O ! THAT WAY MADNESS LIES :[1] JUDICIAL REVIEW FOR ERROR OF LAW

By HARRY WHITMORE*

The Problem Posed

For centuries the superior courts have wielded a judicial big stick labelled 'jurisdictional error' in order to control and supervise the activities of administrators and inferior tribunals; moreover the stick has been brandished in the face of parliaments which have indicated fairly clearly that they intended the particular inferior body to be free of judicial interference.[2] The doctrine of review for jurisdictional error is well established; but there is widespread criticism of its operation. The distinction between findings of inferior bodies which are 'collateral' to the merits and thus reviewable and those which are not, a distinction which is basic to the doctrine, has been described as one of the 'apparently meaningless categories' of legal reference.[3] Particularly effective and persistent criticism has been mounted by D. M. Gordon.[4] In his view the distinction between jurisdictional facts and other facts cannot be maintained. He is completely opposed to any acceptance of the idea that the courts should be free to manipulate jurisdictional error to control the activities of inferior bodies on policy grounds alone; arbitrariness and uncertainty have no place in the law of judicial review.[5]

It is arguable that the critics have over-emphasized the uncertainties of judicial review for jurisdictional error, and the lack of logic inherent in the concept;[6] but whether jurisdictional error is truly a meaningless category or not, it seems likely that its importance will decline as it is supplanted to some degree by the even more flexible and uncertain

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[1] *King Lear*, Act III, Sc. IV.

[2] See de Smith, *Judicial Review of Administrative Action* (1959), 266ff.; Rubinstein, *Jurisdiction and Illegality* (1965) 85ff.; Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966) 242ff.

[3] Stone, *Legal Systems and Lawyers' Reasonings* (1964) 241ff.; 340. It is noteworthy, however, that Professor Stone has some doubts as to whether jurisdictional error is properly included in the suggested list of meaningless categories.

[4] See particularly 'The Relation of Facts to Jurisdiction' (1929) 45 *Law Quarterly Review* 459; 'The Observance of Law as a Condition of Jurisdiction' (1931) 47 *Law Quarterly Review* 386, 557; 'Conditional or Contingent Jurisdiction of Tribunals' (1960) 1 *University of British Columbia Law Review* 185; 'Jurisdictional Fact: An Answer' (1966) 82 *Law Quarterly Review* 515.

[5] Gordon has berated 'the professors' (in this case Professors Sawer and de Smith) for their failure to condemn the 'impure' conception of jurisdiction; book review of *Judicial Review of Administrative Action* (1960) 76 *Law Quarterly Review* 306, 314.

[6] On this point see Jaffe, *Judicial Control of Administrative Action* (1965) 631ff.

concept of review for error of law.[7] The courts and the legislatures by fostering review for error of law have created an even better and bigger stick for the judges to wield against the administration. The stick is becoming ever more ready to hand, for the litigant may frequently secure review for error of law by means of one of the special remedies, the prerogative writs, injunction or declaration[8] or by statutory appeal procedures.

Comments on the uncertainties of the fact-law distinction are by no means uncommon, but probably because this distinction has only quite recently become so significant in the area of judicial review of administrative action, most jurisprudential examination of the problem has been superficial.[9] The most well-known statement of the difficulty is that by Professor Dickinson to the effect that ' Matters of law grow downward into roots of fact and matters of fact reach upward without a break, into matters of law. The knife of policy alone effects an artifficial cleavage where the court chooses to draw the line '.[10]

Even more to the point is the following comment:

> No two terms of legal science have rendered better service than ' law ' and ' fact '. They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them. In them or their kind a science of law finds its strength and durability. They are the creations of centuries. What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy. They may torture the souls of language mechanicians who insist that all words and phrases must have a fixed content, but they, in their flexibility, are essential to the science which has to do with the control of men through the power to pass judgment on their conduct.[11]

The writer here was concerned with division of functions between judge and jury. Although this allocation may be of the utmost importance there are more urgent difficulties posed by introduction of the law-fact distinction into the field of administrative law in such a way that the citizens ' right to review of some adverse administrative action depends upon a preliminary finding that a question of law is involved. The conclusion so often reached that it is proper for the courts to draw the

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[7] Professor Stone has no doubt that this *is* a category of meaningless reference, *op. cit.* 340.

[8] The circumstances in which these remedies may be availed of are discussed below.

[9] See *e.g.* Salmond, *Jurisprudence* (11th ed. 1957) 66ff.; Paton, *Jurisprudence* (3rd ed. 1964) 175ff.; Cross, *Precedent in English Law* (1961) 241ff.; Pound, *Jurisprudence* (1959) v, 544ff. It is noteworthy that in the latter work the majority of footnote references are to modern works concerned with judicial review in the United States. Stone notes the need for further examination of the problem, *op. cit.* 340.

[10] Dickinson, *Administrative Justice and the Supremacy of the Law* (1927) 55. The author was, of course, referring to the difficulty in the context of judicial review.

[11] Green, *Judge and Jury* (1930) 270ff., quoted by Jaffe, *Judicial Control of Administrative Action* (1965) 547.

distinction on the basis of 'pragmatic', 'practical' or 'empirical' balancing of the comparative qualification of judge and administrator[12] appears quite acceptable from an academic point of view. It is somewhat less satisfactory to the citizen or the practitioner who is confronted with a real problem as to whether or not an application for review is likely to be successful.

The issues may be clearly understood after consideration of some practical situations. In many contexts government officials, administrative tribunals, officers and committees of trade unions and other associations are required to decide whether a word, or a phrase, or a sentence whether it be in a statute, a regulation, a rule, a contract or other document will apply to certain facts found. Examples are of everyday occurrence; some cases are complex, some are simple. Where facts are found showing that certain equipment is in place on land and fixed by bolts and rivets to concrete foundations, an official will have to reach a decision in the light of the statutory provision that 'in determining the improved value of premises occupied for trade, business or manufacturing purposes, such premises shall not include any plant, machines, tools or appliances which are not fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto'. He will have to decide whether the premises are used for the prescribed purposes, whether the equipment comprises 'plant, machines, tools or appliances', whether it is 'fixed', and if so whether it may be removed without 'structural damage': his decision might be affected by common law decisions as to what comprises 'land' and 'fixtures'.[13] Upon finding that a book contains photographs showing certain anatomical detail and particular words and phrases a customs official or a Literature Censorship Board will have to decide whether the book is 'blasphemous, indecent or obscene'. A trade union committee or official after finding that a member has engaged in a certain pattern of conduct will have to decide whether this constitutes 'unfair competition' which is proscribed by the union rules.[14] A taxation official or reviewing tribunal having found facts relating to a particular transaction will have to decide whether profits that arose 'are derived from the carrying out of a scheme devised for the purpose of making a profit'[15] or whether the transaction was or was not 'an adventure in the nature of trade'.[16] Similarly in varied circumstances, and again by application of statutory or other standards to facts found decisions will have to be reached as to whether land is 'in the same ownership',[17]

[12] See *e.g.* Griffith and Street, *Principles of Administrative Law* (3rd ed. 1963) 239; Davis, *Administrative Law Treatise* (1958) iv, 199ff.

[13] *The Australian Gas Light Co. v. The Valuer-General* (1940) 40 S.R. (N.S.W.) 126.

[14] *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329.

[15] *Commissioner of Inland Revenue v. Walker* [1963] N.Z.L.R. 339.

[16] *Griffiths v. J.P. Harrison (Watford) Ltd* [1963] A.C. 1.

[17] *Ex parte Tooth & Co. Ltd; Re Council of City of Sydney* (1962) 80 W.N. (N.S.W.) 572.

whether newsboys are ' employees ',[18] whether a person is ' resident ' in a particular area,[19] whether certain persons are ' officers ' of a trade union,[20] whether a person claiming unemployment benefit is a person ' directly interested in a trade dispute ',[21] and so on.

In each of these situations, and it can well be seen that the situations are commonplace in any regulated society, the crucial questions for the citizen and practitioner are easily posed. Assuming that a suitable remedy can be found[22] will the courts be prepared to review the decision made by the official or tribunal on the basis that a question of law is presented? If error can be shown, will the court correct it? It will be demonstrated that even in these apparently uncomplicated situations it is difficult, if not impossible, to predict with confidence what the outcome might be.

Unfortunately the position is indeed more complex than the foregoing situations would indicate, for they assume that the official or tribunal is either required or forbidden to take prescribed action upon finding that standards, statutory or otherwise, apply to the facts found; *e.g.* that a certain rate of tax must be applied to ' an adventure in the nature of trade ' or that importation of a book must be prohibited when there is a finding that it is ' blasphemous, indecent or obscene '. But this is by no means the only way in which power is conferred. More commonly in these days power is not conferred in such absolute terms. Most powers contain a substantial discretionary element. Upon making a finding that a member of a union or association has been guilty of ' unfair competition ' a committee will usually be found to have a power to impose disciplinary sanctions—a discretion to choose between penalties, or even not to impose a penalty at all. So, too, upon finding that a newsboy is an ' employee ', an administrative body will usually have some discretion as to the form of the order to be made. After deciding that premises do include certain equipment the official in actually arriving at his valuation will be afforded a fairly wide scope for exercise of discretion. In English and Australian law techniques for the control of discretionary powers are well developed through the doctrine of *ultra vires*.[23] The courts will not permit the discretion to be abused: by exercise to achieve an improper purpose; by taking account of irrelevant matter or disregarding of relevant matter; by improper delegation or fettering of the power; or by exercise under dictation by some outside

[18] *N.L.R.B. v. Hearst Publications* (1944) 322 U.S. 111.

[19] *Commissioner of Taxation v. Miller* (1946) 73 C.L.R. 93.

[20] *N.L.R.B. v. Coca-Cola Bottling Co.* (1956) 350 U.S. 264.

[21] *Punton v. Ministry of Pensions and National Insurance* (*No.* 2) [1964] 1 W.L.R. 226.

[22] See below.

[23] These techniques are bedevilled by similar uncertainties to those which manifest themselves in relation to jurisdictional error and error of law; see generally, de Smith, *Judicial Review of Administrative Action* (1959) ch. 6; Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966) 172ff.

body. The question is whether such abuses of discretionary power which have traditionally been remedied by the prerogative writ of mandamus will be treated as errors of law to permit review when error of law is the ground which must be established.

Although the fact-law distinction is becoming steadily more important in English, Australian and other Commonwealth jurisdictions,[24] and although there are a multitude of decisions by the courts as to what are ' questions of law ', there has never been a thorough examination in Australia of the problems and difficulties inherent in any system of judicial review of administrative action which depends upon a distinction being drawn between matters of law and matters of fact. It is to United States law and administrative lawyers that we must turn for guidance.

The United States Experience[25]

It is somewhat surprising to find that the law-fact distinction is still of such importance in the United States where decisions of administrative agencies may be reviewed by the courts on matters of law and matters of fact. The answer is, of course, that review on matters of fact is extremely limited whereas review on matters of law may lead to complete substitution of a judicial decision for the original administrative decision. Before delving deeper it may be as well to clear away two preliminary matters. First, it is reasonably clear that the common law doctrine of review of jurisdictional facts is virtually defunct ; it has been supplanted by the doctrine of review for ' substantial evidence '. The doctrine does appear to survive in somewhat attenuated form in relation to constitutional-jurisdictional facts particularly where civil rights are involved. Certain it is that there are a number of older cases in which the language of jurisdictional error is employed[26] and even some modern ones.[27] However, Professor Davis remarks[28] that

> The present state of the law is probably embodied in a 1946 remark of Mr Justice Frankfurter: ' This argument revives if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine

[24] Statute after statute will provide simply for review where ' a question of law ' or a ' point of law ' is involved. England has ' made it wholesale ' by providing in s. 9 of Tribunals and Inquiries Act, 1958 (Eng.) for review of tribunal decisions by the High Court on application by any party to the proceedings who is dissatisfied ' in point of law '. It would seem that legislators either do not realize or are not concerned that the scope of review afforded by such provisions is almost completely at the discretion of the courts. The trend has not escaped criticism: see Robson, ' Administrative Justice and Injustice: A Commentary on the Franks Report ' [1958] *Public Law* 12; Griffith, ' Tribunals and Inquiries ' (1959) 22 *Modern Law Review* 125.

[25] It will be immediately apparent to the reader that I am heavily indebted to Professors Davis and Jaffe for the material in this section. I hope that I have not misrepresented their views or misunderstood the basic approaches. If I have I can only plead in defence a long absence from the United States.

[26] *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U.S. 287; *Ng Fung Ho v. White* (1922) 259 U.S. 276; *Crowell v. Benson* (1932) 285 U.S. 22.

[27] See *e.g. Jacobellis v. Ohio* (1964) 378 U.S. 184.

[28] *Administrative Law Treatise* (1958) iv, 159ff.

> of " jurisdictional fact ". In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson* . . . brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose.'[29]

Secondly, the principles developed by the courts to govern judicial review have to a considerable extent been codified in the Administrative Procedure Act 1946 (U.S.) and its State equivalents. Section 10 of the Act deals with judicial review; it provides, *inter alia*:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
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> (a) *Rights of review*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof.
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> (e) *Scope of review*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8[30] or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

An initial difficulty with the section is created by the qualifying clause: ' Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion '. Privative clauses are as common in the United States as they are in Australia:[31] statutes provide that a particular decision is to be ' final ' or ' final and conclusive ' or even ' not to be reviewed '. The approach of the courts varies according to the formula, and indeed even where the same formula is used in different

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[29] *Estep v. United States* (1946) 327 U.S. 114. But see the *Jacobellis* case *supra* n. 27.

[30] These are sections dealing with hearing procedure and the nature of the decision to be made by the agency itself or its subordinate hearing officers. A record comprising a transcript of testimony, exhibits and other papers is required to be kept and the decision, which must include a statement of findings and conclusions, as well as the reasons therefore, on all matters of fact, law or discretion, is part of the record. Review both on questions of law and questions of fact is thus greatly facilitated.

[31] See Benjafield and Whitmore, *op. cit.* 242ff.

statutes dealing with different exercises of power. It seems that clauses prescribing finality will not generally exclude review either on questions of fact or of law but that to deal with more explicit clauses the courts have at times resorted to the concept of jurisdictional error. Furthermore there are many cases in which administrative action has been held unreviewable.[32] Literal application of the qualifying clause seems to exclude review wherever an agency discretion is involved despite the specific power to review for abuse of discretion contained in section 10 (e). Again the courts have adopted widely different approaches according to the nature of the power involved. The approaches range from complete disregard of the qualifying clause[33] to holdings that there can be no review of discretionary executive action when matters of high policy are involved.[34] Between these two extremes it seems that the courts *may* assert a right to review or partial review where abuse of discretion is alleged or they may give full effect to the qualifying clause.[35]

Review of agency decisions on questions of fact must be dealt with fairly briefly. Although Professor Jaffe insists on the traditional view ' that the adequacy of the evidence adduced to support a finding of fact is a question of law '[36] the courts of the United States are no longer forced to rely on this somewhat doubtful proposition [37] in order to maintain review on questions of fact. Instead they may utilise the judge-made ' substantial evidence ' rule [38] which is now incorporated in the Administrative Procedure Act. The idea is, of course, that while it is proper for courts to decide questions of law they should only interfere with administrative findings of fact in the very limited class of cases where the findings are not supported by ' substantial evidence '. ' Substantial evidence ' has been described as ' more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion '.[39] Professor Davis comments:

> The meaning of ' substantial evidence ' is about as clear and about as vague as it should be; the main inquiry is whether on the record the agency could reasonably make the finding. The test is

[32] See Davis, *op. cit.* iv, ch. 28. As with the English and Australian cases it is difficult to perceive any high degree of consistency in dealing with privative clauses. Davis puts it that ' The most important forces are the reactions of judges to reviewing or refraining from reviewing particular questions in particular cases '.

[33] *United States ex rel. Accardi v. Shaughnessy* (1954) 347 U.S. 260.

[34] *United States v. Pink* (1942) 315 U.S. 203.

[35] See *Carlson v. Landon* (1952) 342 U.S. 524; *Panama Canal Co. v. Grace Line* (1958) 356 U.S. 309; *Schilling v. Rogers* (1960) 363 U.S. 666; *Arrow Transportation Co. v. Southern R. Co.* (1963) 372 U.S. 658. Compare the approach of Davis, *op. cit.* iv, 80ff. with that of Berger, ' Administrative Arbitrariness and Judicial Review ' (1965) 65 *Columbia Law Review* 55.

[36] Jaffe, *op. cit.* 551, 595.

[37] Brown, ' Fact and Law in Judicial Review ' (1943) 56 *Harvard Law Review* 899, 903.

[38] Traced back to *I.C.C. v. Louisville & N.R.R.* (1913) 227 U.S. 88.

[39] *Consolidated Edison Co. v. N.L.R.B.* (1938) 305 U.S. 197, 229.

> the same as the test on review of a jury verdict, but the review is narrower than the review of the findings of a judge sitting without a jury. Despite the theory, the judges as a matter of practical fact have a good deal of elbow room to vary the intensity of review as they deem necessary or desirable in particular cases.[40]

Since the Administrative Procedure Act it is quite clear that review for 'substantial evidence' on the whole of the record is required:[41] this means that the reviewing court must look at the evidence on both sides. 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight'.[42] It does not mean that the court should weigh competing inferences: a court may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*'.[43] This makes it clear that the 'substantial evidence' rule applies also to inferences of fact; the decisions of administrators are not to be overturned merely because a court might have drawn different inferences from the primary facts found.

When it is borne in mind that the courts are required 'to decide all relevant questions of law'[44] the law-fact distinction becomes quite basic to the whole system of review. Inevitably disputes will arise as to how a question of law is to be isolated. Debate has extended over many years and now the major protagonists are Professors Davis and Jaffe.[45] Professor Jaffe recognizes the difficulty of making a clear distinction and further he recognizes that within limits the administration must be permitted to make law. Beyond this, however, he insists upon an analytic approach; avoidance of analysis by characterizing a question as one of mixed fact and law subject to review only as to 'reasonableness', is in his view, an avoidance of judicial responsibility. The analysis is predicated upon the basic premise: 'A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect'.[46] Once an assertion of legal effect is made the question becomes one of law.[47] The idea is firmly rejected that when a word of common meaning is used in an instrument or a

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[40] *Op. cit.* iv, 118. Professor Jaffe states that 'The law demands evidence sufficient to enable a mind to find the legally required fact by reasoning from that evidence'. *Op. cit.* 596.

[41] *Universal Camera Corporation v. N.L.R.B.* (1951) 340 U.S. 474.

[42] *Ibid.* 488.

[43] *Ibid.*

[44] Administrative Procedure Act 1946, s. 10 (e)—subject to the qualifying clause.

[45] See generally Davis, *Administrative Law Treatise* iv, (1958) ch. 30; Jaffe, *Judicial Control of Administrative Action* (1965) ch. 14; Davis, 'Judicial Control of Administrative Action: A Review' (1966) 66 *Columbia Law Review* 635.

[46] *Op. cit.* 548.

[47] The following illustration brings the analysis down to earth. A finding that an employee, while at work, has been intentionally hit on the head by a fellow employee, is a finding of fact. But if it is asserted that the injury arose out of the employment and is compensable under a workers' compensation statute, this is a conclusion of law.

statute its application to findings of fact presents a question of fact. He points out that words rarely have a single meaning and that disputes must inevitably arise as to whether they describe the phenomenon in question. Such disputes ' must be resolved by reference to the purposes of the statute and the question is thus one of law '.[48] To meet his preliminary point that within limits administrators should be permitted to make law Professor Jaffe asserts that the courts should interfere only where a conclusion is clearly erroneous.[49]

It will have already become apparent that the question whether statutory words or phrases apply to particular findings of fact—a question of law whether or not the words used are of common meaning—is to be decided first by the administrator and then, if judicial review is sought, by the courts. The decision should in either case, according to Professor Jaffe, be based upon the ' clear statutory purpose '.[50] He concedes that there may be two or more answers where this test is applied and that in such a case it is proper for the courts to decide that the actual choice of answer should be left to the administrator, within the range of possible answers. Expertise is a factor to be taken into account in assessing the statutory purpose; in the sense that the courts will defer to the administrator when of opinion that expertness is relevant. However, Professor Jaffe cavils against mechanical application of the expertness approach in such a way that it determines the scope of review—by restricting review to reasonableness and thus treating a question of law as if it was a question of fact.[51] The control of discretionary power by the doctrine of ' abuse of discretion ' is dealt with fairly shortly[52] although it seems to be assumed that such abuse does constitute a question of law.[53]

In the case law there is ample material to support Professor Jaffe's analytic approach [54] but there are cases in which a different approach

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[48] *Op. cit.* 551. Professor Jaffe might have called in aid the words of Brandeis J.: ' When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law '. *Great Northern Railway v. Merchants Elevator Co.* (1922) 259 U.S. 285, 291. Can ' construction ' be distinguished from the situation here?

[49] *Op. cit.* 554.

[50] *Op. cit.* 572. It is noted that this may appear to be ' a crashing platitude or a resounding rationalization for results otherwise determined' but nevertheless it is insisted that it is a valuable initial premise.

[51] On the question of expertise and the law-fact distinction see Korn, ' Law, Fact, and Science in the Courts' (1966) 66 *Columbia Law Review* 1080.

[52] *Op. cit.* 586ff.

[53] It has been remarked that ' American law about invalidating action that is unreasonable or arbitrary seems to be less developed ' than English law: Wade, ' Anglo-American Administrative Law: Some Reflections' (1965) 81 *Law Quarterly Review* 357, 379.

[54] See *e.g. Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144; *Office Employes v. N.L.R.B.* (1957) 353 U.S. 313; *Packard Motor Car Co. v. N.L.R.B.* (1947) 330 U.S. 485; *F.T.C. v. Anheuser-Busch* (1960) 363 U.S. 536; *F.T.C. v. Mandel Bros* (1959) 359 U.S. 385; *Jacobellis v. Ohio* (1964) 378 U.S. 184; *Good Humor Corp. v. McGoldrick* (1943) 46 N.E. 2d. 881; *Red Top Brewing Co. v. Bowers* (1955) 125 N.E. 2d. 188.

is taken. The most well known, and one which Professor Jaffe examines in some detail, is *N.L.R.B. v. Hearst Publications, Inc.*[55] The issues were fairly simple. The statute, the National Labor Relations Act 1935 (U.S.) required an employer to bargain with the representatives of ' employees '. Hearst Publications refused to bargain with newsboys on the ground that they were independent contractors. The facts found included the following: that the newsboys were adult men who sold newspapers and magazines at street corner stands; the newsboys handled publications other than those by Hearst but Hearst had on some occasions objected to the selling of rival publications; Hearst allocated stands and supplied boxes, racks, aprons, advertising matter and so on; Hearst fixed prices and allocations and applied certain standards as to conduct; papers were supplied on credit and newsboys were required to pay for those sold, lost and unreturned. The N.L.R.B. found the newsboys to be ' employees '. On review the Court of Appeal treated the question as one of law and reversed the Board's decision, the primary consideration being, of course, the common law definition of ' employee '. However the Supreme Court reinstated the Board's decision on the basis that the inferences of fact had support in the record—thus treating the question as one of fact. Although agreeing with the decision of the Supreme Court having regard to statutory purposes, Professor Jaffe concludes that phrasing of the opinion obscured analysis and indeed suggested ' an abdication of the judicial function '.[56]

At this point the views of Professor Davis become relevant. While agreeing that there is a strong line of cases supporting the analytical approach to the law-fact distinction he argues strongly that there is an equally well established catena of cases in which a ' practical, functional, pragmatic or policy approach ' is adopted.[57] The *Hearst* case is put forward as but one example of this latter approach.[58] ' The Supreme Court ', he asserts, ' commonly holds that *because* of such practical considerations as the expertness of an agency or its staff, a question of determining what decision to make on undisputed or established facts is a question of fact and not a question of law '.[59] Or alternatively the courts may omit all discussion of the law-fact distinction and where they think that judicial intervention is appropriate merely hold that the administrative decision must be upheld where it has warrant in the record

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[55] (1944) 322 U.S. 111.

[56] *Op. cit.* 560, 575.

[57] *Administrative Law Treatise* (1958) iv, 192.

[58] Limitations of space prevent detailed discussion of this line of cases. Professor Davis includes: *Dobson v. Commissioner* (1943) 320 U.S. 489; *Swift & Co. v. United States* (1942) 316 U.S. 216; *Alleghany Corp. v. Breswick & Co.* (1957) 353 U.S. 151; *Gilbertville Trucking Co. v. United States* (1962) 371 U.S. 115; *Commissioner v. Duberstein* (1960) 363 U.S. 278.

[59] *Op. cit.* 201.

and a rational basis in law.[60] Professor Davis establishes that in the *Dobson* case[61] the Supreme Court treated the question whether there was a ' tax benefit ' as ' an accounting problem and therefore a question of fact ' when analytically it was a clear-cut question of law. This is on all fours with the *Hearst* case. The Court was quite explicit as to its reasons:

> The [Tax] court is independent and its neutrality is not clouded by prosecuting duties . . .. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject . . .. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts.[62]

It is easy then to assert, as Professor Davis does assert, that the law-fact distinction *is* manipulated to determine the scope of review on a practical basis.[63] Furthermore, Professor Davis is aware that the most important questions for review are questions of discretion which strictly are neither questions of law nor questions of fact; but they are particularly within the specialization of administrative agencies and their staffs, and on a practical basis, better classified as questions of fact.[64]

Professor Davis applauds the practical approach for a number of reasons:[65] historically the law-fact distinction has been practical and not analytical; in order to decide between the literal or practical meaning of words the courts must inquire into the use of the terms ' law ' and ' fact ' to guide the scope of review, and this leads to more sound decisions; the analytic approach tends to permit substitution of judicial judgment on ' ought ' or ' should ' questions—the matters for discretion. He is of opinion that the primary guide to decision between ' law ' and ' fact ' should be the comparative qualifications of administrative agencies and the courts. Some assistance might also be gleaned from the ' real or assumed intent of Congress about allocation of functions between courts and agencies '.[66]

Unfortunately, the views of Professor Davis create more difficulties than they solve. He recognizes that some unsatisfactory consequences flow from the fluctuation of the courts between the analytic and the

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[60] *Rochester Tel. Corp. v. United States* (1939) 307 U.S. 125.

[61] *Dobson v. Commissioner of Internal Revenue* (1943) 320 U.S. 489.

[62] *Ibid.* 498-499.

[63] He would prefer substitution of the words ' judicial question ' and ' administrative question ' for the words ' law ' and ' fact ' because such terminology would ' focus attention on practical needs rather than on a relatively sterile analysis of words '. *Op. cit.* 194. This suggestion might be of value in Australian jurisdictions where thoroughgoing reform of the system [*sic*] of administrative law is contemplated.

[64] *Ibid.* 209.

[65] *Ibid.* 207ff.

[66] *Ibid.* 211.

practical approach to the law-fact distinction[67] and, further, that the Supreme Court has never given any explanation as to why it sometimes follows one approach and sometimes the other.[68] And yet surely he is right to emphasize that there are two distinct lines of cases. It is easy to say that the choice is, and must be, guided by judicial discretion—a discretion itself guided more often than not by the strength of opinion as to whether the administrative action is right or wrong—but this affords little help to the practitioner and must inevitably lead to increased litigation and costs and uncertainty in the administrative agencies. It seems to the writer that the analytic approach, if strictly adhered to, is likely to prove a more satisfactory base for prediction and coherence in a system of administrative *law*. But the United States experience as a whole seems to demonstrate that a system of review based on the law-fact distinction is, in any event, unlikely to prove satisfactory.

The British-Australian Experience

It would be a pleasure at this stage to be able to say that one could turn with a feeling of relief to the comparative simplicity of English and Australian law. This pleasure is denied, for disputes on the law-fact distinction are interwoven into the fabric of the case-law in a multiplicity of contexts.

Simplicity might have been attained, at the possible cost of giving too much scope for judicial review, had the courts adhered to the view put forward by Lord Parker in *Farmer v. Cotton's Trustees*:[69]

> The views from time to time expressed in this House have been far from unanimous, but 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 properly construed of some statutory enactment the question is one of law only.

Judicial support for this approach is easy to find. In *Hayes v. Federal Commissioner of Taxation*[70] Fullagar J. referred to Lord Parker's remarks with evident approval and went on to say:

> With the greatest respect, this seems to me to be the only reasonable view. The distinction between the two classes of question is, I think, greatly simplified, if we bear in mind the distinction, so clearly drawn by Wigmore, between the *factum probandum* (the ultimate fact in issue) and *facta probantia* (the facts adduced to prove or disprove that ultimate fact). The ' facts ' referred to by Lord Parker in the passage quoted are the *facta probantia*. Where the *factum probandum* involves a term used in a statute, the question whether the accepted *facta probantia* establish that *factum probandum* will generally—so far as I can see, always—be a question of law.

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[67] *Ibid.* 193.
[68] *Ibid.* 229.
[69] [1915] A.C. 922, 932.
[70] (1956) 96 C.L.R. 47, 51.

Lord Reid has recently said:[71]

> The question whether the words of an Act apply to particular facts is generally called a question of law . . .. In some exceptional cases the question whether a particular word or phrase in an Act applies to particular facts has come to be regarded, for reasons that I do not fully understand, as a question of fact.

This approach, which is, of course, the counterpart of the United States analytic line of decisions, has been adopted mainly in cases concerned with the review of decisions by taxation tribunals[72] but there are signs of a similar approach, sometimes less explicit, in other contexts.[73]

The most illuminating opinion of recent years is that of Lord Radcliffe in *Edwards v. Bairstow*.[74] He said:

> My Lords, I think that it 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 . . .. But that being said, the law does not supply a precise definition of the word ' trade ': much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. In effect it lays down the limits within which it would be permissible to say that a ' trade ' as interpreted by section 237 of the Act does or does not exist.

This is close indeed to the approach advocated by Professor Jaffe. The question is one of law but provided that the facts found are capable of being within the statutory term there is no error. Indeed, Lord Radcliffe notes that where there is room for manoeuvre as to whether or not the facts fall within a statutory term a determination is a question of degree and *can* be described as a question of fact: but he deprecates ' too much abbreviation ' in stating the question, ' as by asserting that it is simply a question of fact whether or not a trade exists. It is not simply a question of fact '.

Complexity is introduced by the many opinions and decisions, to the effect noted by Lord Reid, that whether a particular word or phrase in an Act applies to particular facts found is not a question of law at all but is simply a question of fact. Usually the courts will say that a question of fact is presented because the word or phrase ' is an ordinary English

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[71] *Griffiths v. J.P. Harrison (Watford) Ltd* [1963] A.C. 1, 15.

[72] See *e.g. per* Gresson P. in *Commissioner of Inland Revenue v. Walker* [1963] N.Z.L.R. 339, 353ff.; *per* Latham C.J. in *Commissioner of Taxation v. Miller* (1946) 73 C.L.R. 93, 97; *per* Rich A.C.J. in *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150, 154.

[73] See *e.g. In re Butler* [1939] 1 K.B. 570; *Church v. Inclosure Commissioners* (1862) 11 C.B. (N.S.) 664; *Gould v. Minister of National Insurance* [1951] 1 K.B. 731; *Ex parte Tooth & Co. Ltd* ; *Re Council of City of Sydney* (1962) 80 W.N. (N.S.W.) 572; *Hoddinott v. Newton Chambers & Co. Ltd* [1901] A.C. 49; *Reg. v. Medical Appeal Tribunal*; *Ex parte Burpitt* [1957] 2 Q.B. 584.

[74] [1956] A.C. 14, 33ff.

word or phrase ', or is used in the same sense as ' in ordinary speech ', or involves ' questions of degree '. One of the most influential judgments in Australia has been that of Jordan C.J. in *The Australian Gas Light Co. v. The Valuer-General.*[75] He said:[76] ' The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law '. This proposition may now be doubted.[77] But he goes on to say: ' The question whether a particular set of facts comes within the description of such a word or phrase is one of fact '. There is ample authority for this proposition.[78] Thus the question whether a person is ' resident ' in a particular area has been held to be a question of fact because it is a question of degree and the word is used in the statute in the common sense.[79] Whether a transaction is ' an adventure in the nature of trade ' is for the same reasons a question of fact.[80] The words ' mining operations ' are used in a taxing statute as an ordinary English expression and present a question of fact.[81] Again most of these examples involve review of taxation tribunals. But there are numerous examples in other fields: ' speed . . . dangerous to the public ' is a question of degree—a question of fact;[82] ' substantial part ' of premises is a question of fact;[83] ' unfit for human habitation ' is a question of degree—a question of fact;[84] ' houses ' raises a question of fact.[85]

Even where this view is taken presumably it follows that where words and phrases are used which do not have a common meaning or involve questions of degree their application to facts found does raise a question of law.[86]

It must not be thought that adherence to the theory that application of statutory standards to facts found is a question of fact precludes judicial review where a question of law or error of law must be established. This would be much too unsophisticated ! But a language usage must be explained before further difficulties are encountered. In *Hayes'* case[87]

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[75] (1940) 40 S.R. (N.S.W.) 126.

[76] *Ibid.* 137.

[77] *Edwards v. Bairstow* [1956] A.C. 14, 31, 33.

[78] *Ibid.* 30.

[79] *Inland Revenue Commissioners v. Lysaght* [1928] A.C. 234; *Commissioner of Taxation v. Miller* (1946) 73 C.L.R. 93.

[80] *Edwards v. Bairstow* [1956] A.C. 14, 30; *Griffiths v. J.P. Harrison (Watford) Ltd* [1963] A.C. 1.

[81] *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150; *N.S.W. Associated Blue-Metal Quarries Ltd v. Federal Commissioner of Taxation* (1956) 94 C.L.R. 509.

[82] *Bracegirdle v. Oxley* [1947] K.B. 349.

[83] *Atkinson v. Bettison* [1955] 1 W.L.R. 1127.

[84] *In re Bowman* [1932] 2 K.B. 621; *Daly v. Elstree R.D.C.* [1948] 2 All E.R. 13.

[85] *In re Bainbridge* [1939] 1 K.B. 500.

[86] See cases cited above. Also see *Bracegirdle v. Oxley* [1947] 1 K.B. 349; *Gould v. Minister of National Insurance* [1951] 1 K.B. 731; *British Launderers' Research Association v. Borough of Hendon Rating Authority* [1949] 1 K.B. 462; *D.P.P. v. Head* [1958] 2 W.L.R. 617.

[87] (1956) 96 C.L.R. 47.

Fullagar J. thought that simplification could be achieved by describing the difference between *facta probantia* and *facta probanda.* The more common usage is to distinguish ' primary facts ' and ' inferences '. In *Bracegirdle v. Oxley*[88] Denning J. explained the distinction thus:

> Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact.[89] It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law.

When the problem is whether the primary facts fall within a statutory term there will be raised a question, conclusion, or inference of fact or of law according to which of the two approaches outlined in the preceding paragraphs is adopted. In *Federal Commissioner of Taxation v. Broken Hill South Ltd*[90] the primary facts were that because of economic conditions a mine was in a ' closed down ' condition; the only employees were surface men who acted as watchmen and engineers who periodically ran the engines. The inference to be drawn was whether or not ' mining operations '—a statutory term—were being carried on. Rich A.C.J. applying Lord Parker's approach held this to be an inference or question of law.[91] Other members of the court adopting the ' common meaning ' approach held that it was an inference of fact.[92]

Authority to the effect that review can still be obtained despite a holding that only an inference of fact is involved is now plentiful. In the *Australian Gas Light* case[93] Jordan C.J. explained that

> . . . if the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior court which can determine only questions of law.[94]

The scope of review suggested seems identical to that envisaged by Lord Radcliffe in *Edwards v. Bairstow*; in practice little seems to turn on the fact-law distinction unless it is asserted that there is only one

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[88] [1947] K.B. 349, 358.

[89] This statement needs to be qualified. *Infra.*

[90] (1941) 65 C.L.R. 150.

[91] *Ibid.* 154.

[92] *Ibid.* 155, 160.

[93] (1940) 40 S.R. (N.S.W.) 126, 138.

[94] See also *Commissioner of Taxation v. Miller* (1946) 73 C.L.R. 93, 103; *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150, 155; *Fisher v. Deputy Commissioner of Taxation* (1966) 40 A.L.J.R. 328.

possible answer to a question of law. Also in *Edwards v. Bairstow* Viscount Simonds made it clear that on his analysis a distinction between law and fact was not critical.[95] He went on to say:[96]

> The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand.

The test has also been put in terms of ' reasonableness '. Lord Denning in discussing whether a decision of the Special Commissioners for Income Tax could be reversed because it was ' erroneous in point of law ' stated:

> And it is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions, and often do. Juries do. So do judges. And are they not all reasonable men? But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.[97]

Review of primary facts is theoretically more limited. It is said that the only question of law that can arise on primary facts is whether there was any evidence to support the finding[98] and the House of Lords has insisted that the courts will more readily review inferences than primary facts.[99] The reason is, of course, that the trial judge, jury or tribunal has seen and heard the witnesses. It has recently been held in England that in reviewing decisions of the Minister under the Town and Country Planning Act where review is limited to points of law the Supreme Court Rules will not permit re-hearing on primary facts although the Rules may be availed of to justify admission of fresh evidence.[1] The allegation

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[95] [1956] A.C. 14, 29.

[96] *Ibid.*

[97] *Griffiths v. J.P. Harrison (Watford) Ltd* [1963] A.C. 1, 19. See also *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150, 155; *Great Western Railway Co. v. Bater* [1922] 2 A.C. 1, 12; *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; *Walton v. Holland* [1963] N.Z.L.R. 729; *Armah v. Government of Ghana* [1966] 3 All E.R. 177; *cf. Reg. v. District Court; Ex parte White* (1966) 40 A.L.J.R. 337, 341.

[98] *Smith v. General Motor Cab Co.* [1911] A.C. 188; *The Australian Gas Light Co. v. Valuer-General* (1940) 40 S.R. (N.S.W.) 126, 138; *British Launderers' Research Association v. Borough of Hendon Rating Authority* [1949] 1 K.B. 462, 471; *American Thread Co. v. Joyce* (1913) 108 L.T. 353; *Ex parte Parker; Re Brotherson* (1957) 57 S.R. (N.S.W.) 326.

[99] *Benmax v. Austin Motor Co.* [1955] A.C. 370; *Wheat v. E. Lacon & Co. Ltd* [1966] 2. W.L.R. 581.

[1] *Green v. Minister of Housing and Local Government* [1966] 3 All E.R. 942.

that facts are not supported by evidence cannot be maintained colourably to establish a question of law.[2]

Although it is in the context of application of statutory standards to facts found that the practitioner will most often seek to have administrative decisions reviewed he must never overlook the possibility of establishing other questions or errors of law. First there is the problem of discretionary powers. It has long been established that exercise of discretionary power may be controlled by means of the *ultra vires* doctrine[3] but it was not entirely clear until very recently that the abuses of the discretion covered by the doctrine would be regarded as errors of law. In many cases it was assumed or stated that this was so,[4] and finally in *Baldwin and Francis Ltd v. Patents Appeal Tribunal*[5] Lord Denning posed the direct question: 'Is that an error of law?' He went on to say: 'I have no doubt that it is: and it is an error of such a kind as to entitle the Queen's Bench to interfere'. Lord Denning canvassed a number of decisions in which abuses had been treated as errors of law. Furthermore, although mere lack of evidence to support a discretionary decision or even improper rejection of evidence by a tribunal will not amount to error of law, it has been held that such error may be established where the lack or rejection of evidence shows that the tribunal did not understand the nature or scope of its discretion.[6] Indeed any misconception of powers may amount to error of law.[7]

Secondly, in any situation where review is limited to questions of law it may be necessary to consider whether procedural breaches amounting to denial of natural justice are capable of being treated as errors of law. There has been little judicial consideration of this problem. In a very recent decision the English Court of Appeal took the view that disregard of minimum standards of natural justice by denial of the right to be heard did constitute error of law.[8] The position in Australia is far less clear. In *Mobil Oil Australia Pty Ltd v. Commissioner of Taxation*[9] the Taxation

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[2] *Fisher v. Deputy Commissioner of Taxation* (1966) 40 A.L.J.R. 328.

[3] *Supra.* The usual remedy has been mandamus—issued on the basis that there has been 'a failure to hear and determine according to law'; but now the declaratory judgment appears to be supplanting mandamus.

[4] See *e.g. John East Iron Works Ltd v. Labour Relations Board of Saskatchewan* [1949] 3 D.L.R. 51; *Commissioner of Stamp Duties v. Pearse* (1951) 84 C.L.R. 490; *R. v. Agricultural Land Tribunal for Wales; Ex parte Davies* [1953] 1 W.L.R. 722; *R. v. Agricultural Land Tribunal; Ex parte Bracey* [1960] 1 W.L.R. 911; *Ex parte Hopkins; Re Cronin* (1956) 57 S.R. (N.S.W.) 554.

[5] [1959] A.C. 663, 693.

[6] *Ward v. Williams* (1955) 92 C.L.R. 496; And see *Norris v. Brown* (1966) 84 W.N. (Pt 1) (N.S.W.) 393.

[7] *Edwards v. Bairstow* [1956] A.C. 14; *R. v. Vestry of St Pancras* (1890) 24 Q.B.D. 371; *Hammond v. Hutt Valley and Bays Metropolitan Milk Board* [1958] N.Z.L.R. 720; *Lynn v. Ringwood* [1964] N.S.W.R. 199; *Reg. v. The District Court; Ex parte White* (1966) 40 A.L.J.R. 337.

[8] *Maurice v. London County Council* [1964] 1 All E.R. 779.

[9] (1963) 37 A.L.J.R. 182.

Board of Review excluded from a hearing the appellant taxpayer and its representatives : the reason for the exclusion was that counsel for the Commissioner proposed to introduce oral and documentary evidence concerning the affairs of other companies engaged in the marketing of petroleum products. A case was stated for the opinion of the High Court on the basis that questions of law were involved. The majority of the Court considered the exclusion of the taxpayer and his representatives to be a matter solely for the discretion of the tribunal which did not involve questions of law.[10] Kitto J. considered that a question of law arose as to whether the Board was legally bound to conform to the principles of natural justice[11] but came to the rather astonishing conclusion that the Board was not so legally bound having regard to the variable standards of natural justice.

The lawyer who is sincerely concerned with development of a system of administrative law which properly balances the skills and techniques of the courts and the judges on the one hand and the administrators and their tribunals on the other must surely be concerned at the bewildering confusion introduced by the idea that the courts may review administrative decisions on the ground of error of law. The aggrieved citizen can have little confidence in or respect for a ground for review which cannot be adequately explained to him by the most astute lawyer. What has gone wrong? On the technical side a number of comments may be put forward:

(a) Confusion seems to arise out of the use of the terms ' question of law ', ' point of law ' and ' error of law ' as if they were completely interchangeable. It would be more logical to adopt a usage whereby the question whether facts fall within a statutory term would be said to involve a ' question of law ', or ' a point of law '. An ' error of law ' would then be established only where the facts found were shown not to be within the permissible range of meanings to be given to the term.

(b) There seems to be little purpose in insisting that where the statutory term is of common meaning the question whether facts fall within it is merely one of fact—particularly when the courts are prepared, in any event, to review that question of fact. Surely it would be simpler and more logical to hold that a question of law is presented in every such case but that the administrator or administrative tribunal should be permitted to make law within permissible limits indicated by the courts.[12]

(c) If only for the sake of simplicity in the remedial law it would seem highly desirable that both abuse of discretion and denial of natural justice should always be treated as raising a question of law.

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[10] *Ibid.* 187.

[11] *Ibid.* 190.

[12] Again, the approach of Professor Jaffe is preferred.

On the policy side the issues are much more complex. It seems fairly clear that by elaboration of the doctrines that inferences of fact must be reasonable and that primary facts must be supported by evidence the courts have pushed far into the field occupied by the ' substantial evidence ' rule in the United States. Furthermore, by treating questions of law as having only one answer, or a very limited number of answers, the courts can at will substitute their opinions for those of skilled administrators. Lord Radcliffe put it thus:

> Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.[13]

In relation to discretionary administrative power, the scope of review is almost without limit.[14] The courts are, of course, aware of the nature of their power—and indeed the ' inference of fact ' doctrine was intended to place some limit on the scope of review. Nevertheless, the only real limitation is the restraint of the judges. No doubt, as in the United States, the major considerations which guide the judge's exercise of discretion in particular cases are the opinions formed as to the degree of ' wrongness ' of the decision and as to its impact on the individual concerned.

Because there are large issues of administrative efficiency and public interest involved the Parliaments and executive governments of Australia cannot afford to view these developments with equanimity. Are they willing to continue the trend towards providing review for error of law almost indiscriminately and give the courts almost limitless power to interfere with administrative processes? There is some sign that they are not. In the Trade Practices Act 1965-1966 (Cth) the Commonwealth Parliament has provided for review by the Commonwealth Industrial Court of questions of law referred by the Trade Practices Tribunal. It is specifically provided that ' a reference in this section to a question of law does not include a reference to a question whether there is sufficient evidence to justify a finding of fact by the Tribunal '.[15] But this is an isolated example.[16]

The Remedies

Certiorari

The principle that the superior courts may, by the prerogative writ of *certiorari*, quash the decisions of administrative tribunals and inferior

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[13] *Edwards v. Bairstow* [1956] A.C. 14, 39.

[14] See Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966) 185ff.

[15] Section 66 (4).

[16] And, in any event, the High Court could review for error of law on the face of the record by means of *certiorari*.

courts for error of law on the face of the record is now well established.[17] Although the superior courts in England had for long asserted the power to review for error of law on the face of the record[18] such power was intermingled with the power to review for jurisdictional error[19] and clear application of the doctrine to an administrative body was delayed until the *Northumberland* case[20] in 1951. Since the mid-1950's reported cases have appeared in a steady stream both in England[21] and Australia.[22] In a very recent decision the High Court did not question the existence of the doctrine although they decided that *certiorari* should not issue in the particular case.[23] The 'errors of law' canvassed in the reported cases range over the entire spectrum discussed in this article and thus *certiorari* has become a very potent remedy to be used against the administration.[24] It is not without limit, however: in the first place the technical requirements for the issue of *certiorari* must be satisfied[25] and in the second the error must appear 'on the face of the record'.[26] Unfortunately there is little clarity as to what constitutes 'the record' for this purpose.[27] In the *Northumberland* case it was said that the record comprised the document initiating proceedings, the pleadings (if any) and the adjudication, but not the evidence or the reasons unless the tribunal

[17] For the historical background see Sawer 'Error of Law on the Face of an Administrative Record' (1954-1956) 3 *Annual Law Review* 24, 26. Professor Sawer considered the development to be 'unfortunate' as it might obfuscate the need for legislative action to provide for proper judicial review of administrative discretionary power.

[18] See *R. v. Nat Bell Liquors Ltd* [1922] 2 A.C. 128; and Sawer, *ibid. passim.*

[19] See *e.g. R. v. Dunn* [1840] 12 A. & E. 599.

[20] *R. v. Northumberland Compensation Appeal Tribunal*; *Ex parte Shaw* [1951] 1 K.B. 711.

[21] *E.g. R. v. Birmingham Compensation Appeal Tribunal*; *Ex parte Road Haulage Executive* [1952] 2 All E.R. 100; *R. v. Agricultural Land Tribunal*; *Ex parte Davies* [1953] 1 W.L.R. 722; *Reg. v. Medical Appeal Tribunal*; *Ex parte Gilmore* [1957] 1 Q.B. 574; *Davies v. Price* [1958] 1 W.L.R. 434; *Baldwin & Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663; *R. v. Minister of Housing and Local Government*; *Ex parte Chichester R.D.C.* [1960] 1 W.L.R. 587; *R. v. Patents Appeal Tribunal*; *Ex parte Swift and Co.* [1962] 1 All E.R. 610; *R. v. Essex Quarter Sessions*; *Ex parte Thomas* [1966] 1 All E.R. 353.

[22] *E.g. R. v. Industrial Appeals Court*; *Ex parte Henry Berry & Co. (Australasia) Ltd* [1955] V.L.R. 156; *Ex parte Hopkins*; *Re Cronin* (1956) 57 S.R. (N.S.W.) 554; *Ex parte Crothers*; *Re Anderson* (1961) 78 W.N. (N.S.W.) 316; *The Queen v. Tennant*; *Ex parte Woods* [1962] Qd R. 241; *Ex parte Tooth & Co. Ltd*; *Re Council of City of Sydney* (1962) 80 W.N. (N.S.W.) 572.

[23] *Reg. v. District Court*; *Ex parte White* (1966) 40 A.L.J.R. 337.

[24] In some cases the courts have shown themselves to be very conscious of the scope of the remedy and have sought to avoid its full application; See *e.g. Ex parte Crothers*; *Re Anderson* (1961) 78 W.N. (N.S.W.) 316; *The Queen v. Tennant*; *Ex parte Woods* [1962] Qd R. 241.

[25] See Benjafield and Whitmore, *op. cit.* 200ff.; de Smith, *Judicial Review of Administrative Action* (1959) ch. 9.

[26] Thus where the error complained of is an abuse of discretion, it has been held that such error must appear on the record to attract *certiorari*: *R. v. Paddington & St Marylebone Rent Tribunal*; *Ex parte Kendal Hotels* [1947] 1 All E.R. 448; *R. v. Agricultural Land Tribunal*; *Ex parte Bracey* [1960] 1 W.L.R. 911. The way round these decisions is to hold that the error amounts to excess of jurisdiction: see de Smith, *op. cit.* 210, and *Baldwin & Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663.

[27] See generally de Smith, *op. cit.* 300ff.

chooses to incorporate them.[28] Lord Denning has since said that the record should comprise not only the formal order but all those documents which appear therefrom to be the basis of the decisions, *i.e.* all documents 'touching the same'.[29] Nevertheless, there is still doubt as to the extent to which documents and reasons stated orally but taken down in shorthand are to be regarded as part of the record.[30]

Prohibition

The prerogative writ of prohibition is used to prevent the continuance of proceedings where jurisdiction is lacking or where there has been denial of natural justice.[31] Errors of law which fall into either of these categories can thus be dealt with by prohibition.

Mandamus

Mandamus is the traditional remedy used where there has been failure to hear and determine according to law. This ground may be established by jurisdictional error leading to refusal of jurisdiction, abuse of discretionary power and misapplication of powers sufficient to show that the body concerned has misconceived the nature of its power.[32] Errors of this type may be redressed by mandamus.

Habeas Corpus

Although used comparatively rarely these days, *habeas corpus* is still available to secure the liberty of the subject.[33] Very frequently the ground sought to be established is that an accused person has been committed without sufficient evidence of guilt. In a series of earlier cases the courts asserted their right to review on the basis of jurisdictional error.[34] It has been shown that lack of evidence may establish error of law and in a recent decision of the House of Lords the view has been expressed that such error will be an alternative ground.[35]

Injunction

The main use of the injunction[36] in which the concept of error of law is availed of to provide its usual wide scope of review is in cases where court intervention has been sought to control the activities of domestic tribunals, *i.e.* the committees of trade unions, sporting associations, employers' organisations and similar bodies. The jurisdiction to review

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[28] [1952] 1 K.B. 338, 352.

[29] *Baldwin & Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663, 690.

[30] See other opinions in *Baldwin & Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663 and *Reg. v. District Court; Ex parte White* (1966) 40 A.L.J.R. 337, 342.

[31] See Benjafield and Whitmore, *op. cit.* 207ff.; de Smith, *op. cit.* ch. 9.

[32] See Benjafield and Whitmore, *op. cit.* 211ff.; de Smith, *op. cit.* ch. 12.

[33] See Campbell and Whitmore, *Freedom in Australia* (1966) 70ff.

[34] Despite some doubts expressed as to whether this really was jurisdictional error.

[35] *Armah v. Government of Ghana* [1966] 3 All E.R. 177, 202.

[36] But not the only use—see Benjafield and Whitmore, *op. cit.* 218ff.

for error of law has been pressed in recent years[37] with the rules of the particular organisation or a contract standing in the place of legislative provisions.

Declaratory Judgment

For most of this century the declaratory judgment has been growing in importance as a public law remedy[38] but some doubts still exist as to the scope of review for error of law. When the error amounts to an abuse of discretion there is little doubt that the remedy is available[39] although the language is usually that of *ultra vires* review. If denial of natural justice be error of law then that error too may be rectified by declaratory judgment.[40] The decision of the High Court in *Toowoomba Foundry Pty Ltd v. The Commonwealth*[41] to the effect that a declaration may not be had to establish the invalidity of the decision of a statutory tribunal has severely inhibited the use of the remedy in Australia in that particular context. There can be little doubt that the *Toowoomba* case should now be regarded as being out of line.[42] The doubt exists when the error complained of does not amount to abuse of discretion, denial of natural justice, or jurisdictional error.

In a series of English cases the view was expressed that a declaration could be had to correct errors of law whether or not they be on the face of the record.[43] Confusion has been introduced by the *Punton* cases. The plaintiffs had appealed to the insurance commissioner against disallowance of their claims to unemployment benefit; the appeal was itself disallowed on the ground that the plaintiffs had failed to prove that

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[37] See *e.g. Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; *Hawick v. Flegg* (1958) 75 W.N. (N.S.W.) 255; *Baker v. Gough* (1962) 80 W.N. (N.S.W.) 1263; *Schweikert v. Burnell* (1963) 80 W.N. (N.S.W.) 1227; *Nagle v. Feilden* [1966] 1 All E.R. 689.

[38] New South Wales stood outside the mainstream of development because of certain restrictive decisions of the courts. Amendments to s. 10 of the Equity Act, 1901-1965 (N.S.W.) introduced by the Law Reform (Miscellaneous Provisions) Act, 1965 (N.S.W.) have made the declaratory judgment fully available in New South Wales.

[39] See *e.g. Hanson v. Radcliffe U.D.C.* [1922] 2 Ch. 490; *Prescott v. Birmingham Corporation* [1955] 1 Ch. 210; *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223; *Patton v. Attorney-General* [1947] V.L.R. 257; *Hall & Co. Ltd v. Shoreham-by-Sea U.D.C.* [1964] 1 W.L.R. 240; *Robinson v. Lloyd* [1962] W.A.R. 168.

[40] *Cooper v. Wilson* [1937] 2 K.B. 309; *Hoggard v. Worsborough U.D.C.* [1962] 2 Q.B. 93; *Delta Properties Pty Ltd v. Brisbane City Council* (1955) 95 C.L.R. 11; *Ridge v. Baldwin* [1964] A.C. 40.

[41] (1945) 71 C.L.R. 545.

[42] See *e.g. Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* [1960] A.C. 260; *Ridge v. Baldwin* [1964] A.C. 40; *Mutual Life and Citizens' Assurance Co. Ltd v. Attorney-General (Qld)* (1961) 106 C.L.R. 48; *Robinson v. Lloyd* [1962] W.A.R. 168.

[43] See *e.g. per* Denning L.J. in *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 346; *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18, 41; *per* Lord Merriman in *Taylor v. National Assistance Board* [1956] P. 470, 494; *per* Upjohn L.J. in *Punton v. Ministry of Pensions and National Insurance* [1963] 1 W.L.R. 186, 192ff.

none of the category of semi-skilled workers to which they belonged had been ' directly interested in the dispute '.[44] It was conceded throughout that the decision could have been challenged for error of law on the face of the record by means of *certiorari* had that remedy been sought within the short limitation period of six months. An originating summons which sought to have the matter determined by declaration was struck out by Master Jacob but the Court of Appeal held that the originating summons could be amended to raise a question of law.[45] Lord Denning adverted to the advantages of the declaration in this context and Upjohn L.J. agreed with him; while agreeing with the order Diplock L.J. was not prepared to say in this proceeding that the declaration would always be an alternative to *certiorari*. After a declaration had been refused by Phillimore J. in the exercise of his discretion[46] the matter was taken again to the Court of Appeal; but this time the Court was differently constituted. The Court expressed the opinion that there was no jurisdiction to award a declaration in these circumstances.[47] Sellers L.J. thought that the restrictive decision on alternative remedies in *Barraclough v. Brown*[48] was apposite even though *certiorari* would have been available at the proper time. It seems however that his decision was mainly based on the distinction between *certiorari* to quash and a mere declaration which would leave two conflicting decisions standing—that of the insurance commissioners and that of the Court. This distinction again turns on the proposition that an error of law does not invalidate a decision and that a declaration cannot itself invalidate an administrative decision in these circumstances. Curiously enough Sellers L.J. relied upon a *dictum* of Denning L.J. in *Healey v. Minister of Health*[49] to the effect that a declaration might leave two inconsistent findings standing. However earlier in that case Denning L.J. had made it clear that the courts did have power to declare a decision invalid if it was wrong in law[50] and the difficulty in *Healey* was that a rehearing was sought without there being any allegation of defect of jurisdiction or error of law.

Some sympathy can be felt for the attitude adopted by Sellers L.J.[51] in the general context of review for error of law ; he was attempting to give some finality to administrative decisions. It may be doubted, however, whether much is gained by insisting upon a technical distinction between *certiorari* and the declaratory judgment. Very recently the Court

[44] The statutory phrase.

[45] *Punton v. Ministry of Pensions and National Insurance* [1963] 1 W.L.R. 186.

[46] [1963] 2 All E.R. 693.

[47] *Punton v. Ministry of Pensions and National Insurance (No. 2)* [1964] 1 W.L.R. 226. The Court found it unnecessary to decide this; it merely affirmed the decision of Phillimore J.

[48] [1897] A.C. 615. And see *Argoson Finance Co. Ltd v. Oxby* [1964] 1 All E.R. 791.

[49] [1955] 1 Q.B. 221, 228.

[50] *Ibid.* 227.

[51] And concurred in by Danckwerts and Davies L.JJ.

of Appeal[52] has again asserted the jurisdiction to award a declaration when an administrative body has committed an error of law[53] but this time considerable emphasis was placed upon the fact that valuable property rights were involved.

Statutory Review

The most significant impact of review for error of law has developed out of the practice of providing legislatively for review by the courts of the decisions of officials and administrative tribunals for error of law, or where a question or point of law is involved. Indeed, the majority of decisions on the scope of review have arisen out of statutory appeal procedures. In England the Tribunal and Inquiries Act, 1958 (Eng.) has extended such review to a large number of administrative tribunals. In Australia the majority of statutory review provisions occur in the context of taxing legislation [54] but there is gradual extension into other areas. Sometimes the provision is direct[55] and sometimes it is indirect.[56]

The pattern of remedies presents as much bewildering complexity as the concept of ' error of law ' itself. We, in Australia, are now at a stage where draconic action to unravel the sorry mess is needed as a matter of urgency. Surely the present complexities and uncertainties cannot be tolerated indefinitely. I join with Professor Sawer[57] in seeking introduction of administrative courts properly staffed by judges and administrators who are aware of the administrative difficulties posed by the modern welfare state.

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[52] This time constituted by Lord Denning and Danckwerts and Salmon L.JJ.

[53] *Munnich v. Godstone R.D.C.* [1966] 1 W.L.R. 427.

[54] *E.g.* see Gift Duty Assessment Act 1941-1963 (Cth) ss. 32 (7.), 33 (9.); Pay-roll Tax Assessment Act 1941-1966 (Cth) s. 40 (5.); Income Tax Assessment Act 1936-1966 (Cth) s. 196; Estate Duty Assessment Act 1914-1966 (Cth) ss. 25 (7.), 26 (9.); Land Tax Act 1958 (Vic.) s. 32; Land Tax Act, 1936-1966 (S.A.) s. 52 (7); Land Tax Assessment Act, 1907-1965 (W.A.) s. 48 (4); Land and Income Taxation Act 1910 (Tas.) s. 149.

[55] *E.g.* see Matrimonial Causes Act 1959-1966 (Cth) s. 91; Trade Practices Act 1965-1966 (Cth) s. 63; Workers' Compensation Act, 1926-1966 (N.S.W.) s. 37 (4); Justices Act, 1902-1966 (N.S.W.) s. 101 (1); Workers Compensation Act 1958 (Vic.) s. 56 (3); The Land Acts, 1962-1967 (Qld) s. 45 (1); The Industrial Conciliation and Arbitration Acts, 1961-1964 (Qld) s. 34 (1); Workers' Compensation Act 1912-1966 (W.A.) s. 29 (9); Justices Act 1959 (Tas.) s. 123 (1).

[56] *E.g.* in New South Wales appeals to the Local Government Boards dealing with subdivisions and buildings are deemed to be submissions to arbitration under the Arbitration Act, 1902 (N.S.W.). This attracts review for error of law by the Land and Valuation Court.

[57] Sawer, *Ombudsman* (1964) 41, and *passim.*