
BUREAUCRACY TRIUMPHANT

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PREFATORY NOTE

In 1923, when the first of the articles here reprinted was written, comparatively little had been published or spoken about the problem which is discussed in these pages. Since that date, however, attention has been increasingly directed to the question, and it is now much in the minds both of lawyers and of laymen. The manner in which it presented itself to one humble observer in 1923 may, therefore, seem to be something of an anachronism; but the author has thought it best to reproduce the articles substantially as they were written, rather than to refashion them into a continuous text, because in their original form they may serve to show how, to his observation (for what it may be worth), the problem has grown and shaped itself in the last few years. He is conscious that the preservation of the articles in their original form may involve a certain amount of overlapping, but hopes that it is not sufficiently serious to deprive him of the indulgence of the reader.

The author is much indebted to Messrs. John Murray for permission to reprint, as sections I, II, and IV of this little book, articles which have appeared in the *Quarterly Review*. Other portions have appeared in the *Journal of the Society of Public Teachers of Law* and the *Law Quarterly Review*, and are here published with the kind concurrence of the editors of those learned periodicals.

C. K. A.

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I [1]

EQUALITY before the law is our most valued constitutional principle. Notoriously, we are superior to foreigners in most respects, but in this above all. The foreigners themselves tell us so: our constitution is the envy of the world. Any opinion to the contrary would have been a blasphemy to Blackstone, and not short of a serious heresy to most Englishmen to-day. No doubt much of this admiration is justified. We will assume for present purposes the virtues of the British Constitution—some of them real enough, some of them not quite so real as text-writers would lead us to suppose. The object of these observations is to point out that we have reached a juncture when we can no longer be content with self-congratulations, but must overhaul some of the constitutional principles which we have been taught to think most fundamental.

Equality before the law has been familiarized to lawyers and laymen alike by a great constitutionalist not long deceased. Professor Dicey made it famous as the principle of 'the Rule of Law'. That principle, reduced to its simplest terms, has two aspects. (1) Every man is responsible for his acts whatever his position in society. The individual servant of the Crown must answer for any wrong he has done as an individual. He can never plead that the wrongdoing was commanded by a superior. While the actual agent of mischief is thus responsible for his acts, the department

[1] *Quarterly Review*, October, 1923.

to which he belongs is responsible, through its head, only to Parliament, and so ultimately to the public. (2) There is only one system of justice available to or against all or any of His Majesty's subjects. There are no special courts and no special procedure applicable exclusively to members of the executive. The Crown itself, and all servants of the Crown, are justiciable, if at all, in the ordinary courts by the ordinary law of the land. We have no *droit administratif*. To this principle the contrast is usually found in France. There, if a government servant is accused of wrongdoing in the discharge of his official duties, the action lies in a special administrative court, with ultimate recourse to a special Court of Appeal, the Conseil d'État. The whole of this jurisdiction forms a separate and highly technical branch of the law, and the activity of the administrative courts is immense.

It is not too much to say that this constitutional principle, so natural to a Frenchman, shocks the conscience of the average Englishman. The present writer can state from experience that 90 per cent. of students beginning the study of constitutional law form the impression that France lives under a system of bureaucratic tyranny little short of Tsarism. Of course nothing could be farther from the truth. The administrative code was undoubtedly intended by Napoleon to strengthen the central government and to protect the executive officer in some measure from the ordinary rules of liability. But Napoleonism is not the spirit of modern France. The development of French administrative law in the last century has been very much more in favour of the subject than of the administration. The remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England to-day. It has become a maxim of constitutionalists, and a bulwark of French democracy, that the Conseil d'État is the great buffer between the public and the bureaucrat.

But what are the remedies against the Crown—i.e. the State—in England? There is a direct remedy in matters of contract; but it is of a peculiar character. It is known as the Petition of Right; its exact nature became settled comparatively late in the nineteenth century, and it now lies for almost any ordinary claim arising out of a contract with the Crown. But its procedure, now governed by statute, is peculiar, and gives the Crown certain advantages in pleading; and it will not lie at all unless the Home Secretary pleases. He, in conjunction with the Attorney-General, may advise the Crown not to submit to the claim; no action lies against him by the suppliant for his refusal, and there is no appeal. His refusal is rare when there is any substance in the claim; and the discretion left in his hands would not normally be dangerous to the subject were it not, as I shall attempt to show, that government departments exhibit an increasing tendency to arbitrary and unconscionable action. Nor does the Petition lie in all cases; for example, no servant of the Crown, including in that term a soldier, can claim his pay by this process. For other reasons, which would be too technical for the present purpose, the Petition of Right is a highly unsatisfactory remedy to the subject. Those who still remember the shameful Archer-Shee Case in 1910 will realize what obstacles the Crown may place in the way of a just but inconvenient Petition of Right.

Where the claim is not for contract but for tort—i.e. for an ordinary civil wrong such as libel or trespass or false imprisonment—there is no direct remedy whatever against the Crown. Suppose the Home Office orders an official to enter upon your land unlawfully and eject you. As has been pointed out, the actual individual who carries out the order is liable in an action of trespass; but there is no action against the Home Office. If you are negligently run over by a van belonging to X & Co., you have an action against the driver of the van, but you also have an action against the corporation which employs him; and it is the corporation which you will naturally sue, because it has funds from which you can recover damages, whereas the van-driver probably has none. If you are run over by, say, a Post-Office van, you have an action against the driver, if you are foolish enough to bring it; but you have no action against the department which employs this negligent servant. This happy result proceeds from the principle that 'the King can do no wrong'—a maxim which came into our law not through any jurisprudential necessity, but by a doctrine which was more or less an historical accident. It is true that if you bring an action against the van-driver, and recover damages, the Crown may, and generally does, put him in funds to satisfy the judgement; but it is under no legal obligation to do so.

So much by way of introduction. At the present time the principles glanced at above are proving quite inadequate to existing conditions, and we are becoming involved in some strange and perturbing constitutional anomalies.

The enormous growth of local government in recent years has necessarily meant decentralization. It is not our present business to inquire whether this is an inevitable phase in the social evolution of England, or whether or not its tendency is socialistic. Law becomes increasingly statute as opposed to common law, and in the process a great deal of legislative power is delegated to local authorities whose function, constitutionally considered, should be administrative, not judicial or legislative. It is no longer possible to find the law which most intimately affects the citizen's life in statutes and decisions. Much of it must be sought in the not very accessible regulations of minor authorities which work by anything but legal methods. Against their rulings there is in many cases no appeal to the ordinary courts.

This is true of education, of the poor law, of public health, highways, the police, licensing, rating. There are a vast number of local by-laws in each locality which are not as conspicuous an example of autonomy as is often imagined. The growing tendency is that the central department—e.g. the Home Office or the Ministry of Health—should 'suggest' to the local authorities a set of 'model by-laws'. Except in large towns which desire to assert their independence, the 'office pattern' of local regulations is usually followed as the line of least resistance. The courts, though instinctively hostile to officialism, are powerless to curtail prerogatives definitely granted by statute to subordinate authorities. The most they can do is to say, in appropriate cases, that powers arrogated by officials are *ultra vires* the statute under which they are claimed. And this is not easy when, as often happens, the authorizing statute is hastily drafted and loose in its terms.

Devolution by way of local government may be necessary and desirable; but the present danger is that the local authorities are made not only legislators, but in many cases the judges and interpreters of their own legislation. Take a simple case which may happen to any owner of house property. He receives a notification from the Borough Council ordering him to close a certain house as being dilapidated and unfit for human habitation. He appeals to the Local Government Board, which orders a 'public local inquiry' to be held. This is done; the owner states his case, and an inspector, after hearing the evidence and making an examination, submits a report to the Local Government Board. The latter considers the appeal in private, and dismisses it. Nobody knows exactly how the body which came to this decision was constituted. The inspector's report is never seen by the house-owner, and its production is refused. He is not entitled to be heard before the deciding tribunal. He cannot appeal against the decision. The most he can do is to ask the courts to say that the Local Government must at least hear him in his own defence. He spends a considerable sum of money in the attempt to attain this object, only to be told by the House of Lords that he has no legal right to be heard by the tribunal which has virtually destroyed his property.[1]

[1] *Local Government Board* v. *Arlidge*, [1915] A.C. 120.

A local education authority is bound by statute to maintain efficiently the schools within its jurisdiction. It chooses to pay the teachers in provided schools at one rate, those in a non-provided school at a lower rate. The managers of the non-provided school complain that the local authority by this conduct is failing to fulfil its statutory duty. The decision rests with the Board of Education. Difficult questions both of law and of fact are likely to arise in such cases. The Board has no power to examine witnesses on oath, it need not examine witnesses at all; it can obtain its information and arrive at its decision in any way it chooses, and it need not give its reasons. It may, as it did in the leading case, deliberately evade the issue; then the worst that can happen to it is that it can be ordered by the House of Lords to decide the issue. Thousands of pounds may be spent in order to make it move; and when at last it does move, its decision, affecting a large number of teachers in the country, is final and unappealable.[1]

The objectionable feature of these departmental tribunals is that they work in the dark and decide legal issues by methods of their own manufacture. The possibility of appeal is always a stimulus to careful judgement, and here the stimulus is absent. Moreover, many an official who would not dream of deliberate injustice in his private relationships is quite without conscience when it comes to scoring a point for his department. It is evidence of a deplorable tendency that the Coalition government, already prolific in bureaucratic excesses, passed in 1921 the extraordinary

[1] *Board of Education* v. *Rice*, [1911] A.C. 179.

Tribunals of Inquiry Act, by which a mere resolution of both Houses can set up a tribunal on any matter 'of urgent public importance', with practically all the powers of a court of law, including the right to institute proceedings for contempt of court, and the power to exclude the public from its sessions.

There are many minor evidences of the same bureaucratic irresponsibility. I will cite only one, which comes home to a good many householders. The telephone subscriber signs a document which is facetiously described as a 'contract'. It is one of those contracts in which, as the phrase goes, 'the reciprocity is all on one side'. In an ordinary contract, when a man pays money, he expects to know what he is getting. The telephone subscriber never knows how many calls he is getting for his money. The Department is the sole and final judge in this matter. The subscriber may prove by unimpeachable evidence that he has been overcharged, but he is merely told that Post Office machines cannot lie; and from this intimation, not always couched in the most polite terms, there is no legal appeal whatever.

In all these matters, legislative and judicial, what is really happening is that Parliament is getting rid of its own responsibilities. It is a short and easy method of legislation to delegate wide and ill-defined powers to subordinate bodies. Doubtless it saves the time and simplifies the labours of the House of Commons, but the practical result is that the proper jurisdiction of the courts is ousted. A statute is passed in full publicity, under a running fire of analysis, criticism, and amendment in both Houses; the regulations of departments and local authorities are created by the tortuous processes of the official mind and curtained from the vulgar gaze by departmental 'discretion'. The Great War made us only too familiar with short cuts to legislation, particularly proclamations and Orders in Council. In 1916, in the *Zamora* Case,[1] the Privy Council had to give the executive a rude reminder that the Crown could not alter the law of the land by Order in Council; and in the Art O'Brien Case,[2] the Court of Appeal deplored this slipshod method of legislation, which sooner or later must end in the bureaucrats being hoist with their own petard.

It may be thought that in the examples I have chosen —and many others might be cited—there is no great danger to the liberty of the subject, because departments and officials will on the whole exercise their discretion fairly and reasonably. Unhappily much of the evidence points in the opposite direction. When there is a definite system of administrative law, certain principles of fairness and equity grow up as a necessary part of it. The French have a maxim in their *droit administratif* that 'The State is an honest man'. It is beneath the dignity of the government to stoop to shabby tricks and push merely technical rights *à outrance*. We, having no administrative law, but merely the emulation of a number of competing authorities, have developed no standard of honesty for the Crown, and unhandsome dealing is all too frequent. Repeatedly of late the Law Officers have adopted the pleadings of

[1] *The Zamora*, [1916] 2 A.C. 77.

[2] *R. v. Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] 2 K.B. 361 (and see [1923] A.C. 603).

Shylock and made claims which, even if technically specious, have no substantial merit.

Doubtless this spirit was fostered by the war. To a certain extent all patriotic citizens acknowledged the principle *inter arma leges silent*; at all events, they submitted to inconveniences and dictation which would have been intolerable in ordinary circumstances. The liberty of every subject was imperilled by the notorious Regulation 14B of the Defence of the Realm Regulations;[1] but no right-minded citizen would invoke Magna Carta in presence of the enemy. Emergency legislation, if an evil, was a necessary evil. But sometimes it went much farther than even emergency demanded. Ministries sometimes assumed powers which denied the most elementary claims of justice. A remarkable example is provided by Regulation 2 (A) (2) of the Defence of the Realm Regulations, by which the Minister of Munitions purported to forbid any landlord to bring proceedings against any tenant who was a munition-worker in certain areas. As late as July 1919 this Regulation was pleaded by a munition-worker who impudently remained in possession after his tenancy had expired. It was emphatically declared by the King's Bench to be *ultra vires* and unconstitutional.[2]

[1] The Regulation empowered the Secretary of State, on the recommendation of the competent naval and military authority, to intern any person 'of hostile origin or associations'. It was under this Regulation that the naturalized German, Arthur Zadig, was interned by the Home Secretary in 1915, and the imprisonment was held lawful by the House of Lords (*R.* v. *Halliday*, [1917] A.C. 260). The phrase 'or associations' of course left extremely wide discretionary powers in the hands of the authorities.

[2] *Chester* v. *Bateson*, [1920] 1 K.B. 829.

Twice the Crown has attempted to establish a right to expropriate the subject without compensation. In the great De Keyser's Hotel Case[1] the House of Lords held that the Crown is bound to compensate for dispossession from landed property according to the assessment of a jury; and in the Newcastle Breweries Case,[2] where a large quantity of rum had been seized, Mr. Justice Salter applied the same principle to movable goods. Of course it was not proposed by the Crown in these cases to seize land or goods without compensation of any kind; but the Crown wished to be able to say, 'We are not obliged to compensate you at all, but of our grace and favour we will give you what the Defence of the Realm Losses Commission awards.' There is a world of difference between this and the assessment of an ordinary court in due process of law.

No less bold was the argument of the Crown in the Pyrogallic Acid Case.[3] An Act of 1876 provides that 'the importation of arms, ammunition, gunpowder, *or any other goods* may be prohibited by Proclamation or Order in Council'. On this wording the Crown claimed the right to prohibit by proclamation the importation of any goods whatsoever. Both common-sense and technical rules of evidence indicate that 'any other goods' are meant by the statute to be goods of the same kind as arms, ammunition, and gunpowder—not, as the Attorney-General contended, any conceivable commodity, from shoes and ships and sealing-wax to bread and meat.

[1] *De Keyser's Royal Hotel, Ltd.* v. *R.*, [1920] A.C. 508.
[2] *Newcastle Breweries, Ltd.*, v. *R.*, [1920] 1 K.B. 854.
[3] *A.-G.* v. *Brown*, [1920] 1 K.B. 773.

Mr. Justice Sankey (as he then was) rejected the Crown's contention, though his decision was reversed on technical grounds owing to the passing of an Act of Indemnity.

These are examples of bureaucracy overreaching itself; but there are also instances of conduct which, though technically sanctioned, nobody would hesitate to call dishonest in a private individual. One of the worst examples is provided by a case which came before the House of Lords in 1922. I simplify the facts, but they roughly amount to this:—A was lessee of a house from B, and by his lease was bound, *inter alia*, to insure, and if the house was destroyed by fire during his tenancy, to rebuild with the insurance money. In 1918 the military authorities took possession of the house under the powers vested in them, and used it as a place of internment for German prisoners of war. During their occupation it was destroyed by fire. Now, B, the lessor, was entitled to look to somebody for reimbursement; and the rule of law applicable was that A, the lessee, though dispossessed by the military authorities, was still liable to the lessor on the covenants of his lease. Naturally both he and A looked to the War Office to make good the damage which had occurred through their compulsory occupation. The War Office summarily denied all liability. The Law Lords did not conceal their disgust at this conduct, but were unable to give the lessee relief. It may be that the War Office, having established its legal immunity, afterwards compensated the lessee as a matter of grace; of this I am not in a position to speak. But the legal situation is bad enough.[1]

[1] *Matthey* v. *Curling*, [1922] 2 A.C. 180.

In 1916 the War Office entered into a contract with a certain aviation school to train pupils 'for the duration of the war'. In June 1918 it desired to put an end to the contract. It appears to have had some reasonable grounds of complaint against the school, but none which was sufficient in law to justify repudiation. However, by an Act of 1918 His Majesty in Council was empowered to declare what date was to be treated as the termination of the war, and this was to be applicable to contracts 'except where the context otherwise requires'. Purporting to act on this power, the War Office informed the aviation school *in June 1918* that the war was at an end and the contract 'for the duration of the war' therefore terminated. This monstrous contention was rejected by Mr. Justice McCardie, and damages awarded to the suppliants.[1]

X had obtained judgement for a large amount against a corporation styling itself the Russian Volunteer Fleet. The judgement debt being unsatisfied, he obtained a writ empowering the Sheriff of Lincoln to seize two ships which belonged to the corporation. The Board of Trade gave notice to the Sheriff that the two ships in question were the property of His Majesty and requested him to withdraw. The position of the Sheriff, a disinterested third person, now is that two persons are claiming the property of which he is seised under a judicial order. In such circumstances, his usual procedure would be to bring what is called an interpleader summons to determine who is the true owner in law. But this cannot be done, because the court is rightly of opinion that 'the

[1] *Ruffy-Arnell* v. *R.*, [1922] 1 K.B. 599.

Crown cannot be made a party to an interpleader issue'. The result is that a judicial decision empowering X to have his debt satisfied is rendered nugatory by the mere veto of the Board of Trade. Moreover, the Board of Trade is acting with cynical disingenuousness. There is no sufficient evidence that the ships really belong to the Crown at all. Under a practice which grew up during the war, the Crown has merely been *registered* as owner, and the evidence would seem to indicate that in fact the Crown is only a hirer from the Russian Volunteer Fleet. Nevertheless, it has sufficient title to deprive the creditor of his manifest rights and impede the due course of law.[1]

But none of these cases equals in brutal cynicism the litigation by the Duff Development Company against the Government of Kelantan, in Malaya.[2] It

[1] *The Mogileff (No. 2)*, [1922] P. 122. Lord Justice Bankes said (at p. 133): 'I very much regret that it is not possible in my opinion to take any other view of the matter than the one taken by the learned judge.' Lord Justice Scrutton said (at p. 136): 'I agree that in the matter which is now before the Court we cannot do anything else than dismiss the appeal. I desire, however, to say that it seems to show the extreme advisability of action by the Committee [the Crown Proceedings Committee, as to which see p. 49, n. 2] which it is stated has been appointed under the presidency of the Attorney-General to consider in what respects the rights of the Crown should or should not be altered by legislation; for I cannot help feeling that the objection which has been taken by the Crown in this case, which I think is a good objection in law, has the effect of preventing an order of the Court being enforced, and of delaying justice to one of His Majesty's subjects.' Lord Justice Atkin said (at p. 138): 'That is sufficient to dispose of this case, but I think it is very unfortunate that it should be so, because not only is the subject delayed in obtaining the amount of money for which the Court has decided he is entitled to have judgement, but also the sheriff, a very important public officer of the Crown, is harassed by reasons of the difficulties he is put into as to the course that he should take.'

[2] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797.

may well be doubted whether in any other case a Crown department has, at every turn, so frankly avowed its intention to obstruct justice by any dishonourable means in its power. The facts lie within a small compass. At a time when Kelantan was a dependency of Siam, Mr. Duff obtained certain concessions of land from its government. In 1909, by the Anglo-Siamese treaty, Kelantan passed under British suzerainty. It continued to be nominally ruled by its own Sultan, but 'with the advice of' the British Government. Everybody knows that in such cases the real government is carried on by the Colonial Office, and it was hardly disputed that this was the actual state of facts in Kelantan. In 1912 the Duff Development Company surrendered its existing concessions and entered into a new agreement with the Crown agents for the Colonies, acting on behalf of the Government of Kelantan. The material part of this agreement, so far as the litigation is concerned, was that the Government undertook to construct a railway through part of the plaintiff's concession. This was not done, and the Company claimed as for a breach of contract. There was an arbitration clause in the agreement, and the parties proceeded to nominate arbitrators. The Government nominated several ex-colonial officials, to whom the Company not unnaturally objected; the Company nominated several distinguished lawyers, including two ex-Lord Chancellors, to whom the Government objected for reasons best known to itself. In this dispute the Secretary of State intervened, as provided by the contract, and nominated an ex-Chief Justice of Nigeria as arbitrator. The award was given in favour of the

Company. The Government refused to abide by it, and moved Mr. Justice Russell in the Chancery Division to set it aside. He emphatically declined; so, on appeal, did the Court of Appeal and the House of Lords.

It need hardly be said that by this time costs amounting to some thousands of pounds had been incurred, and these were, as usual, awarded in the successive Courts against the losers. After the decision in the Court of Appeal, the Colonial Office informed the Company in writing that it did not intend to submit to execution of the judgement. The Company, one may suppose, hardly took this intimation seriously; but it turned out to be very serious indeed. The Government refused to pay costs. The Company accordingly instituted garnishee proceedings to attach certain funds in the disposition of the defendants. It sounds incredible, but it is the fact that the Government produced a certificate from the Secretary of State to the effect that Kelantan was an independent sovereign state, and therefore not amenable to the jurisdiction of English Courts. In view of this declaration the Courts were, by an unmistakable rule of law, bound to dismiss the action. It is perfectly clear that the Government had abused the process of the Court by allowing long and expensive litigation to proceed from stage to stage, without the slightest intention of abiding by the judgement. It is equally clear that all the Courts concerned regarded the Government defence as entirely without merits, and were undisguisedly chagrined at seeing justice burked by the *ipse dixit* of the Colonial Office. The Lord Chancellor gave the broadest of hints, amounting to a direct appeal, to the Government not to persist in a policy which every judge concerned considered scandalous. No notice was taken of his observations, and in further litigation as to the costs of the garnishee proceedings, the Crown gave another exhibition of its sleight of hand.

A writer in *Truth*, who calls attention to this case, very properly observes: 'Throughout this case things have been done in the name of that Government [Kelantan] which are a disgrace to its masters in the Colonial Office.' The same journal, in its issue of July 4, 1923, reports another case in Malaya, concerning the State of Negri Sembilan. The plaintiff had been injured in a motor accident caused by the defective condition of a bridge, for the upkeep of which he claimed that the State of Negri Sembilan was liable. It was urged against him that he ought to have sued the Government of the Federated Malay States. The plaintiff was indeed between the devil and the deep blue sea, for on the one hand the judge doubted whether there was any such person in law as the Government of the Federated Malay States, and on the other Negri Sembilan claimed to be a sovereign independent state, and therefore unsuable!

One final illustration, taken from a decision of the Court of Appeal, will show the difficulties of procedure which are opposed to a claimant against the Crown.[1] In 1919, the Marshall Shipping Company obtained—as it was legally bound to obtain—the permission of the Shipping Controller to sell one of its ships; but the Shipping Controller stipulated, for reasons which do not appear, that the Company should pay a

[1] *Marshall Shipping Co.* v. *Board of Trade*, [1923] 2 K.B. 343.

toll of £20,000 to the Exchequer on the sale. The Company did so, presumably under protest. This extraordinary habit of extorting money for the granting of a statutory licence had been growing up in different departments, and in 1922 the Courts declared it to be illegal.[1] On the strength of this decision, the Company was clearly entitled to get back, as 'money had and received', the £20,000 which it had paid to the Shipping Controller in 1919. But, in the meantime, the Shipping Controller had ceased to exist, all his liabilities passing, by an Act of 1921, to the Board of Trade. The Board of Trade refused to give back the money, and the plaintiffs proposed to sue for it. But the question was, whom and how were they to sue? Let us follow the course of the litigation. A writ is issued and served upon the solicitor to the Board of Trade. He refuses to accept service. The writ is then served on Sir Sydney Chapman, Permanent Secretary of the Board of Trade. He enters a conditional appearance on behalf of the Board, and then takes out a summons before a Master of the Supreme Court to set aside the writ on the ground 'that the Board of Trade as such, and as a Government department, cannot be sued'. The Master sets aside the writ. Appeal to a High Court Judge, who restores the writ and service. Appeal to the Court of Appeal, which holds that the service is bad, and that the only way in which the plaintiff can cure the technical defect is, in the words of Lord Justice Scrutton, 'by going to the several distinguished persons who constitute the committee and astonishing them by serving them with a

[1] *A.-G. v. Wills. United Dairies Ltd.* (1922), 38 T.L.R. 781.

writ which will probably bring it to their attention for the first time that they are members of a committee called the "Board of Trade".' So the plaintiff must begin all over again; and the pitfalls that lie behind him are as nothing to those which lie before. Three highly controversial questions of law still remain to be solved: (1) Can the Board of Trade be sued at all, as such? Has it any legal personality, or is it merely an unincorporated Committee? (2) Should the action be laid in tort or in contract? If in tort (i.e. the wrong of 'extorting money *colore officii*'), should it lie against the Shipping Controller (who no longer exists) or against an individual, one Sir Joseph Maclay (who is no longer Shipping Controller)? (3) If in contract, should it lie against the Board of Trade as such, or against the Crown? On any one of these technical points, the claimant may well lose his whole case, notwithstanding that he has a clear right of law and justice to have his money back. No wonder Lord Justice Scrutton observed:

'I personally feel that the whole subject of proceedings against Government departments is in a very unsatisfactory state. I feel that it is of great public importance that there should be prompt and efficient means of calling in question the legality of the action of Government departments which, owing to the great national emergencies arising out of the war, have been inclined to take action that they considered necessary in the interests of the State without any nice consideration of the question whether it was legal or not, and I hope that the committee which is now considering the question of proceedings against the Crown will be able to give the subject more effective remedies against Government departments than he has at present.'

These sentiments of a learned and fearless judge—it is not the first time that Lord Justice Scrutton has so expressed himself—are those of the public. There is at the present time profound and widespread dissatisfaction with the relations between State and subject. This is not merely part of the heritage of the war; the bureaucratic tendency was developing long before 1914, but five years of emergency government brought it to a pitch which soon became intolerable. It is idle to boast of the glories of our constitution when the fountain of justice is polluted by the owner of the soil. The examples I have cited above are but a drop in the ocean of the cases which never come to judgement. Men are well aware by this time that if they have the hardihood or misfortune to engage in litigation with the Crown, they must be prepared for all the technical obstruction in which the departments make it their business to excel. Obstructive and temporizing methods are often successful, like those of the shady solicitor: claimants are 'bluffed' out of court. Money and patience are exhausted by 'the law's delays, the proud man's contumely', and men prefer to submit to injustice and cut their losses rather than face the interminable prospect of damages and costs and perpetual postponements.

From no point of view can this pay, not even financially. It is false economy to refuse satisfaction of just claims; the Exchequer may be a few pounds in pocket at the expense of an individual, but all that is saved in this way is poured out again for the litigation in which the Crown recognizes no limit, as it recognises no mercy. The Law Officers and their staff do not work for nothing. Money and time are spent like water in resisting just demands, and the whole system is as uneconomic as it is unscrupulous. *Interest reipublicae ut sit finis litium.*

From the moral and social point of view, it pays still less. The law-abiding spirit and the respect for justice are among the highest assets of the English people. How can the public respect the law when its very guardians are constantly appearing in support of unjust claims, and when the judges are daily compelled to dispense what they know, and openly declare, is not justice? Nobody supposes that the Law Officers, as individuals, desire to cheat any particular litigant. They are the slaves of an evil tradition, a tradition extraordinarily at variance with our pious professions of legal virtue. The State is not an honest man. Its dishonesty is the worse because it combines the methods of the bully, who has all the odds in his favour, with those of the casuist, who can make the worse appear the better reason. But injustice will not go unavenged. Tit for tat. The plundered will in their turn plunder the government whenever opportunity offers, and will glory in doing it. What kind of social equilibrium will result from this discord between governor and governed, it is easy to see. 'Void of Justice,' cries Meredith, 'what a sunless place is any realm! . . . The void of Justice is a godless region.'

This evil tradition in Crown law has been greatly fostered and made the cat's-paw of two prime causes which are at the bottom of the present state of things. First, there is the bureaucratic mind. It has its conspicuous merits in its own proper sphere, but it has gone far beyond that sphere. It has been unduly exalted by legislation: it was given practically *carte blanche* during the war: and it has ever since accumulated more and more power. Power is exceedingly bad for it, because it is of its very nature inhuman. Being inhuman, it will, in the assertion of its supposed duty, have no mercy upon the insignificant individual citizen. To any but those who desire to see a Sidney Webbian England, it is essential that the bureaucratic mind be confined to its proper function, which is that of the lieutenant, not the captain.

Secondly, constitutionally speaking, we are living in an unreal world. We are clinging to old shibboleths about equality before the law when that principle is rapidly evaporating. We are in fact developing a system of administrative law, and we will not admit it in theory; consequently the courts are engaged in the vain and humiliating endeavour to fit the square peg into the round hole. There are some who think that we shall muddle through, that the law will adapt itself empirically to new conditions, as it has always done, and work out a rational system. But the changed situation must be acknowledged and the conditions made favourable for adaptation. What seems to be needed is that administrative law, if it must exist, should be taken in hand courageously and that the public should know how it stands. No reform is more urgent. Lord Justice Scrutton expresses the representative opinion of the legal profession when he demands revision of the whole system of remedies against the Crown. The committee to which he refers was appointed a long time ago under the presidency of the then Attorney-General, now the Lord Chief Justice. Presumably it is still pursuing its labours, but nothing is heard of them. Its conclusions are awaited with anxiety by the public who suffer from the methods of bureaucrats, and by lawyers who are apprehensive for constitutional principles.[1]

[1] It reported in 1927. See *post*, p. 49, n. 2.

II[1]

SIR JOHN MARRIOTT's study of 'English Political Institutions' has long been a valuable guide to historians, publicists, and lawyers. We wish we could add that it has also been the instructor of our politicians. The first edition appeared in 1910. Since that date very important constitutional changes have been going on, sometimes in the full glare of political controversy, more often by gradual processes scarcely perceived by the majority of the public. A number of these changes were indicated by the late Professor Dicey in the more recent editions of his widely known *Law of the Constitution.* Sir John Marriott now finds the time ripe to summarize them in a new introduction to his work, published separately as a pamphlet. Its forty pages are packed with matter highly instructive to all—and they should be many—who are interested in the present transformations of the English constitutional system. Our only criticism of this succinct thesis, apart from some considerations which we venture to offer below, is not of its quality, but of its quantity. We trust it may be regarded as prolegomena to a fuller study which in due time will be incorporated in the parent work.[2] Transitionary processes are still palpably going on. It cannot, however, be long before a clear necessity arises for some publicist, as familiar as Sir John Marriott with the actual conditions of political life, to rewrite the law

[1] *Quarterly Review,* January, 1925. A review of Sir J. A. R. Marriott's *The English Constitution in Transition, 1910–1924.*

[2] See now the same author's *Mechanism of the Modern State*, Oxford, 1927.

of our Constitution. When that time comes, it will be surprising if we do not find that a great many of our traditional principles have become so attenuated that it will be mere pedantic affectation to retain them in theory when they are so remote from practice.

We are concerned here with one only of the many questions with which Sir John Marriott deals. He writes as follows concerning the tendencies of legislation and bureaucracy:

'Menaced by the multiplication of external organizations, Parliament has itself not merely connived at, but contributed to the infringement of its legislative monopoly. In former days Englishmen were said to be distinguished from their Continental neighbours by their "instinctive scepticism about bureaucratic wisdom". Consequently Parliament attempted, in making laws, to provide beforehand, by precise statutory enactment, for every contingency which might reasonably be expected to arise. This naturally rendered the form of English statutes exceptionally elaborate and detailed. Parliament has recently shown a marked tendency to abandon this tradition. In our legislative forms we have moved towards Continental methods. Partly owing to the increasing complexity of industrial and social conditions, partly under the subtle influence of Fabian Socialism, partly from the general abandonment of the principle of *laissez faire* and the growing demand for governmental guidance and control in all the affairs of life, partly from sheer despair of coping with the insistent cry for legislation, Parliament has manifested a disposition to leave more and more to the administrative department. Many modern statutes are mere *cadres*, giving no adequate indication of their ultimate scope. They lay down general rules and leave it to the Departments concerned to give substance to the legislative skeleton by the issue of Administrative Orders. . . . It is true that *Provisional*

Orders require statutory confirmation, but *Statutory Orders* become operative after "lying on the table" for a given number of days. In both cases, therefore, Parliament retains formal control; in the latter case, it is little more than a form.'

One of the consequences is, inevitably, a formidable increase in the expenditure of public money. The recommendations of the Select Committee on National Expenditure in 1918 have been duly pigeon-holed and ignored. Those who have been taught to cherish the principle 'No taxation without representation' will be shocked to learn that, according to this Committee, they have been 'suckled in a creed outworn': 'so far as the direct effective (Parliamentary) control of proposals for expenditure is concerned, it would be true to say that if the estimates were never presented, and the Committee of Supply never set up, there would be no noticeable difference.' Sir John Marriott goes on to discuss the various solutions, all of them somewhat startling to a mere old-fashioned constitutionalist—Referendum, Syndicalism, and Direct Action—which are offered by different 'young' schools of thought. Of any less revolutionary effort to solve a pressing problem Sir John is unfortunately unable to inform us. The millions of Englishmen who find no bright promise in any of the three desperate expedients mentioned above are apparently content with the principle *solvitur ambulando*—always a somewhat thin and comfortless creed.

On the whole, Sir John Marriott is not alarmed. On the Rule of Law and the growth of Administrative Law he makes the following observations:

'The multiplication of statutes almost inevitably tends to the curtailment of individual liberty, but liberty has been curtailed even more perhaps by the character than by the volume of legislation. . . . Bacon observed that there is "no worse torture than the torture of laws". If he was right the modern citizen is evidently obnoxious to that form of torture to a degree undreamed of by the victims of medieval tyranny. Apart from this, however, there has been in recent years an equally marked tendency to confer by statute judicial or quasi-judicial authority upon permanent officials. . . . To confer judicial authority upon the officials of administrative Departments, and at the same time to invest them with the power to make Orders which have the force of law, is plainly to confound the Legislative power with the Executive and the Judicial power with both. Moreover, it tends to blur the important distinction between what is and what ought to be. If those who are responsible for laying down the law are charged also with the duty of applying it, the menace to personal liberty must become acute, and the English citizen is likely again to incur risks from which the great contest of the seventeenth century was thought finally to have relieved him. The Judges may still be lions, but they are likely to become, as Bacon would have gladly made them, lions under the throne, though the throne is no longer occupied by a single monarch who can, at worst, be removed, but by the many-headed bureaucracy which can be dislodged, if at all, only by a sustained and gigantic effort.'

Notwithstanding these grave animadversions, we have, in Sir John's opinion, 'passed through the ordeal of a great war with the minimum infringement of those safeguards for personal liberty of which Englishmen have been justly tenacious'. In support of this view, the Art O'Brien case[1] is cited, with its energetic vindication of the principle of Habeas Corpus. This optimism, coming as it does from one who has a first-hand know-

[1] *R. v. Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] 2 K.B. 361.

ledge of the political machine, will be gratifying to the many citizens who have begun to feel serious alarm at recent developments. A lawyer, contemplating the decay of age-long first principles of justice, cannot feel the same measure of confidence.

We have already called attention to a number of examples from the Courts which seem to show, first, that the principle of the Rule of Law needs candid and careful revision, and second, that the temper of the present bureaucracy is to press unmeritorious claims to the profit of the Crown and the unjust detriment of the subject. It has been recognized that this was partly the result of necessary emergency legislation. But we are getting farther and farther away from the war, and the mischievous tendency should be diminishing. It shows no signs of doing so. The Art O'Brien case, in which the judges fortunately had a free hand, has been more than counterbalanced by a number of cases which further illustrate the helplessness of the individual amid the sleights and subtleties of administrative litigation.

Nobody has a better opportunity of enjoying departmental ingenuity than the house-owner; indeed, it is matter for wonder that anybody with money to invest will choose this form of property, which immediately involves him in a complex net of obligations to local authorities and to the Ministry of Health. In particular, the provisions applying to working-class dwellings are a masterpiece of muddledom. The relevant enactments are the Housing of the Working Classes Act, 1890, and the Housing, Town-Planning, &c., Acts, 1909–19.[1]

[1] See now the Housing Act, 1925, and the Town Planning Act, 1925.

These statutes are an amorphous mass of references and cross-references casually thrown together, and their general effect has been well described as a 'mosaic of legislation'. More than one judge has confessed his despair of finding any consistent intelligible meaning in them. The house-owner himself cannot hope to understand their effect: he is between the upper and the nether millstones of the Courts and the Departments, who have to grind out between them the true or supposed meaning of the enactments. We may take one important provision as illustrating the difficulties of the landlord and the highly Protean performances of the Crown and the local authorities. It is provided by the Act of 1919 that in the case of dwellings suitable for housing the working classes, the local authority may serve upon the owner a notice requiring him to carry out certain repairs in order to render the dwellings fit for habitation. A reasonable time for carrying out the work must be specified in the notice, and this must not in any case be less than twenty-one days. If the work is not done within the specified time, the local authority is empowered to carry out the repairs itself and to charge the owner with the expenses incurred. If they are not paid on demand, action may be brought to recover them before a magistrate. In the first case with which we are concerned (*Ryall* v. *Cubitt Heath*, [1922] 1 K.B. 276) owners of extensive property in Bermondsey were served with a notice by the Borough Council calling on them to carry out repairs on a number of houses within twenty-one days. They failed to do so; the Council did the work itself and sued the owners for expenses amounting to more than £600. It is obvious that in the then conditions of labour, twenty-one days was in many cases a wholly inadequate time in which to get building work executed; and the magistrate held that by no possible effort or diligence could the owners have done the work within that period. He therefore held that the Council's claim failed, inasmuch as the notices did not specify a reasonable time, as required by the Act. But the Council contended that so long as the *minimum* period of twenty-one days was specified, the magistrate had no jurisdiction to inquire into the general question of reasonableness; and on this ground appealed. A Divisional Court of the King's Bench dismissed the appeal, holding that the twenty-one days was merely a minimum and that the Court of Summary Jurisdiction had power to examine the whole question of reasonableness, with due regard to all the circumstances of the case.

The next phase (*R.* v. *The Minister of Health, Ex p. Rush*, [1922] 2 K.B. 28) is that an owner in similar circumstances carries out (as he contends) repairs which he has been required to do, under the same Act, by the Paddington Borough Council. Six months after the work has been completed, the Council suddenly discovers that the repairs are not satisfactory; and the owner is thereupon informed that he has 'failed to comply' with the notice issued to him, and that an order has that day been given to the Council's own contractor to carry out the work. The owner protests and claims that he has done all that he was required to do. The only answer he receives comes nine months later in the form of a bill for £134. Relying on a provision in the Act of 1909, he appeals to the Ministry of Health. But the Ministry of Health is not disposed to tolerate any nonsense of that kind. The landlord cannot appeal. He has quite mistaken his rights. There *used* to be a right of appeal to the Minister about these trifling matters of expense, but it has now been 'impliedly repealed' by the Act of 1919, which gives a right of appeal only when the house cannot *without reconstruction* be rendered fit for habitation. The owner, therefore, who claims that this £134 need never have been spent, cannot get a hearing either before the local authority or the Minister. He has to go to the King's Bench for a mandamus compelling the Minister to hear his appeal. This he has no difficulty in getting; but having got it, he has only succeeded in 'cranking up' the administrative machine. Whether it will eventually move in the direction he desires, no man, the house-owner least of all, can tell.

In this case, then, the Crown's contention, which never had any merit but ingenuity, failed. But that does not discourage your true bureaucrat. We next find the very contention in which the Crown failed being employed by a local authority to checkmate a claimant (*Ryall* v. *Hart*, [1923] 2 K.B. 464). This time the landlord is sued before a magistrate for expenses incurred by the Bermondsey Council in making his house fit for habitation: his defence is that he did not have reasonable notice of the repairs. Again, the magistrate finds in his favour, holding that the work could not possibly have been done within the twenty-one days specified in the notice.

But, says the bureaucrat, you cannot raise that defence now; the King's Bench has said in the previous Bermondsey case that you have an appeal *to the Minister*, and you ought to have availed yourself of it; it is inconceivable that you can have *two* rights of appeal in a matter so unimportant as alteration of or expenditure on your house property. Again the King's Bench must be invoked, and asked to hold, as it does hold, that it is neither unreasonable nor illegal that a man should have two rights of appeal in a matter touching his pocket to an indefinite extent.

In another case with similar circumstances (*Adams* v. *Tuer*, [1923] W.N. 278) a Rural District Council, having served the usual notice and then done the work itself, sued for £342 expenses incurred. The justices found that the amount charged for labour was excessive, that all the work charged for was not done, and that part of the work was not necessary; and they fixed £250 as a proper sum to cover the expenses. Again the Council contended that the justices had no power to inquire into the reasonableness of the amount, and that their duty apparently was to award either the whole amount or nothing at all; and again the house-owner, already admittedly overcharged £100, is haled before the King's Bench to have it settled whether the overcharge is or is not in the best interests of justice. The King's Bench had no difficulty in answering the question. Such are the problems of logic and casuistry which the *disjecta membra* of hasty administrative legislation constantly force on our Courts.

Compensation for war losses was a much-agitated question after the war, and it is impossible to sympathize with all those who made claims against the public for pecuniary loss incurred through Government interference at a time when all the well-affected were losing something either in person or estate. But some of the distinctions which were drawn between admissible and inadmissable claims are not easy to follow, and appear to have worked serious injustice in not a few cases. The subject was for the most part governed by the Indemnity Act, 1920, which, as is well known, indemnified servants of the Crown for acts done to the detriment of individuals in the emergency of war conditions. In such cases, the person aggrieved could not pursue his ordinary remedy at law, but was bound to apply for compensation to a special tribunal set up by the Act. Further, there were many cases in which, owing to the peculiarities of our Crown law, the person damnified had no *legal* recourse against the Government; in such circumstances the Indemnity Act provided that the claim should be considered according to certain principles laid down in Part II of the Schedule of the Statute. One of these principles was that a claim could be entertained only 'for direct loss . . . suffered by the claimant by reason of direct and particular interference with his business'. The object was to prevent claims for all kinds of remote and speculative damage which might be alleged to flow from Departmental interference; and it is clear that some limitation of this kind was necessary to restrain frivolous, vexatious, and avaricious claims. But what was 'direct' damage? It seemed to be restricted to such narrow limits that quite honest and reasonable claims failed on purely technical grounds. A company, during the war, has chartered a ship for Mediterranean trade. The ship is about to sail for Egypt with a full outward and return cargo, when it is ordered by the Shipping Controller to proceed to Cuba and bring a cargo of sugar to England. The loss to the company as a result of this order is estimated at £20,000. Is this *direct* damage? The House of Lords says not (*Moss S.S. Co.* v. *Board of Trade*, [1923] A.C. 133); and probably, in the special circumstances of the case, the result was not unjust, though the dissent of two members of the House and the extraordinarily different reasons given by the other three were fairly certain to prove a source of embarrassment when the point arose again. In a later case (*Black* v. *Admiralty Commissioners*, [1924] 1 K.B. 661) a meritorious claim seems to have failed through the vagueness of the Indemnity Act. In May 1916, B, a steam-trawler owner, ordered from a firm of ship-builders eight trawlers which were intended to be used by him in his business. They were to be delivered on specified dates in 1917 and 1918; but in October 1916, before the building had begun, the Admiralty exercised its powers under D.O.R.A. and ordered the builders to abandon any work for private owners and to build for the Admiralty instead. B therefore—doubtless for excellent public reasons—had to go without his ships. But he was bound to have new ships sooner or later if his business was not to perish. If he got them in 1917 or 1918, they would cost him £39,000 more than in 1916, when he originally ordered them. Actually, he could not have bought them at all or got them built till 1919, when they would have cost him £66,000 more that in 1916. Had he not suffered a 'direct' loss through the interference of the Admiralty, which was quite well aware when it issued its order to the builders that they were under contract to build trawlers for B? The Court of Appeal decided that B could not maintain his claim, and that he must get his ships built at whatever fancy price the conditions of the market might demand. He had to content himself with the reflexion that the loss of £66,000 was merely 'indirect', and it is to be hoped that he had sufficient philosophy to persuade himself that it was not really a loss at all.

A considerable amount of inconvenience and unnecessary litigation was caused by the reshuffling of Departments and Ministries after the war. Thus the Shipping Controller's rights and liabilities passed to the Board of Trade, the Board of Trade in some important matters was supplanted by the Ministry of Transport, and under the very complicated provisions of the enactments relating to the Irish Free State a number of Departmental functions were transferred to the Government of that Dominion. Each Department was anxious, it need hardly be said, to shift its responsibility elsewhere; and the result often was that a litigant had to spend a great deal of money in determining which particular Department (if any) he could sue for an admittedly substantial claim. Each Department was ready if necessary to appeal as far as the House of Lords in order to disclaim its responsibility, and thus the unhappy litigant might be involved in months or perhaps years of preliminary law-suits before he could even begin to prosecute his claim. Thus in 1917 and 1918 an Irish railway company enters into an agreement with the Board of Trade by which the company promises to take up certain rails and sleepers and transfer them to the Board; the Board promises in return to pay for the cost of replacing the rails and sleepers, of constructing a double instead of a single line, and of making consequential alterations to certain stations. The company carries out its part of the bargain; six years later it is still attempting to find out which part of the mystical body of the Crown is prepared to keep faith with it. The Board of Trade says its liabilities have passed to the Ministry of Transport: the Ministry of Transport refers the plaintiff to the Government of the Irish Free State. Mr. Justice Rowlatt holds that the Ministry of Transport is liable: the Court of Appeal reverses his decision; and the House of Lords, after the usual interval of time, reverses the Court of Appeal. After the final tribunal has delivered itself, the company (if it is not by this time in liquidation) has the satisfaction of knowing that it can at last proceed to sue somebody.[1]

It may be remembered that various Ministries set up during the war were empowered to grant licences for numerous purposes, such as export, import, and distribution of goods, and transactions concerning ships. Both in morality and in law the duty of a person entrusted with the power of granting licences was solely to exercise his judicial discretion on the merits

[1] *A.-G.* v. *Great Southern & Western Railway Co. of Ireland*, [1925] A.C. 754.

of each application. But it occurred to the Food Ministry, which was invested with large powers in this respect, that this was an admirable opportunity for turning a dishonest penny for the public revenue. It proceeded to charge considerable sums for granting its licences. If this were done by an official for his private gain, it would, of course, amount to the grossest corruption; and the irregularity of the procedure was not altered by the fact that it was not an individual, but the public, which took the ill-gotten profit. Nor was the imposition improved in essence, though given a hypocritical exterior, by being disguised under the semblance of a voluntary agreement. Thus, in the test case (*Attorney-General* v. *Wilts. United Dairies, Ltd.*, [1922] 38 T.L.R. 781), a company was refused a licence by the Food Controller to import milk and to deal in milk products unless and until it had 'agreed' to pay the Food Controller a toll of 2*d.* per gallon on the milk imported. The money was paid, but, in the words of Lord Justice Bankes in another case, paid 'grudgingly and of necessity, but without open protest, because protest was felt to be useless'. It was, in fact, according to any plain use of language, paid under compulsion; and money so paid can be recovered at law. The Dairy Company's claim to recover these sums was contested as far as the House of Lords. The House was not moved by appeals from the Attorney-General that officials should not be 'interfered with' in the beneficent discharge of their duties. It was held that the imposition was illegal and contrary to so fundamental a constitutional document as the Bill of Rights, inasmuch as it amounted to taxation imposed on the subject without the authority of Parliament. This case was decided in 1922. Now, the Shipping Controller had followed the example of his colleague, and had exacted very large sums for the issue of licences to sell British ships to foreign purchasers. In 1923, the Court of Appeal had clearly indicated that the exaction of such sums was equally illegal in regard to ships as in regard to milk (*Marshall Shipping Co.* v. *Board of Trade*, [1923] 2 K.B. 343); but this was only an opinion, not a decision, since the case in which it was given, like so many others, was merely part of the preliminary skirmish to discover which Department the claimant could sue. In the next case (*Brocklebank* v. *R.* [1924] 1 K.B. 647 and 40 T.L.R. 869), the Crown boldly takes advantage of its own wrongdoing and teaches us for the first time that the Sovereign is the only person exempted from the familiar principle, *nemo suam turpitudinem allegans est audiendus*. The shipowners here obtained from the Shipping Controller in November and December 1919 (and therefore no longer during actual war conditions) a licence to sell one of their obsolete ships to an Italian firm; but only on condition of paying £35,000, being 15 per cent. of the sale price, to the Ministry of Shipping. They now sue for the recovery of this money, on the authority of the principle laid down by the House of Lords in the Wilts. Dairy Case. It must be noted that an action to recover money exacted under compulsion is a form of action *in contract*; and it is specially provided by the Indemnity Act, 1920, that actions *in contract*, arising out of acts done during the war, continue to be maintainable against the Crown, by way of Petition of Right, if brought within a certain time. But the Crown is ready for all emergencies. It says: 'You must not sue us in contract, because we have committed a *civil wrong*; the exaction of money by compulsion, sometimes vulgarly known as blackmail, is as much a *tort* as libel or assault or trespass: we have sinned, and we glory in our shame, because the Indemnity Act says that no action shall lie for a *wrong* done by an official during the war in good faith in the exercise of his duties: in short, *just because* the exaction was illegal at Common Law and contrary to the Bill of Rights, we defy you to get back a penny.' The Court of Appeal has no option but to admit the legal validity of this attractive argument; but not without protest. Lord Justice Scrutton 'expressed regret that the suppliants, who, in his view, had suffered a wrong at law, should be deprived of their remedy by a misunderstanding of the Indemnity Act, 1920, and he might be permitted to regret that the Government in those circumstances should keep money illegally obtained, but he could do no more than regret it'. The epilogue is that while this litigation was going on, the claimants lost even the right to apply to the War Compensation Court, being barred by the expiry of the time specified by the Indemnity Act for bringing such claims.

Should any reader suppose that too unfavourable a light has been thrown on these cases, we hope that one final illustration will show that our highest Court of Justice is becoming a little tired of the fantastic lengths to which the Crown will sometimes push its claims. The case of *Postmaster-General* v. *Liverpool Corporation*, [1923] A.C. 587, supplies a kind of legal argument and a degree of cynicism for which it would be hard to find a parallel in our law reports. The facts were simple. The Corporation were the undertakers for the supply of electricity to the City of Liverpool, and owned the electric main which was here in question. The Postmaster-General owned a telephone-pipe which he had taken over, under statutory powers, from the National Telephone Co. An explosion occurred through the escape of electricity from the Corporation's main to the telephone-pipe, and the latter was damaged. It was found as a fact, and was not disputed, that the escape was caused not through any defect in the Corporation's main, but through the negligent and incompetent laying of the telephone-pipe. It is provided by an Act of 1878 that any person who injures or destroys a line belonging to the Postmaster-General must make good the damage to that official. As we have said, the injury was caused entirely through a defect in the Postmaster-General's own telephone-pipe. *He proceeded to sue the Corporation for the damage.*

The House of Lords had difficulty in maintaining judicial restraint of language. Those Lords who did not speak in anger spoke in sorrow; for indeed they could not but feel that such litigation brings the whole system of justice into contempt. Lord Carson accurately summarized the Postmaster-General's contention when he said:

'My Lords, it seems to me that the appellant desires to lay down that not only is the Postmaster-General, by which I mean of course his department, incapable of doing wrong, but that if he does commit a wrong, whereby damage occurs, he ought to ask somebody else to pay for it.'

Lord Shaw said that 'in the ordinary relations of men, the proposal would be monstrous, and if carried into practice would of course plainly be a tyrannical and unjustifiable act.' The Earl of Birkenhead described the whole proceedings as 'an absolutely hopeless appeal without merit in fact or foundation in law'. The total amount of damage done by the escape of electricity was £40. The proceedings were taken through the whole hierarchy of the Courts, from County Court to House of Lords. Before the final tribunal three King's Counsel and two Juniors appeared. The case, from first to last, cannot have cost less than several thousand pounds. It need hardly be said that ultimately the public pays for the Crown's share of these totally unnecessary costs. The Attorney-General solemnly suggested that if the decision went against the Postmaster-General, it would be necessary to introduce legislation. Undaunted by the veiled threat, the Earl of Birkenhead waxed satirical:

'It is indicated that legislation may become necessary if the view of the Postmaster-General fails of acceptance in this House. I have amused myself by speculating as to its probable ambit. The first section of such a Bill will, I suppose, provide that when the Postmaster-General by his own negligence occasions damage to a telegraphic line other persons (including perhaps the owners) non-contributory to that damage and negligence shall pay for it; and the second, no doubt, will provide that when the Postmaster-General inherits from a company a laid pipe which neither they nor he could have laid down without the consent of X, the

Postmaster-General shall nevertheless be absolved from the condition without which his predecessors in title would never have been allowed by X to lay the pipe at all. My Lords, I shall watch with interest the Parliamentary progress of such a proposal.'

All the Lords were unanimous that the case, assuming that it should ever have been brought at all, should never have been carried beyond the County Court. For example, Lord Shaw observed:

'I have read with much care the decision of the Court of Appeal; it is one of great analytical accuracy. It emphatically negatived the suggestion that s. 8 of the Telegraph Act of 1868 gave any cover or warrant for conduct of the kind described, or for the claim put forward. I think the Postmaster-General's department might have been well content to stop there and to consider itself relieved from what must have been the odious duty of endeavouring to support by statute what would otherwise be, as I have stated, tyrannical and unjustifiable conduct. They have not chosen that course, my Lords, and they come here because it is a test case. My answer, in full agreement with the County Court judge and the Court of Appeal, is that the claim and all other claims of which this is a test or sample have no support whatever under s. 8 properly construed.'

Lord Wrenbury. 'My Lords, I agree, and I desire to add that I entirely concur in that which has been said by the noble and learned Lord on the Woolsack as to the action of the Postmaster-General in bringing this appeal before your Lordships' House.'

Lord Carson. 'My Lords, I also concur, and I should like to add that, in my opinion, when once the County Court judge had found the facts, which are not challenged, in these proceedings, I think it is regrettable that the Postmaster-General proceeded with the litigation.'

Is it credible, in view of these pronouncements, that the Crown ever believed that it had any real chance of success in its monstrous claim? We venture to think that any lawyer who knew his business would, as soon as the County Court judge's findings were known, have answered the legal question as the House of Lords answered it. Why, then, is the case litigated with such pertinacity? There can be only one reply. The method is one of terrorization. The Corporation is being punished for its obduracy in not yielding at once to the Postmaster-General's piratical demand. The choice is as simple as 'your money or your life'—pay us £40 now, or pay your counsel some thousands of pounds after, say, two years of litigation. Invariably these cases, after their first stages, resolve themselves into a fight for costs. Fortunately, the intended victim in this case was a powerful corporation with money as well as spirit; but in the long run, the tax-paying inhabitants both of Liverpool and of England will pay for the production of this tragi-comedy. A private individual, who did not wish to enjoy the luxury of martyrdom, would pay his £40 at once with what fortitude he could muster; and nobody could blame him if he falsified his next income-tax return for a like amount.

On a previous occasion, we have attempted to point the moral of cases like these, and will refrain from doing so again—even if it were necessary to do so; for the facts themselves are eloquent enough without comment. Those who wish to study in detail the curious methods and effects of departmental-judicial jurisdiction will find a typical and, many will think, a startling example in the powers exercised by the Minister of Health under the National Insurance Act 1911, in regard to removing the names of medical practitioners from 'panels'.[1] We beg leave to remain respectfully sceptical of the enthusiasm, qualified though it be, with which some of our publicists, such as Sir John Marriott, appear to regard the present glories of our Constitution.

[1] See Ministry of Health, *Reports of Enquiries and Appeals, &c.*, vol. iii, H.M. Stationery Office, 1924. See the present writer's *Law in the Making* (2nd ed.), pp. 342 ff.

III[1]

'ADMINISTRATIVE Law,' we are often told, is a term foreign to our jurisprudence—at all events in the sense in which it is commonly employed in other countries. Some of our jurists, notably Austin and Holland, have so far recognized it as to attempt to delimit the spheres of Constitutional and Administrative Law; but, as Maitland has shown,[2] their attempts have not been conspicuously successful. Maitland's own conclusion is negative. 'The demarcation of the province of constitutional law,' he insists,[3] 'is with us a matter of convenience.' *A fortiori*, Administrative can be separated from Constitutional Law only as a matter of convenience —convenience, that is, for purposes of selection, arrangement, and exposition.

The same uncertainty exists among writers more familiar than ourselves with this topic. M. Hauriou, in his classic *Précis de Droit Administratif*,[4] assembles a number of standard definitions, all of which it is easy to criticize from one point of view or another. His own definition centres in the aim rather than the content of Administrative Law—it 'has as its object the regulation of the employment and exercise of the means of action *des administrations publiques* considered in principle as rights in respect of their execution and as powers in respect of their authority'. This leaves us in doubt as to

[1] A paper read before the Society of Public Teachers of Law at its annual meeting at Trinity College, Cambridge, on July 6, 1928, and reprinted from the *Journal of the Society of Public Teachers of Law*, 1928.

[2] *Constitutional History*, 526 ff. [3] *Ibid.*, 536. [4] 6th ed., 390

the meaning of *administrations publiques*, and leads to a discussion of the general doctrine of administrative *personality*—a conception full of difficulties, and far beyond the scope of the present inquiry. M. Berthélemy[1] is more concrete and direct. Like Maitland, he deprecates any attempt at an artificial separation of Constitutional from Administrative Law.

'The one is a necessary preface to the other. Constitutional Law acquaints us with the political organization of the State, the distinction between public powers, the rules by which certain persons are invested with that double function which constitutes the essence of government—that of making law, that of effecting its execution. Administrative Law analyses the mechanism of the Governmental machine. Constitutional Law tells us how the apparatus is constructed: Administrative Law tells us how it works, how each of its component parts functions.'

This line of distinction corresponds, to use Maitland's phrase, with the difference between *structure* and *function*: a difference which, as he has shown, cannot be rigidly maintained in English law. The same is true of French law. Any English student who opens a standard treatise on *droit administratif* will at once observe that many subjects are included which he has been accustomed to regard as belonging to Constitutional Law: and if he then turns to a treatise, like that of Duguit, on *droit constitutionnel*, he will find that both his text-books to a considerable extent cover the same ground. They would, indeed, both be manifestly incomplete if they did not.

It is a cruel sport, and one to which lawyers are somewhat prone, to try to make the supple body of the law

[1] *Traité Élémentaire de Droit Administratif*, 7th edn., p. 1.

lie easy on a Procrustean bed of definition. At the risk of seeming to shirk my duty, I am not going to attempt a cast-iron definition of Administrative Law, though I think that the distinction between 'structure and function' is, *exceptis excipiendis*, sound and intelligible. My objective is limited to certain marked tendencies in our present governmental system which are commonly referred to as manifestations of 'Administrative Law'; and when people use that term, I think they have particularly in mind one or all of four different things.

(1) A special body of law, distinct from the general law, applicable to legal relationships between the State (Crown) or its representatives and the private individual, and conferring or tending to confer on the former special privileges in those relationships.

If that is what is meant by Administrative Law, then we may say that, in broad principle at least, no such thing exists in England. But is this the true meaning of Administrative Law in any enlightened country to-day? To take the most familiar example, is French *droit administratif* nowadays a special code of official privilege and immunity? That is certainly a view commonly held in this country. Through the brilliant and popular exposition of Dicey, much attention has been directed to *droit administratif* as it existed under Napoleon, and, indeed, until about 1872; but insufficient attention has been directed to the remarkable jurisprudence of the Conseil d'État since that date. Continental Administrative Law is often thought of as a system in which bureaucratic influence impedes or ousts justice, in which the executive seeks to place itself above legal redress, and in which the Courts adjudicating between sovereign and subject are not Courts properly so called and are not actuated by an unfettered spirit of justice. All this is contrasted unfavourably with our own Rule of Law.

Some little time ago, writing on this subject, the present writer hazarded the following opinion:[1] 'The development of French Administrative Law in the last century has been very much more in favour of the subject than of the administration. The remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England to-day. It has become a maxim of Constitutionalists, and a bulwark of French democracy, that the Conseil d'État is the great buffer between the public and the bureaucrat.' This statement causes pain and surprise, though very courteous pain and surprise, to Sir John Marriott in his admirable work on *The Mechanism of the Modern State*.[2] The writer observes: 'Perhaps reconciliation between opposite views is to be found in the words of the quotation which I have italicized' (i.e. remedies *against the State*). 'It is notoriously difficult for an *English citizen to enforce rights against the State*, or, as we should say, the Crown, while it is exceptionally easy for him to obtain redress for injuries against the agents of the Crown.' With that statement I respectfully concur: but what then? Why do some of our constitutionalists attach such peculiar sanctity to the personal liability of the Crown servant? We entertain no such feelings when we approach the ordinary law of *respondeat superior*. Dicey himself points out that the rule has

[1] [illegible] pp. 2 3

[2] ii. 336.

often worked very inconveniently.[1] Recourse against the great and really responsible principal is far more important than recourse against the insignificant individual agent. And even if our doctrine be the true gospel, we are strangely inconsistent about it. In contract, we say that the action must lie direct against the Crown, not against its representative; in tort, we say the reverse. And even in tort, although it is the individual who must submit to judgement, in many cases it is the Crown which pays the damages, though circuitously. But the point need not be laboured. Most lawyers would agree that the principle that the King can do no wrong is exceedingly difficult to justify in present conditions. The Crown Proceedings Committee in 1927 recommended its abolition,[2] but apparently there is no immediate prospect, if any at all, of the recommendation being adopted.

In France, four principal classes of cases come before the Conseil d'État. Two of these—*contentieux de répression* and *d'interprétation*—are not relevant to the present purpose. The jurisdiction of *annulation* bears a strong resemblance to our doctrine of *ultra vires*, though the analogy is far from complete. It is a powerful control over the legality of administrative decisions and assumed executive powers; but it goes much farther

[1] *Law of the Constitution*, 8th edn., p. 392.

[2] *Crown Proceedings Committee*, Report, S. 11, H.M.S.O., Cmd. 2842, 1927. The Bill drafted, after some four years of deliberation, by this Committee proposes to make the Crown liable in tort and puts forward radical changes in the whole sphere of Crown procedure. It has not been advanced, despite strong demands from the legal profession, which have been twice voiced in *The Times*, in 1928, by the Presidents of the Bar Council and the Law Society.

than any similar control exercised by our Courts, inasmuch as it restrains not only acts which are definitely in excess of power, but acts which, though technically within the assigned legal limits of authority, are prompted by what we should call 'malicious' motives. Examples, which I have not space to quote, of this (to us) curious but very effectual doctrine of *détournement de pouvoir* may be found in Duguit's *Les Transformations du Droit Public*, translated by Prof. Laski as *Law in the Modern State*. The *contentieux de pleine juridiction* are cases which do not concern the powers *de jure* of the executive, but in which the *right* of an individual has *de facto* been violated through the working of administrative machinery. Much emphasis is laid by French writers on the fact that there must be a definite private right, and it must be definitely violated.[1] Both contract and tort fall within this jurisdiction. In tort, if the damage has been done through the fault of a State agent, the question then is whether the fault is *de service* or *personnelle*. If the former, then the public authority—i.e. the State itself, or a local authority, such as a *département* or *commune*—is liable in the administrative court. If the latter, the wrongdoer is liable personally before the *tribunaux judiciaires*. French authorities are by no means agreed in their definitions of these two different classes of acts. To quote the most recently published work known to me on *droit administratif*, that of Prof. Rolland of Paris,[2] by *faute de service* we must understand 'a plainly irregular and defective function-

[1] See, e.g., Berthélemy, *op. cit.*, p. 957.
[2] *Précis de Droit Administratif*, 1928, p. 251.

ing of public service, falling short of the average which may be normally demanded. This fault may consist in the carrying out of a decision—for example, the wrongful dismissal of a State servant—or of an act of commission or omission. Thus it has been held that there was a *faute du service public* when a German hand-grenade was left in charge of an adjutant and, through negligent handling, exploded and killed one of the residents in the house where the officer was billeted.' What distinguishes *faute personnelle* from this kind of vicarious wrongdoing is, to quote Laferrière,[1] 'the fact that it reveals the *man* with his frailties, his passions, his imprudences, and not the *administrator* more or less liable to error'. We have reason to know from our own law of *respondeat superior* that the distinction between an act done 'in the course and within the scope' of a servant's employment, and a 'frolic of his own', is often extremely difficult to draw. In France, no less than in England, much case law surrounds the matter. But the general principle of distinction between the two kinds of liability is firmly established, and it accords with reason, justice, and common sense.

The doctrine of State liability in France goes even farther than this. For some years past there have been the beginnings, likely to develop, of what may be called a doctrine of the 'absolute liability' of the State—i.e. liability not only for fault, but for extraordinary *risk*, and resulting damage, incurred through the maintenance, though without negligence, of dangerous things by a *service public*: e.g. a powder magazine.[2] And further, an

[1] Cited Rolland, *op. cit.*, p. 262.

[2] Conseil d'État, March 28, 1919; cited Rolland, *op. cit.*, p. 252.

important decision of the Conseil d'État in 1918, in the case of *Lemonnier*,[1] established a principle which had been growing since 1909, viz. that where the act complained of involves both *faute personnelle* and a defect of administrative machinery, the liability of individual agent and of the State is cumulative.

But it is said that French officials are protected by the doctrine of *acte de gouvernement*,[2] whereas we, at least since *Entick* v. *Carrington* in 1765 (19 St. T. 1067), have recognized no doctrine of 'State necessity'. Actually, however, for the last forty years at least the doctrine of *acte de gouvernement* has been so severely restricted that it cannot be said to confer any extraordinary privilege on the executive. According to the best opinion,[3] it comprises only (1) acts affecting the relation of the Government to the two Chambers (e.g. dissolution or adjournment), (2) diplomatic acts affecting foreign affairs, and (3) acts made imperative by a state of war. These are all of a quite exceptional nature, and in England no less than in France they are subject to special rules of law.

While, then, it is misleading to represent the administration in France as unduly privileged, is it not also misleading to represent the Crown in this country as entirely unprivileged, even in those matters in which we allow any action at all against it? The prerogative, no doubt, is subject to the Common Law and to statute; but the large body of special rules which go to make up

[1] Conseil d'État, July 26, 1918; *Recueil*, 1918, 772.
[2] Dicey, *op. cit.*, pp. 366, 386.
[3] Hauriou, *op. cit.*, p. 433.

Crown Practice are not mere trifling formalities, and they cannot be said to lean in favour of the plaintiff against the Crown. The special advantages which the Crown enjoys in Petition of Right—fiat, discovery, counter-claim, pleading, amendment—are not without practical importance. Nor is it possible to ignore the operation of the Public Authorities Protection Act, 1893. Dicey has said[1] that to regard this Act 'as an example of the existence of administrative law in England seems to me little else than playing with words'. Had this acute observer lived to see some of the more recent examples of the operation of the Act, such as *Freeborn* v. *Leeming*, [1926] 1 K.B. 160,[2] he might have been led to modify this judgement.

[1] *Op. cit.*, p. 384.

[2] In this case, the plaintiff had been knocked down by a motor-car on September 5, 1923. His hip was dislocated, and on the following day he was taken to a workhouse infirmary and placed under the care of the defendant, a qualified medical man. The defendant failed to discover the dislocation and therefore did nothing to reduce it: it was admitted that this amounted to negligence. On leaving the infirmary, the plaintiff was treated by other doctors at his home. The real nature of the injury was discovered, and an operation was performed: but it was too late to repair the results of the defendant's incompetence, and the plaintiff was permanently disabled. On April 25, 1924—six months and ten days after he had left the infirmary—the plaintiff began an action in the High Court for damages. The defendant admittedly came within the provisions of the Public Authorities Protection Act, 1893, s. 1, which provides that an action against public authorities (as defined in the Act) must be begun 'within six months next after the act, neglect or default complained of'. Clearly the plaintiff could not know until some time after he left the infirmary, and had had other medical attention, whether or not the defendant had been guilty of any 'act, neglect or default'—in other words, he could not tell whether or not he had a cause of action; but the Court of Appeal, being bound by a previous decision, held that the period of six months must be dated strictly from the 'act, negligence or default' itself, not from the arising of the cause of action. The plaintiff consequently went without any remedy whatever.

(2) A special jurisdiction to deal with the special body of Administrative Law.

While we have a number of administrative tribunals in England—to these I will revert—we have no dichotomy of the judicature into 'ordinary' and 'administrative'. Here I would only observe that some misconception seems to exist as to the judicial functions of the Conseil d'État. It is true that that body possesses a curious mixture of attributions, some administrative, some consultative, some judicial; it is true also that French writers warn us emphatically against regarding it as a mere branch of the ordinary judicature.[1] But in its judicial capacity—the *sections du contentieux*—it is, if the tautology may be pardoned, essentially judicial. It is not to be regarded as a body of civil servants performing an office which is foreign to their true function. It is totally different in character from our Whitehall tribunals. There is really nothing in the French division of jurisdiction more repugnant to English notions than in the division of our own jurisdiction into Common Law and Equity. Both, in course of time, have become merely matter of machinery.

(3) Legislative power entrusted to the executive.

The present scope of delegated legislation—Orders in Council, Statutory Rules and Orders, local by-laws and regulations—is so familiar to lawyers that it is unneces-

Great possibilities of hardship reside in s. 1 of the Public Authorities Protection Act, as thus interpreted; for it is clear that in many circumstances a plaintiff may be uncertain for some time after the injury of which he complains whether or not he has a cause of action against a public authority; and it need hardly be said that the public authority concerned is not usually solicitous to diminish this uncertainty.

[1] See Berthélemy, *op. cit.*, p. 919.

sary to give examples of it or to comment on the rapidity of its growth.[1] Frequent caustic observations leave no doubt as to the manner in which it is regarded by the Bench. There is a large body of opinion that it 'has increased, is increasing, and ought to be diminished'; and some recent statutes have furnished memorable examples of the unbounded confidence which Parliament reposes in the administration. I need only refer to the observations of Lord Hewart C.J. in *R.* v. *Minister of Health, Ex parte Wortley R.C.*, [1927] 2 K.B., at p. 236, concerning s. 67 (1) of the Rating and Valuation Act, 1925—a provision which adopted the remarkable method of empowering the Minister, 'if any difficulty arises in connection with the application of this Act' to certain circumstances, simply to 'remove the difficulty'. Just that: with one annihilating gesture to 'remove the difficulty', as 'twere some presumptuous insect on the august ministerial countenance.[2]

(4) Judicial powers entrusted to the executive.

[1] See, for further detail, the present writer's *Law in the Making*, chap. vii.

[2] A similar clause (120) in the Local Government Bill was the subject of debate in the House of Commons in 1929 (see *The Times*, February 15, 1929). An amendment for its rejection was defeated by 207 votes to 119. It was then carried with an amendment which makes little difference to its substance (see leading article in *The Times*, February 16, 1929). The debate is gratifying evidence of the fact that Members of Parliament are becoming increasingly alive to the dangers of this kind of Ministerial power. The official argument in its defence is that it is merely temporary and is intended only to solve overlooked difficulties which may become apparent in the early stages of the Act's operation. It is difficult to see why the same argument should not apply to any Act of a complex nature, or, indeed, to any Act at all. This apology does not touch the real objection, which is the uncontrolled usurpation by the executive of legislative and judicial functions. A Ministerial power is not saved from being arbitrary merely because it is 'temporary'. Nor does a provision of this kind stimulate careful drafting.

Again I need make no more than a very brief reference to the increasing number of administrative tribunals which exercise powers of appeal from a variety of subordinate authorities. Even if I had space to enumerate them, it would be superfluous to do so in view of the full and lucid account which Dr. W. A. Robson has given of them in his *Justice and Administrative Law*. Dr. Robson justly sums up the present tendency when he says:[1]

'What we now find . . . is that large judicial duties of an important character have been given, not to persons holding judicial office, not even to known and ascertainable individuals, but to vast departments of the State, huge administrative organizations employing thousands of anonymous civil servants. In some cases the responsible ministry does not itself perform the judicial function in question, but is empowered to set up and regulate the tribunal, which is to do the work. This does not affect the principle involved, however, because the vital feature of the whole arrangement is the fact that there is no appeal to the regular courts of law.'

Among these administrative-judicial powers, perhaps the most remarkable are those exercised by the Ministry of Health in regard to National Health Insurance and by the Ministry of Labour in regard to Unemployment Insurance. It is worth noting, by way of comparison, that French law jealously preserves the right of appeal to the Conseil d'État in all but the most trifling administrative cases, and that at least since 1881 the jurisdiction of this Court has for all practical purposes made the exercise of judicial power by Ministers illegal and unconstitutional.[2]

[1] *Op. cit.*, p. 91.

[2] *Revue du Droit Public*, July–September 1924, p. 354; Berthélemy, *op. cit.*, p. 942.

These, then, are the existing and growing elements of Administrative Law in this country. Why do so many critics, lawyers and laymen alike, feel uneasy about them?

Do they, for example, work badly? On the whole, the answer must be that they do not. Departmental legislation is sometimes sharply criticized; for example, an ex-Solicitor-General, Sir Henry Slesser (now Lord Justice Slesser), has referred to it as being 'often the whim of a Government clerk'.[1] But (doubtful though the compliment may seem) there is no ground for thinking that it is any worse than much Parliamentary legislation. It is not necessarily arbitrary or ill-considered, since it is usually the result of careful consultation with competent representatives of the interests which it chiefly affects. Nor is it necessarily amateurish, since most Government Departments now have trained lawyers as members of their permanent staffs to advise on legal questions and to draft regulations.

As to the judicial functions of the executive, it is difficult to generalize in the absence of any adequate records; but it is probably true that in the large majority of cases substantial, if summary, justice is done.

But this pragmatic test is hardly sufficient. It might have been said, and it often has been said, of the Star Chamber that it was a very efficient Court and did a great deal of useful work; but that did not prevent it from becoming a constitutional danger which the public opinion of this country would not tolerate.

Are we, then, in the presence of a constitutional danger? Is any fundamental principle of our system

[1] *Law Journal*, November 19, 1927.

of government threatened—for example, the separation of powers? It does not lie in the mouth of English lawyers to insist fanatically on that doctrine. All our authoritative writers have warned us against attempting to read it into the peculiar growth of our constitution. Indeed, no country seems to have succeeded in applying it without large reservations. France has not done so, and it is significant that the United States, one of its most ardent adherents, is at the present time developing a body of Administrative Law which no ingenuity can reconcile with the gospel according to Montesquieu.

But it goes to the other extreme to deny any validity whatever to the doctrine of the separation of powers. From the point of view of mere convenience, it rests upon a sound and useful principle, for, provided that room is left for necessary exceptions, it represents a good working basis, and probably the only basis, for the *normal* distribution of public power. Without some such principle of apportionment, government is certain to become unwieldy. Our constitution takes no harm because Parliament is at once a legislative assembly and a Court; it can, without disaster, take to its bosom so versatile an anomaly as the Lord Chancellor, who, as legislator, judge, and administrator, seems to embody in his own person three Athanasian Incomprehensibles. But if every public officer possessed this singularly Protean character the business of government would become a nightmare. And while it may be conceded that there is no fundamental objection to a certain degree of overlapping between the legislative and judicial powers, different considerations arise where the executive is concerned. Let us not think of the bureaucrat as an octopus ever stretching his tentacles for more and more absolute powers. He is both efficient and disinterested; we are proud of our Judges in England, and we have as good reason to be proud of our Civil Service. But it is exactly from the executive officer's efficiency and zeal that we must save ourselves—and him. His business is to get things done. He knows best what is to be done and the most convenient means of doing it: he is the expert, with special means of knowledge at his command: and when principles of law are put in his way, he is apt to be impatient of them as mere pedantic obstructions. We had a striking example of this characteristic attitude in s. 4 of the Rating and Valuation Bill of 1928.[1] That section proposed to make His Majesty's Judges a consultative body to assist the executive by giving proleptic *responsa* on hypothetical questions of law arising out of the Act. There is no reason to doubt that the motive which prompted this proposal was of the most honest; it sincerely aimed at preventing litigation and saving expense. Doubtless the unanimous protest—would it be disrespectful to call it an anticipatory strike?—which came from the judges must have seemed to Whitehall the most pettifogging obstructionism; indeed, the protestants were chidden by a distinguished ex-Lord Chancellor for their reactionary frowardness. Lawyers of less original temperament —and may we not say the great bulk of the public as well?—were convinced that the Judges on this occasion were asserting a principle the profound importance of

[1] See App. I, *post*, p. 106.

which Whitehall, with all its wisdom, was quite unable to grasp. Many a time the zealous and conscientious administrative official must murmur to himself bitterly: 'Who will rid me of this turbulent judge?' Say what you will of the administrator's merits—and they are eminent—he is not the best person to be either legislator or judge, except under the close control of those who are trained to look beyond the practical means of attaining an immediate object to the principles which may be involved in its attainment. Under that control he may be a valuable, indeed an indispensable, part of the general administration of law.

The pressing question therefore is: What sort of control should be maintained over him? There are those—whom I will call the 'Root-and-Branch School' —who would banish utterly from our system the elements of Administrative Law to which I have adverted. In my belief that is neither practicable nor necessary. Administrative Law need not be a scourge if it be openly avowed and properly regulated. It is quite illusory, as things have shaped themselves, to ask Parliament to attend to every detail of modern legislation, or to ask the Courts to judge, at first instance, every minor matter of dispute arising out of our greatly extended and reticulated administration. You may, of course, challenge the whole system of government, but that is another issue altogether: lawyers have to deal with things as they are. The real difficulty in which we find ourselves at present is that Administrative Law, in the senses which I have indicated, has come into our house surreptitiously, by a back door. But it has certainly come, and it is not likely to go; and instead of repeating monotonously that *droit administratif* does not exist in England, and that the Rule of Law is, was, and ever shall be, we must put this uninvited guest in his proper place—and keep him there. As Lord Sankey observes in his *Principles and Practice of the Law To-day*:[1] 'If, then, we have taken steps towards the system of *droit administratif*, it is surely pertinent to enquire whether we ought not to adopt the real thing, with all the special protection it confers on the subject in France and Germany, and not a perversion of it.'

What steps should be taken towards this most desirable end? A great number might be suggested: I will only indicate those which seem to be most pressing—and I need hardly say that within these limits I cannot do more than refer to them in the barest outline. Each of them involves many matters of detail which require careful elaboration.

(*a*) One could wish for some power to demand of Parliament a greater reluctance, a greater caution, in delegating legislative power to any and every administrative authority. Delegation cannot be wholly avoided, but at least it can be kept within reasonable limits. The matter is prosaic—there are 'no votes in it'—but it is important; and unless greater interest can be aroused in it, the public may some day wake up to find that it is very much more important than it imagined.

(*b*) The Master of the Rolls has pleaded[2] for another highly necessary safeguard—a more effective Parliamentary control over Statutory Rules and Orders. As

[1] p. 17. [2] *Law Journal*, November 5, 1927.

is well known, Rules and Orders made under statutory authority require Parliamentary confirmation, though there is an extraordinary lack of uniformity in the method of confirmation. The most usual expedient is that the draft Rules or Orders lie on the table of the House for a stated number of days. This appears to be, in the majority of cases, the emptiest formality, and there is no proper machinery of supervision. The burden is then cast on the Courts—at least, when they are given the opportunity—of testing the Rules and Orders by the doctrine of *ultra vires*; and it goes without saying that the expense of this process falls on the private litigant. A methodical and sincere scrutiny is greatly to be desired. There is already precedent for it in the Joint Committee of both Houses which, in conjunction with the Legislative Committee, examines and reports upon proposed Measures of the National Assembly of the Church of England under the 'Enabling Act' of 1919.[1] It is submitted that some supervision of this kind should be provided in all cases. The work would no doubt be tedious and probably arduous, but no more so than a great many of the duties which Parliamentary Committees already perform, and, on the whole, perform assiduously.

(*c*) The very salutary control exercised over delegated legislation by the doctrine of *ultra vires* should be jealously preserved. There is a tendency to exclude it by the use of the formula that 'rules [&c.] made under this Act shall have the same effect as if enacted in this Act'. Recent examples—the device, however, is not of

[1] 9 & 10 Geo V, c. 76.

very recent origin—may be found in the Restoration of Order in Ireland Act, 1920, s. 1 (4),[1] the Fertilizers and Feeding Stuffs Act, 1926, s. 23 (1), and the Sale of Food (Weights and Measures) Act, 1926, s. 9 (1). It has been settled by the House of Lords[2] that the effect of this provision is absolutely to preclude the Courts from scrutinizing the Order or Regulation thus privileged. It may be argued that, since the subordinate enactment has received the sanction of Parliament, there is nothing here more disquieting than in the immunity of ordinary statutes from judicial censorship. But this is unconvincing in view of the perfunctory character of the Parliamentary sanction; and it is of the utmost moment that the real safeguard of judicial scrutiny should not be gradually whittled away. The weighty observations of Lord Shaw on this point in *Zadig's Case*[3] should be

[1] See *R. v. Cannon Row Police Station Inspector, Ex p. Brady* (1921), 37 T.L.R. 975.

[2] *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347.

[3] *R. v. Halliday*, [1917] A.C. 260. Lord Shaw said (at p. 287): "The form, in modern times, of using the Privy Council as the executive channel for statutory powers is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the Constitution His Majesty acts through his Ministers, is simply the Government of the day. The author of the power is Parliament; the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires*. . In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave public and constitutional danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would lie public unrest and public peril. On all this there is no disputing."

This reduces to comparative unimportance those apparent safeguards derived not from the Act of Parliament, but inserted into the "regulagraven on the tablets of every Member of Parliament's heart.

(*d*) There is at present no uniformity in the constitution and procedure of administrative tribunals. Such 'procedure' as there is doubtless has the advantages that it is reasonably cheap and fairly expeditious; but its defects are many and salient: the tribunal is not necessarily public; there is often no oral hearing of the parties; there are frequently no recorded precedents—at all events, none available to the public—and therefore no certainty; no reasons are necessarily given for the decision of the Minister or other authority; and the constituent personnel is of the most bewildering variety. On all these matters I find myself so completely in agreement with Dr. Robson[1] that I should be merely plagiarizing him if I dwelt on them. I do not think that we can reasonably ask that every administrative tribunal should observe exactly the same technique of pro edure and evidence as ordinary courts of law; in any case, if we do ask that, we must go on to ask for statutory reversal of the law as laid down in *Arlidge's Case*[2] of evil memory —and even of other cases which preceded it. But we

tions" themselves. The language of the regulation, for instance, "where it appears to the Secretary of State" and "on the recommendation of a competent military or naval authority" is simply equivalent to a declaration that the delegate, to judge and issue, is one department of Government, and that that will, of course, act in accord with, and on the recommendation of, those other departments which are presumably versed in the situation. The Government remains master. . . . Once let the overmastering generality of the principle of regulation be affirmed, as has been done, all is lost; the law itself is overmastered. The only law remaining is that which the Bench must accept from the mouth of the Government: "Hoc volo, sic jubeo; sit pro ratione voluntas." '

[1] *Justice and Administrative Law.* [2] [1915] A.C. 120: see *ante*, p. 6.

may at least ask that these tribunals observe certain elementary rules without which any judicial or quasi-judicial body belies its name: for example, that they be subject, as frequently they are not at present, to the 'fundamental rule of law that no person can be deprived of his liberty or property without being heard, or being given the opportunity to be heard, before the properly constituted tribunal'—the words are those of Sankey J. (as he then was) in *R.* v. *Housing Appeal Tribunal*, [1920] 3 K.B., at p. 344, a highly instructive case in the singular 'judicial' methods adopted by the Ministry of Health in housing and in many other matters.[1] If the

[1] This case arose under s. 5 (now repealed by the Housing Act, 1925) of the Housing (Additional Powers) Act, 1919. By that section, local authorities were empowered to prohibit building operations which interfered with the provision of dwelling-houses. Any person thus prohibited from building was given the right of appeal to a specially constituted local Appeal Tribunal, and the Minister of Health had power to make rules of procedure for these tribunals.

In 1919 a company proposed to convert certain premises in Huddersfield into a picture 'palace'. The Corporation of Huddersfield prohibited the building on the grounds, *inter alia*, that it was of a luxury character, and that there was a local shortage of labour and materials for the purposes of building dwelling-houses. The company appealed in writing to the Appeal Tribunal, traversing all the grounds of objection stated by the Corporation. The Tribunal, having no evidence before it except the two written statements of the parties, and without giving either side an opportunity of expanding or substantiating these statements either orally or in writing, dismissed the appeal.

The Rule of Procedure (R. 7) under which it was argued for the Minister that the proceedings of the Tribunal were 'strictly regular' is very characteristic: 'If, after considering the notice of appeal and the statement of the local authority in reply and any further particulars which may have been furnished by either party, the Appeal Tribunal are of opinion that the case is of such a nature that it can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily.'

The Court of King's Bench, by a majority, held that the construction sought to be placed on this rule of 'procedure' was to abolish procedure administration is to assume a double capacity, executive and judicial, the methods of the one capacity must not be applied to the other. The matter is complex and needs close attention in detail; but it cannot be beyond the wit of man to devise a general statute governing the procedure of all administrative tribunals, with a very careful definition of that term, and a 'drag-net' clause which would bring within its ambit any tribunals created thereafter.

(*e*) The whole question of appeal from administrative tribunals urgently calls for consideration. Not only is the right of appeal vital to the litigant, but the mere existence of it is a powerful stimulus to efficiency and care in the tribunal of first instance—a fact which, in my submission, far outweighs the argument that the existence of an appellate court makes the first trial a mere formal preliminary to a fuller hearing. In many cases, of course, there is already appeal to the High Court, but by no means in all.

What would be the best method of establishing a general system of appeal from administrative decisions? Dr. Robson is of opinion that the administrative tribunals should be subject to no fuller control by the ordinary courts than at present exists, and that 'where the subject-matter of the dispute is important, a right of appeal should normally lie to a superior Administrative Appeal Tribunal, whose decisions should be final'.[1] It is not quite clear whether this means a single Administrative Appeal Tribunal for all cases, or a number of

altogether: and that the appellants had not had anything which could properly and reasonably be called a 'hearing'.

[1] *Op. cit.*, p. 321.

separate Appeal Tribunals in different Departments. If the latter, the result would be a needless multiplicity of Courts of questionable efficacy.[1] The argument in favour of special Administrative Appeal Tribunals, as distinct from the ordinary Courts, is that they may be made to contain an expert element specially fitted to deal with technical administrative matters, or at all events to contain a mixture of the purely legal and of the expert, such as exists, for example, in the Railway Rates Tribunal. The advantages of this kind of Court are highly problematical. Where any considerable issue is at stake, it is far more important to bring to bear a trained judicial faculty than a particular kind of specialized virtuosity: for, while the judicial faculty does not necessarily accompany expert proficiency, it is inherent in the trained Judge's function that he should be able to address his mind to problems of all kinds, whatever technical elements they may contain. This is, in fact, what our Judges do every day, and there is no reason to think that they are less qualified to deal with administrative details than with the innumerable technical questions which now come before them. It might very well be that in some matters they would profit by the help of assessors, and there could be no objection to this, provided that the assessors were restrained to a purely advisory capacity, as they are, for example, in the Admiralty Court. And again, it does not follow that appeal should lie from every conceivable matter which comes before administrative tribunals; some of them are trifling, and, as I have

[1] See *post*, pp. 103 ff.

suggested, substantial justice is done and expense is saved by leaving the final decision in such matters to the tribunal—for example, claims for unemployment benefits, of which, Dr. Robson tells us,[1] the Courts of Referees hears some 15,000 cases every month. But in any but the most insignificant matters appeal should be possible, either directly, or by way of case stated, or subject to preliminary leave to appeal from the superior Court; and as things stand at present my submission is that the ordinary Courts are by far the most appropriate forum for this jurisdiction. If in course of time it appeared that the burden thus cast on the Courts was too heavy, it would then be early enough to consider the appointment of more Judges, or possibly the creation of a special Court to deal exclusively with administrative business. It would not matter greatly whether this were called an ordinary or an 'administrative' Court, provided that it consisted of judicially qualified persons and that its functions were essentially judicial—not, so to say, a mere by-product of administrative activities. The time for any such expedient hardly seems to have arrived, though it may not be far distant; in the meantime, the attempt to create anything in this country analogous to the Conseil d'État would probably conflict with tradition and enter upon its career under a handicap of prejudice.

(*f*) Bound up with the question of appeal is that of costs, and this is in some ways the most difficult problem of all. The Common Law rule is that costs are given neither to nor against the Crown, for the reason

[1] *Op. cit.*, p. 128.

whimsically stated by Blackstone[1] that, as the Crown has a prerogative not to give them, so it would be beneath its dignity to accept them; unlike Pooh-Bah, it cannot 'pocket the insult'. The rule is not so harsh as it seems at first sight, for two reasons. First, it has been materially restricted by statute; thus by the Crown Suits Act, 1855, it is excluded from the majority of the forms of action on the Revenue side of the King's Bench; by the Petition of Right Act, 1860 (ss. 11 and 12), from proceedings under that Act—a very important exception; by the Income Tax Act, 1918 (s. 149 (2) (*a*)), from income-tax appeals; and so forth. Further, it has been made possible by a few statutes to sue Ministers and Departments as such, e.g. the Admiralty, in some cases, under the Admiralty Lands and Works Act, 1864, and the Minister of Transport under the Ministry of Transport Act, 1919; though it is to be observed that in these cases the Common Law rule as to costs holds good unless the Act otherwise provides. Secondly, it is not to be supposed that the rule always operates to the advantage of the Crown. There are many circumstances in which the unsuccessful and unmeritorious claimant against the Crown profits by the rule, at the expense of the taxpayer—see the pointed observations of the Master of the Rolls in *In re Carbonit Aktiengesellschaft*, [1924] 2 Ch. 53, 68. All this conceded, there are still a considerable number of cases to which the Common Law rule applies, with hardship to the subject. The Crown Proceedings Committee[2] proposes to substitute the ordinary rule of costs as between party and party.

[1] 3 Comm. 400.

[2] See *ante*, p. 49, n. 2.

But would this really solve the difficulty? Is it, indeed, solved in those cases to which the ordinary rule now applies? The Crown is a particularly formidable adversary in three respects: it is ever ready and willing to avail itself of any dilatory technicalities—it is an adept at the ancient game of 'essoins'—and interlocutory costs may therefore accumulate alarmingly; it is ready, when interested in a 'principle', to push appeal to its furthest extent; and it has unlimited resources at its disposal both in money and in legal talent (the two terms being for certain purposes synonymous). We have recently had the spectacle of Somerset House carrying an income-tax appeal to the House of Lords for a matter of £11. Not long ago I was told, by a solicitor interested in the matter, of a similar case which was only stopped by a question in the House of Commons and by the personal intervention of the Chancellor of the Exchequer, the sum involved being £15.[1] Faced with the prospect of this war to the knife, the subject finds cold comfort in the assurance that if he loses he will be ruined, and if he wins he will get his taxed costs. True, in the latter event, if he has been modest in his selection of counsel, his taxed costs need not differ greatly from his solicitor and client costs; but what solicitor would advise a client to rely upon the services of one junior counsel, however competent, when he is to be faced with one of the Law Officers of the Crown, or some other prominent King's Counsel, and a Treasury junior or two, all specialists in the question before the Court?

[1] See App. II, *post*, p. 132.

True it is that it is not in the interest of the republic that litigation, whether against the Crown or another, should be too cheap. But at present, as against the Crown, it is manifestly too dear. The problem is the more difficult because it involves the wider question of the whole cost of litigation in England. It would be folly to advocate any infallible panacea; but, as a beginning, one expedient at least suggests itself. Appeals might in many cases be abbreviated without hardship to either side. An unnecessarily extended hierarchy of courts means a warfare of attrition: it gives the Crown an advantage, for a public authority feels bound, rightly or wrongly, to carry its point to the ultimate test. And the private litigant, too, when any important principle or property is involved, will often feel that he must take every chance which is open to him. If the matter stopped earlier, both parties would feel equally satisfied —or dissatisfied. Why, to take one example, should income-tax cases be taken as far as the House of Lords? The differences of judicial opinion in this branch of the law, obfuscated as it is by unintelligible statutes, have almost reached the point of comedy; and if the results of the cases are examined, it will be found that the law would have been very much the same as it is at present if the appeals had gone no further than a single Judge of the King's Bench. In this matter our system compares very unfavourably with the rapid and inexpensive appeals in France in cases of *contributions directes*.

Doubtless it would not be desirable in all cases to deprive the parties of access to the ultimate appellate

Court; but when the principle at stake was important, and the money small, the expedient which has worked very well in criminal appeals might be applied with advantage—i.e. the appeal might be allowed to go a further stage only on a certificate from the Attorney-General. It is hardly necessary to say that different considerations would apply to different cases, and that the whole matter requires very careful adjustment in detail; but as a general principle my submission is, on the one hand, that appeal to the Courts should ordinarily be available, and, on the other hand, that the appeal should be limited to as few Courts as possible. For a great many of these matters final appeal, say, to a Divisional Court of the King's Bench would be entirely appropriate.

(*g*) My final point is, I well know, merely a pious wish, and probably a vain one. A long and lugubrious succession of cases since the war has made us aware of a peculiar ferocity in the Crown as litigant. Let us, in fairness, remember that the matter is not entirely one-sided. To the speculative or mercenary litigant any corporation is fair game, and the greatest corporation of all is the fairest game of all. The Crown has to repel many disingenuous demands; but that is a poor reason for retaliating upon the innocent with the unmeritorious claims and defences which have become all too familiar in recent years. The Crown should be the fountain of mercy no less than of justice, and its representatives discredit the whole administration of law in the eyes of the public by pressing *summum jus* against the subject. Is it too much to hope that the attitude of the Law Officers in this respect—and it is chiefly a matter for them—should be the *discretio boni viri* exercised benevolently against the extreme demands of the zealous bureaucrat? It is only the lawyer who knows how to temper the fierce legalism of the layman.

IV[1]

THERE has been in the last few years an unmistakable growth of public opinion concerning the increase of departmental powers—not, as yet, a sufficiently widespread opinion, but one which has certainly begun to assert itself. It is gradually being realized that we are faced with nothing more nor less than a constitutional crisis. The Lord Chancellor (Lord Sankey), who has long had this matter at heart—as is shown not only by many of his judicial observations, but by his suggestive pamphlet, *The Principles and Practice of the Law To-day*, and by his foreword to Dr Port's volume—has lost no time in placing the whole question under the consideration of an impartial Committee. Simultaneously, Lord Hewart's book makes it certain that public opinion can no longer remain uninformed. Here in plain, spirited, and untechnical language the ordinary citizen is told what is contributing, and has been contributing for years past, to create essential differences between the theory and the practice of the system which governs him. Lord Hewart puts the issue in the plainest possible terms. 'The whole scheme of self-government is being undermined, and that, too, in a way which no self-respecting people, if they were aware of the facts, would for a moment tolerate.' The facts are now before a self-respecting people. It remains to be seen whether they will be tolerated.

In illustration of his main theme Lord Hewart begins

[1] *Quarterly Review*, April, 1930. A review of *The New Despotism*, by Lord Hewart C.J., and *Administrative Law*, by F. J. Port.

with a reference to a case which he himself, expressing the opinion of a Divisional Court, described as 'the high-water mark of legislative provisions of this character'—that is, provisions authorizing a Minister to 'remove difficulties' in the working of a statute which has already invested him with a variety of extensive powers.[1] We may respectfully follow Lord Hewart's example by giving at the outset another and an even more conspicuous example of the tendencies which Lord Hewart deprecates. Shortly after the appearance of *The New Despotism* there came before the King's Bench the case of *R* v *Minister of Health, Ex parte Yaffé*, [1930] 2 K.B. 98 The short point in this case arose out of the Housing Act, 1925, under which the Minister of Health had made an order confirming (and materially altering)[2] an improvement scheme, so called, framed by the Liverpool Corporation. Mr Yaffé, whose property was affected by the scheme,[3] contended that the confirming order of the Minister was *ultra vires*, on the ground that the 'improvement scheme' was not in reality an improvement scheme at all, but merely one which gave the Corporation powers to sell, lease, or otherwise dispose of, as the council might think fit, the cleared area. There was no programme, such as was plainly contemplated by the Act, for the development

[1] *Ante*, p 55

[2] This is important, because the scheme, as thus altered, was one which would have been valid under the Act The hardship to the individual, therefore, was not great in this case, since the scheme as it finally stood was one to which he could not have objected if it had originally been made in that form But this, of course, does not affect the very serious principle contained in the Crown's contention

[3] He was to be paid the value of his land, and nothing for his houses.

and improvement of a particular area. A recent decision[1] supported him in this contention, and it followed irresistibly, in his submission, that an order made in reference to a scheme which, on this and certain other grounds, was a nullity under the Act, was itself a nullity. But the Housing Act contains a provision that an order made under this part of the statute 'shall have effect as if enacted in this Act'; and a leading case in the House of Lords[2] has laid it down once for all that the effect of this provision is to place the departmental order entirely beyond the scrutiny of the Courts.[3] The

[1] *R.* v. *Minister of Health, Ex p. Davis*, [1929] 1 K.B. 649.

[2] *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347.

[3] With regard to this objectionable form of legislation, which becomes increasingly frequent, Lord Justice Scrutton, in the case under consideration, in the Court of Appeal, observes ([1930] 2 K.B. at p. 144): 'So far as I have examined the legislation, there are many variations in the form in which a provision that the Order of the Minister shall have effect as if enacted in the Act, may be made. Sometimes the Order is only provisional, until confirmed by Parliament. Sometimes it is to be laid on the table of both Houses for a given period, during which it may be annulled by resolution of one or both Houses. Sometimes, if not objected to within a certain time, it cannot be questioned afterwards. Sometimes it is followed by the very wide words contained in Schedule III, s. 2, of the Act now under consideration. Again, as to subject-matter, sometimes the Order is merely to provide rules of procedure for carrying out a process which Parliament has ordained, but for which it has provided no machinery, leaving this to be provided by a Minister. Sometimes the Order is to affect rights of property in individuals. Each Act containing such a clause is to be considered on its own object and language. . . . (p. 148) As a matter of constitutional importance, I hope that Members of Parliament and Ministers and Parliamentary draftsmen will consider whether this form of legislation is really satisfactory. It may be convenient to Ministers not to have to consider carefully whether the powers they are purporting to exercise are within their statutory authority and the powers delegated to them by statute. Parliamentary draftsmen may have got into the habit of inserting this kind of Star Chamber clause either on the instructions of the Minister or as a matter of habit without his instructions. Members of Parliament may not

Attorney-General's argument (which prevailed) was that if an order merely *purported* to be made under the Act, that was sufficient to give it binding force. This he stated quite unreservedly, as the following interchange will show:

The Lord Chief Justice. Is your argument this: That any order of the Minister, however far it may depart from the Act, has effect as though enacted in the Act if it purports to be made under the Act?

The Attorney-General.—That is so, my Lord. Of course, it doesn't sound very pretty in that form—(laughter)—and I would prefer to say that the Court will not inquire whether it is within the Act. . . .

The Lord Chief Justice.—Do you say that if, under the name of an improvement scheme under this Act, the Minister sanctioned anything whatever, it would have statutory effect?

The Attorney-General.—I think that is so. . . .

Mr. Justice Talbot.—Suppose Parliament had intended to say what the Attorney-General says that they have said, how could they have expressed it better than they have done?

The Lord Chief Justice.—They might have said, 'After the passing of this Act, the Minister may do what he likes.'

Mr. Justice Swift.—That is what they *have* said! [1]

The constitutional issue raised by this case was thus stated by Mr. Justice Swift (who dissented):

'When Parliament delegates its powers of legislation to

trouble to consider what the sections to which they are giving legislative authority really mean, but simply follow the authority of the Minister and the Government Whip. But I cannot think it desirable that when Parliament delegates authority to affect property and persons only if certain statutory conditions are observed, it should then pass clauses which, it may be contended, allow their delegates to contravene these conditions, and make *ultra vires* orders which cannot be controlled by the Courts which have to administer the laws of the land.'

[1] *The Times*, November 6, 1929.

a Minister of the Crown, and enacts that in certain circumstances he may make "an Order" and that his Order "when made" shall have effect as if enacted in the Act, is it open to the Judiciary, if that alleged Order be challenged, to consider whether in fact "an Order" has been made?'[1]

The majority of the Court felt themselves bound by authority to hold that they had no power to review the Minister's order. The Court of Appeal unanimously reversed this decision, holding that the alleged Order was, in a phrase adopted from Comyns by Lord Justice Slesser, 'legi, fidei, rationi non consona'. The answer to the startling contention of the Crown is given by Lord Justice Scrutton (at p. 145):

> 'The Attorney-General went so far as to argue that though the Order violated all the statutory conditions and was made without a scheme, or advertisement, or public inquiry, once the Order was made, it had the effect of a statute. I cannot agree. In my view an Order which goes beyond the statutory conditions under which alone it can be made, an Order which for that reason the Minister could be prohibited from making, if he announced his intention of making it, is not an Order which when made can by reason of s. 40, sub-s. 5, have statutory effect.'

Several points of significance emerge from the case besides the actual decision. A study of the narrative of facts (too lengthy to be reproduced here) in the judgements of Lord Justice Scrutton and Lord Justice Greer will show the reader how arbitrary and inquisitorial was the administrative procedure throughout. And similarly the discussion of the relevant legislation will show that this case was only the logical and

[1] [1930] 2 K.B. 110.

inevitable climax of a long process of legislation, beginning in 1903. Lord Justice Scrutton said (at p. 144):

'This history shows a gradual increase in the powers of the Ministry, and greater freedom from the control of Parliament. The strongest clause is that repeated in Schedule III, s. 2, of the Housing Act, 1925, from Schedule I, s. 2, of the Housing Act, 1909. That clause runs: "Shall, save as otherwise expressly provided by this schedule, become final and have effect as if enacted in this Act; and the confirmation by the Minister shall be conclusive evidence that the requirements of this Act have been complied with, and that the Order has been duly made and is within the powers of this Act." This apparently is intended to prevent any question of *ultra vires* being raised however flagrantly the Order in question may exceed the powers given by the Act.'

And similarly Lord Justice Slesser observes (at p. 179):

'The history of the legislation does, however, reveal this fact, that the Housing of the Working Classes Act, 1903, as amended by the Act of 1909, and continued in the Act of 1925, does take away all Parliamentary control subsequent to the making of the Order, and that after their promulgation the Orders of the Minister are completely unchallengeable unless it be by process in a Court of law.'

To such fantastic results, in logic and in fact, does the reckless delegation of legislative powers inevitably lead. Let us now consider briefly the chief dangers of which Lord Hewart bids us beware.

A great part of the law-making function has passed from the legislature to the executive, principally by the method of 'skeleton' legislation, or 'legislation by reference'. If mere bulk be a guide, much the greater part of the law of the land now consists of departmental Rules and Orders. To no less an authority than a former

Prime Minister—Mr. Baldwin, speaking in the House of Commons on July 4, 1929—we are indebted for the information that in the three years, 1925–8, the average number of Acts was 50·6, the average number of pages occupied by them was 539; while the average number of Statutory Rules and Orders was 1,408·6, the average number or pages 1,844. The means by which Parliament controls its delegates become the more unreal as delegation becomes the more common, and there is consequently a marked tendency for this great mass of demi-legislation to grow increasingly complex and absolute. This process is accentuated by the express exclusion of the proper constitutional check upon all subordinate legislation—namely, judicial review. By such devices (already mentioned) as enduing departmental orders with statutory force *per se*, the Courts are rendered as powerless to control the ordinances of Whitehall as they are to control those of Westminster. This policy is contrary to one of the most important constitutional functions of the King's Bench, which in its high prerogative writs (mandamus, prohibition, and certiorari) has an ancient and beneficent instrument for keeping delegated functions within their assigned limits. Not only legislative, but many judicial, powers are being accumulated by the executive.

'It is not, but it ought to be, common knowledge that there is in this country, a considerable number of statutes, most of them passed during the last twenty years, which have vested in public officials, to the exclusion of the jurisdiction of the Courts of Law, the power of deciding questions of a judicial nature. Usually the power is given nominally to the Minister or other head of a Government department, sometimes to the department itself, and it is commonly provided that his or its decisions shall be final and conclusive.'

We cannot enter upon a full description of them here, but the principal kinds of executive-judicial powers now exercised in England are mentioned in Chapter V of Dr. Port's volume.

The objections to the methods of these tribunals are that they are, in many cases, secret: they are impersonal: they need not, and often do not, give the parties an opportunity of being heard: there is no means of knowing, as of right, on what evidence the decision has been based: there is no record, accessible to the public, of the proceedings: there is not necessarily any regard for that principle of uniformity and continuity which is the foundation of our Common Law system. Further, the fact that the administrative decision is often final not only deprives the subject of an important means of redress, but removes that stimulus to accuracy and circumspection which always resides in the possibility of appeal. It is not claimed, of course, that injustice is deliberately committed: it *is* claimed, however, and cannot, we believe, be denied, that the opportunities for injustice are latent and, therefore, sufficiently perturbing. No less unfortunate is the manifest possibility, under such a system, of corruption—a danger which is not dismissed by saying, what neither the Lord Chief Justice nor anybody acquainted with the Civil Service for a moment disputes, that corruption does not exist at present.

Most of the irregularities castigated by Lord Hewart are remarked upon by Dr. Port in various connexions.

In comparing our so-called administrative law with that of France and the United States, he appears to take the same fundamental objection to our present system, or lack of system, as does Lord Hewart—namely, that it is unscientific and irresponsible. Dr. Port's chief plea, if we understand him aright, is for a regularized administrative law which shall be *law*, legally defined and legally administered. Under that régime, 'the silent and almost unnoticed growth of extraordinary powers in the hands of administrative authorities, such as has recently taken place in England, is impossible'. We venture, however, to doubt whether some of the means which Dr. Port suggests and the principles which he favours will best achieve the desired result.

Before we consider that question, it is pertinent to inquire into the causes from which the present situation has arisen, or is supposed to have arisen. Dr. Port suggests the following principal reasons for the increasing delegation of Parliamentary powers:

(1) *Urgency.*—Doubtless there may be national emergencies in which it is necessary to have recourse to some law-making authority less deliberate in its methods than Parliament. We have had recent, and not very endearing, experience of that necessity, and it has proved far from easy to shake off its effects. It is impossible to contend that the kind of 'urgency' which gave birth to D.O.R.A. is any reason for the wholesale surrender of legislative power in normal conditions. We hear this argument of 'urgency' in another connexion, to which Lord Hewart makes pointed reference. It is the pretext on which rule-making authorities, under section 2 of the

Rules Publication Act, 1893, give immediate binding effect, without Parliament scrutiny, to 'provisional rules', which 'shall only continue in force until rules have been made in accordance with the foregoing provisions of this Act'. By an ingenious perversion of the legislator's intention, these ostensibly temporary rules acquire permanence by the simple device of never making any genuinely permanent rules 'in accordance with the foregoing provisions of this Act', i.e. in accordance with section 1 of the Act, which provides certain safeguards of publicity and Parliamentary control. The public, it is to be hoped, will regard with caution, amounting to scepticism, this facile appeal to urgency.

(2) *Lack of time.*—The pressure upon the time of the House of Commons, its inability to undertake even a fraction of the tasks proposed for it, the abortiveness of innumerable Bills, the insignificance of the private member's opportunities—these matters are notorious and are generally accepted as inevitable. May it be that we bow to them with a little too much resignation? The Lord Chief Justice raises a large issue when he remarks: 'The reasonable citizen may well be tempted sometimes to ask the question: For whose benefit and at whose request is this mountain of statutes, and this still greater mountain of rules, orders, and regulations, built up from year to year?' Most people would agree that a return to unqualified *laisser faire* is nowadays quite impracticable, even if it were desirable; but it is by no means inconceivable that before long there will be, in this country and others, a powerful reaction against the exaggerated extension of governmental functions. We

regretfully believe this to be improbable, however, for more reasons than can now be discussed. But whatever the verdict of the future may be, one thing is certain in the present. Some delegation of Parliamentary powers may be, as Lord Hewart concedes, necessary in matters of detail; but Parliament's deputy is at present showing far more activity than used to be considered either necessary or beneficial.[1] And this is not surprising. The departmental functionary does not suffer from the same restrictions as Parliament. Give him a free hand with codes of rules and regulations, and the only limit to the codes is the limit of his invention. Thus our sub-legislation yearly increases to such prodigious bulk, and thus it comes to pass that we are now being enjoined by Whitehall to wash our hands before milking a cow.

(3) *Technicality*.—It is said that many of the matters which now claim the attention of Parliament are beyond the competence of anybody but highly trained specialists. The argument runs counter to the practice and the theory of centuries. Parliament has always concerned itself with technical matters of the greatest diversity, and in the greatest detail. Any legislative body in any large modern community must face this task. It is the business of Parliament to get (as it always can) the best expert advice in the country and then to bring to bear an impartial legislative faculty upon the wider issues of principle which may arise from the material thus placed before it. Further, the expert with the greatest fund of technical information is not necessarily the best legislator. It is often the 'mere outsider'—of course, intelli-

[1] See App. IV, *post*, p. 145.

gent and trained in general political methods—who, making the fullest use of information supplied by the specialist, can exercise upon any given problem an independent judgement which it is difficult for the 'insider' to possess. Intensive specialization is often a hindrance rather than a help to constructive policy within its own peculiar sphere.

(4) *Experimentation.*—

'Yet another reason suggests itself, and it is that subordinate legislation *enables experiments to be carried out* in a way which would be impossible if the slow parliamentary methods had to be used on each occasion. It is often provided that the same body which makes a Rule or Order may also revoke or amend it, so that if the first proves unsuitable in some respect, no great trouble need be gone to, in order to vary the experiment.'

This is indeed true; and the singularly complacent conclusion which it suggests to Dr. Port is that 'these and similar provisions enable legislation to be much more flexible than was possible under former conditions'. There is a wealth of euphemism in this term 'flexible'. We should have supposed, in the first place, that of all things in the world legislation was the least suitable for mere experiment. The average mind will share none of Dr. Port's satisfaction at the picture of resourceful civil servants experimenting with the liberty and property of their fellow citizens in such a way that '*no great trouble need be gone to, in order to vary the experiment*'. Even less trouble need be gone to in *making* the experiment, when it can be so easily varied.

If all these arguments were conceded, even then, as

Lord Hewart insists, they would afford no ground whatever for ousting the jurisdiction of Parliament and of the Courts. Lord Hewart finds a deeper and more insidious reason for the present tendencies than any of those advanced by Dr. Port. 'There is now, and for some years past has been, a persistent influence at work which, whatever the motives or the intentions that support it may be thought to be, undoubtedly has the effect of placing a large and increasing field of departmental authority and activity beyond the reach of the ordinary law.' There is 'a deep-seated official conviction . . . that this, when all is said and done, is the best and most scientific way of ruling the country'. All this 'is manifestly the offspring of a well-thought-out plan, the object and the effect of which are to clothe the department with despotic powers'.

The 'deep-seated official conviction' was pithily expressed by the Sentry in *Iolanthe*:

> 'But then the prospect of a lot
> Of dull M.P.s in close proximity
> A-thinking for themselves, is what
> No man can face with equanimity.'

And this temper, though far from consciously flagitious, may lead to results which are scarcely distinguishable from unscrupulousness. If, for example, as Lord Hewart is convinced, it leads servants of the public deliberately to draft subordinate legislation in unintelligible terms, on the principle that 'to be intelligible is to be found out', it is impossible to go on paying compliments to an abstract purity of purpose. Purposely to obscure private right seems to us as mischievous as the less subtle offence of positively violating private right. We cling to a hope, however, that this now serious evil of cryptic legislation is the result of Dr. Port's admired 'flexibility' rather than of malice prepense.

Audi alteram partem. It is to be wished, for the sake of full and fair discussion, that the civil servant were not restrained by the rules of his employment from publicly stating his point of view. One can gather it only from private and semi-official discussions, and it seems to resolve itself into some such propositions as the following:

(i) *We neither desire nor demand these powers; they are thrust upon us increasingly by a Parliament which will not do its own work, and we can only do our best to use them as efficiently as possible.*—The argument is plausible; but it really amounts to this, that the departments, *once they are possessed of delegated powers* (whether they sought them or not), are determined to use them in their own way with the minimum of interference from higher authority. To say this is not to impute to the Civil Service any extraordinary Machiavellianism. It is very natural indeed that the administrator, with convenient machinery at hand and long experience of the most effectual ways and means, should be impatient of, perhaps cynical about, the formal dilatory methods of an unwieldy body of persons whose vocation is words, not deeds. This scepticism of authority is the natural accompaniment of vicarious assiduity; the obvious check upon it is for the ultimate controlling power—i.e. the public, if Parliament will not assert its own authority—to prevent *trop de zèle* from reversing the rôles, as between legislature and executive, of principal and agent.

(ii) *We get things done. We are bidden to execute, and we execute; what more, or what less, can you ask?*—This is the burden of a reply, given in the *Daily Telegraph* of October 10, 1929, to Lord Hewart's animadversions. It comes from Sir Stanley Leathes, who, enjoying retirement after long and distinguished departmental service, is dispensed from the Civil Service ordinance of silence. Sir Stanley Leathes begins by admitting all the abuses pointed out by the Lord Chief Justice. Then what is the ray of comfort? (We take the liberty in the following quotations of inserting italics which are not in the original.) The whole system, as it now stands, 'is anomalous and amorphous, but it cannot be denied that it *does its work*; it is in its way efficient'. 'It is a cardinal requisite in the Ministry of Health (for instance) that it should *do its work.* How can the work of the Minister be done without rules and regulations and orders that can be changed when they are proved to be faulty? *Who can make those rules and regulations and orders except the Minister? No one, for no one has the necessary knowledge and experience.*' After this sweeping *petitio principii*, we are assured that 'nine-tenths of all the decisions affecting individuals that are made in the secret tribunals of these despotic departments are as honestly made as those of the Civil Service Commission, and those that do not involve honesty' (this dark phrase, we may confidently assume, is not meant to be as sinister as it sounds) '*are made according to the law of necessity—because something has to be decided*'. It is truly gratifying to think of the rights of Englishmen being decided by secret tribunals according to the 'law of necessity'. We trust we shall not be suspected of too literal and too opprobrious an analogy if we recall certain famous lines:

> 'So spake the fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds.'

Then we are given to understand that the guiding principle—doubtless under the supreme 'law of necessity'—for secret tribunals is a mysterious inspiration called 'Standard'. 'What is the standard of treatment that can justly be demanded of a panel doctor? What is the standard of sanitation that can from time to time be required of a sanitary authority? What standard of houses is so bad that they ought to be condemned and pulled down? What standard of education is proper in a non-provided school?' These are questions 'of standard, of judgement, of discretion, which *cannot be decided by a code, nor by a Court of law*'. No reason is given for this assumption that 'standard, judgement, and discretion' are the monopoly of Whitehall. The whole system of Common Law under which Sir Stanley Leathes has lived all his life is built up on 'standard, judgement, and discretion'—which differ, however, from the departmental species in the important particular that they are based on uniformity, consistency, and public policy and not upon esoteric, closely guarded principles which, though they may justify themselves pragmatically in many cases, lack any general guarantee against arbitrariness. There is the further difference that 'in a department, legislation and jurisdiction melt into one another'. They do indeed; and the result is not, as might have been supposed, a horrid mess, but apparently some magically vitalizing amalgam. The powers of government, thus melted in the bureaucratic crucible, 'make up administration, and administration must be alive; whereas law, if Lord Hewart will pardon me, is always three-parts dead'. The live dog, however hybrid, however uncertain of temper, is better than the three-parts-dead lion. We are given examples of the practical success of these remarkable departmental principles; thus we are told that the Civil Service examinations are extremely well conducted, and we are asked, apparently in all solemnity: 'Would they be as good if the code of each were made by Parliament and its execution subject to control by the High Court of Justice?' When, against the extremely serious matters which Lord Hewart propounds, he or any other reasonable person is credited with the suggestion that purely scholastic examinations would be a fitting subject for the jurisdiction of the High Court, irrelevance seems to have reached the point of levity.

(iii) '*Trust us.*'—The powers delegated are perhaps, *in theory* a little wide, possibly, *in appearance*, almost tyrannical; but the public may rely upon the administration *in practice* to exercise them reasonably and justly and even benevolently. This is perhaps the most frequent argument of all. Because the individual administrator does not personally desire to deprive any man of his rights, he cannot see anything wrong in the system. The utter unsoundness of the argument in principle is self-evident. We pride ourselves on the ability and fairness of our judiciary; we do not on that account give our judges power of life and death over all criminals and all crimes, in full trust and confidence that they will not hang any man unless he deserves it. The second answer is matter of fact. It is not the case that these executive powers are always used reasonably or justly or benevolently. They are sometimes exercised in an extremely harsh and high-handed manner, and the Courts, when Parliament has not silenced them, have no hesitation in saying so. This fact we have previously attempted to illustrate in these pages, and therefore we refrain from doing so again; but if the reader requires further evidence, possibly the not untypical case of *Rex* v. *Minister of Health, Ex parte Yaffé*, already mentioned, will supply it.

The remedial measures advocated by Lord Hewart are, in sum, 'to reassert, in grim earnest, the Sovereignty of Parliament and the Rule of Law'; while, in detail, he suggests a number of immediate steps for correcting the most glaring of the present abuses.

'Is it too much to hope, in the first place, that the worst of the offending sections in Acts of Parliament may be repealed or amended? And, in the second place, is it not comparatively easy to prevent similar sections from being enacted in future? To this end what is necessary is simply a particular state of public opinion, and in order that that state of public opinion may be brought into existence, what is necessary is simply a knowledge of the facts. At present, it is tolerably safe to suppose, only a small part of the electorate knows what has been done and is being done, while it is a still smaller part that has any real appreciation of the meaning and effect of the statutory provisions which offer at once the occasion and the instrument of despotic power.'

As we have said, there is reason to think that this 'particular state of public opinion' is gradually coming into existence. Many will wonder, however, whether it is likely to thrive under a socialist régime; and this doubt is not entirely dispelled by the gratifying circumstance that Labour's first two Lords Chancellor have both been fully alive to the danger. A Lord Chancellor, after all, is a mere lawyer, and it may well seem to powerful influences in Whitehall that his training, his intelligence, and his knowledge of affairs have not sufficiently imbued him with 'standard, judgement, and discretion'. He may even be one of those mercenary lawyers whose chief preoccupation is to advance the interests of his own profession by fostering the maximum of expensive litigation. In this light, it would seem, did the Marquess of Salisbury, in April 1928, regard the leading judicial authorities of England when, with one voice, they protested (happily with success) against the proposal of the Rating and Valuation Bill, 1928, to make them 'departmental solicitors' (in Lord Hewart's phrase). They were to be charged with the function of giving anticipatory opinions on hypothetical cases which might arise out of the lack of prevision and the defective draftsmanship of the Ministry of Health.[1] In their protest the Lord Privy Seal, oblivious of the history of 'auricular taking of opinions' in the seventeenth century and of the obscurities and hardships which must inevitably result for hypothetical judicial decisions, could see no assertion of principle, but only a cynical indifference to the pockets of 'unfortunate ratepayers' (see *The New Despotism*, p. 140).

Lord Hewart next calls for a real, instead of a merely

[1] See App. I, *post*, p. 106.

perfunctory, Parliamentary supervision of delegated legislation. This, he suggests, could be exercised by Committees of each House; or—we may add—by a Joint Committee of both Houses, such as now examines the Measures of the National Assembly of the Church of England. (A somewhat similar control is exercised over certain Orders in Council made by the Ministry of Transport: see *Administrative Law*, p. 356.)[1] A pro-

[1] That these Committees may sometimes exercise a very salutary control is illustrated by the following example, for which I am indebted to 'W. I. J.', writing in the *Law Quarterly Review* (xlvi. 10) 'Attention should be drawn to the recent action of a Select Committee of the House of Lords in refusing approval to the Leeds Provisional Order contained in the Ministry of Health Provisional Orders (No 3) Bill. Full reports are given in the *Justice of the Peace and Local Government Review* for July 20, 1929 and in the Yorkshire newspapers for July 11, 1929 The Order was made by the Minister of Health under section 303 of the Public Health Act, 1875, which enables him to repeal, alter, or amend any local Act applying to the area of a local authority, and dealing with the same subject-matters as the Public Health Act, 1875, on the application of that local authority, subject to certain restrictions. This provision has been much used by local authorities for the extension of their powers without the expense of a private Act. It is sufficient for them to obtain local Acts on public health matters, and then gradually to extend them by provisional orders. The Leeds Order, for instance, purported to be merely an alteration of the Leeds Act of 1927. Under that Act, the Corporation had power to use surplus land, acquired under the Act of 1925, and not wanted for the purposes of that Act, for any other purpose, so that the Corporation could build on such land, and let it or sell it to other persons for any purpose which it thought fit. The Order now sought gave authority to exercise these powers over any land acquired or to be acquired in the future, under any power whatsoever. It was, in short, an Order enabling the Corporation to become owners of all the property in the City of Leeds. The exercise of the power was subject in each case to the approval of the Minister of Health, and his approval was in any case necessary because the Corporation had not the borrowing powers which would be required. But the effect of the Order, as was pointed out by the Committee, was to substitute the consent of the Minister for the consent of Parliament.

There may be two opinions as to the desirability of granting such extensive powers to local authorities. In fact some of us, even ratepayers posal for this method of control was put to the last Government in July 1929, but the Prime Minister regretfully found it 'impracticable', for the following significant reason—'owing to the large number of Statutory Rules and Orders made in every year, and to the variety and complexity of the subjects with which they deal, and to the fact that many of them are issued during the parliamentary recess'. As Sir John Marriott, who asked the question of the Government, observed in a letter to *The Times*, this answer with one breath admitted the whole case for supervision, and with the next dismissed it. It amounted simply to a confession of Parliament's despair of exercising any effectual surveillance; and yet the Prime Minister went on to say that sufficient control already existed in the constitutional checks of *Parliamentary scrutiny* and the jurisdiction of the Courts (which, as we have seen, is constantly burked). If it be really true that Parliament is nowadays unable to cope with its proper tasks and must depute them to others, then is it not time to avow candidly that the system of so-called representative government is no longer representative?

of Leeds, may well ask whether it is not purely a matter for the local authority. But undoubtedly, if it is considered desirable for the local authorities to be kept in leading-strings, the end should be held by Parliament and not by the executive government. And if Parliament decides otherwise, then it is a matter to be dealt with either by public Act, or in each individual case by local Act. Evidently, the House of Lords took a serious view of the matter, for the unusual procedure was adopted of appointing a Lord of Appeal—Lord Atkin—as Chairman of the Committee. The Committee discussed the question whether the Order was not in any case *ultra vires*, but did not decide that point, and the Order was disapproved on the ground that such extensive powers ought not to be given except by statute.'

Certain other measures of reform

'are tolerably obvious. Why should not the Rules Publication Act, in fact as well as in name, be "simplified and amended" so as to exclude exception or evasion, and so as to secure a real and effective Parliamentary supervision over all rules and orders? And it goes without saying that there should be an end of all schemes to enable Government departments to rewrite a statute, or to invite premature opinions on hypothetical cases from His Majesty's judges, or to shelter department decisions or orders against review by the Courts. On the positive side, future legislation would be conducted in such a way as not to repeat these performances. On the negative side, all reasonable steps would be taken to retrace and correct any such errors in the past.'

There is ground for hope that these things, or some of them, will be done in the not very distant future. But beyond the immediate measures of reparation and precaution which the Lord Chief Justice urges, there lie further problems; and one of the most pressing, as it seems to us, is the future status and the function of Administrative Law in our constitutional system. What is the best system for adjusting the mutual claims of State and citizen in such a way that their reciprocal rights and duties shall be most effectively secured?

The branch of law which preserves this balance is usually called Administrative Law. The term is extremely unpopular in England, because in the past it has been associated, and justly associated, with a system of official privilege and irresponsibility, which, though it has been attempted, has never been tolerated for long by the English nation. The element of privilege and protection, of placing the representatives of the State above the law, has died within the last fifty years in France; but its phantom still haunts this country, and it is only now beginning to be laid. It is evidently difficult for a generation brought up on the early editions of Dicey's *Law of the Constitution* to relinquish the belief that *droit administratif* is the sinister embodiment of all the distempers of the commonwealth which the Rule of Law has so proudly repulsed. But it is quite at variance with the facts to imagine at this time of day that the Administrative Law of France, or of the United States, or, we believe, of any great modern State, is a contrivance designed to load the dice against the subject in a throw with the administration. In the means of redressing a grievance against the State, the French citizen is to-day far better off than the English citizen. If this be regarded as an overstatement, we should recommend the reader to study Dr. Port's account of administrative law in France, or even in the United States, where it has had to contend against an atmosphere even more unsympathetic than that of England. These are, we venture to think, the most valuable parts of Dr. Port's treatise, and they will help to dispel many inveterate misconceptions.

'Rightly understood' (says Lord Hewart), '"droit administratif" is a definite system of law, the rules and principles of which, it is true, differ essentially from the rules and principles of the ordinary law governing the relations of private citizens *inter se*. Nevertheless, it is a system of true administrative law, administered by a tribunal which applies judicial methods of procedure. The Council of State, when it is exercising judicial as distinguished from administrative functions, acts by a Committee which is in many respects analogous to the Judicial Committee of the Privy Council, in the exercise of its jurisdiction to hear appeals from the Dominions and in Prize Cases. The tribunal considers the arguments of advocates and delivers reasoned judgements. These judgements are reported, and form precedents from which a fixed system of legal rules has been evolved. In short, the system may aptly be described as a special branch of the law for the determination of questions of a particular kind, and the tribunal as a quasi-judicial tribunal for administering this special branch of law.'

It is true that the Lord Chief Justice at one place refers to the *droit administratif* as being 'profoundly repugnant to English ideas'; but we understand him to be there referring to the original Napoleonic administrative law, which is no more.

The term 'administrative law', to Englishmen, is certainly not free from ambiguity. As Dr. Port shows in his first chapter, all our writers have had great difficulty in drawing any clear line between 'constitutional' and 'administrative' law. But the substance of the matter, whatever the label, is—those legal relationships between the citizen and the State which proceed from the putting in motion of governmental powers by the executive arm of the constitutional sovereign. It is that great and growing body of law which needs to be taken in hand in England. Upon this desideratum all seem to be agreed, whether they regard the technical term 'administrative law' with approval, abhorrence, or neutrality.

What we actually have is a travesty of law. On the one hand, there is an antiquated and costly system of procedure against the Crown; on the other, a sprawling mass of departmental powers, partly executive, partly legislative, partly judicial, some controlled by Parliament and the judiciary, many of them uncontrolled. This haphazard, unscientific growth Lord Hewart describes as 'administrative lawlessness'. 'To employ the terms administrative "law" and administrative "justice",' he tells us, 'to such a system, or negation of system, is really grotesque.' And so it is, if by 'administrative law' is meant a coherent and efficient body of legal rules. But, needless to say, we are not meant to understand by 'administrative lawlessness' that the hypertrophic powers of the executive are actually illegal. They are authorized, though too lightly, by the sovereign authority, and their danger lies in their very legality. A law of exemption and exception is none the less a law; and, while the spirit of modern *droit administratif* is to impose strict responsibility on administrative action, the present tendency of English administrative 'lawlessness' is to bestow upon executive action that very exemption from responsibility which was justly objected against the older *droit administratif*.

To advocate a system of true governmental responsibility—in other words, a real and sound administrative law—is in no sense to attack the Rule of Law: for the essence of the Rule of Law, properly understood, is the uniformity of legal responsibility and the denial of special privilege. Nor is there any necessity slavishly to imitate foreign models and to attempt to set up a Conseil d'État or a Court of Claims in this country. There is no reason why the administrative law of the future should not be regularized and developed as part of the ordinary legal system of the land. That is what it is, for all common purposes, in France—none the less so because, for historical reasons, it falls within a particular *form* of jurisdiction. Indeed, paradoxically enough, it is more truly and more widely a Rule of Law than, we believe, Dicey could claim for England were he alive to-day.

But it is said that the Courts could not cope with the volume of administrative business. We confess ourselves unconvinced of this until it has been proved in practice. Indubitably, there are certain minor matters with which it is unnecessary to trouble the Courts—for instance, claims for insurance benefits; though, even here, we think that the American principle is valuable, viz. that while the findings of *fact* of a quasi-judicial tribunal might be considered final (an example in England is the findings of fact of Income Tax Commissioners), on matters of law there should, even in these apparently insignificant cases, be recourse to the Courts. If, in the fullness of time, it proved true that the Courts were overburdened, one would have supposed that the obvious remedy was to strengthen them. It is indeed remarkable that Parliament, though ever ready to swell the ranks of officialdom, often shows the greatest reluctance to add a single member to the Bench, whatever the state of litigation. Apparently the existence of a single puisne judge inspires more foreboding in the breast of the average Member of Parliament than a whole new Ministry or a whole regiment of officials; and this although the judges are among the few servants of the public whose remuneration has not been adjusted to the post-war cost of living.

But then it is urged that access to the Courts is a dubious boon when it costs as much as it does at present. This is certainly a serious difficulty. The comparative cheapness of litigation in France makes the working of administrative law far easier than it is likely to be in England in the immediate future. It would be difficult, even with much fuller discussion than is here possible, to suggest any general remedy for the high cost of litigation; but in respect of Crown suits, we believe that much might be accomplished by limiting the hierarchy of appeals. Many of these administrative cases are now carried much farther than is necessary for a satisfactory legal solution. It is intolerable, for example, in a country where a grievously heavy burden of taxation is borne with remarkable honesty, that the taxpayer cannot go to the Courts with one of the numerous doubtful points which arise out of revenue law, without being faced with a vista of appeals leading up to the House of Lords. Whichever party be responsible for the protracted warfare, the ultimate cost to the public is heavy; and if the Crown or a public authority be the aggressor, the mere possibility of its pertinacity is enough to deter most persons of limited resources from prosecuting reasonable claims.

Although Dr. Port in his last chapter makes certain valuable suggestions for reform, many of them on the same lines as those which are recommended by the Lord Chief Justice and which we need not reiterate, we cannot resist the impression that the kind of administrative law to which he looks forward in England is ill-suited to the spirit of our legal institutions. Throughout his book Dr. Port shows a disposition towards the principle of the separation of powers which would lead, in our submission, to the utmost constitutional confusion. Because, as he rightly points out, we have never carried this principle to doctrinaire extremes: because our constitution exhibits some striking exceptions from it (such as the Lord Chancellor): because, in short, in this as in so many matters we have found reasonable compromise better than fanatical intransigence: Dr. Port seems to draw the inference that the separation of powers has no reality or value for us at all. He handsomely concedes that 'some sort of separation of the organs which exercise the different functions is desirable'. But a rigid separation, he holds, would defeat its avowed object.

'It strikes a keynote of distrust instead of co-operation; and it prevents a natural adjustment of the various parts of the machine. For Government, in order to be effective, must be co-operative—the co-operation of the different functions towards a single high purpose. A private business is quite rightly often divided into several departments, each with its particular function; but no experienced person would for a moment urge that there should not be the closest co-operation between them, with connecting links of personnel.'

Assuredly there must be co-operation; nothing is worse than rivalries and antagonisms between different branches of government, or, what is more common, between different executive departments. But there must also be a system of constitutional checks and balances, which are not the same thing as 'distrust'.

And there is no real analogy between a private business, which is conducted for profit, and the governmental organization, which is conducted, in this country at all events, for things (even loss!) other than profit. It is fair to Dr. Port to say that he thinks (p. 107) that far too much indiscriminate overlapping has taken place in recent years; but he is exceedingly vague about what he terms 'a *discreet* overlap', which, *if the 'danger limits are duly observed'*, is likely to produce 'good rather than ill'. From the notorious fact that Parliament has tended more and more to make the bureaucracy judge in its own cause, the singular conclusion is drawn: 'Here again, then, is clear evidence (as there was with the legislative powers granted to the administrative organ) that . . . a rigid separation of the powers exercised by the various organs of Government' is '*incompatible with the efficient working of State business in its modern developments*'. Surely the only way to make certain that the 'danger limits are duly observed' is to insist that the separation of powers is a proper and normal principle to be observed: to regard its reckless abandonment as evidence of the very reverse of the 'efficient working of State business'; and, while recognizing that some 'overlapping may be necessary in exceptional cases, to inquire very carefully indeed before accepting it as 'discreet'.

There is something almost touching in Dr. Port's resignation concerning the inevitability of officialdom. He regards with a calm amounting to satisfaction 'the wide and legitimate sphere of natural influence of the permanent staffs' over the whole initiative and policy of legislation. 'The position of predominance which administration naturally assumed in a simple society of early times, must perforce to a large extent be granted to it in the complex one of our own day'—which seems an admirable argument for re-establishing the Star Chamber. '*Circumstances have compelled* the legislature to authorize the administrative function to trespass beyond its formal boundaries and to invade not only the legislative, but also the judicial field in a novel manner.'

All this reasoning leads, we suggest, to a false conclusion. True it is that administration has increased prodigiously: true it is that, while the total population of Great Britain has, within a century, approximately quadrupled itself, the class of officials has multiplied itself *by more than twelve*: true it is that the day may not be far distant when half the population will be in government employ, salaried out of the taxes supplied by the other half. But because the executive now administers hugely, why should it also adjudicate and legislate hugely? Would it not seem to follow much more reasonably that since the executive now has so many shoes to make and repair, it had better stick to its last?

But Dr. Port is powerfully impressed by the proficiency of the specialist; and it is doubtless for that reason that he proposes, as one of the measures necessary for putting administrative law on its feet, a system of expert tribunals for the decision of administrative matters. They are to be recruited from the following attractive sources:

'Not only is there a valuable reservoir of experience gained by members of the various administrative tribunals, . . . but there are the trained lawyers who act as legal advisers to Government departments, the important officials of various Trade Unions, Insurance Companies, etc., and the highly responsible and experienced Government servants who control the particular sections of work which fall within the sphere of administrative jurisdiction.'

This demand for specialist tribunals is invariably based on the assumption that modern administrative law raises questions of such extreme technicality that they are quite beyond the competence of ordinary judges. But this assumption has little foundation in fact. Already a great many cases of what may properly be called an administrative character come before the High Court. There is no extraordinary technicality about them. The main substantive point for decision is usually straightforward, and of far less technicality than problems which are constantly arising in other branches of the law. What complexities do manifest themselves are usually the result of obscure or conflicting enactments, which judges, trained in interpretation, are infinitely better qualified to handle than officials whose own efforts at drafting do not inspire enthusiastic confidence in their appreciation of the niceties of the language. The insistence on these supposed mystical elements results from the official's absorption—very proper in other respects—in his own technique. The expert always tends to surround his subject with mystery, much of which proves to be factitious in the light of unprejudiced 'lay' criticism. And even if there were any extraordinary technicality in these matters, judges, who spend their time in unravelling technicalities of unlimited diversity, are the very persons to deal with them. A Somerset House official might think, not without some show of reason, that the only person who could possibly penetrate to the inmost mysteries of the Income Tax was one who had spent his life in the Department of Inland Revenue. Do our judges find these enigmas beyond their capacity? The only thing which baffles them is the language in which Somerset House has thought fit to express the so-called intentions of the legislature.

We remain unconvinced, then, of the necessity for specialist tribunals and a specialist administrative law. Unless we are prepared to admit that the whole constitutional centre of gravity has moved from the legislature to the executive: unless we are willing to be governed not by ourselves through our representatives but by officials who are responsible to no electorate: unless, in short, we are disposed to revise the whole theory and practice of the constitution which has so long been our boast: unless we are prepared to go thus far, then what is most urgently needed, and what is in no sense beyond practical possibility, is to make administrative power as responsible *de jure* as it is efficient *de facto*. And this we believe will be done only by means of a wholesome body of administrative law developed in harmony with the traditional principles of the general legal system.

APPENDIX I

ADMINISTRATIVE CONSULTATION OF THE JUDICIARY[1]

THE passage *ante*, p. 59 is criticized in a learned and suggestive article, entitled 'Consultation of the Judiciary by the Executive', by Mr. E. C. S. Wade in the *Law Quarterly Review*, xlvi. 169.

Mr. Wade's comment on the passage is: 'According to this criticism the administrator sins equally whether he acts judicially himself or consults the judicial organs of the State, save in the capacity of plaintiff or defendant in ordinary litigation.' This is the familiar dialectical device of creating a false dilemma. Whether or not the administrator 'sins' in consulting the judicial organs of the State clearly depends on the manner, the spirit, and the effect of the 'consultation'.

It is a curious and significant circumstance that the highest judicial opinion in the country was, almost unanimously, vehemently opposed to this project. What inspired the opposition? Was it mere professional prejudice? Was it, as the Marquess of Salisbury seems to have thought, the total inability of lawyers to understand or to consider the interests of litigants? In the debate in the House of Lords, many objections were advanced which deserve careful consideration. The proposed clause read as follows:

'(i) If on the representation of the Central Valuation Committee made after consultation with such associations

[1] *Law Quarterly Review*, January 1931.

or bodies as appear to them to be concerned, it is made to appear to the Minister of Health that a substantial question of law has arisen in relation to the valuation of hereditaments or of any class of hereditaments for the purpose of rating and that, unless that question is authoritatively determined, want of uniformity or inequality in valuation may result, the Minister may submit the question to the High Court for its opinion thereon and the High Court after hearing such parties as it thinks proper shall give its opinion on this question.

'(ii) The Central Valuation Committee may appear as parties on the hearing of any such case for the purpose of supporting any contention with respect to the question at issue, and may, if they think fit so to do, contribute such amount as they think proper towards the costs of any persons appearing on the hearing for the purpose of supporting the contrary contention.'

The best commentary on the manifold weaknesses and ambiguities of the clause is to be found in the observations of Lord Carson:

'In the old days, as I understood, and I had some experience as a Law Officer, if in framing your Bill you had any doubt about it, you sent it to the Law Officers, and the Government had the care and responsibility for their own legislation. But now what you are to do is this: you are, without having any concrete case or parties before you, to go to the Courts and ask for their opinion. When that opinion is given, I am not sure what is to happen. It does not say in the clause. All it says is that: "the High Court after hearing such parties as it thinks proper shall give its opinion on the question." Is that opinion to affect people who have not been heard? Is it to affect a number of people who may come within a certain class, but who may think they have entirely different rights? If not, of what value is it? If it is a mere departmental matter to help the department, then probably there is not very much harm in it; but does it mean that when John Jones . . . has a case to be considered, and goes up before the Court, he is to be told that there is already a decision which has been given? He will say: "When was it made? Why was I not given notice of it?" Of course, they cannot give everybody notice of what is going to affect people upon these decisions being taken by the High Court.

'Who is to state the case? I suppose the Central Valuation Committee. Who is to agree the facts? and the deductions from the facts? It is all to be stated behind the backs of the ratepayers. It may be a very convenient thing for a Government to be able to come forward when a ratepayer objects and to say: "Oh, you cannot do anything more, this is all closed; on such and such a morning we went before the Lord Chief Justice and one of his colleagues in the King's Bench Division, and it is all completely settled." "But," he says, "I did not know anything about it." "Well," is the reply, "you ought to have known, because everybody is presumed to know the law, and the law has been settled by this Court." Who is to settle the case? And then, if the Central Valuation Committee do not like the decision of the Court, are they to be able to go to the Court of Appeal? Are they to be able to go to the House of Lords? There is nothing about that in the Bill. "The Minister may submit the question to the High Court for its opinion thereon," but how much further the matter goes I do not know.'

There are even graver objections. Nothing is said as to whether the 'opinion' of the Court is to be binding upon the Minister once it has been given. The word 'authoritatively' suggests binding force, but it is highly ambiguous, and if it was intended that the opinion should be final and binding on all parties, it is difficult to see why this was not stated in terms. The proposal, therefore, as it stood, was that the Courts were to be compelled—for the statute was imperative in form—to give an anticipatory opinion upon an abstract question, and the Department which demanded the opinion was apparently under no obligation whatever to accept it. If it ignored it or appealed from it, the individual whose rights were affected would be still under the necessity of resorting to, or becoming defendant in, decisive litigation. In that not improbable event, nobody would be a whit the better off; the litigant would certainly have gained no advantage, nor would other prospective litigants, and the public would have suffered the actual disadvantage of duplicating Crown costs. That the Department would meekly and loyally accept an embarrassing opinion may or may not be probable; the important matter is that apparently it was to be under no obligation to do so. It might even consider itself under a duty not to accept it, but, as so frequently happens already, to test the issue to the utmost resort.

But on the other hand, if the Department found the opinion convenient, it would have a most potent instrument for the suppression of future disputes, however bona fide. The point was forcefully put by Lord Hanworth and Lord Merrivale, both of whom spoke from abundant experience of Departmental methods. Lord Hanworth said:

'The effect of this clause is to enable a Minister to submit a question to the High Court and to obtain an opinion. When that opinion is obtained the Minister will be armed with an authoritative declaration which, it might be said, he could apply in all cases. A judgement of the Court is binding upon the parties, and it is of authority where the facts are similar and in analogous cases, but it is quite a new thing for the Minister to be able to secure an opinion which can afterwards be held *in terrorem* over others who may have cases somewhat similar. For my part—and I think all lawyers will agree upon this—it is quite irregular and unwise that this power should be given to the Ministry, because it might be used (and there is a danger of its being used) in cases where it does not apply, thus preventing those who desire to have their matters decided on their own proper facts from bringing those matters to the attention of the Court in the ordinary way.'

Lord Merrivale said:

'When this clause is examined, what will be seen is that the department in question, where it is anticipated that grave difficulties may arise, will be able to select a general question of law, a question of general application, to get the sanction of the Minister of Health for proceeding under this clause, and then to take care that, upon a question and with a process of argument which will be regulated by itself, it will anticipate a conflict of authority with the individual by securing, upon arguments which it controls, a decision of a judge which is intended to be authoritative and secure in advance. There is nothing like it in the whole character of our law. I do not know that there is anything like it in the character of the law of any Western State. I have not enough experience of the latest developments of autocratic government to know if elsewhere there is some process by which, when the citizen comes to be in conflict with the Executive, he must go to the department with which he is in conflict and elicit from some pigeon-hole in which it is placed for reference a decision which they say governs the situation. This is totally contrary to anything we have known of in the whole history of administration in this country, and for my part I confess that I regard it with great apprehension.'

The fears expressed in these opinions are not matters of imagination. Many taxpayers must have had experience of at least one precedent which gives ample ground for the apprehensions expressed by Lords Hanworth and Merrivale. Several of the speakers in the debate in the House of Lords remarked that it would be monstrous to apply the system of anticipatory opinions to the Finance Acts. As it happens, something not dissimilar already exists in this respect. In 1920 a Royal Commission sat to consider the working of the Income Tax. Its voluminous report, though in theory possessing no more than a persuasive authority, is a document of oracular prestige in Inland Revenue offices. Income Tax law bristles with unsettled and highly debatable points, and in many instances where case-law is silent, opinions have been expressed in the Report. Should the taxpayer be concerned with one of these doubtful questions, he will often be told: 'The Courts have never decided this, but the Commissioners are of such-and-such an opinion.' (The opinion not infrequently takes the form that 'the practice of the Department has been thus-and-thus, and we see no reason for changing it'.) Certainly this does not mean, 'You have no further rights in the matter': but every sensible taxpayer, with, to say the least, as much discretion as valour, knows exactly what it *does* mean. It amounts to a clear intimation that the Department, having the warrant of the official advisory pronouncement, is determined to carry the matter to the last possible test if it is disputed. And indeed it is easy to understand that this may be conceived as a duty, for the sake of uniformity and certainty. The effect, however, is merely to add another, and a formidable, difficulty to those which already make Crown litigation so hazardous an undertaking. It may well be that the opinion—being, after all, only an opinion—is ill founded. It may well be that Departmental interpretation seeks, in all good faith, to extend its ambit, in the abstract, to a case which, with a variation of the material facts, does not truly fall within it in the concrete. But in itself it is a powerful deterrent, and it needs neither ungenerous suspicion nor morbid imagination to picture the dangerous uses to which it might be put.

It is to be observed further that in the clause as drafted it was left entirely in the discretion of the Central Valuation Committee whether or to what extent interested parties were to be relieved of the costs of being adequately represented when the opinion of the Court was sought. Nothing could be more unsatisfactory than the uncertainty and insecurity which the vagueness of this discretion would inevitably entail.

The whole notion of 'consultation' of the judiciary is, by hypothesis, a contradiction which requires exceptional justification. The judge does not sit in the seat of justice in order to be consulted, but in order to decide an issue. If, then, he is to be 'consulted', his advice must be one of two things. Either it is mere opinion, subject to the same limitation as any other opinion—namely, that the person advised may or may not, at his option, follow the advice: in this case, it is not easy to see the advantage of imposing this additional duty on Judges, who already, in the discharge of their proper function, have more than enough to do. Or, in the alternative, it is (like the fictitious 'advice' of the Judicial Committee) opinion of such a peculiarly authoritative nature that it is not, and is not intended to be, really opinion at all, but judgement disguised as opinion. There seems to be no cogent motive for extracting opinions from the Bench except to give them an authority which cannot belong to any lesser opinion. If, then, this opinion is really judgement, it is open to the extremely serious objection that it is anticipatory of actual facts, which are of infinite complexity, and upon which all judgement, in the sense of the application of principle to circumstances, must depend. Mr. Wade is too good a lawyer to make light of the objections to hypothetical judgements—indeed, he appears to admit them, for, as will appear, he proposes to get rid of the hypothetical element in his projected form of 'consultation'. No abstract principle of interpretation laid down in advance by the Courts could be, or at all events ought to be, more than a guide for the decision of subsequent cases. It is therefore either superfluous, or else it is a signpost with a pointing finger in which we may read a gesture not of direction but of command or threat.

The objections urged against the clause have been amply substantiated by the actual working of the Rating and Valuation Act, 1928, during the short time that it has been in operation. It is provided by the Act that certain 'industrial hereditaments' shall be placed upon a special list for purposes of derating. One of the principal kinds of these hereditaments is the factory or workshop: but it is provided that the relief shall not be extended to a factory or workshop if it is 'primarily occupied and used' for certain defined 'non-factory' purposes—if, for example, it is primarily occupied and used as a retail shop, or as a distributive wholesale business. A host of cases have arisen throughout the country concerning the interpretation of these sections of the Act. Many problems, quite incalculable in advance, have arisen. What is the exact line of demarcation between a factory and a retail shop? What precisely is meant by 'industrial'—for instance, does a newspaper office 'manufacture' an 'article'? When goods or materials are separated and sorted and reissued in new form, is this an 'industrial process', does it amount to 'adapting an article for sale', or does it constitute a 'distributive wholesale business'? If premises consist partly of a manufactory and partly of a retail shop—for example, a bakehouse together with a baker's shop—do the two together amount to an industrial hereditament? And so on. There has been the greatest possible degree of difference of judicial opinion. The Divisional Court of the King's Bench has differed from the Scottish Court which has had to decide similar matters, the Court of Appeal has differed from the Divisional Court in a large number of cases, and in all the Courts concerned there has been an embarrassing amount of dissent. Twice at least the English Courts have endeavoured to lay down wide, general principles for the interpretation of these troublesome sections; the most recent attempt (at the date of writing) is that of the Court of Appeal in the group of consolidated cases of which the first is *Bailey* v. *Stoke-on-Trent Assessment*

Committee (1930), 46 T.L.R. 601[1]. But it is quite clear to anybody who tries to find a path through this jungle of case-law that the variations of fact are so great and so vital that any experiment in anticipatory generalization would be simply in the void. It would not advance anybody a single step beyond the words of the Act, which, like all statutory provisions, are themselves an anticipatory generalization. We may take as an illustration one point which has arisen in a number of these cases. A good many businesses consist of the sorting and classification of articles of various kinds. Clearly, sorting and classifying articles may amount in some circumstances to what is usually understood by an industrial process, such as 'adapting an article for sale', and in that case the premises on which it is conducted are entitled to relief; in other circumstances it may be merely an intermediate stage in the distribution of a completely manufactured article. How can such a question possibly be determined except upon the particular facts and circumstances of a specific industry? It has been held by the Divisional Court that separating and sorting the natural fleeces of wool is not 'adapting an article for sale' (*Bradford Revenue Officer* v. *Bradford Assessment Committee and Laycock* (1930), 46 T.L.R. 506); that sorting and breaking up scrap metal for remanufacture by metal-workers is an industrial process, and not a 'distributive wholesale business' (*Langbaurgh Revenue Officer* v. *Langbaurgh Assessment Committee and Cheyne* (1930), 46 T.L.R. 508); that cleaning seed and

[1] See also the principles laid down by the Divisional Court in *Dudley Revenue Officer* v. *Lloyd's British Testing Co.* (1930), 46 T.L.R. 428.

removing foreign matter from it is not 'adapting for sale', but is a 'distributive wholesale business' (*Ipswich Revenue Officer* v. *Eastern Counties Farmers' Co-operative Association* (1930), 46 T.L.R. 512); that coffee-roasting by a large firm of coffee-merchants is a 'distributive wholesale business' (*Stepney Revenue Officer* v. *Twining* (1930), 46 T.L.R. 530). A number of these cases have been reversed by the Court of Appeal, and the only safe conclusion on the whole matter seems to be that which is stated by Lord Justice Scrutton in *Bailey* v. *Stoke-on-Trent Assessment Committee, ubi sup.* at p. 601: 'In my view the question whether sorting or separation of an article to be sold from a bulk is adapting for sale depends on the facts of each particular case and cannot be defined simply by saying "No sorting is adapting for sale".'[1] Imagination quails before the confusion which would have been wrought if it had been attempted—and these seem to be exactly the kind of circumstances in which the attempt might have been made—to settle these and analogous questions by proleptic opinions *in abstracto*. If the proposed expedient, or any other, could have saved all this teeming litigation, it would indeed have conferred a benefit on the community; but instead of preventing it, it would merely have added another stage to it; and by far the simpler and more efficacious

[1] The Divisional Court seems to have come to much the same conclusion in *Dewsbury Revenue Officer* v. *Dewsbury Assessment Committee and Burrows* (1930), 46 T.L.R. 519. This was a rag-sorting case: it had been found by Quarter Sessions that the premises were not 'primarily occupied and used' for the purposes of a factory or workshop, and the Divisional Court held that it could not interfere, 'the question being largely one of fact in each case'. The result, however, is difficult to reconcile with the *Langbaurgh Case, ubi sup.*

expedient, it is submitted, would be that to which Lord Justice Scrutton calls attention in the leading case above cited—namely, that all these matters could be settled by two appeals at the most, as they are in Scotland, instead of by four, as they are in England. At the moment of writing, it still remains to be seen whether all the searchings of heart which culminate in *Bailey* v. *Stoke-on-Trent Assessment Committee* may not turn out to have been in vain as the result of long and costly appeals to the House of Lords.[1] A more unnecessary waste of public and private money it is difficult to imagine.

In support of his thesis, Mr. Wade cites certain examples which do not greatly assist his case. The reference to the High Court by the Minister under s. 10 of the Unemployment Insurance Act, 1920, is, on Mr. Wade's own showing, of a totally different nature from that which was proposed by the Rating Act. The question under this section is whether a certain kind of employment brings a certain person, or certain persons, within the terms of the Act. There are two possible forms of procedure. (*a*) The Minister may decide the question himself, and the person concerned may then bring an appeal to the High Court. Clearly there is no question of 'consultation' here. Mr. Wade cites Roche J. as observing in one case (*Re Unemployment Insurance Act, 1920*, [1922] 1 K.B. 188): 'I am doing what I was invited to do by the Minister of Labour, namely, to lay down a general working rule, so far as I can, for the administration of the Act of Parliament.' But this case was an ordinary appeal from a decision of the

[1] See now (January, 1931) *Moon* v. *L.C.C.*, [1931] W.N. 17.

Minister: and whatever private request may have been made to the learned Judge by the Ministry of Labour, the effect of the judgement, as matter of law, is to 'lay down a general working rule' only in the same sense as any other decision on appeal. (*b*) The Minister may, instead of deciding the matter himself, refer it to the High Court for *decision* (not for *opinion*). Here again there is nothing in the nature of 'consultation'. The High Court is no more 'consulted' than when Justices state a case, as they may do on many matters, for the decision of the High Court. The decision affects a specific, concrete case, and is in no sense in the abstract: for example, in another case cited by Mr. Wade (*In re Unemployment Insurance Act, 1920*, [1922] 1 K.B. 466), the cases of eighteen different persons, following eighteen different occupations, were considered together, on reference from the Minister, and each case was, of course, decided on its own facts. Nothing could be farther removed from the consultation proposed by the Rating Act, and the second alternative in the section really amounts to nothing more than a matter of procedure. Naturally, these decisions of the High Court upon reference from the Department are precedents, but neither more nor less so than any other decisions of the High Court upon the interpretation of statutes.

It is unsafe to base any general conclusions on the curious procedure of 'special reference' to the Privy Council under s. 4 of the Judicial Committee Act, 1833. The Judicial Committee is a Court with very peculiar and diverse jurisdiction, and in an Empire comprising so many different social, legal, and religious elements, it may well be that questions arise which are better decided by a kind of residuary and advisory jurisdiction than by the ordinary processes of litigation. So much may be said in support of some of the examples which Mr. Wade cites—e.g., 'the administration of the estate of an Indian Rajah; the validity of Orders in Council regarding the administration of justice in the Channel Islands, involving private rights, i.e., loss of office; questions arising on the severance of a colony having responsible government, no other tribunal being available'; and the Labrador boundary dispute. For such 'innominate' questions a peculiar form of jurisdiction may be useful: but it is not to be supposed that the system of special reference to the Judicial Committee has always or even often worked well. The most frequent and the most important use to which it has been put is the special reference of questions of interpretation as to the constitution of Canada. Mr. Wade cites Lord Loreburn as having given his blessing to this practice in the leading case of *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1912] A.C. 571. All that that case decides is that it is not, under the British North America Act, actually *ultra vires*[1] for the Dominion Parliament and the provincial legislatures to impose upon the Courts

[1] Mr. Wade, no doubt *per incuriam*, reverses the whole effect of the case in the following sentence (*L. Q. R.* xlvi. 185): 'To answer questions such as the Dominion Act required the Supreme Court to answer was *ultra vires*, unless it could be shown that the practice was (1) incompatible with the maintenance of the Court's judicial character or of public confidence in it, or (2) with the free access of an unbiased tribunal of appeal to which litigants in the provincial Courts were entitled as of right.' Presumably either a 'not' has fallen out before '*ultra vires*, or *ultra* is miswritten for *intra*.

the duty of answering abstract constitutional questions. The case says nothing, and could say nothing, as to the desirability of so doing. In actual fact, if we are to believe Lord Haldane, Lord Loreburn (who, after all, in the decision cited was delivering not his own opinion, but that of the Court) was strongly opposed to the practice which had grown up in Canada. Lord Haldane's words (cited in Lord Hewart's *The New Despotism*, p. 126) are a significant commentary on the form of 'consultation' which Mr. Wade commends:

'I referred on the last occasion to the liking which had grown up in Canada for submitting abstract constitutional questions to the Courts there and ultimately to the Privy Council. In my opinion experience of that course had led to enormous inconvenience, and successive Lord Chancellors have objected to and denounced it. The late Lord Herschell said some strong things about it, and at times refused to give an opinion. The late Lord Loreburn was even stronger, and other Lord Chancellors and other judges in the Judicial Committee have expressed themselves without restraint upon a system which they deemed to be very mischievous. It was mischievous because it invited the Court to go beyond the particular case which it had to decide, and to say things beyond the facts to which the particular decision would be applied, which might prejudice future suitors.'

Some of Mr. Wade's other examples are scarcely more convincing. Consultation of the Judges by the House of Lords in a case actually in litigation is no analogy to that proposed by clause 4, and indeed is not pressed as such by Mr. Wade: its relevance therefore is not apparent. At a time when the members of the highest tribunal were not necessarily lawyers by training, this form of consultation had possibilities of usefulness which it no longer possesses. But it was always a somewhat dubious usefulness. The practice of 'summoning' added a heavy burden to the duties of the Judges, and was sometimes resented by them. There was also a certain element of futility about it when, as happened in a famous case like *Egerton* v. *Brownlow* (1853), 4 H.L.C. 1, three Lords out of four could wholly ignore the opinion of eight Judges. In any case, it has been in disuse since *Allen* v. *Flood*, [1898] A.C. 1, and is not likely to be revived.

As to matters of law not actually in litigation, it is true that the House of Lords theoretically has the right to consult the Judges. It has seldom used this power, but there is at least one famous example of its having done so. As is well known, the questions and answers in *M'Naughten's Case* (1843), 10 Cl. & F. 200, as to what amounts to insanity in law, were in the abstract. The results have been unfortunate, and have fully justified the apprehensions (which Mr. Wade cites) expressed by Chief Justice Tindal and Mr. Justice Maule. Nobody knows whether the rules in *M'Naughten's Case* are really authoritative or not; they are vague and equivocal in their terms, so that there is scarcely a word in them which has not been the subject of doubt, dissent, and anxiety; and, in short, there are few propositions in the whole of our jurisprudence which have been so unsatisfactory in their interpretation and application as these celebrated 'rules'. It is matter for congratulation that the House of Lords has not repeated the experiment in other branches of the law.

But it is difficult to know whether Mr. Wade is really defending 'consultation', for what he himself proposes is not 'consultation' at all, but something entirely different. His method of argument is a little puzzling. Unless I do him an injustice, it seems to run on these lines: The Rating and Valuation Act proposes a certain form of consultation; you object to it: I admit your objections to the actual form suggested; I propose to remove them and to substitute a totally different form; now, how can you ever have been so unreasonable as to object?

What Mr. Wade proposes is, in its briefest terms, that in case of doubt as to the interpretation of an administrative statute (in this case a Rating Act), the Minister shall apply to the Court for directions, by a form of procedure analogous to the originating summons; that all interested parties shall be represented; that the case shall be in concrete form; that the decision of the Court shall be binding and not merely advisory; and that the costs shall 'come out of the estate'—i.e., shall be paid out of the public revenue.

'It is suggested that questions of construction under such measures as Rating Acts might be determined with the facility with which the construction of the Property Statutes can be determined by adopting the originating summons. The Minister, had clause 4 been enacted with the modifications to be suggested hereafter, might be put in the position of trustees of a settlement applying to the Court for directions in the administration of their trust on the construction of Settled Land or Trustee Acts. The respondents, or defendants, to the summons would be the Central Valuation Committee, together with a selected ratepayer occupying the class of hereditament concerning which the substantial question of law had arisen, and, if necessary, the local rating authority concerned. Each party to the summons would be separately represented. Costs would, to complete the analogy, come out of the estate—in this case the State for which the Minister has appeared as trustee of the public interest—unless the Court regarded the conduct of any party as frivolous or otherwise deserving of the burden of costs. . . . The necessary modifications in drafting such a clause as clause 4 are not formidable and the actual procedure should be governed by rules of court which could exclude the possibility of reference on purely hypothetical questions.'

Whether or not this suggestion be practicable, it plainly is no answer to the objections made to clause 4 of the Rating and Valuation Bill and to similar statutory provisions. What it contemplates is not 'consultation', but judgement—judgement which differs from that in an ordinary action only in the method of originating it and in the important fact that the costs of all parties are paid by the State. It may be due to the present writer's obtuseness that he fails to understand why Mr. Wade, having recognized and carefully circumvented all the objections made to 'consultation', is at such pains to defend forms of 'consultation' to which all those objections apply.

Mr. Wade, however, contributes what is much needed—a constructive proposal for reducing the cost and vexation of administrative actions. One would be very reluctant to seem unsympathetic to any such suggestion. But one cannot resist certain doubts, not, it is hoped, merely pedantic, concerning the analogy of the originating summons. The kind of originating summons which Mr. Wade evidently has in mind—there are, of course, other kinds *inter partes*—is that in which a person (trustee, administrator, or other *fidei-*

commissarius), being under a duty to administer property for the benefit of others and himself claiming no interest in it, applies to the Court, in a case of doubt, for instructions as to the manner in which he is to discharge that duty. There are some difficulties in the way of conceiving the administrator as a 'trustee of the public interest', except by way of metaphor, for his primary function is to keep in motion a part of the governmental machine, and he might urge, not without plausibility, that if there is any trusteeship, it is in the legislature, not in the executive. But it may not be quite fair to Mr. Wade to take him in too literal and too technical a sense. Let us by all means agree that it would prevent much waste of time, temper, and money if there were some procedure, *designed for concrete cases* (the originating summons of actual practice is, *par excellence*, concrete and *ad hoc*), by which a speedy and inexpensive judgement could be obtained on certain doubtful points of administrative law. It still eludes me how this proposal invalidates in any degree the objections to the device which has in fact been attempted by the Executive, and which, as Mr. Wade himself assures us, the Executive is determined to attempt again. But Mr. Wade's very different device will, let us hope, receive the consideration which it merits.

But while this is to be hoped, it must be confessed that hope exceeds expectation. The costs are to 'come out of the estate'; and it seems only too probable that the short answer to Mr. Wade's proposal, considered as a practical expedient rather than as a desideratum, is that no Government Department would for a moment entertain it. It may be said that it is not for Government Departments, but for Parliament, to entertain such matters, and that the Executive will do what it is told. That is the theory of the constitution, but in practice we have learned how difficult it is for our democratic Parliament to carry a measure against the passive resistance of the undemocratic Executive. Such, at all events, seems to be the history of the Crown Proceedings Bill. Departmental objections to Mr. Wade's 'originating summons' suggest themselves only too readily. There is little likelihood that the Executive would consent to placing upon the public, instead of upon the individual, the responsibility and the cost of settling the innumerable obscure points of administrative law. And, in fairness, it is not altogether reasonable to expect it to do so. There are loud and justified demands for economy everywhere, and it is not difficult to foresee that a Department which frequently had recourse to 'consultation', bearing the costs of all parties interested or claiming to be interested, would soon incur the displeasure of the Treasury: and the reproach would be the more pointed because the Department would be exposing the weaknesses and ambiguities of legislation which, though nominally emanating from Parliament, is notoriously of its own prompting. Nor must it be forgotten that there are always persons who will resent and dispute any claim by the Government, and if there were a procedure in which costs fell solely on the Crown, there would be unceasing demands for it. They need not all be granted, of course, for presumably recourse to 'consultation' would be in the discretion of the

Minister, and not available to the individual as of right (like the right to an originating summons, under Order LIV *a*, of a person who claims to be interested in a deed, will, or other instrument *inter alios factum*).[1] But in practice it is to be feared that in the majority of cases even of *bona fide* points of doubt raised by individuals, the natural tendency of a Department would be (if present experience is any guide) to say: 'Go to the Courts and fight it out at your own risk'; and that when 'consultation', in Mr. Wade's wide sense, was resorted to by the Minister, its purpose and effect would be to spike the guns of a threatening host of litigants. If, however, Mr. Wade can bring about a Departmental change of heart in such matters, he will have done a notable service: and in the meantime, his is at least the credit of making a constructive proposal for the amelioration of an unhappy state of things.

In the Law Quarterly Review *for January 1931, Mr. Wade published the following reply, which is reprinted here with his kind permission:*

By his searching criticism of the proposal to amend the procedure suggested by clause 4 of the Rating and Valuation Bill, 1925 (or, as he would prefer it, to substitute a different procedure to attain the same end), Professor Allen has focussed attention on an important question of constitutional law. It would be interesting

[1] Mr. Wade, however, says that 'some safeguard would be necessary . . . to secure that references should be available at the instance of any person affected'. It would be interesting to know what the form and extent of this safeguard would be.

to have the opinion of a senior member of the Civil Service both on the proposal and Professor Allen's article....

He chides me with confusion of argument. His 'obtuseness', i.e. my obscurity, is due to two causes. In the first place the choice of title, or the omission of a sub-title, was somewhat unfortunate. For 'Consultation of the Judiciary by the Executive' there should read, 'A proposal for utilizing the Judiciary to determine doubtful points of law between the Executive and the Subject, avoiding on the one hand the defects of opinions on hypothetical cases, and on the other the expensive, dilatory, and cumberous procedure of ordinary litigation and the appeals consequent thereon.' Secondly, according to Professor Allen, I failed to indicate sufficiently clearly that I did not myself advocate consultation. My proposal, however, was put into one chapter; the precedents of consultation and references into others. I had hoped this would have sufficed to show that the relevance of the citation of precedents was to indicate that the device of consultation, whatever its defects—which I freely admit in the case of hypothetical questions—had always played its part in our judicial system. The relevance of section 10 of the Unemployment Insurance Act, 1920, is that it is of the essence of my proposal for a procedure by originating summons. Professor Allen has given me a welcomed opportunity of removing any obscurities which may have confused an appreciation of my object, namely, to advocate references to decide concrete cases *ad hoc*.

The larger part of Professor Allen's article is devoted to 'flogging a dead horse'—consultation on hypothetical cases, which I condemn equally with him in the form proposed by clause 4. My omission of discussion of the debate in the House of Lords when the clause was before the House was intentional. I was not proposing to disagree with the weight of opposition to that particular form of consultation. But I am unmoved by Professor Allen's criticism of the impracticability of my proposal which was different and attempted to overcome the objections to that form of procedure. The need for a new method has been emphasized by the flood of litigation in rating matters cited so fully in his article. He apparently agrees that it is indefensible that the unfortunate ratepayer should have to face the prospect of four stages of appeals to the Courts before he can obtain a certain decision on a point of interpretation of rating law. In this respect the taxpayer is at an equal disadvantage.

The objections raised to my proposal are:

(1) The Executive are not likely to assent to the reference of concrete cases for determination by way of originating summons, because they will never regard themselves as trustees of the public interest. Professor Allen is quite right in not taking this trusteeship too literally. It means that the Executive's task is to ensure the smooth working of that sphere of administration which is for the public good entrusted to a particular department. In practice the Ministry of Labour submits to a similar procedure under section 10 of the Unemployment Insurance Act, 1920, and the system works well. If the category of a person for insurance purposes can be determined in this simple and inexpensive way, why should not the interpretation of a rating Act be so

determined? It is difficult to justify the separation of judicial and executive functions to the extent of preventing the Executive consulting the Judiciary on concrete points of law *ad hoc*, save by a procedure which may drag the subject, or alternatively the authority, through four appeal Courts. In this respect at least Professor Allen is disposed to agree.

(2) The second objection relates to costs, which I proposed should be paid by the State, subject to the discretion of the Court if the proceedings had been instituted without proper cause. We are told that the Executive will not consent to placing upon the public the cost of settling obscure points of administrative law. In practice they are at present willing to take suitable cases up to the House of Lords, provided an important question of principle is involved, and to indemnify the subject as to his costs at their discretion. This practice is adopted by the Board of Inland Revenue. The proposal is that the discretion should pass from the Treasury or Department concerned to the Court, as in the case of Petitions of Right. It is interesting to note that the recent practice in Prohibition proceedings has been for the Crown to pay costs when unsuccessful, though there appears to exist no statutory relaxation in this connexion of the rule that the Crown neither pays nor receives costs.[1] In Patent and Trade Mark cases the costs of the Comptroller-General are in the discretion of the Court to award them against an unsuccessful

[1] For an example of this, see *R.* v. *Minister of Health, Ex p. Yaffé*, [1930] 2 K.B. 96 (C.A.); cf. *R.* v. *JJ. of County of London and L.C.C.*, [1894] 1 Q.B. 453.

applicant, but costs cannot be given against the Comptroller. The Executive, while properly the guardian of the public purse, is not always the enemy of the subject, provided the subject is a reasonable being.

(3) Finally, Professor Allen inquires what safeguards I propose to ensure that references should be available at the instance of any persons affected. My proposal as to costs removes the objection that groundless proceedings will be instituted by persons with no interest save to attack a Government Department. Moreover, if necessary, parties, other than the public authority concerned, could be required to give security for costs, if the Court were satisfied that reasons existed for requiring this precaution. Otherwise I see no reason why the simple procedure by way of originating summons for the final determination by a single judge should not be available to any person (in addition to the Minister and the public authority) whose proprietary interests are threatened, e.g. by an actual assessment to rates on the construction of a doubtful provision in an Act of Parliament, to the same extent as appeals lie to the Courts to-day in rating matters. Professor Allen does not suggest that any of the appeals cited by him are frivolous or vexatious. Why should references on the same questions be regarded as opening up the way to groundless proceedings?

E. C. S. Wade.

Postscript.

Mr. Wade has been good enough to show me his reply, and, if he will allow me to say so, I think that nothing could be fairer and more temperate. I cannot agree that my obtuseness is synonymous with his obscurity, for if I have misunderstood his argument, I am sure that the fault is mine and not his. If the horse which I have been flogging is dead, it remains to be seen whether it will not come to life again. I have only to add that if Mr. Wade's proposal should prove practicable, nobody will be more pleased than myself, and, as I have explained, the fact that I foresee certain obstacles which I fear may not be overcome does not diminish my sympathy for the proposal itself in principle.

C. K. A.

APPENDIX II

REVENUE APPEALS

THE subject broached *ante*, p. 70, has been the occasion of some strong observations by Viscount Dunedin in the House of Lords. In *Fry* v. *Burma Corporation*, [1930] A.C. at p. 326 Lord Dunedin said:

'My Lords, I am bound to say that I do not think I have ever been called on to decide a more useless appeal than this appeal. I can quite understand that the Crown should bring to this House anything that raises a general question that is likely to affect the taxpayer one way or the other. It does not matter one whit which way this case is decided, because there is no general principle involved in it. The case is a very peculiar one, and not particularly liable to happen again, but, if it does happen again, nobody can tell whether it is for the interest of the Crown or for the interest of the taxpayer that the decision should be one way or the other. It all depends upon the particular figures. . . . My remarks do not apply to the Attorney-General and Solicitor-General; they have far too much work to be able absolutely to advise as to all cases, but it really is high time—and I say this insistently—that those who advise the Crown in these matters should make up their minds that the Crown can be wrong, and not think it absolutely necessary to bring every case to this House, however trivial, simply because the Crown has been found wrong in that particular one.'

In these obeservations Lord Warrington of Clyffe and Lord Atkin associated themselves. After judgement had been delivered, the following colloquy took place:

Sir William Jowitt, A.-G.—My Lord, in view of certain observations which fell from your Lordship which were not put to me in the course of the argument, I think it fair, particularly as your Lordship was good enough to indicate that I personally was not implicated and that others were, to say that the amount involved in this case is very large indeed and this case governs other cases, and the appeal is being taken for that purpose. Your Lordships were not aware of these facts.

Viscount Dunedin.—I still stick to my opinion. The Court of Appeal is the Court of Appeal, and this case raises no general question in this sense, that you yourself very candidly said you cannot tell whether it is for the interest of the taxpayers as a whole whether the case shall be decided in the one way or the other. I keep to my observations. I might have to repeat them, but I do not say so necessarily, because I quite see that, if there is a question of general importance, then, no matter how the decision is, it is for the Crown to go on, but I do notice that there are seven cases in the paper and in five of them the Crown is appellant. I shall watch with interest what these cases are.

Sir William Jowitt, A.-G.—My Lord, I thought I ought to point that matter out to your Lordship, particularly in view of the fact that the learned trial judge decided in our favour.

Viscount Dunedin.—You have not disturbed my observations.

In a case which was decided shortly afterwards—*Jones* v. *Leeming*, [1930] A.C. 415—Lord Dunedin returned to the charge. At p. 421 he observed:

'My Lords, this case is a striking example of the class of appeal in income-tax cases, which on a recent occasion I felt bound to deprecate. There is no new question of law involved in it, merely the application of old principles to the particular facts. There has been a unanimous judgement of the judge of first instance and of the three judges of the Court of Appeal against the Crown, and the sum at stake is 130*l.* 12*s.* The case itself is one of the simplest.'

The noble and learned Viscount felt the matter to be of such public importance that he raised it for debate in the House of Lords on April 3, 1930. The following are extracts from the debate, as reported in the *Law Journal* for April 12, 1930:

'*Viscount Dunedin* rose to call attention to the practice of appeals to the House of Lords in Income Tax cases. In the course of his speech he said: My Lords, it may possibly be within the knowledge of some of your Lordships that on a recent occasion I indicated, in the judicial business of the House, that I thought it necessary to call attention to what I considered a practice which was being abused, of the Crown coming to your Lordships' House on every occasion on which they had lost, irrespective of whether the case was really worth being brought to the Supreme Tribunal. I am not going into that matter again. I am content to let bygones be bygones, and that all the more because I have been informed that in the last case in which I made these remarks the Crown has, I think very properly, told the litigant, who had won the case before every judge before whom it came, that they are prepared to pay his costs as between solicitor and client; but I should not have put down the Notice on the Paper merely to say what I have said. I put it down because I do not wish to appear as a mere critic when, as I believe, there is a perfectly easy remedy to meet what I think was an abuse, and what I think, from the notice taken of my remarks in the Press, is evidently considered an abuse by a widespread feeling throughout the country.

'The proposition which I have to make is not original. It is not my own and I do not claim any credit for it, but it is much the best that I have seen put forward. There has been a certain amount of correspondence, and various people have proposed that in every case between taxpayer and Crown the costs should be met by the Crown. I do not think that that would ever do. I think that would simply lead to an abuse at the instance of the taxpayer—precisely the same abuse as the abuse at the instance of the Crown. But what I do propose is this. When the Crown wins in the Court of Appeal then let matters be just as they are. If the taxpayer chooses to go to the House of Lords, then let him go at his own risk. But when the Crown loses in the Court of Appeal, then I would propose that the Crown should not be allowed to come to your Lordships' House except with the leave of the Court of Appeal, and that it should be possible, although not at all necessary, that the Court of Appeal should clog that permission to appeal with such conditions as to costs as it should think fit. I confess I think that that would meet the situation.

'I think the Court of Appeal could perfectly be trusted to give leave in all proper cases. And I do believe that if that was done the two objects which are sought would both be obtained. The two objects are: first, that the Crown should have the chance of having really general questions decided by the highest Tribunal, and, secondly, that some unfortunate mortal should not be made the whipping boy to stand the expense of having the general question determined. I am not, of course, expecting for one moment that the Government should say "Yes" to what I am saying, but I ask them, if they will, to give an undertaking that they will consider this proposal, so that if it commends itself to them it may be put in the next Finance Bill.

'*The Paymaster-General* (*Lord Arnold*).—My Lords, I need scarcely tell you that any suggestions or remarks of the noble and learned Viscount will receive full consideration by the Government. He has not expected anything in the nature of a definite reply on this occasion, and I am quite sure that he will not look for anything of the sort at such short notice; but I can assure him that his suggestion will be considered. I do not think it necessary to trouble your Lordships at any length on the general question, but, as the noble and learned Viscount spoke, I think, of the abuse which had taken place in regard to these matters of appeals, I think it is only right for me to say that the Board of Inland Revenue do not enter appeals from decisions given against them by the Court of Appeal or the Court of Session unless there is a very large sum of money at stake, or an important point of principle is in issue, which would involve large sums of money in other cases. But in all cases where the Board are themselves seeking to establish some new point of principle in Income Tax administration they pay the taxpayer's costs, whether they are successful or not . . .

'*Viscount Hailsham.*—. . . I am bound to say that, speaking from my experience, I do not think the suggestion which my noble and learned friend has put forward for consideration is one which commends itself to me, at any rate on such consideration as I have been able to give to it, and, as he knows very well, it is a suggestion which is not now made for the first time.

'The suggestion is that the Crown in Revenue cases shall have imposed upon it a limitation to which no other litigant is submitted. The suggestion is made on the ground, which no doubt is a perfectly true ground, that the Crown has behind it resources which the ordinary litigant cannot command and that, therefore, there is a risk of those resources being abused to the oppression of the poorer litigant. That, of course, is true. It is true in every case in which one litigant has large resources behind him and the other is in a comparatively poor position. It is not limited to the cases in which the Crown is one of the parties. In every case in which the Crown is a party it cannot fail to happen that there must be a certain, I do not want to be misunderstood if I use the word bias, but a certain feeling of sympathy against the Crown. In every case in which there is a wealthy corporation on the one side and an individual on the other there is a natural feeling in favour of the individual and against the corporation.

'It seems to me that by limiting the right of appeal to those cases in which the Court of Appeal chooses to give leave, you are preventing the Crown from appealing, and, therefore, preventing, your Lordships will remember, the general body of taxpayers (because those are the people whom the Crown represents) from appealing in precisely those cases in which it may be most necessary to give the Crown the right to appeal—namely, those cases in which, unhappily, the Judges in the Court of Appeal have allowed themselves to be a little misled by the sympathy to which I have already referred. From my own experience I am quite sure that some of the cases in which I have been most successful in obtaining in this House a reversal of decisions of the Court of Appeal have been precisely those cases in which the Court of Appeal were most certain that the Crown was wrong and would have been absolutely unanimous in refusing leave to appeal had I asked them.

'The real remedy for the abuse, if there be an abuse, of the Crown's power, lies in the proper discharge of their duties by the Law Officers of the Crown. Again I speak of my own experience only because this is a matter in which I can speak with some little knowledge.

'It was my practice, and the practice of the Solicitor-General, my learned friend Sir Thomas Inskip, and I doubt not it is the normal practice of a Law Officer (I expect my noble and learned friend Lord Hanworth would be able to confirm me) before signing notice of appeal in a Revenue case to give some consideration to the case, which, after all, he has argued, with the merits of which he is well acquainted and the importance of which he will be able to judge. Unless he thinks it is a proper case to bring before your Lordships' House it would be the duty of the Law Officer (a duty which I have discharged before now) to ask the solicitor for the Board of Inland Revenue to come to see him, and to explain either that there ought to be no appeal at all or, if there were an appeal, that an undertaking should be given to pay the costs, whichever way the appeal went. As the noble Lord, Lord Arnold, has pointed out, the Inland Revenue normally do that in cases in which they are seeking to decide some great point of principle on a matter in which the actual sum at stake in the individual case is unreasonably small. It is in that direction that a proper check ought to be imposed, and is imposed, upon any risk of abuse of the resources of the Crown in such litigation as the noble and learned Viscount has brought to your Lordships' attention. . .

'*The Lord Chancellor.*— . . . Far be it from me to give a judgement before I hear all that can be said, but as at present advised I am not quite sure that my mind will go in the same way as that of the noble Viscount. I think every case should depend upon its own facts, and I rather agree with what has been said by the noble and learned Viscount, my predecessor, Lord Hailsham, that this is rather a matter for the exercise of their functions by the Law Officers of the Crown. At the same time, the noble and learned Viscount's remarks shall be most carefully considered.

'*Viscount Dunedin.*—My Lords, I have no right to speak again except with leave of the House. I do regret the remarks that have fallen from the noble and learned Viscount in front of me (Viscount Hailsham). . . . But really the result of his speech is that things ought to remain just as they are. I am perfectly certain that the general feeling in the country is that they ought not to remain just as they are.

'I had said that I would not go back into matters, but it has really become necessary to say something. I will take an instance. There were various comments in the newspapers as to what I had said. I happened to go into a shop and they said: "Oh, we have seen what you have been saying. You know that was just our case. We had a case and we thought we were right, and our solicitor asked about it, and the answer he got was, 'Well, you may try the case if you like, but we will take you to the House of Lords'." That is the general feeling in the country, and I believe if the solicitors of London were asked every one would say that when a client comes to them upon an Income-Tax case they say: "Well, remember, you won't win short of the House of Lords." There are statistics I would like to get and they are these. Within the last two years how many cases have been decided against the Crown in the Court of Appeal, and of those cases how many have been taken on appeal to this House? I should not be a bit surprised to hear it was every one. . . . As far as the general question is concerned, I readily acknowledge the courtesy of the Government in the statement that they will consider the matter, but I am afraid they will not consider it very favourably after what my noble friend has said. I must say that it seems to me that the idea that is dominant in the speech of my noble friend is a thorough distrust of the Court of Appeal. Why the Court of Appeal cannot be trusted to give leave in a proper case I cannot imagine. As to the conduct of Crown cases, while he held office as a Law Officer I do not doubt it was all right, but after all one may have many benefits but we cannot have him as a sempiternal Attorney-General.'

The following editorial observations in the *Law Journal* for March 1, 1930, are also pertinent:

Income-Tax Methods.

'The ways of the income-tax authorities have been criticized during this week in two very different tribunals —in a Court of summary jurisdiction, the Guildhall Justice Room, and in the highest tribunal of the country, the House of Lords. In the first case, a man whose claims to allowances were apparently disputed, was summoned in respect of unpaid tax. When the matter first came before the Alderman, the collector asked for an order for payment only of the costs of the summons, saying that the authorities had decided to give the defendant "the benefit of the doubt", though he maintained that the claim was maintainable. Not unnaturally, the Alderman felt disinclined to allow the matter to be dealt with in this way, and adjourned the summons. At the second hearing on Monday, the Court was asked to make an order for payment of the tax claimed as well as the costs on the ground that an agreement for payment of the costs had not been complied with. But the Alderman held that the Crown's claim that the tax was payable had not been proved, and he dismissed the summons. The facts reported on are not sufficient to enable an opinion to be expressed as to whether, assuming they were proved, the defendant was liable to pay the tax claimed; but they do show a very unsatisfactory position of affairs. If the defendant was liable for the tax, the proceedings for compelling him to pay it should have been persisted in; if he was not liable to pay, he should not have been summoned at all. For the income-tax authorities to issue a summons in a doubtful case and then offer to abandon it on payment of costs is a form of procedure which, to put the matter mildly, is not to be commended.'

Lord Dunedin's words in *Fry* v. *Burma Corporation*, *ubi sup.*, are then cited, with the following comment:

'Strong words; but not a whit too strong, as those who have experience of the attitude of the authorities on questions of revenue law will agree. It is really intolerable that individuals should be forced—as they too frequently are—to go from the Commissioners to the Court, from the Court of first instance to the Court of Appeal, and from the Court of Appeal to the House of Lords, not as appellants, but as respondents, because the contention of the Income-Tax authorities is held to be wrong. In some cases, it is true, the Crown undertakes to pay the respondents' costs of appeals to the Lords, but, when this matter was raised in Parliament, a few years ago, the reply of the then Chancellor of the Exchequer, Mr. Winston Churchill, indicated that this would only be done exceptionally. In our view, the Judge who hears these cases on appeal from the Commissioners should be empowered to refuse leave to the Crown to appeal from his decision, except on the terms that the Crown indemnifies the taxpayer as to costs in any event; and the Court of Appeal should, of course, have the same power. This would not apply to appeals by the taxpayer, so that it would in no way encourage frivolous appeals by persons desirous of escaping the payment of taxes for which they had been held liable.'

APPENDIX III

BIBLIOGRAPHY OF ADMINISTRATIVE LAW

THE classic works on French Administrative Law are the treatises of M. Hauriou and H. Berthélemy, and a more recent text-book of high standing is *Les Principes Généraux du Droit Administratif Francais*, by G. Jéze, 2nd ed., 1914. An abridged version, by the author himself, of Hauriou's treatise is published under the title of *Précis Élémentaire de Droit Administratif* (2nd ed., by A. Hauriou, 1930). There are numerous small handbooks of modern *droit administratif*: a particularly lucid volume of this kind is L. Rolland's *Précis de Droit Administratif*, in the excellent series called *Petits Précis Dalloz*. The compact *Notions Élémentaires de Droit Administratif* of F. Bernard (Sirey, 1907) is also useful for English readers as an introduction to the subject: and an illuminating outline of the general administrative system of France will be found in H. Barthélemy's *Le Gouvernement de la France* (3rd ed., 1925). The late Dr. F. J. Port's *Administrative Law* also contains a chapter which gives a sketch of the main principles of *droit administratif*. The very interesting history of the matter is to be sought in Hauriou and Berthélemy, and Dicey's historical sketch, in his *Law of the Constitution*, is the most valuable part of his treatment of this topic. The remainder is vigorous, but is coloured by an insular view which is no longer appropriate to the facts: and in some respects, already referred to, it is highly misleading.

There have been few works on Administrative Law in English, for the excellent reason that English lawyers have not recognized this as being a separate branch of law at all. Until recently, therefore, the only systematic account of English Administrative Law was in German, and was somewhat behind the times: it is *Verwaltungsrecht und Verwaltungsrechtsprechung im modernen England*, by Otto Koellreutter (Mohr, 1912). Dr. Port's treatise on *Administrative Law*, which has already been sufficiently considered, is a discussion of the problem of Administrative Law in England rather than a systematic exposition of the substantive law. Recently there has been a good deal of discussion of the subject, and it is beginning to take shape as a definite department of English legal study. The following works may be consulted:

Public Authorities and Legal Liability, by G. E. Robinson, with an Introduction by J. H. Morgan, K.C. (University of London Press, 1925).

Justice and Administrative Law, by W. A. Robson (Macmillan, 1928).

The Mechanism of the Modern State, by Sir John Marriott (Clarendon Press, 1927).

The New Despotism, by Lord Hewart of Bury (see *ante*, pp. 76 ff.).

'The *Conseil d'État* in France,' by Prof. H. Berthélemy, in *Journal of the Society of Comparative Legislation*, vol. xii, part i, p. 23.

Stephen's Commentaries on the Laws of England (Butterworth, 19th ed., 1928), vol. iv, book ii.

Cases in Constitutional Law, by D. L. Keir and F. H. Lawson (Clarendon Press, 1928), especially Parts v and vi.

Law in the Making, by C. K. Allen (Clarendon Press, 2nd ed., 1930), chap. vii.

A compendious comparison of the chief developments of Administrative Law in England, France, and Germany will be found in Goodnow, *Comparative Administrative Law*. The growth of Administrative Law in England can hardly be understood without some knowledge of the history of local government. On this complex subject reference may be made to Redlich and Hirst, *Local Government in England* (now, however, obsolete or obsolescent), especially vol. i, book 1; Webb, *English Local Government*, especially vol. iv, chaps. v and vi; and, for an elementary sketch, *Stephen's Commentaries on the Laws of England*, 19th ed., vol. iv, book ii, part iii.

APPENDIX IV

LEGISLATIVE OUTPUT

ONE of the reasons commonly assigned for the subordinate legislative activity of the Executive at the present time is that there are nowadays so many claims upon the attention of Parliament that it has not time to attend to all the details of administrative legislation. The notion seems to be current that Parliament now produces a far greater bulk of statute than it ever did before. This, however, is not the fact. If we go back to the middle of the nineteenth century, we find that more than twice as many statutes were enacted upon an average every year than in the period following the Great War: and a reference to the text of these nineteenth-century Acts will show that although many of them were quite as technical and comprehensive as present-day statutes, they depended far less frequently than nowadays upon Rules and Orders for their detailed provisions. The following comparison of the decades 1866–75 and 1920–9 may be of interest. The figures are based on the volumes of statutes published in the Law Reports series.

Year.	*Public General Acts Passed.*	*Year.*	*Public General Acts Passed.*
1866	122	1872	98
1867	146	1873	91
1868	130	1874	96
1869	117	1875	96
1870	112	TOTAL	1,125
1871	117	AVERAGE PER YEAR	112

From 1876 to 1885 there is a considerable diminution.

From 1886 to 1895 the same applies.

From 1896 to 1905 the output is very small. In 1904 there are only 36 Acts, in 1905 only 20.

From 1906 to 1915 there is little change from the average of years after 1875. In 1912 there are only 31 Acts.

In the post-war period:

Year.	*Public General Acts Passed.*
1920	82
1921	67
1922	65
1923	42
1924	41
1925	91
1926	63
1927	43
1928	45
1929	39
TOTAL	578
AVERAGE PER YEAR	58

How, we cannot help wondering, did Parliament contrive, between the years 1866 and 1875, to perform its legislative functions without the masses of Statutory Rules and Orders which now accumulate every year?

TABLE OF CASES