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THE EQUITABLE ORIGINS OF THE IMPROPER PURPOSE GROUND

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In the third edition of *Judicial Review of Administrative Action* Mark Aronson and his co-authors observe:

> The overall ground of judicial review is that the repository of public power has breached the limits placed upon the grant of that power.[1]

The authors note that the basic assumption underlying this proposition is that all powers have limits. In this context the authors state:

> The powers of public officials are regarded as being held on trust for the public who granted them. They cannot lawfully be exercised for personal gain or motive, or irrationally, or for purposes which exceed the reasons for their conferral. There are obvious parallels with equity's doctrines

governing fiduciaries, although one must not press that analogy too far.[2]

The first reference given for this passage is an observation by Sir Anthony Mason, writing extra-judicially, that:

In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.[3]

The link between equitable relief and administrative law has also been identified, with regard to *Wednesbury* unreasonableness, by Justice Gummow, who has often referred to this extract by Sir Anthony Mason, both as a judge of the Federal Court[4] and of the High Court.[5] The infusion of equitable principles occurred, his Honour suggests, by a process of analogy, applying to a new field principles developed in another.[6] The result is what Justice French has felicitously called 'the equitable spirit of administrative justice'.[7]

In the mid nineteenth century, when this process commenced, the caste of mind of a Chancery judge was quite different to that of a

common law judge. The proposition that there existed legal principles that could readily be adapted to new situations, which came naturally to a Chancery judge, permitted more flexibility than did the technicalities of the common law.

The metaphor, sometimes deployed, that public power is held on trust, is generally a political rather than a legal proposition. Some public powers may well be subject to requirements as strict as those applicable to fiduciaries. Not all can be so described. A closer, and often more useful, analogy is with the control exercised by courts of equity over powers, which encompasses, but extends beyond, fiduciary powers.

The Law of Powers

In the law of property a 'power' is a term of art referring to any authority that one person has to deal with property that s/he does not own. This was a natural source of analogy for equity judges when, as I will show below, they were first faced on a systematic basis with statutory powers that impinged upon the property rights of citizens.

The author of *Thomas on Powers* explains the distinction between trust and powers:

> A trust imposes an obligation, or creates a duty: a power confers an option. A trust is imperative, whereas a power is discretionary.[8]

Some powers are accurately described as 'trust' or 'fiduciary' powers, so that the donee is a fiduciary of the authority to deal with another's property. They are to be distinguished from 'bare' or 'mere' powers.

To the same effect as the observations of Sir Anthony Mason, quoted above, the author of *Thomas on Powers* states:

> there has always been a close interdependence between the traditional principles and doctrines of the law of powers and those of judicial review in public law (a common history which remains largely untold). This has continued over recent decades and, indeed, as both the scope and grounds of judicial review have expanded considerably, the process of cross fertilisation has become more marked. … [T]hroughout this century, and especially in recent years, there have been substantial changes in many areas of the law in which the principles and doctrines of the law of powers operate and apply, or might be expected to operate

and apply, and that, as a result, those principles and doctrines have themselves had to be developed and adapted to meet new demands and changed circumstances.[9]

Equitable Origins

It cannot be suggested that the principles developed for controlling the exercise of statutory powers, on the one hand, and the exercise of powers over property, on the other hand, have a historically shared doctrinal origin. The linkage did, however, arise, as so often in the development of the common law, in the law of remedies. It is in the pragmatic development of common law principle from the bottom up, by means of decision-making in individual cases, that common themes emerge in the course of determining what is fair and just, leading to the grant of the appropriate remedy, on the basis of analogical reasoning.

The mechanism by which the principles applicable to fraud on a power were adopted for administrative law purposes was litigation brought in the Court of Chancery for equitable relief. At the relevant time, the relief sought was by way of injunction. The jurisprudence on declarations developed later.

The significance of the injunction as a remedy in administrative law is emphasised by its inclusion, in express terms, in s 75(v) of the *Commonwealth Constitution* as one of the constitutional writs. (Although injunctions have been granted by order rather than writ long before that happened for the prerogative writs). This provision is one of the fundamental underpinnings of the rule of law in Australia. Although not directly applicable to the common law basis of review in State jurisdiction, inevitably the High Court's jurisprudence on the constitutional writs will exercise a gravitational pull on the whole of administrative law.

No doubt part of the attraction of litigation in Chancery in the mid nineteenth century was the proclivity of Chancery judges to protect individual property rights against statutory expropriation, particularly by the newfangled institutional form of railway companies. As early as 1839 Lord Chancellor Cottenham said, in one of the earliest cases of compulsory acquisition by a railway company:

> it is extremely important to watch over the interests of those whose property is affected by these companies, to take care that the company shall not … be permitted to exercise powers beyond those which the Act of Parliament gives them, and to keep them most strictly within the powers of

> the Act of Parliament. The powers are so large — it may be necessary for the benefit of the public — but they are so large, and so injurious to the interests of individuals, that I think it is the duty of every Court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their Act of Parliament.[10]

The authors of *de Smith, Woolf & Jowell*, the foundational text on British administrative law, identify the origin of contemporary doctrine on extraneous purposes in cases concerning the exercise of powers of compulsory acquisition in the mid nineteenth century by railway companies.[11] The key authority to which the authors refer is the 1866 House of Lords judgment, *Galloway v The Mayor of London.*[12] It was preceded by a number of similar cases in Chancery.[13]

Compulsory powers of acquisition by railway companies, and later by public authorities, were the cases in which the basic principles were most frequently applied. However, it was not only railway companies who sought to exercise statutory powers in a manner which led persons affected to seek injunctions from the Court of Chancery. For example,

neighbouring residents objected to a proposal to construct a urinal in Grosvenor Place adjacent to the wall of Buckingham Palace.[14]

In *Galloway,* Lord Chancellor Cranworth said:

> The case of the Appellant … rested on a principle well recognized, and founded on the soundest principles of justice. The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers. The necessity for strictly enforcing this principle became apparent, when it became an ordinary occurrence that associations should be formed of large numbers of persons possessing enormous pecuniary resources, and to whom are given powers of interfering for certain persons with the rights of private property. In such a state of things it was very important that means should be devised, whereby the Courts, consistently with the ordinary

> principles on which they act, should be able to keep such associations or companies strictly within their powers, and should prevent them, when the legislature has given them power to interfere with private property for one purpose, from using that power for another. … It has become a well-settled head of equity, that any company authorized by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.[15]

In Australia, the principle emerged from litigation over the proposal by the Council of the City of Sydney to acquire land by compulsion, in order to extend Martin Place from Castlereagh Street to Macquarie Street, *Galloway* was the basic authority cited.[16] The approval of the judgment in Equity in New South Wales by the Privy Council in *Municipal Council of Sydney v Campbell* cited as the foundational Australian authority on improper purpose. The reasoning in the Privy Council's decision however is unremarkable and borders on the glib — quite typical of the Privy Council of the era when determining how much attention was good enough for an appeal from the colonies.[17]

The extract from *Galloway* quoted above indicates that the Court was reacting to the emergence of a new form of institution, namely corporations which were given extraordinary powers to interfere with the property of others, particularly railway corporations. Traditionally, there had been other such statutory bodies with similar powers, notably sewer commissions, whose activities had long been regulated by the common law courts through the writ of certiorari or by actions in trespass. The historical origins of judicial review by the common law courts has been traced to this body of case law.[18]

The scope of Chancery's jurisdiction, extending beyond proceedings for an injunction, was manifest in the first case in which Lord Cranworth formulated his proposition that a compulsory taking of lands by railway companies must be 'bona fide with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose.' This principle was first enunciated by his Lordship in 1860 in proceedings in the Court of Chancery in lunacy, because one of the persons whose land was to be acquired was a lunatic.[19]

In 1864, two years before the decision in *Galloway*, Lord Cranworth, who had two periods as a Lord Chancellor (1852–1858 and

1865–1866) had agreed with the then Lord Chancellor, Lord Westbury, his reasons in *Duke of Portland v Topham*, in what has become the classic formulation of the test for a fraud on a power. Lord Westbury had said:

> inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.[20]

The language of these two judgments is in substance the same. It appears that Chancery judges had identified what they regarded as a principle of general application. As quoted above, the judgments in *Galloway* and *Duke of Portland* each state that a high principle of the law has been invoked. From that perspective, common law powers over

property did not differ from powers conferred by statute. Nothing has changed in this respect.

Such analogical reasoning is also reflected in other closely related areas of the law. It was Lord Cranworth in 1854 who delivered the definitive judgment that established the principle that a director of a corporation was subject to the conflict of interest principles established by fiduciary law,[21] relying on *Keech v Sanford*.[22]

Why Chancery?

In the middle decades of the nineteenth century, parties chose to proceed in equity with respect to decisions that may otherwise have been regulated by the common law courts through the exercise of the prerogative writs. It was this choice by litigants that allowed the penetration of equitable principles into the development of administrative law including, relevantly, the emergence of the improper purposes ground.

Chancery judges could draw on a significant body of precedent in the regulation of matters of public interest. Of particular significance was the role of the Crown as *parens patriae.* That role had been exercised by the Attorney-General by instituting proceedings in Chancery with

respect to charitable and ecclesiastical corporations which lacked a visitor. Such a jurisdiction was readily adaptable, by analogy, to other corporations which had no visitors, first municipal corporations and then other statutory corporations.[23] In such proceedings, the Court would, at the suit of the Attorney, directly or on relation, injunct a corporation from imposing a rate for an unauthorised purpose,[24] or from expending public funds for an unauthorised purpose, eventually extending beyond trust funds.[25]

Injunctions came to be issued against water and sewerage instrumentalities[26] on matters which had in the past been litigated in the common law courts. This reflected a dramatic improvement in Chancery practice.

In the years immediately preceding the *Duke of Portland* and *Galloway* cases, important reforms were made to procedure, in both common law courts and Chancery, culminating in the 1870s in the broad based reform of the *Judicature Acts.* However, in mid century, litigants had a real choice of jurisdiction and many chose Chancery.

The horrors of Chancery procedure, depicted by Dickens in *Bleak House*, a novel set in about 1827, were addressed by statute. A number

of Acts, especially in 1852, radically reformed Chancery: replacing remuneration of judges and clerks from fees with salaries; abolishing the corrupt sinecures of Masters; simplifying proceedings and facilitating evidence; and formulating a comprehensive set of consolidated orders.[27]

The ability to bring proceedings in Chancery was extended by the *Chancery Procedure Act* 1852, which empowered the Court to determine rights at law, without prior proceedings in a common law court.[28] Furthermore, a new power to make declarations without consequential relief was first conferred in 1850 and affirmed in the 1852 Act. However, for some time there was resistance to making such declarations.[29] The similar resistance to exercising the jurisdiction at law led to the *Chancery Regulation Act* 1862, which required the Court to determine any question of law on which the relief sought depended.

Lord Westbury had long been the most prominent advocate of fusion. Indeed, he was called the ‘Galileo of fusion’ by a journal which had earlier characterised fusion as suicide and Chartist, which in that era carried the connotation of Bolshevik in the twentieth century. Lord Cranworth was regarded as a moderate reformer, but was still a reformer.[30]

Perhaps the most significant development for present purposes was the 1852 Act which established, for the first time, that procedure in Chancery would be the same whether the Court was asked to restrain breach of a legal, or, equitable right. Although the distinction between the exclusive and the auxiliary jurisdiction of the Court remained, procedural impediments were substantially removed, even before the *Judiciary Acts.*

The Proper Purpose Principle

The relevant principle identified by Chancery judges in the mid nineteenth century can be articulated at different levels of generality. At a comprehensive level it can be expressed as follows: Any kind of authority to affect the rights of others can only be exercised bona fide and for the purposes for which it was conferred. This appears to me to be the principle referred to by both Lord Westbury and Lord Cranworth.

A principle expressed at this level of generality could have the standing of a maxim, applicable to any legal context in which it is relevant. However, so far as I am aware, such a principle was never articulated in Latin and, accordingly, was not included in the various lists

of maxims that have been collated from time to time which, because of the origins of maxims in Roman Law, were always set out in Latin.

The usual formulation is that a power must be exercised 'bona fide for the purposes for which it was conferred'. It is a form of words that has been applied in a number of different legal contexts. The common law cases indicated that there was no distinction between 'bona fides' and 'purposes'. The formulation conveyed one idea, not two. It was only when the principle was incorporated in the comparative rigidity of a statutory formulation — as in the *Administrative Decisions (Judicial Review) Act* and its progeny — that it became appropriate to separate the element of bona fides from the element of purpose.[31]

The usual formulation is a principle of general application in any institutional context in which persons have an authority to act conferred upon them. Accordingly, when interpreting one of the foundational documents of the Church of Scotland, Lord Lindley said:

> there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred.[32]

In Australia the principle has been applied in numerous statutory contexts.[33] It is the same principle as has emerged in the law of corporations, in which context the overlay of fiduciary powers is frequently referred to. Both lines of authority involve the application in an organisational or institutional context of ideas first articulated in the control by courts of equity of powers in the law of property.[34]

Cross-Fertilisation

One of the strengths of the common law has been its capacity to adapt to changing circumstances by the cross-fertilisation of principles and doctrine between different areas of the law. The requirements of teaching in discreet subject areas, with concomitant specialisation on the part of academics, can result in spheres of legal discourse being divided into undesirably rigid categories that become self-referential, to the point of being self-absorbed. This tendency has been reinforced by a similar trend towards specialisation in the profession. One purpose of this essay is to indicate the utility of cross-fertilisation between different spheres of legal discourse, by taking as an example the improper purposes basis of judicial review.

Recognition of the common origins of doctrines applicable in different areas of the law is a manifestation of that cross-fertilisation

which has been so important in the capacity of the common law to grow and adapt to changed circumstances. There are a number of common, and some contrasting, features in the disparate fields in which questions of improper purpose arise.

Two examples of common issues indicate the benefits of cross-fertilisation:

(1) The utility of a two-fold division between fiduciary and mere powers;

(2) The identification of the nature of a purpose that may be improper.

The distinction between fiduciary and mere powers is well established in the law of powers. A similar categorisation can be discerned in other areas of the law, albeit not always acknowledged in those precise terms.

In one of the early texts on corporations law a distinction was drawn between the powers and privileges of the corporation itself, eg to compulsorily acquire property and powers vested in the directors who have fiduciary duties. The author characterised the former test as:

> Powers and other privileges … [that] must be exercised for the purposes intended.

Whereas:

> The powers of directors can be used only strictly for the purposes for which they are created.[35]

The reference to 'strictness' in the case of powers of directors, as distinct from powers of the corporation itself, suggests that a fiduciary power is involved. Statutory powers may, with advantage, be categorised by means of a similar distinction.

A ubiquitous difficulty with the proper purpose principle is the fact that it is rare for any decision-maker to only have one purpose for the exercise of a power or authority. In the context of administrative law, the authors of *de Smith* identify six different tests that have been applied for determining what impact the presence of an impermissible purpose has upon the validity of the decision.[36] Aronson and his co-authors provide a critical assessment of these tests.[37] Craig has, for similar reasons, reduced the number of tests to four.[38]

The various formulations found in the authorities turn on the degree of significance which the impermissible purpose had upon the ultimate result. Similar considerations have arisen in other spheres of

legal discourse such as choosing between a sole purpose, dominant purpose or substantial purpose test with respect to the law of legal professional privilege,[39] or choosing between a sole purpose or dominant purpose test in the law of abuse of process.[40]

The case law on common law powers does not suggest that there is a single test applicable in all contexts. Dicta in some cases indicate that the presence of *any* improper purpose invalidates the exercise of the power. However, the wide range of different tests found in this case law appears to be very similar to the range originally set out in *de Smith*.[41]

The distinction between fiduciary powers and mere powers may be of assistance in this regard. With respect to a power analogous to a fiduciary power, the mere presence of an improper purpose may vitiate the exercise of the power. A more substantial consequence, however, is required in the case of a mere power.

Such a twofold distinction between different kinds of powers may also be useful when categorising statutory powers. There may be powers which, like a fiduciary power, can only be exercised for a particular purpose, so that any intrusion of another purpose leads to

invalidity. It may well be that many of the difficulties that have attended the proper purpose rule in corporations law arises from a failure to distinguish fiduciary powers from mere powers. Not all conduct of officers of corporations deserves to be subject to the fiduciary standard.[42] A good faith standing may be all that is required.[43]

In a statutory context, the issue will be determined on the basis of the interpretation of the particular power to determine what, in the specific context of that statute, Parliament intended a defect of that character to have. The approach of the High Court in *Project Blue Sky* to identifying whether or not Parliament intended a particular defect to lead to invalidity of the decision may explain the various tests which appear in the authorities, which are discussed in the administrative law texts to which I have referred.[44] It is not a matter of multiple 'tests' but a matter of varying interpretations of Parliamentary intention.

The results will necessarily be more varied than the bifurcation suggested by distinguishing fiduciary from mere powers. The analysis involves a spectrum rather than a bifurcation, but it may be assisted by identifying the two extremities and drawing upon analogous case law.

With respect to the second matter identified above — the nature of an improper purpose — there appears to be a more consistent approach. In each of the legal spheres in which improper purpose is a vitiating factor the test is subjective not objective. The question is whether the impermissible purpose was an actuating purpose in the sense of an intention to bring about a result. Accordingly, in the context of administrative law, as Dixon J put it with reference to a statutory discretionary power conferred without any legislative identification of the grounds on which it is to be exercised:

> wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion.[45]

Similarly in the context of corporations law, the focus is on the actuating purpose which caused directors to exercise a power conferred upon them by the articles of association. The question is what was:

> the substantial object the accomplishment of which formed the real ground of the board's action.[46]

Or, what was '"the moving cause" of the action of the directors'.[47]

In the area of powers, including powers of appointment, the emphasis is similarly on the actual 'intention or purpose' of the person exercising the power.[48] In this context a distinction has sometimes been made between intention and motive which is not always useful and has been criticised.[49] However, as Brennan J put it, with respect to the issue then before the Court:

> Intention relates to the result which the plaintiff desires to obtain by commencing or maintaining the proceeding; motive relates to all the considerations which move that party to commence or maintain the proceeding. The desired result is no doubt an element of the moving considerations, but it does not exhaust those considerations.[50]

The Australian case law appears to have resolved upon a substantial, actuating purpose test for the improper purpose ground in administrative law.[51] The authorities establish that a vitiating purpose must be a substantial purpose, in the sense that but for the unauthorised purpose the power would not have been exercised in the way it was.

In the analysis of the law of powers there is a clear distinction drawn between intervention on the basis of excessive execution of a power, on the one hand, and intervention on the basis of fraud on a power, on the other.[52] Many of the matters identified as constituting an excessive execution of a power are analogous to aspects of ultra vires in the narrow sense and extend to a number of grounds for judicial review. The improper purpose ground has a close analogy, in terms of the applicable principles, with the law of fraud on a power.

The concept of improper purpose, in the context of fraud on a power, does not involve an idea of dishonest or immoral conduct, and the references to good faith in this case law should be so understood. In a case involving fraud on a power, the Privy Council said that fraud:

> merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.[53]

The same is true of a finding of improper purpose in administrative law. In a recent joint judgment, the High Court expressly adopted the equitable concept of 'fraud', 'bad faith' and 'abuse of power' for purposes of public law.[54]

Conclusion

The proper purpose principle appears in a number of different contexts with regard to the conduct of artificial legal personalities. The central role played by organisations in contemporary society has lead to a focus on institutionalism in the social sciences, notably, over recent decades, in economics and political science.[55]

The proper purpose principle is only one of a number of legal principles that arise in much the same way in different institutional contexts, including trade unions, corporations and public administration. In each sphere, there is a requirement that a power be exercised rationally by reference to relevant considerations and without reference to irrelevant considerations which arise in the same contexts. This principle of rationality is similar to the proper purpose principle in this respect.

I have long been of the view that the proper focus is on principles of institutional law, rather than upon the academically defined disciplines of corporations, trade union and administrative law.[56] In any event, the benefits of cross-fertilisation and the common historical origins of

principles in equity, are such that scholars in one field should be conversant with scholarship in each other field.

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[1] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Sydney, Law Book Co, 3rd ed, 2004) at 85.

[2] Ibid at 86.

[3] Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 238.

[4] *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Livestock Corp* (1990) 96 ALR 153 at 167; *Bienke v Minister for Primary Industries & Energy* (1994) 125 ALR 151 at 163.

[5] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257–259 [24]–[29]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 649.

[6] See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 618ff.

[7] RS French, 'The Equitable Gesit in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* at 1.

[8] Geraint Thomas, *Thomas on Powers* (London, Sweet & Maxwell, 1998) at 20–21 [1–40]; see also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (Sydney, LexisNexis Butterworths, 7th ed, 2006) at 36–37 [246].

[9] Thomas, above n 8 at vii.

[10] See *Webb v Manchester & Leeds Railway Co* (1839) 4 My & Cr 116 at 120; 41 ER 46 at 47–48.

[11] See SA de Smith, Harry Woolf and Jeffrey L Jowell, *Judicial Review of Administrative Action* (London, Sweet & Maxwell, 5th ed, 1995) at 330–331 [6–059].

[12] (1866) LR 1 HL 34.

[13] See, eg, *Eversfield v Mid-Sussex Railway Co* (1859) 1 Giff 153; 65 ER 865; *Dodd v Salisbury & Yeovil Railway Co* (1859) 1 Giff 158; 65 ER 867. In the latter case the Vice Chancellor, Sir John Stuart, said:

> in constructing works under the authority of Acts of Parliament for the purposes of the railway, the company are not at liberty to make use of their compulsory powers to attain a subsidiary object. Those powers, which are great powers, are given to the company solely to enable them to construct their works in a convenient and proper way, and for no other purpose whatsoever.

[14] See *Biddulph v The Vestry of St George*, *Hanover Square* (1864) 33 LJ Ch 411.

[15] (1866) LR 1 HL 34 at 43.

[16] See *Campbell v Municipal Council of Sydney* (1923) 24 SR (NSW) 179 esp at 187ff; and *Campbell v Municipal Council of Sydney (No2)* (1923) 24 SR (NSW) 193 at 205.

[17] See *Municipal Council of Sydney v Campbell* [1925] AC 338 esp at 343.

[18] See Louis L Jaffe and Edith G Henderson, 'Judicial Review and the Rule of Law' (1956) 72 *LQR* 345.

[19] See *Stockton & Darlington Railway Co v Brown* (1860) 9 HL Cas 246 at 256; 11 ER 724 at 728.

[20] *Duke of Portland v Topham* (1864) 11 HL Cas 32 at 54; 11 ER 1242 at 1251.

[21] See *Aberdeen Railway Co v Blaikie Bros* [1843–60] All ER Rep 249 at 252.

[22] (1726) Cas temp King 61; 25 ER 223.

[23] See de Smith et al, above n 11 at 640–641 [14–050]–[14–053].

[24] *Attorney-General v Corporation of Lichfield* (1848) 11 Beav 120 esp at 128–131; 50 ER 762 at 765–767; *Attorney-General v Andrews* (1850) 2 Mac & G 225 at 229–230; 42 ER 87 at 88–89.

[25] *Attorney-General v The Mayor of Norwich* (1837) 2 My & Cr 406 at 424–425, 429; 40 ER 695 at 701–703; *Attorney-General v Guardians of the Poor of Southampton* (1849) 17 Sim 6 at 13; 60 ER 1028 at 1031.

[26] See *Gard v Commissioners of Sewers of the City of London* (1885) 28 Ch D 486; *Lynch v Commissioners of Sewers of the City of London* (1886) 32 Ch D 72.

[27] See Harold Potter, *An Introduction to the History of Equity and its Courts* (London, Sweet & Maxwell, 1931) esp at 21; Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery' (2004) *Law & History Review* 389 and 565 esp at 579–584.

[28] See Frederick Jordan, 'Chapters on Equity in New South Wales' in FC Stephen (ed), *Sir Frederick Jordan: Select Legal Papers* (Sydney, Legal Books, 6th ed, 1983) at 5–6.

[29] See PW Young, *Declaratory Orders* (Sydney, Butterworths, 2nd ed, 1984) at 24–26.

[30] See Lobban, above n 27 at 584–6.

[31] See the cases discussed in Aronson et al, above n 1 at 292–294.

[32] See *General Assembly of Free Church of Scotland v Overtoun* [1904] AC 515 at 695 (per Lord Lindley).

[33] See, eg, *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 67–68, 82–83; *Municipal Council of Sydney v Campbell* [1925] AC 338 esp at 343; *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108 at 119–120; *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 186–187.

[34] In corporations law, see David MJ Bennett, 'The Ascertainment of Purpose when Bona Fides are in Issue — Some Logical Problems' (1989) 12 *Sydney L Rev* 5; RC Nolan, 'The Proper Purpose Doctrine and Company Directors' in Barry AK Rider (ed), *The Realm of Company Law* (London, Kluwer Law International, 1998); Saul Fridman, 'An Analysis of the Proper Purpose Rule' (1998) 10 *Bond L Rev* 164.

[35] See Seward Brice, *A Treatise on the Doctrine of Ultra Vires* (London, Stevens & Haynes, 2nd ed, 1877) at 511 and 610. See also 3rd ed, 1893 at 408 and 570.

[36] de Smith et al, above n 11 at 340–343 [6–077].

[37] Aronson et al, above n 1 at 298.

[38] PP Craig, *Administrative Law* (London, Sweet & Maxwell, 5th ed, 2003) at 559.

[39] Compare *Grant v Downs* (1976) 135 CLR 674; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

[40] *Williams v Spautz* (1992) 174 CLR 509 at 529.

[41] See, eg, DM Maclean, *Trusts and Powers* (Sydney, Law Book Co, 1989) at 118–120; Thomas, above n 8 at 482–483 [9–69]–[9–71].

[42] See, eg, Fridman, above n 34 at 164.

[43] See PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity Fiduciaries and Trusts* (Toronto, Carswell, 1989) at 3–26; Nolan, above n 34.

[44] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; see also *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557; HP Lee, 'Improper Purpose' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Melbourne, Cambridge University Press, 2007) at 201–202.

[45] *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473.

[46] *Mills v Mills* (1938) 60 CLR 150 at 186 (per Dixon J).

[47] Ibid at 165 (per Latham CJ).

[48] See, eg, *In Re Crawshay, Dec.d; Hore-Ruthven v Public Trustee* [1948] 1 Ch 123 at 134–135.

[49] See Maclean, above n 41 at 93–96.

[50] *Williams v Spautz* (1992) 174 CLR 509 at 535.

[51] See *Thompson v Council of the Municipality of Randwick* (1950) 81 CLR 87 at 106; *Samrein Pty Ltd v Metropolitan Water, Sewerage & Drainage Board* (1982) 41 ALR 467 at 468–469.

[52] See, eg, *Halsbury's Laws of England* (4th ed, 1999) vol 36(2) at 194–196 [353–358] on excessive execution and 200–205 [364–371] on fraud on a power; to similar effect are the separate chapters in George Farwell, *A Concise Treatise on Powers* (London, Stephens & Sons, 3rd ed, 1916) compare ch VI and ch X; Thomas, above n 8, compare ch 8 and ch 9.

[53] *Vatcher v Paull* [1915] AC 372 at 378.

[54] See *SZFDE v Minister for Immigration and Citizenship* (2007) 237 ALR 64 at 67–68 [12]–[13].

[55] See, eg, Peter A Hale and Rosemary CR Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 936.

[56] See, eg, JJ Spigelman, 'Foundations of Administrative Law: Toward General Principles of Institutional Law' (1999) 58 *Aus J of Public Administration* 3.