

THE GROUNDS FOR CERTIORARI AND PROHIBITION

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Introduction

Administrative law has come to be one of the most important of all branches of the common law. Within the bounds of administrative-law rules depend the relationships between the state and the individual, relationships which impinge upon the lives of all citizens. This is especially so in England and throughout Canada, including Quebec, even though the latter province is not a common-law jurisdiction. In times when compulsory acquisition or expropriation¹ is a commonplace, the welfare state a given factor in England, and the concept of compulsory military service in various forms has become accepted, the powers of government and of the whole executive machine must be carefully tabulated lest the rights of the individual sink below the water. It is because of this atmosphere, therefore, that the methods of judicial control of administrative powers should be well-defined. Yet this is the very state of affairs which does not exist. The purpose of this article is to examine at some length the grounds for the two prerogative writs or orders² which are negative in effect, and which may thus

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¹ It has not been the practice in England to compensate owners adequately where compulsory acquisition takes place. Thus, in the tragic affair of Mr. Pilgrim, explained by Dr. R. M. Jackson in *Judicial Review of Legislative Policy* (1955), 18 *Mod.L.Rev.* 571, at p. 574, a purchaser bought land at full value, including development value. It later appeared that the local authority was going to acquire it compulsorily at "existing use value", and the owner committed suicide. It is this type of occurrence which persuaded the Committee on Administrative Tribunals and Enquiries, in its Report (1957, Cmnd. 218), to recommend that compensation on compulsory acquisition should always be assessed at not less than market value (para. 278), a recommendation which, if adopted, would bring English policy into line with that in Canada. A Bill to effect this recommendation is at present before the United Kingdom Parliament.

² Both were originally prerogative writs, but in England the Administration of Justice (Miscellaneous Provisions) Act, 1938, s.7, abolished the old writs of certiorari, prohibition and mandamus (but leaving habeas corpus untouched), replacing them by orders of the same names. Only the

curb the overzealous exercise of administrative power. In another place I have attempted to define the courts, tribunals and authorities subject to these remedies,³ and thus I only intend here to clarify the grounds open to an applicant for one of the remedies.⁴

Certiorari may perhaps be defined shortly as a remedy whereby the superior court⁵ orders some inferior tribunal or court to send up the record of any proceeding of a judicial nature⁶ pending before it.⁷ Its effect is to enable the superior court either to quash it completely or to refuse to interfere at all with such proceeding, but the superior court may not in any way substitute its own decision for that taken below.⁸ Prohibition is perhaps of a similar nature, except that it will issue only where the proceeding below has not yet been completed, or there is at least something left for it to act upon.⁹ It prevents something happening or continuing,

procedure was altered and simplified, and the substantive law remains the same. In view of this, and since the writs still exist as such in Canada, the words "writ" and "order" are sometimes used in this article interchangeably.

³ The Scope of the Prerogative Orders in Administrative Law (1958), 12 Northern Ireland Legal Quarterly, 78, 142 and 223. In this article the vital difference between "judicial" and "administrative" powers and duties is considered. Broadly it may be stated here that the prerogative writs or orders will only issue if the inferior court or tribunal has a power or duty of some judicial nature.

⁴ A similar treatment of the positive remedy of mandamus will appear in an article in the forthcoming number of the Juridical Review, entitled The Purpose of Mandamus.

⁵ In England always the High Court.

⁶ See *supra*, footnote 3.

⁷ For a fuller exposition of this definition, see Yardley, Certiorari and the Problem of Locus Standi (1955), 71 L.Q.Rev. at pp. 388-389. Other definitions may be found in Holdsworth, History of English Law Vol. I, (7th ed., revised, 1956), p. 228; Archbold, Quarter Sessions (6th ed., 1908), p. 127; and Paley on Summary Convictions (9th ed., 1926), p. 796.

⁸ See Yardley, Remedies in Administrative Law (1958), 3 Br. J. of Ad. L. 69, at p. 71.

⁹ See *e.g.* Jacob, Law Dictionary (8th ed., 1762), "Prohibition"; Hawkins, Pleas of the Crown (1762), Book II, Ch. 22, s. 25; Blackstone, Commentaries (12th ed., 1794), Vol. III, pp. 112-114; Bouvier, Law Dictionary (Rawle ed., 1898), "Prohibition". Jenks, in The Prerogative Writs in English Law (1923), 32 Yale L.J. 523, considered that prohibition appeared to be prerogative in the strictest sense, dating from the critical years of the thirteenth century, when the newly-consolidated state was entering upon its struggle with rival jurisdictions for the sole custody of the fount of justice. Prohibition was the special weapon of the King's courts against ecclesiastical tribunals, the royal judges relying largely upon the private litigant to start proceedings under it. The fiction of its prerogative character was kept up by a requirement that the party applying should allege by "suggestion" that the King's interest was threatened; and this fiction remained until formally abolished by the statute (1831), 1 Will. IV, c.31. *Veley v. Burder* (1841), 12 A. & E. 265, was a case concerning a statute of Edward I, in which prohibition was referred to as "the King's prohibition". See also Holdsworth, *op. cit.*, *supra*, footnote 7, pp. 228-229; and *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese, ex p. White*, [1947] K.B. 263, at p. 269, [1948] 1 K.B. 195, at

but if the proceeding is already ended below then certiorari is the more appropriate remedy. The similarity of Canadian to English law is very marked, and in particular there is an abundance of quotation of the English authorities in Canadian cases on the subject.¹⁰ For this reason only a selection of the more important of the Canadian decisions will be quoted in this article, and the main body of the argument will be concerned with the basis of the law common to the two countries, namely the bulk of English case-law concerned with the two remedies.

Many of the technicalities and formalities previously existing in England have disappeared since the old writs became orders,¹¹ and a straightforward application for an issue of certiorari or prohibition will now be treated in a simple manner by the court; the application being either granted or refused, with no intermediate stages. In Canada, where the remedies remain in the form of writs, the procedure is nevertheless very similar. It is not the purpose of the present account to examine it fully, but this procedure is exhaustively discussed by the Judicial Committee of the Privy Council in *R. v. Nat Bell Liquors Ltd.* in 1922.¹² In view of the common stem of English and Canadian rules on this subject, a word or so should be said about the essentials in the procedure of the two remedies in England. Certiorari may only be obtained within six months of the proceeding complained of.¹³ Although

pp. 209, 220, in which prohibition is defined in the course of all the judgments.

On the distinction between certiorari and prohibition, see especially *R. v. Electricity Commissioners*, [1924] 1 K.B. 171, at p. 206; and *Hannon v. Eisler*, [1955] 1 D.L.R. 183 (Man. C. A.). Both cases are considered in more detail later.

¹⁰ *E.g.* throughout the reports of *R. v. Nat Bell Liquors Ltd.* (1920), 53 D.L.R. 482 (Walsh J., Alta.), (1920), 54 D.L.R. 704 (A. D., in which only English cases were quoted), (1921), 56 D.L.R. 523 (A.D., refusing by 2—1 to disturb the decision of the previous equally divided court), and [1922] 2 A.C. 128 (P.C.).

¹¹ *Supra*, footnote 2. Thus there is no longer the procedure of application for a rule *nisi*, later to be made absolute. As instances of technicalities previously required, see *R. v. Brown* (1699), 1 Salk. 146; *R. v. Barnes* (1705), 1 Salk. 151; *R. v. Bridgwater Inhabitants* (1841), 10 A. & E. 693; *R. v. Cann* (1746), 2 Stra. 1263. As examples of the present relaxed rules, see the recent cases of *R. v. Stokesley JJ., ex p. Bartram*, [1956] 1 W.L.R. 254 (cross-examination of deponents of affidavits allowed); and *R. v. Staff Sub-Committee of L.C.C.'s Education Committee, ex p. Schonfeld*, [1956] 1 W.L.R. 430 (the right of an applicant for certiorari to appear in person before the Court of Appeal in England).

¹² [1922] 2 A.C. 128.

¹³ R.S.C., Ord. LIX, r.4. This was the main reason why the applicant in *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18, was unable to seek a certiorari, and had to ask for a declaration. The court has power to extend this time, if it thinks fit, but the applicant must give notice to the person whom he would serve in the ordinary way: *R. v. Ashford, Kent, JJ., ex p. Richley*, [1955] 1 W.L.R. 562.

there is no specific time limit in the case of prohibition,¹⁴ time is of the essence of the remedy, for it cannot issue after the proceeding below has finished. Normally, of course, special cause or grounds for one of the remedies must be shown by an applicant,¹⁵ but the Crown has been privileged in being able to obtain an issue of an order without showing such special cause,¹⁶ the grounds being argued at the later stage of the actual examination of the inferior tribunal's proceedings. Prohibition has sometimes been issued *quousque* (until the inferior court alters its decision), rather than in the usual peremptory form,¹⁷ but this has been very rare in recent years.¹⁸ Finally, the remedy against anyone who fails to obey a certiorari is attachment,¹⁹ and this is generally considered to be the case for prohibition as well, but there is little authority on this latter point.²⁰

¹⁴ Bacon, Abridgment (5th ed., 1798), "Prohibition" (M). There is no direct case on the point. Related are *Case of Jay and Topham* (1689), 12 State Trials 822; *R. v. Knollys* (1694), 12 State Trials 1167; see Hanbury Equality and Privilege in English Law (1952), 68 L.Q. Rev. 173, at p. 191.

¹⁵ *Anonymous* (1796), 1 Salk. 144: if a certiorari be granted, and the cause afterwards appears false, a *procedendo* should be awarded; *Anonymous* (1702), 7 Mod. 118: "it is unusual to send a certiorari without a special cause"; *R. v. Knatchbull* (1703), 1 Salk. 150; Comyns, Digest (5th ed., 1822), "Certiorari"; *R. v. Long* (1828), 1 M. & R. 139. *Nehuff's Case* (1705), 1 Salk. 151, was curious, because the writ appears to have issued merely because the defendant consented to its issue.

On the problem of *locus standi* for an applicant for one of the remedies, see Yardley, *Certiorari and the Problem of Locus Standi*, *supra*, footnote 7; *Prohibition and Mandamus and the Problem of Locus Standi* (1957), 73 L.Q.Rev. 534.

¹⁶ *R. v. James* (1801), 1 East 303n.

¹⁷ Thus a prohibition would be issued *quousque* where a spiritual court refused to give a copy of articles: *Benmoyer's Case* (1703), 6 Mod. 87; see also *Anonymous* (1680), 1 Ventr. 5; Bacon, *op. cit.*, *supra*, footnote 14 "Prohibition" (F). A prohibition could not be granted for the double count of "denying copy of the libel" (failing to furnish a copy of pleadings) and on the merits; but it might be granted on the first count *quousque*, and, when that was discharged by receiving the copy, the usual peremptory prohibition might be granted on the merits: *Anonymous* (1704), 6 Mod. 308.

¹⁸ *White v. Steele* (1862), 12 C.B.N.S. 383, at p. 412, and *London Corporation v. Cox* (1867), L.R. 2 H.L. 239, at p. 276, appear to be the last cases in which this form of prohibition was discussed. In each case Willes J. was sitting.

¹⁹ *Mungean v. Wheatley* (1851), 6 Exch. 88.

²⁰ It is perhaps strange how rare it is that anyone disobeys the order of an English court, and particularly this habit of obedience is seen where an inferior court or tribunal is ordered to do or refrain from doing anything. To the knowledge of the author there is no case in which a declaration (which cannot be directly enforced by the court) has not been obeyed, and thus the problem of what would happen after disobedience remains theoretical. See Yardley, *op. cit.*, footnote 8, at p. 78, where this problem is discussed.

I. *The Grounds for Certiorari*

Most text-book writers have agreed in the main about the grounds for an issue of certiorari, and their differences have usually been in wording only. In 1926,²¹ the grounds were enumerated in one book as being: (i) want of jurisdiction (because the members of the court were unqualified, or because of pecuniary interest or bias, or a case not being cognizable by the court, or ouster by reason of some matter appearing in the course of the proceedings, such as *res judicata*); (ii) defective jurisdiction (such as the omission of some essential preliminary step); (iii) excess of jurisdiction; (iv) fraud; and (v) defects or informalities on the face of the proceedings.²² In an Irish case,²³ Gibson J. said that certiorari lies:

- a) where there is a want or excess of jurisdiction when the inquiry begins or during its progress;
- b) when in the exercise of jurisdiction there is error on the face of the adjudication;
- c) where there has been abuse of jurisdiction (as by misstating the complaint etc., or disregard of the essentials of justice and the conditions regulating the functions and duty of the tribunal);
- d) where the court is shown to be disqualified by likelihood of bias or of interest;
- e) where there is fraud.

And more recently Mr. de Smith²⁴ has enumerated the grounds for the remedy as: (i) want of jurisdiction, (ii) excess of jurisdiction, (iii) abuse of jurisdiction, (iv) ouster of jurisdiction, (v) irregularity or error of law on the face of the proceeding, and (vi) fraud or collusion in procuring the conviction or order.

Thus we find references to "defect, want, excess, abuse and ouster" of jurisdiction separately, and yet there seems no valid reason why each should be carefully distinguished from the others, for once there is a defect of any kind in jurisdiction it hardly matters what that defect is, the effect in every case being to let in certiorari. It is proposed, therefore, to divide up the grounds for certiorari into (i) defect of jurisdiction, (ii) breach of natural justice,

²¹ Paley, *op. cit.*, *supra*, footnote 7, pp. 796 *et seqq.*

²² See also D. M. Gordon, Q.C., *Certiorari and the Revival of Error in Fact* (1926), 42 L.Q.Rev. 521; Short and Mellor, *Crown Practice* (1908), pp. 43-47.

²³ *R. v. Mahoney*, [1910] 2 I.R. 695, at p. 731. This case has been frequently cited with approval by Canadian judges; see *e.g.* all the reports of *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 10.

²⁴ *Wrongs and Remedies in Administrative Law* (1952), 15 Mod.L.Rev. 189.

and (iii) error of law on the face of the record,²⁵ and also to examine the possible sub-divisions of the first two of these grounds.

1) DEFECT OF JURISDICTION

a) *Want of jurisdiction*

This ground for certiorari has never been disputed, and want of jurisdiction is always fatal to the validity of the proceeding below.²⁶ The recent case of *R. v. County of London Quarter Sessions Appeals Committee, ex p. Rossi*,²⁷ is a useful illustration of the working of this rule. The mother of an illegitimate child appealed to quarter sessions against the dismissal by a magistrates' court of her application for a bastardy order. The respondent, although he attended on the day fixed for hearing, was not present in court when, on the application of the appellant, the hearing was adjourned *sine die*. Later the clerk of the peace sent a notice of the date fixed for the resumed hearing by registered post to the respondent at his last or normal place of abode, as authorised by section 3(i) of the Summary Jurisdiction (Appeals) Act, 1933. The letter was returned, marked "undelivered, no response". At the resumed hearing the appellant gave evidence that, in her opinion, the respondent was evading service; the hearing was resumed, and the appeal allowed. The respondent applied for an order of certiorari on the ground that he had not been given notice "in due course", as required by the section, and the Court of Appeal decided that certiorari should go. The notice could not be regarded as duly served when it was shown not to have been received. Evading service was a ground for ordinary substituted or personal service, not for dispensing with service altogether.

²⁵ Other grounds for the issue of certiorari are not relevant to the present study, as they do not affect inferior courts or tribunals. For a list of such grounds, see Jaffe and Henderson, *Judicial Review and the Rule of Law: Historical Origins* (1956), 72 L.Q.Rev. 345, at p. 351.

²⁶ See *R. v. Somersetshire JJ.* (1826), 5 B. & C. 816; *R. v. North Riding of Yorkshire JJ.* (1827), 6 B. & C. 152; *R. v. Poor Law Commissioners, Re St. Pancras* (1837), 6 A. & E. 1; *R. v. West Riding of Yorkshire JJ.* (1837), 7 A. & E. 583; *R. v. Arkwright* (1848), 12 Q.B. 960; *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Hierowski*, [1953] 2 Q.B. 147; *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Gormly*, [1952] 1 K.B. 179. *R. v. Minister of Housing and Local Government, ex p. Rank Organisation Ltd.*, [1958] 1 W.L.R. 1093. It seems that this is even so when a statute has taken away the right to apply for a certiorari: *R. v. West Riding of Yorkshire JJ.* (1794), 5 T.R. 629; *R. v. Wood* (1855), 5 E. & B. 49; *Knapman v. Board of Health for Saltfleet Township*, [1954] 3 D.L.R. 760 (Ont. H. C.). See also *infra*, footnote 218.

Where, however, the allegation of a want of jurisdiction is disproved the case for the remedy fails: *R. v. Clarke* (1799), 8 T.R. 220; *R. v. Grant* (1849), 19 L.J.M.C. 59; *Brittain v. Kinnaird* (1819), 1 B. & B. 432.

²⁷ [1956] 1 Q.B. 682.

A further point which must be clearly understood is that this ground for a certiorari concerns only the question of jurisdiction. Once it is established that a court or body below had a valid jurisdiction to determine a matter it is not possible to obtain an issue of certiorari on the ground of a wrong exercise of discretion by that lower court or body. In *R. v. Paddington North and St. Marylebone Rent Tribunal, ex p. Perry*,²⁸ the rent tribunal granted the landlord of certain flats an increase of rent under the Housing Repairs and Rents Act, 1954, to cover the rise in the cost of services over the period between September, 1939, and August, 1954. The services were set out in a schedule to the determination, and included (a) contractual services, viz. central heating, hot water, lifts, lighting and heating, (b) non-contractual services, viz. porterage, cleaning, removal of refuse and pest control. The tenants applied for an order of certiorari on the grounds that (a) there was no evidence of a rise in the cost of services, and (b) the tribunal took into account items which were not services. Lord Goddard C. J., Ormerod and Glyn-Jones JJ., in the Divisional Court, held that to give the tribunal jurisdiction there must firstly be a controlled tenancy, secondly the standard rent must be fixed by a letting before September 2nd, 1939, and lastly the provision of services by the landlord; and in the present case all three conditions were satisfied. The court considered that the matters set out were services and not merely maintenance. As the tribunal had jurisdiction, and no error appeared on the face of the determination, the court could not investigate the question whether it had been rightly or wrongly exercised. This rule is equally clear in Canada.²⁹

In England it has been held³⁰ that an evident want of jurisdiction might always be inquired into: parties interested in a magistrates' order had the right to call upon the justices to make everything that gave them jurisdiction appear upon the face. The effect of this is that the jurisdiction of an inferior court or body making

²⁸ [1956] 1 Q.B. 229. Avory J., in *R. v. Minister of Health, ex p. Wycombe Guardians* (1922), 87 J.P. 37, at p. 38, said, in view of the concluding words of a section of an Act (namely that "the decision of the Local Government Board shall be binding and conclusive"): "it is clear that the applicants for the rule can succeed only if it is made to appear that the Minister of Health acted without jurisdiction". (The powers and duties of the Local Government Board were transferred to the Minister of Health by the Ministry of Health Act, 1919.)

²⁹ It is the cardinal principle in the opinion of the Judicial Committee of the Privy Council in *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 12. See also *Children's Aid Society of the Catholic Archdiocese of Vancouver v. Salmon Arm*, [1941] 1 D.L.R. 532 (B.C.C.A.).

³⁰ *R. v. Middleton in Teesdale Inhabitants* (1840), 10 A. & E. 691.

an order or giving a judgment can always be questioned; but if the jurisdiction is sufficiently shown certiorari will not issue.³¹ In Canada it was held in *Town of Dauphin v. Director of the Children's Aid Society of Western Manitoba*³² that the court had an inherent power to investigate the validity of the jurisdiction of any inferior court or authority by means of a certiorari, even though it was not concerned with the merits of the issue below.³³ It was also held that this power could not be taken away by statute. This was a bold decision, in line with the previous case of *Toronto Newspaper Guild v. Globe Printing Co.* in 1953.³⁴ This latter case was concerned with the Ontario Labour Relations Act, which contained a privative clause, purporting to deny resort to certiorari or any other prerogative writ or process to challenge orders or decisions of an administrative adjudicating tribunal. It was nevertheless held that this clause could not oust the power of a superior court to quash an arbitrary Board decision, which had resulted from a declining of jurisdiction in disregard of a statutory duty. The impugned decision followed a refusal to receive certain evidence relevant to an inquiry prescribed by statute, and also a refusal to permit cross-examination to elicit such evidence, together with a refusal by the Board to make the inquiry on its own. The Board had declared that, whether the evidence would prove the subject-matter of the inquiry or not, the subject-matter itself

³¹ *E.g.* jurisdiction by statute: *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *cf. R. v. Montgomeryshire JJ.* (1866), 15 L.T. 290.

³² [1956] 5 D.L.R. 274. See also *Segal v. Montreal*, [1931] 4 D.L.R. 603; and *Re Ontario Labour Relations Board*, [1957] 8 D.L.R. 65 (again expressly affirming that the right to certiorari cannot be taken away by statute); *cf. White v. Kuzych*, [1951] A.C. 585, in the Judicial Committee of the Privy Council, on appeal from the British Columbia Court of Appeal: a member expelled from a trade union (because he objected to the "closed shop" principle) was bound to seek other appellate remedies provided for by a by-law of the union, before resorting to the remedy of declaration, even though he alleged that there had been a breach of natural justice.

³³ See *R. v. Wallace* (1883), 4 O.R. 127, at p. 141: Ontario courts may look at the evidence adduced before the inferior court or tribunal, but its weight is entirely for that inferior body. *Cf. Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 3 D.L.R. 561.

³⁴ *Ibid.* See also *Re Corporation of District of Surrey, Municipal By-Law, 1954, No. 1291*, [1957] 6 D.L.R. 768. Professor G. Sawyer, in *Error of Law on the Face of an Administrative Record* (1954), 3 U. of W.A.A.L.Rev. 24, at p. 25, considers that certiorari is being used too widely in Canada to control Labour Boards. This view is probably too extreme, for the prerogative writs are in essence the final safeguard of the individual against executive encroachment. It would therefore seem entirely reasonable to the author that the Canadian courts should regard these safeguards as inviolable. It is as a result of privative clauses in English statutes that the Report of the Committee on Administrative Tribunals and Enquiries, *supra*, footnote 1, recommends, at para. 117, that: "Accordingly no statute should contain words purporting to oust these remedies" (namely certiorari, prohibition and mandamus).

was irrelevant. Thus a certiorari issued to quash the Board's decision. Again, in a case two years earlier,³⁵ the British Columbia Supreme Court decided that a certiorari always lies where there is a clear absence of jurisdiction, notwithstanding the existence of a right of appeal. In that case the legislation under which a criminal charge had been laid was *ultra vires*. The English courts do not go quite so far as this, for in England, as is well known, Parliament may do anything and is legislatively supreme. Thus it is possible for English statutes to exclude the right to a certiorari altogether. I have discussed this subject more fully elsewhere,³⁶ but for our present purposes suffice it to say that the courts interpret these privative clauses very strictly, and only enforce them where they are absolutely clear and unavoidable.³⁷

Jurisdictional fact

The problem of the sufficiency of jurisdiction in the court below is all-important, for jurisdiction to decide a matter rightly also implies a jurisdiction to decide it wrongly. As Mr. D. M. Gordon, Q.C., of British Columbia, has said,³⁸ "it would be unworkable to have the binding effect of a judgment depend on its agreement with facts in the absolute, for the test would have to be resort to a second tribunal, and fallibility is inherent in the fact-finding machinery of all tribunals." The Americans name this the problem of "jurisdictional fact", implying that a court may draw a wrong inference in a cause within its jurisdiction; a wrong decision within such a valid jurisdiction being just as binding as a correct one, as Professor Zechariah Chafee asserts.³⁹ No other solution could possibly stand up to criticism, for it would be difficult for anyone, or any body, to assume the responsibility of determining whether or not a decision is correct without, perhaps, making an error himself. Judge Noyes described the position neatly in the American case of *Brougham v. Oceanic Steam Navigation Co.*⁴⁰

³⁵ *R. v. Robison*, [1951] 1 D.L.R. 156. Also, in *Knapman v. Board of Health for Saltfleet Township*, *supra*, footnote 26, the Ontario High Court held that certiorari was not excluded by a privative clause in the Public Health Act, R.S.O., 1950, c. 306, where the Board's violation of natural justice amounted to a disclaimer of jurisdiction to which it would otherwise have been entitled.

³⁶ *Statutory Limitations on the Power of the Prerogative Orders in England* (1957), 3 U. of Q.L.J. 103.

³⁷ See e.g. the attitude of the Court of Appeal in *R. v. Medical Appeal Tribunal, ex p. Gilmore*, [1957] 1 Q.B. 574, discussed later in this article.

³⁸ *The Relation of Facts to Jurisdiction* (1929), 45 L.Q.Rev. 459, at pp. 460-461; see also his articles, *The Observance of Law as a Condition of Jurisdiction* (1931), 47 L.Q.Rev. 386, 557; *Excess of Jurisdiction in Sentencing or Awarding Relief* (1939), 55 L.Q.Rev. 521.

³⁹ Z. Chafee Jr., *Some Problems of Equity* (1950), p. 296 *et seqq.*

⁴⁰ (1913), 205 F. 857 (C.C.A. 2d.), noted by Chafee, *ibid.*, at p. 297.

The jurisdiction with which we are concerned is the power to hear and determine a cause. It is not limited to making correct decisions but includes the power to decide wrong as well as right. As applied to a particular controversy it is the power to hear and determine the subject-matter of that controversy. And by this is meant the power to hear and determine causes of the class to which the particular controversy belongs. It is the power to act upon the general question in its relation to the facts presented; . . . The jurisdiction of a court depends upon its right to decide a case and never upon the merits of its decision.

The situation is entirely different, however, if the court has no jurisdiction to decide a case at all, for then any decision on the matter by the court is void, since it had no power to make it.⁴¹

Can an inferior court or tribunal give itself jurisdiction in a specific case by its own decision? In the nineteenth century there was no definite authority on this question, though the better opinion seemed to be that, although it may decide in favour of its own possession of jurisdiction, such a decision was subject to review in the superior court.⁴² It is worthwhile to quote the *dicta* of Coleridge J. in *Bunbury v. Fuller*:⁴³

It is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit of its jurisdiction depends, and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court.

But Lord Esher M.R., in a later case⁴⁴ was rather more cautious, and qualified the general statement by saying:

In other words Parliament may entrust the tribunal with the power of deciding whether or not they have jurisdiction, because they are empowered to decide the preliminary facts which alone will give it to them.

The question has now been answered beyond doubt. In *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Philippe*,⁴⁵ a tribunal tried unsuccessfully to give itself jurisdiction

⁴¹ Chafee, *ibid.*, p. 299.

⁴² *R. v. Grant*, *supra*, footnote 26, at p. 63.

⁴³ (1853), 9 Exch. 111, 140.

⁴⁴ *R. v. Income Tax Special Purposes Commissioners* (1888), 21 Q.B.D. 313, at p. 319.

⁴⁵ [1950] 2 All E.R. 211; cf. *E. v. Ludlow, ex p. Barnsley Corporation*, [1947] 1 K.B. 634, in which the decision of a deputy umpire, under the Reinstatement in Civil Employment Act, 1944, was held final on preliminary matters, upon which his jurisdiction to hear an appeal under the Act was based, because Parliament had enacted that this should be so.

by its own decision; and in a 1951 case⁴⁶ the same rent tribunal was held entitled to inquire into the facts to see whether it had jurisdiction to hear a case, but a decision on such a matter may be wrong, and could obviously be reviewed by the agency of an order of certiorari.

b) *Excess of jurisdiction*

Excess of jurisdiction occurs whenever a conviction or order is beyond the powers of the body responsible for it; an original jurisdiction as to the matter concerned existed, but the court exercising that jurisdiction has gone too far. To take an early example,⁴⁷ magistrates were entitled to make a certain order concerning foreign salt, but, after making the order in the particular instance they discovered that the salt concerned was not foreign at all. They were acting entirely within their powers so long as the salt was foreign, but if the time should come, as it did, when they should realize that the salt they were dealing with was not foreign, then they would be obliged to stop exercising their jurisdiction. Since this was what they had not done, the order was quashed on a certiorari. In a modern case⁴⁸ the manager of a club was convicted before justices of ten offences against the Licensing (Consolidation) Act, 1910, and was fined £10 and ordered to pay 20 guineas costs. The costs of the prosecution amounted to 21 guineas. At the same time there was a summons against the secretary to show cause why the club should not be struck off the register, and the magistrates, in ordering it to be struck off, ordered the secretary to pay £100 costs. A Divisional Court, on the application of the secretary, ordered that certiorari should go, and also incidentally that the papers should be sent to the Lord Chancellor. The justices had, under the guise of an order for costs, inflicted on a person who had not been convicted of any offence what could only have been intended as a penalty.

The court will, however, refuse to interfere where it is not certain that there has been an excess of jurisdiction. An anonymous case of 1830⁴⁹ shows us an instance of magistrates having power to commit for a common assault, though not if it was accompanied by an attempt to commit a felony. Here they convicted summarily, and since the evidence (of which the magistrates were the judges)

⁴⁶ *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek*, [1951] 2 K.B. 1.

⁴⁷ *Anonymous* (1695), 1 Salk. 145; cf. *R. v. Bishop* (1720), Bunb. 61.

⁴⁸ *R. v. Highgate JJ., ex p. Petrov*, [1954] 1 All E.R. 406.

⁴⁹ 1 B. & A. 382.

did not clearly show an intention to commit a felony, the King's Bench refused to interfere by certiorari.⁵⁰ Blackburn J. once said:⁵¹

Whether in this case they have or have not applied the proper principle I have not made up my mind, but I am clearly of opinion that neither we nor the magistrate are made a court of appeal from the decision of the board (the Greenwich Board of Works), so long as it keeps within the duty which the legislature has intrusted to it. If the board exceeded its jurisdiction the apportionment is void, but so long as it keeps within its powers a mistake committed by it is as irremediable as a mistake made by the House of Lords.

This passage is as true today as it was then, for neither insufficiency of reasons for a decision, nor insufficiency of evidence upon which it is made, is in itself fatal to that decision. So long as a body keeps within the limits of its discretion its actual decision cannot be touched by means of a certiorari.⁵² On the other hand it has been held that the writ should lie when magistrates were not sitting in "open court" in a case where it was proper to do so,⁵³ and similarly it lay to bring up a summary adjudication of an indictable charge, which had taken place otherwise than on a day specially appointed for the hearing of indictable offences, of which public notice had been given,⁵⁴ for in these latter cases the magistrates' previously valid jurisdiction had been superseded by some extra element which made the further exercise of jurisdiction excessive.

In the present century the certainty in the law has remained unaltered. The important case of *R. v. Nat Bell Liquors Ltd.*,⁵⁵ which was an appeal to the Privy Council from the Supreme Court of Canada, determined that absence of evidence did not necessarily affect the jurisdiction of a magistrate to convict.⁵⁶ This case

⁵⁰ See also *R. v. St. James, Westminster* (1834), 2 A. & E. 241, at p. 248; *Lovesy v. Stallard* (1874), 30 L.T. 792, at p. 794, per Lord Coleridge.

⁵¹ *Nesbitt v. Greenwich Board of Works* (1875), L.R. 10 Q.B. 465, at p. 468.

⁵² See also *Ex p. Vaughan* (1866), L.R. 2 Q.B. 115.

⁵³ *R. v. Hampshire JJ.* (1875), 39 J.P. 101.

⁵⁴ *Walker v. Morgan* (1912), 76 J.P. 325; see also *R. v. Staffordshire JJ.*, [1898] 2 Q.B. 231 (an order for costs made upon some person not legally liable to pay).

⁵⁵ *Supra*, footnote 12.

⁵⁶ In *R. v. Bloomsbury Income Tax Commissioners*, [1915] 3 K.B. 768 (a case of prohibition, though the principle applies to certiorari cases), it was held that the Commissioners had jurisdiction to make an assessment unless it could be shown that there were no grounds at all on which they could honestly have believed that the person assessed was chargeable; see also *Westminster Corporation v. L.N.W.R.*, [1905] A.C. 426, at p. 430, in which Lord Macnaghten asserts that a corporation must act within its powers, in good faith and reasonably. *Ross-Clunis v. Pafadopoulos*, [1958] 1 W.L.R. 546, a Cyprus appeal to the Privy Council, is in line with this rule; and see also *R. v. National Insurance (Industrial Injuries) Commissioner, ex p. Richardson*, [1958] 1 W.L.R. 851; *Goddard v. Minister of Housing and Local Government*, [1958] 1 W.L.R. 1151.

may be regarded as setting the final seal on the principle in both England and Canada, for it was hard fought and exhaustively argued in a series of appeals.⁵⁷ In England *R. v. Minister of Health* in 1939⁵⁸ is quite emphatic. There the Committee of Visitors to a hospital refused to grant a pension to a dismissed shoe-mender, but the Minister of Health, when appealed to, decided that the claimant was entitled to receive from the Committee a superannuation allowance under section 11 of the Asylum Officers' Superannuation Act, 1909. The court held that, although the Minister had probably misconstrued the statute, yet he was within his jurisdiction, and so the rule nisi for a certiorari was discharged. To say that there is no jurisdiction to convict unless there is evidence to support it is as absurd as saying that magistrates only have jurisdiction as long as they are right.⁵⁹

c).^f *Otherwise defective jurisdiction*

It is commonly supposed that a third ground for certiorari connected with the invalid jurisdiction of the court or body below exists. This ground is considered to be neither quite want of jurisdiction nor excess of jurisdiction, but somewhere between the two, for there would have been jurisdiction were it not for the intervention of some circumstance which took away that jurisdiction. For instance, where jurisdiction for stopping up a highway depended upon the making of a new one, and, instead of a new one being made, the old one was widened, the jurisdiction was taken

⁵⁷ See *supra*, footnote 10. The cases actually concerned an accidental omission in a return required under the Alberta Liquor Export Act, and its subsequent verification by affidavit. All the reports of the case in its various stages show that there was never any doubt that *ultra vires* was a ground for certiorari, and since the case there can be no doubt that the weight to be accorded to evidence, and even whether it is proper to hear evidence at all, is no concern of the superior court, unless such absence of evidence *etc.* completely defeats the jurisdiction below. The Privy Council ultimately approved *R. v. Carter* (1916), 28 D.L.R. 606, and disapproved *R. v. Emery* (1916), 33 D.L.R. 556, and *R. v. Hoffman* (1917), 28 Man. R. 7.

⁵⁸ [1939] 1 K.B. 232, followed in *R. v. Paddington and St. Marylebone Furnished Houses Rent Tribunal, ex p. Kendal Hotels Ltd.* (1947), 175 L.T. 330 (where the lowering of a rent was entirely within the discretion of the tribunal, although it was alleged that it had considered matters it should not consider); see too *R. v. Lincolnshire JJ., ex p. Brett*, [1926] 2 K.B. 192 (the magistrates' decision on the evidence could not be disturbed); *Minister of Health v. R., ex p. Yaffé*, [1931] A.C. 494.

⁵⁹ Fairly recent instances of certiorari issuing to remedy a straightforward excess of jurisdiction are *Errington v. Minister of Health*, [1935] 1 K.B. 249; *R. v. Willesden JJ., ex p. Utley*, [1948] 1 K.B. 397; *R. v. Kent JJ., ex p. Machin*, [1952] 1 All E.R. 1123; *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Philippe*, *supra*, footnote 45. Distinguish *R. v. Minister of Health, supra*, footnote 28. An example of a decision in the Supreme Court of Canada is *Major v. Beauport*, [1951] 1 D.L.R. 586.

away.⁶⁰ Several examples of the non-performance of a condition precedent to the existence of jurisdiction are apparent during the nineteenth century,⁶¹ and these are the commonest instances of this alleged ground for the remedy.⁶² As however will be argued below, I do not believe that such a fine distinction between the various types of *ultra vires* acts is necessary.

The distinction between want of, excess of and otherwise defective jurisdiction

It can be appreciated that the distinction between these three alleged grounds for certiorari is often hard to see, and cases concerning unlawful convictions and sentences illustrate this confusion. A common type of case in which there has been held an *excess* of jurisdiction is a joint conviction of two persons for offences necessarily several.⁶³ Similarly a conviction under a different statute from the one under which the information was laid has led to the issue of the writ on this ground,⁶⁴ as has also a conviction for an offence unknown to the law.⁶⁵ It is difficult to say with any con-

⁶⁰ *Welch v. Nash* (1807), 8 East 394; cf. *R. v. Audley Inhabitants* (1700), 2 Salk. 527.

⁶¹ *R. v. Badger* (1856), 6 E. & B. 137; *R. v. Evans* (1850), 19 L.J.M.C. 151; *R. v. Lee* (1888), 52 J.P. 344. The latter two cases were followed in *R. v. Farmer*, [1892] 1 Q.B. 637, where magistrates had made an affiliation order. The summons was served at the alleged father's last abode, and evidence was given that he resided there. But actually he was in America, and so the order was quashed, because the jurisdiction of justices only attached on proof that the summons was duly served: the court had power to inquire into the validity of service.

⁶² The writ would issue not only where a defect of law appeared on the face of the proceedings in the inferior court (a ground which will be discussed later in this article), but also where the defect was one of jurisdiction, of whatever kind, in which case the superior court might go beyond the face of the record to discover such a defect: *R. v. Walsall Overseers* (1878), 3 Q.B.D. 464; *R. v. Bolton* (1841), 1 Q.B. 66; cf. *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417, at p. 442 (matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings, or may be brought before the superior court on affidavit, but they must be extrinsic to the adjudication impeached). Distinguish *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 10, and the line of cases discussed in connection with it.

A more recent, and rather different, instance of the so-called separate ground is *R. v. Salisbury and Amesbury JJ., ex p. Greatbatch*, [1954] 2 Q.B. 142.

⁶³ *Morgan v. Brown* (1836), 5 L.J.M.C. 77; see also *R. v. Cridland* (1857), 27 L.J.M.C. 28, 7 E. & B. 853 (magistrates convicted four persons beyond their powers); *Birnie v. Marshall* (1876), 35 L.T. 376 (following *R. v. Cridland*. The conviction was bad on the face and there was also excess of jurisdiction); *Hamilton v. Walker*, [1892] 2 Q.B. 25; *Penwarden v. Palmer* (1894), 19 L.T. 362 (following *R. v. Cridland*); *Parker v. Sutherland* (1917), 86 L.J.K.B. 1052 (magistrates heard two informations against the same man at the same time, without his previous consent); *Crepps v. Durden* (1777), Cowp. 640; *R. v. Payton* (1797), 7 T.R. 153.

⁶⁴ *R. v. Brickhill* (1864), 33 L.J.M.C. 156.

⁶⁵ *Re Daisy Hopkins* (1891), 61 L.J.Q.B. 240; cf. *R. v. Bradley* (1894),

fidence that in any of these cases the matter of dispute was concerned with excess of jurisdiction pure and simple, as opposed to any other defect of jurisdiction. A further complicating factor has been the use made by Mr. de Smith in a closely reasoned article⁶⁶ of the phrase *ultra vires*, for he suggests that there is a difference between *ultra vires* and absence or excess of jurisdiction. The assertion seems a strange one, for the literal meaning of the phrase is "beyond the powers" or "outside the jurisdiction", and thus it should naturally have the same meaning as "excess of jurisdiction". The two phrases are in any case always used by judges in certiorari cases as synonymous.⁶⁷ Mr. de Smith declares that certain forms of abuse of powers, which may cause an administrative body to be regarded as having acted *ultra vires* do not "go to jurisdiction".⁶⁸ He asserts:⁶⁹

One of the principles of the *ultra vires* doctrine is that administrative bodies which exercise discretionary powers arbitrarily or on irrelevant grounds act *ultra vires*. But, as has been indicated, such a misapplication of powers does not necessarily affect jurisdiction; and in certiorari proceedings it is usual to review the conduct of these bodies in terms of jurisdiction.

It is submitted that a great deal of unnecessary distinction has been drawn between defect, want, excess, abuse, ouster *etc.* of jurisdiction; and to this group we will, with respect, add *ultra vires*. The differences in detail between them are unimportant compared with the basic rule that whenever the jurisdiction of an inferior authority is bad (however it may have become so) the effect is always the same—a valid ground for a certiorari has been established.⁷⁰

Proof of defect of jurisdiction

It was settled early that extrinsic evidence could be considered whenever the jurisdiction of an inferior court was questioned in

63 L.J.M.C. 183; *R. v. Sheffield and Manchester Rly. Co.* (1839), 11 A. & E. 194; see also *R. v. Lichfield City Council* (1843), 12 L.J.Q.B. 308; *Re Penny and S.E.Rly. Co.* (1857), 7 E. & B. 660.

⁶⁶ *Supra*, footnote 24. See generally on the subject of *ultra vires* Sir Cecil Carr, *Concerning English Administrative Law*.

⁶⁷ See e.g. *R. v. Electricity Commissioners*, *supra*, footnote 9; *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223.

⁶⁸ *Supra*, footnote 24, at p. 194.

⁶⁹ *Ibid.*, at p. 201.

⁷⁰ A further ground for the issue of certiorari has been suggested by Mr. D. M. Gordon, Q.C., *op cit.*, *supra*, footnote 22. It is submitted that there is little real support for this suggestion; see Yardley, *op cit.*, *supra*, footnote 7, at p. 392, and the controversy between Mr. Gordon and I in (1955), 71 L.Q.Rev. 483, and (1956), 72 L.Q.Rev. 36.

proceedings by way of certiorari,⁷¹ the method of producing such evidence being by affidavit.⁷² But the superior court has never admitted affidavit evidence without good reason, as extracts from the judgments in a case of 1835 show.⁷³ Patteson J. says:⁷⁴

With regard to the objections in point of jurisdiction, raised by affidavit, I protest against its being understood that we can, on every occasion, look into extrinsic matter, on motion to bring up orders by certiorari. There may be such an occasion; but the general rule is otherwise. Here, at all events, there has been an appeal to the sessions, and the points should have been raised there.

Coleridge J. adds:⁷⁵

I do not say that there is no case in which, on application for a certiorari, the court may inquire into facts on affidavit: in some instances the court here is a court of appeal from inferior jurisdictions, and where it does look into the merits of proceedings below, it can do so only on affidavit. But we must be cautious not to exceed our jurisdiction: and when we find that there is a court of appeal below, to which the matter brought before us on affidavit might have been carried, I think we are confined to objections appearing on the face of the order.

Thus the court will not admit affidavit evidence without good cause shown. But where an affidavit is properly submitted it must be complete, otherwise it will be rejected, and, almost invariably, a certiorari cannot be obtained with fresh affidavits submitted.⁷⁶ *R. v. Bolton*⁷⁷ determined finally that the superior court would not inquire into the facts or reasonableness of a decision below on affidavit, providing the order or judgment was good on its face and the inferior authority had jurisdiction.⁷⁸

⁷¹ The opposite was the rule when the writ was invoked on the ground of error of law on the face of the record, see *infra*.

⁷² *R. v. Butler* (1768), 1 W.Bl. 649; *R. v. Bridgwater Overseers* (1774), 1 Cowp. 139 (in these two cases the objections were *probably* raised by affidavit); *R. v. Great Marlow Inhabitants* (1802), 2 East 244; *R. v. Standard Hill Inhabitants* (1815), 4 M. & S. 378; *R. v. Anonymous* (1816), 2 Chit. 137 (affidavit evidence admissible and *usually necessary* in cases of want of jurisdiction, bias and fraud, or to show that the record was incomplete, but not in cases of error on the face of the record—see *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1951] 1 All E. R. 268 and [1952] 1 K.B. 338, at p. 352, per Denning L.J.); *R. v. Long*, *supra*, footnote 15 (where the issue of a certiorari was refused because there was no accompanying affidavit); *R. v. Sheffield, Ashton-under-Lyne and Manchester Rly. Co.* (1839), 11 A. & E. 194; *Re Dent Tithe Commutation* (1845), 8 Q.B. 45.

⁷³ *R. v. Cambridgeshire JJ.* (1835), 4 A. & E. 111.

⁷⁴ *Ibid.*, at p. 122.

⁷⁵ *Ibid.*, at p. 125.

⁷⁶ *R. v. Manchester and Leeds Rly. Co.* (1838), 8 A. & E. 413.

⁷⁷ *Supra*, footnote 62.

⁷⁸ See also *R. v. Grant, supra*, footnote 26; *R. v. Badger, supra*, footnote 61; *Re Penny and the S.E. Rly. Co.*, *supra*, footnote 65; *R. v. Boteler* (1864), 4 B. & S. 959; *Colonial Bank of Australasia v. Willan, supra*, footnote 62; *R. v. Milk Marketing Board* (1934), 50 T.L.R. 559; *R. v. Boycott, ex p.*

The Franks Committee Report

The Report of the Committee on Administrative Tribunals and Enquiries, under the chairmanship of Sir Oliver Franks,⁷⁹ deals specifically with the efficacy of the three prerogative orders in England. It considers that they continue to provide the best ultimate safeguard against illegitimate proceedings of administrative tribunals. In fact the Committee has said that it is "convinced that the remedies by way of orders of certiorari, prohibition and mandamus should continue."⁸⁰ It is indeed recommended that an appeal on law should lie to the Divisional Court from administrative tribunals,⁸¹ which may tend to exclude the ground of error of law on the face of the record for a certiorari,⁸² but as far as the present ground is concerned no legislative change is advised: "A challenge to the jurisdiction of a tribunal should continue to be dealt with by motion for an order of certiorari."⁸³ This part of the Report has been accepted in principle by the British Government.⁸⁴

2) BREACH OF NATURAL JUSTICE

The term "natural justice"⁸⁵ is in fact a collective term for several grounds for a certiorari, but opinions differ as to the identity and number of these grounds.⁸⁶ Greer L.J. mentions it in the famous case of *Errington v. Minister of Health*:⁸⁷ "... a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice, that is to say he must hear both sides, and must not hear one side in the absence of the other." Again, in *General Medical Council v. Spackman*,⁸⁸ a registered *Keasley*, [1939] 2 K.B. 651; *R. v. Wandsworth JJ.*, [1942] 1 K.B. 281; *General Medical Council v. Spackman*, [1943] A.C. 627 (the last four cases being examples of affidavits showing breach of natural justice).

⁷⁹ *Supra*, footnote 1. Ch. 10.

⁸¹ *Ibid.*, paras. 114-116; and see *infra*.

⁸³ *Op cit.*, *supra*, footnote 79, para. 114.

⁸⁴ 575 H.C. Deb. 400-519 (October 31st, 1957); 577 H.C. Deb. 41 (November 12th, 1957); 206 H.L. Deb. 522-592 (November 27th, 1957). It is therefore thought desirable that English and Scottish procedure and practice should be as wide as that in Canada: see *supra*, footnote 34; and also *New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal*, [1957] N.Z.L.R. 167 (New Zealand C.A.).

⁸⁵ For some discussion of it, see Schwartz, Law and the Executive in Britain (1949), Ch. V.

⁸⁶ An account of the rules and suggested future rules of natural justice, written from a different angle than that I am taking, is contained in the Report of the Committee on Ministers' Powers (1932), Cmd. 4060, p. 75 *et seqq.* See also the judgment of Harman J., in *Syrne v. Kinematograph Renters Society Ltd.*, [1958] 1 W.L.R. 762 (a case covering declaration and injunction).

⁸⁷ *Supra*, footnote 59, at p. 268. He also quotes from Viscount Haldane L.C. in *Local Government Board v. Arlidge*, [1915] A.C. 120, at p. 132, who mentions natural justice in an indirect way.

⁸⁸ *Supra*, footnote 78.

medical practitioner had been found by the Divorce Division to have committed adultery with a person to whom he stood in a professional relationship, and the decree nisi of divorce was pronounced in that court, and later made absolute. At a hearing before the General Medical Council the practitioner tendered fresh evidence on the issue of adultery, which had not been called at the hearing of the petition, although it was then available. The Council, however, declined to hear the fresh evidence, and accepted the decree nisi as *prima facie* proof of adultery, directing that the practitioner's name be erased from the register. The House of Lords held that although the Council was entitled to regard the decree in the divorce suit as *prima facie* evidence of adultery it was bound to hear any evidence tendered by the practitioner, and that, having refused to hear such evidence, it had not made "due inquiry" as required by section 29 of the Medical Act, 1858. Thus the Council's decision was quashed by means of a certiorari.⁸⁹ Lord Wright, in the course of his learned speech, said:⁹⁰

... the grounds on which certiorari may be granted are strictly limited. They may, I think, for purposes of this case, broadly be taken to be: i) the ground that the Council's proceeding was *ultra vires*, and ii) the ground which without any very great precision has been described as a departure from "natural justice".

He also states that really only the second ground could apply in this case, as the powers of the Council were too wide to be impeached for *ultra vires*.

It is submitted that there are in fact four rules of natural justice for breach of which certiorari is available: a) *audi alteram partem*, b) no interest, c) reasonableness, and d) no fraud. The ground is equally valid throughout Canada, Australia, New Zealand and

⁸⁹ Though the principle of the issue of a certiorari on the ground of a breach of natural justice remains intact, the exact question of law in *Spackman's* case could never occur again. The Medical Act, 1950, s. 18(2), provides that in any inquiry under the Medical Act, 1858, s. 29, "whether a person has been guilty of infamous conduct in any professional respect, any finding of fact which is shown to have been made in any matrimonial proceedings in the United Kingdom or the Republic of Ireland, being proceedings in the High Court or Court of Session or on appeal from a decision in such proceedings, shall be conclusive evidence of the fact found." Under the 1950 Act there is now also an appeal from any decision of the General Medical Council upon such matters to the Judicial Committee of the Privy Council. One of the first of such appeals was *Simpson v. G.M.C.*, reported only in *The Times*, Oct. 25th and Nov. 9th, 1955, and noted by Sir Carleton K. Allen in (1956), 72 L.Q.Rev. 332. The first of such cases to appear in any series of law reports was *Ong Bak Hin v. G.M.C.*, [1956] 1 W.L.R. 515.

⁹⁰ *Supra*, footnote 88, at p. 640.

South Africa,⁹¹ and the division of the ensuing pages on these lines should be equally appropriate.

a) *Audi alteram partem*

This is perhaps the most commonly invoked rule of natural justice.⁹² Examples of the rule are to be found in the middle of the nineteenth century,⁹³ and *Cooper v. Wandsworth Board of Works* in 1863⁹⁴ put the point beyond dispute, for the extensively reported argument was based on "that sound and universally applicable principle of natural justice, that no man shall be condemned" without a hearing.⁹⁵ Other earlier cases of application of the principle were referred to by Erle C.J. in his judgment,⁹⁶ and, acting upon these and upon the use of logic, it was determined that where the Board had swiftly demolished the plaintiff's house under the powers given by a statute, because he had not given notice of building, there had been a failure to abide by the rules of *audi alteram partem*.⁹⁷

The default in sending notice to the Board of the intention to build is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer. . . . I fully agree that the legislature intended to give the district board very large powers indeed: but the qualification I speak of is one which has been recognised to the full extent.⁹⁸

In the present century there are many examples of certiorari issuing on this ground. A resolution of the Milk Marketing Board has been quashed because a retailer was not given a fair oppor-

⁹¹ See particularly S.A. de Smith, *The Right to a Hearing in English Administrative Law* (1955), 68 Harv.L.Rev. 569, at pp. 596-599, where recent cases are discussed.

⁹² See de Smith, *ibid.*; also D. M. Gordon, Q.C., *The Cab-Driver's Licence Case* (1954), 70 L.Q.Rev. 203; Yardley, *Revocation of Licences — An English Dilemma* (1956), 1 Jur. Rev. (N.S.) 240.

⁹³ *E.g. R. v. St. Albans JJ.* (1853), 22 L.J.M.C. 142.

⁹⁴ 14 C.B.N.S. 180. The case was an action for damages, but the principle of *audi alteram partem* is the important point decided, and is of general application in administrative law.

⁹⁵ *Ibid.*, at p. 183.

⁹⁶ *Ibid.*, at p. 189.

⁹⁷ The principle is not referred to by its name, but its implications are clear. A mandamus had been applied for by the defendants, after the plaintiff had successfully maintained an action for trespass before Willes J., even though no malice had been shown. Compare on this point *Partridge v. G.M.C.* (1890), 59 L.J.Q.B. 475.

⁹⁸ Per Erle C.J., *supra*, footnote 94, at p. 188.

tunity of replying to a charge against him.⁹⁹ In *Errington v. Minister of Health*,¹⁰⁰ the Minister's confirmation of a clearance order was quashed because, even though objections to the order had been lodged, he had taken into consideration *ex parte* statements, with which the owners had had no opportunity of dealing. As to the quasi-judicial duty of the Minister, Greer L.J.¹⁰¹ cited Lord Loreburn L.C. in *Board of Education v. Rice*,¹⁰² who was discoursing upon the duty of the Board of Education:

I need not add that in doing [deciding] either, they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any irrelevant statement prejudicial to their view. . . .

So the form of the hearing is not important in quasi-judicial proceedings, provided that the basic rule of *audi alteram partem* is observed.

The continuity of cases continues.¹⁰³ *R. v. Boycott, ex p. Keasley*¹⁰⁴ concerned the signing of a certificate by doctors that a certain boy was an imbecile. A certiorari lay to bring up this certificate to be quashed, because one of the doctors signing had not even seen or examined the boy.¹⁰⁵ Again, the rule applied where an

⁹⁹ *R. v. Milk Marketing Board*, *supra*, footnote 78; *cf. Board of Education v. Rice*, [1911] A.C. 179, in which the Board had not determined questions put to it, but had dealt with other matters, and it was held that a certiorari must issue to quash, and a mandamus to command it to determine the questions.

For further examples of the application of the principle, see *R. v. Wandsworth J.J.*, *ex p. Read*, *supra*, footnote 78; *R. v. East Kerrier J.J.*, *ex p. Mundy*, [1952] 2 Q.B. 719: justice must not only be done, but it must be manifestly seen to be done.

¹⁰⁰ *Supra*, footnote 59; see also a note by H. G. Hanbury in (1937) 53 L.Q.Rev. 214. *Cf. R. v. Metropolitan Police Commissioner, ex p. Parker*, [1953] 1 W.L.R. 1150, which Mr. Gordon, Q.C., and I criticized at length, in the articles listed *supra*, footnote 92.

¹⁰¹ *Ibid.*, at p. 266.

¹⁰² *Supra*, footnote 99, at p. 182.

¹⁰³ All the various cases, English and Commonwealth, considered by Mr. de Smith, *op. cit.*, *supra*, footnote 91, are concerned with this ground.

¹⁰⁴ *Supra*, footnote 78.

¹⁰⁵ It must be noted that the correctness of the decision in *R. v. Boycott* has been doubted by the Divisional Court in *R. v. St. Lawrence's Hospital, ex p. Pritchard*, [1953] 1 W.L.R. 1158, at p. 1162. There the statutory Visitors to an institution, acting under the Mental Deficiency Act, 1913, s. 11, recommended the continued detention of a girl, aged, nineteen. Before reaching their decision they had refused to hear the girl's mother or the mother's counsel, although they allowed them to be present, except when the girl was actually examined. On the girl's application for certiorari it was held that this had been an administrative decision concerning confidential matters, and thus, following *R. v. Metropolitan Police Commissioner, ex p. Parker*, *supra*, footnote 100, certiorari would not lie.

assessment committee assessed a higher rate than that which had been agreed by the parties because of the general report of an expert valuer, which was not disclosed to the ratepayers.¹⁰⁶ In one of the frequent instances of late of cases concerning rent tribunals,¹⁰⁷ a breach of the rule was one of the grounds for the issue of an order of certiorari, for there the tribunal had reduced the rents of certain flats because of their excessive height, and yet neither at the hearing, nor beforehand, were the applicants given an opportunity of dealing with the question of the height of the flats.

Exclusion of the audi alteram partem rule

A significant exclusion of the *Errington* rule has been made in sub-section 3 of section 10 of the Town and Country Planning Act, 1947. The rule has been made inapplicable to the Minister (now the Minister of Housing), for it is provided that if, after objections have been lodged to a plan, the Minister is of opinion that the local planning authority, or any other authority or person, ought to be consulted before he comes to his decision, "he shall consult that authority or person, but shall not be under any obligation to consult any other authority or person, or to afford any opportunity for further objections or representations or to cause any further local inquiry or other hearing to be held." This type of statutory exclusion has become quite common in England, but once more it may be of significance to refer to the recommendation of the Franks Committee that "no statute should contain words purporting to oust these remedies . . ."¹⁰⁸

Again, the remedy will be excluded where an executive, as opposed to a judicial or quasi-judicial act is involved.¹⁰⁹ It suffices here to give one example, that of a deportation order being made against an alien (not necessarily an enemy alien). No certiorari

¹⁰⁶ *R. v. City of Westminster Assessment Committee, ex p. Grosvenor House (Park Lane) Ltd.*, [1940] 1 K.B. 53. Scott L.J. expressed some doubt, because this was only part of the evidence before the committee, and he thought there was no duty to disclose it, but he still agreed that certiorari would lie, as the committee did not "hear" the other side. See also *R. v. Wandsworth J.J., ex p. Read*, *supra*, footnote 78.

¹⁰⁷ *R. v. Paddington and St. Marylebone Rent Tribunal, ex p. Bell London and Provincial Properties Ltd.*, [1949] 1 K.B. 666.

¹⁰⁸ *Supra*, footnote 1, para. 117; *cf.* the Canadian position, *supra*, footnote 34. For further examples and discussion of this type of statutory exclusion see Hood Phillips, *Constitutional Law of Great Britain and the Commonwealth* (2nd ed., 1957), p. 447 *et seqq.*; Griffith and Street, *Principles of Administrative Law* (2nd ed., 1957), p. 175 *et seqq.*

¹⁰⁹ Fully discussed in the Northern Ireland Legal Quarterly article, see *supra*, footnote 3.

(or habeas corpus) will lie in England for not holding an inquiry or giving the deportee an opportunity of being heard.¹¹⁰

Similarly certiorari will not lie where an administrative tribunal is exercising a full and unfettered discretion accorded to it by statute. Even if the rule of *audi alteram partem* has been broken the remedy cannot be invoked successfully.¹¹¹ A mining case of 1948 provides a contrast.¹¹² A registrar had awarded compensation to miners who had contracted pneumoconiosis, the award being in a lump sum, instead of by weekly payments. This discretion as to the form of the compensation was exercised under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, and the Workmen's Compensation Act, 1925, section 23, and it was with the agreement of the miners themselves; but the Registrar gave his decision for the agreement to be recorded in ignorance of the fact that there was on the file an objection by the approved society with which the workmen were insured for National Health Insurance. It was held, therefore, that he had proceeded in error, and had not given the society, which, under the Acts, was an interested party, an opportunity of being heard. His discretion did not cover this mistake, and the recording of the memorandum was quashed on a certiorari.

b) No interest

The earliest manifestation of a breach of natural justice as a ground for certiorari is probably that of interest on the part of one of the persons adjudicating in the court below. This ground, though well-founded and certain from an early date, has, however, changed its nature during the last century. Its application has become far more specialised, so that, although what comes under the heading of interest today would certainly have come under that heading in 1700, yet the converse would by no means necessarily be true. At the beginning of the eighteenth century a magistrate would have been held to be interested if he was concerned in any way whatsoever with the case in hand,¹¹³ and it can be seen

¹¹⁰ *R. v. Secretary of State for Home Affairs, ex p. Venicoff*, [1920] 3 K.B. 72. It is, however, arguable that the act was not purely executive in this case; perhaps there is some judicial element in the executive decision which prompts the issue of a deportation order. But, if this is so, deportation orders must be put in a category of their own, for they may not be brought up for review on a certiorari.

¹¹¹ *R. v. Paddington and St. Marylebone Furnished Houses Rent Tribunal, ex p. Kendal Hotels Ltd. Supra*, footnote 58.

¹¹² *R. v. Pontypridd County Court Registrar*, [1948] 1 All E.R. 218.

¹¹³ *Case of Foxham Tithing* (1704), 2 Salk. 607; *Great Chartre v. Kennington* (1742), 2 Stra. 1173: one of two removing justices was an inhabitant of the parish from which the pauper was removed.

from a case of 1841¹¹⁴ that this remained the rule even at that date. A Paving Act had empowered commissioners to lay rates, any party aggrieved being allowed to appeal to quarter sessions, whose order was to be final; and no order, rate *etc.* was to be removed by certiorari. On an appeal against a rate the respondents objected to the admission of certain evidence, but the quarter sessions, by a majority of eleven magistrates to eight, held the evidence admissible. Three of the eleven magistrates, however, were partners in a company which owned certain premises assessed to the rate in the name of the occupier, and the respondents therefore applied for a certiorari on the ground of interest. It was held that, since a question in the cause had been decided by a court improperly constituted, on account of the interest of the three magistrates, the clause prohibiting a certiorari in the statute did not operate.¹¹⁵ On affidavit of the above facts, the order of quarter sessions was quashed, although the affidavits did not actually satisfy the court that the magistrates had acted partially.

But since the mid-nineteenth century there has been a change in judicial outlook, and now it is possible to trace two well-defined types of interest, (i) pecuniary interest, and (ii) bias.

(i) PECUNIARY INTEREST

From a case of 1851¹¹⁶ it seems that a mere suspicion of favour may not have the same effect as an actual pecuniary interest, and the case which clearly marked the alteration in judicial attitude was *R. v. Rand*.¹¹⁷ There a certificate under the Bradford Waterworks Act, 1854, allowing the waterworks company to take the water of certain streams, was granted by the magistrates, after hearing evidence on both sides. A rule was obtained for a certiorari to bring up this certificate to be quashed on the ground that the justices who granted it were interested, and all the objections were disposed of during argument, except the following. On the affidavits of both sides it appeared that a hospital and a friendly society had invested parts of their funds in bonds of the Bradford Corporation, charging the borough fund, and that these bonds

¹¹⁴ *R. v. Cheltenham Commissioners* (1841), 1 Q.B. 467; see also *R. v. Yarpole* (1790), 4 T.R. 1, where it distinctly appeared that the vote of the interested magistrate had turned the decision; *R. v. Aberdare Canal Co.* (1850), 14 Q.B. 854.

¹¹⁵ See a fuller exposition of this principle, *supra*, footnote 36.

¹¹⁶ *R. v. Dean of Rochester* (1851), 17 Q.B. 1; cf. *Dimes v. Grand Junction Canal* (1852), 3 H.L.C. 759; *R. v. Kent JJ.* (1880), 44 J.P. 298. The change to the new meaning of "interest" was not swift, and the older meaning still lingered in judgments till the end of the nineteenth century.

¹¹⁷ (1866), L.R. 1 Q.B. 230, which followed *R. v. Dean of Rochester*, *ibid.*

were taken in the name of trustees, and that two of the magistrates in question were, one of them among the trustees of the society, and the other among the trustees of the hospital. Neither of them had, nor by any possibility could have, any pecuniary beneficial interest in these bonds, but no doubt the security of their *cestui que* trusts would be improved by anything improving the borough fund; and anything improving the waterworks, after they became the property of the corporation, would produce that effect. The court, consisting of Cockburn C.J., Blackburn and Shee JJ., drew a distinction between this type of interest and a direct pecuniary interest, and, by using its discretion, discharged the rule for a certiorari. The judgment (actually delivered by Blackburn J.) has been the keystone in this branch of the law. The converse position has been illustrated by *Dimes v. Grand Junction Canal*,¹¹⁸ in which the Lord Chancellor had decided in favour of a company in which he himself had shares. On appeal (for it could not obviously be a certiorari case, where a decision of the Lord Chancellor in his court was concerned) his decision was reversed by the House of Lords, acting on the advice of the judges, and another decision to the same effect was substituted. Even though this was not a certiorari case the principle with which we are now concerned was fully discussed. A pecuniary interest is a ground for certiorari, but anything short of a pecuniary interest or an interest showing a real likelihood of bias (discussed below) can be discounted.

(ii) BIAS

The present-day ground of bias is the second branch of the new specialised ground of interest. In *Local Government Board v. Arlidge*,¹¹⁹ Viscount Haldane L.C. says with regard to bodies whose duty is to decide matters judicially: "They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made." A number of recent cases have concerned the retirement of the justices' clerk with the magistrates when they consider their decision. In most of such cases the subsequent application for certiorari has proved abortive, and a single illustration should suffice to explain this result. In *R. v. Camborne JJ, ex p. Pearce*,¹²⁰

¹¹⁸ *Supra*, footnote 116; see my discussion of the case in (1956), 72 L.Q. Rev. 39-41.

¹¹⁹ *Supra*, footnote 87.

¹²⁰ [1955] 1 Q.B. 41. As a result of the decisions in a number of cases concerning this problem it was evident that uncertainty existed as to the exact legal position, and several letters were received by the Lord Chan-

magistrates were considering a conviction under the Food and Drugs Act, 1938, and after they had retired the chairman sent for their clerk to advise them on a point of law. They did not discuss the facts of the case with him, but since the clerk was a member of the county council, even though not of its health committee, the applicant asked for a certiorari to quash his conviction. The

cellor and the Lord Chief Justice on the subject. Lord Goddard C.J. therefore delivered a Practice Direction, in which the Lord Chancellor and the judges involved in the recent decisions concurred, [1953] 1 W.L.R. 1416. Lord Goddard declared that there were two questions to be answered, 1) in what matters may magistrates consult their clerk? 2) in what manner may they consult him? As to the first question, the clerk may be consulted on all questions of law, or of mixed law and fact, and on questions regarding the practice and procedure of the court; plus certain other special matters, such as information upon sentences imposed in other courts or previously for certain offences *etc.* But the clerk may not be consulted on questions of fact. In answer to the second question, Lord Goddard thought that the decision in *R. v. East Kerrier JJ., ex p. Mundy*, *supra*, footnote 99, could hardly be misconstrued. The decision in a magistrates' court must be that of the justices themselves, and not of their clerk, or of the justices together with their clerk. Thus, a clerk should not retire with the magistrates as a matter of course. The justices may send for him, or ask him to retire with them, but he ought to return to his place in court immediately he has satisfied the magistrates upon the point required. The Lord Chief Justice felt that little difficulty would be occasioned if magistrates and clerks observed the principle stated by Lord Hewart C.J. (quoted in the extract from Slade J.'s judgment in the text of this article, below). The substance of this Practice Direction was also used by Lord Goddard as advice when addressing the annual conference of the Justices' Clerks Society on July 16th, 1956.

The three cases leading up to the above Practice Direction were the *East Kerrier JJ.* case, *supra*, footnote 99 (a clerk had taken a piece of paper from the police to the magistrates in the course of their deliberations, and a certiorari issued to quash their conviction of the applicant because it was not generally known what the paper contained, and justice had not been manifestly seen to be done); *R. v. Welshpool JJ., ex p. Holley*, [1953] 2 Q.B. 403 (the clerk had been sent for to advise on a question of law, but stayed with the justices even after his answer had been given. Nevertheless certiorari did not issue); and *R. v. Barry JJ., ex p. Kashim*, [1953] 2 All E.R. 1005 (conviction quashed where the clerk had retired to advise on a question of fact). See also *Ex p. How*, [1953] 1 W.L.R. 1480, in which the Divisional Court refused to order a certiorari although it was contended that the clerk had retired with the justices in circumstances which rendered it improper for him to do so. The court could always report to the Lord Chancellor magistrates who disregarded the court's directions, and they would not always allow certiorari in such cases.

See too *R. v. Sunderland JJ.*, [1901] 2 K.B. 357; *R. v. Dorset Quarter Sessions, ex p. O'Brien*, [1956] 1 Q.B. 452n (decided in 1953, but not reported till 1956); *R. v. Nailsworth JJ., ex p. Bird*, [1953] 1 W.L.R. 1046: magistrates had granted a licence, but one of the justices had previously signed a petition in favour of the licence. A party opposing the grant came to know of this fact *after* the members of the licensing committee had retired to consider their decision, but he did not object until the decision had been given, presumably hoping that the licence would not in any case be granted. The Divisional Court refused a certiorari, on the ground that the party should have objected before the decision was given. There was no bias, and Lord Goddard C.J., at p. 1048, said: "It is not anything that raises a doubt in somebody's mind that is enough to set aside an order or a judgment of justices; there must be something in the nature of real bias."

Divisional Court refused to grant it, and Slade J. expounded the principle in such cases as follows:¹²¹

To disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown. . . . not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained. . . . The frequency with which obligations of bias have come before the courts in recent times seems to indicate that Lord Hewart's remainder in the *Sussex Justices'* case that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.

Thus it is only where an allegation of bias is substantial that certiorari will issue.¹²²

c) Reasonableness

The existence of "reasonableness" as a ground for certiorari is disputed. It is submitted here that it nevertheless does exist, and that together with the undisputed ground of "no fraud" (which will be considered next) it falls within the rules of natural justice, which have never been held to be a closed class. Although no case directly supports my view, it is submitted that the existence of this rule is the logical deduction from cases related to the matter.

Certiorari does not lie on account of the unreasonable exercise of a discretionary power, such as the refusal of an adjourn-

¹²¹ *Ibid.*, at p. 51.

¹²² See *R. v. Grimsby Borough Quarter Sessions, ex p. Fuller*, [1956] 1 Q.B. 36: during an appeal to quarter sessions against a summary conviction the accused was asked in cross-examination why he had not accepted the work offered to him shortly before he appeared before the justices. The clerk of the peace, in order to assist the accused, thereupon handed to the Recorder a copy of a police report on the accused's antecedents which appeared to show that at the time in question the accused was in custody awaiting trial on the present charge. Immediately following the relevant passage in the report was a list of the accused's previous convictions. The Recorder dismissed the appeal, and in the absence of any explanation from the Recorder certiorari had to go because of the substantial probability of bias. Also *R. v. Hendon R.D.C., ex p. Chorley*, [1933] 2 K.B. 696. It was even thought worthwhile by the House of Lords in *Franklin v. Minister of Town and Country Planning*, [1948] A.C. 87, to state that the Minister concerned in the case had no judicial or quasi-judicial duty imposed on him, so that considerations of bias were irrelevant.

ment,¹²³ or in one of the many cases of the exercise of pure executive or administrative discretion; when a discretion is conferred upon a local authority the court ought to show great reluctance before attempting to determine how, in their opinion, the discretion ought to be exercised.¹²⁴ But, as Lord Macnaghten once said,¹²⁵ a public body with statutory powers "must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably." Thus it was that in *Roberts v. Hopwood*,¹²⁶ where under a certain Act a metropolitan borough council was empowered to fix wages for its servants "as it thought fit", and it exercised its statutory discretion unreasonably, a minimum wage being fixed by the council disregarding the fall in the cost of living, the auditor had disallowed the excess and surcharged it on the councillors responsible (as he was empowered to do under another statute). A rule nisi for a certiorari to bring up the auditor's certificate to be quashed was discharged by the House of Lords, following the Divisional Court and reversing the Court of Appeal. The discretion conferred on the council must be exercised reasonably, and the fixing by the council of an arbitrary sum for wages, without regard to existing labour conditions, was not a reasonable exercise of that discretion.¹²⁷ Since a rule for a certiorari would be discharged where the exercise of the discretion is reasonable, conversely a certiorari ought to be obtained where the exercise is unreasonable.¹²⁸

d) No fraud

Fraud is a well-established ground for certiorari.¹²⁹ A good ex-

¹²³ *R. v. Glamorganshire JJ.* (1889), 5 T.L.R. 636.

¹²⁴ *Kruse v. Johnson*, [1898] 2 Q.B. 91, at p. 99.

¹²⁵ In *Westminster Corporation v. L.N.W.R.*, [1905] A.C. 426, at p. 430: this was an injunction case, but the principle stated is of general application.

¹²⁶ [1925] A.C. 578.

¹²⁷ Cf. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, *supra*, footnote 67, in which the exercise of the statutory discretion was reasonable.

¹²⁸ In *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66 (an appeal to the Privy Council from the Supreme Court of Ceylon), the Controller of Textiles in Ceylon cancelled the appellant's textile licence, under regulation 62 of the Defence (Control of Textiles) Regulations, 1945, which empowered him to do so "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer." The Privy Council actually decided that the Controller was not acting "judicially", and so a mandate in the nature of a writ of certiorari could not issue for the purpose of quashing his order of cancellation. The Controller need not even have given notice of his intention to revoke the licence, or have held any inquiry, public or private, before so revoking it. But, had it been held that he was acting judicially, then it is almost certain that his act would have been held unreasonable, and the mandate would have issued on that ground. For a detailed criticism of the case, see Yardley, *op. cit.*, *supra*, footnote 92.

¹²⁹ See *R. v. Anonymous* (1816), 2 Chit. 137.

ample is *R. v. Gillyard*.¹³⁰ Certain Excise Acts provided that a maltster should not be punishable for certain offences if he prosecuted a servant to conviction, and produced a certificate of such conviction before any penalty was recovered against himself. Also no certiorari should be issued at the suit of any defendant to remove any such proceeding before magistrates. Here a maltster procured the conviction of a servant by collusion in order to protect himself, and, despite the provisions of the statutes, the Queen's Bench granted a certiorari on the ground of fraud. In contrast, in a recent case of bastardy proceedings,¹³¹ the putative father, who denied paternity, called as a witness a man with whom he alleged that the woman had had intercourse. This man in evidence denied the intercourse, and an affiliation order was made. A subsequent appeal was dismissed, but later the man was charged with perjury in respect of his denial. He did not give evidence in his own defence, but called the woman as a witness, and she denied the intercourse. Nevertheless the man was convicted of perjury, and the putative father thereupon applied for an order of certiorari to quash the affiliation order. The Court of Appeal held that application should be refused. The conviction for perjury was not evidence against the woman and had been obtained on evidence (statements made to a police officer by the man) which was not admissible against the woman.¹³²

Are the rules of natural justice closed?

In this article the four sub-divisions of natural justice differ from those generally accepted in that the inclusion of "reasonableness" and "no fraud" is not widely recognised. Yet their inclusion appears logical, in my submission, and there is no valid reason why natural justice should not expand and widen as a ground for certiorari in the future. It is right that the law should have an escape valve for future development, performing the function of the old equity, for it is this way that it remains vital and continues to be just.

Breach of natural justice related to defect of jurisdiction

It may be asked whether natural justice is in fact only a subdivision of the ground of defect of jurisdiction. Does not the exis-

¹³⁰ (1848), 12 Q.B. 527.

¹³¹ *R. v. Ashford, Kent, JJ., ex p. Richley* (No. 2), [1956] 1 Q.B. 167.

¹³² See also *Smith v. East Elloe R.D.C.* [1956] A.C. 736, where there was an application out of time in an action for damages and declarations. The case is fully discussed by de Smith, *The Abuse of Statutory Powers*, [1956] Public Law 233.

tence of a fraud or of the pecuniary interest of a magistrate render the jurisdiction of an inferior adjudicating body void? In 1864 it was held¹³³ that where an objection went to the jurisdiction of magistrates a certiorari may issue, even though the party applying for it had induced the magistrates to state a case for the opinion of the superior court, and notwithstanding that such case was still pending; and the actual objection to the jurisdiction of the magistrates was that of interest. Greer L.J.¹³⁴ said that when an administrative body was given the duty to decide an appeal it must act judicially, giving each of the parties an opportunity of presenting the case made, and without bias—implying, therefore, that any bias would take away the administrative body's jurisdiction. Again Mr. D. M. Gordon, Q.C., asserts¹³⁵ that extrinsic evidence has constantly been admitted to show interest or bias of a tribunal, usually under the supposition that this creates a want of jurisdiction. So strictly the answer to both my questions may be "yes", and confidence in such an answer would be reinforced on considering that new and different ways of nullifying a valid jurisdiction, or of acting outside jurisdiction, or of acting without any jurisdiction at all may be discovered from day to day, thus showing that the ground of defect of jurisdiction is also one which may expand. Nevertheless it is more convenient to treat natural justice as a separate ground for the remedy. Accuracy in the law is vitally important, but certainty must eliminate confusion. Natural justice has its own peculiar characteristics, and thus it is more suitable to treat it as distinct.

Proof of breach of natural justice

It has been shown above that affidavit evidence is adduced to bring up extrinsic matters proving defect of jurisdiction in the court below when a certiorari is applied for; and the same practice has obtained where a question of natural justice is involved.¹³⁶

¹³³ *R. v. Allen*, 4 B. & S. 915; see also the Canadian cases, *Toronto Newspaper Guild v. Globe Printing Co.*, *supra*, footnote 33; and *Knapman v. Board of Health for Saltfleet Township*, *supra*, footnote 26.

¹³⁴ *Errington v. Minister of Health*, *supra*, footnote 59.

¹³⁵ *Op. cit.*, *supra*, footnote 22.

¹³⁶ *R. v. Anonymous*, *supra*, footnote 129 (affidavit evidence admissible and usually necessary in cases of want of jurisdiction, bias and fraud, or to show that the record was incomplete, but not in cases of error of law on the face of the record—see *R. v. Northumberland Compensation Appeal Tribunal*, *ex p. Shaw*, *supra*, footnote 72, per Denning L.J., discussed later); *R. v. Bolton*, *supra*, footnote 72 (the court will only inquire into the facts or reasonableness of a decision below on affidavit where the justices had no jurisdiction or where their order was bad on its face); *Re Dent Tithe Commutation*, *supra*, footnote 72 (*audi alteram partem*).

There are several examples of matters within the ambit of natural

The Franks Committee Report

The Report of the Committee on Administrative Tribunals and Enquiries makes no recommendation concerning this ground for certiorari. Since the Committee is in favour of the continuation of the remedy,¹³⁷ it can therefore be safely assumed that it favours the continuing existence of this ground for certiorari.

3. ERROR OF LAW ON THE FACE OF THE RECORD

Mr. de Smith has said¹³⁸ that in recent years this ground for the remedy has almost been forgotten. The courts used to quash convictions for even the most trivial defects, and so Parliament took away the right to a certiorari in a number of statutes creating summary offences—a device which was not wholly successful in excluding judicial review¹³⁹—and finally by prescribing, in the Summary Jurisdiction Act, 1848, a standard form of conviction which omitted all mention of the evidence or the reasoning by which the magistrates reached their decision. This did not alter the law relating to certiorari, but it made it virtually impossible for the courts to correct errors of law made by magistrates, except errors which went to their jurisdiction. “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.”¹⁴⁰ The principle was certainly never forgotten in England¹⁴¹ or in Canada¹⁴² but there have been occasions in the English courts when it was temporarily overlooked.¹⁴³

justice being disclosed on affidavit because they did not appear on the face of the record: *R. v. Milk Marketing Board*; *R. v. Boycott, ex p. Keasley*; *R. v. Wandsworth JJ., ex p. Read*; *General Medical Council v. Spackman*, *supra*, footnote 78.

¹³⁷ *Supra*, footnote 1, paras. 114-117; *supra*, footnotes 79-84.

¹³⁸ Note, (1951), 14 Mod.L.Rev. 207.

¹³⁹ See Yardley, *supra*, footnote 36.

¹⁴⁰ *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 12, at p. 159, per Lord Summer.

¹⁴¹ See e.g. Halsbury, Laws of England (Hailsham Edition), Vol. IX, p. 887; Keir and Lawson, Cases on Constitutional Law (4th ed. revised, 1954), p. 270; Paley *op. cit.*, *supra*, footnote 7, p. 796 *et seq.*; de Smith, *op cit.*, *supra*, footnote 24. It even appears in elementary text-books, such as Harris and Wilshire, Criminal Law (18th ed., 1950), p. 658.

¹⁴² E.g. *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 12; *College of Physicians and Surgeons v. Mahood*, [1929] 4 D.L.R. 123 (Alta.S.C.); *Children's Aid Society of the Catholic Archdiocese of Vancouver v. Salmon Arm*, [1941] 1 D.L.R. 532 (B.C.C.A.); *John East Iron Works Ltd. v. Labour Relations Board of Saskatchewan*, [1949] 3 D.L.R. 51 (Sask.C.A.).

¹⁴³ See *subter*; also in *R. v. Mahoney*, *supra*, footnote 23, at p. 731, Gibson J., the Irish judge, omitted to mention it when enumerating the grounds for certiorari.

The record.

First it is important to know upon what the error may appear.¹⁴⁴ In 1700 the record consisted of all those documents which were kept by the tribunal for a permanent memorial and testimony of their proceedings; the Court of King's Bench determined what was the record, and if it was incomplete or defective when returned it was quashed.¹⁴⁵ Several cases about that time were concerned with the composition of the record, and it was decided that both the documents initiating proceedings¹⁴⁶ and those concluding them (*i.e.* the adjudication)¹⁴⁷ must be included, whilst in summary proceedings everything necessary to support the conviction had to appear on the face of the record, including the information, evidence and adjudication; nothing could be supplied by argument or intendment, for any error of law or defect of form had to appear on the face.¹⁴⁸ Later in the century it was held that where statutory authority to take away property was not shown on the face of the proceedings those proceedings had to be quashed.¹⁴⁹ But a distinction was laid between an order and a conviction, for it was determined that the removal of a clerk of the peace by justices was an order, not a conviction, and so the evidence leading to the decision need not be set out in the order, provided the justices had jurisdiction;¹⁵⁰ but such evidence was required to be set out in the case of a conviction,¹⁵¹ otherwise such conviction would be

¹⁴⁴ Certiorari or *certiorari facias*, to give it its old pre-eighteenth century name, must not be confused with *recordari facias*, which was a writ lying when the proceedings were in a court which was not a court of record. On receipt of such a writ the suitors came to testify as to the proceedings of the court, and it would seem that they sometimes put their record in writing: Holdsworth, *op cit.*, *supra*, footnote 7, p. 73, note 7; Bracton, Notebook, case 243.

¹⁴⁵ *R. v. Levermore* (1701), 1 Salk. 146.

¹⁴⁶ *Anonymous* (1697), 2 Salk. 479.

¹⁴⁷ *South Cadbury Inhabitants v. Braddon, Somerset, Inhabitants* (1710), 2 Salk. 601.

¹⁴⁸ Such principles were stated by Lord Holt C.J. in *R. v. Chandler* (1702), 1 Ld. Raym. 581. It was held in *R. v. St. Mary, Devizes* (1702), 1 Salk. 147, that the very order complained of must be returned, or else the rule for the writ would be discharged.

¹⁴⁹ *R. v. Croke* (1774), 1 Cowp. 26; *cf. Taylor v. Clemson, supra*, footnote 31, at p. 650 in which jurisdiction was sufficiently shown. Lord Cottenham distinguished the case from *R. v. Croke*.

¹⁵⁰ *R. v. Lloyd* (1734), 9 Stra. 996; *Ruyslip v. Hendon* (1698), 5 Mod. 418, Holt 572; *R. v. Audley Inhabitants, supra*, footnote 60; *cf. R. v. Mast* (1795), 6 T.R. 154.

¹⁵¹ *R. v. Killett* (1767), 4 Burr. 2063; this followed *R. v. Bissex* (1756), unreported, in which Denison J. declared that the case of *R. et Reg. v. Pullen*, unreported, was no longer the law in that case, for a conviction on oath *de veritate praemissorum* was held sufficient, without setting it forth specifically.

quashed. In 1787, however,¹⁵² a certiorari was applied for to remove a conviction by a magistrate under the Deer Act.¹⁵³ It was held that where a record was returned to sessions a copy of the conviction annexed to the writ was sufficient, for if an Act gave a general form of conviction, as in this instance, "the party can have no benefit from certiorari, because the proceedings or examinations need not be returned, but only the conviction, which, being general, cannot exhibit an error on the proceedings." On the other hand at the end of the century, in *R. v. Clarke*¹⁵⁴ all the evidence for and against the defendant was set out on the face of the conviction. The court held that this was proper, and recommended it as a precedent to be followed in the future, expressing itself much dissatisfied with the general mode of stating the evidence which had previously been practised in these cases. Thus although the magistrate was the sole judge of the weight of evidence given before him, where he had the power of convicting, and the court would not examine whether or not he had drawn a right conclusion from the evidence, yet if no evidence appeared on the conviction to support a material part of the information the court would quash the conviction.¹⁵⁵

It was stated in *R. v. Rotherham Inhabitants*¹⁵⁶ that there appeared to be no case in which anything other than the record could be brought up upon the ground of error of law, except where a case had been stated, and another case of the same year¹⁵⁷ decided that if quarter sessions had heard an appeal, and not granted a further case stated, certiorari would lie to remove only the order of sessions and the original order of the justices, and not the examinations on which the latter was grounded, nor the notice and grounds

¹⁵² *R. v. Eaton*, 2 T.R. 285 (the case appears to be identical with the one of the same name reported in 2 T.R. 89).

¹⁵³ (1776), 16 Geo. III, c. 30.

¹⁵⁴ *Supra*, footnote 26, at p. 222; *R. v. March* (1824), 4 D. & R. 260; *R. v. Middleton in Teesdale Inhabitants*, *supra*, footnote 30: parties interested in an order have a right to call upon the justices to make everything which gives them jurisdiction appear on the examinations.

¹⁵⁵ *R. v. Smith* (1800), 8 T.R. 588; *Anonymous* (1815), 1 Chit. 34; "the conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The court will not assume that the justice has done his duty unless he tells us so by his own acts": *R. v. Warnford* (1825), 5 D. & R. 489, at p. 490, per Abbot C.J. (too much must not be implied from this statement, for the learned Chief Justice can hardly have meant that the magistrate was no longer the sole judge of the weight of evidence given before him). If the record when returned was incomplete or defective the King's Bench had the discretion, instead of quashing it, to order it to be completed: *Williams v. Lord Bagot* (1824), 4 D. & R. 315.

¹⁵⁶ (1842), 12 L.J.M.C. 17 (this case was an exception in which the writ was considered as having issued improvidently).

¹⁵⁷ *R. v. West Riding of Yorkshire JJ.* (1842), 12 L.J.M.C. 15.

of appeal, for they formed no part of the record of the determination of the sessions. Finally, as has been mentioned above, the Summary Jurisdiction Act, 1848, prescribed a standard form of conviction omitting the mention of reasoning or evidence, so that the record became a plain recital of the actual conviction. In the very important case of *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* in 1952,¹⁵⁸ the Attorney General argued that error of law on the face of the record as a ground for certiorari became obsolete after this Act, but this argument was not sustained by the court.¹⁵⁹ In fact, ways of avoiding the strict provisions of the Act itself have sometimes been employed, and in particular affidavits have occasionally been used by consent of both parties to supplement the record.¹⁶⁰

Error of law on the face

*R. v. Middlesex Quarter Sessions, ex p. D.P.P.*¹⁶¹ exemplifies the distinction between what is and what is not an error of law on the face of the record. The defendant at quarter sessions had pleaded not guilty to a count in an indictment which alleged that he had driven a motor car while under the influence of alcohol, and the chairman, in the presence of the persons waiting in the box to be sworn, told the prosecuting counsel that he had read the depositions very carefully and did not think that any jury would convict. Prosecuting counsel, however, submitted that there was evidence to go to the jury, and so the chairman ordered the jury to be sworn, adding ominously that he would in any case give them his view of the matter. After prosecuting counsel had opened the case the chairman continued to make certain remarks of a similar nature, to the effect that it would be a waste of time for them to hear any evidence, since the defendant ought to be acquitted. Before any evidence was actually called he asked the jury whether they wished to hear any such evidence, and the foreman replied in the negative, a verdict of "not guilty by direction" being

¹⁵⁸ *Supra*, footnote 72, discussed later. Denning L.J., at p. 346 of the report, gives an illuminating account of the history with which we have just dealt.

¹⁵⁹ See also, more recently, *R. v. National Insurance Commissioner, ex p. Timmis*, [1955] 1 Q.B. 139.

¹⁶⁰ *R. v. Essex Inhabitants* (1792), 4 T.R. 591 (probably the first case in which both parties agreed to go to the King's Bench although there was no actual error on the record); *R. v. Tower Hamlet Sewers Commissioners* (1843), 5 Q.B. 357; *R. v. West Riding of Yorkshire JJ., ex p. Broadbent*, [1910] 2 K.B. 192; *General Medical Council v. Spackman, supra*, footnote 78.

¹⁶¹ [1952] 2 Q.B. 758, noted by Mr. D. M. Gordon, Q.C., in (1953), 69 L.Q.Rev. 175.

entered. The Director of Public Prosecutions applied for an order of certiorari to bring up and quash the acquittal, and also for an order of mandamus to direct the sessions to try the defendant according to law. But it was held that certiorari was inapplicable as a remedy in this case, because there was no actual error of law on the face of the record. The defendant had been properly arraigned and the jury sworn to try him, and the jury had returned a valid verdict, even though it may have been arrived at improperly. The motion for a mandamus was also dismissed, because there had in fact been a hearing and determination. The only possible way in which certiorari might have been obtained was on the ground of a breach of natural justice, but Lord Goddard C.J.¹⁶² said that there never had been a case in which an acquittal, as opposed to a conviction, by a court of summary jurisdiction had been quashed by means of a certiorari, and, with the agreement of the other members of the five-strong Divisional Court (Hilbery, Slade, Devlin and Parker JJ.) he affirmed that this was not going to be the first such case.

Error of fact

It is not possible to go beyond the face of the record and review facts and evidence on a certiorari.¹⁶³ In very early times it might have been possible,¹⁶⁴ and this also appears to be the case in the United States of America at the present day,¹⁶⁵ but it is not so in England or Canada.¹⁶⁶ Evidence can only be considered in certiorari proceedings if it is stated on the face of the record. The misconstruction of a statute, or a bad decision on the evidence, is

¹⁶² *Ibid.*, at p. 769. He quoted with approval the judgment of Scrutton J. in *R. v. Simpson*, [1914] 1 K.B. 66, at p. 75, which is to the same effect. *R. v. Wandsworth JJ.*, *ex p. Read*, *supra*, footnote 78, was quoted by the Attorney General against the view eventually taken by Lord Goddard, but, as the Lord Chief Justice points out, certiorari went to bring up the record of a court of summary jurisdiction in that case for a denial of natural justice *because there had been a conviction*.

¹⁶³ Affirmatively decided in *R. v. Sheffield Area Rent Tribunal*, *ex p. Purshouse* (1957), 121 J.P. 553.

¹⁶⁴ *Long's Case* (1595), 1 Cro. 489.

¹⁶⁵ See Schwartz, *op. cit.*, *supra*, footnote 85. He quotes *Jackson v. People* (1860), 9 Mich. 111, at pp. 118-119: the court, on a certiorari, will review questions of law, and will go into the evidence to the extent of deciding whether the finding was a legitimate inference from the facts proved, or whether there was an evidentiary basis for the conclusions of the inferior tribunal. The office of the writ is, therefore, to review *all* questions of regularity in the proceedings, which is a far more extreme view than has ever been taken in English or Canadian law.

¹⁶⁶ *Lovesy v. Stallard*, *supra*, footnote 50; *R. v. Galway JJ.*, [1906] 2 I.R. 446 (Irish case); *R. v. Mahoney*, *supra*, footnote 23; *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 12; *R. v. Lincolnshire JJ.*, *ex p. Brett*, *supra*, footnote 58.

no ground for a certiorari.¹⁶⁷ Mr. de Smith, in his article on "The Limits of Judicial Review: Statutory Discretion and the Doctrine of Ultra Vires",¹⁶⁸ has asserted that "whilst certiorari is the appropriate remedy where 'judicial' powers have been exceeded or abused, it will not lie to enable the final determination of the authority entrusted with those powers to be reviewed on its merits, either for insufficiency of evidence or lack of evidence." And Denning L.J.,¹⁶⁹ after examining the history of the subject, decided that evidence can, and always could, only be reviewed if it appeared on the face of the record.

Curious history of the rule in England

Mr. de Smith has suggested¹⁷⁰ that the history of this ground for the remedy has been in the nature of a pendulum. At the turn of the eighteenth century error on the face of a proceeding was a well-established ground, and it continued as such for over a century.¹⁷¹ The court would review the law as exhibited on the face of the proceedings if it appeared bad (though not if the law appeared good on the face¹⁷²), but it would not go beyond the face for the purposes of review; for instance it would not delve into matters of fact beyond the face of the record in order to inquire how individual votes were given on the bench.¹⁷³ As Probyn J. once said,¹⁷⁴ "this court can take no notice of anything but the order. I remember a case where the original examinations were returned with the order; but the court said they could take notice of nothing but what was contained in the body of the order." In *R. v. Cottenham Inhabitants*¹⁷⁵ an order of quarter sessions was

¹⁶⁷ *R. v. Minister of Health*, [1939] 1 K.B. 232.

¹⁶⁸ (1948), 11 Mod.L.Rev. 306, at p. 307.

¹⁶⁹ In *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, *supra*, footnote 72; *cf. R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Philippe, supra*, footnote 45.

¹⁷⁰ *Supra*, footnote 138.

¹⁷¹ *Ruyslip v. Hendon, supra*, footnote 150; *Grenville v. College of Physicians* (1700), 12 Mod. 386; *R. v. Bass* (1793), 5 T.R. 251; *R. v. Anonymous, supra*, footnote 129; *cf. Kent v. Elstob* (1802), 3 East 18; *Scougull v. Campbell* (1819), 2 Chit. 283 (both the last two cases were arbitration cases, but a rule for a revision of a decision similar to that in certiorari was held to obtain).

¹⁷² *Brittain v. Kinnaird* (1819), 1 B. & B. 432 (a conviction was good on its face); *Anonymous* (1830), 1 B. & A. 382 (no excess of jurisdiction appeared on the face of the conviction); *R. v. St. James, Westminster, supra*, footnote 50.

¹⁷³ *R. v. Leicestershire JJ.* (1813), 1 M. & S. 442; *R. v. Monmouthshire JJ.* (1828), 8 B. & C. 137.

¹⁷⁴ In *R. v. Oulton Inhabitants* (1735), Burr. S.C. 64 (quoted in *R. v. Woolpit Inhabitants* (1835), 4 A. & E. 205); see too *R. v. Abergele Inhabitants* (1838), 8 A. & E. 394; *Christie v. Unwin* (1840), 11 A. & E. 373.

¹⁷⁵ (1834), 2 A. & E. 250.

regular on its face, and so the only question that might come before the court was that of jurisdiction. "It is a wholesome rule that this court is not to entertain a jurisdiction over extraneous matters coming before the sessions, unless they be specifically stated. If it were otherwise, if we could go into the merits without a special case, there would be, in almost every instance, a discussion upon affidavits."¹⁷⁶ Objections as to matters not on the face of an order may be noticed only where they touch on the question of jurisdiction, as it was decided in 1838,¹⁷⁷ even though in actual fact the magistrates had acted "absurdly" in admitting matters which were not evidence at all.

The state of the law was summed up by the important case of *R. v. Bolton* in 1841,¹⁷⁸ for there it was asserted that the court would not inquire into the facts or reasonableness of a decision below, on affidavit, providing the justices had jurisdiction and the order was good on its face. Thus it is necessarily implied that the court will review a case when the order of a court below is bad on its face. This is a fair summary of the position at that time, and in fact the general law remained unchanged in the succeeding years, although, as Mr. de Smith says,¹⁷⁹ a number of statutes creating summary offences took away the right to a certiorari, and although, as has been pointed out above, the Summary Jurisdiction Act, 1848, converted the form of a conviction to no more than a bare statement from which it was almost impossible to deduce any error of law. Where an order or conviction was good on its face, and the court below had jurisdiction, the Queen's Bench could not go beyond the face of the record¹⁸⁰ to consider the evidence or any other such matter,¹⁸¹ unless a "case" had been granted by sessions.¹⁸² But where the face of the record betrayed the fact that the body below had not sufficient jurisdiction a certiorari

¹⁷⁶ *Ibid.*, at p. 255, per Taunton J.

¹⁷⁷ *R. v. Cheshire JJ.* (1838), 8 A. & E. 398.

¹⁷⁸ *Supra*, footnote 62.

¹⁷⁹ *Supra*, footnote 138; and see his article *Statutory Restriction of Judicial Review* (1955), 18 Mod. L. Rev. 575; also Yardley, *op. cit.*, *supra*, footnote 36.

¹⁸⁰ *R. v. Buckinghamshire JJ.* (1843), 3 Q.B. 800: the court would not direct an order of removal of a pauper, with the examinations on which it was founded and the order of sessions, to be brought up by a certiorari, on the ground that the examinations contained no legal evidence in support of the order of removal. The parish had appealed to sessions, but not raised the objection there; *R. v. Kesteven JJ.* (1844), 3 Q.B. 810.

¹⁸¹ *R. v. Altermum Inhabitants* (1841), 10 A. & E. 699 (even where it was alleged that the evidence was inadmissible); *R. v. Buckinghamshire JJ.*, *ibid.*; *Lovesy v. Stallard*, *supra*, footnote 50. Contrast the American rule: *Jackson v. People*, *supra*, footnote 165.

¹⁸² *R. v. Rotherham Inhabitants*, *supra*, footnote 156; *R. v. Sutton Coldfield Overseers* (1874), L.R. 9 Q.B. 153.

would issue to bring up the proceedings to be quashed.¹⁸³ In one case,¹⁸⁴ the record showed that the notice of certain proceedings had not been long enough. Actually the paper in which the notice had appeared was dated a day late, and, if evidence had been allowed to prove that the paper had been circulated the day before its date, then a valid jurisdiction would have been established; but the court refused to allow such affidavit evidence to be given, for they could not go beyond the face of the record, which was bad, and so the proceedings were quashed. This may have been carrying the principle too far. A bad adjudication, shown as such on the face of the record, would always be quashed after the issue of a certiorari,¹⁸⁵ and one which was not only in error on a point of law, but also showed an excess of jurisdiction, was doubly avoided.¹⁸⁶

The Walsall case

Any remaining doubt as to whether the Summary Jurisdiction Act, 1848, had really disposed of error of law on the face of the record as a ground for the issue of the writ should surely have been dispelled by the case of *Walsall Overseers v. L.N.W.R.* in 1878 in the House of Lords.¹⁸⁷ The overseers of the poor of Walsall had made a rate and assessed the property of the respondent railway company within the borough and "foreign" (as it was and is still called) of Walsall. On appeal to the borough quarter sessions an amendment of the rate was ordered, subject to a case stated. But a rule was issued calling upon the company to show cause why the order of sessions should not be quashed, on the ground that it was bad in law. In the Queen's Bench Division and the Court of Appeal the order of sessions was confirmed: the four members of the Court of Appeal were evenly divided, and so, according to the practice of that court, the appeal was dismissed, and it was held that the court had no jurisdiction to hear such a case. The House of Lords, however, reversed these decisions, holding that the writ would always issue on the ground of error of law on the face of the record. Earl Cairns L.C. (the other members of the House were Lords Penzance and O'Hagan) even went so far as to urge courts of quarter sessions to state reasons for their

¹⁸³ *Re Dent Tithe Commutation*, *supra*, footnote 72.

¹⁸⁴ *R. v. Aberdare Canal Co.*, *supra*, footnote 114.

¹⁸⁵ *R. v. Kay* (1873), L.R. 8 Q.B. 324; *R. v. Poor Law Commissioners* (1854), 1 Jur.N.S. 251.

¹⁸⁶ *Birnie v. Marshall*, *supra*, footnote 63; *Penwarden v. Palmer* (1894), 19 L.T. 362.

¹⁸⁷ 4 App. Cas. 30.

decisions, and so render them easily susceptible of the supervision of the Queen's Bench Division by means of a *certiorari*.¹⁸⁸

All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should in some way state upon the face of the order the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed.

Following this decision, a conviction under section 7 of the Conspiracy and Protection of Property Act, 1875, failed to state the actual acts which the informant was prevented from legally performing, and was quashed accordingly.¹⁸⁹ And even though there may appear to have been occasions when courts have distinguished it¹⁹⁰ there has not been any judgment directly contrary to the decision in the *Walsall* case: nor could there be, since the decision was that of the House of Lords. In a roundabout way the case has been supported by later ones holding that the court cannot go beyond the face of the record to review evidence,¹⁹¹ and the Judicial Committee of the Privy Council in the Canadian case of *R. v. Nat Bell Liquors Ltd.* in 1922¹⁹² follows it expressly. It was held that a conviction by a magistrate for a non-indictable offence could not be questioned by means of a *certiorari* simply because the depositions showed that there was no evidence to support the conviction, or that the magistrate had misdirected himself in considering the evidence; the absence of evidence did not affect the jurisdiction of the magistrate to try the charge. The provisions of

¹⁸⁸ *Ibid.*, at p. 40. This passage might almost have come from the Report of the Committee on Administrative Tribunals and Enquiries, *supra*, footnote 1.

¹⁸⁹ *R. v. McKenzie*, [1892] 2 Q.B. 519; see also *R. v. Wood, ex p. Farwell* (1918), 87 L.J.K.B. 913.

¹⁹⁰ *R. v. City of London Income Tax Commissioners* (1904), 91 L.T. 94: *certiorari* did not issue because the error was only a small one; *R. v. Tyrone JJ.* (1917), 2 I.R. 96 (Irish case): the justices' order was bad in form only, and the court, in its discretion, declined to quash it. *Cf. R. v. Aberdare Canal Co.*, *supra*, footnote 114.

¹⁹¹ *R. v. Galway JJ.*, *supra*, footnote 166; *R. v. Mahony*, *supra*, footnote 23 (both Irish cases); *R. v. Cheshire JJ., ex p. Heaven* (1913), 108 L.T. 374.

¹⁹² *Supra*, footnote 12, also discussed *supra*.

the Criminal Code, the Liquor Act (Alberta), sections 62 and 63, and the Crown Practice Rules (Alberta), whereby the depositions were to be taken down and placed with the record, and to be returned together with the conviction when a certiorari was applied for, did not prevent the application in Canada of the rule above stated. It was also held that evidence below could only be considered in certiorari proceedings if stated on the face of the record, for only law stated on the face could be reviewed. It is true that Lord Sumner said in this case that the result of the Summary Jurisdiction Act, 1848, had been that "the face of the record 'spoke' no longer; it was the inscrutable face of a sphinx",¹⁹³ but he agreed that the general law as to the ground for the writ of certiorari remained unchanged.

Other Canadian cases show that the validity of this ground for certiorari has never been doubted in Canadian courts. It is thus all the more surprising that any doubt should have existed in England, as will be explained below. In *Children's Aid Society of the Catholic Archdiocese of Vancouver v. Salmon Arm* in 1941,¹⁹⁴ certiorari lay to quash an order of a juvenile court judge under the Infants Act, where there was a complete absence on the record of material evidence giving rise to the judgment. Such a total absence of evidence on the record amounted to an error of law on the face, and therefore the court was not merely attempting to weigh the validity or force of evidence below. In the event the British Columbia Court of Appeal judicially noted the decision in *R. v. Nat Bell Liquors Ltd.*¹⁹⁵ Again, in an earlier case,¹⁹⁶ the Alberta Supreme Court expressly followed the *Nat Bell Liquors* case. Although Professor G. Sawyer has alleged¹⁹⁷ that certiorari is being used too widely in Canada to control Labour Boards, particularly on the ground of error of law on the face of the record, it is submitted that in fact Canadian courts have been more consistent in their understanding and application of this ground for the writ.

The Racecourse Betting Control Board case

The only definite case which would appear inconsistent with the *Walsall* decision is the English case of *Racecourse Betting Control Board v. Secretary of State for Air*.¹⁹⁸ This case concerned

¹⁹³ *Ibid.*, at p. 159, already quoted earlier in this article.

¹⁹⁴ *Supra*, footnote 142; see also *John East Iron Works Ltd. v. Labour Relations Board of Saskatchewan*, *supra*, footnote 142 (Sask.C.A.).

¹⁹⁵ *Supra*, footnote 12.

¹⁹⁶ *College of Physicians and Surgeons v. Mahood*, *supra*, footnote 142.

¹⁹⁷ *Supra*, footnote 34, at p. 25. He cites particularly *Toronto Newspaper Guild v. Globe Printing Co.*, which is also discussed *supra*, footnote 34.

¹⁹⁸ [1944] 1 Ch. 144.

an arbitration award which the High Court was debarred by a particular statute from setting aside by motion for error of law on its face. But surely this case should never have been seriously considered as an authority in questions concerning certiorari, because it has only a specialised application to motions to set aside decisions in arbitration cases, and such motions are quite separate from applications for certiorari.¹⁹⁹ Even the case itself was contrary to two previous decisions in arbitration matters.²⁰⁰

Perhaps not quite so much importance was ever attached to the *Racecourse Betting Control Board* case as has at times been thought, for, between 1944 and 1952, cases were still reported of the old-established ground for a certiorari being upheld.²⁰¹ It is hard to believe, with all the wealth of case-law to be referred to, that this ground for the remedy should ever have been thought to have died out, yet three prominently confusing landmarks were the parliamentary policy of excluding the right to a certiorari when creating new summary offences, the Summary Jurisdiction Act, 1848, and the *Racecourse Betting Control Board* case. So it was that in the more recent case of *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*²⁰² the ground was argued as being obsolete.

The Northumberland case

The applicant was awarded compensation for loss of employment as clerk to a joint hospital board by the Gosforth Urban District Council. He appealed, under the procedure laid down in such cases by statute, to the Northumberland Compensation Appeal Tribunal on the ground that the compensating authority had failed to take into account his service with the District Council,

¹⁹⁹ See (1698), 9 & 10 Will. III, c. 15; *Kent v. Elstob* (1802), 2 East 18; *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189; *Hogge v. Burgess* (1858), 3 H. & N. 293. In *R. v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians*, [1953] 1 Q.B. 704, an indenture of apprenticeship had provided that any dispute between the parties to it must be submitted for arbitration by the private body named in the indenture, and the Divisional Court held that neither certiorari nor prohibition would go to that body.

²⁰⁰ *Re Jones and Carter's Arbitration*, [1922] 2 Ch. 599; *Horrell v. Lord St. John of Bletso*, [1928] 2 K.B. 616.

²⁰¹ *R. v. Paddington Furnished Houses Rent Tribunal, ex p. Kendal Hotels Ltd.*, *supra*, footnote 58 (in which there are dicta to the effect that certiorari only lies if jurisdiction is questioned or if the order was bad on its face); *R. v. Paddington and St. Marylebone Rent Tribunal, ex p. Bell London and Provincial Properties Ltd.*, *supra*, footnote 107 (in which references to a tribunal were bad *ab initio*); *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Philippe*, *supra*, footnote 45; see also the Canadian cases cited, *supra*, footnotes 192-197.

²⁰² *Supra*, footnote 72.

as required by the National Health Service (Transfer of Officers and Compensation) Regulations, 1948. The tribunal upheld the authority's decision, though at the time of the later application for a certiorari to quash their decision they were prepared to agree that they had been guilty of an error of law in so doing. Fortunately for Mr. Shaw, the reasons for the decision of the tribunal were embodied in the record of the decision, and he therefore applied for a certiorari on the ground of an error of law on the face of the record. It was suggested that, although the tribunal admitted being guilty of such an error of law, yet there was no remedy for the mistake. But it was held unanimously, both by the Divisional Court (consisting of Lord Goddard C.J.,²⁰³ Hilbery and Parker J.J.) and by the Court of Appeal (Singleton, Denning and Morris L.J.J.), that an order of certiorari would lie, and the tribunal's decision was quashed. Denning L.J. reviewed the history of this ground shortly, and Singleton L.J. pointed out that, in the *Racecourse Betting Control Board* case, neither the *Walsall* case nor the *Nat Bell Liquors* case was quoted to the court. The House of Lords in the *Walsall* case and the Privy Council in the *Nat Bell Liquors* case were therefore expressly followed, and the Court of Appeal in the *Racecourse Betting Control Board* case was expressly not followed.

The Gilmore case

*R. v. Medical Appeal Tribunal, ex p. Gilmore*²⁰⁴ possibly takes this development a little further. A medical appeal tribunal had to assess the degree of disablement when a man, whose right eye had been severely injured and whose left eye had been partly injured in 1936, suffered a second injury in 1955 by which the condition of his left eye was so severely aggravated that he became almost totally blind. The tribunal assessed the aggravation at only twenty per cent, but regulations made under the parent Act required that in such a case the blindness in both eyes was to be deemed to be due to that accident. Thus the tribunal had misinterpreted the regulations, and was guilty of an error of law. The tribunal's award, however, did not set out fully the material facts of the applicant's injury, although it incorporated an extract from a specialist's report in which the facts were fully stated. A complicating factor was that section 36 (3) of the parent Act, the National

²⁰³ The comprehensive judgment of Lord Goddard, which was delivered without taking time for consideration, was approved practically in its entirety by the Court of Appeal.

²⁰⁴ *Supra*, footnote 37; and see a note by S. A. de Smith, (1957), 20 Mod.L.Rev. 394.

Insurance Industrial Injuries) Act, 1946, provided that "... any decision of a claim or question (by the tribunal) ... shall be final", and a Divisional Court of the Queen's Bench Division refused the applicant's motion out of time for an order of certiorari to quash the decision. But, on appeal, the Court of Appeal granted the order for two reasons: (i) certiorari was never to be taken away by any statute except by the most clear and explicit words; the word "final" was not enough, since it meant only "without appeal";²⁰⁵ and (ii) the effect of quoting an extract from a specialist's report in the award was to make the whole report a part of the record, and there was therefore an error of law apparent on the face of the record. Where the decision seems to be so indicative of the growth of this ground for certiorari is exemplified by an extract from the judgment of Denning L.J.:²⁰⁶

It seems to me that the tribunal cannot, by failing to find the material facts, defeat an application for certiorari. The court has always had power to order an inferior tribunal to complete the record.

Both Romer and Parker L.JJ. were in full agreement with this line of reasoning. Thus, if any part of the record of a tribunal's decision contains an extract from some larger document, or perhaps a reference to any matter not actually included in the record itself, then the record is deemed to include the whole of such document or matter on its face. *Ipso facto* the task of any applicant alleging an error of law upon the face of such record is rendered easier.²⁰⁷

²⁰⁵ I disagree entirely with the comment made upon this decision by Mr. J. A. G. Griffith in [1957] Public Law, at pp. 89-92. (And see also Griffith, [1958] Public Law, at pp. 319-322.) Mr. Griffith considers it highly undesirable that the courts should have the power to review decisions of specialist tribunals, particularly where Parliament has laid down that such decisions should be "final". I, on the other hand, am inclined to view this case as a great step in the right direction. So often in the past few years the courts have been over-eager to hold they have no power to upset decisions of administrative or quasi-administrative bodies, without realizing the full scope of the prerogative orders in England. Mr. Griffith does not appear to be much worried that the tribunal had made a clearly *wrong* award, and he is thus adopting an argument which was put forward by the Attorney General before the Court of Appeal in the *Northumberland* case, *supra*, footnote 72 and which was utterly rejected by that court. The deduction of the Franks Committee, para. 107 of the Report, mentioned *subter*, and its recommendation in para. 117, *supra*, footnote 80, would appear to be decisive against Mr. Griffith's contention. See also Yardley, *op. cit.*, *supra*, footnote 36.

²⁰⁶ *Supra*, footnote 37, at p. 582. It should however, be noted that this particular tribunal was bound by the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948, regulation 13, to incorporate the reasons for its decision in the actual record.

²⁰⁷ There is no need for affidavit evidence to be adduced, for the whole of the objection is already apparent: *R. v. Anonymous*, *supra*, footnote 129; *R. v. Bolton*, *supra*, footnote 62; *R. v. Northumberland Compensation Appeal*

The Franks Committee Report.

The Report of the Committee on Administrative Tribunals and Enquiries²⁰⁸ does not express quite the same satisfaction with this ground for certiorari as it does with that of defective jurisdiction. The main reason for this has been the difficulty found in the past in detecting errors of law actually on the face of the record, rather than merely behind it. Accordingly the Committee recommends that there should be an appeal structure within the tribunals themselves, so that there should be a general right of appeal from a tribunal of first instance to a second or appellate tribunal (and not to a Minister).²⁰⁹ Thereafter there should be a right of appeal on law only to the Divisional Court in England²¹⁰ or to the Inner House of the Court of Session in Scotland,²¹¹ with, in any case, one further appeal higher by leave.²¹² If and when the whole of this recommendation receives statutory force it will result in the effectual removal of one of the grounds for certiorari, at least in cases concerning tribunals rather than inferior courts, and the substitution of a system of direct appeals. On the other hand, the recommendation is coupled with another that tribunals should be required in all cases to give reasons for their decisions,²¹³

Tribunal, ex p. Shaw, supra, footnote 72, at p. 352, per Denning L.J. But affidavit evidence has been used by consent of both parties to supplement the record: Denning L.J.'s statement in *R. v. Medical Appeal Tribunal, ex p. Gilmore, supra*, footnote 37, at p. 582; *R. v. Essex Inhabitants, supra*, footnote 160; *R. v. Tower Hamlet Sewers Commissioners, supra*, footnote 160. Denning L.J. has also said that such evidence is admissible and usually necessary to show want of jurisdiction, bias or fraud, or to show that the record is incomplete: *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw, ibid.*, at p. 352.

²⁰⁸ *Supra*, footnote 1; and see E. C. S. Wade, *Administration under the Law* (1957), 73 L.Q.Rev. 470; W. A. Robson, *Administrative Justice and Injustice: A Commentary on the Franks Report*, [1958] Public Law 12.

²⁰⁹ *Ibid.*, para. 105. The Committee did not, however, think it necessary to set up an appellate tribunal when the tribunal of first instance was exceptionally strong and well qualified, such as the Pensions Appeal Tribunal or the General Claims Tribunal: para. 106. The Committee has also rejected the suggestion that a general administrative appeal tribunal or a new Administrative Division of the High Court should be set up: paras. 120-126 and 407. The present appeals to the High Court in cases concerning land, on the ground that an order is *ultra vires* or that the prescribed procedure has not been followed, should be retained, to the exclusion of the remedy by way of certiorari: Ch. 25.

²¹⁰ Certain exceptions to this principle are considered reasonable in para. 115.

²¹¹ Appeals from Valuation Committees lie at present to the Lands Valuation Appeal Court, and the Committee does not propose that this practice should be changed: para. 119.

²¹² Paras. 116 and 119.

²¹³ Ch. 9. As far as administrative procedure involving an inquiry or hearing is concerned, the complete text of an inspector's report should accompany the Minister's letter of decision (Ch. 23), and the Minister's letter "should set out in full his findings and inferences of fact and the reasons for the decision" (Ch. 24).

and this would equally facilitate applications for certiorari on the existing third ground, namely error of law on the face.

As the law stands at present, therefore, error of law on the face is a good ground for certiorari. It has always been certain in Canada,²¹⁴ and the position in English law has grown steadily closer to that in Canada, as the *Gilmore* case indicates.²¹⁵ It is quite likely that in England a new general remedy of direct appeal will be added to the present system of review, but nevertheless the Franks Committee has been at pains to point out that it does not favour the abolition of the prerogative orders,²¹⁶ nor does it recommend any statutory pruning of the grounds for certiorari. It considers that "a challenge to the jurisdiction of a tribunal should continue to be dealt with by motion for an order of certiorari";²¹⁷ and that "whatever may be decided as to the scope and method of appeals to the courts from tribunals we are convinced that the remedies by way of order of certiorari, prohibition and mandamus should continue. They are clearly necessary in cases where questions of jurisdiction are involved and in cases where no provision is made for appeals on points of law. Accordingly no statute should contain words purporting to oust these remedies"²¹⁸

²¹⁴ See *supra*, footnotes 192-197.

²¹⁵ *Supra*; and see e.g. *R. v. Darlington Corporation Juvenile Court, ex p. West Hartlepool Corporation*, [1957] 1 W.L.R. 336; *R. v. Agricultural Land Tribunal for the Eastern Province, ex p. Grant*, [1956] 1 W.L.R. 1240; and *R. v. Agricultural Land Tribunal for the Wales and Monmouth Area, ex p. Davies*, [1953] 1 All E.R. 1182. Cf. *R. v. Patents Appeal Tribunal, ex p. Baldwin and Francis, Ltd.*, [1958] 2 W.L.R. 1010, noted by me in (1958), 74 L.Q. Rev. 490 (where certiorari was refused where no manifest error of law appeared on the face of a decision of the Patents Appeal Tribunal); and *Davies v. Price*, [1958] 1 W.L.R. 434 (*Agricultural Land Tribunal*); and *R. v. Medical Appeal Tribunal, ex p. Hubble*, [1958] 3 W.L.R. 24.

The *Gilmore* case itself has recently been followed on the point that a finger is one of a number of complementary organs, and a certiorari issued because of an error of law on the face by the tribunal similar to that in the former case: *R. v. Medical Appeal Tribunal, ex p. Burpitt*, [1957] 2 Q.B. 548. See also *R. v. Medical Appeal Tribunal, ex p. Griffiths*, [1958] 1 W.L.R. 517 (legs are also "paired organs" for this purpose).

²¹⁶ Para. 117.

²¹⁷ Para. 114.

²¹⁸ Para. 117.

At the time of writing the Tribunals and Inquiries Act, 1958, has just received the Royal Assent. This is a short measure intended to carry into effect some of the recommendations of the Franks Committee which require legislative change, and which have been accepted by the Government, and may be regarded as the precursor of other statutory enactments. Three sections are of particular importance for the purposes of this article. S. 11 provides that any statutory provision that any order or determination shall not be called into question in any court, and any statutory provision which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus. (This is not welcomed by Mr. J. A. G. Griffiths, [1958] Public Law, at p. 111; and

II. *The Grounds for Prohibition*

The prerogative writ of prohibition has for long been the sister of certiorari. Whilst certiorari is a remedy for something that has taken place in the past, prohibition is the means whereby wrongs are prevented from occurring in the future. This is not the place to examine the meaning and nature of prohibition or certiorari, or the interrelation of these two ancient remedies,²¹⁹ but for present purposes it suffices to quote a sentence from the judgment of Atkin L.J. in *R. v. Electricity Commissioners*:²²⁰ "I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage." This is one of the cardinal points of a decision which has been treated by the courts throughout the Commonwealth as basic, even though it is merely a decision of the English Court of Appeal. Since it is of the essence of prohibition that it should issue before the record of a proceeding below has been completed it is highly unlikely that an applicant can successfully allege an error of law on the face of such record. Similarly it is not easy to establish a breach of natural justice. Although it will be submitted in the ensuing pages that the grounds for certiorari and prohibition are logically identical, it will be found that the only common and generally recognised ground for prohibition, both in England and in Canada, is that of defective jurisdiction.²²¹ It is proposed to examine the three possible grounds in the same order as in the foregoing treatment of certiorari.

see *supra*, footnote 205). S. 9 provides for appeals on points of law from decisions of certain tribunals to the High Court in England or the Court of Session in Scotland; and, by s. 12, Ministers and tribunals must give reasons for decisions if so requested. Certiorari on the ground of error of law on the face of the record will remain the appropriate remedy where the national insurance, industrial injuries or national assistance tribunals are concerned. No provision is made in the Act for appeals from first instance tribunals to appellate tribunals.

The Ministry of Housing and Local Government recently issued Circular No. 9/58, dealing with certain accepted changes in administrative procedures involving an inquiry which do not require legislative enactment. In particular the Minister will in future give reasons for his decisions after an inquiry has been held concerning compulsory purchase (expropriation) or clearance orders. For this type of inquiry, therefore, the Franks Committee Report recommendation in Ch. 9, *supra*, is being implemented. Similar circulars have been issued by the Scottish Home Department (Circular No. 9231) and the Department of Health for Scotland (D.H.S. Circular 50/1958).

²¹⁹ For a full account, see Yardley, *op. cit.*, *supra*, footnote 8.

²²⁰ *Supra*, footnote 9, at p. 206.

²²¹ Comyns, Digest (5th ed.), "Prohibition" (F.1); Allen, Law and Orders (2nd ed., 1956), pp. 253-255; see also *Ackerley v. Parkinson* (1815), 3 M. & S. 411, at p. 428, per Bayley J.

1) DEFECT OF JURISDICTION

a) *Want of jurisdiction*

Want of jurisdiction was established early as a ground for the issue of prohibition,²²² and the continuity of cases has remained both in England²²³ and Canada.²²⁴ Where a matter about to be considered by an ecclesiastical court was one which could not properly be brought there, a prohibition issued.²²⁵ Again, the remedy would be available where an action in an English county court, which was outside its jurisdiction, was disguised as one within the jurisdiction.²²⁶ In an interesting case of 1851²²⁷ the writ issued to prohibit a suit against a foreign sovereign in the Mayor's Court of London, because the sovereign as a defendant was privileged from litigation.²²⁸ But in a later case the Court of Admiralty was held to be the proper court to decide whether or not a foreign

²²² *E.g. Buggin v. Bennett* (1767), 4 Burr. 2034 (in which are cited also the two unreported cases of 1738, *Hynes v. Thompson and Driver v. Colgate*); *Darby v. Cosens* (1787), 1 T.R. 552.

²²³ *Duke of Devonshire v. Foott* (1871), 5 Ir.R.Eq. 314 (Irish case); *Lee v. Cohen* (1894), 71 L.T. 824; *R. v. Minister of Health, ex p. Davis*, [1929] 1 K.B. 619; *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal, ex p. Ascot Lodge Ltd.*, [1947] K.B. 973; *R. v. National Arbitration Tribunal, ex p. South Shields Corporation*, [1952] 1 K.B. 46; *R. v. L.C.C.*, [1893] 2 Q.B. 454; *R. v. Tottenham and District Rent Tribunal, ex p. Northfield (Highgate) Ltd.*, [1957] 1 Q.B. 103.

²²⁴ *E.g. Federowich v. Federowich*, [1929] 4 D.L.R. 969 (Man.K.B.); *Hannon v. Eisler*, *supra*, footnote 9; *Dionne v. Municipal Court of the City of Montreal*, [1956] 3 D.L.R. 727 (Que.S.C.), where a prohibition was granted to quash a conviction under an invalid by-law, thus preventing execution.

²²⁵ *Byerley v. Windus* (1826), 5 B. & C. 1; *cf. Ricketts v. Bodenham* (1836), 4 A. & E. 433; *Chesterton v. Farlar* (1838), 7 A. & E. 713.

²²⁶ *Hunt v. North Staffs Rly. Co.* (1857), 2 H. & N. 451; followed in *Parsons v. Burgess*, [1927] W.N. 230; see also *Sergeant v. Dale* (1877), 2 Q.B.D. 558 (the inferior court had no jurisdiction, so the writ issued despite delay which did not amount to acquiescence).

²²⁷ *Wadsworth v. Queen of Spain; de Haber v. Queen of Portugal*, 17 Q.B. 171.

²²⁸ There has always been some doubt on the immunity from litigation of a foreign sovereign in the position of a defendant. This is not the place to examine the problem thoroughly, but see *Twycross v. Dreyfus* (1877), 5 Ch.D. 605, at p. 616; *The Parlement Belge* (1880), 5 P.D. 197; *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149; *Duff Development Co. v. Government of Kelantan*, [1924] A.C. 797. In *Sultan of Johore v. Abubakar Tunku Aris Bendahar*, [1952] A.C. 318, the Judicial Committee of the Privy Council, on an appeal from the Singapore Court of Appeal, considered that there has not been finally established in England (or in Singapore, where the rules applicable are the same) any absolute and universal rule that a foreign independent sovereign cannot be impleaded in the courts in any circumstances. But *cf. Rahimtoola v. Nizam of Hyderabad*, [1957] 3 W.L.R. 884 (H.L.). See also Hanbury, *The Position of the Foreign Sovereign before English Courts*, Current Legal Problems (1955), p. 1.

As a plaintiff the sovereign may always sue in England: *King of Spain v. Hullett* (1833), 7 Bligh.N.S. 359, at p. 393; *cf. Republic of Italy v. Hambro's Bank*, [1950] Ch. 314.

vessel enjoyed the immunity from English law of a foreign sovereign state, and so the writ would not issue, for the court in issuing a warrant for arrest of the ship was quite properly considering a difficult point of international law.²²⁹ In 1951, in the Supreme Court of Canada, prohibition was held to be the proper remedy available in Quebec for raising the question of the validity of a provincial law or a municipal by-law. A magistrate would thus be restrained by this means from proceeding with the matter.²³⁰

Jurisdictional fact

It has been noted in the discussion of certiorari, that although an inferior court or tribunal may give itself jurisdiction in a specific case by its own decision the subject is open to review in the superior court, and such must logically be the rule for prohibition also. It is true that Avory J. has said:²³¹

... it is an erroneous application of the formula to say that the tribunals 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.

But the question of jurisdiction is a question of law, and, though law depends ultimately on facts, yet a wrong application of law may be subject to review. It is impossible to conceive that a tribunal should have the power to decide whether or not it has jurisdiction in a case, without the existence of any check on its decision. Furthermore, in a case of 1889²³² prohibition issued where an inferior court had decided a wrong principle of law upon which its jurisdiction was based.

b) Excess of jurisdiction

Many cases of this ground for prohibition are reported.²³³ But no prohibition will be granted after judgment on this ground unless

²²⁹ *The Charkieh* (1873), L.R. 8 Q.B. 197.

²³⁰ *Major v. Beauport*, *supra*, footnote 59. It was also held that certiorari would be the proper remedy where the judgment had already been given below.

²³¹ *R. v. Bloomsbury Income Tax Commissioners*, [1915] 3 K.B. 768, at p. 789; see also *Cave v. Mountain* (1840), 1 Man. & G. 257; *R. v. Bolton*, *supra*, footnote 62, at p. 75; *Colonial Bank of Australasia v. Willan*, *supra*, footnote 62, at pp. 442-443; *R. v. Income Tax Special Purposes Commissioners*, *supra*, footnote 44, at p. 319, per Lord Esher M.R.

²³² *R. v. Bromley JJ.* (1889), 62 L.T. 114 (otherwise *R. v. Kent JJ.*, 24 Q.B.D. 181). Note, however, that in *Taylor v. Nicholls* (1876), 1 C.P.D. 242, the writ was held not to issue where the jurisdiction of the tribunal was merely doubtful.

²³³ *E.g. Re the Chancellor of Oxford University and Taylor* (1841), 1 Q.B. 952; *James v. S.W.Rly. Co.* (1872), L.R. 7 Exch. 287; *R. v. Lefroy* (1873), L.R. 8 Q.B. 134; *Howard v. Graves* (1885), 52 L.T. 858; *R. v.*

it is *clear* that there has been an excess of jurisdiction.²³⁴ One must remember that jurisdiction to decide a matter rightly also implies a jurisdiction to decide it wrongly; the actual decision may be wrong, but that is quite distinct from the jurisdiction upon which the decision is based.²³⁵ One practical result does indeed follow from the difference between want of jurisdiction and excess of jurisdiction as grounds for prohibition: if there is complete want of jurisdiction the remedy is available at once, whereas if there is only excess it may not be invoked unless and until the excess of jurisdiction occurs.²³⁶ The difference, however, is not one of principle; a similar principle is applied to two different kinds of situations. There are very many ways in which a jurisdiction may become defective, and they may occur at many different stages of an action. As Pollock B. once said:²³⁷

The judge ought to go on with the inquiry until he has ascertained that if he goes any further he will exceed his jurisdiction, and then he ought to stop, for, if he goes any further, he will render himself liable to a prohibition.

In recent years the most usual instances of prohibition issuing because of excess of jurisdiction are where statutory tribunals have acted *ultra vires*. Thus a local authority which had made references to a rent tribunal of 302 contracts of tenancy in relation to flats in a large building off the Edgware Road in London, England,²³⁸ had not received any complaint from the tenants, nor had it investigated to see whether there was any *prima facie* case of un-

Lincolnshire County Court Judge (1887), 20 Q.B.D. 167; *R. v. D'Eyncourt* (1888), 4 T.L.R. 455; *Re London Scottish Permanent Building Society* (1893), 63 L.J.Q.B. 112. Cf. *Ex p. Smyth* (1835), 3 A. & E. 719; *Hallack v. Chancellor of Cambridge University* (1841), 1 Q.B. 593; *Re Appledore Tithe Commutation* (1845), 8 Q.B. 139; *Norris v. Carrington* (1864), 16 C.B.N.S. 396; *Farrow v. Hague* (1864), 33 L.J. Ex. 258 (no prohibition merely for a wrong construction of an Act of Parliament).

²³⁴ *Ricardo v. Maidenhead Local Board of Health* (1857), 27 L.J.M.C. 73.

²³⁵ *R. v. Swansea Income Tax Commissioners, ex p. English Crown Spelter Co. Ltd.*, [1925] 2 K.B. 250.

²³⁶ *London Corporation v. Cox*, *supra*, footnote 18; *R. v. Sir Travers Twiss* (1869), L.R. 4 Q.B. 407; *Hall v. Maule and Streat* (1838), 7 A. & E. 721.

²³⁷ *R. v. Lincolnshire County Court Judge*, *supra*, footnote 233, at p. 170.

²³⁸ *R. v. Paddington and St. Marylebone Rent Tribunal, ex p. Bell London and Provincial Properties*, *supra*, footnote 107 (the Park West case); see also *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*, [1937] A.C. 898 (a declaration by the respondents that a dwelling-house belonging to the appellants was insanitary was made *ultra vires*); *R. v. Electricity Commissioners*, *supra*, footnote 9 (where a scheme to constitute electricity districts has been formulated *ultra vires* a prohibition will issue, even though it was not to come into operation until confirmed by the Minister of Transport and approved by resolutions of the Houses of Parliament).

fairness of rent charged. It had not validly and *bona fide* exercised its powers conferred upon it by Parliament.²³⁹

c) *Otherwise defective jurisdiction*

Miscellaneous cases might come under this heading. Thus Holt C.J., in an early case,²⁴⁰ said *obiter*, in the course of his dissenting judgment, that even a colour of title would oust magistrates' jurisdiction and cause a prohibition to issue after a conviction, to prevent the carrying out of the punishment. This statement was, however, disapproved in a case in which the claim of a title to a fishery was one of the points to be decided by the magistrates in the particular action.²⁴¹ But, although the remedy can issue because of a defect in the jurisdiction of the inferior court, yet if that jurisdiction is sound it will not lie for a slip or defect in the form of the judgment below;²⁴² that may be the subject of appeal. A case in the present century in England is illustrative of the ground.²⁴³ A bishop appointed a Chancellor for his diocese by letters patent, and gave him power, in the absence of the bishop himself from his consistory court, to determine certain causes brought before that court, "nevertheless first consulting us and our successors, and having our consent, in case either party earnestly crave our judgment." The respondents in a case in the consistory court asked, in their reply, that the bishop should be first consulted, and his consent obtained, before judgment be passed by the Chancellor. Although they had "earnestly craved" the bishop's judgment, the Chancellor did not consult his bishop, and it was held that the defect of jurisdiction sufficiently appeared on the face of the proceedings, since the terms in the letters patent went to the jurisdiction, and were not merely matters of procedure. A writ of prohibition therefore issued.

²³⁹ Under the Furnished Houses (Rent Control) Act, 1946, s. 2.

²⁴⁰ *R. v. Burnaby* (1703), 2 Ld. Raym. 900 (the case concerned certiorari, and so the actual judgment is not strictly relevant to our present argument); see also *Breedon v. Gill* (1696), 5 Mod. 272; cf. *Chesterton v. Farlar* (1838), 7 A. & E. 713.

²⁴¹ *R. v. Higgins* (1845), 8 Q.B. 149n.

²⁴² *Enraght v. Lord Penzance and Perkins* (1882), 7 App. Cas. 240, at p. 250; *Sims v. Count de Wintz* (1840), 8 Dowl. 646; *Williams v. Bolland* (1876), 1 C.P.D. 227; *Griffin v. Ellis and Gough* (1840), 11 A. & E. 743, at p. 756, per Lord Denman C.J.; cf. *Bridge v. Branch* (1876), 1 C.P.D. 633.

²⁴³ *R. v. Tristram*, [1902] 1 K.B. 816; perhaps also *R. v. North, ex p. Oakey*, [1927] 1 K.B. 491 (discussed more fully later), in which a breach of the rule of *audi alteram partem* was held to amount to a defect taking away the jurisdiction of a consistory court; similarly *L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrières de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal*, [1953] 4 D.L.R. 161 (also discussed below).

Distinction between want of, excess of and otherwise defective jurisdiction

It is submitted that it has been sufficiently shown, both in relation to certiorari²⁴⁴ and to prohibition that there is no real difference or distinction in principle between the three sub-divisions of the ground of defect of jurisdiction. Wherever the jurisdiction of an inferior court or tribunal is impugned in any way according to the rules already discussed in this article certiorari or prohibition, whichever may be relevant in the particular instance, will issue.

Small defects of jurisdiction

The issue of prohibition is within the discretion of the court,²⁴⁵ and the subject-matter must be of a certain materiality before the court will allow it to issue. In a decision of 1765²⁴⁶ a prohibition was refused despite the allegation that there was an encroachment of the ecclesiastical on the temporal jurisdiction in a trivial matter. Again, in the nineteenth century, the writ was refused where the objection concerned a question of time for which an appeal was the proper remedy,²⁴⁷ and also where there was merely a slip or defect in the form of the judgment.²⁴⁸ On the other hand it has been held that neither the smallness of the claim nor delay were reasons for refusing the writ, if there was clearly an excess of jurisdiction.²⁴⁹ In 1937, in a case before the Privy Council, on appeal from the Court of Appeal of the Straits Settlements,²⁵⁰ it was stated that a prohibition could issue so long as the respondents still had some duties left, so that they were not *functi officio*. Again, in *Hannon v. Eisler*,²⁵¹ the Manitoba Court of Appeal held that prohibition will always issue to prevent a judgment given without jurisdiction by an inferior court or tribunal from being enforced, provided that there is still something for it to act upon. Thus the true position today would seem to be that the matter is always left to the discretion of the court. If the jurisdictional objection is sufficiently material the superior court will allow prohibition to issue, but otherwise it is likely to refuse the remedy within its discretion.

²⁴⁴ *Supra*.

²⁴⁵ It is not proposed to discuss here at any length the problem of *locus standi*: see Yardley, *op. cit.*, *supra*, footnote 15. The law is mainly similar to that concerning certiorari: see Yardley, *op. cit.*, *supra*, footnote 7.

²⁴⁶ *Butterworth v. Walker*, 3 Burr. 1689.

²⁴⁷ *Barker v. Palmer* (1881), 8 Q.B.D. 9.

²⁴⁸ *Enraght v. Lord Penzance and Perkins*, *supra*, footnote 242.

²⁴⁹ *Worthington v. Jeffries* (1875), L.R. 10 C.P. 379.

²⁵⁰ *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*, *supra*, footnote 238.

²⁵¹ *Supra*, footnote 9.

Contingent jurisdiction

Where a jurisdiction depends upon a contingency which has been fulfilled, then the jurisdiction is as good as if it had existed *ab initio*, but there are occasions when the contingent jurisdiction rests upon acquiescence. Thus, where a summons to a defendant to appear before a county court was issued on 3rd January, 1850, but was based on an order made by the county court judge on 30th October, 1847, which had given the plaintiff leave to issue a summons, there was some doubt as to the validity of the order. Because of the delay in the issue of the summons it was submitted that a new order authorizing the summons should have been made. But it was held that the defendant had acquiesced in the procedure by leaving a notice with the clerk of the county court, stating that he intended to rely on the statute of limitations as a bar to the action, and he had thus waived his right to object to the jurisdiction of the county court.²⁵² Similarly, an irregularity of procedure may be the subject of waiver, so as to preclude the granting of a prohibition after judgment.²⁵³ But acquiescence will only make a contingent jurisdiction complete, and will not remedy a jurisdiction which is faulty *ab initio*. For example, in a case of 1855,²⁵⁴ the parties to a plaint in a county court appeared before the judge and consented to a reference to arbitrators, without objecting to the fact that there was a want of jurisdiction. One of the parties, however, during the progress of the reference, did object to the jurisdiction of the arbitrators, on the ground that title to land came in question, but the arbitrators proceeded with the reference. It was determined that the applicant was nevertheless entitled to the issue of a prohibition. Cave J., in *Moore v. Gamgee*, elaborated on the problem:²⁵⁵

There are two senses in which it may be said that there is no jurisdiction to entertain an action—first, where under no circumstances can the court entertain the particular kind of action, as in cases under section 56 of the Act²⁵⁶—that is, libel, slander, seduction, or breach of promise of marriage; secondly, there are cases provided for by section 74, where under certain circumstances leave can be given to bring an action which the court could not otherwise entertain; . . . It seems, therefore, that cases which are within section 74 would come under

²⁵² *Re Jones v. James* (1850), 19 L.J.Q.B. 257.

²⁵³ *Moufflet v. Washburn* (1886), 54 L.T. 16, following *Re Jones v. James*, *ibid.*

²⁵⁴ *Re Knowles v. Holden* (1855), 24 L.J.Ex. 223.

²⁵⁵ (1890), 25 Q.B.D. 244, at p. 246; see also *Joseph v. Henry* (1850), 19 L.J.Q.B. 369 (if the jurisdiction of the inferior tribunal depended upon the facts which were in dispute, the decision on those facts could not be questioned by means of prohibition).

²⁵⁶ Cave J. was referring to the County Courts Act, 1888.

the head of procedure, rather than under the head of jurisdiction, although no doubt this court would have power to issue a prohibition in a proper case. I think, therefore, that the objection to the jurisdiction of the court may be waived by taking any step in the proceedings before applying to dismiss the action; and this view is borne out by a case which was not cited in argument: *Re Jones v. James*²⁵⁷ . . . (in that case) in the course of the argument of the motion, Erle J. said: "Where an inferior court has no jurisdiction from the beginning, a party, by taking a step in a cause before it, does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such a case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards".

But, although acquiescence will take away the right to a prohibition when a jurisdiction is contingent, mere delay short of acquiescence probably will not have the same effect.²⁵⁸

Consent of parties to an invalid jurisdiction

It is a matter of doubt whether the consent of the parties will validate an uncertain jurisdiction. One case of 1844 seemed to imply that it would,²⁵⁹ for there the Tithe Commissioners were proceeding to adjudicate upon a boundary between parishes, which was also a boundary between counties. Their jurisdiction to do so was doubtful, and so it was not known whether a prohibition ought to lie. But since the Commissioners made no objection the court granted the writ. What, however, would have been the decision if the Commissioners had objected to the argument for a prohibition being heard at all? That question is hard to answer definitely, though the writ may have issued to try the question of jurisdiction. It is perhaps most satisfactory to regard acquiescence as only validating a jurisdiction that is contingent, and the case cited above is, after all, one in which the waiver of objection merely facilitated the issue of a prohibition against a body with an uncertain jurisdiction. It had the reverse effect to that of validating the uncertain jurisdiction itself. It would be illogical to suggest that such waiver could make good a jurisdiction which was already bad.

²⁵⁷ *Supra*, footnote 252.

²⁵⁸ *Serjeant v. Dale*, *supra*, footnote 226. Where there has been an irregularity of procedure in the lower court it may be the subject of waiver by a party to the suit, thus precluding prohibition issuing at his instance after judgment. But entry of appearance *etc.* does not constitute waiver of the right to prohibition before the exact nature of the claim in the action concerned is known: *Lee v. Cohen*, *supra*, footnote 223; *Clarke Bros. v. Knowles*, [1918] 1 K.B. 128 (a demand for further and better particulars did not amount to a waiver).

²⁵⁹ *Re Ystradgunlais Commutation* (1844), 8 Q.B. 32. Such consent could not, of course, have this effect in criminal cases; *e.g.* a person not subject to military law could not consent to be tried by court-martial.

Should the defect of jurisdiction have been pleaded in the court or tribunal below?

No certain answer can be given to this question,²⁶⁰ because of the difference between a jurisdiction which is totally void and one only rendered invalid by something arising in the course of the suit. A case of 1718²⁶¹ showed this distinction, for it was there held that, if there was a defect of jurisdiction apparent on the face of the libel (pleadings) in a spiritual court, then the party never came too late, for the sentence and all other proceedings were a mere nullity: but if the party did not object to the jurisdiction on account of some matter arising in the suit showing that there was a defect of jurisdiction, then after sentence the party should never have a prohibition because he had acquiesced in the manner of trial.

There have been cases where a plea to the jurisdiction, rather than a prohibition, has been the proper remedy, as, for instance, in an early case,²⁶² in which "Holt C.J. and all the court agreed unanimously that, if an inferior court had jurisdiction over the cause of action, no prohibition ought to go upon a suggestion that the cause of action arose out of the jurisdiction." The party ought first to plead to the jurisdiction, and then, if the plea is refused, move for a prohibition. Lord Holt did admit that there had been cases to the contrary, but said that the law was "now settled". It was a curious case, and one of which the principle has certainly become obsolete, if indeed it was ever good law; it must be remembered that the report was brief, and perhaps not accurate. At any rate in the nineteenth century the only cases reported of pleas to the jurisdiction, rather than prohibition, being held to be the proper remedy are cases under special statutes, such as the Mayor's Court of London Procedure Act, 1857, section 15,²⁶³ and the Salford Hundred Court of Record Act, 1868, section 7;²⁶⁴ but the courts even loosened the strict working of these Acts, and some-

²⁶⁰ There used to be no necessity so to plead: *Bishop of Winchester's Case* (1595), 2 Co. Rep. 45. But the rule had changed by the time of the Bloodless Revolution of 1688: *Admiralty Case* (1611), 12 Co. Rep. 79; *Anonymous* (1701), 2 Salk. 551 (whenever the objection on which a prohibition is based is foreign to the libel in an ecclesiastical case the party must plead it below, otherwise he cannot have a prohibition later).

²⁶¹ *Argyle v. Hunt*, 1 Stra. 187; see also *Home v. Earl Camden* (1795), 2 Hy. Bl. 533.

²⁶² *Anonymous* (1707), 11 Mod. 132.

²⁶³ *Manning v. Farquharson* (1860), 30 L.J.Q.B. 22; *Baker v. Clark* (1873), L.R. 8 C.P. 121.

²⁶⁴ *Payne v. Hogg*, [1900] 2 Q.B. 43 (though even in this case the decision was treated as being within the discretion of the court).

times allowed the writ to issue.²⁶⁵ It was pointed out in argument in *Baker v. Clark*,²⁶⁶ one of the cases under the Mayor's Court of London Procedure Act, that if the defendant pleaded to the jurisdiction, as provided by that Act, he would be precluded from setting up any other defence. This may have been one of the reasons which persuaded the courts to use their ingenuity in overcoming the strict letter of a statute, but the matter is of only limited importance today, when it is hard to find instances of the remedy of prohibition being excluded expressly by statute, even though exclusion by inference sometimes occurs.²⁶⁷

Proof of defect of jurisdiction

The application for a prohibition should be supported by an

²⁶⁵ Under the Mayor's Court of London Procedure Act: *Quarty v. Timmins* (1874), L. R. 9 C.P. 416 (in which the writ issued to a stranger); *Jacobs v. Brett* (1875), L.R. 20 Eq. 1 (in which the writ even issued to a defendant, which was strictly forbidden by the Act, because it was held that the real effect of the section was only to limit the modes of objecting to the jurisdiction *within* the Lord Mayor's Court).

Under the Salford Hundred Court of Record Act: *Oram v. Brearey* (1877), 2 Ex. Ch. D. 346 (in which it was held that, although in the inferior court an objection to the jurisdiction could only be raised by special plea, yet Parliament had not taken away the jurisdiction of the superior court).

²⁶⁶ *Supra*, footnote 263.

²⁶⁷ But see *R. v. Chester Licensing JJ., ex p. Bennion*, [1914] 3 K.B. 349. Compare also s. 11 of the new Tribunals and Inquiries Act, 1958, *supra*, footnote 218. The section makes no mention of prohibition, and in this respect imitates the Report of the Franks Committee, *supra*, footnote 1.

Since the abolition in England of the writ of prohibition, and the creation of the new prerogative order (*supra*, footnote 2), the old law as to demurrers ceases to be of importance. Formerly, where a party demurred to the issue of a prohibition, and part of the demurrer was good and the other part bad, the whole demurrer failed: *Boydell v. Jones* (1838), 4 M. & W. 451. But a note by Mr. Serjeant Manning in the report of *Hinde v. Gray* (1840), 1 Man. & G. 201, had the effect of persuading judges, and Parke B. (who had given the judgment in *Boydell v. Jones*) in particular, that the demurrer should only fail as to that part of it which was bad: *Briscoe v. Hill* (1842), 10 M. & W. 741; *Slade v. Hawley* (1845), 13 M. & W. 761; *Dawson v. Wrench* (1849), 3 Ex. 365. Brett L.J. in *S.E.Rly. Co. v. Railway Commissioners* (1881), 6 Q.B.D. 586, at p. 605, agreed with this line of cases, although the majority of the Court of Appeal, Lord Selbourne L.C. and Lord Coleridge C.J., did not. (Brett L.J. quoted also *Lush v. Webb* (1676), 1 Sid. 251, and the account in Comyns, Digest, "Prohibition" (F. 17)). Brett L.J.'s dissenting judgment appears to be supported by later cases: *R. v. Local Government Board* (1882), 20 Q.B.D. 309, at p. 320, per Brett L.J. himself again; followed in *R. v. Minister of Housing and Local Government, ex p. Finchley B.C.*, [1955] 1 W.L.R. 29 (in which an application for certiorari was refused); *R. v. Westmorland County Court Judge* (1887), 58 L.T. 417; and see also *Free v. Burgoyne* (1826), 5 B. & C. 400; *Walsh v. Ionides* (1853), 1 E. & B. 383; *Ellis v. Fleming* (1876), 45 L.J.C.P. 512. Furthermore, his contention was approved in the Hailsham edition of Halsbury, Laws of England, vol. IX, pp. 823-824.

It is probably safe to assume now that a prohibition will apply only to that part of an action which is in excess of the inferior court or tribunal's jurisdiction, and not to any parts not in excess of it.

affidavit succinctly stating the reasons for the application, and setting out shortly and clearly the facts relied on,²⁶⁸ but other additional affidavits are not usually necessary. Most defects of jurisdiction will appear upon the face of the proceedings below, but cases have been reported, especially in earlier times, in which additional affidavits have been employed.²⁶⁹ In fact affidavits have been found necessary to ground a motion for a prohibition where the lack of jurisdiction did not appear upon the face, for such defects are not obvious and ought to be so verified.

2) BREACH OF NATURAL JUSTICE

Indications of the existence of this ground for prohibition have been rare.²⁷⁰

a) *Audi alteram partem*

Audi alteram partem has been considered in only one English case on prohibition, *R. v. North, ex p. Oakey*.²⁷¹ In the course of restoration work in a church a fresco was damaged. A parishioner interested in the fresco petitioned the consistory court for a faculty to repair the damage, alleging that the damage was done by the vicar's order, but not asking that he should pay the cost of reparation. A general citation was issued citing all the parishioners and inhabitants to show cause why a faculty should not be granted to allow of the repair, but no special citation was issued to the vicar. The vicar knew of the petition, but did not appear. In his absence the judge of the consistory court on 24th July, 1925, granted the faculty asked, and ordered the vicar to pay the expenses of reparation and the costs of the petition. On 11th February, 1926, a monition was issued, ordering him to pay the said sums under threat of sequestration, and on 9th March the vicar applied for a prohibition. One of the grounds on which the writ was granted was that the order of 24th July and the monition were made with-

²⁶⁸ Short and Mellor, *op. cit.*, *supra*, footnote 22, p. 83.

²⁶⁹ *Buggin v. Bennett*, *supra*, footnote 222; *Gould v. Gapper* (1804), 5 East 345; *cf. Ricketts v. Bodenham* (1836), 4 A. & E. 433.

²⁷⁰ See *e.g.* Halsbury, *Laws of England* (3rd ed., by Viscount Simonds), vol. XI, pp. 114-115, s. 213; *Martin v. Mackonochie* (1879), 4 Q.B.D. 697, at p. 732, per Thesiger L.J.: appeal, and not prohibition, would be the proper remedy in a case where a method of appeal was provided, unless the judge's error involved the doing of something which, in the words of Littledale J. (in *Ex. p. Smyth*, *supra*, footnote 233, at p. 724) was "contrary to the general laws of the land", or, to use the language of Lush J. in the court below, was "so vicious as to violate some fundamental principle of justice". Thesiger L.J. may have had in mind the possibility of a breach of the rules of natural justice.

²⁷¹ *Supra*, footnote 243.

out giving the vicar an opportunity of being heard in his defence.²⁷² It is true that it was then reasoned that this fact took away the jurisdiction of the consistory court, so that the High Court stated this ground for the issue of the writ as being that of defective jurisdiction, but Bankes L.J. emphasised the point that the finding was based on the departure from the rule of *audi alteram partem*.²⁷³

In a recent case in Canada,²⁷⁴ the certification of a trade union as an authorised bargaining agent for employees was revoked by the Labour Relations Board of Quebec, because the union had called an illegal strike. The union had received no notice of the Board's intention to revoke the certificate, nor did it have any opportunity of being heard. Consequently a prohibition issued²⁷⁵ to prevent the revocation taking effect, all five judges of the Supreme Court of Canada agreeing that express words were necessary to overcome the presumption that the *audi alteram partem* rule had to be observed in the exercise of judicial functions.²⁷⁶

b) No interest

More cases are to be found touching upon the subject of interest, and mainly that subdivision of interest, bias. On one occasion Parke B., in answering, on behalf of the judges of England, questions put by the House of Lords, said:²⁷⁷

If this had been a proceeding in an inferior court, one to which a prohibition might go from a court in Westminster Hall, such a prohibition would be granted, pending the proceedings, upon an allegation that the presiding judge of the court was interested in the suit.

²⁷² It was argued that there had been a delay in the application for prohibition, but it was held not to have been serious enough to justify refusal of the writ. Also, even if the order of 24th July and the monition might have been the subject of an appeal to the Court of Arches, which was very doubtful, as the vicar had not been a party to the proceedings, that fact was no ground for refusing the issue of the writ.

²⁷³ He even quoted two older cases in which the principle had been involved, although they were not cases of prohibition: *Capel v. Child* (1832), 2 Cr. & J. 558, at pp. 579, 580 (an action against sequestrators for fees detained, used as a very persuasive authority by Mr. D. M. Gordon, Q.C. in his article, *supra*, footnote 92 and *Bonaker v. Evans* (1850), 16 Q.B. 162 (an action for debt against sequestrators).

²⁷⁴ *L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrières de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal*, *supra*, footnote 243. This case, together with other cases from various parts of the Commonwealth, is discussed by Mr. de Smith, *supra*, footnote 91, at pp. 596-599. Mr. de Smith is, however, mainly concerned with certiorari, rather than prohibition.

²⁷⁵ It is curious that Mr. de Smith, *op. cit.*, *ibid.*, at p. 596, states that this is a certiorari case, which is not so.

²⁷⁶ *Supra*, footnote 243, at pp. 173, 176-177, 180, 185. The problem of what is a judicial function is discussed elsewhere, see *supra*, footnote 3.

²⁷⁷ *Dimes v. Grand Junction Canal*, *supra*, footnotes 116 and 118; and see *R. v. Essex JJ.* (1816), 5 M. & S. 513.

And in the following year, although it was held²⁷⁸ that prohibition would not issue on the grounds of interest of a bishop, in a case in his consistory court, because the Chancellor, and not the bishop, was the judge, yet there are dicta of Lord Campbell C.J.²⁷⁹ to the effect that: "... the slightest real interest in the issue of a suit incapacitates anyone from acting as a judge in it, although it may be certain that in fact the interest, from its real or proportionate significance, cannot create any bias in his mind."

*R. v. Farrant*²⁸⁰ was a curious case. A magistrate, who was also a surgeon, attended a patient professionally for injury caused by an assault. He tried to induce his patient not to prosecute for the assault, and conveyed to him a message, sent by the person who had committed that assault, offering an apology and suggesting a settlement. A summons was, however, issued for the assault, and the magistrate was subpoenaed to give evidence for the prosecution. A writ of prohibition was obtained to prohibit the magistrate from sitting at the hearing, and he moved to set aside the prohibition. It was held that the fact that he had been subpoenaed, and that it was intended to call him as a witness at the hearing, was not a legal disqualification, and the High Court would not on that ground prohibit the magistrate from sitting: thus he appeared to be a type of nineteenth century counterpart of the witness-juror of the middle ages! It was also held that the acts of the magistrate did not show that he had such a substantial interest in the result as to make it likely that he would have a bias, and so the rule to dismiss the prohibition was made absolute. It is implied, therefore, that a likelihood of bias would have given a good ground for the issue of the writ, and, in addition, Stephen J. said²⁸¹ that any pecuniary interest in the subject-matter of the litigation, however slight, would disqualify a magistrate from taking part in the decision of a case. Thus, despite the decision in favour of the surgeon-magistrate, an offence against this sub-heading of natural justice would appear to give rise to a prohibition in a proper case. What is more, the actual decision on the facts in the case may be suspect, because there was conflicting evidence whether or not the magistrate had offered to lay a bet of five to one that the complainant would not succeed before the justices! Again, in an Irish case of 1913,²⁸² it

²⁷⁸ *Ex. p. Medwin and Hurst* (1853), 1 E. & B. 609.

²⁷⁹ *Ibid.*, at p. 614. But cf. *R. v. Bolingbroke*, [1893] 2 Q.B. 347; *Ex p. Workington Overseers* (1893), 10 T.L.R. 173 (both decisions upon a special statute); following *R. v. Essex JJ.*, *supra*, footnote 278.

²⁸⁰ (1887), 20 Q.B.D. 58.

²⁸¹ *Ibid.*, at p. 60.

²⁸² *R. (Rea) v. Davison*, [1913] 2 I.R. 342. It is curious to note that the

was held that the function of magistrates in returning prisoners for trial for indictable offences was judicial, and that prohibition would lie if bias or want of jurisdiction was established. On the facts of the case the magistrates were held to have jurisdiction, and no bias was established, so the application for the writ failed, but the principle seems clear.

Is breach of natural justice really a ground for prohibition?

I can find no prohibition cases which deal with the suggested third and fourth sub-headings of natural justice, namely reasonableness and no fraud;²⁸³ and the occasions for the use of prohibition when there has been a breach of any of the rules of natural justice must of necessity be rare, for the purpose of the remedy is to provide for the future, rather than to put right some wrong occurring in the past. It is very difficult to assert with confidence that any such breach has occurred until the proceeding in the inferior court or tribunal has ended, particularly where a breach of the rule of *audi alteram partem* is alleged, for the apparent wrong may be remedied eventually in the hearing below. There is a dearth of recent authority on the subject, but nevertheless it would seem that in a proper case this is a ground for prohibition.²⁸⁴ It should be particularly useful where the judge of an inferior court or a member of a tribunal has some interest, either financial or in the nature of bias,²⁸⁵ in the proceeding before him, and the rarity of the cases is perhaps a tribute to the probity of these persons.

3) ERROR OF LAW ON THE FACE OF THE RECORD

The problem of the existence of this third ground for prohibition is complex. In principle the ground should exist, since it is well established in the case of certiorari,²⁸⁶ and prohibition is in essence a remedy very similar to certiorari.²⁸⁷ Nevertheless concrete evidence of error of law on the face of the record being held to be a ground for prohibition is very hard to find. In Canada, indeed, it has been expressly decided in a case before the Ontario Supreme Court in 1921²⁸⁸ that prohibition will not issue on this ground. In judges in this case (Palles C.B., Gibson and Boyd JJ.) were divided 2—1, in different groups, on three out of the four points actually decided.

²⁸³ See *supra*.

²⁸⁴ And the relationship between this ground for prohibition and that of defective jurisdiction are close, see *supra*, footnote 273; and for certiorari, *supra*, footnotes 133-135.

²⁸⁵ These terms are explained earlier in this article in connection with certiorari.

²⁸⁶ As fully discussed *supra*.

²⁸⁷ *R. v. Electricity Commissioners*, *supra*, footnote 9.

²⁸⁸ *R. v. Seguin* (1921), 59 D.L.R. 534.

England prohibition has always been held to lie for a fatal defect of jurisdiction appearing on the face,²⁸⁹ even though the applicant for it has consented to or acquiesced in the exercise of jurisdiction by the inferior court.²⁹⁰ But defect of jurisdiction is not really what is meant when we talk of error of law upon the face of the record: it is a form of such an error,²⁹¹ but we are really concerned with errors in connection with decisions on points of law other than the question of jurisdiction. Perhaps the only case which can be called a direct authority was reported in 1841, *Veley v. Burder*.²⁹²

The question arose before eight judges whether the validity of a rate for the repair of a church, which was illegally fixed, and which the plaintiffs had proceeded to enforce in an ecclesiastical court, could be inquired into by a court of common law, and whether such court could issue a prohibition to the spiritual court to stay proceedings. By the statute 13 Ed. I²⁹³ the ecclesiastical courts had sole and exclusive jurisdiction upon the question of the repair of churches, and the statute ends:

In all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the King's Prohibition.

But in this case the proceeding instituted in the spiritual court was to enforce the payment of the illegal rate, made by the churchwardens alone and without the parishioners, not made in vestry, nor at the time for which they were convened, when they had neglected or refused to attend. The libel (pleadings in the ecclesiastical court) showed upon its face that the rate was a nullity at common law, and so the superior court determined that the writ of prohibition lay.

Although no other concrete authority can be found to support a view that error of law on the face of the record is a ground for the issue of prohibition, there are several cases which are persuasive by inference, all reported in the nineteenth century. It is well settled that a prohibition will be refused where the tribunal below has merely exercised its discretion within the bounds of its proper

²⁸⁹ *Argyle v. Hunt*, *supra*, footnote 261.

²⁹⁰ *Farquharson v. Morgan* (1894), 1 Q.B. 552; see also *Paxton v. Knight* (1757), 1 Burr. 314; *Buggin v. Bennett*, *supra*, footnote 222; *cf. Gould v. Gapper*, *supra*, footnote 269. The whole subject is discussed *supra*.

²⁹¹ It may be noted here that the Franks Committee Report, *supra*, footnote 1, para. 114, suggests that, where there is an appeal on a point of law (as recommended in Ch. 10 of the Report—and see *supra*, footnote 218), any question of jurisdiction should be determined at the same time, thus rendering it unnecessary for the appellant to apply *ex parte* for leave to move for an order of certiorari as well.

²⁹² *Supra*, footnote 9.

²⁹³ *Circumspecte Agatis*, 1285.

jurisdiction,²⁹⁴ but there were dicta, about the time of the decision in *Veley v. Burder*, to the effect that prohibition would issue where there had been misconduct, such as justices' refusal to hear any legal evidence, or a grossly improper decision upon the evidence.²⁹⁵ There was some judicial dispute over the matter in the middle years of the century, and Willes J. compromised by saying that a prohibition ought to issue *quousque*²⁹⁶ where proper evidence had been refused:²⁹⁷

There may be other cases in which such a special writ may be proper; for instance, there is authority for saying that, in matters purely of ecclesiastical cognizance, where a particular sort of evidence is refused which, according to the rules of the common law, ought to have been admitted,—a matter which affects the manner and form of proceeding only—the prohibition is *quousque*.

Two decisions upon the County Court Act, 1867, section 11, are relevant. In one,²⁹⁸ Cockburn C.J. said *obiter* that if the county court took jurisdiction upon itself without evidence or after refusing to go into evidence, and it turned out that there was in fact no jurisdiction, the Queen's Bench would interfere by means of a prohibition. In the other case²⁹⁹ it was decided that the remedy would issue if a county court judge determined that he had jurisdiction, not by deciding on conflicting facts, but on a wrong assumption as to a point of law. But the pendulum swung back again in 1888,³⁰⁰ for then it was held that an erroneous decision on admissibility of evidence, or a decision without any evidence to support it, given by a county court judge in a matter in which he had jurisdiction, did not amount to grounds for a prohibition. This latter decision is clearly in line with the position concerning the related remedy of certiorari.³⁰¹ Some support may nevertheless be divined from these cases for the contention that a prohibition may issue on the ground of an error of law on the face of the

²⁹⁴ *R. v. Poor Law Commissioners for England and Wales, Re Newport Union*, *supra*, footnote 26; *Joseph v. Henry*, *supra*, footnote 255.

²⁹⁵ *R. v. Higgins* (1845), 8 Q.B. 149n (a case decided, but not reported, in 1843); *cf. R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 12. In *Re Dunford* (1848), 12 Jur. 361, the mere receipt of improper evidence in a county court was held to be no ground for the remedy, though the case would have been otherwise if the court had received evidence contrary to the terms of a statute.

²⁹⁶ See *supra*, footnote 17.

²⁹⁷ *White v. Steele*, *supra*, footnote 18, at p. 412.

²⁹⁸ *Brown v. Cocking* (1868), L.R. 3 Q.B. 672, at p. 675.

²⁹⁹ *Re Elston v. Rose* (1868), L.R. 4 Q.B. 4.

³⁰⁰ *R. v. Greenwich County Court Judge*, 60 L.T. 248.

³⁰¹ *R. v. Nat Bell Liquors Ltd.*, *supra*, footnote 12.

proceedings. The invalidity of an inferior court's jurisdiction was often based on such an error.³⁰²

It may seem a little presumptuous to attempt to base a principle upon the one real authority of a case decided over a hundred years ago,³⁰³ supported only by persuasive analogous decisions, but is not the reason for the absence of mention of this possible ground for prohibition merely that the remedy issues to prevent future wrongful proceedings, or to stop the continuation of proceedings already started? As in the case of a breach of natural justice it is very hard to detect the flaw in the proceedings until afterwards. Once a decision upon a question of law has been reached in the inferior court or tribunal, and the record completed, there is usually nothing left for a prohibition to act upon. Only in very rare circumstances could the remedy be set in motion by an error of law upon the face of the record of past proceedings, in fact only where a decision has been reached and the record compiled, but the proceedings are not yet over—for instance, where the judgment has not yet been executed. If such special circumstances should occur, then “an application for prohibition is never too late so long as there is something left for it to operate upon.”³⁰⁴ The true position must surely be that error of law on the face of the record is in principle as much a ground for prohibition as it is for certiorari, but it will rarely be applicable.³⁰⁵ Certiorari will in any case lie at a later date,³⁰⁶ after the proceeding below has finished, and it is therefore unlikely that an applicant will seek a prohibition on this ground.

Conclusions

In sum it may be stated that the grounds for certiorari and prohibition in England and Canada are the same in principle. They are:—

- a) Defective jurisdiction in the inferior court or tribunal, of whatever kind the defect may be;
- b) Breach of natural justice, which it is submitted may be sub-

³⁰² See also *Liverpool Gas Co. v. Everton* (1871), 40 L.J.M.C. 104 (a prohibition was granted against a Recorder who had acted outside his jurisdiction by allowing an appellant more time to appeal); *Martin v. Mackonochie*, *supra*, footnote 270, at p. 732, per Thesiger L.J.; cf. *The Charkieh*, *supra*, footnote 229.

³⁰³ *Veley v. Burder*, *supra*, footnote 9.

³⁰⁴ *Re London Scottish Permanent Building Society*, *supra*, footnote 238, at p. 113, per R.S. Wright J.; see also *Hannon v. Eisler*, *supra*, footnote 9.

³⁰⁵ This may be the real reason behind the decision in *R. v. Seguin*, *supra*, footnote 288.

³⁰⁶ As has been shown throughout the discussion of this ground for certiorari, *supra*.

divided into the rules of (i) *audi alteram partem*, (ii) no interest, whether pecuniary or in the nature of bias, (iii) reasonableness, and (iv) no fraud. At times this ground approximates very nearly to that of defective jurisdiction. It is also less likely to give rise to a prohibition than to a certiorari, because the breach can usually only be detected after the conclusion of the proceedings below; and

c) Error of law on the face of the record of the proceeding below. This ground has only very rarely given rise to a prohibition, for the same reasons that make breach of natural justice a rare ground for the remedy, and its existence as a ground for prohibition has been denied in Canada, though the latter decision³⁰⁷ may well have been mistaken, and is certainly wrong in principle.

Finally, it appears likely, as a result of the Report of the Franks Committee,³⁰⁸ that the third ground will cease to be so widely applicable in certiorari cases, because direct appeals on law will lie to the High Court in England, but the other two grounds for certiorari will remain intact. The Report recommends the continued existence and vigour of the prerogative orders in England, and even the one radical change recommended will have the indirect effect of strengthening the traditional methods of protection of the individual against arbitrary power.

³⁰⁷ *R. v. Seguin*, *supra*, footnote 288.

³⁰⁸ *Supra*, footnote 1; and see particularly *supra*, footnote 218.