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VOIDNESS AND VOIDABILITY IN ADMINISTRATIVE LAW

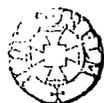
by

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ABSTRACT OF THESIS

It is proposed to investigate whether the distinction between a void and a voidable act, is a necessary incident of the law governing judicial review of administrative decisions, whether the consequences of the distinction are utilised by the Courts, and whether the distinction has a useful role to play in Administrative Law.

The theoretical and historical basis of the distinction is first examined with the conclusion that void and voidable decisions are a necessary result of a system of review based upon the ultra vires doctrine.

The notion of jurisdiction is examined to ascertain whether there is any general formula with which to distinguish between decisions producing nullity and those resulting in a voidable decision. It is concluded that such a formula is undesirable in principle and can not in the light of existing authority be produced.

The various reviewable defects are then analysed to determine whether the Courts regard them as void or voidable. There is considerable inconsistency in the cases, but it is reasonably clear that some procedural defects, breach of natural justice, and serious abuse of discretion are jurisdictional and produce nullity. As a result of this an investigation of the various consequences of the distinction in connection with remedies, locus standi, estoppel, and privative clauses leads to the conclusion that the Courts do not consistently apply the logical consequences of nullity, and indeed that to do so would produce inconvenience. However, in the field of actions in tort and privative clauses the distinction is consistently relied upon.

Finally voidable decisions are examined to determine whether a doctrine of retroactivity operates with the conclusion that it does not.

2.

In conclusion the technical difficulties arising from the existing system of review based upon the notion of jurisdiction are criticised, and a broader basis for judicial review is proposed which would involve the ultra vires doctrine and therefore the void voidable distinction having only a subordinate role.

PART I. INTRODUCTION

Chapter 1. General Introduction

A considerable number of cases in the field of judicial review of administrative decisions have utilised or discussed the distinction between a void and voidable decision. The distinction has been assumed to be analogous to that in contract (1) and thus has fundamental consequences. In contract a void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy (2). Thus no rights, either inter partes, or third party can in principle arise under such a contract and it can give rise to no collateral consequences. Thus, at common law, the children of a void marriage are illegitimate, although the rigours of this rule have been partially modified by statute (3). A voidable contract, however, has all the characteristics of a valid contract except that its operation is conditional upon the election of one of the parties to set it aside, but "until it is rescinded it is valid and binding" (4). However in certain circumstances, the act of quashing may have retrospective effect. This is generally the case where a marriage is held to be voidable and set aside, (5) although a considerable number of exceptions to this have been established (6).

Thus the crucial difference between the two types of act is the necessity, where the act is voidable, of a positive action which destroys its efficacy. Upon this other consequences depend.

A void decision, or act, is of course a linguistic contradiction, there being nothing in existence which the law can recognise as having legal effect. Thus the absence of what can be regarded as defining characteristics, genuine agreement, essential formalities, consideration, produce a void contract, whereas other defects, error, fraud, misrepresentation make the agreement voidable.

In the case of administrative decisions the same basic concept has been used. Thus in *D.P.P. v. Head* [1958] 1 ALLER 692 Lord Denning said, of a detention order made by the Home Secretary, "If the original order was void it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. All consequences which flow from it would similarly be void, including dealings with property." (7)

However in *Durayapah v. Fernando* [1967] 2 ALLER 152 the Judicial



Committee of the Privy Council while recognising the possibility of a decision being 'a complete nullity' regarded the use of the term 'void' as appropriate to contract only and not to the field of administrative law. In as far as both terms refer to an act which prima Facie has no legal effect, they will for the present purpose be treated as synonymous without however the implication that the void, voidability distinction in Administrative Law is necessarily connected with that in contract.

Recent cases have applied the consequences of the distinction, in a number of contexts, which are not only of practical importance but also of theoretical interest, as illustrations of the way logical or linguistic concepts are manipulated by the Courts to achieve policy purposes, and in particular the extent to which the Courts are prepared to violate the logic of a rule or concept in order to achieve a just result.

The principle consequences of the distinction recognised in these decisions appear to be:-

A Privative clause preventing void decisions from challenge in the Courts is ineffective. *Anisminic v Foreign Compensation Commission*.
(above)

The Declaration will not issue against a voidable decision

Punton v Minister of Pensions and National Insurance (No.2) [1964] 1 ALLER 448

A third party cannot challenge a voidable decision.

Durayapah v Fernando (above)

An order of mandamus cannot lie to a voidable decision unless it is first quashed by certiorari

R v Paddington Valuation Officer [1966] 1QB 380

A void decision cannot be waived. *Ridge v Baldwin* [1964] A.C.40.

It may be inappropriate to appeal against a void decision

Chapman v Earl [1968] 2 ALLER 1214

A voidable decision cannot be challenged collaterally

D.P.P. v Head (above)

Thus the distinction has ramifications throughout the subject, and because it appears material to the availability of remedies, is of some value as a basis for selecting an appropriate remedy in a given situation, a particularly untidy area of law.

In these cases the consequences of the distinction have been applied. However express judicial pronouncements have been cautious and true to the pragmatic traditions of the common law have avoided general analysis.

Lord Wilberforce, in *Anisminic*, (above) said (at 208) "There are dangers in the use of the word (nullity) if it draws with it the difficult distinction between what is void, and what is voidable, and I certainly do not wish to be taken to recognise that this distinction exists, or to analyse it if it does."

Similarly in *Ridge v Baldwin*, Lord Evershed (quoting Pollock on Contract 13th Ed. 48) thought that the distinction was 'imprecise and apt to mislead' and in *D.P.P. v Head*, Lord Somerville of Harrow said (1959 A.C. at 104.) "The distinction between void and voidable is by no means a clear one. I am not satisfied that the question whether a man should go or not go to prison should depend upon that distinction."

This hesitation is partly explicable by the prevalent formulary approach to judicial review, where attention centres upon the rules governing the availability of a particular remedy. Thus the rules about remedies are treated as dominant, obscuring those governing the effect of the decision. Thus in *R v University of Aston ex p. Roffey* [1969] 2 ALLER 964 the Court refused, in its discretion to issue certiorari against a decision of the Board of Examiners which was held to be in breach of natural justice, even though this defect was held, in *Ridge v Baldwin* to result in nullity. Had the students been able to challenge the decision of expulsion by means of an action in tort, or contract they might have succeeded (8).

More fundamentally there are substantial difficulties in applying a strict distinction between voidness and voidability and in the context of administrative decisions.

Professor Wade points out (9), that since any decision however defective has, unless challenged in legal proceedings, a de facto effectiveness, a strict distinction between voidness and voidability is not apt. All decisions are in this sense voidable, and to describe a decision as void merely signifies that the quashing of it has retrospective effect. (10). In addition, since further rules as to such matters as locus standi might justify the Courts refusal to intervene, even a 'void' decision may for practical purposes remain valid. "Voidness is, like most legal concepts relative rather than absolute."

This of course can be said equally of void contracts, or marriages, but with the important distinction that in the case of administrative decisions the element of official enforcement is predominant. Executive machinery will give effect to a decision unless legal proceedings are commenced against it, and the rules governing procedures for such attack are sufficiently restrictive to prevent exposure of even a complete nullity by any member of the public. Thus if A is dismissed from public office, in unauthorised circumstances, unless he asserts his right, his successors claim, backed by executive machinery, will be de facto effective, and it would be unlikely that a third party with no locus standi could obtain an order declaring this appointment void. Various rules, concerning waiver locus standi, limitation, the discretion of the Court to refuse a prerogative or equitable remedy, militate, at least in practice, against voidness as an absolute conception.

From a juristic point of view, Wade, following Kelsen, finds a logical fallacy in the concept of nullity, arguing that, since in every case a decision of the court must be sought before the defect can be exposed, the courts decision is a genuine constitutive act, which establishes that "the decision fulfils the conditions of nullity determined by the legal order". Kelsen similarly argues, that since the "decision" is the referent of the collection of rules concerning its validity, and effect, it therefore exists, since everything referred to by the legal system exists within the context of that system.

It is submitted that this approach is a distortion. To describe something as a void act is merely a linguistic convenience. What is really meant is that no act exists at all. The position is not that as formulated by Wade, i.e. that certain defects produce a decision with the characteristics of nullity, but can equally well be that the absence of essential requirements means that nothing has yet come into existence to which the law will give effect. Hence the absence of defining characteristics is what makes a contract void. It will be examined whether this is so in the case of administrative decisions. Thus D.M. Gordon says "Voidness represents a state of nothingness from which nothing can issue, and which consequently can never acquire any different status." (12).

To treat a void decision as existing merely because the language of a rule refers to it, is a misuse of language of the same nature as that involved where it is maintained that a square circle exists because it is possible to formulate such a concept. This distortion arises out of a misconception as to the function of language. Words do not necessarily correspond with entities, real or imagined, but depend for their meaning upon their use. Thus the only criterion for determining whether something is void is to examine whether the rules of law give to it any degree of effectiveness.

Wade's analysis can be applied to every situation since all legal relationships require judicial recognition in order to be effective in law. If the assistance of a Court is not sought, or for a procedural reason withheld, it is equally meaningless to describe an act as valid, void or voidable. It is something with which the law is not concerned, although in the absence of a judicial decision to the contrary, the de facto position will be relied upon for the purpose of other legal relationships. This applies to marriages and title to property as much as to administrative decisions. The meaning of any legal concept can only be elucidated in the light of the rules of law concerning it (14) and thus the distinction between void and voidable has significance only in the context of any distinction drawn by the Courts between the two kinds of act, as to their consequences.

In both contract and marriage, other rules, competing with those arising from nullity, prevent the existence of an absolute concept of nullity, and lead to the treatment of the distinction as a relative matter, involving questions of degree.

Thus under the Infants Relief Act 1874 title passes to an infant buyer under an "absolutely void" contract, and in addition a contract, void against the infant is binding upon the adult party. (15).

And in the context of marriage E. S. Cohn writes (16), "The difference between an act which is void, and an act which is valid, is unlike the difference between yes and no, between effect and no effect. It is a difference of grade and quantity. Some effects are produced while others are not".

This approach has also been taken in the field of Administrative Law. Akehurst (17) like Wade, treats nullity as a relative concept, and Bradley (18) regards the distinction as misleading because it under-

estimates the competing rules of procedure and remedy which govern the actual approach of the Courts.

"To discuss the effects of a departure from natural justice, merely in terms of whether the decision is void or voidable does not sufficiently reveal the variety of the degrees of validity with which an administrative act may be clothed, nor the wide choice of solutions open to a court".

Garner too regards the issue as turning essentially upon the rules about remedies (19).

Thus the extent to which other rules militate against a distinction between void and voidable, will form an important part of this study. However two points can be made at once. Firstly despite the existence of competing rules, it is necessary, both conceptually and for practical purposes, to decide whether a decision is a nullity, since rules about the effect of the decision and those about procedure and availability of remedies, are analytically distinct. Channel J in *R v Williams* 1914 LKB.608 had this in mind when he said "A party may preclude himself from claiming the writ" (of certiorari) 'whether the proceedings which he seeks to quash are void or voidable. If they are void, it is true that no conduct of his will validate them, but such considerations do not affect the principles upon which the Courts act in granting or refusing the writ of certiorari".

Thus it may be open to the court to apply other consequences of nullity despite a rule preventing this in one particular context. This is shown by *Webb v Minister of Housing and Local Government* [1965] 2 ALLER. Coast Protection Legislation authorised Local Authorities to produce schemes for coast protection works. If compulsory purchase powers were necessary to implement such schemes, compulsory purchase orders could be made. A scheme and the resulting compulsory purchase order required confirmation by the Minister and both were protected by a provision allowing review upon specified grounds within a six weeks time limit, after which the acts were not at any time to 'be questioned in any legal proceedings whatsoever'. Such a clause had been held in *Smith v East Elloe R.D.C.* [1956] A.C.736 to prevent all challenge to a decision after the lapse of six weeks (20). The applicant sought to set aside a compulsory purchase order scheme made under the Act^{WHICH} was defective for improper purposes and procedural irregularities. However as he had not challenged the scheme within

six weeks, it was argued that it became unimpeachable, and thus, the subsequent compulsory purchase order unless vitiated by defects of its own, became unchallengeable even within six weeks, since the privative clause had made the scheme a valid one sufficient to support the compulsory purchase order. The Court of Appeal rejected this approach. It was held that the original scheme was a nullity and thus had no existence. The existence of a scheme was a condition precedent to a compulsory purchase order, and that too was therefore void. "The Ministers Order cannot breathe life into what has no valid existence" (per Danckwerts L.J. at 776). This was so, even though it was accepted that the words of the privative clause prevented direct challenge to the scheme after the expiry of time, and the same presumably would have applied had the Order been challenged out of time. Thus the clause was treated as a procedural bar which did not prevent the application of the normal indirect consequences of nullity including collateral impeachment. "Shall not be questioned" was, it is submitted, construed as referring only to direct challenge. Other interpretations of this case have been put forward (21), but it is difficult to explain the decision without reliance upon the concept of nullity.

Secondly it is submitted that different considerations govern voidness, and voidability in Public Law situations than in the field of contract, where the purpose of the law is primarily the regulation of individual relationships. Here there is no objection either logical or upon policy grounds to an act being void in a relative sense, against certain persons or in certain situations. However in the case of decisions based upon statutory power, the nullity of a decision has generally signified that it is one made without jurisdiction. Thus if a decision is void only in a relative sense, the legal position of individuals may be affected by officials acting beyond their statutory powers. The 'Rule of Law' to be anything more than a cant phrase must at least require that acts without legislative authority shall have no effect and give rise to no consequences.

Thus it will be regarded as acceptable in principle to postulate an absolute concept of nullity, although this may be modified by competing procedural rules imposed in the public interest.

Three broad issues will be examined.

Firstly the Historical basis development of the void voidable, distinction.

Secondly the modern law as to which defects result in a void, and which a voidable decision.

Finally the effects of distinction will be examined to determine whether the Courts consistently follow through the logic underlying the distinction, and if not, what other factors militate against this.

Some circularity is inevitable since the Courts frequently fail to express whether they regard a decision as void or voidable, and therefore this can only be inferred from the consequences of the defect which the court applies in a particular case. The Courts tend to use the term 'void' as loosely synonymous with 'defective' and thus the importance of the distinction tends to be overlooked (22). Certain necessary consequences of nullity will be employed as pointers to the attitude of the Courts when examining the second issue. Later attention will focus upon the extent to which these are in fact applied.

The field of investigation will comprise all decisions of statutory bodies, loosely described as administrative. However, despite the close connection between this area of law and that governing review of 'inferior courts stricto sensu, decisions concerning ordinary courts of law (23) will be used only by way of analogy. The distinction drawn by Fry L.J. in *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1QB at 446-7, between Courts and other judicial bodies, based upon formality of procedure will be employed, despite the lack of precise criteria for separating courts from other decision making organs. Lord Esher's description of a 'court' as a body of persons that have the power of imposing an obligation upon individuals' (24) will be regarded as too wide.

Where possible, decisions affecting the use and ownership of land will be employed. Not only is this an important area of administrative decision making power, but also involves situations that well illustrate the problems inherent in the distinction between voidness and voidability, particularly third party rights, and questions of title.

NOTES

- (1) See Lord Morris in *Ridge v. Baldwin* 1963 2 ALLER 66 at 110
- (2) Salmond, *Jurisprudence*, 12th Ed. 341 *Ingram v. Little* [1961] 1QB31
- (3) See *Legitimacy Act* 1959 S2
- (4) Anson *Law of Contract* 23rd Ed. 8.
- (5) *Newbold v. Athben* 1931 P.75.
- (6) See cases discussed by Bromley, *Family Law* 3rd Ed. at 66.
- (7) See also Lord Pearce in *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 146 at 196 and *Ridge v. Baldwin* [1963] 2 ALLER 66 at 116, 119.
- (8) As in *Innes v. Wylie* [1844] 1 Cov. & K. 262
- (9) 83 LQR 501.
- (10) cf Kelsen. *General Theory of Law and State* (1961) and Lord Morris in *Ridge v. Baldwin* [1963] 2 ALLER at 110.
- (11) cf *Durayapah v. Fernando* (above).
- (12) 1926 42 LQR. 532.
- (13) See Hart. *Definition and Theory in Jurisprudence* 70 LQR 37.
- (14) Hart *Definition and Theory in Jurisprudence* 70 LQR 37.
- (15) Cheshire and Fifoot. *Law of Contract* (7th Ed.) 313.
Stocks v. Wilson [1913] 2KB 235.
- (16) 64 LQR 321
- (17) 31 MLF 2,138
- (18) 1964 CL.J 83
- (19) *Administrative Law* 3rd Ed. 124.
- (20) This case has been criticised and may no longer be law.
See *Anisminic v. Foreign Compensation Commission* (above).
- (21) See Bennett Miller 1966 P.L 330
- (22) See AKEHURST 30 MLR 2.
- (23) See S10(1) *Tribunals and Inquiries Act* 1958.
- (24) *R v. Local Government Board* (1882) 10 QBD 39.

CHAPTER 2 HISTORICAL SUMMARY

The historical development of the distinction between voidness and voidability can be traced by distinguishing the three periods, pre-seventeenth century; seventeenth and eighteenth centuries; nineteenth century. It is proposed that the modern period be considered to commence with *Local Government Board v. Arlidge* [1915] AC 120 where the House of Lords recognised, probably for the first time, that administrative convenience could sometimes prevail over both private rights and Common Law standards.

Before the seventeenth century no clear distinction had been drawn between voidness and voidability. Holdsworth (H.E.L. 7th Ed. Vol. I 213) shows that in medieval times a challenge to a decision was not distinguishable from a personal or quasi criminal action against the judge. Maitland states that "the idea of a complaint against a judgement which is not an accusation against the judge is not easily formed (P & M ii 665). By the fourteenth century, however, the King's Bench was reviewing the decisions of inferior courts, by means of the writ of error, the precursor of certiorari (1). Consequently the notion of a voidable decision can be regarded as prior, both logically and historically, to a void decision. It was realised at this time that original proceedings had to be determined before new could be taken.

"One shall not have a writ of error before the original writ between the parties be determined, and they be without day". (2) Further, the face of the record rule was essential to writ of error proceedings. "A complainant could only succeed if he could point out an error in the record (3)". Writ of error, therefore, lay only to courts of record, and of these only to courts which followed the common law. This limitation had an important effect on the development of certiorari in the seventeenth century. Courts of record, however, exercised many powers which would not be entrusted to administrative agencies, the Sewers Commissioners in particular exercising a characteristic mixture of judicial administrative and legislative power and playing an important part in the development of judicial review (4).

The notion that a decision can be null and void was recognised as early as the fifteenth century. In *Bowser v. Collins* (1482) Y.B. 22 Ed. IV 30 pl. 11 it was recognised that no decision made by a

Court outside its jurisdiction could be res judicata because it was a nullity ab initio. Pigott pointed out that a writ of error would be inappropriate because the judgement could be challenged collaterally without being formally quashed. "If their patent does not give them power and authority it is non judice. A man shall have a traverse to a matter of record and also to a matter of fact in order to avoid such a record when the court has no jurisdiction".

Two points are important here. Firstly, the emergence of a distinction between void and voidable was linked with the distinction between direct and collateral attack. The inconsistencies to be found in later years can be partially traced to the need to show lack of jurisdiction in order to ground an action in tort. Secondly nullity was equated with lack of jurisdiction, and with the result that different considerations governed challenge where the defect was not regarded as affecting jurisdiction. Thus for defects within jurisdiction writ of error, and, (although some doubt exists on this point (5)) certiorari, was the appropriate remedy (6). Rubinstein (7) shows that as writ of error lay only to bodies giving judgements according to the common law it is likely that certiorari, being in effect similar to writ of error was developed to cover situations where neither collateral attack nor error were appropriate. However whatever the position was as to remedies for non-jurisdictional defects it is clear that the record could only be challenged where lack of jurisdiction was alleged (8).

From the beginning of the seventeenth century an increase in legislation in response to the social and economic changes of the sixteenth century meant a corresponding increase in the number of and powers of bodies charged with decision making powers. The Elizabethan Poor Laws had given extensive powers to the Overseers of the Poor and Justices of the Peace. Increased interest in flood control meant that increased powers were given to the Sewer Commissioners to enforce private duties, and to undertake new works. As well as this, a multitude of Courts, local and institutional such as that of the College of Physicians made the traditional remedy of an action for damages against officians unsatisfactory as a hindrance to efficient government. In 1616 the Privy Council, Bacon being Attorney General, acting under prerogative powers forbade judicial interference with the Sewer Commissioners with reference to actions for trespass and false

imprisonment. However, in 1688 the prerogative conciliar courts, which had exercised a jurisdiction corresponding to a droit administratif (9) were abolished, and review of the executive was left, as it is now, to the ordinary Courts. As a result of this two developments increased the significance of the distinction between void and voidable decisions.

Firstly a rule governing actions in tort was established, preserving a compromise between freedom of executive action and individual rights (10). The *Marshalsea Case* (1612) 10 Co Rep 686 forms a convenient landmark. An action for false imprisonment was brought against officers of the Marshalsea Court who justified themselves by an order of that Court on the basis of a judgement in *assumpsit*. Council argued (at 706) that "admitting the court has no jurisdiction, yet the proceeding in it (being a court of record), is not void, but voidable by unit of error". Coke however stated in unequivocal terms that lack of jurisdiction makes a decision a nullity and permits an action in tort, and also that no action lies "when a court has jurisdiction and proceeds *inverso ordine*" (at 76a). Thus nullity was linked with lack of jurisdiction, and the consequences of nullity in permitting collateral attack made clear. Earlier decisions had sometimes proceeded upon the bases of the inviolability of the record. In *Rookes case* 1598 it was held that even where jurisdiction was questioned the record could not be contradicted, but that Courts not of record could be subject to full review of legality (11). This of course militates against a distinction based upon jurisdiction and nullity, and is inconsistent with decisions such as *Bowser v. Collins* (above).

However the principle in the *Marshalsea case* was extended to Courts not of record, and later to all inferior tribunals. Thus in the *Exeter College Case*, *Phillips v. Bury* (1692) Holt KB 715 Holt made it clear that if a person has judicial power, his judgement, (of expulsion)" must have some effect to make a vacancy be it never so wrong (at 725).

The *Marshalsea* principle has two aspects. In one sense it protects officials since their decision, if within jurisdiction cannot be collaterally challenged, but in another, it protects individuals, since if it is alleged that jurisdiction is lacking, the record affords no protection since it can be contradicted (13).

Indeed every point of jurisdiction was required to be set out on the record.

The second development was the emergence of the prerogative writ certiorari to quash invalid decisions. Precisely how and when certiorari became a general remedy in respect of administrative action is uncertain. Henderson would regard 1535 - 1680 as the relevant period (14) and Rubinstein traces the evolution of the writ from its origin as a means of obtaining information from inferior tribunals as a result of the removal of their records to the Council and the Kings Bench, to its modern function of quashing the decision even where no formal record exists, as a development during the seventeenth century although, even during the fifteenth and sixteenth century certiorari being closely connected with the writ of error had been used as a means of review (15).

However in *Groenvelt v. Burwell* 1700 1 Ld Raym 454 it was held that certiorari lies to "any court erected by statute" and will quash the proceedings of inferior bodies that have exceeded their jurisdiction. It can also be inferred from this case that certiorari like writ of error, could quash decisions for defects not affecting jurisdiction, although these must appear on the record.

Holt in dealing with a complaint against the College of Physicians, held that, although writ of error would not lie since the jurisdiction was not a common law one, the party "hath as good a remedy as a writ of error" in certiorari (at 469).

After this it was clearly established that certiorari lay for jurisdictional defects (16) although here the implications of nullity were not, it appears, fully recognised, since as late as 1735 in *R v. Dulton* (Cas. t Hard 159,) it was held that the record could not be contradicted to prove a jurisdictional defect. However this limitation was soon foresaken (17).

The probable reason for the emergence of certiorari in the Seventeenth Century was partly the need to find a new remedy after the abolition of the conciliar courts, and the increase in administrative powers during the sixteenth and seventeenth centuries, and partly the need to provide for situations which were covered, neither by the Marshalsea rule, which prevented collateral review of voidable decisions, nor by the writ of errors, which was limited to common law courts of record. Thus certiorari was the only available

remedy in respect of voidable decisions of statutory bodies which were not constituted as Courts of Record. Nevertheless certiorari also was used to set aside decisions outside jurisdiction and it was in these terms that the remedy developed during the eighteenth century. This dual function of certiorari, emphasised in *Groenvelt v. Burnwell* (18) contributes towards the confusion between the notions of void and voidable in administrative law, since in certiorari cases it was seldom necessary to distinguish between jurisdictional and other defects, and consequently little attempt was made to formulate a consistent theory determining which defects went to jurisdiction. It was only in 1951 in *ex parte Shaw* (1952) 1 KB 336 that the dual role of certiorari was formally recognised as applicable to administrative tribunals (19).

However in the context of tort actions there were several authorities dealing with this question and the origins of a consistent formula for determining which defects went to jurisdiction can be detected. Thus in the *Marsnalsea* case, jurisdiction was treated as a matter of the right person determining the right subject matter, and in *Terry v. Huntingdon* 1668 *Hardres* 480 an action in Trover against the Excise Commissioners concerning an alleged mistake of fact, it was held that jurisdictional limits involved place, person and subject matter, and that any mistake as to these results in nullity. However in *Gahan v. Maungay* (1793) 1 *Ridge L & S* 20, although the void and voidable distinction was insisted upon, jurisdiction was simply equated with "authority to decide".

Already the language used to imprecise enough to allow considerable uncertainty as to what amounts to a jurisdictional defect. In the *Marshalsea* case, "subject matter" referred to cause of action, while in *Baggs Case* 11 Co Pep 936, Coks included compliance with natural justice, and "sufficient cause", as necessary to the jurisdiction of a Corporation to disenfranchise a citizen (28). In *Papillon v. Buckner* *Hardress* 478 the notion of the Jurisdictional fact was applied. It was held that, although a wrong decision that a man was a bankrupt may make "all void" an erroneous finding by the Commissioners of Excise that certain liquors were "strong waters", did not allow an action in conversion.

Generally therefore, before the nineteenth century the distinction between void and voidable has been maintained in the context of

collateral proceedings. Holdsworth says that "from the days of the year books until the present day this distinction between an abuse of jurisdiction and an absence of jurisdiction has been maintained" (21).

This was not the position in certiorari cases. Partly because of the twofold scope of certiorari mentioned above, and partly; because of the need to overcome privative clauses, which after about 1670 appeared in various statutes in order to restrict judicial review by certiorari (22), the Courts extended the concept of jurisdiction to include any error of law, in the light of the rule established in *R v. Moreley* (1760) 2 Burr 104D that a privative clause did not protect jurisdictional defects. A further factor from the second half of the eighteenth century was that, if jurisdiction was questioned, the record was not conclusive. Thus Henderson (23) shows that "the Courts appear to have equated jurisdiction with legality, and reviewed any objection based upon the language of the statute by certiorari, whether or not it appears on the face of the record". And Rubinstein, referring to the evasion of privative clauses says "This simple expedient was too tempting for the judges who zealously guarded their supervisory jurisdiction over inferior tribunals, and who never considered conceptual clarity to be of primary importance " (24).

By the nineteenth century the distinction between void and voidable had been established in principle, but its application was obscured by the extension of the concept of want of jurisdiction in certiorari cases, to cover, potentially all reviewable defects.

During the nineteenth century three developments further obscured the distinction.

Firstly the Summary Jurisdiction Act 1848 greatly diminished the opportunity for review of decisions of magistrates courts for defects within jurisdiction, since it dispensed with the need to give full reasons for a decision providing only for a short formal record of conviction. The scope for review of error of law by certiorari was limited to defects appearing in the record, but "the face of the record spoke no longer, it was the inscrutable face of a sphinx"(25). The formula contained in this act was applied to other statutory bodies, and resulted in a position where certiorari

became associated only with jurisdiction defects, and as Lord Denning pointed out in *Ex. P Shaw* [1952] 1 KB at 348 its scope seemed to be forgotten in respect of error within jurisdiction (26).

Secondly the Writ of Error was abolished by successive stages during the nineteenth century, and as a result defects which had served as justification for the issue of this remedy, in particular Error in Fact, were no longer utilised by the Courts, although Gordon argues that certiorari originally lay for Error in Fact, and that this non-jurisdictional ground for review should therefore remain part of the law. This view will be examined below (27).

The result of these two factors was that lack of jurisdiction became in practice the only ground for review. Naturally enough the Courts broadened still further the class of jurisdictional defects in order to preserve the power of review.

This results in the concept of jurisdiction losing its original significance, that is as a factor limiting judicial review, and became, in the words of Frankfurter J. 'a verbal coat of two many colours'. (28)

More particularly, the link between jurisdiction and nullity was weakened, since the categories of jurisdictional defects now included defects which earlier decisions had treated as voidable only. This applied particularly to the rules of natural justice (29), and resulted in the modern view that some defects although amounting to *ultra vires* are voidable only (30).

The third development, perhaps by way of reaction against this extension of the concept of jurisdiction, was the establishment, in a limited number of cases, of an *a priori* theory of jurisdiction based upon the narrow notion of capacity to enter the inquiry (31). This approach, similar to but narrower than the approach taken in earlier cases involving collateral attack treats the question of jurisdiction as determinable at the commencement of the inquiry and thus regards any defect arising at some later stage as not jurisdictional. This precludes the more important modern grounds for review from being jurisdictional, in particular, absence of natural justice, and abuse of discretion. As a result the theory has an important bearing upon the modern classification of *ultra vires* (32), and the distinction between voidness and voidability.

In so far as this theory purports to distinguish between an erroneous decision and one lacking jurisdiction it is acceptable, but in that it goes further and excludes the majority of grounds for review which are likely to arise in practice, it will be suggested that it is conceptually unjustified and in practice too restrictive. A significant element in any attempt to elucidate the modern law governing the effect of invalid decisions must be that the complex procedural requirements imposed by modern statutes and the large amount of discretionary power entrusted to officials, require attention to be given to a much wider and more subtle range of defects than were possible in these earlier cases. In view of this, the historical precedents while valuable to elucidate broad principles, should not be relied upon to any greater extent.

Conclusion

It has been attempted to show, firstly that the distinction between void and voidable decisions has a firm historical foundation, and that therefore it is misleading to regard the issue as involving a recent import of ideas from the law of contract (33).

Secondly, it has been shown that the distinction is linked with that between jurisdictional defects, and errors within jurisdiction, and thirdly that, like other aspects of judicial review, this has developed in the formulary context of particular remedies and means of review. There is an analogy between administrative law, even in modern times, and the early development of the law of contract out of particular forms of action.

Finally the notion of jurisdiction has not been consistently or exhaustively analysed. The development of different remedies, and pressures from changing institutions and differing legislative and judicial policies, have affected the availability of remedies and the classification of defects both of which predetermine the limits of judicial review, and therefore the legal freedom allowed to public authorities.

NOTES

- (1) Henderson Foundations of English Administrative Law 83-9 93-106
De Smith 11 CLJ 46
- (2) Y.B. 17 Ed III (RS) per Pole arg.
- (3) Henderson op cit 214
- (4) See Jaffe and Henderson 72 LQR 348 et seq.
- (5) See Sawyer (1953) 3 U of W Australia Law Review
- (6) Commins v. Massim 1643 March N.C. 196
Bushell's Case 1 Mod 119
- (7) Op cit 62-65
- (8) Fuller v Fotch 1695 Garth 346
Pappillan v. Buckner (1669) Hard 478
- (9) See Mitchell 1965 PL 95
- (10) Rubinstein Op Cit 56-61
- (11) Also Gwynne v. Poole (1693) 2 Lut 1565 at 1567
- (12) Phillips v. Bury (1692) Holt KB 715
Cahan v. Maingay (1793) 1 Ridg L & S 20 at 43
Doswell v. Impey (1823) 1 B & C 163
- (13) Henderson Op Cit 144
R v. Bowden 1732 2 Barnard KB 144
- (14) The possibility of Certiorari was not mentioned in Bonhams
Case 1609
See Rubinstein op cit 61-68
Holdsworth H.E.L. Vol 1 (7th Ed.) 226
Jaffe 72 LQR at 351
- (15) See Sayles Selden Soc. Cols. 55, 57, 58, 74
Henderson op cit 83-89
Milsom Origins of Judicial Review P 136 et seq.
- (16) R v. Glamorganshire (Inhabitants) 1 Salk 396
- (17) see Jaffe 70 Harvard Law Review 953 at 958
- (18) See also Commins v. Nassim 1 643 March N.C. 196
Bushell's Case 1 Mod 119
- (19) See also R v. Nat Bell Liquors [1922] 2 AC 128

- (20) Also Phillips v. Bury 4 Mod 124
- (21) H.E.L. vi 235
- (22) See Conventicle Act 1670 (22 Car 11 C1)
- (23) Op cit 150-52
- (24) Op cit 72
- (25) R v. Nat Bell Liquors [1922] 2 A.C. 128 at 159
- (26) See Racecourse Betting Control Board v. Secretary of State for Air [1944] Ch 114
- (27) Certiorari and the Revival of Error in Fact (1926) 42 LQR 521
See Chapter 5 (below)
- (28) 735 Ct. 67 (1952)
- (29) Gordon (1931) 47 LQR 386, 557
- (30) Durrayapah v. Fernando [1967] 2 ALLER 152
R v. Paddington Valuation Officer [1966] 1 QB 380
- (31) Britham v. Kinniard 1819 1 B & B 432
Case v. Mountain 1840 1 M & G 257
R v. Bolton (1841) 1 QB 66
- (32) Contrast the Court of Appeals Approach in Anisminic v. Foreign Compensation Commission [1967] 2 ALLER with that of the House of Lords in the same case [1969] 2 AC 147
- (33) See Wade 1967 83 LQR 499

PART II. THE CATEGORIES OF INVALIDITY

CHAPTER 3. THE THEORY OF JURISDICTION

Historically the distinction between voidness, and voidability has corresponded with that between jurisdictional and other defects. This remains true today (1) since the ultra vires doctrine would be meaningless if a decision which is ultra vires or outside jurisdiction were not to be regarded as a nullity.

The rationale of jurisdiction has been explained by Diplock L. J. in *Anisminic v Foreign Compensation Commission* [1967] 2 ALL.ER at 993 (2). Jurisdiction means the power, conferred by statute to make a determination that will be recognised as effective by the executive branch of government, who will be obliged to enforce it. Thus the power to make a decision is in this sense, no different from any other kind of power, involving an ability, conferred by law, to produce an alteration in a legal relationship. If the power does not exist, or if necessary conditions of its exercise are lacking, it cannot give rise to effective consequences. Any action taken in reliance upon a purported exercise of such power would therefore be wrongful, as lacking legal justification. To maintain that a decision can be ultra vires and yet have even a limited degree of effectiveness is a self contradictory proposition. An ultra vires act is ipso facto a nullity. (3)

From this must be distinguished a decision which is 'wrong'. The terms 'right' and 'wrong' have no objective significance in this context. A 'right' decision is simply one to which effect must be given, because it is made by a person who possesses the statutory power to produce such a decision. However a decision can be treated as 'wrong' if machinery exists by means of which another person is entitled in specified circumstances to substitute his decision for the one concerned, where the statute allows the executive to give effect to the substituted decision. This situation arises where an appeal is provided. Here the original decision is effective unless and until another decision is substituted. Thus it is at most voidable. Strictly the person authorised to make a substituted decision cannot do this unless the original decision is in existence, and thus the two spheres, of review, based upon the power of the High Court to keep inferior bodies within their jurisdiction (4), and of appeal are separate.

In order to discover what defects affect the jurisdiction of a tribunal it is necessary to determine which defects are treated by the Courts as resulting in nullity. If a decision is voidable then *ex hypothesi* the tribunal has jurisdiction. If a decision is a nullity in the strict sense then conversely it is idle to regard the tribunal as having jurisdiction to make it. If however the Courts do not apply the consequences of nullity at all in this area of law, that is, if a decision without statutory authority is given even a limited and relative effect, it would be difficult to maintain that every exercise of power depends upon statutory authority. It is generally maintained that judicial review depends almost exclusively upon the *ultra vires* doctrine. (5) This can only be supported if all reviewable defects produce nullity, or if those that do not produce nullity can be explained as exceptional cases.

Since authority to decide is generally conferred by statute, any kind of limit whatsoever can be imposed by the statute upon the jurisdiction of the body concerned. However the categories of jurisdictional defect are rarely so specified (6), and where they are not, it is open to the Court to determine which defects produce an *ultra vires* decision. In doing so, the overriding consideration in a system governed by statutory sovereignty must be the terms of the relevant legislation. Subject to this it is submitted that no *a priori* conceptual formula can be produced which distinguishes jurisdictional from other defects. Any kind of limitation can be placed upon a tribunals' power to decide, a limitation as to sphere of reasonableness, being no less logical than one as to procedure, persons or subject matter. It has been seen that the limits of jurisdiction and so of the Courts powers of review have fluctuated between the Seventeenth Century and today. (Chap. 2 above) This reflects the changing attitude of Parliament and the Courts to the question of the extent to which judicial control over governmental powers should be allowed.

Henderson (7) outlines the relevant policy considerations

- "1. There must be general standards of conduct and purpose for government officials as well as for private citizens...

2. It must be possible for the individual whose activity or property is affected by Government action to test whether Government Officials have applied those general standards properly. In our society a Court of general jurisdiction is the testing place so that, broadly speaking the same criteria of legality are applied to citizen and official alike.
3. Some kinds of decision must be left to the final determination of the administrative officials..... In modern society there is, and must always be room for administrative discretion.

It is therefore necessary to employ the ultra vires doctrine, assuming, without prejudice, that this is the main justification for judicial review, as a means to allow an administrative official to be secure against potential judicial intervention in respect of every error he may make, since this renders any independent authority which he might possess, merely nominal. (8) (The establishment of a general right of appeal as opposed to review, raises different considerations and is, in principle, more acceptable.) At the same time the notion of jurisdiction must serve as a basis to allow the Court to intervene, where minimum standards of conduct are departed from, as well as where the express terms of a statute are violated.

This is both a policy problem, to justify judicial review by distinguishing between problems justiciable by a general tribunal and those which should be left to be dealt with within the administration itself and a conceptual one, since it is necessary to provide clear and general rules to distinguish between decisions which the law will recognise, and those which, violating minimum standards of legality, the Executive will not be permitted to enforce. Rubinstein says (9) "Nothing is more conspicuous than the failure of English Law to evolve a consistent jurisdictional doctrine even elementary principles are subject to conflicting or irreconcilable views."

Changes in judicial and legislative attitudes to governmental powers and discretions, (10) and the reluctance of the Courts to attach the drastic consequences of nullity to ostensibly valid and bona fide decisions (11) have conditioned the Courts' treatment of the definition of jurisdiction, to such an extent that the notion has become, as shown above, (chapter 2) a 'coat of many colours'.

Under the existing system of administrative law, the limits of judicial review can be altered by two devices, either by extending or curtailing the categories of jurisdictional defects, or by applying restrictive rules about remedies many of those available being discretionary. Failure to make explicit which of these approaches is being utilized in a given situation, and to link the rules about remedies with those about the nature and effect of defective decisions have caused further confusion in distinguishing between void and voidable decisions (12).

The majority of writers, and judicial pronouncements upon the subject of jurisdiction do not postulate an a priori formula which distinguishes between jurisdictional and other defects. Thus Yardley finds it unnecessary to sub classify the various grounds for judicial review (13) and both Garner and Wade simply list the categories of reviewable defect under the general head of ultra vires (14). Similarly in *Anisminic v Foreign Compensation Commission* the House of Lords listed the main grounds of judicial review, describing them as jurisdictional, and as resulting in nullity. Lord Wilberforce (at 207) regarded these as "certain fundamental assumptions which necessarily underlie the remission of power to decide, such as the requirements that a decision must be made in accordance with principles of natural justice and good faith".

Thus the limits to jurisdiction can be imposed by means of judicial as well as legislative restraints. Even in cases where the express statutory requirements as to persons and subject matter are violated, the clearest examples of jurisdictional defects, it is still open to the Court to decide whether personal qualifications are directory or mandatory, and in particular whether sub-delegation is permissible, and if so to what extent (15) and where subject matter is in question to determine whether the tribunal itself is entitled to determine the limits of its subject matter (16).

The authorities are agreed however that defects classifiable merely as error, do not affect jurisdiction. The rationale of this has been explained by Lord Sumner in *R v Nat Bell Liquors* (above) on the basis that power to determine must include freedom to err or it would be nugatory, and the principle was restated by the House of Lords in *R v. Governor of Brixton Prison ex p. Armah* [1968] A.C 192

where Lord Reid said (at 234) "If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue he does not destroy his jurisdiction by reaching a wrong decision". Nevertheless the distinction between error and jurisdiction is, as the decision in *Anisminic* has recently shown by no means a precise one. In a wide sense any defect constitutes an error, but normally errors of law in the sense of misapplication of evidence or application of wrong criteria and errors of fact are regarded as outside the jurisdictional principle (17). However in *Anisminic* it was held by the House of Lords that the application of a wrong criterion to elucidate the term "successor in title" although itself an error of law, resulted in a statutory tribunal exceeding its jurisdiction, since in treating a person as a successor in title who was in the opinion of the Court not a successor in title, the tribunal had based its decision upon an irrelevant factor, and so departed beyond its prescribed subject matter. This reasoning potentially extends the categories of jurisdictional defect to include any error of construction (18). Similarly although, in the absence of an appeal, error of fact as such is not reviewable the Courts are prepared to set aside a decision where the tribunal has erred as to a fact relevant to its prescribed subject matter (19). It has been found difficult to distinguish this class of reviewable "facts", (although many of these are upon closer analysis really questions of law, being applications of statutory definitions) from facts which affect "merits" and which are therefore within the jurisdiction of the tribunal. This matter will be discussed below. (See Chapter 7)

Finally the Courts exercise review as opposed to appeal jurisdiction in respect of patent error of law. Occasionally this has been taken to mean that this class of defect is jurisdictional (20), but this view is contradicted by the greater weight of authority which treats patent error as an exceptional ground for review, (21).

These specific problems will be examined below, but in this context it is submitted that they militate against any conceptual explanation of jurisdiction which can at the same time provide useful policy guidance.

However two attempts have been made to provide a theory of jurisdiction, both of which have influenced the attitude of the judiciary and which therefore constitute a further complicating factor in any attempt to distinguish between void and voidable decisions.

The first is that of Dr. Rubinstein (22) who postulates a definition of jurisdiction based upon the notion of ostensible authority. If a decision is apparently within the scope of its statutory authority then it should, at least prima facie be given validity because this is related to "the predictable capacity of ordinary people to make a correct appreciation of the situation".

(23) Conversely, a decision will be outside jurisdiction where "the error committed by the tribunal is so manifest a departure from the authority of the statute that reasonable men acting in good faith could not believe it to be within the scope of that authority".

The rationale of this is obvious, and can be supported to some extent by analogy with the doctrine of apparent authority in Agency. However the element of public interest in the limitation of statutory powers distinguishes the two situations, and it is clear that this doctrine is not reflected by the majority of authority in as far as it purports to provide a test of general application. Thus in *Anisminic* a decision was held to be void as a result of a defect caused by a highly technical error of construction and the question of ostensible authority was not referred to in deciding whether what was done constituted a "determination" for the purpose of a privative clause.

Nevertheless in isolated groups of cases where the question of nullity has arisen, some support is to be found for this principle, particularly in situations where the extreme consequences of nullity would cause inconvenience.

Thus in *Smith v. East Elloe R.D.C.* [1956] A.C. 736, where a privative clause purported to prevent a decision from being challenged in the Court, the House of Lords refused to review a decision taken as a result of fraud on the ground that it was protected by such a clause. Lord Radcliffe however thought that the clause would not have any effect where the defect was "branded upon the face" of the decision whereas an order not patently defective "is still an act capable of legal consequences. Unless the necessary proceedings are taken at law ... to get it ... upset, it will remain as effective for its ostensible purpose as the most impeccable of orders".

Similarly in *Colonial Bank of Australia v. Willan* (1874) LR 5P C 714 "manifest want of jurisdiction" was regarded as allowing the court to exercise a power of review in the face of a privative clause. This doctrine has been utilized in this context by Australian Courts (24).

Decisions which allow validity to the acts of de facto offices are based upon the same rationale (25) as perhaps are those cases which hold that the otherwise discretionary remedies of prohibition and perhaps certiorari cannot be refused if a jurisdictional defect appears upon the face of the order (26).

However these are isolated authorities and Rubinstein recognises that this view is not supported by the majority of decisions. It is suggested that this approach is unsatisfactory as a general basis for judicial review in as much as it requires different principles to be applied, depending upon whether challenge is direct or collateral. Ostensible authority does not give sufficient scope for intervention when a decision is sought to be set aside by means of the prerogative orders or a declaration whereas its application is more convincing where the validity of the decision becomes indirectly relevant in an independent legal issue. Thus in *D.P.P. v. Head* [1959] 1 A.C.83 the respondent was convicted of an offence against a woman "under detention in an Institution" under Mental Health Legislation. The House of Lords held that his conviction should be quashed as a certificate which authorised the conviction was defective. Lord Denning dissented on this point on the ground that the certificate being within jurisdiction was only voidable and therefore the woman was, at the relevant time lawfully detained. A more satisfactory result could, it is suggested have been achieved had a doctrine of ostensible validity been applied, which itself would have been consistent with the policy behind the creation of this statutory offence. However this doctrine would produce justice only in situations, such as this where the validity of administrative action is genuinely incidental, and should only be applied as the basis of the void voidable distinction in conjunction with a system of direct attack which is independent of the question of jurisdiction. Otherwise the position would resemble that postulated by Blackburn J. in *Pease v. Chaytor* (1863) 3B2S620, who was prepared to regard "jurisdiction" as governed by different principles in a collateral action in tort than if direct review were utilized. This adds further confusion to the already complex rules about choice of remedy.

The second attempt to produce a rationale of jurisdiction enjoys more support from the cases. This is the "pure theory of jurisdiction propounded by D. M. Gordon in a series of articles published between

1927 and 1966 (27). This review regards jurisdiction as a matter of capacity to investigate a prescribed subject matter and to make a determination thereon. If a body has such capacity, nothing done in the course of such determination can remove its jurisdiction. Thus only one question is relevant to determine jurisdiction. Is the tribunal the right one? This involves determining whether the body concerned is the tribunal authorised by statute and whether that body is dealing with the issues entrusted to it by statute. Any decision upon a matter which the tribunal has to decide is conclusive, in the absence of a right of appeal. Thus if a rent tribunal is empowered to fix rent for furnished premises, its decision upon that point is necessarily within jurisdiction, even though if wrong the tribunal will be dealing with unauthorised subject matter. Gordon finds it illogical that a tribunal can have jurisdiction to determine a matter, which if wrongly determined, results in loss of jurisdiction. But in every case a tribunal or Court must determine whether it has jurisdiction. The theory of judicial review would be self defeating if a wrong decision upon this matter was itself within jurisdiction. This suggests that the pure theory is unsound.

This theory, is similar to but narrower than, the approach seen in Seventeenth Century decisions upon collateral attack (28). It involves a mechanical test for establishing jurisdiction, which is applicable only at "the commencement of the inquiry" (29). Thus many procedural errors, including breach of the rules of natural justice, as well as mistakes of law, fact and abuse of discretion will never be jurisdictional. Gordon justifies this narrow formulation by assuming that certiorari has, historically had a wider scope than at present, extending to many kinds of non-jurisdictional defect. This view is extremely doubtful (30) and except in the case of patent error of law does not represent the modern position. However Gordon accepts that the need to extend this sphere of judicial review has caused this narrow formulation to be distorted, and the clear distinction between nullity and voidability based upon capacity to decide to be overlooked.

This approach which provides an a priori test of jurisdiction has affected the approach of both judges and writers to the concept of jurisdiction. Thus in *R v. Bolton* (1841) 6QB Lord Dennison said "The

question of jurisdiction does not depend upon the truth or falsehood of the charge, but on its nature. It is determinable on the commencement not at the conclusion of the enquiry". This dictum has been treated as a locus classicus supporting a narrow concept of jurisdiction but, in the light of the facts of the case, which concerned a wrong finding by justices that the defendant was a pauper and therefore eligible to be evicted from a parish house, is simply authority for the elementary principle that a wrong finding as such does not deprive a tribunal of jurisdiction. Similarly Griffiths and Street (31) suggest that the distinction between voidness and voidability may lie between lack of jurisdiction, determinable at the commencement of the inquiry and abuse of jurisdiction involving defects arising at a later stage usually involving an abuse of discretion. The House of Lords in *Anisminic v. Foreign Compensation Commission* confronted with a discrepancy between the pure theory and authority that other defects resulted in nullity distinguished between a narrow strict sense of jurisdiction involving a commencement of inquiry test, and lack of jurisdiction in a wider sense extending to defects of motive and reasoning. It is clear however from the speeches of Lord Reid, and Lord Pearce that the consequences of both types of jurisdictional defects are the same. In the Court of Appeal Diplock L. J. had employed an approach similar to, but somewhat wider than, that of Gordon treating four types of defect as affecting jurisdiction.

1. The authority must be properly qualified which includes absence of bias.
2. There must (usually) be an inquiry.
3. The case must be of the kind described in the Statute which description includes, inter alia words identifying parties and subject matter.
4. The determination must state whether a situation of the kind described in the statute exists.

Except that Gordon would not regard observance of natural justice as a condition of jurisdiction this approach is based upon the idea of capacity to consider a prescribed subject matter which excludes the imposition of restrictions as to the manner in which the power is to be exercised. Gordon finds it "astonishing that it should ever seem

plausible to contend that the way a power is used can show that the power does not exist. Proceedings without jurisdiction are CORAM NON JUDICE, but how can a judge be any less of a judge by merely blundering." (32)

It is suggested that the pure theory is based upon a misconception as to the meaning of capacity, and upon an unduly rigid classification of defects. Capacity simply means the ability to effect a change in a legal relationship, and as such is as Wade shows (34) synonymous and not at variance with the notion of power or authority. Diplock L. J. in *Anisminic* shows that in the context of decision making power the power or capacity concerned consists of the ability to bring about a state of affairs which those responsible for enforcement machinery will be bound to recognise and to give effect. Thus the operative moment to determine when jurisdiction exists, is, it is suggested when enforcement becomes necessary. Only then does the issue become material, because until then no alteration in the individuals' legal position has been made and therefore the question of power does not arise. If this view is accepted there is no difficulty in treating jurisdictional defects as arising at any stage in the proceedings, since it is when the final decision becomes effective that the necessary requirements of validity must be established. It is possible to distinguish between defects of jurisdiction which prevent the tribunal from commencing its inquiry, and those which arise at a later stage, and this may be material in cases where it is sought to invalidate not merely the final decision but the whole proceedings ab initio. Lord Evershed in *Fidge v. Baldwin* [1963] 2 ALL.ER at 88 distinguished between a decision that is a nullity although the proceedings up to its pronouncement were proper and effective, and situations where the entire proceedings are ineffective. This may be material in natural justice cases where a complete rehearing is demanded.

Apart from these considerations it does not seem logically necessary to assume with Gordon that Jurisdiction once acquired cannot be lost. One aspect of jurisdiction is capacity to enter upon the inquiry, but if Parliament can impose any limits whatsoever to the jurisdiction of a statutory body, there is no reason why the Courts should not impose standards of fairness, relevance and procedure upon the powers of an inferior body. The extent to which the Courts should impose such

limitations is a matter of policy rather than logic, and this is what distinguishes defects as to mode of exercise of power from lack of capacity in a narrow sense. Thus Diplock L. J. in *Garthwaite v. Garthwaite* [1964] P. 356 at 357 said that Jurisdiction, in a wide sense, embraces the "settled practice of the Court" as to the way it will exercise its power. In the case of inferior tribunals this "practice" is imposed by Parliament or the reviewing Court.

Finally Gordon appears to classify the various types of defect in an unduly rigid manner. He distinguishes between error of law and lack of jurisdiction and between the procedure and definition of a tribunal. It is submitted that many defects can be classified in alternate ways with differing consequences. Thus bias can be regarded as an aspect of natural justice and therefore as wrong procedure, but alternatively can be treated as affecting the qualifications of the tribunal and thus as jurisdictional. This was the approach of the Court of Appeal in *Anisminic*. Similarly an error of law can have numerous different results. In *Anisminic* an error of construction resulted in the tribunal considering an irrelevant matter. In other cases an error of definition may result in the tribunal considering the wrong subject matter as where a Rent Tribunal erroneously decides that the premises in question are furnished. Gordon would deny that this type of error affects jurisdiction as this is one of the issues that the tribunal must consider if it is to reach a decision. This rationale makes statutory limitations upon subject matter worthless. Failure to comply with the *audi alteram partem* rule can be regarded as a defect *sui generis*, or as a failure to comply with an implied procedural requirement, while the categories of abuse of power, unreasonableness, improper purposes, fraud or irrelevant considerations overlap considerably, with each other as well as with requirements as to subject matter.

It is submitted that it is not the nature of the defect in itself that governs the question of jurisdiction, but its effect, whether it results in an infringement of the limits to the tribunals freedom imposed by Parliament as to subject matter or by the Court as to mode of exercise. Both types of limitation upon the exercise of power are *prima facie* permissible.

The pure theory, is inconsistent with the attitude of the House of Lords in *Anisminic*. Their Lordships without producing a general formula listed the various categories of defects which produce nullity. These include defects subsumable under a commencement of inquiry test, but also extend to defects of procedure, fraud, the consideration of irrelevant matters, and the exclusion of relevant matters.

However, the defects where there is doubt as to the question of voidness and voidability, are those which the "pure theory" do not treat as jurisdictional, procedural errors, natural justice, error of law or fact, and abuse of discretion. Defects subsumable under the Commencement of the inquiry test are always treated as jurisdictional. Thus a decision taken by a person unauthorised by statute is always treated as *ultra vires* and void (33). Problems which arise in this area are caused by ambiguous classification. Sometimes a tribunal is improperly qualified owing to a procedural defect and this influences the Court in deciding whether the resulting decision is a nullity (34). A complaint based upon failure to give a hearing could obscure a situation where there is unauthorised sub delegation of the power to decide (35) and here too the effect of the decision may depend upon which classification is selected.

It is submitted that the Pure theory is not, as has been advocated by its main proponent logically necessary as an explanation of jurisdiction, and as a matter of policy, it fails to provide the Court with adequate scope to deal with all the defects which have been held to be reviewable.

It provides an explanation of only one possible requirement of jurisdiction, that of initial capacity, which is probably the least common area in which complaints occur. In the following chapters the main categories of reviewable defect will be examined, with reference to the influence of the pure theory, in order to determine whether the Courts regard these as resulting in nullity.

NOTES

- (1) Anisminic v. Foreign Compensation Commission [1969] A.C 147
Ridge v. Baldwin [1963] 2 ALLER 66 at 119.
- (2) Overruled on the substantive issued by the House of Lords [1969]
A.C 147
- (3) See Wade 1967 83 LQR 499 512-18. Anisminic Case (above).
- (4) Wade. Administrative Law (2nd Edition) P. 48.
- (5) Yardley (2nd Edition) 92
Wade Op Cit 45
Griffiths & Street (4th Edition) 214 - 217
Garner. Administrative Law (2nd Edition) 108.
- (6) Although see Foreign Compensation Act 1969 S3 and statutes
providing for judicial review only upon specified grounds EG
Acquisition of Land (Authorisation Procedure) Act 1946 First
Schedule Part IV Para. 15 and 16.
- (7) Foundations of English Administrative Law P3.
- (8) See Lord Sumner in R v. Nat Bell Liquors (1921) 2 A.C. 128
- (9) Op Cit (P. 194)
- (10) Compare Livesedge v. Anderson [1944] A.C 206 and Carltona
v. Commissioner of Works [1943] 2 ALLER 560 with Padfield
v. Minister of Agriculture [1968] A.C 997.
- (11) R v. Loxdale (1758) 1 Burr 445
Durayapah v. Fernando [1967] 2 ALLER 152
- (12) See Wade (1967) 83 LQR 499 and (1968) 84 LQR 95
- (13) Source Book of English Administrative Law (2nd Edition) 92 - 93.
- (14) Garner. Administrative Law (2nd Edition) P. 110.
Wade. Administrative Law (2nd Edition) 49.
- (15) Barnard v. National Dock Labour Board 1953 2 QB 18
Jeffs v. New Zealand Marketing Board 1967 1 A.C. 551
- (16) R v. Special Purpose Commissioners of Income Tax (1888)
21 QBD 313 at 319.
- (17) Nat Bell Liquors case (above).
Baldwin and Francis v. Patent Appeal Tribunal [1959] A.C.663
- (18) Wade (1969) 85 LQR 198.

- (19) White and Collins v. Minister of Health [1939] 2 KB 838.
- (20) See Pallas C. B. in R v. Mahony [1910] 21R 695 at 722.
- (21) R v. Nat Bell Liquors (above)
Baldwin and Francis v. Patent Appeal Tribunal (above)
and see Chapter 7 below.
- (22) Jurisdiction and Illegality (1965).
- (23) Op Cit 239
- (24) Morgan v. Rylands Bros. (Australia) Ltd. (1927) 39 C.LR 517 at 520
R v. Murray 1949 77 CLR 387
Benjoefield and Whitmore Australian Administrative Law (3rd Ed.)243
- (25) See P. 114 below.
- (26) De Smith Op Cit at p. 428 and 430.
- (27) 45. LQR 459
47 LQR 386, 557
60 LQR 250
1960 U.B.C.L.R. 185
82.LQR 266, 515
See also De Smith Op Cit 97
Wade 82 LQR 226
- (28) Henderson Op Cit 117-18 and See Chapter 2 above
- (29) See R v. Bolton (1841) 1 QB 66 per Lord Denman at 74
- (30) See (1926) 42 LQR 521 and Yardley
- (31) 4th Edition at 217 See also Lord Denning in Baldwin and Francis v.
Patent Appeal Tribunal [1959] A.C 663 at 696
- (32) 47 LQR 389
- (33) Barnard v. National Dock Labour Board (above)
Vine v. National Dock Labour Board [1957] A.C 488
- (34) See Woollet v. Ministry of Agriculture [1955] 1QB 103
- (35) See Jeffs v. New Zealand Marketing Board (above)

CHAPTER 4 PROCEDURAL DEFECTS

Gordon objects to the notion that procedural defects may affect jurisdiction, upon the ground that miscarriages during the inquiry cannot nullify and constitute at most, error of law. He regards it as illogical, firstly that a tribunal, having jurisdiction at the outset, can subsequently lose jurisdiction, and secondly that errors of law or procedure should be divided into two categories based upon the seriousness of the defect, or upon any other criterion which he regards as arbitrary (1). He cites authority to show that procedural defects are not necessarily treated as jurisdictional, but nevertheless recognises that his contention is not generally supported by the authorities.

It has been suggested, above, that the commencement of inquiry test is not a necessary logical solution to the problem of jurisdiction. The limits to jurisdiction can be set by the court, and it is when the decision is made and not at the commencement of the decision making process that the question of validity becomes relevant. Thus any defect occurring before that moment can, in principle be treated as jurisdictional. Gordon's other objection although recognising that, as a matter of convenience, it would be wrong to treat all errors as jurisdictional, does it is suggested put too high a premium upon conceptual exactitude. Distinctions based upon degree of importance, essentially value judgements, resulting from an accumulation of factors, are used throughout the law, and are frequently a basis for classification. This is so for example in the case of the distinction between contractual conditions and warranties. Value judgements of this type are a basic element in legal techniques (2), and their importance is underestimated by stigmatizing them as arbitrary.

Gordon finds it "astonishing that it should seem plausible to contend that the way a power is used can show that the power does not exist". Is not the converse position more acceptable? All persons having power, must operate within a minimum procedural context. The rules of procedure exist partly in order to define and identify the tribunal. Thus as Dias points out (3), (albeit in a different context),

if the reigning monarch makes a declaration with the unanimous assent of all the members of both Houses of Parliament assembled, for example, at a garden party, that would not become binding. Only when the correct procedural machinery is harnessed, is the exercise of power meaningful. (Indeed this is perhaps the defining characteristic of a legal system (4))

Thus potentially, all procedural defects, are capable of nullifying. This would however be extremely inconvenient in view of the technical complexities of modern statutory procedures. The Courts therefore distinguish between those procedural requirements which are essential to the jurisdiction (mandatory) and those which are merely directory and do not necessarily invalidate. The distinction between them is a question of degree based upon the importance of the particular requirement concerned. (5)

Unfortunately apart from this wide principle, the authorities are confused. The terms mandatory and directory are not consistently employed. There is authority firstly that failure to comply with a directory provision does not effect validity at all, and gives no ground for challenge, and that failure to comply with a mandatory requirement makes a decision either void or voidable (6). This is curious, involving as it does the proposition that observance of a statutory requirement can be dispensed with without the attachment of any sanction. Secondly there is some authority that even a directory requirement must be substantially complied with (7) and thirdly that failure to comply with a mandatory provision results in nullity, but that a decision involving contravention of a directory principle is voidable (8). This, it is submitted is the most acceptable approach. If mandatory procedural requirements are essential, then they should constitute conditions to jurisdiction. A tribunal which disregards these cannot therefore be regarded as exercising the jurisdiction intended by Parliament. Failure to comply with any other procedural requirement, even if trivial, is technically a mistake of law, and therefore, assuming the existence of appropriate methods of challenge, should prima facie constitute a ground for setting aside the decision. If upon a correct interpretation of the statute the Court is of the opinion that the defect concerned should not effect validity at all, then it can, in its discretion refuse

a remedy. This analysis has the advantage of simplicity, while serving the same policy ends, as the alternative approaches, and it is submitted that modern authority supports this view. Many of the decisions cited to support the proposition that failure of a directory requirement does not effect validity are cases where it was necessary to establish nullity, and thus the possibility of the decision being voidable was immaterial. Thus in *Bailey v. Williamson* the plaintiff relied upon the invalidity of a regulation which had not been laid before Parliament as the statute required by way of a defence to a prosecution. This would only succeed if the defect made the by law void at initio. And in *Howard v. Boddington*, Lord Penzance, holding that a decision of a Bishop under the Public Worship Regulation Act 1874 was void for non compliance with statutory provisions as to time distinguished between imperative conditions which if not complied with result in the nullity of all subsequent proceedings and provisions which are "mandatory or directory" where "although such provisions have not been complied with, the subsequent proceedings do not fail". It was not relevant, to determine whether lack of a directory requirement allows any form of challenge.

In more recent cases it has been held that while failure of a mandatory condition nullifies, defects arising out of directory requirements also constitute ground for review. Thus in *Chapman v. Earl* an application to a rent tribunal omitted to specify the amount of rent claimed. It was held that this was a mandatory requirement which nullified, so that the appropriate remedy was review in certiorari rather than by way of appeal under S9 of the Tribunals and Inquiries Act 1958. Had the provision been merely directory the defect could have been waived. Considerable authority supports the proposition that if the requirement is directory a defect can be cured by waiver or consent (9). These cases would of course be meaningless if such a decision was unchallengeable, but in view of the proposition that a nullity cannot be waived (10), support the view that defects in respect of directory procedural requirements result in a voidable decision. Gordon cites such cases as evidence that no procedural defect affects jurisdiction (11). However, he gives very little attention to the distinction between mandatory and directory requirements, and his discussion appears to overlook the fact that in many of the cases the question of waiver was treated as depending upon the effect of the particular provision upon the jurisdiction of the tribunal (12).

In *Edwick v. Sunbury upon Thames Urban District Council* [1962] 1 QB 229 it was held that a notice of refusal of planning permission was void because it had been served outside the statutory time limit. Salmon J. equated disregard of a mandatory requirement with nullity. In *James v. Minister of Housing* (1967) failure by a local authority to notify a planning decision to the applicant was held not to nullify. Lord Denning M.R. said (at 142) "I think the procedural requirements are directory only. The grant or refusal of permission after two months is not void, but at most voidable. Finally in *R v. Minister of Health ex p. Yaffe* [1931] A.C. 494 a local authority improvement scheme was challenged, upon the ground that certain procedural requirements as to form had not been complied with. The scheme was protected by a privative clause of the "as if enacted in the Act form. The House of Lords thought that the privative clause would protect a scheme only if what is done falls within the limits of the conditions founding the Ministers jurisdiction. A scheme which failed to comply with imperative requirements would not be a scheme within the meaning of the Act. However the majority held that the scheme submitted was a valid. The provisions not complied with were not imperative, and any defects had in fact been cured.

These decisions support the proposition that failure to comply with a mandatory requirement results in nullity, and that even if the requirement is directory only, the Court can in appropriate circumstances set aside the decision as voidable.

The only express modern authority that non compliance with a mandatory requirement does not necessarily affect jurisdiction and nullify is the decision of the Queens Bench Division in *Brayheads (Ascot) Ltd. v. Berkshire County Council* [1964] 1 ALLER 149. The applicants had been served with an enforcement notice alleging breach of a condition which was attached to a grant of planning permission. They contended that the condition was a nullity in that in the initial notice of grant no reasons had been specified for its imposition contrary to the statutory requirements.

It was held that even though the procedural requirement concerned was mandatory, it did not follow that non compliance made the decision void. It is submitted that this view is inconsistent with the weight of authority and also inconsistent with the rationale of an imperative

requirement. In as far as the authorities are agreed that some procedural requirements nullify while others do not, the inconsistency may merely be a terminological one. Nevertheless in as far as mandatory conditions all of which are regarded as essential require, on this view, to be further sub-divided in those that nullify and those that result in voidability only, it is difficult to determine the principle upon which such a distinction should be based. Similarly this view allows for the proposition that disregard of a directory requirement does not carry any consequences whatsoever. To regard such defects as voidable only, allows a discretion to the Court to uphold a decision where the defect has caused no harm or injustice. The existing confusion allows the same discretion to be exercised only by way of manipulation of the terms directory, mandatory and imperative.

The distinction drawn by the Courts between mandatory and directory requirements suggests that mandatory requirements are regarded as affecting jurisdiction. The general test employed is the importance of the particular provision in the light of the governing statute (13). Thus where the amount of rent to be claimed was not specified in an application to a rent tribunal it was held that the decision was void, upon the ground that Parliament did not intend the jurisdiction of the tribunal to extend to fixing the rent for itself. Thus the requirement was deemed to be mandatory (14). *Conversley in Francis Jackson Developments v. Hall* (1951) 2 KB 488 an application by a sub-tenant to a rent tribunal had failed to specify the Landlord's name correctly. His lessor, had served a notice to quit and the Landlord in his turn brought an action for possession of the premises. A notice to quit could not take effect while an application was before the tribunal. Thus the Landlord's claim depended, inter alia upon whether the procedural defect resulted in the application being a nullity. The Court of Appeal relying upon the distinction between directory and mandatory requirements held that the omission did not nullify, since to have such effect would prejudice the kind of person likely to take advantage of such procedures, being usually without professional advice.

Griffiths and Street (15) suggest that the distinction between procedural requirements that affect jurisdiction and those that

do not depends upon the commencement of inquiry test. Thus no defect committed in the course of inquiry will nullify. This view, somewhat wider than that of Gordon is not supported by the authorities mentioned above. Other tests have been employed which are inconsistant with this. In *Cullimore v. Lyme Regis Corporation* [1962] 1 QB 718, a Coast Protection Scheme made by the defendents was made without complience with statutory provisions concerning service of certain notices. Edmund Davies J. held that the particular provision was mandatory and that non complience therefore nullified. He based his decision upon the distinction between a statute conferring powers, and one conferring duties. In the former case procedural requirements will be strictly construed whereas where a duty is involved the Court will be more willing to treat such requirements as directory in order to facilate performance in the public interest.

It is submitted therefore that the distinction between directory and mandatory requirements governs that between voidness and voidability, and that the conceptual commencement of the inquiry test offers no acceptable solution to the problem of drawing such a distinction. It is open to the Court in the light of its opinion as to the effect of the defect upon the policy of the statute (16) to determine which provisions affect jurisdiction. Non compliance with other procedural requirements allows the Court to set aside the decision provided that machinary for quashing exists and subject to any rules that allow the Court a discretion to refuse a remedy.

NOTES

- (1) 47 LQR at 358 566-7
- (2) See Hart Concept of Law Ch.7.
- (3) Jurisprudence (2nd Ed.) 489. See also Heuston. Essays in Constitutional Law (2nd Ed.) Ch.1.
- (4) Hart op. cit. passim
- (5) De Smith op. cit. 126 Howard v. Boddington 1877 2 P.D 203
- (6) De Smith loc cit (above) Griffiths & Street (op cit 4th Ed.221)
Maxwell on Interpretation of Statutes 11th Ed. 362-373
Bailey & Williamson (1873) LR 8 QB 118
Howard v. Boddington (above)
R v. Sheer Metalers ft [1954] 1 QB 586
- (7) Cullimore v. Lyme Regis Corporation. (P.39)
- (8) Edwick v. Sunbury on Thames U.D.C. [1957] 1 QB 229
Chapman v. Earl [1968] 2 ALLER 1214
James v. Minister of Housing 1967 1 WLR 171
reversed upon other grounds sub nom James v. Secretary of State for Wales.
- (9) Smith v. Wiles [1921] 2 KB 66 Nair v. Teak [1967] 2 A.C. 31
Shrager v. Basil Dighton 1924 1 KB 274
Wells v. Minister of Housing and Local Government [1967] 1 WLR 1000
- (10) Rubinstein op cit
Ridge v. Baldwin 1964 A.C. 40 at 126
- (11) (1931) LQR 566-7 R v. Swansea (Harbour Trustees)(1839)
8A 2E439
- (12) See Park Gate Iron Co. v. Coates (1870) LR 5 C.P. 134
- (13) Howard v. Boddington (above)
- (14) Chapman v. Earl (above)
- (15) 4th Ed. P. 221
- (16) See Padfield v. Minister of Agriculture [1968] A.C.997

CHAPTER 5. THE RULES OF NATURAL JUSTICE

The authorities as to whether breach of the bias rule, and of the audi alteram partem rule produce nullity are in some confusion (1). Breach of the audi alteram partem rule would not, under the pure theory affect jurisdiction, although occasionally the somewhat arbitrary distinction has been made between a failure of natural justice before, and one during the inquiry (2). On the view of jurisdiction taken above, it is submitted that, in principle at any rate there is no reason why observance of both rules should not be a requirement of jurisdiction. However, even where the pure theory is not relied upon breach of the rules of natural justice is often treated as a ground of review in its own right, separately from ultra vires (3). This can of course be accounted for in view of the intrinsic importance of natural justice, but apart from expository advantages such classification is inconsistent with the general principle that review, apart from ultra vires, is only justified where the defect concerned is patent, which is unlikely to be the case where natural justice is concerned (4).

It is possible to classify natural justice within the ultra vires principle, as a species of procedural ultra vires (5) or in the case of the bias rule as a matter affecting the qualifications of the tribunal (6). However the mode of classification within the ultra vires principle is a somewhat sterile question. If breach of natural justice produces nullity, it must, however classified, be regarded as a head of ultra vires.

Before examining the modern authorities, it should be noticed that an historical objection, exists in the case of both rules of natural justice, to regarding such defects as jurisdictional. Gordon cites authority, purporting to show that bias and failure to hear were, before the end of the Nineteenth Century, treated as error in fact, a non jurisdictional defect, which was remedied by the writ of error (7). This remedy did not lie to all inferior tribunals (8) and Gordon argues that error in fact was remedied by certiorari in situations where the writ of error did not lie. Thus despite the obsolescence of writ of

error (9) error in fact is theoretically still available as a ground justifying the issue of certiorari.

Both these assertions are only tenuously supported. There is authority from the Seventeenth Century that bias (10) and the audi alteram partem rule (11) go to jurisdiction and result in nullity, and from the middle of the eighteenth century it has been established that non jurisdictional defects were reviewable only if patent (12) but that the record could be traversed where lack of jurisdiction was alleged. Both bias and failure to hear are unlikely to be disclosed by the record. Gordon is of the opinion however, that extrinsic evidence was available to show error in fact. However the authority he offers consists in the main of bias cases, which were often treated as involving jurisdiction. In certiorari cases the face of the record rule has been relied upon without distinction between the two kinds of non-jurisdictional defect (13).

Secondly even assuming that extrinsic evidence lay for error of fact (14), it is by no means certain that certiorari did so. Gordon admits (15) that "it is almost impossible to find any clear reference to error of fact in connection with certiorari proceedings". Thus, as extrinsic evidence was necessary to show bias, want of jurisdiction could well have formed the basis for intervention by means of certiorari. Yardley distinguishes between courts of common law and statutory tribunals denying that in the latter context bias was to be regarded as error of fact (16). He argues that the concept of error in fact is now defunct.

It is submitted therefore that the earlier authorities should be treated with caution. Moreover even if natural justice has not always been treated as jurisdictional, the meaning of jurisdiction has fluctuated from the seventeenth century to the present day, and thus there is no reason in principle why both bias and failure to hear should not today be among the heads of ultra vires.

The two rules will be discussed separately.

Bias

The authorities supporting the proposition that bias results in a voidable decision are not impressive. In modern times the issue has not directly risen for determination. Nevertheless in Metropolitan Property Co. v. Lannon (1969) where a decision of a rent tribunal

was quashed by certiorari, Lord Denning M.R. regarded it as an inarguable proposition, that a biased decision was voidable only. Only six decisions can be regarded as firmly supporting this proposition (17) and each of these is inconclusive as authority.

The leading case is *Dimes v. Grand Junction Canal*, an appeal from a decision of the Lord Chancellor declaring that the respondent Company was a beneficiary in a certain estate. It was argued that the Lord Chancellors decree was vitiated by bias, as the Lord Chancellor held shares in the respondent company. The issue of voidness or voidability was material as, before the appeal, the applicant had given notice that he intended to treat the respondent company as a trespasser and took steps to impede its use of the land in question.

It was held by Parke B, speaking for the judges of England, to whom the question had been referred that the Lord Chancellor's decision was voidable only, and thus effective until set aside on appeal. However, this was unnecessary for the result, since the Vice Chancellor, whose decision was not effected by bias, had made an order in the lower Court which had the same effect as that made by the Chancellor, and this prevented the respondent from being a trespasser. Moreover the decision in this case has been distinguished (18) on the basis that the decision in question was that of a superior court, the decisions of which can in practice only be voidable and not void. A superior court has jurisdiction to determine the limits of its own jurisdiction, and thus any wrong conclusion can itself only constitute error within jurisdiction (19). In addition, the decisions of superior courts are not reviewable, but challengeable in direct proceedings, only by way of appeal. (Perhaps a gross or manifest excess of jurisdiction could be treated as a nullity in collateral proceedings). Parke B, emphasised the inconvenience that would result if the decision was treated as void. This applies whatever defect is in question, and is only a significant argument in circumstances where the nullifying defect is latent, highly technical, or in some other way not likely to be detected by a person relying upon the decision.

The other authorities rely heavily upon *Dimes*, and thus are affected by the inconclusiveness of that decision. *Phillips v. Eyre*, although a distinguished authority upon other matters involves in this context no more than an obiter statement that a person who acts under the authority of a biased judgement cannot be treated as a trespasser, and that an

appeal or writ of error is the appropriate remedy. R v. Galway J.J. was an attempt to quash an acquitted by quarter sessions for bias. If the decision was void, it was argued, that the accused could be tried again, whereas if it was voidable the double jeopardy principle would apply and the accused would go free. It was held that the decision was voidable only and thus the accused having been "put once in peril" could not be retried. However Pallas C.B. for obvious policy reasons expressly treated attempts to set aside acquittals as sui generis, regarding bias as generally affecting jurisdiction. It is suggested that the double jeopardy principle does not necessarily turn upon the classification of a decision as void or voidable, but upon the question of whether, as a matter of fact a person has been put at risk of conviction by the institution of proceedings against him. Thus only where proceedings are manifestly a sham or illegal would the accused not be protected by the double jeopardy rule. R v. Simpson was another double jeopardy case, where certiorari was sought to quash an acquittal by justices. Here the disqualification was statutory and thus the question of natural justice was obiter. The majority of the Divisional Court based its refusal to quash the acquittal upon narrower grounds than that of the void, voidable distinction. Singleton L.J. thought that a plea of autrefois acquit in any later proceedings was the appropriate remedy, and that this would be lost if the acquittal was quashed. This left the issue open, but nevertheless his Lordships reasoning suggests that he considered the acquittal voidable only. Ballaiche J. however found himself, upon policy grounds, reluctant to quash an acquittal, and contented himself with saying that the decision was not "obviously" lacking in jurisdiction. This is consistent with the suggestion made above.

A more general authority is the decision of the Court of Appeal in R v. Commissioners of Sewers of Essex (1885) 14 QBD 561, where an order by the Commissioners to the applicant to execute certain repairs was quashed for bias. It was held that the order would be quashed for the future, but that this would not entitle the applicants to recover expenses for work already undertaken in obedience to the order, since these were incurred as a result of an "existing legal obligation". Under the governing provisions however, individuals were bound to pay

for repairs, as long as the commissioners were "acting within their jurisdiction". However even without this express provision, no order made by the Commissioners would be effective if outside jurisdiction. Therefore in order to give this statutory provision any force at all, it is suggested that it should be construed as providing a different test of jurisdiction to the one that would otherwise operate, perhaps one limited to the narrow meaning of jurisdiction as capacity over persons, place and subject matter. If this is so, then bias would not, in this sense and context, destroy jurisdiction.

Finally, the case most frequently cited in support of the principle in *Dimes v. Wildes* is *Wildes v. Russel*. A justices clerk brought an action to recover salary, after he was dismissed from office by the Quarter Sessions, acting under statutory powers. His allegation that certain members of the Court were disqualified by bias, was rejected and thus the issue of voidness or voidability was obiter. It is clear however that his quasi contractual action could only have been successful had the decision been void. It was stated that if the decision was vitiated by bias, it would be voidable only.

A part from these decisions a number of other cases indicate that bias can be cured by waiver or consent. (20) This suggests that bias does not effect jurisdiction. Nevertheless waiver may be regarded as relevant to the issue of a remedy to a particular individual, and thus based upon different considerations than those governing the effect of the invalidity (see Chapter 10 below). In one case, *R v. Williams* 1914 1 KB 608 it was expressly stated that the conduct of an applicant (for certiorari) can preclude him from relief, whether the decision is void or voidable.

A large number of modern cases on the other hand suggest that bias can be regarded as a jurisdictional defect (21). In addition to the express dicta, the need to show bias by extrinsic evidence, coupled with the rule that except for patent error of law the Courts power to review decisions of inferior bodies must be founded upon jurisdiction (22) suggests that both rules of natural justice are but regarded as jurisdictional. The alternative is to regard natural justice as *sui generis*, not governed by the face of the record rule, but nevertheless not constituting a jurisdictional defect. It is suggested that this solution is unnecessary.

There are a number of express dicta to the effect that bias produces nullity. The Court of Appeal and a majority of the House of Lords accepted this in *Anisimic v. Foreign Compensation Commission* 1969 2 A.C. 147 and in *ex parte Perry* 1956 1 QB 229 at 227. Goddard C.J. said "If certiorari is moved because of the bias of a justice, the theory that lies behind that is that the justice has no jurisdiction".

In *Cooper v. Wilson* [1937] 2 QB 309 the issue was directly relevant. The plaintiff had been dismissed from the Liverpool Police Force by the Chief Constable, and his appeal against this decision was rejected by the Watch Committee. He then sought a declaration that the decision of the Watch Committee was invalid, inter alia for bias. The respondents argued that the applicants proper course was to exercise his statutory right of appeal to the Home Secretary. In rejecting this the Court of Appeal based its reasoning upon the nullity of the decision. Greer L.J. said (at 321) "It would be idle for a plaintiff who is alleging that he has never been dismissed to appeal to the Secretary of State." He also regarded a declaration that the offending decision was null and void, as an appropriate remedy. Scott L.J. also made it clear that he regarded the decision as a nullity. However there was an alternative basis for the decision in that the Court was of the opinion that the applicant had effectively resigned before the purported dismissal, which was for that reason a nullity.

Thus the modern decisions are indecisive. One reason for this is that the majority of bias cases consist of certiorari applications to quash decisions of licencing justices and other judicial tribunals. In these cases the distinction between void and voidable is immaterial, certiorari lying in both cases. However in *Metropolitan Property Co. v. Lannon*, (above) the Divisional Court doubted whether an appeal under Section 9 of the Tribunal and Inquiries Act 1958, was appropriate to challenge a biased decision of a rent tribunal. Certiorari was regarded as the appropriate remedy. This is only explicable upon the basis that the defect was jurisdictional and that no appeal can be from a nullity (23). Where the point has arisen discussion is perfunctory. In *R v. Rand* [1866] 1 QB 230, Blackburn J. (at 233) considered that pecuniary bias would make a justices' certificate a nullity, but that this may not be so in the case of other types of

bias. Apart from the extent of interest required to disqualify there is no reason to distinguish between the various kinds of bias.

Cases involving dismissal from trade or professional organisations are more significant. In *Taylor v. National Union of Seaman* [1967] 1 WLR 532, the plaintiff was dismissed from his post as a Union Official in breach of both the bias and the *audi alteram partem* rule. His dismissal was, without distinguishing between the two aspects of natural justice treated as a nullity. Nevertheless the Court refused, perhaps as a matter of discretion to issue the declaration asked for, since this would amount to specific performance of a master and servant contract, and would since the plaintiff had obtained other employment be somewhat unreal. Similarly in *Allinson V.G.M.C.* 1894 1 QB 750 where the plaintiff sought an injunction to prevent his name being removed from the medical register pursuant to a decision of a disciplinary tribunal, Lord Esher M.R. said that participation in the decision by a biased person would render the decision "wholly void". It is submitted that the approach of Lopes L.J. is correct in that he regarded that the matter as one of capacity. This is consistent with Diplock L.J.'s view in *Anisminic* (above) and makes it clear that bias naturally falls within the *ultra vires* principle.

It may be possible to reconcile these conflicting groups of cases upon the basis of Blackburn J.'s dictum (above) in *R. v. Rand*, by distinguishing between pecuniary and other types of bias, or between purely technical disqualifications and situations where there is a "real likelihood of bias" (24) the latter category of defects being a serious abuse of power and therefore jurisdictional. There is little to be gained from such a distinction, and it is therefore submitted that there is sufficient authority to support the proposition that a biased decision is a nullity. This is a conceptually satisfactory solution, since both rules of natural justice are treated as generally analogous to heads of *ultra vires* rather than to patent error. Moreover the policy of the law is better served by this analysis with its emphasis upon the serious nature of a breach of natural justice.

Audi Alteram Partem

The principle authorities on the question of failure to hear support the proposition that this defect produces nullity (25). As in the case of bias there is no reason in principle why this should not be so. Nevertheless there is some authority that, in order to meet some of the difficulties arising from a failure to hear, breach of this rule produces a voidable decision only (26). As in the case of bias express statements are infrequent, but unlike bias cases, a large number of decisions exist which are explicable only upon the assumption that a decision in breach of the audi alteram partem rule is void.

Ridge v. Baldwin [1963] 2 ALLER 66 is the leading case. The House of Lords held by a majority (Lord Devlin and Lord Evershed dissenting on this point) that the dismissal under statutory provisions of a Police Chief Constable without a hearing was a nullity, so that his exercise of a statutory right of appeal to the Home Secretary was also void, and could not amount to a waiver of his right to challenge the decision in the Courts, even though under the relevant legislation the decision of the Home Secretary was made "final".

Lord Hodgeson said (at 116) "The decision taken by the Watch Committee was at all times a nullity, and nothing that was done thereafter by way of appeal could give it validity In all the cases where the courts have held that the principles of natural justice have been flouted I can find none where the language does not indicate that the decision impugned was void".

Lord Evershed thought the decision was voidable, but cited no authority in support. He thought that this analysis was necessary in order to preserve the discretion of the court to refuse relief where no injustice has been done. This conflicts with the generally accepted opinion that breach of natural justice is wrongful per se, whether or not any additional harm or injustice results (27). Moreover the question of relief depends upon the rules governing the remedy which is sought. Even though a decision is a nullity the Court, if a remedy is discretionary may refuse to issue it (28). The two issues are logically separate. Lord Evershed was also of the

opinion that certiorari cannot lie to quash a void decision (at P.89). This issue will be discussed below (see Chapter 10). If this is correct, however, it would seem that few jurisdictional defects would be, in Lord Evershed's sense, capable of producing nullity, since certiorari is well established as a means of exposing jurisdictional defects (29).

The opinion of the majority, has been generally followed (30). But in *Durrayapah v. Fernando* [1967] 2 A.C. 337 which is the only subsequent decision of the highest tribunal, where the point has arisen, Lord Evershed's view was preferred by the judicial committee of the Privy Council. A Municipal Council in Ceylon had been dissolved by a Ministerial order. The Council itself did not challenge the decision but the Mayor who had lost his office applied for certiorari upon the ground that the decision was in breach of natural justice. It was held that the dissolution was invalid but, that it was voidable only, and therefore could be set aside only by the person who was its direct object, in this case the Council, against whom however it could be regarded as void ab initio. The purpose of this analysis was clearly to prevent a third party from obtaining a remedy if the person primarily effected did not wish to challenge the decision. As Wade points out (31) this result could have been achieved by utilizing locus standi rules, or the discretionary nature of certiorari. Instead of this the Privy Council introduced three difficulties into this area of law. Firstly the decision clearly conflicts with *Ridge v. Baldwin*. The Judicial Committee construed the opinions on that case as forming a majority in favour of voidability. Lord Morris' speech was relied upon to produce this, since certain passages can be construed as signifying that a decision in breach of natural justice was voidable. However his Lordship merely pointed out that the terms void and voidable must in this context be used with care, since even a nullity must at some stage be declared such by a Court, otherwise the decision, being enforceable by the executive will be de facto effective (see Chapter 1 above). This is a truism applicable to all defects. Nevertheless the Privy Council, giving a narrower meaning to Lord Morris's words distinguished between decisions that were void and others only voidable, placing those in breach of

natural justice in the latter category.

Secondly, it is not clear that, even if a decision is voidable, only the person against whom it is made can challenge it, and thirdly their Lordships statement that a voidable decision is void ab initio as against that person is tantamount to giving the quashing of a voidable decision retrospective effect. These issues will be discussed below (Chapters 10 and 11).

By relying upon Lord Morris' truism the Privy Council have obscured the main purpose of the distinction between void and voidable, is that, when challenged in the Court, a void decision should be treated as far as possible as if no legal consequences can flow from it, whereas a voidable decision can be given a limited amount of legal efficiency.

Durrayapah v. Fernando has been criticised, and in New Zealand, expressly treated as erroneous (32). The House of Lords in Anisminic (above) stated, obiter, that breach of the audi alteram partem rule results in nullity, and this is supported by the authorities before Ridge v. Baldwin. The frequently quoted dictum of the Earl of Selbourne in Spackman v. Plumstead Board of Works (10 App. Cas. 229 at 240) that "there would be no decision within the meaning of the statute, if there were anything of that sort contrary to the essence of justice" has been reflected in the decisions. Thus in Smith v. R (1878) 3 App. Cas. 614 the forfeiture by the Crown of a Colonial lease was held to be a nullity that could be collaterally impeached because, in the absence of a hearing the Crown had no duty to act. In several cases actions of trespass have succeeded concerning the enforcement of local authority decisions taken without a hearing (33). Although no express statements were made, the absence of any formal quashing of the orders concerned shows that these decisions can only be explained upon the basis of nullity.

Similarly in Capel v. Child (1850) 16 QB 162, Bonaker v. Evans (1850) 16 QB 162 and Osgood v. Nelson (1872) LR 5 H.L. 636, actions for money had and received were regarded as appropriate remedies for loss of office without hearing.

The concept of nullity was applied in an extreme manner in Wood v. Wood (1874) LR 9 Exch 190. The plaintiff was expelled from a mutual insurance society without a hearing and brought an action for damages against the committee. It was held that the decision was a nullity, and as such it could have no effect upon his legal position. Therefore still being a member of the society he had suffered no loss "The act of expulsion was really of no effect at all" Per Kelly CB at 199.

Clearly the decision supports an inconvenient general principle and takes logic to an illogical extreme. It is submitted however that Wood v. Wood is authority merely for the proposition that an invalid decision does not constitute a cause of action in itself. This applies whether the decision is void, or voidable, with the possible exception of malicious decisions within jurisdiction. (See Chapter 9 below). Had the plaintiff actually been refused any benefits due to him as a member of the society he would have had a remedy in contract, under the normal rules governing collateral attack. Moreover an action for a declaration that the expulsion was void would, today, be an appropriate remedy.

Nevertheless it is possible to argue that the concept of nullity does not govern decisions involving contractual as opposed to statutory powers. A decision in breach of natural justice involves a breach of contract, whether void or voidable, assuming the existence of an express or implied (34) duty to hear. The reasoning in Wood v. Wood suggests that breach of contract occurs only if the decision is voidable. However the rules of contractual bodies, such as trade unions, are in fact analogous to legislation, being subject to judicial review in the interests of public policy, which is frequently exercised in terms of the Ultra Vires Doctrine. Lord Denning has remarked that trade union rules are akin to by-laws (35) and this analysis has been confirmed in the recent case of Edwards v. S.O.G.A.T. (1970) where the Court of Appeal held that the rules of natural justice are applicable to expulsion from a trade union despite their purported exclusion by contract. Lord Denning M.R.'s reasoning was based upon the existence of a right to livelihood and the ultra vires doctrine. Sachs L.J. however based his judgement upon the ordinary law of contract, regarding a term excluding natural justice as being void as a matter of public policy. If Lord Denning's view is correct, then the rules of natural

justice are binding, independently of contract, and thus it is meaningful to regard a decision in breach of them as a nullity, and ineffective to terminate the relationship.

Even where no status arises from membership, of a domestic body, it is still meaningful to treat a decision of expulsion in breach of natural justice as void, since any attempt to enforce it would then constitute repudiation, which terminates the relationship only if accepted by the other party. If the decision were not void, the relationship would be terminated, but an action in damages would lie for breach of contract. It is doubtful whether natural justice is applicable to decisions other than those involving expulsion (36), but if decisions imposing other serious penalties are subject to these rules, it is submitted that the decision itself being void, any attempt to enforce it would constitute breach of contract. This is consistent with *Wood v. Woad* above.

Only in the case of the ordinary master and servant relationship does the concept of nullity seem inapplicable. However it is doubtful whether natural justice is applicable in this context (37) in the absence of a status relationship arising out of statutory protection of the employment. If natural justice is applicable, violation of the rule can at most constitute breach of contract, since repudiation per se, terminates the relationship, the Courts being unwilling to order re-instatement (38). Possibly the position of the private employee might be open to reconsideration in the light of recent developments in the related area of Trade Union decisions and also in situations involving expulsion from Universities. The notion of status appears no longer to depend upon procedural protection.

It is submitted that breach of both rules of Natural Justice results in nullity. Both are restrictions upon decision making power imposed by the Courts. Neither can be classified as mere "mistakes" within jurisdiction. Both can be established without the limitation of the face of the record rule. The decisions generally support this proposition. Arguments in favour of voidability proceed upon the basis that this is necessary to preserve judicial discretion as to the issue of remedies. This will be discussed below (see Chapter 10).

Decisions already mentioned show that the Courts are prepared to treat questions of remedy and discretion as divorced from the question of nullity.

NOTES

- (1) Akehurst 31 MLR 2
De Smith op cit 223-227 259-261
Rubinstein op cit 202-203 221-222
- (2) See Millward (1961) 39 Can Bar Rev 351 Akehurst 31 MLR 2
- (3) See Garner Administrative Law (3rd Ed.)
- (4) R v. Nat Bell Liquors [1922] A.C. 128
R v. Northumberland Compensation Appeal Tribunal [1952] 1 KB 338
Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147
- (5) Wade Administrative Law (2nd Ed.) 154
- (6) Diplock L.J. in Anisminic v. Foreign Compensation Commission
[1967] 2 ALLER
- (7) See Dimes v. Grand Junction Canal (1852) 3 HLC 759 and
(1926) 42 LQR 521 Brookes v. Earl Rivers 1668 Hard 503
Company of Mercers of Chester v. Bowker (1726) 1 Stra 639
- (8) Per Goddard C.J. in ex p. Shaw 1951 1 KB 711 at 715
Rubinstein op cit 53 De Smith op cit P.376
- (9) Common Law Procedure Act 1852
and see 1907 7 Edw VII C23 520
- (10) Bonhams Case (1610) 8 Co Rep 113 (6)
Day v. Savadge 1614 Hob 85
- (11) Baggs Case (1615) 11 Co Rep 936
- (12) Holdsworth H.E.L. Vol.1. 214
Henderson op cit 144-145
- (13) Parish of Ruislip v. Parish of Hendon (1698) 5 Mod 417
R v. Devenan J.J. (1819) 1 Chit 34
- (14) The rule appears to have been that the record could not be
contradicted to establish error of fact (R v. Carlisle (1831)
2B Ad 362)
- (15) Loc cit 525
- (16) See 72 LQR 40-41
- (17) Dimes v. Grand Junction Canal (1852) 3 HLC 759
Wildes v. Russel (1866) LR 1 CP 722
Phillips v. Eyre (1870) LR 6 QB 1 at 22
R v. Commissioners of Sewers for Essex (1885) 14 QBD 561
R v. Galway J.J. 1906 2 IR 499
R v. Simpson 1914 1KB 66

- (18) See Wade (1967) 84 LQR 107
- (19) Rubinstein Op cit 12
London Corporation v. Cox (1867) LR 2 HL 239 at 262
- (20) Wakefield Local Board v. West Riding & Grimsby Ry Co.
(1865) LR 1 QB 85
R v. Cheltenham Commissioners [1841] 1 QB 467 at 475
and see cases cited by Gordon 47 LQR 572 note 26
- (21) R v. Rand LR 1 QB 230
Allinson v. G.M.C. [1894] L QB 750
Leeson v. G.M.C. [1889] 43 Ch, at 373, 378, 383
R v. Paddington Rent Tribunal. [1947] 1 ALLER 448
R v. Paddington Rent Tribunal [1956] 1 QB 229
Cooper v. Wilson [1937] 2 KB 309
Oscroft v. Benabo [1967] 1 WLR 1087 at 1100
Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147
- (22) R v. Nat Bell Liquors (above)
R v. Industrial Injuries Commissioner [1966] 2 WLR 97
R v. Northumberland Compensation Appeal Tribunal [1952] 1KB 338
R v. Paddington Rent Tribunal [1956] 1 QB at 237
- (23) See Leary v. Vehicle Maintenance Union [1970] 2 ALLER 713
Lever v. Westminster Borough Council [1970] 3 WLR 732
- (24) See R v. Barnsley J.J. [1960] 2 QB 167
- (25) Ridge v. Baldwin [1964] A.C. 40
Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147
G.M.C. v. Spackman [1943] A.C. 644, 645
- (26) Durrayapah v. Fernando (above)
and see Lord Evershed's dissenting speech in Ridge v. Baldwin.
(above)
- (27) Kanda v. Government of Malaya [1962] A.C. 322 at 337
Annamunthodo v. Oilfield Workers Trade Union [1961] A.C. 945
at 956
But see Maradana Mosque Trustees v. Mahmud [1967] 1 A.C. 13 at
24-25.
- (28) Taylor v. National Union of Seamen [1967] 1 WLR 532
R v. University of Aston [1969] 2 ALLER 964
- (29) R v. Electricity Commissioners [1924] 1 KB 171
- (30) See Royal Government of Greece v. Governor of Brixton Prison,
[1969] 3 ALLER 1337

- (31) 83 LQR 502-507
- (32) See Denton v. Auckland City [1969] NZ LR 256-268
- (33) Painter v. Liverpool Gas Co. (1836) 3 Ad & E 433
Mason v. Barker (1843) 1 CAR & K 100
Cooper v. Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180
Hopkins v. Smethwick Board of Health (1890) 24 QBD 713
- (34) Russell v. Duke of Norfolk [1949] 1 ALLER 109
- (35) Bonsor v. Musicians Union [1954] 1 Ch at 511
Contra see Faramus v. Film Artistes Association [1964] A.C. 925
- (36) See Breen v. Amalgamated Engineering Union [1970] 2 ALLER 179
- (37) See Lord Reid in Ridge v. Baldwin [1964] A.C. at 65-68
De Smith Op cit 216
- (38) See Taylor v. National Union of Seamen [1967] 1 WLR 532

CHAPTER 6. ABUSE OF JURISDICTION

It is not clear whether abuse of jurisdiction results in nullity. Most authorities would regard it as a vitiating defect, but there is little agreement as to its classification, and indeed as to what defects can be subsumed under this head.

Many commentators subdivide the ultra vires principles into lack of jurisdiction and abuse of jurisdiction (1) and there is House of Lords authority for distinguishing between jurisdictional defects in the narrow sense of incapacity to commence the proceedings, and in the wider sense, embracing defects of motive or reasoning, fraud, improper purposes, taking into account irrelevant considerations or failing to take into account relevant considerations (2). There has, however, been little examination of the purpose (if any exist apart from convenience of classification) of this distinction and the authorities are inconsistent as to the terminology used to describe the kind of defect involved.

Some authorities, particularly in local Government cases treat the issue as one of reasonableness (3). Lord Reid in *Kingsbridge Investments v Kent C.C.* 1970 1 ALL.ER 70 in discussing the effect of a Local Authority planning condition said that, to be valid a condition must not be ultra vires and must not be unreasonable. In *Roberts v Hopwood* 1925 A.C. 578 Lord Wrenbury said (at 613) "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds."

However unreasonableness is probably insufficient as a justification of the Courts intervention (4). Other authorities list specific grounds upon which review can be based. De Smith distinguishes acting for an improper purpose, which includes fraud, taking irrelevant factors into consideration or failing to take relevant factors into consideration, and unreasonableness. These grounds for review apply to administrative (5), judicial (6), and legislative (7) powers, although in the latter case unreasonableness has been confined to Local Authority byelaws as opposed to ministerial regulations. Garner uses the general term "bad faith" to cover these categories, but it is submitted, that unless this ground for review is restricted to wide discretionary powers, the machiavalian undertones in the term are inappropriate to describe situations such as that in *Anisminic* where a genuine mis- construction of a technical term resulted in a decision becoming ultra

vires on the grounds that the Commissions error has resulted in a decision based upon irrelevant considerations. Bad faith should be confined to actual fraud or dishonesty as suggested by Lord Greene in *Point of Ayr Collieries v Lloyd George* 1943 2KB at 547.

These various categories overlap. Fraud is one kind of improper purpose. Improper purpose in turn can be treated as one kind of irrelevant consideration although there may be a difference of degree between the two categories. It is not clear that, despite the dictum of Lord Greene in the *Wednesbury Case* that unreasonableness is a ground for review in its own right. In the leading decisions on unreasonableness the test the Courts used was, in fact based upon the relevance to the statutory policy of the factors taken into account by the authority. Thus in *Roberts v Hopwood* the wage award was "unreasonable" because the authority had based its calculation upon social welfare considerations, a factor regarded by the House of Lords in 1925 as irrelevant (8). In *Hall v Shoreham* 1964 1 WLR 240 the Court of Appeal applying a test of unreasonableness and one of irrelevancy held a planning condition void, as imposed partly for the unauthorised purpose of avoiding the payment of compensation. Similarly in *Padfield v Minister of Agriculture*, 1968 A.C. regarded by Wade as an assertion of the power of the Court to interfere with unreasonable executive action, the defect actually involved was the admission by the Minister of political policy considerations in dealing with statutory provisions concerning the interests of the milk producing community. It is difficult in practice to visualise a decision that is sufficiently unreasonable to warrant interference and at the same time impeccable in respect of the relevancy of its reasoning. Lord Read appeared to recognise this in *Westminster Bank v Beverley* 1970 2 W L R 645 when he said "Unreasonableness is not an apt description of action in excess of power, and it is not a very satisfactory description of action in abuse of power". In that case the House of Lords held that a Ministerial decision confirming the refusal of planning permission by a Local Authority was not unreasonable and an abuse of power because the factors taken into account, in particular the financial burden upon the ratepayers were (per Viscount Dilhorne at 647) "a material consideration". (9)

It is submitted that unreasonableness is not an independent head of ultra vires but is important rather to determine whether one of the more specific heads of abuse of power should vitiate a decision. Improper purposes, irrelevant considerations do not vitiate per se, but only if they materially affect the decision, (10) if the decision cannot reasonable be justified in the light of legitimate considerations or purposes. In Walkers decision 1944 KB 664 the same irrelevant consideration was taken into account as in Roberts v. Hopwood, but nevertheless the wage award was held valid on the grounds that, despite the irrelevancy the sum fixed was reasonable.

Megaw J's dictum in Hanks v. Minister of Housing and Local Government 1963 1 QB provides the most useful approach to the classification of abuse of power. In criticising the multiplicity of workds used to describe the categories of abuse of power he regarded the essential criterion as the relevance to the statutory purposes of the considerations taken into account in reaching the decision. Improper purposes, fraud, unreasonableness are all aspects of the overall requirement of relevance. There is one possible qualification of this. Despite some inconsistencies in the authorities (11) it is reasonably clear than an improper purpose will only vitiate if it is the main or dominant purpose of the decision (12) although in Webb v. Minister of Housing and Local Government (above) the Court of Appeal squashed a compulsory purchase order vitiated by the inclusion of more land than was required for the authorised purpose. The improper purpose was substantial but could not be described as dominant.

A subsidiary purpose even though not authorised will not vitiate (13). This test has not been used in irrelevant consideration cases where the inclusion of any material irrelevancy justifies review. Thus if an improper purpose not being dominant fails to satisfy the test, the defect, if it affects the decision in any way could be reviewable under the head of irrelevant considerations. The converse is not the case. An irrelevant consideration could not be reviewable as an improper purpose unless dominant. Thus irrelevant considerations is a wider category than improper purposes and therefore unless the effect of classifying a defect as improper differs from that in the case of irrelevant considerations there appears to be no need for improper purposes as a separate category. However it will be suggested that the line between voidness and voidibility lies between improper purposes and irrelevant considerations, and that improper purposes is

a jurisdictional defect whereas an irrelevant consideration is error within jurisdiction. Therefore in discussing the authorities abuse of power will be subdivided into Improper Purposes, Fraud and irrelevant considerations.

The authorities on the question whether abuse of power goes to jurisdiction and produces nullity are inconsistent, partly because of the influence of the narrow, and it has been suggested, fallacious commencement of inquiry test and partly because the implications of the overlapping of the various categories have been insufficiently explored.

There is strong authority that improper purposes produces nullity. There is also authority suggesting that "irrelevant considerations" produce nullity. Here the cases are not consistent, and the law is seriously confused by a large body of cases which treat taking irrelevant factors into consideration as error of law, reviewable only if on the face of the record (14). Similarly decisions based on insufficient evidence have been held erroneous in law (15) although this kind of defect is closely connected with, if not synonymous with failing to take relevant considerations into account.

As regards improper purposes, it was said in *Short v. Poole Corporation* 1926 CH 60 at 88 that "if an attempt is made to exercise powers corruptly, for some improper purpose, such an attempt must fail. It is null and void". The decision of *Webb v. Minister of Housing*, (discussed above) where, a coast protection scheme involving the exercise of compulsory powers for purposes not within the governing legislation, was collaterally impeached by means of a challenge to a compulsory purchase order to which the scheme was a condition precedent can only be explained on the assumption that, subject to express statutory provisions, the scheme was a nullity.

Similarly in *R v. Paddington and St. Marylebone Rent Tribunal* 1949 1 ALLER 720 a Local Authority had, for policy reasons, referred entire blocks of flats to a rent tribunal instead of dealing with individual contracts, as envisaged by the governing legislation. As a result it was held that the reference was a nullity since the unauthorised purpose constituted a failure to exercise their powers under the Act. There being no reference upon which to base the tribunal's jurisdiction, the rent assessment was a nullity. This would not have been the same had the decision been voidable only.

Other authorities indirectly utilise the nullity principle in improper purposes cases by permitting such decisions to be collaterally impeached by means of an action in tort where public authorities justify the infringement of private rights by reliance upon statutory powers which they have exercised for the wrong purpose (16). Decisions involving challenge under statutory procedures providing for review upon the ground that the decision concerned is "not within the powers of the act", treat improper purposes as a head of ultra vires under this provision (17).

The only important authority to the contrary is the majority view of the House of Lords in *Smith v. East Elloe R.D.C.* 1956 A.C. 736 where the validity of a compulsory purchase order made by the Local Authority as the result of the fraud of the clerk was in question. A privative clause allowing review on limited grounds including ultra vires governed the decision, preventing challenge after the expiry of six weeks. A majority held that this clause was effective to prevent all challenge after that period, (this point will be considered below) and a different majority thought that even within the time limit "bad faith" could not be reviewed, since this did not involve the decision being "outside the powers of this act".

Lord Reid (at 762) distinguished misuse of power, both bona fide, and mala fide, from ultra vires "the order is intra vires in the sense that what it authorises to be done is within the scope of the act under which it is made".

Lord Radcliffe (at 769) emphasises that an order made in bad faith is not a nullity and "is an act capable of legal consequences. It bears no brand of invalidity upon its forehead, and until it is squashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders".

This suggests that the House of Lords were utilizing a narrow concept of jurisdictional error, but if so, it is difficult to understand the basis upon which review would have been possible had the privative clause not been operative, since the fraud did not appear on the record even if the particular order could have been treated as "judicial" for certiorari purposes.

Smith v. East Elloe was criticised by the House of Lords in the *Anisminic* case (above) (18), and the decision is readily distinguishable since the fraud involved was not that of the Council itself but of its clerk who procured the compulsory purchase order. Thus vis a vis the Council the decision in question was not defective for

fraud, or improper purposes, but at most for taking, unwittingly an irrelevant factor into account.

It is suggested therefore that a decision based upon improper purposes is a nullity.

FRAUD

Two distinct situations must be considered; firstly where the deciding body itself reaches a fraudulent decision. If improper purposes nullifies then a fortiori the same is true in the case of fraud which is a particular kind of improper purpose with the additional element that the purpose is known to be improper by the deciding body. Lord Morton in *Smith v. East Elloe* (above) refused to distinguish 'improper motives bona fide from those mala fide,' regarding each as capable of being jurisdictional.

The second situation is where the fraud is committed by a third party as in *Lazarus Estates v. Beasley* 1956 1 All ER 341, where a Tribunal awarded a rent increase as a result of a fraudulent declaration by the landlord. Here there are dicta that fraud nullifies. In that case, Denning L.J. said 'if the declaration is proved to be false or fraudulent it is a nullity and void, and in *Harrison v. Southampton Corporation* (1853) 4 D C M2 G 137 a decision of an Ecclesiastical Court which had been obtained by fraud was treated as a nullity after a lapse of fifty years. However, the doctrine of the bona fide purchaser appears to protect a person acquiring as third party upon a judgement in rem which is obtained by fraud (19). This would not apply where third party title through a void contract is in question.

It is submitted that fraud in this situation does not necessarily nullify. If the deciding body is not a party, the fraud operates, as in *Smith v. East Elloe* as an irrelevant factor which it has unwittingly taken into account. The same consequence as in other irrelevant considerations cases should therefore apply. One situation might be distinguished; that where a fraudulent declaration or statement is made, which is necessary to found further proceedings such as application to a Rent Tribunal. Here the ultimate decision will be void, as in *Lazarus Estates v. Beasley*, and *R v. Paddington Rent Tribunal* (above) the fraud making the Landlords declaration void, which resulted in the Tribunal having no jurisdiction to proceed, for failure of an essential

condition precedent. Thus the decision is void, not for fraud but for procedural ultra vires.

Fraud will therefore be regarded, not as a ground of invalidity in its own right but as a quality which brings the exercise of a power within the ambit of one of the other recognised categories of invalidity.

Irrelevant considerations

There is, in principle, no reason why a decision based upon irrelevant factors should not be ultra vires and void. Power can be limited by a sphere of relevance as well as by subject matter. Gordon's objection to this stems from his insistence that jurisdiction is a matter of capacity to proceed, determined at the commencement of the proceedings, and that, it is illogical to maintain that jurisdiction can, once established, be lost.

These difficulties are avoided if, as argued above, the operative moment to determine the question of proceedings is regarded as being the conclusion, not the commencement, of the decision making process. It is only then that all the conditions for an enforceable decision are present. An order which the tribunal is not empowered to make can no more be enforceable than a decision affecting the wrong subject matter. Jurisdiction means only power to make a statement or perform an act which will be legally binding and enforceable by the executive (20), and if any requirement of jurisdiction is absent, at the time the decision should become enforceable the decision is void.

In *Anisminic Ltd., v. Foreign Compensation Commission* [1969] 2 A.C. 147 a majority of the House of Lords considered that failure to consider relevant matters or the consideration of irrelevant matters was a jurisdictional defect, which produced a nullity 'that was no decision at all' and could not be protected by a privative clause (21). The Commission was obliged to certify an applicant as entitled to share in the compensation fund if a specified number of conditions were satisfied, the relevant one being that the owner of the land concerned and any person who became successor in title to the owner should be a British National upon a certain date. As a result of what their Lordships regarded as a misconstruction of the term 'successor in title', the Commission held that the applicant was not entitled to

participate in the fund since its interest in the property concerned had been assigned to an Egyptian Company which was treated as successor in title. It was held that, upon a true construction of the legislation, a successor in title could not include a person existing contemporaneously with the original owner, and so, ex hypothesi the nationality of a successor in title was not relevant when the original owner was the applicant. Thus, in requiring the nationality of the Egyptian assignee to be established the Commission had taken an extra, unauthorised, factor into consideration.

Similarly in *R. v. St. Pancras Vestry* (1890) 24 QBD 371 failure to consider relevant matters and consideration of improper matters was equated with refusal to exercise jurisdiction and mandamus lay upon the assumption that no operative decision had been made (22) and in *R v. Weymouth Licencing J. J. ex p. Sleep* [1942] L KB 465 at 472, 480 where an application for a licence was refused on irrelevant grounds, the availability of mandamus was based upon excess of jurisdiction. Finally *Estate and Trust Agencies Ltd. v. Singapore Improvement Trust* [1937] A.C. 898 constitutes Privy Council authority, that a decision based upon irrelevant factors is void. A housing authority used an unacceptable test in deciding that a home was unfit for human habitation and the Judicial Committee held that their statutory declaration, being in excess of jurisdiction, was unenforceable (at 917).

However, other decisions are equivocal. In two groups of cases, while no express consideration was given to the point it appears that the Court was not prepared to treat the offending decision as void. Firstly in a number of certiorari cases the remedy has issued, but without making the cases of review clear whether the order was issuing for excess of jurisdiction or ^per tinent error (23). The dual role of certiorari has caused considerable confusion in this area. In two cases the irrelevant factors were required to appear on the record before the Court would interfere by certiorari (24), and in one of them, *ex p. Kendal Hotels* the Divisional Court refused to set aside a decision of a rent tribunal which had omitted to take certain factors into account regarding the decision as within jurisdiction (25).

In the second group of cases despite dicta that a failure to take

relevant factors into account in reaching a decision is not a genuine exercise of the statutory discretion certiorari has issued to quash the decision in conjunction with mandamus (26). This suggests that the decision was not regarded as a nullity. Mandamus issued unsupported by certiorari in *R v. Flint County Council licencing Committee* (above) where a licence was refused in reliance upon a general policy irrelevant to the statutory purposes, but there no change in legal relations had been affected owing to the nature of the subject matter. Thus there was no necessity to quash, before ordering the committee, by mandamus to reconsider (27).

In a number of decisions, it has been held that planning conditions based upon considerations not relevant to the policy of the governing legislation were void (28). In *Hall v. Shoreham* the whole planning permission was held by the Court of Appeal to be a nullity and therefore the plaintiff was in the position of a developer without permission despite his contention that the permission should take effect free of the condition which would be disregarded as a nullity. It was held that the condition was not severable. The issue of severance and its relationship with nullity also arose in *Kent County Council v. Kingsway Investments* where the condition concerned provided for the automatic lapse of the applicants permission unless details were approved within a three year period. The details were not approved and thirteen years later the applicant sought a declaration that, the condition was void, and that therefore his permission still existed. Nullity was crucial to this contention, since had the condition been voidable, it would unless quashed within three years have taken effect and destroyed the permission. The Court of Appeal and the House of Lords agreed that the invalidity of the condition for unreasonableness based upon its relevance to planning policy would make it void.

The House of Lords however, held by a majority that the condition was not invalid at all, and therefore that the permission itself had lapsed. The same conclusion was reached by their Lordships upon the alternative ground that the condition although void was no severable and therefore its nullity affected the permission itself and made that void. It appears from this decision (29) that only trivial and peripheral conditions are capable of severance (30), and that if

the condition is fundamental, essential, or 'part of the structure' of the permission (31), the whole permission stands or falls with it. This somewhat circular criterion, put into more precise language by Lord Reid (at 75, 77) when he distinguished between conditions which affect the manner of development, and those which do not concern user of the land itself, reveals the drastic consequences of regarding abuse of discretion as producing nullity. In most cases the whole of a permission would have to be treated as non existant. Lord Denning L.J. and Davies L.J. in the Court of Appeal recognised this. "Many houses in Kent would have been built without valid permission, and would be in danger of having enforcement notices served on them" (32). If severence was allowed "many permissions thought to have expired, and become dead will be resuscitated and so cause chaos in the defendents planning policy".

These remarks reveal the dangers in the nullity concept, since there is no power in the Court to alter, amend, or substitute defective conditions even though the vitiating factors may vary through all the degrees of importance. It is suggested that the Court could retain some freedom of manoeuvre if the condition were to be treated as voidable at the option of the Court. A power to remit an unsatisfactory condition or permission to the Minister or Planning Authority for amendment would it is suggested, be a welcome innovation in this area of administrative law.

The authorities, albeit with a substantial inconsistency appear to regard irrelevant considerations as jurisdictional and producing nullity. However the planning cases discussed above are equally capable of classification under the head of improper purposes. The defective conditions were described in terms of unreasonableness, and lack of relevance to planning policy and in each case the authority had imposed a condition to further some non-planning purpose. In *Hall v. Shoreham* (above) the defendents purpose in requiring the plaintiff to build a public road on their land as a condition to a grant of planning permission was to avoid the payment of compensation, which would have been necessary had they acted, under the more appropriate highways legislation. The condition was held void because it was fundamental to the grant (1964 1 ALLER 1 at 10, 14, 18.) Similarly in *Mixnams Properties v. Chertsey U.D.C.* 1963 2 ALLER 767 a condition imposed on a caravan site licence, amounted to an attempt to impose a system of caravan rent control without statutory authority.

It is suggested however that irrelevant considerations should not be regarded as producing nullity. A fundamental difficulty appears if the governing Anisminic case is applied liberally, since categorising irrelevancies as jurisdictional defects tends to obliterate the distinction between ultra vires, and error within jurisdiction, and therefore that between appeal and review. Before Anisminic it was established that error of law was a ground for review only if apparent on the record (33). Although the appropriate, and probably the only remedy (34) was certiorari and therefore the point is seldom material it is also reasonably clear that this defect does not produce nullity (35). Error of Law in a wide sense of course can include all defects whether jurisdictional or otherwise, but the narrower class of errors includes only defects which would not be reviewable were it not for the 'face of the record' rule recognised as applicable to administrative Tribunals in the Northumberland case. For the purpose of this rule the taking of irrelevant factors into consideration (36) or the failure to consider relevant factors (37) of lack of evidence to support a decision (38) have been regarded as error within jurisdiction only. Thus in the Northumberland case, the failure of the Tribunal to consider a relevant period of service, for redundancy compensation purposes was not regarded as capable of being a jurisdictional defect, since this would have made most of the reasoning concerning the face of the record rule, unnecessary. Similarly in Taylor v. National Assistance Board the Board had treated alimony pending suit as part of the applicants income for legal aid purposes. The Court of Appeal, and the House of Lords treated the alleged error as one of Law (See 112) although the remedy sought was a declaration, which as will be shown below is probably appropriate only to jurisdictional defects. In Anisminic however, the consideration of an additional factor, the nationality of a person whom the Commission erroneously treated as a successor in title was held by a majority of the House of Lords to produce a nullity as a jurisdictional defect. It is difficult to detect any analytical distinction between this case and the cases discussed above. In

Anisminic in determining whether the applicant was entitled to compensation the commission required an unauthorised fact to be established. In the Northumberland case, also concerning a claim for compensation the tribunal failed to establish the required number of facts, and in Taylor the tribunal was alleged to have calculated the amount of legal aid by reference to an irrelevant source of income. Indeed every error of law, except trivial mistakes involving procedure, constitutes the introduction of irrelevant material, either in itself, or in its result where a wrong definition of a technical term is applied to the situation before the Tribunal, the application of the erroneous definition being an irrelevant factor. This allows the reviewing court, following Anisminic to exercise considerable freedom of manoeuvre, to determine whether to treat a given defect as error of law or excess of jurisdiction. Its choice will be exercised on the light of such factors as privative clauses, the disclosure of the defect in the record, and the remedy sought. Professor De Smith points out "The impression received (from Anisminic) is that almost any question of law decided by the commission is susceptible to review", (39) and in Baldwin v. Francis v. Patent Appeal Tribunal 1959 A.C. 663 Lord Denning recognised that taking irrelevant factors into account has a dual aspect. In dealing with a Patent decision vitiated by failure to consider relevant specifications he emphasised that the decision being voidable needed to be squashed by certiorari (at 694) but at the same time was prepared to regard the error of law as capable of amounting to excess of jurisdiction "Allowing that a tribunal which falls into an error of this particular kind does exceed its jurisdiction, nevertheless I am quite clear that it falls into error of law too".

Brown J. in Anisminic in his judgement at first instance (40) which was upheld by the House of Lords attempted to formulate a basis for separating the two categories "There is a distinction between a case where the inferior tribunal asks itself the right question and gives the wrong answer (Was this house fit for human habitation, what was the length of this man's service?) and a case where the inferior tribunal asks itself entirely the wrong question." Thus in Anisminic the commission formulated an extra question for itself to decide, viz the nationality of T.E.D.O., but in the Northumberland case, the question was correct, the length of service, but the matters relevant to the answer were misconstrued.

With respect this distinction appears to be purely verbal, or at most a formula representing a distinction based on degree of importance. The assignment of a defect to a category appears to depend upon what are treated as 'questions' to be answered by the Tribunal. Unless the draftsman expressly lists the matters to be determined, as was the case in *Anisminic* the Court is free to regard any matter to be established as a relevant 'question'. Thus in *Davies v. Price* 1958 1 ALL 67 a tribunal upholding a landlord's notice to quit under the Agricultural Holdings Act 1958 failed to consider the use to which the Landlord proposed to put the land. The Court of Appeal held that this was an error within jurisdiction based upon failure to consider relevant evidence but the decision was criticised by the House of Lords in *Anisminic* their Lordships regarding the tribunal as having considered a wrong question. The distinction between 'questions' and other material to be considered is also inapposite to apply to administrative discretions where a planning authority is empowered to attach 'such conditions as it thinks fit' to a grant of planning permission. Here, conditions based upon irrelevant factors are invalid, but it is meaningless to describe the various factors contributing towards the decision as 'questions', and to distinguish between these, and other irrelevances.

It is submitted that the classification of the type of defect in as jurisdictional should be restricted to the particular type of statutory scheme involved where the subject matter to be considered by the Commission was formally listed in the governing Order in Council. Thus the mistake, in treating a person as successor in title, who was not, in the view of the House of Lords, capable of being so treated, is closer to the collateral fact situation, (many so called collateral questions being really questions of law) than to irrelevant considerations. Thus the commission were dealing with the wrong subject matter, the existence of a successor in title being regarded by the majority as a condition precedent to jurisdiction. The wide dicta concerning irrelevant factors in the speeches of Lord Reid and Lord Pearce cannot, it is suggested, be reconciled with the decisions of the House of Lords in *Taylor's case*, *Baldwin and Francis*, and the *Northumberland case*.

The approach based upon jurisdictional subject matter has some support in the analogous situation where decisions have been made based upon lack of evidence or upon inadmissible evidence. The same inconsistency is apparent since it has been held that decisions defective in this way are not void for excess of jurisdiction, but merely erroneous in law (41). However, in *R. v. Marsham* 1892 1 QB.371 at 378 a distinction was made between refusal of evidence on the ground that it was not relevant to the subject matter before the Court, which was an error within jurisdiction, and refusal of evidence upon the ground that the subject matter concerned was not within the jurisdiction of the Court. This would constitute a jurisdictional defect. Thus if in *Anisminic* the Commission had made the converse mistake, i.e. decided erroneously that a particular person was not a successor in title, and therefore refused to consider evidence as to that person's nationality, its decision would not have been ultra vires for failing to consider the correct subject matter.

The rule in *R. v. Marsham* applies to formal bodies with jurisdiction to construe rules of evidence (42) but in principle there seems no reason why the same principle should not govern administrative discretions. In many of the decisions concerning discretions exercised upon irrelevant grounds, such as *Roberts v. Hopwood*, *Prescott v. Birmingham Corporation*, and *Padfield v. Minister of Agriculture* the point was immaterial, and in others which were held to result in nullity, the main purpose of the act in question was unauthorised.

Lord Morris, dissenting in *Anisminic* appeared to take this approach. His Lordship regarded the use of the phrase, 'asking the wrong question' as appropriate to describe the situation where a tribunal's jurisdiction is dependent upon the existence of a condition precedent or "related to some state of affairs" (193). This in *ex parte Hierowski* 1953 2QB 147 a rent tribunal was empowered to reconsider rent upon the grounds of change of circumstances. A decision made where no change of circumstances was alleged was void, not because relevant factors had been ignored, but because the situation upon which the jurisdiction depended had not been shown to exist. Had the tribunal erroneously decided that there was a change of circumstances, it is submitted that the decision would still be void, as this was a jurisdictional question.

It is suggested therefore that irrelevancy should not produce nullity, unless the irrelevant consideration is sufficiently important to bring the decision within the 'dominant purpose' principle. Only if the main purpose of the decision is improper, or where jurisdictional subject matter is involved, is the resulting act void. This preserves the distinction between appeal and review and prevents the consequences of nullity attaching to all misuses of discretion however trivial. Clearly the distinction between irrelevant considerations and improper purposes is a question of degree involving a value judgement based upon the relationship between the extraneous material and the final decision. This distinction would, however, meet the problem postulated by De Smith (at 306) where an authority, needing land for housing purposes makes a compulsory purchase order in respect of A's land, rather than B's or C's, because it dislikes A's political views. If the decision is grossly unreasonable because for example C's land is the most suitable for the purpose it can be inferred that the irrelevancy is fundamental, and therefore the decision will be a nullity, giving A a cause of action in tort. If on the other hand the purchase of each plot can be equally justified the Court will treat the situation as involving error re-dressable only by appeal, or certiorari and thus exercise a discretion whether to quash. Unless the bias rule was applicable in this situation the Court following Anisminic would probably have to treat the order as a nullity in both situations, the only alternative here being to regard the irrelevancy as completely immaterial, and therefore not to regard the decision as defective at all. The distinction between void and voidable in this context allows the Court flexibility of approach, and provides a sound conceptual basis for the issue of discretionary remedies.

One difficulty arises. If irrelevant considerations is treated as error within jurisdiction the Court's power to intervene will be limited by the face of the record rule, a concept inappropriate to administrative acts. However, there are some dicta that even latent defects are reviewable by means of the declaration (43) and that therefore the limitation to judicial acts, a part of certiorari law, is inapplicable.

It will be shown later than this is unlikely (44) and that certiorari is the only remedy appropriate to error of law. Even if this is so the ambit of certiorari has been extended in recent years to

include non-judicial functions (45) and certainly compulsory purchase orders (46) and grants of planning permission (47) have been treated as judicial for certain purposes. The notion of record is wide enough to include written reasons for a decision and perhaps extends to oral reasons (47) for a decision, particularly important in the light of the increasing number of situations involving a statutory duty to give reasons for a decision. Even where no such duty exists, if the decision is unreasonable in the light of available evidence this can constitute patent error (48).

Thus the face of the record rule is capable of covering the great majority of decisions in abuse of power, and the jurisdictional role should be limited to apply only to the more important of these, fraud and fundamentally improper purposes. This avoids the existing anomalies, and allows the reviewing Court greater flexibility in its treatment of unreasonable decisions.

NOTES

- (1) Griffiths and Street, 4th Ed. P.217
Yardley. A Source Book of English Administrative Law
2nd ed. P.93
De Smith, Op. Cit at P.301 et seq.
Akehurst 81 M.L.R. P.3 Note 7
- (2) Baldwin and Francis v. Patent Appeal Tribunal [1959] A.C. at 695
Anisminic v. Foreign Compensation Commission [1969] 2 A.C. at 171
- (3) Westminster Corporation v. L & North Western Railway [1905]
A.C. 426 at 430
Fawcett Properties v. Bucks C.C. [1961] A.C. 636
Hall v. Shoreham U.D.C. [1964] 1 WLR 240
- (4) See Lord Greenes dictum in Associated Provincial Picture Houses
v. Wednesbury Case [1948] 1 KB 223
- (5) Wednesbury Case (above)
- (6) Anisminic (above)
- (7) Maceldowney v. Forde [1969] 2 ALL.E.1039
- (8) See Friedman Legal Theory 5th Ed. 450
- (9) See also De Smith 330
Prescott v. Birmingham Corp. [1955] Ch. 210
Birmingham & Midland Omnibus Co. Ltd. v. Worcestershire C.C.
[1967] 1 WLR. 409 at 422.
- (10) See De Smith Op. Cit Page 330
- (11) Westminster Corporation v. L & North Western Railway (above)
Webb v. Minister of Housing 65 1 W.L.R. at 778.
- (12) R v. Brighton Corporation ex p. Shoosmith (1907) 9 6 LT 672
- (13) Sidney Municipal Council v. Campbell [1925] A.C. 338
- (14) R v. Northumberland Compensation Appeals Tribunal ex parte
Shaw and Baldwin and Francis v. Patent Appeal Tribunal (above)
- (15) R v. Governor of Brixton Prison ex parte Armah 1966 3 WLR 828
R v. Nat Bell Liquors [1922] 2 A.C. 128
- (16) Westminster Corporation v. L.N. Western Railway (above)
Birmingham & Midland Motor Omnibus Co. v. Worcester County
Council (above)
- (17) Moore v. Minister of Housing & Local Government [1966] 2 QB 602
London & Westcliffe Properties v. Minister of Housing & Local
Government [1961] 1 WLR 519

- (18) 1969 2 A.C. at 170, 181, 201
- (19) *Castrique v. Imrie* (1870) LR 4 H.L. 414 at 435
- (20) See Diplock L.J. in *Anisminic v. Foreign Compensation Commission*
[1967] 2 ALL
R v. Mahony 1910 21 R. 695 at 731 is consistent with this
approach
- (21) at 171, 198, 210
- (22) See R v. Flint C.C. Licencing Committee [1957] 1 QB 350
- (23) Ex parte Hierowski [1953] 2 ALL 4 at 627
Ex parte Davis [1953] 1 WLR 722
Ex parte Grant [1956] 1 WLR 1240
- (24) Ex parte Kendal Hotels [1947] 1 ALL 448 at 449
Ex parte Hierowski [1953] 2 ALL 4 at 627
- (25) See also ex p. Bracey [1960] 1 WLR 911 at 915
(The Court in these cases regarded ^{MANDAMUS} as a more appropriate
remedy but see below).
- (26) Ex parte Peachey [1966] 1 QB 380
R v. Pontypridd Court Registrar [1948] 1 ALL 218
R v. Board of Education [1910] 2 KB 165
- (27) The same applies in *Padfield v. Minister of Agriculture*
1968 A.C. where the Minister acting on irrelevant grounds
had refused to submit a matter to a statutory committee.
- (28) *Mixmans Properties v. Chertsey U.D.C.* [1963] 2 ALL 787
Pyx Granite Co. v. Minister of Housing [1958] 1 ALL 633
Hall v. Shoreham [1964] 1 WLR 240
Kingsbridge Investments v. Kent C.C. [1970] 1 ALL E. 1
- (29) See also *Pyx Granite Co. v. Minister of Housing & Local
Government* [1960] A.C. 260
- (30) See P. 86, 89, 90, 96
- (31) Per Lord Morris
- (32) [1969] 1 ALL ER at 612, 616
- (33) R v. Northumberland Compensation Appeals Tribunal
Davies v. Price
Ex p. Kendal Hotels [1947] 1 ALL 426 at 429
- (34) There are some dicta that the declaration can review error of
law and if this is so it seems that the error need not be
patent.
See *Garner Administrative Law* (3rd Ed) 135
See below P 98.

- (35) Anisminic (above)
Ex p. Peachey [1966] 1 QB 380 at 462 per Denning L.J.
Healey v. Minister of Health.
Punton v. Minister of Pensions.
see below Chapter 7
- (36) Taylor v. National Assistance Board.
ex parte Kendal Hotels (above)
3rd case Allcroft v. Lord Bishop of London
[1891] A.C. at 617
- (37) R v. Northumberland Compensation Tribunal (above)
Baldwin & Francis v. Patent Appeal Tribunal (above)
- (38) R v. Natbell Liquors (above)
ex parte Armah [1966] 3 WLR 828
- (39) 1969 CL. J 164
- (40) Reported [1969] 2 A.C. at 243
- (41) See ex parte Armah (above)
- (42) De Smith Op. Cit 329 330
- (43) Taylor v. N.A.B. [1956] P. 40
Banard v. National Dock Labour Board [1953] 2 QB 18 42
Lee v. Showmans Guild [1952] 2 QB 329 343 346
- (44) Described as a novel and far reaching contention by Parker L.J.
Healey v. Minister of Health [1955] 1 QB 221
- (45) R v. Gaming Board (1970)
- (46) Ex parte Yaffe [1930] 2 KB 98
- (47) R v. Hendon R.D. C. ex parte Chorley. [1933] 1 KB 696
- (48) R v. Chertsey J. J. [1961] 1 ALL 625
- (49) See ex parte Armah (above)

CHAPTER 7. ERROR OF LAW AND FACT

Whether jurisdiction can be destroyed as a result of an error made by the tribunal in a matter upon which it must decide is a crucial issue in Gordon's exposition of his theory of jurisdiction (1). Gordon, regards it as illogical that a mistake in a matter which the tribunal is called upon to decide can result in nullity. This view has been criticised above (see Chapter 3). Nevertheless the traditional approach of the Courts has been to adopt a distinction between lack of jurisdiction and mistake, treating mistake as such as not affecting jurisdiction, and as producing at most a voidable decision which can be challenged only upon appeal or by certiorari if the defect is patent (2). There is a contradiction involved in entrusting a matter to the decision of a tribunal, and allowing review for vires if the decision is "wrong". As Diplock L.J. pointed out in the Court of Appeal in *Anisminic*, the terms "right" and "wrong" in a legal context have no objective meaning. They merely denote the existence of a decision made by a competent body, and the possibility, for example by way of appeal, of another body substituting its decision for the one in question (see 1967 2 ALLER at 993). Nevertheless the term error is wide enough to comprehend, mistakes as to qualifications and procedure, and these are regarded as capable of affecting jurisdiction. Moreover a tribunal dealing with the wrong subject matter is exceeding jurisdiction, even though the definition of the subject matter may involve decisions upon questions of law and fact. Thus in *ex p. Zerek* [1951] 1 ALLER 482, the jurisdiction of a rent tribunal to reduce rents for unfurnished tenancies was held to be dependent upon the "actual existence of an unfurnished letting", and that any wrong decision upon this matter resulted in the tribunal acting ultra vires and the decision being a nullity. Lord Goddard said (at 485) "If a certain state of facts has to exist before an inferior tribunal has jurisdiction, it can inquire into the facts, in order to decide whether or not it has jurisdiction, but it cannot give itself jurisdiction by a wrong decision on them". Gordon argues that this reasoning is invalid upon the ground that the matter in question is one which lies in the direct path of the tribunal to decide. If this is

correct, the result is that, unless a right of appeal exists, limitations as to subject matter are nugatory, a point particularly well illustrated in decisions such as *White and Collins v. Minister of Health* 1939 2 KB 838, where negative limitations are involved (3).

Thus the Courts have superimposed, upon the basic distinction between jurisdiction and error, the doctrine of jurisdictional, or collateral fact, which requires that any finding made by the tribunal upon a question which, as a matter of statutory interpretation, is relevant to definition of subject matter, and therefore operates as a condition precedent to jurisdiction, is subject to review, and that a wrong finding destroys jurisdiction (4) producing nullity. Many of these questions of fact are more accurately classified as questions of law. However the distinction in this context is immaterial. (See the dictum of Farwell J. in note (3) above). The notion of collateral findings is sufficiently imprecise to allow judicial discretion a wide rein, and as Wade points out (5) is essentially a policy notion to allow control to be exercised over the findings of inferior bodies. Lord Esher in *R v. Commissioners for Special Purposes of Income Tax* (1888) 21 QBD 313 at 319 regards that matter as one of legislative intention. It would be more accurate to treat the question as one of judicial intention, since the willingness of the Court to classify findings as jurisdictional varies with changing policy. Thus in the United States where a doctrine of "substantial evidence operates" the Courts are less inclined to treat findings as jurisdictional, since a reasonable measure of control operates without recourse to the ultra vires principle (6). Although the jurisdictional fact doctrine constitutes a useful "spare wheel", particularly where the Courts wish to set aside findings which are supported by substantial evidence. Indeed, in this country it is possible that the strict doctrine of jurisdictional fact may be declining in importance, owing to the increasing usefulness of other methods of review. Statutory rights of appeal of law are often the appropriate remedy for challenging any wrong finding (7). Moreover the reasoning of the House of Lords in *Anisminic v. Foreign Compensation Commission* leads to the conclusion that the notion of ultra vires can be liberally applied, since a decision

will be without jurisdiction if any error of construction leads to the introduction of extra-aneous considerations or to the failure to take relevent factors into account. This analysis has been criticised above (see Chapter 6.). Finally there are signs of the emergence of a doctrine analogous to that existing in the United States. In *Ashbridge v. Investments v. Minister of Housing and Local Government* [1965] 1 WLR 1320 the Court of Appeal held that for the purpose of a statutory clearance of order, neither a finding that a building was "unfit for human habitation" nor one that it was "a house" went in itself to jurisdiction. However such findings could be reviewed if unsupported by evidence, possibly only complete absence of evidence could justify review for ultra vires upon this ground, but insufficiency of evidence constitutes error of law, reviewable by certiorari (8).

Gordon denies the validity of the doctrine of collateral fact, but nevertheless recognises that the Courts do utilize the device. His objections are logical and are twofold. Firstly his notion of jurisdiction as capacity to investigate specified matters, leads him to the conclusion that jurisdiction, once obtained cannot be lost. It has been suggested above that this narrow notion of jurisdiction is not as a matter of logic necessary. Capacity in this context means power to bind, and the moment to ascertain this is when the purported decision becomes effective, at the end, rather than at the commencement of the inquiry. Moreover to regard every matter that the tribunal is called upon to decide as within jurisdiction is to deny the possibility of judicial review, since in every case a tribunal must, "in the direct path of its inquiry" decide whether it has jurisdiction.

Secondly Gordon objects that it is logically impossible in any specific case where there are no express statutory instructions to decide which issues should be treated as jurisdictional. This has a substantial measure of agreement. Wade regards the notion of jurisdictional fact as illogical, but justifiable upon policy grounds, as a device to prevent tribunals exercising excessive powers (9). De Smith finds logical justification difficult (10) and Rubinstein finds that the dividing line between jurisdictional and other questions "is at best vague at the worst arbitrary" (11). Gordon collects numerous authorities to show the impossibility of including a general formula as a result of the many cases in which the Courts have held

issues to be jurisdictional (12). Certainly where the decision making process can be divided into two or more stages, in the sense that a finding upon a specified issue must be made before the tribunal can proceed with its investigation into further matters, the doctrine is prima facie applicable (13). However almost every decision making process can be so treated, a fortiori where the statute expressly lists the findings that must be made, as in the Anisminic case. More specific formula verge upon the paradoxical. Thus it has been said that a jurisdictional question is one "which is extrinsic to the adjudication impeached" (14) or "not the main question which the tribunal have to decide" (15). This compels the conclusion that the less important an issue is, the higher is the chance of it being treated as jurisdictional. Jaffe holds the converse view, that, "jurisdictional matters are those upon which the legislatures attention has been focused, and that the word "jurisdiction" simply expresses the gravity of the error (16). From this would follow the absurd proposition that the question of guilt or innocence in a criminal case is jurisdictional, fulfilling as it does, both these criteria. Nor can the relative gravity of the many kinds of error which a tribunal may commit, easily be determined. If an unjust decision results, any error is important.

It is therefore suggested that a search for an a priori formula applicable to any set of facts is an inappropriate approach. The problem is of the same logical nature as that involved in questions of causation. If an act occurs it forms the culmination of a chain of cause and effect events extending backwards into time indefinitely. The distinction between proximate and remote cause gives rise to philosophical issues (17). In a legal context however the issue is partly, though not completely one of policy, namely what acts should the law regard as contributing towards liability for an event which involves damage (18). There is also a logical element involved, and this does not involve an a priori formula but depends upon the particular context of each situation. In a specific context but not otherwise it is possible to distinguish those conditions of an event which constitute conditions sine qua non, from those which are necessary or sufficient to complete the event.

This also applies in the collateral fact context. The idea of preliminary expresses not an absolute concept, but a relationship which is meaningful therefore only in the context of a particular (statutory) situation. As D. J. Bentley shows (19) the analogy is to be found in language. The respective functions of adjectives and adverbs is clear. But a particular word can only be classified when it is seen in position in a group of words such as a clause or phrase which constitute a meaningful whole. Thus the function of collateral findings is all that can be determined upon an a priori basis. Rubinstein describes such a function as the formation of the "gateway through which the tribunal must pass to reach the safe ground of its jurisdictional sphere". Thus jurisdictional issues can be identified in a particular context partly by means of a value judgement, and partly by dividing the various issues which fall to be determined into logically separate chains of reasoning. In this way at least, those which might possible constitute conditions precedent can be separated from those which form an integral part of the reasoning leading to the decision. This approach is reflected by ordinary language and recognises the element of policy which is involved. The policy factors which are relevant can also be examined, and it is in the search for these that the decided cases are relevant, rather than as aids to producing a general formula.

Gordon's declared antipathy towards judicial discretion, conditions his attitude to questions of jurisdiction. In many areas of law the language used being "open textured" in characters allows for judicial value judgements (20). This is not merely inevitable but advantageous. Unless legislation attempted the impossible task of listing every specific situation, questions of degree, value and importance, must be settled by a value judgement, which although limited by the linguistic possibilities of the particular concept, is no less applicable to questions of jurisdiction than in the fields of tort and contract. Gordon says (21) "But have the Courts any right to have policies? They are supposed to follow definite legal principles which may grow, but are supposed to be self consistent". This attitude, it is submitted, leads to unreal difficulties.

Finally Gordon draws a distinction between judicial and administrative decisions (22) regarding it as acceptable that an administrative act such as the discretionary power of the Home Secretary to deport aliens, be dependent for its validity upon the existence of a fact situation. It is submitted that, even if it is possible to lay down a general formula to distinguish between the judicial and the administrative, such a distinction is not relevant to this context. Gordon, perhaps because of the *res judicata* principle attaches peculiar significance to the notion of a judicial finding. As Rubinstein shows, the doctrine of *res judicata* is not relevant to the question of validity for judicial review purposes (23). The doctrine operates as a defence where a matter already decided by an authorised body is in question in later proceedings of the same kind (24). If a decision is void for excess of jurisdiction the doctrine is not applicable. As far as errors within jurisdiction are concerned, it may be that the strict doctrine of *res judicata* does not apply to administrative decisions (25). However there appears to be no material distinction between the two kinds of function. In both cases an official is given a discretion to make a decision upon a prescribed subject matter. The distinguishing characteristic of a judicial function appears to be that the discretion must be exercised in the light of prescribed factors which are required by the statute to be taken into consideration (26). An administrative discretion on the other hand involves no such mandatory requirement to make objective findings (27). However in both cases the subject matter of the decision is limited by the statute, and thus the collateral fact principle operates, whether the decision is one of a rent tribunal required to apply prescribed standards in fixing rent for "furnished dwellings" or of the Home Secretary required to determine as a matter of policy whether an "alien" should remain in this country. In both cases a situation must "objectively" exist (that is in the opinion of a reviewing Court) before jurisdiction can arise. In both cases it is convenient to allow crucial issues relevant to the limitations of the power in question to be determined by the Court, this being the rationale of the jurisdictional fact doctrine.

As mentioned above, the majority of jurisdictional facts, involve the application of statutory definitions and are therefore more properly classified as error of law, which is reviewable by certiorari without recourse to the ultra vires doctrine. However if this course of action is taken the decision will be voidable only (29), whereas, where the collateral fact doctrine is relied upon, the decision must be a nullity. Thus despite the convenience of certiorari and statutory remedies for errors of law, it is still necessary to distinguish the special class of error which falls within the jurisdictional fact principle. Moreover recent developments which indicate that an appeal is not an appropriate remedy where the decision in question is ultra vires (30) may accentuate the importance of the device.

Apart from this doctrine it is established that errors of fact are not reviewable at all, and that errors of law, are reviewable only if on the face of the record, and by means of certiorari (31). There is however some authority that even latent error can be reviewed if the declaration is utilised since the face of the record rule is simply an incident of certiorari law (32). Against this it can be argued that the declaration does not lie against a voidable decision, and that the rule allowing review for error within jurisdiction is itself only a result of the historical development of certiorari (33). It is clear that error within jurisdiction results in a decision that is voidable only. This was expressly held both by the Court of Appeal and the House of Lords in *Anisminic v. Foreign Compensation Commission*, and supported by the decisions of the Court of Appeal in *Healy v. Minister of Health* [1954] 3 ALLER 452, and *Punton v. Minister of Pensions (No. 2)* [1964] 1 ALLER 488 in both of which cases the Court refused to intervene by means of the declaration upon the ground that a valid, albeit erroneous, decision had been made by the competent authority and there was no machinery available for setting this aside. In *ex p. Armah* [1968] A.C. 192 Lord Reid said (at 234) "Neither an error in fact nor an error in law will destroy jurisdiction". Nevertheless there exists a body of authority that patent error of law is a jurisdictional defect and produces nullity. If latent error of law is not reviewable at all, then this proposition leads to the conclusion that all reviewable, as opposed to appealable decisions are void, a tidy solution which is however inconvenient as a matter of policy, since wholesale invalidation

of administrative action as a result of technicalities is as pernicious as ineffectual judicial remedies. If, on the other hand latent errors are also reviewable then the distinction between voidness and voidability appears to depend upon the technical question of the record, an equally unsatisfactory view. It is reasonably clear however that latent error of law is not reviewable. There are dicta to this effect in *Anisminic* (at 196) and the decisions in the *Northumberland Case* (above) and in *Baldwin & Francis v. Patent Appeal Tribunal* [1959] A.C. 663 where the meaning of "the record" was examined in detail, are inexplicable if the possibility of review did not depend upon whether the record discloses the defect.

The authorities in favour of patent error being a jurisdictional defect appear to be based upon the notion that disclosure of an error by the record is an insult to the legal system and therefore a gross abuse of power (33). Thus in *R. v. Mahony* [1910] 2 IR 695, Pallas C.B. at least thought that patent error was a jurisdictional matter, and would not be protected by a privative clause. Another source of confusion was the belief that certiorari lay only for jurisdictional defects which led to attempts to subsume all defects reviewable by certiorari under this head. In *ex p. Perry* [1955] 3 ALLER at 395. Goddard L.J. said "Certiorari is a remedy granted....where a tribunal has exceeded its jurisdiction....if on the face of the notification of determinations we could see that they had taken into account something that was not a service at all....the Court could say that the tribunal was acting without jurisdiction"(34). It is difficult to reconcile this with *ex p. Shaw* where it was established that the face of the record rule applies to administrative tribunals. It was accepted in that case that certiorari lies to jurisdictional defects, and thus the decision would have been unnecessary had the patent error in question been jurisdictional. The Court of Appeal regarded itself as reintroducing the rule that certiorari will lie for non-jurisdictional defects if they appear on the record (see *Denning L.J.* [1952] 1 KB at 348).

This decision shows that the proper explanation of the face of the record rule is that it is an exceptional ground of review existing as a result of the historical development of certiorari. Thus it operates by way of exception to the rule that voidable decisions are not reviewable. This is also supported by convenience since nullification as a result of a technical error is a disproportionately severe

consequence, and is also consistent with the theory of jurisdiction both conceptually and historically. The only substantial group of cases inconsistent with this consists of a number of rating decisions where it was assumed that patent defects allow a distress warrant for non payment of rates to be collaterally impeached without the rate first being quashed (35). However, this view was negated by the Court of Appeal in *ex p. Peachey Properties Ltd.* [1966] 1 QB 380 where a valuation list constructed upon a wrong legal basis was regarded as voidable only, and therefore certiorari was necessary to quash, before mandamus could issue to the valuation officer to construct a new list. Rubinstein (36) shows that if the relevant decisions are examined the defects involved will appear as jurisdictional matters involving non-occupancy and premises situated outside the rating area.

It is submitted therefore that patent error does not result in nullity, and that it is clearly established that latent error, if reviewable at all, can similarly produce no more than a voidable decision. However the doctrine of jurisdictional fact provides a limited exception to this general proposition.

NOTES

- (1) 45 LQR 459 60 LQR 250 82 LQR 515
- (2) See Lord Sumners speech in R v. Nat Bell Liquors [1922] A.C.128
- (3) See R v. Shoreditch Assessment Committee [1910] 2 KB 859 at 880 per Farwell J. and Wade 82 LQR at 232.
- (4) Bunbury v. Fuller (1853) 9 Ex 111 at 140.
R v. Special Commissioners of Income Tax (1888) 21 QBD 313 at 319
Anisminic v. Foreign Compensation Commission [1967] 2 ALLER 986
[1968] 2 A.C. 147
- (5) Loc cit above
- (6) Jaffe 69 Harv LR 1020 70 Harv L.R. 953
- (7) EG S9 of the Tribunals and Inquiries Act 1958 but see Chapter 8 for a possible restriction upon the utility of these.
- (8) R v. Governor of Brixton Prison ex p. Armah 1966 3 WLR 828
- (9) 1966 82 LQR 231
- (10) Op Cit 99-100
- (11) Rubinstein op cit 214
- (12) 45 LQR 479-483
See also cases quoted by Wade loc cit note 9 above at 235
- (13) See Lord Eshers dictum in R v. Special Commissioners of Income Tax (above note (4))
- (14) Colonial Bank of Australia v. Willan (1874) L.R. 5 PC 477
- (15) Ex p. Zerek 1951 2 KBl at 6.
- (16) 70 Harv LR 953 at 961, 963.
- (17) See Hart and Honore. Causation in the Law Part I.
- (18) See Hart and Honore op cit 4.
Prosser. Torts 2nd Ed. 252.
- (19) 1962 P.L. 7.
- (20) Hart Concept of Law Ch.7.
- (21) at 82 LQR 520
- (22) 82 LQR 268

- (23) Op Cit 26-27
- (24) Low v. Bouverie [1891] 2 Ch 82 at 115
- (25) See Ganz 1965 PL 237
- (26) Ridge v. Baldwin [1964] A.C 40
Re H.K. [1967] 1 ALL ER 226
- (27) Schmidt v. Secretary of State of Home Affairs [1969] 1 ALLER 904
- (28) Anisminic v. Foreign Compensation Commission [1969] 2 A.C 147
- (29) See Chapter 8 below and Stringer v. Minister of Housing [1970]
1 WLR 1282
Leary v. National Union of Vehicle Builders [1970] 2 ALLER 713
- (30) R v. Northumberland Compensation Appeal Tribunal [1952] 1 KB at 348
Anisminic v. Foreign Compensation Commission [1969] 2 A.C 147
- (31) See Chapter 8 below for discussion fo this view.
Lee v. Showmans Guild.
- (32) See Funton v. Minister of Pensions [1964] 1 ALLER 488
R v. Northumberland Compensation Tribunal (above) at 350
- (33) Wade op cit 2nd Ed. p. 85
- (34) See also Lord Somervell in D.P.P. v. Head 1959 A.C 83 at 104
The Speech of Lord Sumner in R v. Nat Bell Liquors [1922] 2 A.C
at 156 suggests that he regarded error of law as being
jurisdictional.
- (35) Birmingham (Overseers) v. Shaw (1849) 10 QB 868
See Ryde on Rating (11th Ed.) 833.
- (36) Op Cit 187.

PART III. EFFECTS OF THE DISTINCTION

Chapter 8. Direct Remedies

(a) Appeals

The exercise of a right of appeal is in principle only possible where the initial decision is voidable. If a decision is void then all subsequent proceedings including appellate ones should also be void. Further it can be said that an appellate court has no jurisdiction to consider an appeal from a nullity, since this would be assuming original rather than appellate powers. In view of the many statutory provisions in force governing appeals from administrative bodies, in particular under S9 of the Tribunals and Inquiries Act 1958, this consequence of a strict approach to nullity would cause inconvenience in an area already beset by numerous formulary problems.

Three situations can be distinguished.

1. Where a right of appeal exists and has not been exercised but the applicant seeks review of the decision.
2. Where a right of appeal has been exercised, but the plaintiff still seeks to invoke the review powers of the Court.
3. Where the plaintiff exercises a right of appeal on the ground that the initial decision is ultra vires.

1. There is a consistent body of authority that, where a decision is a nullity, failure to take advantage of appellate procedure does not prevent the plaintiff from obtaining certiorari, or a declaration. Thus in *Cooper v. Wilson* [1937] 2 KB 209, the appellant had been dismissed from his post in the Police Force, as a result of a decision by the Watch Committee which the Court of Appeal held to be void. It was contended that under the governing legislation the plaintiffs sole right was to appeal to the Home Secretary. The Court held that this right of appeal need not be exercised where the decision was a nullity. Greer L.J. said (at 321) "It would be idle for a plaintiff who has never been dismissed to appeal to the Secretary of State". Similarly in *Barnard v. National Dock Labour Board* [1953] 1 ALLER 1113 Denning L.J. in dealing with the relationship between a statutory code governing complaints against wrongful dismissal and the prerogative orders thought that an appeal from a void decision would itself be a nullity (at 1119).

In *Birmingham Overseers v. Shaw* (1849) 10 QB 868 at 880, Lord Denman thought that the position in such a case was that the party affected may appeal, but if the decision is void, is not bound to do so. This appears to be the principle underlying R.S.C. Ord 53R2(2) which allows the Court a discretion to adjourn an application for certiorari, to quash an order subject to an appeal within a limited time, while that appeal is pending.

However these cases can be explained upon the wider ground that the existence of an alternative statutory remedy is not necessarily a bar to judicial review (1) unless the remedy provided is, as a matter of interpretation intended to be exclusive (2). Thus in *Coopers case* (above) Greer L.J. regarded the relationship between the issue of a declaration and a statutory right of appeal as a matter for the discretion of the Court. Thus in decisions concerning the statutory procedures for challenge provided under various statutes concerning decisions affecting land (3) it has been held that such decisions cannot directly be challenged after the lapse of the prescribed period of time (4) although the position may be otherwise in the case of collateral challenge (5). Thus the Court in its discretion may refuse certiorari or a declaration if a convenient right of appeal exists, irrespective of whether the decision is void or voidable, and conversely will exercise its review powers despite the existence of a statutory remedy where the decision is only voidable (6).

However if the defect does not go to jurisdiction it is submitted that the statutory right of appeal is prima facie the appropriate remedy, whereas for jurisdictional defects review procedures are appropriate (7). This can be inferred from the decisions in *Chapman v. Earl* [1968] 2 ALLER 1214, and *Metropolitan Property Co. v. Lannon* [1968] 1 ALLER 354. Both decisions involved appeals under S9 of the *Tribunals and Inquiries Act 1958*. In *Earl's case* this was coupled with an application for certiorari to quash a decision of a rent officer for breach of a mandatory procedural requirement. The Divisional Court held that the decision was a nullity and the Court went on to say (at 1220) that "the appeals are misconceived and that relief cannot be given to him except by certiorari". In *Lannon's case* a decision of a rent tribunal was challenged for bias. It was held by the Court of Appeal [1968] 3 ALLER 304 that the decision would be quashed upon certiorari, the appeal procedure being relevant only to a subsidiary objection as to

the statement of reasons. The Divisional Court expressed the "gravest doubts" as to the appropriateness of an appeal procedure to quash a decision for bias.

It is submitted that where a statutory appeal or other determination is held to be the exclusive remedy, the void voidable distinction becomes relevant since, although the Court is precluded by the Statute from substituting its decision for that of the statutory body, no infringement of this is involved if the Court awards a declaration to the effect that no decision has been made by the competent authority. Thus in *Healey v. Minister of Health* [1955] 1 QB 221 the Court of Appeal refused to grant a declaration concerning a question which the governing legislation entrusted to the Minister on the ground that this would give rise to two inconsistent decisions (Per Denning L.J. at 228) but left open the possibility of awarding a declaration upon the basis that the decision was void because the Minister lacked jurisdiction.

2. Where a right of appeal has been exercised and the applicant then enlists the aid of the Court the nullity principle has been invoked to allow him to do so. In *Annamunthodo v. Oilfield Workers Trade Union* [1961] A.C. 945 the applicant had appealed against dismissal from a trade union to an authority whose decision was under the rules of the Union to be "final and binding". The Judicial Committee of the Privy Council held that this did not prevent his present application for a declaration that the decision was contrary to natural justice. "If the decision was null and void the appeal to the Annual Conference cannot make any difference" (Per Council *arguendo* at 949).

This principle was applied in a Statutory context in *Barnard v. National Dock Labour Board* [1953] 2 QB 18. The Plaintiff was suspended from his employment by an Official to whom authority had been wrongfully sub-delegated. His appeal to a Statutory Tribunal was dismissed. The Court however were prepared to issue a declaration. Singleton L.J. said (at 34) "If ... the notice of suspension was a nullity, the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension".

Similarly in *Ridge v. Baldwin* [1964] A.C. 40 an unsuccessful appeal to the Home Secretary did not prevent the plaintiff from seeking a declaration that his dismissal was void as contrary to natural justice. Lord Morris stated the governing principle (at 126) when he

said "An appeal to the Secretary of State raises the question whether a decision which has validity, should or should not be upheld. The question raised was the fundamental point that the purported decision of the watch committee was no decision".

However, it was assumed in these decisions that the applicant was entitled to exercise the prescribed rights of Appeal, which as De Smith points out (7) gives him "two bites at his cherry". It is submitted that, if this is correct the court in its discretion should be able to withhold a remedy in appropriate circumstances, for example if the plaintiff had failed to raise the relevant objections at the appeal (8). This is an aspect of the law governing particular remedies, and analytically distinct from questions of voidness and voidability.

3. The cases discussed above have generally proceeded upon the basis that a right of appeal can be exercised whether the decision is void or voidable. If this were not so the statutory procedures whereby an "order" may be challenged in the High Court on specified grounds within a period of six weeks would appear to be nugatory if confined to voidable decisions only, since the prescribed grounds of challenge are confined to jurisdictional matters (9).

However certain decisions have applied the strict consequences of nullity to the effect that an appellate body has no jurisdiction to hear an appeal from a void decision (10). Thus in *Chapman v. Earl* (above) the divisional Court regarded certiorari as the appropriate remedy since the decision concerned was made without jurisdiction and void and refused to allow an appeal under S9 of the Tribunals and Inquiries Act 1959 regarding such a course as "misconceived". This is a self destructive principle since as Lord MacMillan said in *McPherson v. McPherson* "Where a judge has assumed jurisdiction which he did not possess and on appeal it is held that he had no jurisdiction, is his judgement treated as a nullity, and if so how can you appeal against it?" If no decision exists, it may be argued that both appeal and review are impossible.

The same principle was applied by Megarry J. in the recent case of *Leary v. National Union of Vehicle Builders* [1970] 2 ALLER 713 where the Plaintiff was expelled from the Union in Breach of Natural Justice. It was argued that the deficiency in natural justice was cured by a fair

hearing before an appellate tribunal. It was held however that since the hearing by the appellate body was, in effect the first hearing, the previous decision being a nullity, the Appeals Committee could not assume an original jurisdiction and thus the appeal was invalid. However it is submitted that a simpler explanation of the decision can be found, in that if a failure of natural justice was cureable by a proper appeal the plaintiff would in effect be deprived of the chance of two fair hearings, on the merits. The appellate proceedings would constitute the first legitimate hearing available to the plaintiff and he would be deprived of his right of appeal (at P. 720).

There is adequate authority to the effect that appellate proceedings are a suitable forum to canvass jurisdictional defects. Express dicta from the Court of Appeal can be found in *O'Connor v. Isaacs* 1956 2 QB at 364 and *Re Purkiss' Application* 1962 1 WLR 902 where Diplock L.J. said of the Land Tribunal "Its decision either that it had jurisdiction or that it had no jurisdiction is not conclusive. It can be questioned either on appeal or by certiorari" Other decisions, including those discussed above assume the appropriateness of this method of challenging jurisdiction (11).

It is submitted that here is a situation where it is obvious that the Court must sacrifice logic to convenience. Statutory methods of challenge provide a convenient way of avoiding the procedural tangles among the traditional prerogative and equitable remedies. It would be particularly unsatisfactory to limit the scope of S9 of the Tribunals and Inquiries Act for conceptual reasons.

(b) Certiorari

Certiorari being an order to quash an invalid decision is not strictly necessary where the decision is a nullity, its function being solely declaratory (12). This has resulted in the refusal in certain early cases to issue certiorari where the decision was void, and to leave the applicant to his remedy by way of collateral attack (13). As a result it has sometimes been said that any decision quashable by certiorari is valid until quashed (14). Before the availability of certiorari for error of law on the face of the record was applied to the field of administrative tribunals in the Nineteen Fifties, it was thought (15) that certiorari lay only for jurisdictional defects. This

coupled with the above rule led to absurdity where it was sometimes denied that certiorari had any scope at all in this area. Thus in R v. Burnaby (1703) 2 Ld Raym 9000 Powell J, in dealing with an application for certiorari to quash a conviction by justices said "If they had jurisdiction, the act that rests their jurisdiction in them excludes us and everybody else to call in question their judgement and if they have not jurisdiction then an action lies against the maker, and him that executes the conviction and that is the parties proper remedy". The device of asserting that certiorari was excluded only in cases of "manifest lack of jurisdiction" was sometimes relied upon giving credence to the relationship between certiorari and the face of the record rule (16).

This view is inconsistent with the weight of authority since, even before the face of the record rule was re-established it was settled that certiorari lay for jurisdictional defects, even though the decision concerned was held to be void, where a privative clause was involved (17). The Courts in these cases have consistently held that certiorari will be, despite the existence of such a clause where the decision is a nullity for want of jurisdiction. It is well established now that jurisdictional defects are reviewable by certiorari (18).

A similar confusion has existed as a result the converse assumption that certiorari lies only where the decision is a nullity. Cases where certiorari has quashed decisions patently defective in law have sometimes been justified upon the basis that these defects result in nullity (19). However the law is now clear that certiorari has two separate areas of supervision. "One is the area of the inferior jurisdiction and the qualifications and conditions of its exercise. The other is the observance of Law in the course of its exercise" (20).

Certiorari will, illogically lie to review jurisdictional defects even though it has been recognised (21) that there is strictly no need to quash. Certiorari will also fulfill what is historically its original function, that of setting aside a record upon which a defect is apparent (22) and it is clear that this kind of defect results in a voidable decision, allowing a constitutive role to the Order.

(c) Declaration

It can be maintained that the Declaratory Judgement is appropriate only to review void decisions Akehurst points out that a "declaration is in strict theory merely declaratory of existing rights, it does not constitute new rights. A declaration that a decision is voidable is an acknowledgment that the decision is liable to be quashed, but it does not actually quash the decision. Consequently the Courts have sometimes refused to issue declarations in respect of voidable decisions because they consider that public respect for the Courts would be impowered if they passed judgements which the defendant was under no legal obligation to obey". (23)

From this it appears that the declaration is a collateral form of challenge in that it operates only to state an existing legal relationship. If a decision, for example of expulsion purports to alter that relationship, a declaration states whether it has done so, and thus can expose voidable decisions only to the extent that they must be regarded as effective until quashed. Thus it is only useful if a decision is a nullity.

It is not clear whether the Courts do rely upon this conceptual approach in view of the reception of the declaratory judgement as a "general" administrative law remedy (24). Further, even if this attitude is taken it is not clear whether the Courts refuse jurisdiction to issue a declaration to a voidable decision, or whether this is simply an aspect of the discretionary nature of the remedy, and a wider aspect of the rule that a declaration will not issue where it serves no useful purpose (25).

The Jurisdiction to issue a declaration in respect of an administrative decision arises from R.S.C. Ord 25 Rule 5 which provides that "No action shall be open to objection on the ground that a merely declaratory judgement is sought thereby and the Court may make binding declarations of right whether any consequential relief can be claimed or not". Less frequently a declaration can be sought by way of originating summons under Ord 54A Rule, 1A which refers to "any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of the construction of a statute."

Both provisions refer to declarations of right, as opposed to declarations of the invalidity of the act concerned. This is reflected by the law as to locus standi for the declaration, and also by difficulties arising where the decision concerned does not affect legal rights. In *Gregory v. Camden B.C.* [1966] WLR 869 Paul J. refused to issue a declaration that a grant of planning permission was ultra vires because the Plaintiff whose premises adjoined the property had no connection with the issue apart from an interest in amenity "All a declaration does is to declare the rights of a particular individual". Similarly Diplock L.J. in *Anisminic v. Foreign Compensation Commission* 1967 2 ALLER 48 was doubtful whether a declaration would lie against the Foreign Compensation Commission whose decision was merely precedent to executive action to be taken by another body. The Court would have no jurisdiction to declare the decision itself erroneous. "The Jurisdiction of the High Court is limited to declaring the existence of legally enforceable rights and liabilities" (26). However this view was doubted in the same case in the House of Lords (27) and it is possible to find examples of declarations taking the form that a decision is invalid, or ultra vires as well as dicta that this is possible (28). However even in these cases the declaration includes a statement as to the plaintiffs personal rights or liabilities, that, for example, in case of wrongful dismissal, he still has pension rights (29) or that where he is contesting an invalid revocation of planning permission, that he still has a permission. The term "rights" in this context has a wide rather than a Hohfeldian meaning, extending to all legal relationships, particularly important being the immunity, disability, or "no right", privilege relationships where the plaintiff seeks a declaration that he need not comply with a particular order or decision (30).

Despite this collateral and non constitutive aspect of the declaration it is significant that only a minority of decisions have proceeded upon the basis that a declaration precedes nullity, and in each case an alternative explanation is possible.

In *Healey v. Minister of Health* [1954] 3 ALLER 452 the Minister of Health was empowered to determine who was a mental health officer for the purpose of statutory superannuation regulations. The Plaintiff

sought a declaration that he was a mental health officer within the meaning of the regulations alleging that the Ministers decision to the contrary was erroneous in law. It was held that as the statute had entrusted the matter to the Minister, no other body had jurisdiction to determine the question. This was an application of the rule in *Barraclough v. Brown* [1897] A.C. 615 providing that where a statute entrusts a matter exclusively to the jurisdiction of another body, an ordinary court cannot determine that matter and was sufficient to dispose of the case. In fact Morris L.J. (at 231) pointed out that the position might have been different had the decision been challenged by way of the Courts supervisory jurisdiction for ultra vires, or error of law. However Lord Denning was concerned that unless the Ministers decision was revoked by him of his own free will, it would still stand. "There would then be two inconsistent findings, one by the Minister and one by the Court. That would be a most undesirable state of affairs". (at 228) His Lordship thought that had the declaration been formulated as a declaration that the decision was erroneous in law, the plaintiff might have succeeded. The same objection however would remain even here. The declaration does not involve machinery for setting the decision aside, thus however formulated would be useless.

Zamir regards this decision as an attempt to resort to the original jurisdiction of the High Court which failed because the jurisdiction had been entrusted to the Minister (31). However the majority regarded the decision as an attempt to appeal from a decision which could not be set aside. It is clear from Morris L.J.'s speech that the Court would have been able to declare that the Ministers decision was a nullity.

In *Punton v. Minister of Pensions* (No.2) the declaration was expressed in the form that a Tribunals decision that the plaintiffs were "persons interested in an industrial dispute" and so not entitled to unemployment benefit, was erroneous in law. The Court of Appeal refused to issue the declaration on the ground that the matter was entrusted to the Tribunal and that the Tribunal's decision was binding until revoked. Sellers L.J. (at 451) regarded certiorari as an appropriate remedy since this would merely quash the decision and would not usurp the function of the tribunal. An application could also be made under 89 of the Tribunals and Inquiries Act 1958. His Lordship

(at 455) made it clear that the declaration in itself did not involve any machinery for setting aside the decision. However his Lordship also regarded the discretion of the Court to refuse declaratory relief as relevant. The effect of the statute was to "emphasise the need for speedy and final decisions" by a statutory authority. Per Davies L.J. (at 457) and therefore litigants should not be encouraged to come to the courts after a delay of six months during which the decision could have been appealed under 89.

The element of discretion rather than an absolute lack of Jurisdiction to issue the declaration was also revealed in the manner in which Sellers L.J. distinguished Taylor v. National Assistance Board [1956] P470 where the Court were prepared to issue a declaration in respect of a decision which was merely erroneous, and not regarded as ultra vires. The Board there had powers of amendment, and thus a declaration that its decision was voidable would have served a useful purpose.

These two cases although emphasising the logical difficulties involved in obtaining a declaration against a voidable decision, are it is submitted not conclusive to prevent the Court from issuing a declaration in such circumstances.

Further support for the proposition can be found in Walters & Eton R.D.C. [1950] 2 ALLER 588 where the Court of Appeal was asked to issue a declaration that the Plaintiff was entitled to participate in a statutory superannuation fund. The Minister was empowered to determine questions arising out of the provisions of the statute, and it was provided that his "determination shall be final". The declaration was refused on the ground that as the responsible authority had already reached its decision the Court would not substitute its own view, in the face of this valid, albeit erroneous determination.

However it was common ground that if the decision was made by the proper authority it could not be challenged, and the only issue in dispute was whether the defendant as employer, or the County Council as administering authority was the "body charged with the decision making power". Therefore the attention of the Court was not drawn to the general question of whether a declaration was the appropriate remedy.

Other decisions often quoted in support of the unsuitability of the

declaration in the field of erroneous decisions are similarly based upon the rule that where a matter is entrusted to a specified body for determination the High Court cannot itself determine that matter (32). This concerns restriction of original, not of supervisory jurisdiction. The only authority dealing with supervisory jurisdiction is Punton and in this case it is submitted that the element of discretion is the underlying ratio.

However where legislation is construed as having entrusted a dispute to the exclusive determination of an administrative body, the distinction between void and voidable has some bearing upon the availability of the declaration since where the body concerned has failed to make a determination the plaintiff should be able to declare that the plaintiffs legal position has not been altered. Thus if a purported decision is a nullity the Court can issue a declaration to that effect, and the situation in Healey and Punton does not arise. Thus in Pyx Granite Co. Ltd. v. Minister of Housing, a grant of planning permission in respect of the plaintiffs quarrying activities was challenged on the grounds that the jurisdiction to grant such permission had been removed by statute. The Court of Appeal held that, despite the existence of a code of statutory appeals procedure the declaration was an appropriate remedy in this case, since its subject was whether the plaintiffs common law rights to quarry had been restricted by a valid decision. The Court was not usurping a function entrusted to another body.

This limited application of the nullity principle justifying the issue of a declaration, does not support the wide statement that a declaration will not lie to a voidable decision (33).

There is direct authority to the contrary in Taylor's case above, and a considerable amount of indirect authority in cases where the Courts have issued declarations without regarding nullity as a condition precedent, albeit the decisions were held for other purposes to be void (34). In other cases the Court has doubted whether the decision is void or voidable, but have nevertheless been prepared to issue a declaration (35).

Diplock L.J.'s doubt in *Anisminic* [1967] 3 WLR 412 as to the availability of the declaration against a decision of a tribunal that was erroneous in law, is sometimes quoted in support of the limitation in question (36). However this was based upon the principle that as

the declaration must refer to the rights of the parties, the tribunal is an unsuitable object for it, since its determination under the statutory provisions concerned, did not itself set up private rights, but was merely a condition precedent to action by another person. It is that person against whom the declaration should be issued. "The conduct of the inferior tribunal whether it is a nullity or not is not capable of giving rise to any cause of action against him on the part of the claimant" (at 413). Thus the issue of voidness or voidibility is irrelevant in this context.

The most convincing group of cases, however, are those where the Courts have discussed the scope of the declaration in relation to error of law. There are wide dicta particularly by Denning L.J. that the declaration lies to correct errors of law and is not limited to jurisdictional defects (37). However these decisions in fact involved defects of jurisdiction. Other cases, involved the question of whether errors that did not appear on the record could be reviewed by means of the declaration (38). Although this point is uncertain, it seems from these that the Courts saw no difficulty in reviewing patent error of law, even though this results in a voidable decision.

Thus in *Lee v. Showmans Guild of Great Britain* 1952 2 QB 329 Denning L.J. in dealing with a defect in a decision by a domestic tribunal (which was not therefore amenable to certiorari) said that the remedy by declaration was more effective than the remedy by certiorari, because the former "is not subject to the limitation that the error must appear on the face of the record" (346). However in *Healey's case* this was described by Parker L.J. as "a novel, and far reaching contention". In *Taylor v. National Assistance Board* 1956 P 70, a declaration issued against an error that was probably not patent, being disclosed in the course of preliminary correspondence. The House of Lords, albeit overturning the decision on its facts did not question the propriety of the remedy.

To regard the scope of review as limited to patent error whether for certiorari or declaration purposes, is tantamount to accepting the view put forward by Wade (39) that it is the blemish on the record rather than the defect itself which constitutes the vitiating factor.

It is suggested that the better view is that the face of the record rule is a procedural aspect of certiorari law, and does not therefore apply to the declaration. These decisions at least show that the Courts do not regard nullity as a condition precedent to the declaration.

Finally in private law, a declaration has been successfully claimed to the effect that a contract is voidable only (39). However possibly this can be reconciled with principle upon the ground that the parties can themselves rescind in reliance upon the declaration.

It is submitted that, as in the case of certiorari it is open to the Court to violate logic, and award a declaration against a voidable decision. This is subject to two qualifications. Where the declaration will serve no useful purpose the Court may withhold it, in its discretion.⁽⁴⁰⁾ Secondly the Court will not declare rights subject to the exclusive jurisdiction of another body, except in a negative sense to determine whether the responsible authority has in fact made an effective decision. Here the distinction between void and voidable will be relevant. It has been argued that administrative bodies are not subject to res judicata in that they can usually reconsider their own decisions (41). If this is so then the rule that the declaration cannot quash is unimportant, except that where the authority concerned is a judicial body, subject to res judicata, certiorari will perhaps be the appropriate remedy. However the cases supporting the application of the declaration to voidable decisions assume that its effect is constitutive.

(d) Mandamus

The Prerogative order of mandamus issues to compel the performance of a duty. Thus it has no direct concern with the setting aside of invalid acts, being limited to enforcement of the duty to exercise a discretion, but falling short of compelling the discretion to be exercised in a particular way. Rather misleadingly it is sometimes said that mandamus lies to ministerial but not judicial functions (42). Thus where a justice erroneously holds that he has no jurisdiction mandamus will lie, but will not lie for a mistaken exercise of that jurisdiction (43). Mandamus should therefore lie only where a purported decision is a nullity, since the underlying rationale must

be that the tribunal has not performed its duty to reach a decision. This is the basis of a consistent line of authority. Decisions have been challenged by mandamus on the ground that the defect concerned resulted in the tribunal declining jurisdiction, or failing to exercise jurisdiction (44), although it was pointed out in *R v. Cotham* 1898 1QB 802 that the distinction between an erroneous exercise of jurisdiction and "failure to hear and determine according to law" can be "very fine" (at 806) a distinction regarded by Gordon as non-existent (45). Thus mandamus will lie where there is an excess of jurisdiction, but not where a statutory body is acting within its jurisdiction (46) unless the decision is first quashed by certiorari.

In *R v. Paddington Valuation Officer ex p. Peachey*, [1966] 1 QB 380 a rating list was challenged on the grounds that it had been constructed upon the wrong basis. The Court of Appeal held that this defect rendered the list at the most voidable, and that therefore mandamus could not lie to order the valuation officer to prepare a valid list unless the defective one was quashed by certiorari. Salmon L.J. (at 419) said "A finding that the list is null and void is necessarily implicit in an order for mandamus". However the Court thought that to avoid inconvenience the mandamus might issue in advance of the certiorari. Similarly in *Baldwin and Francis v. Patent Appeal Tribunal* [1959] A.C. 663 Lord Denning said that where mandamus is issued to the tribunal, it must hear and determine the case afresh, and it cannot well do this if its previous order is still standing" (at 693-4).

However, under the formula of "declining jurisdiction" the Courts have issued mandamus in respect of decisions based upon irrelevant considerations (47) or where relevant factors had not been taken into account (48). Although this can be justified upon the basis (criticised in Chapter 7 above) that these defects result in nullity, in many cases intervention has been justified upon the basis that these decisions were wrong in law, and that mandamus lies to compel a tribunal to decide according to law. Thus in *Padfield v. Minister of Agriculture* [1968] A.C. 997 the House of Lords held that the Minister, in exercising a discretion whether to refer a matter to a statutory committee, had taken irrelevant factors into account. This was treated not as ultra vires, but as a failure to exercise the discretion according to law.

Lord Upjohn (at 1058) said "The Minister in exercising his powers can only be controlled by a prerogative writ (sic) which will only issue if he acts wrongfully" and Lord Morris, (dissenting in the result) assumed (at 1041) that mandamus could issue if "the Minister misinterpreted the law, or proceeded upon an erroneous view of the law".

In *ex parte Kendal Hotels* [1947] 1 ALLER 448 mandamus was regarded as an appropriate remedy against a decision to which certiorari would not lie. Goddard C.J. held that as the decision was within jurisdiction and good on its face, mandamus was the only remedy. Similarly in a number of cases mandamus issued in respect of decisions vitiated by irrelevant considerations without reliance upon nullity or lack of jurisdiction (49) and in two cases mandamus was held to be available to review a decision which was held valid for the purpose of preventing collateral challenge (50).

If these decisions are accepted then the scope of mandamus approximates to that of certiorari. However intervention based upon the imposition of a duty to determine according to law does not meet the objection raised in *Peachey* (above) that the offending decision must be removed, and mandamus is inappropriate to do this. In certain circumstances an existing decision can be ignored, or reconsidered by the authority concerned without any formal setting aside. Thus the granting of a licence in disregard of certain formal requirements could not be questioned by mandamus alone as the licence was, in the absence of a jurisdictional defect, a valid one, (51) whereas a licence refused in the same way could be so challenged because no new legal relationship had arisen, in the absence of a provision preventing successive applications (52). Thus, irrespective of voidness and voidability mandamus would be appropriate in a situation similar to that in *Padfield* which involves an administrative negative decision, not subject to *res judicata*.

It is submitted that the cases where mandamus has been extended under the pretext of enforcing a duty to observe the law, can be explained partly upon the basis that defects arising out of an abuse of discretion are treated ambiguously by the Courts, being sometimes presented as jurisdictional and sometimes regarded as mere error (53), and partly by the desire of the Courts to intervene in cases which



were regarded as not amenable to certiorari, and for which mandamus appeared the only available remedy. The restriction of certiorari to judicial functions given a narrow meaning to exclude even decisions of licencing justices (54) contributed towards this. However in recent years the scope of certiorari has broadened, as has the meaning given to the term judicial (55) and thus less justification exists for an overlap between these remedies.

Mandamus should be restricted to review decisions which are alleged to be nullities, in order to provide a consistent principle upon which to base a choice of remedy, but even here the order can be issued in conjunction with certiorari, to prevent difficulties arising out of incorrect formulation of the grounds of review. Indeed the remedies are often issued in conjunction even in cases where the defect concerned clearly results in nullity (56).

Summary

In the field of direct review the courts have only spasmodically applied the logical consequences of nullity. Competing factors have necessitated extensions of the various remedies, with the result that they overlap to such an extent that no clear basis exists for choosing between them in a given situation.

It is suggested de lege ferenda that the principle of nullity should be employed as a basis upon which to define the kind of situation to which each remedy is appropriate. Thus appellate proceedings and certiorari should apply only to defects within jurisdiction, and mandamus only to jurisdictional defects, defined to exclude defects involving irrelevant considerations. The declaration having procedural advantages over certiorari should be recognised as constitutive and therefore lying both to jurisdictional and non jurisdictional defects. Alternatively certiorari might fulfill this function since this remedy has certain advantages in having flexible locus standi rules, in which case the role of the declaration should be limited to jurisdictional defects, and in particular to situations where mandamus is clearly unsuitable, as where an individual maintains that a certain decision is not enforceable against him. Authority exists to support such a classification, although without rejection of a considerable number of decisions, it is impossible to maintain that this

represents existing law. Such a scheme also involves the production of a clear test for distinguishing between ultra vires and error within jurisdiction since at present this is obscured by the dual role of both certiorari and the declaration.

NOTES

- (1) Pyx Granite Co. v. Minister of Housing [1958] 1 QB 554
- (2) Healey v. Minister of Health [1955] 1 QB 221
- (3) EG Housing Act 1957 Sched IV Paras. 2 & 3
Town and Country Planning Act
- (4) Smith v. East Elloe R.D.C. [1956] A.C. 736
- (5) Webb v. Minister of Housing (see p.6)
- (6) Ex p. Peachey (1966)
- (7) Op City P. 437
- (8) R v. Commissioner of Valuation 1901 21R 215 at 230-231
R v. Ministry of Health 1954 H.I. 79
- (9) EG Housing Act 1957 (above)
- (10) Harman v. Official Receiver [1934] A.C. 245
R v. Jones (Gwyn) [1969] 1 ALLER 325
See Council arguendo in Dimes v. Grand Junction Canal 3 H.L.C. 777
- (11) Essex C.C. v. Essex Incorporated Church Union [1963] A.C. 808
Oscroft v. Benato [1967] 1 WLR 1027
Wild v. Wild [1968] 3 WLR 1148
- (12) R v. Manchester Legal Aid Committee ex p. Brand [1952] 2 KB 413
- (13) Ex p. Lord Gifford 1845 LT QS 341
Weston v. Sneych (1857) 1 H & N 763
- (14) Dixon J. in Parisienne Basket Shoes Proprietary Ltd. v. Whyte
(1938) 59 CLR 369 at 392
Lamar J. 229 U.S. 162, at 170-1 (1913)
- (15) See Chapter 1 (above)
- (16) R v. Sheffield, Ashton under Lyme and Manchester Ry Co. (1839)
11 Ad & E 194
Contra R v. Judge Pugh ex p. Graham [1951] 2 KB 623 at 630
Colonial Bank of Australia v. Withan (1874) L.R. 5PC 417
- (17) R v. Cheltenham Commissioners (1841) 1 QB 467
R v. St Olaves District Board (1857) 8E & B529
Ex p. Bradlaugh (1878) 3 Q.B.D. 509
- (18) R v. Electricity Commissioners [1924] 1KB 1 71
R v. Minister of Health ex p. Yaffe [1930] 2 KB 98

- (19) R v. Mahony 1910 21 R 695 at 722
- (20) R v. Nat Bell Liquors [1922] 2 A.C. 128 at 156
- (21) Anisminic v. Foreign Compensation Commission (above p.)
R v. Judge Pugh [1951] 2 KB 623 at 630
- (22) Ex p. Shaw (above)
Baldwin and Francis v. Patent Appeal Tribunal [1959] A.C. 663
- (23) (1968) 31 MLR 8
- (24) Borrie 1955 18 MLR 138
See Denning L.J. in Barnard v. National Dock Labour Board
[1953] 21 ALLER 1113 at 1119, and Denning Freedom under
the Law (Hamlyn Lectures) at p.126
- (25) Zamir. The Declaratory Judgement 64-7
- (26) See also Wilson v. Tees & Hartlepool Port Authority [1969]
Lloyd Rep 120
- (27) [1969] 1 ALLER 208, 212, 243, 256
- (28) Ridge v. Baldwin [1964] A.C. 40
- (29) Ridge v. Baldwin (above)
Healey v. Minister of Health [1955] 1 QB 221 at 237
- (30) Dyson v. A.G. 1911 1KB 410
- (31) The Declaratory Judgement (1962) 71-72
- (32) Blencowe v. Northamptonshire C.C. [1907] 1 CH 504
East Midland Gas Board v. Doncaster Corporation [1953] 1 WLR 54
Zamir Op Cit 75
- (33) See Wade 83 LGR 501
- (34) Ridge v. Baldwin [1964] A.C. 40
Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147
Cooper v. Wilson [1937] 2 KB 309
- (35) Kanda v. Government of Malaya [1962] A.C. 322, 338.
- (36) De Smith Op Cit 540
- (37) Barnards Case (above) [1953] 2 QB at 41
Pyx Granite Co. v. Minister of Housing [1958] 1 QB at 57
- (38) Administrative Law (2nd Ed.) 87.
- (39) Hutton v. Hutton [1916] 2 KB 642

- (40) Punton v. Minister of Pensions (No.2) [1964] 1 ALLER 4448
- (41) See Ganz 1965 PL 237
and Swenson. Federal Administrative Law 104 for conflictin
views on the position in the United States
- (42) Rubinstein Op Cit 98
- (43) R v. Licencing Authority for Goods Vehicles for the Metropolitan
Traffic Area ex p. Barrett [1949] 2KB 17 at 27
- (44) R v. Adamson (1875) 1 QBD 201
R v. Evans (1890) 62 LT 570
R v. Cotham [1898] 1 QB 802
R v. Housing Tribunal [1920] 3 KB 33
- (45) 1931 47 LQR at 388
- (46) Peats Case (1704) 6 Mod 228
Smith v. Chorley R.D.C. [1897] 1 QB 681
- (47) R v. Adamson (1875) 1 QBD 201
R v. Flint C.C. Licencing Committee [1957] 1 QB 350
- (48) R v. St Pancrad Vestry (1890) 24 QBD 371
- (49) R v. Income Tax Special Purpose Commissioners (1888) 21QBD 313
I.R.C. v. Pemsell [1891] A.C. 531
R v. Weymouth Licencing J.J. [1942] 1KB 465
- (50) Partridge v. G.M.C. (1890) 25 QBD 90
Davies v. Bromley Corporation [1908] 1KB 170
- (51) R v. Nicholson [1899] 2 QB 455
- (52) R v. Kingston J.J. [1902] 86 LT 589
- (53) See Chapter 7 above
- (54) See R v. Cotham (above)
- (55) See Chapter 9 (below)
Ridge v. Baldwin [1964] A.C. 40
Jaywardine v. Silva [1970] 1 WLR 1365
- (56) R v. University of Aston [1969] 2 ALLER 964
R v. Gaming Board [1970] 1 WLR 1009

CHAPTER 9. COLLATERAL CHALLENGE

It should be possible to challenge a decision collaterally only if it is void, since collateral challenge always involves the calling in question of a decision without taking steps to have that decision set aside, reversed or modified in proceedings specially designated for the purpose (1). Thus whenever a person asserts or defends a claim, to which the validity of a decision is material, he is challenging it collaterally. The range of possible collateral attack situations is therefore extremely wide. In particular collateral challenge may involve an action in contract, quasi contract or tort where the defendant justifies his act by reliance upon a decision made under statutory powers. Similarly resistance to enforcement proceedings involves collateral challenge of the decision, and less frequently the effect of a decision can be so canvassed in an action involving title to land or goods (2) or in an action where a decision or act is directly challenged, on the grounds that its validity depends upon the existence of an earlier act or decision as condition precedent (3).

Some procedures are in form methods of collateral challenge, but are in fact utilized as means of direct attack in that no other result is sought than to expose the decision as invalid. Thus Habeas Corpus being directed towards the person detaining the body of the applicant in principle presupposes that the decision authorising the detention can be disregarded. Mandamus being an order to a public body to discharge a statutory duty, again presupposes that any previous decision was void (4). The Declaration issued under R.S.C. Ord 25r5 takes the form of a statement of the Plaintiffs legal rights (5), and thus can logically impugn a decision only if it is void and thus ineffective to alter his legal position. However, as shown above, in these cases the line between direct and collateral review has become blurred, and these procedures involve a scope of review nearer to that where certiorari is the remedy sought.

It is sometimes maintained (6) that different policy considerations govern direct and collateral attack, justifying a narrower scope of review in collateral than in direct proceedings. Firstly the purpose of collateral attack is not necessarily to expose an invalid exercise

of power. This may be genuinely incidental. Thus in *D.P.P. v. Head* 1959 A.C. 83 the validity of a committal order made twenty years previously was relevant to a conviction for an offence against a woman subject to detention under Mental Health Legislation. Viscount Simmonds at 87 made it clear that the exposure of unlawful administrative action was not, in those proceedings the concern of the Court. Secondly the doctrine of collateral challenge can have unjust results where persons relying upon decisions which are treated as void find themselves lacking legal justification for acts done in good faith. In *Innes v. Wylie* 1844 1 Cor & K262, a Constable who, in obedience to an order of expulsion, prevented the plaintiff from entering the premises of a club, was held liable in tort because the expulsion was in breach of natural justice.

Thus either the possibility of collateral attack must be more limited than that of direct attack, or alternatively exceptions to the governing principle will have to be admitted to avoid imposing an unfair burden of responsibility upon executive officials.

Historically the relationship between nullity and collateral attack was well established by the middle of the Seventeenth Century (7). In *Terry v. Huntingdon*, concerning an action in Trover against the Commissioners of Excise for wrongly classifying certain liquours as "strong waters". Rainesford C.J. said (The Commissioners) "both themselves and their officers would be trespassers and the reason is that when they exceed their authority they cease to be Commissioners and act as private persons".

In *Wilkins v. Howard* (1838) 7 Ad and 1807, in an action against Magistrates in respect of a committal order it was said "It is clear that the plaintiff cannot succeed unless the proceeding was a nullity".

However in these early cases a narrow concept of jurisdiction limited to persons, place and subject matter, corresponding to the suggested commencement of the inquiry test appears to have governed the possibility of collateral attack. This leads Rubinstein to suggest that, at least in some circumstances the limits to jurisdiction might vary with the method of attack (8). Thus in *Pease v. Chaytor* (1863) 3 B & S 620 Blackburn J. thought that a wider range of defects would

justify a defence to enforcement proceedings than would apply in an action in tort.

This solution, it is submitted is not necessary to achieve the aim of allowing a greater scope for review in direct proceedings than in collateral proceedings. The same result is achieved by the simpler process of treating the availability of direct remedies as independent of the question of jurisdiction. Thus since the Northumberland Case certiorari lies for all errors of law, a category wide enough to include jurisdictional defects as well. It is suggested that with the extension of certiorari to administrative bodies the "face of the record" requirement should be abandoned, but even if this does not happen, the distinction between jurisdictional and other defects need only be material in limited circumstances, where a defect does not appear on the record, or where a privative clause is in force, or where the decision is sought to be collaterally impeached.

In modern law the principle of nullity is relied upon in collateral proceedings to the extent that collateral remedies have frequently been refused upon the ground that the decision concerned is voidable only. Thus in *Marsh v. Marsh* [1945] A.C. 271 the validity of a divorce decree became material in later proceedings concerning the administration of an estate. The House of Lords held that the decision being voidable only must be treated as valid for the purpose of collateral impeachment. It is significant that it was said, (at 284) that the position would have been otherwise had a breach of natural justice been involved.

Similarly in cases involving bias, collateral actions have failed because that bias was regarded as producing a voidable decision only (9).

The same principle was applied to an order made by an Administrative body, by Lord Denning in *D.P.P. v. Head* [1958] 1 ALLER 679. The Accused's conviction of an offence against a person detained under Mental Health legislation depended upon whether the original certificate of detention made years previously by the Home Secretary was valid. Lord Denning held that as the certificate disclosed an error of law it was voidable only and thus since it had not been set aside it must be treated as valid to support the conviction. However the majority were prepared to set aside the conviction, whether the certificate was void or voidable on the ground that the presumption that a person was a defective within

the meaning of the Act, which was necessary to establish the offence was rebutted by defect in the committal order. This is sufficient to explain the decision in the light of the particular statutory provisions involved. However the majority reasoning has received some criticism (10) and it is submitted that Lord Denning's rationale with its emphasis that a void decision destroys the validity of all action taken in reliance upon it is to be preferred. The majority speeches were probably influenced by Habeas Corpus law in that patent error not going to jurisdiction is sufficient basis for the writ (11) which as regards inferior bodies, has, despite being strictly a means of collateral attack, a similar scope to certiorari (12).

Other decisions of administrative bodies have been invalidated in collateral proceedings (13). However in these decisions it is only exceptionally that nullity is specifically made the basis of the action. This was the case in *Webb v. Minister of Housing* (discussed above) where a compulsory purchase order was quashed on the ground that the works scheme to which it was a condition precedent was a complete nullity despite the existence of a statutory provision preventing direct challenge after a six weeks period. Actions in trespass in *Cooper's* case, *Hopkins* case and the *Westminster Corporation* case (above) have simply been based upon the invalidity of the decision. However the defects involved, breach of the *audi alteram partem* rule, and improper purposes, have in other contexts expressly been held to nullify (14)

Wood v. Woad discloses a difficulty in the application of the nullity principle to collateral attack. The Plaintiff was expelled from a mutual insurance society in breach of the *audi alteram partem* rule. He brought an action in tort to recover money he would have received against a claim. It was held that as the expulsion was void, and the plaintiff was therefore still a member he had suffered no loss since he should simply have ignored the decision. Clearly this rationale is inapplicable where a trespass or some other recognised tort is committed in reliance upon the purported decision, but where loss flows directly from an *ultra vires* act, which does not give rise to such course of action it is difficult to establish liability. *Wood v. Woad* itself was distinguished in *Bonsor v. Musicians Union* [1954] 1 CH 479 on the ground that no damage in fact took place.

However there is authority that loss arising from a decision which lacks jurisdiction is not actionable as such (15). The effect of the jurisdictional defect is to make the decision void, and thus remove a possible defence of statutory authority in any action arising out of the implementation of the decision "No such thing was ever heard of as an action for making an order against a person without jurisdiction" (16).

Despite this there have been dicta that loss consequent upon an ultra vires act is actionable (17) and in the Canadian case of *Roneavelli v. Duplessis* 1959 SCR 121 the plaintiff successfully claimed damages against the Prime Minister of Quebec for wrongful revocation of a licence, even though the decision was regarded as void (Per Rand J. at 143). This decision has been explained by Wade as resting upon a provision of the Quebec Civil Code and thus not applicable in England (18). However it appears that malicious acts within jurisdiction are actionable (19) and it is difficult to see why the same should not apply to ultra vires acts as long as mala fides is shown.

If this is so liability in tort for malicious irregularity or abuse of power is independent of the void voidable distinction and, constituting a cause of action in its own right, is not a form of collateral attack.

Thus, with this one possible exception, an action in tort presupposes a void decision.

Three aspects of this remain to be discussed. Firstly whether the collateral attack decisions are based upon a similar definition of jurisdiction to the one established in the other contexts which have been examined? Secondly, what exceptions to the general principle exist. Thirdly is the scope of collateral attack limited by the concept of jurisdiction in the case of both judicial and administrative decisions.

The Meaning of Jurisdiction in Collateral Proceedings

Salmond takes the view that jurisdictional defects for the purpose of collateral attack are confined to defects of person, place and subject matter.(20) This, as shown above, is supported by the early decisions, and also by the rule limiting an action in tort for defects within jurisdiction to situations where malice is shown. In direct proceedings malice, or other improper purpose, would, as shown above, be regarded as

a jurisdictional defect, and thus there would be no need for this rule recognised by Parliament in S1 of the Justices Protection Act 1848. However, there are dicta (21) to the effect that the malice referred to in this context is in itself the basis of the action. This is consistent with *Roncarelli v. Duplessis* (above) and with the suggestion that where malice is the basis of the complaint the cause of action is *sui generis*, for abuse of statutory power, and not a method of collateral attack. If this is so, then the question of malice is independent of the void, voidable distinction. The authorities are inconsistent upon this point. It is submitted however that S1 and S2 of the Justices Protection Act can be construed in this way without distorting what Coleridge J. described as an "exceedingly ill worded" Act (22). S1 allows an "action on the case as for Tort" only if malice is shown where a justice acts inside jurisdiction, and S2 preserves the same rights of action as exist at common law for acts "without or in excess of jurisdiction". Both sections, although confined to justices of the peace have been regarded as introducing no material changes in the law (23) and it is suggested that where an act is in excess of jurisdiction it can either be the subject of collateral attack, where malice is generally irrelevant, or of a possible, if at present *inchoate* (24) action in tort for malicious abuse of power.

Recent cases in the field of direct review, in particular *Anisminic* and *Ridge v. Baldwin* have been based upon a wide approach to jurisdictional defects, and although it is suggested that *Anisminic* extends the category too far, it is clear that breach of natural justice results in nullity. This ground has justified collateral attack in *Coopers case* and *Hopkins case*, (above) and decisions vitiated by improper purposes have been treated as void in collateral proceedings, in *Webb v. Minister of Housing and Westminster Corporation v. L.N.W.R.* (above). Indeed in *Osgood v. Nelson* 41 LJ QB 329 in an action in quasi contract by an official who alleged (*inter alia*) that his removal from office was in breach of natural justice the House of Lords held (*obiter*) that "if a man was removed from an office of this kind from any frivolous or futile cause you would in all probability be inclined to treat the removal as a nullity". Perhaps like *Anisminic* this case goes too far in widening the range of jurisdictional defects, into the area of unreasonableness and insufficiency of grounds, but suggests at least that the Courts are prepared to depart from the person, place, subject matter formula.

Finally an inconvenient result of such a distinction between collateral and direct proceedings would be to sharpen the distinction between the two whereas there is an area where they merge, where remedies such as the declaration are involved, in form collateral, but in fact, as shown above, used as methods of direct review. Two competing notions of jurisdiction as well as being conceptually unnecessary would limit the effectiveness of these remedies, whereas a single notion of jurisdiction allows them a sufficiently wide scope, and yet does prevent the ambit of direct, being wider than that of collateral attack. Certiorari and statutory methods of direct review are available to challenge non jurisdictional defects.

2. Exceptions to the Rule that Collateral attack depends upon nullity

Apart from the self-destructiveness of the nullity principle shown in *Wood v. Wood*, it is clear that the doctrine although preventing all defects from being reviewable in collateral proceedings, has drastic consequences, particularly where the processes of decision making and implementation are complex since many persons relying upon a decision held to be ultra vires may find themselves exposed to legal action, either as principle or servant or agent.

Thus, unless as has been advocated (25), the governing principles should be replaced by special rules, similar to those operative in France governing tort liability of public officials, it is necessary to introduce piecemeal exceptions to the principle in order to protect both officials and members of the public.

This area of law has been more thoroughly developed in the United States both as to the implications of nullity and its exceptions. This is due largely to constitutional aspects of illegal action, and the law has been developed particularly in the context of statutes held to be unconstitutional, which have been regarded by the Courts as complete nullities giving rise to no legal consequences (26).

However despite such extreme assertions exceptions have been formalised. In *Chicot County Drainage District v. Baxter State Bank* 308 U.S. 371 Hughes C.J. said (at 374) "an all inclusive statement of a principle of retroactive invalidity cannot be justified".

Thus various devices have been used to modify the consequences of nullity.

Firstly the idea of relative nullity has meant that a statute may be invalid as applied to one set of facts and yet valid as applied to another. However this can lead to official confusion. Secondly a presumption of validity prevents collateral attack of a decision which is prima facie valid and acted upon in good faith (27). Thus a finance officer paying out money in reliance upon an unconstitutional statute has been held not liable.

Similarly there is a "de facto" doctrine regarded by Swenson (28) as a simple matter of policy and necessity. Proceedings of a de facto official are, for purposes of collateral attack, to be treated as equally binding as those of a de jure officer.

In English Law the principle and its exceptions have not been systematically treated, but it is possible to detect four groups of exceptional situations where, despite the nullity of the decision collateral attack is restricted. Conversely there is some authority that in cases involving personal liberty collateral remedies will be allowed even though the decision is within jurisdiction (29). However these cases proceed upon the assumption that every patent defect produces a nullity (30). This has been discussed above (P.83). However there are some early dicta that collateral actions lie against a voidable arrest warrant (31). These cases are inconsistent with modern authority as to the effect of patent irregularity, and are best regarded as based upon an undue extension of Habeas Corpus law.

Firstly protection is given to persons enforcing a decision by excusing them from liability in respect of a void order unless they have notice of the want of jurisdiction concerned (32). Some decisions have gone further and made the face of the record rule decisive. In *Demer v. Cook* (1903) 88 LT 629 it was said that where a gaoler receives a prisoner under a warrant that is correct in form "no action will lie against him if it should turn out that the court had no jurisdiction to issue it". In *O'Connor v. Isaacs* [1956] 2 QB 88 this principle was extended (obiter) to cover the liability of the deciding officer. Diplock J. whose judgement was upheld by the Court of Appeal thought that, unless a defect of jurisdiction appears on the face of the record, the record must be quashed before a collateral action lies. This violates the general principle that the existence of a record is immaterial where jurisdiction is challenged, but in its application to magistrates

can be explained by reference to the express requirements of the Justices Protection Act 1848 S2 which provides that a conviction, but it seems no other kind of order, must be set aside before an action in tort will lie for excess of jurisdiction.

Similar protection to enforcement officials has been given by a number of statutes. In particular the Constables Protection Act 1750 protects "any person for anything done in obedience to any warrant under the hand or seal of any justice of the peace". By S6 this expressly includes jurisdictional defects. Thus, as under the common law decisions the enforcement officer need not determine questions of validity, but it is submitted that his protection is lost if the defect appears on the face of the warrant (33).

Other statutes provide protection which expressly includes jurisdictional defects. S141 (1) Mental Health Act 1959 exempts "persons purporting to exercise powers under the Act" from liability in civil and criminal proceedings "whether on the ground of want of jurisdiction or any other ground".

However where jurisdiction is not so mentioned, it is submitted that the rule in *Anisminic v. Foreign Compensation Commission* [1969] A.C. 147 may govern this situation, whereby protection to persons relying upon a "decision" or an "order" may extend only to something that does exist as a decision, or order and thus would not include acts to be void. This, coupled with the wide concept of ultra vires employed by their Lordships in *Anisminic* would, however, frustrate the purpose of this kind of provision, and it is suggested that this point should be expressly covered in all such legislation.

A similar exception to liability is based upon the defence of mistake of fact. A magistrate (34), and, according to the dictum of Blackburn J. in *Pease v. Chaytor* (1863) 3B & S 620 any "tribunal of limited authority" is exempt from liability arising from an excess of jurisdiction if he had no means of knowing a fact which deprives him of jurisdiction. This does not extend to matters of law and thus would not normally include the "jurisdictional fact" situation.

It is significant that most authorities in this area and in the field of collateral attack generally are old cases. This reflects the infrequency in modern times of an action being commenced against the individual enforcing officer, and more generally the prevalence, despite the inadequacies of the prerogative orders and the declaration (35) of

direct as opposed to collateral means of review. The establishment of statutory means of challenge to decisions affecting land has probably contributed towards this. It appears from *Uttoxeter U.D.C. v. Clarke* 1951 ALLER 1318 at 1321 where an injunction issued against the defendant who resisted entry to his land by the plaintiff acting under compulsory powers, that apart from the statutory procedure, no other means of challenge either directly or collaterally will be permitted (36).

These rules are not strictly exceptions to the general principle in that they constitute purely personal defences, and do not negate a cause of action as such. Thus in *O'Connor v. Isaacs*, a case concerning the Justices Protection Act 1948, the plaintiff relied upon S2 of the Act which provides that a conviction made without jurisdiction must be formally set aside before an action can be brought against the magistrate. The Court of Appeal held that for the purposes of the Limitation Act 1939, time runs from when the wrongful act was committed and not from the setting aside of the decision, which was a purely procedural device to protect the magistrate. Morris L.J. said (at 361) "The whole case of the plaintiff is that the orders made were nullities and need not be obeyed".

However a genuine exception exists in the case of acts by de facto officials. There is ~~no~~ authority that a doctrine similar to that in the United States exists in this country.

Thus in *R. v. Corporation of the Bedford Level* (1805) 6 East 356 the appointment of a deputy registrar charged with the duty of registering title to land was defective. The issue arose whether persons whose titles to land he had registered, had the right to vote at an election for which a valid registration of title was necessary. Lord Ellenborough held that the acts of an officer de facto in the sense of "a person who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law" (at 367) would be valid. It was held however that with the recent death of his principal a fact "notorious to the owners of land in the level" the person concerned had lost any reputation he might have possessed. In *Kestell v. Langmaid* [1950] 1KB 233 a notice to quit which was under the provisions of the governing legislation "null and void" held by the Court of Appeal to "exist" as a notice, so that it could be acted upon by the tenant, giving him a right to compensation under the Statute.

The same principle seems to have been applied recently in *Royal Government of Greece v. Governor of Brixton Prison* [1969] 3 ALLER 1337. The House of Lords were asked to decide whether a Greek national, who had been convicted of an extraditable offence by a Greek Court, should be extradited. A duly authenticated certificate of conviction had been presented. The conviction although valid under Greek Law was in breach of the *audi alteram partem* rule, and it was argued for the prisoner that as the Conviction was a nullity in English Law (37) there was no ground for extradition. It was held that the conviction existed in fact. Lord Reid said (at 1337) "It is one thing to say that he was never convicted, and quite another thing to say that the law regards his conviction as a nullity". This coupled with the discretion exercised by the Home Secretary in matters of extradition meant that assuming that the certificate was genuine, the conviction could not be challenged. However perhaps the result would have been different had the conviction been void, under Greek law as well as under English Law.

Finally in actions arising out of questions of title to property an exception appears to exist in favour of a bona fide purchaser. Thus in *Biddle v. Bond* (1865) 6B & S 225 the Court held that a bona fide purchaser obtains a good title to goods, even if as a result of a void distress. Conversely in *Lock v. Selacod* (1841) 1 QB 736 goods were distrained by a warrant which was bad on its face, and it was held that no title passed to the plaintiff even though the warrant was merely voidable on the ground that he was not a bona fide purchaser.

These exceptions exist to obviate extreme injustices. In general it is clear, despite the decreased importance of collateral attack that this is an area of law where the consequences of the void / voidable distinction are strictly applied by the Courts.

The Distinction between Judicial and Administrative Acts

It is sometimes held that, in collateral proceedings the jurisdictional concept applies only to judicial decisions, and that therefore ADMINISTRATIVE acts are subject to collateral review for all defects (38). If this is so then the importance of the distinction between voidness and voidibility is reduced.

It is submitted that for three reasons this view is incorrect.

Firstly, it is difficult, in this context, to draw any distinction in principle between judicial and administrative acts. In other areas such a distinction may be useful, as regards for example, privilege in defamation, or the application of the rules of natural justice. This depends upon the meaning given to "judicial" in each context. However as regards the ultra vires doctrine, and the scope of review, the same rationale governs both type of power. In each case a discretion is given to an official, circumscribed within a statutory limit, to make a decision affecting individuals. A real distinction however exists between these acts, and ministerial acts, which involve little or no discretion. Since the actor has a duty to perform an act without a power to choose a solution from a range of alternatives, the distinction between mere error, and ultra vires does not arise. All defects are jurisdictional and an action in tort should always lie (39).

In the case of powers involving choice or discretion a common rationale governs judicial and administrative acts. In each case a discretion is entrusted to an official, so that his decision will be treated as effective by other branches of government (40). The notion of discretion or choice would be meaningless if his decision were only enforceable if free from error. Thus Lord Sumner in *R. v. Nat Bell Liquors* [1921] A.C. distinguished error from ultra vires, and made it clear that error as such does not affect jurisdiction. The difference between judicial and administrative acts is superficial in this context. A judicial act is one where objective standards for the exercise of the discretion are provided, or perhaps where a minimum formal procedure is laid down (41). An administrative act differs from this only in degree, involving greater freedom of discretion, and a less circumscribed choice of factors to apply (42). The two types of power tend to merge, but in both it is submitted that error and ultra vires should be distinguished,

although error is less likely in the case of an administrative decision because of the absence of objective rules and standards to be applied. The jurisdictional principle is the same however in each case. Decisions beyond the area of discretion are unenforceable and thus provide no defence to a collateral action.

The distinction is sometimes defended upon the narrower basis of *res judicata*, it being argued that a judicial act within jurisdiction is unempeachable collaterally because it is *res judicata*, and that as this doctrine applies only to judicial functions (43) there is no obstacle to collateral impeachment of administrative decisions (44). However this is strictly a misuse of the term *res judicata*, since the doctrine is narrower than that of collateral challenge, applying only to the original parties, and preventing the same issue being litigated for a second time once determined by a Court acting within its jurisdiction (45). Thus in *Re Waring* [1948] Ch 221 a decision of the Chancery division the ratio of which was later overruled was *res judicata* to prevent the parties from contesting it in the light of the change in the law. This did not however prevent a person who was not party to the original litigation from obtaining a contrary ruling in respect of the same property.

The difference between conclusiveness for collateral review purposes and *res judicata* has been recognised in the United States (46) and in this country the two decisions in *I.R.C. v. Sneath* [1932] 2 KB 362 and *I.R.C. v Pearlberg* [1953] 1 ALLER 388 illustrates the independence of the two notions. In *Sneath* an assessment by the Income Tax Commissioners was held by the Court of Appeal not to constitute *res judicata* to prevent a contrary decision being made in respect of later years. Lord Harmsworth M.R. (at 380) and Greer L.J. at 386, denied that the function of the Commissioners was judicial for this purpose, but thought that as regards the instant year the decision would be "conclusive and final". In *Pearlberg* a similar decision was held to be unempeachable unless the regulations governing appeal were followed. The question of administrative or judicial was not discussed but Denning L.J. said (at 389) "The debt became absolute and conclusive, and its legal effect cannot be denied".

Thus conclusiveness does not depend upon *res judicata*, but simply upon the existence of a legally effective decision, which may be voidable in direct proceedings.

Secondly the authority supporting the distinction between judicial and administrative acts is insufficient. Only two cases clearly support this proposition and in each the point was obiter.

In *Everett v. Griffiths* [1921] A.C. 631 the Defendant Chairman of a board of guardians signed an order for the reception of the plaintiff in a lunatic asylum. In an action for negligence the House of Lords held that the defendant having acted reasonably and *bona fide*, was not in breach of duty. Although the distinction between judgment and administrative acts were discussed, it was in the context of the rule allowing immunity from personal liability to a person exercising judicial functions as long as he acts in good faith within jurisdiction. This it has been suggested above is not to be regarded as collateral attack. The general question of collateral impeachment of administrative did not therefore arise, although it was assumed that the defendant was acting judicially (at 678 and 687).

In *Eleko v. Government of Nigeria* [1931] A.C. 662 the Privy Council refused to issue Habeas Corpus to secure the release of the applicant whose deportation had been ordered by the Governor of Nigeria. The Plaintiff contended that certain factual conditions precedent were not present. Lord Atkin (at 670) said "The Governor acts solely under executive powers and in no sense as a court. As the Executive he can only act in pursuance of the power given to him at law". This dictum does not support the general proposition that any error nullifies for the purpose of collateral attack. It has been established that the extent of the discretion entrusted to the Home Secretary in the field of Deportation is such that unless he acts *mala fide* (47) the grounds upon which he acts cannot be reviewed. However his order is reviewable for *vires*, (48) if, for example the proposed deportee is not an alien (49) and this jurisdictional fact situation is common to all kinds of power. Thus Lord Atkin's dictum should be regarded as referring only to *ultra vires*, in which sense it is unobjectionable.

Secondly although Habeas Corpus, conceptually ranks as a means of collateral attack being directed to the detainer to show existing authority for the detention its scope as shown above is such that, like

the declaration it operates as a direct remedy, lying for errors of law and fact and for non-jurisdictional procedural defects to both administrative and inferior judicial bodies (50). Thus Habeas Corpus being a remedy sui generis and of anomalous scope is no guide to the limits of collateral attack.

Thirdly the Courts in the context of collateral review define judicial widely to contrast, not with administrative powers, but with ministerial acts. Thus "judicial" for this purpose may include what is in other contexts, such as natural justice, regarded as an executive act. Indeed in natural justice cases, the distinction between judicial and administrative appears to have been discredited (51) and perhaps by analogy the same is true of certiorari. Certainly in both these areas the meaning of judicial has been, after excessive reliance on formalism in the 1930's (52), progressively widened to embrace an increasing range of statutory powers the defining criterion selected by the Courts being that of the effect of the decision upon individual rights (54) the term "rights" being interpreted liberally, rather than in a Hohfeldian sense to embrace what Lord Denning in *Schmidt v. Home Office* [1969] 1 ALLER 904 described as "legitimate expectations". The only qualification of this wide approach is that a decision involving a wide discretion unfettered by the need to make objective findings may not be judicial (55).

This approach has been applied in the context of collateral attack, without the qualification preventing wide discretions from being "judicial" for this purpose. Thus in *Everett v. Griffiths* Lord Atkinson said "Whether a proceeding is a judicial proceeding or merely an administrative proceeding depends more upon what is authorised to be done by the named authority, what is done, and the effect of the act upon the rights and interest of others" at 682.

May C.J. in *R v. Dublin Corporation* [1878] 2 LR 1R 371 at 376, held the same view "A judicial act seems to be an act done by competent authority upon consideration of facts and circumstances imposing liability and affecting the rights of others.

In *Partridge v. G.M.C.* (1890) 25 QB the distinction between judicial and ministerial functions was applied in an action in tort against the Medical Council for erroneously removing the Plaintiffs name from the

Register. It was held that since the defendants powers were "discretionary" and not ministerial they should be treated as judicial and thus would be collaterally unimpeachable.

The only authoritative statement to the contrary was made by Lord Pearce in *Anisminic*, where in deciding that a determination by the Foreign Compensation Commission was a nullity and so not protected by a Privative clause, he distinguished *Smith v. East Elloŵ R.D.C.* where a Compulsory Purchase Order was held to be protected by a similar clause, on the ground that the latter case concerned an executive act and was possible governed by different principles in the context of the distinction between void and voidable. However if this distinction is acceptable, the implication of the dictum appears to be that Executive acts may be merely voidable in situations where judicial acts are void, which is the reverse of the proposition at present under consideration.

It is submitted therefore that the application of the void voidable distinction to judicial acts is misconceived. There is no adequate policy reason for this, the authorities in support are indecisive and can be distinguished, and the meaning of "judicial" is wide enough to embrace all decisions which involve the distinction between ultra vires and error.

NOTES

- (1) Rubinstein Op Cit 37
- (2) Phillips v Bury 1692 Horlt KB 715
- (3) As in Webb v. Minister of Housing (above p.6)
- (4) Ex p. Peachey [1966] 1 QB 380
- (5) See Gregory v. Camden B.C.
- (6) See Rubinstein Op. Cit. 47-48
- (7) Marshalsea Case (1612) 10 Co Rep 68b
Terry v. Huntingdon (1668) Hard 480
Pappillon v. Buckner (1669) Hard 478
Phillips v. Bury (1692) Holt KB 715
Gwynne v. Poole (1692) 2 Lut App 1560
- (8) Op Cit 277
- (9) See above Chapter 5.
Wildes v. Russel (1866) LR 1CP. 722, 741
Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759 at 786
- (10) (1958) Criminal Law Review 279 at 285
(1958) 21 MLR 538
- (11) De Smith Op cit p.595
- (12) Bushells Case (1674) 2 Mod 218.
Ex p. Schtrahs [1962] 3 WLR 1013
- (13) Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180
Hopkins v. Smethwick Board of Works (1890) 24 QBD 712
Westminster Corporation v. L.N.W.R. 1905 A.C 426
Osgood v. Nelson 41 LJ QB 329
Wood v. Wood (1874) LR 9 Ex 190
Webb v. Minister of Housing & Local Government (above)
- (14) above Chapters 5 and 6
- (15) Polley v. Fordham [1904] 2 KB 345
O'Connor v. Isaacs [1956] 2 QB 288
Abbot v. Sullivan [1952] 1KB 189 at 197
- (16) Polley v. Fordham (above) at 348
- (17) Abbot v. Sullivan (above) per Denning L.J. at, Bonsor v.
Musicians Union [1954] 1 Ch 479 at 513
And see David v. Abdul Cader [1963] 3 ALLER 579
Garner Administrative Law (3rd Ed.) 144, 176
- (18) Administrative Law 2nd Ed. P.99

- (19) See Sheridan 1951 14 MLR 270
Everett v. Griffiths [1921] 1 A.C at 658
Partridge v. G.M.C. [1890] 25 QBD 90
- (20) 14th Ed. 582-4
- (21) O'Connor v. Isaacs (above)
- (22) Barton v. Brickness (1850) 13 QB 393 at 395
- (23) See Sheridan (1951) 14 MLR 267
Rubinstein Op Cit 141
- (24) De Smith op cit 317-319
- (25) Akehurst 1968 31 MLR at 144
- (26) See Norton v. Shelby County (118 U.S. 425) per Field J.
Freeman Judgements 5th Ed. 642
Hart. Administrative Law (2nd Ed.) 643
- (27) Goodman v. Guild 94 Tenn 486
- (28) Federal Administrative Law 207
- (29) Wickes v. Clutterbuck (1825) 2 Bing 483
Baldwin v. Blackmore (1758) 1 Hurr 596
Cosset v. Howard (1847) 11 Jur 750 at 756
- (30) R v. Mahony 1910 21R 695 at 731-2
Murray v. Murray [1940] 4 ALLER 250
L.C.C. v. Hackney Borough Council [1928] 2KB 588 (Rating)
- (31) Wicks v. Clutterbuck (above)
- (32) Webb v. Batchellor (1875) Freeman KB 396
Turley v. Dav (1906) 14 LT 216
- (33) See Street Law of Torts (3rd Ed.) 88
- (34) Palmer v. Crone [1927] 1 KB 804
- (35) See Law Reform Commission Report on Administrative Law 1969 cmd
4059 See Garner Op Cit 104
- (36) However see the discussion of Webbs case (above) at P6
- (37) See 810 of the Extradition Act 1870
- (38) De Smith op cit 76-80
Gordon 1966 LQR
See Broune J. in Anisminic. [1969] 2 A.C. 234

- (39) Ferguson v. Kinnoul (1842) 9Ch & F 251
Linford v. Fitzroy (1849) 13 QB 240
R v. Local Government Board (1902) 21 R349 Per Pallas C.B. at 374
- (40) See Diplock L.J's Judgement in Anisminic [1967] 2 ALLER at
- (41) See R v. Manchester Legal Aid Committee ex parte Brand (1952)
- (42) De Smith Op Cit 69 - 72
- (43) I.R.C. v. Sneath 1932 2 KB 362
Halsbury L.E. 3rd Ed. 15 at 184 Ganz 1965 PL 237
- (44) See De Smith Op cit 93
- (45) See Rubinstein Op Cit 26-29
- (46) Hart. Introduction to Administrative Law 2nd Ed. 656
- (47) Ex p. Soblen [1963] 2 QB 243 at 302
- (48) Ex p. Venicoff [1920] 3KB 72
- (49) R v. Home Secretary [1917] 1 KB 922 at 933
- (50) De Smith op cit p. 595
Rubinstein Op Cit 111-115
Ex p. Ruddy [1956] 2 QB 108
Ex p. Schtrahs [1962] 3 WLR 1013 at 1045
- (51) Ridge v. Baldwin [1964] A.C. 40
Re H.K. [1967] 2 QB 613
R v. Gaming Board [1970] 2 WLR 1009
- (52) See Committee on Ministers Powers Report 1932 cmd 4060
- (54) Ridge v. Baldwin [1964] A.C. 40 Per Lord Reed at 76
- (55) Ex p. Brand [1952] 2 QB 413
R v. Gaming Board [1970] 2 WLR 1009

CHAPTER 10. FACTORS PRECLUDING RELIEF

1. Waiver

It is sometimes held that a decision outside jurisdiction, being a nullity cannot be cured, by consent, nor by estoppel since this would result in the powers of a public authority being extended beyond the intention expressed by Parliament (1). Nor can estoppel prevent the exercise of statutory duties or powers (2). A defect which does not go to jurisdiction can however (3), be waived.

Two situations arise. Is a person, who consents to an invalid act, debarred from challenging its validity at a later stage? Secondly is an authority who seeks to rely upon an invalid decision later estopped from denying its validity?

Prima facie the answer to both these questions depends upon the void, voidable distinction. If the decision is a nullity, then nothing exists to constitute the subject matter of the consent or estoppel, and thus in neither case can validity be given to a nullity (4). However, policy considerations militate against so arbitrary a solution, particularly where an official seeks to avoid responsibility for an ultra vires act which has been relied upon by the individuals concerned.

In the case of waiver by the injured party the decisions are inconsistent. Reliance is frequently placed upon the proposition that a nullity cannot be waived, particularly in cases involving recourse to a right of appeal (5).

Nevertheless there are decisions allowing jurisdictional defects to be waived, even though for other purposes the decision was treated as void (6).

The Courts have sometimes justified this by drawing distinctions between different types of jurisdictional defect, employing the concepts of "total" or "general" want of jurisdiction, and "contingent" want of jurisdiction (7) of which only the latter group are curable by consent. Thus in *Essex Incorporated Church Union v. Essex C.C.* [1963] A.C. 808, Lord Reid (at 820) asserted the "fundamental principle that no consent can confer upon a statutory body power to act beyond its jurisdiction

nor estopp the consenting party from subsequently challenging the jurisdiction" (at 820). However, Lord Devlin (at 834) limited this to defects of general jurisdiction which he equated with power to enter the enquiry. In as far as these decisions suggest that an ultra vires act can be voidable, they are clearly inconsistent with principle. However, Lord Devlin's distinction appears to reflect the "pure theory" of jurisdiction under which defects in the course of the inquiry are not jurisdictional and so produce at most, a voidable decision.

The distinction between waivable defects and others is sometimes based upon a different principle, that a party can waive jurisdictional requirements imposed for his own benefit, whereas others cannot be waived at all (8).

This is more convincing, as it allows for the explanation that certain jurisdictional requirements are in themselves dependent upon consent. Thus if a person consents, either before or after the decision to a failure of natural justice, the decision is valid, not because of waiver as such, but because no jurisdictional defect has occurred. Thus statutes allow jurisdiction to be conferred by consent (9) and there is no reason why requirements which exist, not in the public interest as such, but merely to protect individual parties, should not be removed by consent of the party concerned. Thus in the case of the audi alteram partem rule, a person with full knowledge of the charge against him can refuse his opportunity to be heard without invalidating the decision (10). There is no reason why this should not be achieved retrospectively. It is submitted that this principle provides an explanation of *Durayapah v. Fernando* [1967] 2 ALL.ER 152. The Privy Council refused an application to set aside a decision of the Minister dissolving a Municipal Council upon the ground that the decision was merely voidable, and that the applicant the Mayor was therefore unable to rely upon its invalidity since the Council themselves had taken no steps to challenge it. It is suggested that the question of voidness and voidability should be irrelevant here. The decision was valid because the Council had by implication, consented to the absence of a hearing, and therefore the audi alteram partem rule had not been violated.

Clearly this cannot apply to all kinds of jurisdictional defect. The waiver cases, do support a distinction based upon the purpose of the jurisdictional requirement. Possibly the rules of natural justice and certain procedural requirements as to the serving of notice and the giving of reasons can be construed as depending upon the absence of consent. Subject matter, fraud, qualifications of the tribunal being matters where the public interest predominates should invalidate irrespective of consent.

Apart from this, waiver decisions can be regarded as based upon the Court's power to refuse a remedy in its discretion. As Farwell J. pointed out in *R v. Williams* [1914] 1 KB 608, the Court may refuse a remedy upon various grounds, whether the decision is void or voidable without affecting the validity of the decision. Thus in *ex p. Zerek* [1951] 2 KB 1 at 11 the Court refused to award certiorari to quash a decision of a Rent Tribunal reducing rent for the applicants premises. Nevertheless the Court assumed that the alternative course would be open to the Landlord of suing in contract for arrears of rent.

This makes it clear that although refusal of a remedy may result in a void decision being unchallengeable, and therefore that the nullity is in a sense relative, nevertheless the decision has no legal effect, unless a positive rule of law, such as that allowing the Court to withhold a discretionary remedy, prevents an applicant from taking advantage of the nullity.

The problem of consent arises in acute form where the official making the decision seeks to rely upon its invalidity in order to substitute a new decision for the one concerned. This is sometimes treated as a matter of *res judicata*, and there is some doubt as to whether this doctrine applies to administrative as opposed to judicial bodies (11). It is submitted, however, that *res judicata* has no application to this situation, being concerned only with cases where a court is requested to reconsider a decision or a finding already made by an authorised body (12). Thus in *Punton v. Minister of Pensions (No 2)* the Court of Appeal refused to substitute its decision upon a superannuation question for that of a statutory tribunal acting within its jurisdiction, even though the tribunals decision was wrong in law. Certainly the application of *res judicata* depends upon the jurisdictional principle and therefore upon nullity (13).

The problem of estoppel against the deciding body was raised by Lord Evershed in *Ridge v. Baldwin* [1963] 2 ALL ER at 89. The applicant had been dismissed from office and appealed to the Home Secretary who rejected his appeal. "What would have been the situation had the Secretary of State allowed the appellant's appeal and held that he should be re-instated as chief constable? Would it have been open to the Corporation to refuse to give effect to such decision on the ground that the proceedings ... before the watch committee had been a nullity?" His Lordship, classifying the decision in question as voidable, regarded this as necessary to avoid such an inconvenient result which might flow from the proposition, upheld by the majority, that an appeal from a void decision is in itself a nullity.

Similarly in Criminal cases, where a conviction is set aside on appeal for failure to comply with procedural requirements or for breach of natural justice, it has been held that the conviction was voidable only, in order to preserve the double jeopardy principle, and to prevent the court from issuing a *venire de novo* (14).

In the context of administrative acts the void, voidable distinction appears to govern the problem of whether an authority which performs an invalid act upon which an individual relies is estoppel from relying upon the invalidity, and from making a second, inconsistent determination. Thus in *Rhyl R.D.C. v. Rhyl Amusements Ltd.* [1959] 1 ALL.ER 257, it was held that the Local Authority could not be estopped from relying upon the invalidity of a lease which it had granted some years previously, and which had been relied upon by the parties concerned. The lease was *ultra vires*, and the doctrine of estoppel could not be relied upon in contradiction to statutory limitations of power. Similarly in *Southend-on-Sea Corporation v. Hodgeson (Wickford) Ltd.*, the Borough Engineer had informed the respondent that planning permission would not be required for a proposed development. Subsequently an enforcement notice was served upon the respondent, which was upheld by the Divisional Court upon the ground that the Engineer had no authority to bind the Council, and that therefore the doctrine of estoppel was

inapplicable. The Council could not be estopped from exercising its statutory duties and discretions. Both these cases depend upon nullity. As Cassells J. said in *Minister of Agriculture v. Matthews* (above) an ultra vires Act performed by an official or his servant cannot in law be an act of the official concerned, and therefore neither consent nor estoppel can operate in the face of a statutory restriction of power.

Where the decision taken is within jurisdiction but erroneous it is merely voidable, and estoppel may therefore prevent reliance upon the defect. This was the solution reached in the recent decision of *Lever Finance Ltd. v. Westminster (City) Borough Council* [1970] 3 WLR 732. An official of the authority had represented to the applicant that his proposed development would not require planning permission. In reliance upon this the applicant had incurred expenses in connection with his project. It was held by the Court of Appeal that the authority was bound by the decision of its officer, and therefore could not serve an enforcement notice against the applicant. The Court held that the Official was authorised to make a binding determination as a result of §64 of the Town and Country Planning Act 1968 which permits delegation of planning decisions to officials of the planning authority. Although such delegation is required to be in writing the authority could not rely upon the absence of this formality since it had been a longstanding custom to permit such officials to decide certain planning questions, and this custom, amounting to an implied delegation cured any irregularity. Thus the defect was treated as one not affecting jurisdiction (15). However, Lord Denning M.R. was prepared to hold upon wider grounds that, independently of the statute, the longstanding practice by which the authority accepted the decisions of its officers upon certain matters amounted to implied delegation arising out of the concept of "ostensible authority". This is inconsistent with the reluctance of the Court in earlier cases to imply authority to sub-delegate the power to make decisions affecting individual rights particularly where the decision concerned is judicial in character (16). It is also inconsistent with the general principle that estoppel, of which ostensible authority is a category, cannot confer jurisdiction. Sachs L. J.'s judgement

based upon the combined effect of the statute and the practice is to be preferred.

It is submitted that the void, voidable distinction is relevant to the question of estoppel. A nullity cannot be cured by estoppel, but there is no reason why an authority should not be estopped from relying upon a defect in its decision, as long as that decision is within the power conferred by statute.

Nevertheless this has the unsatisfactory result that an authority may be in a position to rely upon its own illegal act, and that the individuals only protection against this, is the technical distinction, particularly fine in the case of procedural irregularities, between jurisdictional defects, and error within jurisdiction. However, there is authority that the Court may in its discretion refuse to issue certiorari, where the party seeking the remedy has benefited from the order that he seeks to impugn (17). This may also apply in the case of the declaration.

As in the case of waiver, therefore the rules governing estoppel are most appropriately treated in the context of the Courts' discretion to refuse a remedy. Where this is not involved, the void, voidable distinction governs both situations.

2. Locus Standi

In *Durayapah v. Fernando* [1967] 2 ALL.ER 152 the Privy Council employed the distinction between void and voidable in order to determine whether a party, other than the subject of the decision, is entitled to challenge it. A Municipal Council in Ceylon was dissolved by the Minister of Local Government in breach of the *audi alteram partem* rule. The Council as such took no steps to challenge the decision, but the applicant the Mayor, sought certiorari. It was held that although the decision was invalid, it was merely voidable, and thus could only be challenged by the party primarily affected, in this case the Council itself.

Lord Upjohn (at 158) distinguished between decisions which are a complete nullity which can be challenged by any person "having a legitimate interest" in the matter, and those which are voidable at the instance of the person against whom they are made. He further

complicated the issue, by regarding even a voidable decision as void ab initio against the party concerned. From this it can be inferred that if the decision is set aside by the person concerned the quashing is retrospective. The Judicial Committee purported to follow *Ridge v. Baldwin* [1963] 2 ALL.ER 66 regarding the majority view in that case as supporting the proposition that breach of the audi alteram partem rule makes a decision only voidable. The judgements of Lord Evershed and Lord Devlin certainly support this, but it is submitted that the majority here was constructed by a misreading of Lord Morris' speech. Lord Morris (at 404) expressly stated that the purported dismissal was void and of no effect. In commenting upon the distinction between void and voidable, his Lordship simply referred to the necessity in such cases to obtain a ruling from the Court if a purported decision was questioned. Otherwise as mentioned above, the de facto position would prevail "If in that situation it was said that the decision is voidable, that was only to say that the decision of the Court was awaited" (at 110). The position with regard to third parties did not arise in that case. Voidability in Lord Morris' sense would apply to all decisions and as Wade points out (18) reduces "voidable" to a mere platitude. However the Privy Council clearly recognised the possibility of two kinds of decision with different effects since they made it clear that if the decision were a complete nullity the Council and therefore the Mayor would still be in office. Wade treats the problem of third party application arising in such situations as one properly to be solved by applying rules about locus standi for the various remedies. It is however clear that the Privy Council recognised locus standi rules, but did not regard them as material, since it was expressly stated that even where a decision was a nullity it could only be contested by a person having some legitimate interest (at 158). Moreover, the Mayor would have sufficient locus standi, certainly for certiorari (19) and perhaps for a declaration.

The rule that a voidable decision involves restrictive locus standi rules in its own right can be inferred from this case. Ahehurst (20) regards acquiescence by the person primarily effected, as curing the denial of natural justice, and thus a third party is

barred from a remedy, not because of locus standi, or because of voidability, but because the defect no longer exists. It has been suggested above that this rationale is convenient only where the defect consists of absence of a hearing or bias, matters essentially concerned with the rights of the affected individual, and that it does not constitute a general solution to the problem of consent to a void decision.

The Privy Council were probably wrong in treating *Ridge v. Baldwin* as authority that breach of the audi alteram partem rule produces a voidable decision (21). The two further issues remain however. Firstly can a voidable decision be quashed only by the party directly concerned? Secondly is such quashing full retrospective? Restrospectivity will be considered below (22), but on the question of locus standi, it is submitted that apart from this decision no authority exists in favour of any narrower locus standi rule governing voidable decisions, than the normal locus standi rules applicable to each remedy (23).

Thus in *Attorney General of Gambia v. N'Jie* [1961] A.C. 617, the Judicial Committee stated (at 634) that the term "a person aggrieved" by a decision, which in this case was not ultra vires, but subject to appeal, was not confined to a person "who had had a decision given against him" but includes "a person who has a genuine grievance because an order has been made which prejudicially affects his interests". In *Maurice v. L.C.C.* [1964] 2 QB 362 a householder who anticipated a loss of amenity as a result of the defendants decision to construct a block of flats in the vicinity was held to be "a person aggrieved" in order to exercise a statutory right of appeal.

These decisions are not strictly in point as they concern express statutory formula which provide a right of appeal on the merits.

However, in certiorari cases, a wide concept of locus standi has been employed without reference to the void, voidable distinction. In *R v. Hendon R.D.C. ex p. Chorley* [1933] 2 KB 696, certiorari issued at the instance of an adjoining landowner in respect of a grant of planning permission vitiated by bias. Although it is uncertain whether bias affects jurisdiction, (Lord Hewart appeared (at 702) to think that it did) and there is some authority that a biased decision is voidable only (24) the effect of nullity or voidability

was clearly treated as irrelevant. In *R v. Bradford upon Avon U.D.C.* [1964] 1 WLR 1136, the Court held albeit with some doubt, that certiorari can be moved against a planning decision in respect of land adjoining the Highway by a person other than the owner, in this case a user of the Highway. Although the grounds upon which the decision was enpeached were jurisdictional, a distinction between this and other grounds for certiorari was not made. Finally in *ex p. Peachey* [1966] 1 QB 380, where it was assumed that the rules governing locus standi for the various remedies were the same, the decision was held by the Court of Appeal to be voidable only, but nevertheless Denning L. J. excluding only "mere busybodies" said that the Court "will listen to anyone whose interests are affected by what has been done" (at 401).

Conversly in declaration proceedings, a narrow locus standi rule has been employed even upon the assumption that the decision concerned was ultra vires and void (25).

It is submitted therefore that the rules governing third party rights, are independent of the void and voidable distinction. The Court may in its discretion refuse a remedy to third parties upon the basis that they do not possess a sufficient interest in the matter. One factor which the court may take into consideration in this context is whether the person primarily affected has acquiesced in the decision. If for example the owner of a piece of land does not contest an ultra vires compulsory purchase order in respect of that land, it is open to the Court to consider in its discretion whether to allow a remedy to a licensee, or to an owner of an easment over that land. It makes no difference whether the decision is void or voidable, except to the extent that if the decision is a nullity and ultra vires this may justify the Court in giving a wider ambit to the locus standi rules, since, assuming that a voidable decision does not have retrospective effect, whereas a declaration of nullity is, *ex hypothesi* retrospective, a larger class of persons and legal relationships are likely to be effected by a void decision. It is suggested that the reasoning in *Durayapah v. Fernando* is relevent to this (26) question alone.

The Discretion of the Court

In a small number of cases the distinction between void and voidable has been in order to justify the Court refusing a remedy in its discretion. Lord Evershed, (dissenting) in *Ridge v Baldwin* 1964 A.C. 40 at 91, justified his opinion that breach of the *audi alteram partem* rule results in a decision that is voidable only, upon the basis that this allows the Court to exercise a discretion whether to quash the decision. His Lordship, inconsistently with the main current of authority thought that the principles of natural justice should be enforced only where there is "a real miscarriage of justice" (27). Thus in *Ridge v. Baldwin*, had the applicant's appeal to the Home Secretary been successful, and his reinstatement ordered, the Watch Committee could not have contested the decision upon the ground that the appeal based upon an invalid decision was itself a nullity. Similarly in *Peachey* (above) Lord Denning, holding that the valuation list was voidable only was prepared to refrain from quashing it until a new list had been prepared, although Salwen L. J. doubted whether this was possible.

It is submitted that, as in the case of *locus standi* the discretionary element exists only in the context of particular remedies. *Certiorari*, *mandamus* and the declaration are discretionary remedies. The Court exercises its discretion to refuse them in appropriate circumstances, whether the decision is void or voidable and sometimes after an express holding that the decision is without jurisdiction. (28)

However, the discretion in these cases is exercisable upon established grounds and to allow a more general discretion upon the basis of voidability is therefore retrogressive. Thus if the remedy sought is discretionary then the Court may refuse it whether the decision is void or voidable (29). If the remedy is not discretionary then the plaintiff is entitled to it, upon showing that the decision is defective and complying with the other rules governing the remedy. In practice however the only non discretionary remedy is a collateral action in tort which is applicable only where the decision is void. Thus in all cases where the decision is voidable, the Court is able to exercise a discretion, and if a direct remedy is chosen this discretion can be exercised even where the decision is void.

However in three situations the distinction between void, and voidable becomes directly relevant to the Courts' discretion.

Firstly there are situations where a declaration has been refused upon the ground that the power concerned has been entrusted to a person who has made a decision which is valid though voidable. The Court here is entitled to refuse to issue the remedy on the ground that it serves no useful purpose, there being no machinery available for setting aside the offending decision (30).

Secondly there have been cases where certiorari has been refused upon the ground that the decision is void and can therefore be ignored and collaterally impeached. This does not of course mean that certiorari will not lie against nullities at all, but merely that if a more convenient procedure is available the court will withhold the order.

Finally, a least in the cases of certiorari and mandamus even if the remedy is refused, this will not give the decision validity if it is one classifiable as void. The applicant will still be able to ignore it, to resist enforcement proceedings, and perhaps to bring an action by a means which does not involve the discretion of the Court. Thus in *R v. University of Aston ex p. Roffey* 1969 the applicants, students expelled from the University in breach of the *audi alteram partem* rule, were refused certiorari in the discretion of the Court. It is suggested that, had they then ignored the decision and treated themselves as members of the University, they might have succeeded in an action in tort against any person who attempted to remove them from the University premises. In *Ex Parte Zerek* (above) Lord Devlin suggested that if a landlord failed to obtain certiorari to quash a decision of a rent tribunal he might still achieve the same result by an action in contract. Only if the decision were voidable would refusal to allow collateral attack be justified.

This emphasis on choice of remedy is not a merit in our law. It is suggested that if a decision is void for lack of jurisdiction the Court should always say so. The rules governing the discretionary remedies should take into account the public interest in ensuring that inferior bodies act within their powers, and comply with basic procedural standards. It is however necessary to preserve an element of discretion to refuse to assist an undeserving applicant even here, and thus a *de facto* limitation upon the concept of absolute nullity must be accepted. As Wade points out, if no remedy can be obtained

against a decision it must be in effect treated as valid. The availability of a remedy depends upon the identity of the person claiming it, upon his conduct, and upon the discretion of the Court. In this sense it is meaningful to regard nullity as a relative concept. (31) However to state that a legal relationship is de facto effective unless disturbed by a Court is a truism applicable to all such relationships. The particular element of enforcement by executive machinery of a decision which is not challenged, or where a remedy is refused, makes the concept of nullity less convincing in the area of law.

Nevertheless the rules governing waiver, locus standi, and discretion are analytically separable from those governing the consequence of the decision. A nullity gives rise to no legal consequences, unless a competing rule exists, to prevail over this principle. Thus an individual need give no recognition to a void decision until all means of challenge both direct and collateral are exhausted. Ultimately the aid of the Court will be required, and the distinction between void and voidable should act as a guide to choice of remedy, and to the Court when investigating the consequences of the decision and the range of persons entitled to question it.

Privative Clauses

In *Anisminic v. Foreign Compensation Commission* [1969] A.C. 147 the effect of a privative clause was treated by the House of Lords as based upon the distinction between a void and a voidable decision. Their Lordships, held that a statutory provision enacting that "the determination by the commission of any application made to them, under this act shall not be called in question in any court of law" does not extend to a determination that has no existence because it is a nullity. (32) This in conjunction with the proposition also upheld by their Lordships is a doctrine with wide implications since the only defect which is certainly not capable of producing nullity is patent error of law. The reasoning of the House of Lords is on the face of it convincing. If a privative clause can prevent even jurisdictional defects from challenge, then the notion of an inferior body with a limited jurisdiction becomes meaningless. (Per Lord Wilberforce at 208).

The Courts when they restrict the application of a privative clause to defects within jurisdiction are simply observing Parliaments' intention "What would be the purpose of defining by statute the limit of a tribunals powers, if by means of a clause inserted in the instrument those poers could be safely passed". (Per Lord Wilberforce at 208). In this context the notion of nullity is a convenient linguistic device to apply to the construction of the provative clause.

However, it is doubtful whether this reasoning is more than technically respectable. Firstly from Lord Reids general summary of the main categories of defects producing nullity, it is clear that these constitute limits to jurisdiction, not imposed by Parliament but by the Courts. The rules of natural justice are an obvious example. Secondly it is doubtful whether Parliament intended the privative clause to be thus narrowly construed, as protecting only errors within jurisdiction, since one result of this decision was the enactment of S3 of the Foreign Compensation Act 1969 which purports to protect even jurisdictional defects from judicial review. The effect of S3 will be discussed below. The reasoning employed by their Lordships constitutes a device to obscure the fact that the Courts are prepared to violate the spirit if not the form of Parliamentary Sovereignty (22).

The principle that a privative clause will not protect a nullity has been well established in the field of judicial review of inferior courts proper (34). In ex p. Bradlaugh (1878) 3 QBD 509 Mellor J. said

"It is well established that the provision taking away the certiorari doesnot apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a magistrate could make any order he pleased without question".

It is therefore surprising that this principle ^{HAS NOT BEEN APPLIED} in all administrative contexts extending as it does to any form of clause purporting to prevent review of "decisions" "orders" "schemes" or "determinations" where it can be said that the act referred to does not exist. The Courts have tended to approach each type of formula as a separate question of construction. Thus in R v. Minister of Health ex p. Yaffe [1931] A.C at 503 the House of Lords thought that a local authority scheme could be reviewed despite a provision giving it effect "as if enacted in the Act" if the scheme was in conflict or inconsistant with the Act that authorises it. The defect in question involved a failure

to comply with the procedure required by the Act. The House of Lords held however that any defect which existed had been cured before confirmation by the Minister exercising his power of amendment. This suggests that the Court did not regard the original scheme as void ab initio for if it was a nullity the Ministers confirmatory powers would not be exercisable. In *Institute of Patent Agents v. Lockwood* [1894] A.C. 347 the House of Lords held (obiter) that an invalid piece of subordinate legislation was protected by this phrase, which would otherwise be meaningless, and apart from reference to the possibility of a conflict between the Act itself and a rule purported to be made under it the notion of jurisdiction was not employed. Similarly in *Smith v. East Elloe*, *Webb v. Minister of Housing* (above) and *Woollet v. Minister of Agriculture* ([1955] 1QB 103) a clause preventing challenge in the Courts after six weeks was held to prevent at least direct challenge to a decision which in the latter two cases was regarded as a nullity. It was in addition found necessary to enact S11 of the Tribunals and Inquiries Act 1958 which prevents certain privative clauses from being effective to prevent review by certiorari or mandamus. This section, it appears is necessary only to allow review of patent error of law. However this is consistent with other provisions in the Act (35).

Nevertheless in *ex p. Gilmore* [1957] 1QB 574 the Court of Appeal made it clear that a privative clause does not apply to a nullity. Parker C. J. said "The ordinary remedy by way of certiorari for lack of jurisdiction is not counted by a statutory provision that the decision sought to be quashed is final. Indeed that must be so since a decision arrived at without jurisdiction is in effect a nullity. This however is not so where the remedy is evoked for error of law on the face of the decision. In such a case it cannot be said that the decision is a nullity".

Denning L. J. said that even an express "no certiorari" clause cannot be used to allow tribunals to exceed their jurisdiction.

Until *Anisminic* therefore the relationship between Privative clauses and nullity was not clear, despite a considerable weight of Nineteenth century authority.

It remains to be determined whether the reasoning in *Anisminic* is applicable to all privative clauses.

Firstly their Lordships distinguished *Smith v. East Elloe R.D.C.* where a privative clause was held effective to prevent review of a decision vitiated by fraud, on the grounds that this was an administrative, not a judicial decision. It is difficult to see the significance of this, since in the context of collateral attack, the authorities that draw such a distinction appear to treat administrative decisions as more rather than less, capable of being nullities than judicial decisions (see Chapter 9 above). However in *Smith v. East Elloe R.D.C.* a different type of clause was involved, one permitting review within a specified time, and secondly it appears that a majority of their Lordships thought that the defect in question did not result in nullity. Certainly the rationale of *Anisminic* was applied to a Court Protection Scheme in *Webb v. Minister of Housing and Local Government*, where a scheme was successfully impeached, in a collateral form of attack, despite the existence of a privative clause.

It is suggested that there is no reason why the nullity principle in this context should not apply to all kinds of decision.

Any clause which refers to "decisions", "orders", "schemes" or "acts" is *prima facie* subject to the *Anisminic* principle. However as the decision in *Anisminic* was based upon the presumed intention of Parliament, suitable statutory language can of course prevent review of even a void decision. As a result of the decision in *Anisminic* a suitable clause was inserted into S3 of the Foreign Compensation Act 1969. This provides for review of a decision of the Commission by way of a case stated to the Court of Appeal, and that, subject to this, "determinations of the Commission are not to be called into question in any Court of Law except upon the ground of lack of natural justice." The Act goes on to state that for this purpose, "determination" includes "a provisional determination" and anything that purports to be a determination. This indicates that even a nullity is protected by this provision. (Even if this is not so, S3 expressly gives the tribunal power to "determine any question, as to the construction or interpretation of any provision" of the governing Order in Council.)

This, with the curious saving for natural justice appears to be the most comprehensive privative clause yet introduced in an English Statute. It may be regarded as *eiusdem generis* with the "conclusive evidence clause" which makes the confirmation of an order "conclusive evidence that the requirements of this Act have been complied with,

and that the order is duly made, and is within the powers of this act". In *ex p. Ringer* (1909) 73 J.P 436 this has been held to exclude any inquiry into vires. In Yaffe's case (above) this clause, was contrasted with the "as if enacted clause" mentioned above, upon the basis that the former, but not the latter prevents jurisdictional defects from challenge (at 532-533). However it may be possible to argue upon the basis of *Anisminic* that the "order" referred to in such clause must exist in law before the clause can take effect. This was the view taken in *Corporation of Waterford v. Murphy* [1920] 2 IR 165 where a conclusive evidence clause was held not to protect a void by-law. It is submitted that this view is untenable since, assuming the equation of lack of jurisdiction with nullity, the clause, to have any meaning at all, must refer to a de facto order. Thus only a manifestly illegal order would be outside its ambit.

Authority concerning the effect of nullity upon privative clauses, is plentiful in Commonwealth jurisdictions where in Canada at any rate the nullity principle is carried its logical conclusion, drastically restricting the effect of such provisions. Thus Sutherland says "It may well be asked if there is any type of clause which could be devised to exclude judicial review beyond any question. A court may always say that the "decision" is not a decision because it was made without jurisdiction. The result is that no type of deprivatory clause can exclude review for the simple reason that it has no application". Thus in decisions arising out of the interposition of statutory Labour Boards to determine collective bargaining questions, comprehensive privative clauses expressly excluding each supervisory remedy have been held inapplicable, and sometimes ignored, (37) where the defect is regarded as jurisdictional and so producing nullity (38). Moreover the categories of jurisdictional defects have been broadly defined to include rulings on evidence (39) miscellaneous procedural defects (40), error of law (41) and the device of jurisdictional fact, liberally employed (41). Thus Laskin (42) regards "Jurisdiction" as "a sort of comforting conceptualism which in its designation carries its own condemnation of labour board action".

However even here a privative clause which explicitly covers jurisdictional defects must be recognised as effective unless it can be treated, (in Canada) as unconstitutional (43).

In Australia the drastic consequences of such a doctrine have been limited by allowing judicial review, only in cases of manifest lack of jurisdiction (44). In *R v. Murrey*, 1949 77 CLR 387, Menzies J. said (at 454) Even if there is excess of jurisdiction the privative clause protects the decision since the tribunal has not manifestly disregarded its jurisdictional limits. This principle embodying as it does a compromise solution where the Courts wish to preserve their powers of review in the face of a privative clause has been recognised in Canada. (45) As far as English Law is concerned, it is possible to construe dicta in isolated cases as reflecting a similar principle. Lord Radcliffe in *Smith v. East Elloe* (above) referred to an order with the "brand of invalidity upon its forehead" and the reference of Lord Herchell in *Lockwoods* case to a rule which was in conflict with the parent act, may be based upon a similar idea (46). However this approach, which has been criticised above (see Chapter 3), is inconsistent with *Anisminic*. It is submitted that the proper basis for defining the scope of privative clauses is to systematically categorise, without reliance upon an a priori conceptual definition of jurisdiction which defects should produce nullity. The arbitrary "commencement of inquiry" test has been advocated as a solution to the problem in Canada (47). It is submitted that this is unduly restrictive, and that the "ostensible authority" doctrine capricious and uncertain in its application.

There remains one type of privative clause which may not be governed by the nullity principle. This, now a standard form in statutes concerning interference with ownership or use of land, provides for challenge to "orders" or "schemes" upon limited grounds including *ultra vires*, and within a specified period, thereafter providing that the decision is not to be challenged in any legal proceedings whatsoever. (48)

Prima facie a nullity would not be covered by this formula, referring as it does to an "order" or a "decision". However it is suggested that two considerations militate against this.

Firstly this formula providing a statutory regime for challenge can be construed as constituting an exclusive procedure which thereby displaces the normal remedies of *certiorari*, *mandamus*, prohibition, and declaration. The prerogative orders are not necessarily displaced by the existence of an alternative remedy, but will be excluded if the

statutory procedure is regarded as exclusive. This both within the six weeks time limit and after its expiry no other remedy can be utilized. Thus in *Woollet v. Minister of Agriculture* [1955] 1QB 103, the Court of Appeal refused to issue a declaration that a certificate issued by the Minister was invalid after the lapse of six weeks. It was held that the certificate even if defective was not a nullity, but that even if it was "no certificate at all" the Court could not intervene. Jenkins L. J. said, (at 129) "Para 16 imposes an absolute bar to all litigation, including litigation designed to establish that the certificate is a nullity".

Smith v. East Elloe R.D.C., (above) supports this, there being majorities (albeit of differing composition) in support of the propositions that no challenge was possible after the expiry of six weeks, and that even within that period review was confined to the grounds specified in the Act. However, it is not clear that the majority regarded the decision concerned as void, and Lord Somervill (dissenting) was prepared to allow challenge upon grounds not covered by the statute. The criticism made of this decision in *Anisminic* (above) and by Lord Denning in *Webb v. Minister of Housing* (above) suggest that this decision will no longer be treated as authority for any general rule of law.

Secondly the six weeks time limit may be regarded as analogous to a statute of limitations, providing a procedural bar to all litigation independently of questions of ultra vires. This analysis is convincing only if the specified grounds for challenge within the time limit can be construed as extending to all defects that are normally reviewable. If this is not so, then either (according to the majority view in *Smith v. East Elloe*) other defects are not open to review at all, and thus the clause must be construed as a privative clause proper, or the grounds not so covered are reviewable quite independently of the statutory formula, and therefore, it is submitted not governed by the six weeks limitation period.

The weight of authority supports the view that the formula prevents all challenge, both direct (49) and indirect (50) after the lapse of time. Each remedy, including an action in tort has its own limitation period. The effect of this type of formula is merely to substitute, for obvious reasons of convenience in view of the reliance that must be placed upon decisions affecting land, a general time limit. It is suggested that the Courts may take this approach in distinguishing

this sort of clause from those governed by Anisminic.

However a compromise solution can be found based upon the reasoning of the Court of Appeal in *Webb v. Minister of Housing and Local Government* (above). The facts of this case have already been examined. In this context it is relevant to show that the Court was prepared to give some effect to the limitation clause, which was construed to prevent all direct review to the scheme or order to which it referred. Nevertheless, as the scheme was a nullity, it could have no legal effect except in as far as the express terms of the clause required otherwise. Thus collateral acts, done in reliance upon a nullity can be impeached unless they are themselves protected under the provisions of a privative clause.

The *Webb* case, well illustrates a fundamental aspect of the concept of nullity. Even though the rules discussed in this chapter, consent, locus standi, the discretion of the Court and privative clauses, in practice may prevent challenge to an otherwise void decision, or may result in the nullity of the decision being relative, the decision itself has no legal consequences, unless one of these specific rules necessitates treating it as effective. This is particularly important in the context of collateral attack in its various forms, since here, outside the capricious spheres of the prerogative and equitable remedies, these competing rules do not operate. Apart from the ordinary limitation period and rules governing each specific cause of action, which rarely involve the discretion of the Court, if recognised damage is caused as a result of reliance upon a void decision, the individual will have a remedy. Where the decision is, on the other hand, voidable the converse position exists, and unless the Court is prepared to grant a remedy the decision remains effective for all purposes.

NOTES

- (1) R v. Judge Pugh [1951] 2KB 623
Hamp Adams v. Hall [1911] 2KB 942
Essex Incorporated Congregational Church Union v. Essex C.C.
[1963] A.C 808
- (2) Rhyl R.D.C. v. Rhyl Amusements [1959] 1 ALLER 257
- (3) Chapman v. Earl [1968] 2 ALLER 1214
- (4) This was the rationale of Cassels J. in Minister of Agriculture
and Fisheries v. Matthews [1949] 2 ALLER 724 at 729
- (5) Ridge v. Baldwin [1964] A.C 40
- (6) R v. Cheltenham Commissioners [1841] 1 QB 467
Park Iron Gates v. Coates (1870) LR 5PC 636
- (7) Lucking v., Denning (1705) 1 Salk 202
See Gordon 47 LQR 556, 574
De Smith Op Cit 433.
- (8) See Park Iron Gates v. Coates (above) at 638
- (9) EC County Court Act 1934 543, - 55.
- (10) Annamunthodo v. Oilfield Workers Trade Union [1961] 3 ALLER 208
- (11) Ganz (1965) PL 237
- (12) Rubinstein Op Cit 26
Odgers Principles of Pleading and Practice (18th Ed.) 197
- (13) Rubinstein (loc cit)
- (14) R v. Neal 1949 2 ALLER 438
- (15) See also Wells v. Minister of Housing [1967] 2 ALLER 104
- (16) Altringham v. Minister of Agriculture [1948] 1 ALLER 780.
Barnard v. National Dock Labour Board [1953] 2 QB 18
- (17) See cases cited by De Smith op cit. 430 12 63, 64, 65.
- (18) Wade 83 LQR at 513.
- (19) Ex p. Chorley [1933] 2 KB 606.
R v. Thames Magistrates Court [1957] 55 LGR 129
- (20) 31 MLR 150
- (21) See above Ch. 5
- (22) See below Ch. 11
- (23) On which see Yardley (1955) 71 LQR 388
(1957) 73 LQR 534-539
- (24) See above Ch. 5

- (25) Gregory v. Camden B.C. [1966] 1 WLR 809
- (26) See Galeotti - Judicial Control of Public Authorities in England and in Italy 208-209.
- (27) Contra - See Davies v. Grand Junction Canal (above)
Allinson v. G.M.C. [1894] 1QB 750
- (28) R v. Senate of Aston University ex p. Roffey [1969] 2 ALLER 964
Taylor v. National Union of Seamen [1967] 1 WLR 532
- (29) R v. Williams [1914] 1 KB 608
- (30) Punton v. Minister of Pensions [1964] 1 ALLER 448
- (31) Wade 83 LQR 499 et seq
- (32) See Lord Reid at 170 Lord Morris at 173, and Lord Pearce at 201
- (33) See Wade (1969) 85 LQR 198.
- (34) R v. Cheltenham Commissioners (1841) 1 QB 467
R v. St. Albans J.J. (1853) 22 LJ.MC 142
R v. Wood (1855) 3 E B 49.
R v. Brickhill (1864) 33 LJM C 156
Ex p. Bradlaugh (1879) 3 QBD 509
R v. Hurst ex p. Smith [1960] 2 QB 133
- (35) See S9 & S12
- (36) (1952) 30 Can Bar L. Rev at 75, 76
- (37) Re Toronto Newspaper Guild and Globe Printing Co 1952 2 DLR 302
- (38) Per Renfret C.J.C. in 1953 4 DLR 161
- (39) Globe Printing Case (above)
- (40) Re Canadian Furhandlers Union 1952 2 DLR 621
- (41) Re Labour Relations Board (Nova Scotia) 1952 3 DLR 42 NS
- (42) (1952) 30 Car Bar Per at 944
- (43) See R (Sewell) v. Morrell 1944 3 DLR 710
and Le Dain (1957) 35 Car Bar Rev 826 - 827
- (44) Ross Anderson (1952) 3 OC BR 933
- (45) Le Dain Loc Cit 826
- (46) See also Morris L.J. in Woollet v. Minister of Agriculture
[1955] 1 QB at 138
- (47) See Millward (1961) 39 Can Bar Rev at 395
- (48) E.G. Housing Act 1957 Sched IV Paras 2 and 3
- (49) Woollets case (above)
Cartwright v. Minister of Housing (1967) 65 LGR 384
- (50) Uitoxeter R.D.C. v. Clarke [1952] 1 ALLER 1318

CHAPTER 11. VOIDABLE DECISIONS - RETROSPECTIVE EFFECT

In *Durrayapah v. Fernando* (above) where breach of the *audi alteram partem* rule was regarded as producing a voidable decision, the Privy Council thought that as against a person entitled to set aside the decision, it would be treated as void ab initio. This implies that the quashing of such a decision by the Court has retrospective effect, and that, as far as the person entitled to intervene is concerned all transactions made in reliance upon that decision will be invalidated. There is very little direct authority upon this point. It is clear that where a decision is a nullity, a declaration to that effect will result in the failure of all collateral transactions (1). However, on principle if a decision is voidable only, it should be perfectly good until quashed. The purpose of the device of voidability is to prevent a decision, which is erroneous, but within jurisdiction from being ignored and to allow it to give rise to the legal consequences attendant upon it, unless someone chooses to challenge it, in which case his election should not prejudice others who have already relied upon the decision. Thus in contract, a voidable transaction passes a good title to a bona fide purchaser. In family law, even though a decree setting aside a voidable marriage has retrospective effect, the inconveniences arising from this have caused the piecemeal introduction of qualifications to this rule.

There are a number of dicta to the effect that the quashing of a voidable decision does not have retrospective effect. Thus in *R v. Paddington Valuation Officer* [1965] 2 ALLER 836, the issue arose whether a rating valuation list vitiated by error should be quashed. Lord Denning (at 842) supported the contention that mandamus should issue to order the compilation of a new list, after which the old one could be quashed by certiorari. His Lordship pointed out that everything done under the old list will remain good. "For it is a general rule that where a voidable transaction is avoided, it does not invalidate intermediate transactions which were made upon the basis that it was good." Thus rates paid under the old list could not be recovered.

Similarly in *D.P.P. v. Head* 1958 1 ALLER 679 Lord Denning thought that if a detention order was voidable the Court would have a discretion whether or not to quash it (2), and that until this was done the order would remain good, and a support for all that has been done under it (3). This principle can be seen in *R v. Commissioner of Sewers for Essex* (1885) 14 QBD 561, where an order by the Commissioners charging the applicant to execute repairs was quashed for bias. It was held that the order was voidable only, and thus the Court of Appeal were prepared to set it aside for the future, but not to issue mandamus to compel the Commissioners to reimburse the applicant for expenses already incurred, since there were, at the time of expenditure, incurred under an existing legal obligation.

Indeed if the setting aside of a voidable decision was retrospective, this would conflict with the rule that, in the absence of malice, an action in tort cannot be brought against a person relying upon a voidable decision.

However Lord Devlin in *Ridge v. Baldwin* [1963] 2 ALLER 66 at 120 was prepared at least to listen to the contention that the Court could, if it quashed a voidable decision, do so on terms that would restore the parties to their original position. Thus the discretion of the Court may be material as far as restitution is concerned if the order to quash has general retrospective effect considerable inconvenience would be caused, if, for example, a statutory tribunal has been awarding persons, or compensation upon a wrong legal basis over a considerable period of time.

In view of the lack of direct authority, it is necessary to find an analogy in the similar situation where a first instance judgement is reversed upon appeal. The two situations are not, directly comparable since an appellate court can substitute its own decision upon the issue, whereas a reviewing court can merely quash the offending order, returning it to the tribunal for amendment.

Early decisions support a rule that a judgement reversed is no judgement, and that reversal annuls ab initio. This is nevertheless contradicted by other authorities maintaining the contradictory proposition that a voidable judgement being valid until quashed cannot be treated as though it had never existed (4). Thus in *Hood Barra v.*

Crossman [1897] A.C. 172 it was held by the House of Lords that a solicitor who as an assignee received payment of costs payable to his client under an order of Court cannot even with knowledge that an appeal is pending, upon the reversal of the order be ordered to repay such costs. Each of these principles involves injustice if applied logically. Retroactivity may convert into trespasses, acts which were lawful when performed, and deprive purchasers of title to property. The second principle however results in the proposition that a party deprived of property by an erroneous judgement, will lose any title to the property which he might obtain upon reversal, if between judgement and appeal the property is transferred to a third party.

The reversal of a judgement upon appeal has a relating back effect in two specific situations. Firstly the doctrine of restitution operates, the Court ordering restoration to a party of "all things which he have lost by virtue of the said judgement" or, more commonly in modern times the Court directs specific acts of restitution (5) where the writ of restitution orders return of land, put into the respondent's possession by the reversed judgement, the application of a relating back doctrine results in the respondent being called upon to account for mesne profits for the time he had the use of the land (6).

Restitution applies equally to quashing by certiorari (7). Indeed the doctrine in this context originated when writ of error was the common form of appeal.

Nevertheless it is impossible to regard restitution as evidencing a general doctrine of retroactivity. Such proceedings can only be ordered against a party to the judgement, and thus are not relevant to the central problem that of the effect of quashing upon collateral transactions, in particular where third party rights or title are involved.

The second situation is where the principle of *lis pendens* is involved. A purchaser of land subject to a pending legal action obtains a title subject to the result of that action. Thus where A is given title as against B as a result of a judgement in his favour, and after an appeal has been lodged conveys the property to a third party, the title of that person acquired *pendente lite* is subject to the result of the appeal. Thus if the appeal reverts the property in

B, the third party loses his title. It was however thought that in equity, if not at common law the doctrine of a bona fide purchaser for value of a legal estate was applicable, and thus that a purchaser who took without notice of the pending appeal would obtain a good title (8) although the position was not clear, (9). It is arguable that different principles should govern title voidable as a result of a contractual defect, from those governing title obtained as a result of a defective judgement, although it suggested that here a distinction could be drawn between a judgement of a Court *stricto sensu*, and that of a statutory tribunal or administrative decision making agency. However the Judgements Act 1839 (replaced by the Land Charges Act 1925 made operation of the doctrine, except where express notice was received, dependent upon registration of the *lis*, which was defined in the 1925 act to include "any action, information or proceeding pending in Court, relating to land, or any interest in, or charge on land, and a petition in Bankruptcy". This would include an appeal (10). However, the term "court" is limited by section 20(1) to proceedings in the High Court of Justice, the Chancery Courts of Lancaster and Durham and the County Court, and thus has no application to administrative bodies. Nevertheless an appeal to the High Court against a local authority compulsory purchase order could perhaps be registered as a pending *lis*, although under the existing compulsory purchase legislation title does not normally pass until after the expiry of the six weeks period for challenge, and thus the doctrine of *lis pendens* is unnecessary.

The *lis pendens* principle is thus of limited application. However it does not apply to personal chattels or choses in action (11). However in the circumstances where the doctrine does apply it operates to destroy the title of a third party upon reversal, thus giving a limited sphere of retroactivity to the quashing of a decision. It is uncertain whether the doctrine of *lis pendens* operates to protect title before the appeal is lodged. On principle this should not be the case, since there is no *lis* in existence. However in *Case v. Stacpoole* (1813) 1 Dav PC 18, Lord Redesdale was of the opinion (*obiter*) that the quashing of a decision upon appeal destroyed title of a third party, purchasing from a party whose title was established by the overturned judgement irrespective of whether the transaction took place, before

or after the appeal proceedings were commenced. This suggests a concept of relating back, extending beyond the doctrine of *lis pendens*, and is supported by a number of American decisions holding in effect, that a purchaser relying upon a judgement must take subject to the risk of it being set aside at a later stage, even though such proceedings had not yet been commenced. This applied whether the reversal was by way of appeal or review by writ of error (12). However the relating back in these cases was justified by reliance on the *lis pendens* principle, which suggests that, where this is not applicable, the setting aside of a decision is not retrospective. This principle is supported by English Authority. Thus in *Ridge v. Baldwin* 1964 the applicant was dismissed from his position in breach of natural justice. He wished to establish that his dismissal was of no effect in law, in order to preserve the pension rights due to him as one who had resigned from his post. Whether he could claim arrears of pension was regarded as depending upon whether the decision was void or voidable. Similarly in cases concerning the possibility of liability in tort for acts done in reliance upon the existence of a legal situation established by a judgement it has been consistently held that no such action can lie, for things done before the judgement was quashed (13). However in the American case of *Harp v. Brookshire* (1923) 248 SW 177 the Court distinguished between performance of an act expressly authorised by the judgement and one made in reliance upon the validity of the legal situation established by it. It was held that the plaintiff who claimed a right of way over the defendant's land could obtain damages for obstruction, even though at the trial the Court held that he had no right of way, and the defendant's refusal to allow him to cross his land took place before reversal. Thus a voidable decision was given retrospective effect. The same result was reached in the Canadian case of *Lamb v. Kincaid* (1907) 38 SCR 816, where a tribunal held that A was the owner of a gold placer-claim. The decision was reversed and upon appeal title was held to reside in B. The Supreme Court of Canada accepted without argument that A was liable in damages to B for the tortious extraction of gold between judgement and reversal.

This reasoning is unsatisfactory in principle destroying as it does the difference between a void and voidable decision. If the distinction has any value it is surely to provide protection for a person who relies upon an act which the tribunal is empowered to make. If a decision turns out to be erroneous, restitution is an adequate remedy for a party who successfully obtains its reversal. As in the case of other voidable transactions, an third party should not be prejudiced when relying bona fide upon the validity of an act, although where express notice of a possible defect is received, then protection should be given to the party who sets aside the decision. This position is, it is submitted, supported by the English authorities. However the doctrine of retroactivity appears to have been applied upon isolated occasions. Thus in *Wiseman v. Wiseman* [1953] P79, a wife appealed, out of time, from a divorce decree upon the ground of procedural irregularity. The decree was reversed, the Court holding that although the decree was voidable only her husbands remarriage was thereby nullified. Gordon justifies this decision on its particular facts, since on the special circumstances of marriage, relating back as the only workable solution where two persons claim to be married to the same party. As a matter of public policy one marriage must be regarded as void, since this is the only possible form of restitution (14). Thus exceptions may be admitted as a matter of public policy (15). It is clear that these exceptions are extremely flexible and not susceptible to logical analysis, since in *Wiseman*, Lord Denning thought that, even though the quashing of the decree related back, this would not operate to render a child of the subsequent marriage illegitimate. "The Child was legitimate when born, and the doctrine of relation back has never been applied so as to render unlawful, that which was originally lawful".

To what extent should such exceptions apply to administrative decisions? It is thought that the nature of these rarely calls for retroactivity, above that allowed for by the doctrine of restitution. Thus if a public official is erroneously dismissed from office and later succeeds, either upon appeal or by certiorari in setting aside the dismissal, acts done by in the interim the person appointed as his successor should not be invalidated. Indeed even if the dismissal

is a nullity, the doctrine of de facto authority should perhaps be called upon to prevent wholesale invalidation of acts done before the invalidity was established. Similarly where a decision to grant a licence is quashed, third parties who rely upon the validity of the licence should, until it is set aside, be protected. In the case of decisions effecting land, quashing should not invalidate intermediate transactions. Indeed estoppel may operate, in the case of irregularity, but not when the decision is a nullity to prevent the authority from relying upon the invalidity of a decision (16).

It is where a decision is void that difficulties arise, since no protection can be given to acts done in reliance upon the decision, except through the power of the Court to withhold a discretionary remedy. Thus where a grant of planning permission is declared void owing to the imposition of a ultra vires condition, the applicant and by any other person subject to the same conditions will be liable to enforcement notices as being in the position of developers without permission (17). Similarly where a public official is dismissed without a hearing, when his dismissal is declared void, all acts done by his successor will be invalidated, which might include the issue of licences to the public, or the appointment of subordinate officials. This suggests that the doctrine of ultra vires may be the wrong approach to the problem of the control of the administration.

NOTES

- (1) Hall v. Shoreham U.D.C. (above).
Kingsbridge Investments v. Minister of Housing (above).
- (2) But see Chapter 10 (above)
- (3) See also Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759 at 786
McPherson v. McPherson (1935) ALLER Rep. 105 at 111, 112.
- (4) See cases cited by Gordon (1958) 74 LQR 519
- (5) Gordon loc cit 521
- (6) Rodger v. Comptoir d'Escompte de Paris (1871) LR 3PC 465
- (7) R v. Wilson (1835) 3 A & E 817
R v. Hellier (1851) 17 QB 229
- (8) Gordon (1959) 75 LQR 86
- (9) See Bellamy v. Sabine 1 De G & J 566
- (10) Johnson v. Refuge Assurance Co. [1913] 1 KB 259
- (11) Wigram v. Buckley 1894 3 Ch. 483
- (12) Sharp v. Elliot (1885) 8 SW 488
Attica Building & Loan Association v. Codvert (1939) 23 NE
2nd 483
Westminster College v. Fry (1905) 91 SW 472
- (13) Dimes v. Grand Junction Canal Co. above
Williams v. Smith (1863) 14 CB (N.S.) 576
Phillips & Eyre (1870) LR 6 QB 1 at 22
- (14) 74 LQR 546
- (15) Menvil's Case (1584) 14 Co Rep 19
Drury's Case (1610) 8 Co Rep 1416
- (16) Wells v. Minister of Housing (above)
Southend-on-Sea Corporation v. Hodgenson (Wickford) Ltd. (above)
- (17) See Chap. 6 (above)

CONCLUSIONS

1. It has been shown that the distinction between voidness and voidability is an integral part of a system of review based upon ultra vires, and that there is sufficient, although in the case of natural justice, not conclusive authority that most reviewable defects produce nullity, and so can be subsumed under the general head of ultra vires. Conceptual formulae providing a general definition of jurisdictional defects are unnecessary.
2. The dividing line between void and voidable decisions should lie between "acting for an improper purpose" and "taking irrelevant factors" into account. The latter class of defect should not produce an ultra vires decision but should be treated as error in law and result in voidability. This reconciles the decisions, avoids the difficulties raised in the Anisminic case, and allows the Courts a greater degree of flexibility in determining the effect of a decision vitiated by an irrelevancy.
3. Nullity although justified by the rationale of the ultra vires doctrine has drastic and inconvenient consequences. The Courts have utilised the consequences of nullity where convenient but nevertheless have violated logic in situations where the rules governing the remedies cannot be reconciled with the ultra vires doctrine. Thus certiorari has always been available to "quash" a nullity, and the declaration will probably lie to voidable decisions. Rules governing locus standi and the discretion of the Court have also prevented the full application of the doctrine of nullity.
4. However in two areas the distinction is used to produce a reasonable solution to a problem of conflicting interests. An action in tort will not lie where the offending decision is voidable. A privative clause will not protect a void decision. If the categories of voidable decisions are wide enough to include "irrelevant considerations" this allows protection to be given to less serious defects while preventing gross abuses of power from enjoying any special immunity in the Courts.
5. Thus the distinction between voidness and voidability where its inconvenient results have not been avoided appears to have only limited utility. It is submitted that the distinction is so fundamental to the ultra vires principle that, in the context of existing methods of review it must remain a necessary concomitant of a system of control

based upon jurisdiction. With only limited alteration of existing authority the distinction serves as a basis for the construction of a rational scheme of classification both of grounds for review and remedies. Thus, Natural Justice, Procedural defects, fraud and improper purposes result in nullity for which actions in tort and injunctions, declarations and mandamus, are the appropriate methods of review. Decisions vitiated by irrelevancy can be challenged either by certiorari or by exercising a statutory right of appeal.

Thus a clear distinction can be made, at the cost of modification of the scope of certiorari, between review for vires and for other defects.

6. Criticism has usually been focused upon the inadequacies of the existing remedies, to meet the problems of modern administrative law. However, it is suggested that the inflexibility of the ultra vires doctrine is partly to blame for the many technical difficulties. The existence in many contexts of devices which militate against the strict application of nullity is particularly noteworthy, as are the problems of estoppel.

It is suggested that a broader basis of review be found than one based predominantly upon ultra vires. Certainly in a system founded upon Statutory powers and involving Parliamentary sovereignty there is a necessary place for a doctrine of ultra vires, and therefore of nullity. However ultra vires can be given a narrow scope by limiting it to acts or decisions which violate express statutory language, and by excluding natural justice, and at least some aspects of abuse of power from the ambit of the doctrine. This involves the introduction of a doctrine similar to the notion of "ostensible scope of authority" propounded by Rubinstein which although unsatisfactory in the context of the present law, is compatible with a scheme of review which is not exclusively geared to the concept of jurisdiction. The French notion of L'Inexistence conforms closely to this suggested ground of review involving the assumption that "the judge has gone so far as to doubt whether the administration has really taken any decision for him to review. The illegality is so gross and flagrant as to amount to the Administration acting completely outside its jurisdiction (1).

In the case of other grounds for review there is no reason why these should not transcend the boundaries of ultra vires. The French doctrine of *detournement de pouvoir* is one which is not based upon ultra vires, and a similar doctrine in this country coupled with a general right of appeal on points of law and fact from Administrative bodies would do much to eradicate existing difficulties which appear to be largely technical.

Partial freedom from the doctrine of ultra vires involves the opportunity for an expansion of the scope of the remedies, the main function of which is at present only to quash, or declare void. In particular some machinery by which the Court can alter or amend administrative decisions is desirable. The crude operation of the doctrine of nullity in the field of planning conditions reveals the need for this. In addition there may be scope for a device similar to the "Exception of illegality" of European Economic Community Law, whereby an act can be treated as inapplicable to the applicant without its general validity being destroyed. Finally the reduction in importance of the jurisdictional principle could lead to a reconsideration of the basis of the tort liability of public authorities, and to the establishment of a separate cause of action based upon abuse of administrative power.

NOTES

- (1) See Brown and Garner French Administrative Law P119.

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