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THE SCOPE OF REVIEW IN ENGLISH ADMINISTRATIVE LAW

BERNARD SCHWARTZ*

Scope of Review

The scope of judicial review of administrative action in the Anglo-American world has been dominated by the distinction between "law" and "fact," a distinction that is fundamental throughout our law and that has, indeed, been the keystone upon which our whole system of appellate review has been built. As Sir Carleton Allen puts it, in this field, "it is generally agreed that the jurisdiction of superior Courts should be invoked only on questions of law—a principle which is already familiar in other spheres, such as appeals to the Court of Criminal Appeal and cases stated to the High Court by justices and other authorities of inferior jurisdiction. To re-open all disputed issues of fact might lead to endless litigation, with no very satisfactory conclusion in the end."1 As applied to the field of administrative law, this separation of law and fact sounds attractively simple. "The administrative tribunal would find the facts and the courts would not interfere unless the absence of evidence or the perversity of the finding required them to intervene."2

The approach of the courts to the scope of review has been based almost entirely upon this distinction between questions of law and questions of fact. As to the latter, the primary responsibility of decision is with the administrative expert. It is only the former that are to be decided judicially. "If the action rests upon an administrative determination—an exercise of judgment in an area which [the legislature] has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."3

From an historical point of view, the use of the law-fact distinction in the field of review of administrative action was a wholly natural development. When Anglo-American courts came to be confronted with cases involving challenges to the legality of agency

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acts, they had at their disposition the fully developed law of appellate review of lower courts as well as that governing the respective roles of judge and jury, both of which were grounded entirely on the law-fact distinction. In evolving the law of agency review, it was not surprising that the judges proceeded, so far as possible, by analogy, with the principles that had been constructed so meticulously by their predecessors in the above-mentioned fields, and particularly that of appellate court review. In their origins, indeed, cases involving review of agency action by the Court of King's Bench appear to have been treated exactly like cases involving review of inferior courts by that tribunal. The prerogative writs themselves, which became the basic non-statutory method of securing review of administrative acts in the common-law world, were originally available only to control inferior courts. When those same writs began to be used as a means of controlling administrative agencies, it was natural for them to be governed by the rules that applied when they were issued against lower courts, including that limiting the scrutiny of the reviewing court to questions of law.

The law-fact distinction, whose penetration into the law of judicial review of administrative action can thus be explained historically, may also be said to have a significant practical basis in the field of administrative law. A theory of review grounded upon the distinction rests upon a division of labor between judge and administrator giving full play to the particular competence of each. Questions of law are to be decided judicially, for the judge, both by training and tradition, is best equipped to deal with them. "Our desire to have courts determine questions of law is related to a belief in their possession of expertise with regard to such questions." These considerations do not apply to the judicial review of the factual issues arising out of administrative determinations. There, the advantages of expertise are with the administrator.

The fact "findings of an expert commission have a validity to which no judicial examination can pretend, the decision, for instance, of the New York Public Service Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the Courts in a similar case."5

**Error of Law**

Until recently, it might have been contended that the above analysis, while doubtless substantially correct so far as the American

system was concerned, did not accurately state the position in English administrative law. For it had come to be assumed in Britain that unless broadened by statute, the scope of review of administrative action depended, not upon the distinction between law and fact, but upon that between jurisdictional and non-jurisdictional errors.

The law of judicial review in the common-law world has in large part, developed from the law of ultra vires. Review has been based on the theory “That every public officer has marked out for him by law a certain area of ‘jurisdiction.’ Within the boundaries of this area he can act freely according to his own discretion, and the courts will respect his action as final and not inquire into its rightfulness. But if he oversteps those bounds, then the courts will intervene. In this form, the law of court review of public officers becomes simply a branch of the law of ultra vires. The only question before the court is one of jurisdiction, and the court has no control of the officer’s exercise of discretion within that jurisdiction.” Under this theory, judicial review of administrative action is focused primarily on the issue of jurisdiction. If the administration acts within its jurisdiction, its action is not subject to judicial correction. “Inferior jurisdictions could be checked whenever they acted in excess or want of jurisdiction. So too administrative acts will be declared illegal by the Courts if there is no jurisdiction to carry them out.”

Certiorari is, in the absence of statute, the most commonly used remedy to obtain judicial review of administrative action in the English system. There is little doubt that certiorari, as it was developed by the Court of King’s Bench, was based upon the jurisdictional theory of review just outlined. It is, however, a mistake to assume that review under certiorari extends only to the bare question of jurisdiction, using that term in its narrow sense of the marking off of the area of power of the agency concerned. “It must be apparent,” asserted an American court almost a century ago with regard to the scope of its review power in an action for a writ of certiorari, “that if the superior court could only examine into the right of the inferior one to enter upon an inquiry, without reference to the manner in which that inquiry is conducted, this remedy would be of small account.”

8. Griffith and Street, op. cit. supra note 7.
was to inquire into something more than the bare jurisdictional question. The supervision of the reviewing court, according to Lord Sumner, "goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise, the other is the observance of the law in the course of its exercise."10

And, as Lord Justice Denning informs us, until about a century ago, certiorari was regularly used to correct errors of law on the face of the record, even though such errors were committed by a tribunal acting within the area of jurisdiction marked out for it by the law.11

More recently, there has been a tendency among English lawyers and judges to forget this extension of certiorari for the correction of non-jurisdictional errors of law. "Of recent years," states the learned judge just cited, "the scope of certiorari seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law, and several judges have said as much."12

The development referred to by Denning, L. J., had, indeed, gone so far that a member of the Court of Appeal, could declare, in reply to the claim of counsel that it was a general principle that a superior court would set aside the decision of an inferior tribunal if that decision contained on the face of it an error of law, that "I do not think there is any such general principle."13 On the contrary, as stated in a frequently referred to passage by Greer L. J., "Where the proceedings are regular upon their face and the magistrates had jurisdiction, the court will not grant the writ of certiorari on the ground that the court below has misconceived a point of law."14

The 1951 decision of the Court of Appeal in *Rex v. Northumberland Compensation Appeal Tribunal*15 makes it clear that such restricted views of the scope of certiorari are erroneous. The applicant in the *Northumberland Compensation Appeal Tribunal* case had lost his employment as clerk to a local hospital board in consequence of the enactment of the National Health Service Act, 1946. The relevant local authority awarded him compensation for the loss of his employment, but did so only on the basis of his service on the hospital board, rejecting his claim that the whole of his local gov

15. [1952] 1 K. B. 338 (1951)
ernment service should be taken into account. The applicant appealed to the compensation award tribunal, which, under the law, had the function of determining the compensation payable to officers of hospital boards who lost their employment by reason of the transfer of hospitals to the Minister of Health under the 1946 Act. The tribunal dismissed the appeal and the applicant sought certiorari to quash its decision on the ground that the tribunal had erred in law in computing the compensation to which he was entitled on the basis of his service only as an officer of the hospital board. Before the Divisional Court, it was admitted by counsel for the tribunal that the tribunal had erred in its method of computation, but, though conceding that such error was one of law on the face of the decision, he contended that certiorari would lie to such a statutory tribunal only in the case of want or excess of jurisdiction. According to his claim as stated by one member of the Court of Appeal, "The statutory tribunals, like this one here, are often made the judges of both fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it."16

There was thus presented squarely the question of the correctness of the view, already stated, that the scope of certiorari was limited to the correction of jurisdictional errors in the narrow sense. "The question in this case," declares Denning, L. J., "is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly whilst keeping well within its jurisdiction. If it does so, can the King's Bench intervene?"17

In answering this question in the affirmative, the Court of Appeal was strongly influenced by the fact that a negative response on its part would have meant the perpetuation of the rank injustice inflicted upon the applicant. The administrative decision which he challenged was based upon an error of law which counsel for the tribunal frankly acknowledged. "It is an error which deprives Mr.

16. Id. at 346, per Denning, L. J.
17. Ibid.
Shaw of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay Mr. Shaw the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such case there were no means of correcting the error."

In holding that an order of certiorari could be granted to quash an administrative decision on the ground of error of law, the Court of Appeal was not really extending the scope of review in a certiorari proceeding. "When the King’s Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had." Those lawyers and judges (however eminent some of them may have been) who supported the view that certiorari was confined to the correction of jurisdictional errors had forgotten the basic historical facts with regard to the supervisory position of the King’s Bench. As Lord justice Denning has affirmed, "the Court of King’s Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law." Control by the courts which does not extend to administrative decisions which, on their face, offend against the law would be but illusory, much as sounding brass or a tinkling cymbal. By its decision that errors of law could be inquired into in certiorari proceedings, the Court of Appeal was only returning to the amplitude which the writ of certiorari clearly had in earlier times. It should not be forgotten that, under the customary wording of the old writ, the record of the inferior tribunal was ordered to be sent up so that the King’s Bench might cause to be done thereon "what of right and according to the law and custom of England" ought to be done.

It is because of its express rejection of the heresy that a court upon review, need not quash an administrative decision tainted by an error of law that the Northumberland Compensation Appeal Tribunal case well justifies its characterization by Lord Justice Morris in a public lecture "as being a very important one—and I so regard it. That is because the controlling powers which can be

18. Id. at 354, per Denning, L. J.
19. Id. at 347, per Denning, L. J.
20. Id. at 346.
exercised by the Queen’s Bench Division over inferior courts by orders of certiorari or prohibition form so vital a part in our legal and constitutional system in ensuring that statutory tribunals do not act in excess of jurisdiction and in correcting errors of law. In recent years there had been a tendency to consider that certiorari was confined to the correction of the results of acting in excess of jurisdiction. It has been made plain that certiorari can be used to correct errors of law which appear on the face of the record."

"Speaking Order" Doctrine

In the *Northumberland Compensation Appeal Tribunal* case just discussed, the order of the tribunal at issue indicated on its face that it was based upon an error of law. "I base my opinion" declares Lord Justice Singleton, "that there is error on the face of the decision on the terms of the decision itself; it is a ‘speaking order’. read alongside the regulations, it shows that the tribunal declined to consider any service other than service with the hospital board." It was the fact that the administrative decision itself "spoke" its error of law that enabled the reviewing court to set it aside for, as Denning, L. J., pointed out, "throughout all the cases there is one governing rule: Certiorari is only available to quash a decision for error of law if the error appears on the face of the record." It was the fact that the administrative decision itself "spoke" its error of law that enabled the reviewing court to set it aside for, as Denning, L. J., pointed out, "throughout all the cases there is one governing rule: Certiorari is only available to quash a decision for error of law if the error appears on the face of the record."

In a case like *Rex v. Northumberland Compensation Appeal Tribunal*, the error of law will not appear on the face of the record unless the administrative agency itself chooses to have it so appear. The record in certiorari cases, the judge just cited informs us, "must contain at least the document which initiates the proceedings, the pleadings, if any; and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them." If, in a given case, the agency concerned is unwilling to set forth the grounds of its decision in its order, certiorari will, as a practical matter, prove a worthless remedy, for there will, in the vast majority of cases, be no error on the face which the court’s order can reach. In such a case, states Lord Sumner, the administrative tribunal, by keeping silent, has not, in theory perhaps, been able to "stunt the jurisdiction of the Queen’s Bench or alter the actual law of certiorari. What it did was to disarm its

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25. Id. at 355, per Morris, L. J.
26. Id. at 351.
27 Id. at 352.
exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer, it was the inscrutable face of a sphinx."^

For the reviewing court to be able effectively to intervene, the administrative tribunal "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."  The words quoted are from a noted opinion of Lord Cairns, L. C., in which he laid down the distinction between so-called "speaking" and "unspeaking" orders, which under the Northumberland Compensation Appeal Tribunal case, has become of basic importance in the English law of scope of review. According to Lord Goddard, C. J., when Lord Cairns, in the passage just cited, "speaks of an unspeaking or unintelligible order, he obviously means an order which gives no reasons, or does not explain in any way why the [inferior] court made the order, but simply states that the court made such-and-such a conviction, order for removal or for quashing the poor rate, or other order of that sort, giving no reasons for doing so. It may not be unintelligible in one sense, but it is unintelligible in that it does not tell the superior court why the inferior court made that order."  On the other hand if, the inferior court or tribunal states in its order what led to its decision, that makes the order a "speaking" one, which can be criticized on certiorari.  If the tribunal "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."^

In order to understand the significance of the "speaking order" doctrine in English administrative law, one should bear in mind the

fundamental principle that, unless required to do so by statute, administrative agencies in Britain are under no legal obligation to give those affected any reasons for their decisions. It is only where the agency concerned chooses to articulate the bases of its action that its order becomes a "speaking" order and hence subject to being quashed by certiorari. "If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision." In the majority of cases, the orders of English administrative agencies appear to be "unspeaking" ones, in such cases, where no reasons are given, certiorari will be of little avail, even though the agency may have acted upon a misconception of the law. As Lord Goddard, C. J., puts it, with regard to review of an inferior court, "If the order is merely a statement of conviction and that there shall be a fine of 40 s., or an order of removal or quashing a poor rate, there is an end of it, this court cannot examine further." What the Lord Chief Justice says in this passage is true as well in the vast majority of cases where administrative decisions are "unspeaking"; in such cases, too, the courts cannot examine further than the face of the challenged agency orders, which, as a practical matter, "speak" only with the "inscrutable face of a sphinx."

In the opinion of the present writer, the "speaking order" doctrine constitutes an unwarranted and illogical restriction of the scope of judicial review in English administrative law. According to the authors of a leading treatise, "It is characteristic of the haphazard and illogical state of the law of judicial control that the effectiveness of review may depend on the readiness of tribunals to volunteer written reasons for their decisions." Under the "speaking order" doctrine, if administrative agencies, in Lord Sumner's phrase, "state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned." In other words, the administrator who adheres to the spirit of fair play and gives the private citizen affected by his decision the reasons for the decision may be penalized by the ultimate quashing of that decision, if the reasons given are erroneous in law; the administrator who observes only the letter of the law and

36. Griffith and Street, op. cit. supra note 7, at 214.
gives no reasons, unless he is compelled to do so by statute, will normally suffer no such consequences.

The "speaking order" doctrine constitutes one of the great barriers to effective judicial control of administrative action in the English system. Except where agencies are required by law to give reasons for their decisions (and, it should be noted, the Committee on Ministers' Powers was strongly in favor of such a requirement), that doctrine, in effect, places administrative decisions beyond the reach of reviewing courts, at least in certiorari proceedings. As a recent report puts it, if the administrative "tribunal fails to set out any facts or reasons to support its decision the High Court is powerless, Taking advantage of this rule, administrative tribunals tend to give a bare decision in order to escape supervision."38 It is indeed, difficult for an observer interested in strengthening judicial control not to agree with Professor Hamson that the "distinction at present drawn between 'speaking' and 'unspeaking' orders is a mere obstacle to the administration of justice the high court should have the power either to quash without more ado an order which is 'unspeaking' or at least to compel the inferior tribunal to make up and transmit a full record."39

CERTIORARI AND DECLARATION COMPARED

Under the "speaking order" doctrine, certiorari will issue only if the challenged administrative decision "speaks" its error of law. If the order at issue is an "unspeaking" one, in that it does not give any reasons, certiorari will not be available even though the decision may, in actuality, be based upon an erroneous conception of law. This result follows naturally from the principle that, on certiorari, the reviewing court's power of inquiry is limited to the face of the record, it may not go behind the determination upon which it is asked to pass judgment.

Does this basic restriction upon the reviewing court's right of inquiry apply in other than certiorari cases? Lord Justice Denning has indicated that this question can be answered in the negative, at least insofar as actions for injunctions or declaratory judgments are concerned. In an important 1952 case, he declared that the "remedy by declaration and injunction can be as effective as, if not more effective than, certiorari. It is, indeed, more effective, because it is not subject to the limitation that the error must appear on the

38. Rule of Law 46 (1955) (a report prepared by a committee of the Inns of Court Conservative and Unionist Society)
39. Hamson, Executive Discretion and Judicial Control 207 (1954)
face of the record." If the learned judge were correct in this remark, it could mean a significant change in the English law of judicial review. It is true that the injunction can rarely be used as a remedy in Britain in the field of administrative law, but, under *Bernard v. National Dock Labour Board*, the action for a declaration can now be used as a substitute for certiorari as a method of securing judicial review of many administrative determinations. If, as Denning, L. J., implies, the court in a declaratory judgment proceeding is not restricted, in its inquiry, to the face of the record, that could mean the end of the "speaking order" doctrine, which really makes sense only in a proceeding like certiorari where the limitation to the face of the record strictly applies.

Desirable though this result would be, it unfortunately appears to be precluded by the decision of the Court of Appeal in *Healey v. Minister of Health*. In that case, the Minister of Health had determined that plaintiff, a shoemaker employed in the shoemaker's shop of a mental hospital, was not a mental health officer within the meaning of the regulations providing for the grant of superannuation benefits to such officers. Plaintiff then brought an action against the Minister for a declaration that he was a mental health officer. It should be noted that as pointed out by Morris, L. J., in the *Healey* case, it was not suggested that any error of law was revealed on the face of the Minister's determination. Plaintiff, however, in seeking a declaratory judgment was, in effect, asking the court not to limit itself to the bare record. He claimed that since, as a matter of fact, patients at the hospital where he was employed worked in the shoemaker's shop, under his direction (at least part of the time) as occupational therapy forming part of their treatment, he was, in reality, a mental health officer.

According to Parker, L. J., plaintiff's claim was, in actuality, based upon the assertion that the court's power of inquiry in a declaration proceeding was broader than that in an action for certiorari. "It is . contended that once the Minister has determined the matter the High Court has jurisdiction to go behind the determination and to hold that it was wrong in law even though no error of law appeared on the face of the determination. In other words, it is contended that the court's supervisory jurisdiction is wide enough to enable it to declare a determination to be unlawful in the sense of being wrong in law even though the matter was not

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41. [1953] 2 Q. B. 18 (C.A.)
43. Id. at 231.
one which could form any ground for moving for an order of certiorari."

The Court of Appeal, in disposing of Healey's case, did so on the technical ground that plaintiff had not expressly asked the court to declare that the Minister's determination was invalid. This avoided the necessity for the court to deal directly with the claim that the scope of review in a declaratory-judgment action was broader than that in a certiorari proceeding. The implications of their Lordships' opinions are, however, clearly against the validity of this claim, which was characterized by Lord Justice Parker as "at once a novel and far-reaching contention—novel in that so far as I know such a jurisdiction, if it exists, has never been invoked, and far-reaching in that, if valid awards of arbitrators and decisions of statutory tribunals, such as rent tribunals, would be open to review, even though there was no error on the face of such awards or decisions."

It seems unlikely that the judge who characterized plaintiff's contention in this way would uphold it as valid if the question were presented squarely to him. The Healey case thus appears to support the view that the scope of review of administrative decisions is not wider in an action for a declaration than on an application for certiorari. The action for a declaration may be an appropriate alternative method of impugning an agency order for patent error of law. But if the challenged order does not "speak" its error of law, the declaratory judgment will be no more effective than certiorari as a method of review.

**Error of Fact**

Under *Rex v. Northumberland Compensation Appeal Tribunal*, already discussed, the reviewing court can, on an application for certiorari quash an administrative decision, not only for lack of jurisdiction in the strict sense, but also for errors of law which appear on the face of the record. The decision of the Court of Appeal in the Northumberland Compensation Appeal Tribunal case was a natural culmination in the development of a law of judicial review based upon the doctrine of ultra vires. As is well known, the starting point of the English law of review was the concept of lack of jurisdiction. Only if the administration acted outside the area of authority marked out for it by law would the courts set aside its action. But the courts, both in Britain and in other English-

44. *Id.* at 232.
47. *Id.* at 164.
speaking countries came to see that judicial review limited to the
bare question of jurisdiction was hardly sufficient to control ad-
ministrative illegality. The historic function of review, according to
the United States Attorney General's Committee on Administrative
Procedure, is to serve "as a brake on excursion by the administra-
tive body beyond its lawfully delegated authority and on the exces-
sive assumption of power by the executive."^8 In the performance
of this function we may expect the courts to speak the final word on
interpretation of law. The notion of ultra vires, originally imported
into the field of administrative law for the particular case of lack of
jurisdiction in the narrow sense, could be extended to other cases,
notably that of error of law, for proper construction of the law is a
limit that the administrator must defer to and he exceeds his power
if he does not conform to the law.49

Administrative action based upon an error of law cannot be said
to be within the authority conferred. Mr. Justice Brandeis has,
indeed, gone so far as to assert that "The supremacy of law de-
mands that there shall be opportunity to have some court decide
whether an erroneous rule of law was applied,"50 and the Com-
mittee on Ministers' Powers came to a similar conclusion.51 But,
whether we place the extension upon a constitutional basis or not,
it seems clear that the scope of judicial review has expanded from
its original starting point of correction of bare jurisdictional errors.
Judicial control today, in the words of Denning, L. J., "extends not
only to seeing that the inferior tribunals keep within their jursdic-
tion, but also to seeing that they observe the law."52 To put it an-
other way, the notion of ultra vires, upon which the English law of
review is grounded, has been expanded from the primary conception
of lack of jurisdiction to embrace cases involving improper exer-
cises of jurisdiction.53

What has been said shows clearly that the English reviewing
court, like those in other common-law countries, will quash ad-

48. Report of the Attorney General's Committee on Administrative
Procedure 77-78 (1941).
49. Compare Haurio, Precis de Droit Administratif 405 (12th ed.
1933).
50. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 84
(1936).
51. Report of the Committee on Minister's Power 108 (Cmd. 4060,
1932).
52. Rex v. Northumberland Compensation Appeal Tribunal, [1952] 1
K. B. at 347.
53. This is shown even more clearly perhaps by the cases allowing
certiorari where natural justice has been violated, since there is plainly no
lack of jurisdiction in them. See Griffith & Street, op. cit. supra note 7, at
213.
administrative action when the agency concerned has committed a patent error of law. Is the same result reached when the challenged decision is based upon an error of fact?

Here again, to be sure, one can argue that the administration is guilty of a false application of law. It ordinarily receives authority to take certain action, but only on the existence of a given legal and factual situation. If the required situation of fact does not really exist can it not be said that the administration has misapplied the law just as truly as when it commits an error of pure law? “Must not the authority charged with ensuring respect for legality by setting aside errors of law also necessarily inquire into the facts?” asks a French jurist. “Does not a false appraisal of the facts lead to an error of law? In separating the two, are we not unjustifiably mutilating the role of the reviewing court?”

However valid this argument may be, it must be recognized that it is utterly inconsistent with the present English law of scope of review. The English law of review is grounded almost entirely upon the distinction between “law” and “fact” with which we dealt at the beginning of this paper. The reviewing court can, we have seen, intervene where an administrative decision is grounded upon an error of law. But the same is not true as far as mistakes of fact are concerned, the commonly stated view is that administrative findings of fact should not be subject to any review. This view was well articulated in the conclusion of the Committee on Ministers Powers on the Subject. “While we are of the opinion,” reads its Report, “that there should be an absolute and universal right of appeal to the High Court on any point of law from the judicial decision of a minister or a Ministerial tribunal, we are satisfied that there should as a rule be no appeal to any court of law on issues of fact.”

The English law on review of errors of fact appears much narrower than that followed by courts in the United States. As pointed out in an English treatise, “The United States courts will review administrative findings [of fact] which are not supported by substantial evidence, that is, by ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” The American scope of review, according to Professor Wade, “at first sight contradicts our rule that the court cannot substitute its own conclusions on the facts for that of the administrative agency.

54. Goldenberg, Le Conseil d'Etat: Juge du Fait 13 (1932)
56. Griffith and Street, op. cit. supra note 7, at 219.
chosen by Parliament. The American rule at least permits a limited re-examination of the facts.\textsuperscript{57} Some British lawyers, indeed, go even further and regard the American doctrine of review as an unwarranted interference by the judiciary in the sphere of administration. “To my mind,” writes Dr. Evatt, “the most surprising feature in the development of administrative law in the United States is the persistence of the notion that the ordinary courts of law should be permitted to review the findings of fact which have been re-mitted by the legislature to the decision of the administrator.”\textsuperscript{58}

The present writer has, however, asserted that the American theory of review is not as different from that which prevails in Britain as one might at first believe\textsuperscript{59} and, in this view, he has been seconded by Professor Wade.\textsuperscript{60} The latter writes that the difference between the American and the English scope of review is “of less significance since an English court can fall back on the ‘no evidence’ rule, i.e. that as a matter of law an inference from the facts does not logically accord with and flow from them, as the late Lord du Parcq once put it.”\textsuperscript{61} This statement has been criticized by Professors Griffith and Street. “It is suggested with respect” say they, “that this statement is wrong. In the case relied on by Professor Wade, Lord du Parcq was dealing with income-tax litigation where statute expressly gives a right of appeal on points of ‘law’. It is a well-recognized rule that a right of appeal includes the right to appeal from findings not supported by the evidence. But English law has here always maintained the distinction between ‘excess of jurisdiction’ and ‘appeal on a point of law’ and there is no decided case in England to the effect that a right to quash for excess of jurisdiction extends to circumstances where the decision is against the weight of the evidence.”\textsuperscript{62}

The criticism of Professor Wade just quoted appears based upon a misreading of both American and English law. It errs, in the first place, in its assumption that the American courts will set aside an administrative decision where it is against the weight of the evidence. Under the American theory the reviewing court is not concerned with the weight of the evidence, it has only to see if the

\textsuperscript{57} Wade, Forward to Schwartz, American Administrative Law vi (1950).
\textsuperscript{58} Evatt, \textit{The Judges and the Teachers of Public Law}, 53 Harv. L. Rev. 1145, 1162 (1940).
\textsuperscript{59} Schwartz, \textit{op. cit. supra} note 57, at 115-16.
\textsuperscript{60} Report 108, \textit{op. cit. supra} note 51.
\textsuperscript{62} Griffith and Street, \textit{op. cit. supra} note 7, at 220.
administrative finding of fact is supported by substantial evidence. In such cases, as Mr. Chief Justice Hughes has pointed out, "the judicial inquiry goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority." To criticize Professor Wade because there is no English case quashing where an administrative decision is against the weight of the evidence is unwarranted, even if there is no such English case, that does not demonstrate the error of Professor Wade's view that the English scope of review is not very different from the American one, since, as just pointed out, the American courts themselves do not inquire into the weight of the evidence.

In actuality, the English courts have not kept as complete a hands-off policy from reviewing administrative findings of fact as is often supposed. We have already seen how, in the English system, the scope of review has come to include errors of law, the reviewing court in Britain will clearly set aside an administrative decision based upon a misconception of the law. But, under the view of the English courts, it is a question of law whether there was any evidence upon which another tribunal could have come to the conclusion at which it had in fact arrived.

The English courts may thus acquire competence to review whether the administrative finding of fact is without evidentiary support, the question of evidentiary support is seen to be one of law, for a finding without such support is arbitrary and ultra vires. As Lord du Parcq aptly expressed it, in the case cited by Professor Wade, "To come to a conclusion which there is no evidence to support is to make an error in law." To this, the critics cited will object that Lord du Parcq was speaking in a case where the statute expressly gave an appeal on points of law, his views there, it will be urged, are not relevant in cases where no such statute exists. It is difficult for the present writer to see the force of this view. Under the income tax law, the aggrieved taxpayer, it is true, is given a right of appeal to the courts.

63. Of course, reviewing courts are concerned with the weight of the evidence whenever the review is de novo, as it is in many American cases, such as, for instance, in all the cases coming to a court from the Internal Revenue Service. The statement in the text assumes that the review is in accordance with the substantial evidence rule.


against a decision of the General (or Special) Commissioners of Income Tax on the ground that it was erroneous in point of law. But is the scope of review here not similar to that which now prevails in applications for certiorari and actions for declarations? In the latter cases, too, as shown by decisions already dealt with, the courts will quash challenged determinations on the ground that they were erroneous in point of law. It is hard to understand why the scope of review, so far as error of law is concerned, should be different in the statutory than in the non-statutory review proceeding (except, perhaps, for the limitation already discussed to errors on the face of the record where the non-statutory method is used). If lack of any evidence is an error of law in the statutory proceeding, it should constitute similar error (at least where the lack is apparent on the face of the record) in cases involving control by certiorari and declaration.

That the distinction claimed by the critics already cited between "excess of jurisdiction" and "appeal on a point of law" does not really exist, at least insofar as the point under discussion is concerned, is shown by the cases under the appeal provisions of the English Housing Acts. Under those laws, an individual aggrieved by a clearance or compulsory purchase order may apply to the High Court for the quashing of such order. The High Court may quash if satisfied that "the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of the Act not having been complied with."

This statutory review provision seems but to incorporate the "excess of jurisdiction" theory of review which governs on an application for certiorari, and, if the distinction referred to is correct, it should not be possible for the courts in Housing Act cases to review the question of evidentiary support the way they do in cases like those arising under the Income Tax Acts, where there are appeals on points of law. Yet, under the Housing Act cases, too, the question of evidentiary support is construed to be one of law, and the High Court can quash when there is no evidence in support of a challenged order. This is demonstrated by the very first case construing the review provisions of the Housing Act of 1930. According to Swift, J., there, under that Act "An application may be made to this Court . only on the grounds there specified—namely, that the order is not within the powers of the Act, or that some require-

ment of the Act has not been complied with, or on the further ground that there was no evidence to support the order.”

And, in a later case, Croom-Johnson, J., assumed (though without deciding it) “that it is open to this court to examine and see whether there is evidence, or whether there was evidence before the Minister when he made the order, upon this theory, as I understand it, that if there was no evidence entitling the Minister to come to the conclusion that the houses were in the condition indicated in the section, therefore, the order made thereupon was not within the powers of the Act.”

If lack of evidence can be gone into in these Housing Act cases, it is hard to see why it cannot be gone into as well in non-statutory review proceedings, which are based upon essentially the same “excess of jurisdiction” theory. In Healey v. Minister of Health, where the Court of Appeal refused to issue a declaration that plaintiff was a mental health officer and entitled to superannuation benefits as such, plaintiff’s counsel, in urging that relief should be granted where the Minister of Health had wrongly decided plaintiff was not a mental health officer, took as an instance a case “where the Minister had made a palpable error. Suppose, he said, that a man had served more than 10 years and had reached the age of 60. Under regulation 7 he would be entitled to a pension. But suppose the Minister determined that he had no right to one. Would not the courts interfere?”

Lord Justice Denning answers this question with a categorical affirmative, “I think they would. There would in that case be good reason for thinking that the Minister had mistaken or misused his powers and the court would on that ground declare his determination to be invalid.”

In the example given, the Minister appears to have committed a manifest error of fact contrary to all the evidence, he has decided that the hypothetical applicant did not come within the factual requirements of regulation 7. In such a case, for the court to be utterly precluded from examining the question of evidentiary support would be for it to countenance a patent injustice. If that question cannot be explored at all by the judge, the right to judicial review becomes but an empty form. “It makes judicial review of administrative orders a hopeless-

69. In re Bowman, [1932] 2 K. B. 621, 627 (emphasis added)

70. Re the London County Council (Riley Street, Chelsea, No. 1) Order 1938, [1945] 2 All E. R. 484, 489. See, similarly, In re Bainbridge 1939 1 K. B. 500, 502.

71. [1955] 1 Q. B. 221, supra note 42.

72. Id. at 227.

73. Id. at 227-28.
formality for the litigant. It reduces the judicial process in such cases to a mere feint."

In the Healey case itself, the plaintiff was a shoemaker who had been held by the Minister not to be a mental health officer. The finding of the Minister may well have been wrong in the light of all the evidence (though, it must be admitted, this is hardly likely on the facts as they are reported), but, at the very least, the Minister's decision was a reasonable one and cannot be said to have been supported by no evidence at all. Suppose, however, that the plaintiff had been a practising psychiatrist employed in the relevant mental hospital and the Minister had then, contrary to all of the evidence, classified him, for purposes of superannuation, not as a mental health officer, but in the same category as the shoemaker. In such a case, would there be any doubt that the courts would interfere? Even Professors Griffith and Street concede that "the absence of any evidence, though not in itself necessarily a separate head of review, must be treated as a cogent factor in deciding whether to quash for unreasonableness or improper purpose."

In the opinion of the present writer, it would be more accurate to treat lack of evidence as a separate ground of review. But whether one does or treats it (as Messrs. Griffith and Street do) as a factor indicating unreasonableness or improper purpose, or (as Denning, L. J., does) as showing mistake or misuse of powers, is less important than the fact that, as can be seen from the above discussion, the English courts do have the power to inquire into the question of evidentiary support.

Enough has been said to substantiate the contention that the judge in Britain, like his confrere in the United States, can examine administrative findings of fact to determine whether they are supported by evidence. It would, however, be a mistake to assume from this that the scope of review of findings of fact is exactly the same in both the English and American systems of administrative law. Though the basic theory of review is similar in both countries (i.e., whether a finding is supported by evidence is a question of law), the scope of review in practice is not as broad in Britain as it is in the United States. Under the English test (the so-called "no evidence" rule), the reviewing court looks only to see that there is some evidentiary basis for the administrative finding; there is no quantita-

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75. Griffith and Street, op. cit. supra note 8, at 221.
76. Supra note 72.
77. Of course, the scope of review in America varies from court to court and from agency to agency.
tive examination of the supporting evidence. If a factual issue is involved, the administrative finding can, as Charles, J., has stated, be interfered with only if the agency concerned had no material on which to base it. Only if there is no evidence in support of the finding is the administrative determination not within the powers conferred. To quote Croom-Johnson, J., in a postwar case where it was alleged that there was no evidence on which the Minister could find as he did, "I am not concerned with the question as to whether upon the facts as set out in the documents, and in the evidence on the one side or the other, I should have come to the same conclusion or not. This court is engaged simply in looking to see whether there is evidence." Nor is the court concerned with the question of the substantiality of the evidence in support. In the words of the learned judge, "very little evidence may justify a finding of fact." The individual seeking review cannot prevail unless the court upholds his contention that there is no evidence to support the finding.

In the American system, the reviewing court can, to some extent, undertake a quantitative examination of the evidence in support of administrative findings of fact. Judicial review in the United States is, to quote Professor Wade again, governed by the "substantial evidence" rule, viz. that the scope of judicial review over administrative action is limited to questions of law and to whether or not the findings of fact underlying the administrative conclusion are based upon substantial evidence. Under this test, when is the evidence in support of an administrative finding of fact substantial? As the present writer reads the American cases, they require the reversal of an administrative determination when a challenged finding of fact is not a reasonable one in the light of the evidence in the whole record. Substantial evidence is hence such evidence as might lead a reasonable man to make the finding at issue. The evidence in support of a fact finding is substantial when from it an inference of the existence of the fact may be drawn reasonably. In such a case, the reviewing court must uphold the finding, even if it would have drawn a contrary inference from the evidence. "Choice lies with the Board and its finding is supported by the evidence and is conclusive where others might reasonably make the same choice."

79. Re the London County Council (Riley Street, Chelsea, No. 1) Order 1938, [1945] 2 All E. R. 484, 489 (K.B.D.).
80. Ibid.
81. See Wade, supra note 57.
The substantial evidence rule which governs the American scope of review tests the rationality of administrative findings of fact, taking into account all the evidence on both sides. The meaning of substantial evidence is that declared by Mr. Chief Justice Hughes in a leading case, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The substantial evidence test is thus a test of the reasonableness, not of the rightness, of administrative findings of fact.

Under the American approach just analyzed, the reviewing court can inquire into the rational basis of challenged administrative findings. The court will not reverse merely because the finding is not the one which it would have made had it been the initial adjudicator; if the finding is a reasonable one, it must be upheld. This is not very far from the scope of review asserted by Lord Greene, M. R., in a 1946 decision of the Judicial Committee of the Privy Council. In that case, which involved assessments by the Canadian Minister of National Revenue to income tax and excess profits tax for certain years, the Minister's decision was attacked on the ground that there was before him no evidence on which he, as a reasonable man, could determine that the profits in question were in excess of what was reasonable for the particular business. According to Lord Greene, in a case like this, the reviewing court is "always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case, the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion."

The approach articulated by Lord Greene in this passage is analogous to that under the American rational basis test. What his Lordship is saying is that the court can inquire into the reasonableness of the Ministerial determination. If the evidence shows it to

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85. Id. at 123.
86. Compare the review of by-laws and decisions of local authorities, where the courts in Britain can inquire into reasonableness. See Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K. B. 223, 234.
have been reasonable, even though not that which the court would have made, it must be upheld, if found arbitrary, it will be overruled. What is most significant about the case in which Lord Greene made these observations is the fact that it was not one involving judicial review of an administrative decision based upon the "excess of jurisdiction" theory. The relevant statute provided for a full appeal to the Canadian Exchequer Court, and the appeal was to be regarded as an action in the court. The case was thus analogous to an appellate case in the judicial process. And it illustrates the truth of a remark made on a previous occasion by the present writer that, in general, judicial review of administrative agencies in America has been assimilated to appeals from lower courts. The scope of review of administrative findings permitted under the American rational basis rule is basically similar to that which prevails in Britain where appellate proceedings are concerned.

It is not contended that the broader scope of review allowed under the American system should necessarily be imported into English administrative law. Two observations should, however, be made. The first is that, as has already been emphasized, the American rule is not as inconsistent with English law as is commonly supposed. The courts in Britain already possess the power to inquire into the question of whether there is any evidence in support of challenged administrative findings. To permit them to make a quantitative analysis of the evidentiary support similar to that permitted to American courts would involve a change of degree, and not of kind. Secondly there is little doubt that the American scope of review makes for far more effective judicial control of administrative action. In a 1949 case involving an appeal from a licensing decision, Lord Goddard, C. J., stated, in reply to the contention that all that the appellate tribunal could decide was whether there was any evidence upon which the licensing authority could come to its decision, "If that argument be right, the right of appeal would be purely illusory." Although it may not be generally realized, the same can well be said of the right of review, where inquiry into the facts is limited by the "no evidence" rule. It is very rare for an administrative agency to act without any evidence in support of its findings. But, unless it does so act, under the English law, its findings of fact are conclusive. And it should not be forgotten that it is

87 See [1947] A. C. at 122.
the power to find the facts, rather than the law, that is the decisive element in the vast majority of cases. As aptly stated by an American Chief Justice, "The power of administrative bodies to make findings of fact which may be treated as conclusive is a power of enormous consequence. An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country and I care little who lays down the general principles'" 90

**Jurisdictional Facts**

Under the scope of review which prevails in English administrative law, the reviewing court can intervene only to correct errors of law. It is true, as we have seen, that the question of evidentiary support is construed as one of law, so that the court can examine findings of fact to determine whether they are supported by evidence. But the judicial inquiry into fact findings does not go further than to determine whether there is any evidence to sustain them, only if the administrative finding of fact is supported by no evidence in the record can the English courts grant relief.

A different result will however, be reached if the fact at issue is a jurisdictional one. "The courts can intervene if some fact which is a condition precedent to the exercise of administrative power is non-existent." 91 To apply the normal theory of limited review of facts would run counter to the policy of the law against allowing inferior tribunals to determine the limits of their own jurisdiction. "An [administrative] agency may not finally decide the limits of its statutory power," the United States Supreme Court has declared. "That is a judicial function." 92 Where the administrative jurisdiction depends upon a finding of fact, the reviewing court should be able to determine for itself whether that finding is correct. "No tribunal of inferior jurisdiction," as Farwell, L. J., expressed it, "can by its own decision finally decide on the question of the existence or extent of such jurisdiction such question is always subject to review by the High Court and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact, a Court with jurisdiction confined to the city of London cannot extend

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91. Griffith and Street, *op. cit. supra* note 7, at 208.
92. Social Security Board v. Nierotko, 327 U. S. 358, 369 (1946). This case, as such, may be considered inconsistent with other Supreme Court decisions, but the quoted statement has been referred to with approval in East Texas Motor Freight Lines v. Frozen Food Express, 351 U. S. 49 (1956).
such jurisdiction by finding as a fact that Piccadilly Circus is in the
ward of Chepe."93

In the postwar English cases, the doctrine of full judicial review
of so-called jurisdictional facts has been applied most frequently
upon review of the determinations of the tribunals set up under the
Furnished Houses (Rent Control) Act, 1946. Under that law
Lord Goddard, C.J., has stated, "Parliament has chosen to make
them [i.e. the rent tribunals] the absolute masters of the situation
and to leave the decision of these cases to them without appeal."94
Despite this, it has been clear that the Queen's Bench Division can
intervene by an order of certiorari when a rent tribunal acts in excess
of its jurisdiction, and, since the Northumberland Compensation
Appeal Tribunal case,95 when it commits an error of law apparent
on the face of the record. It was this which recently led the Minister
of Housing, when asked in the House of Commons to introduce a
law to enable the parties in rent tribunal proceedings to require a
case on points of law to be stated to the High Court, to assert that
such a law was unnecessary, since, at the present time, "If a tribunal
exceeds its jurisdiction, or misdirects itself in law action can be
taken in the High Court to quash the decision."96

As early as May, 1947, the Divisional Court quashed a rent
tribunal determination on the ground that the tribunal had no
jurisdiction to entertain the case, where it did not appear that the
landlord was contractually entitled to a payment for the use of
furniture or "services" provided by him at the rented premises.97
In the case referred to, it would seem that the jurisdiction of the
tribunal depended upon whether there was, in fact, a contract for the
provision of furniture or services by the landlord and the court
appears to have decided this factual question upon its own inde-
pendent judgment. In a case decided in July, 1947, where the court
quashed the determination of a rent tribunal upon the same ground,
counsel for the landlords expressly urged the rule of full review of
jurisdictional facts, asserting that "Since the existence and extent
of jurisdiction in the tribunal depends on the facts, the question may

(C.A.) See White and Collins v. Minister of Health, [1939] 2 K. B. 838, for
a striking application of the doctrine of full review of jurisdictional facts.
94. Rex v. Paddington Rent Tribunal, [1947] 1 All E. R. 448, 450
(K.B.D.) Compare Rex v. Paddington Rent Tribunal, [1955] 3 All E. R. 391,
396 (Q.B.D.) where the Lord Chief Justice declared, "These tribunals, one
may say, are a law unto themselves."
95. See note 15 supra.
96. 535 H. C. Deb. 5s., cols. 234-35 (written answers)
973. See, similarly, Rex v. Paddington and St. Marylebone Rent Tribunal,
arise as to the jurisdiction of the tribunal to find those facts. Their findings of fact can be investigated by this court. Therefore unless this court can find evidence on which the tribunal could hold that there is a term of the contract that the landlords should provide hot water, they must be held to have acted without jurisdiction."

The court did not expressly adopt the doctrine urged, but its decision quashing the tribunal's determination was based upon the tribunal's factual error in finding that a contract existed, which certainly implies full review of the jurisdictional fact.

In two 1950 decisions, the Divisional Court made express its reliance upon the jurisdictional fact doctrine in rent tribunal cases. "I am of opinion," states Lord Goddard, C. J., in one of the decisions referred to, "that the tribunal in the present case had power to inquire into whether there was a contract, because it was only if there was a contract that they could exercise the jurisdiction which the Act of Parliament has given them. When they have decided that, it is open to the person who complains of that decision to ask this court to inquire into it by means of certiorari." Nor is the court's inquiry concluded by the tribunal's finding on the question of jurisdictional fact. "It must not merely appear that a contract exists on which they could exercise their jurisdiction; it must in fact exist."

To an American observer, these English rent tribunal cases, all decided since the last war, which apply the rule of full judicial review of jurisdictional facts, are of particular interest, for the jurisprudence of the United States Supreme Court during the same period manifests a striking tendency completely to abandon the jurisdictional fact doctrine. Until recently, it is true, the American tribunal was as firmly wedded to that doctrine as the English courts appear to be. In Crowell v. Benson, however, the leading American decision articulating the rule of full review of jurisdictional facts, Mr. Justice Brandeis announced a famous dissent in which he challenged the very basis of the jurisdictional fact doctrine. According to him, most statutory schemes of the type administered by regulatory or social service agencies imply a large number of facts on which jurisdiction turns, and full judicial review over them could practically do away with the limitations imposed by the courts

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101. Id. at 647 (emphasis added), see Parker, J.
upon their review power over factual issues. In Justice Brandeis' view, it would be both burdensome to reviewing courts and disruptive of administrative processes to hold that every fact issue on which a claim of lack of statutory jurisdiction can be made to depend becomes thereby entitled to a full redetermination by the courts on review. The reason is that there are few factual questions of any importance that, if incorrectly decided by the administration, cannot be made the basis of a claim of lack of statutory jurisdiction.

The United States Supreme Court itself soon became convinced of the logic of Justice Brandeis' dissent. And this led the Court to all but abandon the jurisdictional fact doctrine in its recent jurisprudence, findings of fact on which jurisdiction depends are reviewed no more broadly than ordinary findings of fact. The English rent tribunal cases, on the other hand, indicate that the courts in Britain still assert the power to inquire into the facts on which the jurisdiction of an administrative tribunal depends. The importance of judicial control on the question of jurisdiction has been seen to outweigh the inconveniences to administration that might result from employment of the jurisdictional fact doctrine.

A caveat should perhaps be interposed here. Though the rent tribunal cases show the adherence of the English courts to the rule of full review of facts upon which jurisdiction depends, it would be going too far to say that they will inexorably apply that rule in all cases. On the contrary, in cases where the problem of jurisdictional fact has arisen, the English courts have consistently followed the distinction drawn by Lord Esher, M. R., in what has been termed the "classic judgment" on the subject. According to his Lordship, "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be

104. Compare Rex v. Paddington Rent Tribunal, [1955] 3 All E. R. 391 (Q.B.D.), where the court seemed to distinguish between the three jurisdictional facts expressly contained in section 40 (1) of the Housing Repairs and Rents Act, 1954, and other facts upon which it was claimed, jurisdiction depended.
105. Griffith and Street, op. cit. supra note 7, at 209.
held that they acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more."

In the second type of case, Lord Esher concludes, it is erroneous to apply the doctrine of full review of jurisdictional facts. A tribunal of the second type can 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." 106

As the cases already discussed demonstrate, the English rent tribunals are tribunals of the first type referred to by Lord Esher. "As a result, it must not merely appear to these tribunals that the condition precedent to their jurisdiction exists, but it must in fact exist." 108 In Rex v. Ludlow; ex parte Barnsley Corporation, 109 on the other hand, it was held that a tribunal of the second type mentioned by Lord Esher was involved. In that case, the corporation had been ordered by a deputy umpire to reinstate a former employee under the Reinstatement in Civil Employment Act, 1944. The corporation applied for certiorari to quash the reinstatement order on the ground that it was made without jurisdiction, since the person ordered reinstated was not its "employee." Lord Goddard, C. J., in delivering judgment, indicated clearly that the doctrine of full review of jurisdictional facts would not be applied. After quoting the passage of Lord Esher given above, he stated that "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. It seems to me that that is what the tribunal has done in the present case, and that it was clearly given the right to do so by the Act." 110 The deputy umpire was, in other words, clothed by the Act with jurisdiction to decide his own jurisdiction.

Why should the jurisdictional fact doctrine be applied in the rent tribunal cases, but not in that involving the reinstatement tri-

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107. Id. at 320.
110. Id. at 640.
bunal? It is difficult to see any real distinction between the two types of cases. The administrative authority to act was as much dependent upon the existence of the employment relationship in the Barnsley Corporation case as was that of the rent tribunals upon the existence of a contract for furniture or services in the cases already discussed. It is true, as Lord Esher says, that Parliament can enact that administrative findings shall be conclusive on questions of jurisdictional fact (and even on pure matters of law, for that matter) But Parliament has not expressly done so in these cases and one searches in vain for an indication of implied legislative intent which was present in Barnsley Corporation but not in the rent tribunal cases. It may be that the only explanation one can give for the difference in result is that stated by Professors Griffith and Street. “Despite the seeming clarity and certainty of Lord Esher’s test, in practice Parliament has so conspicuously failed to give the courts assistance that they are bound to make a creative choice and it would hardly be surprising if they declared a fact ‘jurisdictional’ when they had already decided that they would like to interfere with the administrative tribunal.”111 In this view, the rent tribunal cases are explainable primarily on the basis of the judicial hostility to a new type of tribunal, dispensing informal administrative justice in an area which had heretofore been more or less the exclusive domain of the common law whose decisions are rendered immune from any appeal. 

The present writer does not deny the existence of the judicial tendency relied on by the authors just cited, to increase the scope of judicial review when they have less confidence in the particular tribunal.112 At the same time, it is felt that that tendency is not enough to explain the difference in result as between Barnsley Corporation and the rent tribunal cases, so far as review of jurisdictional facts is concerned. In actuality the distinction drawn by Lord Goddard for his Barnsley Corporation decision was really non-existent. This means, in turn, that the judicial approach in Barnsley Corporation is inconsistent with that followed in the rent tribunal cases, for there was as much reason for applying the doctrine of full review of jurisdictional facts in Barnsley Corporation as in the other cases. If this conclusion is sound, the implications are disturbing. The unexplained refusal of the court in

111. Griffith and Street, op. cit. supra note 7, at 209-10.
112. Id. at 224.
the Barnsley Corporation case to apply the jurisdictional fact doctrine leaves the commentator on English administrative law in, to say the least, a somewhat bewildered state. The life of the law may not be logic, but a branch of the law that is not logically consistent internally leaves much to be desired. Whatever one may think of the merits of the doctrine of full review of jurisdictional facts, its application should be a consistent one. If, on the contrary, the doctrine is sometimes applied and sometimes not, in cases that appear to be fundamentally alike, then the law on the subject is far from satisfactory. The evil resulting from judicial inconsistency in applying a supposedly established doctrine is self-evident. If the application of such doctrine in particular cases depends primarily upon judicial fancy, the law becomes, not a chart to govern conduct, but a game of chance, instead of settling rights and liabilities, it unsettles them.

Mixed Questions

Our discussion thus far has been based on the assumption that there is a clear-cut distinction between questions of law and questions of fact, with the former for the reviewing court and the latter primarily for the administrator. Actually, as administrative lawyers on both sides of the Atlantic have come to realize, the distinction between "law" and "fact," on which the scope of review is based, is not nearly so well defined as is often supposed. "[A]s Sir Cecil Carr has pointed out, the distinction between law and fact is easier to express in a phrase than to preserve consistently in practice, and, indeed, this is a difficulty which constantly arises in all branches of the law." The extent of review depends upon which side of the law-fact dividing line the challenged administrative finding is seen to fall. Yet there may be great difficulty in concrete cases in determining on which side of the line a particular finding does fall. The law-fact distinction, Mr. Justice Frankfurter has asserted, "is often not an illuminating test and is never self-executing."

The difficulty involved in applying the distinction between "law" and "fact" in particular cases has led to the characterization of a large number of questions as "mixed questions of law and fact." In Anglo-American administrative law, the problem of the so-called mixed questions has arisen most frequently in recent years in connection with the application of statutory language to particular

114. Allen, op. cit. supra note 1, at 160.
states of fact. The extent to which the courts review the application
of legal terms or concepts to the facts is, indeed, now the heart of
the problem of scope of review. The difficulty is," as an English
treatise points out, "most acute when statutes include words of
variable meaning, for example 'producer' or 'employee.' If a statute
gives a right of appeal on law and a party wishes to challenge the
administrative holding that he is a 'producer,' is that an appealable
point of law?"

In the American system, the answer must be a negative one. The
leading case is Gray v. Powell, a 1941 decision of the Federal
Supreme Court. The administrative finding at issue there was simi-
lar to that mentioned in the just-cited quotation, namely that the
party seeking review was not a "producer." The statute involved
was one fixing coal prices, though exempting from its regulatory
provisions coal consumed by a "producer." The private party con-
cerned claimed that the coal consumed by it came within this ex-
emption and challenged the administrative finding that he was not
a "producer." In upholding the agency concerned, the American
Court indicated that the finding at issue was primarily within the
administrative competence and not subject to wider review than
agency findings of pure fact. "Where, as here, a determination has
been left to an administrative body," the Court's opinion reads,
"this delegation will be respected and the administrative conclusion
left untouched. Although we have here no dispute as to the
evidentiary facts, that does not permit a court to substitute its
judgment for that of the Director."

In Gray v. Powell, it was at least arguable that the challenged
administrative finding was not right. But the American Court ex-
pressly states that that is not its concern upon review. The re-
viewing court can reverse only when it "can say that a set of cir-
cumstances deemed by the Commission to bring them within the
concept 'producer' is so unrelated to the tasks entrusted by Con-
gress to the Commission as in effect to deny a sensible exercise of
judgment." In such a case, it would seem that the administrative
finding is not only not right but also not reasonable. Where, on the
contrary, the agency determination, though perhaps erroneous in
the view of the reviewing court, is a reasonable one, "it is the

117. Griffith and Street, op. cit. supra note 7, at 224.
118. 314 U. S. 402 (1941), But see Davis, Administrative Law 247
(1951).
119. 314 U. S. at 412.
120. Id. at 413.
It may be going too far to assert, as did Mr. Justice Roberts who dissented, that the majority of the Court adopted its construction of the term “producer” “apparently only because the Director has adopted it,” but it is certainly true that, under the Court’s reasoning, it could not substitute its judgment for that of the Director on the proper construction of the statutory term. Even if the Court would have construed the term differently had the matter been before it originally for decision upon its own independent judgment, it had to accept the agency construction, provided only that it did not pass the bounds of reason.

*Gray v. Powell* lays down the doctrine that, on review, an administrative construction of a statutory term like “producer” will be upheld if it is rational, even though the court might well have construed the term differently on its own independent judgment. As it was explained by Mr. Chief Justice Vinson in a later case applying the *Gray v. Powell* doctrine, “To sustain the Commission’s application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The ‘reviewing court’s function is limited.’ All that is needed to support the Commission’s interpretation is that it has ‘warrant in the record’ and a ‘reasonable basis in law’”

*Gray v. Powell* thus stands for the proposition that the test upon review is not the *rightness* of the challenged administrative finding upon the question of whether the individual concerned was a “producer,” but only its reasonableness. But, we have already seen, the question of reasonableness is also that which the American courts must now ask themselves in reviewing administrative findings of fact. *Gray v. Powell* is so important to American administrative law precisely because it makes the scope of review of administrative findings like that involved in it similar to that available over administrative findings of fact. In both cases, the reviewing court can determine only whether the challenged findings possess a rational basis.

In *Gray v. Powell* and the many cases in accord with its doctrine, the American courts appear, in effect, to have done exactly what Lord Atkinson strongly protested against in an important

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122. *Id.* at 422.
"What I have many times in this House protested against," said his Lordship. "is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact."

In the view commonly followed by the English courts a finding such as that at issue in Gray v Powell, involving as it did the application of the statutory term "producer" to the undisputed facts of the case, is one which is more legal than factual in nature and hence one which can be examined fully by the reviewing court. This view was well expressed over forty years ago by Lord Parker when he stated, "in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions of some statutory enactment, the question is one of law only."

A number of English cases decided during the post-war decade adhere to Lord Parker's view. Among the most interesting of them is a 1951 judgment of Ormerod, J., in a case arising under the National Insurance Act, 1946. The appellant there was a music hall artist who had entered into a contract under which he undertook to appear in a variety act at a theatre for one week. The Minister of National Insurance had held that during that week appellant was not an "employed person," but was a "self-employed person" within the meaning of the relevant sections of the Act. Counsel for the employer contended that, as appellant's right to appeal was restricted to an appeal on matters of law, the appeal had to be dismissed if it could be said that there was evidence by which the Minister could find that the contract was one for services only, rather than one of service. In other words, the contention asserted was that the question whether appellant was an "employed person" was one of fact, which the court could examine only to see if it was supported by any evidence. Ormerod, J., refused to accept this argument, stating instead that the question was one of law and therefore one which could be the subject of an appeal under the statute. This was so, said he, because the case depended upon the construction of the written employment contract.

It may be said that this decision is so obvious as hardly to be worth discussing, since, as Lord Atkin has pointed out, the construction of a written agreement is manifestly a pure question of

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It should, however, be borne in mind that, under Gray v. Powell and the American cases following its doctrine, the scope of review will not be broadened by the fact that the answer to the mixed question of law and fact depends upon the construction of a contract or some other legal document. Indeed, as we shall emphasize, the whole point about Gray v. Powell is that it narrows the scope of review of administrative interpretations of legal documents. It may be, to quote Mr. Justice Frankfurter on the effect of the American rule, that "the construction of documents has for historic reasons been deemed to be a question of law in the sense that the meaning is to be given by judges and not by laymen. But this crude division between what is 'law' and what is 'fact' is not relevant to the proper demarcation of functions as between [administrative agencies] and the reviewing courts. The specialized equipment of the [agency] and the trained instinct that comes from its experience ought to leave with the [agency] the final say also as to matters which involve construction of legal documents."

Other English decisions which illustrate the difference between the judicial approach on both sides of the Atlantic to review of the type of finding under discussion are those involving war pension claims. The key question in many of these cases is that of whether the disability for which the claimant seeks redress was attributable to war service. "Was the question of attributability a question of law or a question of fact?" counsel for a pension claimant was asked from the Bench in one case. It was a mixed question of law and fact," was his reply. As in the cases we have been discussing, the administrative finding on the mixed question involves the application of a legislative term—here, "attributable to military service during the war"—to the facts of the particular case. Under the American cases, such agency finding will be treated like a finding of fact for the purpose of determining the proper scope of review. The English war pension cases, on the contrary, treat it as a finding of law which is fully reviewable. A similar result is reached where

131. Ibid.
132. In this case, it should be noted, the legislative instrument was the Royal Warrant of June 29, 1940 (1).
133. It is recognized, as Griffith and Street, op. cit. supra note 7, at 221, n. 2, points out, that, in these war pension cases, the Royal Warrant provides that disablement should be accepted as due to war service unless there is evidence to the contrary. But this does not seem to affect the question under discussion, namely, whether the administrative finding should be treated as one of law or fact for the purpose of determining the scope of review.
the administrative finding at issue determines whether an injury was "caused by" a bomb dropped by the enemy134 or whether the claimant had suffered a "disablement,"135 or whether the injury suffered arose "out of and in the course of the performance by [claimant] of his duties as a member of the civil defence organisation."136 These English cases should be compared with an important 1951 decision of the United States Supreme Court in which an administrative finding that a death for which compensation was sought had arisen "out of and in the course of employment" (as was required by the relevant statutes) was treated as a question of "fact" and hence subject only to limited review137.

To the comparative observer, the difference in approach as between the American and English courts to review of administrative findings applying statutory concepts to the facts is a matter of great significance and, in this aspect of the subject at least, the difference is not one which casts credit upon the American system. The type of finding under discussion is, in many ways, the most important which the administrator can make in exercising adjudicatory authority. For it is by its application of the statutory language to particular fact patterns that the agency concerned gives specific form and content to its enabling legislation. Where an agency misapplies the statute upon which its power rests, it may well be acting beyond its authority. Proper administration of any statutory scheme presupposes proper application of the terms and concepts employed in the relevant legislation. Misapplication of a key statutory term may well enable the administrator to act in excess of its jurisdiction. If a rent tribunal is vested with authority to lower rents in cases where the landlord has contracted to provide furniture or services, its very power to act depends upon its finding that a given chattel is "furniture."138 Indeed, it is difficult not to conclude that the statutory jurisdiction of an administrative agency is always dependent upon the proper application of the terms and concepts contained in its enabling legislation. To limit review of such application by the agency is, in effect, to limit review on the jurisdictional question. Yet this is precisely what is done under the American case of Gray v Powell.

It is a patent misuse of terms to say that an administrative finding that a death "arose out of and in the course of employment" is a finding of "fact," as did the United States Supreme Court in a case already referred to.\textsuperscript{139} It is actually, as Viscount Cave, L.C. once urged, "a mixed finding of fact and law, and unless such a finding is open to review by the Courts little benefit will accrue to the subject from the right which is given to him to have a case stated for the opinion of the King's Bench Division."\textsuperscript{140} Though the administrative finding in this type of case may well be, in large part, one of fact, i.e., whether the death did arise out of and in the course of employment depends upon the factual circumstances under which the death occurred, it also involves a question of statutory interpretation. To apply the statutory term "out of and in the course of employment" to the facts of specific cases is to give concrete meaning to that term.

It is recognized that it may be denied that a finding of the type under discussion is one of statutory interpretation in the strict sense. It has been urged by American jurists that the interpretation and application of statutes are two different things. In this view, interpretation properly so called includes only the determination of the proper sensible meaning of the statute. Application is the process of determining whether the facts of the particular case are within or without that meaning.\textsuperscript{141} Under this view, it will be said, findings of the type we are concerned with involve only the application, not the interpretation, of the relevant statute.

In the opinion of the present writer, to so differentiate interpretation from application is to make a mere dialectic distinction. A statutory term can have meaning only in its application to the particular facts of a particular case.\textsuperscript{142} As Mr. Justice Frankfurter has aptly pointed out, "Meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication."\textsuperscript{142} Actually, the steps in the process of interpreting statutes may be divided into three parts (1) finding or choosing the proper statute or statutes applicable, (2) interpreting the statute law in its technical sense; (3) applying the meaning so found to the case at hand.\textsuperscript{144}

\textsuperscript{140} Commissioners of Inland Revenue v. Lysaght, [1928] A. C. 234, 241.
\textsuperscript{143} Trust of Bingham v. Commissioner, 325 U. S. 365, 380 (1945).
\textsuperscript{144} De Sloovere, \textit{supra} note 141, at 1.
To find out the meaning of a statutory term only in the abstract is to engage in vacuous academic exercise. It is when the meaning so found is applied to the case at hand that the statute is really being interpreted. Indeed, as one authority well puts it, the final application to a specific case is the crux of the whole process of statutory interpretation.\footnote{45}

That application really is the critical stage of the interpretive process is clear upon consideration of Austin’s famous distinction between what he called “genuine” and “suprious” interpretation. The latter type, said he, involves the application of a statutory provision to a case which does not upon a proper interpretation come within the statute. “The judge applies the law to the fact, according to his opinion of the meaning or (by a process which is generally confounded with interpretation or construction, but which in truth is legislation) he decides according to his own notion of what the legislator ought to have established. By this extensive or restrictive interpretation ex ratione legis, much judiciary law grows up.”\footnote{46}

What Austin was declaiming against here was judicial misapplication of statutory terms. Can it be doubted that, in cases of the kind referred to by him, application of law to fact was, not only part of interpretation of the statute, but, in many ways, its most significant part?\footnote{47}

If an administrative agency finds that an individual is an employee of some other individual so as to make the regulatory law administered by it applicable to him, the agency appears clearly to be interpreting the statutory term “employee.” Calling the agency’s act mere application and not interpretation cannot change the fact that its action is giving specific meaning to the legislative language. As Lord Radcliffe recently expressed it, with regard to a similar problem, “[I]t is a question of law what meaning is to be given to the words of the Income Tax Act ‘trade, manufacture, adventure or concern in the nature of trade’ and for that matter what constitute ‘profits or gains’ arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the court to interpret its meaning. \footnote{48} And, if questions of statutory interpretation are to be determined by the reviewing court upon its own independent judgment, it is difficult to see how it can logically limit its review over findings claimed to misapply statutory terms. “If the appellate courts must make an independent examination of the

\footnotesize{145. Id. at 20.} \footnotesize{146. Id. at 19, quoting 2 Austin, Jurisprudence 656 (4th ed. 1873). See Pound, Spurious Interpretation, 7 Colum. L. Rev. 379 (1907).} \footnotesize{147. Edwards v. Bairstow, [1955] 3 Weekly L. R. 410, 420 (II.L.).}
meaning of every word in legislation, on the assumption that the construction of legislative language is necessarily for the appellate courts, how can they reasonably refuse to consider claims that the words have been misapplied in the circumstances of a particular case? 148

The decision of the American Court in Gray v. Powell assimilates review of questions of statutory interpretation to review of questions of fact. That is a plain statement of its effect, no matter how courts or commentators may try to obscure its meaning. And it is because of its effect that Gray v. Powell is of such great consequence. It blurs the distinction between law and fact upon which the scope of review in American, as in English, administrative law had been grounded. It limits review, not only of agency findings of "fact" in the narrow, literal sense, 149 but also of agency constructions of statute law. The latter are matters which, under the traditional theory of Anglo-American judicial review, are matters more legal than factual in nature 150 and hence for the courts upon review. By conveniently labelling them matters of application, rather than interpretation, the American courts have continued to pay lip-service to the form of the traditional theory. But the doctrine of Gray v. Powell tends to make the practical effectiveness of that theory a thing of the past in American administrative law.

"If the Minister Is Satisfied"

In our discussion of error of fact, we saw that the courts in Britain, no less than their counterparts in the United States, can inquire into the evidentiary basis of administrative findings. In the English system, such judicial inquiry determines whether there is any evidence in support of a challenged finding for the administrator to make a finding or reach a conclusion which is supported by no evidence is for him to make an error in law. 151 It should, however, be noted that, in a country whose public law is governed by the principle of parliamentary sovereignty, even this degree of judicial control can be precluded by appropriate legislative enactment. Thus, in Robinson v. Minister of Town and Country Planning, 152 where a ministerial order declaring certain land in Plymouth to be subject to compulsory purchase was challenged on the ground that, at the

148. Trust of Bingham v. Commissioner, 325 U. S. 365, 380 (1945), per Frankfurter, J.
151. See note 65 supra.
time he made the order, the Minister had no evidence before him to support it, Somervell, L. J., declared, "I think the Act gives the Minister the power to come to his decision as an administrative decision, which no doubt he can be called upon to justify in Parliament, but which he cannot be called on to justify in a court of law on the ground that there was either insufficient evidence or no evidence on which a reasonable man in the position of the Minister could so decide."

What was the statutory provision which, according to the learned judge, had the effect of barring judicial inquiry into the question of evidentiary support? The Town and Country Planning Act, 1944,\(^{154}\) provides that a declaratory order, such as that at issue in the Robinson case, may be made where the Minister "is satisfied" that it is requisite for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority. In the now famous case of Liversidge v. Anderson,\(^{155}\) where it was held that the language of Defence Regulation 18B had the effect of precluding all judicial inquiry into a ministerial order, even Lord Atkin, who vigorously dissented from this holding, agreed that a provision like that in the 1944 Act just cited vested in the Minister a complete discretion, free from control by the courts. Citing defence regulations which contained expressions like "If the Secretary of State is satisfied" or "satisfied that it is necessary," his Lordship said, "In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith."\(^{156}\) If the defence regulation at issue in the Liversidge case had contained such words, it is clear, as Somervell, L. J., points out, that Lord Atkin would have agreed with the majority there.\(^{157}\)

The effect of a statutory provision like that in the Town and Country Planning Act, 1944, under which the Minister can act if he "is satisfied" his action is necessary, has been stated in argument by Sir Hartley Shawcross. Under the decided cases, said he it has been held that, where a Minister acted under such legislation, "if the Minister was satisfied, the matter was a subjective one for him and that, unless it could be shown that he acted in bad faith, his decision stood."\(^{158}\) It must be conceded that there is support in

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153. Id. at 720.
154. Section 1 (1).
156. Id. at 233.
the cases for Sir Hartley's view. The leading decision is the already cited case of Robinson v. Minister of Town and Country Planning. There, the objectors to the Ministerial order claimed that there was no evidence upon which the Minister could decide as he did. Even if true, however, that was irrelevant in view of the statutory provision for Ministerial satisfaction. The conclusion that the order should be made is, according to Lord Greene, M.R., "one of opinion and policy as to which the Minister, assuming always that he acts bona fide, is the sole judge; namely, he must be satisfied that it is requisite for the purpose of dealing satisfactorily with extensive war damage that all or some part of the land in question should be laid out afresh and developed as a whole. The words 'requisite' and 'satisfactorily' clearly indicate that the question is one of opinion and policy, matters which are peculiarly for the Minister . . . to decide. No objective test is possible." The argument of the objectors could not succeed in the face of the clear legislative intent that it was the satisfaction of the Minister, not that of the court, that was to prevail. "It imports an objective test into a matter to which such a test is entirely inappropriate . . . and this is to substitute a test formulated, in some unexplained manner and according to some unascertainable principle, by the court itself for the opinion of the Minister to which the language of the subsection commits the decision."161

The language of the judgments delivered in Robinson's case certainly appears all but to bar judicial inquiry into a ministerial order based upon a statutory provision like that contained in the enabling act there. It is true that there is an implied condition, even under such a statute, that the Minister act in good faith. "There may be cases in which, on the ground of want of bona fides, a court may have power to act." But if the Minister does act in good faith, and who could dispute it or disputing it prove the opposite, he has been vested with complete discretion whether or not to issue the order. As Croom-Johnson, J., expressed it in a decision rendered after the Robinson case, "the court will not go behind the expression of the Minister's satisfaction."164 In these cases, where

159. See note 152 supra.
161. Id. at 714.
a Minister is, for example, authorized to issue an order if he is satisfied that it is expedient in the national interest, "the ultimate judge of what is or is not in the national interest is the Minister It is not the local authorities. It is not the court."\footnote{156}

Professor Hamson has recently informed us of the shock experienced by a noted French administrative lawyer to whom the cases just discussed had been explained. "Touching provisions based upon the condition 'If the Minister is satisfied' or 'If it appears to the Minister,' my French interlocutor was frankly scandalised by the interpretation put upon them by the English courts. He held the categorical, and refreshing, view (which is that of the Conseil d'Etat) that if a Minister is to be satisfied, he must as Minister have reasonable grounds upon which his satisfaction is based. He regarded as fantastic the suggestion that a court would hold that the condition that a Minister should be satisfied is finally fulfilled by the bare statement of M. Dupont (who may happen to be Minister) declaring that M. Dupont is, or believes himself to be, satisfied."\footnote{166}

The reaction of the French jurist was, in Professor Hamson's phrase, to an English lawyer a most painful commentary upon the state of this branch of the law in England.\footnote{167} To one who has some familiarity with the droit administratif, the French response is hardly surprising. Though provisions like that involved in the Robinson case are common enough in the French statute book, they have not, for many years, been construed as they are in the English system. On the contrary, in the jurisprudence of the Conseil d'Etat, as Professor Hamson indicates, though the statute provides for a Minister being satisfied on a particular issue, his satisfaction must be a reasonable one. And it is for the reviewing court (in France the Conseil itself) to determine whether there are, in fact, reasonable grounds upon which the Ministerial satisfaction can be based.

A little reflection will demonstrate that it is the French rather than the English law that is the more sound in its approach to the question under discussion. No one doubts, it is true, that Parliament can, in the British system, vest any Minister with unlimited discretion free from all judicial control. The only question is whether, in a statute which provides for a Minister to be satisfied...
on a given issue, the legislature has done so.\textsuperscript{168} "Now is it or is it not tolerably certain that the majority in Parliament were not aware of any such provision in the Bill when they passed it, and that very few of those who were aware of it had any knowledge of its effect?"\textsuperscript{169} In view of all that has been said and written in recent years about the dangers inherent in grants of uncontrolled discretion, it hardly seems reasonable to assume that the legislator intended such a grant where his intent has not been unmistakably expressed. Where the enabling statute contains only language such as that involved in the \textit{Robinson} case, the legislature has not clearly expressed the purpose of completely and finally excluding all control by the courts. For, let no mistake be made about it, such complete exclusion is the effect of the type of provision we are discussing, if \textit{Robinson}'s case is sound. As Sir David Maxwell Fyfe has expressed it, the only question into which the courts can inquire is the honesty of the Minister's satisfaction.\textsuperscript{170} And that inquiry is, we have indicated, little more than a matter of form. To quote Lord Radcliffe, "\textit{[T]}he field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality."\textsuperscript{171}

Provisions of the type under discussion appear to have made their way into the English system primarily during the last war, although there were some such provisions even in the pre-war statute book. The Defence Regulations issued during and since the war have literally abounded in language vesting subjective discretion in Ministers, by expressions similar to that in the statute construed in the \textit{Robinson} case. And, during the war, it was not unnatural for the courts to accept the premise that the emergency was so great that they should do nothing to interfere with the exercise of these powers. In the apt language of Lord Macmillan, "In a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure."\textsuperscript{172}

The wartime attitude of the English courts is well shown by the judgment of Lord Greene, M. R., in an important case in which

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\item \textsuperscript{168} Paraphrasing Lord Atkin in \textit{Liversidge} v. \textit{Anderson}, [1942] A. C. 206, 239 (1941).
\item \textsuperscript{169} Hewart, \textit{The New Despotism} 71 (1929).
\item \textsuperscript{171} \textit{Id.} at 77.
\item \textsuperscript{172} \textit{Liversidge} v. \textit{Anderson}, [1942] A. C. 206, 251 (1941).
\end{itemize}
the regulation at issue authorized the relevant Minister to take certain action "if it appears" to him that "in the interests of public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community," it is necessary to do so. Lord Greene's language, which was concurred in by the entire Court of Appeal, is extreme in its denial of any possibility of judicial control (except perhaps for the question of Ministerial good faith) "If one thing is settled beyond the possibility of dispute," said his Lordship, "it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. One thing is certain, and that is that those matters are not within the competence of this court. It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere." From this and other cases, it was clear that, where a wartime regulation committed to the satisfaction of an executive authority the decision of what was necessary or expedient, it was not competent to the courts to investigate the grounds or the reasonableness of the decision. Indeed, as is well known, in Liversidge v. Anderson the House of Lords went so far as to reach this result under a regulation which authorized certain action, "if the Secretary of State has reasonable cause to believe," despite the clear demonstration in Lord Atkin's dissenting opinion that this language imported an objective rather than a subjective test, i.e., the existence of "reasonable cause" was an objective fact which could be inquired into by a reviewing court.

What makes these wartime cases of such significance is the fact that, as a recent report points out, the sort of formula which was held, during the war, to preclude judicial inquiry has been repeated in a number of statutes and statutory orders enacted after the war came to an end. And the courts have continued to rely on the rationale of the wartime cases in holding, as in Robinson's case, that formulae which commit the taking of action to the satisfaction of the relevant authority bar judicial inquiry into the basis of such satisfaction even in peacetime. This is clearly shown by the reply of

176. Rule of Law 17, op. cit. supra note 38.
Somervell, L. J., to the contention that the wartime decisions must be limited to cases involving regulations for what may be described as war purposes. "I do not so construe these authorities," declared his Lordship. "It must be obvious that Parliament can confer the same unlimited discretion on Ministers for purposes other than war purposes. Construing the words in their natural meaning and in the light of the authorities, I think Parliament has done so in this part of this Act."\(^{177}\)

With respect, it is suggested that the learned judge was incorrect in assuming that the cases construing the Defence Regulations must necessarily govern cases which are decided after the conflict has ceased. It is one thing to hold that the legislature has intended to vest all but unlimited discretion in an administrative authority to deal with a war emergency; it is quite another matter to make the same holding with regard to a statute enacted to meet the lesser exigencies of more normal periods, where that result is not compelled by the language of the legislator. "The validity of action under the war power," Mr. Justice Frankfurter well informs us, "must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in time of peace would be lawless."\(^{178}\) Similarly, the vesting of unchallengeable discretion is not to be justified in peace time just because a like grant may be one of the necessities generated by war.

A valuable analogy may be found in the postwar reception given to language like that in the regulation at issue in \textit{Liversidge v. Anderson}. The decision of the House of Lords in that case, as has been mentioned, held that a regulation, giving the Secretary of State power to take action if he "has reasonable cause to believe" certain conditions existed, vested an unreviewable discretion in the Secretary What is particularly significant for our purposes is the complete preclusion of judicial control which results from their Lordships' judgments. Such preclusion is not merely implicit in those judgments but is candidly expressed as their underlying purpose. "To my mind," asserted Viscount Maugham, "this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law."\(^{179}\) And this in the face of the

\(^{177}\) [1947] K. B. at 721.
\(^{179}\) [1942] A. C. at 220.
requirement of "reasonable cause" in Regulation 18B which Lord Atkin amply proves has always involved an objective test, by an independent tribunal, of the reasonableness claimed for the conduct which is impugned. Under the majority decision in Liversidge v. Anderson, the words "reasonable cause," as Lord Radcliffe has put it, "meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction."  

Words such as those in Regulation 18B are "commonly found when a legislature or law-making authority confers powers on a minister or official." And it is this which has led to the fear that the House of Lords decision might serve as an unwholesome precedent which might have a permanently damaging effect upon judicial review. It is difficult to see, writes Sir Carleton Allen, why the Liversidge holding "should not apply just as forcibly to a policeman as to a Cabinet Minister, or why the policeman should not say 'I am required to have reasonable cause. Well, after mature reflection, I came to the conclusion that I had reasonable cause. That element was present to my mind and determined my belief and conduct. I have satisfied the condition.' Perhaps some day, on the strength of Liversidge v. Anderson, some enterprising counsel will have the hardihood to advance this argument in a case of false imprisonment."  

Sir Carleton's prediction has not proved unfounded, for, in 1950, a counsel did actually urge that the Liversidge doctrine applied whenever language like that in Regulation 18B was found. This contention was made in Nakkuda Ali v. Jayaratne, where the relevant regulation empowered the Controller of Textiles in Ceylon to revoke a textile dealer's license where he "has reasonable grounds to believe" the licensee is unfit to continue as a dealer. Counsel for the Controller relied squarely on the Liversidge case, asserting that "The Controller comes into the category of persons who should be allowed a subjective test, that test should be whether he honestly believes, or honestly is of opinion, that he had reasonable grounds to believe." In a most significant portion of his opinion,

180. See Allen, op. cit. supra note 1, at 333.
182. Id. at 77
183. Allen, op. cit. supra note 1, at 336.
Lord Radcliffe, who delivered the judgment of the Judicial Committee, refused to adopt the Liversidge construction. "Indeed," said he, "it would be a very unfortunate thing if the decision of Liversidge's case . . . came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments." There is no general principle that the words "if the Minister has reasonable cause to believe" are to be understood as the House of Lords construed them in Liversidge. Instead, in the normal case, "they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in fact nothing. . . . Their lordships therefore treat the words in reg. 62, 'where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer' as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power. . . ."

If Liversidge v. Anderson will not be followed outside the context of a war emergency, why should not the same be true of the wartime cases construing the effect of Defence Regulations committing the taking of action to the satisfaction of the relevant administrative authority? Those cases, too, need not be understood as laying down any general rule as to the construction of similar provisions when they appear in ordinary statutes. In cases which do not involve war powers, the courts should say, with Lord Justice Denning, "I do not agree with the contention that, once the Minister says he is satisfied, these courts cannot look behind it to see what he is doing." It is true that, in these, as in other administrative-law cases the courts should not arrogate to themselves an appellate jurisdiction over the administration. It is not for them to determine whether the Minister was correct in being satisfied on the facts before him. But this does not mean the elimination of that supervising and correcting function of the Queen's Bench Division which Morris, L.J., has recently referred to as "one of the bulwarks of our liberties." That the statute authorizes the authority concerned to act if satisfied that a specified condition exists should not bar judi-

186. Id. at 76.
187. Id. at 77.
cial inquiry into the question of vires—to see, as Lord Greene himself has admitted, "that the action is one which is within the four corners of the authority delegated to the Minister." And, as in other review cases, the supervisory authority of the courts should not be limited to the bare question of jurisdiction. Thus, the courts should be able to intervene despite the statutory provision, if there has been a misdirection by the Minister as to the law, error of law can, we have seen, be gone into under the "excess of jurisdiction" theory upon which the supervisory power of the Queen's Bench is based.

That brings us to the crux of the matter, can the judge go into the question of evidentiary support for the Minister's satisfaction? Robinson's case tells us that the courts are precluded from such inquiry. It is, however, suggested that such a construction is not compelled by statutory provisions of the type under discussion. It is inconsistent with the probable intent of the legislator to hold that the grant of authority to act if satisfied that a specified condition exists vests in the governmental organ concerned the power to act where there is no reasonable basis for being satisfied that the condition exists. On the contrary, if it appears, in Lord Reid's phrase, that the authority's satisfaction was so unreasonable as to be perverse, Parliament could hardly have intended its decision to be conclusive. In other words, in cases where the Minister is given power to act "if satisfied" (as in the case of a provision like that construed in the Nakkuda Ali case) there is the implied condition that in fact, reasonable grounds exist for the Ministerial satisfaction. This, it appears to the present writer, is the proper construction of such a statutory formula, and if that is true, the courts on review should be able to require the Minister to show that there was in fact some evidence on which he could be satisfied.

It must, of course, be recognized that the present case-law, and particularly the Robinson case, is the other way. The judicial abnegation in the face of formulae of the type under discussion is, indeed, a matter of great moment. It enables Ministers, impatient of judicial control, to persuade Parliament to vest in them subjective discretions without having to defend provisions so blatant in their preclusion of access to the courts as the "conclusive evidence" clause which the Committee on Ministers' Powers so rightly condemned.

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192. See Griffith and Street, op. cit. supra note 7, at 215.
query in these cases, then the structures of the Donoughmore Committee did not, as had been hoped, all but eliminate the conclusive evidence clause from English administrative law. It has reappeared in the statute book in a new form; but the substance, the elimination of all judicial control of consequence, is the same. As it has been aptly expressed by a recent commentator, “the Pilate-like handwashing by the courts when faced with a decision of a Minister acting under an 'if he is satisfied' power amounts almost to a refusal to accept a responsibility which hitherto it was thought the Constitution had imposed on the judges as part of their function.”

Discretionary Powers

The control of discretionary power is in many ways the crucial question of modern administrative law. It is intimately connected with the extent to which legislative limitations are imposed upon delegations of authority to the administration. “The precise limits of a law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it: when discretion is conferred its limits should be defined with equal clearness.” This principle, so aptly stated by the Committee on Ministers’ Powers, is of vital importance in the English system. It is only with reference to parliamentary limitations upon delegations of power that judicial control can be asserted in Britain through the doctrine of ultra vires. Where the powers delegated confer so wide a discretion upon the administration that it is almost impossible to know what limits the legislator intended to impose, there can be to all practical intents and purposes no effective judicial control. In such a case, to borrow from a famous opinion of Mr. Justice Cardozo, the delegated power is not canalized within banks that keep it from overflowing; it is unconfined and vagrant. The vires have become so broad as to validate almost all conceivable administrative action.

Statutes of the type discussed in the preceding section are good illustrations of the above point. If a statute is interpreted as vesting the power to act in the subjective satisfaction of the Minister, there is practically no scope for effective judicial control of the Ministerial discretion. If the power is construed as “subjective,” it is enough that the Minister should honestly believe that the condition of its exercise is fulfilled, and his statement that he does so believe is

conclusive, subject to the purely theoretical possibility of proving bad faith in the Minister. It is only if, as in the Nakkuda Ali case, the power conferred is deemed “objective” that unlimited discretion is not conferred, in such a case, the reviewing court can determine whether there is in fact an evidentiary basis for the Ministerial satisfaction.

The problem of subjective discretion, it should be noted, is not as pressing in the United States as it is in Britain. The reason for this is that, except where a statute has been deemed wholly to preclude judicial review, the American courts have asserted the authority to determine whether discretionary powers have been abused. The Federal Administrative Procedure Act of 1946 expressly confirms the judicial authority in this respect, for it empowers the reviewing court to set aside administrative action found to constitute an abuse of discretion. When will discretion be deemed abused in the American system? The courts have said that such is the case when the discretion has been exercised in an arbitrary, capricious, or unreasonable manner. As a general proposition, the power of the American reviewing court where discretion is concerned is basically similar to its power of inquiry into questions of fact and so-called mixed questions of law and fact. In all of these cases, the court determines whether the particular administrative finding or conclusion is reasonable in the light of the evidence in the record. Consequently, where the exercise of discretionary authority is challenged, the American reviewing court can determine whether there is a rational basis for the manner in which the administrator exercised the particular power.

In the English, as in the American, system, the courts have tried to control administrative discretionary powers by the concept of abuse of discretion. As Lord Halsbury, L. C., put it, in an oft-cited passage, “‘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 rules of reason and justice, not according to private opinion. It is to be, not arbitrary, vague, and fanciful.”

197 There is an additional exception under the Administrative Procedure Act “so far as agency action is by law committed to agency discretion.” 60 Stat. 243 (1946), 5 U. S. C. 1009 (introductory clause) (1952). The significance of this exception is doubtful in view of the express provision in that Act, 60 Stat. 243 (1946), 5 U. S. C. 1009 (e) (1952), permitting the reviewing court to set aside agency action for abuse of discretion.
198. Section 10(e)(B)(1)
The concept of abuse of discretion in Britain can be directly compared with that in the United States in an important class of cases, namely those involving review of local authorities. The English courts have for many years asserted a power to inquire into the reasonableness of the action of such authorities.

The leading postwar case is *Associated Provincial Picture Houses, Ltd. v. Wednesbury, Corp.*, a 1947 decision of the Court of Appeal. The plaintiff there sought a declaration that a condition imposed by defendant local authority upon a license granted to plaintiff for cinema performances on Sunday, under which "no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not," was ultra vires and unreasonable. In the course of his judgment, Lord Greene, M. R., indicated clearly that the court could examine the reasonableness of the challenged condition. Though the relevant statute allowed the authority to grant the license "subject to such conditions as the authority think fit to impose," the discretion thus conferred was one which, in his Lordship's words, must be exercised reasonably. If this were a case where one could "say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. . . . I think the court can interfere."203

It is true, as Lord Greene takes pains to underline, that review of reasonableness does not enable the court to decide the correctness of the local authority's decision to act as it did. The "proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have to come to. It is not what the court considers unreasonable, a different thing altogether. . . . The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position. . . ."204 In the case under discussion, it can hardly be said that the condition at issue was so unreasonable that no reasonable authority would have imposed it. There was, in the view of the Court of Appeal, a direct rational relationship between the condition and the purposes for which the licensing power was

201. Sunday Entertainments Act, 1932 §1 (1).
203. Id. at 234.
204. Id. at 230.
conferring. “It appears to me quite clear,” states Lord Green, “that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this license. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider.”

Though the case just discussed upheld the authority, the opinion of Lord Greene clearly indicates that the English courts can inquire into the reasonableness of exercises of discretionary power by local authorities. It is usually said, however, that, in the English system, judicial authority to examine directly into reasonableness is limited to cases involving review of the action of local authorities. There is said to be no overriding power in English courts to decide what is reasonable and what is unreasonable where discretionary powers are exercised by Ministers or other agents of the central government.

This does not mean that the concept of abuse of discretion is inapplicable to organs directly responsible to the government at Westminster. Agencies of the central government vested with discretionary authority are not permitted to do as they please in exercising such power. The English courts will, on the contrary, intervene to ensure that the agency concerned has taken into account all relevant considerations (and no others) and that the discretion has been exercised for a proper purpose. If an extraneous consideration or an improper purpose has induced the administrative act at issue, an abuse of discretion will be found. The basis for such judicial finding has been well stated by Lord Justice Denning “In order that a power should be genuinely exercised, the administrator must have the proper state of mind—the state of mind which Parliament expects him to have—the state of mind of an administrator who carefully investigates all the relevant considerations and rejects all irrelevant ones, and thereupon after due consideration [will] come to an honest decision as to whether to exercise the power, or not, for the purpose authorized by Parliament.”

A 1949 case illustrating judicial intervention where the administrator has acted on extraneous considerations is Pilling v. Abergele Urban District Council. It arose under that section of

205. Id. at 229-30.
206. See Griffith and Street, op. cit. supra note 7, at 215.
207. Denning, Freedom under the Law 122 (1949)
the Public Health Act, 1936, which empowers a local authority to
grant "licences authorizing persons to allow land occupied by them
... to be used as sites for movable dwellings." In the Pilling case,
a local authority refused to grant a license under this section on
the ground "that the site is unsuitable because such use would be
detrimental to the amenities of the district particularly on account
of the close proximity of other dwellings." In his opinion, con-
curred in by the other members of the Divisional Court, Lord
Goddard, C. J., states that what the authority did here was to refuse
the license "for what may compendiously be called town-planning
reasons," can they consider such matters in exercising their dis-
cretion to grant or refuse a license? "I have always understood the
law to be," declares his Lordship, "that, where a duty to hear and
determine a question is conferred on a tribunal of any kind, or on
a local authority, they state their reasons for their decision and the
reasons which they state show that they have taken into account
matters which they ought not to have taken into account, or that
they have failed to take matters into account which they ought to
have taken into account, the court can and ought to adjudicate
on the matter." In this case, the relevant statute, the Public
Health Act, 1936, concerned only matters relating to health and
sanitation, and the discretion given was one to consider those mat-
ters only in a license application case. "I think that the discretion
which the section gives to the local authority is to consider such
an application for the grant of a license from the point of view of
public health and the sanitary conditions at the site, and that they
are not entitled under this section to take into account the question
of local amenities." Since the authority had acted on what the
court held to be an extraneous matter, its action was invalid.

Where a Minister or other governmental authority is vested by
Parliament with subjective discretion, it would seem that the rule
barring consideration of extraneous matters becomes inapplicable.
In such a case, the English courts tend to say that it is the legisla-
tive intention that the administrator can take into account any
matters that he thinks fit. This is well shown by Swindon Cor-
poration v. Pearce and Pugh, where the enabling statute (the
Town and Country Planning Act, 1932) authorized an interim de-
velopment authority to prohibit by order development of land, in

209. Id. at 637.
210. Ibid.
211. Id. at 639.
212. Griffith and Street, op. cit. supra note 7, at 218.
213. [1948] 2 K. B. 301.
an area with respect to which a resolution to prepare or adopt a scheme under the Act was in force, "if they are satisfied that it is necessary or expedient to do so." In the case referred to, the court held that the considerations which moved the authority to issue an order prohibiting development could not be inquired into on review. "It is, we think evident," reads the judgment of the court, "that Parliament meant those matters to be left to the decision of the authority. It is for them to consider, and not for a court, what it is desirable should be done or not done in relation to these schemes."  

Even in a case like Swindon Corporation v. Pearce and Pugh, where the discretion conferred is construed by the English courts as more or less subjective, the reviewing court can intervene if the discretion is exercised for an improper purpose. The basic principle which has gradually been developed in English administrative law is, to quote Lord Justice Denning, "that the courts will always be prepared to look into the purpose with which the executive exercise their powers and will not allow them to be used for any purpose other than that for which they are conferred." 215 The rule of improper purpose is an implied limitation upon all grants of discretionary authority, though such grant may seem to be unlimited and even subjective in terms. As a leading treatise puts it, "even though a discretion is expressed in unqualified terms the statute must be taken to read that the discretion must be exercised for the purposes contemplated by the statute, and what these purposes are it is for the court to ascertain."  

A recent case which well shows the application of the rule of improper purpose in practice is Prescott v. Birmingham Corporation. 217 In that case, which bids fair to become one of the most significant of postwar English administrative law decisions, the defendant municipal corporation owned and operated a passenger road transport undertaking and was empowered to charge fares to passengers travelling upon their vehicles. Its city council adopted a scheme to provide free travel facilities on the corporation's omnibuses on every day except Saturday between 10 A.M and 4 P.M. for old people resident in the city who were receiving retirement or old age pensions or national assistance payments. The cost of the

214. Id. at 310.  
216. Griffith and Street, op. cit. supra note 7, at 215.  
scheme was estimated at about 90,000 pounds per year (that being the loss of income expected from the operation of the scheme). Such sum was to be paid out of the general rate fund. The plaintiff, a rate-payer of the city, sought a declaratory judgment that the scheme in question was illegal and ultra vires. A declaration of illegality was granted by Vaisey, J., and his judgment was affirmed by the Court of Appeal.

It should be noted that the relevant statute in the *Prescott* case empowered the defendant corporation to “demand and take for passengers and parcels carried on such vehicles such fares and charges as they may think fit.” But the fact that the statutory language could be said to grant subjective discretion did not mean that the discretion conferred could be exercised for an improper purpose. And, according to the Court of Appeal, such exercise for an improper purpose was exactly what defendant’s scheme for free transportation for old persons amounted to. What the defendant did was to form the opinion that old people who met the conditions specified ought to be allowed free travel facilities and to adopt the scheme giving effect to that opinion. “If we are right,” states Jenkins, L. J., who read the judgment of the court, “in thinking that . . . the defendants owe a duty to their ratepayers to operate their transport undertaking substantially on business lines, we think it must necessarily follow that, in adopting the scheme, the defendants misapprehended the nature and scope of the discretion conferred on them, and mistakenly supposed that it enabled them to confer benefits in the shape of rights of free travel on any class or classes of the local inhabitants appearing to them to be deserving of such benefits by reason of their advanced age and limited means.”

The statute authorizing defendant corporation to operate its transport undertaking intended that the undertaking was to be run as a business venture or, in other words, that the fares were to be fixed in accordance with ordinary business principles. In the present case, however, the defendant had exercised its discretionary power to fix the fares for a wholly different purpose: defendant had, in effect, made a gift to a particular class of persons of rights of free travel “simply because the local authority concerned are of opinion that the favoured class of persons ought on benevolent or philanthropic grounds to be accorded that benefit.” Such “benevolent or philanthropic” purpose was, in the opinion of the court, clearly

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218. Emphasis added.
220. Id. at 1002.
not that for which defendant's rate-fixing power had been conferred. 221

The cases just discussed, and particularly Prescott v. Birmingham Corporation, show how the English courts seek to control administrative discretionary powers, even those that are seemingly absolute on their face. One may, it is true, disagree with the way in which the rule of improper purpose was applied to the specific circumstances in the Prescott case, but the decision of the Court of Appeal does clearly give the lie to any suggestion that there is such a thing as wholly uncontrolled and absolute discretion in English administrative law 222 Though the power vested may be unqualified and even subjective on its face, it is still limited by the rule of improper purpose. The reviewing court will determine for itself the purpose or purposes for which the power at issue was conferred by the legislature and will then decide whether the particular exercise of the power was intended to fulfill the legislative purpose or was rather done for an end other than that for which the power was conferred. In the Prescott case, the court found that the challenged administrative scheme was adopted to promote philanthropic ends which the legislature could not have intended, the scheme was consequently declared illegal.

It has already been pointed out that the English courts, unlike those in the United States, do not have the general authority to rule upon the reasonableness of administrative exercises of discretionary power, at least where the action of local authorities is not at issue. At the same time, we have seen, the reviewing court in Britain can, in determining whether there has been an abuse of discretion, inquire whether the agency concerned has acted upon extraneous considerations and whether the power conferred has been used for an improper purpose. In making such inquiry, the court may, in actuality, come close to being a judge of reasonableness. In Prescott v. Birmingham Corporation, the court held that the power to fix fares could not be used for so-called philanthropic purposes. Its decision to that effect was, in substance, if not in form, based upon the view that it was unreasonable to exercise the power for such a purpose. Similarly, in a case like Pilling v. Abergele Urban District Council, it can be said that it was unreasonable for the authority concerned to take into account an extraneous matter, i.e., one which the legislature did not intend should be taken account of. 221

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221. As Griffith, Note, 18 Modern L. Rev. 159, 161-62 (1955), points out, the decision of the Court of Appeal is comparable to Roberts v. Hopwood, [1925] A. C. 578, especially at 594-95.

222. Compare Griffith and Street, op. cit. supra note 7, at 215.
That there is, in fact, a close relation between review of reasonableness and review to determine whether powers have been exercised for an improper purpose or upon extraneous considerations was acutely perceived by Lord Greene, M. R. “Lawyers,” said his Lordship in a case already discussed, “often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said . . . to be acting ‘unreasonably.’”

Lord Greene goes on to give, as an illustration, the case of a teacher dismissed because she has red hair. “That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

When we say that the administrator has acted unreasonably, we mean that there is no rational connection between what he has done and what the legislature intended him to do. When is the required rational relation lacking? It would seem that such is the case when the administrator has used his power for a purpose other than that contemplated by the legislature or when he has been induced to act by matters which the legislature did not intend him to take into account. If that is true, then the English courts do, in fact if not in form, rule upon the reasonableness of administrative exercises of discretionary power, even in cases other than those involving the acts of local authorities. That being the case, it may be seen that the English and American concepts of abuse of discretion really run into one another. It is true that the courts in Britain, unlike their counterparts in the United States, claim that an administrative act does not constitute an abuse of discretion merely because a judge considers it unreasonable. But an administrative act is unreasonable, we have seen, because it does not conform to the legislative purpose or because it has been based upon extraneous considerations. By asserting their power to intervene if powers have been used for an improper purpose or the agency concerned has


224. Ibid.
taken into account matters which should not have been considered. The English courts are actually coming very close to ruling upon the reasonableness of challenged exercises of discretionary power.

**Détournement de Pouvoir**

In his 1949 Hamlyn Lectures, Lord Justice Denning compared the rule of improper purpose developed to control the exercise of administrative discretionary powers in Britain with the doctrine of *détournement de pouvoir* fashioned for a similar end by the *Conseil d'Etat* in France. As stated by him, under the French doctrine, the "courts insist that a public authority must exercise its powers genuinely in the public interest. The courts will therefore look into the intention with which the act was done and if it was done with a motive, or for an end, other than that for which the power was conferred, it will be held to be bad."225 According to the learned judge, English administrative law is now developing the same principle along parallel lines.226

A case like *Prescott v. Birmingham Corporation* seems to bear out this conclusion of Denning, L. J. In it, the English court conducted an inquiry not unlike that which the *Conseil d'Etat* would make in a *détournement de pouvoir* case. Under the theory that the French tribunal has developed, the administration's powers have been delegated to it by the legislature with certain goals in view. To deviate from those goals is to abuse the power conferred. *Détournement de pouvoir* is thus the use by the administrator of his authority for an illicit purpose, a purpose other than that which the legislator intended. To determine whether such abuse of power has been committed, the French reviewing court must search out what were the intentions of the author of the challenged act, what was the result that he meant to effect, and it must then determine whether or not his purpose was legitimate.227 This is very similar to the inquiry made by the English court in the *Prescott* case. There, too, the judge sought out the purpose behind the administrative scheme at issue and determined whether or not that purpose was one other than those which the legislature had in mind. There is little doubt, indeed, that a French administrative lawyer would classify *Prescott v. Birmingham Corporation* as a *détournement de pouvoir* case. The *Conseil d'Etat*, if an analogous fact pattern were presented to it, would invalidate the challenged scheme because the

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226. Id. at 116.
municipal corporation, however laudable its actual aim, had used its authority for a purpose other than that which the legislature had in mind.

Though the English rule of improper purpose is thus similar to the French doctrine of détournement de pouvoir, that does not mean that reviewing courts in both countries will reach the same results in analogous cases. On the contrary, the courts in Britain are much more cautious in their approach in these cases than are their counterparts on the other side of the Channel. "If theoretically," Professor Hamson informs us, "the doctrine of ultra vires includes the cas d'ouverture known in France as détournement de pouvoir, in practice the doctrine as applied falls far short of the practical results attained in France even on that ground of annulment." 228

The difference between the English and French approach to cases involving alleged abuses of discretion is strikingly exemplified by the decision of the House of Lords in Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning. 229 That case arose out of the Town and Country Planning Act, 1947, and, in order to make the issue presented intelligible, it is necessary first to outline the broad effect and scheme of the Act. 230 The effect of the 1947 Act has been well stated by Denning, L. J., who characterized that law as "a revolution in itself. It takes away the freedom of each man to do as he likes with his own land. No one can now develop his land, or make any material change in the use of it, without the permission of the planning authority; and if he is given permission, he must pay for the privilege. He must pay a charge to the Land Board which is calculated by reference to the increase in value of the land owing to his being allowed to develop it. For instance, if it is being used for agriculture—so that that is its existing use—and he desires to build on it, he must pay the board its development value, that is, its value as building land less its value as agricultural land. Its building value may be much higher than its agricultural value because it is near to any expanding town or to a new road made by the community. This increase in value is as a rule due to no effort by the landowner, but to the efforts of the community; and Parliament has determined to recover it for the State by imposing a development charge." 231

228. Hamson, op. cit. supra note 166, at 166.
231. Id. at 301.
Realizing that the provisions of the Act were not entirely fair to landowners, Parliament provided that they should be compensated for the loss which the imposition of the development charge inflicted upon them. Such compensation was to be made from a fund of 300,000,000 pounds set aside for the purpose. It was, however, recognized that the fund would not be sufficient to compensate all landowners for all their loss, but only some of them for some of it. “Hence,” Lord Justice Denning points out, “the trouble in this case. The landowner wishes to throw the deficiency on the purchaser, whereas the board say that the landowner should bear it himself.”

The board referred to is the Central Land Board, the agency established to administer the scheme set up by the 1947 Act. The Board’s functions under the Act have been characterized as of a fiscal nature. They had to assess and collect the development charge on new development, and to assess the compensation payable to landowners out of the 300,000,000 pounds fund.

The key to the Earl Fitzwilliam’s Wentworth Estate Co. case is to be found in the fact already referred to that the compensation provided by Parliament was not adequate to make individual landowners whole for the loss they were expected to suffer from the operation of the Act. A landowner who contracted to sell his land would, not unnaturally, seek to throw the loss on the purchaser by requiring him to pay the full building value of the land (in which case the purchaser would be given the landowner’s claim upon the fund of 300,000,000 pounds, which would not, however, equal the development charge which the purchaser would have to pay in order to use the land as building land). The Central Land Board had, however, as the already cited passage by Denning, L. J., indicates, decided that the landowner should bear the deficiency himself, on the ground that a sale of land at a price which included building value was unfair to buyers, who, in effect, were forced to pay for building value twice over in two immediate payments (i.e., the purchase price and the development charge). In a circular issued by it entitled “Advice on buying and selling a site for building a house,” the Board had enunciated the policy of “sales at existing use value only.” They laid it down as their policy that a landowner must sell his land at its existing use value only, and they went on to state that they would use their powers of compulsory purchase to make him do so.

232. Id. at 302.
233. Ibid.
234. See note 232 supra.
The *Earl Fitzwilliam's Wentworth Estates Co.* case arose because the Central Land Board did carry out the threat contained in their circular. The applicants had refused to lease a plot of land which they owned on which to build a house except for a term of 300 years and at a rent which was conceded to be far in excess of the existing use value of the land, and subject to the condition that the lessee should pay the development charge in return for having assigned to him the landowners' claim on the 300,000,000 pound fund for compensation for loss of development value. The prospective tenant refused these terms, and, having obtained from the local authority a permit to build, applied to the Central Land Board for assistance. The Board sent the landowners its circular setting forth its policy at sales at existing use value only. It was, to quote Denning, L. J., again, "framed in the form of 'advice to the seller', but the practical effect of it was to tell the landowner that if he left the purchaser to pay the development charge, he was to sell only at existing use value, and that if he refused, the board would consider exercising their powers of compulsory purchase. He did refuse and they did exercise their powers. Hence this action." 235

Under the Town and Country Planning Act, 1947, the Central Land Board was created as primarily a fiscal agency. But it was also given, by section 43 of that statute, a power to acquire land compulsorily. By the first part of that section the Board may, with the approval of the Minister of Town and Country Planning, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of the Act, and in particular, may so acquire any land for the purpose of disposing of it for development for which permission had been granted under Part III of the Act on terms inclusive of any development charge payable under those provisions in respect of that development. By sub-section 2 the Minister is empowered to authorize the board to acquire the land compulsorily if he is satisfied that it is expedient in the public interest that the board should do so, and that they are unable to acquire the land by agreement on reasonable terms. By the "following provisions" of the Act the functions of the board include that of ascertaining development values and of fixing and collecting development charges.

In the *Earl Fitzwilliam's Wentworth Estates Co.* case, the landowners applied to have the compulsory purchase order quashed on the ground that it was invalid, as not having been made for any purpose connected with the Board's functions under the Act, but

235. [1951] 2 K. B. at 308.
for the purpose of enforcing the Board’s policy of sales at existing use values. In the course of the hearing before the Court of Appeal, even the Attorney General did not deny that the dominant purpose of the Central Land Board, if not their sole purpose, had been to enforce the policy of sales at existing use value only. “He said boldly that, accepting that to be the purpose of the board, there was nothing wrong about it.”

Before the House of Lords, indeed, he went even further and urged that the whole question of the motives which had induced the Board to act was not open upon judicial review. “In the exercise of statutory powers there must always be some collateral purpose because they are always exercised for some reason, but the judge of its propriety is the Minister. Nor will the court inquire into the grounds which led the Minister to his conclusion unless his bona fides is challenged.”

To the comparative observer Earl Fitzwilliam’s Wentworth Estates Co. is a striking illustration of a détournement de pouvoir case. “An administrative authority commits a détournement de pouvoir,” a prominent member of the French Conseil d’État informs us, “when, though it performs an act within its jurisdiction, observes the proper procedures, and respects the provisions of statutes and regulations governing its actions, it uses its authority for purposes other than those which the one delegating the authority to it had in mind. Détournement de pouvoir is a violation of the spirit of the law.”

Was there such a violation of the spirit of the law in the Earl Fitzwilliam’s Wentworth Estates Co. case?

There is little doubt that the compulsory purchase order at issue was intended primarily to promote the Central Land Board’s policy of sales at existing use value only because the landowner refused to conform to the Board’s policy that his land was taken compulsorily at existing use value. Even the Attorney General, we have seen, did not seriously contend the contrary. But the policy of the Board was not one which had been laid down anywhere in its enabling legislation. On the contrary, Parliament nowhere sought to enact what the Board had adopted as its policy. “It did not itself enact any positive law that land was to change hands at its existing use value only nor did it authorize anyone else to make such a law.”

It is true that Parliament might well have expected that, after the 1947 Act was passed, land would ordinarily change

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236. Id. at 301.
238. Odent, Cours de Contentieux Administratif 357 (1949-50).
239. See note 232 supra.
240. [1951] 2 K. B. at 309, per Denning, L. J.
hands at its existing use value only. If a purchaser had to pay the
development value to the State, he would presumably only be will-
ing to pay existing use value to the landowner. "But while it is
one thing to rely on economic forces, it is quite another thing to
impose a policy on the people by legal sanctions." The latter was
something the legislator had clearly not attempted to do.

It is difficult to see how the facts in the *Earl Fitzwilliam's Went-
worth Estates Co.* case can be interpreted other than as indicating
the exercise by the Land Board of its power of compulsory pur-
chase for a purpose other than those for which the power had been
conferred. As has been indicated, the legislature may well have
expected and even desired land to change hands at existing use
value after the 1947 Act. But it chose deliberately not to make any
positive legal enactment to that effect, instead, it relied on the
economic theory that the development charge would leave the
would-be developer unable or unwilling to pay more than existing
use value. The *Earl Fitzwilliam's Wentworth Estates Co.* case
arose because this economic theory did not work out in practice
and there were a large number of transactions in land in excess of
existing use value. "In an attempt to stop them the board have
rushed in where Parliament—I will not say feared to tread—but,
at any rate, did not tread." In exercising its power of compulsory
purchase to enforce its policy of sales at existing use value only,
the Board was using its authority to accomplish a purpose which
was not that of the legislator; the policy it was enforcing was the
product of its own handiwork. Yet, by enforcing its policy, the
Board had, in truth, given it the same legal status as it would have
had had it been expressly enacted into positive law which, we have

The real effect of the Board's action is well described by Lord
Justice Denning. "It is, in its effect," he declares, "though not in
its terms, a claim by a government department to legislate. The
policy of 'sales at existing use value only' may be an excellent policy,
and a policy which it is very proper to encourage by economic
means; but once the board proclaim that they will use their com-
pulsory powers to enforce it, then it ceases to be a policy and
becomes a law, and, be it noted, a law laid down by a government
department and not by Parliament. Though it is called advice, it
is nevertheless a rule of conduct which all landowners are expected
to obey, and, if they disobey, it is enforced by a powerful sanction,

242. *Id.* at 310.
namely, compulsory purchase. A general rule of conduct of that description, so enforced, is legislation and nothing else, and as such it is invalid unless it has been enacted by Parliament, or by some one to whom Parliament has delegated its legislative authority."

Being of this opinion, it is not surprising that Lord Justice Denning goes on, in the judgment delivered by him in the Earl Fitzwilliam’s Wentworth Estates Co. case, to assert the view that the compulsory purchase order at issue there was unlawful. The approach of the learned judge is basically similar to that which a court follows under the détournement de pouvoir doctrine developed by the Conseil d’Etat in France. Like that tribunal, Lord Justice Denning inquires into the end which induced the administrative act to determine whether it is one contemplated by the legislator “If once it appears that the ultimate object of the board is one which is not authorized by Parliament, then it is the duty of the courts to interfere, for it is a principle of our law that a public authority, which is entrusted with executive powers, must exercise those powers genuinely for the purposes for which they are conferred. They must not be used for an ulterior object, which is not authorized by law, however desirable that object may seem to them to be in the public interest.” In this case, concludes Denning, L. J., the ultimate object of the Board was to enforce a policy which was not contained in any statute. It was importing by implication into the enabling legislation a restriction upon land contracts which Parliament had declined to impose expressly. That being the case, the ultimate purpose of the Board is one which was not lawful. “If it is to be the law of this country that landowners are to sell their land at existing use values only, that law should be enacted by Parliament.”

The present writer concurs without hesitation in the view recently expressed by Professor Hamson that, in a case such as Earl Fitzwilliam’s Wentworth Estates Co., the French Conseil d’Etat would adopt Lord Justice Denning’s opinion. In the English system, on the other hand, Lord Justice Denning’s views were expressed in a dissenting opinion and it was the majority judgment in the Court of Appeal, not Denning’s dissent, that was affirmed by the House of Lords. Neither the majority in the Court of Appeal nor the House of Lords denied that the action of the Central Land Board had been motivated by their desire to enforce their policy of

243. Id. at 311.
244. Id. at 313.
245. Id. at 314.
sales at existing use value only. In their view, however, the challenged order was also directly related to the functions of the Board in connection with development charges. The prevailing view was well expressed in the judgment of Lord Tucker. According to him, "such a purchase was 'connected with' two functions of the Board, viz., their function of assessing the development charge and their function of collecting it. I think that unrestricted sales on a large scale at prices in excess of existing use value would render more difficult the proper ascertainment of the true existing use value, which is a necessary element in calculating the development charge, and that it being the function of the Board to collect the charge, to set it against the payments which they will have to make out of the £300 million compensation fund, a policy which tends to facilitate and ensure a speedy payment of the charge by including it in the sale price, is a policy the implementing of which is connected with their fiscal functions under the Act. The declared policy of the Board to discourage—by compulsory purchase if necessary—sales of land at prices in excess of existing use value seems to me to be one which the Act has empowered them to carry out, by conferring upon them this power to acquire land for the purpose of disposing of it for development for which permission has been granted at an inclusive price, and it is impossible to say that purchases made for this purpose are ultra vires. ..."¹⁴⁷ Since, in this view, the compulsory purchase order was, as required by the statute, "connected with" the Board's functions under the Act, the fact that the Board might have been moved by a purpose other than that for which its authority was conferred was immaterial. "In these circumstances," states Lord MacDermott, "it is, in my opinion, beside the point that, in seeking to acquire land for the purpose thus stated, the members of the Board, or some of them, may have been moved by considerations of policy which, in themselves, would not constitute a purpose within the meaning of any part of section 43(1) "¹⁴⁸

Though, as Denning, L. J., has pointed out,²⁴⁹ English administrative law may now be developing the principle of détournement de pouvoir along lines parallel to its development in France, the fact that both his colleagues on the Court of Appeal and the House of Lords refused to follow his opinion in a case where, in Professor Hamson's words,²⁵⁰ the Conseil d'Etat would have regarded his views as obvious and elementary, indicates that the English rule...

²⁴⁷. [1952] A. C. at 386-87
²⁴⁸. Id. at 385.
²⁴⁹. See note 226 supra.
of improper purpose is not yet as far-reaching as the French doctrine of détournement de pouvoir. The decision in the Earl Fitzwilliam's Wentworth Estates Co. case appears to be based upon the proposition that, once it is found that the administrator has acted within his powers and in furtherance of a policy declared by the legislature, it is irrelevant that he may also have been induced by a policy other than that expressed in the Act. And it makes no difference that the giving of effect to the latter policy was the administrator's predominant purpose. If the administrative act can be seen to effect a purpose contemplated by the legislature, even though that purpose may have been only an incidental one in the mind of the administrator, it is immaterial that the administrator's main purpose was, in fact, not clearly one for which the power was conferred.

But it is precisely here that the approach of the English courts falls short of that which is followed under the doctrine of détournement de pouvoir. As the opinion of Denning, L. J., puts it, even if the Central Land Board's desire to enforce their policy of sales at existing use value only was "not their sole purpose, nevertheless if it was their predominant purpose, as it clearly was, that is sufficient to invalidate their action." But it is precisely here that the approach of the English courts falls short of that which is followed under the doctrine of détournement de pouvoir. As the opinion of Denning, L. J., puts it, even if the Central Land Board's desire to enforce their policy of sales at existing use value only was "not their sole purpose, nevertheless if it was their predominant purpose, as it clearly was, that is sufficient to invalidate their action." His Lordship here is actually stating the French, not the English law. Under the jurisprudence of the Conseil d'Etat, an administrator who has been primarily induced to act by an improper purpose is held to have committed a détournement de pouvoir, even though his act was intra vires and did actually promote a purpose contemplated by the legislature.

In one sense, the difference in approach as between the English courts and the Conseil d'Etat in cases of the type under discussion may be said to amount to a difference in emphasis with regard to the burden of proof. In the English system, the administrator has discharged his burden if he can convince the court that his act could, in fact, give effect to a purpose contemplated by the legislator if that burden is met, the administrative act must be upheld, even if the private party can show that the challenged act was predominantly motivated by an improper purpose. In the droit administratif, on the other hand, it is the private party who discharges his burden if he can show that the administrator was motivated by an improper purpose if that burden is met, the administrator cannot prevail even if he can demonstrate that there may also be a direct relation between his act and a purpose which the legislature had in mind in delegating the power at issue.

252. See cases cited in Schwartz, op cit. supra note 227 at 217.
This difference in emphasis between the English and French systems makes for a substantial difference in the degree of control actually exercised over administrative discretionary power by reviewing courts. It should not be forgotten that, in these cases where improper purpose is alleged, the private party is at best at a serious disadvantage. It may be, as the celebrated statement of Bowen, L. J., has it, that the state of a man's mind is as much a fact as the state of his digestion. To prove such a state is, however, quite another matter, particularly when the man whose state of mind is at issue is a Minister or some other administrative official. Unless the administrative purpose is clearly articulated in the order which is challenged, it may be all but impossible to prove that the order was motivated by an improper purpose. Where there is, as in the English system, no requirement that the administrator give any reasons for his action, it is often not an easy matter to determine why he acted as he did. In such a case, the inquiry into whether there was the necessary correlation between his purpose and that of the legislature cannot, as a practical matter, be made. And, even if the administrator states his reasons in a "speaking order", it is hardly likely that, if he is motivated by an improper purpose, he will be so naive as to admit it. He will disguise the true motives behind his act and try to give some ostensible legal pretext. His ruse must be unmasked, normally not a simple matter.

For the party seeking review, it is always a most difficult task to convince the court that the purpose behind an administrative act was improper. Anglo-American courts are, in any event, most reluctant to engage in any investigation into the mental processes of the administrator, where he has not articulated the motives for his action. "According to an early English judge," the United States Supreme Court has stated, "the devil himself knoweth not the mind of man," and a modern reviewing court is not much better equipped to lay bare unexposed mental processes." How much more difficult is the task of the private party made by the interpretation of the rule of improper purpose in the *Earl Fitzwilliam's Wentworth Estates Co.* case! Under the House of Lords decision, it is not

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253. See the judgment of Birkett, J., in the *Earl Fitzwilliam's Wentworth Estates Co.* case, [1951] 1 K. B. 203, 218, where the learned judge emphasizes the fact that the Central Land Board nowhere stated directly their reasons for making the challenged order.

254. Compare Waline, *Traité Elementaire de Droit Administratif* 144 (6th ed. 1951), where the author makes a similar statement with regard to the efficacy in practice of the *détournement de pouvoir* doctrine.

enough that plaintiff shows that the administrator was motivated by an improper purpose, he must also, in substance, exclude any possibility that the challenged act could give effect to a purpose authorized by the legislature. This is to impose a well-nigh unsupportable burden upon the party seeking review, when, as indicated, his chances of success are, at best, hardly very great in this type of case.

If the rule of improper purpose is to have the effect in the English system that the détournement de pouvoir doctrine has in France, it is preferable to follow Lord Justice Denning's approach in his Earl Fitzwilliam's Wentworth Estates Co. dissent. Let the plaintiff prove that the act at issue was substantially motivated by an ulterior purpose (i.e., one not contemplated by the legislature), and he should prevail in his review action. The basic problem in present-day administrative law is not to insure that adequate scope is given to administrative discretion (the claims of the administrator in this respect have long since been recognized), but how to control effectively discretionary powers which appear unlimited on their face. The rule of improper purpose can be a valuable adjunct in insuring more effective control, but only if it is not interpreted so narrowly that it is all but impossible to show a violation of it.
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