

Jurisdictional Error: A Post-*Anisminic* Analysis*

by

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I. INTRODUCTION

In *Anisminic Ltd. v. Foreign Compensation Commission* Lord Reid stated:¹

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases in which although the tribunal had jurisdiction to enter on the inquiry it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

This extract draws attention to the most important elements of any examination of the concepts of jurisdictional and non-jurisdictional error in administrative law. Lord Reid refers first to the "narrow and original" sense of the word jurisdiction—that is, jurisdiction to *enter* upon the inquiry in question. Whether a statutory tribunal has jurisdiction to enter upon an inquiry is clearly a preliminary matter and must be decided before the inquiry commences. It is to this question

¹ [1969] 2 A.C. 147, 171.

that the courts in their supervisory capacity have traditionally given their attention.

But Lord Reid goes on to say that despite a tribunal having jurisdiction to enter upon an inquiry, it may, *in the course of the inquiry*, make an error which renders its decision a nullity. Lord Pearce characterised such an error as "stepping outside jurisdiction".² The phrase now generally used is "excess of jurisdiction".³

Lord Reid's list contains some errors which have long been thought of as jurisdictional, for example breaches of natural justice⁴ and bad faith,⁵ but the remainder had generally been regarded as non-jurisdictional. Despite its length, Lord Reid avers that his list is not exhaustive. Yet, if a tribunal avoids all such errors, it is as much entitled to decide a matter wrongly as it is to decide it rightly. A wrong decision at this point amounts to an error within jurisdiction and is not open to review by a supervisory court, "subject only to the power of the court in certain circumstances to correct an error of law".⁶ The reference here is to errors of law apparent on the face of the record. It is clear from Lord Reid's statement that if non-jurisdictional error exists at all it occupies a residual area only.

The basic thesis of this article is that the House of Lords' extension of the concept of jurisdictional error in *Anisminic* necessitates a complete reappraisal of the concepts of jurisdictional and non-jurisdictional error and of the bases for distinguishing between them. It is the writer's submission that their Lordships' formulation of the concept of excess of jurisdiction has provided a logical and consistent basis for the distinction between jurisdictional and non-jurisdictional error and as a result has rendered redundant the original theory of jurisdiction, the concept of preliminary or collateral matters and the concept of non-jurisdictional error of law on the face of the record. It is further submitted that while a remedy for non-jurisdictional error of law may still be available, it is no longer appropriate to the courts' supervisory function. As a first step in this analysis, the different concepts of jurisdiction and of jurisdictional error suggested by Lord Reid must be examined.

II. JURISDICTION IN ITS ORIGINAL SENSE

The "original" concept of jurisdiction developed from the reluctance of the courts in the late 19th century to impugn the decisions of inferior

² *Ibid.*, 195.

³ E.g. de Smith, *Judicial Review of Administrative Action* (3rd ed.) 97-99; Sykes and Maher, "Excess of Jurisdiction: A Problem in Administrative Law" (1970) 7 Melbourne University L.R. 385.

⁴ *Ridge v. Baldwin* [1964] A.C. 40.

⁵ *Ibid.*

⁶ *Supra*, 171.

tribunals on grounds other than a complete misdirection as to the nature of the task assigned.⁷ The theory was that when a tribunal was given a general field of inquiry, the only question going to its jurisdiction was whether or not it correctly entered that field. Having embarked upon the right kind of inquiry, its findings on all questions of law and fact were thought to be binding unless directly overturned on appeal. This principle was forcefully stated by the Privy Council in *Colonial Bank of Australasia v. Willan* in the following terms:⁸

But an objection that the judge has erroneously found a fact which though essential to the validity of his order, he was competent to try, assumes that having general jurisdiction over the subject matter he properly entered upon the inquiry but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal and the power to retry a question which the judge was competent to decide.

In the cases which fall within the principles of the last mentioned decisions the question is, whether the inferior court had jurisdiction to enter upon the inquiry and not whether there has been a miscarriage in the course of the inquiry.

Similar statements of principle appear in many 19th century and early 20th century cases and sporadically thereafter.⁹

This original theory of jurisdiction is that so persuasively advocated by D. M. Gordon.¹⁰ The key to the concept is that jurisdiction depends not on the *truth or accuracy* of a tribunal's findings but on their *scope*. Gordon argues that to have "jurisdiction" means to have the power to decide. Clearly a tribunal has no power of decision at all if it can only decide one way (that is, rightly). If every decision is subject to reversal by a superior court, ultimately jurisdiction rests not with the tribunal but with the superior court. Thus, when a question is remitted to a tribunal for decision the tribunal must have jurisdiction to decide that question rightly or wrongly. As recently as 1966 Lord Reid recognised this concept of jurisdiction when he said:¹¹

If a magistrate or any other tribunal has jurisdiction to *enter* on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.

⁷ de Smith, *op. cit.*, 97-99.

⁸ (1874) L.R. 5 P.C. 417, 443, 444.

⁹ E.g. *R v. Bolton* (1841) 1 Q.B. 66, 74; *R v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 151; *R v. Governor of Brixton Prison, ex parte Armagh* [1968] A.C. 192, 234; *Anisminic Ltd. v. Foreign Compensation Commission* [1967] All E.R. 986, 990 per Sellers L.J.

¹⁰ "The Relation of Facts to Jurisdiction" (1929) 45 L.Q.R. 459; "The Observance of the Law as a Condition of Jurisdiction" (1931) 47 L.Q.R. 386; "Conditional or Contingent Jurisdiction of Tribunals" (1960) 1 U.B.C.L.R. 185; "Jurisdictional Fact: An Answer" (1966) 82 L.Q.R. 515; "What did the Anisminic Case Decide" (1971) 34 M.L.R. 1.

¹¹ *R v. Governor of Brixton Prison, ex parte Armagh*, supra, 234. See also Lord Reid's interpretation of this statement in *Anisminic* supra, 171 restricting its application to the "original" sense of jurisdiction.

According to this view, provided a tribunal correctly enters its field of jurisdiction, whether it decides rightly or wrongly on any particular question in the course of its inquiry is irrelevant; such errors are non-jurisdictional and in the absence of a statutory right of appeal are unreviewable.

Of course, the legitimate scope of a tribunal's findings depends on how widely its field of inquiry, or "area of cognisance" as Gordon puts it,¹² is defined. At the time Gordon wrote his initial article in 1929 the authorities generally supported his view that the scope of a tribunal's jurisdiction should be defined in terms of the "broad question" or "general field" assigned to it. This can be illustrated from two recent leading cases. The general field of inquiry in *Anisminic* would have been characterised as "the receipt and determination of claims for compensation".¹³ The general field of inquiry in *Bell v. Ontario Human Rights Commission*¹⁴ would have been regarded as determining whether or not a complaint of racial discrimination was justified.¹⁵ Had the courts accepted such a wide view of jurisdiction in these two cases both would have been decided differently.

However, even in the 19th century this "pure" theory of jurisdiction proved intolerably restrictive of the courts' supervisory powers over the burgeoning activities of administrative tribunals, and a means of more readily permitting judicial intervention was developed.

III. PRELIMINARY OR COLLATERAL MATTERS—THE DOCTRINE OF COLLATERAL FACT

As early as 1853¹⁶ the courts devised a means of limiting a tribunal's "power to decide" in any particular case to a restricted class of the matters assigned to it. Where jurisdiction to embark upon an inquiry depended on the existence of certain *facts*, it was thought that a tribunal could not have unlimited jurisdiction to interpret those facts so as to extend them to situations quite beyond those intended by the power-conferring statute. Thus, although a tribunal may have correctly entered its "general field" of jurisdiction, it still had the task of deciding whether the facts necessary for the inquiry to proceed were satisfied, and a distinction was drawn between such preliminary or collateral questions and the "facts in issue", that is, those said to be the subject

¹² "What did the *Anisminic* Case Decide," *loc. cit.*, 6.

¹³ *Idem*.

¹⁴ (1971) 18 D.L.R. (3d) 1. The case concerned a complaint of racial discrimination as regards the letting of a "self-contained dwelling" under Section 3 of the Ontario Human Rights Code 1961-1962.

¹⁵ See P. W. Hogg "The Jurisdictional Fact Doctrine in the Supreme Court of Canada" (1971) 9 Osgoode Hall L.J. 203 for an analysis of the case.

¹⁶ *Bunbury v. Fuller* (1853) 9 Exch. 111.

of the inquiry itself. Coleridge J. put the matter this way in *Bunbury v. Fuller*:¹⁷

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

The same principle was accepted by the New Zealand Court of Appeal in these terms:¹⁸

We think that . . . although in such a case the inferior tribunal may, at its peril, determine whether the facts necessary for its jurisdiction exist, the position nevertheless is that the existence . . . of such facts, if questioned, is ultimately a matter that is within the competence of the superior court.

A straightforward illustration of the principle is *Bell v. Ontario Human Rights Commission*¹⁹ where it was held that a tribunal having jurisdiction to inquire into complaints of racial discrimination in respect of the letting of "self-contained units" could not interpret that limitation so as to include shared accommodation and thereby give itself a jurisdiction not intended.

It will be noted that the principle is expressed in terms consistent with the original view of jurisdiction. Thus, if a tribunal makes a wrong decision on a preliminary or collateral matter going to jurisdiction, it is said to "want jurisdiction" or to "lack jurisdiction".²⁰ The terms "exceeds jurisdiction" or "excess of jurisdiction" have sometimes been used in the same sense,²¹ but they have proved less satisfactory²² as they imply that a tribunal exceeded a jurisdiction it had, whereas the result of an error on a collateral point is to vitiate a tribunal's authority from the outset.²³ A matter is said to be "preliminary" because it must be decided before the tribunal's jurisdiction to

¹⁷ *Ibid.*, 140. See also *R v. Shoreditch Assessment Committee* [1910] 2 K.B. 859, 880 per Farwell L.J.; *R v. Blakeley* (1950) 82 C.L.R. 54, 75 per Latham J.

¹⁸ *Stratford Borough v. Wilkinson* [1951] N.Z.L.R. 814, 823. Other New Zealand cases on point are: *Bethune v. Bydder* [1938] N.Z.L.R. 1, 35; *Manawatu-Oroua River Board v. Barber* [1953] N.Z.L.R. 1010, 1033-1034; *Hami Paihana v. Tokerau District Maori Land Board* [1955] N.Z.L.R. 314, 320; *Strongman Electric Supply Co. Ltd. v. Thames Valley Electric Power Board* [1964] N.Z.L.R. 592, 604-605.

¹⁹ *Supra*.

²⁰ *Manawatu-Oroua River Board v. Barber*, *supra*.

²¹ *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* [1959] A.C. 663 per Lord Keid at 683 and Lord Tucker at 687.

²² *Ibid.*, 683 per Lord Reid.

²³ *R v. Nat Bell Liquors Ltd.* [1922] A.C. 128, 158. The exact position seems to be that provided a tribunal correctly enters its "general field" it has jurisdiction to make any preliminary inquiry necessary. An error at that point then deprives it of jurisdiction to continue to the inquiry proper: see *Stratford Borough v. Wilkinson*, *supra*, 823.

embark on the inquiry proper (i.e. to determine the merits) can arise.²⁴ Similarly, an issue is said to be "collateral" (and the tribunal open to "collateral attack") because it is incidental to the merits and is not the essential question the tribunal has to decide.²⁵

Clearly, the concept of collateral attack did not, in theory at least, threaten the principle that jurisdiction arose at the commencement of proceedings. Having entered its general field of jurisdiction and correctly decided any preliminary questions, a tribunal was safely within jurisdiction and errors of fact made in the course of the inquiry were not open to correction. Thus, in *Hami Paihana v. Tokerau District Maori Land Board* where the question whether the defendant was a Maori fell to be decided as the statute said "in the course of the proceedings", Adams J. stated:²⁶

Where the question arose in the course of the proceedings I think it was necessarily part of the *res judicanda* and not collateral. It follows that in the present case the question whether the defendant was a Maori was part of the *res judicanda*.

As the inferior court's error could not be classified as preliminary it was non-jurisdictional and, consequently, unimpeachable.

The great difficulty with the concept of collateral attack is the absence of a logical basis for deciding which facts are preliminary or collateral and which are not. In *Paihana's* case Adams J. said, "the matter depends on the intention of the legislature as expressed in the enactment, or in other words is a question of construction. There is no other touchstone by which one may determine whether a matter is collateral or not."²⁷ Thus, the matter is one of statutory interpretation and a question of law²⁸ to be finally decided by the superior court. In examining the courts' application of this principle it is convenient to divide collateral matters into two categories.

A. Procedural Requirements

Characterisation of procedural requirements as preliminary has presented the courts with little difficulty. For example, failure to give notice of the proceedings in the proper form,²⁹ or within the required time,³⁰ or failure to comply with other "antecedent statutory require-

²⁴ *Ex parte Wake* (1883) 11 Q.B.D. 291.

²⁵ E.g. in *Bells* case, *supra*, whether or not discrimination had occurred.

²⁶ [1955] N.Z.L.R. 314, 321.

²⁷ *Ibid.*, 320.

²⁸ "The construction of a statute is always a question of law": *Anisminic* [1967] 2 All E.R. 986, 994 per Diplock L.J.

²⁹ *R v. Farmer* [1892] 1 Q.B. 627.

³⁰ *R v. Hammersmith Profiteering Committee, ex parte Burton* (1920) 122 L.T. 720.

ments”³¹ are all defects occurring prior to the inquiry itself. Unless such procedural requirements are construed as “directory” only,³² or the statute empowers the tribunal to correct procedural defects³³ failure to observe them amounts to non-fulfilment of a condition precedent to jurisdiction. The tribunal then lacks jurisdiction to embark on the inquiry proper.

B. *Questions of Fact*

The distinction between facts which must exist objectively before a tribunal has jurisdiction and facts which the tribunal has jurisdiction to decide is a tenuous one.³⁴ It has been variously described as the distinction between preliminary or collateral questions and the *res judicanda*,³⁵ or the “very point committed” to the tribunal,³⁶ or the “main issue”,³⁷ or simply “the merits”.³⁸ But expressions such as these are descriptive rather than definitive and provide no clearer guide than simply describing the matter as a question of statutory interpretation.

A study of the cases shows the inconsistency with which the collateral fact doctrine has been applied. It has been held that where a person eligible for a beer licence was required to be an “innkeeper” that question was not collateral,³⁹ yet where a person entitled to a court order was required to be a “resident” that question was collateral.⁴⁰ Where materials could be taken from land “not being an orchard” that question was not collateral,⁴¹ but where construction of drains was permissible on land not being an orchard that question was collateral.⁴² Where power to modify a clearance order depended on a building being a “house” that question was not collateral,⁴³ yet where an eviction order depended on a building being a “dwelling-house”, that question was collateral.⁴⁴ It is not surprising that leading writers on the subject are unanimous that the distinction between preliminary facts going to jurisdiction and facts going to the merits is artificial and

³¹ *Stratford Borough v. Wilkinson*, *supra*.

³² *Wilson Rothery Ltd. v. Mt Wellington Borough* [1967] N.Z.L.R. 115.

³³ E.g. section 40(9) Town and Country Planning Act 1953 confers such power on the Town and Country Planning Appeal Boards.

³⁴ See generally Wade, “Anglo-American Administrative Law” (1966) 82 L.Q.R. 226.

³⁵ *Hami Pathana*, *supra*.

³⁶ *R v. Lincolnshire JJ., ex parte Brett* [1926] 2 K.B. 192, 201.

³⁷ *Bethune v. Bydder*, *supra*.

³⁸ *Bunbury v. Fuller*, *supra*.

³⁹ *R v. Woodhouse* [1906] 2 K.B. 501.

⁴⁰ *Vevers v. Mains* (1888) 4 T.L.R. 206.

⁴¹ *R v. Carlow JJ.* [1916] 2 I.R. 313.

⁴² *R v. Armagh JJ.* [1924] 2 I.R. 55.

⁴³ *Ashbridge Investments Ltd. v. Ministry of Housing and Local Government* [1965] 1 W.L.R. 1320.

⁴⁴ *Bethune v. Bydder* [1938] N.Z.L.R. 1. For an exhaustive catalogue of similarly irreconcilable decisions see Gordon, “The Relation of Facts to Jurisdiction” (1929) 45 L.Q.R. 459, 479-482.

at times purely arbitrary.⁴⁵ All are agreed that no satisfactory test for the distinction has ever been formulated. If there is no satisfactory basis for the distinction, then to say that a tribunal lacks jurisdiction if it decides some facts wrongly, but has jurisdiction to decide others wrongly, is simply to say that where the supervisory court regards a fact as sufficiently important it may assume what amounts to appellate powers and substitute (indirectly) its own opinion on the matter for that of the tribunal.

Thus, almost any fact can be classified as preliminary. If as a matter of statutory interpretation selection of the "bundle" of facts said to constitute the merits lies entirely within the discretion of the superior court, any single fact can be omitted from that bundle and described as preliminary to the rest. This possibility can be illustrated from the facts of an Irish case. In *R v. Armagh JJ*⁴⁶ the Armagh County Council had authority to make drains: (a) over land not being an orchard; and (b) for the purpose of draining flooded roads. Each of these requirements may be characterised as preliminary or collateral in the following way: the broad question remitted to the tribunal "was a drain authorised?" can be recast as "was a drain over land not being an orchard authorised?" or "was a drain for the purpose of draining flooded roads authorised?" If in the opinion of the superior court the tribunal had decided either question wrongly, the matter could have been characterised as preliminary to the remaining question (the merits) and the tribunal's decision overturned.⁴⁷ Yet, in such cases where the criteria to be met are categorically laid down by the enabling legislation, these questions are the *merits* as they make up the entire subject matter of the inquiry, and there is nothing else for the tribunal to decide; selection of one as going to jurisdiction must be purely arbitrary.

Even where a finding has not proved susceptible to this treatment, the courts have been prepared to stretch the "preliminary" requirement in other ways. Thus, in *Bethune v. Bydder* which concerned an action for eviction, the New Zealand Court of Appeal had no hesitation in characterising the question of whether a house was a "dwellinghouse" as "preliminary and collateral to the merits",⁴⁸ despite the fact that the question arose as part of the defendant's *defence* to the action. In the same case Fair J. characterised the Magistrate's error as preliminary

⁴⁵ de Smith, *op. cit.*, 100; Wade, "Anglo-American Administrative Law" (1966) 82 L.Q.R. 226, 231; Gordon, "Jurisdictional Fact: An Answer" (1966) 82 L.Q.R. 515; Hogg, *loc. cit.*, 203.

⁴⁶ *Supra*.

⁴⁷ In fact, the court at first instance held the second question preliminary and wrongly decided, whereas the appeal court held the first question preliminary and wrongly decided.

⁴⁸ *Supra*, 17 per Smith J.

to his "jurisdiction" to invoke the defence on the defendant's behalf.⁴⁹

Cases in which the tribunal, having entered upon and conducted the inquiry correctly, erred by making a wrong order also had to be accommodated. Thus, in *R v. Mulvaney*⁵⁰ the Magistrate's error in sentencing the defendant to imprisonment was held preliminary not to his jurisdiction to entertain the charge but to his jurisdiction to impose punishment. In both *Bethune* and *Mulvaney* the tribunal was held to lack jurisdiction to make the final order. While undoubtedly fair in their result, such decisions are impossible to reconcile with the notion that jurisdiction is determinable at the commencement of the inquiry. The errors in both cases were only preliminary in the sense that each decision made in an inquiry is preliminary to the final decision.

It may fairly be concluded that for over a century the concept of collateral attack has enabled the courts to categorise almost any error of fact as jurisdictional and to intervene and strike down any arbitrary or unwarranted usurpation of power. Thus, in practice the restrictiveness of the original theory of jurisdiction has been largely avoided despite the fact that the collateral fact doctrine itself paid lip service to that theory and despite the court's reiteration of it from time to time as justification for refusing relief.⁵¹

However, a significant limitation on the concept of collateral attack lay in its application to matters of fact rather than to matters of law. Of course, an erroneous finding of law (for example, misconstruction of the enabling statute or any other statute, or wrongful refusal to admit evidence) may and usually does lead to either a failure to meet a condition precedent to jurisdiction,⁵² or to what may be classified as an erroneous finding of collateral fact.⁵³ In these cases the consequences of an erroneous finding of law are open to correction. However, not all errors of law have these consequences, as for example the kind of statutory misconstruction that occurred in *R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw*⁵⁴ and in *Anisminic*. In both cases the only consequence proceeding from the error was an erroneous final decision. Such errors remained beyond the reach of collateral attack.

IV. ERROR OF LAW ON THE FACE OF THE RECORD

Flexible though the collateral fact doctrine was, it left an important facet of a tribunal's powers of decision free from judicial supervision;

⁴⁹ *Ibid.*, 39.

⁵⁰ [1928] N.Z.L.R. 129.

⁵¹ *Davies v. Price* [1958] 1 W.L.R. 434, 441-442; *R v. Governor of Brixton Prison, ex parte Armagh*, supra; *Hami Paihana v. Tokerau District Maori Land Board*, supra.

⁵² *R v. Shoreditch Assessment Committee* [1910] 2 K.B. 859.

⁵³ *Bethune v. Bydder*, supra.

⁵⁴ [1952] 1 K.B. 338.

errors of law made in the course of the inquiry, including misconstruction of the power-conferring statute itself, were sometimes immune from attack. This deficiency led in 1951 to a revival of the use of certiorari as a remedy for such errors of law, provided they appeared on the face of the record.⁵⁵

The remedy had fallen into desuetude from 1848 when Parliament intervened to make the records of inferior courts "non-speaking". It was, however, included in Lord Sumner's canonical exposition of the High Courts' supervisory powers in *R v. Nat Bell Liquors Ltd.* when he said, "Supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercises; the other is the observance of the law in the course of its exercise."⁵⁶ Lord Sumner had already made it clear that errors of law made in the course of an inquiry are non-jurisdictional because they occur in the course of the inquiry.⁵⁷

As to what constitutes the record Lord Denning said in the *Northumberland* case:⁵⁸

I think the record must contain at least the document which initiates proceedings; the pleadings, if any; and the adjudication; but not the evidence nor the reasons unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and these reasons are wrong in law, certiorari lies to quash the decision.

However, later decisions have tended to extend the concept of the record. Thus, it has been held that the court has power to order completion of an imperfect record as regards the tribunal's findings on the facts.⁵⁹ The record may also be taken to include the full text of documents referred to therein.⁶⁰ Furthermore, it appears that even if an error of law does not appear on the record, it is open to review in the superior court if both parties agree to the hearing and both consent to the incorporation of relevant material into the record.⁶¹ Such material does not, however, include the transcript of evidence adduced before the tribunal.⁶²

The concept of error of law on the face of the record is unsatisfactory as a grounds for review in three major respects. First, the remedy depends on disclosure of the error on the record itself. Notwithstanding the very wide terms in which the record has been defined, an error may still not appear on it. For example, it may be disclosed

⁵⁵ *R v. Northumberland Compensation Appeal Tribunal*, supra.

⁵⁶ [1922] 2 A.C. 128, 156.

⁵⁷ *Ibid.*, 154. As already noted, breaches of natural justice and mala fides were always regarded as exceptions to this rule. See note 4. See also post pp. 137-138.

⁵⁸ *Supra*, 352. Cf. *Baldwin Francis Ltd. v. Patents Appeal Tribunal* [1959] A.C. 663, 687 per Lord Tucker.

⁵⁹ *R v. Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B. 574, 583.

⁶⁰ *Straven Services v. Waimairi County* [1966] N.Z.L.R. 966, 999.

⁶¹ *R v. Northumberland Compensation Appeal Tribunal*, supra, 353.

⁶² *Clark v. Rent Appeal Board* [1975] 2 N.Z.L.R. 24, 31.

in a document not referred to in the record. If the parties have not agreed to incorporate that document, such an error may be unimpeachable even though known to the court.⁶³ Alternatively, a tribunal may avoid disclosing an error at all. Thus, as Lord Diplock has said in an extra-judicial statement:⁶⁴

The idea that Parliament can have intended that any administrative tribunal should only be obliged to observe the law in cases where it could not conceal that it has failed to do so, which was the consequence of the decision in the *Northumberland* case, is one which was unlikely to commend itself to courts of law.

Secondly, the distinction between errors of law and errors of fact is highly unsatisfactory. Few if any matters decided by a tribunal, even those concerning the existence of a relatively simple fact situation, do not involve legal concepts.⁶⁵ Moreover, where the existence of certain facts is required by the statute, the tribunal's findings as to those facts in any particular case must involve questions of construction of the statute concerned and these are always questions of law.⁶⁶ For example, in *R v. Medical Appeal Tribunal at London, ex parte Burpitt*⁶⁷ the question of whether two fingers were "paired organs" in the sense intended by the relevant regulations was held to have been wrongly answered as a matter of law and certiorari issued. Thus, it seems that almost all matters before a tribunal can be classified as questions of law. As one leading writer has commented, superior courts are "apt to hold that a finding or inference was one of law if it was wrong but that it was one of fact if satisfied that it was right".⁶⁸ If this is so a tribunal's findings on the merits of a case are left wide open to review by a supervisory court regardless of whether a statutory right of appeal is given or not. The appearance on the record of any finding with which the reviewing court disagrees may, in the absence of a privative provision, result in the decision being quashed.

Thirdly, non-jurisdictional errors of law on the face of the record are protected by a privative provision whereas errors that can be classified as jurisdictional are not.⁶⁹ The problems raised by the relationship between errors of law on the record and privative provisions are discussed below.⁷⁰

⁶³ *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, supra, 687.

⁶⁴ "Judicial Control of Administrative Process" (1971) 24 Current Legal Problems 1, 10.

⁶⁵ See generally de Smith, *op. cit.*, 112-116.

⁶⁶ *Anisminic* [1967] 2 All E.R. 986, 994. See also Lord Morris' judgement [1969] 2 A.C. 147 for a full exposition of this point.

⁶⁷ [1957] 2 Q.B. 584.

⁶⁸ de Smith, *op. cit.*, 113.

⁶⁹ *Anisminic*, supra; *Attorney-General v. Car Haulways N.Z. Ltd.* [1974] 2 N.Z.L.R. 331, 333.

⁷⁰ Post pp. 134-135.

V. EXCESS OF JURISDICTION—THE DECISION IN *Anisminic*

By the 1950's the "original" theory of jurisdiction had been considerably eroded by the courts' application of the principles of collateral attack and error of law on the record. Furthermore, with the coalescence of the doctrines of ultra vires and jurisdictional error,⁷¹ a line of authority had developed in relation to the courts' supervision of the exercise of *discretionary* powers by tribunals which was quite at odds with the original theory. That is, any misconstruction of the enabling statute which resulted in a tribunal incorrectly identifying the matters to which it must have regard in exercising its discretion were open to correction by mandamus, notwithstanding the fact that such errors occurred in the course of the inquiry. Such errors were characterised as being actuated by "extraneous considerations",⁷² having regard to "irrelevant matters",⁷³ "misunderstanding the nature of the opinion it has to form"⁷⁴ or "applying a wrong and inadmissible test".⁷⁵

The basis of these decisions was that a tribunal vested with a statutory discretion could not, by misconstruing the statutory guidelines to which it must have regard in exercising that discretion, arrogate to itself powers not actually conferred.⁷⁶ As the courts moved to include the concept of ultra vires under the jurisdictional umbrella, the effect of such an error was described in jurisdictional terms, for example as failing to exercise jurisdiction,⁷⁷ or as "exceeding jurisdiction".⁷⁸ Nevertheless, it was not until the late 1950's and early 1960's as the courts gradually shed much of their reluctance to interfere with the decisions of tribunals with quasi-judicial functions,⁷⁹ that an attempt was made to impose the principle underlying these cases on to the original theory of jurisdiction. In *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* Lord Denning made the following obiter statement:⁸⁰

⁷¹ Brown, *Jurisdictional Error in Administrative Law* (1972) LLB (Hons) dissertation, 68-71, 78-82.

⁷² *R v. War Pensions Entitlement Appeal Tribunal, ex parte Bott* (1953) 50 C.L.R. 407, 432.

⁷³ *R v. Cotham* [1898] 1 Q.B. 802.

⁷⁴ *R v. Connell* (1944) 69 C.L.R. 407, 432.

⁷⁵ *Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] A.C. 898, 917. Prohibition issued in this case.

⁷⁶ *Ibid.*

⁷⁷ *R v. Cotham, supra.*

⁷⁸ *Seereelall Jhuggroo v. Central Arbitration and Control Board* [1953] A.C. 151, 162; *R v. Weymouth Licensing JJ. ex parte Sleep* [1942] 1 K.B. 465, 480.

⁷⁹ *de Smith, op. cit.*, 4-7. See also *Denton v. Auckland City* [1969] N.Z.L.R. 256 per Speight J.

⁸⁰ [1959] A.C. 663, 695. Lord Denning went on to classify the tribunal's error as a non-jurisdictional error of law on the record.

But an *excess* of jurisdiction in this sense is very different from *want* of jurisdiction altogether which is, of course determinable at the commencement and not at the conclusion of an inquiry (see *R v. Bolton*). Whereas an excess of jurisdiction is determinable in the course of, or at the end of the inquiry.

Lord Denning's innovative distinction between want of jurisdiction and excess of jurisdiction in the course of the inquiry was not adopted by Lords Reid and Tucker both of whom clearly regarded the terms as synonymous.⁸¹

Nevertheless, by 1968 the climate of judicial review had changed, and in *Anisminic* the final blow to the original theory of jurisdiction, and hence to the principle that errors made in the course of the inquiry are non-jurisdictional, was dealt by the House of Lords in what has recently been described as "one of the great landmarks of administrative law".⁸² The facts of *Anisminic* are well known. The Foreign Compensation Commission had made an error of law involving a mis-interpretation of the enabling Order in Council. Article 4(1) of the Order had laid down a number of criteria that had to be satisfied before a claim for compensation was granted. Three specific requirements were listed: (a) that the application related to property in Egypt; (b) that the applicant had been the owner of, or successor in title to, the property at the relevant times; and (c) that the owner or successor in title had been a British national at the relevant times. The Commission misconstrued (c) so as to, in effect, add a fourth requirement. It held that where the applicant was the original owner, it had to prove that both it *and* any successor in title were British nationals. *Anisminic Ltd.* was the original owner and had been a British national at all times; but it had passed title to an Egyptian corporation which had not been. Consequently, its claim was refused.

For a number of reasons the Commission's error was beyond the reach of the recognised grounds for review. First, it did not appear on the face of the record but was disclosed in an internal memorandum made available to the court. Moreover, the Foreign Compensation Act under which the Order in Council was made contained a privative provision which both the Court of Appeal and the House of Lords accepted as ruling out certiorari for non-jurisdictional error. Thus, if the Commission's error was to be corrected it had to be classified as jurisdictional. But this too presented difficulties: the error was one of statutory construction (and therefore of law) occurring in the course of the inquiry; and it gave rise to no erroneous finding of fact which could be classified as preliminary or collateral. Clearly, a new

⁸¹ *Ibid.*, 683, 686-687.

⁸² Cooke J. in *Car Haulways N.Z. Ltd. v. N.Z. Transport Licensing Appeal Authority and the Attorney General*. Unreported judgement, 8th August 1973.

approach was called for, and their Lordships grasped the opportunity enthusiastically.

Lords Reid, Pearce and Wilberforce made it quite explicit that entry by the Commission into its general field of jurisdiction was not enough.⁸³ Lord Pearson agreed with the majority on this point,⁸⁴ and only Lord Morris adhered to the traditional view that errors of law occurring in the course of the inquiry were non-jurisdictional and only reviewable if apparent on the record.⁸⁵

The majority of their Lordships held that having entered its *general field* (that is, the receipt and determination of claims for compensation) the Commission had then to correctly identify and define the limits or boundaries of the *precise area* of jurisdiction vested in it. An error in defining those limits, albeit an error of law, resulted in the Commission exceeding its jurisdiction (or stepping outside the limits) in the course of its inquiry. As Lord Pearce stated:⁸⁶

Lack of jurisdiction may arise in various ways . . . while engaged on a proper inquiry the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry Parliament did direct. Any of these things would cause its purported decision to be a nullity.

It is submitted that their Lordships' decision in *Anisminic* offers a solution to the theoretical confusion and inconsistent practice arising from the inherent deficiencies in the concepts of collateral attack and error of law on the record. As has been shown, these were piecemeal attempts to broaden the courts' supervisory powers and alleviate the strictness of the original theory of jurisdiction. It is not disputed that resort to these concepts was justifiable on policy grounds despite the fact that they rendered any coherent theory of jurisdiction impossible. As de Smith puts it, "at bottom, the problem of determining the concept of jurisdiction for the purposes of judicial review has been one of public policy rather than one of logic."⁸⁷ Yet, it is submitted that their Lordships' application of the principle of "excess of jurisdiction" in *Anisminic* permits a revised theory of jurisdiction which: (a) is logically consistent and provides a clear basis for the distinction between certain types of jurisdictional and non-jurisdictional error; (b) consequently provides a basis for the distinction between the courts' supervisory and appellate jurisdictions; and (c) supercedes the previous concepts of jurisdiction outlined above and so overcomes many of the anomalies and inconsistencies which have bedevilled the court's application of their supervisory powers.

⁸³ *Supra*, 171, 195 and 210 respectively.

⁸⁴ *Ibid.*, 215.

⁸⁵ *Ibid.*, 183.

⁸⁶ *Ibid.*, 195.

⁸⁷ *Op. cit.*, 98.

VI. A REVISED THEORY

Once the historical bar to the concept that a tribunal may exceed its jurisdiction by committing errors of law in the course of its inquiry is removed, a coherent theory of jurisdiction becomes possible. Based on the *Anisminic* concept of excess of jurisdiction, it might be formulated as follows. To every tribunal is remitted a general field of inquiry into which, as a first step, it must correctly enter. In *Anisminic* that general field was the receipt and determination of claims for compensation in respect of property seized by foreign governments. The Foreign Compensation Commission could not, for example, entertain insurance or accident compensation claims. However, having correctly taken that first step, and as it were crossed the threshold, the tribunal must then proceed to define the limits or boundaries of the precise area of jurisdiction entrusted to it. That is, it must correctly identify the questions the statute requires it to ask and the criteria the statute lays down as having to be satisfied. What those questions or criteria *are* delimits the *scope* of the tribunal's jurisdiction. If in the course of its inquiry it errs in identifying them, for example, by adding to them, by failing to identify one or more, or by misinterpreting one or more so as to change its nature,⁸⁸ the tribunal steps outside the strict boundaries of its jurisdiction as imposed by the statute and commits jurisdictional error.

Such errors of construction are of course errors of law,⁸⁹ but their correction does not depend on their appearance on the face of the record, for as Lord Reid said:⁹⁰

... the court must be able to correct—not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter which, on a true construction of their powers, they had no right to deal ... and if the view which I expressed earlier is right, their decision is a nullity.

Thus, in *Anisminic* by asking whether the claimant's successor in title was a British national, the Commission erroneously added to the statutory criteria thereby committing jurisdictional error evidence of which was not limited to the record.

However, what the *questions* posed by the statute are must be distinguished from the *answers* to those questions given in the light of the facts and merits of each particular case. Having correctly identified the statutory criteria, the task of applying them to the facts of each case, of weighing the evidence and the merits and of adjudicating between the conflicting interests of the parties, is the very task remitted

⁸⁸ *Supra*, 171 per Lord Reid and 195 per Lord Pearce.

⁸⁹ *Ante*, note 28.

⁹⁰ *Supra*, 174.

to the tribunal, and errors made in the performance of that task remain non-jurisdictional in nature. As Lord Pearce said:⁹¹

The courts will intervene if the tribunal asks the wrong questions (that is, questions other than those which Parliament directed it to ask itself). But if it directs itself to the right inquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction.

Thus, had the Commission in *Anisminic* restricted itself to the three essential questions posed by Article 4(1), but in the opinion of the superior court answered the question as to whether the company was a British national wrongly, it is submitted that such an error would have been non-jurisdictional in character and consequently unreviewable.

The idea that the statutory criteria themselves delimit the boundaries of a tribunal's area of jurisdiction has much in common with the "pure" theory of jurisdiction advocated by Gordon.⁹² The essential underlying feature of that theory, that the proper role of a supervisory court is to determine the scope of a tribunal's jurisdiction and not the truth or accuracy of its findings on the merits, is retained. However, whereas Gordon defines a tribunal's proper area of jurisdiction as a "broad question" or "general field" without discernible boundaries, it is submitted that it may, with equal logic, be regarded as a much smaller area with "precise limits"⁹³ imposed by the enabling statute. Lord Wilberforce put the matter this way:⁹⁴

In every case, whatever the character of the tribunal . . . the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter.

Having correctly surveyed and marked out this area the tribunal then does have a real power of decision in respect of matters within it, for "it is as much entitled to decide those questions wrongly as it is to decide them rightly".⁹⁵

Of course, the distinction between errors made in identifying the criteria defining the limits of jurisdiction and errors made in applying those criteria to the facts of a particular case is not always an easy one to make. As Lord Wilberforce said:⁹⁶

A tribunal may quite properly validly enter upon its task and in the course of carrying it out may make a decision which is invalid—not merely erroneous. This may be described as 'asking the wrong question' or 'applying the wrong test'—expressions not wholly satisfactory since they

⁹¹ *Supra*, 195 (Lord Pearce's proviso refers to the tribunal making an order of a kind it has no power to make: see 195 line B).

⁹² *Ante*, pp. 112-114 and note 10.

⁹³ *Anisminic*, *supra*, 201 per Lord Pearce.

⁹⁴ *Ibid.*, 207.

⁹⁵ *Ibid.*, 171 per Lord Reid.

⁹⁶ *Supra*, 210.

do not in themselves distinguish between doing something which is not in the tribunal's area and doing something wrong within that area—a crucial distinction which the court has to make.

This difficulty can be illustrated from the facts of *Anisminic* itself. Assume the Commission had *prima facie* correctly identified the three essential questions posed by Article 4(1) of the Order in Council but that in answering the question as to whether the claimant was a "British national" (a term defined in the legislation) it had taken into account an irrelevant factor, for example, whether more than 50% of the claimant's shares were in foreign hands. It would have been open to the court to have classified that factor as additional to the three primary questions. Its imposition could therefore have been regarded as jurisdictional error.

The fact that the concept of excess of jurisdiction may be stretched to extend to *all* errors of law made by a tribunal was recently recognised in New Zealand by Barker J. in *Bay of Islands Timber Co. Ltd. v. Transport Licensing Appeal Authority and the Attorney-General*.⁹⁷ The case concerned an application for exemption from rail preference provisions. One of the statutory criteria for granting an exemption was that it be in the public interest. A relevant consideration was clearly how well the railways performed in carrying the goods in question, and evidence of this was normally adduced by "rail trials". Barker J. held that the Appeal Authority had placed undue emphasis on the importance of rail trials, but he saw the Authority's error as going not merely to its determination of the question of public interest (an error within jurisdiction) but as amounting to the imposition of an irrelevant factor additional to the public interest question (an error in excess of jurisdiction). He said:⁹⁸

As was pointed out by Professor Wade in an article 'Constitutional and Administrative Aspects of the *Anisminic* Case' (1969) 85 L.Q.R. 198, 210, whether there is an excess of jurisdiction or merely an error of law within jurisdiction in the end can only be a value judgment. He points out that the empowering statute will often give little guidance and it is a question of how much latitude the court is prepared to allow.

Admittedly, the line is not always a clear one,^{98a} and there is a "grey area" as in so many other areas of the law; grey areas inevitably involve value judgments and questions of judicial restraint "in the end". But the purpose of a logical and consistent concept of jurisdiction is not to eliminate such grey areas but to provide a rational and identifiable basis for the distinctions that must be made both between different kinds of administrative errors and between their consequences. It is submitted that a distinction between the task of identifying the statutory criteria defining the limits of jurisdiction and the task of

⁹⁷ An as yet unreported judgement, 4th April 1977, at Auckland.

⁹⁸ *Ibid.*, 27. ^{98a} See also *N.Z. Engineering and Associated Trades Union v. Court of Arbitration* [1976] 2 N.Z.L.R. 283, 295 per Richmond J.

applying those criteria to the facts of each case is a rational basis for making the jurisdictional—non-jurisdictional distinction in respect of such errors.

A. *Excess of Jurisdiction—Supervision or Appeal*

The distinction between jurisdictional and non-jurisdictional error is "crucial" (to use Lord Wilberforce's term) to the whole concept of judicial review. Upon it ultimately depends the distinction between the courts' supervisory and appellate jurisdictions, the importance of which has been continually stressed by the highest authorities.⁹⁹ Failure to maintain that distinction may have either of two highly undesirable consequences. First, the principle that the powers of a supervisory court should not extend to a consideration of the merits may itself be extended to circumscribe the proper scope of supervision. It is respectfully submitted that Lord Morris does just this in his dissenting judgment in *Anisminic*.¹ His Lordship says in effect that the question of what the statutory criteria defining the limits of jurisdiction are, and the question as to whether those criteria are satisfied in the particular case, are so inextricably linked that they cannot be separated. The Commission had, it was said, a duty to discharge both tasks, and it could not discharge the latter without first discharging the former.² Furthermore, both tasks involved similar questions of law in that both required interpretation of the enabling Order in Council.³ A determination as to the meaning of the fatal phrase "successor in title" was essentially the same kind of task as that of determining whether the property was in Egypt or whether the company was a "British national" or an "owner". In fact, these latter questions may have involved even more complex concepts of law and of construction of the Order in Council than the former.⁴

Thus, Lord Morris concluded that because the Commission was clearly within its jurisdiction in deciding whether the claimant satisfied the statutory criteria, it must also have been within its jurisdiction in performing the essentially similar task of determining what those criteria were. Errors made in the performance of both tasks were, therefore, protected by the privative provision. Lord Morris stated:⁵

The claim of the applicants had to be determined by the commission and the applicants were under the obligation of satisfying the commission as to certain stated matters. They could not decide whether or not they were satisfied until they had construed the relevant parts of the Order in

⁹⁹ *R v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128.

¹ See also Diplock L.J. in the Court of Appeal decision, *supra*.

² *Supra*, 184.

³ *Ibid.*, 187.

⁴ *Ibid.*, 188-189.

⁵ *Ibid.*, 189.

Council. When they were hearing argument as to the meaning of those relevant parts they were not acting without jurisdiction. They were at the very heart of their duty, their task and their jurisdiction. It cannot be that their necessary duty of deciding as to the meaning would be or could be followed by the result that if they took one view they would be within jurisdiction and if they took another view they would be without.

The fallacy in Lord Morris' reasoning was clearly exposed by Lord Wilberforce in the following passage:⁶

These passages at least answer one of the respondent's main arguments to some extent accepted by the members of the Court of Appeal, which is that *because* the commission has (admittedly) been given power, indeed required, to decide some questions of law arising out of the construction of the relevant Order in Council, it must necessarily have power to decide those questions which relate to the delimitation of its powers: or conversely that if the court has power to review the latter, it must also have power to review the former. But the one does not follow from the other: there is no reason why the Order in Council should not . . . limit the tribunal's powers and at the same time . . . confer upon the tribunal power, in the exercise of its permitted task, to decide other questions of law, including questions of construction of the Order.

Lord Morris' error lay in his paying undue attention to the nature of the decision-making process rather than to the differing functions of the tasks assigned the tribunal. As Lord Wilberforce indicates, there is a logical distinction between deciding what the statutory criteria are and deciding whether those criteria are satisfied, despite the very similar problems of law and construction encountered in discharging both tasks. In carefully redrawing the distinction between jurisdictional questions and the merits, Lord Wilberforce draws attention to the danger of conceptually extending the merits at the expense of the courts' supervisory capacity.

Secondly, in the passage just quoted Lord Wilberforce draws attention to the undesirable consequence of allowing the distinction between jurisdictional and non-jurisdictional error to become blurred. His words "or conversely that if the court has the power to review questions going to jurisdiction it must also have power to review the merits" point to the danger of generalising the courts' supervisory powers to the extent that they amount to a kind of *de facto* appellate capacity. The proper sphere of a supervisory court is to define the limits or scope of the power of inferior bodies and to supervise the legality with which that power is exercised.⁷ But as Lord Sumner said in the *Nat Bell* case:⁸

The superior court is bound not to interfere with what has been done within that jurisdiction, for in doing so it would itself in turn, transgress the limits within which its own jurisdiction . . . is confined.

The primary role of an appellate court, on the other hand, is to reassess the truth and accuracy of the inferior body's findings on

⁶ *Ibid.*, 209.

⁷ *R v. Nat Bell Liquors Ltd.*, *supra*.

⁸ *Ibid.*, 156.

matters within its jurisdiction. An appellate court may be empowered to repeat the process of weighing the evidence, deciding matters of fact and law and adjudicating between the parties.⁹ But it may only do so where such power is expressly conferred on it by statute, whereas the courts' supervisory jurisdiction is inherent. As was said in an early case, "Certiorari always lies unless it is expressly taken away and an appeal never lies unless it is given by the statute."¹⁰

The reasons for this are clear. Where the legislature chooses to create a tribunal for the purpose of deciding matters requiring a judicial mode of determination, its intention is that the tribunal and no other body should have the power to decide those matters. The reasons for preferring a tribunal to the courts are varied.¹¹ Parliament may consider that the matter requires a degree of expertise not possessed by the courts; that decisions are best made by those with a background of practical experience and continuous involvement in the area; that the area requires more flexibility in policy matters than the courts are accustomed to allow; that the sheer number of decisions would overburden the courts; or simply that decisions should be made quickly, cheaply and informally.

In the light of these factors it is evident that the courts are often not the most appropriate decision-making body. Judges are not closely in touch with the policy considerations and practical exigencies so important in many areas. They often lack the experience and expertise necessary to make the best and fairest decisions. In such areas, despite the fact that as Lord Morris so clearly demonstrated in *Anisminic* the tribunal may have to consider complex questions of law in deciding the merits, Parliament may choose to leave the matter entirely in the hands of the tribunal by according the parties no right of appeal to the courts. Conversely, when it is considered that the courts have a legitimate role to play as final arbiter on all or some of the matters before the tribunal, a right of appeal will be granted. But only when it is expressly given such an appellate capacity can a court substitute its own opinion on questions going to the merits for that of the tribunal.¹² To attempt to do so (albeit indirectly) under the guise of supervision amounts to a usurpation of a jurisdiction it does not possess on the basis of an opinion it has been adjudged incompetent to form.

⁹ E.g. appeals to the Administrative Division of the Supreme Court from decisions of the Cinematographic Films Amendment Act 1969. Alternatively, an appellate court may be empowered to hear stated questions of law only as where appeals are made to the Administrative Division from the Censorship Board of Appeal under section 5 of the Cinematographic Films Amendment Act 1969.

¹⁰ *R v. Cashiobury Hundred JJ.* (1823) 3 Dow. & Ry. 35.

¹¹ See generally Hogg, *loc. cit.*, 214.

¹² *R v. Northumberland Compensation Appeal Tribunal*, *supra*, 347.

B. *The Effect of Excess of Jurisdiction on the Existing Categories of Error*

1. *Errors of law on the face of the record*

The problems and possible inequities of a remedy for errors of law on the face of the record have already been discussed.¹³ These in themselves are grounds for its abandonment, and this may now be possible. It is submitted that certiorari for errors of law which were formerly regarded as non-jurisdictional because they were made in the course of the inquiry is now possible regardless of whether such errors appear on the face of the record. Following *Anisminic* they can now be classified as being in excess of jurisdiction. This can be illustrated from the facts of the *Northumberland* case itself. In that case the amount of compensation payable depended on the claimant's total length of employment by government agencies. He had been employed by two such agencies. But in the course of the inquiry the tribunal had misconstrued the criteria laid down by the relevant regulations and had disregarded his employment with one of them. The tribunal thus failed to correctly define the questions delimiting its precise area of jurisdiction, it asked the wrong questions and so, in terms of the *Anisminic* formula, it exceeded its jurisdiction. As Lord Pearce said in *Anisminic*, "an inferior tribunal which properly embarks on an inquiry may go outside its jurisdiction if, in the course of that inquiry, it rejects a consideration it was told to have in mind."¹⁴ An examination of the only two reported New Zealand cases in which a remedy for non-jurisdictional error on the record has been invoked yields similar results.

*Straven Services v. Waimairi County*¹⁵ concerned a planning appeal against the refusal of a building permit on the ground that the proposed building was a "detrimental work". The legislation provided criteria by which that question was to be decided. However, the Appeal Board imposed an additional requirement that an onus lay on the appellant to satisfy the Board that the local body's decision on the matter was wrong. Certiorari issued on the basis that the Appeal Board had heard and determined the appeal "upon a wrong basis in law and that the error was apparent on the face of the record."¹⁶ Certiorari might now issue on the basis that the Appeal Board had misconstrued the legislation, failed to correctly identify the statutory criteria and so exceeded its jurisdiction.

¹³ Ante, p. 119 et seq.

¹⁴ Supra, 198.

¹⁵ [1966] N.Z.L.R. 996.

¹⁶ *Ibid.*, 1005.

*Yukich v. Sinclair*¹⁷ concerned an application for a winemaker's licence. The Magistrate's jurisdiction to grant a licence depended on the applicant being able to satisfy him of three matters: (a) that he was a "fit person"; (b) that his premises were suitable; and (c) that a sufficient supply of grapes was available to him. The Magistrate found that the second and third requirements were satisfied but that the first was not. However, the record disclosed that in considering the first requirement the Magistrate had taken into account an "extraneous matter" which he did not relate to the applicant's fitness. Using the analogy of publicans' licences, he had misconstrued the statute so as to find a general policy against the granting of two licences to one man. Hardy Boys J. clearly regarded the error as non-jurisdictional,¹⁸ but he apparently overlooked the availability of certiorari for error of law on the face of the record and issued mandamus instead.

The statutory format in *Yukich* was very similar to that in *Anisminic* as was the kind of error committed. Like the Commission in the latter case the Magistrate failed to correctly identify the statutory criteria, he placed an additional "hurdle"¹⁹ in the path of the applicant and so exceeded his jurisdiction.

An examination of the English cases on point between 1951 and 1968 leads to similar conclusions in most instances. Thus, the errors in *R v. Head*,²⁰ *R v. Medical Appeal Tribunal, ex parte Gilmore*²¹ and *R v. Liverpool JJ.*²² can all be classified as failure to take account of one of the statutory criteria. The errors in *R v. Agricultural Land Tribunal, ex parte Grant*,²³ *R v. Westminster Compensation Appeal Tribunal*,²⁴ and *R v. Fulham Rent Tribunal, ex parte Hierowski*²⁵ can all be classified as misconstruction of the statutory criteria so as to change the nature of the question asked. In each case the error made could now be classified as excess of jurisdiction.

However, in a small number of English cases certiorari has issued for errors on the record made in applying the statutory criteria to the facts of the case rather than in identifying the criteria. Thus, in *R v. Medical Appeal Authority, ex parte Burpitt*²⁶ the Appeal Authority made a determination on the basis that a man's fingers were not

¹⁷ [1961] N.Z.L.R. 752.

¹⁸ *Ibid.*, 760-761.

¹⁹ *Anisminic*, *supra*, 201 per Lord Pearce.

²⁰ [1959] A.C. 83.

²¹ [1957] 1 Q.B. 574.

²² [1959] 1 All E.R. 337.

²³ [1956] 1 W.L.R. 1240.

²⁴ [1953] 1 W.L.R. 506.

²⁵ [1953] 2 All E.R. 4. In *Anisminic* Lords Reid and Wilberforce classified the error in this case as jurisdictional; yet the exact basis of the decision is not clear.

²⁶ [1957] 2 Q.B. 584.

"interchangeable or complementary organs" as required by the legislation. On a motion for certiorari the Divisional Court held that fingers were organs and were complementary, that the tribunal had made an error of law apparent on the record and that certiorari should issue. It is submitted that the case is an example of the court's failing to observe the distinction between matters which are fairly within the tribunal's area of jurisdiction and matters which are not. Whether or not fingers are "paired organs" was one of the very questions remitted to the Medical Appeal Authority. It correctly identified that question and in the light of its experience and expertise in the area came to a conclusion on it. In quashing the tribunal's decision the court in effect substituted its own opinion on a matter exclusively within the tribunal's jurisdiction and competence. It thus crossed the line dividing its supervisory capacity from its appellate capacity and made a decision on the merits.²⁷ Other cases open to criticism on the same grounds are *R v. Medical Appeal Tribunal, ex parte Griffiths*²⁸ and (possibly) *R v. Birmingham Compensation Appeal Tribunal*.²⁹

If, as has been submitted, all errors of law made in the course of an inquiry and not going to the merits can now be regarded as jurisdictional, the only errors of law which can be regarded as non-jurisdictional are those incidentally made in determining the merits. Furthermore, if the writer's submission is accepted that errors, whether of law or fact, made in deciding the merits, should not in the absence of appellate powers, be open to review, the utility of a remedy for errors of law on the face of the record must be regarded as having been exhausted. Its continued existence serves only to confer on courts of supervision *de facto* appellate powers.

The idea that the role of certiorari for error on the record has been subsumed by the post-*Anisminic* concept of excess of jurisdiction is supported by the remarkably few cases in which the remedy has been involved since *Anisminic* was decided. In New Zealand there have been no such cases although the remedy was recently adverted to in *Attorney-General v. Car Haulways N.Z. Ltd.*,³⁰ *N.Z. Engineering Union v. Court of Arbitration and Others*^{30a} and *Bay of Islands Timber Co. Ltd. v. Transport Licensing Appeal Authority and the Attorney-General*³¹ and was argued but not applied in *Clark v. Rent Appeal Board*.³² Similarly, in England the remedy does not seem to have been invoked although its continuing existence was recognised by

²⁷ It was surely open to the court to refuse relief either on the grounds that although a question of law, the matter was within the exclusive competence of the tribunal, or alternatively, that it was a question of fact.

²⁸ [1958] 1 W.L.R. 517.

²⁹ [1952] 2 All E.R. 100.

³⁰ [1974] 2 N.Z.L.R. 331. ^{30a} [1976] 2 N.Z.L.R. 283.

³¹ Unreported judgement of Barker J., 4th April 1977, at Auckland.

³² [1975] 2 N.Z.L.R. 24.

the majority judges in *Anisminic*³³ and more recently in *R v. Secretary of State for the Environment, ex parte Ostler*.³⁴ In *Clark's* case counsel's submission that the tribunal had failed to consider all the questions posed by the statute could equally well have been made in terms of excess of jurisdiction. O'Regan J. would then have been spared the difficult task of attempting to further define the record.

A feature of the other cases mentioned is that in all of them the enabling legislation contained a privative provision. Non-jurisdictional errors of law on the record are the only errors protected by such provisions,³⁵ and it is not surprising that where such a provision occurs, the courts will seek to give some effect to a clearly stated legislative intention by referring to such errors and the fact that they are protected. Prior to the decision in *Anisminic* there were a number of serious "jurisdictional" errors of law (e.g. failure to correctly identify the statutory criteria) which, because they were made in the course of the inquiry, were classified as non-jurisdictional and hence were protected by privative provisions. In this sense privative provisions had, in theory at least, a genuinely restrictive effect on the courts' supervisory powers. However, after *Anisminic* such errors were reclassified as jurisdictional,³⁶ and the only errors left as non-jurisdictional were errors of law and fact made in determining the merits. But such errors have never needed the protection of a privative provision; they have always been regarded as beyond the reach of a supervisory court even without its aid.³⁷ Continuing repetition of the formula that privative provisions protect non-jurisdictional errors of law on the record, while providing something for "ouster clauses to oust"³⁸ may in fact result in privative provisions having precisely the opposite effect to that intended by the legislature. This is because the formula suggests that in the *absence* of a privative provision the courts' supervisory powers do extend to correction of errors made in determining the merits. In other words, privative provisions may imply the kind of de facto appellate powers which the courts have continually stressed they do not have.

Furthermore, the courts have always been extremely reluctant to refuse relief on the basis that an error was protected by a privative provision, as demonstrated by the *Anisminic* case itself. As the concept of excess of jurisdiction can, if necessary, be stretched to include

³³ *Supra*, 171 per Lord Reid and 195 per Lord Pearce.

³⁴ [1977] 1 Q.B. 122.

³⁵ *Anisminic*, *supra*.

³⁶ *Ante*, pp. 123-124.

³⁷ *R v. Nat Bell Liquors Ltd.*, *supra*. *Anisminic*, *supra*.

³⁸ Wade, "Constitutional and Administrative Aspects of the *Anisminic* Case" (1969) 85 L.Q.R. 198, 205.

virtually any error of law at all,³⁹ privative provisions are rendered almost meaningless by that decision.⁴⁰

Thus, it is submitted that neither privative provisions nor the concept of non-jurisdictional error of law on the face of the record have any proper function in the law of judicial review. The only role the former plays is to sustain the latter. The only role the latter plays is to give ostensible meaning to the former. As both are obsolete both should be abandoned.⁴¹

Support for the view that the concept of excess of jurisdiction has rendered a specific remedy for non-jurisdictional errors of law on the face of the record redundant is found in the writings of leading commentators. In a series of articles written immediately before the House of Lords' decision in *Anisminic*,⁴² Wade clearly regarded the concept as viable and valuable. However, in an article following that decision, he expresses doubts as to whether it retains any real content.⁴³

Cooke J. takes up the same point in *Reid v. Rowley*⁴⁴ a recent New Zealand Court of Appeal decision. Referring to Wade's earlier articles he says, "I have reservations, not relevant to this case, about whether the distinction between ultra vires and error on the face of the record is as black and white as he sees it."⁴⁵ Sykes and Maher suggest that following *Anisminic* and other recent cases, "the concept of error of law on the face of the record would now seem to be virtually meaningless."⁴⁶ Lord Diplock⁴⁷ welcomes the decision in *Anisminic* as a means of avoiding the "irrational consequences" of the decision in the *Northumberland* case.⁴⁸ de Smith is doubtful "whether there is any substance left in the doctrine that certiorari will lie to quash a determination within jurisdiction for error of law on the face of the record."⁴⁹

There is, however, one argument which has been advanced in support of the concept of non-jurisdictional error on the record which

³⁹ Ante, pp. 127-128.

⁴⁰ A possible exception is where they impose a time limit on the bringing of a motion for review. See *Smith v. East Elloe Rural District Council* [1956] A.C. 736, recently followed in *R v. Secretary of State for the Environment, ex parte Ostler* [1977] 1 Q.B. 122.

⁴¹ In its 6th Report the Public and Administrative Law Reform Committee recommended the abandonment of private provisions (except in unusual circumstances) in order to assist the coherent development of the law of judicial review based on a broad power of the courts to correct all errors of law: see pp. 14-15.

⁴² "Unlawful Administrative Action: Void or Voidable" Part I (1967) 83 L.Q.R. 499; Part II (1968) 84 L.Q.R. 95.

⁴³ "Constitutional and Administrative Aspects of the *Anisminic* Case," supra.

⁴⁴ An as yet unreported judgement, 25th May 1977.

⁴⁵ *Ibid.* See also *N.Z. Engineering* case, supra, 301 per Cooke J.

⁴⁶ *Loc. cit.*, 395.

⁴⁷ "Judicial Control of Administrative Process," *loc. cit.* 9-15.

⁴⁸ Supra.

⁴⁹ *Op. cit.*, 105.

must be dealt with. That is, that as such errors do not render a decision a nullity as do jurisdictional errors,⁵⁰ but render it voidable only,⁵¹ the concept provides the courts with a means of avoiding the inconvenience of invalidating everything done pursuant to a decision while granting a remedy effective from the date of judgment.⁵² It may well be that, as Wade argues, this is the only context in which the void-voidable distinction has any intelligible meaning. Yet, the New Zealand courts have recently adopted an approach which avoids that troublesome distinction altogether.⁵³ In *Reid v. Rowley*⁵⁴ Cooke J. approved the approach taken by Speight J. in *Wislang v. Medical Disciplinary Committee*⁵⁵ and held that despite the fact that a decision is void for jurisdictional error, it remains valid in law and has effect until the court has declared its invalidity. Furthermore, when acting in its supervisory jurisdiction, the courts' powers to grant relief are discretionary; relief may therefore be refused.

Cooke J. declined to enumerate all the grounds for such a refusal, but they would seem to include: the availability of appeal rights (depending on the nature of the appeal hearing);⁵⁶ the "viciousness of the breach";⁵⁷ waiver of the error by the applicant for relief at the hearing before the tribunal;⁵⁸ and undue delay in pursuing a remedy.⁵⁹ Lack of locus standi might also be included.⁶⁰ This approach "might be taken as having settled . . . the usefulness of the distinction between void and voidable in New Zealand."⁶¹ But, in addition, it greatly reduces the circumstances in which a court may be tempted to classify jurisdictional errors as non-jurisdictional in order to avoid the drastic inconvenience of declaring a decision void ab initio. For where the breach is slight, or the applicant is undeserving in terms of the criteria set out above, the court may refuse relief altogether. Nevertheless, it is submitted that where relief is warranted the courts should refrain from distorting doctrine by labelling jurisdictional error non-jurisdictional in order to avoid inconvenience. Indeed, there is authority to the effect that they will so refrain.⁶²

⁵⁰ *Anisminic*, supra.

⁵¹ *D.P.P. v. Head* [1959] A.C. 83 per Denning L.J. dissenting; *R v. Secretary of State for the Environment, ex parte Ostler*, supra.

⁵² Wade; "Unlawful Administrative Action: Void or Voidable," supra, 518 et seq.

⁵³ Cf. the situation in England in *R v. Secretary of State for the Environment, ex parte Ostler*, supra.

⁵⁴ Supra.

⁵⁵ [1974] 1 N.Z.L.R. 29.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Reid v. Rowley*, supra.

⁵⁹ *Ibid.*

⁶⁰ *Durayappah v. Fernando* [1967] 2 A.C. 337.

⁶¹ J. F. Northey, "Void and Voidable" [1977] N.Z.L.J. 284, 285.

⁶² *R v. Paddington Valuation Officer, ex parte Peachey* [1966] 1 Q.B. 380, 418 per Danckwerts J.

2. Breaches of natural justice

Breaches of natural justice are errors of procedural rather than substantive law⁶³ and have always occupied a somewhat anomalous position in relation to the recognised concepts of jurisdiction.⁶⁴ Although earlier cases provided some authority for the proposition that at least some breaches of natural justice were only voidable, and therefore could be regarded as errors within jurisdiction,⁶⁵ in recent times all such breaches have been regarded as amounting to jurisdictional error. Hence they have attracted certiorari and prohibition. Furthermore, it has never been suggested that a remedy for breach of natural justice depended on the appearance of the error on the record.

The definitive case is *Ridge v. Baldwin*,⁶⁶ and Lord Hodson put the matter this way:⁶⁷

In all cases where the courts have held that the principles of natural justice have been flouted I can find none where the language does not indicate the opinion that the decision impugned was void. It is true that the distinction between void and voidable is not drawn explicitly in the cases, but the language used shows that where there is a want of jurisdiction as opposed to a failure to follow a procedural requirement, the result is a nullity.

Leaving aside the perplexing void-voidable distinction⁶⁸ which in New Zealand⁶⁹ seems to have resolved itself in line with the principles laid down by the majority in *Ridge v. Baldwin*, a breach of natural justice results in want of jurisdiction and so renders the tribunal's decision a nullity. This is so whether the breach occurs prior to the tribunal embarking on the inquiry proper (as with bias, predetermination, failure to give notice or to accord a hearing) or whether it occurs in the course of the inquiry itself (for example, failure to disclose relevant information,⁷⁰ or refusal to hear relevant evidence⁷¹).

Breaches of natural justice have never been subject to the general limitation that errors made in the course of the inquiry are non-jurisdictional for the principles of natural justice are made up of a number of unwritten procedural and other rules governing the *conduct* of an inquiry. They do not go to the substantive issues before the

⁶³ de Smith, *op. cit.*, 134.

⁶⁴ Gordon, "Certiorari and the Revival of Error in Fact" (1926) 42 L.Q.R. 521.

⁶⁵ *Dimes v. Grand Junction Canal Co.* (1852) 3 H.L.C. 759, 784 (pecuniary interest in the subject matter of the inquiry); *R v. Wandsworth JJ.* [1942] 1 K.B. 281 (breach of audi alteram partem rule).

⁶⁶ [1964] A.C. 40.

⁶⁷ *Ibid.*, 136; cf. Lord Devlin dissenting, 140-141.

⁶⁸ See Wade, "Unlawful Administrative Action: Void or Voidable," *supra*; Northey, "Contractual Misconceptions in Administrative Law" (1969) Recent Law 224.

⁶⁹ *Reid v. Rowley*, *supra*; cf. the recent English Court of Appeal decision *R v. Secretary of State for the Environment, ex parte Ostler*, *supra*. See discussion ante, p. 136.

⁷⁰ *Denton v. Auckland City* [1969] N.Z.L.R. 256.

⁷¹ *General Medical Council v. Spackman* [1943] A.C. 627.

tribunal. They bear no direct relation to the merits of the case and hence in this sense raise no direct question as to the distinction between the courts' supervisory and appellate jurisdictions.

In terms of the *Anisminic* formula a breach of natural justice has always been properly described as excess of jurisdiction as its effect is unrelated to the stage of the inquiry at which it occurred. However, that decision did have the effect of placing both this point, and the fact that a breach of natural justice renders a decision void,⁷² beyond doubt. Furthermore, it brought the two main sources of jurisdictional error, breaches of the implied limits of jurisdiction imposed by the rules of natural justice and errors of law in interpreting the express limits of jurisdiction imposed by statute, into conceptual comity. Both may be regarded as congruently marking out the boundaries of a tribunal's precise area of jurisdiction. An error at any point in respect of either results in excess of jurisdiction.

3. *Preliminary or collateral questions*

The great difficulty with the doctrine of collateral fact is the absence of a rational basis for distinguishing between facts which are preliminary and limit jurisdiction and facts which go to the merits and are within jurisdiction. As has been shown, virtually any finding of fact is open to either classification. Furthermore, the doctrine depends on almost equally unsatisfactory distinctions between matters of law and fact. The only solution to the doctrine's inherent difficulties is its abandonment, and it is submitted that in permitting errors of law made in the course of the inquiry to be characterised as jurisdictional, the decision in *Anisminic* makes this possible for the following reasons.

Virtually all questions remitted to a tribunal can be characterised as errors of law. As Lord Morris so clearly demonstrated in *Anisminic* the mere requirement by a statute that certain fact situations exist inevitably involves questions of statutory construction as to exactly what Parliament meant by the words it used to describe those situations. Even the most simple requirements of fact may have different implications in different statutes; the exact situations to which they extend will depend on the words used, their context, the policy and objects of the statute and general principles of statutory interpretation. But questions of statutory interpretation are always questions of law.⁷³ Thus, any errors made in construing a statute are errors of law. Moreover, as has been judicially recognised,⁷⁴ the concept of excess of jurisdiction is capable of being stretched to accommodate all errors of

⁷² *Supra*, 171, 181, 195, 207-208.

⁷³ *Anisminic* [1967] 2 All E.R. 986, 994 per Diplock L.J.

⁷⁴ *Bay of Islands Timber Company Ltd. v. Transport Licensing Appeal Authority and the Attorney-General*, *supra*, 27.

law for if, in either identifying or applying the statutory requirements, the tribunal asks what are, on a true construction of the statute, wrong questions or has regard to irrelevant considerations, that error may be characterised as being in excess of jurisdiction.

Clearly then the concept and terminology of the collateral fact doctrine is redundant, and it is notable that it is not referred to in any of their Lordships' judgments in *Anisminic*. Furthermore, the writer can find no English or New Zealand case in which the doctrine has been invoked⁷⁵ since *Anisminic*.

VII. CONCLUSION

It may be concluded that the issue as to which of all the matters remitted to a tribunal are jurisdictional and which are non-jurisdictional no longer turns on a distinction between preliminary matters and those decided in the course of the inquiry, or between collateral facts and the facts in issue, or between matters of law and fact, or between errors on the face of the record and errors not so apparent. Given that all the matters before a tribunal involve questions of construction and therefore questions of law, it is the writer's contention that a more logical and consistent basis for drawing that distinction is to distinguish between the identification of the questions or criteria posed by the statute and the application of those questions or criteria to the facts of the individual case. What the questions or criteria posed by the statute are defines the precise area of the tribunal's jurisdiction. Hence errors made in the course of identifying them may properly be regarded as jurisdictional errors and may, at the court's discretion, result in the tribunal's decision being set aside as void. But once the statutory questions or criteria have been correctly identified, the task of determining whether they are satisfied on the merits of the case is within the special competence of the tribunal and no other body. Errors made in performing that task may properly be characterised as non-jurisdictional and irremediable by a supervisory court.

However, the formula is a flexible one; where the tribunal flagrantly errs in applying the statutory criteria such an error may be characterised as amounting to an incorrect identification of those criteria. The point at which a supervisory court makes the distinction is ultimately a "value judgment" and a matter for judicial restraint. For reasons already outlined, it is submitted that such restraint is essential if the courts' supervisory jurisdiction is not to degenerate into an unprincipled *de facto* appellate capacity.

⁷⁵ Cf. the Canadian jurisdiction; e.g. *Bell v. Ontario Human Rights Commission*, *supra*; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers* (1970) 11 D.L.R. (3d) 336. Both decisions are severely criticised by Hogg, *loc. cit.*, as is the collateral fact doctrine itself.