CASE LAW AND COMMENT

Company Law:

Director of more than one company: duty of disclosure. Common Seal: affixing of.

In *Sangara (Holdings) Limited* v. *Hamac Holdings Limited (in liquidation)* (1970) (Full Court of the Supreme Court of the Territory of Papua and New Guinea, as yet unreported), there was some discussion on the question of notice to one company of the affairs of another company where there is a common director or officer. Some attention was also given to what appears to be rather a common phenomenon in Papua-New Guinea at the present time, viz. the functioning of a company without any directors, or at least without any directors who have been validly appointed.

In this case a company, Hamac Holdings Limited (Hamac), whose directors did not possess the qualifying shares required by that company's Articles of Association, either at the time of their appointment, or, in one case, at all, purported to transfer by deed certain assets to another company, Sangara (Holdings) Limited (Sangara).

After Hamac had gone into liquidation, the liquidator sought to set aside the transfer of the assets on three grounds: firstly, that the assets which were transferred were the principal undertaking of the company, and could not be validly transferred until the proposal had been approved or ratified by the shareholders of the company in general meeting; secondly, that the directors of the company were not properly appointed and had no power or authority to make the transfer of the assets; and thirdly, that the Common Seal of the company had not been validly affixed to the deed, because the provisions of the Articles of Association required a resolution of the board of directors, and also required a countersignature of a director and the secretary or a person authorized by the directors, both of whom were to be present when the seal was affixed.

It is not proposed here to deal with the question of whether the assets were the principal undertaking of the company. Suffice to say that, under the Articles of Association of Hamac, for such an undertaking to be validly disposed of by the company there must have been the approval of the shareholders in a general meeting.

Both the other propositions are of general interest.

One Fox was the partner in a firm of accountants which acted as secretaries of both Hamac and Sangara. Fox also acted as a director of Hamac, in pursuance of his purported election as such, though at that time and for some time afterwards he did not hold the share qualification required by Hamac's Articles of Association. Neither, in fact, did any of the other directors appointed at the same general meeting. In addition, Fox also acted as an alternate director of Sangara, and on several occasions was recorded in the minutes of that company as having taken the chair at meetings of the board. There was evidence that Fox was, at the period of the transaction, entrusted with a significant part of the operations of Sangara.

The defence raised by Sangara to the claim that the directors were not properly appointed and that the seal was not properly affixed was based on the principle of estoppel enunciated in *Royal British Bank* v. *Turquand*,[1] and applied recently by Diplock, L.J. in *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Limited*,[2] namely, that where a person dealing with a company acted in good faith

[1] (1856) 6 E. & B. 327.

[2] [1964] 2 Q.B. 480, 502-6.

and with no notice or reasonable grounds for suspicion of irregularity or impropriety, he was not affected by an irregularity or impropriety in a matter of internal regulation of that company. Sangara maintained that they were in such a position.

The replication of the liquidator was twofold. Firstly, the Articles of Association of Hamac, which were a public document, provided a specific procedure for the use of the common seal of that company, and therefore, despite the rule in *Turquand's Case*,[3] Sangara must be taken to have notice of that procedure, and, on the facts of the case, that it had not been complied with. Secondly, he maintained that the position of Fox as a common officer, indeed, in effect, a common director, of the two companies affected Sangara with notice of the irregularity of the appointment of the directors.

The circumstances in which the transactions took place were a follows: Hamac's principal assets, so the court found, were shares in a certain subsidiary company which operated hotels. Fox suggested to a meeting of the board of Hamac that Sangara might be interested in purchasing these assets. Four days later the minutes of a meeting of the board of Sangara showed Fox as reporting that Hamac had offered the assets to Sangara for a consideration which was set out in those minutes. This offer was accepted by resolution of the board. Fox thereupon instructed a solicitor to act on behalf of both parties and prepare the deed, which in this action was sought to be impugned. This deed purported to be executed on behalf of Hamac by Fox as director, and also purported to be countersigned by the firm, of which Fox was a proprietor, and which acted as secretaries of Hamac. The signature of the firm was in the handwriting of one of its employees.

The cash consideration for the transfer was paid in the following way. Fox, on behalf of Hamac, drew a cheque in favour of a third company, T. Ltd., of which he was also a director, and of which his firm also acted as secretaries. This cheque was supposedly in satisfaction of a previous debt. Then he drew a cheque on behalf of T. Ltd. in favour of Sangara and a third cheque, on behalf of Sangara, in favour of Hamac. Two of these cheques were on consecutive forms from the same book, and the account of T. Ltd. in question showed no record of any other transaction.

The basic question for the court, then, was whether or not Sangara was affected with notice of irregularity, in the affairs of Hamac, either because it was affected by the knowledge of Fox, or because it must be taken to have had notice of the irregular procedure in the affixing of the seal.

The trial judge, Ollerenshaw, A.C.J., found that the claim of the liquidator was sustained on all these grounds. He found that Sangara was affected by the knowledge of Fox as a common officer, as he was the principal, or rather the chief executive of Sangara: therefore there was an absence of good faith and also notice of the invalidity of the action purporting to have been taken by Hamac. His Honour also found that there must be imputed to Sangara notice of the irregular manner of affixing the seal. His Honour's reasons were adopted with little additional reasoning by Prentice, J. in the Full Court.

Minogue, A.C.J. and Frost, J. took a slightly different view of the role played by Fox. Although he was not the central or directing influence of Sangara (see *Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited*[4]) he was the agent of Sangara. The test to be applied as to the effect of notice to such an agent who was an officer or director of both companies was that laid down by Vaughan Williams, J. in *In re Hampshire Land Company*,[5] and approved in *Houghton & Company* v. *Nothard Lowe & Wills Limited*,[6] i.e. whether it was the duty of the common officer to the second company to disclose information which he had received in his relationship to the first. Frost, J. applied the reasoning of the

[3] Note 1, *supra*.
[4] [1915] A.C. 705, per Viscount Haldane, L.C. at 713.
[5] [1896] 2 Ch. 743, 748-9.
[6] [1928] A.C. 1.

Court of Appeal in *In re David Payne & Co. Limited*,[7] where the knowledge of the common director who conducted negotiations for a loan from one company to another upon the security of a debenture was not imputed to the lender.

Both Minogue, A.C.J. and Frost, J. felt that in the circumstances the knowledge of Fox should not be imputed to Sangara, and that the election of the directors of Hamac was a matter of internal regulation, of which Sangara should not have had notice unless it could be affected by the knowledge of Fox.

Minogue, A.C.J. found the ground for invalidating the deed was that the rule in *Turquand's Case*[8] did not apply because of the manner in which the common seal of Hamac was affixed to the deed. This, his Honour found, ought to have given Sangara reasonable ground for suspicion of irregularity. (It is noteworthy that Sangara executed the deed by two directors, neither of whom was Fox.) The Articles of Association of Hamac, of which Sangara ought to have known, required that the common seal be affixed by authority of a resolution of the board of directors and in the presence of one director who should sign the document to which the seal was affixed, and of the secretary, or some other person appointed by the directors for that purpose, who should also countersign the document.

His Honour found that this provision required the signature of a director, and the countersignature of another person, i.e., even though the secretary might also be a director, if he signed as director another person was required to countersign the document, and vice versa. Even though in this case the signature of the firm of secretaries was that of an employee of the firm, for the purposes of the particular article the signature must be taken to be that of the firm of which Fox was a partner, which was as if Fox himself had countersigned the document. This irregularity must, his Honour found, have been apparent to Sangara. Therefore they were not the type of outsiders dealing with a company who come within the protection given by the rule in *Turquand's Case*.[9]

Frost, J. also found that the relevant provision in the Articles of Association of Hamac required the signature of two individuals upon a document to which the common seal was affixed. Frost, J. found another instance of irregularity which would have removed Sangara from the scope of the protection given by the rule in *Turquand's Case*[10] in the circumstances of the "round robin" of cheques, and the issuing of a cheque by Sangara in purported satisfaction of a debt which was nowhere else disclosed in the evidence of the financial records of Sangara.

Frost, J. referred to the decisions of *In re Hampshire Land Company*[11] and *In re David Payne & Co. Limited*.[12] These authorities decide that where the common agent is fraudulent, or at least, is a party to the irregularities, no assumption can be made that he will disclose those irregularities. These decisions were approved by the House of Lords in *J. C. Houghton and Company* v. *Northard Lowe and Wills Limited*[13] where Viscount Dunedin described them as being the dictates of common sense, apparently without consideration of the effects of such a holding. The problem is, again, which of two innocent parties must suffer for the dishonest or fraudulent acts of a third person. However, since a company can act only through its agents, one must question whether a company which acts through a fraudulent or dishonest agent, or an agent who has knowledge of an irregularity which may prove fatal to the transaction, can properly be described as innocent.

In view of the policy of s. 124 of the *Uniform Companies Acts*, perhaps the time has come for the Standing Committee of Attorneys-General to reconsider the rule that the knowledge of a common officer who is dishonest or has knowledge of irregularities should not be imputed to the company for which he is acting as agent. It would be worth considering whether the law should not enlarge and state clearly that there is a positive duty of disclosure of such irregularities upon an officer of the company who has actual knowledge of them. This would have the

7 [1904] 2 Ch. 608.
8 Note 1, *supra*.
9 *Ibid.*
10 *Ibid.*
11 Note 5, *supra*.
12 Note 7, *supra*.
13 Note 6, *supra*.

effect of imputing the knowledge of a person such as Fox to the company for which he is acting, and would put companies on their guard against the possibilities of non-disclosure of the type which arose in this case.

However, the law as it stands at present has much to commend it, and there seems no doubt, in view of the authorities which were fully considered by the Full Court, that the conclusion which their Honours reached on this question represents the law as its exists. It is submitted nevertheless that the problem of the duties of directors and officers in regard to disclosure of information, especially where they hold office in more than one company, so that there is a possibility of a conflict of interest, deserves a searching study. Some activity in this direction appears to have taken place in recent years in the United States, especially because of the prevalence of the shareholders' derivative action in that country, and the time seems ripe for such a study in the Australian jurisdictions, particularly in view of an increasing trend towards interlocking directorships.

J. L. Goldring.

Is a Cannibal a Criminal?

R. v. *Noboi-Bosai and others* (Supreme Court of the Territory of Papua and New Guinea, Unreported Judgment Number 634, 11th August, 1971).

Noboi-Bosai is the first case of cannibalism to have been heard in Papua-New Guinea since 1963, when Smithers, J. heard a case of cannibalism at Mendi. The fact that, in the Mendi case, the accused were acquitted because the prosecution had not negatived a compulsion defence, seems to indicate that Smithers, J. considered that cannibalism was a criminal act under s. 236 of the *Criminal Code*. In acquitting Noboi-Bosai and his co-defendants, Prentice, J. reached a different conclusion. He held that s. 236(2) of the Code did not apply to acts of cannibalism and that, if it did, the acts of the accused in this case were neither "improper" nor "indecent" within the meaning of the section. Both of his Honour's conclusions are, it is submitted with respect, of doubtful merit.

The facts quite clearly showed that each of the accused had eaten part of one Sumagi's dead body. The events arose near Daru, among remote people living inland between the Fly and the Strickland rivers. The diet in the area is bananas and sago, with very little, if any, meat. The accused all cooked part of Sumagi's body and ate it, apparently throwing the rest of it away. Sumagi had been murdered. He had killed Isira (who was of the same people as the co-accused), and, as he was returning to the hut, was shot by an arrow fired by Isira's brother. The co-accused were not implicated in the murder.

Section 236 of the Criminal Code provides:

> "Any person who, without lawful justification or excuse, the proof of which lies on him—
>
> (2) Improperly or indecently interferes with . . . any dead human body . . . is guilty of a misdemeanour and is liable to imprisonment with hard labour for two years."

It might be thought that one could hardly provide a clearer case of improperly interfering with a dead human body than by cooking and eating it. Prentice, J., however, opined that there were several features of the section indicating that it did not cover cannibalism. He referred first to the fact that the section heading used the term "misconduct", and said that this was a "mild and inapt way of describing cannibalism". The term as applied to cannibalism does seem something of an understatement, but the term is a generic term covering many types of action, some of which are more morally reprehensible than others. An action which is bad or serious misconduct remains misconduct nevertheless. It would be strange indeed if the offence of rape (s. 347) were to be read down because of the heading to the chapter in which it is contained—"Assaults on Females". Incest, sodomy, buggery,

bestiality and defilement and abuse of young girls are all in a chapter called "Offences against Morality".

His Honour then referred to the fact that the Code made no mention of cannibalism as such. Why should it do so if the object of the section is to cover, in the one broad clause, various types of actions relating to corpses?

The next point made by his Honour was that cannibalism did not seem to have been contemplated in Queensland when the Code was enacted in 1899. His Honour drew from this the conclusion that the Queensland legislature which enacted the Code did not intend s. 236 to cover cannibalism. Here it is submitted that his Honour should have looked at the intention of the Papuan authorities in adopting the Code in 1902, instead of the legislature of Queensland, since although the Code was initially a Queensland enactment, on specific adoption by Papua it became a statute of Papua. There is evidence that Papuan authorities at the time considered cannibalism was covered by the Code. Hubert Murray wrote, in *Papua or British New Guinea*,[1] that cannibalism "may also be, but very rarely is, dealt with under the *Criminal Code*" (p. 202). At p. 217 he said, "Cannibalism generally comes before the court as an incident to murder, but it is sometimes treated as a substantive offence, and I see that there were four cannibals before the court in the year 1909-10. The offence is regarded as fully within a section of the *Criminal Code*, which was probably directed against 'body snatchers', and is punishable with two years."

In any event, when a comprehensive *Criminal Code* is enacted in a jurisdiction, it must surely be unsafe to draw any conclusions as to interpretation from whether the action in question was occurring within the jurisdiction at the time of enactment of the code. Surely a broadly stated provision in a *Criminal Code* which included the crime of piracy should not be read to exclude piracy on a showing that piracy had never occurred within the jurisdiction. His Honour's point that, when a criminal enactment is passed the circumstances in which it came to be enacted may be looked at as an aid to interpretation, must surely be confined to specific criminal legislation enacted in response to specific circumstances. In enacting a comprehensive criminal code, a jurisdiction intends to cover a whole range of both uncommon and common acts, and can well decide to cover acts which have never occurred within the jurisdiction at all.

Finally, Prentice, J. thought that the penalty of two years and the fact that the words "without lawful justification or excuse, the proof of which lies on him" were both indicative that cannibalism was not included. The first point is inconsistent with other passages in his Honour's judgment where the seriousness of cannibalism is played down. As to "lawful justification or excuse", this phrase is clearly included in the section to cover matters such as the exhumation of a body on the order of a coroner.

The judgment then proceeds on the assumption that the conclusion that s. 236(2) does not apply to cannibalism is incorrect. His Honour found that, even if s. 236(2) did apply to cannibalism, there was nothing improper or indecent in the acts of the defendants. He applied the standards of propriety and decency of the ordinary person in the environment of the accused, rather than the general community standard.

Whether in such circumstances the standard to be applied is the standard applied in the accused's own environment is not, it is submitted, quite so clear as his Honour suggested. But, even applying the standard of the environment of the accused, it is submitted that his Honour should have found that the conduct of the accused was improper. His Honour referred to the strange "funerary customs" of Papua and New Guinea—"smoking of the dead, publicly and naked, for weeks, their subsequent disposition in a public place (a shelter or a cave) in a naked sitting condition, allowing free access to the fondling of relatives" and so on. With the greatest respect to his Honour, it is submitted that such acts are much more plainly

[1] Unwin, London, 1912.

"funerary customs" than the cooking of a body and eating it. To constitute a *custom* of any kind, it would need to be shown that there was some degree of frequency about the action. The evidence in the case was that no flesh eating incidents had been reported to the authorities in the area since 1965.

But did the evidence support his Honour's conclusion that cannibalism in the area was funerary? It is submitted that it did not. Two men had died—Isira, who was from the same clan as the accused, and Sumagi, who was from another clan. Isira was buried and Sumagi was cooked and eaten. The accused's own man was buried, and the enemy was eaten. The distinction between the two is significant because it indicates that Sumagi was eaten to show contempt, rather than for funerary purposes. One of the witnesses observed that "disregard or disgust for another clan is expressed by eating the bodies of other clans". Another said that the reason for flesh consumption in this case was "to shame the Sabasagi". Taken in conjunction with the fact that flesh eating had not been reported in the area since 1965, it was plain on the evidence that the "funerary custom" of the accused was burial, and that cannibalism was reserved for the insulting of the enemy, thus taking it outside the ambit of "funerary custom" even for the peoples in the area where the accused lived.

It remains to observe that, in deciding as he did that cannibalism was not improper or indecent in the environment in which the accused lived, Prentice, J. paid scant regard to s. 6(1) of the *Native Customs (Recognition) Ordinance* 1963, which provides that native custom is not to be recognized in courts if it is repugnant to the general principles of humanity.

J. A. Griffin.

Escheat in Papua and New Guinea

In the matter of the Estate of Robert Richard Johns (Deceased) (Supreme Court of the Territory of Papua and New Guinea, Unreported Judgment Number 618, Kelly, J., 29th April, 1971).

There are many instances in the reports of lost wills, but these are all cases where the will was lost before an application for probate had been made. In *Re Johns* the court had to deal with a case where the will had been lost after probate had been granted, in a context in which there was no adequate evidence as to the contents of the probated will. This extraordinary situation arose because, between the time the will was probated and the death of the life tenant, all copies of the will, including those in the Court Registry and the office of the Public Curator (the administrator of the estate), had either been lost or destroyed. The resulting problem raised an interesting issue of reception of the common law in Papua.

The deceased, Johns, had died in 1933 and an order for administration (with will annexed) was granted to the Public Curator of the Territory of Papua in 1934. Apparently by the terms of the will the widow received a life interest in a Crown leasehold, the copy of which held by the Registrar of Titles bore appropriate memorials to this effect.

The widow died in 1960 but the Public Curator's copy of the grant, together with the will annexed thereto, had been destroyed in a fire in the Court Registry in 1946. No copy of the will could be found and no clear evidence as to its contents was available. The Public Curator had obtained an order from the Supreme Court for the sale of the leasehold in 1966 and it was the proceeds of that sale which were the subject of the instant case.

His Honour found that there was insufficient cogent evidence as to the contents of the will and that it was improbable that the contents of the will would ever be forthcoming, having regard to the very extensive enquiries already carried out by the Public Curator. He held, therefore, that he should proceed as though the Public Curator were administering an estate in which there was an intestacy as to the reversionary interest which comprised the residue of the estate.

His Honour then applied the relevant law of intestacy, which is contained in

ss. 20 and 21 of the *Probate and Administration Ordinance* 1913-1940 (Papua). He found that there had been no total intestacy in that there was clearly no intestacy as to the life interest which the widow had already enjoyed: there was an intestacy as to the reversionary interest only and there was, therefore, a partial intestacy. Applying the appropriate provisions, the widow became entitled to a one-half share of the reversionary interest, but there being no issue surviving and no next-of-kin within the meaning of s. 21, the question remained as to what should happen to the remaining one-half share.

In finding that there was no next-of-kin within the meaning of the Ordinance, his Honour excluded the widow on the grounds that "next-of-kin" was limited in this context to blood relations of the deceased. He referred to dicta in *Garrick* v. *Lord Camden, Patton* v. *Jones* (1807) 14 Ves. 372; 33 E.R. 564; and *Gutheil* v. *Ballarat Trustees etc. Ltd.* (1922) 30 C.L.R. 293, and expressly found that there was nothing in s. 21 which would require the application of any but the natural and obvious meaning of the expression.

In order to determine the ultimate destination of the remaining one-half share his Honour then embarked on a voyage into the little charted seas of the reception of common law into the Territory of Papua in order to discover whether the common law rules as to escheat applied here. His Honour had, for guidance, only the relevant statutory provisions and two earlier decisions—that of the High Court of Australia in *Booth* v. *Booth*[1] and that of Mann, C. J., sitting as a single judge in the Supreme Court of the Territory of Papua and New Guinea, in *Murray* v. *Brown River Timber Co. Ltd.*[2] Mr R. S. O'Regan's book on *The Common Law in Papua and New Guinea*[3] had not at that time been published, although his thesis, on which the text of the book was based, had been available to counsel for the Public Curator: no reference is, however, made to this in the judgment.

In order that the question of escheat should arise at all it was necessary to find, and his Honour did in fact find, that the conversion of the reversionary interest in the Crown lease did not render the interest any the less "real estate" for the purposes of the *Probate and Administration Ordinance* 1913-1940 (see the *Land Ordinance* 1906). However, at the very beginning of his consideration of this problem, his Honour expressed doubts as to whether or not escheat to the Crown could properly be applied to a share in a reversionary interest in a lease from the Crown. In the event he did not find it necessary to consider that aspect as he held that escheat does not now apply in the Territory of Papua and did not apply at the date of death of the deceased. His ultimate finding was that the remaining one-half share should go to the Crown as *bona vacantia* (in its wider sense, not the restricted sense of the residuary estate of a person dying intestate without husband or wife: *Dyke* v. *Walford*[4]). It is his Honour's reasoning which provides the focal point of interest in this decision.

His Honour began by pointing out that escheat was a common law concept which had been affected by statute, particularly the *Intestates Estates Act* 1884, s. 4, but which had been abrogated by statute in England in 1925.[5] His Honour also demonstrated that the operation of escheat in Papua appears to be assumed by the provisions of s. 31 of the *Probate and Administration Ordinance* 1913-1940 (which limits its operation in certain circumstances) and also by the provisions of s. 25 of the *Succession Act* 1867 (*Queensland, Adopted*); but as far as his Honour could discover there is no express provision for its operation in any written law of the Territory. If it is to apply at all it would be by virtue of s. 4 of the *Courts and Laws Adopting Ordinance (Amended)* 1889, which is as follows:

> "The principles and rules of common law and equity that for the time being shall be in force and prevail in England shall so far as the same shall be applic-

1 (1935) 53 C.L.R. 1. 2 1964 P. & N.G.L.R. 167.
3 Law Book Company Limited, 1971; reviewed and discussed at p. .... of this issue.
4 (1846) 5 Moo. P.C.C. 434; 13 E.R. 557.
5 Section 45, *Administration of Estates Act* 1925.

able to the circumstances of the Possession [Territory] be likewise the principles and rules of common law and equity that shall for the time being be in force and prevail in British New Guinea [Papua]."

In applying this section to determine whether a particular rule of common law or equity has been received into the Territory of Papua a number of questions arise. His Honour only considered one of these, viz. the extent to which regard is to be had to English statutory law in determining what are the principles and rules of common law and equity that are for the time being in force in England. This question had only previously been considered in one Papuan case (*Murray's Case*), although a similar problem had been considered in *Booth* v. *Booth* in respect of the relevant New Guinea provisions which are:

"The principles and rules of common law and equity that *were in force in England on the 9th day of May, 1921*,[6] shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory, and are not repugnant to or inconsistent with the provisions of any Act, ordinance, law, regulation, rule, order or proclamation having the force of law that is expressed to extend to or applied to or made or promulgated in the Territory."[7]

In *Booth* v. *Booth*, Rich and Dixon, JJ. expressed the view, obiter as Kelly, J. expressly found, that in determining which principles and rules of common law and equity were received into New Guinea regard should be had to the statutory modifications to those rules which had taken place before 9th May, 1921. Mann, C.J. had, on the other hand, in considering the Papuan legislation, rejected this suggestion and had held that the appropriate rule was the common law rule at the relevant time as it would appear if unaffected by statutes which the Territory Court deciding the matter "would not be prepared to regard as incorporated into the general structure of the common law . . . applicable to the Territory".[8] Applying this test his Honour rejected the *English Law Reform (Contributary Negligence) Act* 1945—presumably considering that it ought not to be incorporated into the general structure of the common law in the Territory. This test obviously left much to the discretion of the trial judge and Kelly, J. does not appear to have considered it correct for, without commenting on it, he stated that "at this point of time a definite pronouncement by an appellate court on the meaning of s. 4 of the *Courts and Laws Adopting Ordinance* is lacking and the wide statement by Rich and Dixon, JJ. in *Booth* v. *Booth* . . . in relation to the comparable provision of the *Laws Repeal and Adopting Ordinance* is clearly obiter." His Honour then went on to hold "that it is correct to regard s. 4 as going at least as far as incorporating in the law of Papua such of the principles and rules of the common law of England as had not been abrogated by statute from time to time" so that where, as in the instant case, what was a common law rule had been abrogated by an English statute, that rule could no longer be in force in Papua. He then found that the doctrine of escheat did not operate in Papua at the date of death of the deceased.

So far, his Honour's reasoning accords closely with that of Mr. O'Regan, as expressed in the latter's book at pp. 52 and 53. However, Mr. O'Regan went on to say, in respect of Chief Justice Mann's problem:

"Of course it would not have been correct for him to have gone any further and said that the 1945 English Act applied in Papua. It is the common law as

6 (Author's emphasis).

7 Section 16, *Laws Repeal and Adopting Ordinance* 1921-1933 (New Guinea). This section was also considered by Clarkson, J. in *R.* v. *Philip Boike Ulel* (Unreported Supreme Court Judgment Number 533) where his Honour adopted the suggestion of Rich and Dixon, JJ. in *Booth's Case* (see *infra*) but without indicating reasons for his conclusion and without the benefit of counsel's argument. This case does not appear to have been cited to Kelly, J.

8 See the discussion referred to in note 3 above.

modified by statute which becomes the law of Papua not the common law together with its statutory modifications or alterations."

Mr. Justice Kelly, however, did go on to consider a statutory provision of the same statute which had abrogated the common law of escheat—section 46(1)(vi) of the *Administration of Estates Act* 1925. This provision in effect, as his Honour found, preserved the principle of real property passing to the Crown but substituted for the method of escheat the simpler procedure of the property passing to the Crown as *bona vacantia* as was already the common law rule in relation to personalty which had no other owner. His Honour regarded this as being a

> "statutory modification in the application of a principle or rule of the common law to the extent that having abolished one common law principle, namely, that of escheat to the Crown in the case of realty another principle, that of ownerless property passing to the Crown as *ultimus haeres* was extended to cover interests in realty."

He then concluded that

> "the common law in force in Papua as at the date of death of the deceased included a rule that interests in realty which had no other owner passed to the Crown as *bona vacantia*, there being no basis on which it could be said that such a rule would not be applicable to the circumstances of Papua."

Mr. O'Regan has suggested that the decision in *Booth* v. *Booth* could be reconciled with his proposition if the view is taken that the *Married Women's Property Acts* were regarded as effecting a modification of the rule of equity that, in certain circumstances, a wife may enjoy separate property by extending the scope of the rule so that a wife had unrestricted rights (see p. 45).

Although, at first sight, the decision of Kelly, J. might have the appearance of following the dicta of Rich and Dixon, JJ., his Honour did preface his ultimate finding by saying that he did not consider it necessary in the circumstances to consider the limits of those dicta, and it is submitted that his finding is equally consistent with the approach adopted by Mr. O'Regan, so that true principle behind the decision is that, the common law as to escheat having been abrogated, the common law rules as to *bona vacantia* in the case of personalty had been modified or extended to include realty, and that it is this rule as modified which applies in Papua, not the statutory extension as such.

However, a number of problems remain. Assuming, for instance, that the doctrine of escheat could have applied to the circumstances of Papua before the abrogation of the rule in 1925, was the doctrine adopted here before that date (though never called in question) and then abrogated by an English statute? Does the law of escheat, assuming its suitability, apply still in New Guinea? Are his Honour's doubts as to the applicability of escheat to a "reversionary interest in a lease from the Crown" important (a) in Papua (b) in New Guinea? If so, what is the answer?

These problems and others are not capable of solution unless the problems actually arise in cases before the courts or unless the legislature intervenes to remove future doubts. Mr. O'Regan in his book suggests a simple amendment to the reception provisions in both Territories,[8] and it is understood that Professor Geoffrey Sawer has submitted to the Territory Administration a draft Bill containing six clauses which attempts to clarify the position. Whether the simple solution is adopted, or the more complex one, it is submitted that the problem should be solved as a matter of urgency. Although the problem has not been considered in many cases, it is not a legacy which the Australian Government should leave to a self-governing or independent Papua-New Guinea.

L. K. Young.

Comment: Judicial Review of Decisions of a Warden's Court under Section 56 of the Mining Ordinance

Recent decisions of the Full Court of the Supreme Court of the Territory of Papua and New Guinea[1] and, on an appeal from one of these decisions, of the High Court of Australia,[2] have thrown into relief some of the legal problems concerning the jurisdiction of a Warden's Court to determine compensation in respect of damage occasioned in the course of prospecting or mining on private land. These decisions were concerned more with the legal source of jurisdiction rather than with the limits of jurisdiction, but now that the first problem has been settled by the High Court, the second will assume more significance. This comment will review briefly the main legal problems concerning the limits of jurisdiction.

The general scheme of the *Mining Ordinance* is to allow an appeal from a decision of the Warden's Court to the Supreme Court of the Territory,[3] and in any case where there is an *appeal* the Supreme Court's powers are not limited to questions of whether the Warden exceeded his jurisdiction. However, there is no appeal where the parties consent to a summary determination by the Warden under s. 78(2). This was the situation in both of the recent decisions, and in practice it is probable that there will be many cases where s. 78(2) will apply. In such a case, a party wishing to challenge the decision must seek review by some appropriate remedy, such as the prerogative writs of *certiorari*, prohibition or *mandamus*, or by way of a declaration.

I

The Benggong Case[4]

On 28th July, 1969 Bougainville Copper Proprietary Limited was granted by the Administrator-in-Council a "special mining lease" under s. 49B of the *Mining Ordinance* of 1928-1966. The term of this lease was a period of forty-two years as from 10th April 1969, and it conferred on the company a right to mine on the land affected by the lease. On 31st July, 1969 the Administrator notified in the *Gazette* that he had granted a "lease for mining purposes" to the company. Section 49D of the Ordinance provides that such a lease may be granted "for specified purposes ancillary to mining operations carried out or to be carried out on the dominant lease". In this case the dominant lease was the special mining lease of 28th July, 1969.

Part of a cocoa plantation owned by Martin Benggong was included in the land affected by the lease for mining purposes, and under the lease the company entered the land and in the course of construction of an access road to the main mining area destroyed 110 cocoa trees. Benggong claimed compensation before the Warden's Court on the basis that he had suffered damage to his "economic trees". Section 56 of the *Mining Ordinance* provides that "compensation in respect of prospecting or mining on private land" could be assessed in relation to such damage; that the owner of private land may lodge a claim for assessment with the Warden; and, in sub-section (3), that either party not satisfied with the assessment "may require the matter to be referred to arbitration under the *Arbitration Ordinance* 1951".

The Warden's Court ordered the company to pay $3,850 compensation, to be

1 *R.* v. *McKenzie, comprising the Warden's Court at Jaba River, ex parte Bougainville Copper Pty. Limited* (M.P. No. 77 of 1970 (N.G.)), judgment of Minogue, C.J., Clarkson and Kelly, JJ., dated 4th December, 1970, referred to herein as the *Onoka Case*; *R.* v. *The Mining Warden at Bougainville, ex parte Bougainville Copper Pty. Limited*, (M.P. 39/70), judgment of Minogue, C.J., Clarkson and Kelly, JJ., dated 22nd February, 1971, referred to herein as the *Benggong Case*.

2 *Benggong* v. *Bougainville Copper Pty. Limited* (1971, unreported); the copy of the judgment available to the author was undated. It is possible that if this decision is reported, it will bear a different title.

3 Section 104.

4 This statement of the facts draws upon the information contained in the judgments of the Full Court and of the High Court.

paid in monthly instalments over forty-two years. At this hearing the company did not object to the Warden's assumption of jurisdiction under s. 56 nor to the order requiring payment in instalments. The company had also consented to a summary determination by the Warden under s. 78(2). However, the company sought and obtained orders *nisi* for the issue of the writs of prohibition and *certiorari*, and the application to make these orders absolute came on before the Full Court.[5] The Full Court made the orders absolute, and Benggong sought and obtained leave to appeal to the High Court of Australia. The High Court granted leave and disposed of the matter as an appeal, reversing the decision of the Full Court, and thereby discharging the orders *nisi*.

The Onoka Case

This case involved a claim for compensation by Domasi Onoka in respect of the loss of fish in a certain stretch of the Jaba River which was attendant upon the operations of Bougainville Copper under its special mining lease. Here, too, the Warden assumed jurisdiction under s. 56 and the parties consented to a summary determination under s. 78(2). The Warden's Court awarded compensation, payable in instalments over forty-two years. The company obtained an order *nisi* for *certiorari*, and on the return of the writ the Full Court made the order absolute. There was no appeal to the High Court in this case. (*Onoka's Case* was decided more than two months before the Full Court judgment in *Benggong*.)

II

In both cases, the grounds upon which Bougainville Copper had sought the writs were general and varied, but in both cases the Full Court of its own motion raised the question of whether the Warden had jurisdiction under s. 56 to award compensation in respect of operations carried on under a lease for mining purposes. After legal argument, the court held that s. 56 did not extend to such operations, and that therefore the Warden had no jurisdiction to make the award. The High Court in *Benggong* strongly differed with the Full Court, and the main point of difference between the two courts concerned the interpretation of s. 56.

The question at issue was whether the words "prospecting or mining" in s. 56 extended to include operations under a lease for mining purposes. As a matter of general approach, the Full Court in *Benggong* argued that "*prima facie*, these words . . . would not include the operation of making roads",[6] whereas, on the other hand, Barwick, C.J. in the High Court thought that they were "quite apt . . . to include compensation for damage done in activities which are ancillary to mining and carried out to further the mining venture".[7] The Full Court then interpreted s. 56 by reference both to the legislative history of the Ordinance and to the other provisions in the same part of the Ordinance. The High Court, starting from an opposite *prima facie* view, disagreed at points with the interpretation of these other provisions and stressed that should the Full Court be correct, then the result would be that, at most, a person affected by operations under a lease for mining purposes would only be entitled to compensation if the Administrator had determined to insert a covenant or condition to that effect in the lease.[8] (In this case there was an alternative mode of proceeding open to Benggong, for he could have sought compensation under clause 15(d) of the agreement between Bougainville Copper and the Administration, contained in the Schedule to the *Mining (Bougainville Copper Agreement) Ordinance* 1967. However, this agreement would not have affected operators other than this company.) Of some general significance to the

5 Apparently there is some doubt as to the source of the Supreme Court's power to direct that the order *nisi* be made returnable before the Full Court. In the *Onoka Case*, Kelly, J. considered that he had this power under s. 8 of the *Supreme Court Ordinance*, 1949 (judgment, p. 3).

6 *Benggong*, Full Court, p. 3.

7 *Benggong*, High Court, per Barwick, C.J., p. 7.

8 Under s. 49R of the *Mining Ordinance*.

interpretation of the Ordinance is the view that its general intent is that compensation should be payable where damage is suffered in the exercise of a mining tenement.[9]

The High Court decision in *Benggong* settles the question of the competence of the Warden's Court to act under s. 56. However, the High Court and the Full Court addressed themselves to certain other issues concerning the nature of the Warden's jurisdiction and the function of a court on review, and it is to these issues that attention will now be turned.

III

(1) The Principle that Jurisdiction may not be Conferred by Consent

The Full Court in *Benggong* stated that "jurisdiction could not be conferred upon [the Warden] by consent"[10] of the parties before the Warden's Court. This principle is axiomatic—it follows from the principle that a decision made or action taken by a body in excess of its jurisdiction is void. The Full Court tied in this statement of principle with a finding that even if it had considered the award of prohibition discretionary, it would not have exercised its discretion to refuse the writ here because there had been "such a clear excess of jurisdiction".[11]

It is submitted however that the principle that jurisdiction may not be conferred by consent is quite separate from the question of the court's discretion and irrelevant to it. The issue of discretion arises once it is established that the action taken is void, and the question for the court is whether it should recognize this voidness by the issue of an appropriate remedy.[12] Whether the party seeking the remedy consented to the assumption of jurisdiction is relevant in relation to the consideration that waiver may be a ground for refusing the remedy. The discretion problem is considered later.

(2) Jurisdictional Error and Error of Law

(a) *In general*

As indicated, in *Benggong* the company in its application for the prerogative writs had not sought to rely on the argument that s. 56 did not confer jurisdiction on the Mining Warden. Its application was based on other arguments: that the Warden's order was "wrong in law", "contrary to s. 56", and "in excess of jurisdiction". Similar arguments were made in the *Onoka Case*, although here too the Full Court disposed of the case in reliance on its interpretation of the ambit of s. 56. Now that it is clear that s. 56 does confer jurisdiction, the import of these other arguments becomes central and the High Court judgments do not deal at all exhaustively with these issues.

The High Court justices emphasized that court review by way of the prerogative orders was limited to the question of whether the Warden had exceeded his jurisdiction.[13] Before turning to an examination of the problems that might arise under an exercise of s. 56 jurisdiction, it is necessary to consider the theoretical problems surrounding the notions of jurisdictional error and error of law, with particular reference to the authoritative exposition of the principle in the recent House of Lords decision in *Anisminic Ltd.* v. *Foreign Compensation Commission*.[14]

The theory of jurisdictional error is used in both a narrow and a wide sense.

9 *Benggong*, High Court, per Barwick, C.J., p. 8, and per Windeyer, J., p. 5. In contrast, the Full Court in its judgment did not consider it necessary to consider the canon of construction that a statute should not be interpreted so as to deprive persons of their property rights without compensation: p. 5.

10 *Benggong*, Full Court, p. 5.

11 *Ibid.*

12 Wade, "Unlawful Administrative Action: Void or Voidable?" (1967), 83 *Law Quarterly Review*, 526.

13 *Infra*, notes 24 and 25.

14 [1969] 1 All E.R. 208 (H.L.).

The narrow sense may be stated as follows. Certain questions to be decided by an administrative body are jurisdictional in that they are questions which must be decided by the body before it embarks upon the exercise of its jurisdiction; that is, these are matters which are conditions precedent to the exercise of the statutory power. For example, if a Minister can exercise a power to deport in respect only of "non-citizens" then a jurisdictional question which must be decided in a particular case is whether or not the person to be deported is a "non-citizen". This question, of course, could involve both questions of fact and questions of law. On the other hand, once a body correctly assumes jurisdiction, then such questions of fact and law as it may have to decide in order to exercise its power are non-jurisdictional questions. To continue the example, a Minister's views as to whether a non-citizen's activities endangered the country's defence interests would probably be classified as non-jurisdictional.

If a body wrongly decides a jurisdictional question, it is said to have committed a jurisdictional error. A jurisdictional error may therefore be said to be a mistake of fact or law by a body which vitiates its assumption of jurisdiction to act in a certain way. The legal theory is that a court may fully review the grounds for a determination of a jurisdictional question by a body, and that if such a determination is incorrect, the action taken by the body is a nullity.

However, the proponents of the narrow theory of jurisdictional error recognize that although a body may correctly assume jurisdiction it may nevertheless do something in the course of its exercise which will render the action taken a nullity. Action taken in bad faith, in disregard of the rules of natural justice, (where these rules are applicable), or taken on the basis of an irrelevant consideration, or in disregard of a relevant consideration, will have this effect.[15] Thus, the narrow view of jurisdictional error forms part of a broader theory of judicial review of administrative action which may be called the doctrine of *ultra vires*.

However, the wide view of the notion of jurisdictional error encompasses not only errors in relation to matters which are conditions precedent to an exercise of jurisdiction, but would also include all those varieties of error that may be committed in the course of an exercise of jurisdiction which may nullify the validity of the action taken. This wide view is employed less generally than the narrow view, although in the *Anisminic Case* Lord Pearce clearly adopted it.[16] However, Lord Reid's view that it is better to use the term in its narrow sense will probably be more persuasive.

The importance of the *Anisminic Case* is that it emphasizes that an error of law, in the sense of a misconstruction of the statute governing the power of the body, may nullify the action taken. It is essential to distinguish this type of error from the "error of law on the face of the record". By means of a writ or order of *certiorari* a court may quash a decision of a body where there is apparent on the face of the record of the body an error of law. It seems that an error as to any matter of law is sufficient, but this error must be apparent on the record, and it appears that the error of law does not nullify the decision but that the decision or action of the body is valid until it is quashed by the court. No remedy other than *certiorari* is available in this case.[17]

The distinction put in the preceding paragraph may be sharpened by reference to the situation in *Anisminic*. In the aftermath of the Suez action in 1956 the property of British persons in the Sinai area was sequestered by the Egyptian Government. In 1959 this government paid £27½ million to the United Kingdom Government in order to provide a fund to compensate those whose property was taken. Clause 4 of a U.K. Order-in-Council of 1962 provided that the Foreign Compensation Commission "shall treat a claim [for compensation] as established if the applicant satisfies them" of certain matters, and the first condition was that

15 *Ibid.*, per Lord Reid, 213-14.
16 *Ibid.*, 233.
17 Prohibition might also be available. See generally, de Smith, *Judicial Review of Administrative Action*, 2nd ed., 1968, pp. 411-21.

the application related to property in Egypt. Anisminic Ltd. were a British company whose mine in Egypt had been sequestered, but in 1957 they were successful in negotiating a "sale" of the mine to an Egyptian organization, for one-quarter of its value. A final condition of clause 4 was that the claimant for compensation "and any person who became successor in title of such person" before 1959 "were British nationals". Anisminic's claim for compensation was rejected on the ground that they could not show that their successor in title was a British national. The company then sought declarations that this determination was a nullity and that the Commission were under a statutory duty to treat the claim as established. The trial judge made these declarations and the House of Lords, three to two, unheld his decision.[18]

A brief summary cannot do justice to the refinements of theory expressed in the opinions, but the main point of the case may be isolated. The majority Lords held that the Commission had misconstrued clause 4 and found that on its correct interpretation the nationality of the successor in title was irrelevant where the original owner was the claimant. Lord Reid does not appear to have regarded this as a jurisdictional error in the narrow sense, but nevertheless held that this error of law nullified the Commission's determination, "not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter which, on a true construction of their powers, they had no right to deal".[19] Lord Pearce, taking the wider sense of jurisdictional error, found that the Commission had exceeded their jurisdiction, while Lord Wilberforce, perhaps wary of the ambiguity of the concept, used language which largely avoided making a choice for the narrow or the wide view. These differences of approach are not really material, for howsoever described, the essential quality of the error of misconstruction of the clause was that it rendered the decision a nullity. In dissent, Lord Morris of Borth-y-Guest held that if there was an error of construction this was an error within the jurisdiction of the Commission. He argued that the clause "inevitably involved that any necessary interpretation of words within the compass of [the matters in respect of which the Commission had to be satisfied] was for the Commission".[20]

The difficulty with the majority of opinions in *Anisminic* is that it is difficult to determine how they found that the error of law led the Commission to exceed its powers. It seems rather to be a matter of assertion that this was not "something remitted to the Commission for their decision".[21] Perhaps the strongest factor in *Anisminic* was that here the Order-in-Council by its close definition of the circumstances for recovery of compensation had indicated that these conditions were to be "accurately observed".[22]

Nevertheless, the *Anisminic Case* is of great significance, for there was a current of judicial opinion prior to this case to the effect that once a body had jurisdiction in the narrow sense then an error of law by misconstruction of the statute governing the body's powers did not affect the validity of the decision or action taken.[23] It is clear from *Anisminic* that such an error of law may render the decision or action a nullity in that it led the body to take into account some matter which they had no right to take into account.

18 The *Anisminic Case* has been subject to extensive academic comment. See particularly Wade, "Constitutional and Administrative Law Aspects of the Anisminic Case" (1969), 85 *Law Quarterly Review*, 198, and de Smith [1969], *Cambridge Law Journal*, 161.

19 [1969] 1 All E.R. 208, 216.

20 *Ibid.*, 224.

21 *Ibid.*, 216, per Lord Reid.

22 *Ibid.*, 246, per Lord Wilberforce. Lord Wilberforce's judgment contains a frank appraisal of the factors that will influence a court in determining "whether this or that question of construction has been left to the tribunal. . . ", *ibid.*, 245-6.

23 The House of Lords overruled *Davies* v. *Price* [1958] 1 W.L.R. 434, and with some difficulty distinguished other cases on their facts. However, there is more substantial Australian authority to support the reasoning adopted in *Anisminic*. See the cases cited in Benjafield and Whitmore, *Principles of Australian Administrative Law*, 4th ed., 1971, p. 181, n. 42.

(b) *In relation to Section 56*

The fact situations and legal arguments in the *Benggong* and *Onoka Cases* raise a number of potential issues which go to the question of whether the Mining Warden acted *ultra vires* s. 56.

(i) *The method of assessing compensation.* In *Benggong,* the Warden assessed compensation by computing the annual income that *Benggong* might expect to obtain from his cocoa trees and then multiplying this figure by the term of the lease. The company challenged this basis for the assessment, arguing that there should have been some allowance for fluctuation in world prices and potential labour troubles. In the *Onoka Case,* too, there were several issues of whether compensation had been properly assessed, including the instalment question, and questions of whether the Warden had adopted a proper basis for assessment.

The High Court in *Benggong* rejected the argument advanced there, and the Justices' comments on the limited nature of review by *certiorari* were directed to this problem. Barwick, C.J. observed that the Warden's award was "very generous: and no doubt there may have been some unreality", but that this did not cause the Warden to exceed his jurisdiction: "whether he [exercised it] rightly or wrongly need not be decided for the proceeding before the Supreme Court was not an appeal".[24] Menzies, J. was more explicit. He recognized that the Warden's method of assessment "must have resulted in too high a figure", but that this was "not to the point". He argued that:

> "[The Warden's] jurisdiction . . . permits the making of a wrong award . . . [*Certiorari* and prohibition] do not go to correct awards wrong in law or made contrary to the evidence; they go to restrain excess of jurisdiction or to control errors of law upon the face of an award."[25]

In the *Onoka Case,* the Full Court stated that in the circumstances of the case they did not "consider it appropriate"[26] that the compensation should have been awarded in instalments. It is not made clear whether the Full Court would have made absolute the writ of prohibition on that ground alone, but in the light of the High Court view in *Benggong,* it is clear that this would not have been permissible.

Speaking generally, the High Court's view is that questions concerning the appropriate method of assessment of compensation lie within the jurisdiction of the Warden's Court, and may not be reviewed by a court. The expressions of principle cited above must be seen in the light of the questions before the court, and, in particular, the question of instalment payments, for it is submitted that there are some questions pertaining to the assessment of compensation which are reviewable. In particular, Menzies, J.'s statement, on the face of it, appears to state the extent of court review too narrowly, and the reference to "excess of jurisdiction" should. it is submitted, be understood as a compendious reference to all aspects of court review, which may include questions of fact or of law which affect the existence of a jurisdiction.

(ii) *The meaning of "compensation".* One such question of law and fact which seems to have been involved in the *Benggong Case,* and which was also involved in *Onoka,* was the question of whether there had been an award of what in law was "compensation".

In law, compensation is generally understood as a money payment which is designed, so far as is possible, to be the equivalent of the interest in land lost or injuriously affected. On this basis, an award of "compensation" which included, for instance, an element of punitive damages would be made in excess of jurisdiction. In *Benggong,* it had been argued that the Warden had awarded damages rather than compensation, and Barwick, C.J., without rejecting the distinction, held that

[24] *Benggong,* High Court, Barwick, C.J., p. 11.
[25] *Ibid.,* Menzies, J., p. 1.
[26] *Onoka,* Full Court, p. 4.

he did not see any basis for it in relation to the particular award in question.[27] The High Court's judgment does not preclude the issue being raised on different facts.

(iii) *The limits of the discretion.* Another issue involved in *Benggong* was whether the Warden's Court had taken into account irrelevant considerations when making its assessment. Windeyer, J. referred explicitly to this point:

> "Compensation for the loss of trees ought to be assessed, it would seem, by reference to their expected bearing life, not by the duration of the lease of the land. An inability to plant trees on the land taken for a road might thus be considered an element in assessing a proper rent, or the occupation fee under s. 166B, rather than 'consequential damage' within the meaning of s. 56(1)."[28]

However, his Honour was not prepared to see this as involving an excess of jurisdiction.

It is a well accepted principle that a body vested with a discretion may exceed its jurisdiction by an exercise of the discretion by reference to considerations which, on a proper interpretation of the scope of its discretion, are irrelevant to its exercise.[29] The *Anisminic Case* is perhaps best viewed as an application of this principle, and a case where the Warden's Court awarded punitive damages could be fitted under this rubric too. There is a myriad of case law which supports the principle, but it seems to have been lost sight of in some recent decisions in the Supreme Court in Papua-New Guinea.[30] *Benggong* should not be seen as a rejection of the principle, but as a case where the court was not prepared to see any ground for its application. Two factors may be suggested as having been relevant to what seems to be a generous view on the part of the High Court. Firstly, the policy of the Ordinance suggested an expansive view of the notion of compensation, and, secondly, the fact that the Warden's Court was required to handle a large number of claims militated against too much intervention by court review.[31]

(iv) *The matters in relation to which compensation may be awarded.* Section 56 provides:

> (1) Compensation in respect of mining on private land shall be assessed in relation to the following matters:
>
> (a) damage to the surface and to improvements on the surface, including crops and economic trees;
>
> (b) severance of the land from other land of the owner;
>
> (c) loss of surface rights of way, and
>
> (d) all consequential damage.

There are obviously problems of definition here, but there must at some point be a question of whether compensation has been awarded in relation to a s. 56 matter. The correct view here would appear to be that this is a question of jurisdictional law reviewable by a court; this question is analogous to those situations where a rent tribunal is given power to fix the rent of "furnished premises", where it has

[27] *Benggong*, High Court, Barwick, C.J., p. 11.
[28] *Ibid.*, Windeyer, J., pp. 5-6.
[29] See particularly Lord Greene's judgment in *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 233.
[30] *R.* v. *Wewak Resident Magistrate, ex parte Dyer* (1968, unreported); *R.* v. *Rabaul Resident Magistrate, ex parte Damien Kereku and others* (1970, unreported).
[31] Compare the *Anisminic Case* to *Punton* v. *Ministry of Pensions* (No. 2) [1964] 1 W.L.R. 226. In the *Punton Case*, which in its general characteristics is very similar to *Anisminic*, the Court of Appeal was not prepared to see that a possible error of construction of the statute went to jurisdiction. The court emphasized that the tribunal involved, a National Insurance Commissioner, processed a large number of claims, and that to permit court review would open the possibility of frequent attack in the courts.

been held that the question of whether the premises were "furnished" was jurisdictional.[32]

A question as to the scope of s. 56 may have been involved in the *Onoka Case*, for it would have been possible to argue that s. 56 did not extend to cover a loss of an ability to fish, and that the fourth head of compensation—"all consequential damage"—should be read *ejusdem generis* with the other three heads of damage. However, two lines of argument may be adduced to meet his point. Firstly, in Papua-New Guinea it may be argued that rights over land may extend to rights over certain areas of water,[33] and, secondly, that the phrase "all consequential damage" should, in the light of the High Court approach in *Benggong*, be given an expansive interpretation.[34]

On the other hand, if the Warden's Court is addressing itself to a s. 56 matter, questions of the nature of whether the applicant had a sufficient title to the land as might arise would be for the Warden to decide, and would not be reviewable. This would be a question of law committed to the jurisdiction of the Warden. But it must be remembered that if an error of law concerning title, etc. were to be apparent on the record of the Warden's Court, *certiorari* would be available.

(v) *Sufficiency of evidence for finding of fact.* In the *Onoka Case*, the Full Court considered whether the award of the Warden's Court could have properly been made under clause 15(d) of the Schedule to the *Mining (Bougainville Copper Agreement) Ordinance*, which in its (now erroneous) view was the only applicable source of jurisdiction. The court held that it could not, owing to a "fundamental error" on the part of the Warden which it described as follows:

> "it is apparent that there was no evidence, or at the most only a scintilla of evidence, to support the conclusion implicit in the Warden's reasons that the loss to the plaintiff as representing his sub-clan was 1,500 pounds of fish per year."[35]

Thus it would seem that the Full Court was taking the view that this finding of fact would have vitiated an assumption of jurisdiction under clause 15(d), and this view would be equally applicable to an assumption of jurisdiction under s. 56 of the *Mining Ordinance*.

The scope of court review of findings of fact cannot be stated in simple terms,[36] but it would appear that the Full Court's view exceeds the permissible limits. Findings of fact on matters within the jurisdiction of the body to decide are not reviewable, and Menzies, J.'s remarks in *Benggong* may be taken to be an affirmation of this principle. However, a finding of fact without supporting evidence may be described as an error of law, and if this error was apparent on the face of the record, *certiorari* would be available. The error of fact in the *Onoka Case* would appear to be with regard to a matter committed to the jurisdiction of the Warden, and thus, unless the error was apparent on the face of the record, would not be reviewable.

Findings of fact which go to the existence of jurisdiction stand in a different position. Theoretically, they are fully reviewable, and in any collateral proceedings in which the validity of the relevant decision is in question the court may determine the matter *de novo*. However, with respect to direct challenge by prerogative order or by declaration, the courts are more prepared to give weight to the finding of fact by the body concerned, but the cases show that the judicial attitude appears to vary according to the nature of the remedy sought and the nature of the question.[37]

The law here is rather complex and, in the English courts at least, may be in a state of flux. A possible justification for the Full Court's view in *Onoka* would be to treat a finding of fact without evidence (or even substantial evidence) as having led

32 *R.* v. *Blackpool Rent Tribunal; ex parte Ashton* [1948] 2 K.B. 277.
33 *Tolain, and others* v. *Administration* [1965-1966] P. & N.G.L.R. 232, 269-70.
34 *Supra*, note 9.
35 *Onoka*, Full Court, p. 3.
36 See de Smith, *op. cit.*, note 17, 113-26.
37 *Ibid.*, 124-5.

the body to take account of or fail to take account of a relevant consideration. This appears to be the way the House of Lords in *Anisminic* has extended the scope of review over errors of law, and it would be equally applicable to errors of fact.[38]

(3) The Court's Discretion to Refuse Remedies

Now that the courts are moving to the position that jurisdictional error or action *ultra vires* the power of a body renders the decision or action taken a nullity, the scope of the courts' discretion to award a remedy in the case of direct attack becomes more significant. It is clear that generally there is a discretion to refuse to award a remedy, and with the expansion of the scope of review, it is probable that this discretion will be more frequently exercised.

In both the *Benggong* and *Onoka Cases* the Full Court reserved the question of whether the grant of *certiorari* or prohibition would be discretionary in the circumstances, and held that even if there were a discretion, it would not have been exercised in the circumstances. These matters may be briefly noted.

(a) *The discretion to refuse prohibition or certiorari*

The functional inadequacies of the system of administrative law become strikingly apparent when attention is turned to the remedies. There is authority for the principle that where prohibition is sought in respect of a patent, as distinct from a latent, lack of jurisdiction, the court does not have a discretion to refuse the remedy,[39] and in *Onoka* the Full Court seems to have had this rule in mind. Not only is that distinction obscure, but it is difficult to determine its rationale, and it may be that in the process of modernizing administrative law which can be seen in recent case law the rule will be abandoned.

There is some authority that the same rule applies with respect to *certiorari*,[40] and in *Benggong* the Full Court may well have decided this way if the point had become material. However, the better view is that the grant of *certiorari* is always discretionary.

(b) *Grounds for the exercise of discretion*

Apart from the particular rules concerning the court's discretion that may still attach to *certiorari* and prohibition, it may be stated generally that: "The court is entitled to have regard generally to the conduct of the applicant and to the special circumstances of the case in deciding whether to grant him the remedy he seeks."[41] In the *Benggong* and *Onoka* situations there are a number of possible bases on which a discretion to refuse to award the remedy could be based (assuming that a case for the issue of the writs was made out): failure on the part of the company to object to the jurisdictional defect; the availability of a reference to arbitration under s. 56(3); and the interesting possibility offered by the Full Court in *Onoka*: "that, even though the [Warden's] Court had purported to act under an inapplicable statutory provision, [in the Full Court's view, s. 56], the award was one which could properly have been made under the applicable provision, [clause 15(d) of the Schedule to the *Mining (Bougainville Copper Agreement) Ordinance*, 1967]".[42] It is submitted that the courts should accept this last mentioned possibility as a basis for a refusal to review administrative action. In such cases no substantial injustice would be likely to have occurred, and there would be little point to a re-determination of the matter.

38 See generally Wade, "Anglo-American Administrative Law: More Reflections" (1966), 82 *Law Quarterly Review*, 226, especially 229-32, 239-40.
39 de Smith, *op. cit.*, note 17, 433.
40 Benjafield and Whitmore, *op. cit.* note 23, 209, 211.
41 de Smith, *op. cit.*, note 17, 435.
42 *Onoka*, Full Court, p. 3.

(4) The Privative Clause

Section 134 of the *Mining Ordinance* provides that:

> "No proceedings under this Ordinance shall be removed or removable into the Supreme Court except as provided by this Ordinance."

In *Benggong*, the Full Court held that s. 134 had no application, for on its view clause 15(d) of the agreement was the only applicable provision and that proceedings under this clause could not be described as proceedings under the *Mining Ordinance*. Now that s. 56 is established as a basis for the jurisdiction of the Mining Warden, the relation of s. 134 to s. 56 may be briefly considered.

Part VII of the *Mining Ordinance* deals in some detail with the powers and procedure of the Warden's Court, and in s. 104(1) provides that:

> "Any party aggrieved by a decision of a Warden's Court in any case, in respect of which the decision is not by this Ordinance declared to be final, may appeal to the Supreme Court within sixty days after its pronouncement."

One case where a decision of the Warden is declared to be final is where, as in *Benggong*, the parties consent to a summary determination by the Warden of the matter in issue: s. 78(2),(3).

Statutory provision that a decision "shall be final" appears to have no effect on judicial review, and in such a case a court may review on grounds that there has been an excess of jurisdiction, *ultra vires* action on other grounds, and, by *certiorari*, error of law on the face of the record.[43] More strongly worded privative clauses exclude *certiorari* for error of law, but they may not exclude court review on other grounds. In the *Anisminic Case*, the relevant statute provided that: "The determination by the Commission . . . shall not be called in question in any court of law." The Lords held unanimously that this provision did not bar an action for a declaration that a determination was a nullity. Lord Reid accepted the reasoning that "if one seeks to show that a determination is a nullity, one is not questioning the purported determination—one is maintaining that it does not exist as a determination".[44] Owing to the expansive view taken of what errors may render a decision a nullity, the effect of *Anisminic* is to open the way to judicial review on all grounds despite strongly worded privative clauses. However, the matter is one of interpretation, and the language of the privative provision and the general scheme of the Act or Ordinance may preclude court review. Section 134 is therefore potentially vulnerable, but in relation to the *Mining Ordinance*, two sorts of situation need to be considered.

(i) *Where a party may appeal under s. 104(1).* Although there is authority that review by *certiorari* or declaration may be brought without recourse to a statutory right of appeal to a court,[45] the occasions on which such relief would be granted are likely to be rare, and in the case of the *Mining Ordinance*, apart from s. 134, a court is likely to find that Part VII establishes an exhaustive scheme for appeals which precludes any form of review.

(ii) *Where the decision of the Warden is not subject to appeal.* In this situation, the effect of s. 134 is more directly in question, and it is not easy to determine what the judicial attitude might be. Three broad approaches to construction of s. 134 are open. Firstly, the language of the section—"No proceedings . . . shall be removed or removable into the Supreme Court"—suggests that the draftsman was directing his attention to the prerogative writs of *certiorari* and prohibition. If this construction is adopted, then a court could adopt the view taken in several Australian cases that, with respect to such methods of challenge, s. 134 protects *bona fide* exercises of power which are reasonably capable of reference to the power.[46] However, another consequence of this view of s. 134 would be that it would not extend

[43] *R.* v. *Medical Appeal Tribunal, ex parte, Gilmore* [1957] 1 Q.B. 574.
[44] [1969] 1 All E.R. 208, 212.
[45] de Smith, *op. cit.*, note 17, 436.
[46] Benjafield and Whitmore, *op. cit.*, note 23, 249.

to qualify the scope of review where a decision of a Warden's Court was attacked by way of the declaration.

A second view of the scope of s. 134, which is applicable irrespective of the view taken as to the remedies the section intended to effect, would be to regard it as inapplicable to any form of review where it is alleged that the decision of the Warden's Court is a nullity. This view follows from the reasoning of the House of Lords in *Anisminic*, and would enable review by way of any remedy except review by *certiorari* for error of law on the face of the record.

Thirdly, it could be argued that s. 134 should be read literally and expansively, and that it therefore precludes court review. The main prop of this approach would be the argument that the *Mining Ordinance* manifests a legislative intention to provide a complete code on the question of resort to court, and that where its effect is that there is no appeal this intention should not be thwarted by permitting review. In relation to s. 78(2) and (3) this argument is strengthened by the consideration that a party had consented to the closing off of the avenue of appeal.

IV

This analysis of the legal principles in relation to an exercise of s. 56 jurisdiction may seem unnecessarily complex and the application of the principle made dependent upon fine analytical distinctions which make prediction of a court's decision difficult. However, the error lies rather in an understatement of the theoretical problems in administrative law, for the statement of theory in the *Anisminic Case*, which the discussion has adopted, is of very recent vintage, and the Australian courts may not choose to accept it fully. The aim of the comment has been to expose the main problem areas surrounding s. 56, and in relation to a particular problem the analysis would need to be carried deeper.

The complexity and uncertainty of administrative law theory, and in particular of the law concerning remedies, raises the question of whether or not the whole system is in need of wholesale reform. This question has a particular relevance to the situation in Papua-New Guinea and to the other developing countries of the South Pacific where the costs of legal action are prohibitive from the point of view of the vast majority of the population. (The prerogative writs and actions for a declaration or an injunction must be sought by action commenced in the Supreme Court.) The inability of the individual to afford the risk of financial loss effectively protects the Administration from court review and can only serve to reinforce the view too frequently held by Administrators that their power cannot be questioned. Projects for reform must take account not only of the unsatisfactory state of the law, but must also attempt to ensure that in practice the Administration may be made accountable. In conclusion here, the possible lines of reform are suggested.

As a first step, some sort of "ombudsman" institution seems obviously desirable. There is a growing literature on this subject, and the topic cannot be pursued at all deeply here.[47]

The advantages of ombudsman review over court process are: (i) complaints may be made by the most informal means—by letter or by personal complaint, and this obviates the necessity of legal advice; (ii) complaints may be made about any form of administrative behaviour, for the ombudsman is not concerned only with the legal question of whether the administrative body has acted *ultra vires*; (iii) there is no fee charged; (iv) the ombudsman's techniques of investigation are more effective than court process; (v) in cases where the ombudsman is successful in securing a change in the decision or action taken, the "remedy" is far more effective and direct than are court remedies.

There are of course disadvantages, the two main ones being: (i) the ombuds-

[47] An ombudsman institution has worked quite well in Tanzania, and is being adopted in several African countries. See Bayne, "Tanzania's Ombudsman: The Permanent Commission of Enquiry", in *The Law and the Commonwealth* (1971), pp. 37-58; being the proceedings of the Fourth Commonwealth Law Conference in New Delhi.

man's lack of power to enforce a decision (although this may be overcome by allowing the executive head of state to act on an ombudsman's recommendation); and (ii) the ombudsman's discretion to select complaints for review, coupled with provisions denying to a complainant any right to a hearing. This last problem is unavoidable owing to the large number of complaints received by the ombudsman, but it means that this institution cannot be seen as a sufficient method of control.

Beyond the ombudsman, there is a need for an independent channel for review as of right by complainants before a body with power to control administrative action. At present, the courts perform this function, and an obvious line of reform would be a radical simplification of the law of remedies. The complex and archaic system of prerogative writs should be scrapped. The declaration may in time come to cover the field served by these writs, but the matter is not beyond doubt and reform should not wait possible common law evolution. The most straightforward and probably most effective reform would be to create by a statute a right to "petition for review" administrative action. Then come the more difficult questions concerning the appropriate forum for review. In the circumstances of Papua-New Guinea it would be desirable to allow review to be initiated at a level lower than the Supreme Court in order to palliate the problem of costs. But should review proceed within the regular court system, or would it be desirable to create a separate institution—an "Administrative Appeals Tribunal", or an "Administrative Court" —to receive and determine the petitions for review?

Then there is the problem of the grounds upon which a challenge may be made. Allowing a general right of appeal to the review body might tend to defeat the rationale for creating specialized tribunals, for there would be a temptation to aggrieved parties to challenge decisions as of course in the hope of the appeal succeeding. The grounds for review need to be somewhat narrower and the common law theory of jurisdictional error and *ultra vires* is an obvious model. However, the common law theory is far from clear, and it would not be suitable to merely restate this theory in broad terms. A thoroughgoing reform would need to consider each administrative body and to consider in each case the appropriate scope of review and forum for review.

These suggestions for reform are not of course entirely original, and in Australia, New Zealand and the United Kingdom there are law reform bodies pursuing these matters.[48] It is submitted that the need for reform in Papua-New Guinea is even more pressing.

P. J. Bayne.

[48] See Benjafield and Whitmore, *op. cit.*, note 23, Chapter XIII; J. M. Greenwell, "Administrative Tribunals and the Rule of Law" (1968), *Justice*, Number 1, 1.