CERTIORARI: ERRORS OF LAW ON THE FACE OF THE RECORD

> The laws for thy great grandsire made
> Are laws to thee—must be obeyed—
> Must be obeyed, and why? Because,
> Bad though they be, they are the laws;
> But of the rights by nature taught,
> And born with man, they take no thought.
>
> (*Faust, Part One. Translated by Dr John Anster and published in* 1835. *Anster was a barrister at Dublin, where afterwards he became Regius Professor of Civil Law*).

The remedy of certiorari is employed to quash the judicial decisions of tribunals and courts, usually in cases where no right of appeal is available. It is a discretionary remedy derived from the inherent jurisdiction of the Court of King's Bench over inferior tribunals exercised by means of the prerogative writs. Briefly, the cases in which a decision can be questioned on certiorari fall into the following classes: Firstly, where the lower tribunal had no jurisdiction to make it. Secondly, where in giving it, the tribunal acted in excess of jurisdiction. Thirdly, where the decision was obtained by fraud or by perjury of one of the parties. Finally, where the decision involves an error of law apparent upon the face of the record.

The present study concerns only the last of these grounds. Long supposed dormant, the remedy of certiorari for error of law appearing upon the face of the record has recently been revived as the occasion for considerable judicial controversy. In particular, the cases of *R. v. Northumberland Compensation Tribunal ex parte Shaw*[1] in 1950, and *Baldwin and Francis v. Patents Appeal Tribunal*[2] in 1959 have left the law concerning the remedy in a state of considerable doubt. Accordingly, the controversy concerning the use of certiorari for error has been reviewed in the light of these cases.[3]

Much of this study is an examination of the cases in order to discover viable lines of authoritative decision. The main division of this article is that between the questions: what is an error? and, what is a record? The simplicity of this division is, however, obscured by a third element of the problem: when can an error be said to

[1] [1951] 1 K.B. 711.
[2] [1959] A.C. 663.
[3] At the time of this article going to press, the High Court of Australia is addressing its mind to some of the problems outlined in this article. It is to be hoped that some of the confusion and obscurity in this area of law will be removed by the judgment of the Court.

appear upon the record? A sample problem of the type envisaged could be stated in the following way:

> M, whose professional practice depends upon the possession of a licence to practise, is deprived of his licence by a tribunal statutorily constituted to police the profession. By statute the tribunal is compelled to look to factors A. B and C before coming to the decision to withdraw a practitioner's licence, but they need only present, as the written record of their adjudication, the bare decision made to deprive the practitioner of his licence. However, in the present case, they prepare a fuller record than that required by statute stating that, in consideration of factors A and B, they have decided to withdraw M's licence. An examination of the various documents before the tribunal showed that they had not in fact adverted to factor C.

If we ignore the availability of a writ of mandamus, or certiorari for lack or excess of jurisdiction, the availability of certiorari to quash for an error of law appearing upon the face of the record would depend upon the answers to be given to the following questions. Where the tribunal has omitted a relevant consideration from their written record, does such an omission amount to an error? Can one conclude, in a case where the tribunal was not compelled to give a full record of its deliberations, that the factors appearing in the record were the only ones to which the tribunal adverted in coming to its decision? Assuming that there is an error of law on the record, in what sense can one say that the error *appears* on the record? Should one not be able to conclude from the written record that an error was made; when, if ever, can one look to the materials which the court considered in coming to its decision?

It is to these inquiries in particular that attention has been directed.

AN INQUIRY AS TO WHAT CONSTITUTES AN ERROR OF LAW

Seriousness of the Error:

Though it is simple enough to say that where an error of law appears upon the face of the record certiorari is available, there is considerable obscurity surrounding the question of what constitutes an error of law. As the remedy is discretionary, the court is at liberty to hold that though there has been an error, it is not an error of *sufficient magnitude* to justify the writ. So, in the result, Lord Denning was able to side with the majority opinion in *Baldwin and Francis*[4] holding that, though the error of law did appear upon the face of the record, it was not an error which would warrant the remedy of certiorari.[5]

[4] [1959] A.C. 663.

[5] *Ibid.* 696; and see *R. v. Industrial Appeals Court Ex parte Henry Berry* [1955] V.L.R. 156.

This discretion is mentioned as a matter to be borne in mind in assessing the suitability of certiorari for error as a remedy in a particular case, though it will not be further examined.

Can a Wrong Finding of Facts Amount to an Error of Law?

There seems no compelling reason why an incorrect finding of facts cannot constitute an error of law sufficient for the purpose of the writ. The case law on the point is somewhat confused and there is a series of cases which appear to deny that a mistake of fact is good reason for the granting of certiorari. These cases are concerned to leave 'fact finding' as the unique preserve of the court or tribunal charged with determining the issue, in much the same way as superior courts shrink from interfering with the findings of a jury. Though commendable in itself, this theory has given rise to the extreme opinion which would transform a reluctance to interfere with the determination of the inferior tribunal to a prohibition against exercising the supervisory jurisdiction over its 'fact finding' activities at all. It is submitted that an approach similar to the one employed by a superior court in reviewing a jury finding would approximate to the true criterion for determining when a mistaken finding of fact may be termed an error of law.[6]

This approach was adopted by Lord Kenyon C.J. in *R. v. John Smith*.[7] Here, the accused had been convicted of selling bread within twenty-four hours of its baking. It was argued that no evidence appeared upon the record of any selling, though delivery to another was established. This was held to be a valid objection. Lord Kenyon was at pains to explain the matter as follows:

> If indeed there had been any evidence whatever (however slight) to establish this point, and the magistrate who convicted the defendant had drawn this conclusion from that evidence, we would not have examined the propriety of his conclusion.[8]

Clearly, the test employed is whether there is *any evidence at all* upon which the reasonable magistrate would have to come to the conclusion reached in the case under review. If there is not, then the mistaken finding of fact will amount to an error of law sufficient to support the writ. Moreover, the rule has been enunciated in several of the modern cases on certiorari. In *R. v. Nat Bell*

[6] The case of *Edwards (Inspector of Taxes) v. Bairstow* [1956] A.C. 14 is of some assistance on the point. The House of Lords held in result that a serious mistake in interpreting the facts of a case could be interfered with by a superior court as an error of law. In that case the question decided was whether certain transactions were classifiable as *'an adventure in the nature of trade'*. Viscount Simonds seems to give as his reasons two possible explanations, the first being that 'the commission acted without any evidence. (p. 29). . .', and the second being that 'an inference, though regarded as a mere inference of fact, yet can be challenged as a matter of law'. (p. 32). [7] 8 T.R. 588; 101 E.R. 1561. [8] *Ibid.* 590; *Ibid.* 1562.

Liquors[9] one of the grounds of the application for the writ was that there was no evidence at all upon the charge of selling liquor in a manner contravening the Act. The Privy Council, which reversed the decision of the Canadian Supreme Court allowing the issue of certiorari, admitted that certiorari would go for a mistaken finding of fact. To support the writ it would be required that no evidence at all was given on the essential issue.[10] But, had any evidence at all been led upon that point, then its weight was a matter entirely for the inferior tribunal. A similar approach was manifest in *R. v. Patents Appeal Tribunal ex parte Swift*[11] where a mistaken finding of fact was stated to amount to an error of law.

So far as the prerogative writs are concerned, Victorian authority seems to be silent upon the point, though the matter was raised in *In re Matthew Keogh*[12] which concerned an application for the issue of the writ of habeas corpus. The application sought to test the legality of a conviction for 'having come to Victoria within three years of expiry of sentence for a transportable offence in New South Wales'. The applicant argued that, as no evidence had been given that the offence had been a transportable one, the magistrates were wrong in deciding that it was such an offence and accordingly, that the conviction was improper. The whole matter was sent down for retrial and in strict theory the case is not authoritative, but Higinbotham C.J. seemed inclined to the view that if no such evidence had in fact been brought, then the application was good.[13] He was adamant that no complaint based upon the weight of evidence would succeed.

Can a Wrong Finding of Facts Amount to a Failure to Acquire Jurisdiction?

Keogh's case[14] serves also as an introduction to those cases which have tended to obscure the rule enunciated above. In these cases, the tribunal generally is of limited jurisdiction and may only convict, or act, upon the finding that certain facts exist. In the absence of such jurisdictional facts the body is powerless to act, and if it purports to act in such circumstances certiorari will issue for lack of jurisdiction. So, in *Keogh's* case the magistrates could convict the accused only if the prerequisite facts were fulfilled.

It is argued, with some force, that it would be intolerable to allow the inferior tribunal the final right to decide when it had jurisdiction, and when not; and that any decision which it makes as to the existence of facts which give it jurisdiction is subject to the scrutiny of certiorari for lack of jurisdiction. The problem which then arises

[9] [1922] 2 A.C. 128. [10] *Ibid.* 149. [11] [1962] 1 All E.R. 610.
[12] 15 V.L.R. 395. [13] *Ibid.* 399-400. [14] *Ibid.*

lies in the necessity of distinguishing the tribunal's 'ordinary' fact-finding activities from its findings of 'jurisdictional' facts. Inquiry may be legitimate in those cases where a tribunal having a limited sphere of activity either seeks, or unconsciously acts, in such a way as to increase its jurisdiction. But there can be no argument that a tribunal is acting outside jurisdiction *simply because* it makes a mistake. A tribunal has, at least in some areas of its inquiry, a 'jurisdiction to make mistakes'. Allowing this, it seems that with regard to some findings of fact, complaint may be sustained to the effect that the tribunal was acting outside of jurisdiction. Nor, in such cases, could a finding of fact be made so as to give it jurisdiction. In this area, the case of *R. v. Chandler*[15] is illuminating. Chandler was prosecuted as the operator of an illicit still and it was found by the justices that the offence was within their jurisdiction, the record stating that the defendant's house was within their area. The applicant argued that this finding did not necessarily imply that the still, situated in the garden adjoining the house, was within the area over which the justices had jurisdiction and the conviction was accordingly quashed. As all evidence was made a part of the record of convictions, the Court might have proceeded upon the ground that there was no evidence at all to support the finding of jurisdiction—the case is not specific on the point. The Court refused to substitute itself for the inferior tribunal in order to make any decision as to the weight of such putative evidence. The alternative ground of the decision to quash is significant within the context of the present inquiry: in the absence of jurisdiction over the area, the justices were powerless to act *vis a vis* the accused and they could not, on any view of the evidence, declare themselves to have jurisdiction by making an incorrect finding of fact.

The implications of this, and similar cases, are interesting. One difference, advantageous to the applicant, between certiorari for error and certiorari for lack of jurisdiction lies in the availability of affidavit evidence in order to show that the inferior tribunal has acted without jurisdiction. However, as 'jurisdiction' will depend upon a finding of jurisdictional facts the court of review admitting affidavit evidence will be put to the necessity of evaluating the findings of the inferior tribunal. Does this not amount to an interference with the fact-finding monopoly of the inferior tribunal? Is it not a rehearing—something which certiorari was not intended to be? The problem was pursued in several of the 'vagrant'[16] cases—where the parish justices would find that the vagrant had come

[15] 14 East 267; 104 E.R. 603.

[16] For example, *R. v. Inhabitants of Rislip* 5 Mod. 417; 91 E.R. 1162. The case is replied upon by Lord Denning, but it explains little, and needs a good deal more explaining than he gives.

from a certain parish and, accordingly, would return him whence he came. But, suppose their finding was mistaken? Would they not then lack jurisdiction over the vagrant? These cases are curious in their language and often inconclusive, no decision being given. Intrinsically bound up in these cases is the issue of estoppel and its availability against third parties. However, the general tenor of such decisions as there are indicate a certain reluctance of the court of review to investigate the jurisdictional issue which seems to be involved.

The case of *R. v. Bolton*[17] needs to be examined, for much of what has been said of the inability of prerogative writs to operate upon mistaken findings of fact has sprung from *dicta* in this case. Lord Denman C.J. made a statement of law which, if not always observed by succeeding courts, has been recognized as authoritative. He was at pains to delineate the powers of the superior tribunal '. . . all we can do is to see that the case was within their jurisdiction, and that their proceedings on the face of them are regular. . . .'[18] He differentiated between the two heads of certiorari for error, and certiorari for lack of jurisdiction allowing the propriety of affidavit evidence to show lack of jurisdiction. 'Any further inquiry as to the findings of facts would be wrong', for the '. . . magistrates alone have the responsibility of finding the relevant facts'.[19] The finding of the magistrates in the instant case was not disturbed.

The essence of *Bolton's* case lies in the fact that, though the finding by the magistrates may well have been unreasonable, the Court would not inquire into this matter of a certiorari for error: to do so would be to act as a court of appeal. So long as the magistrates dealt with an issue over which they had jurisdiction, their findings could not be questioned by affidavit.[20] Simple though this summary may appear at first glance, it presupposes that one can easily separate jurisdictional facts from facts in issue. But, if such a classification is based on a real distinction where does one draw the line? In many cases the clear words of the Act authorizing the tribunal may settle the distinction—a court of Petty Sessions may decide upon a number of specified matters, but may not adjudicate upon a charge of murder. In such cases of an explicit limitation there is little difficulty to be encountered in deciding that a tribunal has, or has not, jurisdiction. But in most cases there is no clear line to be drawn between facts necessary in order to found a particular conclusion, and those facts which give a tribunal jurisdiction. Especially this is so with regard to specialized tribunals as for example, the Patents Appeal Tribunals, which have

[17] [1841] 1 Q.B. 66; 113 E.R. 1054. [18] *Ibid.* 72. [19] *Ibid.* 74.
[20] See also [1922] 2 A.C. 128, 158 for a similar statement by the Privy Council.

a limited area of operation. Certain facts must exist before the tribunal has jurisdiction to make its ruling. If they do not exist, and the tribunal finds that the facts do exist, then on one view it has made a mistaken finding of fact. Provided there is *some evidence* upon which the tribunal could decide as it did, then its finding ought not to be interfered with. However, on another view, it is arguable that the tribunal has acted outside its jurisdiction and this may be shown by proving that the facts 'found' by the tribunal were wrongly found. Viewed in this light, it would seem that the court of review would be entitled to interfere with the inferior tribunal's *findings, even to the extent of holding that the weight of the evidence was against such a finding.*

When Does a Mistaken Finding of Fact Appear Upon the Face of the Record?

For the remedy of certiorari for error to be available, the 'error' must appear upon the face of the record: how does this affect the applicant where the claim is that the error is in a mistaken finding of fact? We may leave aside those cases where the mistake was in respect of a jurisdictional fact and affidavit evidence is available.

In the first place, it is possible that the applicant will be quite without remedy: in *R. v. Bainaby*[21] the Court of King's Bench refused to interfere with a finding of fact as to the title to a grove of lime trees because the applicant could point to no erroneous finding of fact upon the face of the record. What the limits imposed by the phrase 'face of the record' are, will be examined later; for the moment it is enough to state that, in the majority of cases, it is not likely to appear from the face of the record that there was no evidence adduced upon the finding alleged to be in error, or that there was no evidence upon which a reasonable tribunal could have decided as it did. Indeed, if the opinion of Lord Reid in *Baldwin and Francis v. Patents Appeal Tribunal*[22] is to be accepted, it is only where the tribunal was under an obligation to record all of the evidence that the absence of such evidence would afford reason for holding the finding of fact to be in error.

The applicant will, in consequence, be placed in the situation where he must either show that the mistaken finding of facts went to jurisdiction, or forego his remedy by certiorari altogether. It is submitted that in those circumstances where no clear distinction exists between jurisdictional facts, and facts in issue, this is reprehensible. There is much to be said for the approach which would obliterate this valueless distinction in this area by an allowance

[21] 1 Salk 181. [22] [1959] A.C. 663, 685.

of affidavit evidence in order to show not only a 'lack' but also an 'excess' of jurisdiction.

When Can a Mistake in the Court's Reasoning Amount to an Error of Law?

In approaching this aspect of the question, there are two problems which block the way to a clear perception of the use of the writ. As in the previous types of error discussed, the first problem concerns omissions from the face of the record and may best be illustrated by the case of *Baldwin and Francis v. Patents Appeal Tribunal.*[23]

Here, the appellants had been granted the patent for an electrical apparatus which was described under four headings, A, B, C and heading D. A second company applied for a patent of another, similar apparatus and the appellants claimed that this product infringed their patent and that the second patent ought only to be granted subject to the possibility of such an infringement. An examiner, at first instance, found in favour of the appellants, his conclusion being that the proposed product would infringe the patent of the appellant's product under heading D. The company then appealed to the respondent Tribunal, which overruled the finding of the examiner, issuing the patent without the limitation claimed by the appellants. The Tribunal delivered a reasoned judgment setting out its grounds for concluding that the proposed product did not infringe the appellant's patent under heading B. No mention was made of any argument, or conclusion as to an infringement under heading D.

Appellants then sought a writ of certiorari to quash for error. They argued that, as the record did not contain the reasoning necessary to conclude that there was no infringement under heading D, this amounted to an error of law appearing on the face of the record. Some reasons, it was argued, must be given in order to support the decision. It was not contended that the reasons for holding that it did not infringe the patent under heading B were erroneous. The House of Lords upheld the decision of the Court of Appeal, that certiorari for error was not available. Lord Morton held that even where such an omission could be construed as an error, in the present case it did not appear upon the face of the record.[24] Lord Reid considered that an omission of reasons, or even a complete absence of reasons, would only amount to an error,[25] if there had been an obligation to set out all the reasons. Lords Somervell and Tucker contented themselves with holding that, on the face of the documents before the Court, there was no error.[26] Lord Denning attacked the problem from a different point of view. He argued that, in the

[23] *Ibid.* 685. [24] *Ibid.* 683. [25] *Ibid.* 685. [26] *Ibid.* 686.

case where the tribunal gives one reason for its decision, there is a presumption that there was no better reason present to the mind of the tribunal which it chose to leave unstated.[27] In the instant case, the reasons given, relative to heading B, were irrelevant to the consideration of heading D, and erroneous when so considered, and accordingly, amounted to an error appearing upon the face of the record. Alternatively, he argued that, in the case where a tribunal either left out a vital consideration, or decided the question on irrelevant considerations, this would amount to an error of law.[28] On the documents before the Court, he was prepared to hold that it was 'a legitimate inference . . . that the tribunal failed to take into consideration alternative D, which was a vital matter for consideration'.[29] However, in the event, Lord Denning held that despite the error appearing upon the face of the record, nonetheless upon discretionary grounds, the remedy ought not to be available.[30]

Baldwin and Francis does little to answer the problem of error by omission of reasons: but, if the availability of certiorari for error is doubtful in this area, a more beneficial approach may be possible where the tribunal involved is one having a limited statutory jurisdiction for a particular purpose. Here, the problem is, of its nature, bound up with questions of jurisdiction and should it appear that the reasons given by the tribunal are not in answer to the question with regard to which it has jurisdiction, it is arguable that the tribunal in such case was acting ultra vires. Accordingly, the decision could be quashed by a writ of *certiorari for lack of jurisdiction,* evidence being available to show such a lack.

The danger resident in the present situation, where the one remedy is of little value as the error may not 'appear' on the record, and where the other may not be available if the strict view propounded in *R. v. Bolton*[31] is taken, is that an applicant may be left in a state of complete uncertainty as to his prospects. The availability of the writ may depend entirely upon the extent to which the court is prepared to take a liberal view of the law. This is apparent from the case, decided in the Court of Appeal, of *Davis v. Price*[32]—a case under the Agricultural Holdings Act.[33] The applicant sought certiorari for both error of law, and for lack of jurisdiction. The Tribunal's decision had merely stated that the tenant was an inefficient farmer and it was not apparent, from the record of their decision, that the landlord was a better, or more efficient, farmer. However, the Court refused to infer from the record that the Tribunal had omitted to consider 'any declared purpose of the landlord'.[34] Nor

[27] *Ibid.* 692. [28] *Ibid.* 693. [29] *Ibid.* 695. [30] *Ibid.* 696.
[31] [1841] 1 Q.B. 66; 113 E.R. 1054. [32] [1958] 1 W.L.R. 434.
[33] Agricultural Holdings Act 1948. [34] [1958] 1 W.L.R. 434, 440.

would it allow a supplementing of the record by a statement of case, which document tended to support the inference which the Court refused to make.[35] Accordingly, there could be no grant of certiorari for error of law—the error not appearing upon the face of the record.

In considering the availability of certiorari for lack of jurisdiction, the Court of Appeal took an illiberal view of the authorities, holding that the Tribunal

> clearly had jurisdiction to decide whether to give or withdraw consent, and if they misconstrued the statute, or acted on no evidence, they merely erred in law, and unless that error is manifest on the face of the award. . . .

then certiorari is not available on either ground.[36] It seems difficult to distinguish this case from that of *Ex parte Grant*.[37]

Without much adverting to the theoretical basis of a distinction between error of law and of jurisdiction, the case seems to advance the viewpoint that there is not such an area of common availability. The whole question is bedevilled with the further distinction between proceedings without jurisdiction, which are *void,* and decisions within jurisdiction but in which some error not amounting to a jurisdictional defect is present. The latter are *voidable* only.[38] If this latter distinction may in some cases be of importance, it is yet apparent that it is little regarded in recent case law in this particular area of law.

There seems to be little Australian authority on the question, but the *obiter dictum* of Dixon J. (as he then was) in *Parisienne Basket Shoes v. Whyte*[39] is of some relevance.

> [It] is one thing to quash a conviction or an order for an error on its face, and another to hold that the court or magistrate usurped jurisdiction in making it.[40]

It is plain from the *dictum* that the two are quite different heads of objection; is it quite so plain that there may not be a set of circumstances qualifying for the remedy under either head?

Leaving this vexed question of the distinction between the two grounds for which certiorari may be granted, there are some cases which do give a measure of support to Lord Denning's contention that, where a tribunal gives written reasons in support of its decision, it gives its best and only reasons and the court, in reviewing a

[35] *Ibid.* [36] *Ibid.* 441.

[37] [1956] 1 W.L.R. 1240, and see also *Ex parte Hopkins* [1957] S.R. (N.S.W.) 554, *Board of Education v. Rice* [1911] A.C. 181.

[38] A brief treatment of the controversy over the void/voidable distinction in relation to natural justice can be found in Benjafield and Whitmore, 'The House of Lords and Natural Justice', 37 *Australian Law Journal* 140, 146.

[39] 59 C.L.R. 369. [40] *Ibid.* 392.

decision of an inferior tribunal, ought not to infer that there were better reasons left unstated.

In *R. v. Inhabitants of Auldy*,[41] certiorari was granted by the Court of Sessions to quash a rate imposed by the justices. The inhabitants of Auldy had objected to the rate because it was called a 'parish levy' on the record and not a 'poor rate'. In arriving at their decision the justices had omitted to take into account the fact that, as it stood, the order could be used to authorize expenditure upon the church, as well as the poor. The justices' jurisdiction only extended to the making of orders concerning the 'poor rate'. It was stated by the Court that:

> . . . though the justices at sessions do not give a reason for their order, yet if they give a reason which is wrong, we must be guided by it, and quash the order because it appears to us to be no reason.[42]

There is no element here of the courts refusing to quash the decision because, the recording of the reasons not being required by the statute, there might be better reasons for the decision left unstated. It would seem analogy enough for a conclusion that where *some* reasons appear and those reasons are unobjectionable in themselves but insufficient to support the conclusion reached, then this will amount to an error of law apparent on the face of the record.

This and other cases are not of great authority. It has never been clear that the courts were prepared to construe omissions as errors, and one might be pardoned for wondering why the House of Lords in *Baldwin and Francis*[43] devoted its great authority to a further confusion of the law.

For the purpose of analysis, omission is better considered as an error and the inquiry directed to whether or not it is an error which appears upon the record. In many cases the tribunal is not bound to give its reasons at all, and its decision will be unimpeachable, however incorrect its reasoning, if it stays within its jurisdiction and does not commit its faulty reasons to its written record. What logical difference does it make where some, but not all of its reasons are embodied in the record? We are faced with the two situations: where some of those reasons which are committed to the record are incorrect; where they are indifferent to, or merely insufficient to support the conclusion.

The courts will not imply that there were better reasons, when those which were stated on the record are bad.[44] In any event, the confusion between errors of law and lack, or excess, of jurisdiction is in many cases an easy way out of the legal difficulties involved for

[41] 2 Salk. 526. [42] *Ibid.* See also 6 East 415; 102 E.R. 1346.
[43] [1959] A.C. 663. [44] *E.g. R. v. Auldy* 2 Salk. 526.

a party aggrieved by an adverse finding. Though at first sight the nature of the complaint would seem to lie in the fact that the tribunal had made an error of law, the remedy may be readily available under the other heads.

Where Reasons are Required to be Given by Statute and Some Reasons are Omitted:

In *Baldwin and Francis* all of the Law Lords were inclined to the view that where reasons must be given, or considerations adverted to, and the tribunal fails, either to give such reasons, or advert to such considerations, then it is acting in a way which will render its decision liable to be quashed.[45]

There would seem to be at least two ways of approaching this problem; which is taken will always depend upon which is the most beneficial to the complaining party.

First, the complaint is that reasons have not been given, that they ought to have been given, and in consequence, that the tribunal was acting *ultra vires* in making the decision at all. This is a complaint against an exercise of the tribunal's jurisdiction, or more accurately, a serious defect in its proceedings. Accordingly, it would seem that application could be made for mandamus to compel the tribunal to hear the matter again, should that be desirable. Again, the mandamus might go to compel the tribunal to state its reasons.

But secondly, it is arguable that the omission of reasons would amount to an error of law apparent upon the face of the record. For it has never been doubted that the empowering statute may be looked at in order to determine whether or not the record is in error. This is one case where the 'error by omission' would appear on the face of the record.

The same type of considerations would be applicable in those cases in which a part only of the reasoning necessary to support the decision was given in the record. It would however be less likely to be classified as a 'defect of jurisdiction' than in the case where no reasons at all were given.

Where Reasons Must be Given and the Reasons Which are Given are Wrong:

This type of error may be disposed of quite shortly. As in the preceding case there are two courses open to the complainant. If the error is one of sufficient magnitude certiorari for error would be available. Alternatively, it might be argued that wrong reasons are

[45] [1959] A.C. 663, 664.

equivalent to no reasons at all and the applicant might ask for mandamus, or for a prohibition as on a defect of jurisdiction.

Error of Fact:

As an appendix to the classification of errors, and before going on to consider the connotations of the term 'record' let us briefly consider the above heading, suggested some years ago by D. M. Gordon.[46] It is of interest as resolving some of the problems arising out of the distinctions between 'lack of jurisdiction', 'excess of jurisdiction' and 'error of law on the face of the record'. Little space is devoted to the heading because the authority supporting it seems to be negligible.

Errors of fact are to be distinguished from lack of jurisdiction as the former render the proceedings voidable only, whilst the latter vitiates them entirely. As examples of errors of fact, Gordon cites the following circumstances: where a defendant dies between summons and hearing, and the tribunal, in ignorance of his death, bring a summary conviction against him;[47] where a tribunal brought an adverse decision against a party and it appeared that the tribunal was biased;[48] where the defendant is an idiot;[49] where an attorney acts for an infant, not being authorized to do so.[50] The area covered by the heading is stated to be those cases where there is a failure of 'some condition of a regular trial which the Court presumes to have been duly carried out. . . .' However, a mere irregularity of procedure would not be sufficent.[51]

The existence of such an 'error of fact' would ground an application for a writ of certiorari and, as in the case of certiorari for a lack of jurisdiction, extrinsic evidence would be admissible to show the defect of proceedings.

The doctrine seems to have had no recent support, indeed it may have been rendered obsolete by the decay of the rigid classification into headings of 'lack', or 'excess' of jurisdiction and error of law which it was intended to rationalize.

THE MEANING OF THE WORD 'RECORD' IN CASES OF CERTIORARI FOR ERROR OF LAW.

The Problem Outlined: Both Blackstone and Coke essayed definitions of 'record'. It was:

> . . . a memoriall or remembrance in rolles of parchement of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law . . . which wee call Courts of Record and are created by Parliament, letters patent or

[46] XLII *Law Quarterly Review* 521.
[47] *Ibid.* [48] *Ibid.* [49] *Ibid.* [50] *Ibid.* [51] *Ibid.*

> prescription. . . . And the rolles, being the records or memorialls of the judges of the courts of record, import in them such incontrollable credit and veritie as they admit of no averment, plea, or proofe to the contrarie.[52]
>
> A Court of Record is that where the acts and judicial proceedings are enrolled in parchement for a perpetual memoriall and testimony: which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question.[53]

Whatever the merit of these two definitions, it is apparent that they offer little help in determining which documents may be categorized as the 'record' in applications for certiorari. Courts have commonly received documents additional to the formal record defined above upon a return to a writ of certiorari for error. Usually they have done so by arguing that the additional matter is analogous to, or incorporated in, the formal record. Nor are the courts limited to the passive role of adjudicating upon the admissibility of the document, or documents, returned with the writ. Lord Denning has asserted, with considerable authority, that the inherent supervisory jurisdiction of the Court of King's Bench extended to an order for the remedying of defective records, and the completion of incomplete records, returned with the writ.[54] Similarly, where the parties are in agreement, the record may be supplemented by affidavit evidence.

In order that record be quashed for error, that error must appear upon its face. Accordingly, there has arisen a deal of confusion, as a record, though consistent in its parts with no error appearing, may, on comparison with some extraneous document or information, appear to be erroneous in its presumptions or mode of reasoning. In the case of *Brittain v. Kinnaird,*[55] admittedly a case primarily on the problem of jurisdiction, the opening comments of Burrough J. are of relevance in considering certiorari for error of law:

> . . . where a magistrate has jurisdiction, a conviction having no defects on the face of it is conclusive evidence of the facts which it alleges.[56]

It is not enough that the record should be erroneous—it must appear *upon its face* to be erroneous. So far is this notion of 'incontrollable veritie' of the record carried, that it has been a subject for academic discussion whether the text of a statute, relevant to the original issue, is, or is not, a part of the 'record' of the original proceedings.[57]

[52] Co. Litt. vol. ii, L.3, C.7 S438 260 A.
[53] Blackstone's Commentaries. Vol. iii, p. 24.
[54] See Denning L.J. *Baldwin and Francis v. Patents Appeal Tribunal* [1959] A.C. 663, 688—*R. v. Northumberland Compensation Appeal Tribunal Ex parte Shaw* [1952] 1 K.B. 338, 352. [55] 129 E.R. 789. [56] *Ibid.* 793.
[57] 'Materials for Consideration in Certiorari' (1963), xv, *University of Toronto Law Journal,* 102 at 119.

WHAT CONSTITUTES THE FACE OF THE RECORD?

Recent Decisions: With the exception of the judgments of Lord Denning, to which we shall return later, recent cases afford little guidance as to the permissible contents of the record on a writ of certiorari for error. The leading case in the area, *R. v. Nat Bell Liquors,*[58] dealt with the situation where a general form of conviction had been created by statute and merely repeats the usual prohibitions upon affidavit evidence designed to supplement or to controvert the record.[59] But, if the prohibition upon affidavit evidence in cases of certiorari for error is now settled, the status of independent documents which may show the grounds of the decision, and hence the error, is less clear.[60] Especially in cases where a statutorily constituted tribunal is under no obligation to prepare a full written record, the question of the admissibility of extraneous documents will arise. By their refusal to commit themselves to a positive statement of when a document may be considered as a part of the record of a decision, the English courts have maintained the law in such a state of uncertainty as will allow of no statement of clear rules on the matter. A brief comparison of recent English pronouncements in cases where documents were stated to be not of the record, and of an English and a Victorian case where documents were admitted though not a part of the formal, or statutorily prescribed, record will indicate the lack of any settled principles or criteria in this area.

In *Davies v. Price*[61] it was argued, *inter alia,* that a statement of case, setting out arguments and facts proved before the agricultural executive committee, should be allowed in as a part of the record of proceedings ensuing before the Agricultural Lands Tribunal. The argument for the admission of the document seems to have been based upon a dictum of Lord Denning's in *Ex parte Shaw:*

> . . . the record must contain at least the document which initiates the proceedings, the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them.[62]

Employing what might be thought an unduly restrictive view of these words, Lord Parker C.J. stated in *dicta* that the document was neither a pleading nor a document initiating proceedings and so was not a part of the record. Sellers L.J. in a brief judgment, con-

[58] [1922] A.C. 128. [59] *Ibid.* 165.

[60] The confusion in this area is particularly well illustrated in the English cases: *R. v. Furnished Houses Rent Tribunal For Paddington and St. Marylebone Ex parte Kendall Hotels Ltd.* [1947] 1 All E.R. 448; *Davies v. Price and Others* [1958] 1 All E.R. 671; *R. v. Agricultural Land Tribunal for the South Eastern Area Ex Parte Bracey* 1960 2 All E.R. 518.

[61] [1958] 1 All E.R. 671. [62] [1952] 1 K.B. 338, 352.

curred; whilst Lord Evershed M.R. expressly refused to endorse Lord Denning's statement of the law holding that, as the statement of case would not in fact have shown the record to have been erroneous, there was no need to examine the argument that it constituted a part of the record. This latter approach is strikingly similar to that of the majority of the House of Lords in *Baldwin and Francis v. Patents Appeal Tribunal.*[63] Here, it was argued that the determination of the Tribunal, together with the preceding decision of the superintending examiner and the two relevant patent specifications could be looked at as comprising the face of the record upon which the error might appear. Examining the documents *de bene esse,* a majority of the Lords held that the error did not appear and accordingly declined to consider whether or not the extraneous documents formed a part of the 'record' of the Tribunal's decision for the purposes of the writ. Lords Somervell and Tucker expressed reservations concerning the *dictum* in *Ex parte Shaw;*[64] Lord Tucker going so far as to ask whether the 'record in relation to certiorari to quash for error on the face means anything more than the order of the decision as recorded',[65] a statement seeming to echo the definitions given by Coke and Blackstone.

In *Ex parte Gilmore*[66] it was conceded that an error appeared upon the face of the record, the argument proceeding upon the meaning to be given to section 36(3) of the National Insurance (Industrial Injuries) Act 1946 (U.K.). Though the record of the tribunal's findings did not itself suffice to show the error, it extracted from a specialist's report concerning the injuries suffered by the plaintiff. By their reference to this report, the tribunal were taken to have incorporated the whole of the report with the record of the decision and the error of law was thereby made manifest. 'Just as a pleading is taken to incorporate every document referred to in it, so also does an adjudication.'[67] Though a case of 'incorporation by reference' this case cannot be taken as strong authority in view of the concession which was made.

If Lord Denning's *dicta* have found little acceptance in the House of Lords, the Victorian Supreme Court, in a case preceding the decision in *Baldwin and Francis,*[68] have shown themselves more accommodating. In *R. v. Industrial Appeals Tribunal ex parte Henry Berry and Co. Aust. Ltd.*[69] it was argued, *inter alia,* that certain trust deeds, referred to in the decision, were to be incorporated as a part of the record of the Industrial Appeals Court on a return to a writ of certiorari for error. The deeds, which related to a

[63] [1959] A.C. 663. [64] See n. 12 *supra.*
[65] [1959] A.C. 663, 687. Note also the arguments on p. 672.
[66] *R. v. Medical Appeal Tribunal Ex parte Gilmore* 1957 1 Q.B. 574.
[67] *Ibid.* Lord Denning, 582. [68] [1959] A.C. 663. [69] [1955] V.L.R. 156.

superannuation scheme, formed the basis of the original applicant's plea for exemption from the requirement of providing long service leave. They were referred to in the certified record of proceedings and, in addition, the rules under the Labour and Industry Act 1958 (Vic.) required the deeds to be lodged with the court at the time of the application for exemption. This latter requirement was treated as relevant only insofar as it indicated that the documents were vital to the application. Hudson J. stated:

> I think it must be treated as basic to the application and for this reason and because of its incorporation by reference in the judgment of the court, I think the deed may also be referred to and examined as a part of the record of the court.[70]

The dictum of Lord Denning in *Ex parte Shaw* was accepted as being authoritative.[71]

Recent cases, it may be concluded, present little assistance and Lord Denning's argument in *Ex parte Shaw* has met with little whole-hearted acceptance. Whilst it would be foolish to suppose that this lack of acceptance reflects a doubt as to the historical veracity of his arguments and nothing more, it is necessary to examine the older authorities on the permissible contents of the record. Before commencing an examination of those cases in which it is doubtful whether or not extrinsic matters may be imported into consideration of what is constituted by the 'face of the record', there are some situations where a silent record may be made to 'speak'.

Supplementing the Record:

The basis of the exceptions which follow lies in either the consent of the parties, or the voluntary action of the tribunal. Firstly, the tribunal may, and not uncommonly does, prepare a fuller record of its deliberations than would be required under the statute regulating its procedure. In such a case, the tribunal has made its record open to the inspection of the superior tribunal. It is as if the tribunal had 'stated a case' for the opinion of the superior tribunal. However, in such a case it would seem not correct to speak of the record being 'supplemented'; the order is simply a 'speaking' order instead of a 'non-speaking' order.

Secondly, errors admitted openly in the face of the court may be corrected by certiorari in the same way as those apparent upon the face of the record. Thirdly, a non-speaking order may be converted to a speaking order by affidavits of the parties affected by the impugned decision below which would set out the inferior tribunal's reasons. The parties could, by agreeing on this course, obtain a ruling on the point of law involved.

[70] [1955] V.L.R. 156, 165. [71] *Ibid.* 164.

If the rationale of these cases lies in the agreement of parties, or the tribunal's willingness to put its decision in a reviewable form, then the anomalous nature of the case of *R. v. Chertsey Justices; Ex parte Franks*[72] becomes clear. In that case the only 'record' was the written imposition of the penalty. In fact, the imposition of the penalty contravened the terms of the statute, but, due to the form of the record, this error did not appear. Parker L.J. held that the *oral* imposition of the penalty which revealed the error, and not the written register of convictions which was clear, ought to be quashed. It might, by some stretch of the imagination, have been called a 'speaking order'—but there is no authority for holding an oral statement to constitute a record of proceedings and in any case, it is difficult to see how the quashing of the oral statement could affect the written register of convictions.

The Validity of the Appeal to Older Authority in Baldwin and Francis:

Since the greater part of the remainder of the inquiry into the contents of the record is to be concerned with an examination of the older cases on certiorari for error, some remarks on the difficulty of assessing these authorities may be of assistance.

(i) The courts have rarely, in the past, directed their minds to making the return to the writ itself a subject of inquiry. When they have done so, it has often been upon such technical grounds as non-agreement of the terms of the writ and return.[73]

(ii) In the case of convictions, the attitude of the court may well have differed according to whether the application to supplement the record was intended to uphold the conviction, from those where it was desired to quash it.[74] Further, it is to be noted that the authorities upon convictions are in general inimical to any supplementing of the record, owing to the particularly full record of conviction required prior to the Jervis legislation.

(iii) Where a special case was stated for the opinion of the court, additional documentary material was commonly laid before the court. Professor Sawer has pointed out that judgment in the cases

[72] [1961] 1 All E.R. 825.

[73] *R. v. Anon.* 91 E.R. 134. Note also *R. v. Levermore* 1 Salk 146, 91 E.R. 135 cited by Denning L.J. in *Ex parte Shaw*.

[74] Compare, *R. v. Liston* 101 E.R. 189, 5 T.R. 338 with the *dicta* by Holt C.J. in *R. v. Bainaby* 1 Salk 181, 91 E.R. 166 on the *Seint John* case. Though the majority of the Court in *R. v. Bainaby* refused to accept *Seint John* as being of authority, note that the *Seint John* case (*Gardener's* case) 5 Co p. 71, 77 E.R. 162 was accepted by the Court as being of authority in *Goldswain's* case in 2 Black 1207, 96 E.R. 711. The case also appears as '*Gardner's* case' in Cro. Eliz. 822. The ratio of the *Seint John* case is stated in the original report as follows: 'A conviction on a penal statute being removed by certiorari into the King's Bench, the defendant may plead against it specially'.

often cited as precedents in this area of the law, for example *The Ruislip Settlement* case,[75] may well have been sought by consent of parties.[76] Accordingly, dicta in such cases may be of little validity in those cases where the judgment of the superior court was not sought by consent, either as to the contents of the record, or as to the general availability of certiorari for error.[77]

(iv) Where the tribunal embodies its reasons in the record, though not bound to do so, they may be scrutinized for error.[78] Similarly, where the tribunal sent up documents additional to their actual determination with the presumed intention of 'stating a case', then such documents might have been deemed to form a part of the record in order that such a scrutiny might be made.[79] The criteria, in many of the older cases, seems rather to rest upon the actual or supposed intention of the tribunal whose proceedings are alleged to be in error, and that of the parties to those proceedings, than any element in the nature of the documents on the face of which the error is alleged to appear.

(v) Difficulty is caused by the confusion of cases of certiorari for error with those of certiorari for lack of jurisdiction. The distinction, adverted to earlier, has been constantly obscured by those cases which refer to 'excess of jurisdiction'. Often the problem seems to be that of the tribunal which is both in and out of its jurisdiction at one and the same time.

> No tribunal . . . has any jurisdiction to be influenced by extraneous considerations or to disregard vital matters. . . . But allowing that a tribunal which falls into an error of this particular kind does exceed its jurisdiction . . . nevertheless I am quite clear that at the same time it falls into an error of law too: for the simple reason that it has 'not determined according to law'.[80]

Even supposing that certiorari for error, and certiorari for a complete lack of jurisdiction of the sort contemplated in *Bolton's* case[81] could be maintained, together with the attendant distinction between void and voidable decisions, yet, in the present enquiry as to the nature of the record in proceedings for error, the area of common availability of certiorari for excess of jurisdiction and for mistake of law provides confusion enough. The all important difference between the remedies lies in the availability of extrinsic evidence in

[75] 87 E.R. 739.

[76] On the old procedure of obtaining an opinion of a higher court by consent, see *R. v. Chantrell* L.R.Q.B., vol. 10, p. 587.

[77] Professor Sawer in 3 *University of Western Australia Law Review*, p. 24.

[78] See for example *dicta* in *R. v. Nat Bell Liquors* [1922] A.C. 128 at 155.

[79] See as an example, *Kent v. Elstob* 3 East p. 18, 102 E.R. 502.

[80] *Baldwin and Francis v. Patents Appeal Tribunal* [1959] A.C. 663, 695.

[81] [1841] 1 Q.B. 66. Vol. 7 El. and Bl. 660, 119 E.R. 1390—*In the matter of W. C. Penney and the South Eastern Railway Co.* which followed *R. v. Bolton* illustrates the difficulty encountered in maintaining the distinction.

order to show 'excess', or 'want', or 'irregularity' of jurisdiction, as distinct from the confinement to the face of the record in certiorari for error. First, it is to be noted, that in such early cases as *R. v. Bainaby*,[82] no such distinction between 'error' and 'excess' was adverted to, and, secondly, in certain cases, the tendency seems to have been to allow in documents as a part of the record *in order that* the error might appear.[83] It seems apparent that the scope of certiorari for 'excess' is widening, whilst that of certiorari for error is becoming more limited. If this is so, then those 'hard' cases of certiorari for error in which the court strove to achieve a just result by straining legal principle may be poor authority today, when certiorari for excess is an available alternative.

In view of its mixed reception by the House of Lords in *Baldwin and Francis v. Patents Appeal Tribunal*,[84] the very vagueness of Lord Denning's statement of what constitutes the record of proceedings, instead of allowing scope for growth of the remedy, may be doing it a disservice.[85] Yet it is apparent that the authorities on which he relies afford little assistance in coming to any definite answer. Though it is proposed to examine his arguments in some detail it is to be expected that the distorting factors enumerated above may render the results of this examination even less conclusive than the comparative certainties of Lord Denning's judicial pronouncements.

The contentions which he advanced in *Baldwin and Francis* are as follows:

The remedy of certiorari for error was never confined to the formal record of proceedings, kept by a superior court of record (Blackstone's 'record'). Not only the record, but 'all things touching the same', in the words of the writ, must be returned.[86]

Where the Court of King's Bench issued a certiorari to Quarter Sessions the return was to include the original order of the justices, the order of sessions, and any other document recited or referred to in terms showing it to be the basis of the decision.[87]

The court would not compel the tribunal to give its reasons, but should they do so, then the reasons would be accounted a part of the record. Scrutiny of the reasons was in consequence not confined to the case where a special case was stated by the magistrates for the consideration of the court.[88]

The cases on convictions may be distinguished, since the form of

[82] Salk 181, 91 E.R. 166.

[83] See for example, *R. v. Uttoxeter* (*Inhabitants*) Cunn N. 28, 94 E.R. 1041—quoted by Lord Denning in *Baldwin and Francis etc.*, 689.

[84] [1959] A.C. 663.

[85] The policy question: whether or not the remedy *should* be extended is treated in the article by Professor Sawer mentioned above—pages 33ff.

[86] [1959] A.C. 663, 688. [87] *Ibid*, 688. [88] *Ibid*, 688.

the conviction was formerly required to contain the information, evidence and adjudication and, in consequence of its fullness, excluded consideration of any other document.[89]

One point may be noted here: the authorities cited by Lord Denning do, on the face of it, support his contention that the *orders* of justices ought to be returned together with the orders of sessions in order that they might appear intelligible. But the cases do not support the contention that, 'any other document which was recited or referred to by Quarter Sessions in terms which showed that it was the basis of the decision',[90] ought also to be considered a part of the record. The considerable importance of this rider is indicated by the Victorian case of *Ex parte Henry Berry*,[91] referred to earlier. Though a case, *R. v. Uttoxeter*,[92] is quoted, it appears not to be authority for the contention. The issue, in that case, was as to whether a rate set by parish officers and later appealed from to Quarter Sessions, ought to be removed together with the order of sessions as a part of the record. At first, the Chief Justice, Probyn J., and Page J. considered that the rate ought to be removed together with the order. The Chief Justice said:

> . . . when a certiorari goes to remove orders '*cum omnibus ea tangea*' everything ought to be removed that may set the thing in a true light . . . how can we know whether this rate be good, unless it be returned? Probyn J.: To what end is a certiorari granted if it can only remove an order and that on which it is grounded cannot appear?[93]

But, Lee J. urged an interesting objection. On the basis of unreported authority, he argued that the complaint was with regard to the assessment, not the rate. The order of sessions was related only to the assessment, not to the rate, which thus bore the character of extrinsic evidence. This seems an acceptance of the argument put by counsel in the case: 'that a rate is never made a record of the sessions, but is only used as evidence'.[94] After 'great debate and search of precedents' it was held that the rate might not be brought up as a part of the return. However, the reason assigned[95] was the great inconvenience and delay which would result should the rate itself be returned.[96] In the subsequent case of *Rex v. Justices of Shrewsbury*[97] the above decision was confirmed, the principal reason assigned being again the 'inconveniency which would accrue to the poor from the dependency of the rate here; which might be for so long a time as to make them starve'.[98]

Certainly, these cases do not support the proposition that documents basic to the decision could be removed by certiorari for error.

[89] *Ibid.* [90] *Ibid.* [91] [1955] V.L.R. 156. [92] 94 E.R. 1041.
[93] *Ibid.* 94 E.R. 1041 quoted in part by Lord Denning in [1959] A.C. 663, 689.
[94] *Ibid.* 1041. [95] As reported by Sir John Strange, *ibid.* 1041.
[96] *Ibid.* 1041. [97] Cunn. 28, 94 E.R. 1041. [98] *Ibid.* 1042.

At the very least, they add yet another factor to the difficulties in assessing the authorities—namely, the *convenience* or otherwise of producing the documents for the court's consideration.[99]

The modern authorities cited in support of the proposition that documents basic to the decision are to be considered a part of the record are little more authoritative.[1] Nor does Lord Denning claim any overwhelming authority to be resident in these cases.[2]

Ex parte Gilmore[3] has been examined already and though Lord Parker C.J. explicitly agreed, and Romer L.J. implicitly agreed with Lord Denning's statement of the law on supplementary documents essential to the original decision, this statement was *obiter dicta* and after the reservations expressed in *Baldwin v. Francis* concerning similar statements, its correctness may be doubted. The case of *R. v. Head*[4] involved an appeal and the only reference to certiorari is one made in *obiter* by Lord Goddard who said: 'Had it been brought before the court by certiorari, . . . the girl would have been immediately discharged'[5] thereby implying that documentary evidence in the form of medical certificates on which the order was based would have been made available. The statement is the merest *dictum* and would seem, in the light of Lord Goddard's later examination of the subject,[6] to be of little weight. Indeed, assuming that one is not being misled by the old arguments as to the 'convenience' or otherwise of producing documents supplementary to the record for the scrutiny of the court, *R. v. James*[7] seems to be authority against incorporation by reference of documents 'basic to the decision'. There, an order of sessions allowing parish accounts was returned. The accounts themselves were not before the Court and the applicant's attempt to supplement the bare order by affidavit evidence was rejected.

An Examination of the Older Authorities on the use of the writ:

An historical inquiry into the use of the writ is demanded by the fact of its comparative disuse during the first half of this century. This hiatus, the examination of which took up most of the judgment of Lord Goddard in the Court of Appeal in *Ex parte Shaw,* was explained by him in the following way. The Jervis

[99] See the similar approach manifested in the case of *R. v. James* 105 E.R. 401., where the Court would not go into the merits of an order of sessions allowing overseers accounts on affidavit. Lord Ellenborough stated: 'The sessions were the proper place for deciding such matters, the time of the court would otherwise be taken in taking parish accounts'.

[1] *Ex parte Gilmore* [1957] 1 Q.B., 574, *R. v. Head* [1958] 1 Q.B. 132: cited by Lord Denning in *Baldwin and Francis v. Patents Appeal Tribunal* [1959] A.C., 663, 690. [2] *Ibid.* 690.

[3] [1957] 1 Q.B. 574. [4] [1958] 1 Q.B. 132. [5] *Ibid.*

[6] See the judgment of Lord Goddard C.J. in *R. v. Northumberland Compensation Tribunal Ex parte Shaw* [1951] 1 K.B. 711.

[7] 2 M. and S. 321; 105 E.R. 401.

legislation, which drastically cut the contents of the record of convictions, and the use of statutes which took away certiorari in respect of the matter with which those statutes dealt, led to the disuse of the writ for error of law. Largely, the attempt of Lord Denning, and of Lord Goddard, has been to breathe new life into a moribund body of case law. In such circumstances, the courts are forced into making the transition back to life a violent one and this may explain in part the gap which appears between nineteenth-century authority and those recent cases in which the remedy has been taken up again.

It is proposed then, to indicate in outline, the nature of the record which used to be returned to the writ in the case of convictions. This will then be compared with the less systematic authorities in the realm of court orders and arbitrator's awards.

The form of the conviction, prior to the Jervis legislation,[8] is given in an appendix to *In re Rix*.[9] The document contained the information, the facts for which it was laid, the evidence of the witnesses and the conviction. Thus, Holroyd J. in *R. v. Daman*[10] stated that:

> Everything necessary to support the conviction must appear on the face of the proceedings, and must be established by regular proof, or by admission of the party of that which has not been proved.[11]

Accordingly, a mandamus might issue to order the justices to complete a record, as where a verbatim report of the relevant evidence was not made. In consequence of this extremely full record, the courts were able to enter upon the issue of the sufficiency of the evidence to support the conviction and though the court would not interfere with the assessment of the weight of the evidence made by the court below, they would intervene where no evidence at all appeared to support a conviction.[12] Equally a consequence was the general refusal of the court to sanction any supplementing of the record. Thus, in *R. v. Liston*,[13] it appeared that the Court whose record was returned had not taken into account a relevant statute relating to the payment of penalties for gaming. This, as an omission, did not appear on the record and the Court declared:

> . . . we cannot take notice of any fact which does not appear on the record itself, on the validity of which we are called to decide. It must either stand or fall on its merits and we cannot take into account any extraneous evidence to support it.[14]

[8] That the form of the record in the case of convictions was traditionally full, and did not depend entirely upon statute for its form, is indicated by *R. v. Warnford* Dow, Ry. vol. v, 489, where Bayley J. expressed the opinion that a transcript of evidence, in the words of the witness, had always been required to form a part of the record of a conviction.

[9] Dow & Ry. vol. 4, 352. [10] Chitty, vol. 1, p. 147. [11] *Ibid* 155.

[12] See the summary given by Jordan C.J. in 43 S.R. (N.S.W.) 195.

[13] 101 E.R. 189. [14] *Ibid.* 191.

However, with the Jervis legislation,[15]

> which has removed evidence from the face of the conviction, the purely corrective jurisdiction exercised by certiorari has become greatly diminished if indeed it has not disappeared.[16]

In consequence of the form of record prescribed in the case of convictions, the law showed a regularity of principle in this field not attained where the form of the record merely expressed a decision with no recital of reasons, or of evidence, leading to the conclusion reached. Perhaps the extreme case, where the courts deserted strict principle in order to achieve a commonsense result, is constituted by those cases which concern the awards of arbitrators.

The seminal case appears to be *Kent v. Estob*.[17] Here, an arbitrator returned his award, and together with it, a document stating the reasons for his decision, and a commentary on the evidence. The Court considered the document as constituting a part of the 'record' for the purpose of inspecting it for error of law. Le Blanc J. gives the fullest account of the decision: his reasons for heeding the additional material were that as the paper was delivered as expressing the reasons for the arbitrator's decision, it could only have been done as a means of allowing the Court to examine the validity of his reasoning.[18]

It seems then, that though supplementary documents might be admitted simply in order that error might appear, this could only be done where the court could construe the documents as being incorporate with the award. Whether or not this might be done depended entirely upon the intention of the arbitrator in preparing the document in question.

The law relating to the awards of arbitrators does not differ overmuch from that relating to the orders made in the administration of Poor Rates, Highways and similar proceedings. Commonly the form of the order, prescribed by statute in respect of these proceedings, was extremely brief. In the absence of any recital of reasons, or of evidence, certiorari for error of law would inevitably have been reduced to the scrutiny of the record for technical or formal errors. An example of the terseness of the statutorily prescribed

[15] 11 and 12 Vic. c. 43 Summary Jurisdiction Act 1848.

[16] *R. v. Nat Bell Liquors* [1922] 2 A.C., 128, 159.

[17] 102 E.R. 502, 102.

[18] Note also *Leggo v. Young* 139 E.R. 904 and *Holgate v. Killick* 158 E.R. 536. These later authorities in no way overrule *Kent v. Estob;* they merely define its scope and limit it to those situations, where the arbitrator intentionally, or in effect 'states a case'. In *Holgate v. Killick* Wilde B. summarizes the law in the following way '[The] Court will not look at anything for the purpose of reviewing the decision of an arbitrator . . . except what appears on the face of the award, or some papers so connected with the face of the award as to form a part of it'.

forms of record is provided by the record prescribed for orders of removal.[19] Here, the record simply stated, 'we do therefore, upon due examination of the premises, taken before us on oath, adjudge the same to be true'.[20] No statement of the evidence was given, merely a statement that there was evidence sufficient to support the conditions precedent to the order of removal—that there had been no legal settlement in the parish from which the pauper was to be removed, no legal settlement elsewhere, and that the pauper had become chargeable on the parish.

The attitude of the courts in their dealing with such non-speaking orders is best illustrated by a trilogy of cases, *Inhabitants of Thackam v. Findon*,[21] *Wrangford and Brandon Parish*[22] and *R. v. Inhabitants of Whittlebury*.[23] In the first of the trilogy, the 'error' was a purely formal one, a failure to comply with the statutorily prescribed form of the record. The second case similarly involved a formal error. However, the Court was unwilling to quash the record and, by agreement between the parties, affidavit evidence was admitted to supplement it.[24] Though the record might, in such manner, be shown to be in error, the additional documents do not become a part of the record—they merely explain its contents. Finally, in the case of *R. v. Inhabitants of Whittlebury*,[25] the justices had gone beyond the statutorily prescribed requirements of the order of removal so that the order became a 'speaking order'. Lord Kenyon said that where the justices 'state all the facts as well as their determination we are not precluded from examining the conclusion drawn by them from the facts'.[26] The inferior tribunal could always voluntarily enlarge the scope of the record so as to present its deliberations to the superior tribunal for review.

There were, however, situations in which documents additional to the statutory record were returned to the writ and the courts found it difficult, or refused, to hold that the documents were extraneous and inadmissible to supplement the record. The first of these concerns those cases occupying the fringe of uncertainty where the tribunal may, or may not, have 'stated a case' for review. The development has been from the situation where the court wittingly 'stated a case' subject to review, to one where they have 'in effect stated a case' though it might have been done unwittingly.[27] It is clear that the intention of the tribunal which prepares a fuller record

[19] *Inter the Inhabitants of South Cadbury and Braddon* 91 E.R. 515.

[20] The form, contained in Chitty's Edition of Burn's, *Justice of the Peace*, vol. 4, 1099, is also contained in the case of *R. v. The Inhabitants of Rotherham* 12 L.J.M.C. 17. [21] 158 E.R. 538. [22] 90 E.R. 860. [23] 101 E.R. 650.

[24] *R. v. Dickenson* 7 E.B. 831 records some disapproval of the practice of supplementing by affidavit—preferring the magistrates to state a case for the court to decide as a special verdict. [25] 101 E.R. 650. [26] *Ibid.*

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

than is required by the governing statute would not always be a conscious intention to 'state a case.' So far we have considered two ways in which the court might subject itself to review by the superior tribunal: enlarging the contents of the statutory record, and accompanying the bare award of an arbitrator with a plainly explanatory document. But, if one accepts the validity of these modes of enlarging an uniformative record, there was always an important limitation upon the development of these exceptional means. The reasons and additional material had always to be incorporate with the record. However apparent it may be that the word 'record' covered all the documents which the inferior tribunal intended to include as the record of its proceedings, it did act as a limitation in those cases where the intention of the tribunal was not made explicit. It did not matter that the intention of the tribunal was not made explicit. It did not matter what their intention was in fact; it was their intention as it appeared from the documents returned which determined whether the superior tribunal would consider that there was 'in effect a case stated' and allow additional documents as being incorporate with the record. This is well illustrated by the case of *R. v. Inhabitants of Abergele*.[28] Here, to a writ couched in the traditional form, the justices returned a variety of documents.[29] In argument it was stated that the documents accompanying the orders showed, on their face, error in the proceedings below. Humfrey contended that, 'They do not in terms ask the opinion of this court, but they do so in effect, by submitting the materials on which an opinion is to be formed'. The following exchange is particularly illuminating:

> Patteson J.: They have returned a great deal that cannot be for the opinion of this court at all, such as the motion papers.
> Humfrey: The writ requires them to return the orders with all things touching the same in the usual form. In stating a case, the sessions transmit the order, and with it all the facts upon which this court may form a judgment.
> Patteson J.: There the order is made in a qualified form, subject to the opinion of the court on a case. Here it is without qualification, but they return that which led to the making of it.[30]

Accordingly, the return was quashed as tending to introduce a 'new practice (which) would tend to let in a motion for a new trial upon every order of sessions'.[31]

The second situation in which documents additional to the record

[28] 111 E.R. 1367.
[29] The original order of removal of a pauper; the examination of the pauper; notice of appeal against the order; a further notice of appeal, somewhat more fully prepared; the motion papers signed by the advocate for the respondents; and the order made by the justices at sessions quashing the original order of removal.
[30] 5 Ad. and EP. 795. [31] *Ibid.*

alleged to be in error were returned, was where preceding court orders were returned together with the record of an appeal. There is ample authority for including these in the permissible contents of the return, and there is authority to support the inclusion of other court orders which had bearing upon the record in question. It is quite clear from the authorities, that the document embodying the original award made at first instance, could be returned with the record of the appellate proceedings in cases where there was no element of a 'case stated'.[32] That court's manner of dealing with the two records was made the subject of discussion in *Inhabitants of South Cadbury and Braddon*[33] where the Court formulated a series of rules.[34]

(a) Should the sessions reverse the first order and that, being removed, appear to be good, the court must assume that the reversal of the order appealed from was on the merits, and affirm the order of sessions;

(b) Should sessions reverse the first order, and that being removed appear to be bad on its face, the court must infer that the reversal was for such defect of form and again affirm the order of sessions;

(c) But, should the first order appear bad, and the sessions affirm it. the court must reverse it 'because it appears naught';

(d) Any order of sessions bad on its face could be quashed.

This procedure went only to inconsistencies between documents. It does not cover situations where the additional record of the appeal tribunal could afford grounds for inferring error in the record appealed from. If sessions affirmed an order of the justices which was bad on its face, the affirming order was not quashed because it was inferred to be in error, but because it affirms a nullity. That the one document could not be used as a basis for inferring the contents of the other is shown by the case of *R. v. Glyde*.[35] Here, the order of sessions incorporated a statement of parish accounts passed by the justices. The accounts containing a manifest error, the affirming order of sessions was quashed and the matter sent down for re-appeal. As the order of the justices did not itemise the accounts it, apparently, could not be quashed as being bad on its face. Nor

[32] For example in *R. v. Morice* 2 Dow and Lowndes 952. *R. v. Glyde* 105 E.R. 401. *R. v. Justices of the West Riding Yorkshire* (1842) 12 L.J.M.C., 15.

[33] 91 E.R. 515.

[34] *Ibid.* (a) If sessions reversed the first order, and that on removal to the court of review appeared good, then that court was to assume the reversal to have been on the merits and should then affirm the order of sessions.

(b) If, however, the order appeared had on its face, then the court of review was to assume that the reversal was for such defect of form and again affirm the order of sessions.

(c) But if the first order appeared law and sessions affirm it, the court of review ought to reverse it.

(d) Any order bad on its face could be questioned.

[35] 105 E.R. 401.

would the Court follow the natural inference that the same items as led to the quashing of the 'speaking' order of sessions had formed the basis of the justice's order. Whilst the two documents could be looked at together, the one could not be employed for inferring what was not expressed in the other.

The Position Today:

In view of the history of the writ, it can be stated that the approach taken by Lord Denning, and in such cases as *In re Henry Berry*,[36] has been marked by an attempt to increase, in a way not warranted by the older authorities, the permissible contents of the record in those cases where there has been neither 'statement of a case' by the court or tribunal alleged to be in error, nor any consent of parties to an augmentation of the record. The relevance of this lack of historical authority lies in the present stalemated situation which has arisen out of the reservations expressed concerning the trend by the House of Lords, in *Baldwin and Francis v. Patents Appeal Tribunal*.[37]

In particular, the much disputed statements made by Lord Denning—in the case of *Ex parte Shaw*:[38]

> . . . the record must contain at least the document which initiates the proceedings, the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them.[39]

and in *Baldwin and Francis:*

> . . . there should be included in the record, not only the formal order, but all of those documents which appear therefrom to be the basis of the decision—that on which it is grounded.[40]

seem not to be capable of being supported by an appeal to older authority. Though it is true that the 'record' in this context had no constant content, and though, in the past, it was often supplemented by other matter which would not be included within the pale of a formal definition of the sort given by Blackstone and Coke; it seems clear that whatever documents were adduced, they had to appear as *a part of the record*. They could not be adduced as supplementary to, or shedding light upon, the contents of the record unless by arrangement and consent of parties. Though the court or tribunal might include in the record of their deliberations matter not normally so required by way of stating a case, or exceptionally, might return an additional document which could be considered as incorporate with the statutory form prescribed, the matter seems to

[36] [1955] V.L.R. 156. [37] [1959] A.C. 663. [38] [1952] 1 K.B. 338.
[39] *Ibid.* 352. [40] [1959] A.C. 663.

have lain wholly within the competence of the inferior court or tribunal. Indeed, a suggestion that one might otherwise supplement the record in order to show it to be in error is inconsistent with the notion of its 'incontrollable veritie'.

CONCLUSION:

This exploration of the vagaries of the case law in relation to certiorari for error must now be brought to an end. There are few certain statements which can be made about the remedy, either as to its past, or as to its future application. It seems, however, that the unwillingness of the House of Lords to consider supplementing the record is based on sound precedent. *It may well be* that development of the law in this area has been stifled by their approach. To return to the original problem with which this essay opened; M. could not refer to the documents before the court were he to allege that there was an error upon the face of the record. He could, however, put those documents before the court were he attempting to establish certiorari for lack of jurisdiction. What grounds for extension of the remedy there are seem to lie in the areas of an increasing willingness of the court of review to make inferential judgments from the documents actually before the court, and the increasing breakdown of the categories of certiorari which might formerly have limited an applicant to the complaint of error on the face of the record.

The difficulties created by the courts inhibit such an extension of the law at every step. As an example of this one may refer to the issue of whether the omission of reasons to support a decision is an error of law on the face of the record. It is plain that where a statute requires the statement of the reasons grounding a decision and these, when stated, are insufficient or wrong, then an 'error' which 'appears' on the face of the record has been made. However, it may be that even in those cases where statute does not require a recital of reasons; and the inferior tribunal has embodied in its record inadequate, or incorrect, reasons, the same considerations will apply. The difficulty in the way of such a contention involves the question of whether the 'error' could be said to 'appear' on the face of the record. At this point the limitations upon the contents of the 'record' prevents recourse to the documents which the court had before it. The better approach in these circumstances is to assume that when the inferior tribunal came to its decision and put down its reasons it gave its best and only reasons. However, the case of *Baldwin and Francis* indicates that it may be still open to the court to assume that there were in fact other and better reasons

forming a basis for the decision and in the absence of the statutory requirement of a full statement of reasoning, to refuse to quash the record.

This state of the law is lamentable. If a tribunal makes a substantial error, then its decision ought to be set aside. The discretionary nature of the writ seems an ample safeguard against the setting aside of a decision on minor or technical points. Whether or not the decision can be set aside ought not to depend on whether the disputed decision can be shown to fall under one branch, restrictively interpreted, of the remedy of certiorari. It is doubtful that a historical basis can be found for the restrictive approach to which the majority of the Law Lords inclined in *Baldwin and Francis;* if such a basis could be found, it is an approach intolerable in present day circumstances.

In individual cases the courts have placed several glosses on the governing doctrines. The distinction between errors of law and defects of jurisdiction has become blurred; in many cases the remedy denied under certiorari for error is available under the heading of certiorari for an excess of jurisdiction. Part of the general blurring of distinctions between 'void' and 'voidable' decisions in administrative law, this development has been marked by a manipulation of the arbitrary line separating questions of jurisdiction from questions of law so as to allow courts of review a measure of control over tribunals from which there is no right of appeal.

Whilst this development may be deplorable as confusing analysis, as deserting lines of authority laid down by earlier decisions, it seems necessary in order that the courts may retain the right to review administrative proceedings.

However, those extensions of the remedy which have been accepted by the courts, have failed to provide any guarantee that decisions made by administrative tribunals are to be subject to judicial review. Though subjection might have been achieved by the adoption of Lord Denning's proposals to make the record 'speak,' so effecting the guarantee of review by what would be, in effect, a legal fiction, this avenue seems now to be closed. In considering this dilemma it might be argued that, as the remedy of certiorari under its various headings is archaic and outmoded, such attempts to salvage and refurbish certiorari as a modern remedy simply delay the possibility of a legislative scheme to provide remedies apt for modern conditions. It might be urged that the less appropriate the remedy appears, the more likely is some legislative action to provide an alternative.

But such argumentation is of little comfort to the individual, complaining of a particular decision. In particular, one might doubt

that the legislature is so observant as to notice his plight and so concerned as to protect his successors. Any part of the admitted unsatisfactory framework, with which we are at present saddled, ought to be exploited for the benefit of the individual. The days of judicial legislation are not passed, as attested by the development of the law of negligence during the course of this century.

It is our conviction that the history of the use of the writ permits a wider extension of its use than seems to have been recognized in recent decisions. The time is not yet passed for some 'brave souls' to create a remedial structure more suited to our present needs. It is to be deplored that the House of Lords, in refusing to face this issue, have made it unlikely that such a fate awaits certiorari for error of law.

J. M. FITZGERALD
I. D. ELLIOTT