

intended object of assuring that justice is properly administered, free from bias or influence.¹¹

The statute under discussion¹² refers to judges or justices or other persons holding court eo nomine.¹³ It does not extend to administrative officers who happen to perform an act requiring deliberation and sound judgment.¹⁴

§ 43. Effect when judge disqualified under statute.

A judge disqualified for any of the reasons set forth in the statute,¹⁵ or a court of which such a judge is a member, is without jurisdiction, and all proceedings had before such a judge or court are void.¹⁶ In that situation, jurisdiction cannot be conferred by consent.¹⁷ Such a judge is even incompetent to make an order in the case setting aside his own void proceedings.¹⁸ It is not necessary, however, that a judgment rendered under such circumstances be set aside by an appellate court,¹⁹ such a disposition

11. *Oakley v Aspinwall*, 3 NY 547.
People ex rel. Union Bag & Paper Corp. v Gilbert, 143 Misc 287, 256 NYS 442, affd 236 AD 873, 260 NYS 939.
Rivenburgh v Hennessy, 4 Lans 208.

12. *Judiciary L § 14.*

13. *Wilcox v Supreme Council, R. A.* 210 NY 370, 104 NE 624.
O'Reilley v Kingston, 114 NY 439, 21 NE 1004.

14. *Foot v Stiles*, 57 NY 399.

The statute has no application to assessors. *O'Reilley v Kingston*, 114 NY 439, 21 NE 1004; *People ex rel. Howlett v Syracuse*, 63 NY 291.

15. *Judiciary L § 14.*

As to the statutory reasons for disqualification, see § 42, supra.

16. *People v Connor*, 142 NY 130, 36 NE 807.
Fitzgerald v Wells, 9 AD2d 812, 192 NYS2d 719.
Loeb v Nassau Electric R. Co. 240 AD 912, 267 NYS 839.

The statutory prohibitions are absolute and constitute a disqualification of the judge or justice which deprives him of jurisdiction. *Di Lodovico v Dotson*, 1 Misc 2d 505, 151 NYS2d 469.

In view of his disqualification, a county judge could not decide whether or not the matter before him was res judicata, and he lacked the capacity to make the order appealed from. *People v Burgett*, 15 AD2d 873, 225 NYS2d 261.

Annotation:

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

17. *Oakley v Aspinwall*, 3 NY 547.
People v Whitridge, No. 2, 144 AD 493, 129 NYS 300.
Di Lodovico v Dotson, 1 Misc 2d 505, 151 NYS2d 469.

18. *People v Whitridge*, No. 2, 144 AD 493, 129 NYS 300.

19. *Elmira Realty Co. v Gibson*, 103 AD 140, 92 NYS 913.

properly may be made by the court originally entertaining the proceeding, provided, of course, that the disqualified judge does not sit therein.²⁰

The disqualification of the judge cannot be waived by the parties to the action or proceeding.¹ However, there is some authority recognizing that an objection to a judge because of his disqualification may be lost by the failure to assert it in the trial court.² And, by statute, an objection to the power of a surrogate to act, based upon a disqualification, may be waived by an adult party to a special proceeding unless it is taken at or before the joinder of issue by that party, or, where an issue is not framed, at or before the submission of the matter or question to the surrogate.³

§ 44. Relief from bias or prejudice unconnected with statutory grounds.

Bias or prejudice which is not connected with the statutory⁴ grounds does not work an immediate disqualification of a judge.⁵

20. *Oakley v Aspinwall*, 3 NY 547.
People ex rel. Union Bag & Paper Corp. v Gilbert, 143 Misc 287, 256 NYS 442, affd 236 AD 873, 260 NYS 939.
Matthews v Noble, 25 Misc 674, 55 NYS 190, mod on other grounds 39 AD 655, 59 NYS 1110.

1. *Re Bingham*, 127 NY 296, 27 NE 1055.
Oakley v Aspinwall, 3 NY 547.
People v Wright, 16 AD2d 743, 227 NYS2d 217.
Seaward v Tasker (Sup) 143 NYS 257, revd on other grounds 171 AD 964, 156 NYS 243.
Kane v Hutkoff, 38 Misc 678, 78 NYS 262, revd on other grounds 81 AD 105, 81 NYS 85.
Murdock v International Tile & T. Co. 14 Misc 225, 35 NYS 668.

Annotation:

Waiver of disqualification of judge. 5 ALR 1588, 73 ALR2d 1238.

2. *People v Owen*, 205 Misc 415, 128 NYS2d 602.

Although by the rules of the Municipal Court of the City of New York, a judge who had made a conciliation effort was prohibited from presiding at the trial without the consent of the parties, a party by proceeding to trial and participating therein waived the right to assert objections to the judge's qualifications on appeal from an adverse determination on the merits, even if the party had entered timely objections to the judge's qualifications. *Hodge v 117 Jefferson Corp.* 39 Misc 2d 92, 239 NYS2d 387.

3. *Surr Ct Act § 7.*
Re Carter, 193 AD 356, 184 NYS 40, per opinion by Kiley, J.

4. *Judiciary L § 14.* As to the statutory grounds, see § 42, supra.

5. § 52, infra.

However, as previously pointed out, a judge may, and frequently will, refrain from trying a case even though the claims advanced by the opposing parties do not show that he is legally disqualified.⁶ If, after the determination in a case, it is contended that the judge was biased therein, such contention may be made the ground of an appeal, notwithstanding there was no statutory disqualification.⁷ In such a case, the inquiry would be whether there was bias and if it affected the result to the detriment of the one claimed to have been aggrieved; if it did not exist, or if, existing, it did not unjustly affect the result, it would be no ground for a successful appeal.⁸ If, on the other hand, bias is shown to have affected the result, the appellate court may order a new trial before another judge.⁹

§ 45. Disqualification as yielding to necessity.

The view has been taken that a judge may act in a proceeding wherein he is disqualified by interest, relationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding.¹⁰ So, where the constitution gave to parties an appeal to the chancellor from all

6. § 41, supra.

Forms:

Allegation of bias of judge. 12 AM JUR PL & PR FORMS 12:49-12:52.

Counteraffidavit denying bias or prejudice of judge against party. 12 AM JUR PL & PR FORMS 12:61.

7. *Fitzgerald v Wells*, 9 AD2d 812, 192 NYS2d 719.

People ex rel. Watkins v Lennon, 206 AD 266, 200 NYS 510.

People v Naimark, 154 AD 760, 139 NYS 418.

8. *Connolly v Scudder*, 222 AD 591, 227 NYS 47, mod on reargu on other grounds 222 AD 604, 227 NYS 60, revd on other grounds 247 NY 401, 160 NE 655.

9. *Sherk v Catena*, 235 AD 686, 255 NYS 315.

10. *Re Ryers*, 72 NY 1.

Re Leefe, 2 Barb Ch 39.

When necessity and statutory provisions require a person to act in a judicial capacity, either alone or as a member of a board, in order to prevent injustice or maintain discipline in the department of which he is a member, action taken by him is not invalidated because he is both judge and accuser, or passes upon a question of fact about which he has personal knowledge. When the necessity does not exist, the opposite rule prevails. *People ex rel. Hayes v Waldo*, 212 NY 156, 105 NE 961, affg 159 AD 901, 143 NYS 1138.

Annotation:

Necessity as justifying action by judicial or administrative officer otherwise disqualified to act in particular case. 39 ALR 1476.

inferior equity tribunals, and the legislature had made no provision authorizing any other person to sit for him in a case where that officer was related to one of the parties, the chancellor was bound to hear the appeal, even though a near relative was personally interested.¹¹ However, since the rule permitting action by a disqualified judge where no other is competent to act is an exception, enforced by necessity, to a rule resting on sound public policy, its application in any case can be justified only by strict and imperious necessity, a disqualified judge not being entitled to act if it is possible to secure another judge to sit in his place.¹² Indeed, examination of the cases where the argument of necessity, based upon the common welfare, has been given weight, shows that they are confined to a narrow field, and that the right to a hearing before a judge who has not determined the issue in advance has in no case been denied on such ground where a determination of guilt may result in a deprivation of liberty or property.¹³ Moreover, since the courts have declared that the disqualification of a judge for any of the statutory reasons deprives him of jurisdiction,¹⁴ a serious doubt exists as to the applicability of the necessity rule in cases where the judge is disqualified under the statute.¹⁵

B. GROUNDS

§ 46. Generally.

Where the grounds which will operate as a disqualification of the judge are expressly set out in the Constitution or in a statute, such provisions are held to be exclusive, and no other causes than those set out will work an immediate categorical disqualification.¹⁶ So, with respect to the statute setting out the grounds for the disqualification of judges generally,¹⁷ the courts, while taking the view that it should be liberally construed to effectuate its purpose,¹⁸ have indicated a reluctance to engraft new disqual-

11. *Re Leefe*, 2 Barb Ch 39.

15. § 42, supra.

12. *Re Ryers*, 72 NY 1.
Paddock v Wells, 2 Barb Ch 331.
Converse v McArthur, 17 Barb 410.

16. *Davis v Seaward*, 85 Misc 210, 146 NYS 981, affd 171 AD 963, 156 NYS 242.

Truesdell v Winne, 44 Misc 451, 90 NYS 155.

13. *Sharkey v Thurston*, 268 NY 123, 196 NE 766.

17. Judiciary L § 14.

14. § 43, supra.

18. § 42, supra.