COMMENT

JURISDICTIONAL ERROR IN ADMINISTRATIVE LAW

This paper is concerned with one aspect of administrative law. It is not possible to define clearly administrative law, in the way that it is possible to define the law of real property, or the law of negotiable instruments, but the central core of administrative law is becoming tolerably clear: it is concerned with the relationship between the individual and the many and varied bodies which wield the controlling and regulating powers of the State. The proposition may simply be put that these bodies have been set up for A, B, C reasons to do X, Y, Z things. In legal language this would be expressed by an assertion that each and every body established by the Parliament to exercise statutory power whether it be a tribunal, board, court, Minister or any other official body, has such and such a jurisdiction, and no other. It is the purpose of this paper to examine this concept of jurisdiction by posing the following questions. If it be accepted that each one of these bodies is empowered to do some things only and not others, should an attempt be made to mark out precisely what each body may be permitted to do? And, further, how is this to be done?

It might first be worthwhile examining one hypothetical example, to familiarize the reader with the terminology used in this area of the law. An inferior court is assumed to have been given jurisdiction to entertain certain civil claims alleged to have arisen in a certain area "X" and involving a certain sum of money "Y". A superior court, for example, the Supreme Court of New South Wales, would today almost certainly take the view that before the inferior court could give judgment on the claim before it, it would need to find that the claim did, in fact, arise in area "X" and that the sum of money "Y" was, in fact, involved. The inferior court's decision is conditional on the actual existence of the jurisdictional facts. If the inferior court gives judgment and the superior court decides that area "Z" was involved and not the area "X", then the decision of the inferior court will be declared to have been a nullity. On the other hand, the question whether the actual claim is properly made out or not will be considered exclusively one for the inferior court.

Needless to say, the types of bodies involved and the factors determining their jurisdiction vary enormously.[1] So also do the methods of challenging jurisdiction. Firstly, the prerogative writs of prohibition, certiorari and mandamus may be used: prohibition will issue to stop a body proceeding further in a matter where it has no jurisdiction; certiorari will quash its final decision if given without jurisdiction; and mandamus will compel a body to entertain a jurisdiction it has wrongly refused. Secondly, the equitable remedies of injunction and declaratory judgment may in some

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[1] See for example W. Friedmann and D. G. Benjafield, *Principles of Australian Administrative Law* (2 ed. 1962) 226-31.

cases be appropriate. Thirdly, it may be possible to resist successfully proceedings taken pursuant to the decision of a body, on the basis that it is a nullity through lack of jurisdiction. Fourthly, an action in tort may be maintainable on the ground that the decision relied upon, authorising, for example, a trespass, is a nullity.

The first of the basic questions may now be asked. Should there be such a concept of jurisdictional error at all?

THE ATTACK OF D. M. GORDON, Q.C.

The field of jurisdictional error in administrative law has received relatively little examination. The major contributor by far has been D. M. Gordon, Q.C.[2] He has strongly advocated what Professor de Smith calls the "pure" theory of jurisdiction:

> Jurisdiction means authority to decide. Whenever a judicial tribunal is empowered or required to inquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari, but are binding until reversed on appeal.[3]

D. M. Gordon would presumably argue that in the example given earlier, if the inferior court, in deciding to entertain the civil claim, found the area involved to be "X" and the sum of money "Y" when in fact they were "Z" and "A", its decision should be unimpeachable unless reviewable by a statutorily given appeal.

Gordon's view is based on two main grounds; (a) historical, (b) theoretical.

The Historical Basis

In an examination of views expressed in an article by Professor Sawer,[4] D. M. Gordon put forward the historical basis for his theory as follows:

> . . . Professor Sawer goes too far in saying that the common law judges never accepted the "pure" theory of jurisdiction. They did accept it fairly consistently between 1819 and 1845; and since then at intervals the old concept has been reaffirmed right down to the present. . . .[5]

It is necessary to examine this particular claim in the context of the historical evolution of jurisdictional error in English law.

Up to the mid-seventeenth century administrative powers were controlled partly by the courts and partly by the central administration. The Court of Chancery, after surviving the attempts of the common lawyers to control it, assumed a position of equality with the Courts of Kings Bench and Common Pleas. In common with the other two courts, it issued writs of certiorari and prohibition for various purposes from the fourteenth century onwards.[6] In particular, certiorari was used to prevent alleged excess of jurisdiction by the Court of Admiralty;[7] prohibition went to the ecclesiastical courts for the same reason.[8] In this way the inferior courts were controlled

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[2] See especially his following articles: "The Relation of Facts to Jurisdiction" (1929) 45 *L.Q.R.* 459; "Excess of Jurisdiction in Sentencing or Awarding Relief" (1939) 55 *L.Q.R.*; his review of S. A. de Smith's *Judicial Review of Administrative Law* in (1960) 76 *L.Q.R.* 306; "Tithe Redemption Commission v. Gwynne" (1944) 60 *L.Q.R.* 250.

[3] S. A. de Smith, *Judicial Review of Administrative Action* (1959) 66.

[4] G. Sawer, "Error of Law on the Face of an Administrative Record" (1956) 3 *University of Western Australia Law Review* 24.

[5] D. M. Gordon, Review of de Smith's *Judicial Review of Administrative Law* in (1960) 76 *L.Q.R.* 306 at 309.

[6] See generally de Smith *supra* n. 3 at 259-63.

[7] *Select Pleas in the Court of Admiralty* Vol. I lxxvi (Selden Society Vol. 6) and Vol. II xli (Selden Society Vol. 11).

[8] See N. Adams, "The Writ of Prohibition to Court Christian" (1936) 20 *Minnesota L.R.* 272.

by the superior courts.

From the 14th century onwards and, particularly under Elizabeth I, there was an increasing utilization of an old institution, the justices of the peace, for purely administrative functions. The justices were given "powers in relation to the poor law, to rating, to highways, to bridges, to gaols, to sewers, to the licensing of ale houses, to apprentices, to trade, to the fixing of wages, to the laws relating to religious nonconformists",[9] as well as their traditional powers in the field of criminal law.

Control over the justices and other units of local government was exercised by the government itself through the Court of Star Chamber and the Provincial Councils. When these controlling authorities were abolished by the Long Parliament and nothing was put in their place, the Court of Kings Bench with only some hesitation, put the justices and other local government bodies in virtually the same category as the inferior courts already under its control.[10]

By the end of the seventeenth century it was clear that jurisdictional error was a major method of control. In 1680 *Terry* v. *Huntingdon*[11] had shown that jurisdictional error made a decision void and enabled an action in trespass to be brought against any person acting under the authority of that decision. The words of Hale, C.B. would be appropriate today:

> And it is to be considered that special jurisdictions may be circumscribed 1. with respect to the subject matter of their jurisdictions; 2. with respect to place; 3. with respect to persons . . . and therefore if they give judgment in a cause arising in another place or betwixt private persons or in other matters all is void. . . .[12]

Throughout the eighteenth century actions for trespass and writs of certiorari were allowed whenever the court of Kings Bench decided that jurisdictional error existed. Initially it was only necessary to recite on the challenged order the disputed facts. During Lord Mansfield's term of office it became the practice to put the facts in issue by affidavits lodged with the petition for the appropriate writ. Kings Bench would then examine the disputed facts for itself.[13] In *The King* v. *Wakefield*[14] Lord Mansfield stated:

> This part of the case depends on the facts, for if the title actually came in question . . . then the justices had no jurisdiction. It appears on the affidavits that the title was not in question.[15]

For the most part during the eighteenth and early nineteenth centuries it was the justices who were the prime target in actions claiming jurisdictional error. The Court of Kings Bench was by no means reluctant to investigate a wide variety of facts and it restricted the area of conclusive determination allowed to the justices to very small measure.[16] The justices were not apparently held in very high esteem by the judges of Kings Bench, although it appears from the following that this attitude changed towards the end of the eighteenth century:

> As to the principle drawn from the old cases, that the Court will be

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[9] W. S. Holdsworth 10, *A History of the English Law* (1938) 128.

[10] See *Commins* v. *Massam* (1643) March 196 at 197-98.

[11] (1680) Hardres 480; 145 E.R. 557.

[12] 145 E.R. 557 at 559. In similar vein see also *Groenvelt* v. *Burwell* (1700) 1 Ld. Raym. 454, 469; 91 E.R. 1202, 1212; *Rex* v. *Inhabitants in Glamorganshire* (1700) I Ld. Raym. 580; 91 E.R. 1287, 1288.

[13] L. L. Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70 *Harvard L.R.* 953 at 957.

[14] (1758) 2 Kenny 164; 96 E.R. 1143.

[15] *Id.* at 1144.

[16] See e.g. *R.* v. *Butcher* (1720) 1 Strange 437; 93 E.R. 620; *R.* v. *Gully* (1715) 10 Mod. 307; 88 E.R. 740; *R.* v. *Dunn* (1714) 10 Mod. 221; 88 E.R. 702.

> astute in discovering defects in convictions before summary jurisdictions, there seems to be no reason for it. . . . In whatever light they may have formerly been viewed, yet the country is now convinced that it derives considerable advantage from the exercise of the powers granted to the justices of the peace.[17]

Even so, into the nineteenth century the courts' attitude was still restrictive. In *Welch* v. *Nash*[18] in 1807, Lord Ellenborough stated:

> This is a question of jurisdiction. . . . Increasing the width of one old highway is neither diverting another old highway nor making a new one: and the justices cannot make facts by their determination in order to give to themselves jurisdiction, contrary to the truth of the case.[19]

In 1811 mandamus was used precisely as it would be used today. In *The King* v. *The Justices of Kent*[20] the justices were empowered by statute to fix the wages of labourers or workmen. They refused to fix rates for the journeymen millers of Kent, claiming they had no jurisdiction. Mandamus was sought and granted to force the justices to hear the application.

It is quite clear that even into the nineteenth century there was no attempt to apply any theory or view that tribunals should have the right to determine conclusively every fact which it was necessary for them to inquire into. The contrary was true. The Court of Kings Bench was only too willing to characterise a large area of facts as jurisdictional. Was this attitude completely reversed in the years 1819 to 1845 as Gordon suggests? Did any judge or group of judges consciously apply the so-called "pure" theory of jurisdiction?

At the most this period displayed a reaction from the previous extensive review of jurisdictional facts. A close examination of the cases demonstrates that the reaction was by no means widespread. It might fairly be said that this period was significant only for introduction of the principles that prevail today; that clear distinctions are to be drawn between jurisdictional facts, on the one hand, and facts left to the conclusive determination of the tribunal, on the other.

The case cited by D. M. Gordon as initiating a complete "hands-off" policy by Kings Bench is *Brittain* v. *Kinnaird*.[21] It is instructive to examine this case closely. The plaintiff had been convicted by magistrates on a charge that he had kept gunpowder on a boat on the Thames. As a result the plaintiff's boat was condemned and seized. The plaintiff instituted proceedings in trespass against the magistrates alleging that "boat" was a technical term and was a jurisdictional fact. As Richardson, J. put it:

> The fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. . . . If a fact decided as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction . . . surely if the magistrate acts bona fide and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if they were to have to defend themselves in a civil suit.[22]

The same reluctance to visit a magistrate with a trespass action where

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[17] *R.* v. *Thompson* (1787) 2 T.R. 18, 23; 100 E.R. 10, 13.

[18] (1807) 8 East. 394; 103 E.R. 394.

[19] *Id.* 402-3.

[20] *The King* v. *The Justices of Kent* (1811) 14 East. 395; 104 E.R. 653. See also the case where the justices did hear and mandamus was refused viz. *The King* v. *The Justices of Cumberland* (1813) 1 M. & S. 187; 105 E.R. 71.

[21] (1819) 1 Brod. & B. 432; 129 E.R. 789.

[22] *Id.* at 793.

he had heard a criminal charge, was evident in *Mills* v. *Collett*.[23] Tindal, C.J. said:

> This is an action in which a magistrate is charged with trespass and false imprisonment for committing the plaintiff to prison for trial, and the only question is whether the magistrate had jurisdiction to investigate and commit . . . it would be most dangerous if he were holden to be liable in such a case.[24]

This judicial attitude reached its highest point in *R.* v. *Bolton*[25] and *R.* v. *Buckingham Justices*.[26] In both cases Lord Denman delivered the leading judgment. In *R.* v. *Bolton* Lord Denman concluded:

> The inquiry before us must be limited to this, whether the magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true . . . we must not constitute ourselves into a Court of Appeal where the statute does not make us such.[27]

Common sense, if nothing else, would suggest that these decisions were correct. What was basically at issue in all of them was whether or not the magistrates were to have some power of decision or whether they were to be treated as powerless puppets, incapable of deciding anything. The cases involved criminal charges. There can be little doubt that a magistrate exercising jurisdiction over summary offences would today be treated in exactly the same way. He has to try a specific offence and his decision should be regarded as binding, subject to any provision for statutory appeal.

Whatever implications might be drawn from this group of cases it is impossible to agree with D. M. Gordon that they decisively establish any "pure" theory of jurisdiction applicable to all situations. Even during this period of time which D. M. Gordon relies upon so heavily, decisions were reached which clearly showed that the concept of jurisdictional error was still very much alive. At no point were the cases of *Brittain* v. *Kinnaird*, *Cave* v. *Mountain*[28] or *R.* v. *Bolton* relied upon as providing a blanket negation of any jurisdictional fact investigation.

In *Weaver* v. *Price*[29] the question whether land was in a particular parish was held to be a jurisdictional fact, so that a wrong decision rendered the levying of a poor rate void. Similarly the issue of whether a person was an occupier of land was held to be a jurisdictional fact in *Bristol* v. *Waite*.[30] The court was content to follow a similar decision in *Milward* v. *Caffin*,[31] decided in 1779.

It is submitted that at no time, even between 1819 and 1845, did the courts follow any "pure" theory of jurisdiction. What this period did do was to force a recognition that besides jurisdictional facts there were others to be left entirely to the determination of the tribunal.

It is interesting to note that D. M. Gordon[32] relies rather hopefully on the case of *Tithe Redemption Commission* v. *Gwynne*[33] as evidencing a disposition in the courts to adopt the "pure" theory of jurisdiction. Reference was made in this case to the 1853 case of *Bunbury* v. *Fuller*[34] in which

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[23] (1829) 6 Bing. 85; 130 E.R. 1212.
[24] *Id.* at 1214-15. See similarly Tindal, C.J. in *Cave* v. *Mountain* (1840) 1 Man. & G. 257; 133 E.R. 330.
[25] (1841) 1 Q.B. 66; 113 E.R. 1054.
[26] (1843) 3 Q.B. 800.
[27] *R.* v. *Bolton op. cit.* n. 25 at 1058.
[28] (1840) 1 Man. & G. 257; 133 E.R. 330.
[29] (1832) 3 B. & Ad. 409; 110 E.R. 147.
[30] (1834) 1 Ad. & El. 264; 110 E.R. 207.
[31] (1779) 2 W. Bl. 1330; 96 E.R. 779.
[32] D. M. Gordon, "Tithe Redemption Commission v. Gwynne" (1944) 60 *L.Q.R.* 250.
[33] (1943) K.B. 756.
[34] (1853) 9 Ex. 111.

Coleridge, J. formulated a classic description of jurisdictional facts as those being collateral to the merits of the case; the merits, of course, being the facts left to the determination of the tribunal. Gordon claimed that none of the court (that is, in the *Tithe Commission* v. *Gwynne*) criticized Coleridge, J.'s views in *Bunbury* v. *Fuller*. Scott, L.J. simply held them inapplicable and Mackinnon, L.J. made no comment on them; Goddard, L.J. even tried Gordon concluded: to justify them.

> The conclusion was unquestionably sound, but the reasoning was open to the criticism that it tacitly assumed that a "collateral" finding . . . would have been void for untruth.[35]

That this was precisely the case was shown by Goddard, L.J.'s later views in *R.* v. *Blackpool Rent Tribunal ex p. Ashton*[36] and *R.* v. *City of London Rent Tribunal ex p. Honig*.[37] In the later case Goddard, L.J. stated:

> I am of the opinion that the tribunal had power to inquire into the collateral fact, namely, whether there was a contract, because it was only if there was a contract that they could exercise the jurisdiction which the Act of Parliament has given them. Having decided that, it is open to the person who complains of that decision to ask this court to inquire into it by means of certiorari.[38]

This opinion appears to destroy D. M. Gordon's reliance on *Tithe Redemption Commission* v. *Gwynne*.

The Theoretical Basis

It is perhaps significant that theoretical criticism of the courts' attitude to jurisdictional error is based almost wholly upon the narrow area of criminal proceedings.[39] Whatever may have been the eighteenth century attitude, no superior court since the early nineteenth century[40] would disagree with D. M. Gordon when he says:

> . . . every tribunal with power to investigate an alleged offence is quite within its jurisdiction in finding the accused guilty, however complete his innocence.[41]

But it is not necessarily useful to extend this narrow approach in criminal proceedings into the whole area of administrative law. It is argued that since it is necessary for any tribunal, whatever its nature, to inquire into the existence or non-existence of all the facts pertaining to its jurisdiction, whether they are collateral or part of the merits, and to give a decision, then that decision must be binding as to all these facts.[42]

It may be true, that of necessity, the tribunal must have jurisdiction to enter into an inquiry as to the existence or absence of all the facts. But it by no means follows that every such decision should be binding. The superior courts have indeed adopted such a view with respect to their own powers but there is no law of logic which requires every decision or opinion of any body to be binding.

The powers must surely be regarded as subject to some limitation. If D. M. Gordon's views are carried to their inevitable conclusion, they would permit a tribunal to call a spade anything but a spade and to have that

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[35] D. M. Gordon, "Tithe Redemption Commission v. Gwynne" *op. cit.* n. 32 at 252.
[36] (1948) 1 All E.R. 900.
[37] (1951) 1 All E.R. 195.
[38] *Id.* at 197.
[39] See Gordon, "The Relation of Facts to Jurisdiction" (1929) 45 *L.Q.R.* 459-64.
[40] See *Brittain* v. *Kinnaird* (1819) 1 Brod. & B. 432; 129 E.R. 789, related cases and discussion above.
[41] D. M. Gordon, "The Relations of Facts to Jurisdiction" *op. cit.* n. 39 at 462.
[42] *Id.* at 466-68.

decision regarded as conclusive. Cases less extreme than this would certainly offend the sensitivities of the courts. Control of some type must be exercised. How else can it be done than by reference to the factors prescribed in the statute establishing the tribunal? Full appeals on law and fact, or even on matters of law, would defeat the goal of expert and relatively speedy decisions by the tribunals. To require "substantial evidence" to support all fact-findings by the tribunal would require far greater utilization of the "substantial evidence" concept in Australian administrative law. As Professor Schwartz has shown, this form of review has dangers of its own.[43]

The strongest evidence of the determination of the courts to exercise supervision over inferior administrative bodies can be seen in their attitude towards privative clauses, that is, clauses in statutes seeking to prohibit any review of the tribunal's decisions. A typical approach is that of Latham, C.J. and Dixon, J. in *The King* v. *Commonwealth Rent Controller*:[44]

> If a legislature gives certain powers and certain powers only to an authority, which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all persons, and in respect of all subject matters, and without observance of any conditions which the legislature has attached to the exercise of the powers.[45]

In reviewing a decision of the Crown Employees' Appeal Board of New South Wales, Street, C.J. made clear the policy considerations which inevitably underlie decisions in this area of the law:

> It would be an extraordinary interpretation to put upon the section that the Board was to have unfettered and unchallenged power to define the extent of its own jurisdiction, and to give any decision or embark upon any proceeding without any liability to correction. It is unlikely that the legislature would have conferred upon this tribunal, two of whose members might have no knowledge of law whatever, the right to determine questions of law and by such determination to extend indefinitely the limits of the Board's jurisdiction.[46]

D. M. Gordon claims that "the impure theory results in making findings retriable only so far as they are unessential findings".[47] The claim that only "unessential" facts are inquired into by the superior courts may be very much doubted. It is debateable whether, in 1861, the existence of land as "abbey lands" was an unessential fact determining a body's jurisdiction to levy a rate.[48] It would be extremely difficult to argue that the fact of "dismissal", which was inquired into and found absent in *Ex p. Wurth re Tully*[49] was unessential. The term is purely a relative one and of little value.

The superior courts are accused by D. M. Gordon, of usurping powers:

> . . . The rules that to examine findings of fact involves exercising appellate powers and that no court has appellate powers except by express statute are rules that the Kings Bench imposed on itself centuries ago. For the past century, though not consistently, the same court and its successor have been trying to justify an exception to those rules.[50]

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[43] B. Schwartz, "An Introduction to American Administrative Law" (2 ed. 1962) 215-17.

[44] (1947) 75 C.L.R. 361.

[45] *Id.* at 369.

[46] *Ex. p. Wurth re Tully* (1954) 55 S.R. (N.S.W.) 47.

[47] D. M. Gordon, in his review of de Smith's "Judicial Review of Administrative Action" (1960) 76 *L.Q.R.* 306, 311.

[48] *Pedley* v. *Davis* (1861) 10 C.B. (N.S.) 492; 142 E.R. 544.

[49] (1954) 55 S.R. (N.S.W.) 47.

[50] D. M. Gordon, review of de Smith's "Judicial Review of Administrative Action" (1960) 76 *L.Q.R.* 306, 312.

This accusation ignores one simple fact. The initial law regarding jurisdictional error and much of the subsequent law was built around the prerogative writs of certiorari, prohibition and mandamus. The history of the concept of jurisdictional error embodied in the writs is too old to substantiate an alleged usurpation of power.

WHAT ARE JURISDICTIONAL FACTS?

If it be accepted that both historically and analytically a sound case can be made for retention of the doctrine of jurisdictional error, a problem still remains. How do we distinguish jurisdictional facts from non-jurisdictional facts? One thing at least is certain. For the last hundred years all the courts have employed much the same terminology to differentiate between the two groups of facts. Jurisdictional facts are preliminary or collateral facts. They are collateral to "the merits"—"the merits", as explained earlier, being the area left for conclusive determination by the tribunal.[51] But the question remains—how in any given case can a decision be reached as to what is jurisdictional or collateral, on the one hand, and "the merits" on the other?

It has been explained that the early nineteenth century saw a reaction against the earlier attitude of extensive control. But while the later nineteenth century introduced the more rational approach of deciding what were jurisdictional facts by an examination of the statutes, the early cases of the period reflects an extraordinary profusion of differing decisions which defy any clear explanation. Examination of a number of cases suggests that some type of judicial intuition was at work. Precedents were sometimes followed; at other times they were ignored.

Some indications of judicial predictability can be discovered. Thus in *Mills* v. *Collett*[52] in 1829, *Marshall* v. *Pitman*[53] in 1833 and *Cave* v. *Mountain*[54] in 1840, Tindal, C.J. refused to investigate the presence of any challenged facts. Erle, J. in *Pedley* v. *Davis*,[55] *R.* v. *Badgee*,[56] *R.* v. *Nunnelly*[57] and *Re Bailey*,[58] consistently examined challenged facts on the ground that they were jurisdictional. In *The Queen* v. *Brown and Ors.*,[59] Erle, J. was a member of the court which granted mandamus against justices on the ground that they had wrongly declined to exercise jurisdiction. In his judgment Erle, J. stated, "The case seems to me much like what we had in *Regina* v. *Dayman*."[60] This statement brought a judicial rebuke from Crompton, J. In *Regina* v. *Dayman*, mandamus had been refused, Erle, J. being the sole dissentient!

Although it is possible and, having regard to the statement of Richardson, J. in *Brittain* v. *Kinnaird*,[61] probable, that the courts were reluctant to find jurisdictional errors to base actions in trespass against the magistrates, the later cases establish no clear principle. There were successful trespass actions as there were unsuccessful ones.[62] The same applied to replevin[63] actions and

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[51] See, e.g., *Bunbury* v. *Fuller* (1853) 9 Ex. 111, 140; *R.* v. *Lincolnshire, JJ. ex p. Brett* (1926) 2 K.B. 192, 202.
[52] (1829) 6 Bing 85; 130 E.R. 1212.
[53] (1833) 9 Bing 595; 131 E.R. 737.
[54] (1840) 133 E.R. 330.
[55] (1861) 10 C.B. (N.S.) 492; 142 E.R. 544.
[56] (1856) 6 El. & Bl. 137; 119 E.R. 816.
[57] (1858) El. Bl. & El. 852; 120 E.R. 728.
[58] (1854) 3 El. & Bl. 607; 118 E.R. 1269.
[59] (1857) 7 El. & Bl. 757; 119 E.R. 1427.
[60] (1857) 7 El. & Bl. 672; 119 E.R. 1395.
[61] (1819) 1 Brod. & B. 432, 442; 129 E.R. 789, 793.
[62] For successful trespass actions see *Weaver* v. *Price* (1832) 3 B. & Ad. 409; 110 E.R. 147; *Pedley* v. *Davis* (1861) 10 C.B. (N.S.) 492; 142 E.R. 544. For unsuccessful ones see *Mould* v. *Williams* (1844) 5 Q.B. 469; 114 E.R. 1326; *Mills* v. *Collett* (1829) 6 Bing. 85; 130 E.R. 1212; *Ashcroft* v. *Bourne* (1832) 3 B. & Ad. 684; 110 E.R. 250.
[63] For successful replevin action see *Bristol* v. *Waite* (1834) 1 A. & E. 264; 110 E.R.

certiorari and prohibition decisions were numerous both ways.

As Professor Jaffe has pointed out,[64] the presence of a statutory right of appeal in a number of cases influenced the court to deny that a certain fact was jurisdictional. In *Ex p. Wake*,[65] Cave, J., in refusing to grant an order of certiorari where a landowner assessed for sewerage rates claimed he had no street frontage as required, expressly referred to the presence of an appeal granted by statute. However, the presence of an appeal provision in *Bristol* v. *Waite*[66] did not preclude certiorari issuing.

The fact that a criminal offence was involved was a strong factor in precluding review for jurisdictional error.

It is apparent that in the majority of the cases of this period no conscious attempt was made to characterise jurisdictional facts by careful reference to statutory provisions. Some of the factors which influenced the choice between jurisdictional and non-jurisdictional facts have been indicated.

It would be comforting to state that today the only basis of distinction between jurisdictional facts and other facts is ordinary statutory interpretation. While it is undoubtedly true that today there is almost constant recourse to statutory interpretation, the fact is that statutes do not simply mark off facts into one category or another. It is still necessary to go further. As de Smith points out, "No satisfactory test has ever been formulated for distinguishing matters which go to jurisdiction from matters which go to the merits."[67]

De Smith has attempted to offer a solution by classifying the various facts into categories.[68] Clearly some of his categories describe the concept of jurisdictional facts as understood in Australia. For example, his second category of "findings which bear upon the territorial competence of the tribunal or the value of the subject-matter"[69] as being jurisdictional would fit the example given at the beginning of this paper exactly. On the other hand, there is conflict in Australia on another of his categories, viz.:

> Findings on procedural questions which have arisen before a hearing (for example whether parties have received notice or summons, whether a time limit within which proceedings must be instituted has been exceeded). . . .[70]

In *Posner* v. *Collector for Inter-State Destitute Persons*[71] an order was made by a Western Australian Magistrate's court without service of the summons on Posner. He sought to have the order of a Victorian court enforcing this W.A. order set aside. His application was refused by the High Court, Dixon, J. saying, *inter alia*:

> . . . the tendency is rather to sustain the authority of orders until they are set aside and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as ineffectual, if the directions of the statute have not been pursued with exactness.[72]

But contrast this decision with the unreported decision of the New South Wales Full Court in *Ex p. Carey re Powell*.[73] In that case a magistrate acting under provisions of the Landlord and Tenant (Amendment) Act, made an

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1207. For unsuccessful see *Marshall* v. *Pitman* 9 Bing. 595, 131 E.R. 737 and *Allen* v. *Sharp* (1848) 2 Ex. 352; 154 E.R. 529.

[64] L. L. Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70 *Harvard L.R.* 953, 961.

[65] (1883) 11 Q.B.D. 291, 297.

[66] (1834) 1 A. & E. 264; 110 E.R. 1207.

[67] S. A. de Smith, *Judicial Review of Administrative Action* (1959) 69.

[68] *Id.* 70-71.

[69] *Id.* at 70.

[70] *Ibid.*

[71] 74 C.L.R. 461. See also *Parisienne Basket Shoes* & *Whyte* (1938) 59 C.L.R. 369.

[72] (1946) 74 C.L.R. 461, 483.

[73] Unreported 10th August, 1954.

order fixing the rent of premises, although the owner, who was also the lessor of the premises, had not been given any notification of the hearing. Section 19(1) required that the applicant must give notice to the lessor (or lessee) of the premises in question. The Full Court said, *inter alia*, ". . . on the evidence before us, the owner was never served, had no notice of these proceedings, was not present, and an order was made without any jurisdiction."

As Jordan, C.J. said in *Ex parte Redgrave; re Bennett*:[74] It is not possible to devise a test which will supply a ready and easy solution for any and every case in which the question may be raised. The answer depends in every case upon the intention of the statute by which the jurisdiction is conferred and this must be gathered by a consideration of its language and the scope of the jurisdiction which it confers, the nature of the fact and its relation to the matter to be determined.[75]

Needless to say, a court can split on the interpretation of the same statute. For example, in *Ex parte Moss; re Board of Fire Commissioners of N.S.W. and Ors.*,[76] mandamus was sought by Moss against the Crown Employees Appeal Board. The Board refused to hear a complaint by Moss challenging the promotion of another officer on an allegation that he (Moss) was next in seniority. The majority (Owen and Macfarlan, JJ.) refused mandamus on the ground that Moss, having failed an examination, was not next in line of seniority, and therefore the Crown Employees Appeal Board had been correct in declining to hear the case. Implicit in this decision was the reasoning that if Moss had been next in seniority the Board would have wrongfully declined jurisdiction. Kinsella, J. held to the contrary that in any case, by an examination of all the statutory provisions relating to the Board, it had full power to determine its own jurisdiction, that is that the fact of Moss' seniority was a question as to "the merits" of the case.

It may be difficult to find the intention of the legislature by statutory interpretation when the guidelines of statutory enactment are withdrawn. This happened in *Permanent Trustee Company of N.S.W.* v. *The Council of the Municipality of Campbelltown*.[77] A municipal council served a notice under s.224(3)(a) of the Local Government Act (N.S.W.), 1919, of intention to take over a strip of land on the footing that it was a road left in a subdivision of private lands and it was doubtful whether it was a public road. The owner appealed to a district court judge as provided by s.224(3)(c) and he dismissed the appeal. The owner then obtained an order nisi for prohibition to restrain further proceedings upon the judgment of the district court judge and certiorari to quash the proceedings before him. McTiernan, Kitto, Menzies and Windeyer, JJ. refused the writs on the grounds that the evidence showed a road had been left in a subdivision of private lands and a doubt did exist as to whether or not it was a public road.[78]

Fullager, J., with only the bare statutory provision allowing an "appeal" to guide him, gave a judgment which would have drawn an approving nod from Richardson, J.:

What, then, has the judge to decide? Surely the very thing which he has to decide is whether the three conditions of the exercise of the

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[74] (1945) 46 S.R. (N.S.W.) 122. See also Jordan, C.J. in *Ex p. Muller re Hood* (1935) 35 S.R. (N.S.W.) 289, 300.

[75] (1945) 46 S.R. (N.S.W.) 122, 125.

[76] (1961) 61 S.R. (N.S.W.) 597. See also on an entirely different statute, the split in *Posner* v. *Collector for Inter-State Destitute Persons* (1946) 74 C.L.R. 461.

[77] (1960) 34 A.L.J.R. 255.

[78] What, one wonders, would McTiernan, Kitto and Windeyer, JJ. have done had they decided differently?

> council's power are fulfilled. . . . Their existence is not a collateral matter which the judge cannot finally determine: it is the very matter which he is given jurisdiction finally to determine.[79]

CONCLUSION

It is much harder to answer the second question posed at the outset than it is to answer the first. All that can be done in trying to distinguish what are jurisdictional facts from what are not is to point to the various factors and influences at work over the decades. In truth, we must agree with Jordan, C.J. that "it is not possible to devise a test which will supply a ready and easy solution".[80]

But why should the answer be any different? Jurisdictional error is only one aspect of administrative law. In determining the legal relations of the citizen vis-a-vis the organs of the State policy and flexibility are essential. Public law is not a suitable area for a rigid application of precedents, even if that were possible. If limits must be placed on the activities of all the various administrative bodies, then the concept of jurisdictional error by its very flexibility is as good a way to do it as any.

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[79] *Op. cit.* n. 77 at 256.
[80] *Ex parte Redgrave; re Bennett* (1945) 46 S.R. (N.S.W.) 122, 125.
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