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SCSL-2003-01-I
(2473 - 2552)

2473

**THE SPECIAL COURT FOR SIERRA LEONE**

**FREETOWN – SIERRA LEONE**

**IN THE APPEALS CHAMBER**

Before: Judge Geoffrey Robertson, QC President
Judge Emmanuel A. Ayoola
Judge Gelaga King
Judge Renate Winter
Judge.....

Registrar: Mr. Robin Vincent
Date filed: 12th November 2003

**CASE NO. SCSL-2003-01-PT**

**THE PROSECUTOR**

**Against**

**CHARLES GHANKAY TAYLOR also known as**

**CHARLES GHANKAY MACARTHUR DAPKANA TAYLOR - APPLICANT**

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**ADDITIONAL SUBMISSIONS FILED FOR AND ON BEHALF OF THE APPLICANT HEREIN CHARLES GHANKAY TAYLOR PURSUANT TO THE ORAL PRONOUNCEMENT OF JUDGE GEOFFREY ROBERTSON Q.C. (PRESIDENT) OF THE APPEALS CHAMBER OF THE 31ST OCTOBER, 2003**

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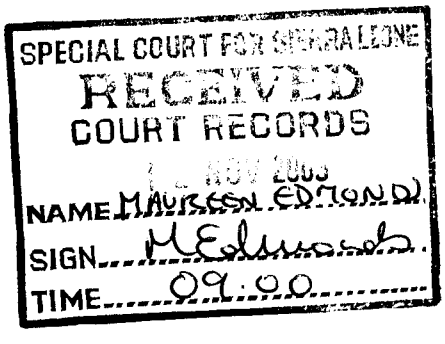
**Office of the Prosecutor**:
Mr. David Crane, Prosecutor
Mr. Desmond de Silva, QC, Deputy Prosecutor
Mr. Walter Marcus-Jones, Senior Appellate Counsel
Mr. Christopher Staker, Senior Appellate Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel

**Applicant's Counsel**:
Terence Michael Terry



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**Pursuant to the oral pronouncement of Judge Geoffrey Robertson Q.C. (President) of the Appeals Chamber to the effect that both sides are free to file additional submissions, Counsel for the Applicant now canvass the following additional submissions**

## (1) The Rule 72: Argument

Your Honour Judge Gelaga-King rightly posed an extremely salient question to Mr. Chris Staker's argument relating to Rule 72 namely whether the accused would not have subjected himself to the jurisdiction of the Special Court and in consequence waived his immunity accorded him against criminal jurisdiction? That I submit is really the central issue, and with respect renders the kind of construction which Mr. Staker apparently sought to put on Rule 72 without merit.

It is further submitted that both the Trial Chamber and the Appeals Chamber can entertain the particular motion of the 23rd July 2003 by virtue of the inherent powers of the Judges to control proceedings before the Trial Chamber OR the Appeals Chamber as the case may be. The exercise of such inherent powers become absolutely necessary for the simple reason that the Prosecutor is vested with enormous powers under the Rules of Procedure and Evidence of the Special Court for Sierra Leone to the extent that he need

not have to establish a prima facie case for the confirmation of an indictment, and moreover there are no express provisions regulating the procedure for the review of the indictment after its confirmation by a Judge. I submit it will be incorrect to suggest that the accused is to be denied the right to approach the Court by motion as the orders sought go to jurisdiction as it may well turn out at the end of the day that the Prosecutor was wrong to seek the confirmation of the indictment and the said Warrant of Arrest and the resulting consequential orders.

It is further submitted that unlike the Rules of Procedure and Evidence of the Special Court for Sierra Leone Article 19 of the Statute of the ICTY and Article 18 of the ICTR regulate the procedure for the review of the indictment. In particular it establishes that if the judge is satisfied that a prima facie case exists the indictment must be confirmed, whereas if the supporting material does not contain sufficient grounds the indictment must be dismissed. In addition Rule 47 of its rules of Procedure and Evidence further detail the procedure to be followed for the review of an indictment. On the other hand there is no comparable provision under the Rules of Procedure and Evidence of the Special Court for Sierra Leone. Furthermore it is submitted that in the determination of cases OR issues brought before the Special Court for Sierra Leone, it should with respect aim at achieving substantial justice for the parties, and therefore in the exercise of its judicial discretion whether OR not to hear a particular motion, the primary objective of the Court must be to attain substantial justice.

At the risk of sounding repetitious, the order confirming both the Purported Indictment and the Purported Warrant of Arrest of Judge Bankole Thompson of 7th March, 2003 was one granted exparte and all the accused has done was to seek to set aside that exparte Order of Judge Bankole Thompson of the 7th March 2003 having regard to the combined effect of Rule 47 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and the inherent jurisdiction of the Court, and particularly so as the Order confirming the Indictment and Warrant of Arrest were granted per incuriam.

On this issue of Rule 72, it is finally submitted that the Trial Chamber having remitted the motion to the Appeals Chamber for determination of the jurisdictional issues raised therein, and the Prosecution having responded in their detail written submissions to the

several jurisdictional issues must now be regarded to have waived any irregularity if at all to the hearing of the motion by the Appeals Chamber.

With regard to the execution of Arrest Warrants issued by the Special Court two issues need to be discussed. First one may wonder what requirements make an arrest lawful under the Statute and the Rules of Procedure and Evidence of the Special Court for Sierra Leone. Secondly one may ask what would be the consequences of the violation of the rights of the accused.

(2) Transmission on the 4th June 2003 of the Indictment, the Decision Approving the Indictment and the Warrant of Arrest and Order for Transfer and Detention by the Registrar of the Special Court for Sierra Leone on the request of the Prosecutor to appropriate authorities of Ghana.

Notwithstanding the two issues referred to above it is submitted that what is of moment for present purposes is the effect of transmitting on the 4th of June 2003 to the state of the Republic of Ghana the purported indictment and Warrant of Arrest issued on the 7th of March 2003 by Judge Bankole Thompson together with the order of transfer of the accused without the Prosecutor seeking an order to unseal and transmit same before it carried out that exercise on the 4th June 2003.

In the event the Appeals Chamber do hold that the Special Court Agreement, 2002 (Ratification) Act, 2002 was validly brought into force, it is submitted that the failure on the part of the prosecutor to secure the grant of an appropriate Order from a Single Judge of the Trial Chamber of the Special Court for Sierra Leone OR the Trial Chamber itself before he requested the Registrar of the Special Court for Sierra Leone on the 4th June 2003 to transmit both the purported indictment and Warrant of Arrest issued by Judge Bankole Thompson on the 7th March 2003 together with the Order of transfer of the accused to the Ghanian authorities was one done by him without lawful authority, lacked jurisdiction to so do and/OR amounted to excess of jurisdiction. In this connection, it is pertinent to refer to the order of Judge Bankole Thompson Presiding Judge of the Trial Chamber of the 7th March 2003 and in particular Order (A), (B) to be found at page 2 of his said Order of 7th March 2003 and (D) to be found

at page 3 of his said Order respectively. In particular under (D) at page 3 it is stated as follows:-

> "Not disclose to the Public, including the media or any Public record, the existence of the Indictment and this Warrant of Arrest, or any part thereof or information pertaining to the Indictment and this Warrant for Arrest until further Order of the Court or at the direction of the Prosecutor"

Consequently it is further submitted that such transmission of both the said purported Indictment and Warrant of Arrest on the 4th June 2003 and the order of transfer of the accused by the Registrar and/OR registry of the Special Court for Sierra Leone to the Ghanian authorities were invalid, void at their inception, on the ground that the order of Judge Pierre Boutet was only granted on the 12th June 2003 for the unsealing of both the said Indictment and Warrant of Arrest to the Special Court for Sierra Leone – indeed a later and subsequent act to that of the afore-mentioned 4th June 2003.

It is equally pertinent to note paragraphs 1, 2 and 3 of the letter dated 27th October 2003 written by no less a person than the Registrar of the Special Court for Sierra Leone under reference: REG/406/03 addressed to Mr. Terence Terry Barrister-at-Law and Solicitor of Marong House, 4th Floor, 11 Charlotte Street, Freetown, Sierra Leone. For ease of reference counsel for the Applicant will now reproduce them in extenso:-

**Paragraph 1:**

> "I refer to your letter dated 23rd October 2003 requesting information regarding the Warrant of Arrest and Order for Detention and Transfer issued by Judge Bankole Thompson on 7th March 2003.

**Paragraph 2**:

> "The Warrant of Arrest and Order for Detention and Transfer ordered the Registrar to "address this Warrant of Arrest, Decision Approving the Indictment, the Approved Indictment of the Accused and a Statement of the Rights of the Accused to the national authorities or such States, or to the relevant international body, including the International Criminal Police Organisation (INTERPOL), as may be indicated by the Prosecutor in accordance with Rule 56."

**Paragraph:3**

> "Pursuant to the above provision, the Prosecutor requested the Registrar on 4th June 2003 to address the Decision Approving the Indictment and the Warrant of Arrest to the authorities of Ghana. On the same date, the Indictment, the Decision Approving the Indictment and the Warrant of Arrest and Order for Transfer and Detention were transmitted by the Registry to the appropriate authorities of Ghana."

See the Order of Judge Pierre Boutet of the 12th June, 2003 as well as the letter dated 23rd October 2003 written by the Applicant's Counsel addressed to the Registrar of the Special Court for Sierra Leone and the Registrar's reply to same dated 27th October 2003. The said order of Judge Pierre Boutet of 12th June 2003 as well as the letter dated 23rd October 2003 from the Applicant's Counsel addressed to the Registrar of the Special Court for Sierra Leone and the Registrar's reply to same dated 27th October 2003 are hereby attached as Index of Attachments ONE, TWO and THREE respectively.

Leaving for a moment whether OR not both the Indictment and Warrant of Arrest were lawfully issued on 7th March 2003, I submit that the above matters were raised by the President Your Honour Judge Geoffrey Robertson Q.C. regarding the fact that it was only on the 12th June 2003 that Judge Pierre Boutet's Order was made when on the facts the Registrar of the Special Court had already on the 4th June 2003 proceeded to transmit the Indictment, the said Warrant of Arrest and the Order of transfer of the accused to the authorities in Ghana when properly considered was in my respectful submission one done without jurisdiction and/OR in excess of jurisdiction. To put it mildly and I mean no disrespect that tantamounts to "Prosecution lawlessness". On the aspect of lack of Jurisdiction and/OR excess of Jurisdiction,

See: (i) Anisminic v. the Foreign Compensation Commission and Another 1969 (1) AER p. 208 particularly the judgment of Lord Morris of Borth-y- Gest at page 233 lines F to H.

(ii) Bairamian FJ, in Madukolu v. Nkemdilim (1962) 1 All NLR 587 at 594- reflected in Judgments of the Supreme Court of Nigeria Holden at Lagos on Friday the 5th of December 1986.- at p. 229-230.

The above mentioned two (2) authorities are attached herewith as Index of Attachments FOUR and FIVE respectively.

Since Nuremberg and the Tokyo Trials were mentioned by the Prosecution and both Amicus curiae,, Counsel for the Applicant will now proceed to make a few submissions and comments were need be on them:-

**NUREMBERG and TOKYO TRIALS**

At Nuremberg there were four chief Prosecutors representing the four Allied Powers (one for each of the Signatories) each of them responsible for a section of the indictment. It cannot really be contended that the investigative authorities were international.

It is submitted however that although the experience of the Nuremberg and Tokyo trials have always been taken as a reference point in international criminal law, its value as a precedent should not be over-estimated. It is well known I submit that the international proceedings instituted against the major war criminals after second World War were essentially justified by the control of the Victors over German and Japanese territory and their institutions. Therefore it is submitted that these trials were deeply influenced by the matrix of victor's justice. It is further submitted that irrespective of any bad faith on the part of the main actors in the proceedings, it was certainly impossible to create in such a very short time truly supranational and impartial institutions for the investigation and prosecution of such complex cases.

On the contrary investigations were essentially with the purview of separate authorities of each of the four Allied Powers. In particular, national contingents of the occupation armies conducted searches for evidence and analysis of the elements discovered. Investigative methods and activities were mainly based on mechanisms

peculiar to the various national military justice systems and the exercise of criminal jurisdiction over enemies. It should be recalled that Article 14 of the Nuremberg Charter specifically established the activities that ought to be conducted by the four Chief Prosecutors acting as a committee. On the other hand, Article 15 of the Charter indicated the tasks that they had to accomplish individually. This last category comprised crucial activities such as: (a) the conduct of investigation, collective and production of evidence; (b) the preparation of relevant portions of the indictment; and (c) the preliminary examination of necessary witnesses and defendants. These powers, attributed to the Prosecutors acting in their individual capacity, seem to confirm that the action of investigation was conducted at the level of national contingents. A further element that shows the prevalence of the national dimension is the concluding sentence of Article 15, where it is established that 'no witness or defendant detained by one of the Signatories can be taken out of the possession of that Signatory without its assent'. This provision reveals beyond any doubt that investigations at Nuremberg were still firmly based on the exercise by the Allies of their power as occupying countries.

**I.C.C.**

Arguably the most significant international organisation to be created since the United Nations, the International Criminal Court ushers in a new era in the protection of human rights. It is submitted that as the direct descendant of the Nuremberg and Tokyo trials, as well as those of the more recent international criminal tribunals for the former Yugoslavia and Rwanda, the International Criminal Court will prosecute genocide, crimes against humanity and war crimes when national justice systems are either unwilling or unable to do so themselves.

**Submissions relating to UN ad hoc Tribunals –namely ICTY, ICTR as well as the ICC.**

As far as UN ad hoc Tribunals namely ICTY and ICTR are concerned, unlike the Special Court for Sierra Leone, it is submitted that as these Tribunals were set up by Security Council's decision under Chapter VII, member states have no choice other

than to comply with the Council's decision and co-operate with the tribunals. This co-operation may entail occasional restrictions of individual rights, where absolutely indispensable. It is submitted further that if one were to consider the individual right involved as protected by a rule of jus cogens i.e. that cannot be derogated by a Treaty based provision, the conflict should be resolved in the opposite way. Leaving aside the case of jus cogens provisions for a moment, it is further submitted that the state concerned would clearly be confronted with the situation referred to in Article 103 of the Charter according to which Charter based obligations prevail over any other Treaty obligations. It is submitted however that the case with the ICC is more complex. To be precise, it is further submitted that the ICC's jurisdiction may be triggered either by a State OR by a Prosecutor proprio motu, OR by the Security Council. In the last event it is submitted that the ICC jurisdiction may be that the solution would be the same as that adopted in the case of ad hoc tribunals.

It is therefore submitted that the strongly mandatory nature of the obligation to co-operate with the two ad hoc tribunals namely ICTY and ICTR and to comply with their Orders – contrasts with the weaker request – based co-operative system of the ICC and the Special Court for Sierra Leone. Again here the difference is due to the fact that the Tribunals were established by the Security Council acting under Chapter VII of the United Nations Charter, while the ICC and the Special Court for Sierra Leone were established by Treaty.

**Implementing Legislation**:-

By and large, it is submitted that typically states have to enact new legislation enabling them to co-operate with the ICTR and ICTR, as these are new institutions and, for example transfer of the accused to the tribunals will not be dealt with in the existing extradition arrangements of the State. The same is true of the ICC.

As ICTY and ICTR were exhaustively discussed by the Prosecution and the respective Amicus Curiae, I shall now proceed to comment on both Tribunals. It is submitted that the Yugoslav and Rwanda tribunals are in effect joined at the hip, sharing not only virtually identical statutes but also some of their institutions. The

Prosecutor is the same for both tribunals, as is the Appeals Chamber. The consequence, at least in theory, is economy of scale as well as uniformity of both prosecutorial policy and appellate jurisprudence. The first major judgment by the Appeals Chamber of the Yugoslav Tribunal, the Tadic jurisdictional decision of 2 October 1995, clarified important legal issues relating to the creation of the body – Prosecutor v. Tadic (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453, (1997) 35 ILM 32. It also pointed the Tribunal towards an innovative and progressive view of war crimes law, going well beyond the Nuremberg precedents by declaring that crimes against humanity could be committed in peacetime, and by establishing the criminal nature of war crimes during internal armed conflicts. Subsequent rulings of the ad hoc tribunals on a variety of matters fed the debates on the creation of an international criminal court. The findings in Tadic with respect to the scope of war crimes were essentially incorporated in the Statute of the International Criminal Court. Other judgments, such as a controversial holding that excluded recourse to a defence of duress, – Prosecutor v. Erdemovic (Case No. IT-96-22-A), Sentencing Appeal, 7 October 1997, (1998) 111 ILR 298 - prompted the drafters of the Rome Statute to enact a provision ensuring precisely the opposite. – Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (hereinafter Rome Statute), Art. 31(1)(d). The issue of 'national security' information, ignored by the International Law Commission, was thrust to the forefront of the debates after the Tribunal ordered Croatia to produce government documents, - Prosecutor v. Blaskic (Case No. IT-95-14-AR108bis)0, Objection to the Issue of Subpoenae Duces Tecum, 29 october 1997, (1998) 110 ILR 677 – and resulted in one of the lengthiest and most enigmatic provisions in the final Statute. - Rome Statute, Art. 72. But the Tribunals did more than simply set legal precedent to guide the drafters. They also provided a reassuring model of what an international criminal court might look like. This was particularly important in debates concerning the role of the Prosecutor. The integrity, neutrality and good judgment of Richard Goldstone and his successor, Louise Arbour, answered those who warned of the dangers of a reckless and irresponsible 'Dr. Strangelove prosecutor'.

(3) **A few submissions relating to the Legal Implications of Judgment in the Pinochet case:-**

It is submitted by Counsel for the Applicant that caution with respect is to be exercised if only to avoid overstating the impact of the decision in the Pinochet case. In the first place, it is submitted that the decision serves as a legal precedent only in the United Kingdom. No other state is bound by the decision. The best that can be said is that the decision by the highest court in one of the foremost Western States namely the U.K. is of persuasive authority for courts in other jurisdictions, particularly Commonwealth States and the United States of America which share a common legal heritage with the United Kingdom. It is further submitted that such a claim may well be exaggerated on the ground that even within the United Kingdom it should be recognised that the decision is very much dependent on its facts. In particular, the fact that none of the seven judges in the case agreed entirely with one another as to the precise details of the decision is evidence of divergence of opinion which could be exploited by lawyers in subsequent cases.

In the second place, and more generally, it is submitted that the decision cannot stand on its own as a precedent for international law. At best, the decision stands as evidence of the practice of the United Kingdom in relation to the application and interpretation of the Torture Convention of 1984. It is submitted that courts in other jurisdictions will be able to refer to the decision and draw inferences therefrom. In this process, it is likely that the case will be used by those pushing for greater enforcement of the Torture Convention. If those courts choose to follow the lead of the House of Lords, it is probable that jurisprudence will emerge which will confirm the operation of the 1984 Convention as overriding the existence of state immunity within international law. This position may eventually evolve into customary international law. However, it is submitted that if no such developments follow, the House of Lords decision may pass into history as an interesting but ultimately insignificant attempt to bring the perpetrator of gross violations of human rights to justice in a national court. (Emphasis mine)

**The Impact on State Sovereignty**

It is submitted that the realist school of international relations posits that states in national self-interested entities exist in a system of perpetual struggle for power. Within such a system the sovereignty of states is supreme, limited only by consent. It is submitted therefore that where the realist challenge of international law is most justifiable is where it is directed at the enforcement of that law. Indeed the relative power of states is a factor in the determination of whether or not they comply with their legal obligations, whether in the form of treaties, both bilateral and multilateral, or customary international law. Such consent is subject to revocation where the self interest of the state demands.

It is further submitted that where a criminal act is committed by the official of a state, jurisdiction over that act lies primarily with the state in question. However, where universality applies, the challenge to the sovereignty of the state is not direct. Rather it is an indirect challenge of the decision not to exercise jurisdiction over a particular individual. The circumstances of the Pinochet case clearly illustrate the problem.

Lords Goff in his speech in the House of Lords, highlighted the political difficulties that might ensue if state immunity were not to exist in cases such as those involving Pinochet. He noted that:

> **"If immunity rationae materiae was excluded, former Heads of State and senior public officials would have to think twice about travelling abroad, for fear of being subject of unfounded allegations emanating from States of a different persuasion."**

On the vexed question of whether national courts constitute the most appropriate forums, Lord Goff's objections appear to be credible. Granted, there is at the moment no other appropriate international forum in which a case such as this could have been brought. However, it would seem that this case highlights the need for the successful creation of the International Criminal Court.

**IMMUNITY OF FOREIGN MINISTERS**

**DEMOCRATIC REPUBLIC OF CONGO VS. BELGIUM**

In its application before the International Court of Justice, Congo asserted that the purported claim to be able to exercise universal jurisdictional violated the Sovereignty of the Congo, and that the non-recognition of the immunity of a serving Foreign Minister violated International law concerning diplomatic immunities. The Court decided that it was not required to address the first question, concerning the circumstances in which a state may exercise universal jurisdiction. On the question of immunities, the Court ruled that the matter fell to be governed by customary international law, since the relevant treaties contained no provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. The Court found that as a matter of principle, the functions of a Minister of Foreign Affairs are such that throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. It then considered whether such immunities could be claimed where the Minister is suspected of having committed war crimes or crimes against humanity (and one might add genocide). It found – on the basis of a careful examination of state practice – that it was unable "to deduce from this practice that there exists under customary international law any form of exception to the rule according to immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crime against humanity.' I submit that the rules of the various International Criminal Tribunals, including those of the ICC, which dispense with immunity, did not alter its conclusion. Nor did international conventions establish jurisdiction, but silent on the question of immunities.

It is further submitted that temporal factor or the immunity question suggest that immunity is more matter of procedure than of substance. The procedural immunity, distinct from substantive immunity, even in the case of serious international crimes, subsists for as long as the suspected official is in office. This is a reflection of the balancing of interests' according to Judges Higgins, Kooijmans and Buergenthal, between attributing responsibility for heinous crimes and the need for maintaining immunities for high-level officials in order that inter-state relations function properly.

National Court jurisprudence indicates that procedural immunity still exists. Achieving this balance might avoid malicious actions by enemy states against other leaders, which can impede the peaceful out come of inter-state disputes.

In so far as the case of The Democratic Republic of the Congo v. Belgium is concerned, Counsel for the Applicant submits in passing that Judge Oda, who it is understood has been appointed to sit as the 5th Judge in the Panel of Judges of the Special Court for Sierra Leone was actually one of the Judges who sat on the ICJ case of the Democratic Republic of Congo v. Belgium, and formed part of the dissent in that case, although in this instant case the Applicant is relying on the majority judgment as that is the judgment the Special Court for Sierra Leone is graciously invited to go by.

However out of due respect for Judge Oda, Counsel hereby refer to his dissent where he held that the DRC;s position that the Belgian law violated international Law does not prove that a legal dispute existed in the Congo v. Belgium case, as required under Article 36 (2) of the Statute of the International Court of Justice. He then went on to state that the moral injury asserted by the DRC was insufficient to elevate the case to a legal dispute, transforming the dispute into a request for a legal opinion on the lawfulness of the Belgian Legislation.

It is submitted however that not even the International criminal Court has received reassurances that states parties to the Court will hand over those appearing in lists of accused if they have internationally recognised immunity – See article 98 of the Statute of the International Criminal Court. In the Pinochet case, the law Lords, who were divided on many points, did agree on the immunity of Heads of State in office. In Spain, the Plenary Session of the Criminal Chamber of the Audiencia National, in a decision (auto) of 4 March 1999, affirmed this same immunity in an absolute way as a result of the recognition of the foreign state and its corollaries with respect to the principle of sovereignty and sovereign equality. In the state of International Law, the crime, whatever its seriousness, does not admit exceptions to the principle of immunity of jurisdiction of existing foregoing heads of state. In this respect the International Court of Justice made an authoritative pronouncement on the matter in

its decision over the suit that the Democratic Republic of Congo had filed against Belgium. Belgium law expressly excludes the immunity of state officials accused of international crimes, - Law of 16 June 1993, modified by that of 10 February 1999, article 5, and, on this basis, the then Congolese Foreign Minister was made subject to an international arrest warrant. According to the Congo, 'by issuing and internationally circulating the arrest warrant of 11 April 2000...Belgium committed a violation of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent Foreign Ministers.' The Court upheld this view with thirteen votes for and three against. There is no exception to this as long as the accused person holds a position which carries immunity from criminal jurisdiction, such as that of Foreign Minister, not even in the case of alleged implication in international crimes. I submit that the emphatic nature of the decision and the size of the majority endorsing it send a clear signal that the main judicial organ of the United Nations does not wish to subject the stability of international relations to disturbances originating from the decentralised judicial investigations of crimes, no matter how abject they be.

In the light of the foregoing submissions Counsel will now address some salient matters referred to by Professor Philippe Stands one of the amicus curiae if only to indicate that the central issue on which he proffered his opinion is not at all settled in the way he has postulated by juxtaposing his comments with a comparatively recent article written by him captioned:-

> 'After Pinochet: the role of national courts' in the book captioned from Nuremberg to Hague – the Future of International Justice edited by him.'

Firstly Professor Philippe Sands himself concedes in the afore-mentioned Article that there is particular concern that in roads into the traditional immunities of foreign sovereigns might undermine the ability of states to interact, especially where traditional immunities are challenged in respect of serving heads of State OR other official.

Secondly Professor Philippe Sands also noted that in the judgment of The Democratic Republic of Congo v. Belgium, that the ICJ stated that the mere fact that various international conventions imposed obligations of prosecution or extradition was not of itself sufficient to reach a conclusion that those conventions removed any entitlement to immunity. As the Court put it: 'jurisdiction does not imply absence of immunity'.

Thirdly, in his conclusions as contained in his aforesaid Article Profession Philippe Sands made the point that the Pinochet and Yerodia cases were different – the distinction between a former president or minister and a serving president or minister is an important one. But he went on to state that the underlying issues are essentially the same. The judgments of the House of Lords (a national court) in Pinochet and of ICJ in Yerodia reflect, in his opinion is a struggle between two competing visions of International Law. For the majority in the House of Lords he went on to state that International Law is treated as a set of rules the primary purpose of which is to give effect to a set of broadly shared values, including a commitment to rooting out impunity for the gravest International Crimes. The other vision, that reflected in the judgment of the ICJ, he argued sees the rules of International Law as being intended principally to facilitate relations between states, which remain the principal International Actors. For the majority in the House, he continued, the balance is to be achieved by limiting the role of immunities and establishing, in effect, a presumption against immunity. The foregoing sums up the position that in his own words and based on his own very analysis the matter is far from been settled. But in his presentation to the Special Court for Sierra Leone, Professor Philippe Sands perhaps inadvertently did not draw attention to what he canvassed in his said Article to the effect that the matter is far from been settled nor that the ICJ's approach will be embraced by those calling for limits on national prosecutions – such as Henry Kissinger in his recent book – (Henry Kissinger, Does American need a Foreign Policy? toward a Diplomacy for the 21st Century (Simon & Schuster, New York and London, 2001) on the grounds that they interfere with the conduct of foreign relations. He then emphasised that the balance between sovereign respect and the conduct of foreign relations, on the one hand, and the prosecution of criminal justice, on the other, will always be a difficult one to reach – indeed a further factor which with

respect does not tally with his conclusions reached in his written opinion as amicus curiae.

In the light of this position canvassed by Professor Philippe Sands in his said article "After Pinochet: the role of National Courts to be found in the book entitled from Nuremberg to The Hague – the future of International Criminal Justice" edited by him, to the extent that the conclusions reached by Professor Diane F. Orentlicher the second amicus Curiae are by and large similar OR identical to that of Professor Philippe Sands, Counsel for the Applicant herein adopt the submissions and reasons canvassed above mutatis mutandis in answer to the thrust of her submissions both written and oral.

Your Honour Judge Ayola during the course of the oral argument wanted to know what provisions under the Special Court Agreement, 2002 (Ratification) Act, 2002 empowered it to remit constitutional questions to the Supreme Court for its determination. At first blush, the simple answer to that question it is submitted will turn on whether the Special Court for Sierra Leone can be regarded as a Court having regard to the combined effect of the provisions of both Section 124 and Section 171(1) of the 1991 Constitution of Sierra Leone, it can properly remit the 2 constitutional questions already submitted and canvassed by Counsel for the Applicant to the Supreme Court of Sierra Leone.

**CONCLUSION**

(1) That an Order be graciously directed to the Prosecutor for him to take steps to withdraw the Indictment within the letter and spirit of Rule 51(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

(2) That an interim order be granted restraining service of the Warrant of Arrest and indictment of the 7th March 2003 on the accused pending the determination of the Motion of the 23rd July 2003 and the several jurisdiction issues submitted to the Appeals Chamber.

(3) That a final Order be graciously granted cancelling and/OR setting aside the Warrant of Arrest of the 7th March 2003 on the two grounds stated in the motion of 23rd day of July 2003.

(4) Further and/OR in the alternative that the request by the Prosecutor to the Registrar on the 4th June 2003 to address the Decision Approving the Indictment and the Warrant of Arrest to the authorities in the State of Ghana and the resulting transmission on the same date the 4th June 2003 of the Indictment, the Decision approving the Indictment and the Warrant of Arrest and Order for Transfer and Detention of the accused by the Registry to the appropriate authorities of Ghana be declared not only premature, but also invalid, and null and void at their inception.

Done in Freetown on this 12th day of November 2003

For the Applicant,

Terence Michael Terry

Counsel for the Applicant

## APPLICANT'S INDEX OF ATTACHMENTS

1. Order of Judge Pierre Boutet of the 12th of June 2003.

2. Letter dated 23rd October, 2003 written by the Applicant's Counsel addressed to the Registrar of the Special Court for Sierra Leone.

3. Letter dated 27th October, 2003 written by the Registrar of the Special Court for Sierra Leone addressed to the Applicant's Counsel.

4. Anisminic v. The Foreign Compensation Commission and Another 1969 (1) AER p. 208 particularly the judgment of Lord Morris of Borth-y-Gest at page 233 lines F to H.

5. Bairamian FJ, in Madukolu v. Nkemdilim (1962) 1 All NLR 587 at 594 reflected in Judgments of the Supreme Court of Nigeria Holden at Lagos on Friday the 5th of December 1986 at pages 229-230.

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# INDEX OF ATTACHMENTS

# INDEX OF ATTACHMENT - ONE

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006

SCSL-2003-1-I-006
(42-43)

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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

Before: Judge Pierre Boutet
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 12th June 2003

The Prosecutor Against:

Charles Ghankay Taylor
aka Charles Ghankay Macarthur Dapkpana Taylor
(Case No. SCSL-2003-01-I)

# ORDER FOR THE DISCLOSURE OF THE INDICTMENT, THE WARRANT OF ARREST AND ORDER FOR TRANSFER AND DETENTION AND THE DECISION APPROVING THE INDICTMENT AND ORDER FOR NON-DISCLOSURE

Office of the Prosecutor:
David Crane, The Prosecutor
Luc Côté, Chief of Prosecution

D. O. Imuran
12-June 03

425 shows

THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

SITTING AS Judge Pierre Boutet, designated pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules");

CONSIDERING that the Indictment against Charles Ghankay Taylor ("the Accused") was reviewed and approved by Judge Bankole Thompson on the 7th of March 2003;

CONSIDERING that the Warrant of Arrest and Order for Transfer and Detention of the Accused was issued on the 7th of March 2003;

CONSIDERING the Decision Approving the Indictment of the 7th of March 2003;

CONSIDERING the Order for Non-Disclosure of the 7th of March 2003;

HAVING RECEIVED on the 7th of June 2003 a request from the Prosecutor for the public disclosure of the Indictment against the Accused, the Warrant of Arrest and Order for Transfer and Detention and the Decision Approving the Indictment and Order for Non-Disclosure;

CONSIDERING that it would be in the public interest to now proceed with such disclosure;

NOW THEREFORE,

PURSUANT to Rules 53 and 54 of the Rules,

HEREBY ORDERS the public disclosure of the Indictment against the Accused, the Warrant of Arrest and Order for Transfer and Detention and the Decision Approving the Indictment and Order for Non-Disclosure;

The additional material supporting the Indictment shall not be disclosed to the public until further order of the Special Court.

Done at Freetown, Sierra Leone this 12th day of June 2003.

Judge Pierre Boutet
Designated Judge

Seal of the Special Court

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# INDEX OF ATTACHMENT - TWO

# *TERENCE TERRY*

**Barrister-at-Law & Solicitor**
**Marong House, 4th Floor**
**11 Charlotte Street**
**Freetown, Sierra Leone**
**email: theodora@sierratel.sl**


23rd October 2003

**WITHOUT PREJUDICE**
to the Accused right to raise the 2 issues contained in his Motion of the 23rd day of July, 2003.

Mr. Robin Vincent
Registrar
Special Court for Sierra Leone
New England
Freetown.

Dear Sir,

RE: **CASE NO. SCSL - 03 - 1**
**THE PROSECUTOR**
**Against**
**CHARLES GHANKAY TAYLOR also known as**
**CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR**

I act as Counsel for the Accused in the above matter.

I will be grateful if you will graciously confirm to me whether you were the person to whom an Order of the Special Court was directed to execute both the indictment and the Warrant of Arrest issued by Judge Bankole Thompson on the 7th of March, 2003 on the above Accused Charles Ghankay Macarthur Taylor? If that is the case, could you confirm whether you were able to execute that Order involving both the said Indictment and Warrant of Arrest OR either of them ?

In the event you were not able to execute that said Order, could you indicate to me whether you were able to report forthwith your inability to so do to the Special Court and if at all you gave any reasons therefore ?

Yours faithfully,

Terence M. Terry.


Telephone & Fax: Freetown 232-22-222605
Phones Direct: 232-22-226662/232-22-229972 - Telephone (Home) Freetown: 238021

# INDEX OF ATTACHMENT - THREE

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +1 212 963 9915 Ext:178 7000
FAX: +39 0831 257001 or +232 22 297001 or +1 212 963 9915 Ext: 178 7001

27 October 2003

Ref: REG/406/03

Mr. Terrence Terry
Barrister-at-Law & Solicitor
Marong House, 4th Floor
11 Charlotte Street
Freetown, Sierra Leone

Dear Mr. Terry,

**Re: The Prosecutor against Charles Ghankay Taylor**

I refer to your letter dated 23 October 2003 requesting information regarding the Warrant of Arrest and Order for Detention and Transfer issued by Judge Bankole Thompson on 7 March 2003.

The Warrant of Arrest and Order for Detention and Transfer ordered the Registrar to "address this Warrant of Arrest, Decision Approving the Indictment, the Approved Indictment of the Accused and a Statement of the Rights of the Accused to the national authorities of such States, or to the relevant international body, including the International Criminal Police Organisation (INTERPOL), as may be indicated by the Prosecutor in accordance with Rule 56."

Pursuant to the above provision, the Prosecutor requested the Registrar on 4 June 2003 to address the Decision Approving the Indictment and the Warrant of Arrest to the authorities of Ghana. On the same date, the Indictment, the Decision Approving the Indictment and the Warrant of Arrest and Order for Transfer and Detention were transmitted by the Registry to the appropriate authorities of Ghana.

Yours sincerely,

ROBIN VINCENT
REGISTRAR

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# INDEX OF ATTACHMENT - FOUR

# ANISMINIC, LTD. *v.* THE FOREIGN COMPENSATION COMMISSION AND ANOTHER.

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson), October 2, 3, 7, 8, 10, 14, 15, 16, 17, 21, 22, 23 and December 17, 1968.]

*Certiorari—Jurisdiction—Principle—Statutory tribunal's decision—No certiorari provision in statute—Error going to jurisdiction distinguished from error within jurisdiction—Review of decision for error of law apparent on face of record and within jurisdiction excluded by no certiorari provision—Error going to jurisdiction rendering tribunal's decision a nullity notwithstanding no certiorari clause.*

*Certiorari—Statutory tribunal—Determination of tribunal to be final—Application to Foreign Compensation Commission—Application of kind into which commission had jurisdiction to enquire—Error of commission in construing Order in Council—Whether error rendering determination a nullity—Foreign Compensation (Egypt) (Determination and Registration of Claims) Order* 1962 (*S.I.* 1962 *No.* 2187), *art.* 4 (1) (*b*)—*Foreign Compensation Act* 1950 (14 *Geo.* 6 *c.* 12), *s.* 4 (4).

*Declaration—Jurisdiction—Inferior tribunal—Declaration that determination of statutory tribunal a nullity—Whether appropriate form of relief.*

The appellants were a British company which owned a mining property in Egypt worth more than £4,000,000. In 1956, after the Israel-Egypt hostilities, the property, together with other properties owned by British nationals, was sequestrated by the Egyptian government. In April 1957, the property was sold to an Egyptian organisation, T.E.D.O. In November 1957, the appellants reached an agreement with T.E.D.O. and the Sequestrator-General whereby the appellants purported to sell to T.E.D.O. for £500,000 the whole of their business in Egypt, whilst reserving to themselves any rights to compensation to which they might be entitled against any government authority other than the Egyptian government. In 1959, a treaty was concluded between the respective governments under which compensation was paid to the British government in respect of certain properties listed in Annex E thereto. The appellants' mining property was there listed, but the disposal of the compensation was in the discretion of the British government. The appellants submitted a claim to compensation to the first respondents, the Foreign Compensation Commission, whose determination thereof could not, by virtue of s. 4 (4)* of the Foreign Compensation Act 1950, be called into question in any court of law. The relevant order providing for payments out of the Egypt compensation fund was the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962†. Article 4 (1)‡ of the order provided that the commission should treat the claim to compensation as established if (by art. 4 (1) (*a*)) the property was listed in Annex E, and (by art. 4 (1) (*b*)) (in relation to that part of Annex E in which the appellants' property was listed) if the applicant was the person referred to in Annex E as the owner of the property or was the successor in title of such person, and that the owner and any person who became successor in title to such person were British nationals on specified dates. In May 1963, the commission provisionally determined that the appellants had failed to establish their claim on the ground that T.E.D.O., which had become the successor in title to the appellants, was not at any time a British national.

**Held:** (*i*) (LORD MORRIS OF BORTH-Y-GEST and LORD PEARSON dissenting) on the true construction of art. 4 (1) (*b*), the words "successor in title" had

* Section 4 (4) is set out at p. 212, letter G, post.
† S.I. 1962 No. 2187.
‡ Article 4 (1) is set out at p. 214, letters F and I, post.

N COMPENSATION
THER.

h-y-Gest, Lord Pearce, Lord
7, 8, 10, 14, 15, 16, 17, 21,

*al's decision—No certiorari*
*n distinguished from error*
*of law apparent on face of*
*certiorari provision—Error*
*n a nullity notwithstanding*

*unal to be final—Applica-*
*plication of kind into which*
*f commission in construing*
*nination a nullity—Foreign*
*istration of Claims) Order*
*ign Compensation Act* 1950

*ration that determination of*
*te form of relief.*

wned a mining property in
the Israel-Egypt hostilities,
d by British nationals, was
pril 1957, the property was
November 1957, the appel-
l the Sequestrator-General
).O. for £500,000 the whole
mselves any rights to com-
any government authority
9, a treaty was concluded
ch compensation was paid
roperties listed in Annex E
ere listed, but the disposal
British government. The
o the first respondents, the
mination thereof could not,
on Act 1950, be called into
providing for payments out
ign Compensation (Egypt)
r 1962†. Article 4 (1)‡ of the
the claim to compensation
was listed in Annex E, and
x E in which the appellants'
son referred to in Annex E
in title of such person, and
essor in title to such person
May 1963, the commission
ad failed to establish their
become the successor in title
national.

l LORD PEARSON dissenting)
ds " successor in title " had

ost.

A no relevance whilst the person listed in Annex E as the original owner of the property in question survived (see p. 217, letter A, p. 241, letter A, and p. 249, letter G, post);

(ii) (LORD MORRIS OF BORTH-Y-GEST and LORD PEARSON dissenting) when the commission rejected the appellants' claim they took into consideration a factor which they had no right to take into account and, accordingly, their B decision was a nullity (see p. 217, letter C, p. 239, letter D, p. 242, letter E, and p. 249, letter I, post);

(iii) on the true construction of s. 4 (4) of the Act of 1950, " determination " meant a real determination not a purported determination (see p. 213, letter D, p. 237, letter H, p. 247, letter H, and p. 250, letter D, post); accordingly (per LORD REID, LORD PEARCE and LORD WILBERFORCE), the sub-C section did not operate to exclude enquiry by a court of law in the present case (see p. 213, letter H, p. 238, letter I, and p. 248, letter D, post) (*Smith* v. *East Elloe Rural District Council* ([1956] 1 All E.R. 855) doubted. *Davies* v. *Price* ([1958] 1 All E.R. 671) overruled);

(iv) in all the circumstances, declarations were the appropriate form of relief (see p. 212, letter F, p. 243, letter B, and p. 250, letter B, post).

D Decision of the COURT OF APPEAL ([1967] 2 All E.R. 986) reversed.

[ As to the quashing of decisions of inferior tribunals for want of jurisdiction, see 1 HALSBURY'S LAWS (3rd Edn.) 142, para. 268; and for cases on the subject, see 16 DIGEST (Repl.) 467-475, *2862-2940*.

As to certiorari being excluded by statute, see 11 HALSBURY'S LAWS (3rd Edn.) 137, para. 257; and as to the exclusion being inapplicable where the E inferior tribunal acts without jurisdiction, see ibid., p. 138, para. 260; and for cases on these subjects, see 16 DIGEST (Repl.) 490-496, *3124-3191*.

As to the power to make declaratory judgments, see 22 HALSBURY'S LAWS (3rd Edn.) 747-749, para. 1610; and for cases on the subject, see 30 DIGEST (Repl.) 168-171, *192-219*.

F For the Foreign Compensation Act 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 148.]

Cases referred to:

*Armah* v. *Government of Ghana*, [1966] 3 All E.R. 177; [1968] A.C. 192; [1966] 3 W.L.R. 828; Digest (Cont. Vol. B) 296, *157a*.

*Board of Education* v. *Rice*, [1911] A.C. 179; [1911-13] All E.R. Rep. 36; G 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; *affg.*, sub nom. *R.* v. *Board of Education*, [1910] 2 K.B. 165; *affg.*, [1909] 2 K.B. 1045; 19 Digest (Repl.) 630, *206*.

*Bradlaugh, Ex p.* (1878), 3 Q.B.D. 509; 47 L.J.M.C. 105; 38 L.T. 680; 42 J.P. 583; 16 Digest (Repl.) 495, *3183*.

*Bunbury* v. *Fuller* (1853), 9 Exch. 111; 23 L.J.Ex. 29; 23 L.T.O.S. 131; 17 J.P. 790; 156 E.R. 47; 11 Digest (Repl.) 78, *992*. H

*Campbell* v. *Brown* (1829), 3 Wils. & Sh. 441.

*Davies* v. *Price*, [1958] 1 All E.R. 671; [1958] 1 W.L.R. 434; Digest (Cont. Vol. A) 16, *74a*.

*Estate and Trust Agencies (1927), Ltd.* v. *Singapore Improvement Trust*, [1937] 3 All E.R. 324; [1937] A.C. 898; 106 L.J.P.C. 152; 157 L.T. 358; 26 Digest (Repl.) 682, **3*. I

*Gilmore's Application, Re*, [1957] 1 All E.R. 796; sub nom. *R.* v. *Medical Appeal Tribunal, Ex p. Gilmore*, [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; 16 Digest (Repl.) 482, *3016*.

*Maradana Mosque (Board of Trustees)* v. *Badi-ud-Din Mahmud*, [1966] 1 All E.R. 545; [1967] A.C. 13; [1966] 2 W.L.R. 921; Digest (Cont. Vol. B) 234, **8a*.

*R.* v. *Bolton* (1841), 1 Q.B. 66; [1835-43] All E.R. Rep. 71; 10 L.J.M.C. 49; 5 J.P. 370; 113 E.R. 1054; 16 Digest (Repl.) 468, *2876*.

*R.* v. *Cheshire Justices, Ex p. Heaver* (1912), 108 L.T. 374; 77 J.P. 33; 16 Digest (Repl.) 467, *2869.*

*R.* v. *Cotham*, [1898] 1 Q.B. 802; 67 L.J.Q.B. 632; sub nom. *R.* v. *Pilkington, etc. Justices and Wallace, Ex p. Williams, R.* v. *Cotham, etc. Justices and Webb, Ex p. Williams*, 78 L.T. 468; 62 J.P. 435; 16 Digest (Repl.) 462, *2826.*

*R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Hierowski*, [1953] 2 All E.R. 4; [1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; 117 J.P. 295; Digest (Cont. Vol. A) 1110, *8122b.*

*R.* v. *His Honour Judge Sir Donald Hurst, Ex p. Smith*, [1960] 2 All E.R. 385; [1960] 2 Q.B. 133; [1960] 2 W.L.R. 961; Digest (Cont. Vol. A) 326, *1137a.*

*R.* v. *Income Tax Special Purposes Comrs.* (1888), 21 Q.B.D. 313; 53 J.P. 84; sub nom. *R.* v. *Income Tax Special Comrs., Ex p. Cape Copper Mining Co., Ltd.*, [1886-90] All E. R. Rep. 1139; 57 L.J.Q.B. 513; 59 L.T. 455; 28 Digest (Repl.) 403, *1792.*

*R.* v. *Minister of Health, Ex p. Glamorgan County Mental Hospital (Committee of Visitors)*, [1938] 1 All E.R. 344; *affd.*, C.A., [1938] 4 All E.R. 32; 102 J.P. 497; sub nom. *R.* v. *Minister of Health*, [1939] 1 K.B. 232; 108 L.J.K.B. 27; 159 L.T. 508; 33 Digest (Repl.) 706, *1649.*

*R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; [1922] All E.R. Rep. 335; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest (Repl.) 469, *2897.*

*R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 16 Digest (Repl.) 479, *2978.*

*R.* v. *St. Olave's District Board*, (1857), 8 E. & B. 529; 21 J.P. Jo. 756; 120 E.R. 198; sub nom. *R.* v. *Metropolitan Board of Works*, 27 L.J.Q.B. 5; 30 L.T.O.S. 132; 16 Digest (Repl.) 496, *3191.*

*R.* v. *Shoreditch Assessment Committee, Ex p. Morgan*, [1910] 2 K.B. 859; [1908-10] All E.R. Rep. 792; 80 L.J.K.B. 185; 103 L.T. 262; 74 J.P. 361; 38 Digest (Repl.) 671, *1216.*

*Ridge* v. *Baldwin*, [1963] 2 All E.R. 66; [1964] A.C. 40; [1963] 2 W.L.R. 935; 127 J.P. 295; 37 Digest (Repl.) 195, *32.*

*Rustomjee* v. *Reginam* (1876), 1 Q.B.D. 487; 45 L.J.Q.B. 249; 34 L.T. 278; *affd.* C.A., (1876), 2 Q.B.D. 69; 46 L.J.Q.B. 238; 36 L.T. 190; 16 Digest (Repl.) 271, *388.*

*Seereelall Jhuggroo* v. *Central Arbitration and Control Board*, [1953] A.C. 151; Digest (Cont. Vol. A) 485, **152a.*

*Smith* v. *East Elloe Rural District Council*, [1956] 1 All E.R. 855; [1956] A.C. 736; [1956] 2 W.L.R. 888; 120 J.P. 263; 26 Digest (Repl.) 703, *135.*

**Appeal.**

This was an appeal by the appellants, Anisminic, Ltd., from an order of the Court of Appeal (SELLERS, DIPLOCK and RUSSELL, L.JJ.) dated 23rd March 1967, and reported [1967] 2 All E.R. 986, allowing the appeal of the respondents, the Foreign Compensation Commission and its legal officer Cecil Frank Cooper, against an order of BROWNE, J., made on 29th July 1966, declaring that a provisional determination by the commission was made without, or in excess of, jurisdiction and was a nullity. BROWNE, J., also declared that the commission were under a statutory duty to treat as established under art. 4 of the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962, the claim of the appellants in respect of their former property in Egypt. (A further declaration made in respect of a claim by the appellants to compensation in respect of damage to the appellants' property arising out of the military action of the Israeli armed forces is outside the scope of this report.) The facts are set out in the opinions of LORD REID and LORD MORRIS OF BORTH-Y-GEST.

*R. J. Parker, Q.C.*, and *F. P. Neill, Q.C.*, for the appellants.

*S. W. Templeman, Q.C.*, and *Gordon Slynn* for the respondents, the commission and its legal officer.

Their Lordships took time for consideration.

17th December. The following opinions were delivered.

2504

**LORD REID:** My Lords, in 1956 the appellants owned a mining property in Egypt which they claim was worth over £4,000,000. On the outbreak of hostilities in the autumn of that year it was occupied by Israeli forces and damaged to the extent of £500,000. On 1st November 1956, property in Egypt belonging to British subjects was sequestrated by the Egyptian government, and on 29th April 1957, after the Israeli forces had withdrawn, the Egyptian government authorised a sale of the appellants' property and it was sold to an Egyptian organisation referred to in this case as T.E.D.O.

The appellants' property had included a large quantity of manganese ore, and steps were taken by them to dissuade their customers from buying ore from T.E.D.O. This seems to have embarrassed the Egyptian authorities, and, on 23rd November 1957, an agreement was made between the appellants, T.E.D.O. and the Sequestrator-General whereby the appellants purported to sell to T.E.D.O. for a price of £500,000 their whole business in Egypt, but this was not to include any claim which the appellants might—

> " be entitled to assert against any governmental authority other than the Egyptian government, as a result of loss suffered by, or of damage to or reduction in the value of "

their business or assets during the events of October and November 1956. Beyond the fact that the appellants received the sum of £500,000, the effect of the agreement is not very clear, for their property had already been sold to T.E.D.O. by the sequestrator. Before the agreement was made, the appellants had no legal right to sue in Egypt either for the return of their property or for compensation for its loss. But they had some hope or prospect of getting something after relations between the United Kingdom and the United Arab Republic returned to normal. This could have been a direct payment to them by the Egyptian government, or, if the method was followed which the British government had adopted in earlier cases, the Egyptian government might pay a lump sum of compensation to the British government to cover all claims by British subjects, and then it would be in the discretion of the British government to determine how any such sum should be distributed among claimants. And similarly with regard to damage done by the Israeli forces there might have been some payment made by the Israeli government. It is not disputed that, by this agreement, the appellants gave up or assigned to T.E.D.O. any claim they might have to receive compensation directly from the Egyptian government, but I think that they did not give up or assign any claim, hope or prospect they might have to receive something from the British or Israeli governments.

The next material event was the making of a treaty between the governments of the United Kingdom and the United Arab Republic on 28th February 1959. That treaty provided for the return to British subjects of their sequestrated property excepting properties sold between 30th October 1956 and 2nd August 1958; those excepted properties were listed in Annex E which included the property of " Sinai Mining (subject to a special arrangement) ". Sinai Mining was the name of the appellants before their name was changed to Anisminic. It is not clear what was meant by " subject to a special arrangement ". Under the treaty the United Arab Republic paid to the British government the sum of £27,500,000 in full and final settlement of claims of a kind mentioned in art. IV. It is not disputed that at that stage the appellants had no legal right to claim to participate in that sum. The disposal of that sum was in the discretion of the British government. The most the appellants had was a hope that they would receive some part of it.

This case arises out of the making of an Order in Council—the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1959 (1).

(1) S.I. 1959 No. 625.

That order has now been superseded by a similar order (2), and I shall refer throughout to this later order. These orders were made under powers contained in the Foreign Compensation Act 1950. That Act set up the first respondents, the Foreign Compensation Commission, to deal with compensation payments made by the governments of Yugoslavia and Czechoslovakia, but it also provides for the commission acting should there be future compensation agreements with foreign governments. The appellants duly submitted a claim under this order to the respondent commission. They also submitted a separate claim in respect of damage done by the Israeli forces. These claims were opposed by the legal officer of the commission and, after sundry procedure including a long oral hearing, the commission, on 8th May 1963, made a provisional determination that:

> ". . . the above-named Applicants, Anisminic Limited, fail to establish a claim under the Egypt Order aforesaid in respect of the matters referred to in paragraph 2 (*a*) of the Amended Answer
> AND THAT the Application in respect of such claims be and is hereby dismissed
> BUT THAT the claim in respect of damage referred to in paragraph 2 (*b*) of the Amended Answer is fit for registration under Article 8 of the said Order in a sum to be hereafter determined."

The claim which was dismissed was the main claim with which this case is concerned, and the claim which was held fit for registration was a claim in respect of the damage done by the Israeli forces.

BROWNE, J., on 29th July 1966, made a declaration that the commission's provisional determination was a nullity and that the commission are under a statutory duty to treat the appellants' first claim as established. The Court of Appeal (3) on 5th April 1967, set aside the judgment of BROWNE, J., and the appellants now seek to have his judgment restored.

The commission's first argument was that, in any event, such a declaration could not competently be made. I agree with your Lordships in rejecting that argument. If the appellants succeed on the merits the declarations made by BROWNE, J., should be restored.

The next argument was that, by reason of the provisions of s. 4 (4) of the Act of 1950, the courts are precluded from considering whether the commission's determination was a nullity, and, therefore, it must be treated as valid whether or not enquiry would disclose that it was a nullity. Section 4 (4) is in these terms:

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."

The commission maintain that these are plain words only capable of having one meaning. Here is a determination which is apparently valid; there is nothing on the face of the document to cast any doubt on its validity. If it is a nullity, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute. The appellants maintain that that is not the meaning of the words of this provision. They say that "determination" means a real determination and does not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity. Or, putting it in another way, 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. It is one thing to question a determination which does exist; it is quite another thing to say that there is nothing to be questioned.

Let me illustrate the matter by supposing a simple case. A statute provides that a certain order may be made by a person who holds a specified qualification or appointment, and it contains a provision, similar to s. 4 (4), that such an

(2) S.I. 1962 No. 2187.
(3) [1967] 2 All E.R. 986; [1968] 2 Q.B. 862.

order made by such a person shall not be called in question in any court of law. A person aggrieved by an order alleges that it is a forgery or that the person who made the order did not hold that qualification or appointment. Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly—meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others; if that were intended it would be easy to say so.

The case which gives most difficulty is *Smith* v. *East Elloe Rural District Council* (4), where the form of ouster clause was similar to that in the present case. But I cannot regard it as a very satisfactory case. The plaintiff was aggrieved by a compulsory purchase order. After two unsuccessful actions she tried again after six years. As this case never reached the stage of a statement of claim we do not know whether her case was that the clerk of the council had fraudulently misled the council and the Ministry, or whether it was that the council and the Ministry were parties to the fraud. The result would be quite different, in my view, for it is only if the authority which made the order had itself acted in mala fide that the order would be a nullity. I think that the case which it was intended to present must have been that the fraud was only the fraud of the clerk, because almost the whole of the argument was on the question whether a time limit in the Act (5) applied where the fraud was alleged; there was no citation of the authorities on the question whether a clause ousting the jurisdiction of the court applied when nullity was in question, and there was little about this matter in the speeches. I do not, therefore, regard this case as a binding authority on this question. The other authorities are dealt with in the speeches of my noble and learned friends, and it is unnecessary for me to deal with them in detail. I have come without hesitation to the conclusion that in this case we are not prevented from enquiring whether the order of the commission was a nullity.

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry 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 enquiry 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

(4) [1956] 1 All E.R. 855; [1956] A.C. 736.
(5) The Acquisition of Land (Authorisation) Act 1946.

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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. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Armah* v. *Government of Ghana* (6) that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law. I think that, if these views are correct, the only case cited which was plainly wrongly decided is *Davies* v. *Price* (7). But in a number of other cases some of the grounds of judgment are questionable.

I can now turn to the provisions of the order under which the commission acted, and to the way in which they reached their decision. It was said in the Court of Appeal (8) that publication of their reasons was unnecessary and perhaps undesirable. Whether or not they could have been required to publish their reasons, I dissent emphatically from the view that publication may have been undesirable. In my view, the commission acted with complete propriety as one would expect looking to their membership. The meaning of the important parts of this order is extremely difficult to discover, and, in my view, a main cause of this is the deplorable modern drafting practice of compressing to the point of obscurity provisions which would not be difficult to understand if written out at rather greater length. The effect of the order was to confer legal rights on persons who might previously have hoped or expected that, in allocating any sums available, discretion would be exercised in their favour. We are concerned in this case with art. 4 of the Order, and more particularly with para. (1) (*b*) (ii) of that article. Article 4 is as follows:

"(1) The Commission shall treat a claim under this Part of the Order as established if the applicant satisfies them of the following matters:—(*a*) that his application relates to property in Egypt which is referred to in Annex E; (*b*) if the property is referred to in paragraph (1) (*a*) or paragraph (2) of Annex E—(i) that the applicant is the person referred to in paragraph (1) (*a*) or in paragraph (2), as the case may be, as the owner of the property or is the successor in title of such person; and (ii) that the person referred to as aforesaid and any person who became successor in title of such person on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959; (*c*) if the property is referred to in paragraph (1) (*b*) of Annex E—(i) that the applicant was the owner on 31st October 1956 or, at the option of the applicant, on the date of the sale of the property at any time before 28th February 1959 by the Government of the United Arab Republic under the provisions of Egyptian Proclamation No. 5 of 1st November 1956 or is the successor in title of such owner; and (ii) that the owner on 31st October 1956 or on the date of such sale, as the case may be, and any person who became successor in title of such owner on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959.

"(2) For the purposes of sub-paragraph (*b*) (i) of paragraph (1) of this Article, any reference in paragraph (2) of Annex E to the estate of a deceased person shall be interpreted as a reference to the persons entitled to such estate under the testamentary dispositions or intestacy of such deceased person.

(6) [1966] 3 All E.R. 177 at p. 187; [1968] A.C. 192 at p. 234.
(7) [1958] 1 All E.R. 671; [1958] 1 W.L.R. 434.
(8) [1967] 2 All E.R. 986; [1968] 2 Q.B. 862.

A " (3) For the purposes of sub-paragraphs (*b*) (ii) and (*c*) (ii) of paragraph (1) of this Article, a British national who died, or in the case of a corporation or association ceased to exist, between 31st October 1956 and 28th February 1959 shall be deemed to have been a British national on the latter date and a person who had not been born, or in the case of a corporation or association had not been constituted, on 31st October 1956 shall be deemed
B to have been a British national on that date if such person became a British national at birth or when constituted, as the case may be; provided that a converted company shall for the purposes of sub-paragraphs (*b*) (ii) and (*c*) (ii) of paragraph (1) of this Article be deemed not to have been a British national.

" (4) If it shall appear to the Commission in relation to any Egyptian
C controlled company referred to in paragraph (1) (*a*) or paragraph (2) of Annex E that under the provisions of any Egyptian measure the shares of any British national in such company have at any time between 30th October 1956 and 28th February 1959 been sold, or purported to be sold, by a sequestrator or by any person acting under his authority without the consent of the holder thereof, the Commission may, if they think it just
D and equitable so to do, and shall if the company is a converted company, hold that such shares were property in Egypt referred to in paragraph (1) (*b*) of Annex E and determine any application in relation to the company or to such shares as if the said company had been incorporated in Egypt and named in the said paragraph."

The task of the commission was to receive claims and to determine the rights
E of each applicant. It is enacted that they shall treat a claim as established if the applicant satisfies them of certain matters. About the first there is no difficulty; the appellants' application does relate to property in Egypt referred to in Annex E. But then the difficulty begins.

Annex E originally only included properties which had been sold during the sequestration, so the person mentioned in Annex E as the owner is the
F person who owned the property before that sale, and his claim is a claim for compensation for having been deprived of that property. Normally he will be the applicant. But there is also provision for an application by a " successor in title ". The first difficulty is to determine what is meant by " successor in title ". Before the order was made, the position was that former owners whose property had been sold during the sequestration had no title to anything. They
G had no title to the property because it had been sold. And they had no title to compensation. All they had was a hope or expectation that they might receive some compensation. They had no legal rights at all. It is now common ground that " successor in title " cannot mean the person who obtained a title to the property which formerly belonged to the applicant. The person who acquired the property from the sequestrator was generally an Egyptian and he could
H have no ground for claiming compensation. So " successor in title " must refer to some person who somehow succeeded to the original owner as the person now having the original owner's hope or expectation of receiving compensation. The obvious case would be where the original owner had died. But for the moment I shall leave that problem.

The main difficulty in this case springs from the fact that the draftsman did
I not state separately what conditions have to be satisfied: (i) where the applicant is the original owner; and (ii) where the applicant claims as the successor in title of the original owner. It is clear that, where the applicant is the original owner, he must prove that he was a British national on the dates stated. And it is equally clear that, where the applicant claims as being the original owner's successor in title, he must prove that both he and the original owner were British nationals on those dates subject to later provisions in the article about persons who had died or had been born within the relevant period. What is left in obscurity is whether the provisions with regard to successors in title have any

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application at all in cases where the applicant is himself the original owner. If this provision had been split up as it should have been, and the conditions, to be satisfied where the original owner is the applicant had been set out, there could have been no such obscurity.

This is the crucial question in this case. It appears from the commission's reasons that they construed this provision as requiring them to enquire, when the applicant is himself the original owner, whether he had a successor in title. So they made that enquiry in this case and held that T.E.D.O. was the appellants' successor in title. As T.E.D.O. was not a British national they rejected the appellants' claim. But if, on a true construction of the order, a claimant who is an original owner does not have to prove anything about successors in title, then the commission made an enquiry which the order did not empower them to make, and they based their decision on a matter which they had no right to take into account. If one uses the word " jurisdiction " in its wider sense, they went beyond their jurisdiction in considering this matter. It was argued that the whole matter of construing the order was something remitted to the commission for their decision. I cannot accept that argument. I find nothing in the order to support it. The order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of their powers. Of course, if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that—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 with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and, if the view which I expressed earlier is right, their decision is a nullity. So the question is whether on a true construction of the order the appellants did or did not have to prove anything with regard to successors in title. If the commission were entitled to enter on the enquiry whether the appellants had a successor in title, then their decision whether T.E.D.O. was their successor in title would, I think, be unassailable whether it was right or wrong; it would be a decision on a matter remitted to them for their decision. The question I have to consider is not whether they made a wrong decision but whether they enquired into and decided a matter which they had no right to consider.

I have great difficulty in seeing how, in the circumstances, there could be a successor in title of a person who is still in existence. This provision is dealing with the period before the order was made when the original owner had no title to anything; he had nothing but a hope that some day somehow he might get some compensation. The rest of the article makes it clear that the phrase (though inaccurate) must apply to a person who can be regarded as having inherited in some way the hope which a deceased original owner had that he would get some compensation. But " successor in title " must, I think, mean some person who could come forward and make a claim in his own right. There can only be a successor in title where the title of its original possessor has passed to another person, his successor, so that the original possessor of the title can no longer make a claim, but his successor can make the claim which the original possessor of the title could have made if his title had not passed to his successor. The " successor " of a deceased person can do that. But how could any " successor " do that while the original owner is still in existence? One can imagine the improbable case of the original owner agreeing with someone that, for a consideration immediately paid to him, he would pay over to the other party any compensation which he might ultimately receive. But that would not create a " successor in title " in any true sense. And I can think of no other way in which the original owner could transfer *inter vivos* his expectation of receiving compensation.

If there were anything in the rest of the order to indicate that such a case was intended to be covered, we might have to attribute to the phrase " successor in title " some unusual and inaccurate meaning which would cover it. But there is nothing of that kind. In themselves the words " successor in title " are, in my opinion, inappropriate in the circumstances of this order to denote any person while the original owner is still in existence, and I think it most improbable that they were ever intended to denote any such person. There is no necessity to stretch them to cover any such person. I would, therefore, hold that the words " and any person who became successor in title of such person " in art. 4 (1) (*b*) (ii) have no application to a case where the applicant is the original owner. It follows that the commission rejected the appellants' claim on a ground which they had no right to take into account and that their decision was a nullity. I would allow this appeal.

**LORD MORRIS OF BORTH-Y-GEST:** My Lords, the appellants made claims to participate in the compensation received from the United Arab Republic. Pursuant to the authority given by the Foreign Compensation Act 1950, Orders in Council were made providing for the determination of such claims by the first respondents, the Foreign Compensation Commission. The application of the appellants was the subject of an oral hearing which took four days. At the hearing, the appellants were represented by counsel. In due course the commission, in provisional determinations, gave their decision. The appellants thereupon brought an action claiming that the determinations of the commission were wrong in law or invalid. But the Act provides that the determination by the commission of any application made to them " shall not be called in question in any court of law ". For many days in successive stages of these proceedings the appellants have done nothing else. They have presented the arguments which they unsuccessfully advanced before the commission. The commission had been properly constituted and had been presided over by their appointed chairman—an eminent Queen's Counsel. How, then, have the appellants justified this somewhat startling procedure?

As the facts which comprise the background to this litigation are so carefully narrated in the judgment of the learned judge, I need only refer to them in summary form. At the time of the events at Suez, in October 1956, the appellants (then called the Sinai Mining Co., Ltd.) were carrying out operations for the extraction of manganese ore in the Sinai Peninsula. They had mining leases or concessions granted to them by the Egyptian government. Their undertaking was valued at about £4,400,000. A proclamation was passed (Proclamation No. 5) which resulted in the undertaking being placed under sequestration. That was on 1st November 1956. The company lost possession and control of their undertaking and it became illegal under Egyptian law for them to dispose of or deal with their undertaking in the absence of ministerial consent. There followed a period within which Israeli forces caused serious damage (to the extent of £532,773) to the property. Those forces withdrew in or about April 1957. In that month (on the 29th) the United Arab Republic passed Decree No. 387. By that decree, authority was given to the Custodian-General of the property of British, French and Australian subjects to sell and liquidate the property of certain persons including the appellants who were subject to Proclamation No. 5. On 29th April 1957, an agreement was made (called a contract of sale) between the Custodian-General of British Property and the chairman of the Economic Board, which organisation was a department of the Egyptian government. It has been referred to as T.E.D.O. What the agreement purported to do was to sell all the assets of the appellants to the chairman, who acted both as chairman of T.E.D.O. and also as the representative of a company which was being formed and which was called the Sinai Manganese Co. S.A.E. As the result of a presidential decision of 18th May 1957, the proposed new company was brought into existence.

It was hardly to be expected that the appellants would accept or acquiesce

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in the expropriation of their property. Nor was it likely that they would be inactive in the protection of their rights and in the assertion of any claims that they could advance. Though they may have been without remedy in the Egyptian courts, they took various steps to assert their rights. On 11th June 1957, they registered with the Foreign Office in London a claim setting out details of the assets and goodwill of their undertaking in Egypt as at 31st October 1956. In the further endeavour to protect their interests, they instructed their agents to write to all their former customers. That was done by means of a circular letter dated 9th July 1957. The letter made it very plain that the appellants in no way recognised the assumption of control by the sequestrator of their assets. The letter recorded that the appellants were advised that—

> "the action of the Egyptian Government must be regarded as a breach of international law which is incapable of giving rise to any valid legal effects . . ."

There was an emphatic warning that the appellants disputed the right of any person or any company to deal in any way with their ores and would regard " as a violation of its legal rights any transaction of any kind whatsoever involving the said ores " and would take, in any country, any steps that it might consider necessary to assert or protect their rights. No more resolute and complete assertion of their claims and their rights could be imagined. Nor were their efforts unproductive of result. Though on 4th September 1957, the Minister of Industry in Egypt issued an order (Order 426 of 1957) purporting to cancel the appellants' 16 mining leases and though the newly-formed company, the Sinai Manganese Co. S.A.E., issued in Egypt a writ in respect of the circular letter of 9th July, when the appellants decided, as they did, that they would negotiate with the Egyptian authorities, they found them ready to come to terms. The result was that an agreement was concluded on 23rd November 1957. The parties to it were the appellants, the new company (the Sinai Manganese Co. S.A.E.), T.E.D.O., and the Sequestrator-General. The appellants agreed to sell and T.E.D.O. agreed to buy " the whole business " of the appellants " as carried on and situate in Egypt ". The sequestrator consented to and acquiesced in the sale. The business was deemed to include all the assets of the appellants situate in Egypt and all their liabilities in Egypt arising out of or in connection with the conduct of their business in Egypt including any sums payable to employees. From the assets there was, however, excluded any claim which the appellants could assert against any government other than the Egyptian government as a result of loss or reduction in value of their business consequent on the events of October and November 1956. " The price of the said sale " was £500,000. There were terms of payment. The appellants did in due course receive the whole of the purchase price. The appellants agreed that they would change their name. They did so and became Anisminic, Ltd.

At the date of that agreement, negotiations were in progress between Her Majesty's government and the United Arab Republic. Though this cannot be a matter affecting the legal issues in this litigation, it may be said as a matter of history that, when the appellants made their agreement, they believed, as the learned judge found—

> " that they were doing better for themselves than Her Majesty's Government was likely to do for them, and that they did not expect to get any additional compensation out of any future Inter-Governmental Agreement . . ."

It must, however, be clear that, if they could qualify to establish a claim under any later Order in Council, they would not be debarred by the fact that it was their firm calculation that their best policy would be to fend for themselves. By way of anticipation in the narrative it may be said that, when the agreement was in

due course considered by the commission, they held that the terms of the agreement made it quite clear that the subject-matter of the sale was the whole business of the appellants in Egypt and that included in it was " any claim of the applicant against the Egyptian government " resulting from the events of October-November 1956. It was " an assignment of all claims for compensation " that the appellants might have against the United Arab Republic in respect of " the business and its assets including cancellation of the mining concessions ". The commission held that the appellants, being fully aware of the cancellation of their leases and of the damage to their business and of the purported sale of it, " sold and intended to sell to T.E.D.O. all claims arising thereout together with the goodwill of the company ". They held, as was, of course, undeniable, that T.E.D.O. was not at any time a British national.

Some 15 months after the appellants made their agreement of 23rd November 1957, an agreement was made between H.M. government and the government of the United Arab Republic. It was an agreement in relation to financial and commercial relations and British property in Egypt. It was made on 28th February 1959. The agreement or treaty cannot easily be summarised, but one part of it provided for the return of British property by the United Arab Republic. From that provision there was, however, an exclusion of property which had been sold between 30th October 1956 and 2nd August 1958, under the provisions of Proclamation No. 5; such property was referred to in what was called Annex E. (The terms of Annex E were altered (by agreement) in August 1962.) An important provision of the treaty was that the government of the United Arab Republic would pay a sum of £27,500,000 to the United Kingdom government in full and final settlement of certain " claims " which included " all claims in respect of the property " which had been excluded from the requirement to return property. The exclusion, as above stated, was of the property sold under Proclamation No. 5 and referred to in Annex E. In Annex E the name of the appellants appeared. In its amended form Annex E referred to the properties in the United Arab Republic " of any United Kingdom nationals appearing on the following list ": in the list was the entry " The Sinai Mining Company Limited, 1 Sh. El Bustan, Cairo (subject to a special arrangement) ". In the treaty there were various definitions of " Property ", " British property ", " United Kingdom nationals " and " Owners ".

It is clear that, merely because of the conclusion of the treaty and the receipt of £27,500,000 by H.M. government, the appellants could not assert any rights against H.M. government (*Rustomjee* v. *Reginam* (9)). What H.M. government did was to have recourse to the provisions of the Foreign Compensation Act 1950. Accordingly, an Order in Council was made on 6th April 1959 (10). It recited the authority given by the Act to make provision for the " determination " by the commission of " claims to participate in compensation received under agreements with foreign Governments ". It recited the treaty of 28th February 1959, and recited that it was—

> " expedient that provision should be made with regard to sums received from the Government of the United Arab Republic and for the registration, assessment and determination of claims in respect of British property in Egypt."

The order proceeded to give directions to the commission. The appellants made claims (on 15th September 1959). They were willing to accept that, if they established their claim and if their loss was being assessed, the commission should regard the £500,000 as being " compensation or recoupment " which the appellants had received. The legal officer (on 14th July 1961) filed an answer and an oral hearing began in March 1962. I need not refer to any pleading matters because a new Order in Council (11) was made on 2nd October 1962,

(9) (1876), 1 Q.B.D. 487; 2 Q.B.D. 69.
(10) S.I. 1959 No. 625.
(11) S.I. 1962 No. 2187.

under which certain important changes were made. After pleading amendments, the oral hearing of the appellants' claim was begun again on 1st April 1963. Part III of the new Order in Council was in particular relevant and applicable as regards the appellants' claim. All of its provisions as well as the other parts of the order demanded consideration by the commission. Here I set out merely the opening paragraphs:

> " PART III—CLAIMS IN RESPECT OF PROPERTY REFERRED TO IN ANNEX E
>
> 4. (1) The Commission shall treat a claim under this Part of the Order as established if the applicant satisfies them of the following matters:—(*a*) that his application relates to property in Egypt which is referred to in Annex E; (*b*) if the property is referred to in paragraph (1)(*a*) or paragraph (2) of Annex E—(i) that the applicant is the person referred to in paragraph (1)(*a*) or in paragraph (2), as the case may be, as the owner of the property or is the successor in title of such person; and (ii) that the person referred to as aforesaid and any person who became successor in title of such person on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959; (*c*) if the property is referred to in paragraph (1)(*b*) of Annex E—(i) that the applicant was the owner on 31st October 1956 or, at the option of the applicant, on the date of the sale of the property at any time before 28th February 1959 by the Government of the United Arab Republic under the provisions of Egyptian Proclamation No. 5 of 1st November 1956 or is the successor in title of such owner; and (ii) that the owner on 31st October 1956 or on the date of such sale, as the case may be, and any person who became successor in title of such owner on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959.
>
> (2) For the purposes of sub-paragraph (*b*)(i) of paragraph (1) of this Article, any reference in paragraph (2) of Annex E to the estate of a deceased person shall be interpreted as a reference to the persons entitled to such estate under the testamentary dispositions or intestacy of such deceased person."

The decision of the commission (on 8th May 1963) was that the appellants had failed to establish their main claim (which was dismissed) but that their claim in reference to damage done to their property arising out of the military action of Israeli armed forces was fit for registration under art. 8 of the Order in Council in the sum (which they assessed) of £532,773. In the reasoned document (called minutes of adjudication), which was later made available, the reasons of the commission were amply recorded. If this were an appeal from their decision much argument might result. As, however, the document is being looked at for the limited purpose of ascertaining whether the commission exceeded the bounds of their jurisdiction it must suffice to see what it was that they decided. Very shortly stated it is, I think, clear that what was decided was that, as the appellants had sold their property to T.E.D.O. and as T.E.D.O. was not a British national and as T.E.D.O. was the " successor in title " or assignee of the appellants, the commission had not been satisfied of the matters referred to in art. 4, with the result that they could not treat the main claim as established. As, however, there had been no successor in title of the appellants in regard to their claim concerning loss which was not the result of Egyptian measures (i.e., the loss caused by Israeli forces), that claim should be registered under art. 8 of the Order in Council. The commission recorded the nature of what was contended before them, viz.:

> " [Counsel for the appellants] stated that the present hearing was in fact limited to the question of entitlement, as it might appear at first sight that the sole question for determination was whether, by virtue of the Agreement of November 1957, the Economic Development Organisation, which was one of the other parties to that Agreement, became the [appellants'] successor in title within the meaning of the Orders; as if it did, it was not a British

national, and it would have become successor in title between the two vital dates, which would defeat the claim. In a sense, he stated, that was the only question, but he submitted that it involved the consideration of basically four issues: First, as the [appellants] claim as original owner and not by succession, is the question of successor in title relevant? Secondly, if it is relevant, did the Agreement of 23rd November 1957 constitute T.E.D.O. the [appellants'] successor in title within the meaning of the Order, to anything in respect of which a claim would otherwise lie? Thirdly, if it did, did it so constitute T.E.D.O. the [appellants'] successor in title to the whole of that which otherwise would have been the subject of a good claim? And, finally, if not, in respect of what can the [appellants] still claim? "

Numerous questions arose in regard to the construction and effect of the November 1957 agreement, as well as questions of construction in regard to the Order in Council and as to the matters of which the commission had to be satisfied. The commission held that the expression " successor in title " throughout the Order in Council referred not to the property which had been " Egyptianised, lost, injured or damaged but to the claim ". They held that the recitals to the Orders in Council showed that the " claims " which they had to consider were claims to participate in the fund which, as the treaty of February 1959 showed, was a fund which was in settlement (inter alia) of all " claims " in respect of (shortly stated) the properties which did not have to be returned and which were denoted in Annex E. On a construction of the November 1957 agreement (and the appellants have accepted that its construction was entirely the function of the commission and is not to be challenged), the commission were satisfied that it—

> " operated as an assignment of all claims for compensation that the [appellants] might have against the U.A.R. in respect of the business and its assets, including cancellation of the mining concessions."

The appellants, they held, being fully aware of such cancellation and of the damage to, and purported sale of, their business had " sold and intended to sell to T.E.D.O. all claims arising thereout together with the goodwill of the Company ". As T.E.D.O. was not a British national but—

> " as it became in the view of the commission the successor in title of the [appellants] to the claim against the U.A.R. and any consequent claim to participate in compensation provided to meet that claim, the [appellants were] unable to succeed under Article 4 or Article 6 in establishing any claim arising out of a claim against the U.A.R."

That was the decision of the commission whose determination of any application made to them " shall not be called in question in any court of law ".

This is not a case in which there has been any sort of suggestion of irregularity either of conduct or procedure on the part of the commission. It has not been said that anything took place which disqualified the commission from making a determination. No occasion arises, therefore, to refer to decisions which have pointed to the consequences of failing to obey or of defying the rules of natural justice, nor to decisions relating to bias in a tribunal, nor to decisions in cases where bad faith has been alleged, nor to decisions in cases where a tribunal has not been properly constituted. If a case arose where bad faith was alleged, the difficult case of *Smith* v. *East Elloe Rural District Council* (12) would need consideration, but the present case can, in my view, be approached without any examination of or reliance on that case.

The provisions of s. 4 (4) of the Act of 1950 do not, in my view, operate to debar any enquiry that may be necessary to decide whether the commission have acted within their authority or jurisdiction. The provisions do operate to debar contentions that the commission while acting within their jurisdiction

(12) [1956] 1 All E.R. 855; [1956] A.C. 736.

have come to wrong or erroneous conclusions. There would be no difficulty in pursuing, and in adducing evidence in support of, an allegation such as an allegation that those who heard a claim had never been appointed, or that those who had been appointed had by some irregular conduct disqualified themselves from adjudicating or continuing to adjudicate. There would be no difficulty in raising any matter that goes to the right or power of the commission to adjudicate (see *R.* v. *Bolton* (13)). What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make. It is, of course, clear that no appeal is given from a determination of the commission. When Parliament sets up a tribunal and refers matters to it, it becomes a question of policy whether to provide for an appeal. Sometimes that is thought to be appropriate. Thus, where (by the Indemnity Act 1920) provision was made for the assessment by the War Compensation Court of certain claims for compensation for acts done in pursuance of prerogative powers, it was enacted that though the decision of the tribunal (presided over by a judge) was to be final there could be an appeal by a party aggrieved by a direction or determination of the tribunal on any point of law. Sometimes, on the other hand, it is not thought appropriate to provide for an appeal. In reference to the commission it was presumably thought that the advantages of securing finality of decision outweighed any disadvantages that might possibly result from having no appeal procedure. It was presumably thought that there was every prospect that right determinations would be reached if those appointed to reach them were persons in whom there could be every confidence.

I return, then, to the question as to how the appellants can justify the calling in question by them of the determination of the commission. The answer is that they boldly say that what looks like a determination was in fact no determination but was a mere nullity. That which, they say, should be disregarded as being null and void, is a determination explained in a carefully reasoned document nearly ten pages in length which is signed by the chairman of the commission. There is no question here of a sham or spurious or merely purported determination. Why, then, is it said to be null and void? The answer given is that it contains errors in law which have caused the commission to exceed their jurisdiction. When analysed, this really means that it is contended that, when the commission considered the meaning of certain words in art. 4 of the Order in Council, they gave them a wrong construction with the consequence that they had no jurisdiction to disallow the claim of the appellants. It is not suggested that the commission were not acting within their jurisdiction when they entertained the application of the appellants and gave it their consideration nor when they heard argument and submissions for four days in regard to it. The moment when it is said that they strayed outside their allotted jurisdiction must, therefore, have been at the moment when they gave their " determination ". The control which is exercised by the High Court over inferior tribunals (a categorising but not a derogatory description) is of a supervisory but not of an appellate nature. It enables the High Court to correct errors of law if they are revealed on the face of the record. The control cannot, however, be exercised if there is some provision (such as a " no certiorari " clause) which prohibits removal to the High Court. But it is well settled that even such a clause is of no avail if the inferior tribunal acts without jurisdiction or exceeds the limit of its jurisdiction.

In all cases similar to the present one it becomes necessary, therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its terms of reference? What was its remit? What were the questions left to it or sent to it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or not the conditions precedent were satisfied? If Parliament

(13) (1841), 1 Q.B. 66; [1835-43] All E.R. Rep. 71.

has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists. The decided cases illustrate the infinite variety of the situations which may exist and the variations of statutory wording which have called for consideration. Most of the cases depend, therefore, on an examination of their own particular facts and of particular sets of words. It is, however, abundantly clear that questions of law as well as of fact can be remitted for the determination of a tribunal. If a tribunal, while acting within its jurisdiction, makes an error of law which it reveals on the face of its recorded determination then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion that does not involve that the tribunal has gone outside its jurisdiction. It follows that, if any errors of law are made in deciding matters which are left to a tribunal for its decision, such errors will be errors within its jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any court of law.

In a passage in his speech in *Armah* v. *Government of Ghana* (14), my noble and learned friend, LORD REID, thus stated the matter:

> "If a magistrate or any other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right, he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction."

To the same effect were words spoken by DENNING, L.J., in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (15):

> "No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction."

In the *Northumberland* case (16), the whole argument proceeded on the basis that the error or errors of law were within the jurisdiction. The judgments would have been unnecessary if it could have been asserted that error of construction was tantamount to excess of jurisdiction.

In speaking of the supervisory jurisdiction of the superior court, LORD SUMNER in his speech in *R.* v. *Nat Bell Liquors, Ltd.* said (17):

> "Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. 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."

If, therefore, a tribunal while within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as it is often expressed, on the face of the record) then the superior court could correct that error unless it was forbidden to do so. It would be so forbidden if

(14) [1966] 3 All E.R. 177 at p. 187; [1968] A.C. 192 at p. 234.
(15) [1952] 1 All E.R. 122 at p. 127; [1952] 1 K.B. 338 at p. 346.
(16) [1952] 1 All E.R. 122; [1952] 1 K.B. 338.
(17) [1922] 2 A.C. 128 at p. 156; [1922] All E.R. Rep. 335 at p. 351.

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the determination was " not to be called in question in any court of law ". If so forbidden it could not then even hear argument which suggested that error of law had been made. It could, however, still consider whether the determination was within " the area of the inferior jurisdiction ".

So the question is raised whether, in the present case, the commission went out of bounds. Did they wander outside their designated area? Did they outstep the confines of the territory of their enquiry? Did they digress away from their allotted task? Was there some preliminary enquiry on the correct determination of which their later jurisdiction was dependent?

For the reasons which I will endeavour to explain, it seems to me that at no time did the commission stray from the direct path which they were required to tread. Under art. 4 of the Order in Council the commission were under a positive duty to treat a claim under Part III as established if the appellant satisfied them of certain matters. If they had stated that they were satisfied of those matters but had then declined to treat a claim as established, there would have been a situation very different from that now under consideration and one in which the court could clearly act. So, also, if they had stated that they were not satisfied of the matters but had nevertheless treated the claim as established. They would have had no right to treat the claim as established unless they were satisfied of the matters. The present is a case in which, faithfully following the wording of art. 4, they stated that they were not satisfied of the matters and, therefore, did not treat the claim as established. In stating why they were not satisfied of the matters they have set out the processes of their reasoning. The more that reasoning is examined the more apparent does it, in my view, become that their members applied their minds very carefully to a consideration of the matters about which the appellants had to satisfy " them ". To no one else were the matters remitted but to " them ". It was for them to be satisfied and not for anyone else. The words of art. 4 state their terms of reference. In those terms were certain words and certain phrases. The commission could not possibly discharge their duty without considering those words and phrases and without reaching a decision as to their meaning. The commission could not burke that task. It seems to me that the words which stated that it was for the commission to be satisfied of certain matters, and defined those matters, inevitably involved that any necessary interpretation of words within the compass of those matters was for the commission. They could not come to a conclusion whether they were satisfied as to the specified matters unless and until they gave meaning to the words which they had to follow. Unless such a phrase as " successor in title " was defined in the order—and it was not—it was an inescapable duty of the commission to consider and to decide what the phrase signified. Doubtless they heard ample argument before forming a view. The same applies in regard to many other words and sequences of words in art. 4. But the forming of views as to these matters lay in the direct path of the commission's duties. They were duties that could not be shirked. They were central to the exercise of their jurisdiction. When their fully reasoned statement of their conclusions (which in this case can be regarded as a part of their " determination ") is studied it becomes possible for someone to contend that an alternative construction of art. 4 should be preferred to that which was thought correct by the commission. But this calling in question cannot, in my view, take place in any court of law. Parliament has forbidden it.

The most careful and valuable judgment of the learned judge contained detailed references to most of the decided cases and acknowledgment was made in the Court of Appeal (18) of the help derived from considering his survey. The learned judge said that the commission had no jurisdiction to consider under art. 4 (1) any other question than those which para. (*a*) and para. (*b*) of that article on their true construction required them to consider and that, if satisfied

(18) [1967] 2 All E.R. 986; [1968] 2 Q.B. 862.

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of those matters, they were under a statutory duty to treat the claim as established and had no jurisdiction to do anything else. That is entirely correct. Nor have the commission done anything else. They were obliged to consider what was the true construction of para. (*a*) and para. (*b*); they came to conclusions; they followed those conclusions. All that was inevitably left to them for them to decide.

Before returning to this aspect of the matter, I must refer to some of the decisions relied on by the appellants. I do so only because a comprehensive and careful argument was addressed to your Lordships directed to the submission that the decided cases support the view that the determination of the commission can in this case be challenged. In my view, they point to exactly the contrary view. When examined, the cases seem to me to reveal a consistent line of authority to the effect that provisions such as the provision in s. 4 (4) of the Act of 1950 will not avail to bar recourse to the courts if a tribunal has acted without or in excess of jurisdiction, but will bar such recourse if the tribunal has kept within and travelled within its jurisdiction even if in so doing it has erred in law and even if such error of law is revealed on " the face " of the tribunal's determination.

In *R.* v. *St Olave's District Board* (19) a question arose whether someone had been an officer of certain commissioners (whose functions by statute came to an end) and so had become entitled to compensation. He applied for it to the district board. They rejected his claim. He appealed to the Metropolitan Board of Works who allowed it. In respect of their decision there was a " no certiorari " clause. A rule was obtained to quash the order of the Metropolitan Board and affidavits were filed in support of a contention that the person concerned had ceased to be an officer before the Act (20) came into operation which determined the commissioners' functions. In showing cause against the rule, it was submitted that the question whether the person was an officer was the very point that the Metropolitan Board had on appeal to decide. In support of the rule, it was submitted that the facts were not disputed on the appeal and that the decision " was entirely on a mistake of law ". To that submission LORD CAMPBELL, C.J., replied (21): " Supposing it to be so, the Court of Appeal were to decide both on law and fact." The court held that the certiorari ought not to have been granted and the rule to quash the order of the Metropolitan Board was discharged. LORD CAMPBELL, C.J., said (21) that it was not a case in which the jurisdiction of the board depended on a preliminary point and that, if they thought that the person was de jure an officer and entitled to compensation, their order was not removable.

In his judgment in *R.* v. *Cotham*, (22), KENNEDY, J., noted the distinction between, on the one hand, disregarding the provisions of a statute and considering matters which ought not to be considered and, on the other hand, what he called " a mere misconstruction of an Act of Parliament ". This, perhaps, illustrates the clear distinction which exists between an error when in the exercise of jurisdiction and an error in deciding whether jurisdiction can be assumed; in the latter case an error may have the consequence that jurisdiction was lacking and was wrongly assumed and the result would be that any purported decision would have no validity.

In *R.* v. *Cheshire Justices, Ex p. Heaver* (23), the compensation authority, after the renewal of a licence of a public house had been refused, had to decide how compensation was to be divided amongst the persons interested in the licensed premises. The lessees of the premises had been held (by the High Court after a Case Stated) to be entitled to be treated as persons interested in the premises. There was a proviso in the lease that, if the renewal of the licence was refused, the lease should cease and determine. By reason of the refusal of renewal the lease came to an end seven years before what would have been its ordinary expiration.

(19) (1857), 8 E. & B. 529. (20) The Metropolis Management Act 1855.
(21) (1857), 8 E. & B. at p. 533. (22) [1898] 1 Q.B. 802 at p. 808.
(23) (1912), 108 L.T. 374.

The lessees claimed to participate by reference to the loss they sustained in consequence of not having the lease for its full term. The compensation authority awarded them a sum which was so small that there were strong grounds for thinking that the authority had proceeded on a wrong basis. On applications by the lessees for certiorari and mandamus, it was held that certiorari would not be granted because the order made was good on its face and that mandamus would not be granted because the authority had not declined jurisdiction and because, whether they were right or wrong in their decision on any question of law arising on the construction of a proviso in the lease or on the facts, the court could not interfere by mandamus as there would at most be an erroneous decision on matters within their jurisdiction. CHANNELL, J., said (24):

> " If there was an error in deciding a point of law which came before them for their decision in the course of their duty, we cannot set it right."

In *R.* v. *Minister of Health, Ex p. Committee of Visitors of Glamorgan County Mental Hospital* (25), there was a question whether a claimant was entitled to a pension (a superannuation allowance). It was said that under the relevant legislation he could only get a pension if he had served for a certain number of years. That he had not done. It was said, however, that under one section of the legislation (26) he would be entitled to receive a pension although he had not served for the stated period. There was a provision that, in the case of any dispute as to the right of an officer to receive a pension (or as to its amount), such dispute was to be determined by the Secretary of State whose decision was to be final. The dispute was referred by the claimant to the Secretary of State. He decided that the claimant was entitled. One view was that if on a correct interpretation of the law no one *could* be granted a pension who lacked the requisite years of service then there could be no dispute which the Minister had jurisdiction to entertain and that consequently the provision as to the finality of his decision would be no bar to an application for certiorari. A rule nisi for a writ of certiorari was discharged by the Divisional Court (27) and an appeal from their decision was dismissed. The Court of Appeal (25) held that the construction of the sections of the legislation came within the jurisdiction of the Minister with the result that, even if he made a mistake of law in construing the sections, his decision could not be challenged. Certiorari would not lie because, if there were any mistakes of law (which the court rather doubted but as to which the court did not have to pronounce), they were mistakes of law within the jurisdiction. GREER, L.J., said (28):

> " . . . if the Minister has wrongly construed that section, still he has not acted without jurisdiction, because a mere misconstruction of this section would not entitle the committee to say that the order was made without jurisdiction."

GREER, L.J., referred with approval to the following passage in 9 HALSBURY'S LAWS OF ENGLAND (2nd Edn.) p. 888 (see now vol. 11 (3rd Edn.) p. 62):

> " Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of certiorari on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence . . ."

SLESSER, L.J., said (29) that at the highest it could not be said that the Minister had done anything more than to arrive at an erroneous decision.

(24) (1912), 108 L.T. at p. 379. (25) [1938] 4 All E.R. 32; [1939] 1 K.B. 232.
(26) The Asylums Officers' Superannuation Act 1909.
(27) [1938] 1 All E.R. 344.
(28) [1938] 4 All E.R. at p. 36; [1939] 1 K.B. at p. 245.
(29) [1938] 4 All E.R. at p. 38; [1939] 1 K.B. at p. 249.

A The reasoning of that case is very much applicable in the present one. The Minister in that case could not determine the dispute which arose without coming to a conclusion as to the construction of the sections of the Act (30) which were the subject of rival contentions. So, here, the commission had to be satisfied by an applicant that his application related to " property ". Property included all rights or interests of any kind in property. The commission might have to decide B whether someone had an " interest " in property. Questions of law might arise. The commission had to decide whether an application related to property " in Egypt ". Questions of law might arise—apart from questions of geography—whether rights or interests were in Egypt. The commission had to decide if an application related to property in Egypt whether such property was referred to in Annex E. What were referred to in Annex E were " the properties in the C United Arab Republic of any United Kingdom nationals appearing on " the list which followed. For the meaning of " United Kingdom nationals " the commission would presumably have to look to Annex A of the Treaty of 28th February 1959. The commission then had to decide whether an applicant was one of the United Kingdom nationals referred to in the appropriate part of Annex E " as the owner of the property ". Stated more fully, the duty of the commission D was a duty to decide whether an applicant satisfied them (inter alia) that he—

> " is the person referred to in paragraph (1)(*a*) or in paragraph (2), as the case may be, as the owner of the property or is the successor in title of such person."

In this case there has been much concentration on the question whether the E commission correctly decided that the phrase " successor in title " included an assignee. But this was but one of very many matters which might receive determination by the commission. A perusal of the Orders in Council shows that they bristle with words and phrases needing construction. For my part, I cannot accept that if, in regard to any one of the many points in respect of which interpretation and construction became necessary a view can be formed that the commission made an error, the consequence follows that their F determination became a nullity as being made in excess of jurisdiction.

If the commission decided that an assignee was a " successor in title " they would have to be satisfied—

> " that the person referred to as aforesaid and any person who became successor in title of such person on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959."

G If the commission decided that the word " and " meant " and " (which I would not be disposed to regard as being very irrational), they might have to decide some question whether an assignment made someone a successor in title on or before the stated date and they might have to decide whether the " person referred to " and the " successor in title " were British nationals on each one of H two dates. The term " British nationals " is elaborately defined. Is it to be said if the commission decided that someone was not a British national and refused to treat a claim as established that it could be sought to show that the person was a British national after all and that the commission exceeded their jurisdiction in refusing the claim? The first part of the definition of " British nationals " has only to be recited to illustrate how varied and perplexing might be the I points of construction as well as of law and of fact that might have to be decided, viz. (31):

> " (*a*) citizens of the United Kingdom and Colonies, citizens of Rhodesia and Nyasaland, citizens of Southern Rhodesia, British subjects without citizenship, and British protected persons belonging to any of the territories for whose international relations the Government of the United Kingdom were on 28th February 1959 responsible."

(30) The Asylums Officers' Superannuation Act 1909.
(31) S.I. 1962 No. 2187, art. 1 (2).

Problems far more elusive and perplexing could arise in regard to these words than those relating to the meaning of the phrase " successor in title ". Many of the United Kingdom nationals referred to in Annex E were, however, corporations. One part of the definition of " British nationals " which they would have to satisfy reads (32):

> " corporations and unincorporated associations constituted under the laws in force in the United Kingdom of Great Britain and Northern Ireland or in any territory for whose international relations the Government of the United Kingdom were on 28th February 1959 responsible."

In an application of these words many difficult points both of law and of construction and of fact could arise. All these points are comparable in character with the particular points relating to successor in title which have been the focus of attention in this particular case. Many other illustrations could be given in regard to issues of law as well as of fact which might inescapably present themselves for the determination of the commission. Thus para. 4 of art. 4 begins with the words: " If it shall appear to the Commission in relation to any Egyptian controlled company . . ."; " Egyptian controlled company " is defined (32); the definition picks up the definition of a British national; the paragraph (33) proceeds to lay down how the commission may hold if the shares of a British national in such a company had been sold by a sequestrator, and how the commission must hold if the Egyptian controlled company was a " converted company " within the definition of those words. Shortly stated, a converted company is an Egyptian controlled company which at certain times was authorised under the laws of the Republic of Egypt or of the United Arab Republic to continue its activities as an Egyptian or United Arab Republic corporation limited by shares. If the commission in steering a course through the elaborations of these and many other complicated provisions made some error of construction or of law which caused the result that they were not satisfied of certain matters and consequently did not treat a claim as established—which they would have done but for some error—I cannot think that it would be right to say that they exceeded their jurisdiction or acted without jurisdiction so that their determination was a nullity. The argument for the appellants involves that if, in various cases that may arise before the commission, there is some misconstruction of some words in the Order in Council then any resultant decision is a mere nullity.

The claim of the appellants had to be determined by the commission and the appellants were under the obligation of satisfying the commission as to certain stated matters. They could not decide whether or not they were satisfied until they had construed the relevant parts of the Order in Council. When they were hearing argument as to the meaning of those relevant parts they were not acting without jurisdiction. They were at the very heart of their duty, their task and their jurisdiction. It cannot be that their necessary duty of deciding as to the meaning would be or could be followed by the result that, if they took one view, they would be within their jurisdiction, and if they took another view that they would be without. If, at the moment of decision, they were inevitably within their jurisdiction because they were doing what they had to do, I cannot think that a later view of someone else, if it differed from theirs, could involve that they trespassed from within their jurisdiction at the moment of decision.

It is sometimes the case that the jurisdiction of a tribunal is made dependent on or subject to some condition. Parliament may enact that, if a certain state of affairs exists, then there will be jurisdiction. If, in such case, it appears that the state of affairs did not exist, then it follows that there would be no jurisdiction. Sometimes, however, a tribunal might undertake the task of considering whether the state of affairs existed. If it made an error in that task such error

(32) S.I. 1962 No. 2187, art. 1 (2).
(33) I.e., para. (4) of art. 4.

would be in regard to a matter preliminary to the existence of jurisdiction. It would not be an error within the limited jurisdiction intended to be conferred. An illustration of this appeared in 1853 in *Bunbury* v. *Fuller* (34). A section of an Act of Parliament (35) imposed a restraint on the jurisdiction of tithe commissioners in the case of lands in respect of which the tithes had already been perpetually commuted or statutorily extinguished. The tithe commissioners had, therefore, no jurisdiction over such lands. COLERIDGE, J., said (36):

> "Now it is a general rule, that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior Court."

The learned judge instanced the case of a judge having a jurisdiction limited to a particular hundred before whom a matter was brought as having arisen within it: if the party charged contended that it arose in another hundred then there would be a collateral matter which was independent of the merits of the claim (36):

> ". . . on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either foreborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake."

In his judgment in *R.* v. *Income Tax Special Purposes Comrs.* (37), LORD ESHER, M.R., pointed out that, while it is generally correct to say that a tribunal cannot give itself jurisdiction by a wrong decision on the facts, there may be cases in which the legislature endows a tribunal with jurisdiction, provided that a certain state of facts exists, and further endows it with jurisdiction to decide, without any appeal from their decision, whether or not that state of affairs does or did exist, i.e., to decide whether a condition precedent was satisfied for the further exercise of jurisdiction:

> "The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of affairs exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more."

In the present case, there was no question of the commission being endowed with jurisdiction only conditionally. The Order in Council made it mandatory that a certain result should follow after the commission came to certain conclusions as to matters remitted to them for their decision. Their jurisdiction and the area and range of it is clear and specific. No condition precedent has to be satisfied before their jurisdiction in regard to a claim begins. An obligation results if in the exercise of their jurisdiction they come to certain conclusions. If a claimant satisfied "them" of certain matters then they were obliged to treat a claim as established. The clear directive to them (which defined the area of their jurisdiction) was that they should address themselves to the question: Has the applicant satisfied us that his application relates to property in Egypt which is referred to in Annex E and (taking the case of property referred to in para. (1) (*a*) or para. (2) of Annex E) that the applicant is the person referred to as the owner of the property or is the successor in title of such person and that

(34) (1853), 9 Exch. 111.
(35) The Tithe Act 1836.
(36) (1853), 9 Exch. at p. 140.
(37) (1888), 21 Q.B.D. 313 at p. 319; [1886-90] All E.R. Rep. 1139 at p. 1141.

the person referred to as aforesaid and any person who became successor in title of such person on or before 28th February 1959, were British nationals on 31st October 1956 and 28th February 1959? There was no condition to be satisfied before their jurisdiction to deal with that question arose. The commission decided that the appellants had not satisfied them. The circumstance that the commission have, helpfully and quite voluntarily (see Tribunals and Inquiries Act 1958, s. 11 and s. 12) made available the careful processes of reasoning which guided them to decision has but served to emphasise that they were within their allotted area. That availability may have made criticism of their reasoning possible but it has not made it lawful.

Some of the cases reviewed by the learned judge were those in which it was manifest that a condition precedent for the exercise of a jurisdiction had not been satisfied. Such a case was *Ex p. Bradlaugh* (38). A statutory provision (39) gave jurisdiction to a magistrate to order the destruction of books subject to two conditions, viz., first, that the publication must be obscene and, secondly, that it must in the magistrate's judgment be such as was a misdemeanour and proper to be prosecuted as such. An order for the destruction of books on the stated ground that the magistrate was satisfied that they were obscene was, therefore, manifestly made without or in excess of jurisdiction. As SIR ALEXANDER COCKBURN, C.J., said (40): "The order, therefore, does not state the existence of matter that is essential to the jurisdiction." Even on the assumption that a "no certiorari" section was applicable, a rule for certiorari was made absolute. He continued (41):

> "This is an objection founded upon an absence of jurisdiction appearing on the face of the order; and I am clearly of opinion that the section does not apply when the application for the certiorari is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction."

The statutory provision was definite. The relevant part read:

> ". . . and if . . . such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except . . . to be destroyed . . ."

The reference to being kept for the purposes aforesaid was a reference to keeping articles for the purpose of sale or distribution or being otherwise published for the purposes of gain, which articles were of such a character and description that their publication would be a misdemeanour and proper to be prosecuted as such. MELLOR, J., said (42) that it was well established that a provision "taking away the certiorari" does not apply where there is an absence of jurisdiction. He said (42) that the order for destruction omitted to state—

> ". . . that the magistrate who made it was satisfied that the books ordered to be destroyed were the proper subject of a prosecution, and therefore the order on the face of it shews an absence of jurisdiction."

The case was really a very plain one and it refers to the undisputed and well-recognised proposition that a "no certiorari" provision will not apply where there is an absence of jurisdiction. The decision has, however, no other bearing on the present case for there is here no room for any suggestion that the commission failed to satisfy any condition precedent or failed to state the existence of any matter essential to their jurisdiction.

In *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* (43), a ratepayer

(38) (1878), 3 Q.B.D. 509.
(39) The Obscene Publications Act 1857, s. 1.
(40) (1878), 3 Q.B.D. at p. 512.
(41) (1878), 3 Q.B.D. at pp. 512, 513.
(42) (1878), 3 Q.B.D. at p. 513.
(43) [1910] 2 K.B. 859; [1908-10] All E.R. Rep. 792.

claimed that the value of his hereditament had been reduced in value. Pursuant to s. 47 of the Valuation (Metropolis) Act 1869, he addressed a written requisition to the overseers. The section provided that:

> "If in the course of any year the value of any hereditament is increased by . . . or is from any cause increased or reduced in value . . . (1) the overseers of the parish . . . on the written requisition of . . . any ratepayer . . . shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament."

The section further provided that a person sending a requisition had to send a copy of it to the clerk to the assessment committee. The section further provided that if, within 14 days after the service of the requisition on the overseers, they made default in sending the provisional list, then the clerk to the assessment committee was required forthwith to summon the assessment committee—

> "and the assessment committee shall appoint a person . . . to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list."

After the ratepayer had addressed his written requisition to the overseers they failed, as required, to send a provisional list to the assessment committee. Because of the default of the overseers, the assessment committee was summoned. The assessment committee, instead of appointing a person to make a provisional list, proceeded to consider the matter themselves and, after hearing the ratepayer's representative, passed a resolution that they found, as a question of fact, that the premises had not been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list. It was held that the ratepayer was entitled to a mandamus commanding the assessment committee to appoint a person to make a provisional list. Provided that there was prima facie evidence of a reduction in value, as it was held that there was, then it seemed plain on the wording of the section that the assessment committee were under obligation to "appoint a person to make such provisional list". As SIR HERBERT COZENS-HARDY, M.R., put it (44):

> "The ascertainment of the fact of reduction cannot be a condition precedent to the putting in force of the machinery by which it may be ascertained whether in truth there has been any reduction in value."

The consideration of statutory wording in that case seems to me to have little relation to the problems arising in the present case.

Nor do I find anything in *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Hierowski* (45) (on which the appellants relied) which runs counter to the stream of authority. A rent had been determined and registered by a rent tribunal. A statutory provision (46) gave power to reconsider the rent "on the ground of change of circumstances". Where no change of circumstances was alleged it was not unnaturally held that there was no jurisdiction to enquire whether a proper rent had been determined on the previous occasion.

In the submissions on behalf of the appellants a phrase much used was that the commission had asked themselves wrong questions. The phrase can be employed when consideration is being given to a question whether a tribunal has correctly decided some point of construction. If, however, the point of construction is fairly and squarely within the jurisdiction of the tribunal for them to decide, then a suggestion that a wrong question has been posed is no more than a means of deploying an argument; and if construction has been left to the tribunal the argument is unavailing. The phrase is, however, valuable and relevant in cases where it can be suggested that some condition precedent has not been satisfied, or where jurisdiction is related to the existence of some

(44) [1910] 2 K.B. at p. 875.
(45) [1953] 2 All E.R. 4; [1953] 2 Q.B. 147.
(46) The Furnished Houses (Rent Control) Act 1946.

state of affairs. Thus, in *Ex p. Bradlaugh* (47) it could properly be said that a wrong question had been asked. In the *Fulham* case (48), the basis for the start of an enquiry did not exist. So in some cases a tribunal may reveal that by asking some wrong question it fails to bring itself within the area of the demarcation of its jurisdiction. In *Maradana Mosque* (*Board of Trustees*) v. *Badi-ud-Din Mahmud* (49), one part of the decision was that the rules of natural justice had been violated. The other part of the decision, relevant for present purposes, was that, where statutory authority was given to a Minister to act if he was satisfied that a school *is* being administered in a certain way, he was not given authority to act because he was satisfied that the school *had been* administered in that way. It could be said that the Minister had asked himself the wrong question; so he had, but the relevant result was that he never brought himself within the area of his jurisdiction.

I do not find it necessary to deal fully with *Davies* v. *Price* (50) or with the actual decision in that case, but I see no reason for thinking that what was expressed by PARKER, L.J. (with the concurrence of LORD EVERSHED, M.R., and SELLERS, L.J.), was out of line with the current of authority; it was there held that, even if the Agricultural Land Tribunal had misconstrued a statute, that did not mean that it had exceeded its jurisdiction (51):

> ". . . it clearly had jurisdiction to decide whether to give or withhold consent, and if it misconstrued the statute or acted on no evidence, it merely erred in law . . ."

if affidavits (52): "showed that it must have misconstrued the statute, that is not a question of want of jurisdiction . . ."

Without further elaborate citation, it is sufficient to refer again to the speech of LORD SUMNER in *R.* v. *Nat Bell Liquors, Ltd.* (53), in which he distinguished between a usurpation of a jurisdiction which someone has not got, and the wrong exercise of a jurisdiction which someone has got. He used the illustration of a justice who convicted without evidence. He would be doing something that he ought not to do but he would be doing it as a judge (54):

> "To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all."

In the present case, the commission could be controlled if being "satisfied" of the matters referred to "them" they failed to obey the mandatory direction of the Order in Council. But in deciding whether or not they were satisfied of the matters, they were working within the confines of their denoted delegated and remitted jurisdiction. In the exercise of it very many questions of construction were inevitably bound to arise. At no time were the commission more centrally within their jurisdiction than when they were grappling with those problems. If anyone could assert that in reaching honest conclusions in regard to the questions of construction they made any error, such error would, in my view, be an error while acting within their jurisdiction and while acting in the discharge of their function within it.

In agreement with SELLERS, DIPLOCK and RUSSELL, L.JJ. (55), I consider that the commission acted entirely within their designated area of jurisdiction.

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(47) (1878), 3 Q.B.D. 509.
(48) [1953] 2 All E.R. 4; [1953] 2 Q.B. 147.
(49) [1966] 1 All E.R. 545; [1967] A.C. 13.
(50) [1958] 1 All E.R. 671; [1958] 1 W.L.R. 434.
(51) [1958] 1 All E.R. at p. 676; [1958] 1 W.L.R. at p. 441.
(52) [1958] 1 All E.R. at p. 677; [1958] 1 W.L.R. at p. 442.
(53) [1922] 2 A.C. 128; [1922] All E.R. Rep. 335.
(54) [1922] 2 A.C. at p. 152; [1922] All E.R. Rep. at pp. 348, 349.
(55) [1967] 2 All E.R. 986; [1968] 2 Q.B. 862.

A I do not think that their decision or determination is to be jettisoned as being a nullity. I would dismiss the appeal.

**LORD PEARCE:** My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to B decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal. Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given C a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament.

If, for instance, Parliament were to carve out an area of enquiry within which an inferior domestic tribunal could give certain relief to wives against their husbands, it would not lie within the power of that tribunal to extend the area D of enquiry and decision, i.e., jurisdiction, thus committed to it by construing "wives" as including all women who have, without marriage, cohabited with a man for a substantial period, or by misconstruing the limits of that into which they were to enquire. It would equally not be within the power of that tribunal to reduce the area committed to it by construing "wives" as excluding all those who, though married, have not been recently cohabiting with their husbands. E Again, if it is instructed to give relief wherever on enquiry it finds that two stated conditions are satisfied, it cannot alter or restrict its jurisdiction by adding a third condition which has to be satisfied before it will give relief. It is, therefore, for the courts to decide the true construction of the statute which defines the area of a tribunal's jurisdiction. This is the only logical way of dealing with the situation and it is the way in which the courts have acted in a supervisory F capacity.

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural G justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make H its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error.

The courts have, however, always been careful to distinguish their intervention I whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review.

> "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."

*R.* v. *Nat Bell Liquors, Ltd.* (56). It is simply an enforcement of Parliament's mandate to the tribunal. If the tribunal is intended, on a true construction of

(56) [1922] 2 A.C. 128 at p. 156; [1922] All E.R. Rep. 335 at p. 351.

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the Act, to enquire into and finally decide questions within a certain area, the courts' supervisory duty is to see that it makes the authorised enquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (i.e., questions other than those which Parliament directed it to ask itself). But if it directs itself to the right enquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction.

It is convenient to set out the matter in broad outline because there has been evolution over the centuries and there have been many technicalities. There have also been many border-line cases. And the courts have at times taken a more robust line to see that the law is carried out and justice administered by inferior tribunals, and at times taken a more cautious and reluctant line in their anxiety not to seem to encroach or to assume an appellate function which they have not got. Thus, an historical survey of the ancient remedies by which the courts have exercised their supervisory jurisdiction by prerogative writs is not very helpful. By writ of certiorari they have called the decision of an inferior tribunal into the court of the King's Bench Division and examined it and quashed it if it is due to an error of law which can be seen on the face of the record. And, having quashed, the courts can by writ of mandamus direct the tribunal to do its duty according to law, or by writ of prohibition forbid the tribunal to do that which is not in accordance with the law. Where a decision is found to be in excess of or without jurisdiction there is strictly no need to quash it, since it is a nullity, before issuing a writ of prohibition or mandamus. But on these technical matters the courts have not always been wholly consistent. And it has been argued that certain decisions may have a temporary validity until quashed and only then become a true nullity. These technical matters are not of importance until one comes to consider the effect of what have been referred to as " ouster " or " no certiorari " clauses in Acts of Parliament and in particular the article to that effect in the present case.

In 1883, the courts were given wide discretionary powers to make declarations. In recent years, partly owing to the technical difficulties which have formerly beset the procedure with regard to prerogative writs, there has been an increasing tendency for the courts simply to make declarations without issuing prerogative writs. Pursuant to that practice a declaration was claimed and given in the present case.

There is no need to deal with all the many cases on this subject which have been referred to by counsel and have been carefully and, in my opinion, correctly analysed in the judgment of BROWNE, J., with which I agree. The principles set out above are established by the following cases. In *Bunbury* v. *Fuller* (57), COLERIDGE, J., in holding that the decision of an assistant tithe commissioner was not in the circumstances " final and conclusive " within the relevant Act said:

> " Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together the subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior Court."

In *R.* v. *Income Tax Special Purposes Comrs.* (58) LORD ESHER, M.R., made it clear that it was for the courts to construe the statute which gave jurisdiction to the inferior tribunal. He construed the section in respect of which the commissioners were enquiring and left the facts to them. He said (59):

(57) (1853), 9 Exch. 111 at p. 140.
(58) (1888), 21 Q.B.D. 313; [1886-90] All E.R. Rep. 1139.
(59) (1888), 21 Q.B.D. at p. 319.

A "This view of the section involves the result that the question, whether the party claiming has so satisfied the terms of the section, must be the subject of inquiry with reference to the particular circumstances in each case ... They have to determine the question, and they must determine it ... according to the rule I have laid down."

And later (60):

B "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more."

In *R.* v. *Board of Education* (61), the Divisional Court quashed a decision of the board on the ground that they—

E "... have not only not decided the question submitted to them but have raised and made an order upon a matter never submitted to them, namely ... or, in other words, they have given themselves jurisdiction to determine the question in favour of the local authority by changing the question submitted to them into the one which we have quoted ..."

per LORD ALVERSTONE, C.J. (62).

F In *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* (63), the Court of Appeal issued a mandamus because the committee had misconceived its duties. FARWELL, L.J., there said (64):

"No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such a question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has a right to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded in law or fact ..."

I Again in *Board of Education* v. *Rice* (65) this House quashed the board's decision and issued a mandamus on the ground that it had not determined the question committed to it by Parliament. LORD LOREBURN, L.C., there said (66):

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(60) (1888), 21 Q.B.D. at p. 319; [1886-90] All E.R. Rep. at p. 1141.
(61) [1909] 2 K.B. 1045.
(62) [1909] 2 K.B. at p. 1061.
(63) [1910] 2 K.B. 859; [1908-10] All E.R. Rep. 792.
(64) [1910] 2 K.B. at p. 880.
(65) [1911] A.C. 179; [1911-13] All E.R. Rep. 36.
(66) [1911] A.C. at p. 182; [1911-13] All E.R. Rep. at p. 38.

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" The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari."

In *Estate and Trust Agencies (1927), Ltd.* v. *Singapore Improvement Trust* (67), the Privy Council issued a writ of prohibition, holding that a housing authority had made a declaration beyond its statutory powers because it had in effect asked itself the wrong question (68):

" In other words, the respondent trust was applying a wrong and an inadmissible test in making the declaration and in deciding to submit it to the Governor in Council. It was therefore acting beyond its powers, and the declaration is not enforceable."

In *Seereelall Jhuggroo* v. *Central Arbitration and Control Board* (69) the Privy Council declined to interfere. The arbitration board had a discretion to decide the amount of payment to planters of sugar cane in Mauritius but there was a statutory fetter (70) that they—

" shall be guided by the principle that the average amount of sugar which planters might expect to receive for their canes would be not less than two-thirds of the amount of sugar which a ton of such canes delivered at the factory may normally be expected to yield."—

LORD PORTER giving the judgment there said (71):

" If, then, the board, in coming to its determination, had neglected or rejected that consideration [i.e., the guidance by the principle] it might well have been held to have exceeded its jurisdiction in taking it to be unfettered, whereas it was subject to a limitation of outlook but not confined to a particular proportion. Whether they used a correct discretion or not is, of course, irrelevant in a case where certiorari is claimed. As long as they take into consideration only matters within their jurisdiction, the resultant decision, right or wrong, is for them and for them only."

He concluded that (72):

" . . . the board was not precluded from taking the matters complained of into consideration, and it follows that the board did not exceed its powers and that the Supreme Court were right in refusing to grant certiorari or mandamus."

The judgment makes it clear that an inferior tribunal which properly embarks on an enquiry may go outside its jurisdiction if, in the course of that enquiry, it rejects a consideration which it was told to have in mind. It would then in effect be directing itself to an enquiry other than that which was laid on it by Parliament. *R.* v. *Fulham, Hammersmith and Kensington Tribunal, Ex p. Hierowski* (73) is another case where a tribunal embarked properly on an enquiry within its jurisdiction, but at the end of it made an order in excess of jurisdiction which was held to be a nullity though it was an order of the kind which it was entitled to make in a proper case. In the case of the *Maradana Mosque* (*Board of Trustees*) v. *Badi-ud-Din Mahmud* (74), the Privy Council held that the Minister of Education in Ceylon acted without or in excess of jurisdiction in that he asked himself the

(67) [1937] 3 All E.R. 324; [1937] A.C. 898.
(68) [1937] 3 All E.R. at p. 332; [1937] A.C. at p. 917.
(69) [1953] A.C. 151.
(70) Sale of Canes (Control) Ordinance (No. 47 of 1941), s. 6 (2).
(71) [1953] A.C. at pp. 162, 163.
(72) [1953] A.C. at p. 163.
(73) [1953] 2 All E.R. 4; [1953] 2 Q.B. 147.
(74) [1966] 1 All E.R. 545; [1967] A.C. 13.

wrong question in deciding whether to make an order. All these cases give firm support for the principles outlined above.

*R.* v. *Minister of Health, Ex p. Committee of Visitors of Glamorgan County Mental Hospital* (75) might seem to give difficulty. The Minister had been given the duty to decide the right to superannuation of a servant and he decided that the servant had such a right. The court thought that probably the Minister construed the relevant section right, but it held that in any event it had not been shown that he acted outside his jurisdiction. It may be that the court was saying rightly that, when it appears more probable that a Minister has not misconstrued anything, there is no ground for certiorari. But it seems possible that the court was saying (which I find difficult) that, on the construction of the particular words giving jurisdiction to the Minister, he was given power to construe the regulations as well as investigate the facts. I do not find the reasoning in the case very satisfactory. *Davies* v. *Price* (76) seems to be out of accord with the main line of authority. The enquiry under review was in effect directed to the wrong question and therefore the applicant should have succeeded. In my opinion, the case was wrongly decided.

Many of the cases cited turn on the difficult question of how far, if at all, the court could take cognisance of an error that was not manifest on the record. That problem did not arise in cases of excess or lack of jurisdiction since there the court for obvious reasons did not confine itself to the record. It looked into all relevant circumstances to see whether jurisdiction did or did not exist. Therefore the problem does not occur here. Indeed, it has to a great extent been eliminated by the Tribunals and Inquiries Act 1958, under which so many tribunals now have to give reasons. Although the commission were not compelled to do so, they very properly disclosed their reasons in a thoughtful minute of adjudication which has in fact been relied on in the particulars of the defence.

The above principles may, however, be affected by the existence (as here) of an ouster or no certiorari clause. The words of s. 4 (4) of the Foreign Compensation Act 1950, are:

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."

It has been argued that your Lordships should construe "determination" as meaning anything which is on its face a determination of the commission including even a purported determination which has no jurisdiction. It would seem that, on such an argument, the court must accept and could not even enquire whether a purported determination was a forged or inaccurate order which did not represent that which the commission had really decided. Moreover, it would mean that, however far the commission ranged outside their jurisdiction or that which they were required to do or however far they departed from natural justice, their determination could not be questioned. A more reasonable and logical construction is that by "determination" Parliament meant a real determination, not a purported determination. On the assumption, however, that either meaning is a possible construction and that, therefore, the word "determination" is ambiguous, the latter meaning would accord with a long established line of cases which adopted that construction. One must assume that Parliament in 1950 had cognisance of these in adopting the words used in s. 4 (4).

In 1829 in *Campbell* v. *Brown* (77), this House upheld a decision of the Lord Ordinary (LORD ALLOWAY) that although by the statute 43 Geo. 3 c. 54, s. 21, the judgment of the presbytery is declared to be final without appeal or review by the court, civil or ecclesiastical, yet if the proceedings on which judgment was pronounced were contrary to law or if that court exceeded the powers committed to it by statute, they may be reversed and set aside by the court.

(75) [1938] 4 All E.R. 32; [1939] 1 K.B. 232.
(76) [1958] 1 All E.R. 671; [1958] 1 W.L.R. 434.
(77) (1829), 3 Wils. & Sh. 441.

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LORD LYNDHURST, L.C., in dealing with the argument that the court's power was ousted by the statute, said (78): A

"But I apprehend that (particularly from the circumstances of the appeal being taken away) a jurisdiction is given in this case to the Court of Session, not to review the 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. There is in the Court of Session in Scotland B that superintending authority over inferior jurisdictions which is requisite in all countries, for the purpose of confining those inferior jurisdictions within the bounds of their duty; and the only question here is whether this case is of such a nature and description as to justify the calling into action that authority of the Superior Court. Cases were cited at the Bar and mentioned in the printed papers now on your Lordships' table in which the C Court of Session has exercised a superintending authority over inferior jurisdictions when they have been guilty of excess of their jurisdiction or have acted inconsistently with the authority with which they were invested."

In *Ex p. Bradlaugh* (79) there was an ouster clause, but SIR ALEXANDER COCKBURN, C.J. said (80):

"... I am clearly of opinion that the section does not apply when the D application for the certiorari is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction."

And MELLOR, J., said (80):

"It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence E of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

This case has been treated as a leading authority that "no certiorari" clauses do not oust the courts where there is an absence of jurisdiction (LORD PARKER, C.J., in *R.* v. *His Honour Judge Sir Donald Hurst, Ex p. Smith* (81)) or an excess of jurisdiction (DENNING, L.J. in *Re Gilmore's Application* (82)). Had Parliament F intended to make a departure in 1950 from the more reasonable construction previously given for so many decades to no certiorari clauses, it must have made the matter more clear.

In my opinion, the subsequent case of *Smith* v. *East Elloe Rural District Council* (83) does not compel your Lordships to decide otherwise. If it seemed to do so, I would think it necessary to reconsider the case in the light of the powerful G dissenting opinions of my noble and learned friends, LORD REID and LORD SOMERVELL OF HARROW. It might possibly be said that it related to an administrative or executive decision not a judicial decision and somewhat different considerations might have applied; certainly none of the authorities relating to absence or excess of jurisdiction were cited to the House. I agree with BROWNE, J., that it is not a compelling authority in the present case. Again, the fact H that the commission were expressly exempted from the provisions of s. 11 of the Tribunal and Inquiries Act 1958, though no doubt a tribute to the high standard of the commission and the fact that their chairman was a lawyer of distinction, cannot have any bearing on the construction of the Foreign Compensation Act 1950. If, therefore, the commission by misconstruing the Order in Council which gave them their jurisdiction and laid down the precise I limit of their duty to enquire and determine, exceeded or departed from their mandate, their determination was without jurisdiction and BROWNE, J., was right in making the order appealed from.

(78) (1829), 3 Wils. & Sh. at p.448.
(79) (1878), 3 Q.B.D. 509.
(80) (1878), 3 Q.B.D. at p. 513.
(81) [1960] 2 All E.R. 385 at p. 389; [1960] 2 Q.B. 133 at p. 142.
(82) [1957] 1 All E.R. 796 at p. 803; [1957] 1 Q.B. 574 at p. 586.
(83) [1956] 1 All E.R. 855; [1956] A.C. 736.

The Foreign Compensation Act 1950 gave wide powers to provide by Orders in Council for the determination by the commission of claims to compensation payable by foreign governments under future agreements (see s. 3 (*a*), (*b*) and (*c*)). Paragraph (*c*) embodied the powers under s. 2 (2) (*a*) for defining the persons who are to be qualified to make claims and the powers under s. 2 (2) (*b*) for prescribing the matters which have to be established to the satisfaction of the commission. Thus it provided for the giving of wide or narrow powers. Pursuant to that Act the Order in Council which deals with the present claim gave a wide power to determine the amount of compensation. But with regard to the establishment of the claims under art. 4 it gave narrow powers. It gave no general discretion at all. If the applicant satisfies them of certain listed matters, the commission shall treat the claim as established. The only listed matters so far as relevant to the present claim were, the appellants argue: (i) the fact that the property referred to in Annex E was in Egypt; (ii) the identity of the claimant as referred to in Annex E; and (iii) the nationality of the claimant on certain dates. There is no dispute that, on these matters, they satisfied the commission. Therefore, on the appellants' argument, the commission had a mandatory duty to treat their claim as established. If their construction of art. 4 is correct, the appellants are right in this contention. There was no discretion in the commission, no jurisdiction to put further hurdles, other than those listed, in the path of the appellants' claim or to embark on enquiries other than those which the Order in Council directed. The commission, on the other hand, construed the order as giving them jurisdiction to enquire and be satisfied on two further points; since they were not satisfied on these they rejected the claim. If *their* construction is correct, they were entitled to do so and have not exceeded their jurisdiction.

The substance of the point is this. Once the appellants proved their identity as persons mentioned in Annex E of the Anglo-Egyptian treaty and their nationality, did they also have to prove, on a true construction of the order, that they had no successor in title; successor in title meaning for this purpose successor to the claim against Egypt (later transmuted by the treaty into a claim to participate in the compensation)? If so, did they have to prove further that any such successor also fulfilled the nationality qualifications? If the appellants had to prove those additional things, admittedly their claim fails. If they did not, then the enquiry made was not the limited enquiry directed by Parliament. Substantially the whole of the order is concerned with the treaty between the British and Egyptian governments of 1959 and the whole of art. 4 is concerned with Annex E of the treaty.

After Suez, the Egyptians had sequestrated the properties of British subjects, including the appellants', and barred their access to Egyptian courts of law. Later, certain of those properties, including the appellants' mines and property, had been sold by the sequestrator to an Egyptian authority, T.E.D.O. Finally, a treaty was made between the British and Egyptian governments whereby, inter alia, the property of certain persons listed in Annex E of the treaty was retained by the Egyptians on payment of £27,500,000 compensation. Other property was returned. The negotiation of compensation for Annex E property was not directly based on a calculation of separate amounts for each property but on a general consideration of all the claims. But it is obvious that, in the bargaining which preceded the agreement, the argument must have ranged over many of the particular items of which the global arrangement was composed.

Before the treaty was signed, the appellants had managed to secure some compensation (amounting to about one-eighth of the value of their property) from the Egyptians. They achieved this by establishing a nuisance value. They wrote round to American and European customers pointing out that the Egyptians had unlawfully supplanted them in their mining business. From the Egyptian point of view this was bad for business. The appellants' mining leases were cancelled and threats of legal action were made against them by the Egyptians. The appellants persisted, however, until an agreement was made

whereby, in effect, they received £500,000 for their nuisance value (the mines had been worth about £4,000,000 or upwards). They agreed to abandon their name of Sinai Mining Co., Ltd. The form of the agreement was a sale by them to T.E.D.O. of their assets in Egypt, but by Egyptian law the property had already been validly sold to T.E.D.O. by the sequestrator and, therefore, the appellants had no property to sell. The Foreign Office was kept informed of these matters contemporaneously. One may presume that, in the bargaining over Annex E, the Egyptian representatives tried to claim that the appellants' property had been sold to them by the appellants and, therefore, did not call for any compensation. One may also presume that the British representatives rejected this purported sale at one-eighth of the value of the property seized while accepting, of course, that credit must be given for the £500,000. I accept the learned judge's view that, by extracting the £500,000 from the Egyptians by their own efforts, the appellants did " nothing but good to the other claimants for compensation ", since the appellants would, of course, have to give credit for it in their present claim. Be that as it may, the appellants (under their former name) were included in Annex E and there were added the words " (. . . special arrangement) ". I read these words as an indication that there were special considerations in respect of this company, i.e., the fact that credit must be given by them for £500,000 already received.

It is to be noted that Annex E refers to " The properties in the United Arab Republic of any United Kingdom nationals appearing on the following list . . .". It is a list of *persons* not properties. And by Annex A, para. (4), " ' Owners ' . . . shall include any successor of the owners . . .". It would be necessary to provide for a successor in case one of the named persons had died or in case one of the undertakings has been dissolved. If assignments of property as opposed to universal successions had been contemplated, I would expect the words " in respect of such property " to be inserted. In my opinion, the mind of the draftsman was addressed to the normal necessity of providing for universal successors and not to the unlikely event of assignment of some rights (if any) to the sequestrated property by the owners after the sequestration.

When one comes to the Order, art. 4 is headed " Claims in respect of property referred to in Annex E ". It sets out to distribute the compensation to the persons there listed. The applicant must first prove (art. 4 (1) (*a*)) that his application relates to property in Egypt which is referred to in Annex E. Next he must prove (art. 4 (1) (*b*)) that he is the person referred to in Annex E or is the successor in title of such person and (art. 4 (1) (*b*) (ii)) that he—

> " and any person who became successor in title of such person on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959."

Article 4 (3) reads:

> " For the purposes of sub-paragraphs (*b*) (ii) and (*c*) (ii) of paragraph (1) of this Article, a British national who died, or in the case of a corporation or association ceased to exist [between the relevant dates] shall be deemed to have been a British national on the latter date and a person who had not been born, or in the case of a corporation or association had not been constituted [on the earlier date] shall be deemed to have been a British national on that date if such person became a British national at birth or when constituted, as the case may be . . ."

The tenor of the article and, in particular, the reference to unborn children shows that the draftsman is directing his mind, primarily at least, to universal successors.

In my view, therefore, the treaty was originally concerned to obtain compensation for listed persons in respect of their property in Egypt provided they were British nationals. In case any human persons had died or corporations had ceased their, universal successors were included as alternatives to the listed

persons, provided the successor was also a British national. Later the Order in Council was concerned likewise to give compensation to the listed persons or, if they had ceased to exist, to their successors. As long, therefore, as the listed persons survived, their successors would not be relevant, since there would not be any. A successor in title of a person is different from a successor in title to a part of his property. T.E.D.O. were never strictly a successor in title of the appellants who, no doubt, being a British company had some assets other than those in Egypt; and these did not pass to T.E.D.O. Successor in title in the context means universal successor. There are difficulties that might arise under such a construction in certain unlikely circumstances, but I do not think that these were in the contemplation of the draftsman, since he did not envisage that a successor in title would exist while the original person or corporation on the list existed. Such a construction would enable one to give a clear simple meaning to the words. I appreciate that one would not expect the "and" in art. 4 (1) (*b*) (ii). But this is due to the unfortunate compression of the sub-paragraph. Since the unattractive composite " and/or " was denied to him, the draftsman had to choose between the two words, neither of which alone would import the right meaning for both situations, namely, where the original claimant was claiming and where the successor was doing so. In the latter case only must two things be proved, namely, that both the successor and the person in Annex E were British. The mere presence of the word " and " in this highly compressed subsection would not justify turning the section from an otherwise clear meaning in accordance with the apparent general intention into a devious and complicated meaning out of accord with it.

The other construction which reads a successor in title as an assignee of, or successor to, some particular thing creates various difficulties. First, one must write in words that show to what he was successor in title. This is not a straightforward matter of implication. There might be some justification for writing in the words " to the said property " since " property " is the matter with which art. 4 (1) (*a*) and art. 4 (1) (*b*) are concerned and almost immediately precedes the words " successor in title ". If one does that, however, one reduces the article to absurdity, since the assignee of the property of nearly all the listed persons was T.E.D.O. which was not a British national. Therefore, almost every claimant who was intended to benefit must fail. To avoid this obvious absurdity, therefore, one must write in further words to the effect that " successor in title to the property does not include any person taking by virtue of the sequestration ". In my view, such a re-writing of the article is not permissible if any reasonable meaning can be given to the words as they stand. Alternatively, one must write in the words " to such claim " taking the word (rather dubiously) from the heading and first line of art. 4 (1). But there was no such claim in existence when the appellants made the purported sale to T.E.D.O. The matters on which the appellants made a claim, viz., Annex E and the payment under it did not exist. Moreover, any claim (which then could only be a moral claim) against the British government was expressly excluded from the purported sale to T.E.D.O., and there was never any successor in title in respect of such a claim. Then, is one to write further into the article " any claim against the Egyptian government "? I see no reason to do so. That would lead to great complication since such claims were not enforceable, and there is no clear indication what happened to such claims when the British government accepted compensation. Thus, there is no relevance in claims against the Egyptian government, as opposed to the moral claims against both governments. And the claim had vanished by the time of the order.

Nor do I think that the purported sale to T.E.D.O. can be read as an assignment of claims in respect of confiscation. There cannot surely be implied the assignment of a claim against the Egyptian government in respect of the confiscation of the business, since the whole agreement was a denial that it had been confiscated. The agreement of " sale " was a document based on the

seller still owning the business. It was made on the assumption that there had been no expropriation of the business and there could be no claim in respect of it. It would be absurd for T.E.D.O. to acquire as owners a claim in respect of that which had made them owners. As one would expect, therefore, the only claims referred to in the " sale " agreement were claims in respect to " damage to or reduction in value of " the business. This is quite different from a claim for total expropriation; it refers presumably to war damage. By Egyptian law (which applied to the " sale " agreement), there was no claim for the expropriation. In my view, it is impossible to torture the " sale " agreement into some implication that thereby the appellants impliedly assigned a claim against Egypt (inconsistent with the basis of the document) for expropriation of the business. This, however, would be an error within the jurisdiction and would not create a nullity. Therefore, in view of the ouster clause it would not be a ground for interference in this case.

I do not accede to any argument that a spes or moral claim came into this matter; nor do I see why, if so, it should be a spes against the Egyptian government rather than a spes against the British government. The appellants had a moral claim against both the Egyptian and British governments, the effect of whose policies had brought this loss on them. Additionally the British government had a duty to protect the interests of the appellants. But assignments of moral claims or hopes were not within the contemplation of the purported sale or of art. 4. Moreover, if the appellants *had* assigned any claims, it would be an equitable assignment. The appellants would still have their legal right to pursue any claim, but a court of equity would compel them to pay the fruits to an assignee.

In my opinion, the commission's construction of art. 4 necessitates an unjustifiable writing in of words and leads to quite needless complexity and difficulty. The appellants' construction, however, gives a more direct interpretation which is in accordance with the general intention shown by the treaty and the Order in Council. These did not envisage the extraordinarily unlikely events of persons in Annex E selling tenuous claims against either or both of the governments concerned. A fortiori, I do not think that the British government was concerning itself with subtle and complicated preventions of a benefit to a non-British person who might conceivably have bought up such a claim or with defeating both a sufferer and his mortgagee if the sufferer should mortgage the fruits of his claim to a non-British person or the sufferer if he should sell part of it. The purported sale of the appellants' property only arose from their ingenious use of their nuisance value. That was known to the British government and was adequately covered by art. 10, which directed the commission when assessing the loss to have regard to and record separately any compensation or recoupment in respect of that loss. It is not impossible that the article was originally inspired by the knowledge of the appellants' bargain with T.E.D.O. And if it had been intended to exclude the appellants, though listed in Annex E, from compensation, it would have been easy to say so.

I, therefore, prefer the learned judge's construction of art. 4 as being simpler, more literal and more in accordance with the general intention of the Order in Council and the treaty with which it is concerned.

It has been suggested that the appellants have no merits. I do not think that merits come into this matter. The appellants have just so much merits as a person has when, through no fault of his own, he has been deprived of property worth £4,000,000 and has received by his own efforts £500,000 in compensation. True, the appellants thought at one time they would get no more. And if they now share in the compensation they will get in toto (after giving credit for the £500,000) somewhat more than they would have done had they brought in nothing by their own efforts, since the larger claims are scaled down to make the money go round. Whether this is unfair as against another claimant who lost £4,000,000 and brought nothing into the contra account by his own efforts is a matter of

opinion. So, too, is the fairness of those with smaller losses getting a larger proportion than the appellants with their larger loss. All these are part of a sensible rough and ready attempt to ration the compensation when there is not enough to go round. No doubt in many cases it works rather unfairly. It would certainly seem a little hard if the appellants were wholly debarred from the fund merely because they secured £500,000 by their own efforts.

It was argued that the declaration should not have been made, because this was not an apt form of relief. I do not accept that argument. It was also argued that the form of the declaration went too far. But these are matters in which the learned judge has a wide experience and it appears that counsel who then appeared for the respondents and also has a wide experience did not argue about the form of the declaration (while of course resisting the making of any such order at all). I think it would be wrong for your Lordships to embark now on such an argument. I would, therefore, allow the appeal and restore the order of BROWNE, J.

**LORD WILBERFORCE:** My Lords, the appellants, Anisminic, Ltd. (an English company), claim the right to participate in the Egyptian compensation fund composed of £27.5 million made available to Her Majesty's government under a treaty with the United Arab Republic of 28th February 1959, and any money added to this sum by subsequent Parliamentary authority. The first respondents, the Foreign Compensation Commission, have by " provisional determination " rejected this claim, and we have to decide whether, in doing so, they have made a determination which, in the words of s. 4 (4) of the Foreign Compensation Act 1950, cannot be called in question in the courts. The commission have also admitted to registration a claim by the appellants in respect of war damage but it is agreed that this claim does not arise if the first claim is established.

I must first say something as to the legal framework of this appeal, for though, in my opinion, the solution of this case is to be looked for in the thickets of subsidiary legislation, it is useful to be clear as to the general character of the argument. I do not think that it is difficult to describe this and I shall endeavour to do so, initially at least, in non-technical terms, avoiding for the moment such words as " jurisdiction ", " error " and " nullity " which create many problems.

The commission are one of many tribunals set up to deal with matters of a specialised character, in the interest of economy, speed and expertise. They have acquired a unique status, since they alone have been excepted from the provisions of the Tribunals and Inquiries Act 1958, s. 11. It is now well established that specialised tribunals may, depending on their nature and on the subject-matter, have the power to decide questions of law, and the position may be reached, as the result of statutory provision, that even if they make what the courts might regard as decisions wrong in law, these are to stand. The commission are certainly within this category; their functions are predominantly judicial; they are a permanent body, composed of lawyers, with a learned chairman, and there is every ground, having regard to the number and the complexity of the cases with which they must deal, for giving a wide measure of finality to their decisions. There is no reason for giving a restrictive interpretation to s. 4 (4) which provides that their " determinations " are not to be " called in question " in courts of law.

In every case, whatever the character of a tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute; at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter. Equally, though this is not something that

arises in the present case, there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of power to decide such as (I do not attempt more than a general reference, since the strength and shade of these matters will depend on the nature of the tribunal and the kind of question it has to decide) the requirement that a decision must be made in accordance with principles of natural justice and good faith. The principle that failure to fulfil these assumptions may be equivalent to a departure from the remitted area must be taken to follow from the decision of this House in *Ridge* v. *Baldwin* (84). Although, in theory perhaps, it may be possible for Parliament to set up a tribunal which has full and autonomous powers to fix its own area of operation, that has, so far, not been done in this country.

The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability on its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal. They may, according to the width and emphasis of their formulation, help to ascertain the extent of that field, to narrow it or to enlarge it, but unless one is to deny the statutory origin of the tribunal, and of its powers, they cannot preclude examination of that extent. It is sometimes said (the argument was presented in these terms) that the preclusive clause does not operate to decisions outside the permitted field because they are a nullity. There are dangers in the use of this word if it draws with it the difficult distinction between what is void and what is voidable, and I certainly do not wish to be taken to recognise that this distinction exists or to analyse it if it does. But it may be convenient so long as it is used to described a decision made outside the permitted field, in other words, as a word of description rather than as in itself a touchstone.

The courts, when they decide that a "decision" is a "nullity", are not disregarding the preclusive clause. For just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed (see the formulation of LORD SUMNER in *R.* v. *Nat Bell Liquors, Ltd.* (85)). In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive. What would be the purpose of defining by statute the limit of a tribunals' powers, if by means of a clause inserted in the instrument of definition, those limits could safely be passed? After the admirable analysis of the authorities made by BROWNE, J., in his judgment (available in the record in this House), no elaborate discussion of authority is needed in order to support this view of the courts' powers. I extract some well-known pronouncements which have stood the test of time. One may find difficulty in some of the cases in following the reasoning by which the conclusion has been reached that a particular area of decision was or was not remitted to the tribunal concerned. Some of these are complicated by the procedural refinements of the prerogative writs; in others perhaps the apparent merits or demerits of the decision may have led the courts into strained distinctions between facts which the tribunal might legitimately find and others (called "jurisdictional") which it might not. But the principle is now becoming reasonably clear.

The separate but complementary responsibilities of court and tribunal were very clearly stated by LORD ESHER, M.R., in *R.* v. *Income Tax Special Purposes Comrs.* in these words (86):

"When an inferior court or tribunal or body, which has to exercise the

(84) [1963] 2 All E.R. 66; [1964] A.C. 40.
(85) [1922] 2 A.C. 128 at p. 156; [1922] All E.R. Rep. 335 at p. 351.
(86) (1888), 21 Q.B.D. 313 at p. 319; [1886-90] All E.R. Rep. 1139 at p. 1141.

power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."

That the ascertainment of the proper limits of the tribunal's power of decision is a task for the court was stated by FARWELL, L.J., in *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* (87), in language which, though perhaps vulnerable to logical analysis, has proved its value as guidance to the courts (88):

> "Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such tribunal would be autocratic not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded in law or fact . . ."

DENNING, L.J., added his authority to this in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* in the words (89):

> "No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction."

These passages at least answer one of the respondents' main arguments, to some extent accepted by the members of the Court of Appeal (90), which is that *because* the commission have (admittedly) been given power, indeed required, to decide some questions of law, arising out of the construction of the relevant Order in Council, they must necessarily have power to decide those questions which relate to the delimitation of their powers; or, conversely, that if the court has power to review the latter, it must also have power to review the former. But the one does not follow from the other; there is no reason why the Order in Council should not (as a matter of construction to be decided by the court) limit the tribunal's powers and at the same time (by the same process of construction) confer on the tribunal power, in the exercise of its permitted task, to decide other questions of law, including questions of construction of the order. I shall endeavour to show that this is what the order has done.

The extent of the interpretatory power conferred on the tribunal may sometimes be difficult to ascertain and argument may be possible whether this or that question of construction has been left to the tribunal, i.e., is within the tribunal's field or whether, because it pertains to the delimitation of the tribunal's area by the legislature, it is reserved for decision by the courts. Sometimes it will be possible to form a conclusion from the form and subject-matter of the legislation In one case it may be seen that the legislature, while stating general objectives, is prepared to concede a wide area to the authority it establishes; this will often be the case where the decision involves a degree of policy-making rather than fact-finding, especially if the authority is a department of government or

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(87) [1910] 2 K.B. 859; [1908-10] All E.R. Rep. 792.
(88) [1910] 2 K.B. at p. 880.
(89) [1952] 1 All E.R. 122 at p. 127; [1952] 1 K.B. 338 at p. 346.
(90) [1907] 2 All E.R. 986; [1968] 2 Q.B. 862.

the Minister at its head. I think that we have reached a stage in our administrative law when we can view this question quite objectively, without any necessary predisposition towards one that questions of law, or questions of construction, are necessarily for the courts. In the kind of case I have mentioned, there is no need to make this assumption. In another type of case it may be apparent that Parliament is itself directly and closely concerned with the definition and delimitation of certain matters of comparative detail and has marked by its language the intention that these shall accurately be observed. If *R.* v. *Minister of Health, Ex p. Committee of Visitors of Glamorgan County Mental Hospital* (91) was rightly decided, it must be because it was a case of the former type. The dispute related to a superannuation allowance and the statute provided that " any dispute " should be determined by the Minister. The basis of the decision is not very clearly expressed but can, I think, be taken to be that, as the context and subject-matter showed, the Minister had a field of decision extending to the construction of the superannuation provisions of the Act. The present case, by contrast, as examination of the relevant Order in Council will show, is clearly of the latter category.

I do not think it desirable to discuss further in detail the many decisions in the reports in this field. But two points may, perhaps, be made. First, the cases in which a tribunal has been held to have passed outside its proper limits are not limited to those in which it had no power to enter on its enquiry or its jurisdiction, or has not satisfied a condition precedent. Certainly such cases exist (for example *Ex p. Bradlaugh* (92)) but they do not exhaust the principle. A tribunal may quite properly validly enter on its task and in the course of carrying it out may make a decision which is invalid—not merely erroneous. This may be described as " asking the wrong question " or " applying the wrong test "—expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area—a crucial distinction which the court has to make. Cases held to be of the former kind (whether, on their facts, correctly or not does not affect the principle) are *Estate and Trust Agencies (1927), Ltd.* v. *Singapore Investment Trust* (93); *Seereelall Jhuggroo* v. *Central Arbitration and Control Board* (94) (" whether [the Board] took into consideration matters outside the ambit of its jurisdiction and beyond the matters which it was entitled to consider "); *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Hierowski* (95). The present case, in my opinion, and it is at this point that I respectfully differ from the Court of Appeal (96), is of this kind. Secondly, I find myself obliged to state that I cannot regard *Smith* v. *East Elloe Rural District Council* (97) as a reliable solvent of this appeal, or of any case where similar questions arise. The preclusive clause was indeed very similar to the present but, however inevitable the particular decision may have been, it was given on too narrow a basis to assist us here. I agree with my noble and learned friends, LORD REID and LORD PEARCE, on this matter. I am also unable to accept the correctness of *Davies* v. *Price* (98), if relied on as a decision that, in giving consent on a ground which was not one of those stated by the statute, the tribunal was acting (though wrongly) within its powers.

I proceed now to consider the relevant statutory provisions. The Foreign Compensation Act 1950, was passed in order to provide, immediately, for the constitution of the commission and for the distribution by them of compensation under agreements entered into with Yugoslavia and Czechoslovakia. It also provided a framework for the eventual distribution of any compensation which

(91) [1938] 4 All E.R. 32; [1939] 1 K.B. 232.
(92) (1878), 3 Q.B.D. 509.
(93) [1937] 3 All E.R. 324 at pp. 331, 332; [1937] A.C. 898 at pp. 915-917.
(94) [1953] A.C. 151 at p. 161.
(95) [1953] 2 All E.R. 4; [1953] 2 Q.B. 147.
(96) [1967] 2 All E.R. 986; [1968] 2 Q.B. 862.
(97) [1956] 1 All E.R. 855; [1956] A.C. 736.
(98) [1958] 1 All E.R. 671; [1958] 1 W.L.R. 434.

A might be received from other governments. This was done by s. 3 which was as follows:

> "If His Majesty's Government in the United Kingdom enter into or contemplate an agreement with the government of any foreign country providing for the payment of compensation by the latter government, His Majesty may by Order in Council make provision for all or any of the following matters, that is to say:—(*a*) for the registration by the commission of claims to participate in such compensation, and for the making of reports by the Commission with respect to such claims; (*b*) for the determination of such claims by the Commission; (*c*) for any matters arising in relation to such claims for which, in relation to the claims mentioned in the last preceding section, provision may be made under that section; (*d*) for the distribution by the Commission of any sums paid to them by His Majesty's Government in the United Kingdom; being sums received under the agreement; (*e*) for any supplementary and incidental matters for which provision appears to His Majesty to be necessary or expedient."

The reference in para. (*c*) to s. 2 enabled the Order in Council to make provision (99)—

> "(*a*) for defining the persons who are to be qualified, in respect of nationality or status, to make applications to the Commission for the purpose of establishing such claims as aforesaid, and for imposing any other conditions to be fulfilled before such claims can be entertained; (*b*) for prescribing the matters which have to be established to the satisfaction of the Commission by persons making such applications;"

This shows very clearly that, as and when machinery should be set up enabling the commission to deal with compensation under future agreements, this should be within fixed and determined limits which the legislature itself would lay down; thus Parliament might (under s. 2 (2) (*a*)) define qualified persons and impose conditions, and (under s. 2 (2) (*b*)) prescribe matters to be established to the commission's satisfaction. There could be no doubt that if, so far as such power was exercised, and such definitions, conditions and prescribed matters were laid down, these would be architectural directions binding the commission, so that if they departed from them, they would be acting beyond their powers. Moreover, when one compares the terminology of s. 4 (4)—"The determination by the Commission of any application made to them under this Act . . ."—with that of s. 3 (*b*)—"the determination of . . . claims . . ."—and appreciates that the power to determine claims is to be subject to such limits (as to definitions, conditions or prescribed matters) as might be approved by Parliament, the conclusion must follow that the preclusive clause can have no application except to a determination made within the limits, whatever they turn out to be, fixed by Parliament. The respondents' argument that they have only to make a self-styled "determination" in order to enjoy automatic protection is thus at once seen to be unsustainable.

Equally open to objection is another argument of the respondents which I mention because it obtained some approval in the Court of Appeal (100). That is that this fund was derived from a foreign power under a treaty, so that, in accordance with well-known principles (see *Rustomjee* v. *Reginam* (101)), no subject had any legal claim to any part of it. The distribution of the fund was solely a matter for the executive, and it would be inconsistent with this situation to recognise any right of an aggrieved person to bring any claim before the court. I cannot follow this argument. Of course it would have been open to Parliament,

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(99) See s. 2 (2) (*a*) and (*b*).
(100) [1967] 2 All E.R. 986; [1968] 2 Q.B. 862.
(101) (1876), 1 Q.B.D. 487; 2 Q.B.D. 69.

or the executive, to provide that the distribution of this fund should be carried out entirely according to the unreviewable discretion of the commission or any other person and, if they had done so, it would have been futile for any claimant to try to bring the court into the matter. The question is whether this is what has been done, or whether, on the contrary, Parliament, while leaving it to the commission to decide whether specified qualifications have been satisfied in individual cases, has itself laid down those qualifications, or some of them, in terms which admit of no departure. It is at least certain that Parliament was concerned that the fund should, in principle, go to British nationals only and the whole question is whether it has also decided, or left to the commission, an incidental question connected with that of nationality.

I turn now to the Order in Council in order to see to what extent the circumscribing power has been exercised. This, up to a point, is extremely clear. Article 4 opens with the words " The Commission shall treat a claim . . . as established if the applicant satisfies them of the following matters ". More imperative words could not be devised. The word " shall " serves, and no word could serve better, to indicate those matters which have been decided and laid down by the legislature, as part of its policy and within which the commission are to make their determination. The commission's own sphere of operation (ample enough) is conveyed by the words " satisfies them " by subsequent references such as " the Commission may " by their duty to " assess . . . as seems just and equitable " by " if it shall appear to the Commission " and similar words. So whatever difficulties there may in some cases be in ascertaining what is left to the tribunal on the one hand and what is reserved from them on the other, do not exist here; the demarcation is plainly made. The next step, and the really difficult one, is to ascertain exactly where the limits of the commission's powers have been set. These must be found from an examination and construction of (relevantly) art. 4 (1) (*a*) and (*b*). The historical antecedents of this article, including the relevant provisions of the agreement of 28th Feburary 1959, have been fully set out in your Lordships' opinions, and provisions of the Order in Council have been analysed both there and by BROWNE, J., in his judgment. I forbear from repeating this analysis as to which I am in agreement with my noble and learned friends, LORD REID and LORD PEARCE, as well as with the learned judge.

I would summarise the considerations which persuade me that the learned judge's conclusions were correct as follows:

1. The use of words. Throughout art. 4 the words are " successor in title of such person "; never is there any reference to the property or any property. The first reference, in Annex A of the treaty of 28th February 1959, was to " successors of such person ". If a particular successor, by assignment, to a particular property had been meant, one would have expected a clearer reference. I recognise that there are difficulties in the way of an interpretation which refers to successorship on death and it may well be that these references are not accurately thought out. But the order is dealing with property abroad, in which some foreign nationals may be interested, and I do not think that such inaccuracy as there is should determine the broader question which concerns us. We must accept that the order uses " successors " as *including* successors on death and the question is whether in addition the word includes assignees.

2. The difficulty of working out any conception of assignment. It is clear that, if any assignments are included, those particular assignments which took place when Annex E properties were sold by Egyptian sequestrators under Proclamation No. 5 cannot be included; to include them would stultify the whole article. But neither is there any warrant for treating such assignments as non-existent, nor, if they are not so treated, is it easy to give any meaning to assignment. It was at one time thought that the article contemplated assignments which would have taken effect if no sale by sequestration had occurred; in the end this was, rightly in my view, given up. But if these sales are not disregarded, the difficulty of stating what kind of assignment is meant becomes very great. It becomes

A necessary to wrestle with the concept of a spes restitutionis against the United Arab Republic, converted, after 28th February 1959, into a spes of compensation against the United Kingdom government, transmuted again after April 1959 (the first Order in Council), into a hope of sharing in the fund. Perhaps this, with all its difficulties, can be worked out, but the difficulties add to the objections against this interpretation.

B 3. As a matter of policy, one starts with Her Majesty's government's claim under the treaty, which was to recover British property, and with the receipt of money to compensate for the retention of Annex E property; then on the one hand, it is perfectly comprehensible that the requirement should be imposed that either the claimant, being an original owner, should be a British national, or that if he is dead and someone else claims in his place, that person should C also be a British national. It can be seen from Annex E that many if not most of the claimants were resident if not domiciled in Egypt. On the other hand, there seems no obvious reason why a British national who has disposed of, or charged, any rights he might have in respect of his property should recover if he has done so in favour of a British subject, but should not do so if he has done so in favour of a non-British subject. As between such a person and the other D claimants on the fund, that person has just as good a claim, provided that he does not recover twice. And, in order to prevent this, there is art. 10.

4. Article 10 provides that, in assessing any loss, the commission shall have regard to any compensation or recoupment in respect of that loss which the applicant has received from any other source. This was accepted by BROWNE, J., as a strong argument in favour of the " successor on death " argument. I think E that this was right. It seems very appropriately to fit such a case as the appellants' where, whether by " assignment " or not, the original owner has succeeded in obtaining some " recoupment " for loss of his property. Compensation or recoupment is hardly likely to be made without some assignment of rights; and, in the conditions prevailing before 1959, it does not seem probable that any assignment would be possible to a British national, or indeed otherwise F than to a national of the United Arab Republic.

These considerations, cumulatively, are, in my opinion, compelling. There remains, of course, the drafting of art. 4 (1) (*b*) (ii) " that the person referred to . . . *and* any person who became successor in title ", which does appear to suggest that a situation may exist where a successor in title is relevant even if the claim is made by the original owner. But I think that this is not decisive; G it is merely the result of unfortunate telescopic drafting. The draftsman ought to have dealt separately with the two cases saying (i) if a claim is made by the person referred to as aforesaid that he was a British national . . . (ii) if a claim is made by the successor in title of such person, and such person succeeded before 28th February 1959, that both he and the person referred to as aforesaid were British nationals. We are well used to doing, by interpretation, this kind of H work on the draftsman's behalf, and I think we can do so here.

In my opinion, therefore, art. 4 should be read as if it imposed three conditions only on satisfaction of which the appellants were entitled, under statutory direction, to have their claim admitted, namely—(a) that their application relates to property in Egypt referred to in Annex E; (b) that they were the persons referred to in Annex E para. (1) (*a*) as the owners of the property; I (c) that they were British nationals at the specified dates. As, ex concessis, all these conditions were fulfilled, to the satisfaction of the commission, the appellants' claim was in law established; the commission by seeking to impose another condition, not warranted by the order, were acting outside their remitted powers and made no determination of that which they alone could determine. Indeed, one might almost say, conversely, that having been satisfied of the three conditions, the commission have, in law, however they described their actions, determined the claim to have been established.

I should mention, in justice to the commission's argument, that a contention

was put forward to the effect that, even if the commission had acted outside their power in the respect suggested, their decision could be upheld on other grounds. I need only say of this that it too involved introducing considerations not laid down in the Order in Council and for the same reasons could not be accepted. Finally, there is the question of remedy. Once it is established that the commission, basing their decision on an interpretation of the Order in Council which cannot be maintained, have made a determination beyond their powers, it appears to me to be clear that the court had power to declare this, and the correct interpretation of the Order in Council, by declaration. Indeed this remedy is in every respect the most suitable in the circumstances of the case. No objection to the actual form of the declaration was taken before BROWNE, J. In my opinion, the appeal should be allowed and the order of BROWNE, J., restored.

**LORD PEARSON:** My Lords, I have had the advantage of reading in advance the opinions of my noble and learned friends, LORD REID, LORD PEARCE and LORD WILBERFORCE. As to the general nature of the court's supervisory function (as distinct from any appellate function) in relation to decisions of tribunals, I agree with what they have said and have nothing to add. I agree with them also that what has been called the " ouster provision " in s. 4 (4) of the Foreign Compensation Act 1950, does not exclude the court's intervention in a case where there is a merely purported determination given in excess of jurisdiction. Also in relation to the present case I would join with my noble and learned friends to this extent, that, if the appellants' contentions as to the true construction of the relevant Order in Council are upheld, it must follow that the commission have acted in excess of jurisdiction and the court should intervene in the exercise of its supervisory function. According to the appellants' contentions, the commission were satisfied of the only matters of which, on the true construction of the Order in Council, the appellants as applicants had to satisfy them, and so the appellants were entitled to a determination in their favour; but the commission, misconstruing the Order in Council, erroneously thought that there were further matters of which the appellants had to satisfy them, and so the commission embarked on an irrelevant enquiry and (in the familiar phrase) asked themselves the wrong question and gave a purported determination which was outside the area of their jurisdiction. If that is the right view of what the commission have done, there has been excess of jurisdiction.

I am, however, not able to agree that the commission misunderstood the Order in Council, or made any error affecting their jurisdiction. The questions of construction arise with regard to the provisions of art. 4 (1) (*b*) of the relevant Order in Council, which is the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962. In order to supply the necessary background to these provisions it is necessary to make some reference to the outline of the history and to certain provisions of previous instruments.

On 1st November 1956, soon after the commencement of the " Suez incident " the Egyptian government issued Proclamation No. 5 of 1956, and thereby they sequestrated the assets in Egypt of British and French subjects, including the appellants' manganese mine in the Sinai Peninsula. The mine was in the territory which came to be occupied by Israeli forces. In April 1957, after the Israeli forces had withdrawn, the Egyptian Minister of Finance and Economy, acting under art. 9 of the Proclamation, authorised the Custodian-General of the property of British, French and Australian subjects to sell and liquidate the establishments and other property of persons set out in a list, in which the appellants were included. On 29th April 1957, there was a contract of sale, to which the first party was the Custodian-General and the second party was Alsayed Hassan Ibrahim " in his capacity as the Chairman of the Economic Board, and Representative of the Sinai Manganese Company S.A.E. (under formation) ". The appellants were not a party. By the contract, all assets belonging to the appellants were sold by the first party to the second party at a price to be determined by a committee, and it was provided by cl. 5 that:

" All title to the assets sold hereunder shall be assigned to and taken over by the purchaser immediately this contract is signed by the parties hereto."

Presumably the sale by that contract was valid under Egyptian law, but in July 1957, the appellants through agents wrote letters to customers of the manganese mine stating that the sequestrator had no authority whatever to act on behalf of the appellants or to deal in any way with their assets, whether in Egypt or elsewhere, and that the appellants regarded as a violation of their legal rights any transaction involving ores from the mine and would take in any country any steps which they might consider necessary to assert or protect these rights. On the other side, the Egyptian Minister of Industry, in September 1957, promulgated an order whereby the mining leases previously granted to the appellants were cancelled—

" as from the date the said company's property was liquidated and the assets thereof were sold to the Economic Board on 29th April 1957."

Also the newly-formed Egyptian company, the Sinai Manganese Co. S.A.E., issued a writ against the appellants' agents and others. Then there were discussions and an agreement was made on 23rd November 1957. The parties to this November agreement were: (i) the appellants; (ii) the Egyptian company, Sinai Manganese Co. S.A.E.; (iii) the Economic Development Organisation, called T.E.D.O., which I think is the same as the " Economic Board " represented by Mr. Ibrahim in the April agreement; (iv) the Sequestrator-General of British property in Egypt, who may be the same as the Custodian-General referred to in the April agreement. By cl. 1A, the appellants agreed to sell and T.E.D.O. agreed to buy the whole business of the first party as carried on and situate in Egypt, and the Sequestrator-General consented to and acquiesced in the sale. By cl. 1B (i) (*a*), the business was deemed to include all the assets of the appellants situate in Egypt. By cl. 1B (ii):

" The said assets of the first party shall not include any claim which the [appellants] may be entitled to assert against any governmental authority other than the Egyptian Government, as a result of loss suffered by, or of damage to or reduction in the value of the business or assets of the [appellants] during or following upon the events of October-November 1956."

The price was £500,000 sterling, payable out of the proceeds of sales of ore other than local sales in Egypt. Clause 12B included a provision that:

" This agreement . . . shall in no respect be deemed a waiver of the claims or rights of the [appellants] save to the extent that it expressively so provides."

This November agreement is in some respects a puzzling document. The appellants' property had already been sold by the April agreement to a person representing T.E.D.O. and the Egyptian company, Sinai Manganese Co. S.A.E. How then could the appellants now sell it and how could T.E.D.O. buy it? I think this November agreement can only be explained by reference to the assertions which the appellants' agents had been making to customers of the manganese mine. The possible weakness of the April agreement (though it would be a weakness in international law or politics or morals rather than in Egyptian law) was that the appellants were not a party to it and refused to accept the authority of the sequestrator to act on their behalf. The object of the November agreement was to clarify the position. The appellants were a party to the November agreement, and by it they sold or purported to sell their property to T.E.D.O. at an agreed price. After that they would be precluded (whether legally or politically or morally) from asserting any right or title to the property. Also cl. 1 of the November agreement can be construed as involving a sale by the appellants to T.E.D.O. of any claims which the appellants might have against the Egyptian government in respect of the sequestration and expropriation of their property. By this clause the appellants sold to T.E.D.O. their whole business as carried on and situate in Egypt, and the business was

deemed to include all their assets situate in Egypt, and para. B (ii) of the clause can be regarded as showing that any such claims of the appellants against the Egyptian government would constitute assets of the business situate in Egypt and would pass under this contract of sale to T.E.D.O. That is a possible view.

On 28th February 1959, a treaty or agreement was made between the government of the United Kingdom and the government of the United Arab Republic concerning financial and commercial relations and British property in Egypt. The first three paragraphs of art. III provided that—

> "The Government of the United Arab Republic shall:—(*a*) on the date of the signature of the present Agreement terminate the application of all measures of sequestration taken by the Government of the United Arab Republic against British property between October 30, 1956, and the date of signature of the present Agreement . . . . (*b*) return all British property (or the proceeds of any such property sold between October 30, 1956, and the date of the signature of the present Agreement) to the owners thereof in accordance with the provisions of Annex B to the present Agreement . . . (*c*) be entitled to exclude from the provisions of paragraph (*b*) of this Article property sold between October 30, 1956, and August 2, 1958, under the provisions of Proclamation No. 5 of November 1, 1956, and referred to in Annex E to the present Agreement . . ."

Paragraph (1) of art. IV provided that—

> "The Government of the United Arab Republic shall pay to the United Kingdom Government the sum of £27,500,000 sterling in full and final settlement of the following:—(*a*) all claims in respect of the property referred to in paragraph (*c*) of Article III of the present Agreement; (*b*) all claims in respect of injury or damage to property suffered prior to the date of the signature of the present Agreement as a result of the measures referred to in paragraph (*a*) of Article III of the present Agreement."

Article I and Annex A provided certain definitions:

> "(2) 'British property' shall mean the property in Egypt of United Kingdom nationals . . .
>
> (3) 'United Kingdom nationals' are: (i) physical persons who at the date of the signature of the present Agreement are citizens of . . . (ii) corporations and associations incorporated or constituted under the laws in force in the United Kingdom . . . or in any territory for whose international relations the United Kingdom Government are, at the date of the signature of the present Agreement, responsible; provided that the persons, corporations and associations concerned were equally United Kingdom nationals on October 31, 1956.
>
> (4) 'Owners' shall mean United Kingdom nationals who, on any date between October 30, 1956, and the date of the signature of the present Agreement, were entitled to the property, rights or interests in question, to the extent to which they were so entitled, and shall include any successors of the owners provided such successors are United Kingdom nationals as defined in paragraph (3) of this Annex."

Paragraph (1) of Annex E had a heading which included the words "The properties in the United Arab Republic of any United Kingdom nationals . . . appearing on the following list . . ." and the list included "Sinai Mining (subject to a special arrangement)".

It is important to note that the requirements in respect of nationality were stringent. To qualify as an "owner" an individual had to be a United Kingdom national, and he was not a United Kingdom national unless he was a citizen both on 30th October 1956, and on 28th February 1959. A person who was a successor of an owner qualified as an owner, but to be a successor he must have been a citizen both on 30th October 1956, and on 28th February 1959. There were similar requirements for corporations.

In April 1959, the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1959 (102), was made. The first recital referred to the Foreign Compensation Act 1950, and the second recital referred to the provision in the treaty of 28th February 1959, for payment by the government of the United Arab Republic to the United Kingdom government of the sum of £27,500,000 " in full and final settlement of the claims referred to in paragraph (1) of Article IV of the Agreement ". The third recital was—

" And Whereas it is expedient that provision should be made with regard to sums received from the Government of the United Arab Republic and for the registration, assessment and determination of claims in respect of British property in Egypt:".

There was in art. 1 a definition of " British nationals ". Article 4 was as follows:

" The Commission shall treat a claim under this Part of the Order as established if the applicant satisfies them of the following matters:—

(1) that his application relates to property in Egypt which was sold between the 30th day of October, 1956, and the 2nd day of August, 1958, under the provisions of Egyptian Proclamation No. 5 of November 1, 1956;

(2) that the property at the time of such sale was owned by a British national;

(3) that the property is referred to in Annex E to the Agreement;

(4) that he was the owner at the time of such sale or is the successor in title of such owner; and

(5) that the owner at the time of such sale and his successor in title, if any, were British nationals on the 31st day of October, 1956, and the 28th day of February, 1959. For the purposes of this paragraph, a British national who died, or in the case of a corporation or association ceased to exist, between the 31st day of October, 1956, and the 28th day of February, 1959, shall be deemed to have been a British national on the latter date."

This Order in Council of 1959 is only a predecessor of the Order in Council of 1962, under which the appellants applied, but it has interesting features. First, as to the meaning of the word " claim ". The claims referred to were until the treaty was made outstanding claims against the Egyptian government (the government of the United Arab Republic) for restitution or compensation. Under the treaty the Egyptian government paid to the United Kingdom government a sum in full and final settlement of these claims. That was an international transaction between governments. The claims probably had no validity by the law of Egypt, the country in which the expropriated or damaged property was situate. They were claims of a political character, presented by the United Kingdom government in diplomatic negotiations and settled by the payment made by the Egyptian government to the United Kingdom government. When the payment had been made there was a fund available for compensating the claimants, and the Order in Council was providing for the registration, assessment and determination of " claims ". The claims would now be claims to participate in the distribution of the fund, but they would be derived from, rooted in and identifiable with the previous claims against the Egyptian government.

Secondly, the nationality requirements of this Order in Council of 1959 were stringent and evidently based largely on the nationality requirements of the treaty. The property must have been owned by a British national at the time of the sale, which took place between 30th October 1956, and 28th February 1959, under the Proclamation. The claimant must be the person who was the owner at the time of such sale or his successor in title. Both the owner and the successor in title, if any, must have been British nationals both on 31st October 1956, and on 28th February 1959. I see no reason for doubting that this last-mentioned requirement, contained in para. (5) of art. 4, is to be read literally as requiring that both of them must have been British nationals on both of the specified dates.

(102) S.I. 1959 No. 625.

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It was because of this requirement that the deeming provision in the second sentence of para. (5) had to be inserted. Suppose the person who was the owner at the time of the sale had (being an individual) died or (being a corporation) ceased to exist before 28th February 1959, and his successor in title was the claimant. The owner still had to have British nationality on 28th February 1959, and it had to be fictitiously conferred on him by the deeming provision.

Thirdly, there is not in the language of para. (5) any indication that if the owner is making the claim and has a successor in title the owner is relieved from the need to prove that both he and the successor in title were British nationals on the two specified dates.

Fourthly, it is to be noted that the property referred to in this article was property in Egypt which was sold between 30th October 1956, and 2nd August 1958. This is evidently a reference to the sales by the Sequestrator-General (Custodian-General) under the Proclamation, and one of these sales was the April agreement. The successor in title could not be a successor in title to the ownership of the property. He could only be a successor in title to the former owner's claim for restitution or compensation.

The Order in Council of 1959 was amended by an Order in Council of 1960 (103), one of the objects of which (as appears from the explanatory note) was to facilitate the establishment of claims under art. 4 (1) of the order of 1959 in cases in which the applicants had been unable to obtain formal evidence of the sale or of the date of sale of their properties under the Proclamation. It would be sufficient to show a sale or a deprivation of possession and enjoyment of the property. But the stringent nationality requirements were continued in a slightly different form. The applicant had to show—

> " (*b*) that the property at the time of such sale or deprivation was owned by a British national . . . (*d*) that the applicant was the owner at the time of such sale or deprivation or is the successor in title of such owner; and (*e*) that the owner at the time of such sale or deprivation and any person who became successor in title of such owner on or before the 28th day of February, 1959, were British nationals on the 31st day of October, 1956, and the 28th day of February, 1959."

Again, there seems to be no reason for reading the nationality requirements otherwise than literally. Both of them had to have British nationality on both of the dates. There is another point of interest in para. (*e*). A person could have become successor in title on or before 28th February 1959, and, therefore, at a time when the property had been sold, so that the owner had lost his ownership and had nothing left but a claim against the Egyptian government for restitution or compensation. If the claim had no validity in Egyptian law, and was merely political and not legal in character and could be described as only a " spes ", nevertheless a person could within the meaning of the Order in Council become a successor in title to the claim. It was something the title to which could pass from one person to another.

In August 1962, by an exchange of notes between the United Kingdom government and the Egyptian government (the government of the United Arab Republic), a new and partly different Annex E was substituted for the Annex E which was originally incorporated in the treaty. The heading now omitted any reference to a sale under the Proclamation, but referred to " The properties . . . of any United Kingdom nationals appearing on the following list . . .". The appellants were still included in the list, and after their name there were still the words " (subject to a special arrangement) ". This must have been a reference to the November agreement, but there was nothing to show what the effect of the special arrangement was intended to be. Then, in October 1962, the Order

(103) The Foreign Compensation (Egypt) (Determination and Registration of Claims) (Amendment) Order 1960 (S.I. 1960 No. 2418).

in Council of 1962 (104), which is the crucial Order in Council under which the appellants made their application, was made in substitution for the Order in Council of 1959 as amended. I think that it is sufficient to set out the following portions of art. 4:

"(1) The Commission shall treat a claim under this Part of the Order as established if the applicant satisfies them of the following matters:—

(*a*) that his application relates to property in Egypt which is referred to in Annex E;

(*b*) if the property is referred to in paragraph (1) (*a*) or paragraph (2) of Annex E—(i) that the applicant is the person referred to in paragraph (1) (*a*) or in paragraph (2), as the case may be, as the owner of the property or is the successor in title of such person; and (ii) that the person referred to as aforesaid and any person who became successor in title of such person on or before 28th February 1959 were British nationals on 31st October 1956 and 28th February 1959 . . .

(2) For the purposes of sub-paragraph (*b*) (i) of paragraph (1) of this Article, any reference in paragraph (2) of Annex E to the estate of a deceased person shall be interpreted as a reference to the persons entitled to such estate under the testamentary dispositions or intestacy of such deceased person.

(3) For the purposes of sub-paragraphs (*b*) (ii) and (*c*) (ii) of paragraph (1) of this Article, a British national who died, or in the case of a corporation or association ceased to exist, between 31st October 1956 and 28th February 1959 shall be deemed to have been a British national on the latter date, and a person who had not been born, or in the case of a corporation or association had not been constituted, on 31st October 1956 shall be deemed to have been a British national on that date if such person became a British national at birth or when constituted, as the case may be . . ."

It seems to me that the provisions of para. (1) (*b*) can and should be read quite literally as meaning what they appear to say. "Successor in title" means a person, whether an individual or a corporation, to whom the claim for restitution or compensation (being all that was left of the owner's interest in the property) has passed by any mode, whether by testamentary disposition or by devolution on intestacy or by assignment or otherwise. By "assignment" I mean a transfer of the beneficial interest. The applicant may be the initial owner claiming on his own behalf, or the initial owner claiming for the benefit of a successor in title, or he may be the successor in title. The applicant, whoever he may be, has to prove that both the initial owner and any person who became successor in title on or before 28th February 1959, were British nationals on 31st October 1956, and 28th February 1959. It was natural to require that the claim should have been British held on 31st October 1956, just before the Egyptian measures of sequestration began, and on 28th February 1959, the date of the treaty. The stringent requirement that each of them must have been a British national on both of the dates (so that an initial owner would have to remain a British national after he had parted with the beneficial interest in the claim and a successor in title would need to have been a British national before he acquired any interest in the claim), though prima facie surprising, was entirely natural because it was following the requirements of the treaty under which the compensation money for meeting such claims had been paid. Paragraph (2) of the article shows that, in a case where there has been a passing of the property on death, the successor in title is the holder of the beneficial interest and not the executor or administrator. Paragraph (3) contains the "deeming" provisions which are necessitated by the stringent nationality requirements. If the owner (being an individual) has died or (being a corporation) has gone out of existence in the period between the two dates, he or it can only be *deemed* to have been a

(104) The Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 (S.I. 1962 No. 2187).

British national on the latter date. And, conversely, if he or it had been born or come into existence between the two dates, he or it can only be *deemed* to have been a British national on the earlier date. As the provisions of para. (1) (*b*) can be understood literally, without any artificial limitation or distortion of the grammatical sense of the words, and the resulting effects are not unreasonable or unnatural, I think the provision should be so understood.

The rival theory is beset with difficulties. It involves reading "successor in title" as meaning only a universal successor. There is no warrant for this limitation in the provisions of the article, and the words "in title" naturally refer to the title to some property, in this case at the material times a claim. The phrase "successor in title" is not apt in relation to a universal successor, and indeed the concept of a universal successor is unfamiliar in English law and would need to be specially indicated in some way, if it was intended. Moreover, it seems to me that the theory breaks down in the case of testamentary dispositions, which are expressly contemplated by para. (2). It is not only possible but usual for testamentary dispositions to divide the testator's estate into several portions allotted to different beneficiaries. In that case there is no universal successor, and, if the theory is right, there is nobody qualified to claim under the article; the testator cannot claim because he is dead, and the beneficiary to whom the claim is given by the will cannot claim because he is not a successor in title in the sense of universal successor. Similarly, in the case of a corporation going into liquidation and being dissolved, the concept of a universal successor is inappropriate and unworkable. The liquidator sells the assets and conveys or delivers or assigns them to the purchaser or purchasers. The succession must be effected by means of the sale and conveyance or delivery or assignment—by act of parties and not by operation of law. If there are several purchasers, none of them is a universal successor, and again nobody can claim under the article if the theory is right.

Moreover, the theory requires a departure from the natural meaning of para. (1) (*b*) (ii). It has to be regarded as a compressed or telescoped provision. As the learned judge, BROWNE, J., said: "At any given moment there can only be in existence either the original owner or his successor in title but not both." If there is a successor in title, he is the only possible claimant, having wholly displaced the original owner. He has to prove both his own British nationality and the British nationality of the initial owner, but can only do this under the deeming provisions as the initial owner must have died or ceased to exist in order to let in the universal successor. If the initial owner still exists, he is the only possible claimant and he has to prove only his own British nationality on the two dates. If he has sold his beneficial interest in the claim to X, he does not have to say anything about that, because that is only a transfer of a particular interest and not a universal succession. Thus, a claim which is beneficially a foreign-held claim at the date of the treaty is admitted to participation in the fund. All these results seem to me inconsistent with the probable intention appearing from the provisions of the article.

I would say, therefore, that the commission construed the article correctly and did not ask themselves any wrong question or exceed their jurisdiction in any way. Having so construed the article, the commission had to make a decision as to the effect of the November agreement. They decided that, by that agreement, the claim passed to T.E.D.O., and so was at the date of the treaty foreign-held and, therefore, it was excluded by the provisions of art. 4 (1) (*b*) (ii) from participation in the fund. The decision as to the effect of the November agreement, whether right or wrong, was plainly within their jurisdiction, and therefore by virtue of s. 4 (4) of the Foreign Compensation Act 1950, it cannot be called in question in any court. I would dismiss the appeal. *Appeal allowed.*

Solicitors: *Linklater & Paines* (for the appellants); *Treasury Solicitor.*

[*Reported by* S. A. HATTEEA, ESQ., *Barrister-at-Law.*]

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# INDEX OF ATTACHMENT - FIVE

BAIRAMIAN FJ, IN MADUKOLU V. NKEMDILIM (1962) 1 ALL NLR 587 AT 594 REFLECTED IN JUDGMENTS OF THE SUPREME COURT OF NIGERIA HOLDEN AT LAGOS ON FRIDAY THE 5TH OF DECEMBER 1986 AT P. 229-230 - 229

the land in dispute in this case. Mr. Alawode has submitted before us that the learned trial judge and the Court of Appeal did not consider the merits of the submission that the judgments are a nullity and therefore could not sustain a defence of estoppel per rem judicatam.

Counsel for the appellants contended that he is entitled to tender the judgment relied upon by the respondents for their plea of res judicata and then proceed to establish the fact that because of the defect in the jurisdiction of the court, the judgment could not sustain the defence. The defect in the jurisdiction claimed was that the value of the land was not stated in the writ of summons filed, and that a judgment founded upon such a writ of summons lacked jurisdiction and therefore was null and void. That was the incompetence relied upon. It is well settled that a court is competent where all the conditions for its exercise of jurisdiction are satisfied. In Madukolu v. Nkemdilim (1962)1 All NLR 587 at p.594, Bairamian F.J, has laid down the test, which has been relied and acted upon by this court on several occasions. See Sken-Consult (Nig) Ltd. & ors v. Ukey (1981)1 S.C.6. These are that a court is competent where

(a) its statutory composition is properly constituted as regards numbers and qualification;

(b) the subject matter of the action is within its jurisdiction;

(c) the matter before the court is initiated by due process of law, and upon the fulfillment of any condition precedent to the exercise of jurisdiction.

Bairamian F.J., added that any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided. The defect is extrinsic to the adjudication. Thus in the circumstances enumerated in Madukolu v. Nkemdilim, and where the lack of jurisdiction is ex facie, the want of jurisdiction can be raised at any time in the same case, as in Okpaku v. Okpaku (1947) W.A.C.A.137 or in a subsequent case where a decision based on the invalid decision is tendered as in Timitimi v. Amabebe 14 W.A.C.A. 374, - see also Ejiofodomi v. Okonkwo (1982) 11 S.C.74 at p.117.

The only grounds on which we have been invited to reject the plea of res judicata is that the value of the land in dispute was not stated in the writ of summons in suit No. 481/67 in Iseyin Grade C Customary Court, and the decision relied upon is therefore