VYTHIALINGAM, J.

These applications raise important questions in regard to the construction of section 24 of the Interpretation Ordinance as amended by the Interpretation (Amendment) Act, No. 18 of 1972 and the practice and procedure relating to the exercise by this Court of its power to call for and examine the records of any subordinate Court and in the exercise of its revisionary powers to make any order thereon as the interests of justice may require.

On 13 May, 1974, Pathirana, J. and Wijesundera, J. directed the Registrar of this Court to call for the records in the following cases:- VI/74 High Court of Badulla 11; 12; 13; 15; 1/28; 1/25 High Court

Kandy 6/74 High Court of Ratnapura and 4/6 D.C. Bandarawela, L/10568, L/10569 and L 10570 D.C. Kandy.

Thereafter the same two Judges and Udalagama, J. made the following order:–

"The Registrar,
Supreme Court,
Colombo.

In terms of section 354 (1) of the Administration of Justice Law No. 44 of 1973, having perused the records in the following cases in order to satisfy ourselves as to the legality and propriety of the orders made by the learned High Court and District Court Judges and the regularity of the proceedings in respect of such orders, we are of the opinion that the said orders on the face of the record appear to be illegal in view of the provisions of section 24 of the Interpretation Ordinance as amended by the Interpretation (Amendment) Act No. 18 of 1972.

Notice Petitioners/Plaintiffs to appear and show cause as to why the said orders should not be set aside in the exercise of our powers of revision.

Notice Respondents/Defendants and the Attorney-General. Petitioners/Plaintiffs will be noticed to appear to show cause on 14.6.1974.

1. H.C.P. Ratnapura 6/74 APN/GEN/13/74 – Order made on 13.5. 1974.
2. D.C. Kandy L. 10568 APN/GEN/10/74 – Order made on 22.4.1974.
3. D.C. Kandy L. 10569 APN/GEN/11/74 – Order made on 22.4.1974.
4. D.C. Kandy L. 10570 APN/GEN/12/74 – Order dated 22.4.1974.
5. H.C. Badulla V/I/74 APN/GEN/6/74 – Order dated 14.3.1974, and 9.4.1974.
6. H.C. Kandy 1/25/74 APN/GEN/74 – Order dated 17.5.74."

Subsequently a similar order was made by the same three Judges in respect of the following cases:–

7. H.C. Kandy 1/28/74 APN/GEN/14/74 — Order dated 29.4.1974
8. H.C. Kandy 11/74.APN/GEN/8/74 — Order dated 22.2.1974
9. H.C. Kandy 15/74/APN/GEN.12.74 — Order dated 5.3.1974

It will be noticed that although twelve cases were originally called for, order to issue notice were made in respect of only nine of these cases. In two of the cases originally called for i.e. H.C. Kandy 12 and 13 of 1974 the Attorney-General had moved this Court in revision in S.C. Applications No. 290/74 and 291/74 but withdrew the applications as the interim injunctions issued in these cases had expired by effluxion of time and there was no longer a live issue in these cases. Probably for this reason the parties in these two cases were not noticed. The third case is D. C. Bandarawela L.6. which is on the list of applications before us now.

I may mention but without comment that the order referred to dated 13.5.1974 in H.C. Ratnapura 6/74 APN/GEN/13/74 in respect of which notice to show cause has been issued is an order dissolving the interim injunction issued by the Court, on the ground that the petitioner in that case had not been able to establish to the satisfaction of the Court that irremediable mischief would ensue to him if the interim injunction was not issued. On the main issue before us the learned High Court Judge held that section 24 of the Interpretation Ordinance did not preclude his issuing the interim injunction. But since it had been dissolved by his order of 13.5.1974 there was nothing more to be done.

The parties noticed in applications APN/GEN/6 & 7/74 filed petition and affidavit before the Hon. The Acting Chief Justice and prayed that these and certain other cases referred to in their petition be directed to be heard by five or more Judges as the matters in dispute in the said cases are both of general and public importance. This was supported before the Acting Chief Justice who directed that the matter be argued on 18.6.1974 and the three Judges before whom the matters came up in pursuance of the notices issued directed that the cases be re-listed in a week's time.

After hearing parties on 18.6.1974 the Acting Justice directed "under section 14(3) (c) of the Administration of Justice Law No. 44 of 1973 that the applications numbers APN/GEN/6/74, 7/74, 9/74, 10/74, 11/74, 12/74, 13/74, 15/74 and 16/74 now pending before the Supreme Court be listed for hearing on 8th July, 1974, before a Bench of nine Judges as the matters in dispute in the said cases are of general and public importance." This Bench of nine Judges was accordingly constituted by the Chief Justice and altogether eighteen applications have been listed before us for disposal.

In three of these cases APN/GEN/21/74, 22/74 and 23/74 the defendants are the Land Reform Commission and interim injunctions

have been issued restraining them. In the course of the argument the learned Solicitor-General conceded that section 24 of the Interpretation Ordinance did not apply to the Land Reform Commission and accordingly the notices in those cases were discharged and the records were directed to be returned to the respective Courts.

As I have already pointed out in the Ratnapura High Court case APN/GEN.13/74 the interim injunction has been dissolved by the High Court Judge himself while in every one of the other eight High Court cases APN/GEN/6/74, 8/74, 12/74, 14/74, 15/74, 18/74, 19/74, 20/74, the interim injunctions have spent themselves by effluxion of time and there is no longer any live issue before us. Notices in all these High Court cases will also have to be discharged and I would accordingly direct that the notices should be discharged in these cases, since theoretical issues or hypothetical questions are not determined by Courts.

We are therefore left with the six District Court cases in D.C. Bandarawela APN/GEN/7/74, D.C. Kandy APN/GEN/9/74, 10/74, 11/74, 16/74 and D.C. Gampola APN/GEN/24/74. All these cases relate to proceedings for the acquisition of land under the provisions of the Land Acquisition Act Cap. 460 and the defendant in each of these cases is the Hon. H. S. R. Kobbekaduwa, Minister of Agriculture and Lands. In all these cases interim injunctions were issued restraining the defendant from proceeding with the acquisition and from evicting the plaintiffs.

In the three Kandy cases APN/GEN/9/74, 10/74 & 11/74 which have been referred to as the Bowlana Estate cases the defendant filed answer and objections to the issue of the interim injunction on 31.5.74 and apparently on account of the urgency of the matter trial and inquiry had been fixed for 12.6.74. But for the unfortunate circumstance of this Court having called for the records *ex mero motu* these cases would in all probability have now been finally concluded one way or other, subject of course to any appeal. In the other three cases dates had been given for the answer and objections of the defendant but before the due dates the records have been called for by this Court and they were accordingly forwarded to this Court. I have no doubt that the same procedure in regard to fixing an early date for trial and inquiry would have been followed in these cases as well.

In all these cases the plaintiffs allege that the decisions and orders of the defendant are bad in law and of no force or avail as they were instigated and influenced by others particularly by Members of Parliament for the respective areas to secure political and personal revenge and that they were made in bad faith for an ulterior motive and for an extraneous purpose and therefore, *ultra vires*. All the Counsel who

appeared for the various plaintiffs in these cases submitted that such orders and decisions were null and void and were not protected against the issue of interim injunctions by the prohibition contained in section 24 of the Interpretation Ordinace. The learned Solicitor-General however argued that bad faith and excess of jurisdiction were irrelevant consideration as a power can be exercised in good faith or in bad faith. The prohibition in section 24 was absolute and the Courts are precluded from issuing injunctions, however corrupt, capricious, arbitrary, irrelevant or regardless of the nature and purposes of the statute the act of the repository might be.

His submission was that in these circumstances the subject was only entitled to a declaration of his rights if he succeeded in proving his case. He argued that on establishing a *prima facie* case he could not obtain an interim injunction to preserve the property in status *quo* in order that in the event of his ultimately succeeding, the declaration he could obtain could he meaningful.

In considering whether the amending Act was ever intended to and does have this startling effect one may be permitted a few preliminary observations. In England "For three centuries however, the Courts have been refusing to enforce statutes which attempt to give public authorities uncontrollable power. If a Minister or Tribunal can be made a law unto itself it is a made potential dictator; and for this there can be no place in a constitution founded on the rule of law . . . In effect they have established a kind of entrenched provision. . . that no executive body or tribunal should be allowed to be the final judge of the extent of its own powers."[50]

The basis for this is that the exercise of governmental authority directly affecting individual interests must rest on legitimate foundations. For example powers exercised by the State, its Ministers, and central government departments must be derived directly or indirectly from Statute or the Common Law, and the ambit of those powers is determined by the Courts, save in so far as their jurisdiction has been excluded by unambiguous statutory languages.

As W. Friedman observes[51] "The State could through its legislature and executive arms extend its functions, its powers and authority until it engulfs all aspects of the community. This of course is the case in totalitarian states where the judiciary functions essentially as a specialised branch of the executive. The Courts are expected to protect and enforce the policies of government. Such a philosophy and structure of powers are

[50] H. W. R. Wade — Constitutional and Administrative aspects of the Anisminic Case. 1969 85 LQR 198 at 200.

[51] W. Friedman — The State and Rule of Law in a Mixed Economy. Tagore Lectures 1971 Calcutta University.

incompatible with the idea of a mixed economy where the economic functions of the state as provider, controller, and entrepreneur are assigned an important, perhaps even a prominent place, but the private sector is meant to retain a definite function and place of its own."

Such is our case and our Republican Constitution provides in Article 131 (1) for the independence of Judges and other State Officers administering justice without being subject to any direction or other interference, although it is the National State Assembly which, as the Supreme Instrument of State Power exercises the judicial power of the people through Courts and other institutions created by law. [Sections 5(c].

In this context the Courts have an important and proper function to perform. As Basnayake, C.J. pointed out in *Ladamuttu Pillai v. The Attorney-General* (supra) "The interpretation of statutes is the proper function of the Courts and once legislation has been enacted the legislature looks to the Courts to declare its true meaning and upon that meaning to determine whether the powers entrusted to the creatures of statute have been exceeded or not. The principles governing the exercise of their functions by statutory functionaries have been declared by the Courts of England and other Commonwealth countries and are now well established and in my view afford valuable guidance in the consideration of the questions arising on this appeal."

The decisions of the Supreme Court in some respects in this case were set aside by the Privy Council but not in regard to this part of the judgment. As long ago as 1910 *Farwell L.J.* [52] declared "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 . . . "

The principles referred to by Basnayake, C.J. may be conveniently summarised thus: "That authority must genuinely address itself to the matter before it; must not act under the dictation of another body disable itself from exercising a discretion it must not or do what it has been forbidden to do, nor must it do what it has not been unauthorised to do. It must act in good faith, must have regard to all relevant considerations and must disregard all irrelevant considerations, must not seek to promote purposes alien to the letter or spirit of the legislation that gives it power to act and must not act arbitrarily or capriciously. [53]

[52] R. V. Shoreditch Assessment Committee (1910) 2 KB 859 at 880.

[53] Judicial Review of Administrative Action — 2nd edition 271 S.A. de Smith.

He groups them for convenience into two broad classes, which however are not mutually exclusive; failure to exercise discretion and excess or abuse of discretionary power. *W. Friedman* refers to these two broad classes as (a) excess of statutory powers and (b) objectionable motives.[54] *Bernard Schwartz and H. W. R. Wade* in their comparative study of Judicial Control of Administrative Action in England and America [55] have classified them as follows:— "Fundamentally the court's jurisdiction rests on two distinct principles, excess of jurisdiction or *ultra vires* and error on the face of the record. If an act is within the powers granted it is valid. If it is outside then it is void. No statute is needed to establish this. It is inherent in the constitutional position of the Courts. A void act is commonly said to be *ultra vires* or without jurisdiction. In this context jurisdiction merely means legal authority or power".

"The Courts read the statute as containing an implied limitation that the administrative decisions shall be reasonable or that it shall conform to certain implied purposes or that particular facts exist. It is assumed that Parliament could not have intended otherwise. If therefore the implied restriction is violated, the act is just as unauthorised and void as the crudest excess of power.

In the *Bracegirdle* case[56] it was argued by the law officers of the Crown that the Order in Council gave absolute power to the Governor to make the order of deportation of a British subject from Ceylon as the section was wide in its terms and unambiguous, and that it could not be questioned in a Court of Law. All three Judges of this Court had no difficulty in holding that, on a proper construction of the Order-in-Council as a whole, the power could only be exercised in a state of emergency, that the Supreme Court was entitled to inquire whether the conditions necessary for the exercise of the power had been fulfilled, and there being no such state of emergency as contemplated in the Order-in-Council the order of deportation was invalid.

Abrahams C.J. remarked in the case "now this power claimed by the Learned Attorney-General is a very wide power, and if the legitimacy of the claim is admitted it means that from 5th August 1914 right down to the present day (19th May, 1937) then in the words of Mr. Perera there has been in contemplation of law no personal liberty in Ceylon"— (at 209).

It is undoubtedly true that, Parliament being sovereign and supreme, can vest absolute power in any executive authority, and so word the terms

[54] (1947) 10 Mod L.R. 384.

[55] Legal Control of Government — Bernard Schwartz and H. W. R. Wade 210.

[56] In re Mark Antony Lyster Bracegirdle (1937) 39 N.L.R. 193.

of the grant of such power as to exclude review by the courts on any ground whatsoever. However, as Lord Wilberforce remarked in the *Anisminic case* (supra) "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."

But if Parliament does so it must do it in clear and unambiguous language. "The wellknown rule that a statute should not be construed as taking away the jurisdiction of the Court in the absence of clear and unambiguous language to that effect now rests on a reluctance to disturb the established state of the law or to deny to the subject access to the seat of justice. "It is," he, (Viscount Simonds) said in another case "a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words. That is . . . a fundamental rule from which I would not for my part sanction any departure." [57]

The question is whether in respect of the matters in issue in these cases this has beeen done by Parliament. It is said that the new section 24 of the Interpretation Ordinance takes away from the courts power to issue an injunction to restrain Ministers and the bodies and persons specified in the section, in respect of acts done or intended to be done by them. That section in its entirety is as follows:—

"24 (1) Nothing in any enactment, whether passed or made before or after the commencement of this Ordinance, shall be construed to confer any court, in any action or other civil proceedings, the power to grant an injunction or make an order for specific performance against the Crown, a Minister, a Parliamentary Secretary, the Judicial Service Commission, The Public Service Commission, or any member or officer of such Commission in respect of any act done or intended or about to be done by any such person or authority in the exercise of any power or authority vested by law in any such person or authority:

Provided, however, that the preceding provisions of this subsection shall not be deemed to affect the power of such Court to make, in lieu thereof, an order declaratory of rights of parties.

(2) No Court shall in civil proceeding grant any injunction or make an order against an officer of the Crown if the granting of the injunction or the making of the order would be to give relief against the Crown which could not have been obtained in proceedings against the Crown."

[57] Maxwell — Interpretation of Statutes — 12th edition 58.

It is at once apparent that what the section does is to prohibit a court, notwithstanding anything in any other enactment, from issuing an injunction or from making an order for specific performance in respect of any act done or intended to be done, by any Minister, or body or persons enumerated therein, **in the exercise of any power or authority vested by law, in any such person or authority**. (The emphasis is mine). It enables a court, however, to issue a declaration in lieu thereof. It does not vest any authority or power in any such person to do any act. What the exact nature and scope of such authority or power, as to whether it is absolute or limited and if so in what respect, are all matters which have to be determined by an examination of the provisions of the statute or law which confers that power.

In these cases the act done or intended to be done is the acquisition of land, and the power or authority to acquire land is vested by the Land Acquisition Act (Cap. 460). It is therefore necessary to examine its provisions. Under this Act the Minister must first decide that land in any area is required for a public purpose. Having done so he is empowered to direct the Acquiring Officer to make investigations for selecting land for the public purpose (section 2). Provision is made for the payment of compensation if damage is caused in the course of such investigations (Section 3). Thereafter if the Minister considers that a particular land is suitable for a public purpose he should direct the Acquiring Officer to cause a notice to be given to the owners of the particular land (section 4).

If the owners object, the objections have to be condsidered and decided and then the Minister has to decide whether the land should or should not be acquired under the Act (sec. 4 (10), and when the Minister so decides he has to make a written declaration that such land is needed for a public purpose and that it will be acquired and direct the Acquiring Officer to cause such declaration to be published – section 5 (1). "A declaration made under subsection (1) in respect of any land or servitude shall be conclusive evidence that such land or servitude is needed for a public purpose" (section 5 (2)). There follow detailed provisions in regard to assessment, determination and payment of compensation.

Section 38 makes provision for the order called a vesting order, directing the Acquiring Officer to take possession of the land. The proviso to section 438 enables the Minister to take steps on occasions calling for urgent acquisition provided a notice under section 2 or section 4 has been exhibited. A vesting Order may subsequently be revoked if possession has not actually been taken, in pursuance of that order. It will be seen therefore that the power to acquire land is given only if the Minister considers that the land is needed for a public purpose. There are well-known principles of law which govern the exercise of this discretion, subjective though it is.

In particular the Courts are stringent in requiring that discretion should be exercised in conformity with the general tenor and policy of the statute and for proper purposes and that it should not be exercised unreasonably. In other words, every discretion is capable of unlawful abuse and to prevent this is the fundamental function of the courts. Unfettered discretion is a contradiction in terms. "Bernard Schwartz and H. W. R. Wade (at page 255).

If the repository of a power exceeds its authority or if a power is exercised without authority, such purported exercise of power may be pronounced invalid. The lawful exercise of a statutory power presupposes not only compliance with the substantive, formal and procedural conditions laid down for its performance but also with the implied requirements governing the exercise of that discretion. All statutory powers must be exercised (i) in good faith (ii) for the purposes for which they are given and not for an extraneous purpose (*iii*) with due regard to relevant considerations and without being influenced by irrelevant considerations and (iv) fairly and in some contexts reasonably.[58]

The term bad faith as used here as opposed to good faith, requires explanation. As Lord Somerville observed in the East Elloe case (supra) "*Mala fides* is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained in the region of the hypothetical cases. It covers fraud and corruption." So much so "that the reservation for the case of bad faith is hardly more than formality." Per Lord Radcliff in *Nakkuda Ali v. Jayaratne.*[59]

"It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorised purpose. Probably most of the recognised grounds of invalidity could be brought under this head; introduction of illegitimate considerations, the rejection of the legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage, or the gratification of personal ill will. However that may be, an exercise of power in bad faith does not seem to me to have any special pre-eminence of its own among the causes that make for invalidity. It is one of several instances of abuse of power and it may or may not be involved in several of the recognised grounds that have been mentioned." Lord Radcliff in East Elloe— at page 870. (supra)

But of course it is a recognised ground of invalidity. "Bad faith, dishonesty — those of course stand by themselves"— Lord Greene, M.R.[60] Its consequences are serious as Denning, L.J. pointed out in the Court of

[58] Halsbury 4th edition Vol. I paras 60, 62, 66

[59] (1950) 51 NLR 457 PC

[60] Supra (1948) IKB 228

Appeal; " No Judgment of a Court or order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is specially pleaded and proved. But once it is proved it vitiates judgments, contracts, and all transactions whatsoever."[61]

And finally "The concept of bad faith eludes precise definition, but in relation to the exercise of statutory powers it may be said to compromise dishonesty (or fraud) or malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. His intention may be to promote another public purpose or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise." (S. A. de Smith — page 315).

However a distinction has been made between an act without jurisdiction and an error within jurisdiction. Discretion implies that there is a choice and where the choice is made without any of the taints which go to jurisdiction then the courts cannot interfere with the choice of the Minister and say that he should have made the other choice and thereby substitute its own decision for that of the Minister, even if he is wrong. An official exercising the discretion committed to him must be at liberty to go wrong. It is inherent in discretionary power that it includes the power to make mistakes.

In the *Carltona Case* (supra) Green, M. R. said "Parliament which authorises this regulation commits to the executive the discretion to decide, and with that discretion if *bona fide* exercised, no Court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is, one which falls within the four corners of the powers given by the legislature and to see that these powers are exercised in good faith . . . apart from that the Courts have no powers at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction."

It is in this sense that the observations of T. S. Fernando, J. in *P. Kannusamy v. The Minister of Defence and External Affairs* [62] must be understood. He said, "where the Act permits the Minister to disallow an application where the Minister is satisfied that it is not in the public interest to grant it, I cannot conceive that Parliament intended that this Court should review a disallowance of an application by examining

[61] Lazarus Estates Ltd. v. Bearely (1956) 1 All E.R. 341 at 345 (1956) 1 QB 702.
[62] (1961) 63 N.L.R. 380

whether it is actually not in the public interest to grant it. Parliament clearly intended that the Minister should be the sole judge of the requirements of public interest. The decision of the Minister is a thing for which she must be answerable in Parliament, but her action cannot be controlled by the Court."

The Courts in Ceylon have given full effect to this principle where the act is within jurisdiction. In the case of *Government Agent v. Perera*[63] this Court held that it was for the Governor to decide whether a particular land was needed for a public purpose or not and that the District Court had no power to entertain any objection to it on the ground that it was not so needed. This decision was approved by the Privy Council in *Wijesekera v. Festing*.[64] This matter came up again in *D. H. Gunesekera v. Minister of Agriculture and Lands*.[65]

In a very short judgment of just twelve lines H. N. G. Fernando, J. (as he then was) said: "The consequence of the publication of the declaration (under section 5(1)) is that subsection 2 of section 5 operates to render the declaration conclusive evidence that the land was needed for a public purpose. The question whether the land should or should not be acquired is one of policy to be determined by the Minister concerned and even if that question may have been wrongly decided, subsection 2 of section 5 renders the position one which cannot be questioned in the Courts." Apparently in all these cases no question of excess or abuse of power was involved.

In the case of *Gamage v. Minister of Agriculture and Lands*[66] the question of the order of the Minister being null and void because the proposal for the said acquisition was motivated by personal and political animosity, as in these cases, and that it was therefore *ultra vires*, was raised. After the notice under section 2(1) of the Act had been given the Minister made an order under the proviso (a) to section 38. No conclusiveness attaches to the publication of the notice under section 2(1) unlike in the case of a declaration under section 5(1). Pathirana, J. with Rajaratnam, J. agreeing, held following the cases referred to by me above that the validity of the Minister's decisions could not be questioned in a Court of Law.

Pathirana, J., distinguished the two cases cited by counsel for the appellants in that case on the ground that certain public bodies were given powers to acquire land for certain specific purposes but the acquisition turned out in fact to be for other purposes not intended by the statute and motivated by some ulterior object. He said "It is different from a case

[63] (1907) 7 N.L.R. 313.
[64] (1919) A.C. 646.
[65] (1963) 65 N.L.R. 119.
[66] (1973) 76 N.L.R. 25.

where a public functionary is given the powers to decide something and pursuant to those powers the public functionary makes a decision in which case the Court cannot impose its own idea of what ought to have been decided as the statute intended the powers of decisions to lie elsewhere." – (at pages 30, 31.)

This is perfectly true if the decision whether right or wrong, was within jurisdiction. But in that case the challenge was for *ultra vires* on the ground of bad faith and improper purpose and it goes directly to jurisdiction and this aspect does not appear to have received any consideration. Cases are cited as illustrating the principles involved and not because they are on the identical facts. Acquisition of land to pay off a grudge, whether it be political or personal, or for a private purpose or no purpose at all when one can acquire only for a public purpose is equally in fraud of the statute as acquiring land for one purpose when power is given to acquire it for another purpose. The fundamental principle of administrative law and the general theory on which judicial control over administrative acts is based is the doctrine of *ultra vires*. If the grant of subjective powers takes away the consideration of the question of *ultra vires*, then the whole basis of judicial review of administrative actions is taken away.

The "conclusive evidence" clause also does not help at all. In the Anisminic case Lord Wilberforce said "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 legislature, the field within which it operates is marked out and limited. . . Equally, though this is not something that arises in the present case, there are certain fundamental assumptions which without explicit treatment 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 questions it has to decide) the requirement that a decision must be made in accordance with the principles of natural justice and good faith . . . . The question what is the tribunal area, is one which it has always been permissible to ask and to answer and it must follow that an examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability on its decisions." (Anisminic case, page 243 and 244.)

In the case of the Land Redemption Ordinance No. 61 of 1942 section 3 (4) sets out that "the question whether any land which the Land Commissioner is authorised to acquire under subsection 1 should or

should not be acquired shall, subject to any regulation made in that behalf be determined by the Land Commissioner in the exercise of his individual judgment" and "every such determination of the Land Commissioner shall be final". It was held by this Court in *Herath v. Attorney-General* [67] and in *Ladamuttu Pillai v. Attorney-General* (supra) that this subsection did not make final any decision made by the Land Commissioner in excess of the powers conferred by subsection 1.

In both these cases the Privy Council expressed agreement with this view. In the case of *Government Agent of Northern Province v. Kanagasunderam* (supra) the Government Agent acquired a portion of a building, although he was requested by the defendant to acquire the whole of the building. It was held that, as section 44 of the Ordinance provided that a part of a house shall not be compulsorily acquired, if the owner desires that the whole should be taken, the taking of possession of a part only of the building was unlawful and that the defendant was entitled to an injunction restraining the Government Agent or his agent from taking possession pending the determination of the action.

This question of the effect of a "conclusive evidence" clause was considered by the Supreme Court in India in the case of *Smt: Somawanti et al v. The State of Punjab* (supra) which was also a case under the Land Acquisition Act of India. Section 6(3) of the said Act states that a declaration made by the Government that a particular land is needed for a public purpose or for a company shall be conclusive evidence that the land was so needed. Mudholkar, J. who delivered the main judgment in the case said, "the conclusiveness is not merely regarding the fact that the Government is satisfied but also with regard to the question that the land is needed for a public purpose or for a company. Then again the conclusiveness must attach not merely to the need but also to the question whether the purpose is a public purpose or what is said to be a company is a company. There can be no need in the abstract. It must be a need for a public purpose or a company." (at page 160).

He then went on to say that the finality however was subject to one exception. "That exception is that if there is a colourable exercise of power, then the declaration will be open to challenge at the instance of the aggrieved party . . . If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all, the actions of the government would be colourable as not being relateable to the power conferred upon it by the Act and its declaration would be a nullity," (page 164) and that the declaration being vitiated by fraud it could not be protected by subsection 3 of section 6.

[67] (1958) 60 N.L.R. 193.

The Courts therefore can inquire into the question as to whether the Minister's decision is *ultra vires* the power or authority vested by law in him. If it is, then it is null and void and will remain as if it had never been done at all. Every case, in which the *vires* of an administrative action is challenged, involves the problem of statutory interpretation. There are really three main rules of interpretation, though with a number of sub rules, explanatory riders and technical rules. The first is the "Literal rule" which directs that plain words must be given their plain meanings. This is summed up in the words of Jervis, C.J. "If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense even though it does lead in our view of the case, to an absurdity or manifest injustice." [68]

Clearly a strict application of this rule would be manifestly unjust where it causes injustice and leads to absurdity and so "The Golden Rule" was developed. This means that the literal meaning of the words can be modified to avoid injustice or absurdity. This was done by Lord Reid in the case of *Luke v. Inland Revenue Commissions*[69] where he said "To apply the words literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result we must do some violence to the words . . . The general principle is well settled. It is only when the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

The third rule which is the oldest and also most suited to modern conditons is what is known as the "Mischief Rule". It is as follows: " that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

(1st) what was the common law before the making of the Act;

(2nd) what was the mischief and defect for which the common law did not provide;

(3rd) what remedy the Parliament hath resolved and appointed to cure the disease of the common law; and

(4th) the true reason of the remedy;

and then the office of all the judges is always to make such construction as will suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato*

[68] (1851) 11CB 378 at 391. [69] (1963) I All E.R. 655 at 664.

commodo and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*." (Heydon's case — supra.)

Formulated by the Barons of the Exchequer nearly four centuries ago it has been accepted, approved and followed ever since. Three centuries later Lindley, M. R. said, "In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."[70] It was applied in 1960 in the case of *Smith v. Hughes*.[71] In that case it was held that prostitutes who attracted the attention of passers-by from balconies or windows were soliciting in a street."

Lord Parker, C.J. said in that case "For my part I approach the matter of considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets to enable people to walk along the streets without being molested or solicited by common prostitutes." The learned Solicitor-General submitted that the words here were plain and unambiguous, and that we should give them their plain meaning. If however, there was any ambiguity in the sense that the words should be read subject to any or all of the presumptions of law in regard to excess of jurisdiction and ulterior purpose, then we should apply the Mischief Rule and interpret the enactment so as to suppress the mischief and advance the remedy.

He submitted that for this purpose we should look at the Hansard particularly at the Minister's speech and ascertain the intention of Parliament and to find out what the mischief was that was sought to be remedied and the history of the legislation. For my part I am of the view that we ought not to do so unless there is such great ambiguity in the words that looking at Hansard alone would be decisive. In the case of *Beswick v. Beswick* (supra) Lord Upjohn said "For purely practical reasons we do not permit debates in either House to be cited . . . Moreover in a very large number of cases such a search even if practicable would throw no light on the question before the Court. But I can see no objection to investigating in the present case the antecedents of S.C. 56." and he proceeded to refer to the proceedings of the Joint Committee of both Houses on the Consolidated Bills, merely to see that there was nothing in the proceedings which weakened the normal presumption against alteration of the previous law by the Consolidating Act. This was considered quite exceptional.

[70] In re Mayfair Property Co. (1898) 2 Ch. 28 at 35.

[71] (1960) 1 W.L.R. 830

The general rule today is quite clear. Parliamentary history of legislation is not a permissible aid in construing a statute. Quite obviously an Act is often the product of compromise, and the interplay of many factors, the result of this being expressed in a set form of words. The question may well arise in such a case as to whose intention it is that is thought to be relevant. Lord Denning's suggestion that the intention of Parliament and that of the Ministers should be considered was unanimously condemned by the Judges of the Court of Appeal in *Magor and St. Mellons, R.D.C. v. Newport Corporation* (supra).

In that case Lord Simmonds said, " It is sufficient to say that the general proposition that it is the duty of the Court to find out the intention of Parliament not only of Parliament but of Ministers also, cannot by any means be supported. The duty of the Court is to interpret the words that the legislature has used. These words may be ambiguous, but even if they are, the power and duty of Court to travel outside them on a voyage of discovery are strictly limited". (page 841).

In the case of *Assam Railways and Trading Co. Ltd. v. I.R.C.*[72] Lord Wright in the Privy Council with the other Lords concurring said "that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible . . . " Reports of Committees and Commissions may however be admitted for the limited purpose of finding out what was the mischief intended to be remedied, but not to show what the intention of Parliament was.

In the case of *Kodakan Pilla v. P. B. Mudannayake* [73] Lord Oaksey said " It is common ground between the parties and in their Lordships' opinion the correct view that judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed." The Report of the Soulbury Commission 1945 was looked into in that case, where the question involved was whether certain legislation was *ultra vires* or not. So also in another case when the question as to whether *mens rea* was an essential element of a particular statute Lord Reid who dissented in the case thought that it was necessary to go behind the words and look at other factors .[74]

As far as the mischief which was sought to be suppressed is concerned I accept the learned Solicitor-General's statement as to what it was; but I reject the invitation to go on a voyage of discovery to ascertain the intention of Parliament. It must be determined primarily from the words used in the enactment.

[72] (1935) AC 445 at 448. [73] (1953) 54 N.L.R. 433.

[74] Warner v. Metropolitan Police Commissioners (1968) 2 W.L.R. 1303.

In this connection Mr. Jayewardene mentioned the changes that had taken place in the Committee Stage of the Bill. I am equally clear that we cannot construe the Act by reference to these changes or to the original Bill. "The alterations made in it during its passage through Committee are as the Court said in *R. v. Hertford College* wisely, inadmissible to explain it". In *Herron v. Rothmines et Commissioners*, Lord Haslbury, L.C. said with reference to the construction of a local Act "I very heartily concur in the language of Fitz Gibbon, L.J. that we cannot interpret the Act by reference to any Bill nor can we determine its construction by reference to its original form.[75]"

Undoubtedly for a proper application of the "Mischief Rule" of interpretation it is necessary for us to look at what the previous law was, what the mischief intended to be suppressed was and what remedy has been provided by Parliament. In regard to the first we do not need to look at what this Member or that Minister said in Parliament to find out what the law was. The Judges are the best persons who should know what the law was or at least they ought to. As for the second, if the mischief had reached such proportions as to require Parliamentary intervention then it would be a matter of common knowledge and Judges would be well aware of it. Lord Parker said in *Hughes v. Smith*, (supra) "Everybody knows . . . " As I have said I am however, prepared to accept the statement from the bar by the learned Solicitor-General as to what the mischief intended to be remedied in these cases was. What the remedy provided by Parliament was is a matter which has to be gathered by what it has said in the enactment itself.

In my view here the words are clear, precise and unambiguous. We add or subtract nothing from them. We are only construing them subject to "the fundamental assumptions which without explicit restatement in every case necessarily underlie every remission of a power and which are as much part of a statute as its express words, namely that they shall be exercised *bona fide* and for the purposes for which they were entrusted by Parliament to such repository. This is so not because the words are not clear but because the law requires it. As stated earlier the fundamental principle of administrative law is the doctrine of *ultra vires* and the source of this principle is the common law as laid down in decided cases by the Judges.

If Parliament intended that these fundamental principles should not apply in this case it should have said so in clear and unmistakable language, or it must arise by necessary implication from the words used in the enactment. " To alter any clearly established principle of law a distinct and positive enactment is necessary."[76] And again " If it is clear that it was the intention of the legislature in passing a new statute to abrogate the

[75] Craies on Statute Law 7th edition 129. [76] Ibid 121.

previous common law on the subject, the common law must prevail, but there is no presumption that a statute is intended to override the common law. In fact the presumption, if any, is the other way for the general rule in exposition is this, that in all doubtful matters and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature for statutes are not presumed to make any alteration further or otherwise than the Act does expressly declare".[77]

There are here no express words taking away the *ultra vires* rule. Nor can I find anything in the words from which this can be necessarily implied. In fact all the evidence in the words of section 24 points in a contrary direction. The omission of the words "purported" or the use of some such words as "ostensible" or "apparently" in relation to the words "act done, intended or about to be done" and the inclusion of the words "in the exercise of any power or authority vested by law" can only mean that the rule in regard to *ultra vires* was intended to apply.

The learned Solicitor-General submitted that the mischief which was sought to be remedied was the delay caused in the implementation of Government policy particularly in regard to village expansion and land reform, by the filing of these actions and the issue of interim injunctions restraining the Minister or other state servant from proceeding with the acquisitions. He said that actions were filed on the flimsiest grounds of *mala fides* which is easy to allege but almost impossible to prove, interim injunctions obtained for the mere asking, and then various devices were adopted to keep the case going in the hope that a change of Government at the next General Elections would result in the acquisitions being abandoned. He said that there were eighty odd such cases pending in the Courts in the island today.

Even if there is some ambiguity in the words of the enactment, and I say that in this respect there is none, then although the rule in regard to the Court adopting a construction which will suppress the mischief and advance the remedy is a valid one, yet in this case there is another equally valid rule of construction which prevents us from doing so, namely that a construction should be adopted which will prevent the abuse of power. To give such a construction would be to enable the repository of the power when acquiring land for a public purpose to do so for an ulterior purpose or no purpose at all and even to act corruptly, capriciously or arbitrarily.

[77] Ibid 339.

I do not say that Parliament cannot confer such arbitrary powers. It can. But if it does so it must do it in clear and unambiguous language or at least use such words as leave no room for doubt that it has done so by necessary implication. As I have pointed out there are no such words here. "Enactments which confer powers are so construed as to meet all attempts to abuse them, and so the courts will always be ready to inquire into the *bona fides* of a purported exercise of a statutory power. The modern tendency seems to be against construing statutes so as to leave the person or body upon whom a power is conferred absolutely untrammelled in the exercise of it."[78]

In the case of *Padfield and others v. Minister of Agriculture, Fisheries and Food et al.* [79] the House of Lords decisively rejected the Minister's claim to unfettered discretion. In this case which has been hailed as a landmark in British Administration Law (see The Myth of Unfettered discretion[80]) the statute provided for complaints by milk producers against the Milk Marketing Board to be referred to a committee of investigation "if the Minister in any case so directs". The Minister refused to refer a complaint. The House ordered him to do so. In the course of the speeches Lord Pearce said, "He (the Minister) cannot simply say albeit honestly 'I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth, I shall therefore never refer anything to the committee of investigations'. To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament namely that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament." (at page 714).

So here we cannot adopt an interpretation under the guise of suppressing the mischief and advancing the remedy which will in effect give the repository of the power absolute and arbitrary power which Parliament never did give and can never be intended to have given unless the words used clearly say so. I do not wish to be understood as saying that the Minister has done or will act in this unreasonable way. All I am saying is that to adopt any other interpretation would only make it possible for anyone, so minded, to do so. We cannot do this without the express or necessarily implied permission of Parliament. When Parliament has chosen not to say that no injunction shall issue whether the act is done *bona fide* or *mala fide* it is beyond our power to say so.

[78] Maxwell – Interpretation of Statutes 146.
[79] (1968) 1 All E.R. 694.
[80] (1968) L.Q.R. 166.

It may be that there have been cases which have dragged on for some years. But there are built-in safeguards against delay. The Land Acquisition Act provides in section 51A for the giving of priority to cases under the Act and State Counsel can always insist on this right. As I have pointed out at least in two of these cases trial had been fixed within two weeks of the filing of answer and objections. In England in one case a trial was concluded within three days[81] and in another within three weeks[82] from the date of the issue arising. The streamlining of procedures under the legal reform carried out by the Minister of Justice and the new sense of urgency which now pervades our courts in regard to the avoidance of delays will all lead to elimination of further delays in the disposal of cases.

Interim injunctions are only issued *ex parte* where there are strong grounds and where all necessary facts are disclosed, and the plaintiff shows that there is a serious matter to be tried[83] and where irreparable harm or damage would be done to him if the interim injunction is not issued.

In considering this question of harm or damage it is a well-recognised principle of injunction law that the balance of convenience to the parties and the nature of the injury which the defendant on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the plaintiff on the other hand might sustain if the injunction is refused and he should ultimately turn out to be right, should be taken into consideration.[84] Quite obviously different considerations would apply where the state is a party than when it is a mere matter between private individuals. It may be that when an act is done in the interests of the state and the welfare of the people as a whole some harm or damage would inevitably be the result to purely private interests and in such case the rights of the individual have to be sacrificed in the larger interests of the community as a whole. So also in times of emergency or great national cataclysms such as floods, famine, and pestilence urgent and immediate action would be necessary. In such cases too, applying the principle of "balance of convenience" the courts would not cause delay by issuing interim injunctions even if some individual or individuals have to suffer irreparable harm or damage. Where the material relevant to the

[81] Marsh (Wholesale) Ltd. v. Customs and Excise Commissioners (1970) 2 QB 206.

[82] Lee v. Department of Education and Science (1967) 66 L.G. R. 211.

[83] D. S. Dissanayake v. Agricultural and Industrial Corporation (1962) 64 N.L.R .283.

[84] Yakkaduwe Sri Pragnarama Thero v. Minister of Education (1962) 64 N.L.R. 283.

substantial dispute is wholly or mainly relevant to the application for interim relief the court can proceed to trial and inquiry into the application for interim relief at one and the same time[85] where the defendant is prejudiced by the grant of an interim injunction he can come by way of appeal to this Court[86] or in urgent cases by way of an application in revision as was done in two of these cases.[87] I therefore see little merit in the submission that some delay in the implementation of government policy in the circumstances of these cases is such a vital factor that we should give to the section an interpretation in order to avoid delays even if such an interpretation should mean that the executive would have absolute and autocratic powers to act as it pleased.

Indeed as Mr. Athulathmudali submitted we are prevented by the Republican Constitution from giving an interpretation which would give the impression of promoting or sanctioning acts done corruptly and *mala fide* and thereby helping to promote the moral and cultural depravity of the people. Section 16(1) sets out the principles of state policy which should guide the making of laws and the governance of Sri Lanka which includes the administration of justice. Section 16(2) (f) sets out one of these principles as follows "raising the moral and cultural standards of the people". One cannot do these by setting the seal of judicial or for that matter legislative approval on corrupt or *mala fide* acts or by seeming to do so and thus opening the door wide for the commission of such acts.

The learned Solicitor-General submitted that there was not one single case which had succeeded on the ground of *mala fides*. Mr. Jayawardene said that when objections were pressed the government had abandoned the acquisitions and these matters did not therefore come up for decision. The Solicitor-General said that when the law officers of the state found that the acquisition were not justified they had advised against acquisition. This may be one reason why there are no such cases. Another was suggested by Lord Radcliff in the East Elloe case when he said "Indeed I think it plain that the Courts have often been content to allow such circumstances (i.e the grounds for invalidity) if established to speak for themselves rather than to press the issue to a finding that the group of persons responsible for the exercise of the power have actually proceeded in bad faith" – (at page 870).

[85] Richard Perera & Others v. Albert Perera (1963) 67 N.L.R. 445 at 449.
Murugesu v. N. D. A. P. Co-operative Union Ltd. (1952) 54 N.L.R . 517.

[86] The Ceylon Hotel Corporation v. V. C. Jayatunge (1969) 74 N.L.R. 442.

[87] SC 290/74 and 291/74.

If the Solicitor-General's submission is restricted to *mala fides* in the sense of corruptly and fraudulently it may be that it would be difficult to find a case where such an allegation had succeeded. But if it is used in the wider sense of covering most of the grounds of invalidity in the sense of fraud on the statute or the Roman Dutch Law concept of *fraudem legem* then there are many cases to be found in the books. We have in the course of the argument been referred to a very large number of cases from many jurisdictions and in some of which ouster clauses properly so called were involved. It is not necessary to refer to all of them but a few call for comment.

It is best to begin with the recent triology of Ceylon cases dealing with the emergency regulations. Regulation 18(1) of the Emergency (Miscellaneous, Provisions and Powers) Regulations No. 6 of 1971 enabled the Permanent Secretary to the Minister of Defence and External Affairs to make an order for the detention of a person if he is of opinion that such order is necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order.

Regulation 19(1) of these regulations confers power on any police officer, any member of the Ceylon Army, Royal Ceylon Navy or Royal Ceylon Air Force, or the Commissioner of Prisons and certain other persons to search, detain for purposes of such search or arrest without warrant any person

(a) who is committing an offence under any Emergency Regulation
 or
(b) who has committed an offence under any Emergency regulation
 or
(c) whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any Emergency Regulation.

Regulation 18(10) sets out that an order for detention made by the Permanent Secretary under Regulation 18(1) shall not be called in question in any court on any ground whatsoever. Regulation 55 excludes the application of section 45 of the Courts Ordinance. Then section 8 of the Public Security Ordinance (Cap. 40) states "No emergency regulation and no order, rule or direction made or given thereunder shall be called in question in any Court". Regulation 18(10) therefore is merely repetitive or tautologous.

In the first of these cases (supra) one Hirdaramani was detained by order, made by the Permanent Secretary under Regulation 18(1). His detention was challenged by a Writ of Habeas Corpus on the ground that the detention was not for a purpose authorised in the regulation but for an extraneous or ulterior purpose namely the facilitating of the investigation into certain contraventions of the Exchange Control Act and other laws and therefore *mala fide*. A Divisional Bench of three Judges of this Court held unanimously on a consideration of affidavit evidence, that *mala fides* on the part of the Permanent Secretary had not been established as a question of fact. It was also held by de Silva, S. P. J. and Samarawickreme, J. (Fernando, C. J. dissenting) that Regulation 55 was not applicable to persons unlawfully detained.

Silva, S. P. J. cited by way of example a person who was sentenced to imprisonment for attempted murder of the Permanent Secretary and who in prison made known his intention to do what he had earlier failed to achieve when he got out of jail. Then if on his release the Permanent Secretary made an order for his detention under Section 18(1) for his own personal safety it would not be open to this Court to say that it will not question this order because of the prohibition contained in Regulation 55. Samarawickreme, J. cited a more felicitous example. He said "For example, the order would not be in terms of the Regulation and would be a sham if the Permanent Secretary were to make it for a purely private purpose such as the detention of the rival to the woman he loved" - (at page 112).

H. N. G. Fernando, C.J. thought that since the power was vested in a person specially selected by the Prime Minister and one in whom she would have had absolute confidence and since there was appeal to her there were sufficient safeguards against abuse and so Regulation 55 was intended to be absolute. He also thought that here we had done something which in the words of Lord Wilberforce had so far not been done in England. This of course was dependent on the presumption that the Permanent Secretary would always act in good faith. But if he did not, what then? Could it be said that the intention of the Governor-General was that even such an act was beyond the reach of the Courts? Whatever be the degree of confidence one may have "Every discretion is capable of unlawful abuse, and it is the Court which must decide where this point is reached. Only within its lawful boundaries is discretion free".[88]

[88] Wade — Administrative Law 3rd Edition 78.

The second of these cases was *Gunasekera v. de Fonseka* [89]. Here another Divisional Bench of this Court had no difficulty in holding that the arrest of a detainee by a Police Officer on the orders of his superior was unlawful because he himself had no reasonable ground for suspecting the detainee to be concerned in or to be committing or have committed an offence. On the very day of his release on the orders of the Supreme Court the detainee was again arrested on an order made by the Permanent Secretary acting under section 18(1) while the detainee was in the Colombo Law Library having consultations with his lawyers.

This gave rise to the third of these cases — *Gunasekera v. Ratnavale* (supra). Another Divisional Court held unanimously that the petitioner had not established *mala fides* on the part of the Permanent Secretary. They then went on to consider the exclusion clauses. Alles, J. agreed with the dissenting view of H. N. G. Fernando C. J. while Wijayatilake, J. agreed with the majority view in Hirdaramani. Although the head-note says that Thamotheram, J. was of the same view as Alles, J. yet I am far from clear in my own mind about this. It is true that he said at page 366 " I have quoted these passages from the three Lords in the East Elloe case who held in the face of a section like 8 of the Public Security Ordinance it was not open to Court to inquire into an allegation of *mala fide* when the determination or order in question was *prima facie* valid. With all respect I agree with their reasoning".

But earlier he said "Where the connection between the subject-matter of the power to be exercised and the purposes prescribed by a statute is expressed to be determinable by the Competent Authority all that the Court can do is to see that the power which it claims to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith" – at page 363. Then he goes on to say that challenging an order under section 18(1) is almost an impossibility and that therefore judicial review has been reduced to a formality.

But he concludes this part of his judgment by saying "But it is clear that the jurisdiction of the Court is only taken away provided that the order on which the government is relying is an order 'made under the Ordinance'. It must be made by the detaining authority in the proper exercise of its power. It would not be an 'an order' made under the Ordinance if it was made merely in the colourable exercise of its power or if the detaining authority exceeded the powers given to it under the Ordinance ... The order must not be made for an ulterior purpose, a purpose which has no connection with the security of the State or the efficient prosecution of the war".

[89] (1972) 75 N.L.R. 246.

These three cases dealt with Emergency Regulations, like the "peculiar"[90] case of *Liversidge v. Anderson*[91] during the war when the House of Lords, by some process of mental gymnastics, held that the words "if a man has" are equivalent to saying "if a man thinks he had" thus turning an objective test into a purely subjective one. These were cases which related to an unprecedented state of emergency in Ceylon, when Courts are prone to give an interpretation which will not unduly hinder the government in taking measures for the security and safety of the state. Nevertheless it is clear that these three cases preserved the right of the Court to intervene in the case of *ultra vires* action even though wide language was used in the privative clauses.

In two cases the Supreme Court in India held that *mala fides* had been established against Chief Ministers of State Governments, one being an act of political revenge and the other out of personal animosity. In the case of *C. S. Rowjee v. The State of Andra Pradesh*[92] the question involved was the nationalisation of bus services in particular areas in the State. A Committee had laid down criteria for determining the area to be taken up for nationalising the bus services and had laid down the order in which this should be done. This order was accepted by the corporation after detailed consideration in February 1961 and was embodied in its annual report dated 24.3.1962 and was published in April, 1962.

Under the Act it was the Corporation which had to form the "opinion" that for the purpose of providing an efficient, adequate, economical and properly co-ordinated transport service it should be run and operated by the State Transport undertaking and to be "satisfied" that such services should in the public interest be provided for any area or route. The fact that the Corporation had accepted the report of the Committee and had published it showed that they had formed the "opinion" and were "satisfied" that nationalisation should be proceeded with in the areas in the order set out.

The General Elections were held in the State in February, 1962. The Chief Minister and his party candidates were contested by the bus operators in Kurnool. The Chief Minister assumed office on 12th March, 1962, and on 19th April, 1962 he had a conference with the corporation officials and he suggested that the order in which the areas should be taken up for nationalisation should be changed and that the area in which the plaintiffs operated their buses should be taken up first.

[90] Ridge v. Baldwin (1964) A.C. 40 at 73. [91] (1942) A.C. 206.
[92] (1964) 51 A.I.R. S.C. 962.

On 4.5.1962 the Corporation adopted a resolution changing the order. The plaintiffs then brought this action challenging the action on the ground of *mala fides* in that the action was taken on account of political rivalry and in order to ruin financially the Chief Minister's political opponents and not for the purpose of the Ordinance.

Ayyangar, J. in the course of his judgment said at page 972 "The first matter that stands out prominently in this connection is the element of time and the sequence of events". He went on to say "What the Court is concerned with and what is relevant to the inquiry in the appeals is not whether theoretically or on a consideration of the arguments for and against now advanced the choice of Kurnool as the next district selected for nationalisation of transport was wise or improper but a totally different question whether this choice of Kurnool was made by the Corporation as required by section 68(c) or whether this choice was in fact and in substance made by the Chief Minister and implemented by him by utilising the machinery of the Corporation as alleged by the appellants. On the evidence placed in the case we are satisfied that it was as a result of the conference of 19.4.1962 and in order to give effect to the wishes of the Chief Minister expressed there that the schemes now impugned were formulated by the Corporation" – (at 978).

It is possible to regard this case as one where an authority entrusted with a discretion had in the purported exercise of its discretion acted under the dictation of another body or person, in which case such an act would also be invalid. Yet in this case the Chief Minister had claimed in Parliament the right to lay down general principles of policy for the guidance of the Corporation and in changing the order he was acting for purposes of political revenge and to ruin his political opponents financially, and not for the purposes of the Act.

The other case is *Pratap Singh v. The State of Punjab* (supra) where the Supreme Court held that the act in question was not for the purpose of the enabling statute but in order to wreak personal vengeance. The Petitioner in that case was a Civil Surgeon in the employ of the State Government and in 1960 he fell from favour of the Chief Minister over his treatment of the Chief Minister's son and because he was not prepared to accommodate the Chief Minister's wife in her demands for drugs. He therefore decided to retire and in December he was granted leave preparatory to retirement on reaching 55 years which was on 15.6.1961 and this grant of leave was gazetted on 21.1.1961.

On 15.1.1961 a weekly, The Blitz carried an article against the Chief Minister and which contained all the allegations of fact relied on by the petitioner in the case. On 18.3.1961 his wife wrote to The Blitz confirming the allegations and in the same month she circulated among the members of Parliament all these allegations. On 3rd June 1961 the

Chief Minister who was also the Minister of Health revoked the order granting leave, made order calling the petitioner back to service and suspending him pending inquiry into certain allegations in regard to his conduct while he was in service.

The Supreme Court held by a majority of three to two that the impugned orders were made to wreak vengeance and that the impugned orders were vitiated by *male fides.* In the course of the judgment it was said "the attack on the orders may be viewed from two related aspects – of *ultra vires* pure and simple and secondly as an infraction of the rule that every power vested in a public authority has to be used honestly, *bona fide* and reasonably . . . where a power is exercised for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power in legal parlance it would be a case of fraud on a power though no corrupt motive or bargain is imputed (page 82).

In the Canadian case of *Roncarelli v. Duplessis* (supra) the appellant was the owner of a restaurant in a busy section of Montreal and for a continuous period of 34 years had a liquor licence which was necessary for the financial success of his restaurant business. He became involved with a religous sect known as the Witnesses of Jehovah. There was violent reaction to this sect and meetings were broken up, property damaged and individuals ordered out of communities by the Roman Catholics. The provincial administration decided to act and large-scale arrests were made of persons selling the publications of the sect for peddling wares without a licence.

Out of about 1000 persons so arrested about 380 were bailed out by the appellant and promptly went back to selling the publications again. Mounting resistance stopped surety bail and imposed cash bail and other means of crushing the movement were sought. One of the matters looked into was the appellant's position and his use of money which he obtained from profits of the liquor licence, a privilege given by the State, to further the movement.

Under the Act the cancellation of a permit was in the discretion of the liquor Commission and the appellant's licence was cancelled and application for renewal refused. It was held that the cancellation was malicious and not for the purpose of the Act by a majority of six to three. In the course of his judgment Real J., said "from the evidence of Mr. Duplessis and Mr. Archaubault (of the Liquor Commission) it appears that the action taken by the latter as general manager and sole member of the Commission was dictated by Mr. Duplessis as the Attorney-General and the Prime Minister of the province and that step was taken as a means of bringing to a halt the activity of the Witnesses, to punish the appellant for the part he had played, not only by revoking the existing licence but in declaring him barred from one for ever, and to warn others that they similarly would be stripped of provincial privileges if they persisted in the activity . . ." (pages 133,134).

He continued "A decision to deny or cancel such a privilege lies within the discretion of the Commission, but that means that decision is to be based upon weighing of considerations pertinent to the object of the administration. No legislative Act can without express language be taken to contemplate an unlimited, arbitrary power exerciseable for any purpose, however capricious or irrelevant regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes, but they are always implied as exceptions. Discretion necessarily implies good faith in public duty; there is always a perspective within which a State is intended to operate and any clear departure from its lines or objects is just as objectionable as fraud or corruption." (Page 140).

"What could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawing . . ." (page 141), and again "a punishment which inflicted on him as it was intended to do, the destruction of his economic life as a restaurant keeper within the province."

It was also held that since it was a malicious act no malice under section 88 of the Canadian Civil Procedure Code was necessary and the defendants were ordered to pay $ 33,123.53 cts. as damages. It was an action in tort like the Ceylon case of *A. K. David v. M. A. M. M. Abdul Cader* (supra) which held that an applicant for a statutory licence to run a cinema was entitled to damages if there has been a malicious misuse of the statutory power to grant that licence. But the essential thing in both cases was that a malicious misuse of discretionary power was held to be *ultra vires* and null and void, where the public authority was acting unlawfully but without committing an actionable wrong or tort then the aggrieved party would only be entitled to a declaration. But if the public authority acted unlawfully and also committed an actionable breach of duty, such authority would also be liable in damages.

Australian Courts too have taken the same view. In the case of the *Municipal Council of Sydney v. Compwell et al*[93] the Municipal Council had statutory power to acquire land for extending streets and also for carrying out improvements in or remodelling any portion of the city. In June the Council acquired land for the extension of a street and an injunction was issued on the ground that the acquisition was not for that purpose but for the purpose of getting a benefit from the increment in the value of the land in consequence of the acquisition.

[93] (1925) A.C. 338.

In November another resolution was adopted to acquire the identical land for the improvement and remodelling of the area in the vicinity as well as for the extension of the street. At that time the Council had no plan for improvement or remodelling the area and no such plan was ever considered or proposed to the Council. It was established in evidence that the wording of the November resolution was suggested by the Council's solicitors. The Privy Council held that the new proposal was also for the identical purpose, that the area affected was identical and that the acquisition was invalid because "a body such as the Municipal Council of Sydney, authorised to take land compulsorily for specified purposes will not be permitted to exercise its powers for different purposes and if it attempts to do so Courts will interfere"– (at page 343).

In *King v. Hickman ex parte Fox & Clinton*[94] the Court had to consider the effect of an ouster clause. This was in the widest possible terms and set out that a decision of the Board "shall not be challenged, appealed against, quashed or called into question or be subject to prohibition, mandamus or injunction in any Court on any account whatever." The question was whether a particular matter was within the ambit of the "coal mining industry." The Court held that any decision which upon its face appears to be within power and is in fact a *bona fide* attempt to act in the course of its authority shall not be regarded as invalid. But prohibition would lie in respect of a decision of a Board on an erroneous finding that the matter was within the ambit of that industry.

The position is identical in South Africa where as in Ceylon the Roman Dutch Law prevails. In the case of *Van Eck N.O. and Van Rensburg N.O. v. Etna Stores*[95] certain quantity of bags of rice were seized under a war time measure which gave power to effect such seizures as may afford evidence of a contravention of any prohibition or failure to comply with any requirements imposed by virtue of these regulations. The seizure however though ostensibly for this purpose was in reality to obtain delivery of the rice for the furtherance of the food distribution scheme. The Court held that it was illegal although officers had acted out of good motive.

Davies A.J.A., said, "To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another is an abuse of that power and amounts to *mala fides*. For to profess to make use of a power which has been given by a statute for one purpose only, while in fact using it for a different purpose is to act in "fraudem legis" as distinct from merely using it for another purpose which is "contra legem".

[94] 70 C.L.R. 598.

[95] (1947) 2 S.A.L.R. 984.

The law in regard to where Courts will interfere with the exercise of its revisionary powers was set out in the case of "*The African Reality Trust Ltd., v. Johannesburg Municipality* (supra) Wessels J., said at page 913, "We also agree with him (Bistowe J.,) where he says, "If a public body or individual exceeds its powers the Courts will exercise a restraining influence and if while ostensibly confirming itself within the scope of its powers, it nevertheless acts *mala fide* or dishonestly or for ulterior reasons which ought not to influence its judgment or with an unreasonableness so gross as to be inexplicable except on the assumption of *mala fides* or ulterior motive, then again the Courts will interfere. But once this decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the Court has no functions whatever."

In the case of *The Minister of Justice et al. v. Musarurwa and Nkomo et al.* (supra) the Minister by using the provisions of two Acts and doing acts permitted by each achieved the purpose of detaining a person which he could only have done under a third Act. It was held that this was unlawful as it was for an ulterior motive and/ or in excess of his powers although it was done *bona fide*. Two decisions of the House of Lords in England loomed large in the argument before us. The first was *Smith v. East Elloe* (supra), where the validity of the orders for compulsory purchase of land was challenged as being wrongful and in bad faith. Under the 1946 Act an aggrieved party could question the order within a period of six weeks under para 15 of the schedule on the ground that the authorisation of the compulsory purchase, "is not empowered to be granted" under the relevant Act or that the requirements of the 1946 Act have not been complied with. Para 16 provided "subject to the provisions of the last foregoing paragraph a compulsory purchase order. . . shall. . .not be questioned in any legal proceedings whatever."

The plaintiff did not question the order within the six weeks period. Applying the literal test Viscount Simmonds, Lord Mortor of Heirylon and Lord Radcliff were all of the opinion that the meaning of the words used in para 16 was too plain to be qualified by any presumption in regard to bad faith prayed by the plaintiff. The minority, Lord Reid and Lord Sommerville of Harrow held that they were not plain enough to deprive a person defrauded of his remedy.

Thus the House of Lords held in this case that all that the Court could do was to follow the plain meaning of the plain words of the ouster clause though there were numerous conflicting opinions on what the plain meaning was, and though a minority of their Lordships were prepared to hold that there was an implied exception for fraud, none of the relevant case law relating to the Courts' disregard of "no certiorari clauses" and issuing certiorari to quash for excess of jurisdiction and other decisions in regard to the fundamental principles of enforcing jurisdictional limits were cited or

considered. "It cannot often be that the House of Lords decides an appeal without any mention of the main principle of law which ought to be in issue. Had reference only been made to the decisions holding that a no certiorari clause will not bar certiorari in case of fraud, the whole case would have been put in a different light." (H. W. R. Wade).

In regard to the unsatisfactory results of the case Wade says that according to this decision, "many kinds of unlawful action are not challengeable even within the six weeks. This extraordinary conclusion would allow uncontrollable abuse of the statutory power and is clearly contrary to principle."[96] This case has now been repudiated by the House of Lords in Anisminic and has not been followed by the Indian Supreme Court.

However, it remains in the books and has recently been followed in the case of *Routh v. Reading Corporation,* where the Court of Appeal without making any reference to Anisminic, held in 1971 that a compulsory purchase order could not be challenged even on the grounds of bad faith outside the prescribed time limit. In 1973 in the case of *Jeary v. Chailey,* Orr L.J., said in reference to an ouster clause in the 1962 Town and Country Planning Act that it was common ground that it "does not apply where the planning authority in serving the ejectment notice acted outside the statutory powers conferred upon them." These reports are not available here, but the facts are taken from 1974 March Modern Law Review, page 222.

However, it now seems clear that the ouster clause will be treated as a statute of limitation, though the time allowed was described by Lord Radcliff as being "pitifully inadequate." Wade states "The House of Lords appear to assume that the verbal similarity between the Anisminic and East Elloe types of ouster clauses means that they must be construed similarly. But where access to the Courts is restricted only in terms of time, the Court might reasonably treat the provision merely as a statute of limitation. On this basis the conflicting decisions of the House of Lords could to some extent be reconciled. (supra 50).

In fact earlier in *Uttoxeter UDC v. Clarke et al*[97] although on the facts it was held that the acquisition was not for an ulterior purpose, para 16 was given a literal meaning but treated as a statute of limitation. The Court said at page 1321, "In its wisdom Parliament appears to have decided that the provision of a limited period within which the action of the authority and Minister can be questioned before the Court is a suitable procedure in cases such as the present and if H.M's lieges do not adopt the procedure laid down by Parliament, they cannot seriously suggest that they are suffering if having

[96] Wade – at 346, 347.

[97] (1962) 1 All E. R. 1318.

laid by and let the time run out, they then seek to develop an argument against the propriety of the order."

This was also the basis on which Wijayatilake J., distinguished the East Elloe Case from the ouster clause he was dealing with in the second Gunasekera case. He said "there the party affected had a right which was not exercised within a set period. In my opinion the rules of interpretation in that case should not be extended to a case such as this where the very right to question the order is challenged and there is no question of prescription."

It was stated in the East Elloe Case that no real hardship was caused to the plaintiff because if she could establish bad faith on the part of any official, she could proceed personally against such official. However, it was from the outset doubtful if on the facts the plaintiff in that case could have succeeded. Her property was requisitioned for housing evacuees in 1940, and a compulsory purchase order was made in 1948 but it was not derequisitioned till 1951. She brought an action for damages in 1952 and succeeded in getting £850/ as damages for trespass. She challenged the compulsory purchase order only in 1954, six years later when her house had been demolished and Council houses had already been put up.

It is also interesting to note that in subsequent proceedings against Pywell the clerk concerned of the Council and a representative of the Ministry for damages for conspiring to injure, her action was dismissed, Diplock J., holding that there was no conspiracy, that damages for trespass had already been recovered and he was not satisfied that the clerk had in fact acted in bad faith. These cases are not reported but the facts have been taken from S. A. de Smith[98] and Hood Phillips.[99]

The effect of this case is, as has been pointed out in Halsbury that, "if however, public works had been constructed or third party rights had accrued on a site subject to a compulsory purchase order, on the assumption that the order was impregnable, it is unlikely, despite the decision in Anisminic, that a Court would countenance a challenge to the order outside the statutory period.[100]

In the Anisminic case the principle enunciated was that a statute, by providing that a determination or an order of an authority or body cannot be challenged in legal proceedings, does not prevent the Courts from holding a determination or order to be a nullity for being outside, the jurisdiction of the

[98] (1956) 18 Mod. L.R. 541

[99] Leading Cases in Constitutional & Administrative Law – notes 396, 397.

[100] Halsbury 4th Edition Vol. 1 pg. 25 para 22.

authority or body. In regard to this, the House was unanimous but as to whether the error was within jurisdiction or not the House was divided three to two. In this case, the House of Lords has made it perfectly clear that nullity is the consequence of all kinds of jurisdictional error, e.g. breach of natural justice, bad faith, failure to deal with the right question, and taking wrong matters into account. So much so that Lord Diplock said "Current trends may soon enable us to say of the English system, there is no question that cannot be turned into a jurisdictionable question."

This decision has been critcised for stretching the doctrine of *ultra vires* to an extreme point, and that it leaves the Commission with virtually no margin of legal error, It comes perilously close to saying that there is jurisdiction if the decision is right. But none if it is wrong. D. M. Gordon Q.C., of the Victoria Bar points out that "one may well conclude that this case supplies another instance of the familiar phenomenon – a hard case making of bad law".[101] Since the amount involved in this case was £ 4 million it has also been called a "value judgment."

But the Courts are no more willing to see injustice done by misapplication of the law than by technical excess of power. The Courts are entitled to apply the rule of interpretation against interpreting a law against causing injustice, if it can be done. Wade points out, "Whether there is excess of jurisdiction or merely error within jurisdiction, can be determined only by construing the empowering statute which will often give little guidance, it is really a question of how much lattitude the court is prepared to allow, and when as in the Anisminic case, a claim worth £ 4 million appears to have been wrongly rejected, the Court will naturally be disposed to intervene."[102] This will equally be true where state programmes are involved and will be allowed to prevail over private interests if the welfare of the people as a whole demands it.

It may indeed be that the flexibility of the rules of interpretation has enabled judges to import into their decisions their own preconceived notions of what is reasonable and what is fair and just in the social and economic fields, and this may have resulted in a few bad decisions. Friedman points out that "Even without the abundant illustration of contradictory judicial approaches to the interpretation of statutes it is patent that these three rules cancel each other out. By emphasizing either the one or the other the judges can adopt a broad or narrow approach, a reformist or conservative attitude."[103]

[101] (1971) 34 Mod. L.R. 11.

[102] Canadian Bar Review (1947) 1277.

[103] Administrative Justice (1971).

In his **Tagore lectures** in Calcutta University in 1970[104] quoting from Berjafield and Whitmore's principles of Australian Administrative Law he points out the dangers of extending the scope of judicial review indefinitely and in a manner which defies definition. He was there concerned with making a plea for a developed and ascertainable body of administrative law which until recently had been rejected as being alien to the principle of the unity of the common law. Dicey rejected its existence; Lord Hewart Chief Justice, of England dismissed it in 1936 as "continental jargon" and as recently as 1963 Lord Reid found it possible to say in *Ridge v. Baldwin* "We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the Courts have had to grope for solutions."

Indeed in the post-war years the spirit of abnegation and sacrifice of the war years lingered on and the reconciliation of the country to a great deal of Government by executive decree continued and the Courts seemed to have forgotten the art of applying to "the ever changing conditions of the world, the never changing principles of law." So much so that Patrick Devlin, as he then was, was prepared to give the common law its "death certificate." This was a period in which the leading cases made a catalogue of abdication and error. During the last few years, however, all this has changed and there has been a reactivation.

In these lectures he makes a plea for a special administrative tribunal and points out that "The countries with a fully fledged system of administrative justice are headed by a tribunal of a status equal with that of the highest civil court, and staffed by highly trained lawyers with a lifelong experience in administration."(page 80). He notes too that English Law is moving in the same direction and quotes the Padfield case as being comparable with the decision of the council d'Etal in the Affaire Barrell (1954) where the Minister of Interior was compelled to disclose the evidence for the exclusion of certain candidates suspected to be communists from admission to the National School of Administration and annulled the decision of the Minister. In fact in two other cases Coleen[105] and Ashbridge[106] the English Courts have moved nearer the American rule of invalidating acts on the ground of insufficiency or of no evidence.

But Friedman at no time denied the right or the necessity of judicial review of administrative acts but insisted that it should be confined to the two main grounds (a) excess of statutory powers, and (b) objectionable

[104] (1956) 9 Current Legal Problems 15.

[105] Coleen Properties Ltd. v. Minister of Housing and Local Government (1971) 1 All E. R. 1049

[106] Ashbridge Investments Ltd. v. Minister of Housing and Local Government (1965) 1 W.L.R. 1320

motives. He said eleswhere[107] "Despite the extreme difficulty of extracting clear principles from the welter of decisions, it is submitted that the two main causes of invalidity for *ultra vires* are excess power (exces de pouvoir) and abuse of power (detouruement de pouvoir). The first means checking legal acts by the terms of the enabling statute, the second means a check on administrative discretion where motives alien to the administrative purpose have prevailed. The position is much confused however through the nebulous test of reasonableness, which the Courts apply to administrative actions."

Clearly the second of these grounds catches up bad faith or *mala fides* for dealing with Lord Mac Naghten's three separate requirements for invalidity, namely "it must keep within limits of the authority committed to it. It must act in good faith and it must act reasonably." He states, "The last proposition is involved in the second, if not in the first. This seemed to mean that Courts were limited to an examination of excess of power and improper motive"– (at page 383).

It is undoubtedly true that in spite of the very lucid exposition of what is meant by "reasonably" in the *Wednesbury Corporation Case* by Green M. R. in which he quoted the example given by Lord Warrington of a red-haired teacher being dismissed because she had red hair; some unreasonable decisions have been given on this ground. The most notorious case is what is known as the *Poplar Case*[108] in which the House of Lords held that the decision of a local body, which had authority to decide the salaries and wages of their employees, "as they may think fit;" to pay $ 4 per week to men as well as women employees, was unreasonable and therefore excessive. Lord Atkinson delivered himself of the opinion that, "The Council allowed themselves to be guided in preference of some eccentric principles of socialist philanthrophy or by feminist ambition to secure equality of the sexes in the matter of wages in the world of Labour."

Another such decision was the case of *Prescott v. Birmingham Corporation.*[109] In that case the Council had the authority to charge "such fares and charges as they may think fit" in the bus and train services they operated. They decided to permit all men over 70 and all women over 60 to travel free within certain prescribed hours. The Court of Appeal held that this was *ultra vires* on the ground that the Council was not at liberty to use the ratepayers' money to inaugurate a new form of social subsidy.

[107] The New Public Corporation (1946) 10 Mod L.R. 380, 381.

[108] Roberts v. Hopwood (1925) A.C.

[109] (1955) Ch. 210.

Judges are human and essentially men of their time, place and circumstance. But, "the best of them have always been conscious of this human aspect of judicial responsibility that the agony of judicial decision is to be aware of the policy choices without determining them by personal predilection and that the one guiding thought was self-limitation of the Court lest it should become a non-elected lawmaker superseding the legislature." Friedman on Property Freedom and Security.[110] An awareness of this danger is in itself a sobering thought and a strong check on any such tendencies.

The Solicitor-General also submitted that our section 241 does nothing more and nothing less than section 21 of the English Crown Proceedings Act, 1947. In considering this submission, it is important to bear in mind the fact that whereas the English Crown Proceedings Act conferred on the subjects a right which they never had before, that of suing the Crown, except in certain circumstances, our section 24 takes away a privilege which the subject always enjoyed. The Solicitor-General pointed out that the subject in England could always proceed against the Crown by way of Petition of Right and the granting of a *fiat* by the Attorney-General was a mere formality and submitted that this was a mere matter of form than of substance.

In this connection he quoted a passage from an article by Sir Thomas Barnes,[111] at that time Procurator-General and Solicitor-General of England, as follows: "Everybody knows" said Lord Justice Bowen in In re Nathan, "that the *fiat* is granted as a matter I will not say of right, but as a matter of invariable grace by the Crown, wherever there is a shadow of claim may move it as the constitutional duty of the Attorney-General not to advise a refusal of the *fiat* unless the claim is frivolous."

But the classes of claims which could be made the subject of a Petition of Right was itself restricted. "The only cases in which a Petition of Right is open to the subject are where lands or goods or money of a subject have found their way into the possession of the Crown and the purpose of the Petition is to obtain restitution or if restitution cannot be given, compensation in money or where a claim arises out of a contract as for goods supplied to the Crown or to the public service. It is in such cases only that instances of Petition of Right having been entertained are to be found in our books," (Feather v. Queen) (ibid).

However, the Crown could not be sued in tort although such an action could be brought personally against an officer of the Crown responsible for

[110] (1956) Mod L R. 464, 465.
[111] Canadian Bar Review (1948) 387.

the act – *Releigh v. Goschen.*[112] The subject had no effective remedy against the Crown in the Country Court and owing to the peculiar procedure the subject was at a disadvantage in some aspects. In 1921, Lord Borkenhead appointed a committee which reported and submitted a draft Bill in 1927, but nothing was done till 1947 when as a result of the pressure of strong public opinion the Crown Proceedings Act was passed.

In Ceylon the subject can sue the Crown in contract as for instance for salary earned by a Public Servant *C. Kodeswaran v. The Attorney-General,* [113] and cases referred to therein – but not tort until recently. So also can an injunction be issued restraining a servant of the Crown. Although it was conceded as axiomatic that no injunction lies against the Crown in *W. H. Buddhadasa v. N. Nadarajah:* (supra) it was held that it could be issued against the official in his personal capacity. In the case of *Mallika Ratwatta v. The Minister of Lands,* (supra) this Court issued a temporary injunction restraining the Minister from proceeding with the acquisition of certain lands where it was challenged on almost identical grounds as in the instant case.

So also in the case of *Government Agent Northern Province v. Kanagasunderam,* (supra) it was held that an injunction could be issued against the Government Agent restraining him from acquiring a house where his act was shown to be an excess of his powers. In *Land Commissioner v. Ladamuttu Pillai,* (supra), the Privy Council set aside the injunction issued, on the ground that the Land Commissioner could not be sued *nominee officii* as he was not a Corporation sole, and also because the injunction would have precluded a new determination under Section 3 i.e which had been brought in by an amendment to the Ordinance after the impugned determination had been made and the Act itself had since been amended. Although the Privy Council upheld the judgment of the Supreme Court that the Land Commissioner was not entitled to make the determination he had made, this question of whether an injunction could be issued or not, was left open.

A consideration of the two sections immediately reveals a vital difference in the wording. Section 21(1) in so far as it is relevant to the purpose of this case is as follows:– "In any civil proceedings by or against the Crown the Court shall subject to the provisions of this Act have power to make all such orders as it has power to make in proceedings between subjects and otherwise to give such appropriate relief as the case may require; Provided, that (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or

[112] Supra 8.
[113] (1970) 72 N.L.R. 337.

specific performance, but may in lieu therof make an order declaring of the rights of parties . . . " Subsection 2 is identical with our section 24(2).

This section does not contain the words of limitations which have been put into our section 24 namely, "in respect of any act done or intended or about to be done by any such person or authority in the exercise of any power or authority vested by law in any such person or authority." In other words, while in England section 21(1) enables a Court in civil proceedings against the Crown to grant any such relief as it could have granted in proceedings between subjects, except to issue injunctions or to order specific performance our section protects the persons concerned against the issue of an injunction only in respect of acts done or intended or about to done in the exercise of any power or authority vested by law. In other words, the protection is afforded only if the act done is within the four corners of the power or authority vested by law; otherwise it would not be in the exercise of that power or authority.

If this was not the intention, then there is no reason why these words should have been dragged in and thrown into the section. If I understand the Solicitor-General correctly, he stated these words were put in because the act should be in the exercise of any power or authority vested by law and not any act at all. But once one concedes that it must be an act in the exercise of any power or authority vested by law, it follows that the exercise of any power must be within the terms of the power and not *ultra vires* the power. It is of significance to note that the decision of this Court in the Hirdaramani case was delivered on 30th December, 1971, and the first of the Gunesekera cases on 21st January 1972 while the Act No. 18 of 1972 received the assent on 11th May, 1972. It has to be presumed that Parliament was aware of these decisions and the conclusion of these words is a clear indication that no changes in the law as stated in these cases was intended.

In view of this significant difference, the English cases on which it was held that an interlocutory injunction will not lie, are not relevant. The first of these cases is *Underhill v. Ministry of Food* (supra). There the challenge against order was on the ground of excess of power as well as bad faith. The plaintiff asked for an interim injunction pending trial but at the argument their counsel conceded that in view of the Crown Proceedings Act 1947, he would be asking for an alternative remedy of an interlocutory declaration. Romer J., held that the declaration referred to in the section was a final declaration and that the Court could not issue an interlocutory declaration.

In the case of *International General Electric Co., of New York Ltd., et al. v. The Commissioner of Customs & Excise*, (supra) the Court of Appeal approved the decisions in Underhill, Upjohn L.J., saying that he could not understand how there could be "such an animal" and observed, "It seems to

me quite clear that, in proceedings against the Crown it is impossible to get anything which corresponds to an interim injunction. But he said that in certain cases, it was proper on a motion or on a summons under R.S.C. 25 & 2 to make some declaration of right on some interlocutory proceedings.

In the case of *Harper v. Home Secretary*[114] the question was left open, while in *Merricks v. Heathcoat Amory and the Minister of Agriculture*[115] an attempt was made to obtain an injunction in his personal capacity or in some other capacity; it was held that from start to finish he was acting in his capacity as an officer representing the Crown and in such a case it was conceded that no injunction could be obtained against him. Such concessions would come easily to lawyers in bred in the tradition that no injunction would lie against the Crown.

The lack of provision in the Crown Proceedings Act 1947 to the power to issue interim injunctions have been criticised. *Wade* calls it, "an unjustifiable lacuna, for interim relief may be just as necessary against the Crown as against any other defendant,"[116] S. A. de Smith states that the Act merely re-affirmed "the rule that no injunction would lie against the Crown;" and that, "the most unfortunate aspect of the present law is that no interlocutary relief can be obtained to restrain an unlawful act done by the Crown or its servants . . . "[117] **Street** points out that this "may cramp the development of our administrative law."[118]

Mr. Thiruchelvam who appeared for some of the parties noticed, submitted that the term "injunction" as used in section 24(1) referred only to a permanent injunction and not to an interim or interlocutory injunction. He pointed out that the proviso to that section by making provisions for the issue of a declaration of the rights of parties in lieu of an injunction clearly showed that what was referred to was a permanent injunction, because one cannot issue an interim declaration of the rights of parties. Such a declaration declaring the rights of parties must of necessity be a final declaration. As Romer J., pointed out in Underhill's case, "It is an unheard of suggestion that an interlocutory declaration should be made which might be in precisely the opposite sense of the final declaration made at the trial . . . ."

[114] Harper v. Secretary of State for the Home Department (1955) 1 Ch. 238.

[115] (1955) 1 Ch. 567.

[116] Wade – Administrative Law 3rd Edition 114.

[117] S. A. de Smith 464.

[118] (1948) 11 Mod. L.R. 139 .

Commenting on the Underhill case *J. A. C. Griffith*[119] states, "since the Act clearly intended declarations to take the place of injunctions, and since interlocutory injunctions cannot be replaced, with the same effect by interim declarations, then the Act must refer only to final injunctions. Therefore interlocutory injunctions are not affected by the Act and may be granted against the Crown." I am much attracted by this submission but in view of my decision that where an act is *ultra vires* the power granted by a statute to a repository of the power, it is not an act done in the exercise of the power and that therefore section 24 does not apply to confer on him an immunity from the issue of an injunction whether final or interlocutory, it is not necessary for me to decide this question or also the submission that in the exercise of the inherent powers of the Court an order to stay proceedings for acquisition could be made pending final determination of the action.

This also disposed of the submission made by the Solicitor-General that this section merely took away one remedy and substituted another remedy for it because there is no substitution of another remedy for an interlocutory injunction. He also submitted that the section did not oust the jurisdiction of the Court and that the cases cited in regard to the ouster clauses were not applicable. He said that the Court could continue to hear and determine the cases and if at the end of the trial the Court was satisfied that plaintiff had succeeded it could issue a declaration of his rights. One has only to take a concrete example to expose the underlying fallacy of this submission.

Let us suppose that a man has flourishing business in a building in which he and his family also reside and that it is his sole means of livelihood. If a Minister vested with power to acquire premises for a public purpose decides to acquire these premises purely out of personal animosity or for political revenge then, if he is not restrained by an interim injunction, he can destroy the building and throw the man and his family and goods out on the streets. In such a case if the man eventually succeeds in his action of what good is the Court's declaration of his rights to him?

The much vaunted dictum of Gratiaen J., that "Courts of Justice have always assumed so far without disillusionment, that their declaratory decrees against the Crown will be respected"[120] will be of no avail to him because he cannot get his building or business back. He can only get compensation which even without the aid of the declaration of his rights by Court, he is in any event always entitled to, under the Land Acquisition Act. So that the section bars the Courts from giving him any effective relief and to that extent it ousts the jurisdiction of Courts. Nor is the remedy provided, in the real sense any remedy at all.

[119] Mod. L.R. (1950) Vol. 13 502.

[120] Attorney-General v. Sabaratnam (1956).

It was also argued that where a land is acquired for a public purpose, it may happen that it belongs to a political opponent or a personal enemy. In such a case, the Courts would not interfere if the "dominant," the "real" the "true", or the "principal" purpose was public interest and not political or personal revenge. The mere fact that a scheme serves some other purpose in addition to its authorised purpose is not a legal objection, provided that the authorised purpose is the genuine motive.[12] In the Etna Stores case Davies AJA said that it is the real purpose which has to be ascertained. In Rowjee's case it was stated that whatever be the inclinations, desires or motives of the Chief Minister, if the Corporation by an independent consideration of the situation decided on the formulation of the impugned schemes their validity could not be successfully impugned merely because the schemes satisfied the alleged grudge which the Chief Minister bore to the affected operators.

In Pratap Singh's case the Court said that when confronted with a case where the purposes sought to be achieved are mixed, some relevant and others alien to the purpose then the Courts have on occasion resolved the difficulty by finding out the dominant purpose which impelled the action. If in such a situation the dominant purpose is unlawful then the act is unlawful and it is not cured by saying that they have another purpose which was lawful.

The Solicitor-General also argued that if the interpretation which commends itself to me is given, then the sections has achieved precisely nothing because an order which is within jurisdiction needs no protection and cannot be questioned by the Courts on the ground that it was made in error. On the basis of the rule of construction "*ut res magis valeat quam pereat,*" the Courts, he submitted must give it an interpretation which will give it life and force and not one which will reduce it to futility. This is perfectly true. But a possible explanation is that which was suggested by Samarawickrema, J., in the Hirdaramani case, although it did not commend itself to H. N. G. Fernando, C.J.

Samarawickrema, J., said at page 120, "The question has been posed as to what has been gained by the inclusion of clause 55. It is no doubt true that in law the writ of Habeas Corpus will not issue to review a valid decision of a statutory authority. But it is true that Courts sometimes tend to review such valid decisions . . . section 45 of the Courts Ordinance empowers a writ to issue to bring up "the body of any person illegally or improperly detained." The use of the word improperly might be regarded as authorising a Court to inquire into the impropriety of a legal and otherwise lawful detention. Whether this is in law a possible view or not, the draftsman may have included the clause to preclude any possibility of a review by Court of

[12] Westminster Corporation v. London North Western Railways (1905) A.C. 424.

detention made by a valid detention order in view of past experience which according to Rubinstein showed that the Courts were sometimes ready to review valid decisions."

So here too, where there is an obvious and palpable error of law whether on the face of the order or otherwise, or on the facts, in the case of an order made within jurisdiction, the Courts may be tempted to interfere if grave and irreparable damage is done by such an order. It is possible, therefore, that this provision was included to ensure that in such a case no injunctions whether interim or permanent, are issued.

Mr. Jayewardene referred to certain cases under the Police Ordinance where language almost identical with that of the words of limitation in section 24 was held not to protect *mala fide* or malicious acts. Section 88 of the Police Ordinance (Chapter 53) sets out that all actions against any person for "anything" done or intended to be done under the provisions of this Ordinance or under the general police powers hereby given shall be commenced within three months" (formerly section 79). In the case of *Ismalanne Lokka v. Harmanis*[122] it was held that this limitation does not apply where a police officer is found to have acted maliciously and not in the *bona fide* exercise of his official duties. It is unnecessary to refer to the other cases, but it is sufficient to say that these cases do lend support to the view that an act which is *mala fide* and in excess of one's statutory powers is not protected.

He also relied on certain cases decided in respect of section 461 of the Civil Procedure Code which requires notice to be given where a public officer is sued, in respect of any official act done by him. But these are not helpful for two reasons. Firstly, there is a difference in the wording of the two sections. Section 461 refers to any act "purporting to be done" whereas section 24(1) refers to "any act done, intended or about to be done." The word "purporting" does not appear in section 24(1), and this makes a vital difference. The words of section 24(1) are more restrictive and does not extend to acts purported to be done or in the ostensible or pretended exercise of a statutory power.

Secondly, the decisions are conflicting while the earlier cases (supra 14 and 42) did hold that notice was not necessary in the case of acts done maliciously or in the colourable exercise of the statutory power, yet the correctness of these decisions was doubted in the case of *Ratnaweera v. S.I. Police C.I.D. et al* (supra) as being too restrictive. Basnayake, C.J., in two later cases held notice was necessary even where the officer concerned was acting *mala fide* (supra 15 and 44).

Mr. Jayewardene also made some submission in regard to the jurisdiction of the Court in view of the fact that order to call for the records of these

[122] (1923) 23 N.L.R. 192.

cases was made by two Judges and thereafter the examination of the records and the orders to issue notices were made by three Judges all in chambers. His submission was that these should all have been done by a properly constituted Bench sitting in public. He pointed to the fact that whereas under the previous law this power could be exercised by the Supreme Court or any judge thereof, now the power is vested under section 13 and 354 of the Administration of Justice Law No. 44 of 1973 in the Supreme Court as such and this meant the Benches as provided for in section 14 and sitting in public as required by section 7.

The obvious answer to this submission is that all these cases were pending in the Supreme Court and an order was made by the Hon. Acting Chief Justice, under section 14(3)(c) to refer these matters to this Bench of nine Judges. This is a valid order and even if this objection could have been appropriately taken up before the three Judges before whom it came up in the first instance it cannot be taken up now. However, I am of the view that all the orders were validly made in terms of the Act.

There must be a properly constituted Bench sitting in public only when the records have been called for and examined and it is found that an exercise of the Courts revisionary powers is probably necessary after parties have been heard. The mere calling for a record, the examination of it and the direction to issue notice are all ministerial acts involving no act of a judicial nature. Any Judge of the Supreme Court has the power to do so, in chambers. Section 7 requires only that sittings of every Court shall be in public where the judicial power is exercised. It does not require that ministerial or administrative acts should be done in public. The case cited by Mr. Jayewardene are all cases where actual trial was involved.

In these cases after two Judges had called for and examined the records three Judges directed that notice be issued. The Registrar stated in open Court on 14.6.1974, that the general practice hitherto had been for him to suggest the different Benches for the day for the approval of the Chief Justice and that the Judges who ordered the notices would normally constitute the Bench to hear the case. He also stated that the Acting Chief Justice had approved the Bench as suggested by him.

This was in accordance with the practice stated in *Queen v. Liyanage*[123] where it was observed that "there are various provisions in the Courts Ordinance for the hearing of appeals, applications and other cases in the exercise of the original criminal jurisdiction of the Supreme Court by one, two, three or more Judges. The power to nominate the Judges in cases where no express provisions has been made therefore appears to us to reside in the

[123] (1962) 64 N.L.R. 313 at 352.

Court, although it is correct to say that by convention it is the Chief Justice who for the purpose of convenience exercises such power."

In one case S.C. APN/GEN/63/64 — Revision in M.C. Colombo South No. 23159/A [124] Sri Skanda Rajah, J., had called for the record and the matter was listed before him. Dr. Colvin R. de Silva who appeared for the respondent submitted that since the Judge had examined the record and issued notice there was the possibility that the accused and even the public might think that he would be biased. Sri Skandha Rajah, J., rejected the submission and referred to the fact that in matters of contempt of inferior Courts the papers are circulated to all the Judges to ascertain their opinion as to whether a Rule should issue or not. In such a case could it be said that all Judges had disqualified themselves.

Whether the Judge or Judges who in the first instance call for and examine the records should sit on the Bench which ultimately determines the case is a matter essentially for them to decide.

I hold therefore that where the act of a repository of a statutory powers is in excess or in abuse of that power in the sense that it is *mala fide* or for a purpose alien to the enabling statute it is *ultra vires* such power, and a nullity. In the case of *Regina v. Paddington Valuation Officer* [125] Denning, M. R. said, "It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need for an order to quash it. It is automatically null and void without more ado." It is as if it had never been made. In such a case section 24(1) of the Interpretation Ordinance as amended by Act No. 18 of 1972 has no application and Courts are precluded from issuing interim injunctions if the facts are such and a consideration of the law relating to injunctions warrants the issue of such injunction.

I have not considered the facts in these cases at all nor the truth or otherwise of the case for the plaintiffs in these cases. My decision is purely on the legal question argued before us.

It remains for me to thank all the Counsel engaged in these cases for the very valuable assistance rendered to us in the determination of the difficult issues involved.

I would direct that all the notices be discharged and that the records be returned to the respective Courts to be proceeded with according to law. As these cases came up on the orders of Court *ex mero motu* there will be no costs.

[124] S.C. APN/GEN/63/64 minutes of 17/12/64.

[125] (1966) 1 Q.B.D. 360 at 402.