[HIGH COURT OF AUSTRALIA.]

DICKASON . . . . . APPELLANT;
PLAINTIFF,

AND

EDWARDS AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 21, 22, 23, 24.

Griffith C.J., O'Connor and Isaacs JJ.

Friendly Society—Domestic tribunal—Disqualification—Personal interest—Nemo debet esse judex in propriâ suâ causâ--Interpretation of rules—Expulsion of member—Friendly Societies Act 1890 (*Vict.*) (*No.* 1094), *sec.* 20.

Where by the rules of a friendly society formed under the *Friendly Societies Act* 1890 (Vict.), it was provided that should a member be adjudged by a tribunal of the society guilty of conduct calculated to bring disgrace on the society he should be expelled, in order to justify expulsion the conduct of which the member is found guilty must be such as may reasonably be regarded as likely to have that result.

Where the rules of a friendly society so formed provide for the constitution of a judicial tribunal to adjudicate upon charges against members, in order to exclude the principle that a man must not be a judge in his own cause an intention to exclude it must appear in the rules either expressly or by necessary implication.

By the rules it was provided that the District Chief Ranger, who was the head of the society, "shall preside at" certain meetings, including those of a certain judicial tribunal constituted by the rules:

Held, that this rule did not require or permit the District Chief Ranger to preside, even formally, on the tribunal on the hearing of a charge against a member in which the District Chief Ranger was in the position of a person complaining of an offence against himself personally.

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By the direction of the District Executive of a friendly society, of which Executive the District Chief Ranger was a member, a charge was brought against a member of the society of conduct calculated to bring disgrace on the society. The conduct complained of consisted of personal abuse of the District Chief Ranger and other officers of the society. The District Chief Ranger presided at the tribunal which heard the charge, but took no active part in the proceedings. The member was found guilty, and was *de facto* expelled from the society :

Held, that the whole proceedings were invalid by reason of the presence of the District Chief Ranger on the tribunal, that the expulsion was ineffectual, and that the member was entitled to a declaration.

Decision of the Supreme Court of Victoria (*Hodges* J.): *Dickason* v. *Edwards*, (1909) V.L.R., 403 ; 31 A.L.T., 55, reversed.

APPEAL from the Supreme Court of Victoria.

The plaintiff, J. E. A. Dickason, was a member of a friendly society in Victoria called the Ancient Order of Foresters of the United Melbourne District, and of a branch or court of that society called the Court Star of the Forest. He brought an action in the Supreme Court of Victoria against H. N. Edwards and the two other trustees of the society, the members of the District Executive of the society, and the trustees of the Court Star of the Forest, alleging that he had been wrongfully and illegally prevented by the society, its officers or members, from exercising and enjoying the rights, privileges and benefits to which he was entitled as a member of the court and of the society, and that he had been injured thereby and suffered damage therefrom. He claimed (*inter alia*) a declaration that he was still a member of the court and of the society; an injunction restraining the defendants and the society, its officers, servants and members from excluding him, or purporting to exclude him, from the meetings and benefits, rights or privileges of the society, and from refusing to accept his contributions in accordance with the rules of the society ; and £100 damages for wrongful expulsion from the society.

The facts of the case and the material rules of the society are sufficiently set out in the judgments hereunder.

The action was heard by *Hodges* J., who gave judgment for the defendants without costs: *Dickason* v. *Edwards* (1).

(1) (1909) V.L.R., 403; 31 A.L.T., 55.

From this judgment the plaintiff now by special leave appealed to the High Court.

Mitchell K.C. (with him *Lowe*), for the appellant. The District Chief Ranger was disqualified from sitting on the two committees. There would have to be very clear and precise language in the rules to enable him to sit in a matter so nearly concerning himself, for it would be contrary to the principles of natural justice for him to sit. It is a general principle applicable to tribunals constituted like these that if a person interested, even formally as a prosecutor, sits on the tribunal, the decision is rendered invalid: *Leeson* v. *General Council of Medical Education and Registration* (1); *Allinson* v. *General Council of Medical Education and Registration* (2); *R.* v. *London County Council*; *Ex parte Akkersdyk*; *Ex parte Fermena* (3).

[ISAACS J. referred to *R.* v. *Howard* (4).]

The principle applies to tribunals constituted by agreement between the parties: *Russell on Arbitration*, 9th ed., p. 93; *Nuttall* v. *Mayor &c. of Manchester* (5); *Eckersley* v. *Mersey Docks and Harbour Board* (6); *Beddow* v. *Beddow* (7); *Baring Bros. & Co.* v. *Doulton & Co.* (8); *Kemp* v. *Rose* (9); *Kimberley* v. *Dick* (10); *Edinburgh Magistrates* v. *Lownie* (11); *Ranger* v. *Great Western Railway Co.* (12).

[ISAACS J. referred to *Jackson* v. *Barry Railway Co.* (13); *Newton* v. *Judges of the High Court, North Western Provinces* (14).]

The rules do not make it necessary for the District Chief Ranger to sit on either the District Judicial Committee or the District Appeal Committee. There must be implied in the rules a provision that a man must not be judge in his own cause. A rule which in effect required or authorized the District Chief Ranger to sit in this inquiry would be invalid as being contrary to natural justice: *Dawkins* v. *Antrobus* (15); *Cheetham* v. *Elliott* (16).

(1) 43 Ch. D., 366, at p. 378.
(2) (1894) 1 Q.B., 750, at p, 758.
(3) (1892) 1 Q.B., 190, at p. 195.
(4) (1902) 2 K.B., 363, at p. 377.
(5) 8 T.L.R., 513.
(6) (1894) 2 Q.B., 667.
(7) 9 Ch. D., 89.
(8) 61 L.J.Q.B., 704.
(9) 1 Gif., 258.
(10) L.R. 13 Eq., 1.
(11) 5 F. Ct. Sess., 711.
(12) 5 H.L.C., 72, at p. 116.
(13) (1893) 1 Ch., 238.
(14) 8 Moo. P.C.C. N.S., 202.
(15) 17 Ch. D., 615, at p. 630.
(16) 12 V.L.R., 370; 8 A.L.T., 16.

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[ISAACS J. referred to *Long* v. *Bishop of Cape Town* (1); *Macqueen* v. *Frackelton* (2).]

If the view of the respondents is correct the District Chief Ranger might preside on the hearing of a charge against himself. The effect of rule 86 is not that a member having been found by one of these committees guilty of conduct calculated to bring disgrace on the Order is *ipso facto* expelled, but it is necessary that the matter shall come before the district meeting with whom the final decision rests. The conduct of which the appellant was found guilty could not fairly or reasonably be said to be conduct calculated to bring disgrace upon the Order. Conduct in order to come within these words must be something done before the public from which the public might say that the order was disgraced: *Grimwood* v. *Victorian Club* (3).

Irvine K.C. and *McArthur*, for the respondents. By rule 86 the committees are made the sole judges of the interpretation of the words "conduct calculated to bring disgrace on the Order," and it is not for this Court to interpret them. The conduct with which the appellant was charged might be considered to be capable of bringing disgrace upon the Order. Unless the Court can say that the decision that the conduct alleged was calculated to bring disgrace on the Order was manifestly absurd or manifestly idle, and could only be a false pretence to cover something else, and was therefore fraudulent, the Court will not interfere: *Dawkins* v. *Antrobus* (4). There are only three things for the Court to decide—were the rules observed, was anything done contrary to natural justice, and was the decision come to *bonâ fide*: *Baird* v. *Wells* (5).

[ISAACS J. referred to *Andrews* v. *Salmon* (6).]

The question comes down to what is a fair construction of rule 86. The District Judicial Committee and the District Appeal Committee are bodies invested with judicial functions. Their decisions at once become operative and have to be obeyed. An appeal may be had from the Judicial Committee to the Appeal Committee, and the District Meeting has the power to do

(1) 1 Moo. P.C.C. N.S., 411, at p. 461.
(2) 8 C.L.R., 673.
(3) 20 V.L.R., 193.
(4) 17 Ch. D., 615.
(5) 44 Ch. D., 661, at p. 670.
(6) W.N. (1888), 102.

anything it chooses on a report from the Appeal Committee, but no right of appeal from the Appeal Committee to the District Meeting is given. The effect of Rule 86 is that a member on being found guilty immediately ceases to be a member, but that expulsion may be defeasible in certain circumstances. The rules require the District Chief Ranger to preside at meetings of the Judicial Committee and the Appeal Committee. Rule 9 expressly says so, whereas in the case of the Chief Ranger of a court it is provided by rule 62 that he is not to preside over a committee if he is personally interested. The District Chief Ranger, who is the head of the society, is contemplated by the rules as being quite above challenge on the ground of bias. That being so, the principles upon which persons are ordinarily disqualified from sitting on judicial tribunals do not apply.

[ISAACS J. referred to *Davenport* v. *The Queen* (1); *R.* v. *Justices of Dublin* (2); *R.* v. *London County Council*; *In re Empire Theatre* (3).]

The District Executive, of which the District Chief Ranger is a member, is authorized by rule 28 (*c*) to lay a charge against a member, and therefore the fact that the District Chief Ranger was one of those who laid the charge does not disqualify him. See *Ellis* v. *Hopper* (4).

Mitchell K.C. in reply.

Cur. adv. vult.

March 24.

GRIFFITH C.J. This is an action brought by the plaintiff, a member of a friendly society called the Ancient Order of Foresters of the United Melbourne District, of which he had been a member for about twenty years, and to whom the rights of membership have been denied. The plaintiff claims a declaration of rights and an injunction to prevent the defendants, who are officers of the society, from excluding him from his rights, and damages. The rights of members of friendly societies *inter se* are entirely contractual, the contract being evidenced by the rules which are made under the authority of the *Friendly*

(1) 3 App. Cas., 115.
(2) (1904) 2 I.R., 75, at p. 91.
(3) 71 L.T., 638.
(4) 3 H. & N., 766.

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Societies Act 1890. In the case of this particular society the governing authorities were, first, what is called the District Meeting—which is a representative body composed of representatives of all the courts forming branches of the Order. This may be called the Parliament of the Order. Then there are the "District Executive" consisting of several officers of the Order, a committee called the "District Judicial Committee," whose functions appear in rule 28 to be to investigate charges or complaints made against members of the Order, and the "District Appeal Committee," which has appellate jurisdiction from the decisions of the District Judicial Committee. The principal officer of the Order is called the "District Chief Ranger." He is a member of all the committees appointed by the District, and head of the District Executive. The rule which deals with the expulsion of members is rule 86, which provides as follows, so far as is material:—"Should any member be convicted of felony, larceny, or embezzlement, or adjudged by the Judicial Committee of his Court or by the District Judicial Committee, or District Appeal Committee guilty of any crime, offence or conduct calculated to bring disgrace on the Order, he shall be expelled, and his name published in the half-yearly report of the District; but such expulsion shall not be inserted until the time (thirty days) has expired for appealing to the District Appeal Committee." I shall have occasion, later, to refer to the rule more in detail, but that is sufficient for the present purpose. On 7th August 1908 a charge was preferred against the plaintiff by the District Secretary by direction of the District Executive, to the effect that the plaintiff had used various expressions which may be described as vulgar abuse with particular reference to the District Chief Ranger and some other members of the District Executive. After setting out the language which was said to have been used the charge concluded thus:—"As such conduct is unbecoming of any respectable member of the Ancient Order of Foresters, Brother John E. A. Dickason is hereby charged under General Law 86 with conduct calculated to bring disgrace upon the Order." The matter was brought before the District Judicial Committee, and the District Chief Ranger was present and presided as chairman during the hearing of the charge. His presence

was objected to by the plaintiff on the ground that he was an interested party—that what the plaintiff was accused of was in effect insulting the District Chief Ranger in a gross manner. However, the District Chief Ranger continued to sit, and the District Judicial Committee gave their decision in these words:—"We consider the charges proved, and that as the Brother was in a state of excitement suffering from an alleged wrong that we hope he will be treated with leniency and that Brother J. E. A. Dickason pay the costs of the inquiry." The plaintiff then appealed to the District Appeal Committee who upheld the decision of the District Judicial Committee. Thereupon the District Executive took steps which resulted in the plaintiff's *de facto* exclusion from all the benefits of membership, and he then brought his action.

Various objections were taken to the validity of this so-called expulsion. It was first contended that the charge itself did not show conduct calculated to bring disgrace upon the Order. It appeared, as I have said, that the charge was of using terms of vulgar abuse concerning members of the Order and, apparently, in the presence of members of the Order. I think it is open to the Court to review the decision on that ground. It was suggested that the word "adjudged" in rule 86 leaves it to the absolute and uncontrolled opinion of the committee to say whether the conduct complained of is "calculated to bring disgrace on the Order." But I think the true test is this, that the conduct must be such that reasonable men might think it was likely to bring disgrace on the Order. Opinions may differ in this case as to whether the conduct alleged was calculated to bring disgrace upon the Order. For my part I have no hesitation in saying, as *Jessel* M.R. did in *Dawkins* v. *Antrobus* (1), that I do not see anything in the language from which, under the circumstances, I should conclude that the conduct of the plaintiff was calculated to bring disgrace upon the Order. Whether a reasonable man could draw a contrary inference is another matter, upon which I do not feel called on to express any definite opinion.

But there is a further difficulty in the way of the respondents. I doubt whether the finding was that the plaintiff had been guilty

(1) 17 Ch. D., 615.

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of conduct calculated to bring disgrace on the Order. The form in which the charge was brought was to set out specifically the language alleged to have been used, and then to wind up with the statement that the plaintiff had thereby been guilty of conduct calculated to bring disgrace on the Order, which, if proved, would lead to the plaintiff's expulsion from the Order. The finding of the District Judicial Committee was, as I construe it, that they found the facts to be as alleged, but declined to draw the inference, because, as a sequence to finding the charges proved they said, implicity if not expressly, that they did not think he ought to be expelled. So that the finding may very reasonably be construed as a finding that, although the plaintiff had used the language alleged under circumstances of great excitement, the committee did not think that his conduct in using that language ought to lead to his expulsion from the Order. If so, the committee did not apply their minds to the question whether his conduct was calculated to bring disgrace upon the Order. Another view of the finding may be that the committee thought that it was not their business to expel the plaintiff, that they had only to say whether or not he had used the words alleged to have been used, and that it was for some other body to say whether the plaintiff should be expelled. I do not think it necessary to say whether this view is correct, but I think there is a good deal to be said in favour of it.

Assuming this difficulty to be out of the way, there remains the objection that the District Chief Ranger could not sit to hear that charge. It is, of course, a general rule of natural fair play that a man cannot be judge in his own cause. In the case of statutory tribunals that rule is absolute unless the Statute provides, as it does in some cases, that a person who is only formally a party may nevertheless sit on the tribunal, as, for instance, in England in the case of licensing tribunals and the London County Council when it sits to determine applications for granting licences. The rule prevails except so far as the language of the particular Statute is to the contrary. In the case of tribunals created by contract between the parties it is entirely a question of the construction of the contract whether the parties have agreed that an interested person shall or shall not be disqualified.

To exclude the general rule of fair play I think it is necessary that it should appear that the parties intend that a person may sit although he is interested, that is to say, you must be able to collect from the contract itself an agreement either expressly or by necessary implication to that effect. The question therefore resolves itself into an examination of this contract. For the respondents it is contended, first, that the District Chief Ranger was bound to sit and, secondly, that whether he was or was not bound to sit he was at liberty to sit. Rule 9 provides that "The District Chief Ranger shall preside at all Executive and District Meetings and Committees appointed by the district." I think that applies to the District Judicial Committee and the District Appeal Committee. Rule 28 applies expressly to the District Judicial Committee, which is to consist of fifteen representatives, and sub-rule (*a*) provides that "No member of the District Appeal Committee or District Executive shall act on the District Judicial Committee except the District Chief Ranger and District Secretary, who shall only act as chairman and secretary of such Committee, and have no vote, the casting vote of the chairman excepted." Sub-rule (*b*) provides for challenging members of the committee. The names are to be drawn out of a ballot box and each party is entitled to challenge three members. By sub-rule (*h*) the District Judicial Committee are required to submit a report in writing of any case investigated to the District Meeting immediately following the investigation, and are to have power "to call for all papers, books, documents, or other evidence they may consider necessary for a fair and impartial investigation." Rule 29 deals with the District Appeal Committee. That also consists of fifteen members. Each party is allowed to challenge three members. By sub-rule (*c*) the names of the witnesses proposed to be called are required to be given in writing to the "District Chief Ranger or Chairman of the Committee" at the time of the meeting. Sub-rule (*d*) provides that the District Appeal Committee shall submit reports in writing of cases investigated by them to the District Meeting immediately following such investigation, "and the decision of the District Meeting thereon shall be final." Sub-rule (*e*) provides that "No member of the District Judicial Committee or

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District Executive shall act on the District Appeal Committee, except the District Chief Ranger and District Secretary, who shall only act as chairman and secretary of such Committee, and have no vote, the casting vote of the chairman excepted." Now as to the point that the District Chief Ranger must preside, I think that is negatived by two considerations. First of all, rule 29 (*c*) assumes that the chairman may be someone else than the District Chief Ranger; and, secondly, the ordinary rule of common sense which governs all matters of this sort must apply, namely, that if a body is composed of several persons and one of them is ill or for some other reason is absent, there is no reason why the other members of the body should not go on with the business and appoint a chairman *pro hac vice*. If he is not there the functions of the committee are not to cease. So that the District Chief Ranger is not bound to sit. Then may he sit? I think it is clear that inasmuch as the District Chief Ranger is a member of both these committees, and is head of the District Executive, and as a charge may be brought by the District Executive against a member, it was not intended that he should be disqualified merely by the fact that he is formally a party to a charge brought against a member. But, if he is not merely a formal party but is in substance an individual complaining of an offence against himself, then I think very different considerations apply. Then it becomes his own cause, not in a technical sense, but substantially. He is a person complaining of a grievance. Is he a person who ought to be allowed to try the alleged offender? I do not know whether it is material, but the charge was in fact presented to the District Appeal Committee by the District Secretary acting as the mouth-piece of the District Executive as a case in which the Appeal Committee had to decide between the District Chief Ranger and the plaintiff. It was put that if they did not find one guilty they had to find the other guilty. That seems in substance a *lis* between the District Chief Ranger and the plaintiff. It is said the District Chief Ranger did not take any part in the proceedings. I am willing to give the fullest credit to that, but I do not think it is material. He was a member of the tribunal that tried the case; he was present when it was heard, and, applying the ordinary rules, I

cannot say that his being there did not vitiate the proceedings altogether. An illustration may be taken from the case of the London County Council. It has been held that when that body is constituted as a judicial tribunal to deal with the granting of licences, members who have been appointed to investigate cases in which licences are applied for and who ask the Council to come to a particular conclusion in those cases are not disqualified from taking part in the decisions upon those cases, because in effect the Statute says so. But suppose the question before the London County Council were whether a licence should be granted to a particular member of the Council it by no means follows that he could take part in determining whether the licence should be granted to him. For these reasons I think the findings of both the District Judicial Committee and the District Appeal Committee were vitiated by the presence of the District Chief Ranger.

There is a further point raised which is of some importance, but which, if the view I take is correct, it is not necessary to determine, and as to which I express no definite opinion. I have already quoted rule 29 (*d*), which provides that reports of cases investigated by the District Appeal Committee are to be submitted to the District Meeting immediately following such investigation, and that "the decision of the District Meeting thereon shall be final." Rule 86 is capable, I think, of two readings. The words are "shall be expelled." These words may mean shall *ipso facto* be expelled, that is, shall cease to be a member of the Order, or they may mean shall be liable to be expelled. If they mean shall *ipso facto* be expelled, then one would think that the finding of the District Judicial Committee should have been in definite terms, that the plaintiff was guilty of conduct of such a nature that he ought to be expelled, whereas their finding was that they did not think he ought to be expelled. However, the rule being open to those two constructions, we should bear in mind that the operation of the rule is to work a forfeiture of all the property of the plaintiff in the order. The plaintiff had been a member of the Order for twenty years, and his proprietary rights were very substantial. The result of expulsion may be that he may be unable ever to obtain the advantage of becoming

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a member of another similar society. This is a reason for being quite sure that forfeiture really did take place. If the words are capable of two meanings, then the words of rule 29 (*d*) become important. The plain meaning of them is that the District Appeal Committee is to report each case investigated to the District Meeting, that the District Meeting is to give a decision upon it and that their decision is to be final. If the meaning of that language is not cut down by rule 86 it follows that the final decision rests with the District Meeting, and, so far as appears in the present case, no such decision has ever been given, so that in that view the expulsion was premature. I have mentioned the matter because I think it is important and one to be borne in mind. For these reasons I think that the attempted expulsion was ineffectual and that the plaintiff is entitled to the relief he seeks.

O'CONNOR J. A number of grounds have been relied upon in support of the plaintiff's right to succeed in this action, but I do not think it necessary to refer to more than two of them. It was contended that the conduct of the plaintiff as proved was not such that the District Judicial Committee could under rule 86 lawfully come to the conclusion that it was calculated to bring disgrace on the Order. I agree that it is open to the Courts to review the decision of a committee such as this on a question of that kind. The only ground, however, upon which the Courts could interfere is that no reasonable man could come to the conclusion that the facts proved amounted to the offence charged under the rules. Now what may be conduct calculated to bring disgrace on the Order is a matter peculiarly for the members of the Order themselves. There is a certain standard of conduct which necessarily obtains in the Order. Nobody can judge as well as they can what would or would not be a disgrace to the Order, and I think it may be taken generally that if the Committee honestly came to the conclusion that the conduct complained of was calculated to bring disgrace on the Order, and that conclusion is neither absurd nor unreasonable, the Court would be loth to interfere. Although I agree with the learned Chief Justice that I should find a difficulty in saying, expressing

my own opinion, that the plaintiff's conduct was of the character referred to in the rules, at the same time I see no ground for interfering with the view taken by the District Judicial Committee.

With regard to the question raised as to whether the expulsion was properly made and whether it could take effect until after the matter had been brought before the District Meeting, I do not think it necessary to express an opinion. I think there are good reasons that may be urged in favour of either point of view. I base my decision entirely upon the ground that the decision of the tribunal which purported to expel the plaintiff was arrived at in disregard of one of the fundamental principles of natural justice. It is necessary in the management of a society of this kind to give powers of expulsion. It is necessary also to appoint tribunals for the purpose of dealing with questions of conduct, and the Courts will not interfere with the decisions of these tribunals unless they exceed their powers, and their decision results in injury to property or to civil rights. Whether a domestic tribunal has exceeded its powers is entirely a question of the construction of the contract which creates it. The rules of a society may give power to decide disputes on any principle the members think fit. The rules may be of such a nature as to empower a judicial body to decide in violation of all principles of natural justice. If the parties choose to agree to a tribunal having power of that kind the Courts will not interfere. But in the interpretation of such a contract there are some leading principles to be borne in mind. The first is that in interpreting rules which give jurisdiction to any tribunal there is always to be read into them the underlying condition that the proceedings shall be carried on in accordance with the fundamental principles of common justice. It is upon a party who wishes to shut out the implication of that basic condition to show that the rules expressly or by necessary implication negative the implication of its existence. To some extent no doubt the tribunal constituted by these rules has infringed upon the principles under which the proceedings of a public tribunal would ordinarily be conducted. It is clear that a distinction is made between the District Chief Ranger and other officials. A committeeman who is interested

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cannot sit on the committee, but, as far as I read the rules, there is nothing to prevent the District Chief Ranger if he is interested from sitting thereon. There is power to challenge committeemen, but there is no power to challenge the District Chief Ranger. The fact that a person other than the District Chief Ranger sat upon a tribunal of primary jurisdiction disqualifies him from sitting on the appellate tribunal. That is not the case with regard to the District Chief Ranger. In all these respects care is taken in the rules to give him permission to sit notwithstanding that he may be inclined to bias from the part he has already taken. But there is no rule which goes so far as to prevent the application of that principle of common justice which prohibits a man from being judge in a cause in which he is personally interested. Now if the contention which is urged for the respondents be right, there would be nothing to prevent the District Chief Ranger from sitting in a case in which he was himself charged with conduct calculated to bring disgrace on the Order. The respondents' contention must carry them to that length. It seems to me that the proposition has only to be stated in that form to have its absurdity revealed. On the other hand, I think it is apparent that an indirect or trivial interest would not interfere with the power of the District Chief Ranger to sit. In other words, it appears to me the true rule is that mentioned in *Allinson* v. *General Council of Medical Education and Registration* (1), as laid down by Lord *Esher* M.R. No doubt the rule applicable to these domestic tribunals differs from that applied to public tribunals. The distinction is well known and has been admitted by counsel on both sides, but as applied to domestic tribunals it must at least involve this—in the words of Lord *Esher* M.R.—that there must be no reasonable or substantial ground for suspecting bias. He states the rule in these terms (2):—" The question of incapacity is to be one 'of substance and fact,' and therefore it seems to me that the man's position must be such that in substance and fact he cannot be suspected. Not that any perversely-minded person cannot suspect him, but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed. I think that for the sake of

(1) (1894) 1 Q.B., 750.

(2) (1894) 1 Q.B., 750, at p. 759.

the character of the administration of justice we ought to go as far as that, but I think we ought not to go any further. I take that to be the rule for the application of the test laid down in *Leeson's Case* (1). Could, then, Dr. Philipson be reasonably or substantially suspected of bias in this case?"

I take it that, if Gallant, who presided at both these trials, could really and substantially be suspected of bias, there was no rule which entitled him to sit and he ought not to have sat. Now, what was the charge? It was, first, that abusive language had been used with regard to the District officials. That of course would include Gallant. It was also part of the charge that on a particular occasion the plaintiff singled out Gallant, and spoke of him in terms of low abuse. I should think it is impossible to say, under these circumstances, that the man who was actually the prosecutor, not in the interest of the Society merely, but prosecutor in a charge of using abusive language concerning himself personally, could escape from being reasonably and substantially suspected of bias. Under these circumstances it appears to me on principles of natural justice the District Chief Ranger had no right to sit. The only question is, has that principle been so abrogated by the terms of the rules as to allow him to sit? I see no ground for saying that that general principle has been abrogated. He was not justified, therefore, in forming part of the tribunal. In my opinion the conclusion at which the District Judicial Committee arrived cannot stand, and the expulsion can be of no effect to alter the plaintiff's rights. I have, therefore, come to the conclusion that the Judge in the Court below was wrong in upholding the decision of the committee, that the appeal must be allowed and the declaration made which has been asked for.

ISAACS J. With regard to the first point, as to whether the conduct complained of was such as to fall within the rule, if it were necessary to say anything about it I am of opinion that it was capable of being considered by the tribunal to be such conduct as was calculated to bring disgrace on the Order. I think that, although the Court has an undoubted right to review the

(1) 43 Ch. D., 366.

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finding in one sense, it has only to see whether the finding was arrived at in accordance with the rules, without any departure from the principles of natural justice, and *bonâ fide*. If those conditions are complied with, then I think that, so long as the finding is one which the Court finds it impossible to designate as one at which no reasonable man could honestly arrive, the Court cannot review it. In this case it is not necessary to say anything more on that point, but I should be very far from suggesting that language of this kind addressed to, or spoken of, one of the governing bodies of this Order, was not calculated to bring disgrace on the Order.

As to whether the verdict was actually arrived at, I should like to say that there is no technicality necessary, and I think the observations of *Cotton* L.J. in *Dawkins* v. *Antrobus* (1), go to show that formality of language is not at all essential. Here the committee did find that the charges were proved. If they had stopped there I should have said it was exactly like a verdict of "guilty" of a jury. They did go on to make a merciful recommendation very like a recommendation to mercy by a jury. Therefore I should not be prepared to say, if called upon, that the charge was not really found to be proved. I also think that when the plaintiff appealed from the District Judicial Committee to the District Appeal Committee he apparently, from the terms of this notice, thought they had found all that was necessary.

The first question, then, I have to consider is whether the presence of Gallant as president of the District Judicial Committee and the District Appeal Committee vitiated the findings. The general principles cannot, I think, be better stated than in the passage referred to by my brother *O'Connor* in *Allinson* v. *General Council of Medical Education and Registration* (2) where *Esher* M.R. uses these words:—"In the administration of justice, whether by a recognized legal Court 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 biassed." Of course that means reasonably sus-

(1) 17 Ch. D., 615, at p. 635.

(2) (1894) 1 Q.B., 750, at p. 758.

pected. That case was referred to in the later case of *R.* v. *Burton*; *Ex parte Young* (1), by *Collins* J. as the leading case on this point, and he quoted that particular passage. It does not matter if the person who is alleged to be disqualified is only present in a nominal capacity. That has been recognized from the earliest times, amongst others in *Brookes* v. *Earl of Rivers* (2) and *R.* v. *London County Council*; *Ex parte Akkersdyk*; *Ex parte Fermenia* (3). The principle then is plain that if a Judge is disqualified, he must not even be present during the hearing of the case. One disqualification is pecuniary interest. If that exists there is an end of the matter at once and the Court goes no further. *Dimes* v. *Grand Junction Canal Co.* (4) and *Allinson* v. *General Council of Medical Education and Registration* (5) are both distinct and express authorities upon that point. But there is another kind of disqualification and that is what I may term "incompatibility." If it is incompatible for the same man to be at once judge and occupy some other position which he really has in the case, then *primâ facie* he must not act as a judge at all. That is a fundamental and essential principle of justice. *Aliquis non debet esse judex in propriâ causâ*, so it is put in *Co. Litt.* 141*a*, or, as it has been otherwise expressed, *nemo debet esse judex et pars*. There are two exceptions to this rule recognized by law. One is where a person is relieved from the operation of that rule by Statute, and the second is where there is a necessity for him to act. That principle of necessity is recognized by the House of Lords in *Dimes* v. *Grand Junction Canal Co.* (6) and in *Ranger* v. *Great Western Railway Co.* (7). Whether this incompatibility exists in any particular case depends upon the facts. There are two sets of cases typical of this particular objection; one set in which the Judge was held to be disqualified, and another in which he was not. Of the first set, an example is *R.* v. *Milledge* (8), where certain councillors were also justices, and it was held by *Cockburn* C.J. and *Mellor* J. that they were disqualified. The Lord Chief Justice said (9):—"The mere fact that some of the council who passed

(1) (1897) 2 Q.B., 468.
(2) Hard., 503.
(3) (1892) 1 Q.B., 190.
(4) 3 H.L.C., 759.
(5) (1894) 1 Q.B., 750.
(6) 3 H.L.C., 759.
(7) 5 H.L.C., 72.
(8) 4 Q.B.D., 332.
(9) 4 Q.B.D., 332, at p. 333.

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resolutions for this prosecution were borough justices might have been no objection to the order, if these justices had not assisted at the hearing of the summons. But I cannot see how we can get over the fact of their presence when the order was made. They practically made an order in a case where they were prosecutors." So that the mere fact that they were officially connected with the body of prosecutors was not sufficient to disqualify, but actual participation in the matter which they had to decide did disqualify. Another instance is *R.* v. *Gaisford* (1). There the case of *R.* v. *Milledge* (2) was followed, the facts being substantially similar. Of the other set, *Allinson* v. *General Council of Medical Education and Registration* (3), is an example. In that case Dr. Philipson's position was challenged, and Lord *Esher* M.R. said (4):—"Dr. Philipson had been a vice-president of the society, and by reason of his being a vice-president he was *ex officio* a member of the committee to which was entrusted the authority to complain of the conduct of any medical man and to take proceedings in relation to it. He was only *ex officio* a member of the committee; he never in fact acted as a member of the committee." That is the distinction taken by the Court of Appeal. So that the principle seems to me to be this—that, if the person whose presence is challenged can fairly be said to be biassed, either by reason of his necessary interest or by reason of some pre-determination he has arrived at in the course of the case, then he ought not to act unless there is something to relieve him from these disqualifications. Even in a public prosecution a party may waive the objection. One of the strongest examples of this is the case of *Wakefield Local Board of Health* v. *West Riding and Grimsby Railway Co.* (5). There the Statute provided that the justices should be disinterested parties, but the words were held not necessarily to prevent waiver. A distinction has been drawn between public judicial tribunals and private judicial tribunals, but I am not satisfied that that is a sound distinction. In *Ranger* v. *Great Western Railway Co.* (6), a distinction was drawn between judicial and

(1) (1892) 1 Q.B., 381.
(2) 4 Q.B.D., 332.
(3) (1894) 1 Q.B., 750.
(4) (1894) 1 Q.B., 750, at p. 759.
(5) 6 B. & S., 794.
(6) 5 H.L.C., 82.

non-judicial tribunals, and I would particularly refer to these words of Lord *Brougham* (1):—"I think, therefore, that there is no ground for considering that the position in which he was placed was a *quasi* judicial position." There there was a contract by which the party had agreed to allow the engineer of the company to arrive at an opinion which would govern him, and it was pointed out that that was in the face of the knowledge that the engineer represented the company. The House of Lords did not consider the engineer in the light of a judicial tribunal, but considered that there was a contract by which the plaintiff bound himself to submit to the determination of the agent of the defendant. That distinction is also drawn in *R.* v. *Howard* (2), and the same point is referred to in *R.* v. *Justices of Dublin* (3). But in any event it is clear that in the case of a public tribunal the party affected may, if he has knowledge, waive the objection of disqualification. Now, if he can in the case of a public tribunal, of course he can in the case of a private contract. He can waive the objection by his own agreement. The question then becomes—did the plaintiff waive the objection in this instance, if the disqualification existed? That brings us to the consideration of the question of fact whether Gallant did occupy the position of accuser which disqualified him. It appears that the defendants put in evidence the minutes of a meeting of the District Executive of 4th August 1908, at which it was decided to lay the charge against the plaintiff. That minute shows that there were six persons present including Gallant; that Gallant stated that he had instructed the District Secretary to call the meeting to consider what action should be taken against the plaintiff; that Miller, a member of the Executive, gave his account of what had taken place in his presence, and that Gallant gave his account—practically his evidence—of what took place in his presence. The minute states that:—"Brother Gallant stated that as he left the hall after the meeting, one of the Sisters ran back to him and said:—'For goodness sake, don't go down Swanston Street, as J. E. A. Dickason was waiting to give it him and Young.' When

(1) 5 H.L.C., 82, at p. 116.
(2) (1902) 2 K.B., 363.
(3) (1904) 2 Ir. R., 75, at p. 91.

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near the south end of Swanston Street and not far from Flinders Lane, Brother J. E. A. Dickason spoke to him and he was very excited and threatened to give it to Young and would mark him. Brother Gallant said there was no doubt in his mind that J. E. A. Dickason intended to do grievous bodily harm to Brother Young if he met him." That was the evidence given by Gallant to the District Executive of which he was then a member and chairman; others of the Executive also gave evidence. The minute then states that Gallant rang up Young and advised that steps should be taken to have J. E. A. Dickason bound over to keep the peace and that the solicitor should be consulted with that object in view; that in consequence Young waited on Sir George Turner, who advised that a summons should be taken out and served on the plaintiff. So that on the evidence given by these gentlemen, including that of Gallant, the Executive was contemplating legal proceedings against the plaintiff. Then a discussion took place at this meeting as to whether legal proceedings should be taken to punish the plaintiff. They decided however that it was inadvisable in the interests of the society to take legal proceedings, and a motion that this charge should be brought against the plantiff was carried unanimously. For myself I do not see how it is possible to doubt that Gallant had formed a predetermination about the conduct of the plaintiff, and as far as any man could be disqualified from acting as a judge he was disqualified by reason of that predetermination. Then Gallant, much to his credit I think, appears to have doubted whether he ought to sit upon the Judicial Committee or the Appeal Committee, and he *bonâ fide* got advice and *bonâ fide* acting on it he presided on those tribunals. The question is, was that sufficient to upset the proceedings? The only thing that could sustain the finding is some distinct and express or necessarily implied provision in the contract under which, despite the natural injustice which would otherwise exist, Gallant was allowed to sit. The rules have been referred to and have been very fully stated in all material parts by my learned brothers; but I would say this about them, that the rules set out, amongst other things, very convenient directions necessary in many conditions. By rule 9 the District Chief Ranger has his duties prescribed, and one of them is that he shall preside at all Execu-

tive and District Meetings and Committees appointed by the District. That is his duty under the normal state of things. But, as the learned Chief Justice has pointed out, if Gallant were ill, or business called him away to another State, or if for any reason he did not attend, the committee was to go on. It cannot be that the whole machinery should stop because for the moment the District Chief Ranger is unable or unwilling to perform the duties *primâ facie* cast upon his shoulders. Therefore, it is not inconsistent with that rule that any committee shall sit in his absence. That being so, there is no such necessity for him to sit as to countervail the exigency of so essential and fundamental a principle of natural justice as that to which I have referred. The rules also show that complaints may be made and adjudicated upon, and rule 29 (*c*), amongst others, draws a distinction between an appellant and a respondent on one side and the District Chief Ranger on the other. It contemplates those two capacities as being separate. It may be that the District Chief Ranger is the actual and sole accuser. It may be that he is the actual person or one of the actual persons charged, and it seems to me to be impossible to contemplate that the rules make it absolutely necessary for him to act the part of the defendant or a witness and at the same time to continue to sit in his place at the head of the table as chairman of the committee. How can it be said that it is necessary that he should give evidence to himself and his fellow-committeemen, then retire with them and solemnly decide whether he is to believe himself or the man who contradicts him? I think the most express and peremptory language would be necessary to sustain the contention of the respondents on that point. Then, if that were the only point, I am clearly of opinion that the decision of these committees cannot be sustained and that the appellant should succeed.

There is another point which has been equally brought before us and equally argued, and I think I ought to say what my opinion about it is. The right of the plaintiff is set out in rule 1 (*c*) of the society as follows:—"Every member of this society, hereinafter called this District, shall be deemed the holder of one share therein; such share, however, shall be deemed to consist only of the interest he may have in this society, so long as he

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remains a member in accordance with these laws." That puts his position in clear, distinct and intelligible terms, and the question is whether the plaintiff can be deprived of his share in this society in this way—whether he can properly be got rid of, because expulsion causes him to cease to remain a member in the terms of that rule and, therefore, deprives him of his share. There is a fund accumulated by the voluntary subscriptions of members, and the plaintiff's right is, therefore, a proprietary interest; he is the holder of one share in that fund. It has been laid down by very high authority, and always acted upon so far as I know, that when there is a forfeiture the procedure to bring it about must, in order that the forfeiture may be valid, be strictly pursued. The leading authority on that point is *Clarke* v. *Hart* (1). In that case Lord *Chelmsford* L.C. said (2):—"It is unnecessary to advert to the principles that forfeitures are *strictissimi juris*, and that parties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power." Now looking at these rules I thoroughly agree with what counsel has said, viz., that it would be misleading to take one of these rules and construe it by itself and give effect to its words without reading that rule in conjunction with all the others. The respondents rely upon rule 86 which says, amongst other things, that any member who is adjudged by the District Judicial Committee or District Appeal Committee guilty of conduct calculated to bring disgrace on the Order "shall be expelled." They say that is all the rule requires, that the District Judicial Committee found the plaintiff guilty, and that the rule is a self-executing provision which at once and *ipso facto* expels the plaintiff. Now the words "shall be expelled" may, as the learned Chief Justice has pointed out, mean that or they may mean "shall be liable to be expelled." In that liability I would say there may be included this, that it shall be the duty of the proper organ of the society to expel. But I am very strongly of opinion that it does not mean *ipso facto* expulsion. The words are certainly capable of a different interpretation, and I see so many difficulties and incongruities from adopting that interpretation that, unless the

(1) 6 H.L.C., 633.

(2) 6 H.L.C., 633, at p. 650.

language were unambiguous, I would not adopt it. For instance, in rule 86 if the member is *ipso facto* expelled and you read that rule by itself, then the member cannot be readmitted "without the sanction of the Court in which he offended, and agreed to at a summoned meeting called for the purpose, also agreed to at the following District Meeting." In order to see what is the meaning of that you have to look at the other rules. No rule is better established than that where two meanings are possible you must take the more reasonable one. The most recent instance in which that is laid down is *Attorney-General* v. *Till* (1), where Lord *Loreburn* L.C. says:—"Where various interpretations of a section are admissible, it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive." I think that it would be both here, and for this reason, amongst others, that where a member joins this society he sees amongst other things that not only has he a final right of appeal to the District Appeal Committee, but he also finds rule 29 (*d*), which provides that the District Appeal Committee shall submit reports in writing of cases investigated by them to the District Meeting immediately following such investigation. That is a mandatory provision and he has no control over it. But he is one of the members, and he has the right to insist upon that rule being carried out, and to insist on an adverse finding of the District Appeal Committee being sent on at once to the District Meeting. The rule goes on to say—"and the decision of the District Meeting thereon shall be final." I take it that the fair meaning of that is that a member is not to be considered to be finally expelled from the society and deprived by forfeiture of his share until the District Appeal Committee has performed its duty and the District Meeting has had the opportunity of considering the matter. That is the final act which completes the process by which he has agreed to be bound, and to which he has a right to look for his protection. That does not appear on the facts of this case to have been done. Whether in fact it was or was not done I do not know. I have only to look at the case as it comes here, and looking at it, there is no such allegation. I think the point is quite within the

(1) (1910) A.C., 50, at p. 51.

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pleadings and within the competency of this Court to consider. I think for these reasons that this appeal should be allowed.

Appeal allowed. Judgment appealed from discharged. Judgment substituted declaring that the appellant is still a member of the society, and granting an injunction restraining the respondents and the society from excluding the appellant from meetings and benefits, rights or privileges of the society and from refusing to accept his contributions. Damages of 40*s. Appellant's costs of appeal and of action to be paid by the respondents.*

Dist *Adelaide City Corporation* v *Altmann* 46 SASR 186

Ovrt in part *Clyde Engineering Co Ltd* v *Cowburn* (1926) 37 CLR 466

Cons *AIRC, Re; Ex parte CFMEU* (1999) 164 ALR 73

Solicitor, for the appellant, *J. P. Brennan.*
Solicitor, for the respondents, *Sir George Turner.*

B. L.

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MELBOURNE, *March* 4, 7, 8, 9, 10, 11, 14.

SYDNEY, *March* 30.

AUSTRALIAN BOOT TRADE EMPLOYÉS FEDERATION . . . . . } CLAIMANTS;

AND

WHYBROW & CO. AND OTHERS . . RESPONDENTS.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Award inconsistent with State law—Determination of Wages Board—Test of inconsistency—Minimum wage—Commonwealth of Australia Constitution Act (63 & 64 *Vict. c.* 12), *cl.* v. ; *The Constitution, sec.* 51 (XXXV.)—*Factories and Shops Act* 1909 (*No.* 2) (*Vict.*) (*No.* 2241), *sec.* 39.