

High Court of Australia.

FULL COURT—(Griffith, C.J., } March 21, 22,
O'Connor and Isaacs, JJ.) } 23, 24.
(Melbourne.)

DICKASON, Plaintiff Appellant v. EDWARDS and Others, Defendants Respondents.

Friendly Society—Rights of members of—Domestic tribunals—How far decisions of such tribunals reviewable in Courts of law—Principles of natural justice govern proceedings of such tribunals unless expressly or impliedly excluded—No man shall be judge in his own cause—Extent of this rule—Nature of interest that disqualifies—Expulsion of member—Forfeiture, principles applicable to—Inherent power as to conducting meetings of Friendly Society where omission to provide in rules—Principles on which rules appointing domestic tribunals interpreted.

The rights *inter se* of members of a Friendly Society are entirely contractual, the contract being evidenced by the rules of the Society.

A rule of a Friendly Society provided, among other things, that—"Should any member be . . . adjudged "by a Judicial Committee . . . guilty of any . . . "conduct calculated to bring disgrace on the Order, he "shall be expelled." The appellant (a member of the Society), against whom such a charge was brought, objected that the conduct charged was incapable of coming within the rule.—

Held, that the Court might review the matter for the purpose of determining this objection.

But *semble*.—If the conclusion of the domestic tribunal is such as reasonable men acting *bonâ fide* might come to, the Court will not interfere with it.

Per Isaacs, J.—The Court will only review such a decision to find whether it has been arrived at in accordance with the rules of the Society, *bonâ fide*, and without any departure from the principles of natural justice.

The rule of natural justice that no man shall be judge in his own cause applies to domestic tribunals created under the rules of Friendly Societies, unless it is expressly or by necessary implication excluded.

The interest which disqualifies a man from acting judicially must be substantial and not merely nominal.

Allinson v. General Council of Medical Education, (1894) 1 Q.B. 750, adopted and applied.

If a person disqualified by interest sits in a judicial capacity his mere presence vitiates the proceeding, though he has in fact taken no active part in it.

The appellant was charged with conduct which (the Court held) was substantially that of using language of gross personal insult to the chief officer of the Society of which he was a member. The rules provided that the chief officer was to preside over the tribunal appointed under the rules for hearing, among other things, charges such as that preferred against the appellant, and did not provide that where the chief officer was interested he should be disqualified. On the hearing of the charge the chief officer presided over, but (as the trial Judge found) took no part in, the deliberations of the tribunal, though objection was raised by the appellant to his sitting. After hearing evidence, the tribunal found the charge

and it was contended that that being so, the conviction ought not to have been made, because the defendants had admirably constructed apparatus to prevent this annoyance, which, if properly worked, would have done so. But what I have to consider is whether the fact that the annoyance arose from what must be considered as the negligent use of sufficient machinery, sufficient apparatus, is not a nuisance within the meaning of this section, if it appear that the business as actually carried on is a nuisance. The section does not say that the nature of the business must necessarily involve a nuisance, but the question is whether it is a nuisance, and whether that fact has been established to the satisfaction of the Magistrates. Whether it arises from the insufficiency of the means used to prevent a nuisance, or negligence in the use of those means appears to me immaterial, so far as the prosecution is concerned, where the business has in fact become a nuisance. I agree with Mr. Starke's argument that, supposing on some occasion which has not occurred before, and is not likely to occur again, there is an accident—a pipe bursts which contains offensive matter that spreads all over the place—some sudden misadventure which makes the carrying on of that business for the occasion a nuisance, that ought not to be considered an offence against the Act. I certainly think there should not be a conviction in such a case. But the fact that there was a smell caused, according to the evidence, by negligence on one occasion, and on another probably due to the same cause, shows that this was no sudden or exceptional instance, but that it was incidental to the carrying on of the business. If persons will be careless who have control of the work they must bear the consequences when bad smells do occur. The Magistrates considered, apparently, that these two instances were sufficient to show that it was an incident of the business, bringing it within this section—something which they might notice and ought to notice in connection with the carrying on of a business, which was generally carried on in an unobjectionable and inoffensive way. If it had been a mere accident, I think they would have been wrong, but on the evidence I think they were entitled to consider that it was not a mere accident, but was due to the negligence of an employé, that had occurred before, and might occur again. It certainly did occur on the occasion in question. That is the second ground of the order *nisi*. I therefore think they were right in inflicting the small penalty they did inflict. I discharge the order *nisi*, with costs.

Order nisi discharged, with costs.

[Solicitors — For the complainant, Malleon, Stewart, Stawell and Nankivell; for the defendants, Westley and Dale.] S. E. H.

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proved, and in consequence the appellant was *de facto* expelled from the Society.—

Held, that the decision so arrived at was vitiated by the presence of the chief officer, and the resulting expulsion was illegal.

The rules made no express provision for any person presiding over the domestic tribunal in the absence of the chief officer.—

Held (per Griffith, C.J., and Isaacs, J.), that the tribunal had inherent power to appoint a chairman *pro hac vice* in the absence of the chief officer.

Per Griffith, C.J., and Isaacs, J.—Where rules of a Friendly Society provide for a forfeiture of rights the provisions of such rules must be strictly observed in order to work such a forfeiture.

Per O'Connor, J.—In interpreting rules giving jurisdiction to any tribunal there must always be read into the rules the underlying statement that the proceedings of the tribunal shall be carried on in accordance with the fundamental principles of natural justice, and these principles apply unless they are expressly or impliedly excluded.

Judgment of Hodges, J., 15 A.L.R. 411, reversed.

APPEAL FROM THE SUPREME COURT OF VICTORIA.

This was an appeal in an action brought by John Ernest Albert Dickason, who claimed to be a member of the Ancient Order of Foresters, United Melbourne District, Friendly Society, against various officers representing the Society and certain bodies thereof. In his action, Dickason claimed a declaration that he was still a member of the Order, an injunction against the Order, its officers, servants and members, restraining them from excluding him from the Order and its benefits, and damages. The action was tried by Hodges, J., who gave judgment for the defendants. From that decision, reported in 15 A.L.R. 411, this appeal, by special leave, was brought, on the ground—

That the expulsion of the appellant from the said Ancient Order of Foresters was illegal (a) because William Gallant, who was a member of the executive prosecuting the appellant, and was otherwise personally directly concerned in the alleged offence with which the appellant was charged, sat as a member of and took part in the decisions of the domestic tribunals of the said Order which adjudicated on and found the appellant guilty of the charges laid against him; and that such tribunals were consequently incompetent to lawfully determine the said charges (b) inasmuch as the conduct charged against the appellant was incapable under the circumstances of amounting to conduct calculated to bring disgrace on the order within the meaning of the rule; (c) inasmuch as the District Appeal Committee made no report upon the subject-matter of the said charges to the District Committee as provided in the said rules, and the said District Meeting arrived at no decision thereon.

Further facts, and all material rules of the said Society appear in the report of the trial, 15 A.L.R. 411, and in the judgments of the Court *infra*.

Mitchell, K.C., and Lowe for the appellant.

Irvine, K.C., and McArthur for the respondents.

The argument on the appeal was substantially the same as before Hodges, J., and appears fully in 15 A.L.R. 411.

No authorities other than those cited before Hodges, J., and in the judgment of the Court, were referred to.

GRIFFITH, C.J.—This is an action brought by the plaintiff, a member of a Friendly Society called the Ancient Order of Foresters, United Melbourne District, of which he had been a member for about twenty years, and to whom the rights of membership have been denied, claiming a declaration of his rights, 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 of the Society, which are made under the authority of the "Friendly Societies Act." In the case of this particular Society the governing authorities are—(1) What is called the District Meeting, which is a representative body composed of representatives of all the courts or lodges of the Order, and it may be called the Parliament of the Order; (2) the District Executive, consisting of several of the chief officers of the Order; (3) a Judicial Committee called the District Judicial Committee, whose functions appear under rule 28 to be to investigate charges or complaints made against members of the Order; and (4) the District Appeal Committee, which has appellate jurisdiction from decisions of the District Judicial Committee. The principal officer of the Order is called the District Chief Ranger, and he is a member of all committees appointed by the District, and head of the District Executive. The rule which provides for expulsion of members is rule 86, which is as follows, so far as material:—"Should any member be convicted of any felony, larceny or embezzlement, or be adjudged by a 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 to refer to these rules more in detail, but this is sufficient for my present purpose.

A charge was brought against the plaintiff on 7th August, 1908. It was preferred by the District Secretary, by direction of the District Executive. The charge was that the plaintiff made use of various expressions, which may be described as vulgar abuse with particular reference to the District Chief Ranger and some of the other members of the District Executive, and it set out the language alleged to have been used, and concluded—"As such conduct is unbecom-

"ing of any respectable member of the Ancient Order of Foresters, Bro. 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 of the committee. His presence was objected to by the plaintiff, on the ground that he was an interested party, and that what the plaintiff was accused of was in effect insulting the District Chief Ranger in a gross manner. The District Chief Ranger continued to sit, and the District Judicial Committee gave a finding 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 Bro. J. E. A. Dickason pay the costs of this inquiry (£3 19s. 5d.)." The plaintiff then appealed to the District Appeal Committee, in which the District Chief Ranger also presided, and they upheld the decision of the District Judicial Committee. Thereupon the District Executive took steps which resulted in the plaintiff's *de facto* exclusion from the benefits of the Society. He then brought his action. Various objections against the validity of this so-called expulsion are raised. It is first contended that the charge itself did not show a charge of "conduct calculated to bring disgrace on the Order." It appeared that the charge was that of using terms of vulgar abuse in respect of members of the Order, and apparently to members of the Order only. I think it is open to the Court to review a matter of this sort. But it was suggested that the word "adjudged" in r. 86 leaves it to the absolute uncontrolled opinion of the Judicial Committee or Appeal Committee, whether the conduct charged is "conduct calculated to bring disgrace on the Order." I think the true test is this—that the conduct must be such that reasonable men might think it "calculated to bring disgrace on the Order." Opinions might differ in this case, but for my own part I have no hesitation in saying that, in my opinion, there was nothing in the language used which in the circumstances was "calculated to bring disgrace on the Order." Whether reasonable men could draw that inference is another matter, and one on which I do not feel called upon to express any definite opinion.

But there is a further difficulty in the way of the respondents. I doubt very much whether the finding of the District Judicial Committee was a finding 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 to wind up with a statement that the plaintiff had thereby been guilty of "conduct calculated to bring disgrace on the Order," which if proved would lead to his expulsion from the Order. The District Judicial Committee, it seems to me, found

all the facts, but declined to draw the inference leading to such consequences. They said, almost expressly, that they did not think the plaintiff's conduct ought to lead to expulsion. So that their finding might reasonably be construed as a finding that, although he used the language alleged under circumstances of great excitement, they did not think it was a case which warranted expulsion. If that is so, they did not apply their minds to the question whether the conduct alleged was of such a nature as to be "calculated to bring disgrace on the Order." Another view of their finding is that they did not think that that was their business, but that it was their duty to find the facts—whether the words were used—and that it was for some other tribunal to determine what was to follow upon that finding. But I do not think it is necessary to express any opinion upon that point. There is a great deal to be said in favour of the appellant's view on both points.

Assuming these difficulties out of the way, there is the objection that the District Chief Ranger could not sit to hear the charge. It is a general rule of natural fair play that a man cannot be judge in his own cause. In statutory tribunals, that rule is absolute unless the Statute provides, as in some cases, that persons who are only formally parties may nevertheless sit as judges. This is so with licensing tribunals and members of the London County Council, when they sit to determine on the grant of certain licences; but the rule prevails in case of statutory tribunals, except so far as the Statute shows a contrary intention. In the case of a tribunal appointed by the parties, it is a matter of construction of the contract whether they have agreed that such a person shall be disqualified or not. To exclude the general rule of fair play, I think it should appear that they intend that a person may sit though interested. From the contract itself you must collect the agreement of the parties, either from its express terms or by necessary implication. The question then resolves itself into an examination of the provisions of this contract with respect to the tribunal. For the respondents it is contended—(1) That the District Chief Ranger was bound to sit, and (2) whether he was bound or not 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 and the District Appeal Committees. Rule 28, which specifically deals with the District Judicial Committee, after providing for the constitution of that committee, provides—par. (a)—that—"No member of the District Appeal Committee or District Executive shall act on the District Judicial Committee except the District Chief Ranger and the District Secretary, who shall only act as chairman and secretary respectively of such committee, and have no vote, the casting vote of the chairman excepted." Par. (b) provides for challenging mem-

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bers of the committee—"The names of the fifteen "members comprising the District Judicial Committee shall be placed in the ballot-box, and the "first seven drawn, unless challenged, shall form "the committee to try the case, five being a quorum. "The complainant and defendant shall be allowed to "challenge not more than three members each, which "must be done at the time of the drawing of the "ballot." By par. (h) the District Judicial Committee is required to submit reports in writing of cases investigated to the District Meeting immediately following, and they are to have power to call for all papers, books, documents and other evidence they may consider necessary for a fair and impartial investigation. Rule 29 deals with the District Appeal Committee, which also consists of fifteen members. Par. (b) provides for drawing a panel of seven, who, if not challenged or concerned in the case, shall be the committee to investigate and adjudicate upon the case. Par. (c) allows for challenges to each party up to three, and requires the names of any witnesses proposed to be called to be given in writing to the District Chief Ranger or chairman of the committee at the time of meeting. Par. (d) provides that every District Appeal Committee shall submit reports in writing of cases investigated to the District meeting immediately following such investigation, and that "the decision of "the District Meeting thereon shall be final." Par. (e) provides that—"No member of the District "Judicial or District Executive shall act on the "District Appeal Committee except the District Chief Ranger and the District Secretary, who shall only "act as chairman and secretary of such committee, "and have no vote, the casting vote of the chairman "excepted." This rule evidences a general intention that the rules of fair play shall be observed, and that the accused person shall have a fair trial.

Now as to the point that the District Chief Ranger must preside. I think that contention is negated by two considerations. First of all, sub-par. (c) of r. 29 assumes that the chairman may be somebody else than the District Chief Ranger; and secondly, the ordinary rule of common-sense which governs all matters of this sort, that if a body is composed of several persons and the proper chairman is absent, there is no reason why the others should not go on and appoint a chairman *pro hac vice*. Although, therefore, rule 9 says that he shall preside, r. 29 (c) contemplates that he may be absent, and if he is not present it cannot be that the functions of the committee are to cease because he is not there. It is evident, therefore, that rule 9 means that he is to preside if present, but not that he is bound to be present. Then may he sit if interested? I think it is clear that, though he is the head of the executive, and a charge may be brought by the executive, it is intended that he is not to be disqualified by the mere formal charge being laid by the executive of

which he is a member. But if he is not merely a formal party, but in substance the individual person making complaint of an offence committed in substance against himself, I think very different considerations arise. Then it becomes his own cause, not in any technical sense but substantially. He is a person complaining of a grievance. Is he a person who ought to be allowed to pass sentence on the alleged offender? In the present case the District Chief Ranger actually initiated the proceedings before the Executive Committee. Moreover, as a matter of fact—I do not know whether it is material—the case was presented to the District Appeal Committee by the District Secretary as the mouthpiece of the executive as a case in which they had to decide between the District Chief Ranger and the plaintiff, so that if they did not find the plaintiff guilty they were in effect finding the District Chief Ranger guilty—that it was in substance a personal quarrel—a *lis*—between the District Chief Ranger and the plaintiff. It is said that 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, it cannot now be said that his being there did not vitiate the proceedings altogether. An illustration may be taken from the *London County Council Case*, (1902) 2 K.B. 363. The Court held that when that body is constituted as a judicial body, members of it appointed to investigate licensing matters, and take an active part in directing the Council to come to a conclusion, are not disqualified, because the Statute in effect says so. But if the question were whether a licence should be granted to a particular member of the London County Council, no one could successfully contend that that person would not be disqualified from sitting in that case. For these reasons, I think the findings of both committees were vitiated by the presence of the District Chief Ranger.

A further point was raised of some importance, which in the view I have just expressed, it is not necessary to determine. I have already referred to r. 29 (c), which provides that the District Appeal Committee shall submit reports in writing of cases investigated by them to the District Meeting, and that the decision of the District Meeting thereon shall be final. In r. 86, which I have already read, the words "shall be expelled" are capable of two meanings—(1) That the person found guilty shall be *ipso facto* expelled—that is, cease to be a member of the Order; or (2) that he shall be liable to expulsion. If the meaning is "shall be *ipso facto* expelled," one would think that the finding of the District Judicial Committee should be in definite terms that they think the person accused has been guilty of conduct of such a nature that he ought to be expelled. In this instance in their finding they say they do not think so.

The rule being open to these two constructions, and the question being one of forfeiture—in this case forfeiture of all the rights of twenty years' membership, which is substantially a proprietary right, and involving, since the members of these Societies are not admitted after a certain age, a possible inability to obtain the advantages of becoming a member of a similar Society—there is reason for being careful in coming to the conclusion that the forfeiture did take place. If the words are capable of two meanings, par. (d) of r. 29 becomes very important. The plain meaning of the language is that the District Appeal Committee is to report all cases which it investigates to the District Meeting, and that the decision of the District Meeting is to be given on it, and is to be final. If that language is not cut down by r. 86, it follows that the decision rests with the District Meeting, and so far as appears in the present case, no such decision has ever been given. In that view the attempted expulsion was premature. I have mentioned the matter because it is important to be borne in mind. For these reasons, I think the attempted expulsion was ineffectual, and that the plaintiff is entitled to the relief he claims.

O'CONNOR, J.—Several grounds were relied on in support of the plaintiff's right to succeed in the action, but I do not think it necessary to refer to more than two. It was contended that the conduct proved was not such as the committee under rule 86 could lawfully find to be "conduct calculated to bring disgrace on the Order." I agree that it is open to the Courts to review the decisions of these committees on a question of this kind, but it seems to me that the only ground upon which they can interfere is that no reasonable man could honestly come to the conclusion that the facts proved constituted the offence described in the rules. What may be "conduct calculated to bring disgrace on the Order," is a matter peculiarly for the members of the Order itself to determine. There is a certain standard of conduct which necessarily obtains in the Order, and as to what may or may not bring "disgrace on the Order" no one can judge as well as the constituted committee of members. I think it may be taken generally that if they honestly come to the conclusion that conduct is calculated to bring disgrace on the Order, and on the facts that conclusion is not absurd or unreasonable, the Court will not interfere. Although I do not say that I should personally have come to the conclusion that the conduct was of the nature contemplated in the rule, I see no ground for interfering with the view taken by the District Judicial Committee. With regard to the question 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 good reasons may be urged in either point of view. I base my decision entirely on

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 Societies of this kind to give powers of expulsion. It is necessary also to appoint tribunals for the purpose of considering questions of conduct, and the Courts will not interfere with the determination of these tribunals unless they exceed their powers and the decision results in some damage to property, or some interference with civil rights. Whether a domestic tribunal is or is not exceeding its powers is generally a question which turns on the interpretation of the contract which creates the tribunal. A man may join a Society, the rules of which empower the judicial body to decide in violation of all principles of natural justice; if parties choose plainly to agree to a tribunal of that kind the Courts will not interfere with the decision; but in the interpretation of any such contract there are some leading principles to be borne in mind. The first is this. In interpreting rules conferring jurisdiction on any tribunal, there is always to be read into them the underlying statement that the proceedings shall be carried on in accordance with the fundamental principles of natural justice. If a party wishes to shut out that implication it is for him to show that the rules have expressly or by necessary implication negatived the existence in the rules of that underlying principle. To some extent, no doubt, the tribunal under consideration has infringed what would ordinarily be considered the principles upon which such inquiries should be conducted. It is clear that a distinction is drawn between judicial functions exercised by the District Chief Ranger and by other officials. A committeeman who is interested cannot sit, but, as far as I read the rules, there is nothing to prevent the District Chief Ranger from sitting, though he may be interested in a public sense. There is power to challenge a committeeman, but there is no power to challenge the District Chief Ranger. The fact that other persons have sat on the tribunal of primary jurisdiction disqualifies them from sitting on the appellate tribunal, but that is not the case with the District Chief Ranger. In all these respects the rules expressly give him permission to sit, although he may be in an impersonal sense inclined to bias from the part he has taken in the early stages of the inquiry.

But there is no rule which goes so far as to shut out the application of that principle of natural justice which prevents a man from being judge in the cause in which he is personally interested. If the contention of the respondents is right, there cannot be anything to prevent the District Chief Ranger sitting in a case in which he is actually the culprit charged with the offence of "conduct calculated to bring disgrace on the Order." I do not see any escape from the position that the contention of the

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respondents must carry them that length. The mere statement of such a contention reveals its absurdity. The true rule is, I think, laid down in *Allinson's Case*, (1894) 1 Q.B. 750, by Lord Esher, at p. 759. The rule applicable to these domestic tribunals is not that generally applied to public tribunals. The distinction is well known, and has been admitted by Counsel on both sides. In the case of domestic tribunals there must not be, in Lord Esher's words, any reasonable or substantial ground for suspecting bias in persons acting judicially. He says—"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 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*, "43 C.D. 366."

I take it that if Mr. Gallant, who presided on both these tribunals, could, on reasonable and substantial grounds, be suspected of bias, he should not have sat. There is no rule which entitles him to sit under such circumstances. Now, what is the charge? First, abusive language had been used against the District officials. That included Mr. Gallant by name, though it did not single him out; but it is also part of the charge that, on a particular occasion, the plaintiff singled Mr. Gallant out, and spoke of him in terms of low abuse. It is impossible to say under these circumstances that a man who is actually prosecutor—not only in the interests of the Society, but as charging the use of abusive language against himself personally—might not be reasonably and substantially suspected of bias. Placed in such a position of direct personal interest, it seems to me, on principles of natural justice, he had no right to sit. It follows, in my opinion, that his sitting vitiated the decision of the committee of which he was a member, and its decision cannot be allowed to stand. There was, therefore, no justification for the plaintiff's expulsion, and the judgment in the Court below was wrong in upholding it. I therefore agree that this appeal should 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 of such a nature as to fall within the rule, if it is necessary to say anything about it, I think it was capable of being considered by the tribunal as conduct which was "calculated to bring disgrace on the Order." I think that although the Court has an undoubted right to review the finding in one sense, it is only to see whether it was arrived at in accordance with the rules, without any departure from the principles of natural justice, and *bonâ fide*. If these conditions are complied with, then so long as the finding is such as the Court finds it impossible to designate as

one which no reasonable man could honestly arrive at, it will not review it. In this case it is not necessary for me to say anything more on this branch, but I should be very far from suggesting that language of this nature addressed to or spoken of one of the governing bodies of the Order was not calculated to bring disgrace on it.

As to whether the verdict was actually arrived at, I should like to say that there is no technicality necessary, and the observations of Cotton, L.J., in *Dawkins v. Antrobus*, 17 C.D., at p. 635, show that formality of language is not at all necessary. Here the committee did find that the charges were proved. If it had stopped there I should have said the finding was exactly like a jury finding a verdict of guilty. They did go on to make merciful suggestions, very like a recommendation to mercy of a jury. Therefore, I should not be prepared to say, if I were called upon to say anything definite about it, that the charge was not held to be definitely proved. I also think that when Mr. Dickason appealed from the District Judicial Committee's finding to the District Appeal Committee, he apparently considered, from the terms of his notice of appeal, that the District Judicial Committee did find all that was necessary.

Now, the first important question to consider is whether the presence of Mr. Gallant as president of the District Judicial and the District Appeal Committees, vitiated their findings. Generally, the principle cannot be better stated than in the passage referred to by my learned brother O'Connor, where Lord Esher uses these words, at p. 758—"In the administration of justice, whether by a recognised 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 suspected. That case was referred to in the later case of *R. v. Burton*, (1897) 2 Q.B. 468, at p. 473, by Lord Collins as the leading case on this point, and he quoted that particular passage. It does not matter that the person who is disqualified is only present in a nominal capacity—that has been recognised from the earliest traditions. It is recognised so early as in a case in Hard. 503—*The Earl of Rivers' Case*—and so late as *Akkersdyk's Case*, (1892) 1 Q.B. 196, by A. L. Smith, L.J. The principle, then, is plain that if the 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' Case*, 3 H.L.C. 759, and *Allinson's Case*, (1894) 1 Q.B. 750, are distinct and express authorities on that point. But there is another ground of disqualification, and this is, as I may term

it, incompatibility. If it is incompatible for the same man at once to be judge and to occupy some other position which he really has in the case, then he must not *primâ facie* act as judge at all. He cannot be both accuser and judge. That is a fundamental and essential principle of justice. *Aliquis non debet esse judex in propriâ causâ quia non potest esse judex et pars*—Co. Litt. 141 (a); and it has been differently expressed in a different case thus—*Nemo potest esse simul actor et judex*. There are two exceptions to this rule recognised by law. One is where the party interested is relieved from the operation of this rule by Statute, and the other is where there is a necessity for him to act. That principle of necessity is recognised by the House of Lords in *Dimes' Case*, at p. 780, and in *Ranger's Case*, 5 H.L.C., at p. 88. Whether this incompatibility exists depends on the facts of the particular case. There are two sets of cases typical of this particular objection, one set in which the judge was held disqualified, and the other in which he was not. An example of the first is *R. v. Milledge*, 4 Q.B.D. 332, where certain councillors were also Justices, and it was held by Lord Chief Justice Cockburn and Mr. Justice Mellor that they were disqualified. The Lord Chief Justice said—"The mere fact that some of the Council who passed 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 that of *R. v. Gaisford*, (1892) 1 Q.B. 381, in which *Milledge's Case* was followed. The facts were substantially similar. Of the other set *Allinson's Case* (*supra*) is an example of an instance where there was no disqualification. In that case, Dr. Phillipson's position was challenged, but Lord Esher, M.R., said—"Dr. Phillipson 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 be fairly said to be biased, either by reason of his necessary interest, or by reason of some pre-determination that he has arrived at in the course of the case, then he ought not, on these principles, to act, unless there is something to relieve him of the disqualification. Of

course, even in a public tribunal a party may waive the objection. One of the strongest examples of that is the case of *Wakefield Local Board v. West Riding Railway Co.*, L.R. 1 Q.B. 84, where the Statute provided that a Justice should be a disinterested party, but the words were held not necessarily to prevent the operation of waiver. As to the distinction drawn between public judicial tribunals and private judicial tribunals, I am not satisfied that it is a sound distinction. *Ranger's Case* (*supra*) drew the distinction between a judicial and a non-judicial tribunal. I would particularly refer to these words of Lord Brougham, at pp. 116-7—"I think there is no ground for considering that the position in which he was placed was a quasi judicial position." That was the case of a contract by which a party had agreed to allow the engineer of the Company to arrive at an opinion which was to govern him, and it was pointed out that was in face of his knowledge that the engineer represented the Company. Apparently the House of Lords considered that, not in the light of a judicial tribunal at all, but as a contract that a particular person, the agent of one of the parties, should determine certain matters. That distinction was observed in *R. v. Howard*, (1902) 2 K.B., at p. 376, and the same point was referred to in the Irish Court by Pallas, C.B., in *R. v. The Recorder and Justices of Dublin*, (1904) 2 Ir. R. 75, at p. 91 *et seq.* But, in any event, it is clear that in the case of a public tribunal, the party affected may, if he has knowledge of the circumstances, waive the objection, and, of course, he may, in the case of a private contract, waive it in advance by his agreement, and the question then comes to this—Did he waive it in this instance, if it existed?

That brings me to the consideration of the question of fact whether Mr. Gallant did occupy the position of accuser which disqualified him. In the Appeal Book it appears that the defendants put in evidence the minutes of the Executive Meeting of the 4th August, 1908, which preceded the laying of the charge. That exhibit shows this—that there were six persons present—Mr. Gallant, Mr. Young and other members of the District Executive. Mr. Gallant said he had instructed the District Secretary to call a meeting to consider what action should be taken against the appellant. A Mr. Miller gave his account of what took place, and Mr. Gallant then gives his account—practically evidence—of what took place—"When near the south end of Swanston Street and not far from Flinders Lane, Bro. J. E. A Dickason spoke to him, and he was very excited, and threatened to give it to Young, and would mark him. Bro. Gallant said there was no doubt in his mind that J. E. A. Dickason intended to do grievous bodily harm to Bro. Young if he met him." That was evidence given by Mr. Gallant to the District Executive, of which he was then a member and chairman; and other members of the committee also gave evidence. The

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minutes go on to say—"Bro. Gallant rang up Bro. "Young on Saturday morning to inquire if he had "encountered J. E. A. Dickason on Friday night, as "he was afraid he intended to do him (Young) bodily "harm, and advised that steps should be taken to "have J. E. A. Dickason bound over to keep the "peace, and the solicitor should be consulted with "that object in view. In compliance with that ad- "vice, Bro. Young waited upon Sir George Turner," who gave advice.

So they contemplated legal proceedings, on evidence given by these gentlemen at the District Executive meeting, including the evidence of Mr. Gallant himself. Then they discussed at this meeting whether he should take legal proceedings in the Police Court, and they decided that it was not advisable in the interests of the Society that he should do so. Then they decided that this charge should be laid. That was carried unanimously, and the matter proceeded. For myself, I do not see how it is possible to doubt that Mr. Gallant had formed a pre-determination about the conduct of Mr. Dickason, and as far as any man could be disqualified from acting as a judge, he was disqualified by reason of that pre-determination. Then Mr. Gallant, I think much to his credit, appears to have doubted whether he ought to have acted, got advice *bonâ fide*, and acted upon it *bonâ fide*, and he did sit on the committees.

The question now is whether that is sufficient to upset the proceedings. The only thing that could sustain the finding of the committees on which he sat is some distinct and express or necessarily implied provision in the contract under which, despite the natural injustice which otherwise existed, Mr. Gallant would be allowed to sit. The rules have been referred to and more fully stated in all material parts by my learned brothers, but I would say this about them—that the rules set out, among other things, under various headings, very convenient directions as to things necessary under certain conditions. By rule 9 the District Chief Ranger has his duties prescribed, and among others, he is to preside at meetings appointed by the District. That is his duty in the normal state of things. As the learned Chief Justice has pointed out, if Mr. Gallant were ill, or business called him away to another State, or if for any reason he did not attend, the committee could go on. It cannot be that the whole machinery would stop because for the moment the District Chief Ranger is unable or unwilling to carry out the duties *primâ facie* placed on his shoulders, and therefore it is not inconsistent with that rule that the committee shall sit in his absence. That being so, there is no necessity for him to sit so as to countervail the exigency of such an essential and fundamental principle of natural justice as that to which I have referred. The rules also show that complaints may be made and adjudicated upon, and r. 29 (c), amongst others, draws a distinction be-

tween the appellant and respondent on one side, and the District Chief Ranger or chairman of the committee on the other. It contemplates these two capacities as separate. It may be that the District Chief Ranger is the actual and sole accuser; it may be that he is the actual or one of the actual persons charged, and it seems to me impossible to contemplate that the rules make it absolutely necessary for him to act the part of defendant or witness and chairman of the committee. It seems to me impossible that he should continue in his place at the head of the table as chairman of the committee until he is called upon to give evidence to himself and his brother committeemen, and then should afterwards solemnly retire and decide whether he believes himself or the man who contradicts him. I think the most express and peremptory language is necessary to sustain the respondents on that point. If that were the only point I am clearly of opinion that the decision of the committees cannot be sustained, and that the appellant should succeed.

But there is another point equally brought before us and equally argued, and I think I should say what is my opinion about it. Rule 1 (c) provides that—"Every member of this Society shall be "deemed the holder of one share therein "so long as he remains a member in accordance "with these laws." Now, that puts his position in clear, distinct and intelligible terms, and the question is whether he can be deprived of his share in this Society in this way, where he has been improperly got rid of, where the expulsion causes him to cease to be a member, and therefore deprives him of that share. There is a fund accumulated by the voluntary subscriptions of members, and his right is based on a proprietary interest as the holder of one share in that fund. The rule has been laid down by very high authority, and always acted upon, as far as I know, that where there is a forfeiture it must, in order to be valid, be strictly pursued. In *Clarke v. Hart*, 6 H.L.C. 650, in the speech of Lord Chelmsford, it is said—"It is necessary to "advert to the principles that forfeitures are *strictis- "simi 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." That was a case of forfeiture. Looking at these rules, I thoroughly agree with Counsel that it would be misleading to take any one of these rules, construe it by itself, and give effect to the words of it without reading that rule in conjunction with all the other rules. The respondents rely upon upon r. 86, which says that—"Should any member "be convicted of felony, larceny or embezzlement, "or adjudged by a 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 . . ." They say that is all

the rule requires. A District Judicial Committee did find the plaintiff guilty, and the rule has a self-executing provision which at once and *ipso facto* expels the member. The word "expel" may mean that word or simply "liable to expulsion." In that liability it may also include, it may be, a duty on the proper organ of the body to expel him, but I am very strongly of opinion that it does not mean an *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 it were unambiguous, I would not adopt it. For instance, under r. 86 itself, if he is expelled *ipso facto*, he cannot be re-admitted without the sanction of the Court in which he offended and of the District Meeting. It is said that the rule is self-contained. That cannot be the meaning of it, because you have to look to other rules to see the meaning of these expressions, and therefore you have to look to other rules to see the meaning of the other words there used. There is no rule better established than that where there are two meanings possible you take the most reasonable one. The most recent instance of this is to be found in *Attorney-General v. Till*, (1910) A.C. 51—"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 it would be both here, and for this reason amongst others—that a member when he joins this Society sees, among other things, that he has a final right of appeal to the District Appeal Committee, and by r. 29 (d) this committee "shall submit reports . . . in writing of cases investigated by their respective committees to the District Meeting immediately following such investigation, and the decision of the District Meeting thereon shall be final." That is a mandatory provision. He has no control over it, but he is one of the members of the Society, and has a right to insist on that rule being carried out, and an adverse finding of the Appeal Committee being sent on to the District Meeting. The finding or adjudication or decision shall be sent on to the District Meeting. Then the rule goes on to say that the decision of the District Meeting thereon shall be final. I take it that the fair meaning of that is that he is not to be considered finally expelled from the Society and deprived of forfeiture of his share, until that rule has been complied with, and until the District Appeal Committee has performed its duty, and the District Meeting had an opportunity of considering it. That is the final act which completes the process by which under the rule he is to be bound, and to which as a member he looks for his protection. That does not appear by the facts of this case to have been done. Whether in fact it was done I do not know. I have only to look at the case as it comes here, and looking at

that case, there is no such allegation. I think the point is quite within the pleadings and within the competency of this Court to consider. For these reasons, I think the appeal should be allowed.

GRIFFITH, C.J.—Judgment appealed from set aside, and in lieu thereof judgment for the plaintiff, with costs (including costs of interrogatories and discovery). Declaration and injunction as sought, and damages 40s. Appeal allowed, with costs.

Appeal allowed, with costs.

[Solicitors—For the appellant, J. P. Brennan; for the respondents, Turner and Son.] C. J. L.

FULL COURT—(Griffith, C.J.,
O'Connor and Isaacs, J.J.) } Aug. 9, 13, 1909.
(Sydney.)

WILLMOTT, Appellant v. KAUFLINE, Respondent.

Statutory appeal—Conditions precedent to—Deposit of security—Questions of law—Jurisdiction—Prohibition—"Crown Lands Acts (N.S.W.) 1884, 1889 and 1905."

Under the Crown Lands Acts of New South Wales applications for land are to be made to the local Land Board, which, in the event of there being competing applicants, has to decide between them. Section 17 of the Act of 1884, as amended by later Acts, empowers either party to a proceeding before a Land Board to appeal within a specified time to the Land Court by giving notice, and depositing with the Chairman of the Board the sum of five pounds as security for costs of the appeal.—

Held, that the sending by an intending appellant to the Chairman of a local Land Board of a money order for £5 payable to the order of another person with whom the Chairman had no official relations and at another place, was not a payment of a deposit of £5 within the meaning of that section.

Sub-section (vi.) of section 8 of the "Crown Lands Act 1889" provides that whenever any question of law shall arise in a case before the Land Court, that Court shall, if required in writing by any of the parties, or may of its own motion state a case for the decision of the Supreme Court thereon.—

Held, that a question as to the jurisdiction of the Land Court to entertain an appeal from a decision of a Land Board is a question of law within the meaning of this sub-section, and may be submitted in a special case to the Supreme Court, whether prohibition does or does not lie.

Barker v. Palmer, 8 Q.B.D. 9; and *Ah Yick v. Lehmer*, 11 A.L.R. 306, applied.

Decision of the Supreme Court reversed.

This was an appeal from a decision of the Supreme Court of New South Wales, reported 25 N.S.W. W.N. 179.

In competing applications by the parties to the Land Board at Cooma, the appellant had succeeded, and the respondent, desiring to appeal to the Land Appeal Court, sent a notice of appeal to the Chair-