ADMINISTRATIVE FINALITY.

During the past century the fertile soil of our common law tradition has gradually but surely produced a new jurisprudence, the evolution of which may well be hailed as a revolution in our civilization and politics. This new development has been called Administrative Law. It is to be regretted, perhaps, that greater attention has not been accorded it in our legal periodicals. The aspiration of this article will therefore be to call the attention of the legal profession to the far reaching significance of administrative law. The occasion of this article may be found in *Bathurst* v. *Workmen's Compensation Board.*[1]

That case concerns itself with one phase only of administrative law, sometimes called the quasi-judicial but which, in the writer's opinion, may better be called simply the "judicial" phase. What is a judicial act? In the much quoted language of May. C.J., the term 'judicial act,' "does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."[2] Action involving decision, but not imposing liabilities or affecting the rights of others may, for want of a better term, be called "discretionary." With such acts this article does not purport to deal.

In the *Bathurst* case (*supra*) a claim had been made by the widow of a deceased diver for workman's compensation. The diver had been drowned while repairing a water main which lay on the bed of Bathurst Basin. The Workmen's Compensation Board, after hearing the claim, decided that the deceased, as an employee did not come within the scope of Part 1 of the Act. On appeal (under a statutory right of appeal), the New Brunswick Court of last resort held that this decision was not reviewable. Their *ratio decidendi* was based upon the statute, which made questions of

[1] [1928] 1 D.L.R. 114 (N.B.); see also *Peter* v. *Yorkshire Estate Co. Ltd.*, [1926] 2 D.L.R. 641 (P.C.).

[2] *Queen* v. *Corp. of Dublin* (1878) 2 L.R. Ir. 371 at p. 377; *Everett* v. *Griffiths* [1921] 1 A.C. 631 at p. 682.

fact as decided by the Board "final and conclusive," and which made the question in issue a question of fact. There can be little doubt, therefore, as to the soundness of the decision. Any opprobrium which may attach to the case lies further back, and must be looked for in the legislation upon which the Court acted.

As before remarked, this case has been adopted as an occasion or excuse for this article. Let us now proceed to an examination of the authorities, and let it be clearly observed at the outset that Courts of law in such cases are subservient to the legislative intent, assuming, of course, that no question of constitutionality—if that term may be used—is involved. Thus Lord Moulton has said in a case to be noted later:

> Parliament has wisely laid down certain rules to be observed in the performance of its functions. . . . These rules are beyond the criticism of the Courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court, they are adequate or not. In the present case they appear to me to be abundantly sufficient. . . . But even if my opinion were the reverse it would only indicate that I disapproved of the legislation.[3]

It need hardly be pointed out that the various legislatures of Canada are supreme within the limits prescribed by the B.N.A.[4] and that the above quotation applies in Canada as well as in England. If, therefore, an appeal on questions of law or fact should be expressly forbidden, as in the *Bathurst* case (*supra*) no Court may interfere. But where the legislation defining the powers of an administrative agency is not explicit, a fascinating problem arises.

This article, therefore, purports to examine the right or power of the Courts to review the judicial functions of administrative agencies, in cases where the legislature has not expressly regulated such review.

What seems to be the earliest considered case in which an English Court of law placed its restraining influence upon an administrative agency, acting judicially is that of *Capel* v. *Child*.[5] In that case a statute provided that whenever it shall appear to the satisfaction of any Bishop, either of his own knowledge or upon proof by affidavit laid before him. . .[6] that certain conditions exist, he may order the vicar of a certain parish to nominate an assistant, in default of which the Bishop may appoint the assistant himself.

[3] *Local Government Board* v. *Arlidge* [1915] A.C. 120 at p. 150.
[4] *Hodge* v. *The Queen* (1883) 9 A.C. 117.
[5] (1832) 2 Cr. & J. 558 at p. 583.
[6] 57 Geo. III. c. . s. 50.

One of the conditions upon which the Bishop might so act, was the inefficiency of the vicar. The statute was silent on any question of procedure to be followed in issuing such an order. The Bishop, acting under this statute, without a hearing to the vicar, made such an order, and the vicar refused to obey. Thereupon the Bishop nominated an assistant. The vicar refused then to pay him any salary, whereupon the assistant, pursuant to an order from the Bishop, sequestered certain parish property. The vicar then brought an action of assumpsit against the assistant, alleging that the Bishop's orders were improperly made, as no hearing had been given him. The Court found for the vicar, holding that a hearing should have been given.

The main question in this case seems to be: What is the legislative intent? Such seems to have been realized by Vaughan, B., and he made, at page 583, a seemingly correct approach to the *Capel* case (*supra*) when he said:

> We are not called upon to announce our opinion upon the expediency of giving such power to the bishop; the mere opinion which we are called upon to give is, whether the bishop has such power.

But after making this admirable statement of the problem confronting the Court, it seems very questionable whether the learned Judge followed his own analysis, when we find him, at page 577 of the *Capel* case (*supra*), following the judgment of Lord Lyndhurst, C.B., who after similarly stating the problem, concluded by saying:

> Here is a new jurisdiction given—a new authority given; a power is given to the bishop to pronounce a judgment; and, according to every principle of law and equity, such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence.

The language of Lord Lyndhurst savours very little of statutory interpretation, but rather of a determination at all costs to curtail the actions of the Bishop.

In view of the subject matter to be controlled by the Bishop, in its nature not dissimilar to a large business, it seems probable that the object of the statute was to allow a control such as an employer might exercise over his employees. Moreover, the mere fact that the power of decision was entrusted to a Bishop and not to a Court seems to raise an inference against judicial intervention, and the wording of the statute itself, allowing the Bishop to act "of his own knowledge" seems to point to immunity from review.

It seems, therefore, that while properly approaching the question, the Court in reality indulged in a little "spurious legislation." It is not proposed to quarrel with this case, however, and the writer is quite ready to admit that the decision is well within the bounds of sound judicial opinion. Let us accept it as a starting point of this phase of administrative law.

In a later case,[7] where a statute authorized the Governor of New South Wales to suspend certain pastoral leases, and "if at any time . . . it shall be proved to the satisfaction of the Commissioner" that conditions of the lease were not fulfilled, to cancel the lease, it was held that a hearing was illusory when the tenant concerned was not allowed to see the evidence against him, and while not bound by technical rules relating to the admission of evidence or by any form of procedure "the governor must, nevertheless, proceed according to the requirements of substantial justice" which are "requirements well known to our law."

Though the statute in this case did not provide any particular form of procedure, the Court nevertheless held that a substantial hearing must be given. A clear realization seems to have been had of the actual problem, however, and where the statute plainly negatives such a construction, administrative agencies are left strictly to their own devices.[8]

It is necessary that the person whose rights and liabilities are affected be given notice of the decision, even though, due to the terms of the statute, a hearing is not required.[9] It seems that even this requirement might be taken away by express words in the statute; but no such case appears to have arisen.

It is sufficient if a hearing and notice is given after the decision is made with a prospect of revision of the decision, should it be shown to be erroneous.[10]

This brings us to a consideration of three cases, two in the House of Lords, and one before the Judicial Committee of the Privy Council, which may be said to fairly represent the law on this question, as it now stands.

[7] *Smith* v. *The Queen* (1878) 3 A.C. 614 at p. 617. This case is probably weakened though not abrogated by the *Arlidge case* (*infra*). In that case, Arlidge was aware of the evidence before the Board, but not of the contents of a report, based on said evidence.

[8] *The Minister for Lands* v. *Wilson* 17 T.L.R. 318 (P.C. 1901); *Cook* v. *Ricketson* [1901] A.C. 588, 595; cf. *Li Hong Mi* v. *Attorney-General for Hong Kong* [1920] A.C. 735; cf. *Willis* v. *Sir George Gipps* 5 Moo. P.C. 379.

[9] *Minister of Mines* v. *Harney*, [1901] A.C. 347.

[10] *De Verteuil* v. *Knaggs*, [1918] A.C. 557.

In the first of these cases, *Board of Education* v. *Rice*[11] a statute gave to local authorities the duty of maintaining and keeping efficient a non-provided school.[12] A local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid to teachers in provided schools. The statute further stipulated that if any question arises under this section[13] between the local authorities and the managers of a school not provided by the authority, that question shall be determined by the Board of Education.[14] Two questions were submitted under this section to the Board:

(1) Whether the local education authority have in fixing and paying the salaries of the teachers fulfilled their duty under sub-s. 1 of s. 7 of the Act.

(2) Whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay.

The Board purported to give its decision in a document which failed to deal with the matters in issue.

An application was thereupon made for an order to force the Board to decide the questions propounded, and the House of Lords finally approved the action of the lower Court in quashing the decision of the Board on certiorari, and ordering it to determine the questions by a writ of mandamus.

In the course of his opinion, Lord Loreburn made the remarks which are of especial interest to the subject here under discussion:—

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; put sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything.[15]

This dictum, general in terms, but containing by implication

[11] [1911] A.C. 179 at p. 185; cf. *Rex* v. *Local Government Board* (1911), 2 Ir. R. 331.

[12] 2 Edw. 7, c. 42, s. 7, sub-s. 1.

[13] s. 7.

[14] s. 7, sub-s. 3.

[15] [1911] A.C. 179 at p. 182. Note the intimation by Lord Loreburn that if discretionary and involving no law, these requisites are not applicable. No doubt Lord Loreburn had in mind acts which affect no rights or impose no liabilities. Cf. *Palgrave Gold Mining Co.* v. *McMillan* [1892] A.C. 460.

the result of centuries of common law, undoubtedly placed a powerful weapon in the hands of the judiciary, coming as it did from the highest legal authority in England. In the absence of express language by Parliament forbidding judicial review, or affirmatively fixing the procedure of administrative tribunals, it would seem to be the most natural thing in the world for English Courts, accustomed to the rule of law, to follow the example of *Capel* v. *Child* (*supra*) and presume that of course no English legislature could be deemed to have intended to depart from the rules which centuries of experience had evolved in the Courts.

Such, no doubt, would have been sound advice from any English lawyer, prior to 1915. In that year, however, the House of Lords handed down its decision in the famous *Arlidge* case (*supra*) which, it may safely be said, marks a new era in the law of England.

In *Local Government Board* v. *Arlidge* (*supra*) four years after the *Rice* case (*supra*) a statute required a local authority to make a closing order in respect of any dwelling house in their district if it appeared to be unfit for habitation. From this closing order, the statute allowed an appeal to the Local Government Board, and provided that "the procedure on any appeal under their part of the Act. . . shall be such as the Board may by rules determine"[16] The only express limitation on this rule making power was that the Board could not "dismiss any appeal without having first held a public local inquiry."[17] Rules were made by the Board, relating to appeals, but the question raised by the case, and about to be discussed, was entirely untouched by any express language.

On the twelfth of January, 1911, the Hampstead Borough Council, one of the local authorities, issued a closing order against a house owned by William Arlidge. After an unsuccessful appeal to the Local Government Board (hereafter called the "Board") and which may be passed over here, Arlidge executed some minor repairs on the building, and on the refusal of the Borough Council (hereafter called the "Council") to determine the closing order, Arlidge took an appeal to the Board, sending them his evidence by letter. The Board held a public local enquiry through the medium of an inspector, and Arlidge attended and was given an opportunity to be heard. The inspector, however, was not a judicial officer, but merely a collector of evidence for the Board who made the actual decision. He was, however, allowed to give his opinion

[16] s. 39(1).
[17] s. 39(1c).

in the report when he submitted it to the Board. This he did, and Arlidge claimed the privilege of seeing the report, and knowing the nature of the evidence upon which the Board was about to act. The Board refused to show him the report and gave its decision against him *without further hearing.*

Arlidge then obtained a writ of certiorari, which was unanimously set aside by the Divisional Court, three Justices sitting; allowed by the Court of Appeal in a two to one decision, and again set aside by a unanimous decision of the House of Lords. What, then, is the import of this decision in which eight Judges out of ten felt that the Board had not exceeded its power?

Undoubtedly the procedure of the Board was a marked departure from that of the Courts, and strong reasons must have existed to cause such a decided result.

Approaching the question analytically, perhaps the strongest *ratio decidendi* is to be found in the fact that the appeal now given by Parliament to the Board had hitherto been exercised by the *Court* of Quarter Sessions. The change from a Court to an Administrative Board is strong evidence that the legislature intended to get away from those very methods of procedure which Arlidge claimed, and which had not proved to be very efficacious.

A great deal of emphasis was placed upon "natural justice" by the Court of Appeals, who appeared to assume that only a procedure similar to court procedure could be just. Lord Hamilton seems to have effectually answered that assumption, however, in his dissent in the Court of Appeals, and Viscount Haldane well summed up the matter when he held that:

> Those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibiliy of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. . . . Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.[28]

[28] [1915] A.C. 120 at p. 132; ". . . that the judiciary should presume to impose its own methods on administrative or executive officers," said Lord Shaw, in the same case, "is a usurpation."

So much for the analytical side of the question. Functionally, the case is still more remarkable. Though the famous dictum uttered by Coke three hundred years ago that the Courts could declare null a statute which violated "common right and reason," has not been acted upon,[19] yet it serves well to emphasize the intolerance of Anglo-Saxons towards any encroachment upon their rights and liberty. To close the house of an Englishman and calmly refuse to allow him to know what final evidence was used against him, or the *ratio decidendi*, may well be startling to the English common lawyer. That such conduct was acquiesced in by eight out of ten of the highest Judges in England is even more surprising. And the culmination of this remarkable litigation must certainly be found in the not unfavourable comment of Professor Dicey, the great champion of the Rule of Law, when he said:

> How could any trade prosper if it were in the hands of a man who could not dismiss a clerk until the employer had obtained conclusive proof of fraud or misconduct by the servant, or if no evidence were allowed to tell against the alleged delinquent unless it were what lawyers consider the very 'best evidence'? The management of business, in short, is not the same thing as the conduct of a trial. The two things must in many respects be governed by totally different rules.[20]

Then, finding that the Board was not unlike a large business, Professor Dicey viewed the *Arlidge* case (*supra*) without alarm.

It cannot be said that the case was decided without a clear realization of what was being done. Eminent counsel were involved, and one cannot read the opinions in the House of Lords without noting the open minded and discerning attitude of the Law Lords. The case flatly stands for a recognition by the highest Court of England, that administrative action cannot be forced into the mold of court procedure. The case is all the more remarkable as an example of judicial toleration when it is realized that with the powerful lever offered by the *Rice* case (*supra*) cited with approval in the *Arlidge* case (*supra*) it would have been no difficult feat for the judiciary to restrain this legislative progeny and uphold the claims of Arlidge, the litigious representative of the "Rule of Law."

From the standpoint of jurisprudence, an eminent jurist sees in this case a tendency to a new era of law, necessitated by the tremendous detail of our present-day civilization—a detail which

[19] 40 Har. L.R. 30.
[20] 31 L.Q.R. 148 at p. 150; cf. 36 Har. L.R. 263 at p. 265.

cannot be efficiently handled by any existing branch of the government.[21]

It must not be supposed that this case leaves administrative action absolutely unfettered. The *Rice* case (*supra*) still exists, considerably weakened no doubt, but always in the background, Bias, corruption, lack of evidence and other kindred grounds, may still be the bases of certiorari. These two cases were followed in 1922 by a decision of the Judicial Committee of the Privy Council in *Wilson* v. *Esquimalt and Nanaimo Railway Company*.[22] In that case, a statute provided that:

> Upon application being made to the Lieutenant-Governor-in-Council . . showing that any settler occupied or improved (certain) land . . . with the bona fide intention of living on said land, accompanied by reasonable proof of such occupation . . . a Crown grant of the fee simple in such land shall be issued to him.

The Lieutenant-Governor-in-Council made such a grant to Wilson. The railway company claimed that the land so granted belonged to it, and was given a hearing at the time of the application by Wilson. But the nature of the hearing is of chief interest in this connection.

On February 2nd, notice of a hearing for February 9th was sent to the railway company. February 2nd was a Saturday, so that in fact but five days were allowed the railway company's counsel to prepare a case. Counsel therefore wrote the Provincial Secretary, asking for an adjournment of two weeks. An ambiguous answer was given, and counsel appeared on February 9th, fully expecting his request to be granted. Instead, it was refused. and the railway company's interests were represented only by an extemporaneous defence.

But that is not all. At the hearing, the railway company asked that the declarants be produced and sworn. This was refused, although it was pointed out that the Act provided no means whereby the railway company could subpoena them, but that the Council could and should require their presence and give the railway company's counsel full opportunity of cross-examination.

How far this action ran counter to the judicial sensibilities of the trial Court of British Columbia may be seen from the following quotation:

[21] Dean Pound of Harvard Law School. Proceedings of the N. H. Bar Assn. (1917) 2 Wis. L.R. 321.

[22] [1922] 1 A.C. 202 at p. 206.

It is unnecessary to point out how vital it is in investigations into the truth to have full cross-examination of the witnesses. It must be admitted that the statute is confiscatory in its nature. That there is no suggestion of compensation and must, I think, be strictly interpreted. The statute says that the proof of occupation or improvement and intention to live on the land must be "reasonable proof." It does not say proof satisfactory to the Lieutenant-Governor-in-Council, and how can it be said that there is any proof whatever, reasonable or otherwise, when there has been no opportunity for cross-examination?[23]

Added to this, it appeared that the evidence produced by Wilson was, to say the least, meagre—and much of it was hearsay.

Yet, on appeal to the Judicial Committee, it was felt that though perhaps the action of the Lieutenant-Governor was not all that might be desired, it nevertheless fell within the pale of the requirements of the *Rice* case (*supra*), and that the hearing was sufficient. That this decision goes even beyond the much criticized *Arlidge* case (*supra*) seems clear, and it may perhaps lend considerable colour to the contention that the requirement of a hearing is fast becoming illusory. On the other hand, it indicates a phase of judicial restraint which, from the standpoint of efficiency in administrative action, is much to be desired. The case, however, does seem to go to the verge of the law and, should the "hearing" before Administrative Boards be further curtailed, it is doubtful that the judiciary would be justified in abstaining from interference.[24]

Review of Fact Finding.

It seems clear that, in the absence of statutory provisions to the contrary, finding of fact by Administrative Agencies must be conclusive.[25] Mr. Justice Duff, in the *Wilson* case (*supra*) at p. 212, said:

> Whether or not the proof advanced was "reasonable proof" was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor-in-Council in the affirmative could not be questioned in any Court so long, at all events, as it was not demonstrated that there was no "proof" before him which, acting judicially, he could regard as reasonably sufficient.

[23] (1920) 29 B.C.R. 333 at p. 341.

[24] For other cases in which bodies, not Courts, but acting judicially, have been similarly controlled by the Courts, see *Lapointe* v. *L'Association de Bienfaisance et de la Police de Montreal* [1906] A.C. 535 (Police Pension society in awarding pension must exercise discretion judicially; *LaBouchere* v. *Earl of Wharncliffe* (1879) 13 Ch. D. 346. *Fisher* v. *Keane* (1878), 11 Ch. D. 353; (Club Committee in dismissing members for misconduct, under club rules, must not act *ex parte*); *Wood* v. *Woad* (1874) L.R. 9 Ex. 190. (Same as to expulsion by mutual insurance society.

[25] *Wijeyesekera* v. *Festing* [1919] A.C. 646.

It is worth noting that this by no means allows arbitrary action on the part of the Lieutenant-Governor, but that he must use his discretion within limits. The judiciary allows room for an intelligent difference of opinion, but there must be *some* proof. Once more the judiciary has kept in its hands the means of control, but without abusing its power.

It by no means follows, however, that technical rules of evidence must be followed. Such rules are primarily for the protection of the jury, untrained men, unskilled in weighing evidence. The need of protection in this field is not so great where men, expert in the matters entrusted to them, are concerned.[26] In the *Wilson* case (*supra*), Mr. Justice Duff, at p. 213, is reported as saying:

> Their Lordships think the Lieutenant-Governor-in-Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received.

Review on the Merits.

We have seen that certain preliminary requisites as to hearing, notice, and other matters must be observed by an Administrative Board. Let us suppose, however, that all those requisites have been complied with and a decision made by the Board affecting the rights and liabilities of others. How far is it subject to review?

Lord Loreburn, it will be recalled, said, at p. 182, in the *Rice* case (*supra*):

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts.

Supposing the Board does ascertain the law but, in the opinion of the judiciary, wrongly, can the Board's ruling be reviewed by the Courts?

It should be noted at the outset that administrative action which is closely connected with governmenal functions, is not reviewable by the Courts, even though hearing, notice and the other requisities referred to are not complied with.[27] Some such limita-

[26] See note in 36 H.L.R. 79; 36 H.L.R. 263 at p. 265.
[27] *Theodore* v. *Duncan* [1919] A.C. 696 at p. 706.

tion is necessary where emergency action is concerned. As the close relationship is lessened, the reason for judicial abstention becomes less compelling until, finally, a point must be reached where the reason ceases to operate. It must be borne in mind, nevertheless, that administrative agencies are created primarily as an aid to the executive:

> The tendency of modern legislation has recently been to entrust to many who are prima facie only administrative officers, functions which have some judicial attributes at all events, although they remain primarily administrators.[28]

It is suggested, therefore, that in the absence of provision to the contrary, the creating statute should be presumed to have intended administrative finality.[29] The question depends ultimately, of course, upon the statute.[30] Only general principles can here be discussed.

The decisions are conflicting, due, perhaps to varying statutes and it must be confessed that the presumption above suggested has not received unqualified support.

In *Sharp* v. *Wakefield*,[31] *Australian Alliance Assurance Co. Ltd.* v. *Attorney-General for Queensland*,[32] and *Rex* v. *London County Council*,[33] there was a marked disinclination to review the discretion of licensing authorities, so long as they did not abuse their discretion.

> "Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rule of reason and justice, and not according to private opinion.[34]

If there has been an abuse of discretion, the judiciary will interfere,[35] but Pickford, L.J., at p. 489, in *Rex* v. *London County Council*, (*supra*), said:

> We are not sitting here to inquire whether the London County Council came to a right or a wrong conclusion on this matter. We can only inquire whether they have properly heard and determined the application, that is to say, whether they have decided upon grounds which they were entitled to take into consideration.

[28] *Everett* v. *Griffiths* [1921] 1 A.C. 631 at p. 659.
[29] Such a presumption exists as regards procedure. *Arlidge* case (*supra*). But cf. *Roberts* v. *Hopwood* [1925] A.C. 578 at p. 606.
[30] *Everett* v. *Griffiths*, op. cit. p. 659; [1915] A.C. 120 at p. 132
[31] (1891) A.C. 173 at p. 179 (H. of L.).
[32] [1917] A.C. 537 (P.C.).
[33] [1915] 2 K.B. 466.
[34] *Sharp* v. *Wakefield*, Op. Cit. p. 179.
[35] *Williams* v. *Giddy* [1911] A.C. 381; cf. *Roberts* v. *Hopwood* (*supra*).

A remark of Viscount Haldane may well be quoted here. The quotation is taken from page 660 of the *Everett* v. *Griffiths* case, wherein it was sought to charge certain authorities with negligence in finding a man to be a lunatic. The case is not strictly apposite, but the principle involved in the quotation would appear to bear heavily upon our problem. His Lordship there said:

> For provided that the person entrusted by Parliament with the statutory duty of satisfying himself in the fashion prescribed by the Act of 1890 and then to act, in fulfilment of the statutory duty which is that of the justice under s. 16, keeps within his jurisdiction, observing the prescribed conditions, and acting bona fide and honestly, I think that he is doing only what Parliament has called on him to do, and has thereby made lawful, and that the only tribunal that could make him responsible for a mistake in the exercise of the discretion entrusted to him must be such, if any, as is expressly established by Parliament for the purpose.

The line of demarcation between law and fact is sometimes difficult to define.[35a] Thus, in cases to be later discussed, the "necessity" of certain repairs and the "reasonableness" of time allowed to repair were before the Court. Are such matters law or fact? In the *Wilson* case (*supra*), the Lieutenant-Governor-in-Council had to decide, *inter alia*, whether or not there was reasonable proof of occupation, improvement, etc. As has been noted, their Lordships held that an administrative decision as to what constituted reasonable proof could not be reviewed unless there had been no proof before them which could be judicially regarded as reasonably sufficient. It was further remarked, at page 214:

> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

Thus the judiciary refused to review the findings as to occupation and improvement of certain land. The case primarily supports administrative finality as to findings of fact. It allowed, however, an almost untrammeled discretion in regard to the requirements of "reasonable proof" and the general tenor of the decision favours the view that administrative discretion should not, in any circum-

[35a] Cf. *Rees Roturbo Development Syndicate Ltd.* v. *Com'rs of Inland Revenue* [1928] 1 K.B. 506 (C.A.) reversed in the House of Lords, *The Weekly Notes*, Feb. 25th, 1928.

stances, be reviewed unless there had been an abuse of discretion. An intimation of the line of thought which appeared in *Everett* v. *Griffiths* (*supra*), may also be detected in the *Wilson* case (*supra*), at page 214, where their Lordships observed:

> The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation . . . that the Lieutenant-Governor-in-Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.

Basing an opinion on these decisions, therefore, it would seem fairly safe to say that if (a) the proper hearing and notice had been given; (b) the jurisdiction had not been exceeded; (c) there had been no abuse of discretion, and (d) there was a judicial sufficiency of evidence,[36] no Court or other body not specified by the creating act could review the decision, even if seemingly wrong.

But there are other decisions. In *Ryall* v. *Hart*,[37] a local authority, under statutory powers, ordered one Hart to repair a house, owned by him, within twenty-one days. Hart neglected to do so, and the local authority made the repairs. It then sued Hart, under the statute, for the expenses of the work. It was held that Hart could raise before the Court the question of whether or not the time specified in the notice was a "reasonable" time, as required by statute. This decision was made, even though an appeal was given by the statute to the Minister of Health.[38] Lord Hewart, C.J., in the *Hart* case (*supra*), at page 470, said:

> In my opinion if it was intended by the statute not merely to provide an appeal to the Government Department in that respect but also to prevent that question being raised at any other time or by any other method, it might have been expected that that intention would be expressed in clear terms in the statute. That however has not been done.

This quotation appears to be contrary to the authorities previously examined and to the suggested presumption of administrative finality. Lord Hewart also said at p. 470:

> If a condition precedent is prescribed by the statute for the validity of a notice it is a strong thing to say that the question whether or not that condition precedent has been fulfilled cannot be raised before the magistrate merely because the owner is given a right of appeal to a Government Department.

[36] *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (*supra*).
[37] [1923] 2 K.B. 464; cf. *Ryall* v. *Cabot Heath* [1922] 1 K.B. 275.
[38] *Rex* v. *Minister of Health* [1922] 2 K.B. 28.

It was therefore argued in a later case that the decision was confined to a review of conditions precedent.[39] The contention was over-ruled, however, and the magistrate allowed to inquire into the necessity of certain repairs.

The most noteworthy consequence of these decisions may be found in the Housing Act, 1923, s. 10(2), which definitely ousted the Courts from the jurisdiction which they had assumed. The merits may now be examined only by the Minister of Health. In this enactment the student of government may find some evidence of a legislative intent which would not be in harmony with the decisions just examined. To a lawyer, however, the inference would doubtless be the other way, and legislation which fails to give administrative finality in express terms would not, under these decisions, be so construed as to prevent judicial review. It is submitted, however, that the decisions referred to are not in harmony with the *Wilson* case (*supra*), *Everett* v. *Griffiths* (*supra*), the *Arlidge* case (*supra*), and other decisions discussed herein. It would seem fairly probable that they would not receive the approval of the Judicial Committee of the Privy Council or of the House of Lords.[40]

A further question may arise and should be considered. The decisions heretofore examined have been concerned with determinations substantially unembarrassed by precedent. Let us suppose a situation wherein an administrative agency must pass upon a point of law which has been determined by the Courts. Must the agency follow that precedent? And if it does not, may the Courts review its decision? It is submitted that the same considerations should apply as have been discussed in relation to actions where there is no precedent.

The fact that the judiciary, prior to an administrative decision, had on similar facts arrived at a contrary decision, should not give the judiciary any greater power of review than it would otherwise have had. The principle of *stare decisis* appears to be founded on the power of some higher body, which would follow the precedent, to review the decision of the body sought to be bound by the precedent.[41] To say, therefore, that the judiciary may review the admin-

[39] *Adams* v. *Tuer* [1923] 40 T.L.R. 49 (K.B. Div.).

[40] But cf. *Roberts* v. *Hopwood* (*supra*) at p. 606. This case simply allowed and defined a statutory "appeal" to a district auditor. The dictum on page 606 is not, however, favourable to the view taken in this article. See this case adversely criticised along the lines of this paper in 39 H.L.R. 832 at p. 846.

[41] *Lowery* v. *Lamont* [1927] 1 D.L.R. 669 (Man.).

istrative agency *because* there was a precedent is to indulge in the diversion of chasing the devil around the stump. Precedent binds because there is a power of review; not vice versa.[41a]

The matter may be considered from a different angle, however, and the following hypothetical case may serve as an illustration: A workman's compensation commission must pass upon whether or not an accident arose out of and in the course of the employment. A case on all fours has been decided by the English Court, and that decision is binding on the Canadian Courts. The commission does not follow the case. May its decision be reviewed? Direct authority appears to be lacking upon this question. An interesting analogy may be found in the Federal and State Courts of the United States of America. There being no common Court of Appeal, contrary decisions may exist side by side in those co-ordinate Courts. Remembering the remarks of Viscount Haldane in *Everett* v. *Griffith* (*supra*), this analogy may not be lightly disregarded. On the other hand, an analogy is presented by arbitration proceedings. In such proceedings, under statutory authority, where an error of law appears on the face of an award, the error may be reviewed by the Court.[42] It is submitted, however, that the decisions so holding are distinguishable, due to the difference in the statutes. As before suggested, it may well be presumed that administrative finality was intended by the statute because the Board would be administrative in character. Such is not the case where arbitration is concerned. The decision of *Ryall* v. *Hart* (*supra*) must be remembered, however, in its bearing upon such a presumption.

As a final consideration, it may be observed that it will often be difficult to bring the question before the Courts, since certiorari does not go to the merits[43] and mandamus will not lie to order a discretionary act.[44] Quære if such a question could be raised on motion to vary.[45]

Policy.

The policy of such agencies with the powers set out in this article is a problem for a student of government, but in the hope that some considerations which occur after a review of this subject may be of interest, the following critique has been appended.

[41a] Cf. *Rees Roturbo Development Syndicate, Ltd.* v. *Com'rs of Inland Revenue*, (*supra*) where a statutory appeal was allowed.

[42] 1 Hals. 996 and supplement; *Hodgkinson* v. *Fernie* (1857) 3 C.B. (N.S.) 189; *British Westinghouse Elec. and Mfg. Co. Ltd.* v. *Underground Electric Rail. Co. of London* [1912] A.C. 673.

[43] *Rex* v. *Nat Bell Liquors* [1922] 2 A.C. 128.

[44] *The Queen* v. *Churchwardens of All Saints*, Wigan (1875-76) 1 A.C. 611.

[45] Cf. *Attorney-General of Manitoba* v. *Kelly* [1922] 62 D.L.R. 370 (P.C.).

The learned editor of the D.L.R., in the number for January 12th, has attacked not the system of the Acts but the setting up of the Boards under the Acts as a law unto themselves, and has remarked that this habit of legislatures to set up Boards for the administration of the remedies under particular statutes is an abrogation of the spirit, if not the letter, of Magna Charta, the Charta of Liberties, for which men fought and died.

Are these legislative progenies so greatly to be feared? The answer must be found in the limitations upon their activities. Thus far, the discussion has been confined to legal constraint. An attempt has been made to demonstrate that the judicial limitations tend to ensure a proper atmosphere. The person whose rights or liabilities form the subject matter of the Board's activities is placed in a position in which the Board must fairly hear him and give a decision, not according to private opinion, but with due regard to the collective rights of society and of the person directly affected. This, in itself, is an external limitation, acting upon the personnel and character of the Board. The rest should be left to the Board, whether the Court believes it to have decided rightly or wrongly. Should this situation shock our judicial sensibilities? May we not meet attack with counter-attack and ask where we shall find limitations upon our Courts of last resort? No super-judiciary curbs their potential excesses, yet no cry is heard that we retrogress to the Star Chamber because of that deficiency. Why, then, is an appeal necessary to prevent administrative injustice? It is submitted that the answer to our problem is to be found in terms of personnel. Our Courts are trusted because they have proved to be worthy of respect. If it is desirable to improve our administrative agencies, that end should be accomplished by ensuring a satisfactory personnel. Assuming such a Board, there is no reason why administrative finality should result in greater injustice than may be encountered in the Courts. On the other hand, it may well be supposed that less efficiency would result from the allowance of an appeal. Presumably, a Board which exercises its energies and abilities within a narrow field would be more efficient in solving the problems referred to it than would a Court. The purpose and policy of creating Administrative Boards is, in part at least, based upon such an expectation. Does it not seem anomalous, therefore, to suggest that an appeal should be allowed from an expert to a non-expert body?[46]

[46] The anomaly is accentuated by the fact that administrative boards may base their decisions upon evidence which a Court could not consider.

So much for general discussion. Specifically, what limitations may be found?

Firstly, we have seen that the judiciary has the power to keep administrative boards within the confines of their creating statutes.

Secondly, the judiciary has the power to insist upon "natural justice" as outlined in this article.

Thirdly, there is—to borrow from the late Professor Dicey—an "internal limit." That is, everyone exercises his power in accordance with his character.[47] If the proper personnel is assured, this limit should be an efficient safeguard against abuse.

Fourthly, to borrow again from Professor Dicey, there is an "external limit."[48] That is, extraneous forces, acting upon individuals, affect their character. Thus, the mere potentiality of court interference may prevent abuse without the necessity of actual intervention by the judiciary. Most important of external forces, however, is public opinion. Our form of government is peculiarly sensible to public sentiment, and it would be rash to underestimate the importance of this factor.[49] Public opinion of today would demolish the Star Chamber over-night. So long as we retain our representative and responsible form of government we need not fear any permanent or serious encroachment upon our liberties. The voice of the people is the great external boundary of administrative discretion.

Fifthly, we may consider our form of government not as an external limit, but as an active force. As a threat, it affects the character of the Board. In action, under pressure of the electorate, it may legislate the Board out of existence.

Such, in theory, are the safeguards. In practice, it would seem that many such Boards, at least, have proved themselves valuable and trustworthy auxiliaries to our government. If one may take the liberty of quoting Lord Hewart, C.J.,[50] who appears to have spoken in derogation of administrative finality while in Canada, the following extract may well be printed here:

[47] Dicey: "Law of the Constitution," 8th ed., p. 77.

[48] Op. Cit. p. 74.

[49] "The ultimate safeguards," as pointed out by Professor Frankfurter of Harvard Law School, "are to be found in the people themselves, their standards, their zeal, their respect for one another, and for the common good—a truth so obviously accepted that its profound implications, in practice, are largely overlooked."

[50] *Rex* v. *The Minister of Health*, [1925] 2 K.B. 363 at p. 370.

Speaking for myself, I may say that I should be very reluctant to arrive at any conclusion which even seemed to tend in the direction of impairing the autonomous power of a local authority whose resolution is a condition precedent to a certain course. Local authorities are vested with great powers because in practice they show themselves to be worthy of them, and their discretion is not lightly to be diminished in any degree whatsoever.

No attempt has been made to investigate the actual workings of administrative agencies in general. Within a limited sphere, the writer's observations have not disclosed any outstanding abuses due to administrative finality. Even should abuse be shown, however, does it follow that the remedy lies in an appeal to the judiciary? It is suggested, rather, that the remedy lies in an improvement of the personnel of the Board. The latter course should tend to increase, the former to decrease, the efficiency of administrative action.[51]

NIGEL B. TENNANT.

Saint John, N.B.

[51] The chapter on the "Droit Administratif" in Dicey: "The Law of the Constitution (8th ed.), may be of interest to the reader. While the jurisprudence discussed herein bears a similarity to the Droit Administratif, it is pointed out in the work cited that there are important differences.