SCOTTISH LAW COMMISSION

MEMORANDUM No: 14

REMEDIES IN ADMINISTRATIVE LAW

PREFACE

1. On 2 December 1969 the Lord Chancellor informed the House of Lords that he had asked the Law Commission, in pursuance of section 3(1)(e) of the Law Commissions Act 1965 "to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure". On 9 January 1970 we were invited by the Secretary of State and the Lord Advocate, in pursuance of the same section, to institute an inquiry with the same terms of reference in association with the Law Commission and to submit a Report.

2. We invited Professor A W Bradley, Professor of Constitutional Law in the University of Edinburgh, to prepare a preliminary paper on the subject, and it is this paper which forms the main text of this Memorandum. It will be noticed that this valuable work inevitably looks at some aspects of the subject which are outside the Commission's present remit. It is an important and original contribution to the literature of the law of Scotland.

3. There follows a list of the questions which could form headings under which the various arguments might be grouped. It is not claimed that they are exhaustive, and we would be very glad to receive suggestions and opinions on any other branches of the topic; however, it would be helpful, with a view to the collation of replies, if observations were submitted within the framework of these questions.

4. We would be grateful if comments were submitted by 1 January, 1972.

1. It seems clear that an action of reduction is competent to correct failures and excesses of jurisdiction, including breaches of natural justice, but the extent to which a decision, unchallengeable on the above grounds, may be reduced on the ground of an error of law within the jurisdiction is uncertain (see paras. 6.5, 6.6. and Appendix II of the Memorandum.) Should this doubt be removed? If so, how should the power of the court to grant reduction of the decision of an administrative body on the ground of an error of law within the jurisdiction be defined?

2. Since the fact that an error of law has been made may not be apparent "on the face of the record", should there be a rule that full reasons must be given, if requested by any of the parties concerned, for administrative decisions?

3. Should reduction of all or any such decisions be competent in the Sheriff Court?

4. If reduction were to be a competent remedy in the Sheriff Court,

(a) should a power be conferred on the Lord Advocate to remove a Sheriff Court action into the Court of Session on the lines of section 44 of the Crown Proceedings Act 1947?

(b) should the jurisdiction be confined to the Sheriff Principal?

(c) should there be a right of appeal from the Sheriff Principal to the Court of Session?

5. Is the present provision for interim remedies adequate, especially in proceedings against the Crown?

6. (a) Should a uniform time limit be imposed by statute, within which applications must be made for review by the Courts of administrative decisions?

(b) If so, should a dispensing power be conferred on the Court, and on what grounds?

7. It may well be that section 91 of the Court of Session Act 1868 did not empower the court to order the Crown to perform any statutory duty. In any event section 21 of the Crown Proceedings Act 1947 provides that the court shall not make an order against the Crown for specific performance, which was the remedy prescribed by the 1868 Act. Are the provisions in section 21 for the declaratory remedy satisfactory?

8. Should statutory provision be made for the standardisation of all procedures for the stating of a case on a point of law by bodies applying administrative law?

9. Does the law relating to title and interest to sue require amendment in the context of administrative law? If so, in what respect?

10. Should the existing Scottish remedies, subject to amendment and reform, be retained, or should there be substituted for them a new all-purpose "petition for review" along the lines suggested by the Law Commission - (paras. 3.2 and 13.5)?

11. Are there any other matters that you would wish the Committee to consider?

CONTENTS

———oOo———

REMEDIES IN ADMINISTRATIVE LAW

PART I

1. INTRODUCTORY

1.1 In May 1969, the English Law Commission, with the concurrence of the Scottish Law Commission, recommended in a public report to the Lord Chancellor (Cmnd. 4059) that a broad inquiry into administrative law should be conducted by a Royal Commission or by a committee of comparable status. The report stated that the Scottish Law Commission considered it essential that any examination of principles should be carried out upon a United Kingdom footing.

1.2 The recommendation for a broad inquiry by a Royal Commission was not accepted by the Government, which in December 1969 asked the two Law Commissions "to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure." Each Law Commission has now commenced its own review of remedies.

1.3 In June 1970, the English Law Commission issued a study paper prepared for the English consultative panel on administrative law (referred to hereafter as the English Study Paper).

1.4 The object of the present paper is to provide a starting-point for the examination by the Scottish Law Commission of the subject of remedies in administrative law. The comments on the terms of reference of the inquiry and on the English study paper which follow are intended to set the scene for a Scottish inquiry and to focus attention on the main issues with which it should deal. Part II of the paper surveys the existing state of the law in Scotland with the aim of discovering aspects of the law which require attention.

2. TERMS OF REFERENCE

2.1 The terms of reference of the present inquiry clearly exclude the full-scale inquiry into administrative law which the two Law Commissions recommended in 1969. Short of that, how broad or narrow should the inquiry be? In terms, the inquiry is confined to the various judicial remedies for the control of administrative acts and omissions and does not include political or administrative remedies such as parliamentary questioning or complaint to the Parliamentary Commissioner for Administration. The inquiry has the express aim of considering present remedies in the ordinary courts with a view to the development of a simpler and more effective procedure, one implication of this being that a single new procedure may be capable of replacing the various judicial remedies which now exist. The inquiry does not extend to institutional reform in the court system, and it would be outside the scope of the inquiry to consider the creation of a new hierarchy of administrative courts; some would argue that a "simpler and more effective procedure" would be achieved only with such a reform.

2.2 To what extent do the decisions of administrative tribunals rank as "administrative acts" for this inquiry? Since the Franks Report of 1957 and the Tribunals and Inquiries Act of 1958, tribunals have been recognised as exercising adjudicative functions in specialised areas of government. In one sense, ~~xtxixxxty~~ an appeal to a tribunal may itself be regarded as a judicial remedy for an administrative act or omission. Most tribunals provide for impartial adjudication of an appeal against a prior official decision and relatively few (e.g. rent assessment committees and rent tribunals) are concerned with settling disputes between two citizens. But in view of the continuing supervision of tribunals by the Council on Tribunals and its Scottish Committee it would be convenient to exclude from this inquiry the jurisdiction and functioning of tribunals. What does come within the scope of the inquiry is the procedure by which tribunal decisions may be reviewed in the ordinary courts. If, for example, a "simple and more effective procedure" for securing judicial review of administrative action in general is to be developed, it might well also be used as a means of reviewing tribunal decisions. For two reasons the review of tribunal decisions is unlikely to raise acute problems: (1) the decisions in question have already been separated from the normal work of government by being exposed to judicial rather than official process; (2) from most tribunals, there is now an appeal on a point of law to the superior courts. Nonetheless, errors may occur in the process leading to a tribunal decision which do not fall neatly within the scope of an appeal on law.

2.3 Public Inquiries are analytically distinct from tribunals in that they are part of a complex administrative process leading to an official decision, usually made in the name of a Minister. Supervision of inquiries is a matter for the Council on Tribunals, but judicial review of ministers' decisions is within the scope of this paper. As with tribunals, a variety of acts provide specific statutory remedies for review: could these various remedies be replaced by a single procedure for review of official acts? The statutory remedies which exist are mostly straightforward in operation, but difficulties sometimes prevent them being fully effective; there is the related problem of statutory provisions which seek to rely wholly on statutory remedies and in some cases to exclude judicial review altogether. (See Section 10 below.) The effect of public inquiry procedure not only makes it more important that judicial review of these Ministerial decisions should be available but also extends the scope of judicial review by exposing one stage of the administrative process to public scrutiny.

2.4 The main purpose of this inquiry must however be to consider the remedies which exist for controlling official acts and omissions not subject to tribunal or public inquiry procedures. This embraces the whole work of central government (in matters of domestic administration) and local government, as well as of many other public authorities (e.g. nationalised industries; ad hoc regional and local boards). It may not be clear whether a particular institution (e.g. a university) is to be regarded as an official body for this purpose. At present no strict distinction of this kind has to be drawn

drawn either in English or Scots law, as most existing remedies apply both to public and private acts. In this respect, a contrast may be drawn with a legal system like that of France, which makes a formal distinction between public and private law and has a separate system of administrative law with its own courts and remedies. But the demarcation between public and private decisions would become important if a new judicial remedy were to be created applying only to official decisions.

2.5 The range of official acts and omissions subject to judicial review is potentially vast. To take the example of public sector housing, the range of decisions includes, say, a decision of the central government to provide resources for council housing, a decision of the Secretary of State to approve a rent increase for a particular local authority and a decision of a local housing authority to grant or refuse a tenancy to an individual family. A comprehensive inquiry into the proper extent of judicial control of government would have to grapple with this wide field. It is doubtful whether in modern law the line is correctly drawn between those official decisions which are effectively subject to judicial review, and those decisions which are not. But this fundamental issue can hardly be raised within the relatively narrow scope of the present inquiry. If the reasoning in the English study paper is followed in Scotland, the aim is to improve remedies within the present extent of review, not to extend the area of review into governmental decisions which are subject to no judicial review at present.

2.6 One difficulty which underlies this subject is that the concept of judicial review of official acts and omissions is neither settled nor constant. The broad purpose of judicial control of government is to ensure that government is conducted according to law, and thus to uphold the notion of the rule of law. Applied to a particular act or omission, the general principle does not provide an answer to the specific question, is <u>this</u> official decision lawful? Clear cut cases of <u>ultra vires</u> activity on the part of government are less likely to arise than questions of controlling the exercise of discretionary powers, enforcing fair procedures and so on. For example, when is a specialised tribunal permitted to interpret a statute in the manner it thinks best, rather than in the manner which a superior court considers correct? The principles of judicial review do not permit an aggrieved citizen to raise in the courts every matter of fact, law, discretion and merits about which he may be dissatisfied. And the judge whose duty it is to decide exactly where the line should be drawn in a particular case requires insight not only into the reasonable expectations of the citizen but also into the political and administrative processes of government.

3. <u>THE ENGLISH STUDY PAPER</u>

3.1 The English Law Commission's approach to the terms of reference may be illustrated by paragraphs 2-4 of the English study paper, reprinted in Appendix I to this paper. In the English paper, it is considered that the terms of reference require a distinction to be drawn between reform of the

the form and procedure of remedies and reform of their scope, but that this is not always an easy distinction to draw. The basic difficulty in this approach is common to both English and Scots law: in each jurisdiction, the remedies available to challenge official acts have not developed systematically and the present law is a complex mixture of common law and statutory remedies. Both in the past and still today, the form and procedure of remedies have largely served to determine their scope, although, as will be seen in section 5 below, this is felt more acutely in England than in Scotland. The question of standing to seek review (in Scots law, title and interest to sue), the ability of the reviewing court to correct errors of law and the extent to which remedies may be available against the Crown - these are all matters of form and procedure which also have a direct bearing on the scope of review.

3.2 Nonetheless the approach adopted in the English paper is to treat all rules which restrict the scope of any particular remedy when compared with other remedies as rules which relate to form and procedure of judicial remedies: rules which place administrative action beyond control by any judicial remedy are considered to relate to the scope of remedies. The distinction is thus between the scope of individual remedies and the general scope of judicial review. On this basis, the English study paper surveys existing remedies in English law before examining defects in the system of remedies as a whole. The main recommendation of the paper is that rather than reform the various remedies piecemeal, it would be better to provide a single form of proceeding for the challenge of unlawful administrative acts and omissions. Under this proposed petition for review, it would be competent for an aggrieved applicant to seek any one or more of the following forms of relief - to quash, to forbid, to command and to declare.

3.3 Before commenting on this proposal and before considering its applicability in Scots law, the principal findings of the English study paper will be outlined. The English remedies considered fall into three broad groups: (1) the prerogative orders; (2) the remedies of declaration and injunction; and (3) statutory remedies.

(1) The prerogative orders

In origin the prerogative writs (since 1938, prerogative orders) were the means by which the Court of King's Bench exercised control over all inferior courts and official bodies regarded as exercising jurisdiction. By the writ of certiorari, the court could quash a decision of a tribunal or inferior court that had been made in excess of jurisdiction, or in breach of the principles of natural justice. The writ came also to be available against local authorities, ministers and other administrative bodies whose decisions could loosely be regarded as having a judicial aspect. The writ of prohibition lay to restrain a decision being made which if made would have been subject to certiorari, i.e. to prevent an excess of jurisdiction occurring. Mandamus was a remedy to order the performance of a public duty, including the duty of a tribunal or inferior court to hear and determine a matter competently laid

laid before it. Together the three prerogative orders form part of a single supervisory jurisdiction in the public law field. They can still only be sought by a special procedure which differs markedly from procedure in ordinary litigation. While more than one prerogative order may be sought in the same proceedings, no individual may seek a prerogative order together with any other remedy (e.g. damages, or declaration of right). In the case of certiorari, a special limitation period of six months is provided by rules of court. Rules of standing to sue differ in detail as between the various prerogative orders. The remedies are in principle discretionary although in some circumstances an applicant is entitled to the issue of an order as of right.

(2) The remedies of declaration and injunction

As the primary equitable remedy in English law, the injunction has been much used to restrain public authorities from acting 'ultra vires'; the procedure is most commonly used for this purpose known as relator proceedings, whereby the aggrieved individual moves the Attorney-General to allow his name to be used as guardian of the public interest in seeking an injunction. The major advantage of the relator proceedings is that all questions of title to sue are obviated. The scope of the injunction overlaps with that of prohibition, however, and is not available against the Crown nor in some circumstances against officers of the Crown.

Although also an equitable remedy, the declaration is a much younger remedy in English law than the injunction, and its use has been restricted by judicial hesitation. Difficulties in administrative law have been caused by doubts as to the use of the remedy in declaring rights created by a statute which also provides a statutory means of enforcing those rights; by the uncertain overlap between certiorari and declaration; by the uncertain effect of a declaratory judgment granted in relation to a tribunal decision; and by a judicial tendency to impose a narrower test of standing to sue for a declaration than in the case of the prerogative orders.

(3) Statutory remedies

The English study paper gives particular consideration to the statutory procedure for challenging town planning decisions and compulsory purchase orders on grounds either of ultra vires or of non-compliance with statutory requirements. (See section 10.6 below.) Although this remedy has procedural advantages it is available only to a narrow class of persons aggrieved. It is usually accompanied by a statutory exclusion of all other forms of review and also by a brief limitation period (normally six weeks); in view of the House of Lords decision in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147, the legal effect of these exclusion clauses is uncertain. The remainder of the English study paper develops tentative proposals for the reform of remedies. One possibility considered is to make reforms within the existing system of remedies, by removing such defects in particular remedies as seem especially restrictive. But the study paper recommends the creation of a new, all purpose petition for review on the lines already mentioned. The

The new remedy would only be available to control public bodies, and principles of the existing law of judicial review would be retained: no alteration is proposed to the grounds on which judicial control may be sought. It is provisionally suggested that there should be a single test of locus standi, namely that any person who is adversely affected by administrative action should have standing to seek review. All exclusion clauses should be re-examined and should be maintained only where essential.

In a supplementary note, the English study paper raises the question of whether an appeal on a point of law should be substituted for the present use of certiorari as a means of seeking review of decisions for error of law on the face of the record. The study paper also raises the question of whether the form and procedure of judicial remedies should be reformed without taking into account the availability of damages as an alternative remedy.

3.4 It would not be appropriate in this paper to comment in detail on the English study paper, but one or two general observations may be made. In effect the approach adopted is of proposing a new, flexible and all-purpose remedy for review that would maximise the factors from existing English remedies that are favourable to judicial review and minimise all the existing factors that are unfavourable to judicial review. The English study paper tends to take for granted the positive advantages of judicial control. Yet the record of decided cases suggests a more complex conflict of principles and interests (both public and private) than is reflected in the paper. It is a lawyer's natural inclination to suppose that the more judicial review, the better. Within its terms of reference the English study paper does not sufficiently consider the nature of governmental action that is under review. It is also evident that the English study paper has been influenced by the restrictive terms of reference under which it has been prepared; in particular, the distinction between form and procedure of remedies and the scope of remedies may not be satisfactory as a basis for reform.

4. THE REVIEW OF REMEDIES IN SCOTS LAW

4.1 Before considering whether the approach adopted in the English study paper should be followed in Scotland, it should be remembered that the Scottish Law Commission recommended in the published paper on Administrative Law (Cmnd. 4059) that any examination of principles should be carried out on a United Kingdom footing. A measure of reform confined to removing procedural defects of remedies in the two jurisdictions could probably be carried out separately. Certain matters raised by the English study paper, however, relate to legislation which is common to both jurisdictions. The statutory remedies and exclusion clauses in town planning, compulsory purchase and housing legislation apply in both jurisdictions. So too does social security legislation such as the national insurance and supplementary benefits schemes. A general reform of exclusion clauses and statutory remedies would have to be tackled on a British basis. So too, the proposal in the English study paper that a much wider class of persons adversely affected should have

have standing to seek judicial review of administrative action raises a matter of principle with important implications for both jurisdictions. If the proposed petition for review is accepted for English law, a precedent for reform would be set which under certain circumstances might be relevant to Scottish law reform. Similarly the development of a new form of governmental liability for damages would involve issues of principle which should be considered jointly by the English and Scottish Law Commissions.

4.2 It will be apparent from the above brief summary of the English study paper that the greater part of the English paper is concerned with technical and procedural difficulties which do not exist in the same form in Scots law. The prerogative orders of certiorari, mandamus and prohibition are known in Scots law only through Exchequer jurisdiction and are of little importance in what survives of that jurisdiction because of the existence of statutory rights of appeal in revenue matters. Many of the English difficulties result directly from the failure of English law to marry together the 'public law' (or 'extraordinary') group of prerogative remedies, the 'private law' (or 'ordinary') remedies of injunction and declaration and the more modern group of statutory remedies. The absence of the prerogative orders in Scots law has meant a much greater reliance on 'ordinary' remedies. These 'ordinary' remedies in Scots law include two, the reduction and the declarator, with a historical standing in Court of Session practice to which there is no counterpart in English law. If comparison is made between the interdict and the injunction, or between the declarator and the declaration, many of the procedural limitations discussed in the English paper are not reproduced in Scots law. But comparison of this kind brings to light aspects of Scots law which may be themselves regarded as limitations on the effectiveness of the remedies. Most modern statutory remedies exist in both England and Scotland, but even here differences of legal and administrative history prevent there being complete uniformity between the two systems.

4.3 In view of the Scottish reliance on 'ordinary' remedies, a question of principle presents itself even more strongly in regard to Scotland than England - have these general remedies proved effective in the public law sector in the past, and are they effective in this sector today? It may be that the advantages of the Scottish system are more apparent (as a matter of law) than real (as a matter of day-to-day social utility). Merely because Scots law is free of many of the irksome procedural difficulties which are such a marked feature of English administrative law, it does not necessarily follow that Scots law would not benefit from the introduction of a flexible petition for review of official acts and omissions, on the lines proposed in the English study paper, even though the particular advantages of such a remedy would be different as between England and Scotland.

4.4 In Part II of this paper, which now follows, existing remedies which may be used for securing review of official acts and omissions in Scotland will be considered in outline. At least by comparison with England, Scots

Scots law is deficient in existing literature on this subject. Not only is there no outline account of remedies of the kind that is provided in regard to English law by student texts on constitutional and administrative law; there is also no Scottish treatise in any way comparable with Professor de Smith's outstanding book on English law, Judicial Review of Administrative Action. It is an indication of the extent to which Scottish law diverges from English law on these matters that the second edition of Professor de Smith's book (1968) includes many more Commonwealth decisions than in the first edition but, like the first edition, the Scottish law is virtually excluded from consideration. A further factor that adds to the difficulty of presenting an account of the Scottish law lies in the relative shortage of recent judicial decisions: the volume of case law in this field between 1960 and 1970 does not afford evidence of an increase of judicial scrutiny of governmental matters like that experienced in England during the same period.

PART II

5. INTRODUCTORY - The General Basis of Judicial Review

5.1 Although this part will be mainly concerned with examining the law relating to the various remedies by which judicial review of administrative acts and omissions may be obtained, it is first important to stress the generality of the jurisdiction of the Court of Session in this field. As Lord Shaw said in Moss's Empires v. Assessor for Glasgow[1]

> "It is within the jurisdiction of the Court of Session to keep inferior judicatories and administrative bodies right, in the sense of compelling them to keep within the limits of their statutory powers or of compelling them to obey those conditions without the fulfillment of which they have no powers whatsoever. It is within the power of the Court of Session to do that, but it is not within the power or function of the Court of Session itself to do work set by the legislature to be performed by those administrative bodies or inferior judicatories themselves."[1]

5.2 This statement of principle has recently been cited with approval by Lord Cameron in Hamilton v. Roxburgh C.C.[2] One consequence of such a general affirmation of jurisdiction has been a frequent insistence that the Supreme court should be ready to provide a remedy for citizen's wrongs. As Lord Kames wrote (in a passage the significance of which Professor Mitchell has emphasised)[3],

> "No defect in the constitution of a state deserves greater reproach, than the giving licence to wrong without affording redress. Upon this account, it is the province, one should imagine, of the sovereign, and supreme court, to redress wrongs of every kind, where a peculiar remedy is not provided. Under the cognisance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of session have with reluctance/

---

1. 1917 S.C. (H.L.) 1 at p. 11.
2. 1971 S.L.T. 2 at p. 11. Earlier statements to similar effect may be found in e.g. Forbes v. Underwood (1886) 13 R. 465, Ross v. Findlater (1826) 4 Sh. 514.
3. E.g. in "The Scope of Judicial Review", 1958 J.R. 197 at p. 199.

> reluctance been obliged to listen to complaints of various kinds, that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session, which daily increasing by new matter, will probably in time produce a general maxim, That it is the province of this court, to redress all wrongs for which no other remedy is provided. We are, however, as yet far from being ripe for adopting this maxim."[4]

5.3 At least by contrast with English law, far less emphasis has been placed on technical and procedural aspects of particular remedies. The Court of Session, historically a court of law and equity and retaining a residual equitable jurisdiction to provide relief in exercise of the 'nobile officium', has maintained a measure of flexibility and resourcefulness which has been absent from English courts. The most serious defect of English law, for which there are historical reasons which have still not been overcome, is that while the chance of getting relief against official acts or omissions may depend on the particular remedy invoked, there are severe restrictions on the extent to which different remedies may be sought together in the same proceedings. In Scots law, such difficulties have not been experienced and a variety of conclusions may be sought in the same action. A good example of this is Ashley v. Magistrates of Rothesay.[5] In this case, burgh magistrates had, purportedly relying on their statutory power to vary the normal closing time of public-houses for any particular locality, resolved to impose an earlier closing-time for an area which was so drawn as to include all the licensed houses in the burgh. Ashley sought (1) reduction of the resolution of the magistrates, (2) declarator that the earlier closing-time so imposed was invalid, (3) an order requiring the clerk of the magistrates to alter the licenses issued by inserting the lawful closing-time, and (4) damages against the magistrates. In the event the conclusion for damages was not insisted upon, but the other measures of relief sought were granted. The equivalent remedies in English law would have been (1) certiorari (2) declaration (3) mandamus and (4) damage; two entirely separate actions would have been required (a) seeking certiorari and mandamus (b) seeking a declaration of the law and damages. But in Scots law, a single action is sufficient. Indeed it is likely that Ashley could have also/

---

4. Historical Law Tracts, 4th ed., p. 228.
5. (1873) 11 M. 708, affirmed sub nom Macbeth v. Ashley (1874) 1 R. (H.L.) 14.

also sought an interdict to restrain the magistrates from acting unlawfully. It is notable that Ashley's action was successfully brought notwithstanding clauses in the Licensing Act which provided (a) that no licensing decision should be subject to reduction, advocation, suspension or appeal, or any other form of review or stay of execution otherwise than provided by the Act, and (b) that the magistrates could not be sued except within a period of two months from their decision.

5.4 As Lord Shaw's dictum in Moss Empires v. Assessor for Glasgow makes plain, the basis of the supervisory control of the Court of Session is founded on the assumption that it is for the Court to determine the limits of jurisdiction within the legal system. The supremacy of the Court's jurisdiction indeed lies in this, that no "inferior judicatories and administrative bodies" are final judges of the limits of their own jurisdiction. "There is no question the Lords of Session may exceed their authority and there is no other judicature that can control the same, or warrantably judge therein, save only the Parliament."[6] In Patillo v. Maxwell (1779) M. 7386, the judges were reluctant to review enlistment decisions of the Commissioners of Supply but maintained their power to review decisions on jurisdictional grounds; their "inherent and constitutional jurisdiction" was not excluded by the enlistment Acts. Baron Hume wrote, "It is obvious, that no special Judicature can be constituted absolute and uncontrollable judge of the extent and construction of its own charter." (Lectures, Vol. 5, p. 271.) The same theme runs through very many decisions[7] and is the basis of the most recent House of Lords decision on the interpretation of privative clauses.[8]

5.5 The emphasis on the residual supervisory jurisdiction of the Court of Session developed before the emergence of the modern agencies of government. Although many of these agencies exercise their powers in a manner which is unlike the procedure of courts of law and exercise "administrative" rather than "judicial" functions, the supervisory jurisdiction of the Scottish court has survived with less apparent stress than the comparable jurisdiction in England. There the difficult distinction between "administrative" and "judicial" developed a special significance in that the court's supervisory jurisdiction was at one period considered to be confined/

---

6. Stair's Institutes, IV, 1.1. See also IV, 3 - "Whatever is cognosced by inferior courts may be recognosced by the Lords, whose decisions regulate all the inferior courts."

7. E.g. Lord Advocate v. Perth Police Commissioners (1869) 8 M. 244 and Dalgleish v. Leitch (1889) 2 White 302.

8. Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147, especially at p. 174, where Lord Reid states, "It cannot be for the Commission to determine the limits of its powers."

confined to the review of "judicial" or "quasi-judicial" decisions. English law has yet scarcely left these difficulties behind. The classification of functions has fortunately not loomed large in the Scottish cases, although on occasion the judges have been concerned to consider the nature of the agencies or bodies whose decisions they are reviewing.[9] This does not mean that the degree of supervision exercised by the Court of Session has always been constant. In particular, the extent of review has been greater in the decision of cases concerning matters of established civil right, and at times very much less in the decision of cases arising under legislation which has created new rights and new machinery for decision.[10] Although the number of relevant modern decisions is much less in Scotland than in England, recognition of the underlying basis of judicial review seems more persistent in Scotland than in England.[11]

5.6 The remedies which will now be discussed are, apart from those remedies which are statutory, all remedies which serve a wide variety of purposes in Scots law. The account given attempts to concentrate on instances of the use of these remedies in the field of official acts or omissions, and it does not attempt to deal with the use of these remedies in other fields.

6. REDUCTION

6.1 Stair described this remedy, which is as old as the Court of Session itself, as "peculiar to this nation, and a more absolute security of men's rights than any form of process in Roman law or in any neighbouring nation."[1] Today it enables the Court to exercise its supervisory jurisdiction over many forms of official acts. Maclaren[2] described its uses under two headings (i) ordinary reduction, in the sense of its use for rescinding or quashing any deed, contract or other written instrument (ii) reduction of decrees, in the sense of its use for enabling the Court to review its own decrees or the decrees of inferior courts. Under (ii),

> "the Court of Session may reduce the decree of any inferior court which has acted in excess of its statutory power, has deviated from statutory procedure, or has in any way acted without due observance of the judicial administration of justice."[3]

---

9. E.g. Edinburgh and Glasgow Rly. Co. v. Meek (1849) 12 D. 153, Smith v. Lord Advocate 1932 S.L.T. 374, Hayman v. Lord Advocate 1951 S.C. 621, Barrs v. British Wool Marketing Board 1957 S.C. 72.

10. See e.g. the argument in Countess of Loudon v. Ayrshire Trustees, 28th May 1793 (F.C.); Lord Glenlee's judgment in Bremner v. Huntly Friendly Society, 4th Dec. 1817 (F.C.); and, more recently, Don Brothers, Buist and Co. v. Scottish Insurance Commission 1913 S.C. 607, Smith v. Lord Advocate 1932 S.L.T. 374.

11. Cf. Professor Mitchell's comment on Smith v. East Elloe R.D.C. [1956] A.C. 736, in Constitutional Law, 2nd edn., at p. 249.

---

1. IV.20.1.
2. Court of Session Practice, pp. 82-4.
3. Op. cit., p. 83.

The scope of ordinary reduction (i) is not confined to private law instruments such as deeds, wills and contracts but includes documents emanating from official sources which would not rank under (ii) as decrees of inferior courts.

6.2 The effect of a reduction may, depending on the circumstances, be merely declaratory of invalidity or illegality (Stair described the reduction as a declarator of right negativé)[4] or it may have a constitutive effect in setting aside a document which would otherwise have legal effect. Anglice, reduction is appropriate in respect both of void and voidable instruments.[5]

6.3 The wide scope of reduction in matters of private right is paralleled by what is potentially an extremely wide scope in matters concerning the legality of official acts. Taking examples at random, reduction has been sought -

of the decisions of licensing authorities;[6]
of the declaration of a poor's rate;[7]
of a School Board's minutes;[8]
of entries in a register of street widths;[9]
of a sheriff's refusal to confirm byelaws;[10]
of a byelaw alleged to be ultra vires;[11]
of a doctor's dismissal from the National Health Service;[12]
of a disciplinary decision within a fire brigade;[13]
of a rating valuation made in breach of natural justice.[14]

6.4 In the last of these cases, Lord Kinnear said, "Wherever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute to the prejudice of the subject, the jurisdiction of the court to set aside such excess of power as incompetent and illegal is not open to dispute." (1917 S.C. (H.L.) at p.6) The grounds on which reduction may be sought accordingly extend to all those matters which render a decision of an inferior tribunal or administrative body unlawful, incompetent, ultra vires or in excess of jurisdiction. They include charges of/

---

4. Inst. iv.20.2 - views to similar effect were expressed by Lords Fullerton and Mackenzie in Edinburgh & Glasgow Rly. Co. v. Meek (1849) 1 2 D. 153.
5. Professor Smith's view (Short Commentary, p.789) that the void-voidable distinction is not to be found as such in Scots law appears to be borne out by judicial decisions in the public law field. This distinction has recently caused much doubt and uncertainty in English administrative law and the prevailing view is that it is not a helpful distinction: see articles by Professor H.W.R. Wade in (1967) 83 L.Q.R. 526 and (1968) 84 L.Q.R. 95, and by M.B. Akehurst in (1968) 31 M.L.R. 2 and 138.
6. Ashley v. Rothesay Magistrates, supra; Alexander & Son Ltd. v. Minister of Transport 1936 S.L.T. 553.
7. Boyd v. Shaw (1827) 5 S. & D. 413.
8. Marshall v. Ardrossan School Board (1879) 7 R. 359.
9. Caledonian Rly. Co. v. Glasgow Corporation (1905) 7 F. 1020.
10. Glasgow Corporation v. Glasgow Churches Council 1944 S.C. 97.
11. Scott v. Glasgow Corpn. (1899) 1 F. (H.L.) 51; Da Prato v. Partick Mags. 1907 S.C. (H.L.) 5.
12. Palmer v. Inverness Hospitals Board 1963 S.C. 311.
13. McDonald v. Lanarkshire Fire Brigade Committee 1959 S.C. 141.
14. Moss's Empires v. Assessor for Glasgow, supra.

of deviation or departure from statute,[15] breach of regulations,[16] misdirection and taking into account irrelevant considerations,[17] serious defects of procedure,[18] lack of proper notice,[19] bias and other breaches of natural justice,[20] abuse of discretion.[21] In general, such cases are not concerned with the availability of reduction or with procedural matters but with the questions of substance in dispute between the parties - for example, the decision of whether or not a particular discretion has been abused or whether a procedural irregularity has been serious enough to invalidate the proceedings under review.

6.5 But there is one issue in dispute which relates directly to the grounds on which reduction will lie, and this issue both involves difficulties of a theoretical kind and is of direct practical importance. The grounds mentioned in the previous paragraph all relate to the jurisdiction (or competence) of the tribunal or official body whose decision is under review; if any of these grounds are established, the decision is invalid because in one respect or another there has been an excess or failure of jurisdiction. The issue on which doubt exists is whether reduction may be granted of a tribunal's decision which it was within the jurisdiction of the tribunal to make but which was based on the interpretation of a statute or the application of a legal principle which the applicant for reduction claims to be erroneous and which the reviewing court would have decided differently. In brief, whether a tribunal's decision may be reduced on the ground of error of law not going to jurisdiction. Although there does not seem to be a modern Scottish decision directly in point, the prevailing view is probably that error of law within jurisdiction is not a ground for reduction. The report of the Franks Committee on Administrative Tribunals and Inquiries[22] found it necessary to deal with this as affecting the question of whether tribunal decisions should be subject to review by the courts on points of law. The effect of section 9 of the Tribunals and Inquiries Act 1958 is that from most tribunals there is now an appeal on points of law to the Court of Session. But some tribunals (including the National Insurance Commissioners and Supplementary Benefits Appeal Tribunals) are intentionally not within section 9. If the generally held view as to the Scottish position is correct, the anomaly exists that a decision by the National Insurance Commissioners/

---

15. Caledonian Rly. Co. v. Glasgow Corporation (1905) 7 F. 1020, Brown v. Heritors of Kilberry (1825) 4 Shaw 174, Macfarlane v. Mochrum School Board (1875) 3 R. 88.

16. Hayman v. Lord Advocate 1951 S.C. 621.

17. Glasgow Corporation v. Glasgow Churches Council 1944 S.C. 97.

18. Brown v. Heritors of Kilberry, supra, Goodall v. Bilsland 1909 S.C. 1152.

19. Moss's Empires v. Assessor for Glasgow, supra, MacDonald v. Lanarkshire Fire Brigade Committee, supra.

20. Barrs v. British Wool Marketing Board 1957 S.C. 72, Goodall v. Bilsland, sup.

21. Ashley v. Rothesay Magistrates, supra, Marshall v. Ardrossan School Board (1879) 7 R. 359.

22. Cmnd. 218, 1957 at paras. 107, 110.

Commissioners dealing with, say, an industrial injuries claim, is subject to review by certiorari for error of law not going to jurisdiction if it is an English claim, but is not subject to judicial review if it is a Scottish claim.

6.6 A fuller discussion of this matter may be found in Appendix II to this paper. It is there submitted (1) that, on the present state of the authorities, reduction is not considered to be available for mere error of law but (2) that the authorities do not decisively exclude a decision extending the scope of review by reduction to review for manifest error of law.

6.7 Apart from the question of review of errors of law not going to jurisdiction, general principles of law impose certain limitations on the scope of reduction. For example, a dismissed employee cannot normally seek reduction of his notice of dismissal; it was the statutory context and the public character of the employment in Palmer v. Inverness Hospitals Board (supra) which enabled the dismissed doctor to have his dismissal reduced. Yet it is rare for reduction to be held an inappropriate remedy when a decision by a public authority is challenged. One exceptional case was British Oxygen Co. v. South-West Scotland Electricity Board[23] in that extensive litigation, the company initially sought reduction of various tariffs imposed by the Board and declarators that these tariffs were in breach of the Board's statutory powers. Lord Keith, at 1956 S.C. (H.L.) 126 questioned whether the whole form of the action was not misconceived, and indicated a preference for a remedy by way of interdict or an action to recover overpayment. Later, the company abandoned its conclusions for reduction and added a claim for recovery of overpayment of charges. The reported judgments do not clearly disclose why the reductive conclusions were considered inappropriate. A relevant consideration may have been the principle that reduction should not be sought where lesser remedies would suffice.[23a]

6.8 One possible objection to the reductive conclusions in the British Oxygen case may have been that the pursuers sought in effect to reduce only part of the Board's statutory tariffs. There is however ample authority that/

---

23. 1956 S.C. (H.L.) 112 and 1959 S.C. (H.L.) 17.

23a Thomson and Middleton, Manual of Court of Session Procedure, p. 141.

that a reduction in part may be awarded, where the lawful and unlawful parts of the document or decision inpugned may be readily severed; but a partial reduction may not be considered appropriate, particularly where severance is difficult or impossible.[24]

6.9 Are there any aspects of the law relating to reduction which should be considered with a view to reform?

691 Unlike the declarator and interdict, reduction is within the exclusive jurisdiction of the Court of Session and cannot be granted by a Sheriff Court.[25] In 1967, the Grant Committee on the Sheriff Court recommended against extending the sheriff court's jurisdiction to include reduction. Apart from the question of reduction of decisions of the sheriff court itself, applications for the reduction of administrative decisions were said to be rare but "to raise questions of great legal difficulty and importance which ought to be handled by the Court of Session."[26] Against this, it might be argued that the Sheriff Court already has jurisdiction of an appellate or confirmatory kind in relation to many local administrative decisions; it would be consonant with this administrative jurisdiction if the same court had jurisdiction to reduce local administrative decisions. To restrict reduction to the Court of Session is to limit the practical opportunity of challenging local government decisions. The restriction may be anomalous in view of the Sheriff Court's jurisdiction to issue declarators or interdicts in governmental matters. Moreover, where a public authority was itself attempting to enforce a decision by action in the Sheriff Court, the court would have jurisdiction to decide the questions of "great legal difficulty" which might ground a reduction, if these were raised by the defender by way of exception to the enforcement proceedings.[27]

6.92 The scope of reduction in public law matters is broadly comparable to that of certiorari in English law. As an "extraordinary", prerogative remedy, certiorari has always been obtained through a procedure which is distinct from and more summary than ordinary civil procedure in England. But in Scotland, reduction can be sought only by the ordinary full procedure of civil litigation. This may well be appropriate in many cases, but if reduction is to be widely used as an administrative remedy, it should be considered whether a summary procedure should be made available, particularly where the facts are not in dispute. The question of interim relief may also present/

---

24. Islay Estates Co. v. McCormick 1937 S.N. 28; Moss's Empires Ltd. v. Assessor for Glasgow, supra; cf. Mitchell v. Cable (1848) 10 D. 1297, Miller v. Oliver & Boyd (1903) 6 F. 77, McEwen's Trustees v. Church of Scotland General Trustees 1940 S.L.T. 357.

25. S.5, Sheriff Courts (Scotland) Act 1907.

26. Cmnd. 3248, paras. 119-120.

27. Sheriff Courts (Scotland) Act 1907, First Sched, rule 50. Extension of the reduction to the Sheriff Court was recommended in the 4th Report of the Royal Commission on Courts of Law in Scotland, 1870: C. 175, p. 32.

sought to be reduced seeks to enforce it in the interim. Maclaren considered that it was competent to present a note of suspension and interdict in order to obtain interim relief pending an action of reduction, but that this would only be granted if it was impossible otherwise to conserve the right of the pursuer in the reduction should he succeed in the later action.[28]

6.93 Certiorari in English law is subject to a special limitation period of six months laid down by rules of court, which may be extended only with the leave of the court. This has been criticised as being too short. Reduction as a remedy in administrative law appears to be open to the opposite criticism. It appears that it is not subject to a short period of negative prescription but to the 20 year period. The recently published paper of the Scottish Law Commission on reform of the law relating to prescription and limitation of actions[29] does not discuss the particular considerations which apply in the case of decisions of public authorities and its recommendations are concerned essentially with private law. Judicial practice has been to take account of delay in seeking reduction as a reason for withholding it.[30] If it is envisaged that reduction is to become a standard means of seeking review of official decisions and is not merely to remain a weapon of last resort, is a special prescription period necessary? And if so, should a similar period be applied to actions seeking interdict or declarator against public authorities?

6.94 Reduction is essentially a negative remedy by which an offending official decision may be quashed. By reduction, the court has no power to substitute the correct decision for the unlawful decision, although the court may have power to direct the inferior court or administrative body to deal with the matter lawfully (as in Ashley v. Rothesay Mags., supra). Reduction does not seem appropriate where the citizen's complaint is of an unlawful refusal to decide a matter. Unless reduction may be sought of a "no decision" (and if a refusal were expressed in a local authority minute, presumably reduction of the minute could be sought), the positive remedies for seeking performance of public duties must be regarded as complementary to the remedies which seek to restrain illegal acts.[30a] (Below, section 9)

---

28. Maclaren, Bill Chamber Practice, 1915, p. 54; citing inter alia Greig v. M'Farlane (1832) 10 S. 382; Affleck v. Affleck (1862) 24 D. 291, and Wilson v. Caledonian Rly. Co. (1860) 22 D. 697.

29. 1970 Scottish Law Commission No. 15.

30. Anderson v. Campbell, 28th Feb. 1811 (15 months); Crawford v. Lennox (1852) 14 D. 1029 (13 years); Deans of the Chapel Royal v. Lord Advocate (1867) 5 M. 414 (reduction of valuation of teinds sought after 200 years - reduction excluded by negative prescription, presumed knowledge for 40 years); Mathewson v. Yeaman (1900) 2 F. 873 (2¾ years). In Ashley v. Rothesay Magistrates (supra), statutory limit of two months for suing magistrates held not to apply to reductive proceedings.)

30a See Lord MacKay's judgment in Glasgow Corporation v. Glasgow Churches Council 1944 S.C. 97.

6.95 The uncertainty over the availability of reduction in respect of manifest errors of law not going to jurisdiction (above, in paras. 6.5, 6.6) is one which as a matter of public policy needs to be resolved, at least in respect of governmental schemes which are intended to apply uniformly in England and Scotland.

6.96 Unlike the law relating to certiorari in England, reduction has not acquired distinctive rules of title and interest to sue in the public law sphere. This topic, together with the effect of exclusion or privative clauses and the effect of alternative remedies will be considered below in relation to remedies generally (section 10, 12 and 14).

7. DECLARATOR

7.1 Like the reduction, the declarator is one of the oldest Scottish remedies, is of very broad scope throughout the law, and in respect of official acts and omissions has established itself as a valuable remedy. By contrast, in English law the declaration of right, derived from the equitable jurisdiction of the Lord Chancellor, became available in the general jurisdiction of the courts only late in the 19th century; and there has been considerable judicial hesitation in accepting the full scope and ability of the declaration.[1]

7.2 A declaratory conclusion is one framed with the object of having the existence of a right declared by the court; the subject-matter of a declarator may be a right of any description.[2] As Stair said, "declaratory actions are those wherein the right of the pursuer is craved to be declared, but nothing is claimed to be done by the defender ... Such actions may be pursued for instructing and clearing any kind of right relating to liberty, dominion or obligation, but they use not to be raised or insisted on where there is no competition or pretence of any other right." (IV.3.47) A declarator may be sought together with other conclusions, such as reduction, interdict or damages. Except for declarators relating to marriage and personal status, a declarator is within the concurrent jurisdiction of the Court of Session and the sheriff courts.

7.3 Some examples of the use of declarator in relation to official acts and omissions may be given.

(a) Guild v. Scott, 21st Dec. 1809 (F.C.): local farmers and magistrates obtained a declarator that turnpike trustees were required to use toll receipts for repairing the roads.

(b) Tait v. Lauderdale (1827) 5 S. 330: tenants and merchants in Lauder sought reduction and declarator against the Earl of Lauderdale who had obtained a decree from the justices of the peace closing a road near his castle and approving a diversion.

---

1. S.A. de Smith, Judicial Review of Administrative Actions, 2nd ed. chap. 11; L Zamir, The Declaratory Judgment, 1963.

2. Encyclopedia of Laws of Scotland, Supplement, new article "Declarator".

(c) Tennent v. Partick Mags. (1894) 21 R. 735: a licensee obtained a declarator that the licensing jurisdiction of the county justices of the peace, by whom he had been licensed, had not been transferred to the burgh magistrates under the Burgh Police (Scotland) Act 1892.

(d) Rossi v. Edinburgh Mags. (1904) 7 F. (H.L.) 85: an ice-cream seller obtained a declarator that conditions which the magistrates proposed to attach to the issuing of statutory licences for selling ice-cream were ultra vires. In the House of Lords, Lord Robertson considered that it would have been unfortunate if the question of vires could not have been settled until Rossi's lawful trade had been interrupted or harassed by a prosecution for breach of the conditions.

(e) Stirling C.C. v. Falkirk Burgh 1912 S.C. 1281: rate-payers who had paid their annual assessment of rates obtained a declarator that the defenders had no right to levy rates from the pursuers to pay for the expenses of an unsuccessful promotion of a provisional order seeking a burgh extension.

(f) Ayr Mags. v. Lord Advocate 1950 S.C. 102: a police authority obtained a declarator that a public inquiry into a proposed police re-organisation was irregular, ultra vires and not in accordance with substantial justice.

7.4 Although a declarator essentially seeks the declaration of the pursuer's right, what has been called a negative declarator is permitted. In North British Rly. Co. v. Birell's Trustees the company obtained a declarator that the trustees (neighbouring owners) had no right or title to object to the company granting a lease of its surplus land for mining purposes; Lord Dunedin considered this to be an instance of "one great merit of the declarator ... its elasticity."[3] Although such a declarator is in appearance negative, it is in effect seeking to establish a right in the pursuer to pursue a certain course of action without fear of legal restraint. Conversely, if the company had proceeded to grant the lease, it would have been competent for the neighbouring owners to seek a declarator that the lease was invalid.[3a]

7.5 In principle, the jurisdiction of the Court of Session in declarator is as wide as the jurisdiction of the court itself. But certain limitations on the use of declarator exist, and some of these are particularly relevant to the use of the declarator as a remedy in administrative law.

---

3. 1918 S.C. (H.L.) 33 at p. 47.

3a. In matters of private law, it does not follow from the fact that A might seek interdict to restrain certain acts by B if carried out without A's consent, that B will have title and interest to seek a negative declarator against A to the effect that A's consent is not required: Eagle Lodge Ltd. v. Keir and Cawde Estates Ltd. 1964 S.C. 30

7.51 A reduction is always concerned ex post facto with a decision, official record or document already made or granted. By contrast, a declarator may be sought prospectively to establish a legal principle which thereafter should be followed by the tribunal or agency concerned. In general, declarators of this kind have been discouraged. No declarator may be granted where an alternative remedy exists which the court considers should be exhausted before recourse to the Court of Session is sought, particularly on an issue which Parliament has provided should be settled by a specialised tribunal or appeal procedure.[4] But in applying this rule the court may exercise some discretion; there may be circumstances in which a declarator is granted even though the subject-matter is within the scope of a statutory remedy or procedure.[5] In Edinburgh & Glasgow Rly. Co. v. Meek, Lord President Boyle, in a dissenting judgment considered it incompetent to make a declarator ab ante laying down the mode of assessment of a railway which was to be adopted by the 23 poor law authorities who were parties to the action; but the majority argued that because a reduction could be obtained of an unlawful assessment, it was manifestly more convenient to have a single declarator in advance, than wait until what might be 23 unlawful assessments had to be reduced. Arguments from convenience of this kind are usually advanced to justify declarator in anticipation of a statutory process, especially where the statutory proceedings would be penal in character, as in Glasgow District Railway v. Glasgow Mags. Where the issue in dispute is not one which could be raised and settled as such by the statutory procedure, a declarator will more readily be granted.[6]

7.52 No declarator will be granted of abstract, academic or hypothetical questions.[7] The reason for a question being considered hypothetical may be that the action has been raised prematurely[8] or that there is no actual dispute which a declarator would resolve[9] or that the pursuer has no title or interest to sue (Gifford v. Traill, supra). It has been sometimes said that no declarator is competent which seeks to establish the meaning of an Act of Parliament,[10] but a declarator concerning the application of a statute to particular facts is competent.[11] The better view is that the the court will not declare an abstract proposition of law, whether it be a matter of common law or of statutory interpretation.

---

4. Baring v. Wright (1824) 25 609; Balfour v. Malcolm (1842) 1 Bell's App. 153; Caledonian Rly. Co. v. Glasgow Corpn. (1905) 7 F. 1020; Dante v. Ayr Assessor 1922 S.C. 107.

5. Macdonell v. Caledonian Canal Cmssrs. (1830) 8 S. 881; Edinburgh & Glasgow Rly. Co. v. Meek (1849) 12 D. 153; Hogg v. Parochial Board of Auchtermuchty (1880) 7 R. 986; Glasgow District Rly. v. Glasgow Mags. (1884) 11 R. 1110; West Highland Rly Co. v. Inverness C.C. (1904) 6 F. 1052.

6. Hope v. Edinburgh Mags. (1897) 5 S.L.T. 195.

7. Gifford v. Traill (1829) 7 S. 854; Morton v. Gardner (1871) 9 M. 548.

8. Ayr Mags. v. Sec. of State for Scot. 1966 S.L.T. 16; cf. Bothwell Parochial Board v. Pearson (1873) 11 M. 399.

9. Morton v. Gardner, supra; Bothwell Parochial Board v. Pearson, supra; Callender's Cable Co. v. Glasgow Corporation (1900) 2 F. 397.

10. Todd & Higginbotham v. Burnet (1854) 16 D. 794; Orr v. Alston 1912 1 S.L.T. 95; D.M. Walker, Principles of Scottish Private Law, vol. II, p. 1882.

11. Leith Police Cmssrs. v. Campbell (1866) 5 M. 247, West Highland Rly.Co. v. Inverness C.C., supra.

7.53 Similarly, no declarator will be granted where it could have no practical effect in settling a dispute between the parties. This may be because a declarator is sought in what is considered by the court not to be a matter of judicially enforceable right. Thus in Griffin v. Lord Advocate 1950 S.C. 448 the court held it incompetent to declare that Griffin had been a member of the navy, for the interpretation of the order in council dealing with war pensions was a matter for the Minister, and was not within the jurisdiction of the court. On similar reasoning declarators have been withheld on matters concerning military status, the administration of military pensions and the administration of a statutory silicosis scheme.[12]

7.54 As with all other judicial remedies, the pursuer must have title and interest to sue. Lack of such title and interest may itself indicate that the issue is hypothetical, that there is no existing dispute, that a declarator if granted would have no practical effect, or merely that no legal right of the pursuer is in issue.[13] The outstanding recent example of lack of title to sue barring a declarator is Simpson v. Edinburgh Corporation 1960 S.C. 313, although nothing in that case turned on the precise remedy sought. Decisions concerning title and interest to sue will be considered together in relation to remedies generally (section 12, below).

7.6 One practical problem to which an action of declarator may give rise is that of interim relief. In general, suspension and interdict may be used to secure the status quo pending a decision in a different form of action, and Maclaren considers that a suspension and interdict is competent at the instance either of the pursuer or of the defender of an action for declarator.[14] But it is doubtful whether an interim declarator is competent.[15] The same problem exists in English law.[16] This may raise serious difficulty in the case of actions against the Crown and Crown servants in which section 21 of the Crown Proceedings Act 1947 excludes the possibility of interdict. A solution to this problem would have to be sought on a U.K. basis, as section 21 of the 1947 Act equally excludes injunctions against the Crown in English law.

---

12. Mackie v. Lord Advocate (1898) 25 R. 769; Smith v. Lord Advocate (1897) 25 R. 112; Smith v. Lord Advocate 1932 S.L.T. 374; cf. Borthwick Parochial Board v. Temple Parochial Board (1891) 18 R. 1190, where the court declined on a stated case to settle a question which was unregulated by statute and which was therefore left to the "more or less" arbitrary decision of statutory commissioners.

13. Orr v. Alston, supra; Callender's Cable Co. v. Glasgow Cpn., supra; Griffin v. Lord Advocate, supra; Smith v. Lord Advocate (1897) supra.

14. Maclaren, Bill Chamber Practice, p. 53.

15. Ayr Mags. v. Secretary of State for Scotland, supra, citing an unreported decision of 1950, Robinson v. Lord Advocate, (noted at 1965 S.C. 400).

16. Underhill v. Ministry of Food (1950) 66 T.L.R. (Pt. 1) 730; International General Electric Co. v. Commissioners of Customs & Excise [1962] Ch. 784.

7.7 Apart from the question of interim relief, there do not seem to be any particular problems relating to the declarator which restrict its usefulness as a remedy against official acts and omissions. Scots law is free of the certiorari versus declaration problem which has caused difficulty in English law; this may be explained by the ease with which declarator and reduction may be sought in the same proceedings.

8. INTERDICT

8.1 The remedy of interdict is available for two main purposes (a) to stay execution of diligence when a simple suspension is not sufficient; (b) to prevent injury to any right.[1] In the field of administrative law it is possible that the first may by extension be applicable to the review of decisions of certain administrative tribunals whose decisions are directly enforceable against the citizen. The second would be relevant whenever rights were threatened by unlawful official action. In this latter sense, interdict is available to restrain a statutory authority from acting ultra vires, at least where such acts directly infringe an individual's rights. In Campbell's Trustees v. Police Commissioners of Leith interdict was granted to restrain a statutory body from acting in excess of its powers. Lord Hatherley, L.C. said, with regard to public authorities with statutory powers, "In all matters regarding their jurisdiction they are, of course, allowed to exercise those powers according to their judgment and discretion; but when they exceed those powers, they are immediately arrested by interdict or by injunction, it not being a sufficient answer on their part to say, 'you have your remedy at law'."[2] The emphasis is on the interdict as a supporting remedy to give relief where other remedies may be insufficient, an attitude which is probably more English than Scottish, the interdict never having formed part of a separate jurisdiction as did the injunction. In regard to unlawful official acts interdict readily takes its place amongst other remedies. Thus, interdict has been granted to restrain the ultra vires acts of a local authority, a statutory water undertaking and a regional hospital board.[3] Interdict is also available to restrain a company or local authority which is failing to exercise reasonable care in exercising statutory powers and in consequence is injuring the pursuer.[4]

---

1. Encyclopedia of Scots Law, vol. 8, p. 341.
2. (1870) L.R. 2 H.L. (Sc.) 1, at p. 3.
3. Hope v. Edinburgh Mags. (supra); Grieve v. Edinburgh & District Water Trustees, 1918 S.C. 700 and Adams v. Secretary of State for Scotland 1958 S.C. 279.
4. Gillespie v. Lucas & Aird (1893) 20 R. 1035.

8.2 There are various grounds on which an interdict may be withheld notwithstanding the doubtful legality of the conduct impugned. As with the declarator, a court may be unwilling to grant an interdict if there is another competent remedy e.g. a statutory penalty or statutory means of redress.[5] Where a statutory arbitration or adjudication is pending, and there are grounds for supposing that the statutory arbiter or judge has no jurisdiction, an interdict against further proceedings may be granted,[6] but the court may not always consider this desirable, and will not interdict proceedings in a statutory arbitration while it is proceeding unless it is shown that the claim is in whole or in part clearly ill-founded or that the arbiter is asked to exercise powers which he does not possess.[7] This use of interdict, to restrain an excess of jurisdiction, resembles the scope of the prerogative order, prohibition, in English law, but unlike prohibition, interdict is not restricted to controlling bodies which are required to act judicially and is available in respect of the exercise of legislative powers.[8]

8.3 Interdict is sometimes available to supplement statutory remedies and penalties, but the court may consider that the stringent sanctions for breach of interdict should not be substituted for the statutory penalty,[9] or indeed, that the remedy of interdict may be incompetent in view of the statutory penalty (Institute of Patent Agents v. Lockwood, supra). The discretionary nature of interdict is shown by the effect of delay in asserting rights, which may, whether through acquiescence or merely lapse of time, lead to interdict being refused.[10]

8.4 In English law, an injunction has never been available against the Crown. The present position in Scots law is governed by section 21 of the Crown Proceedings Act 1947 which excludes interdict against the Crown and also in certain circumstances against officers of the Crown. This provision has had the effect of excluding interdict in cases where before 1947 it might have been available.[11] The legislative assumption made in section 21 is that the Crown and Crown officers may be expected to give effect to declaratory judgments. But no provision is made for interim relief by way of declarator in circumstances where against a private person an interim interdict would be available (Ayr Magistrates v. Secretary of State for Scotland, supra).

---

5. Buckhaven & Methil Mags. v. Wemyss Coal Co. 1932 S.C. 201; Cumming v. Inverness Mags. 1953 S.C. 1; Institute of Patent Agents v. Lockwood [1894] A.C. 347.
6. McCoard v. Glasgow Cpn. 1935 S.L.T. 117.
7. Dumbarton Water Works Commissioners v. Blantyre (1884) 12 R. 115; cf. contractual arbitration, G.S.W. Rly. v. Caledonian Rly. (1871) 44 S. Jur. 29.
8. Insurance Committee for Glasgow v. Scottish Insurance Commissioners 1915 S.C. 504: although no interdict was ordered in this case, the case nonetheless seems authority for the proposition stated in the text; see also Bell v. Secretary of State for Scotland 1933 S.L.T. 519 and cf. Wedderburn v. Scottish Central Rly. (1848) 10 D. 1317 - no interdict to restrain application to Parliament.
9. Buckhaven & Methil Mags. v. Wemyss Coal Co., supra; see also Kelso School Board v. Hunter (1874) 2 R. 229, and Kelso Mags. v. Alexander 1939 S.C. 78.
10. Buchanan v. Glasgow Cpn. Water Commissioners (1869) 7 M. 853.
11. E.g. Bell v. Secretary of State for Scotland, supra.

8.5 Apart from actions against the Crown, relief by way of interim interdict may raise special problems in cases involving the public interest. In Anderson v. Kirkintilloch Mags. 1948 S.C. 27, special statutory considerations influenced the court to refuse an interim interdict to prevent the holding of a licensing poll. In Graheme v. Swan (1882) 9 R. (H.L.) 91, where no interim interdict was granted and building at an expense of £2,000 had been completed before interdict was granted, the court subsequently took into account the loss to the community of which the pursuer was a member and the fact that the dispute was not about private property rights. In Russell v. Hamilton Mags. (1897) 25 R. 350, where a local authority had promoted a provisional order that was manifestly ultra vires, an interim interdict was granted to restrain the holding of a public inquiry into the draft order. But in Ayr Mags. v. Secretary of State for Scotland (supra), interim relief was refused as the judge could not at that stage assume that the whole proceedings at the inquiry would be ultra vires. Where an interim interdict would impede the introduction or operation of a statutory scheme, difficult questions of the balance of convenience may arise. In Bell v. Secretary of State for Scotland (supra), interim relief was granted to restrain the Secretary of State from proceeding further with bringing a statutory marketing scheme into operation. But in Scottish Milk Marketing Board v. Paris 1935 S.C. 287, a statutory marketing board itself obtained an interim interdict to restrain a farmer from acting contrary to the marketing scheme, the court's decision being based on the public interest and convenience in maintaining the scheme in operation. In Innes v. Royal Burgh of Kirkcaldy 1963 S.L.T. 325 where a council's resolution to reduce all council rents by 25% was challenged, the court held that the balance of convenience lay in maintaining the existing level of rents.[12]

8.6 The interdict broadly serves purposes comparable to those served by the prohibition and the injunction in English law. The greatest single difference lies in the rules relating to title and interest to sue. Scots law has no direct equivalent to the relator proceedings in England, by which if the Attorney-General acting in the public interest allows his name to be used in proceedings for an injunction to restrain unlawful conduct by a public authority or by an individual, no question of the sufficiency of the title to sue can arise. The general question of title to sue will be discussed below (section 12). Although Scots law goes much further than English law in permitting individuals to sue to protect public rights (e.g. Graheme v. Swan, supra), the lack of relator proceedings has sometimes been felt in Scots law.[13] It may be this lack that explains the relatively infrequent use of interdict in Scots law to provide an effective sanction against unlawful conduct which statutory penelties are ineffective to prevent.[14]

---

12. cf. Martin v. Easton (1830) 8 S. 952.

13. E.g. Nicol v. Dundee Harbour Trustees 1915 S.C. (H.L.) 7.

14. On the lines of the use of the injunction in English cases such as Att.-Gen. v. Bastow [1957] 1 Q.B. 514, Att.-Gen. v. Smith [1958] 2 Q.B. 173 and Att.-Gen. v. Harris [1961] 1 Q.B. 31. And see Reid v. Mini-Cabs, 1966 S.C. 137.

9. ENFORCEMENT OF STATUTORY DUTIES

9.1 Professor de Smith has written, "Judicial review can more readily be obtained for wrongful acts than for wrongful omissions"[1] and Professor Mitchell to like effect has remarked, "the jurisdiction to restrain is much more effective than the jurisdiction to compel action".[2] In general, it has been found easier to restrain the commission of ultra vires acts than to compel the performance of public duties. One reason for this is that judicial enforcement of a public duty may involve the court in directing a public authority to spend money in maintaining or developing a public service. As Lord Justice-Clerk Boyle said in Guthrie v. Miller (1827) 5 S. 711, "It would be absurd for this court to sit here and decide all the questions which fall under the ordinary duty of Commissioners of Police ... we cannot be called on to fix whether there is to be a lamp at this point, and a watchman at that." A related consideration is that although public authorities may be placed under statutory duties, a particular duty may not be owed to a member of the public and indeed may be intended by Parliament to be administratively and not judicially enforceable. Power to undertake public works or provide a public service may well not be construed as imposing any kind of duty to exercise the power.[3] Moreover, in relation to the scope of statutory duties, the central government is in a privileged position on account of the judicial presumptions which concern the question of whether a statute binds the Crown.[4]

9.2 Not all these difficulties can easily be solved judicially. But an effective system of remedies should provide the citizen with means of obtaining (1) a judicial decision on the existence and extent of a legal duty owed to him (2) where such a duty exists, a judicial decision whether a public authority has complied with its legal duty and (3) in the event of default, a judicial remedy for securing enforcement of the duty.

9.3 By declarator, a citizen may obtain a decision of points (1) and (2). For this purpose, a declarator may be sought unaccompanied by other relief, as in Heritors of Dunbar v. Dunbar Mags. (1831) 9 S. & D. 669. But a declarator may also be sought together with an interdict to restrain conduct that would be in breach of an established duty.[5] In some circumstances, declaratory conclusions may be accompanied by a conclusion for a decree ordaining implement.[6] An action for reduction of an official decision

---

1. Judicial Review of Administrative Action, 2nd edn., p. 547.
2. Constitutional Law, 2nd ed., p. 314
3. Fleming & Ferguson Ltd. v. Paisley Mags. 1948 S.C. 547.
4. Crown Proceedings Act 1947, section 2(2) and 40(2)(f).
5. Adams v. Secretary of State for Scotland 1958 S.C. 279.
6. Fleming & Ferguson Ltd. v. Paisley Corpn., supra; and see Jex-Blake v. Senatus of Edinburgh University (1873) 11 M. 784, and Bruce v. Aiton 13 R. 358.

which is claimed to be in breach of an authority's duty necessarily requires the court to determine whether this is the case.[7]

9.4 Where an individual has suffered personal injury or injury to property and claims that this is attributable to the acts or omissions of a public authority, an action for damages may often be a suitable means of obtaining a judicial decision on the existence and extent of a statutory duty.[8] But how general a remedy for breach of statutory duty is an action seeking damages, in particular where the loss suffered is economic and does not arise from physical injury to person or property? There are some older decisions which suggest that damages should be generally available for breach of a statutory duty or indeed for wrongful exercise of statutory powers. Thus in Dawson v. Allardyce 18th February 1809 (F.C.), although other forms of review of a parish authority's decision in respect of a school-house were excluded by statute, it was considered competent for the Court of Session to entertain an action of damages to such an amount as should effectively relieve the school-master from any resulting inconvenience. In Ferguson v. Earl of Kinnoul (1842), 9 Cl. & F. 251, wide opinions were pronounced in support of the general principle that public functionaries appointed to act ministerially are liable to an action for damages at the suit of anyone who suffers damage from their breach of duty. Lord Brougham said, "If the law casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages ... to those whom his refusal or failure injures." (p. 289) The Scottish authority principally relied on (Innes v. Edinburgh Mags. M. 13189) was however a case of liability for physical injury sustained through failure to fence road-works. Subsequent decisions have cast considerable doubt on the generality of the opinions expressed in Ferguson v. Kinnoul, and the tendency has been to confine liability for breach of statutory duty to circumstances resembling those in which there may be liability at common law for physical injury caused by negligence.[9] In view of the difficult state of the law, the English and Scottish Law Commissions in 1969 recommended that the courts should in interpreting statutes assume that the remedy of damages is available for breach of statutory duty, unless Parliament expressly provides to the contrary.[10]

---

7. Scott v. Glasgow Corp. (1899) 1 F. (H.L.) 51.

8. E.g. Gray v. St. Andrews District Committee 1911 S.C. 266 (duty of highway authority to maintain roads of statutory width); Keogh v. City of Edinburgh 1926 S.C. 811 (duty of highway authority to light traffic island); Cameron v. Inverness C.C. 1935 S.L.T. 281 (duty of highway authority to keep roads cleared of snow); Deegan v. Dundee Corp. 1940 S.C. 457 (duty of local transport undertaking to provide adequate bus service at rush hour).

9. E.g. Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 3 8, frequently cited in Scottish cases.

10. "The Interpretation of Statutes", H.C. (1968-69) 256, para. 38.

The recommendation did not however expressly take account of the characteristic relationships between government and the individual which are the concern of administrative law and further consideration may need to be given to the appropriateness of damages as a remedy in this context.

9.5 The principal remedy in English law for enforcing performance of public duties is the prerogative order of mandamus. In the recent use made of it, this ancient remedy seems to have acquired a new lease of life.[11] An equivalent to mandamus may still exist in what survives of the former jurisdiction of the Court of Exchequer in Scotland.[12] The Court of Session probably has power, derived from its inherent constitutional jurisdiction of seeing that subordinate authorities conform to the law, to order inferior authorities to perform their legal duty. Thus in Ashley v. Rothesay Mags. (supra), in addition to reduction and declarator, Ashley sought an order from the court requiring the licensing clerk to insert the correct closing-time in the licence. Lord President Inglis considered it to be competent for the court, in rectifying any illegality committed by the magistrates, to order their clerk to undo that illegality. But a convenient procedure for invoking this jurisdiction of the court does not seem to have existed before the Court of Session Act 1868. Section 91 of that Act provides inter alia that the Court may, upon application by summary petition, order the specific performance of any statutory duty, under such conditions and penalties (including fine and imprisonment) in the event of the order not being implemented, as to the Court shall seem proper. The first reported case in which an order under s.91 appears to have been granted was Adamson v. Edinburgh Street Tramways Co. (1872) 10 M. 533: an order to enforce statutory duties in respect of passing places for trams in narrow streets was granted at the instance of omnibus and cab proprietors. Thereafter little use seems to have been made of the summary remedy under s.91.

9.6 Counsel for the pursuer in Lundie v. Falkirk Mags. 18 R. 60 argued, without success and without apparent relevance, that his action was analogous to the remedy under s.91. In Annan v. Leith Licensing Authority (1901) 9 S.L.T. 63, an order under s.91 was refused: in the Lord Ordinary's view, a s.91 petition was not a competent means of enforcing the statutory duties of licensing authorities and indeed was more appropriate to enforce statutory duties imposed in the public interest upon private individuals, e.g. under the/

---

11. E.g. R. v. Paddington Valuation Officer [1966] 1 Q.B. 380; R. v. Metropolitan Police Commissioner [1968] 2 Q.B. 118; Padfield v. Minister of Agriculture [1968] A.C. 997.

12. See the long and inconclusive case of Lord Advocate v. Commissioners of Supply for Edinburgh (1861) 23 D. 933, in which a petition in the nature of mandamus was sought unsuccessfully.

the Public Health Acts. In Carlton Hotel Co. v. Lord Advocate 1921 S.C. 237 by a majority, the Court refused to make a s.91 order, no clear statutory duty being found to exist and the implication being that the remedy was not a suitable means of resolving doubts about the existence and extent of a public duty. The question of whether a s.91 order could be granted against the Crown was raised but left open. Lord Dundas called the s.91 remedy "peculiar and drastic", but Lord Salvesen, in a forceful and persuasive dissenting judgment, saw no reason why a statutory duty of the kind in question should not be ascertained and enforced under s.91: "To decide otherwise would be to hold that when a duty was laid by Act of Parliament on a Minister of the Crown, it must remain a dead letter so far as the rights of private individuals are concerned". (p.249)

9.7 In Leishman v. Scott 1926 S.C. 418, a section 91 order was held to be the most effective way of enforcing a statutory duty which arose under the Friendly Societies Act 1896. Lord President Clyde considered that it would be unfortunate if in Scotland there was no remedy similar to the mandamus in English law. In the view of Lord Sands, if mandamus was the proper form of process in England, it was difficult to suggest that the "special form of mandamus" authorised in Scotland within the limited sphere of statutory duty was not appropriate in a case arising within that sphere. In Smith v. Lord Advocate 1932 S.L.T. 374, where a declarator was sought against the Lord Advocate as representing a Medical Board. the court rejected the pursuer's argument that because a mandamus or a section 91 order could have been sought against the Medical Board, a declarator could therefore be awarded against the Lord Advocate.

9.8 A very recent decision which contrasts strongly with these earlier authorities is T. Docherty Ltd. v. Burgh of Monifieth 1971 S.L.T. 13, in which the court supported the use of s.91 as a means of enforcing public duties. The duty in question was the duty of a local authority to construct sewers under the Burgh Police (Scotland) Act 1892, and the procedure under s.91 enabled the court to determine the nature and extent of that duty. Indeed Lord President Clyde rejected an argument that s.91 could not be invoked where an alternative remedy to enforce a particular duty was provided by statute; for this argument, derived from the English law of mandamus and such cases as Pasmore v. Oswaldtwistle U.D.C. [1898] A.C. 387, the Lord President could see no warrant "in the unequivocal terms of s. 91." A s.91 order requiring a valuation committee to state a case was granted in Langlands (v. Manson 1962 S.C. 495.

9.9 Section 91 may thus be used for determining the duties of public authorities. The view that the restrictive features of the English law of mandamus are not to be regarded as applicable to this remedy is also of value. However, it still remains to be settled whether a section 91 order is available against the Crown or a Crown official. It is significant that although in English law a mandamus may not be sought against the Crown and may not in some circumstances be sought against Crown servants, a mandamus against a Cabinet Minister was upheld in Padfield v. Minister of Agriculture, supra. The practical scope of the s.91 procedure would be much/

much reduced if it were available neither against the Crown nor against Crown servants. In view of the narrow limits within which s.21 of the Crown Proceedings Act 1947 applies to Scotland, it is doubtful whether that section affects the basic question of whether s.91 binds the Crown.[13]

---

13. Cf. D.M. Walker, Principles of Scottish Private Law, Vol. II, p. 1898.

STATUTORY REMEDIES

10.1 Baron Hume described the supervisory jurisdiction of the Lords of Session as "very extensive indeed, ... and such as entitles them, in one shape or another, to take cognizance of many matters which, in the first instance cannot competently be brought before them."[1] For all the advantages of this supervisory jurisdiction, Parliament and government have often sought to improve on common law methods of supervision and review by accompanying the grant of new governmental powers with the provision of special appeal or review procedures. Often these procedures have been reinforced by the legislative exclusion of the ordinary remedies for securing judicial review of official decisions which have been discussed above; the intention has been to secure a degree of review more suited to the special subject matter in hand than the common law remedies available in the Court of Session.

10.2 These statutory procedures are numerous and vary widely in intention and practical effect. Not all are judicial in character. Where, for example, an appeal is provided from a local authority's decision to the Secretary of State for Scotland, the appeal is essentially administrative in character even though at certain stages of the process quasi-judicial duties may arise, for example during the holding of a public inquiry. But in many local government matters, either there is an appeal from the council's decision to the Sheriff, or the council's decision requires to be confirmed by the Sheriff before it comes into effect. The extent to which the Sheriff court has been used in this way is clearly indicated in the Grant Report on the Sheriff Court, 1967.[2] The range of existing legislative instances is extensive, but the Grant Committee was informed that administrative and miscellaneous work accounted for not more than about 5% of the work of the Sheriff courts - much of this work is concerned with disputes between the citizen and officialdom but part is concerned with disputes between citizens.[3] Where an appeal lies to the Sheriff against a local authority's decision, may this be considered a judicial remedy, or is it more akin to an appeal to a higher administrative authority? In conferring such power on the Sheriff Parliament must be taken to be aware of the general nature of the Sheriff's office and of the procedure likely to be adopted in the Sheriff Court.[4]

---

1. Lectures, Vol. 5, p.270.
2. H.M.S.O. Cmnd. 3248, Chap. VIII, Appendices VIII and IX.
3. See e.g. Part IV of Appendix VIII, Powers of Sheriff in relation to Feus, Tenancies and Burdened Estates: Grant Report, pp. 303-305.
4. Portobello Mags. v. Edinburgh Mags. (1882) 10 R. 130.

However, the Sheriff is not always entitled to adopt the same attitude to non-contested applications by local authorities as he would to undefended litigation between private citizens: in respect of revision of ward boundaries under the Burgh Police Act 1892, the Sheriff was bound to hear evidence in support of a proposed revision to satisfy himself that a case existed for the exercise of the statutory power.[5] In the nature of things it is likely that a Sheriff will be particularly alert to legal points relevant to jurisdiction and competence. But even in the case of the confirmation of byelaws, it is now clear that the scope of the sheriff's decision is not confined to matters of judicial review and extends to the merits and expediency of the proposal.[6] The scope and character of the Sheriff's duties in matters such as these bears out the view cited with approval by Lord Cooper in the Glasgow Churches case: "The Sheriff in Scotland is both a judicial and an administrative officer. In the former capacity he is the local judge of the bounds and in the latter he is the King's representative and executive officer for civil affairs."[7] Apart from the special instance of an appeal from licensing courts to the Sheriff, which the Guest Committee on Scottish licensing law (Cmnd. 2021) suggested should be established, the Grant Committee recommended that the Sheriff's function should in principle be not confined to matters of judicial review but should extend to the merits and factual basis of the administrative decisions concerned. The Committee also considered that the scope of an administrative appeal could vary according to the nature of the original decision and suggested that the scope of administrative appeals should be clearly defined in the enabling statute.[8] While the need for this proposal can be understood, a fully satisfactory means of answering the uncertainty relating to the Sheriff's powers on administrative appeals would be the development of general principles on which the Sheriff's powers should be exercised. Detailed research into the actual work of this kind at present undertaken by Sheriffs would be necessary to establish the practical value and effectiveness of the Sheriff as a local remedy against local government decisions. The Sheriff's own jurisdiction in administrative matters is reinforced by the supervisory jurisdiction exercised by the Court of Session over the Sheriff in administrative matters. As Lord Cooper pointed out in the Glasgow Churches case, "it is well established that confirmation of a bye-law by any confirming authority is no bar to that bye-law's challange in a Court of law."[9]

---

5. Lindsay v. Leith Mags. (1897) 24 R. 867.

6. Glasgow Corporation v. Glasgow Churches Council 1944 S.C. 97. See to similar effect Dubs v. Crosshill Police Commissioners (1876) 3 R. 758 (Sheriff must be satisfied of merits of burgh extension), David Allen & Sons Billposting Ltd. v. Edinburgh Corporation 1909 S.C. 70, Lindsay v. Leith Mags. (supra).

7. Encyclopedia of the laws of Scotland, Vol. 13, p. 517.

8. Cmnd. 3248, pp. 82-3.

9. 1944 S.C. at 145.

But just as it can only be a small proportion of local government decisions which ever come before the Sheriff, so it is a correspondingly small proportion of Sheriff Court administrative decisions which come up for review in a superior court. It remains for consideration whether the priority which Sheriff Courts must give to their ordinary criminal and civil work enables the courts to develop the special experience which judicial work in governmental matters requires.

10.3 Another form of statutory remedy which was frequently used in the 19th century and is still an important feature of agricultural legislation is the statutory arbitration. Arbitration is normally based on the voluntary agreement of parties to submit to it, and the statutory imposition of arbitration materially affects its character as a procedure for settling disputes.[10] On a contractual arbitration, the scope of the arbiter's inquiry is governed by the agreement of the parties; in a statutory arbitration, the scope depends upon the provisions of the enabling statute, which in principle may not be overridden by agreement of the parties.[11] Where the arbiter acts in excess of his statutory powers, his award may be reduced in whole[12] or in part;[13] where it is clear that the arbiter has been asked to exercise powers he does not possess, interdict lies to restrain him.[14] The extent of the arbiter's jurisdiction has caused difficulty, in particular as regards his ability to determine facts on which his jurisdiction may depend.[15] The primary statutory remedy for reviewing an arbitral award is by means of the stated case: it was held that this could include the question of whether there was evidence on which a particular finding of fact could competently be made.[16] This limited right of appeal must be exhausted before recourse is had to the common law jurisdiction of the court.[17] Where the Court of Session has given its opinion on a stated case, the statutory arbiter is required to give effect to this opinion in his award, subject to the sanction of reduction.[18] With the growth of the administrative tribunal, statutory arbitration is now much less common, at least in subject matter involving the exercise of governmental powers

---

10. In 1927, the Royal Commission on the Court of Session commented: "when Parliament interferes to exclude the ordinary jurisdiction of the Court and forces the parties concerned in a particular class of dispute to submit to compulsory arbitration, it becomes indispensable to allow them an opportunity of seeking a remedy against the legal misconceptions of the arbiter, in selecting whom they had no choice or only a restricted one." Cmnd. 2801, p.45.

11. Glasgow, Barrhead & Neilston Rly. Co. v. Nitshill Coal Co. (1850) 7 Bell's App. 325; cf. Cameron v. Nicol 1930 S.C. 1.

12. Locherby v. Glasgow Improvement Trustees (1822) 10 M. 971.

13. Islay Estates Co. v. McCormick 1937 S.N. 28.

14. Dumbarton Water Works Commissioners v. Blantyre (1884) 12 R. 115, followed in Glasgow, Yoker & Clydebank Rly. Co. v. Lisverwood (1895) 23 R. 195.

15. Contrast Cowdray v. Ferries 1919 S.C. (H.L.) 27 with Donaldson's Hospital v. Esslemont 1925 S.C. 199 in which the Court affirmed that the arbiter could not be the final judge of his own jurisdiction.

16. Enman v. Dalziel & Co. 1912 S.C. 966.

17. Forsyth-Grant v. Salmon 1961 S.C. 54.

18. Mitchell-Gill v. Buchan 1921 S.C. 390

in relation to a citizen, but provision for it may still be made for the purpose of assessing compensation due under nationalisation Acts or under legislation providing for local government reform.[19] In view of this preference for the administrative tribunal rather than the statutory arbitration in governmental matters, the scope of judicial review of tribunal decisions is a matter of greater current concern than the extent of judicial review of awards made following statutory arbitration. 'Tribunal' is here to be understood in the sense favoured by the Report of the Franks Committee.[20]

10.4 Judicial review of the decisions of administrative tribunals may be sought on jurisdictional grounds by means of reduction, and in some cases declarator or interdict, but it has been more usual for the enabling Act to provide for either an appeal by way of stated case or an appeal on a point of law. Thus in income tax matters, the standard method of appeal to the courts is by way of stated case. This procedure enables the reviewing court to review questions of law, to correct ex facie errors of law, to correct decisions inconsistent with the evidence recorded or which there was no evidence to support, and also decisions which were contrary to "the only reasonable conclusion".[21] An appeal on a point of law covers very similar ground although the procedure for appealing is different. Where an appeal may be brought on a point of law, an appeal is competent even where no error of law is revealed by the order of the tribunal, if it is apparent from the opinions of the tribunal members that the tribunal's decision was based on a particular view of a relevant question of legal right.[23] Section 9, Tribunals and Inquiries Act 1958 provided an appeal on law from certain Scottish tribunals where previously none existed. The Act left it to rules of court to prescribe whether the individual could proceed by appealing on a point of law or by requiring the tribunal to state and sign a case for the opinion of the Court of Session.[24] Under Scottish procedure, it has generally been necessary for the party who requires a case to be stated to do so before the proceedings of the tribunal which he wishes to challenge are concluded. This necessity may of course be excluded by legislation but this is not invariably done. Whatever the merits of the rule in civil and criminal procedure generally, it seems to serve no useful purpose in relation to administrative tribunals and to be merely a technical restriction on the right to seek review.[25] Except where another time-limit

---

19. E.g. Local Government (Scotland) Act 1947, s.141(3), considered in Lanark C.C. v. Burgh of East Kilbride 1967 S.L.T. 305, cf. Lanark C.C. v. Motherwell Mags. 1912 S.C. 1251.

20. 1957 Cmnd. 218, para. 40.

21. W.A. Wilson, "Theory of the Case Stated" in 1969 Br. Tax Review 231.

22. E.g. M'Callum v. Arthur 1955 S.C. 188.

23. N.E. Rly. Co. v. North British Rly. Co. (1897) 25 R. 333.

24. See Rules of Court of Session 290-293. Under Section 9, Tribunals and Inquiries Act 1958, the appellant does not have a choice between appeal on law and case stated: Hoser v. Ministry of Housing [1963] Ch. 428.

25. Johnson et al. v. Glasgow Corporation 1912 S.C. 300; M'Mahon v. Dumbarton C.C. 1961 S.C. 126, which arose under the Town and Country Planning (Scotland) Act 1947. See too the archaic requirement under the Valuation of Lands (Scotland) Amendment Act 1879 which led to Langlands v. Manson 1962 S.C.

limit is provided or where a stated case must be sought before proceedings are closed, the period for appealing is 21 days.[26] The most striking feature of the law relating to appeals from and review of tribunal decisions is the extreme diversity of appeal structures. Notwithstanding Section 9 of the Tribunals and Inquiries Act 1958, there still is a need for the development of general principles to be operative in this field.

10.5 One statutory remedy commonly found today was first provided in the Housing Act 1930 at a time when there was strong criticism of the legislative practice of seeking to exclude judicial review of administrative decisions. Today this remedy is found particularly in housing, town planning and compulsory purchase legislation. Typically it applies to a Minister's decision made following a public inquiry, and it is invariably accompanied by legislative provisions seeking rigorously to exclude other judicial remedies. Thus where a compulsory purchase order has been confirmed by the Secretary of State, any person aggrieved who desires to question the validity of the order may within six weeks of confirmation ask the Court to quash the order on the ground either that the order is not within the powers of the Act under which it has been made or that a statutory requirement (of a procedural kind) has not been complied with and that the applicant's interests have been substantially prejudiced thereby.[27] Subject to this right of challenge, a compulsory purchase order "shall not, either before or after it has been confirmed ... be questioned in any legal proceedings whatsoever."[28] Although these statutory provisions have been criticised, particularly the time-limit of six weeks and the exclusion of other forms of judicial review, they offer a clear-cut means of seeking review of many important ministerial decisions. The scope of review extends both to (a) substantive ultra vires and (b) procedural ultra vires. In Scotland as in England, this statutory remedy has often enabled a judicial decision to be made on the merits of the citizen's objection to validity. In particular, it has served to secure judicial supervision over the procedural aspects of public inquiries.[29] But the nature of the remedy has not always been understood and the court has sometimes stressed the limits on the scope of the remedy rather than its potential width. It is submitted that the remedy extends to all those matters which would render a statutory decision incompetent, ultra vires or in excess of jurisdiction, including the abuse of discretionary powers and breach of the principles of natural justice. But in Peter Holmes & Son v. Secretary of State for Scotland 1965 S.C. 1 both

---

26. Rules of the Court of Session, 290.

27. Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, 1st Sched., para. 15; Town and Country Planning (Scotland) Act 1959, s.31; Housing (Scotland) Act 1966, Sched. 2 (where the period for application to the court is 30 days).

28. 1947 Act, 1st Sched., para. 16.

29. E.g. General Poster Co. v. Secretary of State for Scotland 1960 S.C. 266; Paterson v. Secretary of State for Scotland 1971 S.L.T. (Notes) 2.

both Lord Justice-Clerk Grant and Lord Wheatley stressed the narrow scope of the remedy. Lord Wheatley's judgment in particular takes little account of the need for procedural and discretionary propriety. He described as "well settled" the view that in exercising his discretion to confirm a development plan a Minister is not affected by the fact that there has been a public inquiry. This view could indeed be justified by reference to English decisions of the immediate post-war period but it takes no account of the Franks Report, the Tribunals and Inquiries Act 1958, the subsequent growth of statutory rules of procedure for public inquiries and the work of the Council on Tribunals.

Yet certain defects in this useful remedy exist. (1) As a particular remedy created by statute, it is vulnerable to the defects of particularity. Hamilton v. Roxburgh C.C. is an outstanding example of this vulnerability. Even if the particular defect there revealed is soon removed by amending legislation, the problem of placing particular statutory remedies on a more generalised basis will remain.[30] (2) The remedy may be sought only by a "person aggrieved" by the compulsory purchase or planning decision under review. Although there is no Scottish decision directly on this point, it is very probable that the expression "person aggrieved" would be interpreted by reference to general notions of title and interest to sue. A neighbouring owner would therefore be unable to enforce the rules of procedure for a planning inquiry even if his land was adversely affected in fact by the town planning decision and he had been permitted to take a full part in the inquiry proceedings.[31] (3) Contrary to the general position in Scots law, the particular nature of the statutory remedy coupled with the exclusion of other judicial remedies prevents the statutory remedy being sought with other remedies in the same proceedings. In circumstances where there is doubt as to the scope of the statutory remedy and accompanying doubt as to the full rigour of the exclusion clause, two actions may be necessary.[32] (4) Is the six-week period (30 days under the Housing (Scotland) Act 1966) for exercising the statutory right to seek review too short? In the case, say, of a compulsory purchase order contested at all stages by the affected owner, he will have had ample notice of the subject matter and will probably already have

---

30. 1971 S.L.T. 2. The Court of Session held that the 1964 rules of procedure for public inquiries into compulsory purchase orders could not be enforced by means of the remedy provided by Parliament since 1947 for reviewing the validity of such orders. The reason was purely technical and was probably a drafting error. The defect does not exist under planning legislation - Town and Country Planning (Scotland) Act 1959, s.31(11).

31. See Simpson v. Edinburgh Corporation 1960 S.C. 313 and Buxton v. Minister of Housing and Local Government [1961] 1 Q.B. 278.

32. Following the decision in Hamilton v. Roxburgh C.C., supra, that the statutory remedy was not competent, fresh proceedings have now been instituted by the objectors, who seek to reduce the order; and the county council have been restrained by interim interdict from enforcing the compulsory purchase order in question, The Scotsman, 19th December, 1970.

have had professional advice about it before he is notified of confirmation. The question in part depends on the effect of the barrier which descends at the end of the six-week period. Although the House of Lords decision in Smith v. East Elloe R.D.C.[33] that a compulsory purchase order could not be challenged on grounds of fraud after the six week period has been brought into some doubt by Anisminic Ltd. v. Foreign Compensation Commission[34] the two cases are not closely comparable. If any inroad is to be made into the East Elloe interpretation of the six week rule, the general principle of no review after six weeks would probably not be seriously prejudiced by an exception in the case of fraud or bad faith by the acquiring authority, not discoverable and not discovered by the citizen concerned or his advisers within the six week limit.

10.6 Local government audit

A statutory procedure which may lead to a judicial decision on the legality of expenditure incurred by a local authority is provided by Part X of the Local Government (Scotland) Act 1947. In that the procedure may lead to a surcharge on the elected members or local officials concerned, it is an effective remedy for restraining ultra vires activities.[35] At the annual audit proceedings, any ratepayer is entitled to inspect the abstract of accounts and object to individual items appearing in them. This procedure could be used by a trader who considered that a local authority was competing unlawfully with him. It thus obviates difficulties concerning title and interest to sue which were liable to arise out of the use of common law remedies for calling local authorities to account. (Below, section 12)

10.7 Statutory restriction of judicial review

10.71 Parliament has frequently sought to exclude or restrict the supervisory jurisdiction of the ordinary courts. Early Scottish examples may be found in the eighteenth century enlistment and Impressment Acts[36] and in the first small-debt Acts.[37] Exclusion or privative clauses may vary in their stringency - some appear intended to encourage recourse to statutory procedures for review or appeal; others to exclude judicial review altogether. But, as Baron Hume said, "the erecting of any such absolutely independent Jurisdiction is contrary to the general and on the whole the salutary rule of our practice."[38]

---

33. [1956] A.C. 736.

34. [1969] 2 A.C. 147.

35. For a recent instance of this procedure, see Secretary of State for Scotland v. Glasgow Corporation 1966 S.L.T. 183: in this case the initiative was taken by the Secretary of State, not a ratepayer.

36. See e.g. Imray v. Deputy Lieuts. of Inverness 2nd Mar. 1811 (F.C.) and Chivas v. Duke of Gordon 11th July 1804 (F.C.).

37. See e.g. Sempill v. Alexander 19th Jan. 1810 (F.C.). See also an anonymous article, "The Supreme Courts - Excluded Jurisdiction", (1859) 3 Journal of Jurisprudence, 14.

38. Lectures, Vol. 5, p. 270.

There is abundant judicial authority to the effect that express words are required if the ordinary jurisdiction of the courts is to be excluded.[39] Exclusion clauses, as Baron Hume pointed out, have usually been interpreted narrowly: "If the terms made use of are in any degree equivocal ... the inherent power of the Supreme Court to control all inferior judges and to rectify what is amiss in their proceedings, shall be held to remain."[40] "Yet more important," Hume continued, "even where statute has in plain and positive terms declared, that there shall be no review of the proceedings of a certain special Judicature in any form, yet still, to have the benefit of that provision, this Judicature must take care to keep within the bounds of its commission, must not exceed its statutory power, must not travel out of its territory, or neglect that course of proceeding which is prescribed by the Statute."[41] By reasoning such as this, even a strongly worded exclusion clause does not protect decisions which are considered by the reviewing court to be ultra vires or in excess of jurisdiction,[42] or decisions which are considered to be contrary to the enabling Act,[43] or a failure to exercise jurisdiction.[44] Nor will the finality clause protect from review the inferior tribunal's determination of an essential fact on which its jurisdiction may be considered to depend,[45] or a decision vitiated by a serious defect of procedure,[46] or a breach of natural justice[47] or an abuse of discretion.[48]

10.72 It is clear therefore that an exclusion clause leaves scope for judicial review on jurisdictional grounds. Hume commented, "the question of jurisdiction, or competency of review, comes often, in a great measure, to be involved in and blended with the question on the merits of the sentence or proceeding that is challenged - and ... the review shall or shall not be admitted according, as upon the merits, the judgment is thought to be right or wrong."[49] Nonetheless a distinction, however fine, has been maintained between jurisdictional error and error within jurisdiction. An example of such a distinction, drawn in Lord Advocate v. Police Commissioners of Perth, well illustrates the element of judicial discretion which governs the distinction.

---

39. Journeyman Taylors of Edinburgh v. Incorporation of Taylors (1770) M. 7364; Abercorn v. Edinburgh Mags. (1793) M. 7302, Pryde v. Heritors of Ceres (1843) 5 D. 552, Adamson v. Edinburgh Street Tramways Co. (1872) 10 M. 533, Marr v. Lindsay (1881) 8 R. 784, Harper v. Rutherglen Inspector of Poor (1903) 6 F. 23, Kerr v. Hood 1907 S.C. 895, Jeffray v. Angus 1909 S.C. 400, MacDonald v. Lanarkshire Fire Brigade Joint Committee 1959 S.C. 141.

40. Lectures, Vol. 5, pp. 270-1. For the cases, see e.g. Buchanan v. Towart (1754) M. 7347, Guthrie v. Cowan 10th Dec. 1807 (F.C.), Bremner v. Huntley Friendly Society, 4th Dec. 1817 (F.C.) and Caledonian Rly Co. v. Glasgow Road Trustees (1849) 12 D. 399.

41. Op. cit., p. 271.

42. Countess of Loudon v. Ayrshire Trustees, 28th May 1793 (F.C.), Lord Advocate v. Perth Police Commissioners (1869) 8 M. 244, Sharpe v. Latheron Parochial Board (1883) 10 R. 1163, Caledonian Rly. Co. v. Glasgow Corporation (1905) 7 F. 1020.

43. Young v. Milne, 28th June 1814 (F.C.), MacFarlane v. Mochrum School Board (1875) 3 R. 88, Kelso Mags. v. Alexander 1939 S.C. 78.

44. Dalgleish v. Leitch (1884) 2 White 302.

45. Patillo v. Maxwell (1779) M. 7386), Dalgleish v. Livingstone (1895) 22 R. 646, Sitwell v. Macleod (1899) 1 F. 950, Donaldson's Hospital v. Esslement 1925 S.C. 199.

distinction. "A clause of finality cannot protect a Sheriff's judgment, when, taking an erroneous view of a statute, he either refuses to sanction a lawful act or sanctions an unlawful one. It applies only to those matters of detail which concern the due and proper administration of the statute and which are best disposed of by the sound discretion of a local Judge."[50] There are many reported cases in which insufficient grounds for review were averred to overcome the exclusion clause.[51] Even apart from an express exclusion clause, the original jurisdiction of the court may be excluded by the creation of a specialised jurisdiction, especially on a subject which does not form part of the traditional jurisdiction of the Court of Session. Exclusion of the original jurisdiction of the court may be necessary if the individual is to be required to make use of the statutory means for settling the dispute,[52] but where the inferior tribunal or court in question has been given a wide discretion in regulating its own affairs, the court may be very reluctant to exercise its supervisory review powers.[53]

10.73 In view of the ability of the courts to overcome restrictions on judicial review by recourse to arguments founded on jurisdictional grounds, it does not seem necessary here to discuss particular examples of these clauses. Reform of the law relating to the exclusion of the courts by statutory restriction of review cannot be considered except in relation to the effectiveness of the positive remedies for review which exist. The abundant case-law of the past shows a tension between executive and judicial attitudes towards the desirability of judicial review which still continues.[54] Section 11 of the Tribunals and Inquiries Act 1958, while more widely phrased in relation to Scotland than England, could for constitutional reasons deal only with exclusion clauses contained in then existing legislation, and affords no guarantee against difficulties arising in the future. It seems more important to improve positive remedies for review, and where necessary to modify the ordinary processes of litigation to take account of administrative needs, than to attempt further refinement in the art of excluding the courts. If further legislation is to be considered, the case for reform must be argued at the United Kingdom level.

---

46. Brown v. Heritors of Kilberry (1825) 4 Shaw 174, Forrest v. Harvey (1845) 5 Bell's App. 197, Shearer v. Hamilton (1871) 9 M. 456, Shiell v. Mossman (1872) 10 M. 58,

47. Smith & Tasker v. Robertson (1827) 5 S. 848, Manson v. Smith (1871) 9 M. 492, Stirling v. Hutcheon (1874) 1 R. 935, Moss's Empires v. Glasgow Assessor 1917 S.C. (H.L.) 1.

48. Ashley v. Rothesay Mags. (1874) 1 R. (H.L.) 14.

49. Op. cit., p. 273.

50. (1869) 8 M. at 246, per Lord Justice-Clerk Moncreiff.

51. Foote & Marshall v. Stewart (1778) M. 7385, Chivas v. Gordon 11th July 1804 (F.C.), Merry v. Dallas (1828) 7 S. 90, Simpson v. Harley (1830) 8 S. 977, Wilson v. Leith Walk Trustees (1831) 9 S. 725, Smeaton v. St. Andrews Police Commissioners (1865) 3 M. 816, Leith Police Commissioners v. Campbell (1866) 5 M. 247, Milne & Co. v. Aberdeen District Committee (1899) 2 F. 220, Robson v. Menzies 1913 S.C. (J.) 90.

52. E.g. Balfour v. Malcolm (1842) 1 Bell's App. 153, William Denny & Bros. v. Board of Trade (1880) 7 R. 1019, Dante v. Ayr Assessor 1922 S.C. 109.

53. Walsh v. Pollokshaws Mags. 1907 S.C. (H.L.) 1; Cf. Goodall v. Bilsland 1909 S.C. 1152.

54. See e.g. Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 and the Parliamentary proceedings leading to section 3, Foreign Compensation Act 1969.

11. OTHER REMEDIES

11.1 Nobile officium

The extraordinary equitable jurisdiction of the Court of Session inherent in it as a Supreme Court may through the exercise of the nobile officium in exceptional circumstances provide for a remedy against an official act or omission. In the case of Ferguson et al 1965 S.C. 16, an electoral registration officer wrongly removed the names of certain voters from the draft electoral register, and there was no statutory procedure for revising the definitive list: the court ordered the officer to reinstate the petitioners' names on the register to enable them to vote at an imminent election. So too in the case of Maitland 1961 S.C. 291, the error of a licensing court was corrected by an exercise of the nobile officium in ordering a special meeting of the licensing court: unnecessary expense and delay would otherwise have been caused to the licensee. Lord President Clyde emphasised that the nobile officium was not to be used as a cloak for the incompetence of the applicant's representatives, nor to extend the provisions of an Act of Parliament.[1] While the exercise of nobile officium may be of value in special cases[2] the court makes sparing use of this power.[3] It cannot be used against a statute, even where an evident legislative error has been made.[4] Nor was it exercised to settle a question arising under a statutory scheme for which no legislative provision had been made.[5]

11.2 Exception of illegality

11.21 Where a citizen is directly affected by an administrative decision or regulation which he considers to be ultra vires, he may directly challenge the validity of the decision by means of reduction or declarator. But an alternative course of action is for the citizen to wait until enforcement proceedings are taken against him, whether in a criminal or civil court, and to raise as a defence the question of ultra vires. In civil proceedings,[6] it is now clear that any matter may be raised as exception which would have afforded grounds for reduction. This applies both to the Court of Session and to the Sheriff Court, even though the latter court has no authority to grant reduction.[7] Each court has discretion to decide that the matter would be more conveniently decided in a separate action of

---

1. See Bell's Executor 1960 S.L.T. (Notes) 3 and cf. M'Laughlin 1965 S.C. 243.
2. E.g. West Highlands Woodlands Ltd. 1963 S.C. 494 - court ordered revival of moribund statutory board, on basis of casus improvisus.
3. E.g. Anderson v. Widnell (1868) 7 M. 81, and its sequel Tod v. Anderson (1869) 7 M. 412.
4. E.g. as in Hamilton v. Roxburgh C.C. 1971 S.L.T. 2, para. 10.6 above.
5. Borthwick Parochial Board v. Temple P.B. (1891) 18 R. 1190.
6. E.g. North British Rly. Co. v. Steel Co. of Scotland Ltd. 1921 S.C. 252.
7. See Rules of the Court of Session, Rule 174, and Sheriff Courts (Scotland) Act 1907, 1st Sched., rule 50.

of reduction. It is probably implicit in this procedure that an objection may be raised by way of exception only if the matter could still be raised on a reduction. Thus, it would be doubtful whether an exception could be pleaded if through lapse of time a reduction was no longer available, or if (for example, in the case of a compulsory purchase order) a clause excluding the jurisdiction of the court had taken effect, the citizen having failed to challenge the order by the statutory procedure provided.

11.22 Where criminal proceedings are instituted for an offence against subordinate legislation, whether a local authority byelaw or a central government regulation, the accused person may raise by way of defence an objection to the validity of the byelaw or regulation. No person should be convicted for breach of an enactment which is ultra vires. There are many instances of such defences being raised both in the criminal court of first instance and also as a ground of appeal to the superior court.[8] But there have been judicial doubts about the convenience and appropriateness of a summary court being asked to decide a matter of law of this kind.[9] In 1932, the High Court of Justice upheld a summary conviction for breach of a regulation made by central government which prima facie appeared to be ultra vires.[10] The regulation was later declared to be ultra vires in civil proceedings.[11] One factor which contributed to this virtual abdication of a basic judicial duty was uncertainty about the effect on judicial review of phrases used in relation to subordinate legislation such as "shall have effect as if enacted in this Act",[12] but this uncertainty has now been dispelled[13] and such phrases are no longer used in legislation. Considerations such as the "impossibility" of a criminal court making the correct decision, the absence of the Lord Advocate from the proceedings, the number of convictions already recorded for breach of a byelaw or regulation, the summary nature of first instance proceedings, and the lack of a legally qualified judge in the burgh court,[14] seem of little weight when set against the individual's right to be penalised only for breach of the law. Section 38(2) of the Summary Jurisdiction (Scotland) Act 1908 seems conclusive on this point.

---

8. E.g. Kerr v. Auld (1890) 18 R. (J.) 12; Eastburn v. Wood (1892) 19 R. (J.) 100; Dunsmore v. Lindsay (1903) 6 F. (J.) 14; Rae v. Hamilton (1904) 6 F. (J.) 42; M'Gregor v. Dissellduff 1907 S.C. (J.) 21; Ronaldson v. Williamson 1911 S.C. (J.) 102.

9. Crichton v. Forfar County Road Trustees (1886) 13 R. (J.) 99; Hamilton v. Fyfe 1907 S.C. (J.) 79; Stewart v. Todrick 1908 S.C. (J.) 8; Shepherd v. Howman 1918 J.C. 78; Henderson v. Ross 1928 J.C. 74; Lawson v. Torrance 1929 J.C. 119.

10. Somerville v. Langmuir 1932 J.C. 55.

11. Somerville v. Lord Advocate 1933 S.L.T. 48.

12. E.g. Hamilton v. Fyfe, supra; Shepherd v. Howman, supra; Lawson v. Torrance, supra.

13. Minister of Health v. The King [1931] A.C. 494; M'Ewan's Trustees v. Church of Scotland General Trustees 1940 S.L.T. 356

14. See Somerville v. Langmuir, Stewart v. Todrick, supra.

11.3 SUSPENSION

According to Maclaren[15] suspension is the general name given to a process which has for its object the retention of matters in their present position until the rights of parties can be determined by a final judgment. It may be used as (1) an original proceeding, or (2) a method of review. Suspension as an original proceeding is appropriate either (1) to stay diligence or (2) to prevent the infringement of a right. As a method of review, Maclaren considered the remedy under the heading, Suspension of Decrees, and illustrated this with reference to decrees in the Sheriff Ordinary Court, in the Sheriff Small Debt Court, and in inferior courts other than the Sheriff Court (e.g. Dean of Guild Court).[16] Apart from its use together with interdict to prevent the infringement of a right (see section 8 above), the relevance of suspension to this paper seems to lie in its potential use as a means of reviewing the decisions of inferior courts other than the Sheriff Court. Section 11(2) of the Tribunals and Inquiries Act 1958, in restoring the supervisory jurisdiction of the Court of Session where this had been taken away by statute, expressly refers to the jurisdiction "which the Court of Session would otherwise have to entertain an application for reduction or suspension of any order or determination". It may therefore be that suspension is considered to be a general remedy for seeking judicial review of the decisions of administrative tribunals. Possibly it is not available for this purpose where an appeal on a point of law or by way of case stated is provided. Thus, it has been held that no suspension may be sought if advantage has not been taken of other opportunities of review.[17] But whether for this or other reasons, the precise scope of suspension as a method of review today is difficult to establish and there is little recent case-law. It is not clear, for example, how many modern administrative tribunals may be reckoned as "inferior courts" for this purpose. On the authorities cited by Maclaren, suspension may be sought where an inferior court clearly exceeds its powers, even where the jurisdiction of the Court of Session is excluded.[18] Suspension could be brought in respect of a serious breach of the principles of natural justice by an inferior court.[19] Although the jurisdictional errors which suspension may control could also be reached by a reduction, suspension has the advantage of being a more summary remedy than a reduction; it is presumably not excluded by the possibility of a reduction. Suspension

---

15. Bill Chamber Practice, pp. 8-9.

16. Op. cit., chap. V.

17. West Highland Rly. v. Grant (1902) 10 S.L.T. 413.

18. Maclaren, op. cit., p. 86, citing Bruce v. Irvine (1835) 13 S. 437, Campbell v. Brown (1829) 3 W. & S. 441, and Miller v. M'Callum (1840) 3 D. 65; see also Thomson and Middleton, Manual of Court of Session Procedure, p. 287.

19. Smith & Tasker v. Robertson (1827) 5 S. 848.

Suspension was however held to be incompetent to set aside a decree of an inferior court on the ground of fraud: the extrinsic matter nececessary to upset a decree on this ground could only be introduced on a reduction.[20] In general, however, suspension does not seem of much practical importance as a means of reviewing official acts and omissions in modern law.

11.4 DAMAGES

The ability of the courts to award damages to citizens injured by unlawful acts or omissions of public authorities is in principle a most important judicial remedy. As a means of enforcing performance of the duties of public authorities, the remedy of damages has already been considered in section 9 above. It would be outside the scope of this paper to give close consideration to the liability of public authorities for their unlawful acts. Even considered in relation to one area of government alone (for example the conduct of the police) difficult questions of liability in delict may arise.[21] Professor H.W.R. Wade has written of the English law of tort, "But gaps in the categories of the law of tort are always likely to reveal themselves in connexion with administrative powers, for the old rules of common law do not touch some of the important questions of modern life. Many decisions of ministers, tribunals, or licensing bodies, which may be of the greatest importance to a man's status or livelihood, inflict no recognised legal injury if they are wrongly made."[22] Since this view was first expressed, one of the gaps in the English law of tort seems to have been filled by the decision in Hedley Byrne & Co. v. Heller & Partners Ltd. [1964] A.C. 465 that there may be liability for financial loss caused through reliance on a negligent misstatement. There seems no reason why this should not apply in the case of a citizen who relies to his detriment on inaccurate advice given by a public official.[23] Another recent House of Lords decision on English law concerns the extent of governmental liability for the execution of administrative decisions.[24] Professor de Smith in 1968 wrote; "there may be emerging a general principle that where a person in a position of public authority wilfully exceeds or abuses his powers in a manner that inflicts pecuniary loss on an individual, he commits an actionable wrong although such conduct would not ordinarily be tortious."[25] He supported this view with reference to decisions from

---

20. Smith v. Kirkwood (1897) 24 R. 872. See also on the scope of suspension in regard to judicial decrees, M'Carroll v. M'Kinstery 1923 S.C. 94.
21. E.g. Beaton v. Ivory (1887) 14 R. 1057 and Robertson v. Keith 1936 S.C. 29.
22. Administrative Law, 2nd edn., p. 99.
23. See Minister of Housing and Local Government v. Sharp [1970] 2 Q.B. 223.
24. Home Office v. Dorset Yacht Co. Ltd. [1970] 2 All E.R. 294.
25. Judicial Review of Administrative Action, 2nd edn., p. 19.

from the jurisdictions of Victoria, Quebec and Ceylon. It may be commented that the seed of such a principle could well germinate more readily in Scots law, with its civil law background, than in the English law of tort.

What particular aspects of damages are relevant to a general consideration of remedies in administrative law? Procedurally, it should be possible to seek damages together with other froms of relief such as reduction, declarator or interdict. This is in fact the case in Scots law as illustrated by Ashley v. Rothesay Magistrates (see para. 5.3 above). It would probably be incompetent, however, to seek damages to accompany the exercise of a statutory method of appeal or review; and in many situations where the decision of an administrative tribunal was being challenged, no liability for damages would be in question. In some circumstances, an action of damages simpliciter might be a useful means of collateral attack upon the validity of an official decision or inferior judicial decree, but this is unlikely to be permitted where the decision or decree is protected by a finality clause.[26] There is some judicial support for the view that official decisions affected by malicious or oppressive motives may give rise to a remedy in damages even though other forms of review are not competent.[27] But there is little if any Scottish authority which bears directly upon the question of how far a public authority is liable to compensate a citizen who suffers loss following an ultra vires act or decision made in breach of natural justice.

---

26. Crombie v. M'Ewan (1861) 23 D. 333, Gray v. Smart (1892) 19 R. 692.

27. Dawson v. Allardyce 18th Feb. 1809 (F.C.), Macfarlane v. Mochrum School Board (1875) 3 R. 88.

12. TITLE AND INTEREST TO SUE

12.1 According to Maclaren[1] a pursuer may be required to satisfy the court that he is the proper person to sue and has a real interest in the result of of the action. Provided that title exists, the interest need not be pecuniary nor large. "If there be a pecuniary or patrimonial interest, however small, depending on the determination of the question, the parties have a right to invoke the aid of a court of law to decide their difference."[2] For some purposes, a distinction may be drawn between title and interest, but in cases concerning official acts and omissions this distinction does not seem very material. Although Title and Interest to Pursue is a well-known entry in Scottish digests and treatises, no complete and coherent account of the subject seems to be available. Before considering some general principles which apply in the field of administrative law, particular categories of title and interest will be examined.

12.21 Enforcement of public rights. Any person who is within the class of those entitled to enjoy a public right has title and interest to enforce it: e.g. public rights of pasturage[3]; public right to use land as bleaching-green and for recreation[4]; public right of way[5]; public right to use market.[6] In these cases the pursuer has no personal patrimonial interest and his right is shared in common with other members of a local or wider public. This type of action has been called an "actio popularis". By contrast, in English law an individual can only sue to protect a public right of this kind if he can show that he has suffered special damage through infringement of the right or that the infringement of the public right has concurrently infringed a private right of his own; in all other cases, the public right may be enforced only by the Attorney-General as "parens patriae" in relator proceedings.

12.22 Rights over highway. Similarly, users of the highway may in Scotland sue in respect of unlawful interference with or obstruction of the public right of passage over the highway. Cases of this kind have usually arisen out of the improper exercise of statutory powers or from the failure to perform statutory duties connected with the highway.[7] In such cases, the pursuer may also have a proprietorial interest, for example as owner of land abutting on the road or as owner of the sub-soil;[8] this reinforces the title to sue but/

---

1. Court of Session Practice, p. 188.
2. Strang v. Stewart (1864) 2 M. 1015 at 1029,
3. Anderson v. Renfrew Mags. (1752) M. 16122.
4. Grahame v. Swan (1882) 9 R. (H.L.) 91.
5. Jenkins v. Robertson (1867) 5 M. 27, (1869) 7 M. 739.
6. Blackie v. Edinburgh Mags. (1884) 11 R. 783.
7. Cassilis v. Wigton (1750) M. 16122, Guild v. Scott 21st Dec. 1809 (F.C.), Christie v. Caledonian Rly. Co. (1847) 10 D. 312, Stewart v. Greenock Harbour Trustees (1864) 2 M. 1155, Adamson v. Edinburgh Street Tramways Co. (1872) 10 M. 533, Ogston v. Aberdeen Tramways Co. (1896) 24 R (H.L.) 8
8. Christie v. Caledonian Rly. Co., supra; Stewart v. Greenock Harbour Trustees supra.

but is not essential. The old case, Tait v. Lauderdale (1827) 5 S. 330 while accepting the general principle of entitlement to sue, expressed hesitation about the title to sue of servants who were merely casual workers in a particular neighbourhood, but this hesitation would not be appropriate today. The distinction between English and Scots law in regard to actions of nuisance affecting use of the highway was expressly drawn in Ogston v. Aberdeen Tramways Co. (supra).

12.23 Trade and commercial interest. The interest of a trader in maintaining his trade unaffected by unlawful official acts has been protected in a variety of situations, although in some of these[9] it is possible that the interest being protected was essentially an interest common to all members of the public. But in Scott v. Glasgow Corporation (1899) 1 F. (H.L.) 51, meat importers, dealers and fleshers had title and interest to challenge the validity of a byelaw regulating the holding of meat-auctions in a public market. In Rossi v. Edinburgh Mags.[10] a trader challenged conditions which the magistrates had decided to impose upon the granting of licences for selling ice-cream; Lord Robertson said, at 7 F. (H.L.) 90, "his title is his trade". Similarly in Tennent v. Partick Mags. (1894) 21 R. 735, a licensee had title to seek a declarator that the licensing jurisdiction had not been transferred by statute from the county justices to the burgh magistrates. But in D. & J. Nicol v. Dundee Harbour Trustees[11] it was held that a shipping firm which was suffering competition from the ultra vires activities of a harbour authority had no title to sue as trader, although it did have title to sue as a user of the harbour required to pay rates to the authority.

If this decision is correct, it is doubtful whether there was title and interest to sue in Grieve v. Edinburgh Water Trustees 1918 S.C. 700, where Edinburgh plumbers successfully challenged ultra vires plumbing work being carried on by a statutory water authority. In English law, it is likely that both in Nicol and in Grieve, the action would have been brought in the form of relator proceedings in the name of the Attorney-General, in which case no question as to title to sue could have arisen. Most instances of unlawful municipal trading could be raised in Scotland by ratepayers (para. 12.28 below) but if Nicol is correct, it is doubtful whether in Scotland the trade competitor of a public corporation would have title and interest to seek a judicial decision on the extent of the corporation's powers.[12]

---

9. Finlay v. Linlithgow Mags. (1782) M. 7390; Blackie v. Edinburgh Magns., supra.

10. (1904) 7 F. (H.L.) 85; see also Journeymen Taylors of Edinburgh v. Incorporation of Taylors (1770) M. 7364.

11. 1915 S.C. (H.L.) 7, H.L. reversing judgment of Second Division on this point. See also Reid v. Mini-Cabs et al 1966 S.C. 137.

12. Cf. Charles Roberts & Co. v. British Railways Board [1965] 1 W.L.R. 396.

12.24 Professional interest. In Cameron v. S.S.S. 1964 S.L.T. 91, six schoolteachers were held to have title and interest to seek a declarator that a statutory council intended to be representative of teachers' associations was not lawfully constituted. The Lord Ordinary, Lord Johnston, considered their title to arise from the statutory scheme requiring all teachers to participate in the council. In Adams v. S.S.S. 1958 S.C. 279, although the question of title to sue was not raised, a group of women including women doctors obtained a declarator that the Secretary of State was required by the National Health Service (Scotland) Act and by earlier trusts to seek to appoint women to vacant posts in a women's hospital before advertising for male applicants.

12.25 Neighbours and third parties. Whether or not a neighbouring proprietor has title and interest to seek judicial review of official decisions concerning nearby land will depend on the nature of the statutory powers being exercised and on whether any other kind of interest can be claimed by him. In the highway cases, neighbouring proprietors who were also road users had title to sue.[13] But under current town planning legislation, neighbouring proprietors have no title to seek judicial review of town planning decisions: it has been held that the scheme of town planning legislation confers no rights upon third parties.[14] Where a statutory remedy under such legislation is available only to a "person aggrieved", this may be interpreted in the same sense.[15] But any member of the public qualified to object to the granting of a licence by licensing magistrates has title to seek reduction of an illegally granted licence[16] and a nearby though not adjoining landowner had title to seek review of proceedings in a Dean of Guild Court to which had he not been admitted.[17]

12.26 Heritors and freeholders. A heritor was held to have title and interest to seek judicial review of the administration of the poor's fund, whether by the minister and kirk session or by the local magistrates.[18] But in Abercromby v. Erskine[19] heritor A was held to have no title to challenge the apportionment of augmentation of teinds in so far as no increased valuation was laid on heritor B. In other words, one local ratepayer has no standing to complain of his neighbour's assessment, at common law.

---

13. Christie v. Caledonian Rly. Co., supra; Stewart v. Greenock Harbour Trustees, supra.

14. Simpson v. Edinburgh Corporation 1960 S.C. 313.

15. Buxton v. Minister of Housing [1961] 1 Q.B. 278, in which similar reasoning to that in Simpson was adopted; see also in the same sense Gregory v. Camden L.B.C. [1966] 1 W.L.R. 899.

16. Black v. Tennant (1899) 1 F. 423.

17. Lawrie v. Jackson (1891) 18 R. 1154; cf. Park v. Blair 1961 S.C. 294.

18. Hamilton v. Minister & Kirk-Session of Cambuslang (1752) M. 10570; Heritors of Dunbar v. Dunbar Mags., (1831) 9 S. & D. 669.

19. (1800) M. "Teinds" App. No. 8.

12.27 Local electors. In Cowan v. Wigton Mags. (1782) M. 16133, two burgesses failed in an attempt to set aside the election of magistrates and councillors, but the action probably failed because a statutory procedure for challenging the election was not used and because of the principle that a burgess could not call a burgh council to account generally for its administration of the burgh's affairs (para. 12.28 below). But local government electors, who were also ratepayers, had title to challenge the manner in which a casual vacancy in a school board was filled.[20] A person entitled to vote in a statutory election would seem by virtue of his right to vote to have title to seek judicial review of the conduct of the election.

12.28 Ratepayers. After much litigation, it was established that an 'actio popularis' could not competently be raised by a burgess to seek a general accounting for the management of the common good of a royal burgh.[21] The principle applied in these cases was the following: "The court never sustains an action at the instance of a party who cannot state a direct or immediate interest in the result, which plainly cannot be alleged here, where the pursuers ask for no judgment available to themselves but complain of acts done to the prejudice of the burgh."[22] In Ewing v. Glasgow Commissioners of Police (1839) M'L. & R. 847, this principle was applied to prevent ratepayers seeking review of the application of statutory police funds. Later decisions, however, showed that the principle was confined to the common good, and did not apply where statutory funds raised by rating were in issue.[23] In these cases, the ratepayer may be held to have a direct patrimonial interest in challenging a single item of expenditure. As was said in Farquhar & Gill v. Aberdeen Mags. the complainers could say, "but for your illegal charge, we would have had to pay less rates". Even in regard to matters of the common good, there may be room for distinction between objection to one specific ultra vires act and the general complaint of maladministration.[24]

---

20. Duncan v. Crighton (1892) 19 R. 594.

21. Gilchrist v. Kilhorn Mags. M. 7366; Burgesses of Inverury v. Inverury Mags. 17th Dec. 1820 (F.C.); Grahame v. Swan (1882) 9 R. (H.L.) 91, Conn v. Renfrew Mags. (1906) 8 F. 905.

22. Burgesses of Inverury, supra.

23. Leith Dock Commissioners v. Leith Mags. (1899) 1 F. (H.L.) 65; Stirling C.C. v. Falkirk Burgh 1912 S.C. 1281; Farquhar and Gill v. Aberdeen Mags. 1912 S.C. 1294; see also Innes v. Royal Burgh of Kirkcaldy 1963 S.L.T. 325.

24. Per Lord Dunedin, in D. & J. Nicol v. Dundee Harbour Trustees 1915 S.C. (H.L.) at p. 17, basing his opinion primarily on Aitchison v. Dunbar Mags. 14 S. 421.

12.29 Capacity to sue. In several cases, the question of title to sue has become involved with the question of capacity to sue. Thus, magistrates of a police burgh were held to have no title to seek an interdict restraining a coal company from discharging refuse on the foreshore, in part because the statutory capacity of the magistrates did not extend to this matter.[25] Although there were other factors present in each of these cases, it may be commented that the question would not have arisen had, as in England, relator proceedings on behalf of the public interest been instituted.

Position of Lord Advocate

12. 3 In English law questions of title to sue in actions of public concern are obviated when proceedings are brought in the name of the Attorney-General on the relation of a member of the public, who need satisfy only the Attorney-General that he has a real grievance. This procedure has been much used to review the legality of local authority activities; to secure relief in cases of infringement of a public right e.g. public nuisance; and to secure the proper administration of public and charitable trusts. Although the Lord Advocate has a vague and ill-defined function to represent the public interest, Lord Dunedin stated in D. & J. Nicol v. Dundee Harbour Trustees[26] that no case had been cited where the Lord Advocate had pursued an action of this sort and that the Lord Advocate did not, under the law and practice of Scotland, usually intervene as "parens patriae" except where required to do so by statute. But it was left open in Buckhaven & Methil Mags. v. Wemyss Coal Co. (supra) that the Lord Advocate might have competence in the public interest to seek interdict against a persistent offender against statutory regulations.[27] In Fleming & Ferguson Ltd. v. Paisley Mags. 1948 S.C. 547, Lord President Cooper referred to the fact that an action to enforce an alleged statutory duty was brought neither by the Lord Advocate nor with his concurrence in the public interest, a reference which is difficult to understand in view of earlier statements about the function of the Lord Advocate in this field.

General Observations/

---

25. Buckhaven & Methil Mags. v. Wemyss Coal Co. 1932 S.C. 201; see also Dunlop School Boards v. Patrons of Cunninghame-Grahame Bursary Fund 1910 S.C. 945 and Tay District Fishery Board v. Robertson (1888) 15 R. 40.

26. 1915 S.C. (H.L.) at p. 17.

27. See also Finlay (with concourse of Lord Advocate) v. Linlithgow Mags. (1782) M. 7390, an early and inconclusive case; Melville v. Cummings 1912 S.C. 1185, a case under the Patents Act 1907; and Smith v. Earl of Stair (1849) 6 Bell's App. 487, where Crown had direct proprietorial interest to seek interdict.

General Observations

12.4 The effect of a decision that the pursuer has no title or interest to seek judicial review of official action amounts to this - that the defenders owe no legal duty to the pursuer in respect of the matter in question, or, putting the same point differently, that no dispute exists between the parties to the litigation which is capable of being settled by a judicial decision.[28] The following conclusions emerge from this brief review of selected Scottish cases: (1) that, unlike English law, different remedies do not have different tests of title to seek judicial review; (2) that, in matters of public right, the rules on title to sue are very much wider than in English law; (3) that potential difficulties concerning title to sue may not, as in English law, be obviated by recourse to relator proceedings; (4) that, although in principle Scots law does not differentiate as regards title to sue between private and public disputes, in practice title and interest to sue in matters of public concern has received special attention.

12.5 Rules on standing to sue are an important but difficult part of any system of judicial control of administration. Two conflicting aspects of public policy are at stake. The first principle is that it is in the public interest that all official decisions should be made in accordance with law. The second principle is that public authorities should not be required to show lawful authority for their actings at the instance of any litigious member of the public. A narrow approach to standing to sue, which lays emphasis on the second of these principles, is to require the potential litigant to show a cause of action similar to that required in private law disputes, namely that his rights have been directly infringed by an unlawful official act. 'Rights' for this purpose may be rights of property or other rights or liberties recognised at common law, or rights derived from legislation (as in a claim for damages for breach of statutory duty). On this approach, the individual's 'right' remains central to the legal dispute throughout the case and indeed forms the substance of the case. In the Inverurie case quoted above, the court could not discover such a right; nor could it in Simpson v. Edinburgh Corporation.

12.6 The other approach to this problem places greater weight on the desirability of public authorities observing the law, and accepts that in public law disputes emphasis need not be placed on 'subjective' right. On this approach, standing to sue is merely a threshold question that the court must deal with at the outset, viz. has the applicant got a serious reason for coming to court for a decision? Thereafter the court concerns itself only with the 'objective' legality or illegality of the defender's actings.

---

28. Cf. Gifford v. Traill, supra; Orr v. Alston, supra; A.B. v. C.D. (1899) 2 F. 67; Kilwinning Parish Council v. Board of Management of Cunninghame Workhouse 1909 S.C. 829; MacCormick v The Lord Advocate 1953 SC 396

12.7 In English law, the remedy of certiorari and relator proceedings in the name of the Attorney-General follow the second approach; the remedy of declaration of right follows the first approach. In principle, Scots law follows the first approach of requiring the pursuer to show that a 'subjective' right of his is in issue; the rigour of this approach is tempered however by a willingness in some instances to give a generous interpretation to the right which the pursuer is required to show. The case for reform, therefore, differs significantly in detail between the two jurisdictions, but it is doubtful whether either jurisdiction yet provides a completely satisfactory solution to the problem of providing adequate judicial protection to a citizen who is in fact adversely affected by unlawful official decisions. In particular, the inability of third parties to enforce the lawful administration of town planning control seems a serious weakness of each jurisdiction.

13. GENERAL CONSIDERATIONS

13.1 In this final section, it is intended to comment briefly (a) on one or two considerations which are not confined to particular remedies (b) on the proposal for a new 'petition for review' made in the English Law Commission's study paper on remedies in administrative law.

13.2 The general supervisory jurisdiction of the Court of Session underlies the range of remedies considered above. Because of the structure of the legal system, by which most of these remedies are the remedies ordinarily available in the administration of the law relating to matter of private right, it is difficult to extract from the reported cases clear principles on certain matters of especial importance in a system of judicial review of administrative action. One problem is that of the rules of prescription, or limitation: where Parliament has provided a statutory remedy, this invariably has to be exercised within a stated period which often bears little relation to the limits applicable to the common law remedies. This contrast is probably one reason for the numerous clauses which seek to exclude the supervisory jurisdiction of the court. Section 11(2) of the Tribunals and Inquiries Act 1958 while restoring the jurisdiction of the court in cases

cases where it had been taken away did not attempt to deal with this problem. Judicial practice, at least in the case of reduction, has been to treat delay in seeking judicial relief as a reason for withholding a remedy (para. 6.93 above).

13.3 In English law, the prerogative orders of mandamus and certiorari, and the remedies of injunction and declaration, areregarded as being discretionary remedies; they may be withheld even if the applicant has shown sufficient grounds in law for relief, if there are other circumstances present which incline the court to refuse the application. The element of discretion is much less prominent in Scots law,[1] and, for example, the reduction cannot be described as a discretionary remedy. Discretionary factors however come into play in relation to the effect of delay on the availability of a reduction (para. 6.93 above), the question of interim relief (para. 8.5 above) and the problem of exhaustion of alternative remedies, especially when a declarator has been sought (para. 7.51 above). Parliament has vested certain discretions in the court in relation to statutory remedies, for example, under the statutory challenge to compulsory purchase orders (para. 10.6 above) as regards interim relief and the test of "substantial prejudice" on a departure from procedural requirements. While the existence of overt discretion in judicial remedies creates problems both for potential litigants and the judges, the denial of a judicial discretion may have the effect of causing excessive pressure on the general rules of law, leading to the creation of narrow and artificial distinctions in order that just decisions may be made. If reform of the law is contemplated in the form of new general remedies, judicial discretion may be a necessary counter-balance to the potential width of application of a new remedy.

13.4 The position of the Crown causes some difficulty in regard to administrative remedies both in England and Scotland (e.g. in regard to interim relief, discussed at paras. 7.6 and 8.4 above). While there are well established constitutional grounds for conferring a special position on the Sovereign as such, so far as 'the Crown' is the corporate embodiment of central government the conferment of immunities or privileges on the Crown which would not be justifiable if extended to local authorities and public corporations can lead only to doubtful distinctions between different sections of the public service. The development of principles of governmental liability, in particular, should not turn on the historic status of the Crown.

---

1. Contrast McDonald v. Lanarkshire Fire Brigade Joint Committee 1959 S.C. 141 with Ex parte Fry [1954] 1 W.L.R. 730.

13.5 The English Law Commission's study paper on remedies in administrative law has proposed the creation of a single remedy and procedure for the review of administrative action, to be known as a petition for review. (Para. 3.3. above) By such a petition the Court could be asked to quash a decision, enjoin an authority from committing unlawful acts, command an authority to perform its duty, and declare a decision to be of no effect and also declare the legal rights of the applicant; such a petition could also be combined with a claim for damages. This proposal is particularly attractive in the degree of procedural flexibility and simplicity which it seeks to introduce into English law. Difficulties in the proposal are - (1) the definition of the area of official action which should be subjected to the new petition for review (would universities, domestic tribunals, professional associations, bodies like the Scottish Special Housing Association and publicly owned companies be included?); (2) whether the proposal would involve the abolition of existing remedies (the English paper proposes that the prerogative orders should be abolished); (3) the creation of general rules relating to standing to sue and the limitation period; (4) whether it would be necessary to codify the substantive grounds on which relief could be sought; (5) the nature of the procedure which would be appropriate to a general petition for review, - for example, whether it should be summary in character, or should closely resemble normal civil procedure; (6) the effect of the new remedy on express statutory remedies and exclusion clauses; (7) the enforcement of the various judicial decrees that might be awarded on a petition for review; (8) the extent to which the new remedy would involve a judicial discretion to refuse relief; (9) the court or courts to which the petition for review should be brought.[2] These are all matters of great importance with which a system of administrative law needs to be able to deal. If the English Law Commission is able to overcome them satisfactorily, the result would be a new jurisdiction which if it were adopted would very soon form a most important part of judicial work in England and Wales. Under those circumstances, there would be strong arguments in favour of the law in Scotland equipping itself with a similar jurisdiction.

---

2. The English study paper discusses these and related matters at pp. 65-90.

Appendix I

English Law Commission

Remedies in Administrative Law - A Study Paper, June 1970.

2. Preparatory to our Report of last year we had circulated an Exploratory Working Paper[3] briefly setting out what appeared to us to be the main lines of criticism of English administrative law. Foremost among these was the view that the judicial remedies for the control of administrative action are in urgent need of reform. So we asked the question:

> "(A) How far are changes desirable with regard to the form and procedure of existing judicial remedies for the control of administrative acts and omissions?"

The virtually unanimous response of those who commented on our Paper was that changes are very desirable. In this paper, we propose, first, to set out in some detail the existing law with regard to the remedies for the control of the administration, secondly, to summarise its defects, and thirdly, to suggest how the form and procedure of judicial control might be improved.

3. We must, however, point out at the start of this paper that we are here only concerned with the form and procedure of remedies for the judicial control of administrative action. We are not concerned with the problems posed in question (B) of our Working Paper:

> "How far should any changes with regard to the procedures of existing remedies be accompanied by changes in the scope of those remedies
>
> (i) to cover administrative acts and omissions which are not at present subject to judicial control, and
>
> (ii) to render judicial control more effective, e.g., with regard to the factual basis of an administrative decision?"

Many commentators on the Working Paper thought that the consideration of Question (A)[4] really involved consideration of this Question as well; we have expressed agreement with this view.[5] Nevertheless, our terms of reference compel us, where possible, to draw a fine distinction between reform of the form and procedure of remedies, and reform of their scope.

---

3. Law Commission Published Working Paper No. 11, also published as Appendix A to Law Com. No. 20.

4. See para. 2 above.

5. Law Com. No. 20, para. 9.

4. We have not found this an easy task, and when in doubt on a particular topic we have included rather than excluded it from the paper. Our general approach has been to treat all those rules which restrict the scope of any particular remedy compared with other remedies as rules relating to the form and procedure of judicial remedies. Thus, to take one example, which will be discussed at length later,[6] it seems probable that in some circumstances an applicant will be refused a declaration for lack of standing to sue when he could have obtained certiorari. Because the requirement of standing, or locus standi as it is usually known, will bar an aggrieved citizen from obtaining one remedy, but not necessarily another one, it seems to us that these requirements are an aspect of the law relating to the form and procedure of remedies. The scope of remedies, on the other hand, is a problem which arises, for example, when administrative action is not controllable by any remedy at all; with this aspect of administrative law we are not concerned. So, in this paper we do not make proposals on the question whether review by the High Court should be extended to cover latent errors of law not going to the jurisdiction of the tribunal; the present restriction to errors on the face of the record is one applicable to all remedies. This distinction seems to be supported by the wording of question (B)(i) which clearly contemplates that any extension of the remedies to affect administrative action which at present is wholly immune from judicial review, falls outside the rubric of Question (A). Neither can we be concerned in this paper with questions relating to the depth of the inquiry which can be undertaken under any of the existing remedies, e.g., whether the courts can be entitled to consider the substantial (as opposed to total lack of) evidence for a particular finding. This was an issue which was specifically referred to in (B)(ii) of paragraph 10 of our Exploratory Working Paper. For similar reasons we doubt whether our terms of reference cover the question whether damages should be awarded for administrative acts or omissions which, although wrongful, do not fall within the category of wrongs remediable by an award of damages against a private person and where there is no right to an award of damages for a breach of statutory duty. This letter problem was separately dealt with in Question (C) of our Exploratory Working Paper. But in the last section of this paper we mention both this problem and that of error of law on the face of the record if only to raise the question whether it is really possible to reform the judicial remedies satisfactorily without considering these matters.

---

6. See paras. 70-71 below.

Appendix II

The Scope of Judicial Review for Error of Law

1. In R. v. Nat Bell Liquors Ltd. Lord Sumner gave this description of the supervisory control exercised by superior courts over inferior courts and agencies: "That 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."[1] This description is reflected in the English law of certiorari, which is available (1) to correct failures and excesses of jurisdiction and breaches of natural justice (2) to correct errors of law within jurisdiction which appear on the face of the record of a particular decision.[2] The Franks Report on Administrative Tribunals and Enquiries stated that the courts in Scotland do not exercise this jurisdiction to quash a decision for non-jurisdictional error of law on the face of the record[3]. In support of this view, Sheriff K.W.B. Middleton considered it to be wholly inconsistent with the practice of the Scottish courts to quash for such errors of law: "Where both a general appeal and a restricted appeal on points of law are excluded, the courts in this country will not, it seems, interfere with the decision of an inferior court or tribunal on its merits, even where there has been a manifest error, whether of fact or of law".[4] As examples of the attitude of the Scottish courts, Sheriff Middleton cited Mitchell v. Cable (1848) 10 D. 1297 and Robson v. Menzies 1913 S.C. (J.) 90. He continued: "The distinction between error of law, on the one hand, and excess of jurisdiction, or oppression, or failure of duty, on the other hand, is fundamental, even if not always quite clear-cut, and it would be unfortunate if the Scottish courts were to follow English courts in mixing them up."

2. Replying to this view[5], Professor Mitchell argued that although the Court of Session did not exercise the English jurisdiction to correct error of law on the face of the record under that name, it was nonetheless well within the Scottish tradition that the reviewing court could intervene to deal with a manifest error of law. Mitchell v. Cable was a case of contractual arbitration, and Professor Mitchell saw good reason for distinguishing between the general rule in Scots law governing private arbitration, in which the

---

1. [1922] 2 A.C. 128 at 156.
2. R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw [1952] 1 K.B. 338; Inland Revenue v. Burrs 1961 S.C. (H.L.) 22.
3. Cmnd. 218, 1957, pp. 25-26.
4. 1958 Jur. Rev. 183.
5. "The Scope of Judicial Review", 1959 Jur. Rev. 197.

finality of the arbiter's award derives from the prior consent of the parties, and the case of statutory arbitrations or tribunals, whose jurisdiction is not based on consent of the parties.[6] The second case cited by Sheriff Middleton, Robson v. Menzies, arose under the Small Debt (Scotland) Act 1837, which allowed review only on certain stated grounds (e.g. corruption, malice, oppression, defect of jurisdiction): in that case the Lord Justice-General (Dunedin) had commented, "a more absolute exclusion of appeal could not be imagined"[7] and the significance of the decision may be confined to situations governed by such exclusion clauses. Professor Mitchell further argued that it was impossible to assert unequivocally that manifest errors of law were not open to review since a decision of a statutory tribunal which is contrary to law may itself and for that reason alone be regarded as being ultra vires. Professor Mitchell cited a number of leading Scottish decisions which while phrased in terms of control of jurisdiction were in his view cases in which "the court was forced to try the legal essence of the complaint in order to determine jurisdiction".[8]

3. There are certainly some decisions and dicta which support the view that the Court of Session may not review errors of law within the jurisdiction, even if these errors are apparent from the tribunal's decision itself; for the reason already mentioned, the contractual arbitration cases need not be taken into account.

(a) In Simpson v. Harley (1830) 8 S. 977, where an exclusion clause influenced the decision, it was held that an allegedly erroneous construction of a statute was merely an error in judgment and not an excess of power.

(b) In Milne & Co. v. Aberdeen District Committee (1899) 2 F. 220, where a finality clause in the statute limited the scope of review, it was held that the Sheriff's judgment could not be reviewed even if he had construed the statute erroneously, provided it had been pronounced in exact conformity with his statutory jurisdiction.

(c) In Don Brothers, Buist & Co. v. Scottish Insurance Commission 1913 S.C. 607, the court refused to reduce a decision of the insurance commission interpreting the statutory phrase "working day" in a manner alleged to be contrary to the statute. But the authority of the case may be somewhat diminished by the fact that Lord President Dunedin relied on the analogy of arbitral awards, with which, he said, the court would not interfere

---

6. This distinction had been drawn thirty years previously by the Royal Commission on the Court of Session: see p. 32, n.10 supra.
7. 1913 S.C. (J.) at 93.
8. 1959 Jur. Rev. at p. 207.

however grossly wrong the court might think the arbiter had been, and also by Lord Johnston's evident reluctance to accept that such a matter of law had been withheld from the court. The reasoning of the Lord Ordinary (Hunter) seems preferable, namely that if two reasonable constructions of the Act were possible, the court should accept the construction favoured by the insurance commission.

(d) In Dante v. Ayr Assessor 1922 S.C. 109, Lord Ormidale remarked that a decision merely mistaken in law was not necessarily ultra vires and that a finality clause would protect such a decision.

(e) In M'Ewen's Trustees v. Church of Scotland General Trustees 1940 S.L.T. 357, the Lord Ordinary (Robertson) emphasised the authority of statutory commissioners to decide matters arising incidentally in the exercise of their jurisdiction, citing Erskine: "In all grants of jurisdiction, whether civil or criminal, every power is understood to be conferred without which the jurisdiction cannot be explicated."[9]

(f) In Inland Revenue v. Barrs 1961 S.C. (H.L.) 22, a revenue case which, on a note of appeal under s.17 of the Court of Exchequer (Scotland) Act 1856, fell to be decided on the same principles as governed certiorari in English law, the Lord Ordinary (Walker) held that error of law could be reviewed by means of certiorari but not, according to the common law of Scotland, on a reduction. In the Inner House, in a similar comparative comment, Lord Sorn also referred to the difference between English and Scottish law.[10]

4. Against these decisions, there may be set a number of decisions and dicta which lay stress on the ability of the court to review errors of law and in which this is not justified on expressly jurisdictional grounds.

(a) Campbell v. Brown (1829) 3 W. & S. 441; the authority of the Court of Session in regard to certain decisions of the Court of Presbytery was stated to be, not to review a judgment on its merits, but "to take care that the Court of Presbytery shall keep within the line of its duty and conform to the provisions of the Act of Parliament."

(b) Pryde v. Heritors of Ceres (1843) 5 D. 552; unwilling to intervene in the exercise of discretionary powers of awarding poor law relief, nonetheless Lord Cockburn presumed "that the Court can always interfere to correct error in law"; error in law included not only failure or excess of jurisdiction, but also other forms of legal error (at pp. 557, 559).

---

9. Institutes, I.2.8.
10. 1959 S.C. 273 at 280, and 301.

(c) Edinburgh & Glasgow Railway Co. v. Meek (1849) 12 D. 153: in ruling on whether a declarator could be sought to settle the correct basis for assessing a railway for the poor rate Lord Fullerton posed the rhetorical question, "For after all what is a reduction but the declaration of the illegality of the principles on which the assessment rested?"

(d) Macfarlane v. Mochrum School Board (1875) 3 R. 88: in accepting jurisdiction to reduce the decision of a school board dismissing a schoolmaster, the judges laid emphasis on deviation from the statute, which they expressed variously as failure to follow the statute, acting contrary to the statute, and failure to perform a statutory duty in the statutory manner.

(e) Mathewson v. Yeaman (1900) 2 F. 873: in allowing reduction of a Sheriff's decision, Lord Young said "Reduction has been the common law remedy for such a case of hardship for which in any civilised country there must be a remedy" and explained that reduction could not be used in place of appeal, but was still available to correct error and avoid injustice.

(f) Jeffray v. Angus 1909 S.C. 400: in upholding the jurisdiction of the Court to review a decision of the Dean of Guild Court, the Lord Justice-Clerk (MacDonald) remarked that the Dean of Guild court was in the position of all inferior courts, "bound to keep a record to be reviewed by the Supreme Court, unless the keeping of a record was made unnecessary and review excluded by express enactment" (p. 404).

(g) Moss's Empires Ltd. v. Glasgow Assessor 1916 S.C. (H.L.) 1: Lord Haldane said, (p.4) "Whenever an inferior tribunal has done something contrary to law which may lead to liability or deprivation of rights, then unless Parliament has stepped in and prevented the Court of Session declaring that to be a nullity ... which is a nullity ... the Court of Session has the power to make a declaration to that effect."

(h) Ross & Coulter v. Inland Revenue 1948 S.C. (H.L.) 1: on a tax appeal concerned with the extent of an appeal by stated case, Lord Simonds said that the tax commissioner's discretion was not judicially exercised if its statutory basis had been misconceived. (p. 35)

(i) Sinclair-Lockhart's Trustees v. Central Land Board 1951 S.C. 258: Lord President Cooper affirmed the dictum in Ross & Coulter; a court could intervene where (1) the exercise of jurisdiction did not conform to its statutory basis or (2) if it had not been exercised judicially. He remarked, "These grounds of challenge may overlap, for a judicial discretion is not judicially exercised if those exercising it have misconceived its nature and limits" (p. 269)

5. These authorities are not decisive one way or the other, but they afford evidence of a desire by the superior court to correct evident errors of law made by inferior tribunals, particularly errors in the interpretation of the Acts which govern the work of a tribunal. Applying this approach to

Lord Sumner's dictum quoted at the beginning of this note, the circle may be closed by the suggestion that it is a condition of the exercise of inferior jurisdiction that the law should be observed in the course of its exercise. If that is accepted, Lord Sumner's two categories of supervisory control ((1) jurisdiction (2) observance of law) merge into one. On this basis, Lord Sumner's approach is wholly consistent with the well-known dictum of Lord Shaw of Dunfermline in Moss's Empires Ltd. v. Glasgow Assessor which was quoted in section 5.1 above, at page 9.

6. It is relevant to notice the recent decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 which affects the English law on this point. The House held (1) that the Commission had made an error of law in holding that under the relevant statutory scheme the appellants were not eligible for compensation, and (2) that this error went to jurisdiction and was therefore not protected from judicial review by an exclusion clause. Lord Reid said, at p. 171:

"But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

As B.C. Gould has commented, the effect of this approach is to reduce the difference between jurisdictional error and error of law within the jurisdiction almost to vanishing point.[11] On such reasoning, the error of law made in the English case which marked the revival of certiorari as a means of correcting errors of law within the jurisdiction[12] did itself go to jurisdiction. Within Lord Reid's catalogue, the tribunal there "refused to take into account something which it was required to take into account."

---

11. [1970] Public Law 358, 360.

12. R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw, supra.

7. If the Anisminic decision is to be followed in Scots law, what of the qualification made by Lord Shaw of Dunfermline in the Moss's Empires case, that it is not within the power or function of the Court of Session to do work which the legislature has set to be performed by the inferior tribunals themselves? One possible answer is that where a tribunal has made a choice between two possible interpretations of a statutory provision of a character which it is peculiarly for the tribunal itself to administer, the superior court should accept this as a correct exercise of the tribunal's jurisdiction and not describe it as an "error of law".[13] Provided a specialised tribunal is known to perform its duties generally in a satisfactory manner, the reviewing court will be likely to discourage applicants for review, except where an evident error in applying the general law has occurred.[14]

8. Conclusions

(1) There seems to be no direct Scottish authority on the availability of reduction as a means of reviewing patent errors of law like those which occurred in the Northumberland or Anisminic cases, or like those in decisions of the National Insurance Commissioners which have given rise to review by certiorari.

(2) A tribunal which commits serious errors of law, especially errors contrary to the plain interpretation of relevant statutes, may thereby be regarded as exceeding its statutory jurisdiction and in principle reduction would be available.

(3) Where a tribunal adopts one out of two reasonable interpretations of a statute on a matter within its special expertise, a superior court will be unlikely to hold this to be an error of law.

(4) Settlement of the extent of judicial review for error of law in Scots law should depend on matters of general principle and not on matters of a procedural kind associated with the remedy of reduction.

(5) In the case of tribunals such as the National Insurance Commissioners, further consideration needs to be given to the provision of an express appeal on a point of law, possibly with leave of a Commissioner or the court itself. To provide such an appeal would not itself be incompatible with the maintenance of (3) above. It seems unlikely that the tendency to excessive litigation which occurred under workmen's compensation legislation would be repeated if this further appeal were provided.

---

13. See e.g. Don Brothers, Buist & Co. v. Scottish Insurance Commission, supra.

14. Cf. R. v. Industrial Injuries Commissioner, ex parte A.E.U. [1966] 2 Q.B. 21.

(6) In view of the Anisminic decision, the scope of jurisdictional error of law has been widened at the expense of narrowing the scope of non-jurisdictional error of law; even if it be accepted that in Scots law there is no equivalent to certiorari as a means of reviewing patent errors of law within jurisdiction, the lack of such remedy is less significant than was supposed before the Anisminic case. Unless the principles applicable to contractual arbitration are followed, there seems no reason why in Scotland the decision of the Compensation Tribunal in the Northumberland case should not have been reduced for failure to exercise jurisdiction, for excess of jurisdiction or for action contrary to the statute.