Suggested Materials for Plenary Session 6 October 2014
American Judges' Association
Annual Meeting and Educational Seminars
Golden Nugget Resort
Las Vegas, Nevada U.S.A.
Richard Glasson, Tahoe Justice Court

Avoiding Improper Ex Parte Communication
and
Disqualification of the Bench, Voluntary and Involuntary

1. Correspondence from N. Tourney

2. The Ballad of Judge Murphy or "Oy vey!"

3. In re Rebecca Ward

4. Judge Young and a search warrant

5. Brennan Center Recusal Reform

6. Model Code of Judicial Conduct (USA): ***http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf***
7. Ethical Principles for Judges (Canada): ***https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf***
8. USA and Canada, contrasted: ***http://www.americanbar.org/content/dam/aba/publications/judges_journal/2011sum_jj_ethics.authcheckdam.pdf***

9. Nevada Supreme Court Cases Regarding Disqualification

- ***a.*** *In re Petition to Recall Dunleavy*, 104 Nev.237 (1988)
- ***b.*** *Ainsworth v. Combined Ins. Co*., 105 Nev.237 (1989)
- ***c.*** ***PETA v. Bobby Berosini Ltd.*, 111 Nev. 615 ((1995)**
  http://www1.law.umkc.edu/faculty/levit/DefamationPrivacy/spring-2013/PETAvBobby.pdf
- ***d.*** *Valladeres v. District Court*, 112 Nev. 79 (1996)

e. *Hogan v. Warden*, 112 Nev. 79 (1996)
f. *Snyder v. Viani*, 112 Nev. 595 (1996)
g. *Allum v. Valley Bank of Nevada*, 112 Nev. 591 (1996)
h. *Martin v. Beck*, 112 Nev. 585 (1996)
i. *City of Sparks v. District Court*, 112 Nev. 952 (1996)
j. *Sonner v. State*, 112 Nev. 1328 (1996)
k. *Las Vegas Downtown Redev. Agy v. Hecht*, 113 Nev. 632 (1997)
l. *State, Dept of Transp. V. Barsy*, 113 Nev. 709 (1997)
m. *Nevius v. Warden*, 113 Nev. 1285 (1997)
n. *O'Brien v. State Bar*, 114 Nev. 71 (1998)
o. *Turner v. State*, 114 Nev. 682 (1998)
p. *City of Las Vegas Downtown Redev. Agy. v. 8th Judicial District Court*, 116 Nev. 640 (2000)
q. *Venetian Casino Resort v. Dist Ct.*, 118 Nev. 124 (2000)
r. *Towbin Dodge, LLC v. Dist Ct.*, 121 Nev. Adv. Rep. 27, 2005 Nev. LEXIS 31 (2005)
s. Many more to be found at: ***http://judicial.state.nv.us/Case%20Reference%202013.pdf***

10. Sample Disqualification Procedures:
    a. Tennesssee: ***http://tncourts.gov/rules/supreme-court/10b***
    b. Nevada:

Model Code of Judicial Conduct (USA): Rule 2.9: Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Judicial Independence Statement:

An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles:

1.Judges must exercise their judicial functions independently and free of extraneous influence.

2.Judges must firmly reject any attempt to influence their decisions in any matter before the Court outside the proper process of the Court.

3.Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary.

4.Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

COMMENT: Judges must, of course, reject improper attempts by litigants, politicians, officials or others to influence their decisions.They must also take care that communications with such persons that judges may initiate could not raise reasonable concerns about their independence. As the Honourable J.O. Wilson put it in A Book for Judges:

"It may be safely assumed that every judge will know that [attempts to influence a court] must only be madepublicly in a court room by advocates or litigants. But experience has shown that other persons are unaware of or deliberately disregard this elementary rule, and it is likely that any judge will, in the course of time, be subjected to ex parte efforts by litigants or others to influence his decisions in matters under litigation before him.

...

Regardless of the source, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected.This rule is so elementary that it requires no further exposition!

RULE 10B: DISQUALIFICATION OR RECUSAL OF A JUDGE; FILING AND DISPOSITION OF MOTIONS AND APPEAL.

The procedures set out in this Rule shall be employed to determine whether a judge should preside over a case.

Section 1. Motion Seeking Disqualification or Recusal of Trial Judge of Court of Record.

1.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this Rule.

1.02. While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.

1.03. Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.

1.04. A judge who recuses himself or herself, whether on the Court's own initiative or on motion of a party, shall not participate in selecting his or her successor, absent the agreement of all parties. With the agreement of all parties to the case, the judge may seek an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1). Otherwise, the presiding judge of the court shall effect an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2) or (3). If an interchange cannot be effected, or if the presiding judge is the recused judge, the presiding judge shall request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4).

NRS 1.230 Grounds for disqualifying judges other than Supreme Court justices.

1. A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.

2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

(a) When the judge is a party to or interested in the action or proceeding.

(b) When the judge is related to either party by consanguinity or affinity within the third degree.

(c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

3. A judge, upon the judge's own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias.

4. A judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case.

5. This section does not apply to the arrangement of the calendar or the regulation of the order of business.

[45:19:1865; A 1907, 25; 1927, 108; 1931, 247; 1937, 214; 1939, 255; 1931 NCL § 8407] + [45a:19:1865; added 1931, 247; 1931 NCL § 8407.01]—(NRS A 1957, 69; 1965, 551; 1969, 351; 1975, 608; 1977, 765)

NRS 1.235 Procedure for disqualifying judges other than Supreme Court justices. [Effective through December 31, 2014, and after that date unless the provisions of Senate Joint Resolution No. 14 (2011) are approved and ratified by the voters at the 2014 General Election.]

1. Any party to an action or proceeding pending in any court other than the Supreme Court, who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought. The affidavit of a party represented by an attorney must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Except as otherwise provided in subsections 2 and 3, the affidavit must be filed:

(a) Not less than 20 days before the date set for trial or hearing of the case; or

(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

2. Except as otherwise provided in this subsection and subsection 3, if a case is not assigned to a judge before the time required under subsection 1 for filing the affidavit, the affidavit must be filed:

(a) Within 10 days after the party or the party's attorney is notified that the case has been assigned to a judge;

(b) Before the hearing of any pretrial matter; or

(c) Before the jury is empaneled, evidence taken or any ruling made in the trial or hearing,

➥ whichever occurs first. If the facts upon which disqualification of the judge is sought are not known to the party before the party is notified of the assignment of the judge or before any pretrial hearing is held, the affidavit may be filed not later than the commencement of the trial or hearing of the case.

3. If a case is reassigned to a new judge and the time for filing the affidavit under subsection 1 and paragraph (a) of subsection 2 has expired, the parties have 10 days after notice of the new assignment within which to file the affidavit, and the trial or hearing of the case must be rescheduled for a date after the expiration of the 10-day period unless the parties stipulate to an earlier date.

4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified. Service must be made by delivering the copy to the judge personally or by leaving it at the judge's chambers with some person of suitable age and discretion employed therein.

5. The judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) Immediately transfer the case to another department of the court, if there is more than one department of the court in the district, or request the judge of another district court to preside at the trial or hearing of the matter; or

(b) File a written answer with the clerk of the court within 5 judicial days after the affidavit is filed, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification. The question of the judge's disqualification must thereupon be heard and determined by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed:

(1) By the presiding judge of the judicial district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of years of service.

(2) By the Supreme Court in judicial districts having only one judge.

(Added to NRS by 1977, 767; A 1979, 59, 393; 1981, 319, 872; 2011, 9)

+ Supreme Court of Canada

Ghirardosi v. Minister of Highways for British Columbia, [1966] S.C.R. 367
Date: 1966-03-11

Charles Ghirardosi *Appellant;*

and

The Minister of Highways For British Columbia *Respondent.*

1966: January 31; 1966: March 11.

Present: Taschereau C.J. and Cartwright, Martland, Hall and Spence JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration—Expropriation of appellant's land—Motion to set aside award of umpire—Existence of solicitor and client relationship between arbitrator and respondent at time of arbitration unknown to appellant—Disqualification of arbitrator fatal to validity of award.

The appellant was the owner of certain lands in Trail, British Columbia, expropriated by the Department of Highway. No agreement was reached as to compensation. In the arbitration proceedings which followed pursuant to the *Department of Highways Act,* R.S.B.C. 1960, c. 103, one McQ was appointed arbitrator by the Minister of Highways and one M, by the appellant. The arbitrators, together with H, the umpire appointed by them, convened and heard evidence and argument. The arbitrators were unable to reach an agreement and accordingly, pursuant to s. 26 of the *Department of Highways Act requested that the amount of compensation be determined by the umpire who thereupon fixed the compensation at $25,000.*

By originating notice, the appellant proceeded to set aside the award on the grounds that (1) the arbitrator McQ was disqualified by interest in that he, at the time of the

arbitration, was acting as solicitor for the Minister of Highways and (2) the umpire was disqualified by interest in that, at the time of the arbitration, he was acting as crown counsel for the Province of British Columbia. On motion an order was made setting aside the award. On appeal the Court of Appeal, by a unanimous judgment, set aside the order of the judge of first instance and affirmed the award.

Held: The appeal should be allowed and the order of the judge of first instance restored.

The arbitrator McQ was disqualified. From the beginning to the end of the arbitration he was retained by the respondent Minister in a dispute of the same nature as that which was the subject-matter of the arbitration; in that dispute the party whose land was required by the respondent was in no way connected with the appellant and the land expropriated was some 250 miles distant, but the disqualification arose from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times between McQ and the respondent. Assuming that the umpire H was in no way personally disqualified, the disqualification of McQ was fatal to the validity of the award. *Sellar v. The Highland*

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Railway Co., [1918] S.C. 838; [1919] S.C. (H.L.) 19, followed; *North Shore Railway Co. v. The Reverend Ursuline Ladies of Quebec* (1885), Cass. S.C. Dig. 36, distinguished; *Szilard* v. *Szasz,* [1955] S.C.R. 3; *Summer et al.* v. *Barnhill* (1879) , 12 N.S.R. 501, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1] , setting aside an order of Collins J. and affirming an arbitration award. Appeal allowed and the order of Collins J. restored.

Charles Ghirardosi, in person.

W. G. Burke-Robertson, Q.C., and D. T. Wetmore, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for British Columbia[2] setting aside an order of Collins J. and affirming an award made in an arbitration between the parties.

The appellant was the owner of 7.226 acres of land in the City of Trail, British Columbia, expropriated by the Department of Highways. No agreement was reached as to compensation. In the arbitration proceedings which followed pursuant to the *Department of Highways Act,* R.S.B.C. 1960, c. 103, Mr. C. D. McQuarrie, Q.C., was appointed arbitrator by the Minister of Highways and Mr. M. E. Moran, by the appellant. The arbitrators, together with Mr. D. B. Hinds, the umpire appointed by them, convened at the City of Trail in November 1963, and heard evidence and argument. The arbitrators were unable to reach an agreement and accordingly, pursuant to s. 26 of the *Department of Highways Act,* requested that the amount of compensation be determined by the umpire who on December 23, 1963, made an award fixing the compensation at $25,000.

By originating notice dated February 11, 1964, the appellant moved to set aside the award on the following grounds:

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[1] (1964), 50 W.W.R. 296.
[2] (1964), 50 W.W.R. 296.

1. The Arbitrator, Colin D. McQuarrie, Q.C., appointed by the Minister of Highways of the Province of British Columbia, was and is disqualified by interest in that he has been and was at the time of the

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arbitration referred to herein acting as solicitor or counsel or agent for the said Minister of Highways or the Department of Highways of the Province of British Columbia or both.

2. The Umpire, D. B. Hinds, was and is disqualified by interest in that he has been and was at the time of the arbitration referred to herein acting as Crown Counsel for the Province of British Columbia.

The material before Collins J. consisted of five affidavits. There was no cross-examination on any of these and there is really no dispute as to the relevant facts.

From time to time Mr. McQuarrie had acted for the Department of Highways and had also acted against that Department. Neither he nor any member of his firm had ever held a general retainer from the Department. Prior to being appointed arbitrator in the matter with which we are concerned Mr. McQuarrie was retained by the Minister of Highways to act as solicitor for the Department of Highways in the matter of an expropriation by the Department of a property situate near to Radium, British Columbia, and continued to be so retained throughout the period of the holding of the hearing in the arbitration and the making of the award in regard to the appellant's property.

These facts were not disclosed to the appellant or his solicitor and did not come to the notice of either of them until some time in January, 1964, after the appellant had received a copy of the award.

Mr. Hinds had never acted for the Department of Highways but from time to time had acted as counsel for the Crown in the right of British Columbia in criminal prosecutions. These facts also were unknown to the appellant and his solicitor until after the appellant had received a copy of the award.

On March 2, 1964, the motion came before Collins J. who set aside the award. He gave no recorded reasons for his decision but it is said in the reasons of Lord J.A. in the Court of Appeal that counsel were agreed that the judgment of Collins J. was:

based on a reasonable apprehension that the arbitrator appointed by the Minister might not act in an entirely impartial manner. There was no suggestion of actual bias, and it is common ground that he is a gentleman of integrity and high standing in his profession.

In the Court of Appeal, Sheppard J.A. was of opinion that there was no evidence to support a reasoned suspicion of bias on the part of Mr. McQuarrie. Lord J.A., with

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whom Davey J.A. was in substantial agreement, proceeded on the ground that the award was that of Mr. Hinds and not that of the Board of Arbitrators and so found it unnecessary to deal with the question whether Mr. McQuarrie was disqualified. With the greatest respect I am unable to agree with either of these views.

The applicable principles have recently been restated by Rand J. giving the unanimous judgment of this Court in *Szilard v. Szasz*[3] . At p. 4 he said:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. This principle has found expression in innumerable cases, and a reference to a few of them seems desirable.

Rand J. then reviewed a number of decisions and continued at pp. 6 and 7:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
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> Nor is it that we must be able to infer that the arbitrator 'would not act in an entirely impartial manner'; it is sufficient if there is the basis for a reasonable apprehension of so acting.

One of the cases referred to with approval by Rand J. was *Summer et al.* v. *Barnhill*[4] , in which an award was set aside on the ground that one of the arbitrators was disqualified by the fact of having been regularly retained as solicitor of the estate of which the defendant was the executor, although he had not been engaged as counsel or attorney in the matter referred, and did not concur in the award. Sir William Young C.J. in delivering the judgment of the Court said at p. 505:

> The modern cases are in Russell 101-3, affirming the general principle that an arbitrator ought to be a person who stands indifferent between the parties, and that any concealed or unknown interest or bias will disqualify him. The rule is well expressed in *Kemp v.Rose,* 1Giff., 258; 'a perfectly

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> even and unbiased mind, said the Vice-Chancellor, is essential to the validity of every judicial proceeding. Therefore where it turns out that, unknown to one or both of the parties who submit to be bound by the decision of another, there was a circumstance in the situation of him to whom the decision was entrusted, which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of the Court.' See also *Harvey v. Shelton,* 7 Beav. 462-4. It is of no consequence that Mr. Longworth has not joined in the award. He sat upon the reference and was there as a judge, and, without at all questioning the purity and conscientiousness of his action, I am of opinion, that, as the solicitor of Pearson's estate and the adviser of the executor quite independently of this case, he was not competent to act as one of the arbitrators thereon, and, the fact being unknown to the plaintiffs, their attorney and counsel, that the award should be set aside and the rule *nisi* made absolute with costs.

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[3] [1965] S.C.R. 3.
[4] (1879), 12 N.S.R. 501.

In the case at bar from the beginning to the end of the arbitration Mr. McQuarrie was retained by the respondent in a dispute of the same nature as that which was the subject-matter of the arbitration; the party whose land in *Radium* was required by the respondent was in no way connected with the appellant and the land expropriated was some 250 miles distant, but the disqualification arises from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times between Mr. McQuarrie and the respondent.

Lord J.A. relied in part on the decision of this Court in *North Shore Railway Company v. The Reverend Ursuline Ladies of Quebec* (1885) , which is briefly noted in Cassels Digest of Supreme Court Decisions at p. 36. An examination of the complete record of that case in this Court shews that the appeal was heard on March 4, 1885, and judgment reserved. On the following day judgment was given orally and the note in the Registrar's book reads as follows:

> In the *North Shore Railway Company v. The Ursulines of Quebec,* the Chief Justice states there is no doubt that the judgment of the Court below was correct and the Court is of opinion that the appeal should be dismissed with costs.

No recorded reasons were delivered in either of the Courts below. The action was brought by the Ursulines of Quebec to recover from the Railway Company the amount awarded by a board of arbitrators as compensation for a piece of land taken by the Railway. The main defence was that Charlebois, the arbitrator appointed by the plaintiffs, was disqualified because since a date prior to the arbitra-

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tion he was "le procureur agent" of the plaintiffs, that he had always left the defendant in ignorance of this fact and this had prevented it from taking steps to have him removed as arbitrator. In answer the plaintiffs denied that Charlebois was disqualified and added that if he were it was the duty of the defendant to take steps to set aside his appointment before proceeding with the arbitration. In the plaintiff's factum filed in this Court it is stated that the appellant and its arbitrator knew the facts and never raised any objection and this allegation is supported by the evidence of Charlebois and also by that of Bertrand who was the arbitrator named by the defendant. In these circumstances I think it probable that the ground of the decision was that the defendant proceeded with the arbitration with knowledge of the facts which, after the award, it claimed disqualified Charlebois. There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.

Turning to the main ground on which Lord J.A. proceeded, I am of opinion that, assuming that Mr. Hinds was in no way personally disqualified, the disqualification of Mr. McQuarrie was fatal to the validity of the award. On this point it is sufficient to refer to the judgments in *Sellar v. The Highland Railway Company*[5] . In this case it was held that an arbitrator was disqualified because he held some shares in the Railway Company and that by reason of this the award made by the oversman appointed by the arbitrators must be set aside. On appeal to the Inner House from the judgment of Lord Sands, Lord Johnston said at p. 853:

> The disqualification here of the arbiter has had a somewhat exceptional result. It has not tainted his award, for he did not get the length of making one. It has vitiated his nomination of and devolution on the oversman. At first sight disqualification of the oversman may appear far-fetched. But I think, when the practice in the conduct of arbitrations, at least in Scotland, is remembered, that the propriety and justice of the judgment becomes apparent.

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[5] [1918] S.C. 838; [1919] S.C. (H.L.) 19.

> By common, and I may say almost invariable, practice the arbiters nominate their oversman before commencing the work of the reference. As a pure matter of convenience, and to charge him with a knowledge of the matter at issue, and the considerations *hinc inde,* he

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> accompanies them on any visit to the *locus.* He sits with them throughout the leading of evidence and hears the arguments addressed to them by counsel or agents. He is present at their deliberations. In point of fact he may not inaptly be described as the president of a Court of three, with a controlling voice in case of difference between subordinate colleagues. There can be no question that a man in such a position, should the decision of the question in dispute ultimately devolve upon him, is open to be swayed by the opinions and reasoning of either of those with whom he has thus sat, and therefore that there is substance and not merely form in carrying the objection to the arbiter to the length of vitiating the appointment of the oversman in which he has had a hand. The objection must have been sustained if the disqualification of the arbiter had been discovered before the devolution, and it is, I think, equally well founded, though the discovery does not take place till the devolution has been made, or even the oversman's award has been issued. The arbitration in question has therefore proved abortive,

This judgment was affirmed in the House of Lords. At p. 24 Lord Finlay said:

> It follows that the decreet-arbitral cannot stand. It is perfectly true that the decreet-arbitral was not the work of Mr. Hogg, but Mr. Hogg did act as arbiter in the matter. Having this interest in the Highland Railway Co. he heard the evidence and arguments and he considered the matter, and he and the arbiter on the other side failed to come to agreement. It seems to me that in doing that Mr. Hogg did act judicially in the matter, and, inasmuch as the function of the oversman in deciding by decreet-arbitral was the result of the failure to agree by the arbiters, the decreet-arbitral cannot stand.

The principle of this decision appears to me to govern the case at bar.

Before parting with the matter it is scarcely necessary to add that no impropriety is imputed to Mr. McQuarrie whose integrity and high standing in the profession are unquestioned; but when circumstances exist which have the legal result of disqualification the award cannot stand. An outstanding illustration of the application of this rule is found in the well known case of *Dimes v. Proprietors of the Grand Junction Canal et al.*[6] , in which the House of Lords set aside a decree of the Lord Chancellor of England because he held some shares in the Canal Company although, as Lord Campbell said at p. 793, "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern".

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I would allow the appeal, set aside the judgment of the Court of Appeal and restore the order of Collins J. The appellant will recover from the respondent his costs in the Court of Appeal and in this Court such costs as are taxable in view of the circumstance that he conducted the appeal in person.

Appeal allowed and the order of the judge of first instance restored.

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[6] (1852), 3 H.L. Cas. 759.

Charles Ghirardosi, appellant, on his own behalf.

Solicitor for the respondent: A. W. Hobbs, Victoria.