LEGAL LANDMARKS, 1957-1958

ADMINISTRATIVE LAW

The Right to a Hearing

In what circumstances is the citizen entitled to a hearing before an administrative authority makes a decision which adversely affects his interests? This is a universal problem of government, and the administrator's answer to it will often be different from the citizen's. It is primarily a political question, to be resolved at the legislative or administrative level. But where the legislation which confers a power on some authority to make decisions affecting citizens' rights, liberties, or interests is silent on the subject of a hearing, it is also a question of law. Is the legislative silence to be taken as an indication of intention that no hearing need be given? The tendency of some modern English decisions is in that direction, including in that category the important decision of the Privy Council in *Nakkuda Ali v. Jayaratne*.[1]

On the other hand, there is a respectable body of judicial authority, dating from an earlier period, for a presumption of "natural justice" in the making of administrative decisions affecting vested rights, in the absence of any clear indication of contrary legislative intent. At the heart of this concept of natural justice is the notion that the citizen concerned should be given an opportunity to put his case in defence of his rights. The protection of vested *property* rights by this principle is illustrated by such famous cases as *Cooper v. Wandsworth Board of Works*[2] and, in the High Court of Australia, *Sydney Corporation v. Harris*.[3] Other cases in Australia have extended the principle to the protection of rights or interests other than proprietary in the strict, traditional sense, especially Jordan C.J. in *Re Gosling*[4] and Williams J. in *Election Importing Co. Pty. Ltd. v. Courtice*.[5] Williams J. stated the principle in these words:[6] ". . . a person is prima facie subject to a duty to act judicially in performing a statutory duty or exercising a statutory power if the performance or exercise will impose a new legal liability on another person or will interfere with the legal rights of another person with respect to some particular matter or matters. The exercise of a

1. [1951] A.C. 66. See also *R. v. Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150.
2. (1863) 14 C.B.N.S. 180.
3. (1912) 14 C.L.R. 1.
4. (1943) 43 S.R.N.S.W. 312.
5. (1949) 80 C.L.R. 657.
6. *ibid.* at 662.

power to revoke a licence and thereby abrogate a legal right to which the licensee was previously entitled falls within this principle." In spite of *Nakkuda Ali v. Jayaratne*,[7] the High Court of Australia has recently in a strongly-worded dictum re-affirmed this principle in relation to property rights: *Delta Properties Pty. Ltd. v. Brisbane City Council*.[8] The Supreme Court of New Zealand, though finding great difficulty in distinguishing *Nakkuda Ali v. Jayaratne*, held established commercial interests entitled to similar protection in the two important cases discussed by Professor Northey in his article published earlier in this number of this Journal.[9]

The vitality of that older principle has now been newly asserted by the High Court in *Commissioner of Police v. Tanos*.[10] The Disorderly Houses Act 1943 (N.S.W.) gives authority to a Supreme Court judge to declare premises a disorderly house upon the submission of an affidavit of a senior police officer showing reasonable grounds for suspecting that any one of certain specified undesirable conditions obtain in respect of the premises. A declaration has an effect described by the High Court as "somewhat drastic", subjecting the owner, occupier and patrons of the establishment to severe disabilities. A regulation made by the Governor in Council under a general provision in the Act authorising regulations to carry the Act into effect empowers a judge, if he is of opinion that reasonable grounds have been shown, to make the declaration, at his apparently unfettered discretion, either immediately and *ex parte* or after notice to and hearing of the owner or occupier or both. In this case, a declaration was made *ex parte* in respect of premises occupied by Mrs. Tanos and run by her as a restaurant. She appealed to the High Court, by special leave, against that order.

In the High Court the issue turned mainly on whether Mrs. Tanos should have been given a hearing before the declaration was made. It is to be noted that there was nothing in the terms of the Act to require a hearing, and the regulations had evidently been drafted on the assumption that none was required, and the judge had acted on the assumption that the Act and the regulations gave him an absolute discretion in the matter. The Court (Dixon C.J., Webb and Taylor JJ.) held, however, that the failure to allow a hearing vitiated the declaration. The regulations, it was held, should be construed as authorising an *ex parte* declaration

7. *supra* n. 1.
8. (1955) 95 C.L.R. 11 at 18.
9. *Recent Developments in New Zealand Administrative Law*, *supra* p. 205.
10. (1958) 31 A.L.J. 933.

only in the most exceptional circumstances, which did not exist in this case.

It is true that here the decision which affected the citizen's interests was made not by an administrative official, but by a judge. But the principle applied was expressed in quite general terms. "It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding, he must be afforded an adequate opportunity of being heard." It might be thought that the specific reference in this statement to "judicial or quasi-judicial proceedings" indicates that the Court did not conceive of the principle as applicable to "ordinary" administrative decisions. But the statement is immediately followed by a quotation from Byles J. in *Cooper v. Wandsworth Board of Works*:[11] ". . . although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". Later is a reference to the statement of the principle in *Delta Properties Pty. Ltd. v. Brisbane City Council*.[12] Both *Cooper's Case* and the *Delta Properties Case* were concerned with quite typical administrative powers. It is probably significant that the judgment contains no reference to *Nakkuda Ali v. Jayaratne*.[13] It would seem, then, that so far as the High Court is concerned, Australia is not witnessing the "twilight of natural justice", the phrase used by Mr. H. W. R. Wade after *Nakkuda Ali's Case*.[14]

Prohibition to the Queensland Industrial Court, Privative Clause.

In two recent cases the Supreme Court of Queensland has ordered prohibition against the Industrial Court: *R. v. Industrial Court, ex p. Brisbane City Council*[15] and *R. v. Industrial Court, ex p. Wilkinson*.[16] The decision in the second case was upheld by the High Court on appeal.[17] It was held in both cases that the Industrial Court had exceeded its jurisdiction, in spite of the extremely wide powers conferred on the Court by the Industrial Conciliation and Arbitration Acts 1932 to 1955 to deal with industrial matters (ss. 7, 8) and the very broad definition of "industrial matter" in s. 4. And prohibition was ordered in the

11. (1863) 14 C.B.N.S. 180 at 194.
12. (1955) 95 C.L.R. 11 at 18.
13. [1951] A.C. 66.
14. 67 L.Q.R. 103.
15. [1957] St.R.Qd. 553.
16. [1958] Qd.R. 80.
17. *sub nom. A.-G. v. Wilkinson, in re The Industrial Court* [1958] A.L.R 465.

face of a comprehensive privative clause (s. 21) in the following terms:—

> (2) . . . every decision of the Court shall be final and conclusive, and shall not be impeachable for any informality or want of form, or be appealed against, reviewed, quashed, or in any way called in question in any Court on any account whatsoever.
>
> (3) Proceedings in the Court shall not be removable by *certiorari*, and no writ of prohibition shall be issued, and no injunction or *mandamus* shall be granted by any Court other than the Industrial Court in respect of or to restrain proceedings under any award, order, proceedings, or direction relating to any industrial matter or any other matter which, on the face of the proceedings, appears to be or to relate to an industrial matter or which is found by the Court to be an industrial matter.

In an article published in an earlier volume of this Journal dealing with the judicial interpretation of privative clauses relating to State tribunals,[18] the writer rashly ventured the opinion that the conjunction of the wide positive grant of powers to the Industrial Court and the wide terms of the privative clause made it inconceivable that any situation would arise in which a writ of prohibition could be issued to the Court.

The substance of both cases before the Industrial Court was of an unusual kind. The *Brisbane City Council Case* was a dispute between employer and employee and so was clearly an "industrial matter" within the definition of the Acts. *Wilkinson's Case* was concerned with the week-end trading hours of petrol stations and arose under certain special provisions in the Acts. As such it was not regarded by the Supreme Court or the High Court as an "industrial matter", nor was there any specific finding by the Industrial Court that it was an "industrial matter". It is not intended here to discuss the Supreme Court and High Court judgments so far as they held that the Industrial Court exceeded the *positive* terms of its jurisdiction. Of more general interest is the attitude taken towards the privative terms of s. 21.

In the *Brisbane City Council Case* Philp J. (with whose judgment the other members of the Full Court agreed) subjected sub-sec. (3) of s. 21 to a careful grammatical analysis from which it emerged somewhat eroded. His conclusion was that apart from certiorari the provision was aimed at preventing the issue of

18. *Parliament v. Court: The Effect of Legislative Attempts to Restrict the Control of Supreme Courts over Administrative Tribunals through the Prerogative Writs*, 1 U.Q.L.J. No. 2 p. 39 at p. 49.

process from the Supreme Court against only tribunals or bodies other than the Industrial Court itself, *e.g.* industrial magistrates, who were subject to the supervisory jurisdiction of the Industrial Court. He supported this conclusion by a historical account of the legislation which is plausible but not entirely convincing. However this may be, his interpretation received the weighty endorsement of Dixon C.J., Fullagar J. and Taylor J., in *Wilkinson's Case*. The result, on this view, is that a decision of the Industrial Court cannot be quashed by certiorari but can be rendered nugatory by prohibition. Furthermore prohibition may be ordered to stop proceedings before an industrial magistrate if the Supreme Court is of opinion that they do not concern an industrial matter, unless a party applies to the Industrial Court for and obtains a finding by that Court that they do concern an industrial matter, yet no such finding by the Industrial Court can preclude prohibition in respect of proceedings before that Court itself. This does seem a somewhat remarkable result. However, it is certainly true that the language of s. 21 (3) is most infelicitous, from any point of view, and there is ample judicial precedent for the requirement of clear words to restrict the citizen's rights under the prerogative writs.

If sub-sec. (3) of s. 21 was ineffective to preclude prohibition to the Industrial Court, what of sub-sec. (2)? In the *Brisbane City Council Case* Philp J. was content to rely on earlier Queensland decisions in which similar privative words were held insufficient to prevent the issue of prohibition, decisions which are in fact supported by other Australian cases.[19] All Fullagar J. (with the concurrence of Dixon C.J. and Taylor J.) had to say on the subject in *Wilkinson's Case* was: "Very clear words are required to take away the remedy of prohibition where that important and valuable remedy would be available at common law: see e.g., *Jacobs v. Brett* (1875) L.R. 20 Eq. 1, at p. 6. The words of s. 21 (2) cannot be interpreted as having that effect."

Whatever may have been the judicial attitude in the past to privative clauses of this kind, one would think that some reconsideration would be prompted by the decision of the House of Lords in *Smith v. East Elloe Rural District Council*.[20] In none of the judgments in either of the two cases under review was any reference made to this important case, though it is fair to say that in neither case do counsel appear to have drawn the attention of the court to it. In that case a majority of the House (Viscount Simonds, Lord Morton of Henryton, and Lord Radcliffe, Lord

19. See the article referred to in n. 18 above at p. 45.
20. [1956] A.C. 736.

Reid and Lord Somervell of Harrow dissenting) held that a privative clause in the simple form, "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever . . .", precluded any attack on the validity of the order on the ground that it was made in bad faith. It is true that the remedy sought by the plaintiff in this case was not a prerogative writ—it was an action for damages, injunction, and a declaration that the compulsory purchase order was invalid. But certiorari and prohibition are appropriate procedures for attacking compulsory purchases orders, and the speeches of the majority judges were in quite general terms, as the following quotations amply show.[21]

Viscount Simonds:[22] "I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested . . . What is abundantly clear is that *words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make.* I cannot think of any wider words . . . It was urged by counsel for the appellant that there is a deep-rooted principle that the legislature cannot be assumed to oust the jurisdiction of the court . . . except by clear words, and a number of cases were cited in which the court has asserted its jurisdiction to examine into an alleged abuse of statutory power, and, if necessary, correct it. . . .My Lords, I do not refer in detail to these authorities only because it appears to me that they do not override the first of all principles of construction, that *plain words must be given their plain meaning.*"

Lord Morton of Henryton:[23] "I think that the decision in *Calder v. Halket*[24] would have been different if the section had read, 'No judgment, decree or order of the said court shall be questioned in any legal proceedings whatsoever'. Such words would, I think, clearly 'preclude all enquiry' by *preventing any complainant from raising the question whether the order had or had not been made without jurisdiction.*"

21. In all the quotations the italics are the writer's.
22. At 750-1.
23. At 758.
24. (1840) 3 Moo.P.C. 28.

Lord Radcliffe:[25] "It is quite true, as is said, that these are merely general words: but then, unless there is some compelling reason to the contrary, *I should be inclined to regard general words as the most apt to produce a corresponding general result.*" "Merely to say that Parliament cannot be presumed to have intended to bring about a consequence which many people might think to be unjust is not in my opinion, a principle of construction for this purpose. In point of fact, whatever innocence of view may have been allowable to the lawyers of the eighteenth and nineteenth centuries, the twentieth century lawyer is entitled to few assumptions in this field. It is not open to him to ignore the fact that the legislature has often shown indifference to the assertion of rights which courts of law have been accustomed to recognise and enforce, and that it has often excluded the authority of courts of law in favour of other preferred tribunals."

Australian courts may cling to their "innocence of view" in respect of privative clauses like s. 21 (2) of the Industrial Conciliation and Arbitration Acts, but the Privy Council may one day be called upon to reconsider the matter.

Prohibition and Certiorari to Tribunals which do not make Final Decisions

There are Australian authorities for the proposition that writs of prohibition and certiorari cannot be issued to correct errors of special tribunals which have no power to make decisions immediately determining rights and duties of citizens, but have power only to make decisions which are subject to approval by another authority or recommendations to another authority or the like.[26] But this proposition is clearly inconsistent with such famous cases as *R. v. Electricity Commissioners, ex p. London Electricity Joint Committee Co.*[27] and *Estate and Trust Agency v. Singapore Improvement Trust,*[28] in both of which cases the fact that the authority's decision was subject to approval by another body or was in the form of a recommendation to another body was no bar to the issue of a prerogative writ. These cases were followed by the New South Wales Supreme Court in *Ex parte Hopkins.*[29] The question was raised again before the Full Court of the Supreme Court of Queensland in *R. v. Fowler, ex p. McArthur.*[30]

25. At 767, 769.
26. *e.g. Newcastle Coal Co. v. Firemen's Union* (1908) 6 C.L.R. 466; *R. v. Macfarlane, ex p. O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518; *R. v. Warden at Toowoomba, ex p. Walsh* [1942] St.R.Qd. 303.
27. [1924] 1 K.B. 171. 28. [1937] A.C. 898.
29. [1957] S.R.N.S.W. 554, 74 W.N.N.S.W. 100.
30. [1958] Qd.R. 41.

By the Rules made under the Police Acts 1937 to 1955 provision is made, when the Commissioner of Police has reason to suspect that a member of the police force has been guilty of an offence against the Acts or Rules or that a member of the force should be dismissed for unfitness, for the member to be charged accordingly by the Commissioner and for the Minister to appoint a person to conduct an investigation of the charge. All evidence and addresses given before the investigator must be taken down in writing and forwarded to the Commissioner with the investigator's report, in which he is required to state whether he considers the charge proved. The Commissioner then decides what punishment, if any, should be meted out to the member charged. In this case charges were preferred against two constables, and a stipendiary magistrate was appointed by the Minister to conduct the investigation. After the investigation opened counsel for the constables submitted that the magistrate had no jurisdiction to proceed because the charges had not been properly laid under the Police Rules. The magistrate ruled against this submission and certiorari was sought from the Supreme Court to quash that decision, on the basis that proper laying of a charge was a condition precedent to the conduct of the investigation.

It is open to question whether an application for certiorari was in any event an appropriate procedure in these circumstances, but O'Hagan J. and Hanger J., who gave the main judgments (Stanley J. concurring in their conclusions), concentrated on the jurisdictional issue and held that the investigator did not constitute a quasi-judicial tribunal within the scope of certiorari. It was held that a statutory authority could not be quasi-judicial in this sense unless it had power to make a decision *determining* rights and duties. This in spite of the inevitable reference to Atkin L.J.'s constantly quoted dictum in the *Electricity Commissioners' Case*.[31] "Whenever any body of persons, having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." Atkin L.J. spoke of decisions *affecting* rights, not *determining* rights. "Affecting" is a term which is clearly wider than "determining". Its outer limits may well be vague, but is there any reason to suppose that Atkin L.J. did not use it deliberately, not wishing to confine the benefits of certiorari and prohibition within too definitely narrow limits? If the investigator's report under the Police Rules

31. [1924] 1 K.B. 171 at 205.

that the policeman was or was not guilty of an offence did not "affect" his rights, what was the purpose of the investigation? Hanger J. certainly recognised this point: "While the procedure adopted for securing a report by an independent tribunal on alleged misconduct by a police officer suggests the importance of the report and the value to be attributed to it, I think that the decision of the Commissioner to be made consequent on the report is such a discretionary matter that it should not be held that the investigating tribunal is subject to certiorari in respect of the making of the report". Why does the discretion reposed in the Commissioner affect the issue? It cannot be denied that a finding by the investigator that the charge is proved is likely to weigh heavily with the Commissioner. And the procedure laid down for the investigation in the Police Rules with great care and particularity is clearly designed to give the accused policeman all the protection of a judicial proceeding.

Hanger J. made no attempt to explain away the discretion in the higher authorities in the *Electricity Commissioners' Case*[32] and the *Singapore Improvement Trust Case*[33] which did not prevent certiorari or prohibition from issuing to the recommending tribunals. O'Hagan J., however, undertook that task. He asserted that the Commissioners and the Trust in those cases did make a determination of legal rights, though it did not become effective unless and until approved by the higher authority. In both cases, he said, it was the order of the initial tribunal which, when approved, was the operative legal act. It is true that it would be an abuse of language to describe the report of the investigator under the Police Rules in these terms, but as a matter of substance the distinction is surely an extremely fine one, especially when it is realised that the higher authority in the *Electricity Commissioners' Case* had statutory power not merely to approve or disapprove of the Commissioners' order but to approve it *with variations of its own.*

It is submitted that the Supreme Court in *McArthur's Case* was unnecessarily complicating still further a complicated enough branch of the law. And this was done not in pursuance of any clearly expressed view of judicial policy but by means of unconvincing verbal distinctions. Surely it ought to be accepted that certiorari and prohibition are proper remedies for correcting errors of jurisdiction and of certain other kinds by any statutory authority which is required to act in a judicial (or "quasi-judicial") manner, whatever sort of decision it is set up to arrive at. There

32. *ibid.* 33. [1937] A.C. 898.

are difficulties enough, often, in determining whether an authority is required to act in a judicial manner, but there could be no doubt whatever on that score in this case. If certiorari and prohibition are not available to control jurisdictional errors by the investigator, they are not available to control breaches of natural justice. What remedy is to be sought if an investigator blatantly ignores the clear requirements of the Police Rules designed to give the accused policeman a full and fair opportunity to defend himself? An injunction or a declaration may perhaps be the answer. It may well be that in *McArthur's Case* there was little merit in the allegation of lack of jurisdiction, but since the case was not decided on that ground one is left with the uncomfortable feeling that the prosecutors may have had merit and law on their side but their legal advisers, through no fault of theirs, chose the wrong procedure. It is time that the law concerning the remedies for abuse or excess of power by statutory authorities was completely overhauled and simplified. The decision in *McArthur's Case* adds another reason to the already long list.

Ross Anderson*

LAND LAW

Landlord and Tenant—The Fair Wear and Tear Clause

The obligation of a tenant who has covenanted to keep the premises in repair, fair wear and tear excepted, which appeared to have been settled by the Court of Appeal in *Taylor v. Webb*,[1] is again put in doubt by the Court of Appeal in *Brown v. Davies*.[2]

In *Taylor v Webb* parts of a building became uninhabitable because wind, rain, and decay caused defects in roofs and skylights, the damage extending to the interior through non-repair of the initial defects. This damage was held to be within a fair wear and tear exception.

In this case the covenant was in a simple form, and the only question of construction was the meaning of the exception. In *Brown v. Davies*, on the other hand, the covenant contained what on their face were inconsistent undertakings, viz., (a) to keep the interior in good repair and condition except as to dilapidations or damage resulting from reasonable wear and tear, and (b) to permit the landlord to enter and view, and upon notice by the landlord to carry out any interior repairs and decorations necessary to put the premises in as good a state as at the time of the lease.

1. [1937] 2 K.B. 283. 2. [1958] 1 Q.B. 117.

*M.A. (Oxon.) LL.B. (W.A.); Reader in Law in the University of Queensland; contributing author of *Essays on the Australian Constitution*.