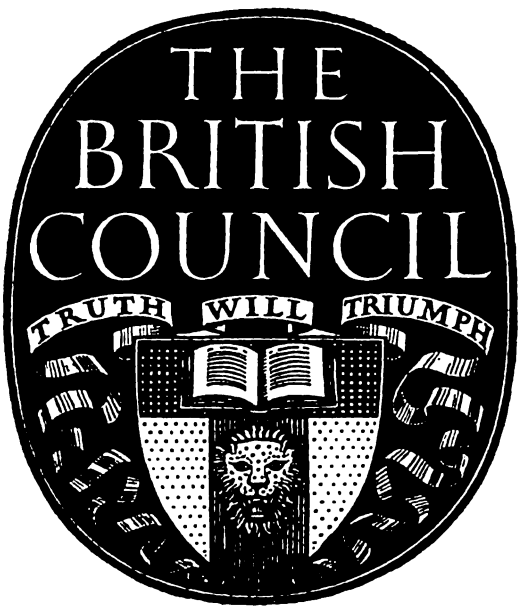
THE
BRITISH
COUNCIL
TRUTH WILL TRIUMPH

THE HISTORY AND DEVELOPMENT OF
COMMERCIAL ARBITRATION

RECENT DEVELOPMENTS IN THE SUPERVISORY
POWERS OF THE COURTS OVER INFERIOR TRIBUNALS

THE HEBREW UNIVERSITY OF JERUSALEM
LIONEL COHEN LECTURES
Fifth Series — January, 1959

THE HISTORY AND DEVELOPMENT OF COMMERCIAL ARBITRATION

RECENT DEVELOPMENTS IN THE SUPERVISORY POWERS OF THE COURTS OVER INFERIOR TRIBUNALS

Lectures by
LORD PARKER OF WADDINGTON
LORD CHIEF JUSTICE OF ENGLAND

JERUSALEM
AT THE MAGNES PRESS
THE HEBREW UNIVERSITY
1959

Distributed in Great Britain the British Commonwealth and Europe by the Oxford University Press

PRINTED IN ISRAEL
CENTRAL PRESS, JERUSALEM

THE HISTORY AND DEVELOPMENT OF COMMERCIAL ARBITRATION

"Arbitrament is an award, determination or judgment which one or more makes at the request of two parties at the least for and upon some . . . controversie had between them . . . and they that make the award or arbitrament are called . . . arbitrators". (*Termes de Le Ley,* 50). The submission of disputes to independent adjudication is a form of ordering human society as old as society itself. Once men begin to live together, to trade, and to depend upon each other for the goods and services which joint effort alone produces, inevitably, the forms of adjudication emerge and grow. Whether the community be that of the family, the tribe or the state, the need for a method of adjudication forces the growth of "courts", first, in the form of the primitive family head, or tribal chief, administering his rough justice, and ultimately the sophisticated tribunals of a developed society.

Resort by merchants to adjudication outside the Royal Courts is evident in England from the first development of international and national trade. Holdsworth was of the opinion that in the Middle Ages "England was economically in a backward stage of development," (*History of English Law,* V. 113), but modern research has revealed a complicated nexus of finance and commerce stretching from England across all western Europe in the later middle ages, and geared to deal with an export and import trade in a wide range of goods, wool, cloth, tin, pewter, coal, linen, canvas, furs, hemp, wines and so on. Substantial trade was done on credit terms; for example, as Fifoot has noted, two Bruges partners at Calais in 1484 bought wool, exported from England, and valued at £25,000 sterling. "The sums outstanding on credit were covered by bills of exchange, to be accepted at the

seasonal fairs held in Antwerp, Bruges and Bergen op Zoom. The Calais representative, if and when he was paid on the bills, must get his money in London. To ship the cash was clumsy and dangerous, and he therefore himself drew bills upon the English 'mercers' who bought heavily at Flemish Fairs" (*History and Sources of the Common Law*, pp. 291–292). These great Fairs over Medieval Europe, bringing together the representatives of the whole trading community, and providing the bases of an international credit system, were indispensable links in the chain of mercantile activity.

The character of the Royal Courts was not adapted initially to serve the needs of this trade and the traders. The early courts were primarily interested in disputes over land and conduct detrimental to the King's peace. Contracts, commercial credits, debts incurred abroad and owed by and to foreigners were almost wholly unenforceable. The writs of debt, detinue, account and covenant were hedged by limitations; the procedure lacked expedition, which was necessary when merchants passing from fair to fair remained within the jurisdiction for so short a time as days or weeks; moreover, jurisdiction was ousted by the necessity of proving venue in England. Thus, the trading communities relied on special tribunals to solve the controversies arising in the world of trade, whether local or international, *viz.* the Courts of the Boroughs, of the Fair and of the Staple. Unlike the case in southern Europe, these courts in England tended to remain in the control of the owner of the franchise under which they were held, and with rare exceptions were not composed of commercial men. The Borough Courts were not solely concerned with commercial matters, but special provisions were made for business litigation: thus, the White Book of London provided for the empanelling of a jury "half of denizens and half of foreigners dwelling in the town" to decide cases of contract, debt and trespass. Commercial questions did, however, predominate at the courts of the fairs — the Courts of Pié-powder — so named "to commemorate the pedlars who trailed their dusty feet from market to market" (Fifoot,

ibid., p. 295). The Court was usually under the control of an officer of the borough or manor, where the fair was held, but in its great days the law might be declared by the merchants themselves. The idea that the law should be speedily administered in commercial causes led to a relaxation of the strict procedure in these Courts. As Dr. Gross has commented, "Pleas were begun without a writ, formalities were assuaged, few essoins were allowed, and an answer to the summons has commented, "Pleas were begun without a writ, formalities were adjourned from hour to hour and from day to day . . . If the defendant failed to appear when summoned, his goods were attached forthwith, appraised and sold" (*Select Cases on the Law Merchant.* See Holdsworth, *ibid.*, V. 116).

In the Staple Towns special courts, existing under the authorisation of the Statute of Staples, 1353, provided for the determination of disputes according to the Law Merchant. The tribunal was the Mayor, "having knowledge of the Law Merchant", with two "conveniable Constables," but where an alien merchant was affected they were to be associated with two "merchant strangers" elected by the mercantile community. Where the subject-matter of the dispute was the quality of wool sold, or the method of its packing, the award of commercial assessors, of whom there were to be six, four alien and two English, was to be final on the Mayor and Constables (Cap. 24). Thus, even in the fourteenth century, there was recognised the peculiar character of 'quality' arbitrations. The statute also provided that, where the rights of aliens were in dispute and the Staple Court was unable to reach a solution, the matter should come by petition before the Chancellor and Council.

The Middle Ages thus saw a diverse system of tribunals dealing with commercial disputes, in which the merchants were able and required to play a part. Already acknowledged was the idea that the settlement of commercial cases should be speedy, that commercial men may be better equipped than lawyers to determine their own

disputes, and that there were some disputes on facts more referable to experts in the trade than to assessors or arbitrators without that special knowledge. Nor was it only under the Staple Statute that such references were made. The merchant guilds themselves sometimes maintained an arbitration tribunal for their members, and there are traces of an early arbitration law emerging in the fifteenth century in a case to which reference will be made later.

An interesting arbitration award in 1424 is to be found in the Rolls of the Mayor's Court of the City of London, which was given by eight medical men of the City, appointed to determine an issue regarding alleged error of treatment to a wound in the muscles of the thumb of the right hand. The award is worth quoting in part: "The Arbitrators, having diligently considered and fully understood the matter, on the evidence of the parties, and the sworn testimony of John Parker, a barber admitted for the practice of surgery only, and also of other trustworthy persons having knowledge of the course of the aforesaid treatment, found that the complainant William Forrest on 31 January last past, the moon being consumed in a bloody sign, to wit, Aquarius, under a very malevolent constellation, was seriously wounded in the said muscles, and on the 9 February, the moon being in the sign of Gemini, a great effusion of blood took place; that Simon Rolf staunched the blood first time, and that afterwards John Harwe, with the assistance of John Dalton, skilfully stopped the flow, which broke out six times in a dangerous fashion, and that on the seventh occasion, the wounded man preferring a mutilated hand rather than death, the said John Harwe, with the consent of the patient, and for lack of other remedy, finally staunched the blood by cautery, as was proper, and thus saved his life." The arbitrators then declared that the course taken was surgically correct, and that "any defect, mutilation or disfigurement of the hand was due either to the constellations aforesaid or some defect of the patient or the original nature of the wound." The dispute seems largely to have been decided on astrology. No doubt even medieval courts were

less qualified than medical practitioners to pass on serious questions of astrology, but the essence of the matter was that those versed in the skill were expected to bring the special knowledge required to the solution of the dispute.

In the next few centuries, however, the pattern changes. The discovery of the New World, the revival of classical learning, the accumulation of wealth, the agricultural and industrial revolution of the sixteenth century, and the clash of Catholic and Protestant, destroyed the society of Medieval England — and swept away institutions which could not carry out the purposes of the new age. Courts of Staple, Borough Courts and Fair Courts crumbled and disappeared; the guilds, the closed societies of merchants, were displaced by the entrepreneurs and financiers and the great joint stock companies of merchant venturers. The international society of the Middle Ages dissolved into nation states, and in England the struggle of Crown and Parliament was carried on parallel to the competition between Council and Common Law Courts. Thus, in a new age, men of commerce began to look for new institutions to which disputes might be referred. The habit of arbitration and the desire for its use persisted, but simultaneously there was a tendency for the institutions of central government to seek to intervene and control the regulation of trade within the state.

It had been a medieval custom to submit petitions to the Chancellor and the Council for redress in trading disputes, and in the sixteenth century the practice continued. Under the Tudor and Stuart reigns, the Council exercised a general superintendence over government, so that it is not surprising to find in the early period the development of a jurisdiction to hear commercial cases in the Court of Star Chamber. Thus, Hudson in his *Court of Star Chamber* noted that "controversies betwixt merchant strangers and Englishmen, or strangers on both parts, were there determined." But the Council also realised the desire of merchants to participate in decisions on commercial questions,

and the practice was observed for ordinary disputes to go to arbitration, a number of merchants being among the arbitrators. For example, Dasent recorded orders of the Council that two English and two foreign merchants were to arbitrate as to freight payable, (1549–1550) ii 377; that owing to the delays of admiralty a case was to be sent to arbitration, (1581) xiii 343; and that merchants were to hear summarily a case turning on questions of freight and average, (1589) xvii 72. At the same time, the Court of Admiralty and the common law courts began to give remedies in commercial cases.

The common law courts, through the action on the case on an assumpsit, developed by the mid-sixteenth century a general remedy in contract and gave themselves jurisdiction over causes involving foreign elements by recognising a notional venue in England. The result was an increase in knowledge of the mechanism of foreign trade, so that in 1615 William West's *Symboleographie* could contain precedents of a charterparty, a sale of a share in a ship, a bill of lading, a bill of exchange and a procuration of a merchant to his factor. The courts came, therefore, to recognise the custom of merchants, and in time, as actions on the case were brought, a general body of principles of commercial law entered into the ordinary law of the land.

The Admiralty Court also expanded during the sixteenth century a jurisdiction over cases in which a foreign merchant was a party, and tended in so doing to come into conflict with the Court of King's Bench. Thus, in 1584, Walsingham wrote to the Chief Justice of the King's Bench to warn him not to issue prohibitions against the Court of Admiralty as the common law "of these marine and foraine causes is thought not so properly and aptly to take knowledge." The struggle was not resolved until the Restoration, when the common law courts won as reward, in recognition of the part which they had played in the parliamentary alliance, a monopoly of commercial litigation.

The assertion by the courts of the land of a role in the settlement of business disputes was not, however, entirely to the desire or liking of the commercial community. As Holdsworth says (*ibid.*, V, at 149), "during the latter half of the sixteenth century there are many indications that the tribunal which gave the most satisfaction to the merchants was one in which they themselves had some share." Thus the tendency was for the charters of the new trading companies to include the privilege that the merchants of the company might settle disputes arising between themselves. In the charter of the African Company (1672), for example, power was given to establish a court, "which court shall consist of one person learned in the civil laws and two merchants," who were to try cases "according to the rules of equity and good conscience and according to the laws and customs of merchants." The reason for the preference is not hard to seek: the delays and technicalities of litigation scarcely accorded with the merchants' desire for speed in the resolution of their controversies, and there persisted the notion that lawyers did not understand commercial problems. W. Cole in *A Rod for Lawyers,* (Marl. Miscell., iv, 323) wrote: "Having often discoursed with lawyers and others about the delays, burdens and uncertainties of trials at law, I very seldom found any averse to Merchants' courts . . . for what a ridiculous thing is it, that judges in Chancery must determine of merchants' negotiations, transacted in foreign parts, which they understood no better than do the seats they sit on." And Pepys, in his *Diary* for December 1st 1663, recording his attendance at a case in the King's Bench involving questions of bottomry and insurance and the technical evidence of mariners, noted, "it was pleasant to see what mad sort of testimonies the seamen did give, and could not be got to speak in order; and then their terms such as the judge could not understand: and to hear how sillily the Counsel and Judge would speak as to the terms necessary in the matter, would make me laugh." Just as the Council, in the sixteenth century, recognised the prevalence of this attitude in the business community, so Parliament gave it statutory recognition or expression in debate. An Act of 1571 gave bankruptcy

jurisdiction to a tribunal of commissioners comprised partly of lawyers and partly of merchants, and an Act of 1601 established a special court of lawyers and merchants for the settlement of insurance issues in London. Later, in 1663, a bill to transfer the jurisdiction of commercial causes to the Admiralty Court from the common law courts was rejected; "the sense of the House," as Marvel noted, "inclining to think, that these things may better be redressed by the law merchant, or lex mercatoria and by courts of Merchants to be erected in some few of the considerable ports of the nation." Considering the weight and the persistence of the claim for commercial adjudication of commercial disputes, it must remain a matter for surprise that courts of merchants were never established. The explanation probably lies in the secure position which the common law courts had obtained at the end of the seventeenth century, by reason of the alliance with Parliament in the civil wars.

Contemporaneously with these developments a system of "arbitration law" was coming into being. One of the earliest cases, in which the courts passed judgment on the character of arbitration, is recorded in the *Year Books* (Anon [1468] Y. B. 8 Edw. 4, fl. 11, pl. 9), and the judicial character of the process and the need for finality and certainty in award were affirmed. Thus Billing said: "quant un arbitror assume sur lui le charge del arbitrement il convient que il loy demosne come un arbitror et un judge, car cheqeun arbitror est fait judge devant lui et monstre lour griefes, et l'arbitré doit oier et solons à adjudger, ou autrement il n'est bon judge"; and Yelverton said the award was void "car cheqeun arbitrement convient etre plein et certain." By the time of the *Consuetudo, vel Lex, Mercatoria* (*circa* 1670), these early principles had become a detailed body of law, so that the elements necessary for an arbitration could be denoted. These were: —

> "First, that the Award be given up in writing within the time limited, by the bonds of compromise made between the parties.

Second, that there be limited and appointed by the Award some reciprocal Act to be done by each party to the other, which the Law requireth to be quid pro quo, albeit never so final.

Third, that they make a final end, and so determine upon all the points or differences produced before them by specification or otherwise, if they be required so to do and authorised thereunto.

Fourth, that they do not award any of the parties to do or perform any unlawful act or thing prohibited and against the law.

Fifth, that they do not award anything whereby any matter, already determined by Decree in Chancery, or Judgment at Common Law or any sentence judicially given in the cause be infringed or meddled withal".

The breadth of the arbitrator's power is readily apparent from this statement of the law: the sole curbs going only to securing action within the submission, preventing awards ordering acts, which are mala in se or mala prohibita, and modifying awards ordering performance inconsistent with judicial judgments. Otherwise the arbitrator is free: indeed his "power is larger than the power of any ordinary judge . . . for an arbitrator hath power to judge according to the compromise after his own mind as well of the fact as of the law, not observing the form of law." (*Cf.* West's *Symboleographie* [1647] Part II, p. 164.) It is only as the eighteenth century passes, that judicial intervention into arbitration begins to extend. The exact cause of this intervention by the courts is not known. There are various theories:

1. The natural desire of the courts to keep all adjudications within their sphere;
2. The fear of the growth of a new system of law;
3. The fact that litigants in arbitrations needed the assistance of the courts who in turn exacted a price for such assistance.

In the first instance at any rate the intervention was, I think, for the last mentioned reason.

Submissions to arbitration at the end of the seventeenth century were possible by several methods. Parties could agree to arbitration, first, by indenture by which they covenanted to stand to the award of the arbitrators; second, by an obligation which contained a condition to the same effect; third, by parol contract; and, fourth, by consent at Assizes, the submission afterwards being made a rule of court. Where submission was by covenant or obligation, action of debt on the obligation would lie (hence the stated requirements of quid pro quo), and in the case of parol contract, action on an assumpsit for non-performance. But the assumpsit had to be supported by consideration. Clearly the most effective mode of submission, being the most easily enforceable, was that which invoked the authority of the courts; because where the submission was a rule of court a party not abiding by the award could be prosecuted for contempt. This was recognised specifically by the Arbitration Act, 1698 (9 and 10 Will. III c. 15), which extended the scope of this mode of submission. The Act made it "lawful for all merchants and traders and others desiring to end any controversie . . . (for which there is no other remedie but by personal action or Suit in Equity) by arbitration to agree that their Submission of their Suit to the Award or Umpirage of any persons should be made a rule of any of His Majesty's Courts of Record which the parties shall choose and to insert such their Agreement in their submission . . ." Further, that on proof of such Agreement by affidavit "a rule shall be made of the said Court that parties shall submit to and finally be concluded by the Arbitration or Umpirage which shall be made . . . pursuant to such submission on pain of contempt." The effect of this Act was stated by Lord Mansfield in *Lucas ex d. Markham* v. *Wilton* (1759) 2 Burr. 701. It was made, he said, "to put submissions to Arbitration in cases where there was no cause depending, upon the same foot as those where there was a cause depending." Thus, informal arbitrations resting in covenant,

or on an obligation, or an assumpsit, were accorded a status within the legal system other than that of mere personal obligations assumed by the parties. A price, however, was exacted for this recognition, because the Act marks the initiation of a period in which arbitrations came under close scrutiny and review by the courts. Thus, the Act itself provided that "any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect and accordingly be set aside by any Court of Law or Equity." The process of judicial intervention into arbitration can be seen growing throughout the eighteenth century, as the functions of the law courts and the practice of the mercantile community coalesce into a coherent system.

At the time of the Arbitration Act, 1698, the grounds for refusing to enforce an award were limited to those arising from the nature of arbitration as mere personal obligations between the parties thereto. Courts only reviewed awards in a jurisdictional sense, *i.e.,* to see that arbitrators acted within the submission, and jurisdictional review does not seem to have gone to questions of procedure affecting what today we would term "natural justice." Thus in *Matthew* v. *Ollerton* (1693) 4 Mod. 226, where, in an action of debt upon an award, the exception was taken in arrest of judgment that "the matter in difference was referred to the plaintiff himself (a party) who made the award." Dolben, J. refused to set it aside, remembering the case of Serjeant Hards. "The Serjeant took a horse from my Lord of Canterbury's Bailiff for a deodand, and the Archbishop brought his action, and it coming to a Trial at the Assizes in Kent, the Serjeant by the rule of Court referred it to the Archbishop to set the price of the horse which was done accordingly, and the Serjeant afterwards moved the Court to set aside the award for the reason now offered, but it was denied by my Lord Hale and per totam curiam." The basis of the decision permitting a party to be judge in his own cause seems to have rested on the consensual character of the obligation to abide by the Award: that if a party to a dispute chooses the other as

arbitrator he must be bound by such consent. Indirect confirmation of this analysis is obtained from a decision in 1703, *Morris* v. *Reynolds,* 2 Ld. Raym. 857, in which the division of judicial view demonstrates clearly the shift of emphasis brought about by the 1698 Act. On a motion to set aside the award of arbitrators chosen by the parties at Nisi Prius in Guildhall, the submission being a rule of court, an affidavit was tendered as to the mismanagement of the arbitrators in refusing to hear the defendant. The traditional view was forcibly put by Holt, C. J. He opposed any setting aside "as contrary to all practice that he had known in his experience which was that in such case the integrity of the arbitrators (whom the parties by consent have chosen to be their judges) shall never be arraigned, no more than the integrity of any Judge." Powell, Powys and Gould, JJ., however, stressed that it would be "abominable, to give countenance to such proceedings . . . because they abused the office of Judge." Clearly, therefore, the case shows the emergence of a newer view, that if arbitration awards were to be given the weight of enforcement through the courts, the court must have a stricter scrutiny of awards to prevent abuse of its own process. Again, in *Harris* v. *Mitchell* (1704) 2 Ver. 585, arbitrators were empowered "to choose an umpire" if they could not agree. Being unable to agree on an award, and also about the person to be the umpire, they threw cross and pile to determine who should name him. The umpire so chosen made his award, but the Court of Equity set it aside. The reason was given by the Master of the Rolls: "An election or choice is an Act that depends on the will and the understanding, but the Arbitrators followed neither in this case, and it is distrusting of God's Providence to leave matters to chance."

Even if indications were apparent early in the eighteenth century of a tendency to extend judicial control over awards, it is not until virtually the end that an Appellate review for mistake of law becomes completely established. Attempts must have been made continuously to persuade the courts to assume such a power, but it seems to have

been resisted. Thus, in *Anderson* v. *Coxeter* (1720) 93 E.R. 534, the whole court ruled that "nothing is ground within that statute for us to set aside the award but manifest corruption in the arbitrators. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded." Nevertheless, an extension of review appears to have taken place within the next thirty years because Lord Mansfield in 1759 in *Lucas ex d. Markham* v. *Wilton* (cited *supra*) states "that the Court will not enter at all into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear on the face of the award and such as go to the misbehaviour of the Arbitrators."

How this readiness to consider "legal objections" appearing on the face of the record came into being is obscure. There is an early case which appeared to permit such a jurisdiction. In *Corneford* v. *Geer* (1715) 2 Vem. 705, the Lord Chancellor said that "if it appear that the arbitrators went upon a plain mistake, either as to the law or in a matter of fact, the same is an error appearing in the body of the award and sufficient to set it aside." Then, a reference in Blackstone in 1768 might suggest that this kind of jurisdiction in error was well-established (Bk. III). He noted "that in consequence of [the 1698] statute, it is now become a considerable part of the business of the superior Courts to set aside such awards when partially or illegally made: or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience to such rules and orders as are issued by the Courts themselves." The passage is, however, ambiguous, and must be treated circumspectly in view of the remarks of Lord Commissioner Wilson in *Morgan* v. *Mather* (1792) 2 Ves. Jun. 15 at p. 18, to the following effect: "It would be a melancholy thing, if, because we differed from the arbitrators in point of fact, we should set aside awards. The only grounds for that are, first, that the arbitrators have awarded what was out of their power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as

if without reason they will not hear a witness; thirdly, that they have proceeded upon mere mistake, which they themselves admit. I am of opinion that, when any thing is submitted to arbitration, the arbitrators cannot award contrary to law; as that is beyond their power: for the parties intend to submit to them only the legal consequences of their transactions and engagements."

From these remarks it would appear that some doubt still persisted in 1790 as to the power of courts to set aside awards for mistake in law. Such doubts were resolved by the King's Bench Judges in banc in *Kent* v. *Elstob* (1802) 3 East 18. The party seeking to sustain the Award admitted the mistake, but argued "that an award was not impeachable on the ground that the arbitrator has not decided according to the strict rule of law," although they agreed that a practice had emerged of setting aside awards where the arbitrator "meant to decide according to law and was mistaken in his notion of it." The Judges ruled that the courts could review the arbitrator's decision, and set the award aside for mistake in point of law, provided it was apparent on the face of the award, or from a statement of reasons in writing given by the arbitrator at the time of the award. The latter case represents the final emergence of the affirmation of the power of the courts to set aside the decisions of arbitrators, and was subsequently approved in *Hodgkinson* v. *Fernie* (1857) 3 C.B. (N.S.) 189. Thus, the systems of resort to arbitration and the common law were integrated, but judicial tradition dies hard, and Williams J. in *Hodgkinson's* case could still disapprove of the existence of appellate jurisdiction by means of error on the face of the award (p. 202). Reverting to the theories for intervention, in may well be that this form of intervention was due to the fear of an "arbitration" law developing.

In the nineteenth century comes the final fruition in the growth of satisfactory judicial and arbitral modes of resolving the disputes of men of commerce. It sees the apex of the work of absorption and

growth which transmuted the practice of commerce into an effective part of the ordinary law of the land, and brought the commercial tribunal under the control of the ordinary courts. The first landmark is the Common Law Procedure Act, 1854. First, the courts were given power to stay proceedings whenever a person, having agreed that a dispute should be referred to arbitration, nevertheless commenced an action in respect of the matters referred. Second, statutory provisions as to the appointment of Arbitrators and umpires were formulated to solve difficulties arising on default. And third, the courts were given power to remit an award back to the arbitrator, who was able to state a question of law for the determination of the courts.

The pace, however, at which the economic life of the nation was developing soon pressed forward a need for even more comprehensive developments. The 1860's saw an immense expansion of trade. The invention of the steamship made London the financial centre of the world. London bankers, merchants and financiers carried on business, and invested and speculated ever more widely in railways, mines, industry and agriculture over the face of the whole globe. The legal institutions of commerce — bankers' credits, time charters (again due to the arrival of the steamship), contracts for the sale of goods — played an ever more important part; but with the enlargement of trade came a proliferation of disputes; and Parliament and the courts were forced to consider modes by which these commercial disputes could be the more speedily handled.

Commercial arbitrations were made subject to a systematic code of law by the Arbitration Act, 1889, amending and consolidating previous practice. In particular, it made statutory the power, theretofore exercised by the courts under their inherent jurisdiction, to set aside an award on the ground of the arbitrator's misconduct, and it enabled the courts to compel the arbitrator to state his award in the form of a special case, thus enabling the courts "to adjudicate on any point of law arising in the reference." It, however, left untouched the in-

herent power of the court to set aside an award on the ground of error of law on its face. No doubt it was felt that the power to order a Special Case was a sufficient safeguard.

The increased control of the courts over commercial arbitration carried with it new responsibilities for the courts: for if a dispute depended on a point of law, the power of the court to compel a statement of a Special Case prolonged the arbitration, and in any event, if they proceeded direct to the courts, they were subject to the delays of ordinary litigation. Thus, a speedy trial in the courts both on a Case Stated from arbitration and on direct reference of the dispute was necessary and desirable. Unfortunately, however, the courts were in 1890 suffering from growing pains attendant upon the fusion of law and equity and had failed to produce the desired greater simplicity of practice and procedure. In 1883, Rules of the Supreme Court, dealing with practice and procedure, had been issued, but by 1895 there had been no less than 7000 decisions on points of practice all obtained at the expense of unfortunate litigants. As can be readily surmised, the reaction of men of business to this situation was not dissimilar from that of their forebears in the seventeenth century. The absence of provision for speedy trials, or for fixing dates for trial, added to the discredit in which the courts were held. Moreover, just as in earlier centuries, many judges were totally ignorant of commercial matters. Though there were famous exceptions like Lord Blackburn, the majority had had little opportunity to become acquainted with the problems of trade and commerce. As Scrutton L. J. said in *Butcher, Wetherby & Co. Ltd.* v. *Norman,* 47 Ll. L.R. 324, "One of the objects of justice is to satisfy the litigants that their cases are fairly and properly heard, and unfortunately, some classes of commercial cases are so complex in their nature that a Judge who is not conversant with that class of commercial business has to have a great many explanations made to him in the course of the case as to matters with which he is quite unfamiliar, and so with every Judge. If I were invited to decide a question of conveyancing turning on

the provisions of the Law of Property Act, I should display an amount of ignorance which would entirely disgust the lay clients and solicitors appearing before me, simply because they are practised and experienced in such judicial matters — whereas I have not been conversant with that particular branch of the law. It is not merely that things have to be explained to a Judge in open Court, which lay Clients and solicitors sitting there think that Judges ought to have known without having them explained, but that nobody quite appreciates how little a Judge of that class of case does know, and they do not realise that things which are so obvious to them are not so obvious to everybody and that they are not obvious to every Judge."

An apt example of the effect of bringing cases of a peculiar technicality before a judge unversed in that branch of the law has been noted by Lord Justice Mackinnon in the sphere of commercial law with which we are concerned (60 L.Q.R. 324/5). It involved a case before Mr. Justice J. C. Lawrance, known as "Long Lawrance." I quote: "When Long Lawrance was trying non-jury cases some time early in 1892, *Rose* v. *Bank of Australasia* was called on. Cohen Q.C. (with him Scrutton) for the plaintiff explained that it was a claim by a shipowner for general average contribution from cargo-owners, based on an immensly complicated adjustment by an eminent firm of adjusters. The defendants, represented by Gorell Barnes Q.C. and J.A. Hamilton, disputed liability, and asserted that the adjustment was not made out on correct principles. The Judge knew as much about the principles of general average as a Hindoo about figure skating. He listened with a semblance of interest to Cohen and Gorell Barnes, reserved judgment and forgot all about the case. After a long delay he was somehow reminded that he ought to give judgment. This he did — in favour of the plaintiff. To his horror Gorell Barnes then rose and said he had failed to deal with a very important point. Not having the least idea what the point was, he pulled himself together and said: 'Oh, Yes; I meant to say that having considered that I think the adjusters took the right view, and in that respect

also I think the claim as made out by them ought to succeed.' The defendants went off to the Court of Appeal. Gorell Barnes having been made a Judge in June, 1892, Joseph Walton took his place as the defendants' leader. The Court of Appeal reversed Lawrance J. As appears in [1894] A.C. 687, the House of Lords restored the judgment of Lawrance J."

It was these circumstances — outside commercial dissatisfaction and the obvious defects of the Courts as they were — that led to the creation of the "Commercial Court." To what extent *Rose* v. *Bank of Australasia* contributed to that end may be problematical, but it is obviously not without some basis that Scrutton L.J. was wont to refer to "Long Laurence" as "the only Begetter of the Commercial Court." The genesis of the Court was in a resolution of the judges of the Queen's Bench Division in 1894:

> "That it is desirable that a list should be made of causes to be tried by a Judge alone, or by jurors from the City; and that a Commercial Court should be constituted of judges to be named by the judges of the Queen's Bench Division."

On the 11th Janauary, 1895, the rules for commercial causes were published, and it was announced that Mr. Justice Mathew, chosen for his special acquaintance with commercial matters, would sit daily for the trial of commercial cases. From then until now one King's Bench Judge, well versed in the commercial law, has always been in charge of the commercial list. The Commercial Court, so called, is not therefore a separate Division of the High Court of Justice, but is merely one of the courts of the Queen's Bench Division presided over by a Judge of that division having special qualifications. There is no exhaustive definition of the causes which are tried in the Commercial Court, but they include causes arising out of the ordinary transactions of merchants and traders; among others, those relating to the construction of mercantile documents, export and import of

merchandise, affreightment, insurance, banking, and mercantile agency and usages. From its inception it has had its own special procedure designed to ensure speedy trials. Thus, once a cause is transferred to the Commercial List, the Judge presiding over that Court has complete charge of the case and of all interlocutory matters. He can dispense with pleadings: he can, and does, ascertain at an early stage exactly what the controversy is between the parties, and will limit the scope of discovery and other interlocutory matters accordingly. He can thus limit the expenses of litigation and secure swift disposition of the dispute. He has power to admit evidence which would otherwise not be admissible, and in practice most of it will be deposed by affidavit.

The position since 1900 has been, therefore, that a commercial dispute can be speedily and efficiently determined in the courts as well as by arbitration. The two systems ought indeed to be properly regarded as co-ordinate rather than rival. Many disputes, like questions as to quality, are clearly more suitable for arbitration. No question of law is involved, and an arbitrator in the trade can, by handling the sample, determine the dispute in a moment without the necessity of hearing advocates, and without the procedure and trappings of a court of law. At the other extreme, a dispute depending solely or mainly on the construction of an exemption clause in a commercial contract is more suitable to be determined by the Commercial Court. This is not to say that an experienced arbitrator, be he lay or legal, might not arrive at a correct decision, but such a case as I have indicated can, and will, no doubt, ultimately come to the courts, and that being so it might as well come there at once, thereby avoiding considerable delay. Between these two extremes, there are of course a mass of disputes in which ultimately the choice will be one of individual preference. In favour of arbitration is the consideration that there will be no publicity unless indeed the matter is ultimately brought before the courts. A further consideration, certainly with us, is that at the moment it is easier to enforce an award abroad than

it is to enforce a judgment. It is worth noticing, however, that the greater contemporary popularity of arbitration as opposed to the use of the Commercial Court is not without some vice where a question of pure law is involved. As Lord Goddard sitting in the Court of Appeal said in *Kyprianou* v. *Cyprus Textiles Ltd.* (1958) 2 Lloyd's List Rep. at 63, what may happen today in arbitration is that "the matter goes to an arbitrator: it then goes to the Appeal Committee of the Association, who reverse the Arbitrator: it then goes to the Judge, who reverses the Appeal Committee: and it now gets to this Court which reverses the Judge. That is one of the beauties of, and shows the 'economy' of, going to arbitration." The truth of the matter is that there is a range of problems proper for the courts, and a range proper for arbitration, so that merchants and traders would be well-advised to take the most expeditious course open for the disposal of any dispute having regard to its proper intrinsic character.

The position in England today, therefore, is that every facility is given to men of commerce for the solution of disputes within and without the courts, and in the result a situation has been reached where the needs of individuals and of society are given full effect through legal institutions. As will have been seen, such was not always the case, and that the forms of legal institutions have changed, and had to change, to accommodate the needs of individuals, is an apt reminder that laws and legal systems are not immutable systems of logic, but the living creatures of the society whose functioning they have to serve. Thus, this reflection on the history of commercial arbitration must, as will any reflection on the development of English Law, come as a timely reminder that the task of lawyers of any generation is not only to administer and apply the law, but to reflect on it, and to mould it to the needs of the time and leave it vigorous and flexible for the accommodation of problems which are to come.

RECENT DEVELOPMENTS IN THE SUPERVISORY POWERS OF THE COURTS OVER INFERIOR TRIBUNALS

I.

Since Dicey wrote his classic work on the Constitution, no trend is more to be observed in the constitutional development of Great Britain, than the proliferation of tribunals, officials and authorities charged with the task of controlling the life of the modern welfare state. Inevitably, the result has been to concentrate attention, in our time, on the conduct and nature of administration, and on the relations between the administration and the judiciary. The traditional function of the judiciary has always been to supervise and overlook duties exercised under the law by administrative tribunals and authorities. Accordingly, there is a natural tendency to identify judicial action with the control of abuses of governmental power, and to identify "government under law" with judicial intervention against executive action. But, to regard the sole concern of the courts in their supervisory capacity as the restraining of abuses is, I think, to misconceive their proper role. In addition to this negative task, there is a positive responsibility to be the handmaiden of administration rather than its governor. This positive task involves, first, the recognition that national policy requires a measure of administrative freedom; second, the affirmation by the courts of their responsibility in facilitating the objectives of administrative action as approved and authorised by Parliament; and third, the appreciation by the judiciary that the methods of judicial control and action are not always appropriate to the solution of disputes between the individual and the State. For those who concentrate on the negative role of the courts in checking abuses of power, the affirmation of this positive task may lay the courts open to the accusation that they are more "executive-minded than the executive" (See Lord Atkin in *Liversidge* v. *Anderson* [1942] A.C. 206 at 245). Its compelling existence, however, was

recognised as long ago as 1762 by Lord Mansfield C.J. in *R.* v. *Barker* 3 Burr. 1265. Speaking of the writ of mandamus Lord Mansfield notes that "it was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one . . ." Note the reference to "good government." "Failure of justice" may be more apparent in the modern state than "defect of police" (if by such we include and comprehend the omission by government officials to perform the tasks of administration), but the need for "justice" and the end of "good government" continue to exercise their claims, albeit sometimes competing, upon the discretion which the courts possess. It is not merely important, it is in my view vital, in considering how English courts exercise their supervisory powers, to keep in mind this duality of objective: to omit to do so is to adopt the misconception that the judicial role in administrative law is solely to control abuse rather than equally to facilitate good government. That English courts have not adopted this fallacy, will be apparent in the pattern of the decisions of the last ten years. This shows a veering to the recognition sometimes of the one purpose and sometimes of the other.

The post-War era has, of course, raised in an acute form the difficulty of reconciling these two objectives. The need to mobilise national resources, first for war, and subsequently for reconstruction, involved the growth of wide discretionary powers in the hands of the government over the life of individuals and of the community. The character of these powers has had, broadly speaking, a dual significance from the point of view of the courts. Some have limited the subject's recognised legal right freely to use his property and to contract. Of this kind are the powers conferred under Town and Country Planning legislation and the Rent Restriction Acts. Others have involved the administration of new social "interests" created for the citizen under welfare schemes, relating, for example, to National Health and Insurance benefits. In the case of both the courts

have been called upon to protect the individual from arbitrary use of powers conferred, and to preserve his legally recognised interests, without obstructing the functions of administration or arrogating to themselves burdens which they could not discharge. The performance of this judicial task at the outset of this period was beset with dilemmas and difficulties. Indeed, many wondered whether the courts could any longer fulfil their duties in regard to the control and reconciliation of disputes in the sphere of administrative law. An eminent academic lawyer went so far as to express the view that there was not in the courts "the freshness of view, the capacity to invent new rules, doctrines and standards, and the readiness to abandon outworn legal tools which fail to serve modern needs" — essential, if judicial intervention in administrative action was to continue effectively. (See Professor Robson in *Justice and Administrative Law,* 3rd. ed., p. 544). Nor were the courts without diffidence as to the role which they could perform. As *Franklin* v. *Minister of Town & Country Planning* [1948] A.C. 87, shows, the prevailing spirit was of judicial caution and hesitancy. Dominant, indeed, was the tendency to accord wide recognition to administrative action at the expense of control over abuse of governmental power.

But the achievement of the last decade has been that the courts have passed from uncertainty to a re-assertion of their part in the control of administrative action. This re-assertion has not involved a claim to control all administrative action; nor to undertake wide tasks more of an appellate than a supervisory character. The continued recognition of the need to allow and promote administration within its sphere has led to the rightful repudiation of any interference in questions of pure policy. The courts may ensure that administrative discretion is exercised according to law, but they do not substitute their discretion for that of the administration. It may be satisfactory in a country like the United States for the Supreme Court, in the exercise of its constitutional role, to pass judgment on issues of policy; but in modern Britain, where no agreement exists on the ends of

Society and the means of achieving those ends, it would be disastrous if courts did not eschew the temptation to pass judgment on an issue of policy. True, the courts may on occasion have to consider, whether explicitly or not, questions of pure policy; for in living systems of law boundaries are never surely fixed like the lines on a mariner's chart. But the underlying search of the courts since 1948 shows a constant striving to achieve a balance between judicial inaction and judicial intervention, the governing test being the existence or non-existence of an issue of policy in the given case. Nor can it, I think, be pretended that the courts are the proper forum for the adjudication of issues of policy. A moment's reflection on judicial experience in England in the seventeenth century illustrates the dangers of the projection of the courts into this arena of controversy. The constant submission to the courts of disputes between Crown and Parliament led, as Clarendon notes in his *History of the Rebellion,* to the growth of a total disrespect and disregard for judges. They were, he said, "as sharp-sighted as secretaries of state in the mysteries of state" and in their courts "apophthegms of state were urged as elements of law" (p. 29). As faction succeeded faction in the state, some judges were imprisoned and some disgraced, so that ultimately the individual could obtain neither justice nor good government. In the modern state, the danger is no less, and the likely consequences no less serious, if different in kind. Judicial self-preservation may indeed alone dictate restraint, quite apart from the considerations which I have already advanced.

I have dealt at some length with these general considerations, since — as the decisions of the courts in individual cases show — they constitute the pattern of the recent developments of the courts' powers.

I come now to the method of control.

Judicial control over administrative action was in general exercised by the old Court of Queen's Bench, and is now exercised by the

Queen's Bench Division of the High Court through the prerogative orders of mandamus, prohibition, and certiorari (these superseded the older writs after the Administration of Justice (Miscellaneous Provisions) Act, 1938 [1 and 2 Geo. 6 c. 63]). It is fitting that I should remind you shortly of their scope.

(1) MANDAMUS.

Mandamus lies against any person, body or inferior court, at the suit of a person aggrieved, to compel the performance of a public duty, which the person, against whom it is sought and issued, is under a legal obligation so to perform. The duty enforced may be either of a ministerial or of a judicial character. If, however, the power conferred on the body which it is sought to control is in the natrue of a mere discretion, or the "duty" imposed may be performed or left unperformed at the discretion of the body on whom it is imposed, no mandamus will issue. Mandamus will not lie against the Crown or its servants acting as such. It is not a writ issuing as of right, or as a matter of course. Thus, the court may refuse the order not only on its merits, but also by reason of the special circumstances of the case, for example, delay on the part of the applicant. Nor will it issue when the applicant has another remedy which is "equally convenient, beneficial and effectual." Particular examples of cases in which a mandamus has been granted include applications to restore, admit or elect a person to an office of a public nature; to compel the delivery up, production and inspection of public documents; to enforce statutory rights and duties; to require public bodies and officials to carry out their duties; and to command inferior tribunals to exercise their discretion.

(2) PROHIBITION.

Prohibition issues to restrain all inferior courts, acting, or purporting to act, in the exercise of judicial functions, from acting in excess

or outside the jurisdiction with which they are legally vested. It will also lie against bodies, which are not in the legal sense "courts", but which exercise, or purport to exercise, judicial functions. Grounds, upon which application may be made, apart from excess or absence of jurisdiction, are departure from the rules of natural justice, and interest or bias on the part of the judge. The order is granted as a matter of discretion, save, possibly, where application is made by the person aggrieved and the defect of jurisdiction is apparent on the face of proceedings. In exercising its discretion, the court will not be fettered by the fact that alternative remedies may exist. Prohibition may issue at any stage in the course of the proceedings which it is sought to restrain, and, in general, application must be made at the first instance after the defect of jurisdiction becomes apparent. In general prohibition lies in every case where certiorari would lie if the proceedings were completed. The only exception as far as I know arises in the case of prohibition to the ecclesiastical courts and to the admiralty court. In *R.* v. *Chancellor of St. Edmundsbury and Ipswich Diocese* [1947] K.B. 263, certiorari to quash the decision of the consistory court, granting a woman a faculty to have reasonable access to the grave of her child in the churchyard, and restraining the Vicar and Churchwardens from interfering with its exercise, was refused. Wrottesley L.J., while stressing that historically writs of certiorari have never gone to ecclesiastical courts, which in spiritual causes have unfettered jurisdiction, nevertheless held that prohibition would lie provided that the ecclesiastical courts were about to exceed their jurisdiction.

(3) CERTIORARI.

Certiorari issues out of the High Court against any inferior court or body or person having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. Its ambit is thus narrower than mandamus which will issue in the case of ministerial as well as judicial duties. It orders the removal

of the record to the High Court, which will, if a defect of process is disclosed, order that the proceedings reviewed be quashed. The grounds on which the decision will be quashed include any excess or want of jurisdiction, error of law on the face of the record, bias or interest on the part of the persons making the decision, and the obtaining of the decision by fraud or perjury. Where application is made at the suit of the Crown, or in a number of limited cases in connection with proceedings in inferior courts of record, certiorari issues as a matter of course; otherwise, its issue is within the discretion of the Queen's Bench Division. The discretion is exercised more liberally (*ex debito justitiae*) when the applicant is an "aggrieved" person, as opposed to a person whose *locus standi* rests on an interest common to the public at large.

As a coherent system of judicial control, however, the prerogative orders plainly possess serious defects. In the conditions of the modern state, where individuals seek to enforce their interests under welfare legislation, mandamus could prove itself the most useful control of any, inasmuch as it lies in respect of the exercise of ministerial powers. It suffers, however, from the disadvantage that some positive legal duty must be shown, and under much of the modern legislation the individual's benefits, however expressed in the statutes, may be no more than mere discretionary privileges. For example, the claim of an employee of a municipal corporation to a superannuation allowance on retirement may be only of the latter character, despite the fact that sect. 8 subs. 1(1) of the Local Government Superannuation Act, 1937, purports to state it as a right (See *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721 *per* Scott, L.J. at p. 728). The line between rights and privileges, is, no doubt, a narrow one, as can be seen by an examination of the *Nakkuda Ali* Case (*Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66). In that case the Judicial Committee of the Privy Council had to consider the distinction between deprivation of a right and withdrawal of a privilege in regard to trading licences. Yet the importation of the element of discretion within the concept

of privilege precludes resort to the order of mandamus, which depends on the existence of the "right" and "duty" traditionally recognised by the common law, and expounded in legal philosophy. Certiorari and prohibition suffer equally in their limitation to situations where the power exercised is of a judicial character. The concept of the "quasi-judicial" proceeding does, no doubt, in its very flexibility, augment the range of the orders and the freedom of the court to grant them. But, because the existence of a duty to act quasi-judicially must depend on the construction of the statute conferring the power, the scope of a court's intervention may always be inhibited by the manner in which the statute is drafted. (*Cf. Franklin* v. *Minister of Town and Country Planning, vide supra.*) All, therefore, that Parliament has to do, to exclude the operation of judicial review by way of certiorari or prohibition, is to express the duty as one to act "judiciously" as opposed to "judicially".

The very limitation in scope of the prerogative orders, in the face of the growing complexity of administration, has called into service that traditional genius for the development of procedures and remedies which has given English law its peculiarly virile character. Indeed, whether regard is had to the development by Mediaeval lawyers of case and assumpsit as general remedies in tort and contract, or to the recent development of the declaration as a remedy in administrative law, the compelling fact which emerges is the paramount absorption of English courts with the problem of giving access to the courts, rather than in the enunciation of general heads of liability, or a general jurisprudence for decision. Thus, a remedy which before 1852 was in the discretion of the Chancery Court has come to play its larger part. Order 25, rule 5, of the Rules of the Supreme Court, provides: —

> "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The essentially negative formulation of this rule results from historic necessity: prior to 1852 the Chancery Court would only grant a declaration consequentially upon other relief being obtainable. The Chancery Procedure Act, 1852 (15 and 16 Vict. c. 86), was interpreted by the pleaders in such a manner that the older rule was thought to be unaffected. Section 50 of that Act, which provided that the Court was enabled "to make binding declarations of right without granting consequential relief", was read to mean that, even if consequential relief might not be granted, yet it must be potentially available as part of the plaintiff's claim before a declaration could be granted. The formulation of the rule in 1883 was thus designed purely to remove this doubt: it left to the courts, however, the positive task of developing rules for determining when a declaration would be available. The remedy was sought (sporadically) after 1890, in the sphere of administrative law, but its efficacy became most apparent in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18.

Fourteen lightermen sought a declaration that their suspension by the Port of London Dock Labour Board was invalid, on the ground that the tribunal which suspended them was not properly constituted. The Dock Labour Board was subject to the Dock Workers (Regulations of Employment) Order, 1947, under which disciplinary powers were granted to the local joint boards of workers and employers in each port area. During the Second World War similar powers to those conferred under the Regulations had been exercised by the Port Manager. These were not revoked, and the local board purported (contrary to the terms of the Regulations) to delegate its disciplinary functions to him. In the course of a trade dispute, the Port Manager, purporting to act under the Regulations, dismissed the lightermen. The plaintiffs appealed to the statutory appeal tribunal, but their appeals were dismissed. Certiorari to quash the tribunal's decision was not available because of delay and so, unless a declaration were granted, they would have had no remedy. A preliminary point was taken by the National Dock Labour Board before McNair J., that the

appeal tribunal's decision could only be set aside by certiorari. McNair J., however, gave judgment for the plaintiffs, holding that, in the case of statutory bodies exercising judicial or quasi-judicial functions, there might be a remedy both by way of certiorari and by way of declaration. The Court of Appeal unanimously affirmed the decision below. Singleton L.J. adverted to the Board's contention that the scheme provided a complete code on matters of discipline, and that only certiorari would lie to review its decisions. "There is great force in this submission" he said, "and there is a body of authority to support it. It cannot be right to say that whenever a tribunal such as the local board, or the appeal tribunal, makes a mistake, the court can grant a declaration such as is asked for in the present case: that would lead to endless confusion. The courts have, however, power to grant a declaration or an injunction in certain cases to prevent injustice" (p. 35). Having reviewed the authorities, he continued: ". . . In the present case, if the question is not one of jurisdiction, it is certainly closely akin to it. The local board had no jurisdiction to delegate: the port manager had no jurisdiction to adjudicate: each purported so to do and in this case . . . a writ of certiorari was of no use. It could be of no use to the plaintiffs in this case. They did not know of the illegality which gave rise to the preliminary point until long after the time for the writ had run; and the question which has been argued before us was not before the appeal tribunal at all. In the circumstances, I am of the opinion that the court has power to grant to the plaintiffs a declaration that their suspension was wrongful." Denning L.J. stated the matter more broadly. After noting "that in the vast majority of cases, the Courts will not seek to interfere with the decisions of statutory tribunals", his Lordship added: "but that there is power to do so, not only by certiorari, but also by way of declaration, I do not doubt. I know of no limit on the power of the Court to grant a declaration, except such limit as it may in its discretion impose upon itself: and the Court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in

accordance with law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why then should not the Court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country. The authorities show clearly that the Courts can intervene" (p. 41). Having found that the Port Manager assumed a jurisdiction which he did not lawfully possess, he noted: "The common law Courts had a regular course of proceeding by which they commanded such a person to show by what warrant — *quo warranto* — he did these things. Discovery could be had against him, and if he had no valid warrant, they ousted him by judgment of ouster. In modern times proceedings by *quo warranto* have been abolished and replaced by declaration and injunction: see Section 9 of the Administration of Justice Act 1938" (p. 42).

The case left uncertain, therefore, how limited or how broad were the confines in which the court would exercise its discretion to grant a declaration. The matter has, however, been subsequently considered, and attempts made to clarify the position. In *Vine* v. *National Dock Labour Board* [1957] A.C. 488, the plaintiff, a dock labourer employed in the reserve pool of the defendants, under the scheme set up by the Dock Workers (Regulation of Employment) Order, 1947, was allocated work with a stevedoring company but failed to report there. A complaint reporting his failure was heard by two members of the Southern Dock Labour Board, to whom that Board had purported to delegate its disciplinary powers. The workman was dismissed, and the dismissal confirmed when he appealed to the statutory appeal tribunal. The man started proceedings against the defendants, claiming damages for wrongful dismissal, and a declaration that the purported dismissal was illegal, ultra vires and void. Ormerod J. granted the declaration requested, and awarded the plaintiff damages. The Court of Appeal struck out the declaration on the

ground that the remedy of damages was adequate. The House of Lords unanimously upheld the view that the local board had acted wrongly in delegating its disciplinary functions to two members of the Board, but thought that the declaration should be given. Lord Kilmuir L.C. emphasised that the discretion to grant a declaration must be used sparingly and with great caution. "The question must be a real and not a theoretical question: the person raising it must have a real interest to raise it: he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought" (p. 500). In that he was approving the Scottish test set out by Lord Dunedin in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] A.C. 438 at 448. The Lord Chancellor, in his speech, which was approved by the other members of the House of Lords, thus repudiated the narrow view that declarations to control administrative action were only available where there was no other remedy, and favoured a more comprehensive view as to the circumstances in which it would be granted. Henceforth, it could be no ground of objection that an applicant could obtain redress by way of certiorari or other remedy.

But how far can this be extended? Is it available to question decisions which are purely administrative in character? This possibility has indeed been suggested by Lord Denning in the Court of Appeal in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 All E.R. 625. "It is" he said, "one of the defects of certiorari that it often involves an inquiry into the distinction between judicial and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy of declaration, which is wide enough to meet this deficiency, as this Court had occasion to point out in *R.* v. *L.C.C., Education Committee, Staff Sub-Committee, ex p. Schonfeld* (reported [1956] 1 All E.R. 680, but not on this point). It applies to administrative acts as well as judicial acts, whenever their validity is challenged because of a denial

of justice, or for other good reason" (p. 632). But this extension of the remedy by way of declaration still remains to be affirmatively considered by the courts. The difficulties are obvious. To enlarge the scope of the declaration in this manner raises, in the most acute form, the question of how far courts can, or ought, legitimately to interfere with administrative decisions whose character may be as much political or economic as legal. Again, unless limitations were imposed, the High Court could easily find itself assuming an appellate character over ministerial actions, leading up to "a superintendency over the government itself." Then the impartiality, and the independence, of the judiciary might well be impugned by reason of the essentially non-legal considerations which would have to be weighed. On the other hand, the complexities and dangers involved may need to be faced if the courts are to insure the vitality of their remedies in the sphere where judicial action is proper. Thus the purpose of the prerogative orders has always been to supervise the functions of subordinate authorities, not to control their decisions reached in the proper exercise of powers: the courts have not interfered where to do so would be to assume an appellate role *in fact.*

It is true that the distinction never obtains complete consistency, since the substitution of the court's discretion for that of the body reviewed may be involved in mere supervision of that body's exercise of its jurisdiction. But there are, in general, those cases where the demarcation is recognised, either because it is obvious or because, in the circumstances of the case to be decided, extrinsic considerations compel courts to articulate the existence of a choice, and to make or repudiate it. Thus, when it is said that certiorari will not issue as the cloak of an appeal in disguise (See Morris L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* [1952] 1 K.B. 338 at 347), the court is recognising a possible dual classification for the situation under review, and rejecting one of the alternatives. Thus intervention was rejected in *Healey* v. *Ministry of Health* [1955] 1 Q.B. 222 (C.A.). In that case the plaintiff was a shoemaker employed by a

hospital management committee in the shoemaker's shop of a mental hospital, in which, during working hours, some of the patients were employed. By letter addressed to the plaintiff the Minister of Health, pursuant to his powers under Regulations, determined that the plaintiff was not "a mental health officer" within the terms of the superannuation regulations. "A mental health officer" is defined as "an officer on the medical or nursing staff of a hospital used wholly or partly for the treatment of patients . . . who devotes the whole or substantially the whole of his time to the treatment or care of such patients . . ." The plaintiff sought a declaration that he was such an officer as defined by the regulation set out on the face of the letter. The Minister said, in answer, that he was not such an officer, and that the regulation which gave the Minister the power to determine these questions made his decision final, and not subject to review or appeal. Cassels J. held that the court had no jurisdiction to consider the issue raised by the plaintiff's claim. The Court of Appeal unanimously affirmed the judgment of the court below. Denning L.J. pointed out: "The relief which is sought does not include a declaration that the Minister's determination was invalid. It seeks only a declaration that the plaintiff is, and was, a mental health officer. It is obvious that if the Court were to consider granting this declaration it would have to hear the case afresh . . . In short, the Court would have to rehear the very matter which the Minister has decided." Thus, "if the court were to entertain this declaration, it would be going outside its province altogether" (p. 228). Lord Justice Morris put it in this way: "In the exercise of their supervisory jurisdiction over inferior courts, Her Majesty's Courts are always strict in seeing that inferior Courts comply with, and observe the law, and that their proceedings are in order and within their powers. The powers which are exercised over inferior Courts are supervisory and controlling powers. In the present case it is to be noted that there is no suggestion that the Minister lacked jurisdiction. It is not said that there was any irregularity of proceeding. It is not said that there was any failure to make due enquiry, or that the Minister acted contrary to the principles of natural justice.

There is no pleading that the determination was wrong in law . . . By his pleading, the plaintiff is inviting the Court to assume an appellate jurisdiction which it has not been given, and which the Court cannot create."

On the view taken of the character of the issue, clearly the Court of Appeal had no choice but to repudiate the suggestion that it should become the court of appeal on a question of fact over the Minister. The issue, however, might, I conceive, have been differently stated. Whether a person is, or is not, a "mental health officer" within the Regulations, might be said to be in part, at any rate, a question of law which would justify interference if the Minister had gone wrong in law. Be that as it may, the choice between judicial intervention and inaction ultimately will depend on whether the need for checking administrative action outweighs the merit of allowing the effective realisation of policy.

Before leaving the discussion as to the difference between assuming appellate as opposed to supervisory functions, it is to be observed that the same distinction appears in connection with the power of the courts to inquire into jurisdictional facts. Thus it is not in every case that the Courts will intervene, when the jurisdiction of a subordinate tribunal depends on a finding of facts. They will not do so if the powers conferred on a tribunal by Parliament give it exclusive authority to determine the facts which are at the basis of its jurisdiction. Lord Esher in his classic judgment in *R.* v. *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313 at 319, has stated the rule thus: "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to

decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction, on finding that it does exist, to proceed further and do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Despite the clarity of this distinction, its application is often difficult. Parliament rarely states its intention in express words as to the jurisdiction which any tribunal is to possess. The courts must apply their own rules to discover the intention of the legislature. The usual approach is to differentiate the determination of collateral facts going to jurisdiction from the matters in issue, (See *R.* v. *Lincolnshire JJ., Ex p. Brett* [1926] 2 K.B. 192 at 202 *per* Atkin L.J.), since for the courts to pass judgment on the latter questions would be to give applicants a right of appeal where none is intended by Parliament. *R.* v. *Ludlow, Ex p. Barnsley Corporation* [1947] 1 K.B. 634, is an example of a case where a determination of fact, apparently jurisdictional, could have become the cloak for an appeal. The case arose under the Reinstatement in Civil Employment Act, 1944, which provided that, where a person whose war service ended after the commencement of the Act made

application to his former employer to be reinstated, the former employer was under an obligation to take that person back into employment. A woman demobilised from the Women's Royal Naval Service applied, under the Act, for reinstatement by the Barnsley Corporation as a telephone switchboard operator. The Corporation refused, contending that prior to her naval service she had been employed in civil defence for a period. An application by the woman to a committee set up under the Act was refused on the ground that it was out of time. She appealed to an Umpire under the Act who held, first, that her application was not out of time and, second, that the Corporation were her former employers within the meaning of the Act, and that there had been default in performance of their obligations. The Corporation applied by certiorari to quash the Umpire's decision on the ground that he had no jurisdiction finally to decide the preliminary questions which formed the basis of this jurisdiction, *i.e.,* that the woman was a former employee of the corporation. The Divisional Court rejected this contention on the interpretation of the statute. Lord Goddard C.J. rested his decision on the notion that the statute unequivocally entrusted the tribunal with the power of deciding whether or not they had jurisdiction, but implicit in his language is the realisation that to find otherwise would give a right of appeal to the court where one was excluded by statute. "The question we have to decide is whether the deputy umpire was acting within his jurisdiction in making the order, because, if he was, then whether his decision was one which would commend itself to this court or not, is a matter of no moment, since we are not sitting as a court of appeal from the deputy umpire" (p. 638).

On the other hand, the tendency of the courts in the rent tribunal cases is often to regard as collateral questions matters which are in issue. Thus, in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, ex p. Philippe* [1950] 2 All E.R. 211, the Divisional Court classed as collateral the question whether a money payment was a premium paid in respect of the grant of a lease to which the

rental tribunal could have regard in fixing the rental equivalent by which the tenant's standard rent was to be diminished. The issue arose because the tenant, the assignee of a lease, applied to the tribunal to determine the standard rent and claimed a reduction on account of a sum paid by the assignor to the landlord, in respect of the grant of permission to assign the lease and in respect of reconstruction of the premises, for which he had covenanted to pay at the time of the grant of the lease. The tribunal assessed the rental equivalent on the basis that both items comprising the sum amounted to a premium within the Act. The landlord applied by way of certiorari to quash the decision. Paragraph 1 of Part I of Schedule I of the Landlord and Tenant (Rent Control) Act, 1949, provided that the tribunal should, if the tenant required, certify that the terms of the Schedule were to be applied, and reduce the rent by a sum calculated by reference to the premium paid, in any case "where it appear[ed] to the tribunal that . . . any premium had been paid." Despite the seeming discretion implied by the provision, Parker J. said: "It seems to us therefore that the fact that such a premium has been paid is a condition precedent to the exercise by the tribunal of its jurisdiction under the 1st Schedule. In other words, before the tribunal can be said to have jurisdiction, it must not merely appear to them that such a premium has been paid, but such a premium must have been paid" (p. 215). He rested his decision on the terms of the statute and on prior authority which had held that rent tribunals were bodies of the type first referred to by Lord Esher M.R. (See *R.* v. *Hampstead etc. Rent Tribunal, ex p. Ascot Lodge Ltd.* [1947] K. B. 973). The Court then quashed the tribunal's ruling that the sum paid in respect of the reconstruction costs by the assignor to the landlord was a premium within the Act. Other examples of the approach taken in rent tribunal cases would be superfluous; suffice it that the approach has always been the same.

Decisions on jurisdictional facts by English courts have often been criticised by lawyers from other countries on the ground that

logical consistency is absent. (See Schwartz, 41 *Minn. L.R.* at 70–71). The distinctions, it is said, adumbrated by Lord Esher, and repeatedly stressed, are not in substance preserved rigidly in the cases. Indeed the examples I have given may be thought to justify the complaint. Yet it is difficult to achieve apparent consistency in cases where so much turns on the legislative scheme which is being interpreted, and the facts of the case under consideration. It is a legal area where precedent in the application of Lord Esher's rule can give no more than bare guidance. The broader consideration of whether the case is one for judicial intervention or inaction is paramount.

Possibly the application of the rule in the rent tribunal cases is in part attributable to the fact that parliament had provided no appeal to an appellate tribunal or otherwise. Partly it may stem from the hostility of the courts to the exercise by administrative bodies of powers of control in an area which by tradition has always fallen within the jurisdiction of the courts. If so, it is one more example of the historic jealousy of the common law courts for rivals in its own sphere.

II.

I come now to a consideration of the use of certiorari to quash a decision where an error of law appears on the face of the record. The use of certiorari for this purpose is not a modern extension. The power has long existed but the occasions for its use had become few in number and it had fallen into abeyance. The reason was that its exercise, of course, depends on there being either a reasoned decision or, at any rate, a record setting out the evidence and the finding. Such a decision is often referred to as a "speaking order". Prior to the middle of the last century the courts freely exercised the power to quash the decisions of magistrates. Indeed they abused it, and Parliament enacted the Summary Jurisdiction Act of 1848, which provided a common form for summary convictions which did not include any statement of the evidence or provide for any reasoned decision.

Lord Sumner in speaking of that Act said: "It did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer; it was the inscrutable face of a sphinx." (See *Rex* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128 at page 159). The judgment of Lord Sumner in that case is long but well worth a careful study.

In 1952, however, the court revived the use of certiorari for this purpose in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338 (C.A.). The applicant, by reason of the enactment of the National Health Service Act, 1946, lost his employment as a clerk to the West Northumberland Hospital Board. As he was aggrieved by the amount of compensation offered, he referred the matter to a tribunal set up under the National Health Service (Transfer of Offices and Compensation) Regulations, 1948. The tribunal was under a duty to determine such questions in accordance with a regulation defining the length and character of "service" to be considered in assessing compensation. Contrary to the provisions of the regulation, the tribunal merely took account of the applicant's service with the local hospital board and ignored his prior service in local government. The order of the tribunal therefore merely set out the period of the applicant's service with the local board, and included a statement that, in the view of the tribunal, this was the only relevant period of service and the order therefore "spoke". The applicant moved in the Divisional Court for certiorari. Counsel for the tribunal admitted the existence of the error of law on the face of the decision, but contended that certiorari would lie to such a statutory tribunal only in the case of want of or excess of jurisdiction. The Divisional Court granted the order and the tribunal appealed. The Court of Appeal unanimously affirmed the decision of the Court below. "Of recent years", said Lord Justice Denning, "the scope of certiorari seems to have been forgotten. It has been supposed

to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record even though they do not go to jurisdiction" (p. 348). The Lord Justice, however, was at pains to stress that "The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so." To the like effect is the judgment of Lord Justice Morris: "It is plain," he said, "that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or a decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown" (p. 357).

Two questions arise from this decision. Despite what the two Lord Justices said, does this power to correct errors of law on the face of the record detract from the principle that the courts do not act as tribunals of appeal? Second, what documents comprise the record and what are the powers of the court if the record is defective?

As to the first issue the position is not unlike that which arises on a case stated on a point of law. In regard to case stated, Lord Radcliffe in *Edwards (Inspector of Taxes)* v. *Bairstow* [1956] A.C. 14 at 36, said: "If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously erroneous in point of law. But, without misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible

for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory to the determination, or as one in which the true and only reasonable conclusion contradicts the determination." The applicability of this position to error of law on the face of the record was approved by Lord Justice Denning in *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 K.B. 574 at p. 582, and plainly these matters as questions of law may be reviewed in appropriate cases. It may therefore be argued that to allow the courts to quash the decision of a lower tribunal because there is no evidence on which the determination can be supported, or because no reasonable person could have come on the evidence to such a conclusion, is really to give the courts appellate jurisdiction. But whatever name is applied, the court never substitutes its own decision. It would only quash the tribunal's decision leaving the tribunal to hear the case again.

As to the second issue, the remedy is, as I have said, dependent on the content of the record. The error must appear on its face, behind which the courts may not be able to go. In *ex p. Gilmore* (cited *supra*) the question of how "the record" was constituted was considered, and the Court of Appeal (*obiter*) held that the full report of a medical specialist, an extract of which was set out in the decision, was incorporated by reference. Denning L.J. said that since the tribunal had given an extract from the specialist's report, they made that report a part of the record. "That, as a pleading is taken to incorporate every document referred to in it, so also does an adjudication."

The *dictum* in *ex p. Gilmore,* that documents incorporated by reference in the bare determination of the tribunal may be regarded by the court, clearly indicates that the notion of what the record contains is flexible. The most precise definition which exists, was given in *ex p. Shaw* (cited *supra*), where it was said that "the record

must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons unless the tribunal chooses to incorporate them." This was approved and applied in *R.* v. *Patents Appeal Tribunal, ex p. Baldwin and Francis Ltd.* [1958] 2 W.L.R. 1010. In that case a patent specification as "the document initiating the proceedings" was held to be contained in the record despite the absence of any reference to it in the award of the tribunal. But, however wide may be the definition of the record, the fatal defect, precluding the exercise by the courts of its jurisdiction in these cases, is that tribunals are not obliged to state their reasons. As Lord Justice Parker said in *ex p. Baldwin & Francis Ltd.*: "The Court can look, and look only, at the reasoned decision, and at such documents as can fairly be said to form part of the record. If no reasoned decision is given, the error of law, if error there be, will not be detected." Nor, if the tribunal fails to state the reasons for its decision, will the applicant be permitted to tender evidence as to the tribunal's reasons by affidavit. The error must be on the face of the record. It is otherwise, of course, where certiorari is sought on the ground of abuse or excess of jurisdiction, of bias or interest, or fraud. If, of course, a tribunal is by statute bound to give reasons, mandamus would lie to compel it to do so. But if, as is generally the case, there is no such requirement, it is doubtful whether the courts have any power to compel it to do so. It is true that in *ex p. Gilmore,* Lord Justice Denning asserted such a right (p. 583). "The Court" he said, "has always had power to order an inferior tribunal to complete the record." The matter is undecided, but I venture to think that the true view is that there is no such power. Accordingly, tribunals not compelled by statute to give reasons invariably oust this remedy of certiorari by refraining from stating the reasons for their decision. Then, the paradox results that he who states fully the reasons for his determination is more susceptible to correction than he who states nothing.

This incongruous result underlines an essential problem in adminis-

trative law, namely, the disability of the courts to review decisions where no "reasons" are given. Until this year few statutory tribunals were compelled to set down the reasons for their decisions, despite the obvious desirability of persons, whose interests have been affected, knowing the grounds upon which the decision has been reached. Moreover, not only does the absence of reasons make the task of the courts impossible, but it undermines public confidence in administration. Silence is often interpreted to indicate arbitrariness on the part of the administrator in his determination. These factors have been weighed and the point aptly stated in the report of the Franks Committee (Command Paper No. 218). "It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. Where no reasons are given, the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the Minister's decision in the Courts or elsewhere. Moreover . . . a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out" (para. 351). But, beneficial as the publication of reasons may be, the courts have never compelled it (See *Local Government Board* v. *Arlidge* [1915] A.C. 120), nor indeed is there ever any legal necessity for judges at common law to give the reasons for their decision. Indeed, the Judicial Committee of the Privy Council has recently rejected the contention that the decision of the courts below should be set aside because no reasons had been given for the determination. (See the Times, November 19th, 1952). Thus, section 12 of the Tribunals and Inquiries Act 1958, which provides that in future tribunals listed in the Act shall furnish either written or oral statements of the reasons for their decision, represents a break with tradition and has removed a considerable disability to effective judicial review.

Judicial disability to review administrative decisions is, however, a wider problem than that which emerges either because tribunals need not, or do not, publish their reasons for decision. There is the whole question of "judge-proof instruments", namely, those orders and instruments, made under an Act of Parliament, which exclude expressly or implicitly any possibility of intervention by the courts.

In recent years the courts have had to consider two forms of words which appeared expressly to oust the jurisdiction of the courts, first, words providing that a compulsory purchase order "shall not be questioned in any legal proceedings whatsoever", and second, the words that "any decision of a claim or question [by the tribunal in regard to which review is sought] . . . shall be final." In *Smith* v. *East Elloe Rural District Council* [1956] A.C. 736, the appellant claimed a declaration that a compulsory purchase order was made and confirmed wrongfully and in bad faith. The appellant's action was brought more than six weeks after notice of the confirmation of the order was published, that period being the time during which a person aggrieved could, by virtue of the relevant statute, apply to the High Court in order to question the validity of the order. The statute went on to provide that "Subject to the provisions of the last foregoing paragraph" (*i.e.,* application within 6 weeks) "a compulsory purchase order . . . shall not . . . be questioned in any legal proceeding whatsoever . . ." The appellant contended that, although her action was begun out of time, the statutory provisions were not applicable in cases where the person on whom the statutory power was conferred exercised it in bad faith. The majority (Viscount Simonds, Lord Morton of Henryton and Lord Radcliffe) held that the words excluded the jurisdiction of the courts for all purposes. Lord Simonds, noting that "Parliament has sought to give finality and security from challenge to compulsory acquisitions of land", stressed that it is the "plain duty [of the courts] to give the words of an Act their proper meaning", and that in the present case "words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make."

Even though the House of Lords by a majority was compelled to consider its jurisdiction ousted, divergence of view on the effect of the general words is significant evidence that underlying the cases on judicial review are inarticulate assessments as to whether the needs of administrative convenience weigh more heavily or not than the desirability of judicial intervention. The attitude of the dissenting minority clearly rejects the claims of administrative convenience and, in so doing, embodies the age-long hostility which the courts have shown to statutory attempts to oust jurisdiction. The view of the majority recognises the legitimate objectives of administrative action and supports the view that the function of the courts is as much to encourage good government as to check the abuses of government.

The case of *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574, went the other way. In addition to the question whether the specialist's report was part of the record, the point was raised that the jurisdiction of the courts was ousted by reason of the wording of Section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, which provides that "any decision of a claim or question . . . [by a tribunal functioning under the Act] . . . shall be final." The Court of Appeal, however, rejected the argument. As Lord Justice Denning said, "the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word final is not enough. That only means 'without appeal'. It does not mean 'without recourse to certiorari'. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made 'final', certiorari can still issue for excess of jurisdiction or for error of law on the face of the record" (p. 583). Lord Justice Parker emphasised that different considerations applied according to whether the court was being asked to quash a decision for an excess of jurisdiction or for an error of law. He said: "The ordinary remedy by way of certiorari for lack of jurisdiction is not ousted 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 invoked for error of law on the face of the decision. In such a case it cannot be said that the decision is a nullity" (p. 588). "But is the statement that the decision shall be final sufficient to oust the remedy? There are many instances where a statute provided that a decision shall be 'final'. Sometimes, as here, the statute provides that, subject to a specific right of appeal, the decision shall be final. In such a case it may be said that the expression 'shall be final' is merely a pointer to the fact that there is no further appeal, and the remedy by certiorari is not by way of appeal. Since, however, appeal is the creature of statute the expression is used in the statutes when no rights of appeal are provided. In such a case it could be said that the expression was of no effect unless it was intended to oust the remedy by way of certiorari. Be that as it may, I am satisfied that such an expression is not sufficient to oust this important and well-established jurisdiction of the courts" (p. 589). The case is indeed an assertion by the courts of the right of judicial review just as *Smith* v. *East Elloe R.D.C.* marked the acknowledgment by the courts of the claims of judicial self-restraint. A comparison of the cases may of course provoke the criticism that the attitude to these attempts to oust the jurisdiction of the courts is unpredictable. The truth of the matter is that the courts are jealous of their jurisdiction and will not surrender it in the absence of very clear words. It is of course possible for Parliament to do anything, but surely self-restraint is not a duty to be observed by the judiciary alone.

However that may be, some inconsistency of decision must be acknowledged in those cases where the exclusion of review is indirect. These may conveniently be described as "the Minister is satisfied" cases. Judicial restraint when faced with this expression is of course illustrated at its greatest in *Liversidge* v. *Anderson* [1942] A.C. 206. The matter arose on a claim for damages for false imprisonment, the applicant having been imprisoned by the Secretary of State for Home Affairs under the Defence (General) Regulations, 1939,

Regulation 18B. There was no direct question involved of the power of the courts to grant a prerogative order, but it was necessary to consider the scope of ministerial discretion where powers were conferred under a regulation which read: "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . ." Could the Minister satisfy the courts that his discretion had been exercised properly by means of a declaration that he had "reasonable cause to believe" a state of affairs existed, or did reasonable grounds have in fact to exist for his expressed belief? The House of Lords (Lord Atkin vigorously dissenting) held the test under the regulation to be subjective. As Lord Macmillan noted (p. 257): "In a matter at once so vital and so urgent in the interests of national safety I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a Court of law would disagree with him, and also without the further liability that should the Court do so or if he cannot consistently with his duty disclose to the Courts the grounds of his belief, he will be mulcted in damages for false imprisonment as having acted outwith his powers."

The implications of *Liversidge* v. *Anderson* were fully developed in *Point of Ayr Collieries Ltd.* v. *Lloyd-George* [1943] 2 All E.R. 547, and *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All E.R. 560 (C.A.), cases which arose under the Defence (General) Regulations.

Within the context of the emergency conditions of the 2nd World War, these decisions can be said to be sensible and justifiable, for "however precious the personal liberty of the subject" (and *a fortiori* his right to use his property) "may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war." (See *per* Lord Atkinson in *R.* v. *Halliday, ex p. Zadig* [1917] A.C. 260 at 271). Administrative expediency

at the time indeed considerably outweighed the claim of persons to the judicial protection from power which in time of peace is so weighty. It is further not very surprising that during the period of urgent reconstruction immediately after the war the approach was the same. Thus, in *Robinson* v. *Minister of Town & Country Planning* [1947] 1 K.B. 702, Lord Justice Somervell said: "Words in a statute must be construed in their context. It must, however, be obvious that Parliament can confer the same unlimited discretion on Ministers for purposes other than war purposes. Construing the words in their natural meaning and in the light of the authorities, I think Parliament has done so in this part of the Act." (Similarly, a subjective approach to the Minister's discretion was taken in *Re Beck and Politzer's Application* [1948] 2 K.B. 339; *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87, and *Demetriades* v. *Glasgow Corporation* [1951] 1 All E.R. 457). The result was that, in the accepted view, words in statutes giving a Minister powers in terms of wide subjective discretions could not be challenged save on the ground of bad faith. The whole question was however re-opened in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 (P.C.). The respondent, the Controller of Textiles in Ceylon, cancelled the appellant's textile licence under a regulation which empowered him to do so where he had "reasonable grounds to believe that any dealer was unfit to be allowed to continue as a dealer." The appellant sought an order in the nature of certiorari to quash the Controller's decision. Counsel for the respondent relied on the principle in *Liversidge* v. *Anderson,* contending that, even if certiorari would lie, the court could only enquire into the honesty of the opinion of the Controller that he had reasonable grounds to believe. Lord Redcliffe, delivering the opinion of the Privy Council, pointedly disaffirmed the view that the subjective test of administrative discretion conferred by these words was of general applicability. "The elaborate consideration" he said, "which the majority of the House gave to the context and the circumstances [in *Liversidge's* case] before adopting that construction itself shows that there is no general principle that such words are to be so under-

stood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning 'if there is in fact reasonable cause for A.B. so to believe.' After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality" (p. 77). The Judicial Committee then proceeded to hold that the words of the regulation imposed a condition that there must in fact exist reasonable grounds for the exercise of his discretion, which were known to the Controller, before he could validly exercise the power of cancellation. This same trend is to be observed in two cases decided in 1958, namely, the case in the Privy Council of *Ross-Clunis* v. *Papadopoullos* [1958] 1 W.L.R. 546, and the case, in Ceylon, of *Sucathadasa* v. *Minister of Local Government and Cultural Affairs* (1958).

The course of decisions from *Liversidge* v. *Anderson* to *Ross-Clunis' Case* shows the varying interpretation of words conferring wide discretions on administrative officials. But as Lord Loreburn L.C. said in *Kydd* v. *Liverpool Watch Committee* [1908] A.C. 331, "the process of reasoning that, because one set of words means one thing in one context, other words or the same words in a different context must necessarily mean the same thing is often vexatious and fruitless." The truth surely is that each case must depend on its context and on its own circumstances, the ultimate decision being governed by the view taken as to whether the case falls within the realm of administrative policy or within the dominion of judicial action. As I have already indicated, English courts have always recognised that

it would be improper to claim control over matters of pure social and political expediency and have recognised this by excluding, from their jurisdiction to review, the acts of officials of state, which are performed by reason of some pure discretion which they possess. These "Ministerial" or "administrative" acts must be set in contradistinction to "judicial" acts, which courts may control by invoking, for example, such procedural concepts as are involved in the term "natural justice". The difficulty has constantly been, however, to define the distinction between "administrative" and "judicial" acts, so that courts, lawyers and laymen can apply the law and plan their future action without the disadvantages that stem from uncertainty.

At one time the view held was that a proceeding could not be judicial unless there existed a *lis inter partes,* and must be judicial if such a *lis* did in fact exist. This presupposed the existence of a right to be heard on a dispute, the tendering of argument and evidence in support or opposition to a proposal, and indeed the presence of a "dispute" between parties analagous to a legal cause (See Lord Herschell in *Boulter* v. *Kent Justices* [1897] A.C. 556, and Scrutton L.J. in *R.* v. *L.C.C., ex p. The Entertainments Protection Association Limited* [1931] 1 K.B. 215 at 233–4). Thus concentration was entirely on the form of the proceedings irrespective of the functions performed. But the growing judicial awareness that an analysis of acts in terms of functions was the most rational basis of review led the Divisional Court, in *R.* v. *Manchester Legal Aid Committee, ex p. Brand* [1952] 2 Q.B. 413, to reject the presence of a *lis* as the determining factor. A debtor applied for a certificate for legal aid to pursue a claim for a breach of contract against his creditor. Before a certificate was granted he was adjudicated bankrupt and the claim vested in the Trustee in Bankruptcy. The latter then applied for a certificate on the standard form, referring only to the disposable income and property of the debtor and not, as he should have done, to his own financial position. The National Assistance Board, whose duty it was to give certificates as to means, wrongly gave a certificate

and the local committee thereupon granted legal aid to the Trustee. The creditor moved by certiorari to quash the certificate. The tribunal contended that the grant of legal aid certificates was not a judicial proceeding, since the elements required to constitute a *lis* were not present. The Divisional Court refused to accept this argument and said (*per* Parker J.): "The true view is that the duty to act judicially may arise in widely different circumstances which it would be impossible and, indeed, inadvisable to attempt to define exhaustively. Where the decision is that of a Court, then, unless, as in the case, for instance, of justices granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is activated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at that decision, the body concerned had to consider proposals and objections and consider evidence, then there is a duty to act judicially in the course of that inquiry . . . Further, an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, and are not in accordance with, the practice of a court of law (p. 429) . . . If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of *lis,* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially" (p. 431).

The significance therefore of *Brand's* case is the conscious recognition by the courts that "administrative" and "judicial" acts are not acts done in closed and clearly delineated categories distinguishable by "form" rather than "function." This is not, however, to deny any validity to the distinction between the types of action, but it is to recognise that the types grow into each other, and that the problems facing the courts in regard to judicial review so often fall in the area where the merger of "rule" and "discretion" (representing the

antinomies of "law" and "policy") are least susceptible of analysis. This fusion becomes apparent from even the most cursory study of the history of English law. Judicial action in the early Middle Ages was intrinsically administrative action, and there has never been a time in which the administrative functions of the ordinary courts of law have entirely disappeared. Even today some persist, and only recently the Restrictive Practices Court has been created standing at the cross-roads of administration and law, where policy and rule meet. The truth is that rules of law are the fetters which judges have progressively placed on their discretion to exercise power over the King's subjects. It may indeed be, as the late Lord Stamp has said, that judicial functions are merely a specialised form of general administration which has acquired an air of detachment. Indeed, in an area where "rules" and "discretions" take on shadowy qualities, classification can only be achieved by a realistic functional analysis of the situations themselves.

I have been attempting to review the scope of the supervisory powers of the courts since the Second World War, and have considered some of the problems arising in regard to error on the face of the record; to wide discretions conferred by statute; to jurisdictional facts; and to the role of declarations. The paramount fact which emerges is the dual need, the need to protect the citizen from misuse of power and the need for efficient and effective administration. Recently the need has grown for society to be organised to withstand the current stresses of the modern world, and to be based opon economic notions which call for the mobilisation of resources, and the claims of policy have thus necessitated the growth of flexible administrative tribunals. Equally, the claims of the individual to protection under the law have increased. In such circumstances there was a real need for a consideration of the place of administrative action in our society and of the modes by which these dual forces can be reconciled, both within constitutional government at large and the sphere of judicial action itself. It was thus that the Franks Committee was created to review

the workings of tribunals and their relation to the courts. It is only necessary to remind you shortly of its work. The range of problems considered covered the areas of dispute from legal representation before tribunals, the publication of reasons, and the exclusion of the rights of appeal, to the precise requirements of freedom from scrutiny which were necessary for the policies of administration to be developed and acted on. The outcome of the Committee's deliberations was not unflattering to the work of the courts in recent years in the sphere of judicial review. Basically it recommended that the control exercised by the courts over administrative action was to be preferred to any system of *Droit Administratif* as exists in France; that all decisions of tribunals should be subject to review by the Divisional Court on points of law on appeal rather than by certiorari or error of law on the face of the record; that challenges to jurisdiction should continue to be examined by motion for the prerogative orders; that prohibition, certiorari and mandamus should continue as primary remedies and that no statute should contain words purporting to oust these orders.

Some of the Committee's recommendations have been carried into effect by the Tribunals and Inquiries Act, 1958, (6 and 7 Eliz. 2. c. 66). The most important provisions of the Act may be briefly stated. A Council on Tribunals is created to exercise a constant scrutiny over the work of the tribunals specified in the Act; to report on matters referred to them in regard to other tribunals; and to consider matters in regard to administrative procedures involving Ministerial inquiries. The chairmen and members of certain tribunals are given a status consonant with the recognition of the need for independence. Moreover the Council must be consulted on rules governing the procedure before such tribunals. In regard to a limited number of tribunals the right is given to appeal or go by case stated on a point of law to the High Court. Further, any provisions in previous Acts which purport to exclude the power of the High Court to review by way of certiorari or mandamus the decisions of inferior bodies and officials are declared to be of no effect. A most significant provision of the

Act is that the tribunals listed therein, and Ministers after the holding of public inquiries, are placed under a duty to give, if requested, the reasons for their decisions, unless such statement of reasons would be prejudicial to "national security". By a further provision these reasons are expressly incorporated in the record of the proceedings. The Act does not, however, schedule every tribunal for inclusion within its provisions, but it does widen the scope of judicial review in regard to a wide variety of questions immediately effecting the subjects' interests. The Act thus does not go as far as your Administrative Jurisdiction Bill *, now under discussion, but the Tribunals and Inquiries Act, 1958, clearly remedies some of the more pressing deficiencies in the system of judicial review in England.

It is, moreover, at once a recognition by the legislature and the executive of the fact that some problems in society are most effectively solved by techniques of adjudication, and that the role of judges need not of necessity impede government but may assist the due realisation of its objectives. The Court of Queen's Bench cannot assert a general superintendence over government, but it can continue within its limits to be a useful organ of government. It is only thus that within the sphere of administrative action, where political and legal problems grow together, the courts can preserve the impartiality and independence which are the essential bases of the English system of jurisprudence and the true guarantee of freedom under the law.

* A text of the "Draft Administrative Jurisdiction Bill for the State of Israel" may be found in Public Law (Autumn, 1958), p. 254 ff.