[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN WORKERS' UNION AND OTHERS . . . . . } APPELLANTS;

AND

BOWEN AND OTHERS . . . . RESPONDENTS.

[No. 2.]

H. C. OF A. 1948.

SYDNEY, *Aug.* 3-6; *Dec.* 6.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

*Voluntary Association—Trade union—Members—Expulsion from union by executive committee—Charges formulated and "prosecuted" by secretary—Secretary member of executive committee—Bias—Domestic tribunal—Bona fides—Natural justice—Appeal to supreme tribunal of union—Effect—Jurisdiction of the Court—Commonwealth Conciliation and Arbitration Act* 1904-1946 (*No.* 13 *of* 1904—*No.* 14 *of* 1946), *ss.* 58D, 58E, 60.*

In cases involving consideration of the findings of a domestic tribunal of a voluntary association, the duty of a court is to determine whether the tribunal has observed the rules of the association and complied with the rules of natural justice; a court has no jurisdiction to review the findings of the tribunal only for the purposes of examining their correctness.

So *held* by the whole Court.

The secretary of a union was entitled by its rules to sit as a member of the union's executive council. Acting on behalf of the council, the secretary, who had been actively engaged in a controversy with certain members, presented to the council, as a "prosecutor," certain charges against those members as a result of which they were expelled from the union. As a member of the council, the secretary took an active part in the hearing of the charges.

*Held* by *Rich, Starke* and *Dixon* JJ. (*Latham* C.J. and *Williams* J. dissenting) that the secretary was shown to be the prosecutor and also to be a

* The *Commonwealth Conciliation and Arbitration Act* 1904-1946 has been amended by Act No. 10 of 1947. By this amendment ss. 58D, 58E and 60 have been re-numbered ss. 80, 81 and 83 respectively: see Act No. 10 of 1947, s. 27 and Third Schedule.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

person invincibly biassed against the accused as a result of his participation in the controversy, and that therefore it was not in accordance with the principles of natural justice that he should act as a member of the tribunal and the proceedings of the council were therefore vitiated. By *Latham* C.J. In this case the rules of the union entitled the secretary to act on the tribunal and as the case before the Court of Arbitration was not fought on the question of bias it should not be decided on that question upon appeal. By *Williams J.* By the rules all members of the council were both prosecutors and judges and the controversy between the secretary and the respondents was not sufficient to place him in a different category from the other members of the council.

Subsequent to the determination of the council the expelled members appealed to the annual convention of the union. Under the rules the convention had complete authority over expulsions. The convention confirmed the decision of the council.

*Held*, by *Latham* C.J., *Rich*, *Starke* and *Dixon* JJ., that no ground having been shown for treating the decision of the convention as void, it gave fresh authority to the expulsions, and the expelled members were no longer entitled to complain that the decision of the council violated the principles of natural justice.

Circumstances in which the proceedings of a domestic tribunal may be vitiated by denial of natural justice, discussed.

Decision of the Commonwealth Court of Conciliation and Arbitration (Judge *Kelly*) in part affirmed, in part varied.

APPEAL from the Commonwealth Court of Conciliation and Arbitration.

Applications by way of summonses for directions and for observance and disallowance of rules were brought under ss. 58D, 58E and 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 by Cornelius Joseph Patrick Bowen, Thomas Renwick, Oliver Hearne, Leo George King, Thomas William Dalton, John Moss and Edward Ryan Irvine against the Australian Workers' Union and, as amended, Thomas Nicholson Pierce Dougherty, H. V. Johnson, R. W. Wilson, J. King, C. Fallon, W. H. Nichol, J. Ferguson, C. Davis, C. H. Cameron, E. Withers, C. H. Goulding, W. Oliver, H. J. Murphy, H. Boland and E. H. O'Connor, being the executive council of the union.

Each of the applicants requested the court to make and give :— (*a*) an order, declaration and direction that the respondent union its executive officers, servants and agents and each of them be respectively restrained from proceeding further upon the purported decision alleged to have been made by the executive council of the union on 20th November 1944 expelling him from membership of

the union; (*b*) an order declaring that the applicant still was a member of the union notwithstanding the purported expulsion and the dismissal of his appeal therefrom; (*c*) an order and declaration that rule 13 of the union's rules was tyrannical, oppressive and contrary to law and was invalid and should be disallowed; and (*d*) an order cancelling the registration of the union. The applicant Bowen also sought an order and declaration that he be restored to his former position as secretary-treasurer of the New South Wales branch of the union. The applicants severally stated that the grounds for the applications were (i) that the expulsion was not made bona fide but was made mala fide, arbitrarily and capriciously; (ii) that the union dismissed an appeal by him as a member of the union against his expulsion and that such decision was arbitrary and capricious; (iii) that the rule under which the expulsion was made was harsh, tyrannical, oppressive and contrary to law; (iv) that assuming that the rule was valid there was no proper ground affording a basis for the exercise of the power in this case and that the rules were not bona fide observed and/or performed; and (v) that the exercise of the power in all the circumstances of this case and the manner of exercising it both in connection with the expulsion and dismissal of the appeal was mala fide and not honestly made and denied natural justice to the applicant.

His Honour Judge *Kelly*, by whom the application was heard, refused to disallow rule 13 and refused also to cancel the registration of the union. His Honour held that there was no proper ground of misconduct within rule 13 warranting the exercise by the executive council of its power under that rule to dismiss from membership the applicants, and, further, that in the proceedings before the executive council and in the deliberations thereof, which resulted in the resolutions to dismiss the applicants from membership, the applicants were not accorded a hearing and consideration of the charges laid against them by the general secretary of the union, in accordance with the principles of natural justice. The executive council, which heard the charges brought against them as purporting to afford grounds for their expulsion, had already determined in prior proceedings that they were guilty thereon. The prosecutor of the charges, Mr. Dougherty, the general secretary of the union, also participated in the deliberations of the tribunal. His Honour accordingly held that the resolutions of the executive council dismissing them from office were invalid and made orders giving the following directions for the performance and observance of the rules of the union by such of the respondents as were members of the executive council of the union:—(*a*) that they and each of

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

them proceed no further upon the purported decisions of the executive council expelling or dismissing from membership of the union each of the applicants; and (*b*) that they and each of them shall recognize, treat and accept each of the applicants so purported to have been expelled or dismissed as still being a member of the union.

From that decision the union and the members of the executive council appealed to the High Court. On the hearing of the appeal no question arose as to the refusal of his Honour to disallow rule 13 and to cancel the registration of the union.

Further facts appear and the relevant rules of the union are sufficiently set forth in the judgments hereunder.

*Miller* K.C. (with him *Kerr*), for the appellants.

*Barwick* K.C. (with him *Isaacs* and *Knight*), for the respondents.

*Cur. adv. vult.*

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by the Australian Workers' Union (an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1946) and the members of the Executive Council of the union against an order made by the Commonwealth Court of Conciliation and Arbitration (Judge *Kelly*) at the instance of C. J. P. Bowen and six other persons, all of whom are respondents in the appeal. The respondents were applicants upon seven separate proceedings for an injunction restraining the Australian Workers' Union, its officers and servants, from proceeding further upon a decision of the Executive Council of the union made on 20th November 1944 expelling them from the union. The applicants also sought an order declaring that they were still members of the union, a declaration that a particular rule (rule 13) was tyrannical and oppressive and should be disallowed, and an order cancelling the registration of the union. The grounds of the application were that the expulsion of the applicants was not bona fide, that an appeal was mala fide dismissed, that there was no proper ground affording a basis for the powers exercised by the Executive Council, that the rules were not bona fide observed or performed, and that the exercise of the powers of the Executive Council in connection with the expulsion of the members and the dismissal of the appeal was mala fide and not honestly made and denied natural justice to the applicants. It will be observed that in all these grounds

the good faith of the Executive Council is challenged. The only other ground of the application related to rule 13. The application, so far as related to the disallowance of rule 13 and the cancellation of the registration of the union, was dismissed, and no question now arises as to these matters.

The order of the Arbitration Court was made under s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1946. This section is in the following terms:—"(1) The court may, upon complaint by any member of an organization and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules. (2) Any person who fails to comply with such directions shall be guilty of an offence. Penalty: Fifty pounds." The order made by the Arbitration Court was an order giving directions for the performance and observance of the rules of the union by the then members of the Executive Council of the union " . . . in manner following, that is to say:—1. That they and each of them proceed no further upon the purported decisions of the Executive Council of the said Organization expelling or dismissing from membership of the said Organization each of the above-named Applicants; 2. That they and each of them shall recognize, treat and accept each of the said Applicants so purported to have been expelled or dismissed as still being a member of the said Organization." The appeal is from this order. The proceedings were instituted before the enactment of s. 8 of the amending Act No. 10 of 1947, which prevents an appeal in future to this Court in such a case.

The question before the Arbitration Court was whether it was proper to make an order giving directions for the performance and observance of the rules of the organization. The organization is a voluntary association, and before exercising a power of expelling members such a body as the Executive Council of the union is bound to comply with the rules of the organization and to observe the principles of natural justice and to act bona fide: " . . . 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": per *O'Connor* J. in *Dickason* v. *Edwards* (1); *Baird* v. *Wells* (2). The learned judge based his decision with respect to the expulsion of the applicants upon the

(1) (1910) 10 C.L.R. 243, at p. 255. (2) (1890) 44 Ch. D. 661, at p. 670.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

following grounds: (1) "there was no proper ground of misconduct within rule 13 warranting the exercise by the Executive Council of its power under that rule to dismiss from membership the applicants"; and (2) "that in the proceedings before the Executive Council the applicants were not accorded a hearing and a consideration of the charges laid against them by the General Secretary of the organization in accordance with the principles of natural justice." His Honour particularized the matters in which the principles of natural justice were not observed as follows:—"(*a*) the Executive Council had already determined in prior proceedings that the applicants were guilty of the charges made; (*b*) the prosecutor of the charges, Mr. Dougherty, the General Secretary of the union, also participated in the deliberation of the tribunal." On these grounds it was held that the expulsions were invalid.

The rules provide in rule 13, first for expulsion in certain cases by a district committee or branch executive of the union with an appeal to the succeeding Convention of the union. Secondly, under the heading of "Misconduct" it is provided that any meeting of the Executive Council or Branch Executive or District Committee may dismiss from membership any member of the union who in its opinion is guilty of misconduct, provided that at least twenty-one days' notice of the investigation is given.

The Executive Council acted under this rule in expelling the applicants. They were given more than twenty-one days' notice of investigation. The charges were preferred in writing. They were given full opportunity to answer the charges and did answer them at considerable length. The rule provides that a member may be dismissed who, *in the opinion* of the Executive Council, is guilty of misconduct. There is no doubt that in fact the Executive Council did form this opinion. If the rule had provided that a person who *was* guilty of misconduct could be expelled (without the express reference to the *opinion* of the adjudicating body) there would have been room for an argument that the decision of whether particular behaviour amounted to misconduct was not committed to that body but that it could be independently examined in a court. The terms of the rule, however, do not leave room for such an argument and the only question (so far as the terms of this rule are concerned) is whether the Executive Council was really, i.e. bona fide, of opinion that the applicants had been guilty of misconduct.

There is no evidence of any lack of bona fides in the ordinary sense of that term. It is true that, as one would expect, all the members of the Executive Council, and particularly Dougherty,

the General Secretary, were actively concerned and interested in the charges of disloyalty to the union made against the applicants who were officers of the New South Wales branch of the union or members of its Executive Council. But rule 13 expressly gives the power of expulsion to the Executive Council of the A.W.U., though it must be obvious that the members of the Executive Council will often have strong views on the matter upon which they are required to adjudicate. However, the decision of the learned judge was not founded upon any want of bona fides in the sense of dishonesty on the part of any members of the Executive Council. The decision that "no proper ground of misconduct" was established must be taken to mean that reasonable men could not regard as "misconduct" the conduct upon which the charges were based.

Rule 33 provides for the constitution of the Executive Council of the union and provides that the General Secretary shall be a member of the Executive Council. Rule 35 provides that the Convention (which meets annually (rule 32)) shall have power (*a*) to direct the policy of the union in matters affecting the interests of the members in all industrial, political and municipal concerns; (*b*) to make, amend or rescind rules.

Rule 36 relates to the powers and duty of the Executive Council. The general management of the affairs of the union, subject to the direction of Convention, is vested in the Executive Council. The Executive Council, when Convention is not sitting, has power "where they deem it necessary and without notice (i) to suspend the policy laid down by Convention or any portion thereof or any rule; (ii) to make such rules or other provisions or to rescind or vary existing rules as may be deemed expedient." It is also provided in rule 36 (i) that "Not less than two-thirds of the members of the Executive Council may by writing signed by them exercise all the powers of the Executive Council." Rule 37 provides that no branch shall have power to open up negotiations relating to any industrial dispute with any combination of employers or to declare such dispute at an end without the sanction of the Executive Council. The rule proceeds:—"In the event of a Branch doing so, or not complying with the instructions of the Executive Council or the Rules deemed essential to the good government of the Union, the Executive Council may, after enquiry, supersede all or any of the officers and members of Executive of such Branch and appoint others in their stead to manage the affairs of such Branch pending a fresh election. During such enquiry the Executive Council shall take all necessary steps to carry out the business of the Branch concerned." The Executive Council of the union exercised this

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

power in respect of the New South Wales branch in June 1944. The matters which were then investigated were the same matters as were preferred as charges against the individual applicants when ultimately they were expelled in November 1944, except that the respondent Renwick was charged only in respect of two of these matters.

Rule 43 contains a provision as to candidates for office in the union. It requires that they must sign a pledge to at all times loyally and conscientiously carry out the constitution and policy of the A.W.U. as laid down by the Executive Council or the annual Convention from time to time, and, furthermore, that they will not join any industrial body nor will they assist in the advocacy of any policy which is in contravention to that of the A.W.U.

The union is a voluntary association which is subject to the statutory provisions of the *Commonwealth Conciliation and Arbitration Act*. The jurisdiction which the Arbitration Court exercises under s. 58E of that Act is by no means identical with the jurisdiction of a court of equity when a member of a voluntary association invokes the aid of the court in order to secure his rights. Where the expulsion of a member interferes with a proprietary right, but only in such a case, a court of equity will intervene to protect him upon the basis that the rules of the organization and the requirements of natural justice must be observed: *Rigby* v. *Connol* (1); *Cameron* v. *Hogan* (2).

Under s. 58E, however, the Arbitration Court can deal with matters other than those of proprietary right. The Court is given power to give "directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules." This is a much wider jurisdiction than that of a court of equity. The Court need not consider whether any question of proprietary right is involved. The Court could give a direction requiring the observance of rules providing for the holding of meetings, the preparation of accounts, the making of reports, &c. The Court may make an order for the purpose of removing any just cause of complaint if the matter complained of can be remedied by the performance or observance of the rules of the organization.

In the present case all the requirements of the rules as to the body which acted (the Executive Council of the union), the notice given (twenty-one days under rule 13), the specification of the charges (misconduct—rule 13) have been satisfied. The Arbitration Court in the present case did not hear evidence upon the question whether

(1) (1880) 14 Ch. D. 482, at p. 487. (2) (1934) 51 C.L.R. 358.

the respondents to this appeal should have been expelled or not. Evidence was directed only to the complaint made, namely, not that the organization did not have power to act, but that it did not act bona fide or in accordance with the principles of natural justice. That was the basis of the claim made by the present respondents that the rules (with their underlying requirements of natural justice and bona fides) had not been observed, and it was upon this ground, and this ground only, that they asked for directions that the rules should be observed by maintaining them in their rights as members, rights of which, they contended, they had been unjustly deprived by a mala-fide decision.

The learned judge held that " no proper ground of misconduct " had been shown to exist. I read this statement as meaning that the evidence did not show that the members who had been expelled had been guilty of acts or omissions which could be regarded by reasonable men as amounting to misconduct. If this were the case it would mean that the rules were not really observed.

It is not the province of the Arbitration Court, or of this Court upon appeal therefrom, to determine whether the Executive Council was right in what it did, but only whether it observed the rules and acted in good faith. The Executive Council doubtless considered many matters which were never referred to in the Arbitration Court. The proceedings in the Arbitration Court were directed only to the issues of the nature of the conduct alleged to be misconduct and good faith.

The A.W.U., which is a registered organization under the *Commonwealth Conciliation and Arbitration Act*, consists of branches. The union was also registered under the *Industrial Arbitration Act* 1940-1943 of New South Wales. It was proposed in 1942 that the New South Wales branch should amalgamate with the United Labourers' Union. In order to give effect to this proposal the New South Wales branch (with the approval of the Central Executive) became registered under the New South Wales Act under the name of the Australian Workers' Union (New South Wales Branch). The rules treated the branch as autonomous and not as part of the A.W.U., because the industrial registrar would not register rules which referred to other rules alterable by means external to the organization proposed to be registered. Under these rules the Branch Executive had extensive powers, e.g. to decide any question affecting the branch which might arise within the constitution, to make, alter or rescind any of the rules of the branch, and generally it had absolute control of the affairs of the branch, subject always to the constitution and general rules of the branch (rule 37). The

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

Branch Executive, described as the highest authority of the branch (rule 38), consisted of four officers, and five committee men and departmental secretaries, and any five members formed a quorum at any meeting of the executive (rule 36). Rule 28 provided that at all general and special meetings fifteen financial members should form a quorum.

The registered rules treated the New South Wales branch as a separate organization, and not as part of the A.W.U. itself. There were no provisions for representatives of the branch to act upon the Executive Council of the union. There were no provisions with respect to taking part in the annual Convention or with respect to paying dues to the A.W.U. In fact, however, the New South Wales branch proceeded as before. The copy of the constitution and general rules of the New South Wales branch which was put in evidence sets out the names of the Federal Executive officers and of branch secretaries on the first page. The branch was still conducted as a branch of the A.W.U. Members of the branch voted in elections of officers of the union. Representatives of the branch acted on the Executive Council of the union and took part in the annual Convention and dues were paid to the union. In 1943 and 1944, however, a controversy arose. It was proposed to alter the New South Wales rules by reducing the number of members to form a quorum at a general meeting of the branch from fifteen to ten.

The General Secretary of the A.W.U. was the appellant, Mr. T. Dougherty. He became concerned with respect to the proposal to alter the number of members required for a quorum at a general meeting of the branch. He brought the matter up before the Executive Council of the A.W.U. He said that three persons who had been engaged in collecting money for the Communist Party had been elected to the Branch Executive and that three members of that executive would be a majority in a meeting of five. He stated that the policy of the Communist Party was to reduce the number necessary to form a quorum at the union meetings until they obtained control, and then to increase the number. He called attention to a statement of policy of the Communist Party that the A.W.U. should be broken up into small sections. He made a statement referring to the general conditions of the New South Wales branch where (it was said) both membership and revenue had seriously decreased. He called attention to the fact that the branch had failed to carry out a direction given by the Executive Council as to the holding of a final meeting at the end of its year of office for the purpose of winding up for the year. This and other matters mentioned were made the occasion for an investigation in

June 1944 into the affairs of the branch under rule 37 of the A.W.U. rules. Notice was given to the officers of the branch that an inquiry would be made into certain specific matters. On 21st June a resolution was passed by the Executive Council declaring that the New South Wales Executive had not complied with an instruction of the Executive Council or the rules deemed essential to the good government of the union. On 22nd June 1944 it was decided that the Executive Council should take over the management and control of the New South Wales branch with a view to reconstruction of same. A committee was appointed to " implement " this decision. Bowen accepted a position as a member of the committee.

Bowen, however, and the present respondents (except King and Irvine) took proceedings in the Equity Court to restrain the Executive Council of the branch from carrying out the resolutions mentioned. The plaintiffs in the suit were " the Australian Workers' Union, New South Wales Branch," Bowen (Branch Secretary-Treasurer), J. Moss, O. Hearne and T. W. Dalton (President and Vice-Presidents of the union), and T. Renwick, a member of the union described as representing himself and all other members of the union. (All these persons, together with Leo King and Edward Irvine, are respondents in the present proceedings.) The defendants were the Australian Workers' Union, the Executive Council and trustees of the union and three members of a committee which had been appointed to manage the affairs of the New South Wales branch.

An interlocutory injunction was granted by *Roper* J. on 30th June 1944. It restrained the defendants from acting upon the resolutions of 21st and 22nd June, from " wrongfully " interfering with the officers of the plaintiff union in the performance of their duties as such officers, from operating upon or withdrawing moneys from the banking account of the plaintiff union and from holding themselves out as being entitled to manage the affairs of the plaintiff union.

On 5th July the executive of the A.W.U. met and considered a circular issued by Bowen and the general attitude adopted by the plaintiffs in the suit. A resolution was passed instructing the officers of the New South Wales branch that no steps whatever should be taken for the purpose of conducting the ballot of the branch for State or Federal positions until the final determination of the proceedings in the Equity Court. A further resolution directed Bowen to advise all candidates through advertisement in " The Worker " of the decision of the Federal Council. Neither of these directions was carried out. A further resolution was passed stating that the Executive Council was deeply concerned with the

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

claim made by Messrs. Moss, Bowen and Renwick and stated to have been supported by the New South Wales Branch Executive "that the A.W.U., New South Wales Branch, is a separate entity entitled to function without being subject to any control, either by the Annual Convention of the Union or the Federal Executive Council."

The Executive Council, exercising its powers under rule 36, then made a new rule empowering the executive to appoint an executive and officers of the New South Wales branch to administer the affairs of the branch. This rule contained a clause providing that it should not come into operation while the injunction remained in force.

The defendants counterclaimed in the suit and in the defence to the counterclaim (8th August) the plaintiffs pleaded that the New South Wales branch was registered as an industrial union under the *Industrial Arbitration Act* 1940-1943 with a complete set of rules "and that the said rules are the constitution and general rules of the plaintiff union . . . and that by reason thereof the said plaintiff union became and is a separate legal entity having exclusive rights of government and control with complete constitution and rules not subject to the constitution and rules of the defendant union (that is, the A.W.U.) or the Convention or the Executive Council thereof."

A vigorous controversy between the opposing parties took place in the columns of "The Worker" and in circulars and other publications during the following months. Dougherty took an active part in this controversy. On 11th September judgment was given in the suit.

*Roper* J. held that the rules which were registered as the rules of the New South Wales branch under the *Industrial Arbitration Act* had not been duly authorized by the Executive of the A.W.U. and that the registration of the New South Wales branch under the State Act was therefore invalid. Accordingly, it was held that the Australian Workers' Union, New South Wales branch, was not a competent plaintiff in the suit. As far as the individual plaintiffs in the suit were concerned, his Honour held that they failed to establish a case for the injunction claimed because the Executive Council of the A.W.U. had under rule 36 altered its rules so as to justify the action and intended action of which the plaintiffs complained. The suit failed and the injunction ceased to operate. The issues in the suit have been finally determined as between the parties and cannot now be reconsidered in this Court.

On 19th September the Executive Council superseded Bowen and other officers in their positions as officers of the New South Wales branch. New officers of that branch were appointed. On 22nd September it was determined to charge Bowen and the other respondents with misconduct and about 26th October letters were sent informing them that the charges would be heard on 20th November. The charges against all the persons concerned except Renwick were in the same terms. They were as follows :—

"1. That when you were a member of the N.S.W. Branch Executive of the Australian Workers' Union the N.S.W. Branch Executive and the individual members thereof, or a majority of them including you, did endeavour to break the N.S.W. Branch away from the Union and did claim that it was a separate legal entity not subject to the control of the Executive Council or Convention of the Union.

2. That when you were a member of the N.S.W. Branch Executive of the Australian Workers' Union, the Secretary of the Branch, Cornelius Bowen, with the consent and connivance of and by the direction of the Branch Executive, or a majority of them including you did : (*a*) Fail to observe the direction of the Executive Council that no steps whatever be taken for the purpose of conducting the ballot of the N.S.W. Branch for State or Federal positions until the final determination of proceedings instituted by Messrs. Moss, Bowen and Renwick against the Union. (*b*) Fail to comply with a direction of the Executive Council to advise all candidates through advertisement in 'The Worker' of the aforesaid decision of the Executive Council.

3. That when you were a member of the N.S.W. Branch Executive of the Australian Workers' Union, the Branch Executive, or a majority of them including you did refuse to comply with an instruction of the Executive Council to dismiss T. Renwick.

4. That whilst you were a member of the N.S.W. Branch Executive of the Australian Workers' Union members of the Branch Executive or a majority of them, with your consent and connivance, did use the property and funds held by the Branch otherwise than for the use and benefit of members of the Union generally.

5. That you did fail to comply with the pledge and declaration signed by you under Rule 43."

Renwick, who was a member of the union and a paid officer, but not an elected officer of the New South Wales branch, was charged only under heads 1 and 4.

On 20th November the respondents attended a meeting of the Executive Council of the A.W.U. They were dealt with separately.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

Each pleaded not guilty to the charges. They had a full hearing. No objection was raised to the right of any member of the Executive Council to sit and take part in the proceedings. They were all found guilty and were expelled.

As already stated, the proceeding before the Arbitration Court should not be regarded as a rehearing of the charges. The only question was whether the rules of the union had been observed and whether the requirements of natural justice and bona fides had been satisfied.

His Honour Judge *Kelly* held in the first place that no proper ground of misconduct had been shown to exist. The bringing of a suit to ascertain and enforce the rights of members of the New South Wales branch under the rules of the branch was not misconduct (*Macqueen* v. *Frackelton* (1)). But the allegations made by the plaintiffs in this suit, and supported by all the present respondents, were made in order to establish the contention that the New South Wales branch was completely independent of the A.W.U. The Executive Council could not take evidence on oath (*Leeson* v. *General Council of Medical Education and Registration* (2)), but the course of proceedings in the suit was clearly established. In my opinion the facts which were stated to the Executive Council were such as to make it possible for reasonable men to conclude that the respondents did endeavour to break the New South Wales branch away from the union. If the respondents had succeeded the union would have been deprived of one of its largest and most powerful branches, and action of this character could certainly be regarded by the Executive as contrary to the interests of the union and disloyal to the union. Further, Bowen and his supporters had definitely refused to obey the directions given with respect to abstaining from holding the ballot and had also refused to comply with the instructions to insert a notification to candidates in "The Worker". It was also true that the members of the New South Wales Branch Executive refused to dismiss Renwick when they were directed to do so by the Executive of the union. The branch Executive did use the property and funds of the union to the extent of over £700 in the course of the litigation against the A.W.U. The facts alleged against Renwick were also established. In relation to all these matters it cannot, in my opinion, be said that they were not such as reasonable men might regard as amounting to misconduct, that is conduct which was not consistent with observance of the rules of the A.W.U. and with loyalty to the union. Accordingly, in my opinion it should not be held that the expulsion

(1) (1909) 8 C.L.R. 673.

(2) (1889) 43 Ch. D. 366, at p. 377.

was invalid on the ground that the Executive could not as reasonable men honestly reach the conclusion that the respondents had been guilty of misconduct.

The second ground upon which the learned judge held that the expulsion was unwarranted was that the principles of natural justice had not been observed in that the Executive Council had already determined in prior proceedings that the applicants were guilty of the charges made. It is true that the Executive had gone into the same matters in connection with the taking over of the affairs of the New South Wales branch. These matters were then examined for the purpose of determining whether it would be wise to take over the management of the branch. The fact that they were considered for that purpose should not, in my opinion, be held to prevent the union from at any time thereafter considering the same matters in relation to the question whether the persons concerned should be allowed to remain members of the union. The relevant facts were the same but the question whether the branch management should be reorganized was a different question from the question whether certain persons should be expelled from the union. In November the persons concerned were given a full hearing and the fact that the same matters had been examined for a different purpose did not in my opinion prevent the Executive Council from acting upon the basis of those matters for the purpose of determining whether or not the members concerned should be expelled from the union.

In the third place, the learned judge held that Mr. T. Dougherty, the general secretary of the union, was the prosecutor of the charges against the respondent and that the fact that he participated in the deliberations of the Executive vitiated the proceedings of that body in relation to the expulsion.

Reference should here be made to a contention for the appellants that s. 58E of the *Arbitration Act* authorizes an application under the section only by a member of an organization and that the applicants had in fact been expelled, even if wrongfully, so that they were no longer members of the union, with the result that their application to the Arbitration Court was met *in limine* by a fatal objection. But there is authority that, if a member of a voluntary association is expelled by a domestic tribunal, a member of which is disqualified by reason of being the accuser, the decision for expulsion is "wholly void." (*Allinson* v. *General Council of Medical Education and Registration* (1)). Thus the persons "expelled" by such a decision do not cease to be members of the association. Whatever may be the

(1) (1894) 1 Q.B. 750, at p. 757.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

position in other cases, this principle should be applied in determining the jurisdiction of the Court under s. 58E. A contrary view would mean that an organization could prevent any application under this section by expelling, even wrongfully, the member who was making it. Accordingly, it was the duty of the Court to consider and determine whether the Executive Council of the union was disqualified by reason of Dougherty's association with the proceedings. The presence of a single disqualified person on the tribunal will make the decision invalid: *R.* v. *London County Council*; *Ex parte Akkersdyk and Fermenia* (1); *Leeson* v. *General Council of Medical Education and Registration* (2).

It is a general rule which is strictly applied that the same person cannot be accuser and judge in judicial proceedings, or where, though the proceedings are not strictly judicial, the principles of natural justice are required to be observed. The rule was stated by *Cotton* L.J. in *Leeson* v. *General Council of Medical Education and Registration* (3) in terms which were approved in the House of Lords in *Frome United Breweries Co. Ltd.* v. *Keepers of the Peace and Justices for County Borough of Bath* (4). "Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint in which the order is made." Dougherty himself raised before the Executive the matters out of which the charges arose. As the principal executive officer of the union he acted for the Council in informing the persons concerned of the charges to be made against them and took an active part in the proceedings in November, the result of which was the expulsion of the respondents.

The provisions of a statute (cf. *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (5)), or the rules of a voluntary association may exclude the application of the principle that a person who prepares and formulates charges and takes part in the prosecution of them is thereby precluded from taking part in the consideration and determination of them. In *Dickason* v. *Edwards* (6) the rules of a friendly society provided that a particular officer should preside at certain meetings, including those of a judicial tribunal constituted under the rules. It was held that the officer was entitled to sit, but was not bound to sit, and that where the offence charged was an offence against that officer personally he ought not to sit, and

(1) (1892) 1 Q.B. 190, at p. 196.
(2) (1889) 43 Ch. D. 366.
(3) (1889) 43 Ch. D., at p. 379.
(4) (1926) A.C. 586, at p. 606.
(5) (1938) 59 C.L.R. 556.
(6) (1910) 10 C.L.R. 243.

that if he did sit the proceedings of the tribunal were invalid. In the present case, however, Dougherty acted on behalf of the whole of the Executive in formulating and presenting the charges and if he were disqualified on that account, then the members of the Executive for whom he acted would be equally disqualified. It appears to me to be obvious that the express provision of the rules that the Executive shall have the power of expelling members excludes in this case the application of the rule that a person who formulates and prosecutes charges is necessarily excluded thereby from participating in the hearing and determination of the charges. As *O'Connor* J. said in *Dickason* v. *Edwards* (1) :—" 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." In the present case the rules are clear that the Executive Council constituted in the manner prescribed by the rules may hear a charge against a member. It is a function of the Executive Council, not only to determine and to uphold the policy of the union, but also to deal with charges of disloyalty to the union. Accordingly, in the present case the rules permitted Dougherty and all the other members of the Executive Council to sit, and the fact that he formulated charges on behalf of the Executive does not in my opinion vitiate the proceedings.

The ground of the decision of the learned judge was that Dougherty acted as prosecutor, not that he was biased in fact, and our attention was not called to any evidence which could be relied upon to establish actual bias except that it was shown that there was an acute controversy within the union with respect to the policy and actions of the respondents, and that Dougherty as general secretary strongly supported the policy and actions of the Executive. The secretary of a trades union will necessarily be concerned in advocating and defending the policy of the union. Such action appears to me to be incidental to his position as secretary and it should, I think, be held to be within the contemplation of the rules. But on this part of the case I prefer to rest my decision upon the fact that the decision of the learned judge was based, not upon any finding of actual or probable bias, but upon the fact that Dougherty was " prosecutor." If the case of the applicants in the Arbitration Court had been based on bias there would have been a prima-facie answer that they had waived any objection upon this

(1) (1910) 10 C.L.R., at p. 255.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Latham C.J.

ground. The facts of Dougherty's controversy with Bowen in the columns of "The Worker" and in a pamphlet and circulars were well known to the respondents, but no objection was raised to Dougherty acting at the meetings in November. An objection of disqualification on the ground of bias may be waived (*Dickason* v. *Edwards* (1)). Submission without objection to the jurisdiction, with knowledge of the facts subsequently alleged to establish bias, is prima-facie evidence of waiver. But, as I have said, I deal with this aspect of the case upon the basis that the decision of the learned judge as to the effect of Dougherty taking part in the deliberations and decisions of the Executive is based simply upon the fact that Dougherty was "prosecutor," that this possibility is contemplated by the rules as being naturally involved in the performance of his functions as general secretary, that there is no finding of actual bias, and that it would be wrong for this Court upon appeal to make such a finding by applying the evidence to a proposition to which it was not clearly and definitely directed in the Arbitration Court. Further, the present applicants appealed to the Annual Convention and their appeals, with a possible exception in the case of Renwick, were dismissed. The arguments directed against the decisions of the Executive have no application to the decisions of the Convention upon the appeals. The position of Renwick in relation to the appeals is not quite clear, but, if he did not appeal or if his appeal was not dealt with by the Convention, the decision of the Executive in his case was in my opinion valid and remains valid for the reasons which I have stated.

I am therefore of opinion that the expulsions of the applicants were not invalid upon any of the grounds suggested. The appeal should be allowed and the order of the Arbitration Court set aside.

RICH J. As I am in general agreement with the reasons given by my colleagues for allowing the appeal, I do not propose to do more than express my opinion with respect to the alleged bias of Mr. Dougherty. In considering the question whether the proceedings of the executive council of the union were carried out in accordance with the requirements of natural justice, the rule to be applied in this case is entirely different from that which is applied to judges, magistrates or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. But where the parties

(1) (1910) 10 C.L.R., at p. 261.

choose their own tribunal the case is very different (cf. *Eckersley* v. *Mersey Docks and Harbour Board* (1)). Nevertheless Mr. Dougherty's position was impossible. He had gone beyond the necessary functions of secretary to those of an informant and prosecutor.

In the instant case the council decided to expel seven of the respondents. Six appealed to the convention which confirmed their dismissal from membership of the council. The convention is the final authority in the union. It is the domestic forum chosen by the parties to deal with questions of this kind and by which they have contracted to be bound. Thus the validity of the dismissals in the last resort rests on the decision of the convention against which no grounds have been shown for setting its decision aside. The six respondents, therefore, have not substantiated their claim to impeach the decision. But in the case of Renwick I agree with my brother *Dixon* that as his appeal was not dealt with he is entitled to treat his expulsion as invalid. As to the six respondents the appeal should be allowed and the order of the Court of Conciliation and Arbitration set aside.

STARKE J. I have had the opportunity of reading and considering the opinion of my brother *Dixon*.

He has covered the whole ground and I agree with his reasoning and conclusions.

The competency of this appeal is established by the decision of this Court in *Jacka* v. *Lewis* (2).

The provisions of the *Commonwealth Conciliation and Arbitration Act* of 1947, No. 10, excluding appeals to this Court, have not been overlooked but they do not affect this appeal: See s. 8 and the inserted s. 36.

DIXON J. This is an appeal from an order of the Commonwealth Court of Conciliation and Arbitration made under s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1946. The appeal was instituted while under the interpretation of s. 31 placed upon it by *Jacka* v. *Lewis* (2) an appeal still lay from orders of that Court made in the exercise of judicial power. Section 58E, of which the validity was upheld in *Barrett* v. *Opitz* (3), and the meaning discussed, gives judicial power (*Jacka* v. *Lewis* (2); *Barrett* v. *Opitz* (4)).

(1) (1894) 2 Q.B. 667, at pp. 672, 673.
(2) (1944) 68 C.L.R. 455.
(3) (1945) 70 C.L.R. 141.
(4) (1945) 70 C.L.R., at p. 164.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

DIXON J.

The order appealed from gives directions for the performance and observance of the rules of the Australian Workers' Union by the appellants, who are the fifteen members of the Executive Council of that organization. The directions the order gives are (1) that the appellants shall proceed no further upon purported decisions of the Executive Council expelling or dismissing from membership each of the respondents; and (2) that they shall recognize treat and accept each of the respondents as still being a member of the organization.

The respondents are seven members of the New South Wales Branch of the Australian Workers' Union who were expelled or dismissed from membership by the Executive Council on 20th November 1944. Since that date the composition of the Executive Council has changed somewhat, but if the purported expulsion of the respondents was void or voidable at the instance of the party as distinguished from voidable by the order of the Court, no doubt it is the duty of the Executive Council for the time being to accept them as members and disregard the decision that they should be dismissed from membership. On this hypothesis the members of the Council would within the meaning of s. 58E be persons who are under an obligation to perform or observe the rules with reference to the respondents and so persons against whom an order might be made under that section giving directions for the performance or observance of such rules. But if the expulsion is not void I do not see how s. 58E would apply. The order does not give directions to the organization as such nor could it do so. For, as I read the section, it is not dealing with the duties of the organization but with those of persons bound by the rules of the organization.

In dismissing the respondents from membership the Executive Council acted under a rule of the organization authorizing that body so to dismiss any member who in its opinion is guilty of misconduct, provided that at least twenty-one days' notice of the investigation is given. The proviso as to notice was complied with. But the validity of the expulsion is impugned upon the ground that what the respondents severally did could neither amount to misconduct nor be held to do so and upon the further ground that the proceedings of the Council in dismissing the respondents from membership violated the principles of natural justice. The proceedings are said to have violated the principles of natural justice because the guilt of the respondents had already been determined by the Council and because the general secretary, Dougherty, who was a member of the body and took part in the determination, had promoted and prosecuted the charges and was incapable, both for that reason and

because of the intensity of his antagonism to the respondents, of taking part in the determination of the charges.

Among the answers given by the appellants to this attack upon the validity of the expulsions is one by way of confession and avoidance. It is that the respondents appealed from the decisions of the Council to the annual convention, which the rules describe as the highest deliberative body in the union, and that the convention dismissed their appeals and so confirmed the expulsions.

The history of the events which led up to and form the basis of the charges of misconduct is a long one, but a somewhat condensed statement will suffice to bring out the points material to the validity of the expulsions. The Australian Workers' Union is divided into branches. It is an organization registered under what was formerly Part V. but is now Part VI. of the *Commonwealth Conciliation and Arbitration Act*. It was also registered as a trade union under the New South Wales legislation. Owing to an amalgamation with it of another union it became necessary to consult the Industrial Registrar of New South Wales and in consequence rules were drawn up for the registration under State law of the New South Wales Branch, with which the amalgamating union was absorbed. The law requires that a step of this kind should be made upon the resolution of the body authorized to make and alter the rules of the Union. That body was the annual convention or in its absence the Executive Council. Although in substance the Executive Council did approve, nevertheless the rules as finally settled were not submitted to it and were not formally resolved or agreed upon. This defect was not known and the rules were registered. The registration, if valid, converted the branch into an independent body. That was in 1942. Its independent existence was not understood or recognized at the time and the relations of the branch to the central authorities were conducted on the footing of the Federal rules, that is the rules registered under the *Commonwealth Conciliation and Arbitration Act*.

The respondent Bowen was branch secretary and the appellant Dougherty was general secretary. The Branch Executive which went out of office on 31st May 1943 proposed some amendments of the branch rules, the rules registered under State law. One of the amendments proposed reduced the numbers of the branch executive and of the quorum. Whether for this or for some stronger reason, Dougherty brought before the Central Executive Council the whole question of the New South Wales branch. Three points stand out in his report and the observations he made in presenting it. First, that the branch occupied a dual position being, under the Federal

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

DIXON J.

rules, part of the Union and, under State law, itself an independent trade union. Secondly, that the amendments made minority control of the Executive a possibility and two new members of the branch were Communists, namely the respondents King and Irvine. Thirdly, that there had been a failure of the branch executive to comply with a direction of the Federal Executive Council. It appeared that in April 1938 a direction had been given to the branches that their executives must meet immediately before the annual meeting for the purpose of completing the business of the period for which they had been elected. The New South Wales executive that had just gone out had not so met. Bowen had not long been branch secretary and he did not know of the direction, and for that matter Dougherty himself had not long since learned of it. But there is a rule which authorizes the Executive Council after inquiry to supersede the officers and members of the executive of a branch and to appoint others in their stead to manage the affairs of the branch pending an election upon the ground, among other grounds, that the branch has not complied with the instructions of the Executive Council or with rules deemed essential to the good government of the union. With this rule in view the Executive Council resolved, on the motion of Dougherty, that the New South Wales executive had not complied with an instruction of the Executive Council on the rules deemed essential to the good government of the union. That was on 21st June 1944. Next day the Executive Council resolved to take over the management and control of the New South Wales branch with a view to its reconstruction and appointed a committee of three to investigate matters concerning that branch.

Bowen, who was a member of the Federal Council, was present and he was chosen to serve on the Committee. On 25th June the committee of three, with the assistance of Dougherty as general secretary, adopted a number of resolutions, including one that the services of the respondent Renwick, who seems to have been, among other things, an assistant secretary of the branch, be dispensed with.

When the branch executive learned of these proceedings they resolved to resist them and commanded Bowen to take no further part with the committee of three. They applied on 27th June by originating summons to the Supreme Court in Equity for an interim injunction and obtained it. On 30th June the injunction was continued, after the defendants to the summons had been heard, until the hearing of the suit. The injunction restrained the defendants from acting upon the above-mentioned resolutions of the Federal

Executive Council and of the sub-committee, from interfering with the officers of the plaintiff union, that is the branch registered under State law, from operating upon its bank account, from collecting its subscriptions or other moneys, from taking possession or disposing of its property and finally from holding themselves out as being entitled to manage its affairs. Dougherty called the Council together on 5th July 1944 in view of these proceedings "for the purpose of protecting the interests of members throughout the Commonwealth." Bowen, who was present, had sent out a circular to members of the branch and he was questioned about this. Next day, and again on 6th July 1944, the Executive Council instructed Bowen and the respondent Moss, who was the president of the branch and the returning officer, to take no steps for the purpose of the then current ballot for State and Federal office-bearers pending the proceedings and to advise candidates by advertisement. Written notice of these directions was sent to him on 11th July. The Council expressed its concern at a claim by Moss, Renwick and Bowen that the branch was a separate entity not subject to the Federal convention or council. Under a rule authorizing the Executive Council to suspend rules and make or vary them and to exercise its powers by writing signed by two-thirds of the members, that body proceeded to approve the decisions of the committee of three, to approve a direction being given to Bowen as branch secretary for the dismissal of Renwick and the doing of various other things, and to agree to the Executive suspending the rules and to the rescission and variation of the rules so far as might be necessary to carry out the decisions. The signatures were complete probably on 30th June. It was to be suspended in operation until the injunction ended. But probably the document failed as a legal instrument for want of registration under s. 58c of the Act.

On 26th June Bowen as secretary of the branch was notified of an instruction that no cheque be drawn without the approval of general secretary and of another resolution that no cash payments be made. On 28th July a statement of claim was filed in the Equity Court naming as plaintiffs the Australian Workers' Union, New South Wales Branch, Bowen, as its secretary-treasurer, Moss as president, two other respondents in this appeal, Hearne and Dalton, as vice-presidents, and Renwick as a member representing all other members of the plaintiff union. The Australian Workers' Union, the members of the Executive Council and the trustees of the plaintiff union were made defendants.

The relief claimed by the statement of claim consisted of, first, a set of declarations of right to the effect that the resolutions of the

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

DIXON J.

Executive Council and of the committee of three were void, that the committee could not act in the management of the branch and that Bowen and the other members of the council of the State union formed the executive; and secondly, a set of injunctions restraining the defendants from acting on the resolutions and from interfering with the management of the branch. By a counterclaim the defendants sought declarations and injunctions to the contrary effect. They asked for a declaration that the Australian Workers' Union, New South Wales branch, was a branch of the union registered federally and subject to its constitution and rules, and a declaration that the rule-making power of the branch was subject to such constitution and rules and was limited to making by-laws. They sought injunctions restraining the plaintiffs from depriving the members of the defendant union of property and funds and from breaking the New South Wales branch away from the union and from impeding or resisting the defendants from taking over the control and management of the New South Wales branch. In answer to the counterclaim of the defendants the plaintiffs pleaded that (in virtue of its State registration) the Australian Workers' Union, New South Wales branch, was a separate legal entity having exclusive rights of government and control with a complete constitution and rules and not subject to the constitution and rules of the Australian Workers' Union federally registered, and with authority to appoint its own officers and to conduct its own business. The plaintiffs had not made any such assertion in their statement of claim, which seems to have been based on the view that the defendants had proceeded irregularly and outside the provisions of the Federal rules. The defendants in their counterclaim had not taken very distinctly the ground upon which they maintained that, in spite of the character of its State registration, the New South Wales body was nothing but a subordinate branch of the Federal union. However, in the course of the hearing of the suit before *Roper* J., the fact appeared that, at the time of the registration under the State Act of the New South Wales body, the formal sanction of neither the Convention nor the Executive Council of the main body had been obtained. *Roper* J. held that, by reason of the provisions of the State Act, without the authority of one or other of these bodies it was not competent to submit the rules of the New South Wales branch for registration. Accordingly the registration of the branch as a State union was void and as a branch or division of a voluntary association or Federal industrial organization it could not sue. His Honour pronounced a decree dismissing the plaintiffs' suit and granting to the defendants the relief which they prayed by

their counterclaims. The decree was pronounced on 11th September 1944. On the same day Dougherty as general secretary notified Bowen as secretary of the New South Wales branch that the Executive now took over the management of the branch and would take the necessary steps to carry on its business pending an inquiry under the rules. At the same time a notice was sent to Bowen that the Executive Council would on 19th September hold an inquiry as to whether the Branch Executive had failed to comply with rules deemed essential to the good government of the union and with the instruction of the Executive Council in certain respects which the notice proceeded to particularize. Like notices were sent to the respondents Moss, Dalton, Hearne, King and Irvine. The inquiry notified was to be held under the rule already mentioned, by which in the event of a branch not complying with the instructions of the Executive Council or the rules deemed essential to the good government of the union the Executive Council may after inquiry supersede all or any of the officers and members of the Executive of the branch and appoint others in their stead to manage the affairs of the branch pending a fresh election. The particulars stated in the notice made the following charges against the members of the executive of the branch. First that they endeavoured to break the branch away from the union and claimed it was a separate legal entity not subject to the control of the convention or Executive Council; second that Bowen as secretary with the consent of the others failed to observe the directions of the Executive to go no further with the ballot and to advise the candidates by advertisement; third that they refused to comply with the direction to dismiss Renwick; fourth that they used the property and funds of the branch otherwise than for the benefit of the members of the union generally; fifth that they failed to comply with the union pledge. The promises of the pledge are: (*a*) to obey the constitution and policy of the union as declared; (*b*) to abstain from joining bodies opposed to the union; (*c*) to abstain from assisting in the advocacy of a policy in contravention of that of the union.

On 19th September 1944 each of the persons notified was called before the Council separately and asked to plead to the charges which were read to him. Each pleaded not guilty. Dougherty "outlined each charge separately." At the conclusion of the hearing of Bowen's case, Bowen being present as a member, the Council declared that the charges had been proved and superseded him from the position of branch secretary and from other offices he held. After all the others had been heard the Council passed a series of resolutions dealing with each man separately. In each

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

DIXON J.

case a resolution found him "guilty of the charges preferred against him." In Moss's case the charges were described as "preferred against him by the General Secretary."

The Council, whose meeting was continued over several days, proceeded to appoint other officers to the branch. On 22nd September the Council resolved on the motion of Dougherty that the respondents Bowen, Moss, Hearne, Dalton, King and Irvine and three others should be notified that the Council would hold an investigation into their alleged misconduct in regard to matters which the resolution went on to specify. The resolution specified the same five charges as had already been made and acted upon as a ground for superseding the respondents as officers of the branch. There was an exception in the case of Renwick, the charges against whom were limited to two, breaking away the branch and using property and funds for the payment of costs in the equity suit.

On 28th September 1944 Moss and Bowen applied to the Industrial Commission of New South Wales for orders and declarations the effect of which, as I follow it, would have been to convert the registration of the whole union under the State legislation into a registration of the New South Wales branch and to re-establish the officers and members of the branch executive in office. The Commission delivered its decision on this application on 22nd November 1944. In the meantime Bowen had set about a propaganda amongst the members of the union, had formed what was called an A.W.U. Defence Committee and had sent out circulars in strong terms, with a subscription list appended. Dougherty, whether by way of answer or of anticipation, published in "The Worker" attacks upon Bowen and the other respondents. They were afterwards reduced to a "synopsis" and published as a separate booklet. The strength and bitterness of the pamphlet is undeniable. The ground which it covers includes the matters forming the basis of the charges and much else besides. A month after the Council's resolution authorizing charges of misconduct, but before the Industrial Commission had decided the application of Moss and Bowen to it, Dougherty sent out notices of the charges. The notices were dated 26th October 1944 and notified each of the respondents mentioned that on 20th November the Executive Council would hold an investigation for the purpose of investigating his alleged misconduct namely, and then followed the same particulars as before. On 20th November the Council met and called on the men thus notified one by one beginning with Bowen. The letter containing the charge against him was read to each man. The president asked how he pleaded. Each pleaded not guilty.

Then the general secretary, Dougherty, "dealt with each charge in detail." The oral evidence in this case described the role he adopted and it might not unfairly be said to be that of counsel for the prosecution. Bowen made some objection to the tribunal acting as accusers and judges. After all the accused had been heard, and apparently by no means summarily, the Council proceeded to deal with their cases in the sequence in which they had heard them. Dougherty took part in the deliberations. On his motion Bowen, Dalton and Hearne were found guilty of the misconduct alleged in the charges and dismissed from membership. Moss, King and Irvine were also found guilty and dismissed from membership, but the motions were not proposed by Dougherty. Renwick's case was not finally dealt with on that day, because the report of a handwriting expert on the authorship of some writing attributed to him was found necessary. But on 23rd November, on Dougherty's motion, he was found guilty and dismissed from membership. On the previous day, 22nd November, the Industrial Commission had given its decision. Notices were then sent to the respondents informing them of the finding and of their expulsion.

The respondents, except possibly Renwick, about whom there is some uncertainty, appealed to the Convention from the decisions of the Council expelling them. They wrote letters briefly stating their cases. The convention appointed a day for the consideration of the appeals, but the respondents were not personally heard. Some of them informed the convention that they were unable to attend. The convention, which, of course, is a large deliberative assembly, does not appear to have given much consideration to the appeals. But resolutions are recorded on its proceedings dismissing them.

The rules are so framed as to leave it very much open to question whether an appeal to the Convention is given from the decision of the Executive Council. But at the time it was assumed on all hands that such an appeal lies and in view of the wide and paramount authority of the Convention over all the affairs of the union I think that we should adopt the view that the rules so intend.

The appeals were dismissed in February 1945. In the following February Bowen applied to the Convention to be readmitted as a member of the union, but his application was refused. In June 1946 proceedings were begun in the Commonwealth Court of Conciliation and Arbitration, but they were irregularly framed and it was not until February 1947 that the applications out of which this appeal arises were made.

H. C. of A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Dixon J.

The first question to consider upon this set of facts is whether the findings of the Executive Council of 20th-23rd November 1944 that the charges were established and amounted to misconduct can be treated as without foundation and on that ground either void or else voidable at the instance of the men expelled. That leaves on one side any question of the violation of the principle that prima facie a prosecutor cannot sit as judge. It is important to keep steadily in mind that we are dealing with a domestic forum acting under rules resting upon a consensual basis. It is a tribunal that has no rules of evidence and can inform itself in any way it chooses. Members may act upon their own knowledge and upon hearsay if they are satisfied of the truth of what they so learn and if they give the member with whom they are dealing a proper opportunity of answering the charge and defending himself. The tests applied to juries' verdicts, namely, whether there was evidence enabling a reasonable man to find an affirmative or whether upon the evidence a finding was unreasonable, have no place in the examination of the validity of such a domestic tribunal's decisions. But the tribunal is bound to act honestly, that is to say it must have an honest opinion that what the member before it did amounted to misconduct and its decision must be given in the interests, real or supposed, of the body it represents and not for an ulterior or extraneous motive (cf. *Maclean* v. *The Workers' Union* (1); *Stuart* v. *Haughley Parochial Church Council* (2); *Lamberton* v. *Thorpe* (3). Counsel for the respondents dealt with the charges particularized in detail.

The charge that the respondents endeavoured to break the branch away from the union and claimed that it was a separate and independent entity, he said, was based wholly on the equity suit, and an appreciation of what had occurred showed that it could afford no foundation for a charge of misconduct. I have stated with some attempt at exactness the steps by which the respondents as plaintiffs in that suit reached the position of asserting the independent existence of the branch and its freedom from the control of the Federal executive. It is, of course, not difficult to present a view in which it is Dougherty who, by challenging the branch executive and using the direction of 1938 as a pretext for procuring the Federal Executive Council to supersede them, forced the branch executive to resort to the Court. It is easy then to find in the counterclaim a compelling cause of the respondents taking their

(1) (1929) 1 Ch. D. 602, at pp. 620-627.

(2) (1935) Ch. 452, at p. 462; (1936) Ch. 32.

(3) (1929) 141 L.T. 638.

stand on the separate incorporation of the branch under State law. Clearly enough the respondents were in no way to be blamed for the registration of the branch as a distinct body.

But I do not think an examination of the facts with the object of supporting such a view of the matter is an admissible mode of attacking the validity of the expulsions. The rules place upon the executive the duty of forming an opinion whether there was misconduct. The question was largely one of motive and purpose and to aid the Executive Council in the interpretation of the respondents' conduct they had, not only their personal experience of the men and their own knowledge of the detailed course of events, but also the polemical publications of Bowen and his executive and the formation of the A.W.U. Defence Committee and the raising of a fund.

It is not possible to say that the Executive Council could not give a sinister complexion to the course pursued by the respondents and honestly consider that they were guilty of misconduct warranting dismissal from membership.

Of the second charge, namely, that relating to proceeding with the ballot contrary to the Council's direction, it was said that no-one could honestly say it was misconduct if the circumstances were considered. There was the Court's injunction protecting the respondents from interference. The direction could only be enforced by the attempted change of rules. The executive had a duty under its own rules and the appellants were restrained from interfering. In this way a strong case against the Council's finding was made. But again I think that the argument amounts to an attempt to review the finding rather than to destroy it on the ground of want of bona fides or misconception of functions. The failure to obey the direction is so much a consequence of the general attitude ascribed to the respondents that the Executive might quite well carry their judgment of the one charge over to the other.

The same observation may be made of the third charge particularized, the failure to dismiss Renwick. The respondents' counsel says that as the executive was precluded from interfering before the injunction expired, this could not be misconduct. Considered separately that may be so. But once the conclusion is reached by the domestic forum that the aim of the respondents was to break the branch away and that the legal proceedings were for the furtherance of that policy, the possibility can no longer be denied of the Council honestly disregarding the lawyer's view of the matter and treating this item as governed by the same considerations.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Dixon J.

The fourth charge, that of spending money otherwise than for the purposes of the union, is in the same position. The injunction protected the respondents against the Council's direction concerning cheques and cash payments. But we are not entitled to examine the correctness of the Council's view either in fact or law, and that body may well have considered that what was really being done was to spend the money in an effort to divide the union.

The fifth finding, namely, that the pledge was not observed, the Council might readily arrive at without incurring any suspicion of the honesty of their conclusion.

From the attack on the expulsions on the ground that a finding of misconduct had no legal foundation it is necessary to turn to the ground that the principles of natural justice were not observed. In the first place it is said that the Council came to their task on 20th November as a body which had already passed judgment on the respondents on the very same charges, that is to say on 19th September. They had, it is true, passed judgment upon the question whether the specific things particularized had been done. But under the rules two proceedings were necessary if the Council were to consider (*a*) superseding the officers and members of the branch in their offices, and (*b*) dismissal from membership. The Council had not decided that the particular things amounted to misconduct or that they merited expulsion. In hearing both charges one after the other upon the same set of facts the Executive was doing only what the rules authorize or, it might even be said, what they necessitate.

The last matter relied upon as invalidating the decisions is of a more serious kind. It is that the Executive and Dougherty were both prosecutors and judges and animated by such intensity of feeling that they were disqualified by bias. So far as this contention is based upon the fact that the Executive Council promoted the charges and that they were vitally concerned in the controversy not only as members of the union but as office-bearers whose authority had been resisted, there is in my opinion no substance in it. The reason lies in the constitution of the union. In choosing as a domestic forum a governing body and in authorizing it to make inquiries and investigations of such a kind the rules necessarily bring about, if they do not actually contemplate, such a situation. Domestic tribunals are often constituted of persons who may, or even must, have taken some part in the matters concerning which they are called upon to exercise their quasi-judicial function. Nor do I think that it has been shown that any particular member, putting aside the general secretary, was disqualified by any interest

or specific ground of bias attaching to him or to them all. But Dougherty appears to me to have assumed altogether a different position. In the first place, he began the attack, on 21st June, with his report and his proposal to supersede the branch officers on the pretext of the failure of the outgoing branch council to comply with the direction of 1938. From that time onwards he led in the controversy. He was the author of the charges heard on 19th September and of the proposal to supersede the branch executive. He acknowledged in his evidence that he was the originator in actual fact of the charges preferred by his letters of 26th October and heard on 20th-23rd November. He had been engaged in bitter public attacks on the respondents, particularly on Bowen, and had exhibited the most intense and extreme opinion about the respondents' conduct concerning the matters in question. Then at the hearing of the charges he assumed the functions of a prosecutor and so to speak presented the case in support of the charges to the Council. It is true that the rules make him a member of the Council as general secretary and require the general secretary's attendance. But they do not make his presence indispensable and do not necessitate his participation in the decision of questions in which his interest or concern makes it improper. "In interpreting rules conferring 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 natural 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": per *O'Connor* J. in *Dickason* v. *Edwards* (1). It is not in accordance with the principles of natural justice to have present as a member of the tribunal a person who has promoted the charge and supports it as the prosecutor or one who is invincibly biassed against the accused as a result of his participation in the controversy, and this was the case with Dougherty. If a person disqualified by such considerations sits with the tribunal and takes part in the decision, that is enough to vitiate it: *Dickason* v. *Edwards* (2).

Prima facie therefore the expulsions might be successfully impugned on that ground. A question might remain as to whether they are to be considered void or avoided.

But there then confronts the respondents the fact that from these decisions six of them appealed to the convention. By so appealing they treated the expulsion, not as regular, but as having an operation

(1) (1910) 10 C.L.R., at p. 255. (2) (1910) 10 C.L.R. 243.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

DIXON J.

under the rules and as proceedings to be reviewed, and, if the convention thought fit, corrected by the convention. The convention had complete authority over the whole question of expulsion, and it was for it to decide whether the findings and the dismissals from membership should be set aside, varied or confirmed. The convention confirmed them.

It may be true that the convention gave them less consideration than might be thought proper. It may be true that the convention treated the dismissal of the appeals as almost a foregone conclusion. But it is the supreme authority in the union and if a supreme authority is chosen as a domestic tribunal, particularly when it is a deliberative assembly, it may be expected to act upon views formed by the knowledge the members possess of the affairs of the body.

I think that under the rules the decision of the convention gave a fresh authority to the dismissals and they no longer depended upon the resolutions of the Executive Council. No ground has been shown for treating the convention's decision as void or for invalidating it.

I think, therefore, that the six respondents who appealed to the convention are no longer in a position to complain that the decision of the Executive Council was not given in accordance with the principles of natural justice.

Renwick stands in a curious position. Dougherty was sure that the convention had never dealt with an appeal by him and there is no record of such an appeal. But Renwick said that he did appeal, or attempt to appeal, by sending a notice of appeal by registered post to Adelaide. I think that as his appeal was never dealt with he is entitled to complain of the decision of the Council expelling him. I think that he was entitled to treat the expulsion as invalid and I am not prepared to disturb the order of the Court of Conciliation and Arbitration with respect to him. As to the other six respondents, I think that the appeal should be allowed with costs and the order of that court set aside.

WILLIAMS J. This is an appeal by the Australian Workers' Union, an organization incorporated and registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1947, and the members of the executive council, from an order made by his Honour Judge *Kelly*, sitting as the Commonwealth Court of Conciliation and Arbitration, under the provisions of s. 58E of that Act on 25th November 1947. His Honour ordered the individual appellants to proceed no further upon the purported decisions of the executive

council expelling or dismissing the respondents from membership of the union and also ordered that these appellants should recognize, treat and accept each of the respondents so purported to have been expelled or dismissed as still being members of the union. The order resulted from findings by his Honour that the respondents were wrongly dismissed from membership of the union on the grounds that (1) there was no proper ground of misconduct under rule 13 of the rules of the union authorizing the exercise by the executive council of the union of its power under that rule to dismiss the respondents from membership of the union and (2) the respondents were not accorded a hearing and consideration of the charges laid against them by the general secretary of the union in accordance with the principles of natural justice because (*a*) the executive council which heard the charges brought against them as purporting to afford grounds for their expulsion had already determined in previous proceedings that they were guilty thereon and (*b*) the prosecutor of the charges, Mr. Dougherty, the general secretary of the union, also participated in the deliberations of the executive council.

Rule 13 of the rules of the union provides that any meeting of the executive council or branch executive or district committee may dismiss from membership any member of the union who in its opinion is guilty of misconduct provided at least twenty-one days' notice of the investigation is given. The meeting of the executive council at which the respondents were dismissed from membership was held on 21st November 1944. The respondents were given more than twenty-one days' notice of the date of the investigation and of the charges which were made against them. These charges were originated and prepared by Dougherty and approved at a meeting of the executive council held on 22nd September 1944. The charges included the charge that they had endeavoured to break the New South Wales branch away from the union and claimed that it was a separate entity not subject to the control of the executive council or convention of the union. With the exception of Renwick, the respondents were also charged with failure to comply with the pledge and declaration signed by them under rule 43. This rule provides that all candidates for executive office must sign a pledge to at all times loyally and conscientiously carry out the constitution and policy of the union as laid down by the executive council or the annual convention from time to time.

Section 58E of the *Commonwealth Conciliation and Arbitration Act* confers upon the Commonwealth Court of Conciliation and Arbitration complete power to supervise the observance and to enforce the

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Williams J.

performance of any rules of an organization by any person who is under an obligation to perform or observe those rules. I see no reason why the word "person" in the section should be confined to natural persons and should not be given the meaning attributed to it by s. 22 (*a*) of the *Acts Interpretation Act* 1901-1941. In my opinion the word includes a body corporate. Accordingly it confers power on that court to order an organization and its responsible officials to recognize as members persons who have been invalidly expelled from membership and who are therefore in law still members of the organization. But it does not confer power on the court to exercise its own discretion as to the manner in which the powers and duties conferred by the rules on the officials of an organization should be exercised. It only authorizes the court to inquire whether those persons have exercised their powers and duties in accordance with the rules, and if they have not done so to give directions which will ensure that the organization and its officials will perform and observe the rules. The section therefore authorized Judge *Kelly* to inquire whether the respondents had been validly dismissed from membership in accordance with rule 13. This involved an inquiry whether (1) the rules of the union had been observed; (2) the respondents had been given a fair hearing; and (3) the executive council had acted honestly and in good faith, if there be any difference in meaning between the two expressions: *Weinberger* v. *Inglis* (1); *Maclean* v. *The Workers' Union* (2); *Lamberton* v. *Thorpe* (3).

This was, I believe, the manner in which his Honour approached the case. The first question that arises is whether his Honour was right in holding that there was no proper ground of misconduct within rule 13 sufficient to warrant the executive council dismissing the respondents from membership. It was for the executive council to form the opinion whether the acts charged constituted misconduct, and in the event of an affirmative opinion, to decide whether the matters brought to its information were sufficient to establish the charges. His Honour could only interfere if he was satisfied that the acts charged were incapable of constituting misconduct within the meaning of the rule (*Leeson* v. *General Council of Medical Education and Registration* (4)), or if he was satisfied that there was no material before the executive council upon which honest men acting bona fide could find that the charges had been established: *Allinson* v. *General Council of Medical Education and*

(1) (1919) A.C. 606.
(2) (1929) 1 Ch. 602.
(3) (1929) 141 L.T. 638.
(4) (1889) 43 Ch. D., at pp. 378, 383, 384.

*Registration* (1); cf. *Minister of National Revenue* v. *Wrights' Canadian Ropes, Ltd.* (2). I am unable to agree with his Honour's finding that there was no proper ground of misconduct under rule 13. His Honour does not specifically state whether he meant that the acts charged were not acts of such a nature as the executive council acting honestly and in good faith could consider to be misconduct within the meaning of the rule, or that there was no material before the executive council on which honest men acting in good faith could reasonably hold that the charges were established. But it is clear that the acts charged were capable of being considered to be misconduct; it would be difficult to consider otherwise; and I believe that his Honour must have meant that there was no material on which the executive council could honestly and bona fide arrive at the conclusion that the charges had been established.

The origin of the charges was the conduct of the respondents with respect to the affairs of the New South Wales branch of the union in 1944. The history of this branch is given in the judgment of *Roper* J. delivered on 11th September 1944, in the suit brought in the Supreme Court of New South Wales in Equity by this branch and others against the union and others, and I do not propose to go over the same ground again. Prior to 24th June 1942 the union itself was registered as a trade union under the *Trade Union Act* 1881-1936 (N.S.W.) as well as being registered as an organization under the *Commonwealth Conciliation and Arbitration Act*. The union was divided into six semi-autonomous branches. The ultimate governing authority of the union is a body called the convention which meets once a year to deal generally with the affairs of the union. Rule 36 of the rules of the union provides that the general management of its affairs subject to the direction of convention shall be vested in the executive council. The powers of the executive council under this rule are very wide and include power, when convention is not sitting, to suspend the policy laid down by convention or any portion thereof or any rule, and to make such rules and other provisions or to rescind or vary existing rules as may be deemed expedient. Rule 37 of the same rules empowers the executive council, where a branch does not comply with its instructions or the rules deemed essential to the good government of the union, after inquiry, to supersede all or any of the officers and members of the executive of such branch and appoint others in their stead to manage the affairs of such branch pending a fresh election. In 1941 negotiations commenced which culminated about

(1) (1894) 1 Q.B., at pp. 757, 760. (2) (1947) A.C. 109, at pp. 121-125.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Williams J.

April of that year in an agreement for the merger of another union, the United Labourers Protective Society of New South Wales, with the New South Wales branch of the union. It was necessary under s. 23 of the *Trade Union Act* that notice of the amalgamation should be given to the registrar. For the purposes of this merger certain documents were therefore lodged with the registrar who insisted upon the New South Wales branch having its own name and rules, and this insistence resulted in the Australian Workers' Union, New South Wales branch, being registered as a separate trade union under the *Trade Union Act* on 24th June 1942, with rules which on their face made that branch an autonomous body.

These rules provided that the rules of the new trade union could be altered or rescinded by that body and therefore without the consent of the parent body. But until 1944 the affairs of the branch continued to be carried on precisely as before, that is to say as a semi-autonomous branch of the union subject to the directions of convention and the executive council. As his Honour said tickets were issued to persons applying to officers of the branch for membership purporting to evidence their membership of the New South Wales branch of the union. Contributions were regularly made to head-office expenses. Members of the New South Wales branch elected delegates to convention and members of the executive council in accordance with these rules, and generally the business of the branch in New South Wales was conducted as though no change had occurred in its constitution as one of the branches of the union. In 1944 the executive of the New South Wales branch, which included all the respondents except Renwick, without the consent of the executive council, commenced to take the necessary steps to alter several rules of the branch and in particular to reduce the quorum at general meetings from fifteen financial members to ten. The executive council objected to these amendments and to other conduct of the affairs of the New South Wales branch, and in June 1944 resolved to take over the control and management of this branch for the purpose of reconstruction, and also resolved that a committee of three be appointed including the respondent Bowen to carry out the terms of the previous resolution. This led to the suit in equity in which the plaintiffs were the Australian Workers' Union, New South Wales branch, Bowen as branch secretary and treasurer, Moss, Hearne and Dalton as president and vice-presidents of the branch, and Renwick, a member of the branch, representing himself and all other members of the branch. It is unnecessary to discuss the proceedings in any detail. His Honour

found that the branch was not a competent plaintiff because it was not a separate entity but merely an unincorporated body of persons forming part of the combination of persons comprising the union.

It was contended for the respondents before us that the suit was brought because the individual plaintiffs believed and were advised by counsel that the attempt by the executive council to supersede them was a breach of the rules of the New South Wales branch, and that it could not be misconduct for the members of the executive and members of the branch to insist upon their legal rights under the rules of the branch and to bring legal proceedings to have those legal rights determined and enforced. But there was ample evidence tendered before *Roper* J. to justify the executive council honestly and bona fide finding that the real purpose of the suit was to break the New South Wales branch away from the union. Further the executive council, in exercising its powers under rule 13, was not confined to the evidence given before his Honour. Its members were entitled to inform their minds from other sources as well, and they were justified and indeed bound to consider the whole of the available material for themselves (*General Medical Council* v. *Spackman* (1) ). In my opinion on the whole of these materials it was clearly open to the executive council acting honestly and in good faith to arrive at the conclusion that the respondents were not really seeking to uphold the legal rights of the New South Wales branch as a semi-autonomous body, but were seeking to establish that it was a completely autonomous and independent body and to break it away from the union. There is less material against Renwick than against the other respondents but he was a plaintiff in the suit and it is, in my opinion, impossible to hold that there was no material on which the executive council could have arrived at such a conclusion in his case. The respondents were given proper notice in accordance with rule 13 of the acts of misconduct with which they were charged. They attended the meeting of the executive council at which these charges were considered, they were given every opportunity of stating their case, and there was no evidence on which Judge *Kelly* could in my opinion find that the rules had not been observed.

There remain for consideration the two grounds on which his Honour found that there had been a violation of the rules of natural justice. The meaning of this expression was discussed by *Maugham* J. (as Viscount *Maugham* then was) in *Maclean's Case* (2), and more recently by Lord *Wright* in *Spackman's Case* (3). The expression

(1) (1943) A.C. 627.
(2) (1929) 1 Ch., at p. 624.
(3) (1943) A.C., at pp. 640-645.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Williams J.

has been described as "sadly lacking in precision" (1) but in essence it would appear to require that the tribunal which is exercising the quasi-judicial function should be impartial and that the person whose conduct is impugned should be given a full and fair opportunity of being heard. The respondents were given proper notice of the charges and were allowed to present their cases in person so that there was no failure of natural justice in this respect. But his Honour found that the executive council was not impartial because it had already determined in prior proceedings that the respondents were guilty of the same charges, and therefore had in the words of Lord *Thankerton* in *Franklin* v. *Minister of Town and Country Planning* (2), "forejudged any genuine consideration of the objections." His Honour's finding referred to the proceedings of the executive council of 21st September 1944 when resolutions were passed under rule 37 superseding the respondents other than Renwick as officers and members of the executive of the New South Wales branch. But the principles of natural justice cannot override the express provisions of the rules, and it could not be "contrary to the essence of justice" for the executive council honestly and bona fide to exercise all its powers and duties under the rules. Accordingly, if the same conduct authorized the executive council so to supersede the respondents under rule 37 and also to expel them for misconduct under rule 13, the executive council could act under both rules, and could meet for these purposes at the same time, provided proper notice had been given under rule 13, or at different times. It would be no disadvantage and well might be an advantage to the respondents that the hearings should take place on separate occasions. But, be that as it may, the rules authorize the executive council to supersede officers and members of the executive of branches and to dismiss persons who have been guilty of misconduct from membership. It cannot be a failure of natural justice for the executive council to exercise both powers when the rules expressly provide that they may do so. It is simply a question in relation to each power whether there has been an honest and bona-fide exercise of that power. If the conduct complained of is such as to justify the executive council superseding members as executive officers of branches and also dismissing them from membership, then the executive council has not exceeded its powers under the rules.

The other ground on which his Honour found that there had been a failure to observe the principles of natural justice was that the

(1) (1943) A.C., at p. 644.

(2) (1948) A.C. 87, at p. 105.

prosecutor of the charges, Mr. Dougherty, the general secretary of the union, also participated in the deliberations of the tribunal. This was an invocation of the principle that it is contrary to natural justice for a person to be both prosecutor and judge at the same time. In *Frome United Breweries Co. Ltd.* v. *Bath Justices* (1), Viscount *Cave* L.C. said, " My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others." It will be seen that bias need not be proved in fact. It is sufficient if the person who is to sit as judge is in such a position that a bias must be assumed. It is necessary not only that justice should be done but that it should appear to have been done. It is not therefore necessary to prove bias in fact, it is sufficient if a litigant might reasonably believe that the tribunal was biassed (*Cottle* v. *Cottle* (2)). But this principle must also give way to express or implied provisions to the contrary. It happens over and over again that the rules of voluntary associations impose both administrative and quasi-judicial functions on the body set up by the rules to manage its affairs, and entrust to the same body the duty of deciding whether to call upon a member to show cause why he should not be expelled, and then determining whether his conduct warrants his expulsion or not. In the present case the charges were originated and prepared by Dougherty and approved by the executive council. All the members of the executive council were therefore prosecutors. Rule 33 of the rules of the union provides that the general secretary of the union shall be a member of the executive council. Rule 47 (*b*) provides that the general secretary shall have the right of speech on all occasions. Rule 47 (*c*) provides that it shall be the duty of the general secretary to attend all meetings of the executive council and take minutes of same. Dougherty was therefore entitled under the rules to sit as a member of the executive council when the charges against the respondents were under review, and it was part of his duties as general secretary

(1) (1926) A.C. 586, at p. 590. (2) (1939) 2 All E.R. 535.

H. C. OF A. 1948.

AUSTRALIAN WORKERS' UNION v. BOWEN [No. 2].

Williams J.

to attend the meeting and place before the executive council the whole of the material which he considered to have a bearing on the investigation. After *Roper* J. had given judgment, Dougherty published a pamphlet entitled " The truth about the attack by the New South Wales branch executive on the Australian Workers' Union," which was described as " a synopsis of a series of articles published in the Australian Worker, in which the general secretary, Mr. Tom Dougherty, refutes the attack made by certain individuals who were members of the New South Wales branch executive on the Australian Workers' Union." In this pamphlet the conduct of the respondents was bitterly attacked. But the respondents had not hesitated to make equally bitter attacks on Dougherty. This controversy was not sufficient to place Dougherty in a different category to that of the other members of the executive council. They were all made by the rules prosecutors and judges. There was probably more personal bitterness between Dougherty and the respondents than there was between the other members of the executive council and the respondents. Dougherty would only have been disqualified if there were special circumstances which made the proceedings before the executive council proceedings in the nature of a *lis* between himself and the respondents : *Maclean's Case* (1). Illustrations of such a *lis* are afforded by *R.* v. *London County Council* ; *Ex parte Akkersdyk and Fermenia* (2), and *Law* v. *Chartered Institute of Patent Agents* (3) where some of the members of the quasi-judicial body had already litigated the very question on which they had to adjudicate with the person charged before another tribunal. A further illustration is afforded by a case in this Court, *Dickason* v. *Edwards* (4), where a member was charged with using abusive language to the district chief ranger before the District Judicial Committee and the district chief ranger presided as chairman during the hearing of the charge. There was no quasi-*lis* between Dougherty and the respondents which made Dougherty a judge in a matter in which he was personally interested. The investigation related to matters which concerned the affairs of the union. As a matter of good taste it might have been better if Dougherty had not taken part in the deliberations, but I am unable to find any evidence on which Judge *Kelly* could find that Dougherty was legally disqualified from doing so (*Maclean's Case* (5) ).

For these reasons I would allow the appeal.

(1) (1929) 1 Ch., at p. 625.
(2) (1892) 1 Q.B. 190.
(3) (1919) 2 Ch. 276.
(4) (1910) 10 C.L.R. 243.
(5) (1929) 1 Ch., at p. 628.

*Appeal allowed as to respondents other than Thomas Renwick. Order of the Commonwealth Court of Conciliation and Arbitration varied by substituting for the words "each of the abovenamed Applicants" and for the words "each of the said Applicants" the following words—"the applicant Thomas Renwick," and by substituting for the order as to costs an order that the respondents to this appeal except the said Renwick pay the costs in the said Court of the appellants herein to be fixed or taxed as the Court shall direct. Said respondents other than the said Renwick to pay the appellants' costs of the appeal.*

Solicitors for the appellant, *J. J. Carroll, Cecil O'Dea & Co.*
Solicitors for the respondents, *C. Jollie Smith & Co.*

J. B.