ERROR OF LAW ON THE FACE OF AN ADMINISTRATIVE RECORD.

In *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw*[1] (herein called *Shaw*), the Court of Appeal (Singleton, Denning and Morris L.JJ.), confirming a Divisional Court (Goddard L.C.J., Hilberry and Parker JJ.), held that on motion equivalent to the common law writ of certiorari the decision of an administrative tribunal which was not a court of record could be quashed for error of law appearing on the face of its record-equivalent; all six judges agreed with the decision, which has also been accepted, with criticisms in detail, by three learned commentators.[2] In arriving at this decision, the Divisional Court as well as the Court of Appeal felt free to overrule a very recent decision of a strong Court of Appeal (Greene M.R., MacKinnon and Goddard L.JJ.), namely, *Racecourse Betting Control Board v. Secretary for Air*,[3] where Lord Greene said of the doctrine now supported, "No authority was quoted in support of this proposition, and, in my opinion, it is wrong in principle."[4] It has been suggested that the view on certiorari expressed in the *Betting Control Board Case* was obiter, since the application was conceived as a motion to control arbitrators,[5] but this seems an unduly technical view; the Court of Appeal had ample power to treat the motion as one for certiorari, and there is no reason to doubt that it would have taken this course if it had thought that the error of the tribunal in question could be so corrected. Hence the decision in *Shaw* can be treated as substantially overruling a decision of the Court of Appeal squarely in point. In terms of authority, the Divisional Court and the Court of Appeal relied on dicta of the House of Lords in *Overseers of Walsall v. London & North Western Railway Co.*[6] and of the Privy Council in *R. v. Nat Bell Liquors*.[7] These cases both concerned inferior courts in a strict sense, and courts of record, and

1 [1951] 1 K.B. 711 (Div. Ct.), [1952] 1 K.B. 338 (C.A.).

2 S.A. de Smith, *Certiorari and Speaking Orders*, (1951) 14 MOD. L. REV. 207-210, (1952) 15 MOD. L. REV. 217-219; D. M. Gordon, *Quashing on Certiorari for Error in Law*, (1951) 67 L.Q. REV. 452-456; Ross Anderson, *Certiorari to Quash Decisions for Errors not going to Jurisdiction*, (1951) 1 QUEENSLAND L.J. (3) 50-52, (1952) 2 QUEENSLAND L.J. 63-64.

3 [1944] Ch. 114.

4 *Ibid.*, at 120.

5 De Smith in 14 MOD. L. REV. 207-210, anticipating Denning L.J. in [1952] 1 K.B. 338, at 351.

6 (1874) 4 A.C. 30.

7 [1922] 2 A.C. 128. The "Nat" is not short for "National" as Mr. D. M. Gordon seemed to think in 67 L.Q. REV. 452.

The first shock one gets, on looking for the earlier authorities which the dicta of Scrutton and Denning L.JJ. would lead one to expect, is the discovery that the use of certiorari as a method of controlling inferior jurisdictions seems to have been entirely unknown between 1300 and 1640. There is no trace of certiorari to prevent inferior courts from exceeding their jurisdiction, leave alone to correct their errors of law, in any of the following reports of the Elizabethan and early Stuart periods, namely, Plowden, Moore, Croke, Coke, Rolle, and Bulstrode. In Coke's Fourth Institute, which gives a detailed account of the organisation of the courts in his day, including a description of the principal methods by which decisions might be challenged, directly or collaterally, there is no mention of certiorari for such purposes.[16] The Abridgements of Brooke (1586) and Fitzherbert (1565) and the latter's New Natura Brevium (1588) are likewise silent.[17] The reference to certiorari in these authorities would lead one to believe that the writ was used solely for administrative purposes, to procure the moving of a record from a tribunal or from the custody of an administrative officer either directly into the King's Bench, or else into Chancery and then if necessary by *mittimus* into the Common Pleas or the Exchequer, for some purpose *controlled by a proceeding other than the certiorari.* For example, a writ of error or of habeas corpus would often be accompanied by a writ of certiorari, if the inferior tribunal lacked the machinery for supplying a satisfactory exemplification of its proceedings;[18] if an inferior tribunal could not provide execution of its judgments, then by certiorari the record could be removed into a superior court so that the latter's execution might issue;[19] if the process of an inferior court was liable to be tolled by failure of service, or by demise of the Crown, then the proceedings could be continued by removal on certiorari;[20] if a fair trial could not be had in the inferior court, the indictment, etc., might be removed elsewhere.[21]

This writer's research went no further back than the Year Books of Edward II,[22] which produced a like result. But the research was

16 In dealing with the King's Bench he mentions prohibition to keep other courts within jurisdiction, but not certiorari: 4 INST. *71.

17 Fitzherbert has no title "Certiorari," but analogous cases occur under "Certification."

18 Cro. Jac. 445, 538, 79 E.R. 381, 461; Cro. Car. 175, 79 E.R. 753; March N.R. No. 232, 82 E.R. 459; Style 98, 82 E.R. 560; 2 CROMPTON'S PRACTICE 329 (1786).

19 2 INST. *23; Style 9, 82 E.R. 489.

20 Y.B. 49 Hen. VI, 47 SELDEN SOCIETY 119.

21 Chedley's Case, (1633) Cro. Car. 331, 79 E.R. 890.

22 Published by the Selden Society for the period 1307-1319.

carried further back by his learned friend Mr. J. A. Iliffe, of the Law School of the University of Tasmania, to whom is due the following information. The characteristic feature of the Latin form of the writ was the phrase *quibusdam certis de causis certiorari volumus,* and in this form the writ can be found in use in the time of Edward I, when the jurisdiction of King's Bench possessed a width and a flexibility which was doubtless due to the frequent presence of the king in person on the Bench. During that period, the plea rolls show many examples of what we would call both control of jurisdiction and review of questions of law carried out in association with the writ of certiorari.[23] This occurred before English law had passed completely under the tyranny of the formulary system; hence it is not easy to assert with confidence that the King's Bench exercised a supervisory and appellate control *by virtue of the writ,* and it may be that these early examples rather illustrate the general and undefined authority of a King's Bench which was still hardly distinct from the King's Council. These discoveries in the coram rege rolls of Edward I make even more remarkable the silence of the centuries until about 1630, during which the formulary system was in full sway and the writ of certiorari appears to have played a subordinate role.

The second shock which the history provides is that the case of *Commins v. Massam*[24] in 1643, in which Denning L.J. tells us will be found "the principles on which the Court acted in the case of the Commissioners of Sewers",[25] is actually an authority against the King's Bench presuming to interfere with the Commissioners on certiorari at all. The case concerned the validity of an order of the Commissioners levying a drainage rate on the prosecutor; the Commissioners and the prosecutor wished to get a point of law in issue settled by the King's Bench, and they entered into a recognisance to give effect to the judgment of the Court: Mallet J. said that even by agreement certiorari would not issue; Bramston C.J. thought that the Court would not normally have power to interfere by certiorari, but that it could proceed upon the agreement of the parties; Heath J. alone took a broad view of the Court's powers, saying, " . . . if they proceed where they have no jurisdiction, or without commission, or contrary to their commission, or not by jury, then they are to be corrected here." The

23 57 SELDEN SOCIETY 41, 86, 123, 147, 161.

24 March N.R. 196 (No. 241), 82 E.R. 473. For the period, it is a clear and full report, which in itself suggests that the procedure was novel.

25 [1952] 1 K.B. 338, at 351. The Commissioners had by statute a mixed legislative, judicial, and administrative authority to provide for the drainage of fen lands. They had existed at least since Hen. VI, and probably earlier, and were a court of record.

difficulties of the Chief Justice and Mallet J. sound peculiar to modern ears; they arose from the fact that the Commissioners, under 23 Hen. VIII, c. 5, recorded their proceedings in English, and as Bramston C.J. said, " . . . we cannot determine any thing upon English proceedings." However, this technical difficulty may be re-expressed for our purposes as indicating a lack of desire to interfere with administrative jurisdictions which followed procedures and reasoning unfamiliar to the common law judges, and indeed Mallet J. almost said as much by drawing attention to the fact that the writ of certiorari concluded "quod faciamus quod *de jure et secundum legem*,[26] . . . fuerit faciendum." Even the proposition of Heath J., it will be noticed, asserts only the power to interfere on grounds of lack of jurisdiction or irregularity in procedure; this is confirmed by his view that certiorari should be available in order to save putting the parties to an action of trespass or replevin, which would have been available only if the decision were entirely void for jurisdictional or procedural error. Perhaps Denning L.J. was relying more upon the assertion of Bramston C.J. that certiorari had lain to the Commissioners of Sewers before the statute of 23 Hen. VIII; Bramston cited no such cases, the Abridgements disclose none, and in any event one would need to see whether such cases were examples of control of jurisdiction or fell within the administrative use of certiorari mentioned above.[27] One might infer from the reference of Denning L.J. to Callis on Sewers[28] that Callis's original Reading on the Statutes of Sewers (1623) dealt with control of the Commissioners by certiorari, but actually there is no such reference in the original text; control by certiorari is first mentioned by the 1685 editor of Callis, and the earliest case he cites is *Commins v. Massam*. Hence Callis rather confirms the view that the development of certiorari to control jurisdiction occurred after 1623.

Similarly, in *Ball v. Pattridge*,[29] the Court of King's Bench held that certiorari did not lie to Commissioners of Fens because they had a "new jurisdiction", excess of which could be tested only by a collateral action of trespass or replevin, in which their decision, if without

[26] i.e., according to *law*, meaning common law (writer's italics).

[27] It would seem more likely that, when the Commissioners kept Latin records, their decisions were corrected by writ of error, as suggested by CALLIS at 198.

[28] [1952] 1 K.B. 338, at 351, footnote 29. The fourth edition, to which Denning L.J. referred, is in the Victorian Supreme Court Library; all references here are to that edition.

[29] (1666) 1 Sid. 296, 82 E.R. 1116.

lawful authority, could be treated as void.[30] Thus a theory that decisions of inferior courts not proceeding in the course of the common law might be attacked only collaterally can be seen developing through the middle years of the 17th century. It could be put in the form of a dilemma: If the lower court had jurisdiction, the common law courts could not interfere because the lower court is not administering the system of the common law; whereas if the lower court had no jurisdiction, its decision was void, could not justify any consequential fines, imprisonments, etc., and provided nothing to quash.

Notwithstanding the theory just mentioned, there are many scattered references to the use of certiorari for the control of inferior jurisdictions, including the Commissioners of Sewers, between 1640 and 1666;[31] it is not easy to be certain whether in these cases, as in *Commins v. Massam,* the writ was obtained by agreement or not, and in all of them there is a strong flavour of jurisdictional objection; but it seems probable that to this period must be assigned the genesis of the modern law. One can only guess at the reasons for the development. Even in its administrative use, certiorari had been frequently associated with review procedures; for example, when it accompanied error and habeas corpus, or when on removal to procure execution of a judgment the King's Bench permitted exceptions to the judgment to be taken on scire facias before allowing execution to issue.[32] The statute 21 Jac. I, c. 8, was passed to prevent the obstruction of indictments by their removal from county general sessions on certiorari; such removal acted as a stay and put the prosecutor to the expense of pursuing the case in London or obtaining there a *procedendo* to enable the court of origin to proceed. The statute required only security for costs, but in working it out the courts showed a tendency to develop its "equity",[33] and this may have forced parties to give some colour to what was still a delaying device by alleging formal objections to the indictment sought to be removed. Finally, as mentioned later, the administration of the poor law invited central control, and the need increased after the disappearance of the conciliar jurisdictions in 1641. The first review of a bastardy order this writer has noticed is in 1648,[34] and of a settlement order in 1649.[35]

[30] To the like effect, Norfolk v. Newcastle, (1666) 1 Sid. 296, 82 E.R. 1116, concerning the Eyre of the Forest of Pickering.

[31] March N.R. No. 115, 82 E.R. 418; Style 14, 27, 33, 46, 60, 86, 192, 211, 82 E.R. 493, 503, 508, 518, 529, 551, 637, 653; 1 Sid. 222, 82 E.R. 1070.

[32] Style 9, 82 E.R. 489.

[33] (1641) March N.R. No. 118, 82 E.R. 419; cf. March N.R. No. 63, 82 E.R. 396.

[34] Style 14, 82 E.R. 493.

[35] Style 168, 82 E.R. 617.

The first case in which a confident statement that certiorari authorises extensive control of inferior jurisdictions appears to be *R. v. Plowright*[36] in 1685, but this case proves either too little or too much. Certiorari was obtained to review a decision of justices on the assessment of chimney money. It was objected that under 16 Car. II, c. 3, the decision of the justices was final, and that this was for the protection of poor men who might otherwise be harried through higher courts. The Court (Pemberton C.J., Jones, Dolben, and Raymond JJ.) referred to the frequency with which orders of justices in bastardy cases had been removed into the Bench, and said that unless certiorari is specifically abolished by statute,[37] it must be assumed that parliament intended it to be available; "therefore the meaning of the Act must be, that the determination of the justices of the peace shall be final in matters of *fact*[38] only; . . . but the right of the duty arising by virtue of this Act was never intended to be determined by them." In the *Ruislip Settlement Case*,[39] much relied upon in *Shaw* by both Courts, Rokeby J. went even further and said that decisions of justices might be examined in the King's Bench on the merits, meaning (it appears) on questions of fact as well as of law. These cases suggest a view, not subsequently upheld, that the King's Bench has a general supervisory authority over inferior tribunals on all questions of law and possibly of factual inference, or at least that it had such an authority over the summary jurisdiction of justices of the peace. The latter construction is very possible, since from 1648 onwards it is in relation to justices of the peace that cases on certiorari multiply rapidly; by far the commonest examples relate to bastardy and pauper settlement orders, and as Holdsworth shows it was in this area that control by the central courts was imperative, since local politics of a particularly unsavoury kind were apt to influence decisions of the country gentlemen on the commission of the peace.[40]

From the time of Holt C.J. onwards, cases are very numerous, and as D. M. Gordon points out,[41] at least the dicta in many of them

[36] 3 Mod. 94, 87 E.R. 60.

[37] A practice already frequent.

[38] Italics in the original.

[39] As reported in 1 Ld. Raym. 425, 91 E.R. 1182. The name is variously spelled in the reports, viz., Ryslip and Ricelip. In Shaw the reference was to 5 Mod. 417 (87 E.R. 739).

[40] 6 HOLDSWORTH, HISTORY OF ENGLISH LAW 351-352; 10, 258 et seq. The Ruislip Case is a good example; as Holt C.J. tartly observed (5 Mod. 418), the unfortunate pauper was being made a vagrant as well, by order of the justices who were shuttling him from parish to parish.

[41] 67 L.Q. REV. 452.

and probably some decisions as well justify the "error on the face of the record" rule. However, even through this period one cannot say dogmatically that the rule was beyond question clearly established in the wide form that would provide review of *all* questions of law appearing in the material which was either formally recorded or "specially stated." There are two considerations which make it necessary to read the cases with care. Firstly, there is always the possibility that, as in the foundation case of *Commins v. Massam,* the opinion of the King's Bench was sought by consent. This procedure, which justices of the peace freely used instead of consulting with the judges of Assize as required by their commissions, was referred to in the *Walsall Case,* and its history given at considerable length in *Reg. v. Chantrell.*[42] Indeed, there is some reason for thinking that the *Ruislip Settlement Case* which Goddard L.C.J.[43] and Denning L.J.[44] relied on in *Shaw* was itself an example of this procedure. Shower, moving the order to quash, said, "This matter comes here upon the whole for the opinion of the Court."[45] Holt C.J. said, " . . . the meaning here was, to have the judgment of the court upon the whole where the man was legally settled, and the design of this order was to lay all matters before us."[46] It is mentioned in *Chantrell's Case* that this practice was disapproved by Holt C.J. in 1699,[47] but it had certainly been used earlier without objection[48] and was resumed later as described in *Chantrell.*[49] The second point about these cases is that the overwhelming majority relate either to excess of jurisdiction in a narrow sense of "jurisdiction", or else to irregularities in procedure which, as D. M. Gordon sorrowfully observes,[50] English judges have often tended to equate with lack of jurisdiction. Of the eleven cases after *Plowright* from 1698 until 1892 which Mr. Gordon cites as illustrating the wider doctrine, all with the possible exception of *R. v. James*[51]

42 (1875) L.R. 10 Q.B. 587.
43 [1951] 1 K.B. 711, at 720.
44 [1952] 1 K.B. 338, at 349.
45 5 Mod. 416, at 417; 87 E.R. 739, at 740.
46 *Ibid.*, at 418.
47 In 2 Salk. 486, 91 E.R. 417.
48 For example, in (1696) 2 Salk. 475, 91 E.R. 408.
49 Perhaps in this procedure can be found the origin of the principle that an inferior court, while not bound to state reasons for decision, may have its decision quashed if it gives reasons and they are wrong — the theory of the "speaking order" expounded in the Walsall and Nat Bell Liquor cases. If the view of the dicta in the Ruislip case given above is correct, then the first statement of the "speaking order" principle is to be found not there but in R. v. Audly, (1701) 2 Salk. 526, 91 E.R. 448, though that also might have been a case "specially stated."
50 In 67 L.Q. Rev. 452, at 455.
51 (1814) 2 M. & S. 321, 105 E.R. 401.

(and *R. v. Glyde* noted to that decision) can be treated as relating to matters of form rather than of substance. The point is well illustrated by another decision on which much reliance was placed in *Shaw,* namely, *Groenwelt v. Burwell.*[52] Certiorari was sought to quash the imposition of a fine by the College of Physicians for malpractice in physic; the Physicians were a court of record since they had statutory power to fine. Certiorari was denied, and the proceedings on that part of the case are very scrappily reported. But the plaintiff then attacked the Physicians collaterally in an action for trespass, and on those proceedings, which are very fully reported, Holt C.J. and his brothers discussed at length the control of inferior courts of record. The function of certiorari was referred to in several passages of the trespass case, and according to some of the reports was stated in very general terms; but Leach's Report expresses the matter thus:[53] "We do take it, that where a Court in its nature is a Court of Record, a certiorari will lie to it, by reason of the great superiority of this Court; which may command them to send their proceedings before them up hither, that it may be seen whether they confine themselves to their jurisdiction; which if they exceed, this Court may correct them . . . *And the Court is to examine, as far as appears on record, that they have not exceeded their authority and if they have—, or not pursued the Act, to quash the proceeding.*"[54] This likewise seems to put the stress on irregularity of procedure rather than on error of law in general. Mr. S. A. de Smith has shown[55] that in some of the early examples of review of law cited in *Shaw,* the authority to do this was derived from statute. It is possible that the control over fines imposed by the Commissioners of Sewers, referred to by Denning L.J.,[56] was based on the reservation of those fines to the Crown in 25 Hen. VIII, c. 5;[57] the special responsibility of the King's Courts for the revenue was also mentioned in the *Chimney Money Case.*[58]

The above considerations considerably reduce one's surprise at the doctrine of error of law on the record having been so persistently

[52] (1698) 1 Salk. 145, 91 E.R. 134; Holt 184, 90 E.R. 1000; 1 Ld. Raym. 454, 91 E.R. 1202; 12 Mod. 386, 88 E.R. 1398.

[53] 12 Mod. 386, at 390; 88 E.R. 1398, at 1400.

[54] Writer's italics. The omission is occupied in the text by "not," an obvious slip.

[55] In 14 MOD. L. REV. 207.

[56] [1952] 1 K.B. 338, at 350.

[57] See the comment by Bramston C.J. in Commins v. Massam, March N.R. 196, at 202; the passage is ambiguous, but the punctuation given in 82 English Reports at 475 suggests that the power to modify fines was attributed to the statutes.

[58] 3 Mod. 94; 87 E.R. 60, *sub nom.* The King v. Plowright.

ignored, as far as administrative tribunals are concerned, after the scope of certiorari was extended to courts not of record. They also reduce one's puzzlement at the silences and the contradictions of the practice writers, referred to by Mr. Gordon. One would not expect a well defined doctrine of great age to have remained buried in the reports until the publication of the first edition of *Halsbury's Laws of England* in 1909, which Mr. Gordon gives as the first confident statement of the "true" doctrine. But if the history of certiorari on these matters is as modern and as confused as the above account suggests, then the situation becomes plainer. We have had a development of the law along familiar lines of advance and retreat, with explanation varying from a general politico-constitutional doctrine (the supreme function of the King's Courts) to nice points of wording in a writ (the precise phrases of the certiorari), finishing up with an application of this form of control to types of tribunal which on the original definition of the scope of the writ were quite beyond its provenance.

Viewed in this light, the decision in *Shaw* does mark a significant step in development, and not merely the self-evident application of a well-established rule. It would be convenient to be able to criticise that step wholly in terms of public policy, and the lines of such a criticism might run as follows. It is desirable in the contemporary collectivist and social service state that the discretionary functions of administrators should be subject to a reasonable degree of control by some central judicial authority, which can sustain traditions of scrupulously fair hearing and a more or less standardised technique of interpretation, and can relate administrative action to the general legal system. Since the English legal system lacks any other instrument for this purpose, the judges show a healthy sense of their responsibilities by developing appropriate controls on their own initiative. Such developments are likely to be more flexible, cautious, and organically sound than legislatively designed control systems. Against this: Administrative discretions have been designed inter alia to achieve speed, flexibility, and cheapness; all these will be endangered if judicial review is extended. Review confined to error on a pseudo-record will be limited and capricious in its operation. Administrators will often be tempted to keep as much out of the "record" as possible, and to refuse to give reasons for decision. At this date, a satisfactory system of control of administrative decisions can be carried out only by legislation, in which provision is made not only for appeals but also for the reorganisation of the administrative bodies giving initial decisions along the lines of the United States Administrative Procedure Act 1946.

Although some of these policy considerations were at least mentioned by both courts in *Shaw,* reasoning based on definitions and precedents was, in the English manner, given first place. Along this line, there is similarly a conflict of arguments. For the decision, it can be said simply that certiorari has for a long time been available to correct error of law on the face of a record at least to the extent pursued in this case, and that the extension of certiorari to courts not of record having already been carried out, the court must now seek the equivalent of a record in the lower tribunal and apply the established doctrine.[59] Against this, it can be said that previous failure to mention such a possibility in the cases dealing with administrative tribunals not of record was no oversight, but a logical development of the pre-existing position,[60] as follows. When certiorari was used only in relation to courts of record, it was well established doctrine that you could go outside the record, by means of affidavit evidence, only if you alleged failure of jurisdiction; otherwise you were confined to what the record disclosed. A tribunal not of record cannot in a technical sense possess a record; therefore its decisions can be attacked only by reference to material proved by affidavit evidence; applying the older doctrine, this can refer only to matters suggesting excess of jurisdiction. The analytical reasoning is therefore not conclusive.

A subsidiary question which gives constant difficulty in the handling of certiorari cases, and has some bearing on the policy problem, is the scope of the concept of "jurisdiction." In *Reg. v. Bolton,*[61] Lord Denman attempted to put this matter on a basis of pure logic: "The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable at the commencement, not at the conclusion, of the inquiry"; Mr. D. M. Gordon has in many articles attempted to restrict the concept of jurisdiction to a similar "rational" basis.[62] But the common law judges have never accepted so restricted a concept, and it is plain enough that the question is at bottom one of policy, not of logic. Jurisdiction falls to be defined here in order to delimit the function of superior courts

[59] The question — what documents constitute the record? — was discussed by Denning L.J. in Shaw, [1952] 1 K.B. 338, at 352, 354, and by Mr. Anderson in (1951) 1 QUEENSLAND L.J. (3) at 51. It is suggested with respect that Denning L.J. was over-optimistic in his view that the initiating document, the "pleadings" and the adjudication, would have disclosed the error in Shaw; that could appear only from reasons for decision or evidence.

[60] It is not suggested that any court actually so reasoned.

[61] (1841) 1 Q.B. 66, 113 E.R. 1054.

[62] *The Relation of Facts to Jurisdiction,* (1929) 45 L.Q. REV. 459; *The Observance of Law as a Condition of Jurisdiction,* (1931) 47 L.Q. REV. 386, 557; and his notes mentioned *supra.*

when controlling inferior courts; in its broadest statement, keeping the inferior tribunal within its "jurisdiction" may be equated with compelling the inferior tribunal to observe "the law", i.e., what the superior tribunal considers the law to be. The objection to so wide a concept is not logical, but practical; it is usually desired, for reasons of expediency, to give the inferior decision some degree of finality, or, as is often said, some jurisdiction to go wrong. But it is almost never the case that the sovereign power is content to define only the *nature of the dispute* which the tribunal is to decide—the threshold question. It usually requires also that the tribunal should be restricted to solutions arrived at within a certain range, by reference to certain standards of judgment, or for certain purposes. The limits of the control to be exercised can vary in many ways, and whether you choose to describe the types of limitation separately or include them all within the term "jurisdiction" is a semantic, not a logical, problem. It would be a help if we could abandon the disputed term "jurisdiction" and speak instead of "authority to decide." The inveterate tendency of the common law judges is to use "jurisdiction" in a broad sense, as is well illustrated by the classic judgment of Lord Sumner in *R. v. Nat Bell Liquors;* he begins the relevant part of the opinion by asserting that the function of certiorari is to keep the lower court within jurisdiction,[63] and concludes by saying:[64] "Supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise." It does not appear that he considered the latter any less a matter of "jurisdiction" than the former.[65] Along these lines, jurisdictional control has come to include fair hearing, acting on relevant considerations and pursuing authorised purposes, and these matters are tested not on the whimsical basis of what reaches a record, but on the full facts, shown by affidavit. This may be as ample a control as is consistent with other purposes of administrative decision.

In this writer's view, the tendency of *Shaw* is on the whole unfortunate, and effective control of administrative discretion now requires legislative action.[66] It is true that none of the major political

[63] [1922] 2 A.C. 128, at 154-155, having just cited the passage from Reg. v. Bolton above.

[64] *Ibid.*, at 156.

[65] It becomes important to consider sub-types of jurisdictional control when applying statutory provisions which take away certiorari. Lord Denman's conception may then be adopted; see per Latham C.J. in Boulus v. Broken Hill Theatres Pty. Ltd., (1949) 78 Commonwealth L.R. 177, at 192.

[66] Perhaps Singleton L.J. felt likewise in Shaw, where he suggested legislative provision for appeal on points of law ([1952] 1 K.B. 338, at 346).

parties show great interest in the matter. The socialist parties have a naive belief in vesting unnecessarily large discretions in the Executive, particularly in Ministers, and a traditional distrust of control devices suggested by lawyers. The anti-socialist parties are lukewarm about making collectivism work better, since in principle they are committed to restricting it, if not destroying it. In such circumstances, the courts can hardly be blamed for wanting to remedy the situation themselves. But there seems little likelihood of administrative officials gladly co-operating in this effort, and to the extent that they resist the courts the ultimate situation is likely to be worse; yet the attempt of the courts may be taken by the politicians as further evidence that they need not intervene. At this writing, *Shaw* does not seem to have been directly applied in any of the common law jurisdictions,[67] but it is as yet too early to draw any conclusions from this; perhaps the administrators have been lying low, or perhaps they have been behaving in an examplary fashion, or perhaps litigants have not had a sufficient monetary inducement to follow the procedure in *Shaw*—which, it must be remembered, was the very model of that sort of hard cases that tend to create new law.

GEOFFREY SAWER.*

[67] One might have expected the doctrine to have been mentioned in the opinion of the Privy Council in Seereelall Jhuggroo v. Central Arbitration and Control Board, [1953] A.C. 151, where certiorari was sought to correct an alleged error in assessment by an administrative board. Shaw was cited; nevertheless their Lordships said (at 161), "the question is not . . . whether the board was wrong in the exercise of its discretion, *nor even whether it misconstrued the words of the Ordinance*" (writer's italics) "but whether it took into consideration matters outside the ambit of its jurisdiction . . ." Probably no error appeared on the "record," but the point is not mentioned in the opinion.

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AN HISTORICAL ADDENDUM.

This note is concerned with the earlier history of certiorari only and is mainly directed to the prevention of too hasty assumptions that there is no direct, discernible link between certiorari as used in *Shaw* and its use in the creative period of English law. For this reason I do not think that it is quite enough to say[1] that combined research so far undertaken in this paper "goes back to" Edward I. For my own part, I have done no more than look at the basic equipment of research, as it were, and have not consulted the black-letter editions nor even the Rolls series. Again, the most careful examination would be incomplete if it lacked acquaintance with the confines of the Public Record Office. In this respect I feel sure that the use of certiorari cannot have been entirely abandoned during the years 1300 to 1600 as a means of controlling courts of inferior jurisdiction and have been relegated to the position of assistant to other writs. I am fortified in this view by Jenks's treatment of *habeas corpus cum causa* as "a mere adjunct to two important writs Original, the writ of Certiorari and the writ of Privilege" in the fifteenth century.[2] Again there is the view of Putnam in *Proceedings before Justices of the Peace, Edward III to Richard III*,[3] where she treats certiorari as serving "much the same purpose as the writ of error." It must also be remembered that both Putnam's work and volume 57 of the Selden Society contain only selected cases.

Such reflections as these incline me to the view that Professor Sawer himself may be under "the tyranny of the formulary system."[4] As was implied by Lord Goddard in *Shaw*,[5] the writ of error replaced certiorari in dealing with courts of record, and the assumption in Professor Sawer's paper that certiorari is a novelty in the field of "error" implies that the writ of error was the tyrant in such a field and that any other writ would have been improper. My own view of the prerogative writs—a view strengthened by the epithet 'prerogative'—is that there is nothing astonishing in a particular example of their use being allowed to fall dormant though never into obsolescense by non-use. It is not therefore until the late Tudor period that such a use needed revival—if indeed this is the correct word to use.

1 See p. 27, *supra*.
2 Edward Jenks, *The Story of Habeas Corpus*, (1902) 18 L.Q. Rev. 64 at 69.
3 Published by The Ames Foundation (1938); see lxiv, lxxii, 57, 99-100.
4 See p. 27, *supra*.
5 [1951] 1 K.B. 711, at 715.

Furthermore, the acknowledgment of the king's presence in proceedings coram rege temp. Edward I, and indeed the frequency of "Teste me ipso" on the writs so far discovered, seem to me to point direct, *non obstante* the Judicature Act, to the present status of the Queen's Bench Division on its "crown side." In conclusion, therefore, I feel that the exercise of extreme caution is necessary before concluding that certiorari necessarily played a subordinate role until 1600.[6]

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[6] See, for example, Brook's New Cases 31, 73 E.R. 860; is this to be read as making certiorari of *subsidiary* importance or merely as an explanation of the correct machinery involved in its use? See also Prine v. Allington, (1602) Moore K.B. 677, 72 E.R. 833, for a note on the distinction between acts judicial and ministerial and the liability of justices of the peace for acts done after receipt of a certiorari.

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