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DISQUALIFICATION ON THE GROUND OF BIAS AS APPLIED TO ADMINISTRATIVE TRIBUNALS

The problem of disqualification of a judge or a person exercising "judicial" functions, on the ground of bias, is comparatively speaking a very modern one. Indeed, the English law need not be traced back beyond 1866, when the decision of Blackburn J. in *Regina* v. *Rand*,[1] laid the foundation of all the modern law on the subject. Since that time, decisions, relatively few in number, have modified slightly the principles there laid down, but in the main, the dictum of Blackburn J. is regarded as being the *locus classicus* on the question. The subject has received surprisingly little attention from legal writers and legal periodicals, there apparently being only one discussion of the English law.[2] The author of that article limited himself to the problem as applied to courts of justice, without touching the question of how the law as laid down applied to administrative tribunals. Any writing on this latter part of the question is even more difficult to find, and with the exception of a short section in Robson, "Justice and Administrative Law",[3] we may proceed on the basis that writing on this part of the subject is non-existent.

Faced with this dearth of discussion, it is submitted that the best way to unearth the basic principles of law from the all too few cases reported, will be to examine the dicta of the judges in certain of the decisions, and attempt to draw some general conclusions therefrom.

The problem centres around the venerable old latin maxim, "Nemo debet esse judex in propria causa", a rough translation of which is "No person shall be a judge in his own cause". While this paper will deal, in the main, with the application of

[1] (1866), L.R. 1 Q.B. 230.

[2] See "Disqualification of Judges on the Ground of Bias", 41 Harvard Law Review 78. Short discussions of the American law may also be found in 20 Columbia Law Review 594, and 36 Michigan Law Review 985.

[3] See pages 58–66.

the maxim to Administrative Tribunals, for purposes of comparison and completeness, it will first be necessary to examine the existing state of the law as applied to the Courts of Justice.

(1) *The Law of Bias in Relation to the Courts of Justice*

As stated above, the law on this subject originated, to all intents and purposes, in the year 1866, when the case of *Regina* v. *Rand*,[4] was decided. In that case, by the Bradford Waterworks Act, 1854, a waterworks company was empowered to take the water of certain streams, but it was enacted that they should not take those flowing into the Harden Beck without the assent of the millowners on that beck, until it had been certified by the justices, that a reservoir, called Doe Park reservoir, had been completed and filled with water of a given capacity. The company was required to give ten days' notice to the millowners before applying for the certificate, to the intent that they might oppose the granting of it. By an Act of the same year, the municipal corporation of Bradford was empowered to purchase the Bradford Waterworks, for the benefit of the borough, and they did so. Thereafter, the municipal corporation duly gave notice of the intention to apply for the certificate of the justices. The granting of the certificate was opposed, but the justices, after hearing evidence and making an elaborate enquiry, decided in favour of the municipal corporation and granted the certificate. A hospital and a friendly society had invested part of their funds in bonds of the Bradford Corporation, and these bonds were taken in the names of trustees. Of the justices who sat on the application for the certificate, one was a trustee of the society, and one a trustee of the hospital. Neither of the justices had, nor by any possibility could have, any pecuniary beneficial interest in these bonds, but no doubt the security of their *cestui qui* trusts would be improved by anything improving the borough fund and anything improving the waterworks, after they became the property of the corporation, would produce that effect. A rule was obtained for a *certiorari* to bring up this certificate to be quashed on the ground that the justices who granted it were interested in the result. The judgment of the Court (Cockburn C.J., Blackburn and Shee JJ.) was delivered by Blackburn J., in the course of which he said; "There is no doubt that any direct pecuniary interest, however small, in the subject of the inquiry, does disqualify a person from acting as a judge in the

[4] (1866), L.R. 1 Q.B. 230.

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 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 those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. 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 for 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; but in the present case there is no ground for doubting that the justices acted perfectly bona fide; and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest; and we think that *Regina* v. *Dean of Rochester*,[5] is an authority, that circumstances from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest."

It would thus appear that there are two distinct divisions of the problem. On the one hand, where a judge has a financial interest in the result, he is disqualified *ipso facto*, from sitting on the hearing of the case. A bias is conclusively presumed in such circumstances. Any order made while he is sitting, or indeed, after he has sat on the case, is void. On the other hand, where it is alleged that a judge is biased on other grounds, it is necessary to prove that there is a real likelihood of bias. It is not necessary to show that there really was a bias, in the mind of the judge, but merely that there was a real likelihood. In fact, once it is shown that there is such likelihood, it is submitted that no amount of evidence showing that the judge in fact is impartial, would allow him to sit.

An illustration of a case where it was alleged that the tribunal was biased, because one member had an interest, other than a financial one in the result, may be found in *The Queen* v. *Huggins*.[6] In that case, the accused was convicted before six justices, for having acted as a pilot, without being licensed so to do. One of the justices, who registered the conviction had been a licensed pilot for 43 years. Huggins was what is termed a "turn pilot", never being in the steady employ of a single ship owner, while the justice was a "choice pilot", *i.e.*, regularly

[5] 17 Q.B. 1, 20 L.J.Q.B. 467.
[6] [1895] 1 Q.B. 563.

employed beforehand by certain shipowners, to pilot all their ships. It was therefore not likely that their interests would ever be in conflict. A *certiorari* was obtained to bring up the conviction to be quashed. Wills J., in the course of his judgment stated; "The question is whether there was a reasonable apprehension of bias. It appears that Martin (the justice) belongs to a small class of privileged persons for whose protection these proceedings were taken. Under those circumstances I cannot help tninking that it would not be in the general interests of justice that the conviction should be allowed to stand. It is impossible to overrate the importance of keeping the administration of justice by magistrates clear from all suspicion of unfairness. Suppose that all these six justices had been licensed pilots, or suppose, on the other hand, that they had all been unlicensed pilots, in neither case would any one venture to say that the tribunal would have been a fair one. But if that be so, then the objection must equally exist when only one out of six is a licensed pilot. It is safer to enlarge the area of this class of objection to the qualification of justices than to restrict it."

Where a person acts as both prosecutor and judge in the same case, it is clear that there is a reasonable apprehension of bias. To say that such a person would not be interested in securing a conviction, would be to hold too high an opinion of the integrity of mankind. While it is true that in such circumstances a man may try his utmost to view the case with an impartial eye, yet nonetheless, to an independent reasonable man, viewing the case from the outside, there would be an appearance of a likelihood of bias, and in such circumstances the courts have declared that the prosecutor is disqualified from sitting as a judge.[7] If he does so sit the conviction will be quashed.

Also, if there would appear to be an animosity against the accused by the judge, then he is disqualified from sitting. In *Rex* v. *Handley*,[8] a magistrate was disqualified from sitting on the decision of a case against an accused whom he had assaulted

[7] See *Regina* v. *Fraser*, 9 T.L.R. 613, where a magistrate who was a member of a religious body, one of the objects of which was to oppose the renewal of licences, was present at a meeting of the body, at which a solicitor was appointed to oppose the granting of a licence. The magistrate sat on the hearing of the renewal application, and the order made was quashed on appeal since the magistrate was disqualified by reason of bias. Also, see *Nichols* v. *Graham*, [1937] 2 D.L.R. 765, where a magistrate, being a member of the City Safety League which was engaged in a vice drive, was held disqualified from hearing a case against a prostitute.

[8] (1921), 61 D.L.R. 656.

one month previously. In *Cottle* v. *Cottle*,[9] where a husband had deserted his wife, and the wife had sued out a summons for desertion, a magistrate was prohibited from sitting, since the wife's mother, who knew the magistrate, had told the husband that "he would really be in for it" when he came on before him. There was no evidence of bias whatsoever, but an impression of bias had been created in the mind of the husband, and such was sufficient to disqualify the magistrate. The administration of justice must be kept clear of any suspicion that the accused will not be dealt with by an impartial tribunal. The test, as expressed by Cave J.,[10] would appear to be, "what would be likely to endanger the respect or diminish the confidence which it is desirable should exist in the administration of justice?"

This cursory examination of the law of bias relating to the Courts of Justice may be concluded by the following short summary. A judge is disqualified from sitting on the ground of bias, if he has personally a pecuniary interest or an interest capable of being measured pecuniarily. In such cases the law raises a conclusive presumption of bias. For reasons of policy, which hardly require explanation, it is not thought convenient, where there is such an interest, to go into the question whether the judge in fact acted partially or impartially. A bias is presumed from the mere existence of the interest. Where the objection is not on the ground of pecuniary interest, but in the nature of a challenge to the favour, there is no such presumption as arises in the case of pecuniary interest, but the question is whether there is a real likelihood, arising from the circumstances, such as would give rise to a challenge to the favour, that the judge would have a bias. This matter is judged as a reasonable man would judge of any matter in the conduct of his business.[11] The interest must be substantial, so as to make it highly probable that he has a real bias; mere possibility of bias is not enough to disqualify him.[12] Relationship is not in itself a disqualification, the same test being applied as in the case of all other interests, with the exception of those pecuniary in their nature.[13]

[9] [1939] 2 All E.R. 535.

[10] In *Regina* v. *Fraser*, 9 T.L.R. 613.

[11] See Vaughan Williams L.J. in *Rex* v. *Sunderland Justices*, [1901] 2 K.B. 357.

[12] *Campbell* v. *Walsh* (1910), 40 N.B.R. 186, 18 C.C.C. 304.

[13] *Ex Parte Grieves* (1890), 29 N.B.R. 543; *Rex* v. *Steele*, 26 O.R. 540; *Rex* v. *Langford*, 15 O.R. 52; *Re Holman*, 12 N.S.R. 375; *Rex* v. *Biggar*, 37 N.B.R. 372, 1 E.L.R. 352; *Campbell* v. *McIntosh* (1872), 1 P.E.I. 473.

Where bias is alleged and the party is aware of it, he must take objection to the jurisdiction at the outset. If he raises no objection until after the hearing, the objection is waived, and cannot be raised thereafter.[14] This would appear to be a principle not in accordance with general law. We have seen that any decision rendered by a judge, who is disqualified from sitting because of bias, is void, a mere nullity.[15] It is difficult to understand how a person by appearing and raising no objection, can be held to waive an objection, which would otherwise render the proceedings a nullity. It being in the public interest that cases be heard by unbiased judges, it is submitted that the rule with respect to waiver should be the other way.

(2) *The Law of Bias in Relation to Administrative Tribunals*

Having thus examined the law as applied to Courts of Justice, let us now turn to the question that will concern this paper, namely, whether the law of bias, as thus stated, applies equally to Administrative Tribunals. If the law does apply, to what extent, if any, is there any difference in its application? Is it of any import that the tribunal is exercising "judicial", "quasi-judicial", or "administrative" functions?

The proposition of law was laid down in the recent case of *Re York Township By-law*,[16] that the law of bias in relation to administrative tribunals, applies only to functions of a "judicial" or "quasi-judicial" nature, and not to functions of an "administrative" nature. In that case, a change was considered in the sewer system of York Township, and a referee was appointed to value, adjust and determine all claims between the respective parts of the township. The referee was a tax-payer in one of the districts to be affected by the change. He heard parties on a formal hearing and made a report on his conclusions, such report being in no way binding on the Ontario Municipal Board to whom it was submitted. The Court consisting of Riddell, Fisher and Gillanders JJ.A., held that the referee was acting in an administrative, rather than a judicial capacity, since his report was of no binding effect, and that he was thus not disqualified by reason of bias, the assumption apparently being that the law of bias does not apply to "administrative" functions of an administrative tribunal. It is true that such remarks were

[14] *Rex* v. *Steele*, 26 O.R. 540; *Rex* v. *Huggins*, [1895] 1 Q.B. 563; *Re Hanlan*, 50 O.L.R. 20.

[15] *Regina* v. *Hertfordshire Justices* (1845), 6 Q.B. 753; *Regina* v. *Rand* (1866), L.R. 1 Q.B. 230.

[16] [1942] 4 D.L.R. 380.

merely *obiter dicta* on the part of Fisher and Gillanders JJ.A., since they decided that the interest of a ratepayer was not a sufficient ground for disqualification even in "judicial" proceedings,[17] and thus certainly not in "administrative" proceedings. However, it is submitted that the decision is a sound one and should be followed in future.

Any exhaustive definition of the terms "administrative", "judicial" and "quasi-judicial", is not within the scope of a paper of this nature. However, we may shortly indicate the distinction between them. An administrative function, is one that does not affect the public generally at all, being usually a ministerial matter affecting the internal regulation of the Board only. A quasi-judicial function, on the other hand, is one, in the exercise of which the Board is acting very like a court, but is actually deciding a question on the ground of policy. A judicial function is one in which the Board is doing exactly what a court usually does, *e.g.* The Workmen's Compensation Board deciding whether an accident arose in the course of employment.

Since an administrative board is always bound to give a hearing, when exercising quasi-judicial functions,[18] and is never bound to give a hearing in the exercise of administrative functions, an examination of the cases in which a hearing is necessary may be of assistance in delimiting the scope of the terms "quasi-judicial" and "administrative". There are generally three classes of cases in which an administrative body is bound to give a hearing, and in which a failure to do so will be a ground for setting the decision aside; (a) where the authority that makes the decision must by statute decide between two parties, and the issue to be decided normally involves questions of mixed policy, law and fact;[19] (b) where no body is deciding anything, but an authority is going to expropriate property or interfere with the common law liberties of a subject;[20] (c) where a ruling

[17] A point about which there would appear to be some doubt. See *In re Wilkins* (1911) 41 N.B.R. 141; *Rex* v. *Gaisford,* [1892] 1 Q.B. 381; *Ex Parte Workington Overseers,* [1894] 1 Q.B. 416; *Rex* v. *Bolingbroke,* [1893] 2 Q.B. 347.

[18] As to the nature of the hearing generally see *St. John* v. *Fraser,* [1935] S.C.R. 441, Davis J.; *General Medical Council* v. *Spackman,* [1943] A.C. 627; *Rex* v. *Pantelidis,* [1943] 1 D.L.R. 569; *Morgan* v. *U.S.* (1935), 298 U.S. 468; *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q.B.D. 712; *Board of Education* v. *Rice,* [1911] A.C. 179.

[19] See *Regina* v. *Rand* (1866) L.R. 1 Q.B. 230 where the justices were empowered by statute to decide between the millowners and the water authority as to whether the reservoir had been completed or not.

[20] *Cooper* v. *Wandsworth Board of Works,* 14 C.B.N.S. 180; *Rex* v. *London County Council,* [1918] 1 K.B. 68. In the former case the authority expropriated plaintiff's property without a hearing. In the latter, the

that will be given is not one deciding between two persons or expropriating property, but is a decision by a body which says that the authorities in the first or second class above may act.[21] All of the above are functions "quasi-judicial" in their nature, and to all of such functions, the law of bias as hereinafter set out, would apply. In any case in which a hearing is necessary, such hearing must be a fair one. The authority conducting the inquiry, as Lord Haldane L.C. said in *Local Government Board* v. *Arlidge*,[22] "must act judicially [and it] must deal with the questions referred to [it] without bias".

Having thus determined that the law of bias applies only to "judicial" or "quasi-judicial" functions of administrative tribunals, let us now examine the principles of law with respect to bias, as laid down, in relation to these functions.

In the case of *The Queen* v. *Huggins*,[23] Wills J. said on this part of our discussion; "In these cases there is always a certain degree of difficulty owing to the confusion which has arisen from a failure to clearly distinguish . . . between cases in which the decisions impugned were those of regular judicial tribunals, and those in which they were the decisions of an administrative rather than a judicial body, but were nevertheless opposed to the ordinary notions of justice. The principles which are applicable to these . . . classes of cases are not in all respects identical". And Wright J., who also delivered a judgment in the case, said at p. 565; "Some of the cases in which the court has been asked to interfere are cases of decisions by administrative bodies, such as the London County Council and others. These are very different from cases of decisions by judicial tribunals. In my judgment the court ought to be slow to interfere in the former, but in the latter ought to interfere on much slighter grounds."

It would thus appear that the law of disqualification on the ground of bias is different in its application to administrative bodies, in that it is not as strict, as the law applied to judicial tribunals. In what respects is it less strict? That would appear to be our problem.

The principle that one shall not be judge in his own cause is deeply rooted in all systems of jurisprudence. The English

defendant council refused to allow complainant to sell leaflets in a park, without hearing her side of the story. Both decisions were set aside on *certiorari*.

[21] See *Hutton* v. *Attorney General*, [1927] 1 Ch. 427; *Howell* v. *Addison*, [1943] 1 All E.R. 29. And note that there is no right to a hearing where the decision is one of high governmental policy as in the *Hutton* case.

[22] [1915] A.C. 120.

Courts have adhered to it with strictness and have vitiated decisions rendered by quasi-judicial bodies when one or more of the members of the tribunal were connected with the prosecution or were otherwise interested in the case.[24]

In *Frome United Breweries Co. Ltd.* v. *Justices for the County Borough of Bath,*[25] Viscount Cave L.C., holding invalid a revocation of a licence by the authorities because some of the members of the tribunal had aided the prosecution, said: "If there is one principle which forms an integral part of the English Law, it is that every member of a body engaged in judicial proceedings 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 a dispute, he is in such a position that a bias must be assumed, he ought not to take part in the decision or even sit upon the tribunal. This rule has been asserted not only in the case of the courts of justice and other judicial tribunals, but in the case of authorities which though in no sense to be called courts, have to act as judges of the rights of others. . . . From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as judge, and if he does so the decision of the whole body will be vitiated."

The first case of importance, applying the law of bias as set out in *Regina* v. *Rand,*[26] to administrative tribunals was *Leeson* v. *General Council of Medical Education and Registration.*[27] In that case the General Council acting under the powers of the Medical Act, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect and removed his name from the register of medical practitioners. The proceedings were instituted by the managing body of a company called the Medical Defence Union, whose object was to protect the characters of medical practitioners and to suppress and prosecute unauthorized practitioners. Two out of twenty-nine persons who conducted

[23] [1895] 1 Q.B. 563.

[24] *Frome Breweries* v. *Bath Justices,* [1926] A.C. 586; *Queen* v. *London County Council,* [1892] 1 Q.B. 190; Robson, "Justice and Administrative Law", pp. 58–66.

[25] [1926] A.C. 586.

[26] (1866), L.R. 1 Q.B. 230.

[27] (1889), 43 Ch. D. 366. The case was applied and followed in *Allinson* v. *General Council of Medcial Education and Registration,* [1894] 1 Q.B. 750. In addition, the test as to bias in administrative tribunals, as set out in *Leeson's* case was adopted by the House of Lords in the leading case on the subject, *Frome United Breweries* v. *Bath Justices,* [1926] A.C. 586.

the inquiry were members of the Medical Defence Union, but not of the managing body of the union. Leeson, whose name was struck off the register, applied for a *certiorari* to set aside the proceedings on the ground that the two members of the Medical Defence Union were interested in the result, having filled the roles of both prosecutor and judge. The Court composed of Cotton, Fry and Bowen L.JJ. held, (Fry L.J. dissenting) that the body which held the inquiry was properly constituted and the decision should stand, the ground of their decision being that the two members of the Medical Defence Union, not being on the managing body of the Union, had no control, nor could they give any direction as to the bringing of complaints. Hence, while they were judges, they were not in fact, prosecutors. In substance and in fact, there could be no reasonable apprehension of bias.[28] Fry L.J. in his dissenting judgment said: "I think that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from the actual bias or prejudice of the judges but that they shall be free from the suspicion of bias or prejudice; and I do not think that subscribers to associations for the purpose of carrying on prosecutions can be said to be free from suspicion of bias or prejudice in the case of prosecutions instituted by the association to which they subscribe."

It is clear from that case, that where a person who has taken part in the judicial proceedings or has sat in the judgment on the case, has any pecuniary interest in the result, however small, the court will not inquire whether he was really biased or likely to be biased.[29] The court will say at once that it is against public policy that a person who has any monetary interest, however small,[30] in the result of the judicial proceedings, should take part in them as a "judicial" officer. There are, however, other relations to the matter of a person who is to be one of the "judicial" officers which may incapacitate him from acting as such, and the crucial question is, as put by Bowen L.J., whether in substance and in fact one of the judges has in truth been also an accuser. The question is one of

[28] Or as expressed by Lord Atkinson, in the *Frome Breweries* v. *Bath Justices*, [1926] A.C. 586, "is there, to an ordinary man with knowledge of the facts, a reasonable apprehension of bias."

[29] See the judgment of Bowen L.J., and also *Regina* v. *Rand* (1866), L.R. 1 Q.B. 230; *Rex* v. *Sutherland Justices*, [1901] 2 K.B. 357.

[30] See *In re Wilkins* (1911), 41 N.B.R. 141 (C.A.), where an arbitrator who was a tax-payer was disqualified from acting in a case concerning the value of property to be expropriated. Other cases where an interest as a rate-payer disqualified a "judicial" officer are *Rex* v. *Gaisford*, [1892] 1 Q.B. 381; *Rex* v. *Bolingbroke*, [1893] 2 Q.B. 347.

substance and fact in the particular case. If his relation is such that by no possibility he can be biased, then it seems clear that there is no objection to his acting. The question is not, whether in fact he was or was not biased. The court cannot inquire into that. The true test is somewhere between these two propositions.

In the administration of justice, whether by the recognized courts of law, or by persons who, although not a legal public court are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased. To use the language of Mellor J. in *Regina* v. *Allan*,[31] "it is highly desirable that justice should be administered by persons who cannot be suspected of improper motives". This phrase, on the basis of the decision in *Leeson's* case, may be too wide, since no one is above suspicion. The true test appears to be that the man's position must be such that in substance and fact, he cannot be suspected. So long as there is a reasonable apprehension of bias, the judicial officer will be prohibited from sitting,[32] or if a decision has been made by such officer, it will be set aside on *certiorari*.[33]

The Court in *Leeson's* case, while adopting the test that there must be a reasonable apprehension of bias to disqualify a judicial officer, concluded that there was not, in substance and in fact, such reasonable apprehension, in that case, because the two officers in question, while members of the investigating body, had in fact, no control over its actions or policies, since they were not on the managing committee. This test of "substance and fact" would appear to be different from the purely objective test as applied in the case of courts of justice. The test in the latter case is objective, and rightly so, since it is the confidence of the ordinary citizen in the administration of justice, that is sought to be retained. Perhaps, in the case of administrative tribunals, an objective test would be too onerous. Take for instance, a case where a "judicial" officer of an administrative tribunal, has, in his "administrative" capacity, become apprised of certain facts of a case, before it comes before him for decision. Objectively, this would appear to

[31] 4 B. & S. 915 at p. 926.

[32] *Regina* v. *Eli*, 10 O.R. 727; *Rex* v. *Handley* (1921), 61 D.L.R. 651. Quaere the statement of Masten J. in *Re Ashby*, (1934) O.R. 421. at p. 431" . . . as to bias, after a careful and diligent search through the digests and the text books, I can find no authority for granting prohibition on the ground that bias is feared".

[33] *Rex* v. *Handley* (1921), 61 D.L.R. 656; *Rex* v. *Sunderland Justices*, [1901] 2 K.B. 357.

create an apprehension of bias on his part, but to suggest that such should be a ground for disqualification of a "judicial" officer, would seriously hinder, if not make impossible the work of administrative bodies. Surely such a state of facts is similar to the case of a juryman, who has personal knowledge of the facts at issue in a case, and no one will be heard to say that such personal knowledge is sufficient to disqualify the juror.[34] It is submitted that the administrative test as to bias,[35] being one of whether in substance and in fact, there is a reasonable apprehension of bias, is a half-way course between the test as applied to courts, namely whether there is a reasonable apprehension of bias, and a test of whether the judge was biased in fact. If such is the case, then the law of bias is relaxed, when applied to administrative bodies, and this would appear to be in accord with the dicta above quoted from *The Queen* v. *Huggins*.[36]

We have seen, that where the "judicial" officer has a pecuniary interest in the matter, however small, he is disqualified from acting, without any inquiry being made into the question of whether he is likely to be biased or not. We have also seen, that where a man, in substance and in fact is both prosecutor and judge,[37] he cannot be allowed to act. What other interests are sufficient to disqualify the deciding officer?

It has been held, that where a judicial officer has strong views on certain issues, and has expressed such views on several occasions, such is not a ground for disqualifying the officer from sitting on a case involving the subject matter of such views, where his views as expressed were prejudicial to the interests of one party,[38] the assumption apparently being that the officer, when considering a single case, will be unbiased and unprejudiced, and will be guided in rendering a decision solely by the evidence.

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[34] For the American law on this point see *In Re Segal and Smith* (1937), 5 F.C.C. 3.

[35] While we have here adopted the test of bias as set out in *Leeson's* case in 1889, yet this was approved in the leading case of *Frome Breweries* v. *Bath Justices*, [1926] A.C. 586, and may be taken to be the authoritative test today.

[36] [1895] 1 Q.B. 563.

[37] See in addition to cases greviously referred to, *Nicholls* v. *Graham*, [1937] 2 D.L.R. 765.

[38] *Ex Parte Wilder* (1902), 66 J.P. 761 D.C.; *Montana Power Co.* v. *Public Service Comm.*, (D. Mont. 1935), 12 F. Supp. 946. But see *Rex* v. *Rand* (1913), 22 C.C.C. 147, where a magistrate was held to be disqualified from acting since it was proved that on various occasions he had made statements to the effect that he would convict a man if he thought he was selling intoxicating liquors, whether there was any evidence against him or not.

This would appear to be an irrational distinction. Where a judicial officer is held to be competent to act although he has expressed premature opinions on the merits of the case, and his views are hostile to one party, and yet not competent where he has a direct interest as a taxpayer,[39] an anomlous situation has been created. Certain facts will disqualify him merely because they raise a presumption of bias, while an actual showing of bias will not. This situation has to a certain extent been remedied in some American states by legislative enactment.[40]

American courts have attempted to draw a distinction in the application of disqualification because of bias, between cases where only law is in dispute, and cases in which the facts also are in dispute. In one case,[41] dealing with the jurisdiction of a Commissioner, who had been a member of an investigating committee which had formulated charges, to hear and determine the proceedings, the court said: "If this case were one in which the facts were not in controversy and in which the Commission was not required to exercise discretion, but only the application of principles of law to an admitted state of facts was involved, the rights of the respondents to an impartial and unbiased tribunal might be adequately safeguarded by a statutory right of appeal from the decision of the Commission. This case, however, involved facts which were in dispute and the respondents were entitled to an impartial and unbiased trial of those facts. Furthermore the case involved the exercise of discretion in the possible imposition of a penalty at the conclusion of the proceedings. . . . In other words, even if the facts in this case had been conceded and if the only question before the Commission had been that of degree of punishment, the respondents would certainly have been entitled under our form of government and the law of the land, to have that punishment fixed by a tribunal, none of the members of which was actuated by personal prejudice, bias or malice."

This, it is submitted, cannot be supported, at least in English law, on the basis of decided cases, and in addition is an undesirable distinction. The test concerning bias that has been adopted, is whether in substance and fact there is a reasonable apprehension of bias. Whether a tribunal is dealing with facts or law, there would still be the same apprehension of bias in the same set of circumstances. While the question of

[39] *In re Wilkins* (1911), 41 N.B.R. 141 (C.A.).

[40] See "Disqualification of Judges" (1920), 20 Columbia Law Review 594; *In Re Fox West Coast Theatres* (S.D. Cal. 1936), 25 Fed. Supp. 250.

[41] *In Re Segal and Smith* (1937), 5 F.C.C. 3.

what the tribunal is dealing with, facts or law, may be of aid in determining whether the apprehension of bias is reasonable or not, it should not in itself be ground for applying a different rule relating to disqualification because of bias. To say that a tribunal cannot be biased when dealing with a pure question of law would appear to be absurd. Few questions of law are so well settled that a strong bias would not swing the scales. At any rate, since the law relating to bias, is designed to uphold in the public mind a high opinion of the impartiality of our tribunals, any distinction in the application of the law, on the basis of the matters being dealt with by the tribunal is undesirable.

Let us now turn our attention to situations, where a tribunal, admittedly biased, is nonetheless allowed to sit in judgment of a case. Such situations are two in number. If the statute, setting up the tribunal, provides that certain officers, who at common law would be disqualified from sitting because of bias, shall sit on the tribunal, then those officers are qualified to sit whether they are biased or not, providing however that the type of bias complained of is the type covered by the statute. The statute has in fact created a biased body, and the person appearing before the tribunal has no right to object to the constitution thereof.[42] In an Ontario case,[43] an optometrist's registration certificate was revoked by the order of the Board of Examiners in Optometry, appointed by an Order in Council, under powers conferred by the Optometry Act.[44] It was objected that the members of the Board were commercial rivals of the appellant, and that the proceeding was not a bona fide exercise of the disciplinary power conferred by the statute, but was rather an attempt to crush a commercial rival. Masten J.A. held that the objection was fully answered by the fact that the Board was appointed by an Order in Council, in pursuance of statutory power. It is submitted that, if the Board in that case had been appointed other than by statute, the members would have been disqualified from sitting, as being members of the class for whose protection the proceedings were taken, as in *The Queen* v. *Huggins*.[45]

It must be remembered that the statutory appointment is only a full answer to disqualification at common law, if the ground of objection alleged by the complainant, is exactly the

[42] See Lord Summer in *Frome United Breweries* v. *Bath Justices*, [1926] A.C. 586.
[43] *Re Ashby*, [1934] O.R. 421.
[44] R.S.O. 1927, c. 215, as amended by 1931, 21 Geo. V, c. 45, s. 3.
[45] [1895] A.C. 563.

same as that covered by the statute. For instance, in the *Ashby* case,[46] if the objection had been that the "judicial" officer had assaulted the complainant on a previous occasion,[47] then it is submitted that the officer would have been disqualified from sitting. The statute is only an answer to any objection based on the fact that the deciding officers were commercial rivals of the complainant, any question of bias on other grounds being dependent on common law principles for its answer.

The second situation in which a tribunal is qualified to sit on the decision of a case, even though at common law it would be regarded as a biased tribunal, is that covered by the doctrine of *"ex necessitate"*. By the great weight of authority, a judge or an officer exercising judicial functions 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 his calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceedings.[48] The rule permitting action by a disqualified judge when no other is competent to act, being 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. It appears that the same rule applies to administrative officers who possess any powers of a judicial nature; that is, if there is anyone else who can act in the place of the disqualified person, or persons, the doctrine of necessity does not apply.[49]

If any member of the tribunal is disqualified on the ground of bias, and nonetheless sits on the decision, then such decision is a nullity and absolutely void, since the tribunal is improperly constituted.[50] This is so even though a majority of the members sitting were in favour of the decision, without reckoning the vote of the disqualified member. It is also of no effect that the latter party withdraws before the decision is made, if it appears that he has joined in discussing the matter with the other

[46] [1934] O.R. 421.

[47] See *Rex* v. *Handley* (1921), 61 D.L.R. 656.

[48] *Tupper* v. *Murphy*, 15 N.S.R. 173; *McNeill* v. *McGillvray*, 42 N.S.R. 133; *Dimes* v. *Grand Junction Canal Co.* (1852), 3 H.L. Cases 759; And see *Judges* v. *Attorney General of Saskatchewan*, [1937] 2 D.L.R. 209, affirming [1936] 4 D.L.R. 134 (P.C. where the Judges of Saskatchewan were held qualified on the basis of the doctrine of *"ex necessitate"* to determine the question as to whether they were liable to pay income tax on their salaries.

[49] *Re Ashby*, [1934] O.R. 421; *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch. D. 366.

[50] *Reg.* v. *Hertfordshire Justices* (1845), 6 Q.B. 753. And see the cases listed in 13 Mews 19.

members of the tribunal.[51] It is with this in mind that it is submitted that the case of *Re Hayward*,[52] was wrongly decided. In that case one of the members who sat on a Board of Examiners under the Optometry Act,[53] to determine whether or not to revoke the appellant's certificate of registration, had taken part in the gathering of evidence against the appellant to show that he had been guilty of unprofessional conduct. Kingstone J., while holding that the member was disqualified from sitting on the ground of bias, came to the conclusion after a perusal of the evidence that the decision had been a correct one, and did not declare the order of the Board a nullity, as the cases above quoted would indicate he should have done.

Other cases could be listed here, as examples of situations in which a judicial officer will be disqualified from sitting because in substance and fact, there is a reasonable apprehension of bias, like *Rex* v. *Sussex Justices*,[54] where a lawyer who was a clerk to one of the justices hearing a case, was acting indirectly for one of the parties to the controversy. He advised the justice as to the disposition of the case, and the decision was set aside on *certiorari* proceedings. Such examples are, however, merely applications of the test above set out, namely, is there in substance and fact a reasonable apprehension of bias, if the judicial officer in question is allowed to sit? Further instances would, it is submitted, serve no useful purpose that can not be gleaned from what has preceded.

The rule then would appear to be settled, as applied to administrative tribunals. We have seen that it is somewhat less strict than the rule as applied to the courts of justice. Views may differ as to whether this is desirable or not. Perhaps some would prefer the stricter rule as stated by Fry L.J. in *Leeson*'s case,[55] and approved by Davey L.J., in *Allinson*'s case,[56] (who while bound by the majority judgment in *Leeson*'s case, expressed his preference for the dissenting judgment of Fry L.J.). However, the law is clearly the other way, having received the approval of the House of Lords in the leading case on the subject, *Frome United Breweries* v. *Bath Justices*.[57]

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[51] See Lord Atkinson in *Frome United Breweries* v. *Bath Justices*, [1926] A.C. 586.
[52] [1934] O.R. 133.
[53] R.S.O. 1927, c. 215, as amended by 1931, 21 Geo. V, c. 45.
[54] [1903] 1 K.B. 131.
[55] (1889), 43 Ch. D. 366.
[56] [1894] 1 Q.B. 750.
[57] [1926] A.C. 586.