damage his competitive position in the market—if, as the dissent claimed, his monopolistic position came from the superiority of the device. But that part of the patentee's advantageous market position which is traceable to the covenant has been removed and competition restored.

DISQUALIFICATION OF FEDERAL JUDGES FOR PERSONAL BIAS

Following an appearance before the House Committee on Un-American Activities, Lester Cole, a motion picture script writer, was suspended by his employer, Loew's, Incorporated, on the ground that his conduct before the committee had violated his contract of employment. He brought a suit to restrain the suspension and to obtain damages. Invoking the disqualification provisions of Section 21 of the Federal Judicial Code,[1] the defendants filed an application to transfer the cause supported by an affidavit that the district judge assigned to the case, Leon R. Yankwich, had a personal bias against them and in favor of the plaintiff. The affidavit stated that during a discussion at the home of friends about the hearings before the House committee Judge Yankwich had said "in substance and effect that in his opinion there was no legal justification for the suspension or discharge of any of the persons whose conduct before the committee resulted in their indictment; that he hoped that none of the cases arising out of such suspensions or discharges came before him, but if they did, he would have no alternative but to render judgment for the plaintiffs in such actions and that if he were the attorney for such plaintiffs he could recover judgment in their favor for millions of dollars."[2] The names of persons present, the place, the occasion, and approximate date of the remarks were included. Treating the affidavit as true, Judge Yankwich found the facts stated insufficient to show the personal bias he considered necessary to disqualify him under Section 21. The section provides: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice against him or in favor of any opposite party to the suit, such judge shall proceed no further therein. . . . Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists."[3] The application for transfer was denied. *Cole v. Loew's, Inc.*[4]

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314 U.S. 495 (1942). There is some dispute as to what the character of the change and the length of time have to be. In the Ellis case the court stated that both the method of restraint of competition must be abandoned and the consequences of the practices fully dissipated. In general, see Bateman, op. cit. supra note 12, at 61.

[1] 36 Stat. 1090 (1911), 28 U.S.C.A. § 25 (1927).

[2] Cole v. Loew's, Inc., 76 F. Supp. 872, 875 (Cal., 1948).

[3] 36 Stat. 1090 (1911), 28 U.S.C.A. § 25 (1927). [4] 76 F. Supp. 872 (Cal., 1948).

While "for the record" Judge Yankwich denied the accuracy of the affidavit,[5] he could pass only upon its "legal sufficiency" and not upon its truth or falsity, according to the well-established rule first announced by the Supreme Court in *Berger v. United States*.[6] The holding of insufficiency in the present case was based on failure to meet the requirement that the bias or prejudice be *personal* —"not the possession of definite views of the law or even a 'prejudgment' of the controversy, but a personal attitude of enmity directed against the suitor." Judge Yankwich classified the statements set out in the affidavit as merely preconceived ideas of the law which might have been written in a legal text, and hence as insufficient to support the allegation of personal bias.

Strict construction of Section 21 is supported by prior cases,[7] some of them involving prejudgment which, although more patent than that in the present case, were still held not to disqualify.[8] Supreme Court precedent is lacking on the question of whether an expression of opinion on the merits of a case should disqualify. *Berger v. United States*, the Supreme Court's only determination of the sufficiency of an affidavit under the section, set up this test: "The reasons and facts must give fair support to the charge of a bent of mind that may prevent or impede impartial judgment."[9] This was an espionage case involving several German-Americans. Although the necessity that the bias be of a personal nature was not stressed, the facts in the *Berger* case seem strong enough to fulfill a requirement of personal enmity.[10] Only four subsequent appellate decisions have been found holding affidavits sufficient,[11] all of them relying chiefly on the *Berger* case.

[5] Ibid., at 878.

[6] 255 U.S. 22 (1920).

[7] Skirvin v. Mesta, 141 F. 2d 668 (C.C.A. 10th, 1944); Scott v. Beams, 122 F. 2d 777 (C.C.A. 10th, 1941).

[8] In re Lisman, 89 F. 2d 898 (C.C.A. 2d, 1937) (affidavit that judge had told a trustee in bankruptcy that he would deny the pending petition of a group of bondholders and had also turned over documentary evidence in the case to a group of creditors who opposed the petition held insufficient, since statements were merely indiscreet expressions); Johnson v. United States, 35 F. 2d 355 (D.C. Wash., 1929) (affidavit claiming the judge had said that none of the claimants in war risk insurance actions would recover in a trial before him so long as the claimant could raise his hand held insufficient; but affidavit was also untimely, uncertain, and in bad faith); Henry v. Speer, 201 Fed. 869 (C.C.A. 5th, 1913) (judge's submittal to a newspaper of an article prejudging a pending case held to show prejudgment merely of the merits of the controversy, a situation against which Section 21 was not directed).

[9] 255 U.S. 22 (1920). Ex parte American Steel Barrel Co., 230 U.S. 35 (1913), the only other Supreme Court case involving the section, expressly limited itself to a narrow holding denying mandamus to requalify a judge after disqualification.

[10] However, McReynolds, J., one of three dissenting justices, maintained that the affidavit merely showed prejudice toward a class and not against any one defendant. Berger v. United States, 255 U.S. 22, 42–43 (1920).

[11] In Schmidt v. United States, 115 F. 2d 394 (C.C.A. 6th, 1940), it was charged that the judge had expressed a prejudicial opinion regarding the facts of the case and the guilt of the defendant. In Morris v. United States, 26 F. 2d 444 (C.C.A. 8th, 1928), the affidavit claimed that the judge had described the defendant as one of the worst bootleggers in the country. In Nations v. United States, 14 F. 2d 507 (C.C.A. 8th, 1926), the affidavit stated that the judge had said that the defendant was guilty of conspiracy to violate prohibition laws. Lewis v. United

The reason given for strict interpretation in *Cole v. Loew's, Inc.* and earlier decisions is fear of abuse of the statute. However, safeguards pointed out in the *Berger* decision[12] limit the danger to some extent. An untruthful affidavit would put the maker in danger of prosecution for perjury and would subject the attorney to disbarment.[13] The affidavit's value as a delaying action is limited by by the requirement that it must be filed ten days before commencement of the term unless good cause can be shown. Furthermore, only one transfer of judges is permitted. The requirement that the affiant state his reasons for belief that bias exists permits elimination of affidavits based on rumor or gossip. Still it is true that, whether or not the judge is disqualified, some delay is obtained. Moreover, even if an affidavit is held insufficient, a party may take exception and have ground for appeal after losing on the merits.

But the argument as to possibilities of abuse was met by the Supreme Court's conclusion in the *Berger* case that "Congress was aware of them and considered that there were countervailing benefits."[14] The *Loew's* decision does not discuss the legislative intent behind Section 21, but from debates in Congress[15] it is clear that the sponsors of the bill wanted it to provide disqualification which should not be contingent on the judge's finding that the reasons given, if true, established the presence of bias. The absence of any provision in the act for a fact-finding machinery to determine whether the judge is actually prejudiced and the lack of a requirement that prejudice be proved suggest the same primary intent to relieve the litigant of a judge in whom he has no confidence rather than to provide a remedy only against bias, actual or reasonably inferred.

Such nearly automatic operation was not, however, assured in the wording of the act. As a result, the courts have apparently felt that the requirement of an affidavit alleging *personal* bias or prejudice, with reasons for such belief, is so clear that they can focus on the plain meaning of the words[16] and need not investigate an intent expressed only orally in Congress. Since the act does not define or give examples of personal bias or prejudice, the construction by the courts, although admittedly strict, is difficult to attack. Some meaning must be given to the word "personal."

The idea of allowing litigants the power of automatic rejection of the judge

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States, 14 F. 2d 369 (C.C.A. 8th, 1926), did not report the statements of the affidavit but merely held that if the affidavit is in proper form the judge is to proceed no farther.

[12] Berger v. United States, 255 U.S. 22, 34–35 (1920).

[13] The effectiveness of these restraints where a judge has been merely "misquoted" may be open to question.

[14] Berger v. United States, 255 U.S. 22, 35 (1920).

[15] 46 Cong. Record 306, 307, 2626–30 esp. 2629 (1911). In the discussion prejudice was referred to as "taking sides," which would conceivably include prejudgment of the merits.

[16] Craven v. United States, 22 F. 2d 605, 607 (C.C.A. 1st, 1927), cert. den. 276 U.S. 627 (1927), states that the word "personal" characterizes the prejudgment guarded against and is "the significant word" of the statute.

scheduled to preside has not been popular with the judiciary.[17] Judge Yankwich manifested this sentiment in stating the seldom-expressed view that a judge has an affirmative duty to stay in a case even though his impartiality has been challenged by an insufficient affidavit.[18] He quoted *United States v. Buck*,[19] which vigorously declared that a judge is the representative of the sovereign, not of the parties, and should not abandon his trust merely because one of the parties is opposed to him. This position has some force. Since judges are an established part of the mechanism for obtaining justice, litigants taking the benefits of the system must also accept individual differences among judges. To insure public respect for the judiciary, any federal judge should be presumed capable of administering a fair trial in any case until his acts indicate otherwise. If district judges were to step aside on insufficient affidavits, their rank would be similar to that of paid referees or jurors, whom parties may pick and choose. It was such "shopping for a judge" that Judge Yankwich wanted to prevent.

But although Judge Yankwich's opinion implies that only personal enmity could under any circumstances result in an unfair trial, it would seem that an expression of opinion on the merits of a case by a judge could be strong enough to entitle a litigant to some form of relief.[20] First, it demonstrates a lack of open-mindedness toward a cause, an adverse leaning without just grounds or before complete knowledge of the facts. Although impersonal, such an opinion impairs part of the fundamental right to a fair trial—the right to be tried by a judge who is reasonably free from bias.[21] Second, it impairs the appearance of a fair trial and a litigant's confidence that justice will be done. *Whitaker v. McLean* states, "The policy underlying Section 21 is that the courts of the United States 'shall not only *be* impartial in the controversies submitted to them, but shall *give assurance* that they are impartial'; i.e., shall *appear* to be impartial."[22] But opinions vary as to what expressions by a judge lead to a reasonable inference that he is incapable of conducting a fair trial. Judge Yankwich, in the present case, maintains that a judge should not have to "padlock his civic conscience and deny himself the right of a free man to express his views on civic or governmental matters in the privacy of a friend's home." A Supreme Court justice has said, "While 'an over-speaking judge is no well-tuned cymbal,' neither is an

[17] Judge Yankwich pointed out that since the enactment of Section 21 in 1912, courts have sought to protect federal trial judges against the one-sidedness of the procedure. He compared it unfavorably with the California practice, which provides for counter-affidavits by the judge and their submission to another judge. Cal. Code Civ. Proc. (Hillyer-Lake, 1947) § 170.5.

[18] In Saunders v. Piggly Wiggly Corp., 1 F. 2d 582 (D.C. Tenn., 1924) the judge withdrew from the case even though he found the affidavit insufficient.

[19] 18 F. Supp. 827 (Mo., 1937).

[20] See Leonard v. Wilcox, 101 Vt. 195, 219, 220, 142 Atl. 762, 772 (1928), where the judge had said that no matter what evidence was presented in the second trial of the case, his decision would be the same.

[21] Whitaker v. McLean, 118 F. 2d 596 (App. D.C., 1941).

[22] Ibid. (italics added). See King v. Sussex Justices, [1924] 1. K.B. 256, 259, stressing that justice should "manifestly" be done.

amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."[23] On the other hand, one state court has warned that a judge should never commit himself upon any question either of fact or of law which is likely to come before him.[24] Although most states do not enforce this strict standard,[25] some have limited judicial expression by disqualification statutes providing for automatic change of venue.[26] A more flexible view which would still provide protection for litigants was taken in *Mitchell v. United States:* "It is the duty of all courts to guard against an *appearance* of prejudice which might generate in the minds of litigants *a well-grounded belief* that the presiding judge is personally biased or prejudiced *against their cause.*"[27] This is similar to the "fair support" test in the Berger case. Such a test of sufficiency, unlike that applied by Judge Yankwich, would not preclude disqualification for prejudgment of the merits of a case.

The problem under any disqualification procedure lies in determining when the danger of a partisan trial outweighs the danger of obstructing the administration of justice. It is submitted that a litigant deserves relief whenever he can show a well-grounded belief of a lack of openmindedness by the judge, whether based on expressions of personal or of impersonal sentiments. The wording of Section 21 failed to provide such relief, according to the hardly assailable construction adopted in *Cole v. Loew's, Inc.* and supporting decisions. Instead of permitting the judge whose impartiality has been questioned to decide whether his alleged acts have demonstrated bias, a more satisfactory result could be obtained by submitting the question to a second district judge. Such a procedure is not prohibited in the act and was described in *Craven v. United States* as "a fitting and common practice."[28] Under the prevailing view a litigant in the federal courts has little hope of using the section unless he can show evidence of personal animosity, regardless of how much unfriendliness the judge has shown to his cause. The section thus applies only to a comparatively rare situation and is relatively ineffective in some cases where there is an appearance of partiality.

EFFECT OF TAFT-HARTLEY UNION REQUIREMENTS ON STATE ANTI-INJUNCTION ACT

About 100 employees of the Smith Cabinet Mfg. Co., of Salem, Indiana, went on strike to force the company to recognize Local 309, United Furniture Workers of America (CIO), as their bargaining representative. Although aware

[23] Justice McReynolds, dissenting, in Berger v. United States, 255 U.S. 22, 42 (1920).

[24] See Crawford v. Ferguson, 5 Okla. Cr. 377, 387, 115 Pac. 278, 282 (1911).

[25] Fishbaugh v. Fishbaugh, 15 Cal. 2d 445, 101 P. 2d 1084 (1940); Bradburn Motors Co. v. Moverman, 63 R. I. 67, 7 A. 2d 207 (1939); King v. Grace, 293 Mass. 244, 200 N.E. 346 (1936).

[26] Ariz. Code Ann. (1939) §§ 21–107; Colo. Stat. Ann. (Michie, 1935) c. 170 § 1; Ind. Stat. Ann. (Burns, 1933) §§ 2-1401, 2-1404, 9-1301; Mich. Stat. Ann. (Henderson, 1936) c. 27.466; Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 8868.

[27] 126 F. 2d 550, 552 (C.C.A. 10th, 1942) (italics added).

[28] 22 F. 2d 605, 606 (C.C.A. 1st, 1927).