chairman of the bench of justices had stood for election as one of the directors of the society, raised a presumption of bias as distinct from pecuniary interest. Their contention was turned down by the court. Lord Devlin said, "we have to satisfy ourselves that there was a real likelihood of bias - not merely satisfy ourselves

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7. R.v. Camborne Justices and Another, Ex parte Pearce [1955] 1 Q.B. 41 (Per Slace J. at P. 51-52)
8. Licensing Act 1964,S.28(3)
9. R.v. Grimsby Borough Quarter Sessions [1956] 1 Q.B.36.

that was the sort of impression that might reasonably get abroad.....'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting".(10) The Court of Appeal came to the conclusion that there was no such bias in that case. In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon, the Chairman of the rent assessment committee determined the rent at substantially below the figure suggested by the expert called by even the tenants. The Chairman was a solicitor who resided with his parents in Regency Lodge and was advising the Regency Lodge tenants in dispute with their landlords who were a company in the same group as the appellant landlords. On appeal from dismissal from motion for certiorari, the Court of Appeal held that the court will not inquire whether a justice or a chairman of the tribunal in fact favoured one side unfairly,"suffice it that reasonable people might think he did".(11) The principle is that no man can be an advocate for or against a party in one proceeding: and at the same time act as a judge of the same party in another proceeding. A barrister or a solicitor should not sit as a judge in his client's case.(12)

A judge should always disqualify "where there is an association with the victim of such a character as may erode

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10. R.v. Barnsley Licensing Justices [1960] 2 Q.B. 167, 187.

11. Per Lord Denning in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (C.A.) [1969] 1 Q.B. 577, 599.

12. Ibid,at 600.

the judicial officer's impartiality and detachment".(13) Bridge J. said in R.v. Altrincham JJ. Ex parte Pennington that "if one visualises almost any sort of association between a justice and the private victim of an offence" such association must disqualify the justice.(14) In it the county council's education committee were the buyers under the contract with the applicant sellers who delivered a short weight of goods to two of the county council's schools. A weights and measures inspector of the council was the prosecutor, and the presiding judge was a co-opted member of the council's education committee. The applicants were convicted. It was held that although a formal connection between a justice and a prosecutor was not such as to disqualify a justice from hearing a case, justices should always disqualify themselves from hearing a case where they had an active interest in an organisation which was the victim of the alleged offence and accordingly since the presiding justice had an active interest in the education committee, the convictions would be quashed.

However, for adjudication in a case of arbitration, where the parties themselves choose their judge and contract to appoint the employee of the other side, then the opinion of the court is that in such "special cases, the scales of justice need not be held in a neutral or wholly indifferent hand".(15) In Jackson v. Barry Railway

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13. R.v. Altrincham JJ. Ex parte Pennington, [1975] 1 Q.B. 549, 553.

14. Ibid at p. 556.

15. Jackson v. Barry Railway [1893] 1 Ch. 238, at p.249 Per Bowen L.J.

Co. a contract was made between the contractor and the company and it was agreed that in case of dispute the matter would be referred to the Company's engineer for deliberation. A dispute arose and the arbitrator expressed his opinion in a letter, but the contractor brought an action alleging that the arbitrator (Mr. Barry) was biased. The Court of Appeal held that the fact that the arbitrator had already expressed an opinion on the point in dispute in an earlier letter after the commencement of the arbritration, would not disqualify him from adhering to that view unless on the fair construction of the letter it appeared that he had made up his mind so as not to be open to change it upon argument. However, undisclosed bias or the presence of any circumstances calculated to prejudice the mind of an arbitrator unknown to either of the parties is considered as a sufficient ground for the interference of the court.(16) It may be said that in ordinary cases, a judge ought not to have any professional or vocational relationship with any of the contesting parties and is expected to be indifferent between them. The question is whether the principle has application in such cases. In a case where one of the contracting parties agreed with the other that the surveyor of the other party should discharge the duties both of expert and of quasi-arbitrator, such a party could not claim that the surveyor must be in the position of an independent arbitrator who had no other duty which involved

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16. Kemp v. Rose (1858) 1 Giff. 258.

acting in the interests of one of the parties: and accordingly so acting he was not guilty of collusion or bad faith.(17)

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17. Panamena European Navigation (Compania Limitada) v. Frederick Leyland and Company Limited (J. Russel & Co.) [1947] A.C. 428 (H.L.).

(F) PROFESSIONAL AND VOCATIONAL RELATIONSHIP: UNITED STATES.

In the United States Supreme Court, no-one serving as a law clerk or as secretary to a justice of the Supreme Court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position.(18) Again ex-law clerks and secretaries are barred from appearing as an attorney or counsellor in that court until two years have elapsed after they leave the employ of the justices. Such persons shall not even participate by way of any form of professional consultation and assistance, in any case that was pending in the Supreme Court during the period in which they held such a position.(18) Professional relationship of the judge with both the client and the case has always been regarded as a universal ground for disqualification. Because in such cases the judge would seldom have an open mind and so it would be improper for him to try the case.(19) In California no justice or judge shall sit or act in any action or proceeding when, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the present action or proceeding. He

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18. 28. U.S.C. - Rules (Rules of the Supreme Court of the United States), R.7.

19. Frank :"Disqualification of Judges", 56 Yale Law Journal , 605, 621 etseq.

is also similarly disqualified from sitting and trying the case when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding.(20) A similar disqualification is also provided under the Utah Code which states that no justice, judge or justice of the peace shall sit in any proceeding when he has been attorney or counsel for either party in the action or proceeding.(21) The federal statute 28 U.S. C.§ 455 has significantly extended the grounds of disqualification. Section 455 (b) (2) disqualifies a justice, judge, magistrate or referee in bankruptcy when he has "served as lawyer in the matter in controversy or a lawyer with whom he previously practised law served during such association as a lawyer concerning the matter or the judge or such lawyer has been a material witness concerning it".(22)

It seems that the danger of bias or apparent bias towards a party or his attorney is the primary concern of the statute's requirement of a judge's disqualification where "a lawyer with whom he previously practised law served

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20. California Civil Procedure code § 170 (4) (West Supp. 1977).

21. Utah Code Annotated (1953)§78-7-1. (3) But the provisions of this section do not apply to the arrangement of the calendar, or the regulation of the order of business, or to the power of transferring the action to some other court.

22. 28 U.S.C.§ 455 (b) (2) as amended Dec. 5, 1974. Pub.L. 93-512, § I, 88 stat. 1609.

during such association as a lawyer concerning the matter", since in such an instance it is far from certain that the judge would have any familiarity with the facts of the case or any opinion on its merits. A party may be a client of the judge's law firm but may be exclusively dealt with by another lawyer of the firm. The judge might have no personal dealings with the party or his case at all while he was in the firm. If a former firm colleague represents before the judge a matter with which he (the colleague) dealt with while the judge was a member of the firm, under the present statute disqualification seems mandatory. The practice has grown up with judges of disqualifying in cases where they played only an advisory rule which terminated prior to the commencement of the litigation. For example, Justice Rehnquist disqualified himself in S & E Contractors, Inc., v. United States[24] though in the Justice Department he played only an advisory role which ended before the initiation of the litigation. Section 455 (as amended) disqualifies a judge where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed any opinion with regard to the merit of the case in controversy.[25] Earlier cases show that judges generally disqualified themselves in cases where they participated as government

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23. Ibid.

24. 406 U.S. 1 (1972)

25. 28 U.S.C. §.455 (b) (3)

lawyers in the cases under controversy when they felt that previous involvement with the cases was sufficient to render it improper to sit as judges. Chief Justice Taney disqualified himself in a case involving relations between the federal government and the Bank of the United States. As Attorney General, he had given the Secretary of the Treasury an opinion on the subject of the case.(26) On the other hand Justice Jackson sent on a case and voted with other Justices in reversing an opinion he had signed as Attorney General, though he hinted that he had been merely the "nominal author".(27)

Judges' membership of the bar does not disqualify them from being present in a trial to disbar a barrister. Quite commonly the legislature entrusts the regulation of a profession to its own members. "An examination of the statutes discloses many instances where business or professions have on examining boards members of the business or professions to be regulated".(28)

In Parish v. Board of Commissioners of Alabama State Bar,(29) it was held that a judge's impartiality could not be reasonably questioned under Section 455(a) in the trial of a suit brought by a black plaintiff claiming discrimination in the administration of an Alabama State bar examination on the basis of facts that the judge had been President of a local bar association in which black lawyers were denied membership.

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26. Bank of the United States v. United States 43 U.S. (2 How) 711, 745-46 (1844).
27. McGrath v. Kristensen, 340 U.S. 162, 177 (1950).
28. People v. Murphy (1961) 110 N.W.2d 805: 89 ALR 2d 1006.
29. 524 F.2d. 98 (1975).

If disqualification did lie in such a case then there would be "hardly any judge in this circuit who was not a member of a segregated bar association at one time, and many have held a high office in the bar associations. The way of life which included segregated bar associations has been eliminated but only a new generation of judges will be free from such a charge. In any event, this circumstance will not support a claim of lack of impartiality".(30) Allegations of lack of partiality must be supported by facts which would give rise to the reasonable inference of bias in relation to the issues presented in the particular case.(30)

Similarly administrative decision makers are disqualified from sitting as judges in cases where they had earlier come into contact with any of the parties or dealt with the particular case as a counsel or in another capacity. As was held in one case, the fundamental requirement of fairness in the performance of adjudicating a proceeding requires at least that one who participates in a case on behalf of any party whether actively or merely formally remaining on briefs should not take part in the decision of that case afterwards.(31)

In American Cynamid Company v. Federal Trade Commission,(32) the drug companies attacked the F.T.C. order contending that its order was void as Chairman Dixon participated in it.

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30. Ibid, pp. 103-104.

31. Transworld Airlines v. Civil Aeronautics Board 254 F.2d 90, 91.

32. 363 F. 2d 757 (6th cir. 1966) (U.S. Ct. of Appeals).

The Chairman, prior to his appointment as Chairman, had been counsel of a Senate Judiciary Sub-Committee which had investigated and commented on the very facts and issues concerning the same parties now before the agency. The Court of Appeals for the 6th circuit held that his participation vitiated the whole decision. It did not matter that his vote was not necessary for a majority. Parties are entitled to have an impartial tribunal whether it consists of one man or many since it is impossible to measure quantitatively the influence of one man on others. However, the court emphasised that the service of the chairman as counsel standing alone would not necessarily disqualify him. The court's decision was based on the depth of the investigation and comments as counsel which showed that he had already formed an opinion regarding the matters under consideration.(33)

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33. Ibid.

CHAPTER V : EXCLUSION OF THE RULE

The discussion in earlier chapters of the scope for application of the rule against interest and bias has inevitably involved a delineation of the limits of that application:: situations where by mention or by implication the rule is excluded.

A few situations involving the exclusion of the rule merit lengthier and separate treatment.

(A) BIAS BY ATTITUDES TOWARDS LAW OR POLICY.

Although, both under English and American Law, the fundamental principle is that judges and administrative authorities should not be biased, there are certain cases where the rule seems to have no application. It is accepted in both countries that preconceived opinion about issues of law or policy will not lead to disqualification.

ENGLAND.

In 1932, the Committee on Ministers' Powers, while examining in detail the subject of natural justice, considered this aspect in paragraph 3 of Section III of their report. The report said:-

"Bias from strong and sincere conviction as to the public policy may operate as a more serious disqualification than pecuniary interest. The mind of the judge ought to be free to decide on purely judicial grounds and should not directly or indirectly be influenced by, or exposed to the influences if, either motives of self-interest or opinion about policy or any other considerations not

relevant to the issue".[1]

The committee further suggested that "in any case in which the Minister's Department would naturally approach the issue to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause. In such a case Parliament ought to provide that the matter should be judged not by a Minister but by an independent tribunal".

However, the view that "opinions about policy" should not influence judges has since been criticised by many eminent judges and writers. It seems that the view of the committee that policy issues are never relevant to judicial determinations does not represent the law.[2] One famous American judge said:

"If however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one will ..... we are born with predispositions: and the process of education, formal and informal, create attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices".[3]

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1. Cmd. 4060 (1932) 78. The Committee is generally known as the Donoughmore Committee. The first sentence of this assertion was quoted with approval by the Administrative Law Committee of the American Bar Association 61 A.B.A. Rep.734 (1936).

2. Griffith and Street, Principles of Administrative Law, (5th ed.) 1973, p. 155.

3. In re Linahan (Frank J.)(1943) 138 F.2d 650 at 651.

A judge may have a sort of bias on a question of law insofar as it has been decided in a previous case, by virtue of the doctrine of precedent. It is accepted almost as a universal practice that a judge in giving judgment or a lawyer in arguing a case may well rely on previous decisions on that point of law. Such a practice is not only common in England and America but is doubtless found in all developed legal systems. Again bias springing from a judge's moral and ethical values is not only unavoidable but arguably desirable. Thus Professor Robson said:

"Society demands that its judges be biased in certain directions no less insistently than it demands that they shall be unbiased in others ..... a man who had not a standard of moral values ..... who had no beliefs as to what is harmful to society and what beneficial, who had no bias in favour of marriage as against promiscuous sexual relations, honesty as against deceit, truthfulness as against lying ..... constitutional government more desirable than anarchy, would not be tolerated as a judge on the bench of any Western country".(4)

In administrative law, a Minister who arrives at a decision after a hearing or enquiry is not necessarily expected to maintain the lofty detachment required of a judge in determining issues between parties. Naturally, Ministers and their departments are liable to be committed

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4. W.A. Robson, Justice and Administrative Law, (1951) p. 410, 413. "A judge who tries a theft charge may safely be assumed to be against theft": Gee v. Freeman (1959) 16 D.L.R. 65,74.

to their own policies, which they tend to favour.[4a] But a Minister is not disqualified for bias simply because he is predisposed in favour of a policy which he has adopted in the public interest. This is what is known as departmental bias. The fount of English authority on this point is the decision of the House of Lords in Franklin v. Minister of Town and Country Planning.[5] In this case the Minister had made a draft order under the New Towns Act 1946 designating Stevenage a "new town". Objections were lodged, and a public inquiry was held. The Minister later confirmed the order. But before this procedure was set in motion, the Minister visited Stevenage and made a speech at a public meeting. There was heckling and jeering. In reply to the heckling, the Minister said, "It is no good your jeering: it is going to be done". The legality of the Minister's order was challenged on the ground, inter alia, that this remark showed that he was biased and had made up his mind in advance. He had prejudiced the issue by publicly declaring the policy before considering the inspector's report and thereby precluded himself from giving unbiased consideration to the report. The question arose whether the law required the Minister to give impartial consideration to the matter.

The High Court quashed the order, holding that the law

4a. The Franks Committee by implication accepted this point - see Committee on Administrative Tribunals and Enquiries (Cmnd.218) (1957), 5, 59-61.

5. [1948] A.C. 87.

required impartial consideration and it had not been given, and that the respondent had not fulfilled his duty to act judicially. The decision was reversed by the Court of Appeal. The matter was then brought before the House of Lords to decide. On appeal,the House of Lords held that in considering the report of the Inspector who held a public local inquiry under Schedule I para. 3 of the New Towns Act 1946, after objection had been made to an order under Section 1(1) of the Act, no judicial or quasi-judicial duty was imposed on him, so that consideration of bias in the execution of such a duty was irrelevant, the sole question being whether or not he genuinely considered the report and the objections. It was also laid down that the public local inquiry under the first schedule to the Act is held with respect to objections only and it is not the duty of the Minister to call evidence in support of the order, since the object of the inquiry is to inform his mind and not to consider any issue between him and the objectors. Lord Thankerton said:(6)

"In my opinion no judicial or quasi-judicial duty was imposed on the respondent, and any reference to judicial duty or bias is irrelevant in the present case. The respondent's duties are in my opinion purely administrative but the Act prescribes certain methods of or steps in, discharge of that duty ..... I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties and that the only question is whether

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6. Supra at pp. 102, 103.

he has complied with the statutory directions to appoint a person to hold the public inquiry and to consider that person's report". Later His Lordship said:

"My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to devote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute".

His Lordship quoted from Ranger v. Great Western Railway,(7) R. v. Sussex JJ.(8) and R. v. Essex JJ.(9) and went on:

"But in the present case the respondent having no judicial duty the only question is what the respondent actually did, that is, whether in fact he did genuinely consider the report and the objections".(10)

The House of Lords held that it would be a ground for challenging a New Towns order that the Minister has not in fact considered the report and the objections, or where his

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7. 5 H.L.C. 72, 89.
8. [1924] 1 K.B.256, 258.
9. [1927] 2 K.B. 475.
10. [1948] A.C.87. 104.

mind was so foreclosed that he failed to give any genuine consideration to them.[11] However, such allegations, as the court observed are exceedingly difficult to substantiate. This case should be distinguished from other cases under the Housing Acts where it was held that the Minister's function in dealing with the inspector's report and in considering objections was quasi-judicial. For example, in Errington v. Minister of Health[12] it was held that in deciding whether or not he should confirm a clearance order made under the Housing Act 1930, the minister occupied a quasi-judicial function and must abide by the rules of natural justice. In 1935, the Court of Appeal quashed a minister's slum clearance order because the inspector had consulted one side (Jarrow Corporation) but not the other after the close of the inquiry and the Corporation submitted further evidence and argument to the Ministry. Where a decision maker, after holding a public inquiry consults one party in the absence of the other it may be alleged that there has been a suspicion of bias.[13] The view has been canvassed that the decision in Franklin overruled Errington and that neither the minister nor the inspector is required to observe the elementary rules

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11. An example of this, where the view expressed in Franklin was followed, is Lavender & Son v. Minister of Housing [1970] I W.L.R. 1231.

12. [1935] 1.K.B. 249.

13. Or alternatively, there has been a breach of the audi alteram partem rule - see J. Jaconelli and S.J. Sauvain "Natural Justice after the close of an Inquiry", 40 M.L.R. (1977) 87, 91. The authors rightly observe that in certain circumstances the line between the two rules is indistinct.

applicable to judicial functions - so long as statutory procedure is complied with.[14] Professor Griffith and Street however reject such a contention and claim that it is erroneous to assume that only the statutory requirements must be complied with. What is required, on their view, is, as Lord Thankerton in Franklin's case said, a "properly conducted" procedure, which implies that the inspector carrying on inquiries must not be biased and the audi alteram partem rule must be observed.[15] It is certainly arguable that there is a difference between the function of a Minister under the Housing Acts, and that of a Minister acting under the New Towns Act. In the former case his function is to hear an appeal from the decision of the local authority; in the second case the Minister is a party throughout. He is not statutorily required to consider objections. Under the Housing Acts, the Minister is required to consider objections, and he is deciding a matter in which the original parties are the local authority and the objectors. Here the issues are more local in scope and a lesser degree of policy is involved.

Again Planning Appeals belonging to a class and raising no large policy issue will be determinable by an inspector[16] instead of the Secretary of State and appeals

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14. Lord Denning, Freedom Under The Law, pp. 121-122.

15. Griffith and Street: Principles of Administrative Law, (5th ed. 1973), at 183.

16. Town & Country Planning Act 1971, Sched.9 (S.I.1972 No. 1652). But appeals against compulsory ourchase orders cannot be determined by inspectors.

relating to the design or appearance of buildings and similar matters may be committed to an independent tribunal.(17) In such cases the rule against bias and interest will apply.(18) The significance of Franklin's decision is that bias does not attach to persons having a policy and implementing it. Judges are not expected to be neutral towards the purposes of law. Similarly administrators are not expected to lack enthusiasm for the policies they believe to be embodied in the statutes they administer. In a subsequent decision, Darlassis v. Minister of Education,(19) Barry J. indicated that the presence of two factors removes the restraints of natural justice from the Minister: (i) if the post-inquiry consultation is on an issue of policy, not fact and (ii) if the consultation is with a person or department which is not a party to the lis inter partes. In a recent case, Lake District Special Planning Board v. Secretary of State for the Environment and another,(20) the applicants, in granting a company permission to station caravans on a camping site, imposed a time limitation. The Company appealed against this condition, and an inspector was

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17. Ibid S.50. (Town and Country Planning Act 1971).

18. See de Smith, Judicial Review of Administrative Action (3rd ed.) P. 223. See a recent case Ellinas v. Department of Environment and Another [1977] J.P.L. 249(Q.B.D).

19. (1954) 52 L.G.R. 304.

20. This case is not officially reported but see The Times, February 17, 1975 (Q.B.D.) and [1975] J.P.L. 220; and see Purdue: "Natural Justice and the Post-Inquiry Procedure", [1975] J.P.L. 445.

appointed to conduct a public inquiry. The Minister did not adopt the inspector's recommendation that the time limitation should stand. He waived the time limitation but imposed a tree-planting condition. The Board unsuccessfully tried to quash the order under Section 245(4)(b) of the Town and Country Planning Act 1971 and Rule 12(2)[21] of the Town and Country Planning (Inquiries procedure) Rules 1969 and 1974.[21a] The Board contended inter alia, that the Minister had differed from the inspector on a "finding of fact" within the meaning of rule 12(2) and that undisclosed communication constituted a breach of rule 12(2) in that it had not been raised in the inquiry, or alternatively that it constituted a breach of natural justice. The Board's arguments were rejected by Kerr, J. The Minister's decision to remove the time limit was based on the general policy of the Department that a series of temporary planning permission was an inappropriate method for controlling land use and that the decision was not related to the further representations made in the undisclosed letter.[22] Kerr, J. observed that the concept of natural justice is not concerned with the observance of

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21. Rule 12(2) provides that where the Minister differs from his inspector "on a finding of fact" or after the close of the inquiry "takes into consideration any new evidence ..... which was not raised at the inquiry" and "by reason thereof" disagrees with the recommendation of his inspector he shall give the parties the opportunity to make written representation or re-open the inquiry.

21a. S.I. 1969 No. 1092 and S.I.1974 No. 419.

22. This communication however did not fulfil the conditions for the removal of restraints of natural justice as enunciated in Darlassis v. Minister of Education, (supra).

technicalities but with matters of substance.[23] The test was whether a reasonable person, viewing the matter objectively and knowing all the facts would consider that there was a risk that the procedure adopted by the tribunal had resulted in injustice or unfairness. Applying that test, it was impossible to say that there was such a risk and the application was dismissed. The decision has given rise to controversy. It has been said[24] that "[the] test so formulated, and particularly, as applied to the facts of this case, runs against recent authority which suggests that once an official starts a hearing or consultative process, he may be placing himself under a stricter duty than would otherwise have been the case".[25] Perhaps the controversy may be resolved if it is accepted that above all, the Ministry had based his decision on the general policy of the Department rather than upon individual fact-findings.

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23. But see the comment, [1975] J.P.L. p. 221: "while agreeing that purely technical breaches ..... of natural justice should not invalidate administrative decisions, it is to be hoped that this decision does not mean that courts will be less strict as towards breaches of the rules which leave a suspicion that justice may not have done".

24. See J. Jaconelli and S.J. Sauvain, "Natural Justice after the close of an Inquiry", 40 M.L.R. [1977] 87, 88.

25. The authors of this article (supra) have referred to Re Liverpool Taxi Owners' Association [1972] 2 All E.R. 589.

UNITED STATES

Similarly in the United States "[bias] in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification".(26) The views on this of the Donoughmore Committee were quoted with approval by the Administrative Law Committee of the American Bar Association,(27) but no change in the law or in departmental practice resulted in America. On the other hand the notion that 'opinion about policy' should not influence judges was criticised as "an anachronism springing from a nineteenth century belief that law is found and not made" while it is known that "all common law is judge made law, resting ultimately upon judicial ideas of policy and that much law which purports to be statutory or constitutional interpretation is judge made law necessarily growing out of judicial development of ideas of policy".(28)

A clear cut rejection occurred in the fourth Morgan case.(29) The case involved the validity of a rate order promulgated by the Secretary of Agriculture fixing the maximum rate to be charged by the market agencies for buying and selling livestock at the Kansas city Stockyards. The

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26. K.C. Davis, Administrative Law Text (3rd ed. 1972), § 12.01.

27. 61 A.B.A. Rep. 734 (1936) supra.

28. K.C. Davis op.cit.

29. United States v. Morgan 313 U.S. 409 (1941).

market agencies alleged that the Secretary was disqualified for bias as he had strongly critised a previous court decision on the same matter in a letter to the New York Times. The Supreme Court upheld his refusal to disqualify himself because of the letter and held that the fact "that he not merely held, but expressed strong views on matters believed by him to have been in issue did not unfit him for exercising his duty in subsequent proceedings ordered by the court".(30) Both cabinet officers and judges "may have an underlying philosophy in approaching a specific case";(31) and the presence of such a view or the expression of it, does not act as a disqualification. They are, nonetheless, "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" and there was nothing in the record which disturbed such an assumption.(31)

Another leading case is Federal Trade Commission v. Cement Institute.(32) The Cement Institute (a trade association) and all of its members had been accused of restraining competition by agreeing to use a multiple basing point system of pricing. The commission before instituting the proceeding had made reports to the President expressing the opinion that the multiple basing point system was a violation of the Sherman Act. The companies alleged that the commission had prejudged the issue and so was "prejudiced and biased". The court assumed that the commission had in fact adopted this view as a result of its prior official

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30. Ibid, at 421.

31. Ibid.

32. F.T.C. v. Cement Institute 333 U.S. 638 (1948).

investigations, but held that the commission was not disqualified. A judge would not disregard the provisions of due process by sitting in a case "after he had expressed an opinion as to whether certain types of conduct were prohibited by law".(33) In this respect the position of the Federal Trade Commission could not be stricter then a court. Similarly in Skelly Oil Company v. Federal Power Commission, where two commissioners had expressed their views already in public addresses, parties sought to disqualify them alleging, inter alia, that they had prejudged an issue. The United States Court of Appeal held that question of disqualification for bias will not arise "from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue".(34)

In a recent case, Laird v. Tatum,(35) a motion to recuse was presented to Rehnquist, J., to disqualify himself from participating in the decision of a case on certiorari to the United States Court of Appeals for the District of Columbia circuit, which case raised a question as to the constitutionality of the Federal Government's surveillance of civilians. The Movants asserted that disqualification was proper because the justice, prior to

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33. F.T.C. v. Cement Institute op.cit., per Mr. Justice Black at 703. There was also apparent application of the doctrine of necessity - discussed later.

34. Skelly Oil Co. v. F.P.C. 375 F.2d. 6,18 (10th cir. 1967) modified on other grounds 390 U.S. 747 (1968).

35. Laird v. Tatum 34 L Ed 2d 50 (U.S.Su.Ct., 1972).

his appointment to the Supreme Court, had appeared as an expert witness for the Justice Department before Senate hearings on the subject matter of the case and had then, and on other occasions while serving as an Assistant Attorney General, expressed publicly an understanding of the law as to the constitutionality of governmental surveillance which was contrary to the movants' contentions. Rehnquist, J. denied the motion to recuse. His explanation is valuable. The main point was that "it is not a ground for disqualification that a judge prior to his nomination expressed his then understanding of the meaning of some particular provision of the constitution".(36)

It seems therefore that in Anglo-American law, the rule against bias is qualified to this extent, that prejudgment on issue of law and policy by both judges and administrative adjudicators is allowed.

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36. Ibid, at 61.

(B) THE RULE OF NECESSITY

In England as well as in America, the doctrine of necessity prevents disqualification unless someone else is legally able to act. The rule of necessity permits a tribunal or a court which would otherwise be disqualified to decide a metter when there is no provision for an alternative tribunal or court. In a case of necessity therefore the objection of interest cannot prevail. In Dimes v. Grand Junction Canal,[1] before a decree made by the Vice Chancellor could be appealed against it was required to be enrolled by the Lord Chancellor. It was held that though he was disqualified by reason of pecuniary interest from hearing the appeal, he was not thereby disqualified from ordering the enrolment, since he was the only person who was empowered to act.

ENGLAND

An earlier English case on the rule is the case of Parishes of Great Charte v. Parish of Kennington. In that case two justices of peace made an order for removal of a pauper which was quashed by the court because one of the justices was an inhabitant of the parish from whence the pauper was removed. The judge was disqualified for interest because the decision affected his taxes. It was held,

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1. Dimes v. Grand Junction Canal (1852) 3H.L.C.759.

2. Parishes of Great Charte v. Parish of Kennington, 2 Strange 1173 (K.B., 1742) Historically it is interesting to note that in one of the earliest cases of disqualification, the Mayor of Hereford was reversed for sitting in a case involving the rights of one of his own lessees, even though no other party was competent to sit: Anonymous 1 Salk 396 (discussed in Chapter I).

nevertheless, that although it was a good principle that a man should not be a judge and party, yet if a situation arose in which the only competent judge assigned by statute was interested in the dispute, he could and ought to proceed notwithstanding.[3] Disqualification of persons as ratepayers raised great difficulties. To remedy this situation, the Justices Jurisdiction Act 1742[4] was passed. Section I of the Act gave justices power to hear appeals notwithstanding any interest they might have as ratepayers, but Section 3 inserted a proviso that the Act should not authorise justices of peace for a county to determine an order relating to any parish or place where such justices were so charged. In R. v. Essex Justices[5] it was held that the Justices Jurisdiction Act 1742 enabled the borough sessions to hear an appeal against a poor rate notwithstanding that the justices were interested in the result. The rule of necessity was recognised and acted on. It was held that, where they consisted of more than four, an appeal lay to them at sessions against a poor rate, although there might be less than four who were devoid of interest in the question.[5a]

In Thelluson v. Rendlesham[6] Lord Brougham justified the hearing of a case by a judge (himself) who had previously been counsel in that case on the ground that not to do so

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3. Ibid.

4. Justices Jurisdiction Act 1742 (16 Geo.2.c.18).

5. (1816) 5 M. & S. 513.

5a. Ibid, at 517, 518.

6. (1859) 7 H.L.Cas.429. (discussed in chapter 4 "Professional & Vocational Relationship").

would have caused great expense and delay to the parties and "almost a denial of justice".

However, the doctrine is applied only to prevent a failure of justice. Lush J. said in Sergeant v. Dale[7] that under common law a judge who has an interest in the result of a suit is disqualified from acting except in cases of necessity, where no other judge has jurisdiction. Similarly the doctrine of necessity required the judges of Saskatchewan to pass upon the constitutionality of legislation rendering them liable to pay income tax on their salaries.[8] Again when it is not possible to constitute a different tribunal, necessity would enable the interested members to act.[9] But when it is possible to constitute an alternative court or tribunal, it is clear that the necessity rule may be avoided. In Earl of Derby's case[10] it was decided that the Chamberlain of Chester could not give a decision in a case in which he was involved but in such a case the suit should be heard in the Court of Chancery coram domino rege. The doctrine may occasionally be avoided by creating a special forum. An interesting American decision provides an example. In 1925, a case came before the Texas Supreme Court involving an organisation called the Woodmen of the World. All the judges of the Supreme Court were members

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7. (1877) 2.Q.B.D. 558,566,567.

8. The Judges v. Att. Gen. for Saskatchewan (1937) 53 T.L. R. 464.

9. R. v. Peterborough Commr's. Ex p. Lewis (1965) 2 O.R. 577.

10. Earl of Derby's case (1613) 12.Co.Rep. 114.

of that organisation and hence the entire court was disqualified in a case involving that group. The Governor resolved the problem by appointing a special court of three women to hear the case.(11)

However reliance on this doctrine may be rendered unnecessary by statutory provisions. In modern times the courts do not have to rely much on the doctrine, as in many cases statutory authorisation is given for interested parties to adjudicate. In Wilkinson v. Barking Corporation,(12) a local authority and the minister were given authority to decide the pension rights of employees. The Local Government Superannuation Act gave employees of the local authorities a statutory right to pensions under certain conditions. The local authority was in fact a judge in his own cause. The statute provided that in case of dispute the aggrieved party could appeal to the minister, whose decision on questions of fact was to be final, though he was also a part of the same administrative process. The Court of Appeal found that such a state of affairs was not consonant with the rule of law, but nevertheless held that there was no escape from the clear statutory provision.(12) When the legal duty to decide is cast upon a person and upon him alone, there is some authority to suggest that person should decide notwithstanding that he is interested in the issue. When a Minister hearing objections under the Housing Acts is biased or interested, the plea of necessity would prevent any complaint of pecuniary or personal bias on the part of the

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11. J.P. Frank, "Disqualification of Judges" 56 Yale L.J. (1947) 605,611 (n.11).

12. Wilkinson v. Barking Corporation [1948] 1 K.B. 721.

Minister.[13] Similarly, in Jeffs v. New Zealand Dairy Production and Marketing Board, the Privy Council held that the legislature had shown a clear intention to make an exception to the general rule that a person should not be a judge in his own cause and that the Board was required to determine zoning questions even though it might have a pecuniary interest. The statute did not provide for the determination of zoning questions by any body other than the Board.[14]

UNITED STATES

The doctrine of necessity thus recognised has long been applied to judicial as well as to administrative proceedings under American law as well as English. The doctrine of necessity applies equally to the "judges and to federal and state administrative officers".[15] When the impartiality of the Federal Trade Commission was challenged, the court declared "the Federal Trade Commission Act established the composition of the Commission and contains no provision for change of venue". The "stern rule of necessity" required the Commission to act.[16] In Evans v. Gore[17] judges were called upon to consider the validity of taxing the income of

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13. Griffith and Street, Principles of Administrative Law (5th ed.) 1973, p. 183.

14. Jeffs v. New Zealand Dairy Production and Marketing Board. [1967] A.C. 551, 565. (P.C.).

15. K.C. Davis, Administrative Law Treatise, Vol-2 p. 162 (1958).

16. Loughran v. F.T.C. 143 F.2d. 431, 433.(8th cir. 1944).

17. Evans v. Gore, 253 U.S. 245 (1920).

federal judges including justices of the Supreme Court which obviously directly affected them. Since no other tribunal existed to decide the question, the judges held that they were not disqualified, though interested in the result of the case.

However the doctrine is applied only to prevent a failure of justice. If it is not possible to constitute a different tribunal, the doctrine of necessity would be applied. Where all judges are disqualified by reason of being defendants in the action, none are disqualified and the court held that if a disqualification of judges operates so as to bar justice to the parties and no other tribunal is available, the disqualified judge or judges may by necessity proceed to judgment.(18) Nevertheless, the rule is held inapplicable where an alternative tribunal can be formed.(19) Sometimes the rule may be avoided by resorting to another impartial tribunal already available. In Tumey v. Ohio(20) the United States Supreme Court did not use the rule of necessity because "there were available in this case other judicial officers who had no disqualification ....." The doctrine of necessity is well illustrated by Brinkley v.

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18. Turner v. American Bar Ass'n, D.C. Tex. (1975) 407 F. Supp. 451, 483. "Although this maxim would allow the Supreme Court to proceed where all or a quorum of the justices have been sued, it would seemingly not allow a District Court Judge to proceed if other judges are available by substitution" - Ibid.

19. Pyatt v. Mayor & Council, 9 N.J. 548, 89 A.2d I (1952): alternative tribunal formed by excluding disqualified members.

20. Tumey v. Ohio 273 U.S. 510, 522-523 (1927) discussed earlier in Chap. 3.

Hassig.[21] In that case, Brinkley's licence to practice medicine had been revoked by the Kansas State Medical Board upon complaints that he had undertaken the diagnosis of disease over the radio, relying on the most meagre of systems reported by mail or telegram, and that he had in like manner prescribed certain prescriptions procurable only at named drug stores and on which he obtained commissions. Brinkley sought to set aside the revocation order on the ground that the board members were prejudiced against him and had been active in instigating the proceedings.

The court, though agreeing that the members were prejudiced, nevertheless refused to give him the relief sought. Judge McDermott said:"..... The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are prejudiced, then any lawyer or doctor who commits an offence so grave that it shocks every right thinking person, has an irrevocable license to practice his profession if he can get the news of his offense to the court or board before the trial begins. That will not do ..... From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if

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21. Brinkley v. Hassig, 83 F.2d 351 (10th cir. 1936), (Circuit Court of Appeals).

another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal".(22) Similarly in Federal Trade Commission v. Cement Institute,(23) where the Commission was charged with prejudice and bias, the Supreme Court of the United States observed (inter alia) that had the entire membership of the Commission been disqualified for bias in the proceedings against the respondents the complaint could not have been acted on either by the Commission or any other agency of the Government. "Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances ..... has not authorised any other Government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices".(24)

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22. Brinkley v. Hassig, op.cit., p. 357.

23. F.T.C. v. Cement Institute 333 U.S. 683 (1948).

24. Ibid, at 701.

(C) WAIVER : ENGLAND

The right to a decision by an impartial tribunal may sometimes be waived by laches or delay, knowledge or consent on the part of the litigant. "If a litigant has himself induced, acquiesced in or waived the [procedural] irregularity he cannot afterwards complain of it".(1) In Hannam v. Bradford Corporation, the Court of Appeal agreed that the decision of the staff sub-committee could have been successfully attacked for bias if the right procedure had been adopted by the plaintiff immediately after his dismissal. But as he refrained from doing so, he had lost the opportunity of getting the decision of a "properly constituted staff sub-committee".(2) In Tolputt & Co. Ltd v. Mole(3) the plaintiff sued a county court registrar in his own court and lost and the registrar taxed the costs which he had been awarded against the plaintiff. The plaintiff appealed against the taxation to the county court judge, then to the Divisional Court and finally to the Court of Appeal. The plaintiff did not invoke the principle nemo judex in re sua until the case reached the Court of Appeal, where it was held that it was too late for him to do so.

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1. Marsh v. Marsh [1945] A.C. 271, 285 (P.C.).

2. [1970] 1 W.L.R. 937, 944 (C.A.).

3. [1911] 1 K.B. 836, (C.A.). (The facts of the case are not entirely clear. See the exchange of the remarks between Buckley L.J. and Fletcher Moulton L.J. and the plaintiff's counsel at p. 838.

Delay therefore, may act as a bar to obtaining the benefits of the principles of natural justice.(4) A party cannot complain later that he has been deprived of natural justice unless he makes a timely objection.(5) There is some authority to suggest that when statute provides a limitation period for the challenge of a decision, and the party brings a delayed action, then even if the defects in natural justice have been fraudulently concealed, the party will lose the right yo challenge. In R. v. Secretary of State for the Environment Ex p. Ostler,(6) Ostler brought an action challenging compulsory purchase orders on the ground of breach of natural justice after the six week's limitation period. The Court of Appeal held, inter alia, that since nearly two years had passed, the orders were immune from any challenge to their validity. "Mr. Ostler is barred by statute from now questionning these orders. He ought to be stopped at this moment".(6) Lord Denning M.R. however made a distinction between an

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4. R. v. Aston University Senate Ex p. Roffey [1969] 2 All E.R. 964 (Q.B.D) delay in bringing proceedings, certiorari denied. But contrast Re McColl (1974) 4 2 D.L.R. (3d) 763 where the British Columbia Supreme Court quashed by certioraro an order made 23 years previously.

5. Ostreicher v. Secretary of State for the Environment and Another, The Times, 6 May, 1977, the party seeking an adjournment of a hearing on religious grounds failed to make timely request. No adjournment was given andthe party was not heard. Held, no breach of natural justice.

6. [1976] 3 W.L.R. 288, 297 (C.A.).

ouster clause which attempts to oust the jurisdiction of the courts altogether and a limitation clause which merely limits the time beyond which judicial review cannot be made. In Anismimic Ltd. v. Foreign Compensation Commission[7] there was a statutory "no certiorari" clause which completely ousted the jurisdiction of the courts. Nevertheless it was held that the decision could be challenged successfully on the ground of want of jurisdiction.[8] It is commonly said that a defect cannot be waived if it goes to jurisdiction, because jurisdiction cannot be conferred by a party's consent or acquiescence.[9] Sometimes waiver of the rules of natural justice was permitted on the ground that the breach of the rules did no go to jurisdiction. Thus in Wakefield Local Board of Health v. The West Riding and Grimsby Railway Company,[10] the Railway Clauses Consolidation Act (1845) S.3 stated that "Justice" shall mean "a justice acting for the county, & c., in which the matter requiring the cognizance of such justice shall arise, and who shall not be interested in the matter". It

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7. [1969] 2 A.C. 147.

8. For further discussion on these two cases see Chap. VI: Effects and Remedies.

9. See 31 M.L.R. (1968) 138, 147. But see Simpson v. Att.Gen. [1955] N.Z.L.R. 271 where the plaintiff brought a declaration challenging the validity of a general election. Validity of the appointment of a judge was also an issue in the action. The C.A. overcame the difficulty by obtaining the consent of the plaintiff - See the criticism by A.G. Davis, (1955) 18 M.L.R. p. 495.

10. (1865) L.R. 1 Q.B. 84.

was held that the latter part of the definition was merely declaratory of the common law principle nemo judex in re sua and could be waived by the parties, because the statute did not intend the disqualification to go to jurisdiction.[11] On the other hand the fact that the rule against interest or bias can be waived does not prove that the breach of the rule does not go to jurisdiction. As a matter of fact in many cases it was held that an applicant could not attack a decision for bias if he knew of it during the original proceedings and failed to object to it. In most of these cases nothing was said on the question whether the breach of the rule made the decision void or voidable.[12] The question of waiver and question of nullity seem to be mutually irrelevant. In R. v. Williams[13] one of the justices was disqualified under statute. Section 15 of the Bread Act 1836 provided that no person who should be concerned in the business of a baker should be capable of acting as a justice of peace under the Act, and if any baker should presume so to do he should for every offence forfeit a penalty. When baker was charged and convicted under the Act, one of the two justices who convicted was a person concerned

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11. E.g., Fry v. Moore (1889) 23 Q.B.D. 395 (C.A.): Substituted service was not a nullity but a mere irregularity which was waived by the defendant's later conduct.

12. E.g., R. v. Cumberland JJ. (1882) 52 J.P. 502, R. v. Essex JJ. Ex p. Perkins [1927] 2 K.B. 475.

13. R. v. Williams [1914] 1 K.B. 608.

in the business of a baker. On certiorari to quash the conviction, the court held that the affidavit of the applicant did not state that any objection was taken at the hearing before the justices, neither did it state that at the date of hearing the applicant was without knowledge of such disqualification. Channell J. said:[14]

"A party may by his conduct preclude himself from claiming the writ [certiorari] ex debito justitiae, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the court acts in granting or refusing the writ of certiorari. This special remedy will not be granted ex debito justitiae to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them".

It is difficult to state with confidence the principles underlying this area. The fact that a defect goes to jurisdiction does not seem necessarily to mean that it cannot be waived. Certiorari and prohibition are of course discretionary remedies[15] and in exercising their discretion

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14. Ibid, pp. 614, 615.

15. Prohibition is not discretionary if the want of jurisdiction is apparent on the face of the record, consequently no waiver is possible in such a situation: Farquharson v. Morgan [1894] 1 Q.B. 552 (C.A.); For discretionary nature of certiorari see R. v. Williams (Supra). For further discussion on discretionary nature of the prerogative orders, see in Chap. VI"Remedies."

the courts have withheld certiorari and prohibition when the applicants have waived defects including defects of a jurisdictional nature in the inferior tribunals. In Lucking v. Denning Lord Holt said that if a cause of action arose outside the area over which the inferior tribunal had jurisdiction and the defendant raised no objection during proceedings before the tribunal, then he would be estopped from alleging want of jurisdiction.(16) In R.v. Comptroller General of Patents and Designs, Ex p. Parke, Davis & Co. Ltd, it was observed that when "the defect of jurisdiction is apparent on the face of the proceedings, the order of prohibition must go as of right and is not a matter of discretion" but where "the defect is not apparent, but depends on some fact in the knowledge of the applicant, which he had the opportunity of bringing forward in the court below, and has allowed that court to proceed without setting up the object, ... the court has a discretion to refuse the writ ....."(17) Generally, the knowledge of, or consent of the parties to, the existence of any interest or probable bias of a judge or justice acts as a waiver of objection by the parties on such grounds. But if the party is not fully cognizant of the facts at the time when he submits to the decision of such a judge or justice, consent will not act as a waiver of disqualification. In R. v. Cumberland JJ.(18) an appeal to Quarter Sessions against a rate was made by a railway company. A Justice on the bench remarked that he was an

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16. (1705) 1 Salk 202.

17. [1953] 2 W.L.R.760, 764 (Q.B.D.); See also Cox v. St. Albans (1672) 1 Mod. 81.

18. [1882] 52 J.P. 502.

ex officio guardian whereupon the parties waived all objection to his sitting; but afterwards it was discovered that the justice had been actively engaged at various meetings in defending the rate, and voting that the costs of defending it should be paid by his board of guardians and the order of the Sessions was quashed. The principle of waiver has its particular application in arbitration cases as in such cases the parties themselves freely choose their own arbitrator with full knowledge of his possible bias or interest so that the courts are also unwilling to interfere with such decisions.(19) Nevertheless undisclosed bias or interest in the mind of an arbitrator unknown to either of the parties who have submitted to his decision is held to be a sufficient ground for interference by the court. In an earlier case a builder by his contract bound himself to abide by the decision of an architect as to the amount to be paid for the work. Without his knowledge, the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount and although he refused to guarantee that amount, the court did not consider the decision of the architect made under such a condition binding and gave directions to ascertain under authority of the court how much remained justly due to the plaintiff.(20)

Again if the facts are known to the party but the party

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19. For example Ranger v. Great Western Rly (1854) 5 H.L. Cas.72 (discussed in chapter III. Pecuniary interest - Bodies other than courts).

20. Kemp v. Rose (1858) 1 Giff. 258.

is not fully cognizant of his right to take objection, he cannot be said to have waived his right by failing to exercise it. Lord Romilly M.R. in Vyvyan v. Vyvyan said:[20a] "Waiver or acquiescence, like election, pre-supposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim".

Under English law, unlike American, there are very few instances of statutory disqualification for bias or interest. Again some statutory provisions have ousted the effect of prohibitions contained in other sections.[21]

20a. 30 Beav. 65, 74 = 54 E.R. 813.

21. E.g., consider the Licensing Act 1964 S. 193 (1),(2) (3) (4) etc., disqualifying justices on various grounds which may be waived by virtue of S. 193 (6) which states "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification .....".

WAIVER : UNITED STATES:

Similarly under American law failure to raise the issue of disqualification at the proper time may result in a judgment that the defect has been waived.(22) A party, in order to challenge successfully the qualification of a trial judge, should raise that issue in a timely fashion in the trial court. In Ramirez v. United States,(23) the defendant was convicted in the United States District court for the Southern District of California of violation of a narcotics statute. In the Court of Appeal, the defendant raised inter alia, the issue that the trial judge was disqualified. The court held that "[by] not having raised the issue in timely fashion below, the appellant has waived any objection".(24)

Bone, circuit judge observed in one case:(25)

"There is no merit in the contention that the sentencing judge should not have heard the motions. No objection was raised prior to or at the hearing of the motions. To disqualify the judge, timely objection should have been made; if not so made, it is waived". On the other hand there is some authority to suggest that an objection may not be always necessary when it is apparent that such objection

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22. Democrat Printing Co. v. F.C.C. 202 F.2d 298, 305 (D.C. Cir. 1952).

23. Ramirez v. U.S. (C.A.Cal.1961) 294 F.2d 277.

24. Ibid, p. 283.

25. Kramer v. United States 166 F.2d 515, 518 (Cir. Ct. of Appeals, nineth circuit.)

would be futile. In N.L.R.B. v. Washington Dehydrated Food Co.[26] in a proceeding against an employer for unfair labor practices, it appeared that the trial examiner played the role of a prosecutor. His conduct deprived the employee of a "fair hearing". In setting aside the order of the National Labor Relations Board, the court said: "It may truly be said that the respondent made no strenuous objection to such conduct of the Trial Examiner during the course of the hearing, but such objection may not always be necessary - especially where it would be of no avail. Furthermore, 'failure of counsel ..... to object may well have been due to their feeling that that course might antagonize the Examiner to the detriment of their clients'".[27] When the disqualification is provided under a statute, there is some authority to suggest that neither delay in making a request for disqualification nor the parties' consent to a judge's participation can effectively constitute a waiver of a statutory disqualification. Thus in William Cramp & Sons Ship and Engine Building Co. v. International Curtis Marine T. Co.[28] the United States Supreme Court reversed a Court of Appeals judgment because of the participation of a District judge in the Court of Appeals who had earlier participated in the same case in the District Court. The Supreme Court rejected the contention

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26. 118 F.2d 980 (U.S.Ct. of Appeals, Ninth Circuit, 1941).

27. Ibid, at 996.

28. (1913) 228 U.S. 645.

that as no objection had been made to the judge's participation in the Court of Appeals and that as consent had been given to his participation, therefore the objection was no longer open in the Supreme Court and that the statutory disqualification should not be applied. The court held that "the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the circuit court of appeals, when, without such consent, because of the prohibition of the statute, he would be disqualified from so doing".(29) However the contention that a statutory disqualification cannot be waived by delay or consent cannot be stated with certainty. There is some authority supporting the view that if a party, being well aware of his rights, fails to make timely objection seeking the judge's disqualification, his failure constitutes a waiver of any possible objection afterwards even if the judge is subject to a statutory disqualification. In Tinkoff v. United States,(30) the court denied a petition for rehearing following the affirmation of the defendant's conviction for attempts to defeat and evade income tax. He was a former revenue agent, a certified public accountant and a lawyer. The petitioner (defendant) alleged that one

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29. Ibid, at 650.

30. 86 F.2d 868 (1936, CA7 ILL) cert. denied 301 U.S. 689.

of the appellate judges was disqualified under statute[31] because he had in the district court heard the cause involved in the appeal. Alschuler (circuit Judge) said:

"If one of the appellate judges had in fact previously heard in the district court the "cause or question" involved on the appeal, this would not of itself have deprived the appellate court, of jurisdiction. An appellant well aware of his rights might waive the point ..... There is here no contention that the appellant, himself a lawyer of experience ..... was not fully cognizant of the situation. In such situations it would be quite intolerable to permit him to withhold presentation of the point until after the hearing of the appeal and its decision against him".[32]

Similarly in Chance v. United States[33] the court, besides holding that no grounds existed for disqualifying a judge under S.47,[34] observed that at no time until a petition for rehearing was filed was there any mention of the possibility that the judge might have been disqualified from participating in the decision of the case. Furthermore, the

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31. This statute, which underwent various re-enactments and redesignations, at present designated as 28 U.S.C. § 47 (see n.34. below).

32. 86 F.2d 868 at 884.

33. 331 F.2d 473 (1964, CA 5 Fla).

34. 28 U.S.C. §. 47 provides: "No Judge shall hear or determine an appeal from the decision of a case or issue tried by him".

court also referred to the governments' contention that the defendant's failure to make timely objection to the judge's qualification to sit on the Court of Appeals constituted a waiver of any possible objection to his acting on the panel.

The Administrative Procedure Act 5 U.S.C.§ 556(b) has used the word "timely" in connection with submission of affidavits of bias and other disqualification. A litigant cannot wait until an adverse decision has been made or until proceedings have long been in progress and then challenge on the ground that the administrator is biased (and so should withdraw) or that the decision demands reversal by the reviewing court. The right to raise the issue of bias or interest to a reviewing court is dependent on the timely raising of that issue. It seems likely that except in unusual cases as where the grounds for a charge of prejudice go justifiably undiscovered until subsequent to an agency decision — the word "timely" should require that the issue be raised to the agency and perhaps to the individual adjudicator before each's respective action.(35) "In short a party cannot play a game to its end in the hope that he will win, with the unvoiced expectation of challenging the umpire's qualifications if perchance he should lose".(36)

The recent amendment to 28 U.S.C. Section 455(37) has

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35. Bower v. Eastern Airlines 214 F.2d 623 (U.S. Ct. of Appeals, 3rd Circuit, 1954).

36. Gellhorn and Byse, Administrative Law; Cases and Comments, (6th ed., 1974) p. 965.

37. 28 U.S.C.§ 455 as amended Dec.5.1974. pub.L. 93-512, § 1, 88 stat. 1609.

brought changes and added further provisions relating to waiver of disqualification. Section 455 (e) states: "No Justice, Judge, magistrate, or referee in bankruptcy [of the United States] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)". Subsection (b) of S.455 states that such person shall disqualify himself:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affacted by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

"where the ground for disqualification arises only under Subsection (a) [i.e. he shall disqualify in any proceeding in which his impartiality might reasonably be questioned], waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification".(38)

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38. 28 U.S.C. § 455(e).

CHAPTER VI : EFFECTS AND REMEDIES

Since the main emphasis of my work concerns the scope and application of the rule against interest and bias, it would be inappropriate to attempt a full-scale examination of the remedies provided by English, or American, administrative law. But the question of the effects of a decision tainted by interest or bias will be considered, and then a general survey of remedies offered, with respect to both jurisdictions.

ENGLAND (A) EFFECTS[1] : VOID OR VOIDABLE.

Leaving aside a few exceptional cases, there is an abundance of high authority to justify the view that a breach of the rule against interest and bias makes a decision void and not voidable. Earlier cases such as Dimes v. Grand Junction Canal Co. raised the questions whether the defect of bias or interest is a jurisdictional defect and whether breach of the rule makes a decision void or voidable. According to Baron Parke (delivering the opinion of the judge to whom the House of Lords referred the case for opinion), the decision of the Lord Chancellor was not absolutely void, on account of his interest but

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1. Other effects such as whether pecuniary interest or bias of a single judge would invalidate the whole decision etc. have been discussed in earlier chapters where appropriate. These are not mentioned in this chapter to avoid repetition. Cases on waiver were discussed in the previous chapter.

voidable only. After discussing Brooks v. Earl of Rivers[2] and the Company of Mercers and Ironmongers of Chester v. Bowker[2] he said: "In none of these cases was the judgment held to be absolutely void. Till prohibition had been granted in one case or judgment reversed in the other we think that the proceedings were valid, and the persons acting under the authority of the Court would not be liable to be treated as trespassers[2a] ..... we think that the order of the Chancellor is not void, but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a judge; that it was a voidable order, and might be questioned and set aside by appeal..... "(3) According to Dr. Rubinstein, this decision has given a "final and conclusive answer" to the question of void or voidability of a decision tainted by interest or bias.[4]

On the other hand Professor H.W.R. Wade, commenting on the authorities cited by Parke B., showed that none of them

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2. Brooks v. Earl of Rivers (1668) Hardr. 503. In this case prohibition was refused as no interest was found: Company of Mercers and Ironmongers of Chester v. Bowker (1726) 1 stra. 639, proceedings in error as one of the company of Mercers became Mayor and for that reason judgment reversed. Both cases are discussed in chap.I.

2a. A voidable decision remains valid until set aside and therefore cannot be attacked in collateral proceedings : Wildes v. Russell (1866) L.R. 1 C.P. 722. These dicta were repeated almost word for word in Phillips v. Eyre (1870) L.R. 6 Q.B. 1,22. For detailed discussion, see M.B. Akehurst, 31 M.L.R.(1968)138 et seq.

3. Dimes v. Grand Junction Canal (Proprietors of) (1852) 3 H.L.C. 759, 785 - 786.

4. Amnon Rubinstein, Jurisdiction and Illegality, P. 203.

could support his (Parke B.'s) assertion. "Since one is a case of proceedings in error, analogous to a modern case where there is a right of appeal, and not material to the present argument. The other case ..... not only fails to support the proposition for which Parke B. cites it, but in fact falsifies it. For it was a case where the remedy sought was prohibition ..... a purely jurisdictional remedy which issues to prevent a tribunal dealing with a case on the ground that, regardless of the merits, its decision will be outside jurisdiction and a nullity".(5) It must be noted that the case of inferior tribunals is totally different from the situation that arose in the Dimes case. There the court whose order was in question was the Court of Chancery, and the Court of Chancery is a superior court. The procedure of review is not applicable to the decision of the superior courts and the only remedy was appeal to the higher court. A decision appealed against remains valid till set aside on appeal. But the act of an inferior tribunal over which the High Court has supervisory jurisdiction is liable to be set aside by the High Court because of the bias or interest of a judge. In the same case, Lord Campbell said:"Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took part in the decision".(6)

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5. H.W.R. Wade, 84 L.Q.R.95,108 (1968).

6. Dimes v. Grand Junction Canal, op.cit., 793.

The courts have uniformly held, whenever the question has arisen, that the decision of an administrative tribunal or authority which is vitiated by interest or bias is void. A clear modern example is Cooper v. Wilson.(7) In it, the Court of Appeal granted a declaration that the police sergeant's dismissal was invalid on the ground that the decision of the watch committee was vitiated by the presence of the Chief Constable in the Committee who was in effect the respondent. Greer L.J. said that "a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void".(7a) Further, in the important decision of Ridge v. Baldwin(8) - which is an important case on natural justice generally, though concerning the audi alteram branch of the rules - Lord Reid pointed out that violation of natural justice had "time and again" been held to render a decision void and not voidable. The appellant's claim for a declaration that his dismissal was void was awarded by the House of Lords. The principle enunciated in Ridge v. Baldwin is similarly applicable to the rule against interest and bias. According to Professor de Smith, "it would be incongruous to adopt a different analysis for the rule against interest and likelihood of bias".(9)

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7. [1937] 2 K.B. 309, (C.A.).

7a. Ibid, p. 324.

8. [1964] A.C. 40, at 80.

9. de Smith, Judicial Review of Administrative Action, (3rd ed) p. 242.

One need not, however, look for authority to the cases decided on the audi alteram partem principle. There are many decisions concerned with the effect of the breach of the rule against interest and bias and which clearly show that a biased tribunal lacks jurisdiction and the decision is absolutely void and not voidable. A typical example is R.v. London County Council Ex parte Akkersdyk Ex parte Fermenia(10) where mandamus was granted without certiorari to compel a county council to rehear and determine an application according to law as the previous determination was vitiated by the presence of some councillors who were accusers. The grant of a bare mandamus of this type necessarily implies a finding that the previous determination of the authority was void and not voidable, so that it may be disregarded altogether. Otherwise there could not be a valid re-hearing until the previous decision was quashed. The question whether defect of bias or interest is a jurisdictional defect is particularly important because a biased tribunal's decision can be challenged even in the face of statutory "no certiorari" or ouster clauses . An earlier decision is R.v. Cheltenham Commissioners, where the court granted certiorari even in the face of a "no certiorari" clause to quash the decision of the licensing justices on the ground of interest. It held that the lower court was improperly constituted on account of the interest of some of the magistrates, and the clause prohibiting certiorari did not operate. It is clear that the court treated the

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10. [1892] 1 Q.B. 190. It seems that the court did not construe the proceedings before the council as 'judicial' for the purposes of certiorari. Though rule nisi for certiorari was obtained, it was abandoned later on, and mandamus was thought to be the proper remedy.

decision of the justices as one outside their jurisdiction, and so void.(11)

A modern case is R.v. Mullins, Ex parte Stenhouse.(12) A full court held that a biased tribunal was improperly constituted and so the statutory clause prohibiting writ of certiorari, mandamus or prohibition against an Appeal Board in relation to any appeal would not apply.

It has been said that the theory that lies behind granting certiorari "is that if a justice is biased, he is in effect a judge in his own cause, certiorari will be granted because the justice had no jurisdiction as he was sitting in a matter in which he was interested".(13)

A leading case which suggests that defect of bias goes to jurisdiction and renders the decision void is Anisminic v. Foreign Compensation Commission.(13a) Section 4(4) of the Foreign Compensation Act 1950 prevented the determination of the Commission from being challenged in any court of law. The House of Lords held that the clause only applied to a real determination but not to a purported determination. Therefore, when the Commission based its decision on a matter which it had no right to take into account, its decision could be brought into question and declared a nullity in spite of the "ouster clause". In this case Lord Reid said (obiter) that there are many cases where a tribunal's decision may be declared a nullity: "It

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11. R.v. Cheltenham Commissioners (1841) 1 Q.B. 467.

12. [1971] Qd.R. 66.

13. R.v. Paddington, etc. Rent Tribunal, Ex p. Perry [1956] 1 Q.B. 229 (Per Lord Goddard C.J. at 237) (obiter).

13a. See n.14 below.

may have given its decision in bad faith ... It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act[14] ....." In the same way Lord Pearce equated want of natural justice with lack of jurisdiction. In the Court of Appeal, Diplock L.J. in his analysis of jurisdictional defects had specifically classified bias as a defect which goes to jurisdiction so that it could be called into question despite any "no certiorari" clause.[15]

The question whether, following the Anisminic doctrine, a compulsory purchase order could be challenged outside the statutory limitation period arose squarely before the court in 1976 in R.v. Secretary of State for Environment Ex parte Ostler[16] In that case one Ostler challenged a compulsory purchase order claiming that he had been prejudiced by a secret agreement made between the authorities of the Department of Environment and an objector, which he had no means of discovering within the six weeks statutory limitation period. Schedule 2 of the Highways Act 1959 provided that the scheme or order, unless challenged within six weeks, should not be questioned in any legal proceeding whatever. Ostler sought an order of certiorari to quash the compulsory purchase order on the ground of breach of natural justice and bad faith verging on fraud, nearly 2 years after they had been confirmed. The

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14. [1969] 1 ALL E.R. 208, at p. 213 (Lord Reid), Lord Pearce) at p. 233.

15. [1967] 3 W.L.R. 231, 395 (C.A.) Diplock L.J.

16. [1976] 3 W.L.R. 288.

Divisional Court ruled that he could challenge the order under the Anisminic doctrine, despite the limitation clause. However, on appeal by the Secretary of State, the Court of Appeal unanimously held that the orders were unchallengeable after the prescribed period.

There is no doubt that with administrative decisions such as compulsory purchase orders the public interest has to play an important role, and where, say, 90 per cent of the demolition work has been carried out, it is extremely convenient that a limit should be put upon the time within which a challenge to the validity of the order is possible! But the terms in which the Anisminic case was distinguished by the Court of Appeal deserve some consideration. It was said that in Anisminic the House of Lords was considering a judicial decision by the foreign compensation commission tribunal, whereas the present case involved an administrative decision. Again in Anisminic there was a purported decision, one which involved a misconstruction of the scope of the statute giving jurisdiction, whereas in Ostler's case there was a decision made within jurisdiction and the vitiating element was simply one involving the way the decision was reached; and, that in the Anisminic case the Act ousted the jurisdiction of the court, whereas in the present case the clause was more like a statute of limitation than a complete ouster on the court. Therefore it was held that as Ostler did not act

within six weeks, the court was bound by Smith v. East Elloe[17] to hold that he was barred by statute from questioning those orders. What is more important is that Lord Denning expressed his view that an order vitiated by lack of natural justice, "would not to my mind be a nullity or void from the beginning. It would only be voidable".[18] Goff L.J. observed that a decision made in violation of natural justice is "an actual decision made within jurisdiction".[18] Administrative decisions made within jurisdiction were voidable only if questioned within the prescribed time. Thereafter they were immune from any challenge to their validity, and accordingly the application for certiorari could not succeed.

The statement of Lord Denning M.R. that breach of natural justice makes a decision voidable and not void is hard to reconcile with earlier authorities (some of which have been discussed) and particularly with the dicta of Lord Reid in Ridge v. Baldwin. Similarly there is an

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17. Smith v. East Elloe Rural District Council [1956] A.C. 736, (H.L.) where a similar limitation clause prevented a compulsory purchase order being challenged after the specified time even on the ground of fraud.

18. R.v. Environment Secretary, Ex p. Ostler (C.A. Op.cit., at p. 296, and Goff L.J. at p. 300.
This decision has been vigorously attacked by lawyers and critics. Again the distinction which Lord Denning M.R. made between an administrative and judicial decision which suggests that "ouster clauses" would apply to them differently has not found favour with commentators. See H.W.R. Wade 93 L.Q.R. [1977] p.8 et seq; C.A. Whomersley, C.L.J. [1977] p. 4 et seq: and Carol Harlow, Pub.L. [1976] pp. 304-7.

abundance of high authorities (again, previously discussed) which held defect of natural justice to be defect which goes to jurisdiction. Even Lord Denning himself, in a recent case while analysing jurisdictional defects, quoted and approved the view expressed by Lord Pearce in the Anisminic case, that lack of jurisdiction may arise if a tribunal departs from the rule of natural justice.(19) To hold that breach of natural justice will make a decision voidable and not void would lead to one serious consequence in that the declaratory judgment, a very useful remedy, would, as the law now stands, lose much of its efficacy, since it is of use only against an action which is ultravires (i.e. outside jurisdiction and void). When the action is intra vires, (i.e. if the error perpetrates within jurisdiction it is usually regarded as voidable. A voidable action remains lawful until set aside and declaration would not lie.(20)

In conclusion, perhaps the real reason behind the use of the word void or voidable is as atated by Lord Wilberforce in Hoffmann - La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry:

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19. R.v. Southampton Justices Ex p. Green [1976] 1 Q.B. 11, at 21 (justices failed to consider matters which they ought to have done and took into consideration matters which they ought not to have done. Held, they exceeded their jurisdiction and accordingly certiorari was granted to quash the proceedings.

20. Punton v. Ministry of Pensions and National Insurance (No.2) [1964] I W.L.R. 226 (C.A.). The applicants had been refused unemployment benefit and asked for a declaration that the commissioner had come to an incorrect determination in law, and that they were entitled to the benefit claimed. Declaration was refused as the decision was intra vires and it was impossible to declare that there was no decision. Certiorari might have been a remedy, but the six months' time limit for certiorari had already expired. See also de Smith, Judicial Review of Administrative Action (3rd ed) p. 130 et seq.

"In truth when the court says that an act of administration is voidable or void but not ab initio this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the court is not willing in casu to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase ..... is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action".(21)

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21 [1975] A.C. 295, 358, 359 (dissenting). Appeal concerned a motion by the Secretary of State for Trade and Industry ("the D.T.I.") for an interim injunction without an undertaking in damages restraining the appellants from selling certain drugs in excess of the prices fixed by the Monopolies Commission.

ENGLAND : (B) REMEDIES: PREROGATIVE REMEDIES:

A wide variety of remedies is available against decisions reached in breach of the rule against interest and bias. The prerogative order of certiorari is the most common and widely used remedy and unlike the position under American law, it is available against judicial as well as administrative bodies performing judicial or quasi-judicial functions. One advantage of certiorari is that it quashes a decision not only when the decision is made outside its jurisdiction (treated as void or a nullity)[22] but also when it is made within its jurisdiction and treated as voidable.[23] The prerogative order of prohibition lies to prevent inferior courts, administrative tribunals or other public authorities from acting or continuing to act contrary to the rule against interest and bias. The prerogative order of mandamus lies to compel a person or a body to perform a public duty imposed on it by law. Order 53 of the Rules of the Supreme Court provides that the applicant must first apply ex parte for leave to apply for the prerogative orders. The party must make the application before the Divisional Bench of the Queens Bench Division. Applicantion for certiorari must be made within six months of the decision impugned unless the delay is satisfactorily explained to the court.[24] The court is unlikely to consider an application

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22. E.g., R. v. Cheltenham Commissioners (1841) 1 Q.B. 467 (discussed in the earlier section of this chapter).

23. See R. v. Secretary of State for Environment Ex p. Ostler, [1976] 3 W.L.R. 288 (C.A.) (discussed in the earlier section).

24. R.S.C.O.53,r.2(2). But the time fixed by the Rules is, presumably, subject to the general power of extension given by O.3,r.5.

if there is delay on the part of the applicant,[25] even though there is a breach of natural justice. Prerogative orders are discretionary. The court may in its discretion refuse to grant a prerogative order, even though it has been applied for within time.[26] It has been said in a recent case: "the court may in its discretion refuse to allow an order of certiorari to go even though the time lapse has been less than six months".[27]

The English courts have supervisory authority over the proceedings of inferior tribunals. If such proceedings are not conducted in an impartial manner either for bias or interest, the court may set aside the proceedings by certiorari.[28] Certiorari is also available against the decisions of administrative tribunals or other public authorities.[29] A local authority cannot take away a common law right without acting in an impartial manner, and that even if the decision is administrative;

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25. E.g., R.v. Aston University Senate Ex p. Roffey [1969] 2 All.E.R. 964; see discussion in Chap.V: "Waiver".

26. E.g., R.v. Stafford JJ., Ex p. Stafford Corporation [1940] 2 K.B. 33; R.v. Williams, Ex p. Phillips [1914] 1 K.B. 608.

27. R.v. Inner London Crown Court, Ex p. Greenwich London Borough Council [1975] 2 W.L.R. 310 (D.C.) at p. 314; see also chap. V "Waiver".

28. E.g., R.v. Essex JJ, Ex p. Perkins [1927] 2 K.B. 475 (bias); R.v. Hertfordshire JJ. (1845) 6 Q.B. 753 (pecuniary interest)

29. Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577 (C.A.).

the court has jurisdiction to quash it by certiorari.(30) Mandamus is issued both against judicial and non-judicial bodies. In R.v. Halifax Justices where the circumstances were such as to make bias on the part of one W. so probable that he ought not to have taken part in the case and a writ of mandamus was granted commanding the justices to hear and determine an application for renewal of the licence according to law.(31) Prohibition lies to prevent inferior courts, administrative tribunals or other public authorities from acting or continuing to act contrary to the rule against interest and bias. For example, in R.v. Kent Police Authority Ex p. Godden(32) the Court of Appeal issued prohibition to prohibit Dr. Brown from determining whether the Chief Inspector was permanently disabled and mandamus to the Police Authority to supply all materials to the applicant's own doctor so that the matter could be decided impartially. About prohibition and certiorari, Atkin, L.J. said in 1924:(33) "Both write are of great antiquity, forming part of the process by which the Kings' Courts restrained courts of inferior jurisdiction from exceeding their powers ..... The operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as,

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30. R.v. Barnsley Metropolitan Borough Council, Ex p. Hook [1976] 1 W.L.R 1052, 1058 (C.A.).

31. 76 J.P. 233 (1912) C.A.

32. [1971] 3 All E.R. 20 (C.A.); [1971] 2 Q.B. 662.

33. R.v. Electricity Commissioners, Ex p. London Electricity Joint Committee Co [1924] 1 K.B. 171 at p. 204; In Ridge v. Baldwin [1964] A.C. 40, Lord Reid showed that the latter requirement "the duty to act judicially" is not additional to the former, but is to be inferred from the nature of the power. (Discussed in chap II: "Modern Application of the Rule").

courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs". The question who has the locus standi to make an application for a prerogative order has given rise to a large number of decisions. For example, there is some authority supporting the view that even a stranger may be awarded certiorari.(34) On the other hand it has been said that the court "would not listen, of course, to a mere busybody who was interfering in things which did not concern him".(35) With respect to prohibition it has been held that when a defect of jurisdiction is apparent on the face of the proceedings, the application for prohibition may be brought not only by a party aggrieved but also by a stranger to the proceedings,(36) and the court is not entitled to have regard to the conduct of the applicant.(37) If the defect of jurisdiction is not patent(38) the court has a discretion to refuse to award prohibition to the applicant.

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34. Buxton v. Minister of Housing and Local Government [1961] 1 Q.B. 278, 286.

35. R.v. Paddington Valuation Officer, Ex p. Peachey Property Corpn. Ltd. [1966] 1 Q.B. 380, 401.

36. E.g., Worthington v. Jeffries (1875) L.R. 10 C.P. 379 But this notion that even a stranger has locus standi has been criticised: see de Smith, Judicial Review of Administrative Action, 3rd ed. p. 368.

37. Eg., Farquharson v. Morgan [1894] 1 Q.B. 552.

38. R.v. Comptroller General of Patents and Designs [1953] 2 W.L.R. 760, 764.

The trend of recent decisions is towards the development of a simple concept of locus standi applicable to certiorari and prohibition. In R.v. Liverpool Corporation, Ex p. Liverpool Taxi Fleet Operator's Association, Lord Denning M.R. said:(39) "The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved' and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him". Similarly in view of the existing state of authorities, locus standi with regard to mandamus cannot be defined with certainty. There is some authority to support the view that the applicant must have a specific legal right to enforce. A person "must show that he has sufficient interest to be protected and that there is no other equally convenient remedy".(40) But the courts do in practice exercise a wide discretion in deciding the degree of interest required for the purpose of an application for

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39. [1972] 2 All E.R. 589 (C.A.); [1972] 2 Q.B. 299, 308-9 (C.A.).

40. R.v. Metropolitan Police Commissioner, Ex p. Blackburn [1968] 1 All E.R. 763, 770, in which the applicant sought an order of mandamus in respect of the prosecution policy of the police regarding gaming clubs. See also Kariapper v. Wijesinha [1968] A.C.714.

mandamus.[41] Prerogative remedies may accompany each other. For example,certiorari and prohibition or prohibition and mandamus or all three orders can be applied for in the same proceedings.[42] In R.v. Kent Police Authority Ex p. Godden[42] prohibition and mandamus were granted by the court.

THE OTHER REMEDIES:

Private law remedies such as injunction and declaration have separate proceedings, which may be begun by either by a writ or by an originating summons. The proceeding for declaration may be emitiated without leave and with no fixed time limit. Declaration is available to nullify an administrative decision made in violation of the rule against interest or bias.[43] Order 15, rule 16 of the Rules of the Supreme Court provides generally that, "no action or other proceedings shall be open to objection on the ground that a merely decratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or

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41. E.g., R.v. Metropolitan Police Commissioner Ex p. Blackburn and Another (No 3) [1973] 1 All E.R. 324 (C.A.), here the question of locus standi was not raised though mandamus was refused on the merits. See D.C.M. Yardley: "Prohibition and Mandamus and the Problem of Locus Standi", (1957) 73 L.Q.R. 534.

42. (Supra). See also Re Liverpool Taxi Fleet Operators' Association, op.cit. Certiorari was thought unsuitable but prohibition was granted. Mandamus did not issue as there was no failure of statutory duty.

43. Eg., Cooper v. Wilson [1937] 2 All E.R.726 (C.A.). Declaration is a wide ranging remedy. But the extent of application of it (as with other remedies) so far as relevant with this thesis will be discussed here.

could be claimed".(44) The criteria to be applied by the court in deciding whether a party has a sufficient interest to entitle him to ask for a declaration sometimes appear to be strict . In Gregory v. Camden L.B.C.(45) the borough council, as local planning authority, had given planning permission for a school to be built at the rear of the plaintiff's property. In fact the correct procedure had not been followed and the grant of permission to build was therefore undoubtedly illegal . But Paull, J. held that the plaintiff, although he would be inconvenienced by the proximity of the intended school, had no locus standi to ask the court to declare the planning permission void.(46) Declaration only states the legal position and it cannot prohibit or quash a decision made within jurisdiction. In such a case , the decision impeached must first be quashed by certiorari.(47) Again declaration is not obtainable as a method of judicial review under section I4(1) of the Tribunals and Inquiries Act I971. Nevertheless it has certain advantages to the litigant in the public law field over other remedies available to him . For example a declaration may be

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44. The action for a declaration like injunction had its origin in a remedy given by the Court of Chancery; see cases referred to by I. Zamir in, The Declaratory Judgement, p.7; de Smith, Judicial Review of Administrative Action , 3rd ed.,p. 425 et seq.

45. [I966] I W.L.R. 899 (Q.B.D.).

46. (Supra) . But see Prescott v. Birmingham Corporation [I955] Ch. 210, C.A., where a ratepayer obtained a declaration that the Corporation's free bus scheme for old-age pensioners was ultra vires ; Brownsea Haven Prop. Ltd., v. Poole Corporatio [I958] Ch. 574, C.A., where hotel proprietors challenged a one-way traffic order.

47. Punton v. Ministry of Pensions and National Insurance No.(2) op.cit.,discussed in earlier section of this chapter.

obtained against the crown,[48] while neither injunction nor mandamus[49] will lie against the crown. The power to make declaration against the crown is preserved by S.21(1) of the Crown Proceedings Act 1947, but proviso (a) to that subsection forbids a court to grant injunction against the crown. Again the proceeding for a declaration may be initiated without leave and without any fixed time limit. This remedy is however a discretionary one.[50] In Taylor v. National Union of Seamen,[51] Ungoed Thomas J. granted a declaration that the expulsion from membership of the union was invalid but refused to grant a declaration to the effect that the plaintiff had continued to be in employment of the union as he did in fact obtain other employment. In cases of unfair dismissal, there is some authority to suggest that the courts may be disinclined to grant a declaration if the relationship between the employer and employee approximates to an ordinary contractual relationship.[52] On the otherhand there is some authority to suggest that when

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48. Dyson v. Attorney General [1911] 1 K.B.410.

49. See J.F. Garner, Administrative Law, 4th ed., pp. 185, 287 et seq. But it will lie against a Minister acting as such: Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997.

50. Re Barnato, Joel v. Sanges [1949] 1 All E.R. 515; and see J.F. Garner, Administrative Law, pp. 188-190.

51. [1967] 1 W.L.R. 532, 553 (Ch.D.) "Prosecutor Judge" case (discussed in Chapter IV).

52. E.g., Vidoyodaya University Council v. Silva [1965] 1 W.L.R. 77 (dismissal of University teacher without hearing. This case has been treated as anomalous by Lord Wilberforce in Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578, at p. 1596 (H.L.).

some element of an office or status is enjoyed by the employee, the court is inclined to grant declaration in favour of the employee dismissed in violation of procedural requirements.(53) "Injunction is an order of a court addressed to a party to proceedings before it and requiring him to refrain from doing, or to do, a particular act".(54) A plaintiff seeking an injunction normally has to show that he is a person aggrieved.(55) If a member of the public wants to secure compliance with a purely public duty, it has been said that he should proceed normally by way of a relator action by obtaining consent of the Attorney General.(56) Injunctions will not be granted if other remedies are available. In a recent case, the House of Lords held that the old rule of practice that an undertaking in damages could not in general be exacted from the Crown was no longer justified since the passing of the Crown Proceedings Act 1947, although in the particular circumstances of the case the majority of the House were

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53. Ridge v. Baldwin [1964] A.C. 40; Malloch v. Aberdeen Corporation (op.cit.), (dismissal of school teacher).

54. de Smith, Judicial Review of Administrative Action, (3rd ed.), at p. 388.

55. E.g., Durayappah v. Fernando [1967] 2 A.C. 337 (mayor of improperly dissolved council held lacking in sufficient interest to sue for an injunction to redress the wrong in his personal capacity).

56. In A.G., Ex rel. McWhirter v. Independent Broadcasting Authority [1973] 1 All E.R.689 the Court of Appeal set out the exceptional circumstances where a member of the public can bring a proceeding for injunction without a relator action.

unwilling to impose such undertaking as a condition for granting an interim injunction.(57) The injunction is in origin an equitable remedy and the granting of it lies in the court's discretion,(58) so that the conduct of the plaintiff may debar his obtaining an injunction. In Ward v. Bradford Corporation(59) W. brought a suit for declaration that the resolution expelling her was null and void for breach of natural justice and an injunction restraining the defendants from acting on it. Her prayer for interim injunction was refused because her conduct merited such expulsion. There was no ground to think that she "was treated unfairly or unjustly".(60)

The remedies of injunction and declaration lie against public as well as private bodies. "The courts cannot grant the prerogative writs such as certiorari and mandamus against domestic bodies, but they can grant declarations and injunctions which are the modern machinery for enforcing administrative law".(61) On the

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57. Hoffman La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295.

58. For a detailed discussion see de Smith, Judicial Review of Administrative Action, 3rd ed., p. 383 et seq.

59. Ward v. Bradford Corporation (1971) 70 L.G.R. 27, Discussed in Chapter IV.

60. Ibid at p. 35. Similarly in Glynn v. Keele University [1971] 2 All E.R. 89 (Ch.D.) G. was expelled from University residential accommodation without hearing. Injunction refused to stop expulsion. What G. had done merited "a severe penalty" and the decision against him was "intrinsically a perfectly proper one" - Pennycuick V-C. at p. 97).

61. Breen v. A.E.U. [1971] 2 W.L.R. 742, 750, (C.A.).

otherhand damages are not obtainable unless the failure to observe natural justice also gives rise either to a breach of tort or contract. For example, damages are obtainable when the failure to observe natural justice has invalidated a decision and the authority on the strength of that decision commits a separate tortious action such as trespass.(62) Equally there is authority to suggest that if there is no contractual link between the parties then even if the decision is made in breach of natural justice, the aggrieved party has no right to damages.(63) In Hannam v. Bradford Corporation(64) the Court of Appeal refused to give damages as there was no contract between the plaintiff and the defendant Council. His claim for damages was "totally misconceived",(65) although the court was satisfied that there was a real likelihood (or a reasonable suspicion of bias) on the part of the sub-committee authority. Damages as a remedy for administrative illegality does not fall within the "existing remedies"(66) and has been excluded from the terms of reference of the Law Commission.

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62. E.g., Hopkins v. Smetwick Local Board of Health (1890) 24 Q.B.D. 712. But see David v. Abdul Cader [1963] 1 W.L.R. 834 (P.C., Ceylon) where the Privy Council decision suggests that an applicant for a statutory licence may possibly have a right to damages for malicious refusal of licence.

63. E.g., Abbott v. Sullivan [1952] 1 K.B. 189.

64. [1970] 1 W.L.R. 937 (C.A.).

65. Ibid, at p. 948.

66. The Law Commission Report No. 73, Cmnd. 6407, para. 9.

STATUTORY REMEDIES:

Remedies are often specifically provided for in Statutes.(67) For example under Section 9 of the Tribunals and Inquiries Act 1958 (now section 13 of the 1971 Act) appeal lies from certain specified tribunals to the High Court.(68) Similarly statute may restrict or oust remedies. Section 11(1) of the Tribunals and Inquiries Act 1958 (Section 14(1) of the 1971 Act) provided that any provision in any earlier Act that any order or determination shall not be questioned in any court shall not have effect to prevent an order for certiorari or mandamus. This section however does not refer to prohibition or declaration. Further, Section 11(3) expressly prevented 11(1) from applying where an Act makes special provision for application to the High Court within a time limited by the Act and to any determination of the Foreign Compensation Commission and clearly intended to oust the court's jurisdiction in that matter. It may safely be submitted, however, that the courts tend to interpret such ouster clauses restrictively so as to preserve as much judicial authority as possible in the interests of private individuals.(69)

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67. E.g., Under Trade Union and Labour Relations Act 1974, the Industrial Tribunals are empowered to recommend reinstatement and award compensation to be paid by the employer for unfair dismissal [Sch. I part III].

68. A person appealing may also apply for judicial review: In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (op.cit) certiorari rather than appeal was assumed to be the appropriate means of challenging a decision affected by likelihood of bias.

69. E.g., R.v. Cheltenham Commissioners (supra); Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147. Discussed in the earlier section of this Chapter.

There may frequently be specific provision for appeal from the decision of administrative authorities, though a person availing himself of such an appeal may also apply to the court for other remedies.(70) Nor is it always necessary to exhaust any internal administrative remedies before coming to the court. In Cooper v. Wilson(71) the Police Sergeant did not appeal to the Home Secretary, but this was held to be no bar to obtaining a declaration from the court. There is some authority to suggest that if the rules of trade unions provide for an internal remedy of appeal, the complainant must seek that remedy before coming to the court.(72) But in later cases, the courts have shown less reluctance to interfere before the exhaustion of domestic remedies.(73) In the case of breach of the principle inside a University, the proper internal remedy is appeal to the Visitor.(74) This wide variety of potential remedies with no clear-cut field of application must often create confusion in the

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70. For example, in Ridge v. Baldwin [1964] A.C.40, the complainant appealed to the Home Secretary and later obtained a declaration from the House of Lords.

71. [1937] 2 ALL E.R. 726 (C.A.).

72. White v. Kuzych [1951] A.C. 585 (decision of a voluntary association is nevertheless a decision even though tainted with bias and the plaintiff must exhaust domestic remedy before coming to the court).

73. Annamunthodo v. Oilfield Workers' T.U. [1961] A.C. 945, 956; Lawlor v. Union of Post Office Workers [1965] Ch. 712, 733; Leigh v. National Union of Railwaymen [1970] 1 Ch.326, 334: See also Paul Jackson, Natural Justice, pp. 72-74.

74. J.W. Bridge: "Keeping Peace in the Universities", 86 L.Q.R. 531.

litigant and sometimes the wrong remains unremedied. Thus Sachs, L.J. said in Hannam v. Bradford Corporation:(75)

"To my mind he has lost the opportunity of obtaining the determination of a properly constituted staff sub-committee.... He cannot put himself into a better position than that as regards damages..... by having refrained...from seeking immediately..... an order of certiorari or mandamus against the council, or an injunction against the governors restraining them from implementing the dismissal until a properly constituted staff sub-committee had come to a decision".

PROPOSED REFORMS:

In 1969, the Law Commission was asked "to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure". The report submitted to Parliament recommended one form of procedure, "an application for judicial review".(76) Under cover of it, a litigant should be able to obtain any of the prerogative orders, or, in appropriate circumstances, a declaration or an injunction. He would have to specify which particular remedy he was seeking but if he later desired to apply for a remedy for which he had not initially applied he would be able to, with the leave of the court to amend his application.

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75. [1970] 1 W.L.R. 937, 944 (C.A.).

76. Law Commission Report No. 73 Cmnd. 6407, para. 43.

The vital difference however, from the present system under order 53 would be that the litigant's choice of remedies in the Divisional Court would not be limited to the prerogative orders but would also include, in appropriate circumstances, a declaration or an injunction. The essential characteristics of the remedies would remain; only the procedure for obtaining them would change. It would ne necessary to obtain leave from the court to make an application.(77) The granting of the application will be highly discretionary because before granting a declaration or injunction under this procedure the court is to have regard to the nature of the relief available by prerogative orders and to the justice and convenience of the case in the light of all its circumstances. As regards locus standi the Commission recommended "that the standing necessary to make an application for judicial review should be such interest as the court considers sufficient in the matter to which the application relates".(78) The court should have power to order discovery. As to time limits, relief should not be refused by the court solely on the ground that there has been delay in making the application,

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77. This is a controversial matter, since no leave is necessary for proceedings seeking declaration or injunction. See H.W.R.W: "Remedies in Administrative Law", 92 L.Q.R. 334, 336.

78. Report (op.cit.,) para. 48.

unless the court considers that the granting of the relief would cause substantial hardship or prejudice to any person or would be detrimental to good administration. The position at the moment is that an injunction cannot be obtained against the Crown although it is possible to get a declaration.(79) But there is no form of interim declaration preserving the status quo pending the final declaration. The Commission therefore recommended(80) that Section 21 of the Crown Proceedings Act 1947 should be amended to provide, in addition to the power there given to make a declaratory order against the Crown, also a power to declare the terms of an interim injunction which would have been granted between subjects. On an application for judicial review, the court, where it is satisfied that there are grounds for quashing a decision, should have a discretionary power in lieu to remit the case to the deciding authority for reconsideration in the light of the court's finding.

If the recommendations become law, the reform will certainly bring a welcome element of flexibility into the prerogative writs, which have been stratified into rigid forms in English common law through the centuries. The litigant's choice of remedies would then be broader than in America under the federal system which does not apply certiorari and prohibition to administrative bodies.(81)

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79. Section 21(1)(a) of the Crown Proceedings Act 1947.

80. Report, op.cit., para. 51.

81. See Remedies: United States.

UNITED STATES (A)EFFECTS

In American law, the earlier cases present conflicting decisions about the effect of bias and interest. It was recognised at common law that a judge who was interested in the action or of kin to either party was disqualified from sitting in a case. Notwithstanding this rule, however, his judgment in the cause was generally considered erroneous only, and not void.(1) But where it was expressly declared by a constitutional or statutory provision that in a certain specified case a judge should not sit, or should not act or should take no part in the decision, there was virtual uniformity in authorities that in such a case, the judgment rendered by the judge "is coram non judice and void, and the express consent will not aid it".(2) In such a case it was held to be no answer that the vote of the disqualified judge was not necessary to bring a decision in the matter.

The same principle was applied to administrative officials. In one Indiana case(3) it was held that in the absence of a

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1. Case v. Hoffman (Su.Ct. of Wisconsin 1898) 220, 221, 222.

2. Ibid, at p. 222. Similarly it was held in William Cramp & Sons Ship & Engine Building Company v. International Curtis Marine T Company (1913) 228 U.S. 645, that consent to a judge's participation who is disqualified under statute would not constitute a waiver of disqualification.

3. Decatur Township v. Board of Commissioners of Marion City, 39 N.E.2d. 479, 482 (Ind. App.1942).

statutory provision, the pecuniary interest of a board member made its decision voidable and not void. On the other hand, it was held in Wilson v. Iowa City[4] that the vote by a member of a city council on any resolution relating to an urban renewal project, if in violation of the conflict of interest provision of the Urban Renewal Law, was void, and the result reached by Council in such matter was also void, whether his vote determined the issue before the Council or not. At the present time however, the American courts do not seem to be very much concerned about the question of void or voidability of a decision for interest or bias, and further authority is sparse. Statutes both Federal and State have made provisions for disqualification on a number of grounds. Again the interpretation of "due process" clauses by the courts has made it clear that the requirement of a disinterested and impartial adjudicator, apart from statutes, has become a constitutional requirement. A fair trial in a fair tribunal is a basic requirement of due process which not only requires absence of actual bias but also interest in the outcome.[5] This due process requirement applies to administrative agencies which adjudicate as well as to courts. A biased decision-maker is now declared to be constitutionally unacceptable.[6] Besides, the remedies of

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4. Wilson v. Iowa City (Su.Ct. of Iowa, 1969) 165 N.W.2d 813.

5. In re Murchison 349 U.S. 133 (1955).

6. Withrow v. Larkin 43 Led 2d 712 (1975, U.S.Sup.Ct.).

declaration[7] and injunction have been used as weapons in reviewing biased administrative decisions. The remedy of declaration lies only in respect of decisions that suffer from jurisdictional defects and are void but not in respect of the decisions that are intra vires and merely voidable .[8] There is some authority to suggest that when disqualification is mandated by statute, failure to provide with statute's requirement constitutes a jurisdictional defect and that it cannot be waived by consent.[9] The amended federal statute 28 U.S.C. § 455 has provided specific mandatory grounds for judicial disqualification and has expressly stated under sub-section (e) that a justice, judge, magistrate or referee in bankruptcy of the United States shall not accept waiver of any ground[10] as set forth in sub section (b) of Section 455.

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7. Wilson v. Iowa City, supra.

8. See discussion in the earlier section of this chapter.

9. William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine T. Co. (1913) 228 U.S. 645.

10. 28 U.S.C. § 455 (e) As amended Dec. 5, 1974 Pub. L. 93 - 512, §1, 88 Stat. 1609.

UNITED STATES (B) REMEDIES: PREROGATIVE REMEDIES.

The right to a trial before an impartial judge is a right that is protected by the due process clause in the constitution. If any decision is made by any judge in violation of procedural due process of law, certiorari may be issued to set aside such an impugned decision. The United States Supreme Court said in Re Murchison:(11) "[The] importance of the federal constitutional questions raised caused us to grant certiorari. The view we take makes it unnecessary for us to consider or decide any ..... questions except the due process challenge to trial by the judge who had conducted the secret one-man grand jury proceedings". Certiorari was granted and the judgments of the Supreme Court of Michigan affirming contempt convictions imposed by a judge of the Recorder's court for the city of Detroit was reversed. The Supreme Court has supervisory authority over the administration of criminal justices in the federal courts. In Offutt v. United States,(12) a contempt conviction against a lawyer was set aside as the charge was entangled with the judge's personal feeling against the lawyer. The cause was remanded to the District Court with a direction that the contempt charge be retried before a different judge.

As under English law, where it is manifest on the petition for certiorari that the judgment sought to be

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11. In re Murchison 349 U.S.133, 136 (1955).

12. Offutt v. United States 348 U.S. 11. (1954).

reviewed was rendered by a court not properly organised because a disqualified judge participated in it, the reviewing court does not need to go into the merits of the cause. In such a case the writ of certiorari may be granted, the judgment reversed and the cause remanded so that it may be heard by a competent court.(13)

Under the federal procedure 28 U.S.C.§ 144 the court is to determine whether the allegations of bias and prejudice are legally sufficient or not is first by the judge who is being challenged. Section 144 states :

"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 favour 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

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13. William Cramp and Sons Ship and Engine Building Co. v. International Curtis Marine T. Company (1913) 228. U.S. 645, 650 (disqualified under statute from sitting in appeal from own judgment). Similarly it was held in R.v. Cheltenham Commissioner (1841) 1 Q.B.467 that a court is improperly constituted when a disqualified judge (i.e. by reason of interest) takes part in it and "no certiorari" clause would not prevent the court from quashing such a decision.

stating that it is made in good faith".(14)

A number of states have adopted procedures for disqualification of judges that are patterned on the federal system. For example, in Utah a litigant can file an affidavit of bias and prejudice to disqualify a judge. The matter is to be first determined by the trial judge but subject to review by the Supreme Court on appeal.(15)

In 1921, the United States Supreme Court in a leading case held that the affidavit will not disqualify unless the alleged facts are "legally sufficient" i.e. give "fair support" to the allegation of bias. The court said that the trial judge would determine whether the affidavit meets the procedural requirements of the section and whether the facts alleged give "fair support" to the charge of "personal bias and prejudice". But the judge should not determine the truth or falsity of the affidavit. For the purpose of the determination, the facts alleged must be taken as true.(16) This ruling has been followed in later cases. In a recent case it has been held that no inquiry

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14. Section 144 applies only to federal district courts.

15. Utah Code Ann. §. 78-7-1. Similar filing of affidavit of bias also exists in Kentucky but in a modified form. When either party to an action pending before the county judge, shall file his affidavit that the judge will not afford him a fair and impartial trial, the parties by agreement may elect a qualified person as special judge to try the action. If no agreement is reached, a qualified person shall be elected by member of the bar present and not interested in the action. (Kentucky Revised Statutes §.25.140,(1960). See also Wisconsin Statute § 261.08.

16. Berger v. United States, 255 U.S. (1921) 22, 33, 34.

into facts beyond the face of the affidavit may be made in connection with a motion for disqualification of a judge on the ground of bias or prejudice.(17)

Some of the states however have adopted an automatic disqualification procedure which is available by the timely filing of an affidavit by the litigant alleging that he fears that he cannot receive an impartial trial because of bias and prejudice of the trial judge. For example, in California(18) when either party in a trial timely files an affidavit or declaration under penalty of perjury or makes an oral statement under oath that he believes that he cannot have an impartial trial before any judge, court commissioner or referee, the matter shall be assigned to some other judge, court commissioner or referee to try the cause or hear the matter. A party is not permitted to make more than one such motion in any one action. It has been suggested, however, that the automatic disqualification system does not furnish an effective check against improper use, since any deterrence possible through the threat of perjury prosecution is remote because of the difficulty in challenging a subjective belief of the party.(19) The

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17. U.S. v. Sciuto, (C.A.Ill., 1976), 531 F.2d. 842.

18. California Code of Civil Procedure (West Supp, 1966) § 170.6 as amended by stats. 1967, c.1602, p 3832 § 2, stats. 1976 c.1071, p ——, §I.

19. New York University Law Review (1967) Vol 42: "State Procedures for Disqualification of Judges for Bias and Prejudice", p. 484, 504.

Federal system appears better by comparison. Under it the facts stated in the affidavit must give a "fair support" to the allegation of bias. This requirement discourages frivolous petitions and in addition the affidavit must be accompanied by a certificate of the litigant's counsel of record stating that it was made in good faith.(20) Such a requirement provides an additional safeguard against abuse in that the counsel is under a threat of contempt or disbarment proceedings if he knowingly certifies a false charge of bias.(21) If the trial judge refuses to disqualify himself on the ground of insufficient affidavit, the appellate court reviews the determination, viewing it as a question of law. Besides, the appellate court has got original jurisdiction to issue the writs of mandamus and prohibition thereby forcing the trial judge to disqualify when a section 144 affidavit is filed. This power is vested in the appellate court by the "all writs" statute.(22)

In Connelly v. United States District Court(23) prohibition was issued to disqualify a judge from hearing a motion to reduce bail. Courts also grant mandamus when they consider that the damage resulting from a trial

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20. 28 U.S.C § 144 (supra).

21. Laughlin v. United States, 151 F. 2d. 281 (D.C.cir.) cert. denied, 326 U.S. 777 (1945).

22. "All writs act" - 28 U.S.C.§ 1651. The Supreme Court and all courts established by the Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law - 28 U.S.C.§ 1651.

23. Connelly v. United States Dist. Ct. 191 F.2d. 692 (9th cir. 1951).

conducted by a biased judge who is disqualified later is greater than the expense and delay caused by granting mandamus. Mandamus would be granted when the "special circumstances" compel immediate solution of the disqualification issue. In Minnesota and Ontario Paper Co. v. Molyneaux[24] an affidavit was filed in a bankruptcy proceeding. The court granted mandamus on the ground that the length and complexity of the matter should be sufficient reasons for early resolution of the disqualification issue. But if the affidavit fails to show any personal bias against the petitioners then the affidavit is "legally insufficient" and the application for mandamus would be denied.[25] Mandamus and prohibition are extraordinary remedies and can be employed justifiably only when rare and exceptional circumstances are present. Mandamus and prohibition would not be granted if it is considered that the provision of appeal[26] after the final decision is an adequate remedy. When a judge disqualifies himself the case is ordered to be transferred and assigned to another judge for all further proceedings.[27] An aggrieved party is entitled to a new trial before an

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24. 70 F. 2d. 545 (8th cir., 1934).

25. Pfizer Inc., v. Lord 456 F. 2d. 532 (U.S. Ct. of Appeals, 8th cir., 1972) certiorari denied 406 U.S. 976 (1972).

26. Green v. Murphy 259 F.2d. 591, (U.S. Ct. of Appeals, 3rd cir., 1958).

27. United States v. Moore 405 F.Supp. 771 (D.C.W.Va. 1976).

impartial judge if it is clear from the record that the trial had not been conducted in a fair and impartial manner.(28) State systems of remedies depend mainly on prerogative writs. For example, in the State of New York, under Article 78 of New York Civil Practice and Rules, the aggrieved party is entitled to relief in the nature of writs of certiorari, mandamus and prohibition i.e. may annul, confirm, direct or prohibit certain action. In Bender v. Board of Regents of University of State of New York, it was held that though a proceeding to revoke the licence of a dentist is "administrative" rather than "judicial" and need not be conducted with the formality required before a judicial tribunal, but the holder of a licence cannot be deprived of it without due "process of law", that is without due motive and hearing before an impartial tribunal. A licence to practise any profession should be promptly revoked whenever it is shown that the holder is guilty of unprofessional conduct but that "result should only follow after a fair and impartial hearing".(29) In California a similar development took place with mandamus. Under §.1084 of the California Code of Civil Procedure(30) the writ of mandamus denominated as "writ of mandate" has been developed as the normal remedy for

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28. E.g., Killilea v. United States 287 F. 2d. 212 (U.S. Ct. of Appeals, 1st cir.,); certiorari denied 366 U.S. 969 (1961).

29. (1941) 30 N.Y.S.2d. 779 (Sup. Ct. Appellate Division, Third Department) Proceeding under Art. 78 of New York Civil Practice and Rules.

30. West's Californian Codes (Civil Procedure) §.1084.

obtaining review. In a leading case it was decided that certiorari cannot be issued to review a state agency action.(31) Mandamus can be issued against both judicial and administrative authorities. Where the writ is issued the reviewing court shall inquire into the question, inter alia, whether or not a fair trial was given by the administrative authorities. The "writ of mandate" covers virtually the whole field of certiorari; under it, the court either commands the respondent to set aside the order or decision or denies the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the courts' opinion and judgment and may order the respondent to take such further action as is especially enjoined upon it by law.(32) Section 1086 of the code states that the writ must be issued in all cases where there is not a plain, speedy or adequate remedy in the course of law.

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31. Standard Oil Company v. State Board of Equalisation 59 P.2d 119 (Cal. 1936).

32. California Code of Civil Procedure § 1094.5 (e) as amended by stats. 1974,c. 668 p. 1532, § 1; stats. 1975, 2nd Ex. Sess., c.I, p—§26.5.

STATUTORY AND OTHER REMEDIES:

The remedies available against administrative authorities in the federal courts differ substantially from those which are available under English law. In the important case of Degge v. Hitchcock[33] the United States Supreme Court held that certiorari was available only to review the decisions of the courts. It could not be used to review the decisions of administrative authorities even though they were judicial in nature. The function of certiorari is performed by newer, modern remedies such as declaration and injunction, which have advantages over certiorari. When an individual seeks a declaration or an injunction, he need not worry whether the alleged administrative action is judicial, quasi-judicial or administrative.[34] The Federal procedure differs substantially from the English system. Unlike the position in English law it is statute law rather than common law that plays the primary role in judicial review in the federal courts. The Administrative Procedure Act makes extensive provision for disqualification and for

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33. Degge v. Hitchcock, 229 U.S. 162 (1913). The United States Supreme Court held that certiorari was the wrong remedy for reviewing a fraud order issued by the Post Master General.

34. The muddle over the theory that certiorari lies to quash only judicial or quasi-judicial acts has not been resolved yet in England. It is evident from a recent case R. v. Barnsley Metropolitan Borough Council Ex p. Hook [1976] 1 W.L.R. 1052 (C.A.) where the District Court dismissed the application for certiorari holding the proceedings as purely administrative. On appeal, Lord Denning opined that certiorari would lie even if the proceedings were administrative (pp. 1057, 1058) while the majority sought to find the power as judicial so as to attract natural justice and admit certiorari. For a recent comment on this case see T. Ingman, "Natural Justice in Barnsley", N.L.J.(1977) p. 999.

judicial review. Section 702 states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof". Under the Act, the hearing employee has a right and obligation to evaluate his own impartiality.(35) On his refusal the agency has a right and duty to review de novo a challenged examiner's impartiality. Section 557 states "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decisions". If the claimant of the prejudice is not satisfied with the agency decision he may raise it before the reviewing court. The reviewing court shall hold unlawful and set aside the agency action, findings and conclusions found to be without observance of procedure required by law or unsupported by substantial evidence in a case subject to Section 556 or 557 of the Act or otherwise reviewed on the record of an agency hearing provided by statute.(36) Section 556 (b) clearly empowers the agency to determine whether a presiding or participating employee conducting a hearing is subject to personal bias or other disqualifications. It is less clear whether a member of an agency participating in the final or appellate determination can be disqualified by his colleagues or the

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35. § 556 (b). Discussed in chapter IV.

36. Administrative Procedure Act 5 U.S.C. § 706.

matter of his disqualification is to be entrusted solely to his conscience. There is some authority to suggest that there is an inherent power in the agency to disqualify one of its members apart from the Administrative Procedure Act.(37) A person claiming bias on the part of the administrative authority would first be required to exhaust administrative remedies. The courts do not normally consider assertions of administrative bias prior to the completion of an adjudicative proceeding. Only in the "exceptional case" where the court is presented with an undisputed allegation of fundamental administrative prejudice will it interrupt the progress of the agency adjudicative hearing.(38)

Apart from the Administrative Procedure Act federal statutes provide various forms of proceedings for review of administrative action. For example, petition for review under provisions like that of the Federal Trade Commission Act, petition for review under the Review Act 1950, statutory injunction in a three-judge court and so on. The review provisions of the Federal Trade Commission Act have been substantially copied into the acts of many

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37. The Federal Communications Commission has expressly recognised inherent power of the Commission to disqualify their fellow members. In re Segal and Smith 5 F. C.C. 3 (1937); see also Long Beach Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 189 F. Supp. 589 (S.D. Cal. 1960) where the court, while basing its result on S.7(a) of the Administrative Procedure Act 1946, seems to assume that even in the absence of the Act an administrative agency possesses the inherent power of disqualification and has the obligation to exercise it in a proper case.

38. United States v. Litton Industries Inc., 462 F. 2d 14 (9th cir 1972); see also Amos Treat & Co Inc., v. Securities and Exchange Commission, 306 F. 2d 260 (1962), where the appellants failed to exhaust the administrative remedies nevertheless the Court entertained action on due process grounds.

other agencies. Under it the petitioner obtains a review of the commission's order by filing a petition before the circuit court of appeals. The Act provides: "The court shall have jurisdiction ..... to make .... a decree affirming, modifying or setting aside the order of the commission and enforcing the same to the extent that such order is affirmed ..... The judgment and decree of the court shall be final, except that the same shall be subject to review by the supreme court upon certiorari ..... The jurisdiction of the circuit court of appeals to affirm, enforce, modify or set aside orders of the commission shall be exclusive".(39)

The Administrative Procedure Act has had no substantial effect upon forms of proceedings. Section 703 (which Under Section 701 does not apply to the extent that statutes preclude judicial review or agency action committed to agency discretion by law) provides: "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings

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39. 38 stat, 720 (1914) 15 U.S.C.§ 45(C)

for judicial enforcement". Though the phrase "any applicable form of legal action" might be thought to revive dormant extraordinary remedies such as certiorari or prohibition, that has never in fact happened, nor is likely to happen.(40) In the absence of any statutory provision for review, the litigant falls back on the ordinary law and its remedies. The means of challenging an administrative action is usually a suit against the officer for damages or for injunction or declaratory judgment in a district court.(41) Injunction and declaration are almost always combined. The non-statutory remedies in the federal courts are "essentially those of injunction and declaratory judgment".(42) With the enactment of the Federal Declaratory Judgments Act 1934,(43) the action for declaration was provided as a federal non-statutory remedy. Injunction became firmly established in 1902 as a means of non-statutory review.(44) As has been observed, the state system of remedies, by way of contrast, depends mainly on prerogative writs. In this

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40. K.C. Davis, Administrative Law Text, § 23.01-P.441 (3rd ed., 1972).

41. For a detailed discussion see K.C. Davis, Administrative Law Text, (op. cit.,) p. 443 at seq.

42. Schwartz and Wade, Legal control of Government, p. 215.

43. Revised in 1948, 62 stat. 964 (1948) amended, 63 stat. 964 (1949), 28 U.S.C.§ 2201.

44. See American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

respect state law is much closer to the English system than to the federal. It has been said that "[the] state courts have often been either unable or unwilling to copy from the federal courts what is especially splendid about the use of injunction and declaratory judgment".(45) Efforts have been to reform state administrative procedure. The Model State Administrative Procedure Act, drafted by the National Conference of Commissioners on Uniform State Laws provides for judicial review of contested cases on the filing of a petition for review.(45a) A person who has exhausted all administrative remedies available within the agency and and who is aggrieved by a final decision in a contested case is entitled to judicial review under that Act. A preliminary, procedural or intermediate agency action is immediately reviewable if review of the final agency decision would not provide an adequate remedy. The reviewing court may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings or decisions are made upon unlawful procedure.(46) At present many of the states have enacted

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45. K.C. Davis, Administrative Law Text, (op. cit.,) § 24.05.

45a. Revised Model State Administrative Procedure Act, S.15.

46. Ibid S.15 (g) (3).

statutes based on the model act.(47) Unlike English courts, the courts in the United States have an inherent power to remand to the relevant agency. But under English law, the remedies of certiorari or declaration are frequently tantamount to a remand order since when a decision is quashed or is declared unlawful the tribunal or the administrative authority is under a legal duty to consider the matter and must decide it again but correctly.(48) The remedy of mandamus has got similar effect to a remand order. For example, in R.v. London County Council, Ex p. Akkersdyk, Ex p. Fermenia,(49) the Divisional court issued a writ of mandamus commanding the council to hear and determine the application according to law. This power of remand is widely used by the federal courts whose power is thus not only limited to affirm or reverse the administrative decisions. When the court is satisfied that the administrative decision was not impartial, the decision or order is vacated and the case is remanded for a de novo consideration of record without the participation of the officer against whom bias is alleged. For example in American Cynamid Company v. Federal Trade Commission where Chairman Dixon was held disqualified for

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47. Gellhorn and Byse have provided a detailed list of states who have enacted statutes on this model act -: Gellhorn & Byse, Administrative law - cases and comments (6th ed. , 1974) pp. 1160 at seq.

48. Schartz and Wade,Legal Control of Government, p. 220.

49. [1892] I.Q.B.D. p. 190 (discussed earlier) mandamus was thought to be the proper remedy instead of certiorari against the county council. It seems that the proceedings were thought not as judicial though the court said that such proceeding ought to be dealt with in a judicial spirit and with a due regard to reason and justice.

bias, the Court of Appeals for the sixth circuit vacated the F.T.C. order and remanded the case for de novo consideration by the F.T.C. without the participation of Chairman Dixon.(50)

The use of the discretionary remedy of injunction may be seen in Withrow v. Larkin.(51) Here, the appellee brought an action against appellant board members seeking injunctive relief and a temporary restraining order against hearing of charges of professional misconduct by the appellant board. A three-judge District Court preliminarily enjoined the board from using the statute giving the board various enforcement powers, and held that the statute was unconstitutional as violative of due process of law in that the board could suspend the physician's license at the board's own hearing on charges evolving from the board's own investigation (368 F. Supp. 796). On direct appeal, the United States Supreme Court reversed and remanded. The Supreme Court said that where the appellee had been granted a restraining order against a contested hearing pursuant to the statute; the question before the Federal District Court was not whether the act was constitutional or not but whether the showing made raised serious constitutional questions and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainant. A preliminary

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50. American Cynamid Co., v. FTC (U.S. Ct. of Appeals, Sixth circuit, 1966) 363 F.2d 757.

51. Withrow v. Larkin (U.S. Sup. Ct.) 43 Led 2d 712.

injunction against enforcement of a state statute may be issued when there is a "high likelihood of success" of the constitutional challenge of the statutes. But when "it is quite unlikely that the appellee would ultimately prevail on the merits of the due process issue presented to the District Court, ... it was an abuse of discretion to issue the preliminary injunction".(52)

On the whole, it may be stated that the federal forms of proceedings for challenging administrative decision are more satisfactory than states' procedure. Compared with its counterpart in England, this body of law is a considerable accomplishment. The statutory review in suits for injunction and declaratory judgments, provide judicial control in a more comprehensive and effective way than in England.

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52. Ibid 723.

CONCLUSION

A subject so general and with so many facets as disqualification scarcely permits of any conclusion more rounded than the obvious one that in both England and America, the rule against interest and bias grows apace. There are similarities as well as differences in its development in the two Countries.

JUDICIAL DISQUALIFICATION

Having its origin under common law, the rule has been provided with constitutional and statutory safeguards in American law. So, while there is almost uniformity of opinion among the courts of England and America as to the major situations regarding judicial disqualification on grounds of interest and bias, it cannot be denied that statutes such as 28 U.S.C. Section 455 have extended the law to include a wide range of subjects as grounds for mandatory disqualification which are not provided under English law. The new amendment substituted "disqualification of justice, judge, magistrate or referee in bankruptcy" for "interest of justice or judge" thus broadening the application of the section. It also extended the grounds on which mandatory disqualification may be based, and added provisions relating to waiver of disqualification. It provides for voluntary disqualification in any proceeding in which the judge's impartiality might reasonably be questioned. These provisions have already been discussed in earlier chapters. Again, the "any other interest" test under 28.U.S.C. §.455 (b)(4) has certainly broadened the grounds for judicial disqualification. The clause referring to "any other

interest" includes interests other than those direct financial interests described in the first portion of the sub-section. The section calls for disqualification when any indirect or remote financial interest could be "substantially affected" by the outcome.(1) The amendment has given a new life to the disqualification procedure. It has provided a general standard as well as specific mandatory grounds for judicial disqualification. On the whole it may be said that this section now provides a detailed guideline for judicial disqualification.

On the other hand, under English law the disqualification of judges and justices for interest and bias is guided purely by the common law principles of natural justice. The rule against interest is clear and simple. It is invoked in cases where direct pecuniary interest is involved.(2) Unlike American law there is hardly any provision for disqualification for "any other interest" other than direct financial interest. In circumstances where the interest is indirect, disqualification will lie only if there exists a real or reasonable likelihood of bias.(3) The disqualification for family relationship under English law does not seem to be entirely

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1. Such an interpretation has been adopted by the United States Court of Appeals, Fourth Circuit in Virginia Electric and Power Company v. Sun Shipbuilding and Dry Dock Company 539 F.2d 357, 367, 368 (1976) discussed in Chap. III "Pecuniary Interest".

2. E.g., R.v. Rand (1866) L.R. 1 Q.B. 230, 232; see discussion in Chapter III on "Pecuniary Interest".

3. Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577, 598, 599 (C.A.), see discussion in Chapter IV "Bias".

clear.[4] Besides, the rule against interest and bias, being a common law principle, suffers from the inherent weakness that it may be excluded by statute.[5] For its effective application under English law, the rule ideally needs statutory support (assuming the continuing absence of a written constitution which might include it) and a detailed guideline for judicial disqualification comparable to that of 28.U.S.C. § .455.

UNITED STATES: ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS CLAUSE :

Again the agency has gone a good deal further in its enactment of a general statute such as the Administrative Procedure Act 1946 which provides a highly judicialized and formal procedure for independent administrative agencies. The Act has provided a corps of "semi-independent subordinate hearing officers"[6] called trial examiners (now presiding employees).[7] They are required to issue initial decisions, which become the decision of the agency unless there is an appeal or review.[8] The A.P.A.

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4. See my earlier discussion in the Section on "Family Relationship" in Chapter 4.

5. E.g., R. v. Barnsley Licensing JJ., [1960] 2 Q.B. 167.

6. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 131 (1953).

7. Also known as "Administrative Law Judges". See K.C. Davis, Administrative Law of the Seventies § 10.00 (1976).

8. See Administrative Procedure Act 5 U.S.C. § 557 (b) parallel section of Administrative Procedure Act 1946 Sec. 8(a).

Procedure is clearly inspired by the model of judicial procedure.(9) It applies in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.(10) The Act is not merely limited to the regulatory agencies. The Supreme Court held in Wong Yang Sung v. McGrath that the Administrative Procedure Act requirement of an impartial hearing applies in every case where a full hearing is required by due process, even though not by the enabling statute.(11) To prevent any possible bias on the part of the presiding employee, the Act prohibits a presiding employee from consulting a person or a party on a fact in issue, unless notice or opportunity for all parties to participate is provided.(12)As has been seen the Act has also provided for separation of investigating and

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9. E.g., They may administer oaths, issue subpenas and so on. See§554(b) and § 556(c).

10. § 554. There are certain exceptions laid down.

11. 339 U.S. 33, 50 (1950).

12. Administrative Procedure Act, 5 U.S.C. § 554(d). See also a recent amendment prohibiting an interested party from making ex parte communication to any person engaged in the decisional process of the proceeding - 557 (d)(1) (as amended Pub. L. 94 - 409 § 4(a), 1976.

prosecuting functions from adjudication.[13] For early removal and quick disposal of bias or other disqualification, S.556(b) of the Act sensibly provides for voluntary disqualification as well as a prompt decision on the matter by the administrative agency. If the defect remains unremedied, a party can raise it before the court. However, judicial review is based on the substantial evidence rule. Administrative findings are held unlawful and set aside if not supported by substantial evidence on the record.[14] It may be argued with some force that when a particular fact (in this case, the absence of an interested or biased trier of fact) is arguably a condition precedent to the constitutionality of administrative action, the courts may have a responsibility to determine this fact for themselves de novo. They cannot abdicate their obligation of review with an administrative finding on interest or bias supported by substantial evidence.[15] In conclusion, it may be submitted that under the Administrative Procedure Act, bias disqualification stands thrice judged. Clearly each individual adjudicator has an obligation to evaluate his own impartiality. Clearly too, on his refusal, the party

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13. Supra, § 554(d) discussed in "Prosecutor Judge" section.

14. § 706.

15. Professor Jaffe suggests "[When] a fact is the asserted constitutional basis for the exercise of the power in question, the court must itself make a finding of the fact and may in its discretion take evidence as to the fact". Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv.L. Rev. 953, 953 (1957).

has a right to apply to the agency as a whole. Finally if the bias or interest remains unremedied, the party may raise the issue before the reviewing court. The better view would seem to be that since judicial review is founded on the principles of due process, it requires at least an independent finding by the courts on the issue of disqualification.

ENGLAND : THE FUTURE OF THE RULE

In England, in the absence of a constitutional provision or a general statute on disqualification on this subject, the same function has to be performed by the common law rules of natural justice. The common law principle of the rule against interest and bias disqualifies an administrative adjudicator in the same

way as the Administrative Procedure Act disqualifies a trial examiner for interest or bias. It has been said that "[the] special procedure that in the United States are called hearings are classified in Britain as tribunals and inquiries".(16) But the various kinds of independent administrative regulatory agencies in America are difficult to equate with English institutions. Statutory tribunals ought to be as impartial as courts of law and exercise similar judicial detachment. Like the presiding employees under the Administrative Procedure Act, it is axiomatic that their members must be free from interest and bias. A tribunal such as a rent tribunal is entitled to use its own knowledge and experience as to the level of rent but if there is direct pecuniary interest or reasonable suspicion of bias on the part of its members, the court will set aside the decision.(17)

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16. B. Schwartz and H.W.R. Wade, Legal Control of Government, (1972) p. 143.

17. Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577 (C.A.). 598, 599

But public inquiries are less formal and less legalistic than tribunals. Whereas hearing officers under the A.P.A. make initial decisions, inspectors carrying on inquiries on behalf of Ministers in this country can normally make only a recommendation to the ministry. One of the difficult problems in Administrative Law is that how far the rules of natural justice are applicable to inquiry procedures.(18) The judicial tendency is to hold that the rules of natural justice apply to statutory inquiries as well.(19) The demand for administrative imparliality is no less strong than the demand for impartiality in the courts. Errington v. Minister of Health(20) has clearly established that a post inquiry communication with the deciding Minister could be caught by the rules of natural justice. Further, recent cases show that post-inquiry communication with one of the parties may amount to breach of the statutory rules as well as a breach

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18. See the House of Lord's decision in Franklin v. Minister of Town and Country Planning [1948] A.C. 87 discussed in Chap. V: "Exclusion of the Rule". See also Report of the Committee on Administrative Tribunals and Inquiries, Cmnd. 218 Chap. 19, Paras 262-277.

19. E.g., Fairmount Investment Ltd. & Another v. Secretary of State for the Environment [1976] 1 W.L.R. 1255 (H.L.), inspector took into account matters not raised at the inquiry which was held as breach of natural justice; Hibernian Property Co. Ltd. v. Secretary of State for the Environment [1974] 27 P & C.R. 197, inspector took information in the absence of one party - held as breach of natural justice. For investigation by inspectors under The Companies Act - see Re Pergamon Press Ltd. [1971] Ch. 388.

20. [1935] 1 K.B. 249.

of natural justice.[21] In the United States the Administrative Procedure Act clearly prohibits a hearing officer or person engaged in the decisional process of the proceeding from making ex parte communication with an interested party.[22] Similarly in 'prosecutor judge' cases, what is provided by the Administrative Procedure Act for American law, has been provided in England by the rules of natural justice. The rule against interest and bias demands that one who is in the position of prosecutor or complainant must not take part in the adjudication.[23] This separation of functions, the courts have emphasised, should be observed not only in the case of courts of justice and other judicial tribunals but also in the case of other authorities which, though in no sense

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21. E.g., Lake District Special Planning Board v. Secretary of State for the Environment [1975] J.P.L. 220, (discussed in section, "Bias by Attitude towards Law or Policy"; see also Performance Cars Ltd. v. Secretary of State for the Environment [1977] J.P.L. 584 (C.A.). A local authority refused to give copies of document before inquiry. Browne L.J. considered it as a breach of the inquiry procedure rule and might also be a denial of natural justice.

22. § 557(d)(1) supra, see also the provisions under § 554(d) supra.

23. E.g., R.v. Barnsley Metropolitan Borough Council Ex p. Hook [1976] 1 W.L.R. 1052 (discussed in "Prosecutor Judge" section).

courts nevertheless act as judges of the rights of others.[24] Lacking both constitutional and statutory support utilised by the American courts, such a bold assertion by the English courts is commendable. But English courts remain at the mercy of the legislature,[25] and again it is submitted that the rule would benefit from being expressed in statutory form.

Again, the existing remedies are not in a satisfactory state.[26] The Law Commission proposed one form of statutory procedure for obtaining remedies "an application for judicial review". Under cover of it, a litigant should be able to obtain any of the prerogative orders or in appropriate circumstances a declaration or an injunction. In addition, it is submitted that it would be beneficial to have a statutory code of procedure for disqualification of administrative authorities for intetest and bias. The code should apply to every adjudication including those of tribunals and inquiries. Proposals for a detailed and formalised general code of procedure such as the Administrative Procedure Act have been criticised by some lawyers on the ground that this would likely to

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24. Frome United Breweries v. Bath Justices [1926] A.C. 586 (discussed in "Prosecutor Judge" section).

25. The rule can be ousted by statute i.e. R.v. Barnsley Licensing JJ. [1960] 2 Q.B. 167, discussed in Chap. III: "Pecuniary Interest".

26. See discussion on "Remedies".

lead undesirable uniformity and rigidity which would frustrate administrative efficiency and flexibility.[27] The proposal for a standard code of procedure applicable to tribunals is not new. As H.W.R. Wade observed: "Legislation now attempts to ensure that the fundamentals of proper procedure 'openness, fairness, and impartiality' - are observed and that uniform standards are applied to all the numerous different tribunals".[28] Professor Thompson said:[29] "England is still a long way from clear-cut, intelligible, generally applicable procedures, ... the United States has its Federal Administrative Procedure Act. Despite the proliferation of different practices, and procedure of different Ministries, there is no reason why a generally applicable system should not be devised". It may be arguable that the widely varying procedures[30] applicable to different types of tribunals and inquiries in England militate against such

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27. E.g., J.A. Farmer, "A model Code of Procedure for Administrative Tribunals - An Illusory Concept", New Zealand Universities Law Review Vol.4 (1970) p. 105 et seq.

28. H.W.R. Wade, Administrative Law, (3rd ed) p. 5. It was argued before the Franks Committee that a standard code applicable to all tribunals would be preferable to the then rather haphazard system - See the Evidence of the Inns of Court Conservative and Unionist Society (1957), Cmnd. 218, Minutes and Appendices, pp. 296 - 301.

29. In a paper entitled, "The Proper Scope of Judicial Review" - presented at the Commonwealth Law Conference at Sydney. See "Third Commonwealth Empire Law Conference" Sydney (1965) 133, 136, 137.

30. See D. Foulkes, Administrative Law, (1976) Chap. 3 and 4; R.E. Wraith and P.G. Hutcheson, Administrative Tribunals, Chap. 6.

a solution. Even if the introduction of a general statute like the A.P.A.[31] is not thought to be desirable,[32] there is no reason why an attempt should not be made to give statutory protection to certain basic procedural principles, for example, the requirement of impartiality which will influence the procedures adopted by the existing and future tribunals,[33] inquiries, statutory bodies, trade unions as well as other authorities.[34] It will merely be a statutory recognition of the principle followed by them and has been recognised by courts from an early period. In recent years Parliament itself has begun in certain spheres to give statutory protection to the rules of natural justice [e.g. Trade Union and Labour Relations Act, 1974. S. 6(13)], and impartiality is now to be observed in all types of adjudication. To this extent the proposal can hardly be regarded as radical

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31. For example, A.P.A. also regulates appointment of hearing officers, their dismissals etc. (see §§ 3105, 7521) and provides a high judicialized procedure, see (n.9 supra).

32. English institutions are different from those in the United States. Appointment of independent hearing officers may not be suitable here. For example, inspectors carrying on inquiries are required to be in touch with the policy of the department - see Schwartz and Wade, Legal Control of Governemnt, op.cit., p. 171.

33. Procedural rules for tribunals are made in consultation with the Council on Tribunals, (Tribunals and Inquiries Act 1971, S.10). But one of the major weakness is its ineffectiveness - see Legal Control of Government, op.cit., p. 180. Under S. 11(1) the Lord Chancellor after consultation with the Council on Tribunals make rules for inquiries.

34. See discussions in previous Chapters, particularly Chap. II: "Modern Application of the Rule".

or controversial.[35] This might be done simply by enacting statutory provisions along these broad lines:

A) Any person engaged in a hearing or a decision-making process shall disqualify himself when he knows that he has a pecuniary interest however small in the subjectmatter in controversy or in a party to the proceeding;

B) Such person shall also disqualify himself when he knows that there is reasonable likelihood of his being biased in favour of or against any party to the proceeding;

C) Such person shall also disqualify himself when his imparliality might reasonably be questioned;

D) An aggrieved party has the right to challenge a determination or order tainted by interest or bias by way of judicial review.

E) The reviewing court shall have the power to make independent findings of fact on the issue of disqualification.

In fact the above provision would add nothing substantially new to the existing practice, but would bring uniformity, force and strength to the principle. It is hoped that Parliament will see the wisdom of

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35. Hearing not required in all cases, e.g., R.v. Aston University Senate Ex p. Roffey [1969] 2 ALL E.R. 964, at p. 973 (per Donaldson, J.) at p. 997 (per Blain, J.); R.v. Race Relations Board Ex p. Selvarajan [1975] W.L.R. 1686, 1694 (C.A.), a board need not hold a hearing, it was enough if it acted with fairness.

upholding this fundamental principle by means of such a generally applicable statutory provision for the greater protection of the individual.

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