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The Growing Ambit of the Common Law

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One of the features of the common law is its three-dimensional character: it extends to jurisprudence, substantive law and procedure. Indeed, the persistence and vitality which characterize the common law tradition since the middle ages[1] derive their strength from that feature; when there appears to be rest and consolidation in one sphere, advance and development take place in the others, and at the end the whole legal system moves forward to meet the demands of a new age. The creative spirit of the common law broke first through on the procedural level when in the early middle ages it developed the system of writs; it then appeared in the sphere of jurisprudence when Fortescue, Littleton and Coke established a common law jurisprudence which was strong enough to withstand the reception of Roman law in England; the development of a tolerably rational system of substantive law was the hardest task for the common law and it was only accomplished by the great judges and writers of the 18th and 19th centuries.

In our days, the most potent source of vitality of the common law is its readiness to receive in its theoretical background new

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[1] Roscoe Pound, The Development of American Law and its Deviation from English Law (1951), 67 L.Q.R. 49, at p. 65.

ideas capable of influencing and changing the rules of substantive law and procedure. Practical requirements make it necessary that progress in these two spheres should be ordered and cautious; this is achieved by the technique of precedent which, however, itself is undergoing a change and losing some of the restrictive features it acquired in the 18th century. In the field of legal thought, no technique of evolution is acceptable; the development of legal ideas depends, in the last resort, on the readiness of the judge and the legislator to accept the changes which emerge from the welter of political and social controversy.

The post-war decisions of the English courts reveal a remarkable responsiveness of the common law to the complex problems which the social changes of that period have produced. By its determination to move with the times, the common law has acquired a thoroughly modern theoretical outlook, which is founded on the unquestioned acceptance of parliamentary supremacy and the political impartiality of the judges. In the following pages an attempt is made to indicate the principal changes in the substantive law which result from the creative expansion of the common law in the post-war period.

I

The most significant legal development of the past fifty years is the almost complete absorption of administrative law in the fold of the common law. This development is an event of the first magnitude, which is comparable to the incorporation of the law merchant into the common law in the 18th century. Since the days of Lord Coke, the common law has been an acquisitive system of law, although of course in our days judges are no longer guided by the rule *boni judicio est ampliare jurisdictionem* but, in the words of Lord Justice Denning,[2] regard the "task of doing justice as between the subject and the administrative branches of government [as] just as important as the task of doing justice between man and man". How far this process of absorption has gone in the daily business of the courts is not generally realized; it is certainly not realized by those who, like Professor Robson[3] or Mr. FitzGerald,[4] still argue that a Supreme Court of Administration should be constituted in England. If a French lawyer who was unaware of the fundamental distinction between French *droit adminis-*

[2] Lord Justice Denning, Freedom under the Law (1949) p. 96.

[3] William A. Robson, Justice and Administrative Law (3rd ed., 1951) p. 618.

[4] Richard C. FitzGerald, Safeguards in the Exercise of Functions by Administrative Bodies (1950), 28 Can. Bar Rev. 538, at pp. 555 ff.

tratif and English administrative law[5] visited the courts at the Strand to-day, he might easily form the mistaken view that he was attending the *Conseil d'Etat*[6] and not an ordinary court of law. In the Court of Appeal, he might listen to a dispute between a local government authority and an area gas board;[7] in the Divisional Court of King's Bench Division a public servant might complain that a compensation appeal tribunal has calculated his pension wrongly;[8] in the commercial court shipowners may sue the Minister of Food as charterer of a ship that carried wheat from Australia to the United Kingdom;[9] in the Chancery Division an appeal might be heard from the decision of the Minister of Local Government and Planning, who decided that land held by a girls school was not held for charitable purposes and, consequently, not exempt from development charges, and with some luck our French visitor might be present when the Minister's decision is overruled.[10] Our visitor might feel inclined to agree with Professor Robson's statement[11] that

> English administrative law is, indeed, so extensive that the problem is not to discover it but rather to master its widespread ramifications and to reduce it to some kind of order and coherence,

but he will find it difficult to reconcile the impressions he gained from his visit to the courts with the nowadays fashionable assertion[12] that there is a

> decline or elimination of judicial control as an effective barrier against arbitrary or irresponsible public administration.

The integration of administrative law, which at present is almost completed, was mainly[13] carried out by a new and extended use of the prerogative orders in recent decisions of the courts. It is well known that the means by which King's Bench Division

[5] Admirably explained by Professor Robson, *op. cit.*, pp. 28 ff.

[6] Cf. Bernard Schwartz, The Administrative Courts in France (1951), 29 Can. Bar Rev. 381, at p. 385.

[7] *Hinckley Urban District Council* v. *West Midlands Gas Board*, [1951] 1 All E.R. 788.

[8] *R.* v. *Northumberland Appeal Tribunal; ex parte Shaw*, [1951] 1 K.B. 711.

[9] *United British Steamship Co.* v. *Minister of Food*, [1951] 1 Lloyd's Rep. 111.

[10] *Abbey, Malvern Wells Ltd.* v. *Ministry of Local Government and Planning*, [1951] 2 All E.R. 154.

[11] *Op. cit.*, at p. 32.

[12] Robson, Book Review (1950), 21 Pol. Q. 411, quoted by Bernard Schwartz, *loc. cit.*, at p. 382.

[13] Other contributory causes were the passing of the Crown Proceedings Act, 1947, and the refusal of the courts to treat the public business corporation charged with the duty of owning and managing a nationalized industry as a department of state: see *Tamlin* v. *Hannaford*, [1950] 1 K.B. 18, and Professor W. Friedmann, The Legal Status and Organisation of the Public Corporation, in Nationalization of British Industries (1951), 16 Law and Contemp. Problems, Autumn Issue, 1951.

exercises control over administrative authorities are the orders (formerly writs) of *mandamus, certiorari* and prohibition. In a recent study of the history of the prerogative writs, Mr. S. A. de Smith [14] shows that originally these writs were used for purely administrative purposes as well as for the supervision and limitation of the jurisdiction of other courts, and that from early days their scope was extended whenever it was necessary. When discussing the writ of *certiorari*, Mr. de Smith refers to the sweeping statement of Holt C. J. in *Groenvelt* v. *Burwell:* [15]

> It is a consequence of all jurisdictions, to have their proceedings returned here by *certiorari*, to be examined here,

and observes: [16]

> Thereafter the King's Bench . . . became what Gneist called an *Oberverwaltungsgericht*, a supreme court of administration, supervising much of the business of local government by keeping subordinate bodies within their legal limitations by writs of *certiorari* and prohibition, and ordering them to perform their duties by writs of *mandamus*. The modern High Court has succeeded to much of this jurisdiction, and there can be no doubt that the absence in the common-law systems of a distinct body of public law, whereby proceedings against public authorities are instituted only before special administrative courts and are governed by a special body of rules, is directly traceable to the extensive use of prerogative writs by the court of King's Bench.

It is necessary here to distinguish between *mandamus*, which still issues to all public authorities whether exercising judicial or administrative functions, and *certiorari* and prohibition, which in the present practice of the English courts are "limited to curbing the exercise of judicial or quasi-judicial powers". [17]

The modern use of *mandamus* may be illustrated by two recent cases. In *Rex* v. *Dunsheath; ex parte Meredith*, [18] a school affiliated to the University of London refused to re-employ a teacher of slavonic languages. Certain members of convocation (which is the representative body of graduates of London Uni-

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[14] S. A. de Smith, The Prerogative Writs (1951), 11 Camb. L.J. 40; further, the history of the writs of *certiorari* and prohibition is reviewed by Wrottesley L.J. in *R.* v. *St. Edmundsbury and Ipswich Diocese; ex parte White*, [1948] 1 K.B. 195; see also D. M. Gordon, *Certiorari* to an Ecclesiastical Court (1947), 63 L.Q.R. 212.

[15] (1699), 1 Ll. Raym. 454, at p. 469. In that case Holt C. J., by way of illustration, referred to the commissioners of sewers and observed that owing to a misinterpretation of a statute they thought that they could not be compelled to certify their proceedings and refused to do so, "but they were committed. . . . It is by the common law that this court will examine, if other courts exceed their jurisdictions."

[16] S. A. de Smith, *loc. cit.*, at p. 48.

[17] Professor E. C. S. Wade, The Courts and the Administrative Process (1947), 63 L.Q.R. 164, at p. 170.

[18] [1951] 1 K.B. 127.

versity) served a requisition on the chairman of convocation, asking that he convene a meeting of convocation where the position of the teacher, who was stated to be a member of the Communist Party, could be discussed; the requisitionists further intended to raise the question of discrimination on political grounds in connection with the appointment of academic teachers. The chairman refused to summon the meeting because, *inter alia*, the matter did not relate to the university but was within the discretion of the council of the particular school; nor was it one on which convocation could properly declare its opinion to the senate of the university. The requisitioning members thereupon moved the court for a *mandamus*. The Divisional Court, consisting of Lord Goddard C.J., Byrne and Finnemore JJ., refused to make an order, on the ground that the statutes of London University, passed in accordance with the University of London Act, 1926, provided that His Majesty in Council should be the visitor of the University, that the dispute concerned a domestic matter, namely, the question whether the chairman of convocation refused to perform a duty placed on him by the statutes of the university, and that that matter was within the jurisdiction of the visitor of the university. In the course of his judgment Lord Goddard observed:[19]

> . . . it is important to remember that mandamus is neither a writ of course nor a writ of right, but will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided that there is no more appropriate remedy,

and later:[20]

> Of course, if a Visitor refuses to act, a mandamus may go to him calling upon him to act; but that is an entirely different matter.

In *Rex* v. *Minister of Labour and National Service; ex parte Manning*[21] the facts were as follows: the management of Kemsley Newspapers Ltd. and the editorial staffs, which were organized in chapels of the National Union of Journalists, had entered into an agreement providing for discussion of matters in which the editorial chapels were concerned. The journalists alleged that in breach of the agreement the management had treated directly with an individual, instead of with the chapel of which he was a member, and that in view of the failure of the management to observe the agreement a trade dispute existed. They reported the matter to the Minister of Labour in accordance with the Con-

[19] At p. 131.
[20] At p. 134.
[21] (1951), 95 Sol. J. 238.

ditions of Employment and National Arbitration Order, 1940,[22] which enjoins the minister to "consider any dispute so reported to him" [23] and empowers him to refer the dispute to the National Arbitration Tribunal unless there exist already suitable means of settling the dispute. The minister refused to act because in his opinion no trade dispute existed, and the representatives of the editorial chapels moved the court for a *mandamus* compelling the minister to consider the dispute. The Divisional Court, consisting of Lord Goddard C.J., Oliver and Cassels JJ., examined in detail the grounds on which the minister founded his refusal and came to the conclusion that his decision was correct because the dispute was not a trade dispute within the meaning of the order but arose from the demand of the journalists that a new procedural agreement for the settlement of disputes should be drawn up.

These two cases may suffice to indicate the present scope and limitations of *mandamus*. By this order the courts can impose the rule of law on every department, tribunal, body or person charged with the performance of a public duty and failing to perform it.[24] It is irrelevant for the issue of the order whether the duty requires the exercise of administrative discretion or the determination of a question by the judicial process or a process analogous to it. In *Rex* v. *Dunsheath* [25] the Lord Chief Justice observed, obiter, that *mandamus* might even lie against the King in Council, and in *Rex* v. *Minister of Labour and National Service* [26] the administrative decision of a minister was examined. The scope of *mandamus*, both as regards the persons to whom it issues and the functions which they exercise, can hardly be wider, but the remedy is subject to a serious limitation: it is only available where the party complained of fails to discharge the public duty which he is

[22] S. R. & O., 1940, No. 1305 (as amended). See M. Turner-Samuels, Industrial Negotiation and Arbitration (1951) pp. 285 ff.

[23] Para. 2(2).

[24] It was held in *R.* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387, that *mandamus* does not issue against the Crown and against Crown servants who have acted as agents of the Crown; but the practical application of that rule was greatly limited by *R.* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313, at p. 317, where it was held that a servant of the Crown who had also a public duty, statutory or otherwise, to perform, in which a member of the public had an interest, could be ordered by *mandamus* to perform that duty: see Bray J. in *R.* v. *Commissioners for Special Purposes of Income Tax; ex parte Dr. Barnado's Homes National Incorporated Assn.*, [1920] 1 K.B. 26, at p. 46. It is probable that the Crown Proceedings Act, 1947, has swept aside the protection of Crown servants acting only as agents of the Crown: see Halsbury's Laws of England, 1951 Supplement, p. 70, cancelling para. 1293 of vol. 9 of the Hailsham edition.

[25] [1951] 1 K.B. 127.

[26] (1951), 95 Sol. J. 238.

obliged to perform [27] or performs it in such an illegal or perfunctory manner that there is, in fact, no performance.[28] *Mandamus* thus deals only with the negative aspect of non-performance of a public duty but normally does not enable the courts to control the positive aspect of wrongful exercise of the duty. The conditions on which *mandamus* is available are, in the words of Lord Goddard C.J. in the *Dunsheath* case,[29] that the duty which the officer is alleged to have failed to perform (1) is in the nature of a public duty, (2) specially affecting the rights of an individual, and (3) that there is no more appropriate remedy.[30]

As regards *certiorari* and prohibition, it has already been observed that originally these writs were used for administrative purposes as well as for the supervision of judicial functions of inferior courts. At present, however, these orders are only granted where the body to whom they are addressed has exercised a judicial or quasi-judicial function, but not where it has exercised a purely administrative power.

The test for the issue of *certiorari* is not whether the body to which it is addressed is an established court of justice or an administrative authority; in the words of Lord Radcliffe in *Nakkuda Ali* v. *M. F. de S. Jayaratne:* [31]

> In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision.

The decisive question is whether the body has to use "a judicial process or a process analogous to the judicial" [31] in order to arrive at its decision; if that question has to be answered in the affirmative, *certiorari* issues. This principle was stated by Atkin L.J. in *Rex.* v. *Electricity Commissioners:* [32]

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs,

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[27] *R.* v. *Justices of Middlesex* (1893), 9 A. & E. 540, at p. 545; *R.* v. *Kent Justices* (1880), 40 J.P. 298.

[28] *R.* v. *Bowman*, [1898] 1 Q.B. 663, at p. 667.

[29] [1951] 1 K.B. 127, at p. 131.

[30] S. 40(5) of the Crown Proceedings Act, 1947, provides that the fact that the Act has introduced some other and further remedy shall not be taken into account when the court decides whether there is available an equally convenient remedy.

[31] [1951] A.C. 66, at p. 75.

[32] [1924] 1 K.B. 171, at p. 205.

and Lord Hewart C.J., who in *Rex* v. *Legislative Committee of the Church Assembly*[33] referred to this statement, added:

> In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially.

It was long believed that, even where that test was satisfied, *certiorari* would issue only where the administrative tribunal had exceeded its jurisdiction or its procedure, or its conduct was flagrantly defective, but that the court could not examine the decision of the administrative tribunal on its merits. Thus, Professor Robson observes that[34]

> a statutory right of appeal is seldom given from the administrative tribunal to an ordinary court; so normally the only recourse is to the supervisory jurisdiction of the High Court. This can be invoked only if the applicant can challenge the jurisdiction, the procedure or the conduct of the tribunal.

This statement, it is submitted with great respect, is inaccurate; it does not take into account the modern application of the prerogative orders and the tendency of the common law to expand the use of these weapons to make them adequate for the purpose of supervising administrative justice. The statement is clearly inaccurate so far as *mandamus* is concerned, because this remedy has always enabled the courts to examine the *grounds* for the refusal of an administrative authority to act, as is demonstrated by *Rex* v. *Minister of Labour and National Service*.[35] As regards *certiorari*, Professor Robson's view is in harmony with a long line of cases, the latest of which is *Rex* v. *Ludlow*,[36] decided in 1947, where Lord Goddard C.J. said:[37]

> A person who is aggrieved by a decision of such a tribunal as that to which I have referred can only apply to the court by way of *certiorari* to bring up the order and quash it if the tribunal has acted outside its jurisdiction.

However, the development of *certiorari* has been so rapid in recent years that *Rex* v. *Ludlow* can no longer be regarded as laying down a general proposition of law. In 1949, in the celebrated case of *Rex* v. *Paddington Rent Tribunal; ex parte Bell London and Pro-*

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[33] [1928] 1 K.B. 411, at p. 415.
[34] *Op. cit.*, at p. 529.
[35] (1951), 95 Sol. J. 238 (p. 473, *ante*).
[36] [1947] K.B. 634. See also *Racecourse Betting Control Board* v. *Secretary of State for Air*, [1944] Ch. 114, which the Divisional Court in *R.* v. *Northumberland Compensation Appeal Tribunal*, [1951] 1 K.B. 711, at p. 723, felt entitled to disregard.
[37] At p. 639.

vincial Properties Ltd.,[38] the Divisional Court treated the question whether on an application for *certiorari* the court could examine the decision of the tribunal on its merits as open, and in 1950 the same court, consisting of Lord Goddard C.J., Hilbery and Parker JJ., in *Rex* v. *Northumberland Compensation Appeal Tribunal; ex parte Shaw*,[39] answered it in the affirmative. The facts of that case, which probably is the most important recent decision on the supervisory jurisdiction of the courts, were as follows: Thomas Shaw was since 1914 in the services of a local district council and in 1936 was appointed clerk to a joint hospital board, but that appointment terminated in 1949 when the hospitals vested in the Minister of Health by virtue of the National Health Service Act, 1946. Shaw applied to the compensation authority constituted under the Act for compensation for loss of office and was awarded a pension based on the length of his employment with the hospital board, namely, from 1936 to 1949; he appealed to the compensation appeal tribunal constituted under the same Act on the ground that his service with the local district council should be taken into account, and when the appeal tribunal rejected that contention, he moved the High Court for an order of *certiorari* to quash the decision of the appeal tribunal. The Divisional Court came to the conclusion that his service with the district council should have been included in the qualifying time and that the pension should have been based on the applicant's public service from 1914 to 1949. That raised the formidable question whether the court, in proceedings for a *certiorari*, could deal with the merits of the decision of the tribunal. Lord Goddard C.J., after a detailed examination of the history of the writ of *certiorari* and the reasons for the erroneous belief that the writ went only to defects of jurisdiction, came to the conclusion that the court had jurisdiction to go into the merits of the tribunal's order where the order is a "speaking order", that is, an order which states the grounds of the decision. Having reached this conclusion, Lord Goddard added:[40]

> So many tribunals have now been set up, all of whom, I am certain, desire to do their duty in the best way, and are often given very difficult sets of regulations and statutes to construe. It certainly must be for their benefit, and I have no doubt they will welcome, that this court should be able to give guidance to them if, in making their orders, they make their orders speaking orders so that this court can then consider them if they are brought before the court on *certiorari*.

[38] [1949] 1 K.B. 666, at p. 683; the decision in that case was based on excess of jurisdiction by the Rent Tribunal.
[39] [1951] 1 K.B. 711.
[40] At p. 724.

The practice of "giving guidance" to administrative tribunals on substantive points of law has been adopted by King's Bench Division even where *certiorari* was ordered on the ground of defect of jurisdiction of the tribunal. Thus, in *Rex* v. *Paddington Rent Tribunal; ex parte Bell London and Provincial Properties*,[41] Lord Goddard, after dealing with the main issue, said:

> As [counsel for the tribunal] invited us to express an opinion on the true interpretation of the [Furnished Houses (Rent Control) Act, 1946] for the guidance of tribunals, let me again endeavour, with the concurrence of the other members of the court, to make this matter clear,

and in *Rex* v. *Paddington North Rent Tribunal; ex parte Holt*[42] the court, after deciding that *certiorari* issued because the tribunal had not given both parties an opportunity of stating their case and that that defect went to the root of its jurisdiction, considered the merits of the case and expressed the hope "that the tribunal would bear those considerations prominently in mind" if the applicant reinstated his proceedings. The practice of "giving guidance", obiter, on the substantive law where the decision of the tribunal is quashed on procedural grounds is another illustration of the tendency of King's Bench Division to extend its supervisory jurisdiction in order to ensure that the rule of law is observed by administrative bodies charged with the duty to act judicially.

It is now apposite to ascertain exactly what area of administrative activity is covered by the supervisory jurisdiction of the courts. From our analysis of the present use of the prerogative orders the following points emerge:

(1) *Mandamus*, *certiorari* and prohibition issue to all administrative authorities.

(2) Where the administrative authority is charged with the duty to act judicially,

(a) if it makes a speaking order, the jurisdiction of the authority, as well as the merits of its decision, can be reviewed by the courts and the judicial control is complete;

(b) if it does not make a speaking order, its refusal to act can be reviewed on a motion for a *mandamus* and a defect of jurisdiction can be considered in proceedings for a *certiorari*, but it might be difficult to attack a substantially wrong decision because, as Lord Sumner said, the face of the order is "the inscrutable face of a sphinx".[43] It is believed, though, that that difficulty is apparent rather than

[41] [1949] 1 K.B. 666, at p. 684.
[42] [1951] W.N. 76.
[43] In *R.* v. *Nat Bell Liquors*, [1922] 2 A.C. 128, at p. 159.

real because the conception of "defect of jurisdiction" is unusually wide in proceedings for a *certiorari;*[44] in particular, the court can in some cases review "collateral facts" which the tribunal must have assumed as being satisfied in order to enable it to exercise its jurisdiction;[45] in short, an order, though not exactly a speaking order, may *speak by implication* and would then be subject to review unless the court is satisfied that Parliament intended to make the tribunal the sole arbiter of the question whether the conditions for the exercise of its jurisdiction are satisfied or not.[46] It must be added that there is no modern case reported where King's Bench Division refrained from exercising its prerogative jurisdiction on the ground that the tribunal preferred to make an inscrutable order to a speaking order, and it is believed that, if that case arose, the court would have little difficulty in disposing of it. In the result, the judicial control of administrative decisions of this type is far advanced; there is reason to think that already at this time it is complete, but if this view is premature, it is probable that on a future occasion the courts will assert control over the only area not at present covered by direct authority and hold that *certiorari* issues in the case of inscrutable orders not protected by parliamentary authority, particularly since judicial control is the logical corollary of the duty of the administrative authority to act judicially.

(3) Where the administrative authority exercises a purely administrative function,

(a) on principle, the courts will not review its decisions. Two cases should be distinguished here: the legislator might have given the administrative body (i) unlimited discretion, or (ii) a limited power; in particular, the power may be limited by such words as "if he has reasonable grounds to believe". These words may either mean "if he honestly *thinks* that he has reasonable grounds to believe"[47] or "if there are *in fact* reasonable grounds for him to believe".[48] It was held in *Nakkuda Ali* v. *M. F. de S. Jayaratne* that such limited power does not *per se* oblige the authority

[44] See Halsbury's Laws of England (Hailsham ed.), Vol. 9, pp. 880 ff.
[45] *R.* v. *London Rent Tribunal; ex parte Honig,* [1951] 1 K.B. 641; *R.* v. *Fulham Rent Tribunal; ex parte Zerek,* [1951] 2 K.B. 1.
[46] *R.* v. *Ludlow,* [1947] K.B. 634, at p. 640.
[47] *Liversidge* v. *Sir John Anderson,* [1942] A.C. 206.
[48] *Nakkuda Ali* v. *M.F. de S. Jayarantne,* [1951] A.C. 66, at p. 77.

to act judicially; in that case the Judicial Committee, in an appeal from Ceylon, advised that the Textile Controller of Ceylon who had statutory power to cancel a textile dealer's licence if he had "reasonable grounds to believe that any dealer is unfit to be allowed to continue as dealer", was not exercising a judicial function when cancelling a licence and that *certiorari* did not issue to him;

(b) exceptionally, the courts will review the authority's decision (i) where it results in failure to act, provided that the conditions for *mandamus* are satisfied, or (ii) when its decision is illegal, because the illegal exercise of an administrative power is equivalent to a refusal to act.[49] Hereunder fall the fraudulent exercise of administrative discretion[50] or the excess of statutory powers by the authority, although the latter case will normally come before the court in enforcement proceedings[51] or where there is a statutory right of appeal.[52]

In conclusion, a very considerable area of administrative activity is at present subject to the supervisory jurisdiction of the courts, and, what is perhaps even more important, three fundamental rules governing the control of administrative acts by the common law begin to emerge. They are:

Rule I: Where the administrative authority is bound to act judicially, both the jurisdiction and the merits of its decisions are subject to review by the courts;

Rule II: Where the administrative authority is not bound to act judicially, the courts will interfere with its decisions only in exceptional circumstances. The courts recognize that the exercise of purely administrative discretion should not normally be amenable to their review; they refrain from interfering with it on the same grounds on which they will not interfere with the exercise of the judicial discretion of the inferior courts without cogent reason. These grounds are stated by Lord Macmillan as follows:[53]

> . . . it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally,

[49] *R.* v. *Bownam* (1898), 1 Q.B. 663, at p. 667.
[50] See *Nakkuda Ali* v. *M.F. de S. Jayaratne*, [1951] A.C. 66, at p. 77.
[51] *Allingham* v. *Minister of Agriculture and Fisheries*, [1948] 1 All E.R. 780.
[52] *Franklin* v. *Minister of Town and Country Planning*, [1948] A.C. 87. See also *Earl Fitzwilliams' Wentworth Estates Co. Ltd.* v. *Minister of Town and Country Planning*, [1951] W.N. 212.
[53] In *D. R. Fraser and Co.* v. *Minister of National Revenue*, [1949] A.C. 24, at p. 36.

no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

Rule III: In the absence of statutory provision to the contrary, the courts have residuary power in a particular instance to decide whether the administrative authority is bound to act judicially or whether it may act purely administratively. This residuary power was exercised in the *Nakkuda Ali* case.[54]

These rules, which were established in the *Stevenage*[55] and *Nakkuda Ali* cases, shattered the hopes of those who, like Mr. Wade,[56] thought that the courts would strengthen their control over purely administrative acts by postulating that those acts, like judicial acts, should comply with certain minimum standards of natural justice. The emphatic rejection of this view by Lord Thankerton in the *Stevenage* case and by Lord Radcliffe in the *Nakkuda Ali* case does not mean more than that the courts regard judicial requirements as unsuitable standards for the evaluation of administrative decisions, which are often influenced by considerations of policy and convenience. This attitude does not mean that the courts have resigned from control over administrative acts; on the contrary, the learned judges have stated clearly the limitations of administrative discretion and have indicated that, if they are exceeded, the courts are likely to intervene. These limitations are stated earlier in this essay;[57] they are still undeveloped because the administration rarely obliges to assist in their development by being "arbitrary or irresponsible", but if the necessity arises they can be developed by the courts into a set of 20th century rules which will protect the citizen in the administrative sphere as effectively as the 18th century rules of natural justice do in the judicial sphere.

The absorption of administrative law into the common law, which was carried out by the modern use of the prerogative orders, is not completed. It may be necessary to consolidate the prerogative orders by statute and to abolish a few antiquated limitations contained in old decisions; it may be convenient to separate the supervisory jurisdiction of King's Bench Division over administrative authorities from the ordinary business of the Division, or to constitute a fourth Division of the High Court dealing mainly with administrative legal issues, or even to transfer the supervisory

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[54] [1951] A.C. 66.

[55] *Franklin* v. *Minister of Town and Country Planning*, [1948] A.C. 87, at p. 103.

[56] H. W. R. Wade, 'Quasi-Judicial' and its Background (1949), 11 Camb. L.J. 239; and The Twilight of Natural Justice? (1951), 67 L.Q.R. 103.

[57] See p. 479, *ante*.

jurisdiction to the Court of Appeal; it might be useful to have the assistance of law assessors in certain administrative causes similar to those assisting sometimes in Admiralty or patent cases. There is no necessity for our purposes to pursue these speculations. It is sufficient here to state that administrative law has been so firmly taken into the fold of the common law that a separation of that new branch of the common law from the jurisdiction of the Supreme Court, and its administration by a separate superior court, is no longer a practical proposition.

(To be concluded)

The Elastic Tissue of the Law

But, alike in England, in Scotland, and in America the Bench has a formative task which, when properly performed, is the highest of all judicial duties. The law, as I have said, should be regarded as an elastic tissue which clothes a growing body. That tissue, that garment, must fit exactly. If it is too tight it will split, and you will have revolution and lawlessness, as we have seen at various times in the history of this country when the law was allowed to become a strait waistcoat. If it is too loose, it will trip us up and impede our movements. Law, therefore, should not be too far behind, or too far ahead of, the growth of society. It should coincide as nearly as possible with that growth. So it is the judge's duty to be in touch with contemporary life, to be awake to the emergence of new facts and forces, and to bring the new facts inside the circumference of law. Now and then a statute may be necessary, but the Common Law is a marvellously adaptive thing, and it is wonderful what can be done with it by one who understands it. The classic case, of course, is Lord Mansfield. During his long tenure of the Chief Justiceship of the King's Bench modern commercial life in this country was beginning. The language was novel, the facts were often new, but behind them lay the same principles of contract and tort which had grown up under Plantagenet and Tudor. Mansfield in a series of masterly judgments created what we know to-day as Commercial Law. An equally striking case is to be found in American legal history. John Marshall, when he began his great career as Chief Justice of the United States, had the task of interpreting the Constitution as a practical mechanism for the government of the country. For the first time in history we have a judge interpreting a written constitution, and in the fierce party struggles of the America of his day it needed delicate and firm interpreting. By his famous judgments — in the *Burr* case, when he dealt with the law of constructive treason, in *Marbury* v. *Madison*, when he asserted the independence of the judiciary, in the *Dartmouth College* case, when he not only established the sanctity of public contracts but gave to American development its strong bias towards individualism — he did perhaps a greater work even than Mansfield. He laid down not a new code of law, but the groundwork for a new civilization. (John Buchan, The Judicial Temperament, from *Homilies and Recreations*)