[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE WAR PENSIONS ENTITLEMENT APPEAL TRIBUNAL AND ANOTHER;

EX PARTE BOTT.

H. C. OF A. 1933.

SYDNEY, *May* 11; *Aug.* 2.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Mandamus—War pension—Claim rejected by Repatriation Commission—Appeal Tribunal—Procedure—Evidence—Right of appellant to be present at hearing—Australian Soldiers' Repatriation Act 1920-1931 (*No.* 6 *of* 1920—*No.* 47 *of* 1931), *secs.* 28, 45K*, 45R*, 45S*, 45W*.

A War Pensions Entitlement Appeal Tribunal, after hearing evidence on an appeal under sec. 45K (7) of the *Australian Soldiers' Repatriation Act* 1920-1931, requested two independent medical specialists to examine the appellant and to report the result to the Tribunal. The report was adverse to the appellant. After receiving the report, the Tribunal resumed its consideration of the appeal in the presence of the appellant's representative, but the appellant was refused admission to the room in which the Tribunal sat. The report was read, but cross-examination upon it was not allowed. The Tribunal disallowed the appeal.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the course the Tribunal took did not vitiate the hearing and determination

The *Australian Soldiers' Repatriation Act* 1920-1931 provides:—By sec. 45K: "(1) A person who has claimed, as a member of the Forces . . . a pension under section twenty-three of this Act, and whose claim has been refused by the Commission on the ground that the . . . incapacity of the member has not resulted from any occurrence happening during the period he was a member of the Forces, or from his employment in connection with naval or military preparations or operations, as the case may be, may within twelve months after . . . (*b*) the date of the determination by the Commission . . . or within such further time as is allowed by an appeal tribunal. . . lodge . . . an appeal to an appeal tribunal against the determination of the Commission. (2) The person with whom an appeal is lodged . . . shall forward the appeal to the Commission which shall transmit it to the appeal

of the appeal, and there was no foundation for the issue of a writ of mandamus directing the Tribunal to hear and determine the appeal again according to law.

Per Rich, Starke, Dixon and *McTiernan* JJ.:—(1) As, by reason of sec. 45w (2) of the *Australian Soldiers' Repatriation Act*, the Tribunal was not bound by any rules of evidence, it was not required to act on sworn testimony only, and it had not abdicated its duty by its action in relation to the report of the medical specialists. (2) The Tribunal was not a Court of law, but was a statutory body set up to carry out the functions prescribed by the *Australian Soldiers' Repatriation Act*.

Per Rich, Dixon and *McTiernan* JJ.:—A writ of mandamus will not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If a tribunal, charged by law with the duty of ascertaining or determining facts upon which rights depend, has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal: But the correctness or incorrectness of the conclusion reached by the tribunal is beside the question whether the writ lies. It is also beside the question that the determination, although not void, is yet one which, because of some failure to proceed in the manner directed by law, or of some collateral defect or impropriety, is liable to be quashed by a Court which on appeal, certiorari or other process is competent to examine it.

ORDER NISI for mandamus.

The applicant, Alfred George Bott, was an ex-member of the Australian Imperial Force, who, during his service in Egypt and on Gallipoli in 1915, contracted rheumatic fever. He was invalided to Australia and, on 4th September 1916, he was discharged as unfit for further service, and a pension was granted to him under the *War*

tribunal with the records in the possession of the Commission relating to the appellant. (3) If, upon the consideration of an appeal by an appeal tribunal, no further evidence is tendered which, in the opinion of the tribunal, has a substantial bearing upon the appellant's claim, the tribunal shall decide the appeal. (4) If, upon the consideration of an appeal before an appeal tribunal, further evidence is tendered which, in the opinion of the tribunal, has a substantial bearing upon the appellant's claim, the tribunal shall refer the case back to the Commission for review. (5) The Commission shall thereupon review the case and notify the appeal tribunal of its determination. (6) If the decision of the Commission in pursuance of the last preceding sub-section is adverse to the appellant, the appeal tribunal shall consider and decide the appeal upon the records and evidence upon which the determination appealed against and the decision upon the review were given by the Commission. (7) If, at any time after a decision of an appeal tribunal made under sub-section (3) or sub-section (6) of this section, the appellant submits to the Commission in writing any further evidence which, in the opinion of the Commission, is relevant to the appellant's claim, the Commission shall reconsider the claim and, if the claim is refused by the Commission, the appellant may, within twelve months of the decision of the Commission, appeal in writing to an appeal tribunal which shall consider the further evidence and decide the appeal: Provided that, where, in the

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Pensions Act 1914-1916. Four months later he re-enlisted for home service but was discharged six weeks afterwards as unfit through rheumatism. From time to time his pension was varied in scale and amount, and finally it was cancelled as from 1st January 1920. An appeal to the Commissioner under sec. 6 of the above-mentioned Act against the cancellation was disallowed on 21st February 1920 on the ground that according to the medical evidence the applicant was no longer suffering from any incapacity caused by war service. On 12th November 1930 Bott applied to the Repatriation Commission for a pension under the *Australian Soldiers' Repatriation Act* 1920-1929 on the ground that he suffered from chronic rheumatism arising from war service. The application was rejected on 20th January 1931, and Bott's attention was directed by the Commission to the fact that under sec. 45K of the *Australian Soldiers' Repatriation Act* he had a right of appeal to the War Pensions Entitlement Appeal Tribunal. Bott appealed accordingly, but his appeal was dismissed by the Tribunal on 16th October 1931 by a decision which stated that the appeal was disallowed in respect of chronic rheumatism. Bott then applied for and obtained an invalid pension under the *Invalid and Old-Age Pensions Act* 1908-1928, which, according to a certificate of a Commonwealth Medical Referee for Invalid Pensions, was granted on account of Bott's rheumatic condition. On 23rd January 1932, on the authority of a State

opinion of the Commission, the further evidence is not relevant to the appellant's claim, the appellant may, within twelve months of the submission of such further evidence to the Commission, submit that evidence in writing to an appeal tribunal which shall decide whether the evidence is relevant to the appellant's claim and, if it decides that the evidence is so relevant, the appellant may appeal to the tribunal which upon such appeal shall consider the further evidence and decide the appeal. (8) Upon any decision being made under this section by an appeal tribunal, it shall forthwith give notice, in the prescribed form, to the Commission and to the appellant, of the decision." By sec. 45R: "(1) An appellant to an appeal tribunal . . . may attend in person at any sittings at which his appeal is being heard . . . (3) Any appellant shall be entitled . . . (*b*) to be represented, at his own expense, at the hearing by a person other than a legal practitioner." By sec. 45S: "An appeal tribunal . . . may—(*a*) summon witnesses; (*b*) take evidence on oath; and (*c*) require the production of documents." By sec. 45W: "(2) Subject to this Act, an appeal tribunal . . . shall not, in the hearing of appeals, be bound by any rules of evidence but shall act according to substantial justice and the merits of the case and shall give to an appellant the benefit of the doubt: Provided too that if the appellant or a representative of the appellant shall make out a prima facie case in support of his claim that the incapacity from which he is suffering . . . was caused or aggravated by war service, the onus of proof that such incapacity was not in fact so caused or aggravated shall lie with the Commission. (3) The hearing of any appeal under this Part shall not be open to the public."

Government medical officer, Bott was admitted to a public hospital as suffering from rheumatism. In August 1932 he applied to the Repatriation Commission for a reconsideration of his case under sec. 45K (7) of the *Australian Soldiers' Repatriation Act*, and submitted some further facts and documents. The Commission reconsidered his claim, but in September 1932 again disallowed it and advised him that if he were still dissatisfied he could lodge a further appeal with the War Pensions Entitlement Appeal Tribunal. A further appeal, which was lodged accordingly by Bott on 31st October 1932, was heard by the Tribunal on 24th February 1933. Although he was present thereat in person Bott was, as authorized by sec. 45R of the Act, represented at the hearing by Thomas William McLaren, a person who was not a legal practitioner. The Tribunal had before it the documents which had been before the Commission, and it also heard evidence on oath, given in support of the appeal by Dr. Brennand, the Commonwealth Medical Referee for Invalid Pensions in Sydney, and by Dr. Sherwood who had examined and prescribed for Bott whilst he was a patient at a public hospital, to the effect that Bott was suffering from chronic rheumatism. No further evidence was tendered by the Commission. At the request of the Tribunal, Bott was x-rayed on 28th February 1933 and the resulting x-ray film, together with other x-ray films taken previously and a full summary of the medical evidence relating to the case, was forwarded to two physicians who had not previously examined him. The physicians, Dr. Blackburn and Dr. Holmes a'Court, were informed by the Tribunal that before deciding the appeal the Tribunal desired that they, in consultation, examine Bott and, after a perusal of the medical evidence forwarded to them, express an opinion as to whether he was suffering from any after effects of rheumatic fever which was recorded in his overseas record. Bott was accordingly examined by the physicians, who, on 28th March 1933, reported :—" We examined the above ex-soldier in consultation. We found that he had marked oral sepsis, a very dirty tongue, and somewhat unhealthy tonsils. We also found him to be in an extremely nervous state. We failed to find any evidence of rheumatism in his joints. We are of opinion that he is not suffering any after effects of rheumatic fever which is recorded in his overseas

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service record." On 6th April 1933 both Bott and his representative, McLaren, attended at the offices of the Repatriation Commission, Sydney, for the purpose of hearing the report, but only McLaren was allowed in the room where the members of the Tribunal were. On the following day the secretary to the Tribunal forwarded to Bott a letter as follows :—" You are informed that the following is the result of your appeal to the War Pensions Entitlement Appeal Tribunal :—Decision of Tribunal.—The Tribunal has decided that any disability you are at present suffering is not attributable to war service. The appeal has, therefore, been disallowed. Date of hearing 24/2/1933. Place of hearing Sydney."

Bott obtained an order nisi directed to Alexander Windeyer Ralston, Edward John Dibdin and Percival Deane, sitting as the War Pensions Entitlement Appeal Tribunal, and to the Repatriation Commission, to show cause why an order should not be made for the issue of one or more of the following writs : (*a*) A writ of certiorari to bring up and quash the proceedings and decision of the Tribunal dated 7th April 1933 ; (*b*) a writ of mandamus directed to the Tribunal to hear and decide in his favour Bott's appeal for a military pension ; and (*c*) a writ of mandamus directed to the Tribunal to hear and determine Bott's appeal in accordance with the provisions of the *Australian Soldiers' Repatriation Act* 1920-1931. The grounds stated were (i.) that Bott was not allowed to be present at the sitting of the Tribunal on 6th April 1933, a sitting of the Tribunal at which his appeal was being heard ; (ii.) that Bott was denied a fair hearing contrary to natural justice ; (iii.) that evidence was used against Bott, such evidence not being sworn and the witnesses not being produced for cross-examination ; (iv.) that Bott was not given the benefit of the doubt ; and (v.) that Bott, having admittedly made out a prima facie case, was entitled to succeed on his appeal, no evidence in reply thereto being before the Tribunal.

In an affidavit filed on behalf of Bott, McLaren stated that he represented Bott at the hearing of the appeal before the Tribunal on 24th February 1933 ; both Dr. Brennand, the Commonwealth Medical Referee for Invalid Pensions, Sydney, and Dr. Sherwood gave evidence on oath before the Tribunal that Bott was

suffering from rheumatism and that the complaint was a continuation of, or related to, the rheumatic fever contracted by Bott in 1915; according to the sworn evidence of both doctors Bott was permanently incapacitated; the representative of the Commission present at the hearing of the appeal declined to ask any questions of either of the two doctors, and did not submit any further evidence; Bott was present but was not called as a witness and no questions were asked of him; he, McLaren, on 6th April 1933 attended before the Tribunal at a further hearing of the appeal; immediately the proceedings opened he requested the chairman of the Tribunal to allow Bott to be present but the request was not acceded to; the chairman then read a joint certificate by Dr. Blackburn and Dr. Holmes a'Court to the effect that Bott was not suffering from rheumatism and that his complaint was not attributable to war service; he, McLaren, was then asked by the chairman if he had any further evidence to tender and he replied by asking: "Are the doctors who give this certificate here to give evidence on oath and offer themselves for cross-examination?" and the reply was "No"; he then addressed the Tribunal in respect of the sworn evidence given by Dr. Brennand and Dr. Sherwood, and directed the attention of the Tribunal to the provisions of sec. 45w (2) of the *Australian Soldiers' Repatriation Act* 1920-1931; he asked the chairman if it was intended to give the decision immediately, and he was informed that the Tribunal would deliberate and communicate its decision to Bott. Bott stated in an affidavit that on 5th April 1933 he was notified to attend before the Tribunal and on the following day he accompanied McLaren to the seat of the Tribunal at Chalmers Street, Sydney, where he was informed by the secretary to the Tribunal that he, the secretary, did not think that Bott would be allowed into the room where the Tribunal sat, and that as the result of the Tribunal's refusal of McLaren's request in this regard he, Bott, was not present during any part of the proceedings that took place before the Tribunal that day.

The chairman of the Appeal Tribunal, Colonel A. W. Ralston, stated on affidavit that when the hearing closed on 24th February the Tribunal adjourned to consider the appeal; the Tribunal

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decided to request that Bott be examined by Dr. Blackburn and Dr. Holmes a'Court to determine (*a*) whether he had any rheumatism, and (*b*) whether he was suffering from any after effects of rheumatic fever which was recorded on his overseas papers, and that prior to such examination a further x-ray examination be made and the result forwarded to the two doctors for their information; the Tribunal received the report from the doctors and subsequently, as was its custom, notified the applicant's representative, in this case McLaren, that he could see the report and make such comments thereon as he wished; no notice was sent to Bott to attend on 6th April; his, the chairman's, recollection was that when the certificate from the doctors was shown to McLaren he, McLaren, said that the certificate was ridiculous; at the hearing Dr. Brennand and Dr. Sherwood were called on behalf of Bott but, as there was a mass of evidence before the Tribunal which appeared to contradict the evidence of those two doctors, the Tribunal had the examination made by two independent experts who were not called by the Repatriation Commission or by Bott; the opinion of those experts was obtained notwithstanding the fact that the Tribunal did not consider that Bott had made out a prima facie case in support of his claim; an additional reason why the Tribunal considered it desirable in this case to obtain an outside opinion was that there was a conflict between the Repatriation Commission and the Old-Age and Invalid Pension authorities; he had no recollection of asking McLaren on 6th April whether he, McLaren, had any further evidence to tender, but he, the chairman, did ask McLaren if he had any comments to make upon the medical certificate of Dr. Blackburn and Dr. Holmes a'Court; nothing that happened on 6th April was regarded by the Tribunal as a hearing of the appeal; and McLaren attended as the result of a message given to him that the certificate was available for his inspection.

The order nisi, which was made returnable before the Full Court of the High Court, now came on for argument.

During the argument the Court was informed that the application for a writ of certiorari would not be proceeded with.

Further material facts appear in the judgments hereunder.

Mack K.C. (with him *Evatt* and *Coleman*), for the applicant. The fact that the Appeal Tribunal referred the matter to two independent doctors shows that it was in doubt about the matter: under sec. 45w (2) of the *Australian Soldiers' Repatriation Act* 1920-1931, the benefit of that doubt should have been given to the applicant. It also shows that the applicant had made out a prima facie case, and, that being so, the onus of proving that his disability was not caused or aggravated by war service passed to the Repatriation Commission as provided in the proviso to sec. 45w (2). This onus has not been discharged by the Commission. The refusal by the Appeal Tribunal to allow the applicant to be present in person when the report of the two doctors was dealt with was contrary to natural justice. The report should have been submitted by the doctors on oath; they could then have been cross-examined by or on behalf of the applicant, if thought necessary or desirable (*Sharp* v. *Wakefield* (1); *Sydney Corporation* v. *Harris* (2); *Local Government Board* v. *Arlidge* (3)). The Appeal Tribunal had no power to obtain a further medical report in respect of the matter. By doing so, the Appeal Tribunal shirked its duty. As it is, the Appeal Tribunal has based its decision on a report by two medical men, who were not on oath, which conflicts with opinions given on oath by other medical men. The affidavits support the view that the applicant had made out a prima facie case. If the matter was determined on 24th February 1933, as is suggested, then the decision should have been in the applicant's favour because the Commission made no attempt to discharge the onus of proof imposed upon it by sec. 45w (2) (*Winnipeg Electric Co.* v. *Geel* (4)).

Betts, for the respondents. The duty of the Appeal Tribunal in the hearing of appeals is as prescribed by sec. 45w (2) of the *Australian Soldiers' Repatriation Act* 1920-1931. That duty was fully observed by the Tribunal. In the circumstances, what the Tribunal had to consider was the further evidence submitted by the applicant under sec. 45k (7). The issues were: (1) Was the applicant suffering from rheumatism?; and (2) if so, was the disability due to or

(1) (1891) A.C. 173, at pp. 178, 179.
(2) (1912) 14 C.L.R. 1, at p. 7.
(3) (1915) A.C. 120, at pp. 132, 133.
(4) (1932) A.C. 690; 101 L.J. P.C. 187.

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aggravated by the applicant's war service. The applicant failed to establish a prima facie case. The further medical evidence submitted by the applicant shows no more than that his disability might possibly relate to his war service. This Court is not concerned with the merits of the case: it is concerned only with whether the Tribunal performed its function in a proper manner and as authorized and empowered by statute. The Tribunal has power to take whatever evidence it thinks necessary or desirable, and, in seeking the opinion of two independent doctors, the Tribunal did nothing that was improper or wrong. The Tribunal decided, on 24th February 1933, that a prima facie case had not been made out, and the matter was referred to the two independent medical men merely for the purpose of assisting the applicant if that were possible. The Tribunal is not bound to accept and act upon sworn evidence only. Nor was the applicant entitled as of right to be present in person when the report of the independent medical men was received by the Tribunal on 6th April 1933. The fact that he was not so present did not operate to prejudice the applicant.

Mack K.C., in reply.

Aug. 2.

The following written judgments were delivered :—

RICH, DIXON AND MCTIERNAN JJ. A prerogative writ of mandamus is sought directed to the War Pensions Entitlement Appeal Tribunal, constituted under the *Australian Soldiers' Repatriation Act* 1920-1931, requiring the Tribunal to hear the prosecutor's appeal for a military pension and decide it in his favour, or alternatively requiring the Tribunal to hear and determine such appeal in accordance with the provisions of the Act. An alternative application for a writ of certiorari was abandoned.

The appeal in question was made to the Tribunal on 31st October 1932, and the Tribunal purported to decide it on 7th April 1933. The appeal was the second made to the War Pensions Entitlement Appeal Tribunal by the prosecutor against the rejection of his claim to a pension under the *Australian Soldiers' Repatriation Act*. The prosecutor is a returned soldier, who, during his service in Egypt and on Gallipoli in 1915, contracted rheumatic fever. He was invalided to

Australia, and eventually on 4th September 1916 he was discharged as unfit for further service and was granted a pension under the *War Pensions Act* 1914-1916. Four months later he re-enlisted for home service, but after six weeks he was again discharged as unfit through rheumatism. From time to time his pension was varied in scale and amount and finally it was cancelled as from 1st January 1920. An appeal to the Commissioner of Pensions under sec. 6 of the *War Pensions Act* 1914-1916 against the cancellation was disallowed by a notification, dated 21st February 1920, which stated that in view of the medical evidence, which showed that he was not then suffering from any incapacity resulting from his employment in connection with warlike operations, it was regretted that his pension could not be restored. On 12th November 1930, the prosecutor claimed a pension under the *Australian Soldiers' Repatriation Act* 1920-1929 on the ground that he suffered from chronic rheumatism arising from war service. The Repatriation Commission obtained reports upon his condition. The reports concluded with an opinion by a medical officer who said that he could not satisfy himself that the prosecutor did suffer from any rheumatism and that, as a hospital investigation had led to a diagnosis of debility and bad teeth, he thought that the soldier's symptoms were best explained by neurosis, due possibly to misfortune since the war and uninfluenced by war service. Thereupon, the Repatriation Commission rejected the prosecutor's claim to a pension and by a notification, dated 20th January 1931, informed him that the investigation of his case disclosed that he was suffering from debility, neurosis and defective teeth, which conditions the Commission decided were not attributable to war service, and that he was not eligible for a war pension. He was further informed that he had a right of appeal to the War Pensions Entitlement Appeal Tribunal. He appealed accordingly. In his appeal he gave the nature of his disability as chronic rheumatism and attempted to establish that he was suffering from that complaint. The Appeal Tribunal, after making inquiries directed to the question whether he did suffer from chronic rheumatism, dismissed the appeal by a decision dated 16th October 1931, which stated that the appeal was disallowed in respect of that disease. The prosecutor then applied for and obtained an invalid

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pension under the *Invalid and Old-Age Pensions Act* 1908-1928. According to a certificate of a Commonwealth Medical Referee for Invalid Pensions he was granted a pension on account of his rheumatic condition. The invalid pension was payable as from 26th November 1931. On 23rd January 1932, upon the authority of a State Government medical officer, he was admitted to a public hospital as suffering from rheumatism. On 11th August 1932, he orally stated these and some other facts to an officer of the Repatriation Commission and left with him the documents supporting his statement. The officer recorded in a minute what he said, and requested him to make a written application to the Commission, advice which he endeavoured to follow.

Sub-sec. 7 of sec. 45K of the *Australian Soldiers' Repatriation Act* 1920-1931 provides that if, at any time after a decision of an Appeal Tribunal, the appellant submits to the Commission in writing any further evidence which, in the opinion of the Commission, is relevant to the appellant's claim, the Commission shall reconsider the claim and, if the claim is refused by the Commission, the appellant may appeal in writing to an Appeal Tribunal, which shall consider the further evidence and decide the appeal. Sec. 28 provides that, whenever it appears to the Commission that under the Act sufficient reason exists for reviewing any determination under Part III., which relates to pensions, the Commission may review the determination. Having regard to the special provisions of sec. 45K, which were inserted in the Act by Act No. 14 of 1929, it is doubtful whether sec. 28 applies after the rejection of a claim to a pension has been confirmed on appeal, but, in any case, the Repatriation Commission appears to have acted under sec. 45K, and to have accepted the prosecutor's letter and the documents he left with its officer as a submission of further evidence under this provision. Further, the Commission seems to have considered that the evidence was relevant. It is true that in a report to the Commission the medical officer said that the additional evidence contained no new relevant facts, but the decision of the Commission, as communicated to the prosecutor, does not proceed upon the ground of its irrelevancy. This communication is contained in a letter, dated 6th September 1932, from the chairman of the Commission advising him that further consideration

had been given to the additional evidence submitted with his letter and to his representations at the office regarding the diagnosis in his case. The chairman wrote :—" I note your claim that the disability from which you are suffering is rheumatism and that the medical certification of your condition is rheumatism. In the opinion of the Commission's medical officers, it is more correct to describe your disability as due to neurosis debility and bad teeth which cause at times a condition of so-called rheumatism. But irrespective of the question of diagnosis, the position is that the condition is not considered by the War Pensions Entitlement Appeal Tribunal to be attributable to war service, and therefore, the Commission cannot vary the decision already reached. If you are still dissatisfied with the decision you are entitled to lodge a further appeal to the War Pensions Entitlement Appeal Tribunal."

In pursuance of this intimation the prosecutor appealed to the Tribunal. If the additional evidence were not considered relevant by the Commission, such an appeal could not be brought directly. If, in its opinion, further evidence submitted is not relevant to an appellant's claim, the procedure directed by the statute is that set out in the proviso to sub-sec. 7 of sec. 45K, which enacts that the appellant may submit the further evidence in writing to the Appeal Tribunal, which shall decide whether the evidence is relevant, and if it decides that the evidence is so relevant, the appellant may appeal to the Tribunal, which upon such appeal shall consider the further evidence and decide the appeal. The letter of 6th September 1932 from the chairman of the Repatriation Commission does not make it clear that, upon the fresh evidence as well as the previous material, the Commission is deciding the claim anew. The phrase " irrespective of the question of diagnosis " is, perhaps, open to criticism, because the Appeal Tribunal's previous decision was in fact based upon the " question of diagnosis." That decision went upon the ground that the appellant's then condition did not appear to be due to rheumatism. But, however this may be, the conclusion that the Repatriation Commission cannot vary the decision is not put upon the ground that, in the Commission's opinion, the further evidence is irrelevant ; and the existence of a right of immediate

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appeal is conceded and stated. The appeal taken to the Tribunal, therefore, must be regarded as fully competent to the prosecutor.

In this, his second appeal, which was dated 31st October 1932, he again stated that the nature of the disability which he claimed to be the result of war service, "and which claim has been rejected by the Repatriation Commission," was chronic rheumatism. The appeal was heard by the Appeal Tribunal on 24th February 1933. In pursuance of sec. 45R, the prosecutor was represented "by a person other than a legal practitioner" and also attended the sittings in person. The Tribunal had before it the documents which had been before the Commission, and it also heard evidence upon oath adduced in support of the appeal. Sec. 45K (3) and (6), which govern the procedure on an appeal from an original refusal of a claim to a pension, require the Tribunal to send new evidence back to the Commission if it has a substantial bearing upon the claim, and confine the Tribunal in considering an appeal from the Commission's decision given on such a remission to "the records and evidence upon which the determination appealed against and the decision upon the review were given by the Commission." Sub-sec. 7 of sec. 45K, however, contains no express restriction upon the materials which the Appeal Tribunal may consider in an appeal brought under its provisions. It provides merely that the Tribunal shall consider the evidence and decide the appeal. On the whole, there appears to be no sufficient reason for attributing to the Legislature an intention that the Appeal Tribunal, in the exercise of its powers under sub-sec. 7, should be confined, as under sub-secs. 4, 5 and 6, to evidence and material already considered by the Commission, and, therefore, obliged, if any further evidence is tendered having a substantial bearing on the case, to pursue the course of remitting the matter for review by the Commission. From this interpretation of sub-sec. 7, it follows that the Appeal Tribunal was right in treating itself as at large and thus at liberty to take into consideration whatever evidentiary matters it thought proper. The question the Tribunal was called upon to decide was one of fact, namely, whether the appellant was under an incapacity which resulted from any occurrence happening during the period he was a member of the Forces enlisted for service outside of Australia (sec. 23 (1) (*a*) (i) and sec. 22). In

the circumstances of the prosecutor's case, this really means that the question was whether he was suffering from chronic rheumatism or any other condition that was caused or aggravated or in any material degree contributed to by the illness contracted upon service and then diagnosed as rheumatic fever. (Compare sec. 45w (2), proviso, and sec. 23 (2) (*a*).) In addressing themselves to this question, the Tribunal were governed by the provisions of sub-sec. 2 of sec. 45w, which are as follows :—" Subject to this Act, an appeal tribunal . . . shall not, in the hearing of appeals, be bound by any rules of evidence but shall act according to substantial justice and the merits of the case and shall give to an appellant the benefit of the doubt : Provided too that if the appellant or a representative of the appellant shall make out a prima facie case in support of his claim that the incapacity from which he is suffering or from which he has died was caused or aggravated by war service, the onus of proof that such incapacity was not in fact so caused or aggravated shall lie with the Commission." The prosecutor maintains that the Tribunal should have considered that a prima facie case had been made out in support of his claim. However this may be, immediately after the hearing of the appeal had been closed on 24th February 1933, a minute was made by the secretary of the Tribunal that the Tribunal desired that (1) the appellant be again x-rayed, and (2) the result together with all papers be forwarded to two named physicians in consultation, (3) who should be asked to examine him and (4) express an opinion whether they considered him as suffering any after effects of rheumatic fever recorded on active service.

The course directed by the minute was followed. The two physicians reported in writing that the appellant had marked oral sepsis, a very dirty tongue, and somewhat unhealthy tonsils ; that they found him in an extremely nervous state, that they failed to find any evidence of rheumatism in his joints, and that they were of opinion that he was not suffering any after effects of rheumatic fever which is recorded in his overseas service record. The representative of the appellant was then requested again to attend the Appeal Tribunal on 6th April 1933. Both he and the appellant attended, but he alone was admitted into the room where the members

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of the Tribunal were. He says that he asked the chairman that the appellant should be allowed in, but that "the request was not acceded to." Sec. 45R (1) provides that an appellant may attend in person at any sittings at which his appeal is being heard. But the chairman of the Appeal Tribunal says that nothing that happened on this day was regarded by the Tribunal as a hearing of the appeal. In fact the representative was shown the report of the two physicians and asked whether he desired to say anything further about it and, probably, whether he wished to adduce further evidence. The Tribunal heard his observations which, he says, included a request that the physicians should be submitted to his cross-examination. On the following day, 7th April 1933, the Tribunal sent to the prosecutor a written communication of its decision as follows:— "The Tribunal has decided that any disability that you are at present suffering from is not attributable to war service. The appeal is therefore disallowed." No demand was made upon the Appeal Tribunal for a reconsideration of the prosecutor's appeal, but, on 26th April 1933, he obtained an order nisi for a mandamus.

A writ of mandamus does not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law *de novo*, at any rate if a sufficient demand or request to do so has been made upon him. In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they

have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void. But the prosecutor who undertakes to establish that a tribunal has so acted ought not to be permitted under colour of doing so to enter upon an examination of the correctness of the tribunal's decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or of the regularity or irregularity of the manner in which the tribunal has proceeded. The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies. It is also beside the question that the determination, although not void, is yet one which, because of some failure to proceed in the manner directed by law, or of some collateral defect or impropriety, is liable to be quashed by a Court which on appeal, certiorari, or other process is competent to examine it (see, per *Channell* J., *R.* v. *Nicholson* (1)).

These principles apply to exclude as irrelevant to the application for a writ of mandamus the suggestion that the Appeal Tribunal did not comply with sec. 45R (1) of the Act because on 6th April 1933 the prosecutor himself was not allowed to be present at the discussion between his representative and the members of the Tribunal. It is not so clear that this is true also of the allegation that the Tribunal disregarded sub-sec. 2 of sec. 45w and, although it considered there was a prima facie case in support of his claim that the incapacity from which the prosecutor suffered was caused or aggravated by war service, failed to put the onus of disproof on the Repatriation Commission and failed to give the prosecutor the benefit of any doubt. Neglect on the part of a Court of law to apply the legal onus of proof would not, of course, so vitiate the proceedings that it would remain under a duty enforceable by mandamus to determine anew the issue before it. But it may be said that the expressions in sub-sec. 2, although adopted from legal procedure, really describe the grounds upon which a more or less discretionary judgment must be formed by an administrative body, and that neglect of its requirements, as distinguished from a mere

(1) (1899) 2 Q.B. 455, at p. 465.

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erroneous application of them, would amount to a departure from the prescribed criterion or a desertion of the issue to be determined. But it does not appear that in point of fact the Appeal Tribunal did in any way disregard the injunctions contained in this provision. The chairman of the Appeal Tribunal says, in his affidavit, that, as the medical evidence called in support of the prosecutor's claim was opposed to a mass of evidence before the Tribunal, it had the examination made by two experts independent of the Repatriation Commission and of the prosecutor; that the opinion of these experts was obtained notwithstanding the fact that the Tribunal did not consider that the applicant had made out a prima facie case in support of his claim; and that an additional reason for obtaining an outside opinion was the conflict between the Repatriation Commission and the Old-Age and Invalid Pensions Authorities. Whether it was right or wrong on the part of the Tribunal to consider that a prima facie case had not been made out is a question not material upon an application for a mandamus. Such an error on its part would not be a ground for issuing a mandamus. The course which the Tribunal adopted, as the chairman describes it, involved the use of an unsworn report of the physicians. The Tribunal is administrative in its character; it is not a Court of justice. Unless it is expressly required to act on sworn testimony only, it is for the Tribunal to decide when it will exercise its power of taking evidence on oath. An examination of the statute leaves no doubt that the Tribunal is not required to act on sworn testimony only. The suggestion that the Tribunal committed to the two physicians the function of deciding the appeal, and thus surrendered its judgment, treats reliance upon the probative force of the physicians' opinion in performing the Tribunal's duty of determining the appeal as equivalent to an abdication of the duty of deciding the issue. What the Appeal Tribunal did was to form a judgment that, upon all the material before it, the negative report of independent physicians, selected by the Tribunal for their skill, ought to lead the Tribunal to a determination adverse to the prosecutor. There is no foundation for the issue of a writ of mandamus directed to the Appeal Tribunal.

The order nisi should be discharged.

STARKE J. Order nisi to members of the War Pensions Entitlement Appeal Tribunal and the Repatriation Commission to show cause why a writ of certiorari should not issue to bring up and quash the proceedings and decisions of the Appeal Tribunal, dated 7th April 1933, whereby the appeal of the applicant, Alfred George Bott, for a war pension was disallowed, or for a writ of mandamus to the members of the Appeal Tribunal to hear and decide in his favour Bott's appeal for a military pension, or to hear and determine his appeal in accordance with the *Australian Soldiers' Repatriation Act* 1920-1931.

The order was abandoned at the hearing in so far as it sought the issue of a writ of certiorari. And it is clear that a writ of mandamus cannot go, directing the members of the Appeal Tribunal to hear the applicant's appeal and decide it in his favour (*R.* v. *Farquhar* (1); *R.* v. *Howard* (2); *R.* v. *Licensing Justices of Kingston-on-Thames* (3)). Further, to justify the grant of a writ of mandamus to hear and determine the applicant's appeal according to law, it must be shown that the Appeal Tribunal refused or failed to hear and determine the appeal; whereas it is clear, in the present case, that the Appeal Tribunal did in fact hear and determine the appeal and decided it adversely to the applicant. So he is driven to the contention that the hearing and determination were not according to law because the Tribunal omitted to act in manner provided by law (*Local Government Board* v. *Arlidge* (4); *R.* v. *Bowman* (5); *R.* v. *Cotham* (6)).

This Court, it must be observed, has no jurisdiction or authority to consider the merits of the case: its only function is to consider whether the Repatriation Commission and the War Pensions Entitlement Appeal Tribunal performed their duties according to law.

A short statement of the facts is necessary before dealing with the contention made on behalf of the applicant. He enlisted in January 1915, and served with the Australian forces in Egypt, and on Gallipoli, where he remained, according to the records of the medical board, for about two weeks, when he was invalided, suffering from exposure and rheumatic infection. In December of 1915, a

(1) (1874) L.R. 9 Q.B. 258.
(2) (1889) 23 Q.B.D. 502.
(3) (1902) 18 T.L.R. 477.
(4) (1915) A.C. 120.
(5) (1898) 1 Q.B. 663.
(6) (1898) 1 Q.B. 802.

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medical board recommended his discharge, and he was returned to Australia, arriving about June of 1916. He claimed a war pension under the *War Pensions Act* 1914-1915, and in August of 1916 he obtained such a pension, and it was continued, in varying amounts, until January 1920, when it was cancelled on the ground that he was no longer suffering from any incapacity caused by war service. In 1920, the *Australian Soldiers' Repatriation Act* was passed. The applicant applied for a pension under this Act, but in January 1931 his application was rejected by the Repatriation Commission, which advised him that he had a right of appeal to the War Pensions Entitlement Appeal Tribunal (*Australian Soldiers' Repatriation Act* 1920-1931, sec. 45K). In February 1931 he appealed to this Tribunal, which in October 1931 disallowed his claim. In August 1932, the applicant applied to the Repatriation Commission for a reconsideration of his case, under sec. 45K (7) of the Act, and submitted some further facts and documents. The Commission reconsidered the claim, but in September 1932 again disallowed it, and advised him that, if he were still dissatisfied, then he could lodge a further appeal with the War Pensions Entitlement Appeal Tribunal. In October 1932, he so appealed. By sec. 45K (7), it is provided that in such circumstances the Appeal Tribunal "shall consider the further evidence and decide the appeal." On the hearing of this appeal, the applicant was represented by T. W. McLaren, a layman. The further evidence submitted on his behalf was considered, but the Tribunal did much more before reaching a decision. It resolved that the applicant should be submitted to an x-ray examination, and that the opinion of two independent medical experts be obtained. The instructions to these experts were in the following terms:—"The ex-soldier has lodged an appeal to the War Pensions Entitlement Appeal Tribunal that his complaint of chronic rheumatism is due to his war service. The Repatriation Commission found no evidence of rheumatism and has rejected his disabilities of debility and bad teeth neurosis as not attributable to war service. Before deciding the appeal in this case, the Tribunal desires that the appellant be examined by yourself and Dr. ( ) in consultation, and after perusal of the enclosed medical evidence express an opinion as to whether he is suffering from any after-effects of rheumatic

fever which is recorded in his overseas record. I therefore forward herewith a full summary of the medical evidence relative to this case. . . . The x-ray films mentioned in the summary dated 12/12/1930 and 2/3/1933 will be delivered . . . prior to the date of appointment." The applicant was accordingly examined under x-rays, and by two medical experts, who, on 28th March 1933, reported:—"We examined the above ex-soldier in consultation. We found that he had marked oral sepsis, a very dirty tongue and somewhat unhealthy tonsils. We also found him to be in an extremely nervous state. We failed to find any evidence of rheumatism in his joints. We are of opinion that he is not suffering any after effects of rheumatic fever which is recorded in his overseas service record." On 5th April 1933, the Appeal Tribunal notified the applicant or his representative of the receipt of this report, and that it was available for inspection and for comment thereon. Both he and his representative attended at the tribunal's offices on 6th April, the date when his appeal was being heard. The applicant, according to his affidavit, was informed by the secretary of the Tribunal that he did not think that he (the applicant) would be allowed into the room where it sat, and according to both the applicant and McLaren, the Tribunal, when it sat, refused McLaren's application that the applicant should be admitted. However, the medical report was read, or shown, and a copy was apparently given, to McLaren. He was asked if he had any comment to make. In substance, he objected that the report was not on oath, and desired that the medical men who made the report should be produced for cross-examination. But the Appeal Tribunal did not assent to the objection, and intimated that the medical experts would not be available for cross-examination. McLaren then addressed the Tribunal, and relied upon sec. 45w (2) of the Act. On 7th April the Appeal Tribunal disallowed the appeal, and so notified the applicant.

The affidavits filed in this case, and the file of papers which is before us, establish beyond doubt that on all these proceedings, the various tribunals had before them, and considered with no little care, the history of the applicant's war service, and how far his incapacity resulted from that service. The Repatriation Commission and the Appeal Tribunal gave him a full and fair opportunity of

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presenting his case, and a full and fair hearing. They considered his statements, and the certificates and opinions of medical men on which he relied, and the fact that he had been granted an invalid pension under the *Invalid and Old-Age Pensions Act* of 1908-1928 on account of his rheumatic condition; also they had before them his war records which contained his medical history as a soldier, and the certificates and opinions of other medical men and the reports of various medical examinations; and the Appeal Tribunal had, finally, the certificate and opinion of the two independent medical experts whom it thought fit to consult. On all this material, both the Repatriation Commission and the Appeal Tribunal reached the conclusion that the applicant was not suffering from incapacity resulting from war service.

Turning now to the precise grounds upon which the rule was obtained:—

(1) That the applicant was not allowed to be present at the sittings of the Appeal Tribunal on the 6th April 1933, a sittings of the Tribunal at which his appeal was being heard.

Undoubtedly he had a right to attend personally, or to be represented at his own expense by any person other than a legal practitioner at any sittings at which his appeal was being heard. He chose to be represented throughout the proceedings by McLaren, and was so represented on 6th April 1933. Apparently he desired also to attend in person on 6th April, and hear the proceedings. There was no reason why the Tribunal should not have allowed him to attend. But he did not desire to present his own case; he left that to McLaren, who represented him, and McLaren was fully heard. There is no substance in this point.

(2) That the applicant was denied a fair hearing, contrary to natural justice.

(3) That evidence was used against the applicant, such evidence not being sworn and the witnesses not being produced for cross-examination.

These two grounds disclose a misconception of the position and function of the Appeal Tribunal; it is not a Court of law, but a statutory body set up to carry out certain functions set forth in the Act. It is given power to summon witnesses, to take evidence on

oath and to require the production of documents (sec. 45s). An appellant may attend in person any sittings at which his appeal is being heard, or may be represented at his own expense at the hearing by a person other than a legal practitioner (sec. 45R). But sec. 45w (2) enacts that, subject to the Act, an Appeal Tribunal shall not, in the hearing of appeals, be bound by any rules of evidence, but shall act according to substantial justice and the merits of the case (cf. *Moses* v. *Parker*; *Ex parte Moses* (1)). No doubt, "when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition . . . has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal" (*Local Government Board* v. *Arlidge* (2)). Rules laid down by the Act must be observed because they are imposed by the Act and for no other reason (3). Apart from the character of the duty imposed upon the Appeal Tribunal, the provisions of sec. 45w (2) make it clear that that tribunal was under no obligation to follow wholly or in any special respects the procedure of a Court of law: it was largely master of its own procedure; its duty was lawfully performed if it observed the express provisions of the Act and did not violate any substantial requirement of justice. The applicant was in fact given an adequate opportunity of presenting his case, and there was no failure of justice in that respect. Evidence was received both for and against him that was not on oath; but the Act imposed no obligation upon the Appeal Tribunal to take evidence upon oath, though it was empowered to do so if that course were considered desirable. Again, obtaining the opinion of independent medical experts is not in any way opposed to substantial justice. The Appeal Tribunal can obtain information in any way

(1) (1896) A.C. 245.
(2) (1915) A.C., at p. 132.
(3) (1915) A.C., at p. 150.

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it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent medical opinion, for instance, upon oath, and whether cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence, and is authorized to act according to substantial justice and the merits of the case. Some suggestion was made that the Appeal Tribunal surrendered its functions to the medical experts, but the instructions it gave to them show that the suggestion is unfounded in fact.

(4) That the applicant was not given the benefit of the doubt.

(5) That the applicant, having admittedly made out a prima facie case, was entitled to succeed on his appeal, no evidence in reply thereto being before the Tribunal.

These last two grounds are founded upon sec. 45w (2) of the Act. The section provides that the Appeal Tribunal shall give the appellant the benefit of the doubt: "Provided too that if the appellant or a representative of the appellant shall make out a prima facie case in support of his claim that the incapacity from which he is suffering . . . was caused or aggravated by war service, the onus of proof that such incapacity was not in fact so caused or aggravated shall lie with the Commission." The section deals with two things, the burden of proof and the weight of evidence. The burden of proving a prima facie case is cast upon the appellant, but, if he proves such a case, then the burden of proving that his incapacity was not in fact caused or aggravated by war service is cast upon the Commission. It may do so either by contradicting the appellant's evidence or by proving other facts. Suppose, however, after considering the nature and strength of the proofs offered in support or denial of the main fact to be established, the Appeal Tribunal is left in doubt as to which way it should decide that fact, then the section directs that the appellant shall be given the benefit of the doubt, or, in effect, enacts that in such circumstances the Commission has failed to satisfy the burden of proof cast upon it (*Abrath* v. *North Eastern Railway Co.* (1)). But the section by no means provides that in case of contradictory evidence the appellant shall succeed. In the

(1) (1883) 11 Q.B.D. 440.

present case the Appeal Tribunal considered all the evidence, and was left in no doubt that the incapacity under which the appellant was suffering was not caused or aggravated by his war services.

The result is that the Appeal Tribunal reached its decision in manner required by law, and the order nisi should be discharged, with the usual consequences.

EVATT J. The applicant, a returned soldier, seeks from this Court a prerogative writ of mandamus directing the respondents who are three officers of the Commonwealth, comprising a War Pensions Entitlement Appeal Tribunal under the Act No. 14 of 1929, to hear and determine his appeal for a pension. The Act in question was assented to on March 25th, 1929. It described itself as an Act "relating to the Establishment of Appeal Tribunals to deal with Appeals relating to War Pensions."

Under the principal Act, the *Australian Soldiers' Repatriation Act* 1920-1922, a Repatriation Commission had been set up. One of the functions committed to it was to determine the claims of members of the Australian Forces to pensions in respect of incapacity arising from active service during the war of 1914-1918. This Court, in *Repatriation Commission* v. *Kirkland* (1), determined that, for all practical purposes, the Commission was to be regarded as a mere department of the Commonwealth Executive Government.

The general design of Parliament, in passing the amending Act of 1929, appears very clearly from its terms. It was to give to ex-members of the A.I.F., who were prosecuting pension claims, the right to secure a review of any adverse departmental decision by entirely independent appeal tribunals. Before such tribunals the relative position of the soldier and the Commission was to be assimilated to that of appellant and respondent.

Sec. 45K (1) gives the ex-soldier "an appeal to an appeal tribunal against the determination of the Commission." Where an appeal is determined against the Commission, sec. 45K (9) gives the Commission a right to approach an appeal tribunal upon any further evidence relating to the appeal which in the opinion of the Commission is relevant thereto. Sec. 45R (1) confers upon an appellant a right to

(1) (1923) 32 C.L.R. 1.

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"attend in person at any sittings at which his appeal is being heard," and sec. 45R (2) and (3) affirms that this right of personal attendance is to be in addition to, and not in substitution for, the right which is given to him, and to the Commission also, of being represented at the hearing of the appeal by any person other than a legal practitioner. Sec. 45W (2) provides as follows :—

> "Subject to this Act, an appeal tribunal and an assessment appeal tribunal shall not, in the hearing of appeals, be bound by any rules of evidence but shall act according to substantial justice and the merits of the case and shall give to an appellant the benefit of the doubt : Provided too that if the appellant or a representative of the appellant shall make out a prima facie case in support of his claim that the incapacity from which he is suffering or from which he has died was caused or aggravated by war service, the onus of proof that such incapacity was not in fact so caused or aggravated shall lie with the Commission."

The sole question in this case is whether the Appeal Tribunal, before which the applicant's case came on February 24th, 1933, really gave the appellant a reasonable opportunity of stating his case. This Court is, of course, not empowered either to determine the merits or demerits of the applicant's pension claim or to examine the proceedings so as to expose mere error of fact or of law. But it is not only empowered, it is its duty, to issue a writ of mandamus if there has been a substantial failure to hear the applicant's case and determine it. The general principle of law is not in doubt. It is conveniently stated in the well known case of *Local Government Board* v. *Arlidge* (1) by Viscount *Haldane* who was, I suppose, as careful to prevent any undue encroachment by the King's Courts upon the exclusive field of "administrative" or "executive" tribunals, as other Judges have been zealous to resist the slightest encroachment by such tribunals beyond the field of power and duty assigned to them by statute law. Viscount *Haldane* said :—

> "I agree with the view expressed in an analogous case by my noble and learned friend Lord *Loreburn*. In *Board of Education* v. *Rice* (2) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to

(1) (1915) A.C. 120. (2) (1911) A.C. 179.

those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus " (1).

I now turn to the facts, which are hardly in dispute. On February 24th, 1933, the applicant was represented upon his appeal to the respondents by Mr. T. W. McLaren. He called two medical witnesses The first was Dr. H. J. W. Brennand, Commonwealth Medical Referee for Invalid Pensions. He was duly sworn, and stated that not only was the applicant suffering from chronic rheumatism, but he was actually receiving an invalid pension on account of that very condition. Asked whether the condition was referable to the rheumatic fever which the applicant had contracted at Gallipoli in 1915, Dr. Brennand said " Yes, definitely, it is related to the old trouble." The chairman, Colonel Ralston, asked Dr. Brennand if he had seen the appellant's war history, and the reply was " No." The chairman then turned to Dr. Kenneth Smith who was present on behalf of the Repatriation Commission and inquired if he desired to ask Dr. Brennand any question. Dr. Smith replied " No."

Dr. Brennand's evidence was corroborated by Dr. J. E. Sherwood in the essential respects, namely, (1) a present condition of chronic rheumatism, and (2) a definite medical relation between that condition and the contraction of rheumatic fever at Gallipoli. Again, the Repatriation Commission's representative, though invited by the chairman to cross-examine the witness, asked no questions. In these circumstances, it is obvious that the applicant had made a " prima facie case " within the meaning of the proviso to sec. 45w (2). For some reason which is very difficult to understand, still less accept, the Tribunal seems to have entertained a contrary opinion. It is of importance to note the action it took after allowing the " appeal " to conclude without the slightest suggestion by anyone that the sworn medical testimony was incorrect.

The chairman of the Tribunal has made an affidavit in reference to the procedure adopted after the adjournment of the Tribunal on February 24th, 1933. In it, he says :—

" The Tribunal decided to request that the applicant be examined by Dr. Blackburn and Dr. Holmes a'Court to determine (1) whether he had any rheumatism ; (2) whether he was suffering any after effects of rheumatic fever

(1) (1915) A.C., at pp. 132, 133.

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which was recorded on his overseas papers and that prior to such examination a further x-ray examination be made and the results of same forwarded to Dr. Blackburn and Dr. Holmes a'Court for their information. The Tribunal received the report from Dr. Blackburn and Dr. Holmes a'Court, and subsequently, as was its custom, notified the applicant's advocate that he could see such report and make such comments thereon as he wished. . . . My recollection is that when the certificate from Dr. Blackburn and Dr. Holmes a'Court was shown to the advocate for the applicant he said that the certificate was ridiculous. At the hearing the applicant called Dr. Brennand, Commonwealth Medical Referee for Invalid Pensions in Sydney, and Dr. Sherwood but as there was a mass of evidence before the Tribunal which appeared to contradict the evidence of these two doctors the Tribunal had the examination made by two independent experts who were not called by the Repatriation Commission or by the applicant. The opinion of these experts was obtained notwithstanding the fact that the Tribunal did not consider that the applicant had made out a prima facie case in support of his claim. An additional reason that the Tribunal considered it desirable in this case to get an outside opinion was that there was a conflict between the Repatriation Commission and the Old-Age and Invalid Pensions authorities."

The affidavit of Mr. McLaren states :—

"On the 6th day of April 1933 I attended before the Tribunal at a further hearing of the appeal. Immediately the proceedings opened I requested the chairman to allow the appellant to be present but this request was not acceded to. The chairman then read a joint certificate from Dr. Blackburn and Dr. Holmes a'Court to the effect that the appellant was not suffering from rheumatism and his complaint was not attributable to war service. . . . I was then asked by the chairman if I had any further evidence to tender and I replied by asking 'Are the doctors who gave this certificate here to give evidence on oath and offer themselves for cross-examination ?' and the reply was 'No.' I asked 'Is the Commission prepared to offer them, in view of the fact that we submitted Dr. Brennand's evidence on oath—the chairman here interrupted and said 'But you would not compare Dr. Brennand with Dr. Blackburn would you ?' and I said 'Why not ? Dr. Brennand is a qualified medical practitioner,' and the chairman said nothing further to my reply. I then addressed the Tribunal and urged that in face of the sworn testimony of Dr. Brennand, a responsible Commonwealth officer, the testimony of Dr. Sherwood who had been treating the appellant over a long period, and the other evidence put forward on his behalf that the Tribunal should not attempt to dispose of the case and apparently make an adverse decision on the case now put forward by the Commission. I pointed out that sec. 45w, sub-section 2, specifically stated that if the appellant had made out a prima facie case that the onus of proof had not been discharged and could not be discharged except by positive evidence given on oath. I concluded by saying that if the decision of the Tribunal was adverse, in view of the fact that I had reminded them of these provisions, I felt that it was a refusal to accord to the appellant natural justice. I asked the chairman if he intended to give the decision immediately and was

informed that the Tribunal would deliberate and communicate its decision to the appellant. This concluded the proceedings."

From the Repatriation Commission file, which was tendered, it appears that on March 10th the Commission wrote to Dr. Blackburn as follows :—

"Re Bott, Alfred George. Ex 1675 Pte. 7th Bn.—I desire to confirm my telephonic communication of yesterday, whereby an appointment was made for the medical examination of the above named ex-soldier by yourself and Dr. Holmes a'Court at your rooms at 2 p.m. on Tuesday 28th March, 1933. This ex-soldier has lodged an appeal to the War Pensions Entitlement Appeal Tribunal that his complaint of chronic rheumatism is due to his war service. The Repatriation Commission found no evidence of rheumatism and has rejected his disabilities of debility and bad teeth neurosis as not attributable to his war service. Before deciding the appeal in this case, the Tribunal desires that the appellant be examined by yourself and Dr. Holmes a'Court in consultation, and, after perusal of the enclosed medical evidence, express an opinion as to whether he is suffering any after-effects of rheumatic fever which is recorded in his oversea service record. I, therefore, forward herewith a full summary of the medical evidence relative to this case, which I should be pleased if you would return to this office with your report as early as possible after the examination has been conducted. The x-ray films taken on 12/12/1930 and 2/3/1933 will be delivered to you prior to the date of appointment. Form 12 is also enclosed to enable you to claim your fee £3 3s. Yours faithfully, J. E. Barrett, Deputy Commissioner."

From the above facts I conclude :—(1) That the decision of the Tribunal was affected, adversely to the appellant, by the report of the two doctors. (2) That owing to their non-attendance before the Tribunal it is impossible to tell whether or to what extent the opinion of these two doctors was affected by the "full summary" of other medical opinions relating to many irrelevant matters and given at different times during a period of many years. (3) That this "full summary" was prepared, not by the Appeal Tribunal, but by the litigant before it, the Repatriation Commission itself, which of course was committed to an opinion adverse to the applicant and which should not have been the channel of communication between the independent tribunal and the two doctors. (4) That, in the circumstances already set out, it was quite impossible for the applicant's representative to present his case without being afforded a reasonable opportunity, either by questioning or by other means, of discovering upon what assumed basis of fact or opinion the report really proceeded.

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Whilst it is impossible to lay down any absolute rule for the guidance of such a tribunal as Parliament thought fit in the 1929 Act to call into being, the dominating note of the Act is struck in the three provisions :—

(1) That it shall act " according to substantial justice."

(2) That it shall " give to an appellant the benefit of the doubt."

(3) That if the appellant " makes out a prima facie case," then " the onus of proof . . . shall lie with the Commission."

The second and third provisions are obviously of the greatest importance, but they need not be discussed upon this application because, in my opinion, the Tribunal did not act " according to substantial justice." This is the overriding statutory command, and it is almost a paraphrase of the general principle enunciated by Viscount *Haldane* in *Arlidge's Case* (1). Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, " bound by any rules of evidence." Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer " substantial justice." The position of an appellant has been specially protected by the Legislature, and he should not be placed in a position where he is effectually prevented from conducting his appeal.

In the present case, I am satisfied that the method of procedure adopted did not accord to the appellant a fair opportunity of meeting the case made, I refrain from saying the " evidence called," against him. The hearing was not " according to substantial justice." It is clear that, through excess of zeal on the part of the Commission, a course of procedure was adopted which was well calculated to produce a miscarriage of justice. I do not suggest, for I have not even considered the question, that the appellant either should have

(1) (1915) A.C., at pp. 132-134.

won his appeal, or would have won it, even after the fullest chance of breaking down, by cross-examination, the hostile certificate. But it is abundantly clear that the Tribunal (1) did not hear and determine the appeal for itself, (2) delegated its responsibility to an unauthorized joint medical tribunal, and (3) by denying the request for cross-examination, prevented the appellant (*a*) from ascertaining the basis of the joint opinion, and (*b*) from attempting to destroy its validity.

Upon this first and fundamental ground, the order nisi for a mandamus to hear should be made absolute.

Order nisi discharged with costs.

Solicitors for the applicant, *J. A. Meagher & de Coek.*

Solicitor for the respondents, *W. H. Sharwood,* Commonwealth Crown Solicitor.

J. B.