TEXT FLY
WITHIN THE
BOOK ONLY

UNIVERSAL
LIBRARY

INCIPLES OF LOCAL GOVERNMENT LAW

By the Same Author

THE LAW AND THE CONSTITUTION
University of London Press Ltd.

CABINET GOVERNMENT
Cambridge University Press.

PARLIAMENT
Cambridge University Press.

PARLIAMENTARY REFORM
Victor Gollancz, Ltd.

THE POOR LAW CODE AND THE LAW OF UNEMPLOYMENT ASSISTANCE
Charles Knight & Co. Ltd.

THE LAW RELATING TO TOWN AND COUNTRY PLANNING
Charles Knight & Co. Ltd.

THE LAW RELATING TO LOCAL AUTHORITIES
Charles Knight & Co. Ltd.

THE LAW OF HOUSING
Charles Knight & Co. Ltd.

THE LAW OF PUBLIC HEALTH
Charles Knight & Co. Ltd.

THE LAW OF FOOD AND DRUGS (with G. J. COLE)
Charles Knight & Co. Ltd.

CONSTITUTIONAL LAWS OF THE BRITISH EMPIRE (with C. M. YOUNG)
Clarendon Press.

THE BRITISH CONSTITUTION
Cambridge University Press.

PRINCIPLES OF LOCAL GOVERNMENT LAW

by

SIR W. IVOR JENNINGS, LITT.D., LL.D.

Vice-Chancellor of the University of Ceylon

Of Gray's Inn, Barrister-at-Law

UNIVERSITY OF LONDON PRESS LTD.

WARWICK SQUARE, LONDON, E.C.4

FIRST PRINTED 1931
SECOND EDITION 1939
THIRD EDITION 1947
Reprinted 1948

AGENTS OVERSEAS

AUSTRALIA AND NEW ZEALAND AND SOUTH SEA ISLANDS

W. S. SMART, P.O. Box 120
SYDNEY, N.S.W.
Showroom. 14, York Street

CANADA

CLARKE, IRWIN & Co., Ltd.,
480-486, University Avenue, TORONTO.

EGYPT AND SUDAN

DINO JUDAH NAHUM,
P.O. Box 940, CAIRO.
Showroom: 11, Sharia Sherif Pasha

FAR EAST (including China and Japan)

DONALD MOORE,
22, Orchard Road, SINGAPORE

INDIA

ORIENT LONGMANS, Ltd.
BOMBAY: Nicol Road
CALCUTTA: Chittaranjan Avenue
MADRAS: Mount Road.

SOUTH AFRICA

H. B. TIMMINS, P.O. Box 94, CAPE TOWN.
Showroom: 58-60, Long Street.

Printed in Great Britain for the UNIVERSITY OF LONDON PRESS LTD
by HAZELL, WATSON AND VINEY, LTD., London and Aylesbury

TO

HELENA, CLAIRE

AND

SHIRLEY

PREFACE TO THE THIRD EDITION

THE second edition of this book, which was published shortly before the outbreak of war, was exhausted just while local government was suffering considerable changes. The plans formulated by the Coalition Government, which had brought the war in Europe to a successful conclusion, had been partially completed, but there was obviously much more to come. The educational policy had been put into the Education Act, 1944, and the Regulations issued thereunder, and it was unlikely that there would be further legislation for some time. The comprehensive water policy had been provided for in the Water Act, 1945. In the field of town and country planning some steps had been taken by the Town and Country Planning (Interim Development) Act, 1943, and the Town and Country Planning Act, 1944, but it seemed probable that there would be a further expansion of the powers of local authorities. Provision had been made for setting up the Local Government Boundary Commission under the Local Government (Boundary Commission) Act, 1945. The local government franchise had been fundamentally altered by the Representation of the People Act, 1945. These and other less important changes were so numerous that it was impossible to reprint the second edition. On the other hand, further legislation was expected to implement policies already

announced, particularly in the fields of Housing and Health, while the prospective legislation dealing with Social Insurance, while it might not affect local government specifically, would react upon local services and probably require some amendment of the book. The financial relations between central and local government were also due for reconsideration. Nor was it at all unlikely that even further changes would be proposed by the new Labour Government. This third edition therefore deals with local government at a transitional stage, and it is necessary for the reader to note that it sets out the general principles of the law as they stood at the time of the resignation of Mr. Churchill in July 1945.

If this gives the reader some notion of local government as a dynamic system, it will be a positive advantage. The defect of all descriptive analysis is that, so to speak, the machinery is stopped in order that it may be studied. The machine, in fact, never stops. What is more, the average reader of a book such as this, above all the young man or woman on active service, of whom so many read the second edition, does not want a description which is academically remote; he requires an analysis which will help him to understand current problems. I trust that the fact that this volume deals with local government in a state of transition will enable the reader to understand the nature of the changes that are yet to come.

W. I. J.

UNIVERSITY OF CEYLON,
COLOMBO,
August 1945.

PREFACE TO THE SECOND EDITION

THE first edition of this book was written during the course of an experiment. An inhabitant of a provincial city, as I was until 1929, could not fail to be impressed with the practical importance of local government, for it is the means by which urban life becomes possible. Moreover, as a teacher of law in the University of Leeds, I realised that for most of my students local government law would be of greater practical value than much of the constitutional law that I was engaged in expounding. The royal prerogative may be an interesting subject, but it is much more remote from practical life and the practice of the law than, say, public health. At the same time, there was no place for local government law in the traditional syllabus of constitutional law, which was dominated by the Whig idea that administrative law was something alien to the British Constitution. There were many objections to that idea, but the simplest was that there was in England a large body of local government law which had as close analogies in the *droit administratif* of France as the common law had in the French civil code. It was therefore necessary for me, in the first edition of this book, to begin with a rather theoretical chapter which was found difficult by most students of law and irrelevant by most students of public administration. My views on the constitutional

theories of the nineteenth century are now to be found in the third edition of *The Law and the Constitution*, published in 1944, and accordingly the theoretical chapter does not appear in the present volume.

There was, however, a further difficulty. The tradition of law teaching makes what is thought to be a fundamental distinction between " the law " and its purposes. The underlying idea (which could, I think, be demonstrated to be false) is that the common law contains within itself the " principles " which permit of its application to new circumstances without the importation from outside of ideas dependent on social or economic conditions. This idea has been applied also to the teaching of statute law, and it has in this respect been assisted by the " golden rule " of interpretation that legislation must be interpreted according to what it says and not according to what it is intended to do. The result of the rapid encroachment of legislation upon the common law is, therefore, that legal " education " consists in large part of the memorising of summaries of sections of Acts of Parliament. The painful process is in some degree mitigated by the process of judicial interpretation, which has enabled the student to turn with gratitude to the familiar task of making consistent or " distinguishing " contradictory judicial decisions.

In the case of local government law, however, if the teacher believes that there is a distinction between " the law " which is set out in formal propositions and the purposes which the law is intended to fulfil, the subject becomes not only intensely dull, but also almost unintelligible. It becomes, in fact, nothing more than a

mass of apparently disconnected rules. Nor does judicial interpretation give much relief. Many of the rules confer wide discretionary powers and, until those powers are exceeded or misused, no question arises for judicial interpretation, though there is wide scope for administrative application. Most judicial decisions on local government legislation deal with minor matters; and if they go to the root of the law, as has happened occasionally in housing and public health law, Parliament often takes the first opportunity of altering the statutes and so rendering the decisions obsolete. Placed in the background of the purposes which local government has to fulfil and the administrative process by which they are carried out, local government law becomes immediately intelligible. Moreover, even if the only object of legal education were to train students to argue points of law in the High Court (which I am prepared to deny), it would be necessary for them to acquire some knowledge of the nature and purposes of local government. In arguing for an interpretation of a section to suit his client, counsel must explain how that section fits into the administrative structure and the reasons for its enactment. Far more is said in argument than appears in the reported decision, and the tendency of teachers of common law to concentrate on the judgments of appellate courts instead of on the actual administration and application of the law gives, I suggest, a false impression of the function of the lawyer.

I am convinced, therefore, that whatever be the appropriate method for the student of private law, the student of local government law must use the so-called "functional" approach. He must, in other words,

understand the process of local administration and something of the social purposes that it is intended to fulfil. The study of public law is thus differentiated from the study of political science or public administration only in emphasis. I was feeling towards that solution in the first edition of this book, and I am happy to know that in consequence the book was much used by students of political science and public administration in the universities and by those interested in local government in the adult education movement and otherwise. I was, however, too timid in 1931 to consider that I was writing for political scientists, and there were in the first edition some sections which must have appeared dull and hardly intelligible. These sections have now been expanded. A new approach is given in Chapter I; there have been some rearrangements in the order of treatment; and almost the whole has been rewritten.

The task of organising the substance has been made much easier by the important consolidating statutes which have been passed since 1931. Local government law is now the most easily accessible of the larger branches of the law. The Local Government Act, 1933, as amended, contains nearly all the rules for the machinery of local government, though on the financial side it requires to be completed by a reconsolidation of the Rating and Valuation Acts. With the exception of some parts of the law of public health and highways (in respect of which consolidating statutes are under consideration), the principal services are covered by recent consolidation Acts. My examples have therefore been chosen in the main from the Education Act, 1921 (which

ought now to be consolidated with its numerous amendments), the Poor Law Act, 1930, the Town and Country Planning Act, 1932, the Housing Act, 1936, the Public Health Act, 1936, and the Food and Drugs Act, 1938. Research which I have undertaken during the preparation of more technical books on branches of local government law has induced me to add to the number of judicial decisions quoted, though the law student who thinks that the law is what the courts decide must be warned that in local government law, as in most branches of administrative law, the courts have only a subsidiary though important function, and that the essential rules are to be found in the legislation. Among other changes of substance it is necessary only to mention that the long historical chapter has been expanded and divided up. It is, I know, dangerous for one who works in the borderland of law and political science to attempt a historical disquisition: yet local government and local government law are so much the product of economic and political changes that a historical approach is very necessary. Moreover, one who believes in the essential unity of what are called the "social sciences" must take a large part of knowledge for his province. The historical chapters were originally written as lectures for delivery at one of the summer schools of the National Association of Local Government Officers. It is therefore appropriate that I should express my appreciation of the enlightened educational policy followed by that body during the past decade.

I have so often rendered thanks to my colleagues at the London School of Economics and Political Science

that repetition may appear to be a matter of form. This book has, however, been used in teaching in two Faculties for eight years, and I have learned much from the comments of teachers as well as from those of students. In particular, Mr. K. B. Smellie's capacity for asking awkward questions has shown me more defects in the first edition than I should have discovered for myself. Many others have made criticisms. I am, however, particularly indebted to Mr. A. D. Hargreaves, of the University of Birmingham, who as usual went to the trouble of providing me with pages of comments. The manuscript of the book was completed in August, 1938. Since then I have been acting as Visiting Professor of Political Science in the University of British Columbia and in consequence have been unable to make any minor changes required by legislation of the current session of Parliament.

W. I. J.

THE UNIVERSITY OF BRITISH COLUMBIA,
VANCOUVER, B.C.,
CANADA,
March 1939.

PREFACE TO THE FIRST EDITION

THIS little book is founded upon part of a course of lectures on Constitutional Law delivered first in the University of Leeds, and since 1929 in the University of London. It is now common to treat as Constitutional Law the general principles of the law relating to Local Government, and that there are good theoretical reasons for doing so I have tried to show in Chapter I. There are, consequently, several excellent books dealing with the organisation and functions of local authorities. My aim has been somewhat different. I have ignored functions except for purposes of illustration and have concentrated upon the juristic and constitutional principles which seemed to me to underlie our system of local government. In approaching the subject from this angle I must acknowledge my debt to the various foreign writers on Administrative Law whom I have quoted in the first chapter. I would mention in particular Professor Koellreutter's *Verwaltungsrecht und Verwaltungsrechtsprechung in modernen Englands.*

Since the readers whom I have had in view are mainly university students, my approach has been definitely and deliberately academic. I believe, indeed, that this is the correct method of treatment even for local officials and others who study for professional examinations. As editor of the *Local*

Government Chronicle I have to follow closely the actual working of local institutions, and I become more and more convinced that for purposes of exposition one must treat local government statutes as containing not so much rules as principles.

W. I. J.

London School of Economics and Political Science
(University of London),
June 1931.

CONTENTS

	PAGE
PREFACE TO THE THIRD EDITION	vii
PREFACE TO THE SECOND EDITION	ix
PREFACE TO THE FIRST EDITION	xv
TABLE OF STATUTES	xix
TABLE OF CASES	xxii

CHAPTER I

THE NATURE OF LOCAL GOVERNMENT

§ 1.	The Meaning of Local Government	1
§ 2.	The Purposes of Local Government	6
§ 3.	Local Government Law	11

CHAPTER II

ENGLISH LOCAL GOVERNMENT BEFORE 1934

§ 1.	The Period of the Sheriff	18
§ 2.	The Period of the Justices of the Peace	24
§ 3.	The Problem of the Towns	31

CHAPTER III

THE DEVELOPMENT OF MODERN LOCAL GOVERNMENT

§ 1.	The Age of Reform	40
§ 2.	The Public Health Agitation	51
§ 3.	The Counties	58
§ 4.	The Inadequacy of Public Health Powers	62
§ 5.	The Period of Rationalisation	66
§ 6.	The Period of Planning	71

CHAPTER IV

LOCAL AUTHORITIES AND THEIR ORGANISATION

§ 1.	Local Authorities	80
§ 2.	Changes in Local Authorities	85
§ 3.	Co-operation among Local Authorities	92
§ 4.	The Local Government Franchise	100
§ 5.	The Composition of Local Authorities	104

PAGE

CHAPTER V

THE WORKING OF LOCAL AUTHORITIES

§ 1. The Committee System 119
§ 2. Officials 131

CHAPTER VI

POWERS AND THEIR ACQUISITION

§ 1. Local Authorities as Corporations 138
§ 2. The Acquisition of Powers 160
§ 3. Private Bills 161
§ 4. Delegated Legislation 176

CHAPTER VII

LOCAL GOVERNMENT FINANCE

§ 1. Expenditure and Income Generally 180
§ 2. Rates 185
§ 3. Derating 197
§ 4. Grants 198
§ 5. Borrowing Powers 214

CHAPTER VIII

CENTRAL CONTROL

§ 1. In General 217
§ 2. Orders, Regulations, and Schemes 221
§ 3. Central Inspection 225
§ 4. Confirmation of Bye-laws and Schemes 227
§ 5. The Audit 232
§ 6. Control over Grants 238
§ 7. Control over Borrowing Powers 246
§ 8. Appellate Functions 250
§ 9. Power to Act in Default 255
§ 10. Cumulative Effect 258

CHAPTER IX

JUDICIAL CONTROL

§ 1. Judicial Control in General 261
§ 2. Damages for Ordinary Wrongs 265
§ 3. Injunctions and Declarations 288
§ 4. The Public Authorities Protection Act 293
§ 5. The Prerogative Writs and Orders 294
§ 6. Effect of Judicial Control 306

INDEX 311

TABLE OF STATUTES

	PAGE
Assize of Arms	22
Statutes of Labourers	25
Statute of Bridges, 1530–31	27
Highway Act, 1555	27
Highway Act, 1562	27
Poor Law Act, 1601	26, 191
Reform Act, 1832	42, 46
Lighting and Watching Act, 1833	189
Poor Law Amendment Act, 1834	42–46, 52, 67, 217, 225, 232
Highway Act, 1835	50–51, 58, 71
Municipal Corporations Act, 1835	9, 46–50, 60, 61, 109, 147, 221
Poor Rate Exemption Act, 1840	191
Lands Clauses Consolidation Act, 1845	172
Railway Clauses Consolidation Act, 1845	285, 291
Waterworks Clauses Act, 1847	172, 281
Nuisances Removal and Diseases Prevention Act, 1848	53
Public Health Act, 1848	53
Metropolis Management Act, 1855	153
Highway Act, 1862	56
Waterworks Clauses Act, 1862	172
Sanitary Act, 1866	54
Elementary Education Act, 1870	57
Local Government Act, 1871	55
Local Loans Act, 1875	68
Public Health Act, 1875	56, 62–64, 70, 175, 177, 228, 253, 255, 276, 278, 297
Public Works Loans Act, 1875	68
Highways and Locomotives Amendment Act, 1878	56
Municipal Corporations Act, 1882	123, 269
Public Health (Support of Sewers) Act, 1883	172
Housing of the Working Classes Act, 1885	65
Local Government Act, 1888	59, 60, 62, 67, 82
Public Bodies Corrupt Practices Act, 1889	109
Housing of the Working Classes Act, 1890	65, 66, 205
Infectious Disease (Prevention) Act, 1890	173
Public Health Acts Amendment Act, 1890	162, 172, 173
Private Street Works Act, 1892	175
Public Authorities Protection Act, 1893	293–94
Local Government Act, 1894	60–61, 62, 67, 85

PAGE

Agricultural Rates Acts, 1896 and 1923 . . . 200, 201
Poor Law Officers' Superannuation Act, 1896 . . . 137
London Government Act, 1899 144
Open Spaces Act, 1906 228
Prevention of Corruption Acts, 1906 and 1916 . . . 109
Public Health Acts Amendment Act, 1907 . . 162, 172, 173
Asylum Officers' Superannuation Act, 1909 . . . 137
Housing, Town Planning, etc., Act, 1909 . . . 65, 231
Mental Deficiency Act, 1913 238
Maternity and Child Welfare Act, 1918 . . . 123, 238
Representation of the People Act, 1918 69
Housing, Town Planning, etc., Act, 1919 . 63, 231, 239
Ministry of Transport Act, 1919 136
Police Act, 1919 136
Blind Persons Act, 1920 238
Roads Act, 1920 . . . . . 206, 239
Education Act, 1921 . . . . . 69, 124, 227
Public Health (Tuberculosis) Act, 1921 238
Local Government and Other Officers' Superannuation Act, 1922 174
Housing Act, 1925 . . . . . 65, 301
Public Health Act, 1925 . . . . . 162, 172, 173
Rating and Valuation Act, 1925 17, 68, 69, 188, 189, 192, 193, 222
Teachers' Superannuation Acts, 1925 to 1937 . . . 137
Town Planning Act, 1925 65
Boards of Guardians (Default) Act, 1926 100
Police (Appeals) Act, 1927 137
Rating and Valuation (Apportionment) Act, 1928 . . 68
Representation of the People (Equal Franchise) Act, 1928 69, 102
Local Government Act, 1929 67, 68, 69, 124, 184, 193, 194, 198, 200, 207, 208, 209, 223, 225, 234, 240, 245, 255
Housing Act, 1930 304
Poor Law Act, 1930 . 123, 124, 133, 134, 217, 218, 221, 222, 225
Town and Country Planning Act, 1932 12, 65, 66, 69, 72, 74, 160, 230, 231, 304
Local Government Act, 1933 5, 17, 68, 71, 78, 82, 83, 84, 87, 89, 92, 97, 98, 105, 106, 107, 109, 110, 111, 114, 116, 117, 118, 122, 123, 128, 132, 134, 135, 137, 141, 144, 145, 147, 162, 163, 165, 179, 189, 214, 215, 228, 229, 236, 296, 298, 304
Local Government (General Exchequer Contributions) Act, 1933 210
Unemployment Act, 1934 . . . . . 76, 210

PAGE
HOUSING ACT, 1935 65
RESTRICTION OF RIBBON DEVELOPMENT ACT, 1935 . 65, 160, 228
HOUSING ACT, 1936
65, 66, 70, 108, 155, 177, 206, 228, 230, 231, 256, 304
MIDWIVES ACT, 1936 210
PUBLIC HEALTH ACT, 1936 71, 99, 135, 145, 153, 162, 172, 175, 176, 178, 228, 229, 254, 256, 264, 276, 277, 278, 282, 287, 297, 299
TRUNK ROADS ACT, 1936 208
FACTORIES ACT, 1937 228
LOCAL GOVERNMENT (FINANCIAL PROVISIONS) ACT, 1937 . . 210
AIR RAID PRECAUTIONS ACT, 1937 239
PUBLIC HEALTH (DRAINAGE OF TRADE PREMISES) ACT, 1937 . 228
LOCAL GOVERNMENT SUPERANNUATION ACT, 1937
119, 133, 137, 174, 176
ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1938 . . . . . 296, 307
FOOD AND DRUGS ACT, 1938 . . . 71, 135, 176, 178, 228
HOUSING (FINANCIAL PROVISIONS) ACT, 1938 . . . 65, 72
CIVIL DEFENCE ACT, 1939 239
MINISTRY OF TOWN AND COUNTRY PLANNING ACT, 1943 73, 219
TOWN AND COUNTRY PLANNING (INTERIM DEVELOPMENT) ACT, 1934 74
RURAL WATER SUPPLIES AND SEWERAGE ACT, 1944 .75, 239, 256
TOWN AND COUNTRY PLANNING ACT, 1944 . . . 75, 239
HOUSING (TEMPORARY PROVISION) ACT, 1944 . . . 72
EDUCATION ACT, 1944 11, 67, 76, 77, 81, 100, 123, 124, 136, 219, 223, 225, 227, 229, 256
REPRESENTATION OF THE PEOPLE ACT, 1945 . . . 69, 101
HOUSING (TEMPORARY ACCOMMODATION) ACT, 1945 . . 72
WATER ACT, 1945 . . . . . 75, 81, 100, 219
FAMILY ALLOWANCES ACT, 1945 77
LOCAL GOVERNMENT (BOUNDARY COMMISSION) ACT, 1945
78, 89, 90, 92
LOCAL AUTHORITIES LOANS ACT, 1945 . . . . 79, 216

TABLE OF CASES

PAGE

Ashbury Rly. Carriage and Iron Co. v. *Riche* (1875), 7 H.L. 653 . 142
Atkinson v. *Newcastle Waterworks Co.* (1877), 2 Ex.D. 441 . 281
Attorney-General v. *Aspinall* (1837), 2 My. & Cr. 613 . . 147
Attorney-General v. *Clerkenwell Vestry*, [1891] 3 Ch. 527. . 289
Attorney-General v. *Dorking Union* (1882), 20 Ch.D. 595 . 289
Attorney-General v. *Fulham Corporation*, [1921] 1 Ch. 440 . 144, 291
Attorney-General v. *Grand Junction Canal Co.*, [1909] 2 Ch. 505 . 292
Attorney-General v. *Great Eastern Rly. Co.* (1880), 5 App. Cas. 473 . 119
Attorney-General v. *London and North Western Rly. Co.*, [1900] 1 Q.B. 78 291
Attorney-General v. *Manchester Corporation*, [1906] 1 Ch. 643 145, 148, 291
Attorney-General v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516 . . 292
Attorney-General v. *Newcastle Corporation*, [1892] A.C. 568 . . 148
Attorney-General v. *Wilson* (1837), 9 Sim. 30 147
Attorney-General v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34 290, 291
Ayers v. *South Australian Banking Co.* (1871), 3 P.C. 548 . . 142
Bathurst Borough v. *Macpherson* (1879), 4 App. Cas. 256 . . 274
Batson v. *London School Board* (1903), 67 J.P. 457 . . . 112
Blackmore v. *Mile End Town Vestry* (1882), L.R. 9 Q.B. 451 274, 284, 286
Board of Education v. *Rice*, [1911] A.C. 179 . . 154, 157, 301
Boyce v. *Paddington Corporation*, [1903] 1 Ch. 109. . . 290
Bradford Corporation v. *Myers*, [1916] 1 A.C. 242. 293
Britannic Merthyr Coal Co. v. *David*, [1910] A.C. 74 . 279
Broadbent v. *Rotherham Corporation*, [1917] 2 Ch. 31 . 159
Campbell v. *Paddington Corporation*, [1911] 1 K.B. 869 . . . 267
Clifford and O'Sullivan, In re, [1921] 2 A.C. 570 . . . 303
Clothier v. *Webster* (1862), 12 C.B.N.S. 790 274
Cooper v. *Wandsworth Board of Works* (1863), 14 C.B.N.S. 180 153, 158
Cooper v. *Wilson*, [1937] 2 K.B. 361 159
Cowley v. *Newmarket Local Board*, [1892] A.C. 345 . . . 285
Cox v. *Paddington Vestry* (1891), 64 L.T. 566 274
Denby & Sons v. *Minister of Health*, [1936] 1 K.B. 337 . . 158
Dent v. *Bournemouth Corporation* (1897), 66 L.J.Q.B. 395 . . 288
Devonport Corporation v. *Tozer*, [1903] 1 Ch. 759 290
Dover Picture Palace Ltd. v. *Dover Corporation* (1913), 11 L.G.R. 971 290
East Suffolk Catchment Board v. *Kent*, [1940] 1 K.B. 349 . . 280
Errington v. *Minister of Health*, [1935] 1 K.B. 249 . . 157, 158

PAGE

Estate and Trust Agencies v. *Singapore Improvement Trust*, [1937] A.C. 898 302
Evans v. *Liverpool Corporation*, [1906] 1 K.B. 160. . . 270, 271
Fairbrother v. *Bury Rural Sanitary Authority* (1889), 37 W. R. 544 . 274
Fielden v. *Morley Corporation*, [1899] 1 Ch. 1. 294
Fisher v. *Oldham Corporation*, [1930] 2 K.B. 364 . . . 203, 269
Foreman v. *Canterbury Corporation* (1871), L.R. 6 Q.B. 214 . . 274
Fredman v. *Minister of Health* (1936), 100 J.P. 104 . . . 158
Frost v. *Minister of Health*, [1935] 1 K.B. 286 157
Glossop v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102 . 289
Gold v. *Essex County Council*, [1942] 2 K.B. 293 . . . 271
Grand Junction Waterworks Co. v. *Hampton Urban District Council* (1899), 63 J.P. 503 294
Groves v. *Wimborne*, [1898] 2 Q.B. 402 279
Guilfoyle v. *Port of London Authority*, [1932] 1 K.B. 336. . . 286
Harrington (Earl of) v. *Derby Corporation*, [1905] 1 Ch. 205 . 289
Hesketh v. *Birmingham Corporation*, [1924] 1 K.B. 260 . . . 287
Horn v. *Minister of Health*, [1937] 1 K.B. 164 158
Hillyer v. *St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820 270
Institute of Patent Agents v. *Lockwood*, [1894] A.C. 347 . . . 305
Jones v. *Llanrwst Urban District Council*, [1911] 1 Ch. 393 . . 289
Kruse v. *Johnson*, [1898] 2 Q.B. 91 228
Lapish v. *Braithwaite*, [1926] A.C. 275 106
Lindsey County Council v. *Marshall*, [1937] A.C. 97 . . . 270
Local Government Board v. *Arlidge*, [1915] A.C. 120 . 155, 158, 275
London County Council v. *Attorney-General*, [1902] A.C. 165 . 149, 291
London Scottish Permanent Society, In re (1893), 63 L.J.Q.B. 112 . 302
Manchester Corporation v. *Farnworth*, [1930] A.C. 170 . . . 276
Manchester Corporation v. *Markland*, [1934] 2 K.B. 101 . . 274, 283
Manchester (Ringway Airport) Compulsory Purchase Order, In re (1935), 99 J.P. 319 158
Mersey Docks and Harbour Board Trustees v. *Gibbs* (1866), 1 H.L. 93 272, 283, 284
Metropolitan Asylum District Board v. *Hill* (1881), 6 App. Cas. 193. 276
Minister of Health v. *The King*, ex parte *Yaffe*, [1931] A.C. 494 . 306
Nathan, In re, *R.* v. *Inland Revenue Commissioners* (1884), 12 Q.B.D. 461 297
Offer v. *Minister of Health*, [1936] 1 K.B. 40 157
Pasmore v. *Oswaldtwistle Urban District Council*, [1898] A.C. 387 . 297
Percy v. *Glasgow Corporation*, [1922] 2 A.C. 299 . . . 267, 274
Phillips v. *Britannic Hygienic Laundry Co.*, [1923] 2 K.B. 832 . . 279
R. v. *Barnstaple Justices*, ex parte *Carder* (1937), 54 T.L.R. 36 . 303
R. v. *Bishop of Sarum*, [1916] 1 K.B. 466 298
R. v. *Bristol Corporation* (1843), 2 L.T.O.S. 155 298
R. v. *Dublin Town Clerk* (1909), 43 I.L.T. 169 298
R. v. *Electricity Commissioners*, [1924] 1 K.B. 171. . . 301, 302
R. v. *Hall*, [1891] 1 Q.B. 747 279
R. v. *Hendon Rural District Council*, ex parte *Chorley*, [1933] 2 K.B. 696 . . . . . 152, 302

PAGE
R. v. *Local Government Board* (1882), 10 Q.B.D. 309 . . . 301
R. v. *London County Council*, ex parte *Entertainments Protection Association*, [1931] 2 K.B. 215 . . . . . 302, 305
R. v. *Minister of Health*, ex parte *Davis*, [1929] 1 K.B. 619 275, 301, 304
R. v. *North Worcestershire Assessment Committee*, [1929] 2 K.B. 397 159
R. v. *Oldham* (1847), 10 Q.B. 700 218
R. v. *Owen* (1907), 72 J.P. 60. 298
R. v. *Poplar Borough Council* (*No.* 2), [1922] 1 K.B. 95. . . 300
R. v. *Salford Assessment Committee*, [1937] 2 K.B. 1 . . 159
R. v. *Tynemouth Rural District Council*, [1896] 2 Q.B. 219 . 299
R. v. *Woodhouse*, [1906] 2 K.B. 501 301
Roberts v. *Hopwood*, [1925] A.C. 578 235
Robinson v. *Workington Corporation*, [1897] 1 Q.B. 619 . . 289
Rochester Corporation v. *R.* (1858), E.B. & E. 1024 . . 298
Ruck v. *Williams* (1858), 3 H. & W. 308 274
Russell v. *Men of Devon* (1788), 2 T.R. 667. . . . 284
Saunders v. *Holborn District Board*, [1895] 1 Q.B. 64 . . 281
Skilton v. *Epsom and Ewell Urban District Council*, [1937] 1 K.B. 112 274, 284, 286
Smith v. *Chorley Rural District Council*, [1897] 1 Q.B. 678 . . 299
Smith v. *Martin and Kingston Corporation*, [1911] 2 K.B. 775 . . 267
Smith v. *West Derby Local Board* (1878), L.R. 3 C.P.D. 423 . . 271
Southampton and Itchin Floating Bridge Co. v. *Southampton Local Board* (1858), 8 El. & Bl. 801 274
Stanbury v. *Exeter Corporation*, [1905] 2 K.B. 838. . . . 263
Stepney Borough Council v. *John Walker & Sons*, [1934] A.C. 365 . 298
Stretton's Derby Brewery Co. v. *Derby Corporation*, [1894] 1 Ch. 431 282
Sutton's Hospital Case (1612), 10 Co. Rep. 23A 146
Swain v. *Southern Rly. Co.* (1938), 54 T.L.R. 1119 . . . 286
Thompson v. *Brighton Corporation*, [1894] 2 Q.B. 332 . . . 286
Touzeau v. *Slough Urban District Council* (1896), 60 J.P. 103 . . 274
Tozeland v. *West Ham Guardians*, [1907] 1 K.B. 920 . . . 269
Ware v. *Regent's Canal Co.* (1858), 3 De G. & J. 212 . . 289
Watkins v. *Naval Colliery Co.*, [1912] A.C. 693 . . . 279
White v. *Hindley Local Board* (1875), 10 Q.B. 219 . . 285

CHAPTER I

THE NATURE OF LOCAL GOVERNMENT

§ 1. *The Meaning of Local Government*

"LOCAL GOVERNMENT" may have a wide variety of meanings. Since it is "government," the system of local government which a country adopts must be part of its governmental or constitutional structure. Since it is "local," it relates to specific portions of the country defined by locality. The institutions of local government are thus governmental organs having jurisdiction not over the whole of a country but over specific portions of it. Yet such an application of the term would be contrary to the meaning which is commonly given to it. No one ever speaks of the main governmental institutions of the States of the United States or of Australia as institutions of local government, though obviously the States are specified localities of the countries to which they belong. The reason is that they are, within their constitutional powers, autonomous authorities. The central institutions of the United States and of Australia have no control over State institutions acting within their constitutional powers. The Congress of the United States and the Parliament of the Commonwealth cannot determine the form of the State government nor the functions that the State institutions shall perform. According to the ordinary use of language,

local government is not merely government which is local; it is, also, government which is subordinate to some higher governmental authority. Local government in the United States is in reality the local government in each of the States, and is subject to the control of the State institutions.

Even this does not solve the problem of area. There are in Great Britain authorities whose jurisdiction extends only to England, Wales, and Scotland respectively. For instance, the Ministry of Health has for most purposes no jurisdiction in Scotland, while some functions which it exercises in England are exercised in Wales by the Welsh Board of Health under its control. Yet we should do violence to ordinary language if we spoke of government by the Ministry of Health, the Department of Health for Scotland, and the Welsh Board of Health as "local government."

Also, some of the functions of central authorities are delegated to bodies which exercise them over specific areas. Every postmaster has functions of control over the postal servants in his area, and every post office performs functions by delegation from the Postmaster-General. Similarly, the employment exchanges of the Ministry of Labour, the local officers of the Assistance Board, and the pensions committees of the Ministry of Pensions exercise under greater or less control the functions of central departments. Yet these are never included, at least in England, in the phrase "local government."

The distinction which is drawn is that between "central government" and "local government."

But it is not easy to draw it precisely. It does not lie in the presence or absence of central administrative control. For most local government is under some central administrative control. Nor does it lie in the existence in local government of a legal discretion which is not completely subject to central administrative control. For, in England, the officers of the Assistance Board, a central body, have a legal discretion.

Again, nearly all systems of government provide for local judicial authorities such as, in England, county courts and courts of summary jurisdiction. These authorities are governmental authorities exercising functions over defined local areas, and for the most part not under central administrative control. It is not possible to limit local government by reference to "administrative functions," nor by excluding "judicial functions." For it is easy to show that there is no precise distinction between "administrative" and "judicial" functions.[1] Moreover, until comparatively recently nearly all the functions of local government were exercised in England by justices of the peace. For some or all of these reasons some writers, such as Professor Edward Jenks,[2] include what are commonly called local "judicial" authorities within their description of the system of local government. Yet this again is to do violence to ordinary language. One would not, in ordinary language, speak of local authorities as including county courts and petty or quarter sessions.

[1] See Jennings, *The Law and the Constitution* (3rd ed.), Appendix I.

[2] *Outlines of Local Government* (8th edition).

The explanation of these difficulties of definition lies in the fact that local government is not a logical division of government. It is a distinction of ordinary language which has no logical justification. As soon as the jurist sets to work to provide his logical categories, he finds that local government is not one of them. The result is that draftsmen of Acts of Parliament avoid such juristic distinctions. The words "local government" are not used. The words "local authority" are of frequent occurrence, but they are always defined by special definition clauses. Usually, indeed, those clauses merely enumerate the various authorities which are to be regarded as "local" authorities for the purposes of the Acts containing the definition clauses.

Ordinary language is rarely precise. By local government is commonly meant government by the most important of the authorities which are generally included in statutory definitions of local authorities. The ordinary man could not say definitely whether "local authorities" included the catchment boards and drainage boards set up for purposes of land drainage, or the standing joint committees which control the county police, or joint boards established to exercise over a wide area some of the functions which would otherwise be exercised by the ordinary local authorities in those areas.

It would be difficult to frame a definition of local authority which would either include or exclude all these authorities and others which may be regarded as borderline cases. It is not necessary to make the attempt. In practice the words are most commonly

used to include only the authorities enumerated in Section 305 of the Local Government Act, 1933, and the similar authorities in London. The authorities enumerated in the section are: (1) county councils, (2) county borough councils, (3) non-county borough councils, (4) urban district councils, (5) rural district councils, and (6) parish councils. The equivalent authorities in London are the London County Council, the metropolitan borough councils, and the Common Council of the City of London. The local government of London is in most respects peculiar and is therefore for the most part ignored in this book, which covers the authorities dealt with by the Local Government Act, 1933. The Act of 1933 and the other statutes which give powers to those authorities refer also to (7) joint boards and joint committees formed by the above authorities (including London authorities if one or more of the constituent authorities is an extra-London authority), and (8) parish meetings. For the purposes of this book it is enough to assume that local government law is the law relating to the organisation and functions of these eight kinds of bodies. This is not a logical category. It is made for convenience. For there is a collection of statutes concerned primarily to regulate these authorities. There are experts specially familiar with these statutes and so with local government law, though the jurist will recognise that local government law is but a part of administrative law. Indeed, there are certain branches of the law [1] which are not peculiar to local authorities but which apply to all or most of the authorities whose organisa-

[1] See especially Chapters VI and IX.

tion and functions are dealt with by administrative law.

§ 2. *The Purposes of Local Government*

The list of local authorities given in the previous section obviously has no application outside England. Nevertheless, every country has a greater or less degree of local government. The administration of a large territory can be controlled from a capital city or even, as the British colonial system shows, from a far-off metropolis. Yet, even where that control is meticulous and detailed, some kind of devolution is essential. The functions of a sanitary inspector might be exercised by an official of the central government; yet it would normally be convenient to allot to him a specific portion of territory and to give him a measure of discretion in the exercise of his functions. In England, a sanitary inspector is not an official of the central government, but is appointed by and is responsible to a local authority most of whose members are elected by the electors of the area. That authority, in turn, is in many respects under central control: but it has also a wide discretion, especially in matters of public health, which have traditionally been regarded as primarily of local concern—though indeed until the middle of last century they were hardly anybody's concern. The large measure of decentralisation which has existed, and which to a substantial degree still exists, in England is one of the main features of the English system of government. Some commentators have spoken of "local *self*-government." That phrase may be cri-

ticised, especially in relation to the highly complex system of modern times; but it does emphasise that in the past, and even in the present, local authorities in England have enjoyed and still enjoy a larger measure of discretionary power than is possessed by local authorities in many parts of the world.

If it became necessary to consider *ab initio* the system of government to be set up in England, we should examine in relation to social and economic conditions what functions might most appropriately be left to local discretion. We should then consider how local authorities might best be organised in order that those functions might be exercised most effectively. In England, no such fundamental reorganisation has ever taken place. The constitutional history of England shows a continuous development since the Norman Conquest. The reformers of local government have been faced with an already existing system. They have had to modify, not to build anew. Where they have asserted that the local authorities were not functioning properly, they have had to reform the existing system in order that the old powers might be better exercised. Where they have considered that the distribution of functions was inefficient, or that new functions should be taken over by public authorities, they have had to arrange or rearrange those functions among existing authorities. There has never been an open field; it has always been, so to speak, a town. Parts could be pulled down; new streets could be provided. In course of time, the topography has been fundamentally modified; but each alteration was a modification of the existing

town, not the building of a new town where none existed before.

All this means only that the English system of local government has evolved gradually. Authorities have existed because they once exercised certain functions. Functions are exercised by existing authorities because once upon a time there were authorities who were thought capable of exercising those functions. A reformer who could begin anew might perhaps devise a completely different system. The present system exists not necessarily because it is the best that could be devised, but simply because it has developed gradually out of a different system. Consequently, it is not possible to begin an exposition of English local government with a theory of the functions of the State and a theory of devolution. It is not possible, in other words, to analyse modern society and to explain the reasons that justify the devolution of certain functions to local authorities. Frequently there are no reasons but history, combined with the belief that the advantages to be gained by change may be off-set by the necessary confusion that that change will bring either temporarily or permanently.

It is for this reason that English local government must be studied in its historical background. Nevertheless, it is desirable also to realise what historical development has produced. Historically, local government was concerned primarily with the preservation of the peace. Consequently, when local authorities were reformed and when organised police services were provided, the two ideas were not dissociated. The two functions which appear most prominently

in the Act which reformed the municipal corporations in 1835 were the control of the police and the making of bye-laws for "good order and government." Outside the towns, the control of the new police forces was necessarily given to justices of the peace, the authorities who had always been responsible for the maintenance of the peace; and even when in 1888 county councils were created, the function was not transferred bodily to them, as had been proposed, but was vested in joint committees on which both the county councils and the justices of the peace were represented.

With the development of the industrial system in the nineteenth century and the accompanying pacification of the country, the safeguarding of the health of the people became the most urgent problem. Social habits that were reasonably innocuous so long as most of the population lived in villages became a menace when the towns grew apace. So there was a gradual accumulation of powers for dealing with the public health, and a growth of special authorities provided for that purpose. General legislation soon became necessary, and first in the towns and then in the country general public health authorities were established. To them were added, also, powers in respect of highways. For industrialisation involved transport, and transport involved roads. It was found convenient, during the course of the last century, to concentrate both public health and highway powers in the hands of the same authorities. Long-distance transport and the need for specialised health services over wide areas have broken down the simple system of the late nine-

teenth century; but taking local government as a whole, it may be said that Public Health and Highways contain the second of the great groups of local services. To these have been added other functions. The control of the erection and the occupation of buildings was seen to be a highly technical matter into which considerations other than those of the public health were relevant. Accordingly, there is a substantial group of functions relating to Housing; and since it was not sufficient to deal with individual houses, nor to deal with the development of land in relation to isolated proposals for development, there has been created a branch of local government law dealing with Town and Country Planning.

The branches of the law included in the second group are concerned primarily with the environment in which people live. In many respects, however, the law of public health deals with the people themselves, by providing hospitals, medical services, and services for special classes of persons, such as the mentally deficient, the blind, children, and those suffering from special diseases like tuberculosis. The service which was, until recently, primarily concerned with the condition of the people was, however, the poor law. In a sense, this is the earliest of local government services, for it was the first to be handed over throughout the country to an elected body. But, because it was the earliest, it was distinct until 1930; and because it was distinct, there was considerable overlapping between the law of public health and the poor law. An individual might receive under the poor law, because he was destitute, a service which he might

have received under the law of public health if he was not destitute. Somewhat greater rationalisation has prevailed since 1930, but in places there is still a dual service; and the dualism has become more pronounced now that assistance in money to the able-bodied poor has been transferred to a central body, the Assistance Board.

Education is another service which was originally provided separately and for a special class of persons. It has now been brought within the normal system of local government, and there is comparatively little overlapping between the law of education and the poor law. Under the Education Act, 1944, the local education authorities are the councils of counties and county boroughs.

These introductory remarks enable us to produce a rough classification of local government law:

1. Local Authorities, their organisation and general methods of operation, including Local Government Elections and Local Finance.
2. Police and Fire Protection, including what is sometimes referred to as Public Control (e.g. weights and measures, food and drugs, and petroleum, motor, and other licensing).
3. Public Health, Highways, Housing, and Town and Country Planning, including mental deficiency, blind persons, maternity and child welfare, midwives, small dwellings acquisition, allotments, advertisements regulation, and restriction of ribbon development.
4. Poor Law.
5. Education.

§ 3. *Local Government Law*

In nearly every country, and certainly in every democratic State, there is a division of the functions of government among various kinds of authorities. It

was formerly thought, and it is still thought by some, that this division was based upon the nature of the functions exercised. There were said to be three kinds of governmental functions, legislative, executive, and judicial. The legislative function was the making of general laws; the executive function was the execution or administration of the laws; and the judicial function was the interpretation of the laws. Analysis shows, however, that no such division in terms of their nature can be made.[1] There are, it is true, three kinds of authorities, legislative, executive or administrative, and judicial. Generally speaking the legislature is concerned with the enactment of general laws; the administrative authorities are concerned with the action necessary to give effect to the laws; and disputes concerning the meaning of laws are usually submitted to the judicial authorities. It is, however, impossible to make a clear distinction between the functions themselves; and there is no State in which it can be said that the classification is anything more than a very rough guide. In England, for instance, local authorities are described as administrative authorities. But administration is a complex process.

Let us consider by way of example the powers exercised by local authorities under the Town and Country Planning Act, 1932. Speaking generally, the purpose of this Act is to secure the orderly development of the country so that services may be provided economically, and health and amenity protected. The Act itself was, of course, passed by the legislature. But not all the general rules with which local authorities

[1] Jennings, *The Law and the Constitution* (3rd ed.), Appendix I.

and private persons are concerned are in the Act; many are in statutory rules and orders made by the Minister of Health under powers conferred by the Act; that is to say, some only of the general rules were enacted by the legislature, the rest being made by an administrative authority. Within the limits prescribed by these general rules, particular rules applying only to the area of the local authority have to be provided in order that the purposes of the Act may be carried out. For this purpose the local authority drafts a scheme. It must be a scheme of the kind contemplated by the Act, so that the first function of the officials of the local authority is to interpret the Act in order to determine what powers their local authority possesses, in what form the scheme must or may be produced, what provisions it must or may contain, what procedure must or may be adopted in order that it may take effect. In other words, they must exercise the "judicial" function of interpreting an Act of Parliament. Having interpreted in this way, they proceed to draft the scheme. They provide, for instance, that the areas marked pink on a map shall be used only for residential buildings with a maximum density of eight to the acre, that the areas marked green shall be used for agricultural purposes only, that the areas slotted green shall remain as woodlands, that the areas coloured grey shall be used as private open spaces, that the areas slotted grey shall be acquired by the local authority as public open spaces, that certain properties shall be demolished to let light and air into cramped districts, and so on. When the draft scheme is completed, it is submitted to the Minister

of Health for confirmation. It cannot take effect until it is so confirmed; and if any person objects—if, for instance, the owner of land zoned for agricultural purposes thinks that he ought to be allowed to sell it for building purposes—the Minister must hold a local inquiry. So the Minister sends an inspector to hold the inquiry, and the legal representatives of the objectors argue before him. The inspector reports to the Minister, and the Minister decides whether to reject the draft or to confirm it or to confirm it with modifications. If the Minister confirms, the scheme is ready to take effect. But if any person alleges that the scheme has not been properly made or confirmed or that it contains provisions not authorised by the Act, he may challenge its validity in the High Court within six weeks. If this is done, the Court considers the validity of the scheme or of some provision of it. If the Court upholds its validity, or if the scheme is not challenged, it takes effect. That is, it comes into force in such a way as to interfere with the property rights of owners of land. It is, in other words, law of a special and local and very detailed kind. The local authority designated by the scheme as the responsible authority proceeds to enforce it. The land designated as public open spaces is acquired; the owners of premises which have to be demolished are ordered to demolish them; if any person builds on land zoned as agricultural proceedings will be brought against him. Again, therefore, a local authority has to interpret the law; and this time the law is not only in the Act and the rules and orders but also in the scheme itself.

The function involved in making and enforcing the

scheme is administrative, but it involves also the interpretation of law and the making of law. Taking town and country planning as a whole, it will be seen that some functions are exercised by Parliament, some by the Courts, and some by the Minister of Health and the local authorities. The distribution of the functions among them cannot be determined by the nature of the functions, but by the composition of the three kinds of authorities and the methods which they use. Parliament cannot be concerned with the making of the scheme, though the scheme becomes a general law for the district, because it has not the local knowledge and cannot be bothered with such parochial matters. It cannot afford the time even to enact the supplementary rules which apply all over the country; it leaves that function to the Minister of Health. The Courts determine whether the scheme or any part of it is valid because Parliament is not certain that the local authority and the Minister can be trusted not to exceed their powers and because it is considered that difficult questions of legal interpretation ought in the last resort to be determined by independent persons who are presumed to be familiar with the problems of interpreting statutes.

So there are three kinds of bodies, the legislature, the Courts, and the administrative authorities. Everything relating to the administrative authorities, their organisation, their methods of operation, their functions, their relations with private persons and with the Courts, are covered by rules which are spoken of comprehensively as Administrative Law.[1]

[1] Jennings, *The Law and the Constitution* (3rd ed.), Chapter VI.

In many countries, local government law is not separated from the rest of administrative law. This is particularly so in a country where local government is not decentralised. A country may be governed wholly from the centre. The local authorities may be mere agents of the central government. In this country, for instance, the administration of unemployment assistance is centralised under the control of the Assistance Board. A poor person who becomes unemployed but has no insurance benefit must approach the local officials of the Board, who act directly under the control of the Board. If all the social services were provided in this way, it would be impossible to treat of local government separately. Historically, however, England was a country of decentralised government. As will be seen from the next chapter, during the eighteenth century nearly all public services except foreign affairs and defence were provided by or under the control of justices of the peace who, though appointed by the Crown on the nomination of the Lord Chancellor, or (in Lancashire) the Chancellor of the Duchy of Lancaster, exercised their functions free from central control. The first great local government reform of the nineteenth century, the reform of the poor law, produced a very substantial measure of central control; but for most of the century the other functions of local government, in course of time handed over to local authorities, were exercised without much central control. In recent years, however, central control has become more and more noticeable, and has now reached the proportions set out in Chapter VIII.

Under this historic system of "local self-government" local authorities have even now a substantial amount of discretion. They consist of persons responsible to the local electorate, or of persons appointed by other persons who are responsible to the local electorate. Within the limits laid down by Parliament and of central control, they adopt a policy which accords, as they think, with the views of the local electorate. Accordingly, there is still a large measure of local autonomy which makes a separation of local government law possible and appropriate. The enactment of general legislation like the Local Government Act, 1933, and the Rating and Valuation Act, 1925, which lays down principles applicable only to local authorities and not to other administrative authorities like the central departments and independent boards like the Assistance Board, often makes it desirable to treat the subject separately. Even so, it must always be remembered that we cannot discuss local government law without discussing some of the powers of the central administrative authorities. Also, many of the rules applied by the Courts in dealing with administrative questions, such as liability for wrongs and breaches of contract, are equally applicable to all administrative authorities which are not sheltered by the mantle of "the Crown." Some, indeed, such as the rules relating to the prerogative writs, apply to all administrative authorities exercising statutory functions. Consequently, many of the rules referred to in Chapter IX are not peculiar to local government law, but are general rules of administrative law.

CHAPTER II

ENGLISH LOCAL GOVERNMENT BEFORE 1834

§ 1. *The Period of the Sheriff*

HISTORY begins with the beginning of time, but the writing of it must begin at some moment less remote. The origins of English local government go back far beyond the Norman Conquest. If one is asked why the map of England shows such a weird mosaic of counties, the first answer must be that many of the administrative counties are but slight modifications of the counties or shires which were once governed by earldormen and sheriffs. They were governed by earldormen and sheriffs because, as to some, they were Anglo-Saxon kingdoms which remained administrative (or judicial) units when the kingdom of England was created, and, as to others, because they were administrative divisions of the kingdom of Wessex. One might then seek to explain the origins of the Anglo-Saxon kingdoms. Such history could not be written without a disquisition on highly controversial topics; and actual knowledge is so small that its value, for our purpose, would be slight.

The functions of government depend upon social and economic conditions. Anglo-Saxon England had no highly developed industrial system. Commerce was small and of little importance outside two or

three comparatively large towns. The great body of the people were engaged in agriculture. They did not buy or sell. They provided their own food, clothing, and shelter, or rendered service in return for them. Few of them left their villages except to go to war. A peasant found outside his own area might safely be presumed to be there for no good purpose. Communications were slow and difficult and there was little intercourse outside a narrow range. In such conditions government must be aimed at two main objects, the preservation of the peace and the regulation of the agriculture of the village—the management of cultivated fields, the regulation of the land where animals were pastured, the cutting of wood, the digging of turf, and so on.

It followed that most government was local government. For the ordinary peasant the vill or hamlet was all that mattered. For the freemen, who were larger landowners and who therefore had contacts outside, a larger area was important. There were, in fact, three administrative divisions. The smallest was the vill, in many cases "governed" by a lord or his steward, and in all cases so governed after the Norman Conquest. There was, next, the hundred, ward, or wapentake, "governed" by the freemen—though the nature of the hundred is so controversial that little can be said about it that is not denied by some historians. Finally, there was the shire, where the earldorman, the sheriff, and the bishop predominated, though the freemen assembled in the shire moot took the decisions according to the custom of the shire and represented the shire in matters in which the king was concerned.

The primary functions of the shire and hundred moots were the settlement of disputes and, what is really the same thing, the punishment of offenders.

After the Norman Conquest the incipient feudal system was generalised. Jurisdiction—that is, government—was vested for the most part in the owners of land. The vill became the "property" of a lord, though frequently the lord was the king himself. The free tenants rendered him fixed services, the villeins or peasants were under his control. The agriculture of the vill was regulated and disputes were settled in courts over which he or his bailiff presided. Many of the hundreds similarly fell into the hands of lords, and even a few counties became "proprietary." But each lord (other than the king) also had a lord, who might be the king. Though the strict feudal system of the continent was rarely copied for governmental purposes, so that lords could rarely exercise jurisdiction over tenants who were themselves lords of vills (or manors), all lords were subject to the jurisdiction of the king in his court—the *Curia Regis*.

The victory of feudalism was never complete. William I claimed to be not a conqueror but the lawful successor of Edward the Confessor. He promised to maintain "the laws of Edward the Confessor." That involved maintaining the pre-Conquest administrative structure. The shire moots and the hundred moots—very soon called county courts and hundred courts—remained in existence though, as has been said, many hundred courts and a few county courts fell into the hands of lords. The sheriff did not become a feudal officer. William had himself been too turbulent

a vassal of his own French overlord not to realise that feudal vassals might be obstreperous. Probably, therefore, he was not sorry to limit the powers of his own lords. The existence of the local courts under the control of the sheriff weakened the power of the feudal lords. The weakness of both systems gave strength to the authority that was common to both, the *Curia Regis*. Strong kings like Henry I and Henry II were able to control or take away powers from both.

Government was thus divided between two sets of courts. The use of the word "court" must not be taken to mean that they were judicial bodies. Naturally, one of their main functions was to settle disputes and punish offenders. The preservation of the peace was one of the main functions of government. But the creation of special bodies staffed by lawyers was a more modern development. The modern habit of distinguishing "judicial" from "administrative" must not blind us to the fact that "judicial" administration is administration: it is the administration of justice, the administration of those branches of the law which provide for the settlement of disputes and the punishment of offenders. In Norman times no such distinction was made.

The regulation of agriculture became a function of the feudal courts. The element of government in the narrow sense soon became smaller. It became a matter of "rights" not of discretion. Accordingly, it developed into the land law and disappeared from administrative law until the present century, when new governmental institutions were created to regulate

the industry. Government, therefore, became primarily the regulation of the peace, the defence of the country, and the conduct of foreign relations. The last was obviously not a local function; the others were. Defence was, however, a feudal function too. Most of the king's vassals, and many of his vassals' tenants, held their land on condition of performing military service. The king could raise an army by calling out the feudal levy. But the Anglo-Saxon laws had recognised the duty of every freeman to defend the peace and security of the country. The introduction of political feudalism did not destroy this duty; and whenever the sheriff called out the men of the county it was their duty to follow him. Those who have seen films of the "Wild West" will know that when cattle thieves descend on a ranch or a gang of desperadoes carries off the heroine, the sheriff calls out the "posse," and there is a thrilling chase across country. The "posse" is good Latin—*posse comitatus*, the power or force of the country—and the procedure is good Anglo-Saxon law. The *posse comitatus* is the Anglo-Saxon *fyrd* or militia. It was regulated by Henry II in the Assize of Arms and was, in part, used by him to put down a rebellion of barons who had called out the feudal array.

The sheriff was the king's representative who "governed" or, more accurately, "farmed" the county in the king's name. The bishop disappeared from the administrative machinery because William I separated lay and ecclesiastical jurisdiction. The earldorman either disappeared or became an ordinary lord, drawing a revenue and a title—an *earldom*—from

the county. The sheriff remained. He presided in the county court; he accounted to the king in the "Exchequer" for the revenues of the county; he went round the hundred courts on his "tourn," seeing that the men were in "tithings" for the purposes of military organisation and the fixing of responsibility for crime, and punishing offenders; he was responsible for the accused persons who were "presented" to the king's justices when, in accordance with reforms of Henry I and Henry II, they came round to sit in the county court; he served or delivered the king's letters or writs; he saw to the feeding and housing of the king's retinue when the king came into the county; he called out the *posse comitatus*.

In short, the sheriff was a great man. In fact, he might be too great. He was not, so to speak, a permanent official. He was not exercising his onerous functions for the honour of the post. Power means profit. He "farmed" the county at an agreed figure. The difference between the farm that he paid and the revenue that he drew was his profit. It is not surprising, therefore, that many of the petitions to the king complained of the oppression of sheriffs. Where control was weak, as in the reigns of Stephen and John, the sheriff was a local potentate. A strong king had to take strong action. In 1170 Henry II had conducted an Inquest of Sheriffs. All the sheriffs were removed and their activities inquired into. None were punished, but none were restored; their places were taken by Exchequer clerks and other persons of low degree.

The strength lay, however, in the office, in the collection of such vast powers in the hands of one man.

Various devices were invented to control their exercise. The sheriffs were forbidden to punish offenders. The justices were sent into the counties frequently. Officers called *coroners* were appointed to hold *inquests* whenever a violent death (which, if it involved felony, also involved forfeiture of property to the king) or other event happened which might produce profit to the king. In the process, much of the judicial administration of the counties passed to the king's court. Since at the same time the king's court was taking jurisdiction from the feudal courts, it acquired an almost unlimited jurisdiction. It created general rules for the whole country, and so laid the foundations of the common law. But a device for governing the localities was found which finally destroyed the hegemony of the sheriff. This device was the creation of special officers in each county (and in many boroughs) charged with the preservation of the peace, and in control of the "constables" who had been appointed for each vill and hundred. These were the conservators or justices of the peace.

§ 2. *The Period of the Justices of the Peace*

The conservators of the peace were established to exercise under the control of the king's justices the main function of mediæval government—the preservation of order. They first definitely appear in the reign of Henry III, though there is some evidence that they date from 1195. They were knights of the shire who received a commission from the king to maintain the peace of the county. For a time their future was doubtful. But gradually they received the power of

trying criminals as well—receiving presentments of criminals from the constables and bringing such criminals before the king's justices.

The Black Death resulted, indirectly, in a substantial increase of their powers. Already before that scourge swept across the country the economic system of the country was being altered. Edward I had done his best to foster the trade of the country. He had given special protection to merchants. The qualities of English wool had been discovered, and a substantial trade had grown up. On the one hand, this created a demand for labour in the centres of trade. On the other hand, there was a financial inducement to lords to secure control of the pasture of the manor and to use it for sheep farming and thus to reduce the employment of agricultural labour. Moreover, agriculture was becoming slightly more "scientific." It was found that paid labour was more efficient than labour rendered as a service. But with the demand for paid labour there came to be, so to speak, a labour corps. Many persons ceased to be villeins; they became agricultural workers; they began moving out of the manors. The Black Death accentuated these tendencies by decimating the agricultural labourers. The demand for labour became greater than the supply. The threat to forfeit holdings in land held in villeinage was no longer effective. There was a new problem of government, the regulation of labour.

To meet this new problem, the Statutes of Labour were passed. They were enforced by Justices of Labour. Later, the two commissions, of the peace and of labourers, were amalgamated. The conservators of

the peace and the justices of labour became the justices of the peace. Their functions multiplied under what Lambard called " stacks of statutes " until the justices became the real rulers of the county.

This process was intensified during the Tudor period. While the great lords were cutting each others' throats, and, what is more important, emptying their money bags, during the Wars of the Roses, the economic system of the country was changing. The wool trade was expanding rapidly, bringing with it what we should now describe as " secondary industries." There was new incentive to landowners—as we must now describe lords of manors—to enclose their common fields and to substitute pasture for the ancient arable system. With the break-up of the manorial system came the hordes of " wandering beggars," and the early legislation of Henry VIII was aimed at giving expanded powers to the justices of the peace.

The dissolution of the monasteries accentuated the problem. Their land came, for a large part, into the hands of *nouveaux riches* who regarded it as a source of revenue. Land now gave rights and included no duties. Fields were enclosed without consideration for those who had formerly drawn their living from them. Vagrants could no longer find hospitality in the monasteries. The poor had to beg, or steal, or die. Thus there arose the problem of unemployment. It was met, at first, from voluntary donations, naturally collected and administered by the Church. The giving of alms for the poor proceeded by stages from a virtue to a necessity, from a moral to a legal obligation. The Poor Law Act, 1601, finally placed the duty of

providing work for those who were physically able but unable to find work, and of relieving those who were physically incapable of work, upon the parish. With the churchwardens were associated new officials called overseers of the poor. Both were placed under the control of the justices, who authorised the levying of a rateable tax or *poor rate* upon the property owners of the parish. †

The growth of commerce, the mobility of the population, and the selfishness of the new landlords created also the problem of maintaining the roads and bridges. It was no longer possible to rely on the landowners for securing the keeping open of the ways of communication. It became a problem of government. The Statute of Bridges, 1530–31, gave justices additional powers for compelling landowners and corporations to repair bridges, and authorised them to levy a rate for the "repayrynge, reedefyenge, and amendment" of bridges where the persons liable could not be found, and to appoint surveyors of bridges. Highways Acts of 1555 and 1562 placed the burden of maintaining roads that were not repairable by landlords upon the parishes. The justices of the peace were to appoint a surveyor for each parish, who was to call out each inhabitant, with his horses and tools, to do four days' labour on the roads.

So the social revolution of the sixteenth century created new duties for justices of the peace. They were, too, duties which we should class as "administrative" rather than "judicial" if we knew precisely what those terms meant. Any such classification would have been unknown to the justices of the period.

For they exercised all their functions in the same manner. Some person ought to perform some duty. He had failed to do so. He was, therefore, presented to the justices at quarter sessions. The justices tried him and made the necessary order. The "person" might be the inhabitants of the parish who were indicted for failing to maintain their roads.

Moreover, the justices operated under the close supervision of the King's Council. It is true that the Court of King's Bench was developing formal methods of control. But all kinds of informal methods were used by the justices of assize, the King's Council, the Council of the North, the Council of the Marches, and the Council of the West, and above all by the Star Chamber. It was no unusual event for the judges or the Council to order the justices to see to the repair of a bridge or to exercise greater control over surveyors, constables, or overseers.

This informal method of control disappeared in 1642 almost by an accident. The Council and its subordinates had been instruments of efficient government under the Tudors. Under the Stuarts they became instruments of oppression. The Long Parliament therefore abolished their supervisory powers, and they were never restored. So the Revolution did not merely establish the authority of Parliament. It left local government in the hands of the country gentlemen, controlled only by the intermittent and casual action of the ordinary courts. In this almost casual way England achieved what the Germans have called "local self-government." They mean, however, not that English local government was carried on in un-

controlled democracies, but that the county aristocracy governed their social inferiors almost as they pleased.

During the seventeenth and eighteenth centuries, a distinction grew up between indictments and orders, a distinction which almost corresponds with the more modern distinction of judicial and administrative. As soon as written records are available—Wiltshire from 1575, the North Riding of Yorkshire from 1605, the West Riding of Yorkshire from 1611, Somerset from 1613, and so on—we find them divided into order books and indictment books. During the course of the eighteenth century, while indictments continued to be dealt with in open court, orders were more and more relegated to informal meetings in the local tavern or elsewhere. The nineteenth-century legislators thus found little difficulty in distinguishing between the two classes of jurisdiction.

The eighteenth century saw, also, an extension of the administrative powers of the justices. Dr. E. O. Dowell, who has studied the local government of Middlesex from 1660 to 1760 in his *A Hundred Years of Quarter Sessions*, deals with the functions of justices under five heads: (1) Law and Order (including liquor control); (2) The Poor Law; (3) Highways and Bridges (including paving, cleansing, lighting, and nuisances); (4) The Labour Code (apprentices, servants, and journeymen); and (5) The Regulation of Production and Distribution.

We notice at once that there are several matters in this list that we have not yet mentioned. Liquor control is correctly classed under "Law and Order." It was, primarily, a development of town life, though

it extended also to the villages. Liquor was the working-man's relief from the squalor and disease of town life. It tended, however, to make him both an unruly citizen and a bad employee. Accordingly, it was necessary for his "betters" to control his drink, and powers for the licensing of ale-houses and gin-shops were therefore given to the justices.

We notice, also, an extension of the matters referred to as "highways." The primary reason, again, was the development of the towns. Paving, lighting, cleansing, and nuisances were urban problems.

But, obviously, the important innovations in the list refer to labour and production and distribution. The problem created by the break-up of the manorial system had been accentuated by later commercial and industrial development. It was inconceivable to the eighteenth century that there should be free competition in the sale of labour. Accordingly, labour had to be regulated. But wages could not be fixed while the cost of living soared. Accordingly, prices had to be controlled as well. It should be said at once that the whole of this system disappeared in the era of free competition in the nineteenth century and has reappeared in a new guise with different ideas, and as a system in different hands unconnected, for the most part, with local government, in the present century.

These matters disappear from local government. But it is essential to notice how the functions of government change with economic changes. It is obvious that the functions of local government altered in the eighteenth century because the economic system was

changing. In part, the developments are the reactions of the landlords—who dominated both Houses of Parliament, the local benches, and the judiciary—to changes that threatened their economic predominance. In part they were genuine attempts to solve new social problems. Indeed, we cannot distinguish the two. For the landlords the basis of the Constitution was the predominance of the owners of property. Anything which threatened their power was not merely an attack on them, it was an attack on the most perfect system of government, the British Constitution, whose merits had been sung not merely by the English Blackstone, but also by the French Montesquieu and the Swiss de Lolme. An attack on it was, as we should say, Bolshevik or, as they would have said, democratic, and, therefore, pernicious and dangerous.

§ 3. *The Problem of the Towns*

If we have, so far, mentioned the towns only incidentally, the reason is obvious. England was, until the end of the eighteenth century, primarily an agricultural community. The problem of local government was essentially a problem of rural government. In the Middle Ages there were only three towns of any considerable size—London, Bristol, and Norwich. There were smaller commercial centres, and wherever merchants forgathered special privileges were granted to them. Not only were they wealthy, but their wealth was in an accessible form. In return for a share of their wealth they were able to obtain special powers of government.

The origin of many of the boroughs is wrapped in a veil of mystery which it is not necessary for us to pierce. It is enough to say that, because privileges were granted specially, the boroughs had each its peculiar system of government. Sometimes there was a special commission of the peace, sometimes there was not. Sometimes the towns were governed by the guilds or companies of merchants (as the City of London, that last stronghold of mediævalism, is to-day). Sometimes they had special "courts" which persist in the borough courts of special jurisdiction to this day. One factor above all is important. Because the burgesses were wealthy, they were taxed separately. Because the burgesses were taxed separately, their representatives were summoned to attend the king "in his court in his council in his parliaments." Because the boroughs had separate representation in Parliament, the Tudor and Stuart monarchies created new boroughs in order to "influence" Parliament. Because the larger the number of electors the more difficult it was to "influence" elections, many of the boroughs were governed by small nominated or self-perpetuating oligarchies.

It is obvious that where a borough was formed primarily to return representatives to Parliament, it would not necessarily feel any responsibility for the government of its citizens. In other boroughs, however, the "corporation" was an effective governing body. Mr. J. H. Thomas, in his *Town Government in the Sixteenth Century*, shows us how seriously many of the corporations discharged their functions. They paved and cleansed the streets, regulated the market,

controlled the production and sale of liquor, provided candles and coals, provided means for fire fighting, looked after the poor, and took steps to deal with the recurrent plagues.

The commercial development of the sixteenth century thus produced a new problem, the problem of urban government. It was, however, minor and exceptional. It could be solved locally and by peculiar local means. It did not require general legislation. Local government was still essentially rural. The emphasis did not change until the great period of economic expansion which is called the Industrial Revolution. One can usually fix precisely the dates of revolutions. The Industrial Revolution, however, lasted a hundred years or more. If we must fix a date for its beginning, we must choose 1760. In that year was opened the first of the great canals. In 1764 Hargreaves invented the spinning jenny. About 1776 James Watt perfected his steam engine. In 1789 Cartwright installed a steam engine in a spinning factory. So the factory system became the almost essential method of industrial organisation. The use of dates in such matters is, however, dangerous. London had been growing apace for most of the century. The movement into the towns had begun before 1760. What matters to us is that the great urban agglomerations were created. The older towns spread. New towns sprang up almost overnight. The balance of population shifted and the population itself grew enormously.

Where the town was a borough the problem of local government might appear to be simple. The corpora-

tion could create new services or develop its existing services. It was, in fact, by no means so simple. In the first place, the corporation governed its ancient area whether the economic unit had expanded or not. The unreformed Corporation of London still governs its historic square mile while the real "London" extends from Buckinghamshire to the sea and from Hertfordshire to the borders of Sussex. In the second place, the corporation did not necessarily feel that it had any responsibility in the matter. Its primary function was to administer its property and to elect members of Parliament. In the third place, the assumption of new powers was not so easy in the eighteenth century as in the sixteenth. And, in the fourth place, a Tory Corporation might object to meeting the needs of the workers brought in by Whig dissenters for their own profit, and might reasonably ask the Whigs to get rid of their own smells.

Moreover, few of the towns were in fact boroughs. Great towns like Leeds and Manchester were just enlarged villages. They had their vestries, their overseers, and their constables. They were governed by the country gentlemen, who took good care to keep away from them except when the factors failed to collect the rents or the unruly inhabitants became so obstreperous as to demand the action of a properly supported magistrate. There were even towns that were not in parishes at all because there had never been an incumbent to cure the souls of the inhabitants. These "extra-parochial places" had no vestries, no overseers, and no petty constables.

Yet these mushroom towns demanded government

more urgently than any of the rural areas. People were, so to speak, thrown together in a heap. Jerry-built hovels were run up to house them. They came from country districts where the sparseness of the population made possible easy modes of life that became highly dangerous in a densely populated area. In the villages they placed their refuse in heaps by the side of their cottage, where it rotted until it was ripe for manure. In the towns these "emancipated" villagers did the same. But now the hovels were crowded upon each other. The heaps of decaying matter lay in the tracks that were euphemistically described as streets. The children played on them because there was nowhere else to play. The rain-water percolated through them and drained into the wells or the rivers from which the water supply was drawn. The flies bred on them and infected the food. The smells percolated into the factories where men, women, and children worked for twelve hours a day, and into the cottages where the able-bodied slept and the sick lay awake.

Nor was what we now call "public health" the only problem. When men are gathered into communities they begin to talk; and as they talk they ask each other questions to which there were no ready answers, such as the question asked four hundred years before: "When Adam delved and Eve span, who was then the gentleman?" The tentative answers were by no means favourable to the "gentlemen" who governed the county or the borough and still less favourable to the men—not yet gentlemen—who owned the factories. Such answers give rise to action, and action calls for

repression—especially when the people of France rebelled against their masters and sent the "gentlemen" to the guillotine. In such conditions the unpaid and unwilling "constable" was as much use as a toothpick in an air raid.

Again, when people had no sustenance except what they derived from their employers, the problem of unemployment became acute. The agricultural labourer who had a plot of land and a few pigs and fowls would not starve so long as there was a harvest to be gathered in. The industrial worker had no support save his employment and the poor law. Strange principles which a professor named Adam Smith was discussing might suddenly result in a complete cessation of work and throw a whole town upon the poor law, to the distress of the unpaid overseer who, under the justices, was responsible, and of the landowners who had to pay the rates.

On the other hand, good trade also brought its problems. Distribution is the handmaid of production. If the transport system was so poor that the goods made could not be transported, the goods would not be made, profits would be lost, the workers would be unemployed, and the poor rates would go up. Canals were being made rapidly, but the roads were the essential means of transport. But the roads were kept in repair, in legal theory, by the unpaid labour of the men of the village, who came out to put earth into the holes and let the waggons and carriages run it in. (It was once proposed to compel vehicles to have very wide wheels, in order that they might flatten out the earth more easily.) In summer the roads

were masses of dust, in winter they were frequently impassable.

With these problems, Parliament was not very much concerned. For most of the time there was a war on. Chatham and Lord North, Pitt and Fox, Burke and Sheridan were great men, but they were not concerned with the problems which affected ordinary people. "Politics" meant matters of high policy. It is true that the problem of order was recognised. The smashing of machinery was regarded as the first step towards the setting up of the guillotine. Seditious and blasphemous writings—that is, anything that criticised the established order—were primarily responsible, so it was thought, and had to be suppressed. Combinations of workmen clearly had revolutionary aims and must be exterminated. The troops must be at the disposal of magistrates to put down incipient disorder. Nor was Parliament entirely unconcerned with the problem of the poor. Unemployment meant high poor rates, and legislation was necessary to try to keep them down. But the laws of political economy were as independent of human action as the laws of God.

The movement for the provision of effective new services came not from the Government but from the towns. Sometimes the corporation, if there was one, took the initiative. More often it was taken by a group of manufacturers or other residents who saw that there were problems to be solved. Since property was insecure and life dangerous so long as the unpaid constables were the only protection, many towns approached Parliament for power to appoint a paid "watch." For much the same reason, powers of

lighting and paving were necessary, and frequently the three were combined—"lighting, watching, and paving" seem to go together as easily as Tom, Dick, and Harry. Sometimes a mixture of philanthropy and business instinct suggested a hospital or other medical service for the care of the labour supply. Sometimes the burden of the poor rate suggested the transfer to commissioners of the powers of overseers.

For these and other reasons private Acts were obtained from Parliament to authorise the town council or bodies of commissioners to exercise functions relating to police, public health, or poor law. Parliamentary authority was necessary in order to be able to levy a rate. The problem of transport was tentatively solved in a slightly different way. If there was a demand for roads, roads could be supplied at a profit. New roads were made and kept in repair and the road-users paid a toll; or existing roads were similarly taken over. As a result, "turnpike trustees" were established all over the country, and did much to provide the main road system of the nineteenth century.

* * * * *

When the British troops came back from Waterloo, they found an England that was almost ripe for change. The Industrial Revolution had profoundly altered the face of the country and profoundly modified the occupations and condition of its inhabitants. Though it took another seventy years for Parliament to realise it, the problem of the new century was the social problem. Since in those days social problems were solved, if at all, by local government, it was a problem

of local government. But "politics" continued to mean high policy—foreign affairs, Ireland, the Corn Laws, Parliamentary reform—and the reform of local government was effected largely by people on whom the light of publicity did not play. The problem was, in essence, to provide a system of government for the towns.

CHAPTER III

THE DEVELOPMENT OF MODERN LOCAL GOVERNMENT

§ 1. *The Age of Reform*

EXPRESSED in terms of politics, the period from the French Revolution to 1830 was one of stark reaction. The old order was on the defensive. The Tory Party was in power; and it was not the progressive Toryism that Peel originated and Disraeli developed, but the unintelligent reactionary Toryism that, led by Disraeli, destroyed Peel. Pitt as a wartime prime minister belied the promise of his youth, and the Earl of Liverpool seems able only because the Duke of Portland and Perceval were so feeble. Canning was an exception, but he was minister for little more than a day. Suddenly in 1830 the age of reason seems to have burst into life. But the impression is false. Melbourne, Palmerston, Aberdeen, and Peel had all been ministers, and were to become prime ministers in the new era. The reaction existed because there was action. The politicians were converted by ideas that were developing outside the range of politics.

Of the causes, the Industrial Revolution was the most important. It not only profoundly affected the lives of ordinary men—a fact which is of little importance where society is dominated by "property"—it created a new and wealthy and, therefore, powerful class of

manufacturers—a class from which Peel and Gladstone were drawn. It affected the relative conditions of the existing upper classes. It created that "public opinion" which developed ideas in the Johnsonian period. It gave that emphasis upon trade and industry which led to the study of political economy. Adam Smith is among the prophets, and prophets are people who differ from the majority—in being able to see the obvious.

Economic changes produce alterations of ideas. The influence of the Industrial Revolution was the greater because when it had hardly begun a social revolution took place in France. The immediate result in England was to put fear into the minds of the governing class and reaction into the policy of politicians. But ultimately it produced a new analysis of political ideas, a reconsideration of the theory of government. Here there was a host of minor prophets from Robert Owen and William Godwin and Thomas Paine to the forgotten heroes of oppression and the architects of mechanics' institutes. But the greatest of the prophets was Jeremy Bentham, the more important because he was in the tradition of the English moralists and had begun his criticism before radicalism spelt revolution.

Nor must the influence of religious philanthropy be forgotten. The religious fervour of John Wesley and the other Methodists emphasised the sanctity of the human personality without respect for class distinction. It emphasised equality, it stimulated thought as well as emotion. It took many forms. It created the socialism of Robert Owen and the Tory philanthropy

of Lord Shaftesbury. But above all, from a political point of view, it made the Whigs and the Radicals the organs of the dissenters.

To these three factors minor influences might be added. But they are enough to explain why the world of ideas was in a ferment while reaction dominated the political arena. They explain, that is, the age of reform.

The first legislative result was the passing of the Reform Act in 1832. It was, in perspective, a small reform. It enfranchised the new middle class, the manufacturing middle class of the towns. But it gave for the first time real political importance to radicals and dissenters. It did not make Tory government impossible. There was a Tory Government without a majority in 1834, there would have been a Tory Government with a majority in 1839 but for the Queen, and there was a Tory Government with an enormous majority in 1841. But it was a new Toryism, the Toryism of the manufacturer's son, Sir Robert Peel, and not the Toryism of the " country gentlemen " whom Disraeli and Lord George Bentinck led into opposition in 1846.

The Whig Government proceeded to the reform of local government, among other aspects of government. Its first effort in this field was the enactment of the Poor Law Amendment Act of 1834, a measure which is impregnated with the radicalism of Jeremy Bentham. It was the only measure of its kind for many years, and there are special reasons for its passage by a reformed Parliament that had already lost the first fine flush of enthusiasm.

Bentham was indeed a radical. His philosophy knew no class distinctions. It was summed up in the phrase "the greatest good of the greatest number." Each individual knows what is best for his own happiness. If each individual votes for a representative, the person elected will represent the interests of the majority. If the elected representatives vote by majorities, the resulting legislation will produce the greatest happiness of the greatest number. For local matters there must be a local representative body which will further the interests of the people of the locality. But since the interest of the locality must be subservient to the interest of the nation as a whole, there must be close control by the representatives of the whole.

But Bentham was no collectivist. He believed, like Adam Smith, in the virtues of free competition. The purpose of laws was to provide the repressive framework within which the individual should be free to seek his own happiness. In this sense, the Radicals and the Whigs were as one. Free competition applied to labour as well as to capital. Accordingly, a system of poor laws that subsidised wages and rents was pernicious. On this point the economists and the landowners who paid the poor rates were as one.

The growing burden of the poor rates compelled the Whig Government to take action. In 1831 a Royal Commission on the Poor Laws was appointed, and it reported in 1834. One Edwin Chadwick was at first an Assistant Commissioner and became a Commissioner in 1832. He had been Bentham's secretary in 1830 when the *Constitutional Code*, containing

Bentham's ideas on constitutional reorganisation, had been written. He was a man of forceful personality, and he alone among the Commissioners knew exactly what he wanted. The Report is therefore largely inspired with the ideas of Chadwick, and hence of Bentham. Two ideas therefore dominate the Report. The one, which relates only to the poor law, is the "principle of less eligibility"—the principle, that is, that the condition of a person under the poor laws should be less attractive than that of the lowest-paid worker. The other, of general importance to the development of local government, is that the poor laws should be administered by locally elected bodies under strict central control, but employing paid officers.

The Government accepted the Report and framed a Bill. It had unpopular elements. Above all, it was both "bureaucratic" and, in part, democratic. But it gave votes according to the ownership of property, it associated the justices with the administration of the poor laws, and, above all, it promised to reduce the poor rates. So the landlords swallowed the Benthamisms and let the Bill pass.

The Poor Law Amendment Act of 1834 is a great landmark in the development of modern local government. Certain characteristics of the administrative system which it set up must therefore be noticed.

(1) It provided for the *election* of local boards of guardians. The justices of the peace became guardians of the poor *ex officio*. The franchise, too, was not democratic. A person had a number of votes according to the value of his property. In this respect it was not a precedent. But it established the principle of

election which is now the major characteristic of English local government.

(2) The boards of guardians operated for unions of parishes which were not based on the historic areas of administration. Unlike those areas, they were convenient for administrative purposes. The general idea was that a union should cover the area from which persons could go to and from the centre of administration in the course of a single day. This precedent, too, was not strictly followed, but we shall see that the poor law unions had great influence on the future areas of local government.

(3) The boards of guardians were to act through paid officials. The Act destroyed the notion that local government could be carried on by unpaid persons appointed annually to carry out important and not always pleasant public duties.

(4) The boards of guardians were *ad hoc* authorities. That is, they were elected or appointed to exercise a single service. There was not, as Bentham had proposed, an integration of the various powers of local government in a local "sub-legislature." This precedent was followed for many years, resulting in a chaotic system which called out for reform. The boards themselves were not abolished until 1930.

(5) The administration of the poor law was placed under strict central control. Three Poor Law Commissioners (with Chadwick as secretary) were given control by means of orders, the appointment and control of the paid officials, and inspection. These methods of control have been extended to other services and, with others of even greater importance,

now provide an effective integration of the local government of the country. The Commissioners were, however, independent of Parliament in the sense that they were not under the control of a responsible minister. The application of the "principle of less eligibility" proved unpopular, and they became even more unpopular as a result of Chadwick's ruthless enthusiasm. In 1847 their powers were transferred to a Poor Law Board responsible to Parliament, through its President, a minister of the Crown. In 1871 the functions of the Board were transferred to the newly created Local Government Board and thence, in 1919, to the Ministry of Health.

The second reform of the Whig Government was of no less importance, though it was founded on entirely different principles. Something was said in the previous chapter of the conditions of the boroughs. Most of the towns had grown enormously. Except in a few places, the councils had not had their powers expanded accordingly. Their primary function, that of electing the borough members of Parliament, had been taken away from them by the Reform Act. Their other function was to manage and dispose of the corporate property. They probably appointed the borough magistrates. They supervised the market and, possibly, the port, because these were sources of corporate revenue. They kept the gaol more or less in repair. If they had obtained further powers, they were unusually public-spirited.

In law, the corporate property had to be used for the benefit of the corporators. These were not the inhabitants but the freemen. These might be as few

as a dozen, and as many as several thousands. Accordingly, it was not illegal for the council to use the corporate property for feasts and entertainments, any more than it is illegal for the City Companies to do the same to-day. Nor was it illegal to pay large salaries to officials who had nothing but formal duties to perform. Nor was it illegal to allow the mayor to occupy corporate property at a nominal rent, or for the council to regulate the market or the port in the interests of its members, or for the council to nominate as justices only those who were among its members. If they also gave money for the poor of the town or otherwise assisted the inhabitants, they were not under any compulsion to do so, but did it because they recognised their moral obligations as leaders of the community.

The fundamental complaint of the Whigs was that the councils were dominated by Tories and Anglicans. The manufacturers and merchants who had brought wealth to the town, and had made themselves wealthy in the process, thought themselves as good as their "betters." It was not enough that they now had the vote for the borough members. They desired social equality. They objected to the self-perpetuating oligarchy that controlled them. They objected above all to the restrictions which gave the freemen a preference in the markets and otherwise.

Accordingly, the Whig Government had good reason for reforming the boroughs. It was decided, however, to appoint a Royal Commission. On this Commission there was no social reformer like Chadwick. It was composed mainly of young Whig lawyers.

They produced some most valuable evidence. But before it was completed, and before any of it was collated, the Government was in urgent need of the Report. Accordingly, a Report was drafted by the chairman and the secretary and was subsequently signed by nearly all the members. It was, to put it bluntly, a party manifesto. Fundamentally it stated the truth, though in exaggerated language. But truth or falsehood does not matter. It provided reasons for legislating. Upon it was founded the Bill which was ultimately passed after much discussion as the Municipal Corporations Act, 1835.

The Bill was an attack upon property. It proposed the diversion of corporate property to public purposes. It proposed to put that property under the control of elected councils. The younger Conservatives, such as Sir Robert Peel, were not wholly averse to it. They thought that the local oligarchies could not be defended. They also objected to the lack of an effective police and judicial system in many of the boroughs. Accordingly, the Bill was not opposed in the House of Commons. But all the "interests" turned out against it in the House of Lords, and the resulting Act was a compromise.

The modern development of local government has been primarily in the towns. The reform that made such a development possible is of fundamental importance. It was, however, based on principles very different from those of the Act of 1834.

(1) The new councils consisted as to three-quarters of persons elected on a franchise which appeared to be

far more democratic than either that of 1832 or that of 1834. It was open to all householders who had occupied property for three years and had paid the poor rate. This appeared to be a "household" franchise and it was spoken of by some radicals as a "democratic franchise" which enabled the working-class for the first time to control their own government, and many books still say the same. Such a statement is not, however, correct. The figures show that in the boroughs there were more parliamentary voters than there were burgesses, although there was a property qualification for the parliamentary franchise. There are several explanations: (*a*) most of the working people did not occupy separate houses, but lived in houses let out in rooms; (*b*) most working-class houses were not separately rated, and it was held that to secure a vote the householder must himself pay the rates, not merely pay additional rent to the landlord; (*c*) the overseers who drew up the burgess lists were not very concerned to see that people who could not read and who would raise no questions were placed on the burgess list; (*d*) three years' occupation was a long period where the population was so little attached to the "soil"; (*e*) political agents struck off voters wholesale, and working people could not read the notices that gave them the chance to answer objections, and (*f*) voting was public until the Ballot Act of 1872, and he was a bold man who voted against the wishes of his landlord or employer. Little change of language was necessary, and from 1869 the franchises were roughly the same until 1918.

(2) As a result of a compromise between the two

Houses, one-quarter of the council consisted of aldermen elected by the council.

(3) No new areas were created. The council governed either the old borough area or the area of the parliamentary borough.

(4) Though the councils had very few powers, they were not *ad hoc* authorities. They were compelled to appoint watch committees and thus to provide for their watching or police. They were allowed, also, to make bye-laws.

(5) The councils were authorised to appoint paid officials, but few of them needed full-time officials of the kind appointed by the boards of guardians.

(6) There was practically no central control. The only exception was that the consent of the Treasury was necessary to the alienation of any of the corporate real estate.

The third and last great reform carried out by the Whig Government was concerned with the highways. The Highway Act, 1835, was by no means so fundamental as the others. It roused no political opposition. It is noteworthy, however, because it consolidated as well as amended the highway law. It provided that the vestry of every parish maintaining highways should elect one or more persons to serve the office of surveyor for the ensuing year; but if it was preferred, a *salaried* surveyor might be appointed. The parish might apply to the justices for a highway district of two or more parishes to be formed in order to have a paid surveyor for the district. Also, a populous parish might itself have a highway board nominated by the vestry.

What is most interesting about this enactment from our point of view is that it is completely in the line of eighteenth-century development and bears no impress of the age of reform except the power to appoint paid surveyors. It provides no new division of the country for highway purposes. It gives powers to the vestries and to the justices. It does not provide for the election of highway boards. It contains no provisions for central control. It is worth mentioning only because it illustrates the chaos into which further development of this kind will throw English local government.

§ 2. *The Public Health Agitation*

A moment's reflection is enough to show that the age of reform had barely touched the problem of the towns. It had enabled a better police organisation. It had provided a brand-new poor law system. It had provided means, but wholly inadequate means, for the better repair of the roads. But it had not touched the main problems of urbanisation and it had not solved the problem of road transport. Few people, and certainly none in public life, had even realised that the problem existed.

It needed a person of intelligence to grasp the problem and a forceful personality to drive home the lesson that he had learned. The intelligence and the personality were found in Edwin Chadwick, though he received valuable assistance from Dr. Southwood Smith and Dr. (afterwards Sir) J. P. Kay-Shuttleworth. The Royal Commissioners on the Poor Laws had assumed that the real problem of the poor law was the able-bodied unemployed. Chadwick as Secre-

tary of the Poor Law Commissioners soon realised that this was not so. The problem of poverty was in large part the problem of sickness. The way to reduce the poor rates was to prevent sickness. Already in 1838 the Poor Law Commissioners pointed out that the Poor Law Act needed amendment so as to enable them to deal with the nuisances that created disease and so gave rise to destitution. When the Report came before Parliament, the Commissioners were ordered to make further inquiries as to the causes of disease. Chadwick, it should be mentioned, suggested this procedure to the Bishop of London, who moved the motion. A Select Committee reported in 1840 after a debate which was regarded as of such small importance that it is not reported in *Hansard*. In 1842, the report of the inquiry ordered in 1839 was published in three volumes. Much of it, needless to say, was written by Chadwick. But the Conservative Government could not suddenly create a new branch of government. Accordingly, a strong Royal Commission was nominated in 1843. It reported in 1844 and 1845 and confirmed Chadwick's views.

The crises over the Corn Laws obstructed further legislation. But meanwhile in 1845 and 1847 ten "Clauses Acts" were passed. Their purpose was to set out provisions which might be included by reference in later private Acts. They dealt, among other things, with such matters as the acquisition of land, the improvement of towns, markets, and fairs, gas and water works, and town police. They were not of immediate application; they made no change in the law; but it was now a simple matter for any borough

council or body of citizens to obtain vast powers of local government without having to fight over every clause. These Acts are still in force, and some of them have been incorporated by general legislation. For the most part, they merely repeat the provisions of former private and local Acts.

The settlement of the Corn Law question enabled the new Liberal Government of 1847 to proceed with general legislation. In 1848 were passed the first Public Health Act and the Nuisances Removal and Diseases Prevention Act. The Public Health Act was a temporary statute, and it was tentative in its provisions. It provided, in the first place, for a General Board of Health, with the First Commissioner of Works as chairman. On the application of one-tenth of the inhabitants of any populous place, the Board had power to set up a local board of health. If the ordinary annual death-rate exceeded 23 per 1,000, the General Board could set up a local board whether the inhabitants petitioned or not. The General Board could in time of danger from epidemic disease acquire compulsory powers by putting into force the Nuisances Removal and Diseases Prevention Act.

This Act clearly owes much to the poor law reform. It is true that in a borough the council would be the local board of health, but elsewhere the boards were to apply to those urban areas which caused the major problem. There was, too, a strong element of central control. But it was a weak Act, as different from the Act of 1834 as the Government of 1848 was from that of 1834. It would probably not have been passed but for an impending epidemic of cholera. Even with that

incentive, it was hardly powerful enough in its nature or wide enough in its scope to do more than touch the fringe of the problem.

The General Board of Health contained as one of its three members Edwin Chadwick, and in 1850 Southwood Smith was also appointed. But, probably as a result of Chadwick's enthusiasm, it had a strong centralising tendency and it aroused angry opposition. It was appointed for five years. Its life was prolonged for one year, but the renewal of its mandate was defeated in 1854 and its place was taken by a new board which was a board only in name and really consisted of a paid president responsible to Parliament. Chadwick went into retirement, *The Times* rejoicing, "Æsculapius and Chiron, in the forms of Mr. Chadwick and Dr. Southwood Smith, have been deposed, and we prefer to take our chance of cholera and the rest than to be bullied into health." The "Board" of 1854 was continued until 1858. Its compulsory powers were then allowed to lapse and its supervisory and medical powers transferred to the Privy Council.

The "interests" had triumphed and Chadwick had been removed, but the problem remained. Between 1858 and 1871 there were epidemics of diphtheria, typhus, cerebro-spinal meningitis, cholera, yellow fever, and cattle plague. The medical department was compelled to investigate the causes not only of these diseases but of many others as well. A Sanitary Bill was drafted in 1866 and was almost lost in the political upheaval created by the defeat of Lord Russell's Government on its Reform Bill. But another epidemic

of cholera was approaching and the Bill was saved. It now became the duty of local authorities to suppress defined nuisances and their powers were considerably enlarged.

But the primary problem of administration lay in the chaos of authorities and powers that the tentative legislative efforts of twenty years had created. Powers were vested in the vestry, the guardians of the poor, the local boards of health, the borough councils, and the improvement commissioners. In 1868–69 a Royal Commission was set up by the Conservative Government. It reported in 1871. It proposed that "the present fragmentary and confused sanitary legislation should be consolidated," "that the administration of sanitary law should be made uniform, universal, and imperative throughout the kingdom," and that "all powers requisite for the health of towns and country should in every place be possessed by one responsible local authority, kept in action, and assisted by a superior authority."

The Report was accepted at once by the Government. The Local Government Act, 1871, set up the Local Government Board and transferred to it the public health functions of the Privy Council and the Home Office, the functions of the Poor Law Board and the functions of the Registrar-General's Office. An Act of 1872 provided additional powers for the Local Government Board (transferring the functions of the Home Office under the Highway Acts and Turnpike Acts) and setting up local sanitary authorities throughout England and Wales outside London. An amending Act was passed in 1874, and the law of public

health was consolidated in the great Public Health Act, 1875.

Since consolidation was so rapid, it is convenient to describe the new system as it was after 1875. Outside London, the whole country was divided into urban sanitary districts and rural sanitary districts. The urban districts were the districts of boroughs, of improvement commissioners, and of local boards, whether created before or after the Act, and provision was made for removing intersecting boundaries. The rural districts were the poor law unions less those portions which were urban districts. The local boards (urban sanitary authorities) were to be elected. The rural authorities were to be the guardians of the union representing parishes in rural districts. The Local Government Board was given substantial powers of control, but by no means so great as those given by the Poor Law. The local authorities had wide and compulsory powers of dealing with public health.

Nor was the Act limited to public health. It dealt also with highways. The Act of 1835 had already been considerably amended, especially by the Highway Act, 1862. The justices had received extended powers of forming highway districts governed by highway boards. The boards were formed partly of justices and partly of "waywardens" elected by the parishes. They had power to appoint paid officers. Under the Public Health Act, the urban sanitary authorities became the highway authorities for their areas, while in rural districts the old law continued to apply. It will be well to mention here that the Highways and Locomotives (Amendment) Act, 1878,

provided that, as far as possible, highway districts should be coterminous with rural sanitary districts, and enabled the guardians to become the highway authority in such cases.

The great public health legislation of 1871–75 enabled the problem of the towns to be solved. It has been much amended and extended by later legislation. Its provisions remain, nevertheless, the basis of the law. It is evident that it owes much to the poor law reform of 1834. Yet it owes much, too, to the legislation of 1835. For the borough councils were and have been since the most important public health authorities. The control of public health by the Local Government Board was by no means so great as its control of the poor law. Chadwick, by his very enthusiasm for centralisation, had compelled the maintenance of a great deal of decentralisation. The urban areas became urban districts because the weight of the problem pressed upon them. Yet Chadwick's poor law unions, deprived of their urban nuclei, became the rural sanitary districts. Above all, by 1878, Bentham's notion of general "sub-legislatures" had made some progress. The urban sanitary authorities were highway authorities but not poor law authorities. The poor law guardians were, in rural areas, the sanitary authorities and, in many places, the highway authorities.

There was, however, already another type of *ad hoc* authority in existence. In 1870 the State at last recognised that popular education could not be achieved through religious bodies alone. The Elementary Education Act, 1870, had authorised the election

of school boards, to provide education under the control of the Education Department of the Privy Council in those areas where voluntary schools did not exist or were not sufficiently numerous. These school districts were the boroughs and, outside the boroughs, combinations of parishes formed by the central authority.

§ 3. *The Counties*

All this time no fundamental change had taken place in the position of the county justices. Public health was primarily a new service. It did not interfere with the justices' powers. Indeed, their judicial powers, especially in respect of nuisances, had been increased. Moreover, the justices' powers had increased in other directions. County police forces became compulsory in 1839, and the justices were naturally the police authorities. The Act of 1835 had increased the justices' highway powers. But it was true that there had been a tendency to ignore the county areas. The poor law unions, the highway districts, the sanitary districts, and the school board districts had been created without reference to county boundaries. Yet the successive Governments felt some diffidence in reforming county administration. The justices had immense influence in county elections, and until 1884 the counties had proportionately to population a much better parliamentary representation than the boroughs.

Bills were drafted to deal with the counties on the lines adopted in the boroughs. Sir Charles Dilke, who was president of the Local Government Board from 1882 to 1885, had had drafted a Bill to deal with both county government and the districts. He wanted

elected county councillors, without aldermen. He wanted to reform the unions and the districts at the same time. He proposed that 100,000 population should exclude a borough from the county. He intended that the school boards should be dissolved and their functions transferred to the borough and district councils.

But such a comprehensive measure would have raised enormous political opposition and would have occupied a substantial amount of Parliamentary time. Accordingly, it was pigeon-holed in 1884 and was never again brought forward as a whole.

The county portion alone was brought forward by the Conservative Government in 1887. It was, of course, modified to suit the new political conditions. The aldermen whom the House of Lords had insisted upon in 1835 found in the new measure a place that the Liberal Government would have denied them. The opposition of the big towns compelled the Government to exclude from county government all boroughs with more than 50,000 inhabitants. On the other hand, London was given a county council.

Clearly, the Local Government Act, 1888, followed the traditions of the Municipal Corporations Act of 1835. The counties maintained their historic boundaries except so far as the great towns became county boroughs. Yorkshire has three county councils, Lincolnshire three, Sussex and Suffolk two each, merely because there had been separate commissions of the peace. For the same reason the Soke of Peterborough and the Isle of Ely became separate administrative counties; and for the same reason Lancashire and

Rutlandshire each had a single county council. The county councils, too, were not *ad hoc* authorities but "sub-legislatures." They were given control of the main roads. They shared with the justices the control of the police. They received from the justices the control of bridges. They dealt with the pollution of rivers. They made bye-laws; and they had other miscellaneous powers. The highway boards, the school boards, the sanitary authorities, and the guardians remained in existence, but the county councils were given certain powers of control over the sanitary authorities.

Further, the element of central control, though greater than in the Act of 1835, was small. Indeed, it was hoped that some of the functions of the central government could be devolved upon the county councils. Power was given for this purpose; but the hope was vain and the power was never exercised.

The second part of Dilke's programme was not completed until 1894. In the meantime, there had been a sentimental agitation, led by one Toulmin Smith, for a return to village life. It was assumed that the villages had once been democratically governed by the inhabitants themselves, as the Greek city states were governed. The assumption was, of course, false history. At no time since the Norman Conquest had the parish been governed otherwise than by the lord or squire and the rector. Nevertheless, provision was made in the Local Government Act, 1894, for the calling of parish meetings in rural parishes. In the larger parishes there were to be parish councils as well. The sanitary authorities became urban and rural dis-

trict councils. The urban district councils were simply the urban sanitary authorities, but under a new name and differently elected. The rural district councils were newly elected bodies. The rural district councillors were to be guardians of the poor also, though guardians were also to be elected to represent the urban districts of the union. Thus, the rural district council and the board of guardians became for the first time independent bodies, though the rural district councillors were members of both bodies.

The Bill was not passed without opposition. It was in the House of Commons for forty-seven days and in the House of Lords for ten days. Mr. H. H. Fowler (afterwards Lord Wolverhampton), the President of the Local Government Board, spoke 803 times and dealt with 1,400 amendments. It is perhaps not without interest to note that on this Bill Mr. Gladstone made his last speech in the House of Commons. It should be added, too, that it was an attack on the House of Lords for the many amendments that they insisted on making.

The Act obviously owed much to the Act of 1834. It contained no provision for aldermen. It dealt with areas which were intended to be reasonably convenient for administration; and powers were given to the county councils to modify areas with that end in view. There was far more central control than in the Act of 1835. The district councils were, primarily, public health authorities, though provision was made for the extinction of highway boards and the transfer of their powers to the district councils. It should be added that the parish organisation has never achieved the success that was prophesied for it.

When Goschen was President of the Local Government Board he had spoken of local government as "a chaos of areas, a chaos of franchises, a chaos of authorities, and a chaos of rates." He himself had initiated the examination of proposals of reform which were put into form by Sir Charles Dilke and enacted in the Acts of 1888 and 1894. Something had been done by 1895 to remove part of the chaos. There was a hierarchy of "sub-legislative" authorities. There were still poor law unions and school board districts. Frequently, too, even the boundaries of districts and counties intersected. Nevertheless, the vestries had practically disappeared; the highway boards were on the point of disappearing; there were three rates only. All later developments have emphasised the authority of the county councils, borough councils, and urban and rural district councils. English local government had taken a long step towards rationalisation.

§ 4. *The Inadequacy of Public Health Powers*

The Public Health Act of 1875 was an enormous step forward. Its powers have nevertheless proved to be inadequate. It was built up out of the provisions of local Acts, and many local authorities began almost at once to extend it by local Acts. On four occasions, 1890, 1907, 1925, and 1936, many of these local provisions were made generally available by amending Acts. But the real difficulty of the Public Health Act was that it did not go to the root of the problem. It regulated the existing system but did not provide for the fundamental reorganisation of that system. If a man has a diseased body, something can be done by drugs

and by compelling him to live according to rules to make him healthier. But a constitution which is thoroughly unsound cannot be converted into that of a vigorous young man.

The Public Health Act made reasonably effective provision for the supply of water, the making of sewers, the paving of streets, the treatment of disease, the prevention of obnoxious trades, the regulation of new structures, and so on. Such provisions were essential to civilised life in industrial conditions: but they were not enough. The Industrial Revolution had already done its worst. The slums cannot be improved, they can only be removed. New developments had to be fitted into an existing system which was fundamentally unsound. Moreover, the initiative in development was left to the individual. A house had to satisfy bye-laws, but in other respects it might be any sort of house, placed wherever a private speculator thought fit. No houses were provided unless there was a profit to be made.

As I have said elsewhere [1]—

"Public Health law came a century too late. It shut the stable door after the horse had escaped. For in the main it contains a system of regulation. It is a hypothetical imperative: *if* someone does something, then something else shall happen. It has therefore enabled local authorities, so far as they were willing, to control the developments which have taken place since 1870. The real harm had been begun one hundred years before. The expansion of England since 1870 has been great indeed, but it is small as compared with the

[1] *Law relating to Town and Country Planning* (1st Edition), p. 3.

expansion in the previous years. Moreover, the first step lies with some individual. No doubt local authorities have power to establish sewerage systems, to supply water, to make up streets, to provide against epidemics, and to do other things on their own initiative. But these powers assume first the existing urban units, and, secondly, the development of those units by private individuals.

"If a landowner, whether of a great estate or a single plot of ground, wishes to build a house or erect a factory, the local authority may say yea or nay, conditionally or unconditionally. But the initiative is that of the private person. He determines in relation to his own needs or expectation of profit where he wants to build, how he wants to build, and what he wants to build. The public health authority determines in relation to his land and the rest of the built-up area whether it is desirable in the public interest that these things should be done. They do not proceed themselves to develop the land, nor have they established any plan for general development by private persons. Each case presents itself to them in isolation."

In other words, the Public Health Act had three fundamental defects:

(1) It did not provide for a fundamental reorganisation of the towns.

(2) It did not enable local authorities themselves to develop the towns.

(3) It did not provide effectively either for the planning of new developments or for the restriction of modifications of the existing system in accordance with plans. The law of housing and town and

country planning has been developed to deal with these defects.

We need not trace the history in detail, since the provisions originally enacted in the Housing of the Working Classes Act, 1885, were consolidated and amended in the Housing of the Working Classes Act, 1890. New housing powers and also town planning powers were conferred by the Housing, Town Planning, etc., Acts of 1909 and 1919. There were amendments in 1921, 1923, and 1924, and the two branches were consolidated in the Housing Act, 1925, and the Town Planning Act, 1925. A series of Housing (Rural Workers) Acts began in 1926, and the Acts of 1926 to 1938 formed a special branch of the law outside the consolidated provisions. Housing Acts of 1930 and 1935 much amended the powers consolidated in the Act of 1925, and there was a new consolidation in the Housing Act, 1936, which had already been amended so far as its financial clauses are concerned by the Housing (Financial Provisions) Act, 1938. The Town Planning Act, 1925, was amended and consolidated in the Town and Country Planning Act, 1932.

The result of this development was that by 1939 the three defects had been met, though no one would suggest that the legislation was perfect. The first defect had been met in part by the conferment of powers to compel the repair of property unfit for habitation which can be put into an inhabitable condition at a reasonable expense and the demolition of such property as cannot be rendered fit in this way. The main provisions for this purpose are to be found in Part II of the Housing Act, 1936. This alone was not enough, and powers for

the clearance of slum areas and the replanning of semi-slum areas by means of more thorough and systematic schemes of destruction and redevelopment are now contained in Part III of the same Act.

The second defect had in part been remedied by the powers of local authorities to provide housing accommodation. Though such powers were first given in 1851 and were systematised in Part III of the Housing of the Working Classes Act, 1890, they were not effectively exercised until Government subsidies became available under a series of Acts beginning in 1919. The powers are now contained in Part V of the Housing Act, 1936, though subsidies had not been available since 1933 except for the rehousing of persons displaced by slum clearance and redevelopment, or in relief of overcrowding, or in the provision of cottages for rural workers. The powers have nevertheless been much used, and are responsible for the creation of the municipal housing estates which are such a characteristic of modern urban development.

The third defect had not really been eradicated. Town planning powers were conferred in 1909 and are contained in a much more developed form in the Town and Country Planning Act, 1932; but the planning of development is long and complicated and, it is feared, expensive because of prospective claims for compensation; and in most parts of the country little more than the first steps have been taken.

§ 5. *The Period of Rationalisation*

No mention can be made of the vast subsidiary powers which now exist. Enough has been said to

show that enormous developments took place during the last quarter of the nineteenth century and during the present century. The guiding hand of the Local Government Board and the Ministry of Health has restrained a too chaotic development of local government and has provided for some measure of co-ordination. But several elements of disorganisation remained at the beginning of the century.

(1) Besides the main group of authorities, borough, county, district, and parish authorities, there were separate poor law guardians and school boards. The school boards were extinguished in 1902 and their functions transferred to borough, county, and urban district councils. In 1945, under the Education Act, 1944, the councils of counties and county boroughs became the local education authorities. The guardians were not abolished until 1930, when their functions were transferred to the councils of counties and county boroughs under the Local Government Act, 1929. Apart from a few minor functions such as land drainage, the functions of local governments are now exercised by the general authorities. The *ad hoc* principle of the Act of 1834 has almost entirely disappeared. In many respects, however, the distribution of functions does not accord with modern conditions.

(2) Though something had been done under the Acts of 1888 and 1894 to systematise the areas of administration, there were still many intersecting boundaries. Moreover, the areas were in many cases not based on convenience of administration but simply on history, and modern developments have in many cases rendered inconvenient areas which were at one

time convenient. So far as the counties are concerned, little has been done to remedy these defects. In the case of a county borough modifications have involved prolonged controversy between the borough and the neighbouring county. Since modifications can be made only with Parliamentary sanction, developments tend to lag behind changing conditions. Within the administrative counties, however, the problem has been rendered less acute by the provisions of the Local Government Act, 1929, now incorporated in the Local Government Act, 1933, for the periodic review of the boundaries of boroughs, districts, and parishes.

(3) The rationalisation of the authorities necessarily involved some rationalisation of their financial powers and obligations. The process was assisted by the enactment of certain provisions relating to loans in the Local Loans Act, 1875, and the Public Works Loans Act, 1875. But the rating system was not reorganised until the Rating and Valuation Act, 1925. Developments since 1925, especially in the Rating and Valuation (Apportionment) Act, 1928, and the Local Government Act, 1929, have emphasised the problem which has never yet been effectively faced, the problem whether some better system of local taxation than the rating system cannot be found. But local authorities no longer rely entirely on their income from property and charges and on rates. Substantial sums were given by way of grants in aid of specific services, such as education, police, roads, housing, and various branches of public health. The reduction of rateable values by the Local Government Act, 1929, and the provision of grants in substitution for loss of rates compelled a re-

consideration of part of the grant system, and the Act of 1929, as amended, provides a complicated grant system in place of all former grants except those for housing, education, police, certain kinds of roads, and a few others. The new system has proved by no means satisfactory; but fundamental alterations need not be expected.

(4) The rationalisation of the local government franchise was effected for a completely different reason. It was part of the reform carried out by the Representation of the People Act, 1918. The franchise was stated in a single section of the Representation of the People (Equal Franchise) Act, 1928. By the Representation of the People Act, 1945, however, the parliamentary elector was given a vote in local government elections also. The special local government franchise was retained, and a person entitled to be registered as a local government elector could be put on the "ratepayers' register" if he made application for that purpose.

(5) The final rationalisation is in the law itself. The rationalisation of the authorities and of the rates which they levy has enabled the Parliamentary Counsel to put the law into a reasonably intelligent shape. Education law was consolidated in the Education Act, 1921, though it has since been much amended. Rating and valuation, housing, and town planning were consolidated in 1925, though subsequent amendments make reconsolidation desirable. So far, no steps have been taken to reconsolidate the Rating and Valuation Act, 1925, and its amending legislation. But as a result of amendments by Acts of 1930 and 1935

a consolidated Housing Act was produced in 1936. The law of town planning was both amended and reconsolidated by the Town and Country Planning Act, 1932. But the core of the problem was the law of local government organisation and of public health. The two subjects are clearly related historically, since the Public Health Act, 1875, created many of the districts and gives the most important powers of borough councils as well as consolidating the law of public health. So complicated had the task become by 1930 that mere consolidation was not enough. The Public Health Acts of 1890, 1907, and 1925 were merely the outstanding measures amending and adding to the Act of 1875. The tenth edition of Lumley's *Public Health* contained nearly 4,000 pages, and there were numerous provisions which, as interpreted by the courts, made complete nonsense.[1] Accordingly, the Minister of Health in 1930 appointed a special committee, the Local Government and Public Health Consolidation Committee, with the following terms of reference:

"With a view to the consolidation of the enactments applying to England and Wales (exclusive of London) and dealing with (*a*) local authorities and local government, and (*b*) matters relating to the public health, to consider under what heads these enactments should be grouped in consolidating legislation and what amendments of the existing law are desirable for facilitating consolidation and securing simplicity, uniformity, and conciseness."

The Committee decided that it could not carry out this duty effectively except by preparing draft Bills.

[1] The most famous example is the law of "single private drains": see Jennings, "Judicial Process at its Worst," *Modern Law Review*, Vol. I, p. 111.

As a result of its labours, three Acts have already been passed by Parliament—the Local Government Act, 1933, the Public Health Act, 1936, and the Food and Drugs Act, 1938. One most important branch of public health law which remains unconsolidated is the law of streets; but most streets are highways, and the law of highways is to be found in a chaotic series of statutes beginning for practical purposes (for it really begins with Magna Charta) with the Highway Act, 1835. Accordingly, it became necessary to consider the law of streets and the law of highways together, and the Ministers of Health and Transport have set up another committee to examine and report on the whole subject.

§ 6. *The Period of Planning*

The last of our periods has only recently begun, but its general tendency is already very clear. It is the period in which the local authorities become instruments for what is called a " national policy " : that is, the general tendencies of administration are laid down centrally and the appropriate departments are instructed to secure the execution of a national policy. So far the central planning is partial only, and there is as yet no national plan to which the various departmental policies conform, though, of course, some co-ordination is effected by the general responsibility of the Cabinet.

The field in which development is most urgent is obviously housing. Before the war houses were being built at the rate of 300,000 a year, and since this was much higher than was required to meet the increase of

population, it was possible to clear the slums and relieve overcrowding. Between 1939 and 1945, however, less than 200,000 houses were built. During the same period, 200,000 houses were totally destroyed by enemy action, and 250,000 were made completely uninhabitable. Three million other houses were damaged, but were made fit for habitation by temporary or permanent repairs. A White Paper on Housing (Cmd. 6609) was issued in March 1945, and it was announced that for two years after the end of the war exceptional measures would be taken to meet the emergency thus created. No doubt in due course there will be special legislation. At the moment there is merely the power in the Housing (Temporary Provisions) Act, 1944, to extend the power in section 1 of the Housing (Financial Provisions) Act, 1938, to grant subsidies for new houses, and also the power in the Housing (Temporary Accommodation) Acts, 1944 and 1945, to provide temporary houses to be maintained and let by the local authorities.

It is not, however, a mere question of building houses, but also a question of finding out where to put them. On this subject there were even before the war doubts about the adequacy of our legislation. Local authorities were empowered to plan the development of their areas by means of town and country planning schemes, but there were numerous difficulties in the Town and Country Planning Act, 1932. What is even more important is that it was not the local authorities which determined whether their areas should be developed or what the pace of development should be. Population follows employment, and if

private industry decided to move out of an area, what was wanted was not planning of new developments but the contraction of existing services. Special legislation was therefore provided for what were first called "depressed areas," then "special areas," and now, under an Act of 1945, "development areas." On the other hand, there were many areas, especially in the neighbourhood of London, which were developing so rapidly that the long process of planning under the Act of 1932 was far too slow to deal with the matter. In 1937 a Royal Commission on the Location of Industry was appointed, and its report (the Barlow Report, Cmd. 6153) was published in 1940. The report suggested that the problem of the distribution of industry must be tackled on a national scale, though the Commission was not agreed as to the organisation and functions of the national authority to be provided.

One aspect of the problem was in any case omitted by the Royal Commission as outside its terms of reference. The newer industries were in many cases being established on the best agricultural land, and in any event population was being attracted away from the land into the towns. This problem was therefore examined in the Report of the Committee on Land Utilisation in Rural Areas (the Scott Report, Cmd. 6378), published in 1942. The Committee, like the Royal Commission, favoured a national authority planning on a national scale, and for this purpose recommended a National Planning Commission. Eventually, in 1943, the Ministry of Town and Country Planning Act authorised the appointment of a Minister of Town and Country Planning charged with the duty

of "securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales." Power was also conferred to appoint a Commission or Commissions, but so far no such action has been taken under it.

One of the special problems which had restricted the value of the Act of 1932 was the enormous cost of compensation to be paid by local authorities whenever restrictions were imposed on land by planning schemes. The power to take "betterment" where a scheme improved the value of land was so hedged about with restrictions that it could not be regarded as a set-off. The question was therefore referred to an Expert Committee on Compensation and Betterment, which issued a report in 1942 (the Uthwatt Report, Cmd. 6386). The Committee recommended the immediate vesting in the State of all rights of development, and the purchase by the planning authority of all areas requiring redevelopment. The Government did not accept the proposals of the Uthwatt Committee, but issued its own proposals in a White Paper (*The Control of Land Use*, Cmd. 6537). These were in turn criticised in the House of Commons and, as the Coalition Government was in process of breaking up, the matter was left for future consideration by the new Government. Meanwhile, however, the Ministry of Town and Country Planning had been at work. The Town and Country Planning (Interim Development) Act, 1943, brought the whole country within interim development orders, even where no orders had been made on the application of the planning authorities, and some amendments

were made in the general law, so as to prevent uncontrolled development pending the making of town and country planning schemes. The Town and Country Planning Act, 1944, provided for development schemes for blitzed areas and simplified the law for the acquisition of land required for development. In this field, too, it is clear that there will be further legislation.

No fundamental reform has yet been attempted in the ordinary realm of public health. In 1944, however, the Government issued a White Paper on a National Water Policy (Cmd. 6615). Its title indicates its general idea. It considered that the powers of the Minister of Health were vague and ill-defined, and that a national water policy should be laid down and be enforced by the Minister. The first piece of legislation was a small measure, the Rural Water Supplies and Sewerage Act, 1944, which merely authorised the making of grants towards the expenses of rural water supplies and sewerage schemes. The powers necessary for the carrying out of the national water policy were, however, provided by the Water Act, 1945, which specifically placed on the Minister of Health the duty " to promote the preservation and proper use of water resources and the provision of water supplies in England and Wales, and to secure the effective execution by water undertakers, under his control and direction, of a national policy relating to water."

In other parts of public health administration there have so far been no such developments, but one proposal is of such importance that, when it is carried out, substantial amendments in this book will become necessary. It is the complete, or the virtually com-

plete, supersession of the poor law. This proposal was made as long ago as 1909, in the famous Minority Report of the Royal Commission on the Poor Laws, the work of Sidney and Beatrice Webb. The proposal was to "break up" the poor law and to allot the function of rendering assistance to the various authorities concerned with children, the sick, the aged, the unemployed, etc. The proposal was never specifically accepted, but slowly it has been put into operation. There are now sufficient powers vested in the local authorities by the Education Act, 1944, to render poor law assistance to children unnecessary. The widows and orphans of "insured persons" now receive pensions and allowances under the Widows, Orphans and Old Age Contributory Pensions Acts, and supplementary pensions and allowances may be provided in case of need by the Assistance Board. Insured persons who are sick or incapacitated can obtain financial as well as medical assistance under the National Health Insurance Acts. Aged persons receive pensions either under the Widows, Orphans and Old Age Contributory Pensions Acts, or under the Old Age Pensions Acts, and supplementary pensions may be obtained from the Assistance Board. Unemployed persons receive either unemployment insurance or unemployment assistance under the Unemployment Acts. Blind persons receive old-age pensions or assistance under the Blind Persons Acts. In consequence of all this legislation, the poor law has already been reduced to small proportions, and in fact the Unemployment Act, 1934, forbids the grant of poor relief to able-bodied persons. There are, however, gaps in the

legislation which still require recourse on occasions to the poor law. When the policy of the White Paper on Social Insurance (Cmd. 6550) has been put into operation, there will be no further need for the poor law. One small part of the plan has been put into effect by the Family Allowances Act, 1945, and a Ministry of National Insurance has already taken over the administration of the various insurance and pension schemes pending the completion of the social insurance plan.

Part of the Beveridge Scheme was the creation of a comprehensive national health service, and a White Paper has been issued under that title (Cmd. 6502) and has been debated in the House of Commons, but there was sufficient controversy to prevent further progress under the Coalition Government and the task has been handed over to the Labour Government.

Meanwhile, the Board of Education had prepared and discussed plans for a general development of the education service. A White Paper on Educational Reconstruction was published in July 1943 (Cmd. 6458) and effect was given to it by the Education Act, 1944. The Board of Education was converted into a Ministry of Education, and the Minister had imposed on him the duty " to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive service in every area." The anomaly of the " Part III authority "—the borough or urban district council

exercising functions in relation to elementary education only—was removed, and the councils of counties and county boroughs became the local education authorities for all purposes.

Finally, it became necessary to consider the general structure of local government. In August 1944 the Minister of Health stated in the House of Commons :

> "Various proposals relating to the reform of local government in England and Wales put forward by the local government associations and received from other authoritative sources have been carefully considered. It is clear from these that there is no general desire to disrupt the existing structure of local government or to abandon in favour of some form of regional government the main features of the county and county borough system; and the Government do not consider that any case has been made out for so drastic a change. On the other hand, the Government are satisfied that within the general framework of the county and county borough system there is need and scope for improvements, and in particular for amending the machinery of the Local Government Act, 1933, relating to adjustments of status, boundaries and areas."

Accordingly, the Minister discussed the matter with the local authorities' associations and subsequently issued a White Paper on Local Government in England and Wales during the Period of Reconstruction (Cmd. 6579). The document is essentially conservative and makes no proposals for fundamental changes. In the main it is concerned with alterations of status and areas, and in this respect effect was given to its proposals by the Local Government (Boundary Commission) Act, 1945. This Act establishes a Boundary Commission empowered to issue orders for changes of status and

boundaries of counties, county boroughs, and county districts outside London and Middlesex. Where the proposals affect a county or a county borough, however, the orders will be provisional only, and will thus require confirmation by Parliament. It is proposed to hold an inquiry into the local government of London.

In respect of local finance no change was suggested, though the General Exchequer Grant must in any case be undertaken soon after the end of the war. Meanwhile one change of considerable importance has already been made. The White Paper on Employment Policy (Cmd. 6527) implies that local borrowing will be controlled by the central government in such a manner as to minimise unemployment. The first step in this direction has been taken by the Local Authorities Loans Act, 1945, which requires local authorities to raise their loans through the Public Works Loan Commissioners until 1950.

Local Government is thus in a process of transition. In principle it will remain unaltered, unless present plans are changed, and the development of a system of regional government has been ruled out. Nevertheless, the various local services are being placed under much stricter central control with the aim of securing the execution of a national policy in relation to each major service. This will not prevent the exercise of a wide measure of local discretion, but it requires a much more positive approach on the part of the central authorities.

CHAPTER IV

LOCAL AUTHORITIES AND THEIR ORGANISATION

§ 1. *Local Authorities*

OUR historical survey enables us to realise that gradually the *ad hoc* authorities have disappeared; and with a few exceptions all the functions of local government are exercised by elected councils, each of which has a substantial administrative jurisdiction over a given area. For some purposes local authorities may combine in the appointment of a joint committee or joint board. For instance, not all public health authorities have enough demand for hospital accommodation to require the provision of a separate hospital. Consequently, several authorities may combine to form a joint hospital board to provide and maintain a hospital for the reception of the sick under the care of any of them. Again, it may be convenient for a single drainage system to be provided for an area governed by several local authorities. Agreements may be made for one authority to operate the system and to receive contributions from the others; alternatively a joint sewerage board may be set up. The control of vagrancy is another service which may require to be exercised over a large area. Accordingly, over most of the country there are joint vagrancy committees.

There is a new tendency to make the use of joint

boards and joint committees compulsory. Under section 6 and the First Schedule of the Education Act, 1944, where it appears to the *Minister of Education* that the establishment of a joint board as the local education authority for the areas of two or more councils (which may include the council of a non-county borough whose population is not less than half of the population of the county in which it is situated : e.g. Cambridge) is desirable, the Minister may by order constitute a joint board for that purpose. Unless the councils agree, the Minister must first hold a local inquiry. Further, if the Minister considers that the local education authorities should combine for some but not for all of their educational functions, he may, after consultation with the authorities, by order establish a joint education committee. Similarly, under section 8 of the Water Act, 1945, a joint water board may be formed without application from any of the local authorities, and under section 9 a joint committee may be established in the same way.

It is first necessary, however, to study the ordinary administrative areas. Let us imagine a map of England and Wales. We will pay attention first to the County of London. This is not the whole of the urban area centred upon Charing Cross. The boundaries were fixed in 1855, long before the tentacles of London had stretched far out into the neighbouring counties. It ends at Highgate and Finsbury Park on the north, Shepherd's Bush and Roehampton on the west, Tooting and Sydenham on the south, and Bow, Woolwich, and Plumstead on the east. Every citizen in this area is governed by two local authorities, the London County Council and either the Common Council of the City of

London or one of the twenty-eight metropolitan borough councils.

Next, we take out eighty-three large towns, which are known as *county boroughs*. These include all the largest towns outside London, but not all the county boroughs are larger than the largest of the boroughs which are not county boroughs and so are usually known as *non-county boroughs*. The county boroughs were created by the Local Government Act, 1888, and certain boroughs like Canterbury and Chester were made county boroughs because of their historic importance.[1] Also, there have been large changes in the distribution of population since 1888, and a county borough cannot cease to occupy that status except by Act of Parliament. No county borough has in fact lost its status, though a Royal Commission has recommended that Merthyr Tydfil should be reduced to the status of a non-county borough. In a county borough the citizen is concerned with one local authority only, the county borough council. Subject to qualifications, the county borough council exercises not only the functions of a non-county borough council, but also the functions of a county council.

Taking the County of London and the county boroughs out of our map, we have left an area which is divided into sixty-two *administrative counties*.[2] For the most part their boundaries coincide with those of the ancient geographical counties (less the county

[1] For the present county boroughs, see Local Government Act, 1933, 1st Schedule, Part II.

[2] For the present administrative counties, see Local Government Act, 1933, 1st Schedule, Part I.

boroughs). There have been, however, some changes. Boundaries have been rectified where they obviously created difficulties of administration, especially where an "island" belonging to one county was detached from its "mainland" and wholly surrounded by another county. Also, for historical reasons (chiefly because a lord of the manor had a right to a separate commission of the peace) certain geographical counties were divided into two or three administrative counties. Thus the three Ridings of Yorkshire and the three Parts of Lincolnshire are separate administrative counties. Suffolk is divided into West Suffolk and East Suffolk and Sussex into East Sussex and West Sussex. The Isle of Ely is separated from Cambridgeshire and the Soke of Peterborough from Northamptonshire. This emphasis upon historic boundaries has made the administrative counties vary considerably in size. Rutland has a population of less than 18,000, while Lancashire has about a million and three-quarters and the County of London has over four millions.

In an administrative county outside London the citizen is governed by at least two local authorities. First, there is the county council. Secondly, the county area is divided into *county districts*, that is, non-county boroughs, urban districts, and rural districts.[1] Each of these has a council. A non-county borough has the same kind of organisation as a county borough but, with a few slight differences, its council has the same functions as an urban district council.[2] In fact, until

[1] Local Government Act, 1933, s. 305.

[2] For the list of non-county boroughs in 1933, see Local Government Act, 1933, 1st Schedule, Part III. There have since been additions.

1934 a non-county borough was called an urban district; but the Local Government Act, 1933, distinguishes them. Non-county borough councils and urban districts have wider functions than rural district councils, notably in the matter of highways.

The rural district is, or may be, further divided into *parishes*. Rural parishes are so small that some measure of direct government is theoretically possible. Thus, every parish has a parish meeting consisting of all the local government electors of the parish.[1] If the parish has a population of three hundred or more, the county council must provide for the establishment of a parish council. If the parish has two hundred or more inhabitants, but less than three hundred, the county council must establish a parish council if the parish meeting so resolves. In any other case the county council *may* establish a parish council if the parish meeting so resolves.[2] But a rural district may consist wholly of one parish, and in that event the rural district council will have the functions of the parish council.[3] Also, two or more parishes may, with the consent of the parish meetings, be combined under a single parish council; and it is not absolutely essential that the parishes should be in the same rural district.[4] The existence of a parish council does not operate to destroy the parish meeting; in fact, in most parishes the parish council is elected by the parish meeting, and in some cases the parish council cannot spend money

[1] Local Government Act, 1933, ss. 43 (1), 47 (1).
[2] *Ibid.*, s. 43 (2).
[3] *Ibid.*, s. 43 (3).
[4] *Ibid.*, s. 45.

without the consent of the parish meeting. Technically, a parish meeting is not a "local authority"; but since it may exercise powers of government we may treat it as such; and in that case the inhabitants of a parish may be subject to four local authorities, the parish meeting, the parish council, the rural district council, and the county council.

When the parish organisation was established by the Local Government Act, 1894, it was contemplated that the parish meeting and the parish council would be important instruments of government. In fact, however, their functions are few and not very important. In many places the parish meeting acts as a forum in which questions relating to the parish are discussed and complaints made about the activity or inactivity of the rural district council. In other places, on the other hand, the parish meeting is for practical purposes moribund. Here as elsewhere it is necessary to have not only a machinery of government but also people who are willing to make that machinery effective.

§ 2. *Changes in Local Authorities*

Boroughs are created by royal charter. It has been mentioned above that the differences in function between a non-county borough council and an urban district are not very great; and in practice steps are taken to see that no important functional changes will result when an urban district is converted into a borough. The change is desired for two reasons. The first is that a borough is commonly regarded as possessing a dignity to which no mere urban district can achieve. It has a mayor, aldermen, and councillors,

while an urban district has only a chairman and councillors. The mayor, aldermen, and councillors may, and usually do, wear robes. The mayor is preceded on formal occasions by a mace-bearer carrying the symbol of authority. The borough has its own coat of arms. In other words, there is a certain ceremonial about a borough which is no essential part of government, but which nevertheless attracts attention to the activities of the council, induces people to believe that membership of a council is a function of some importance, and generally gives the electors an interest in the government of their town. Bagehot long ago drew attention to the importance of the " dignified " functions of the monarchy. In the British system of government there are many other historic survivals and ceremonials which do play quite a part in the process of democratic government. If we are asked whether as a matter of cold analysis the College of Arms, the Changing of the Guard, the Orders of Knighthood, and the robes of peers have any direct constitutional significance, we are compelled to answer in the negative. If, however, we ask whether they may not have an indirect importance in stimulating interest in government, the answer cannot be made so easily. Certainly every dictator knows that " circuses " play some part in the process of government. Local government has fewer opportunities for displays of dignity. The conferment of borough status provides one opportunity; there are, however, other " honours " to be obtained. For instance, a borough may be raised to the dignity of a " city "; it thereby obtains no additional governmental functions, but its prestige, at least

in its own eyes, is enhanced. Again, the title of " Lord Mayor " may be conferred upon the mayor; he ceases to be " Mr. Mayor " and becomes " My Lord Mayor," though the quality of his service is not necessarily enhanced in the process.

The second reason for seeking borough status applies only to populous urban districts. An urban district is not usually promoted directly to the status of county borough. That status is, however, an advantage. A county borough, as we have seen, is not subject to the jurisdiction of a county council. Frequently a borough or urban district contributes more to the county fund than it receives in services. For instance, a non-county borough must bear through its contributions in rates part of the cost of all roads in the county except the unclassified roads (or back streets) in non-county boroughs and urban districts. This is a very heavy item of cost. If the borough becomes a county borough, then it is responsible for the cost only of the roads within its own narrow boundaries. In any case, *amour-propre* induces councillors to believe that they could govern their own town more effectively than the county council in respect of services like roads, secondary education, and poor law. Accordingly, elevation to county borough status is desired; and the first step is to become a borough.

A rural district council as well as an urban district council may petition for a charter,[1] but in fact a rural district council never does so. The petition is made to the King, and it is referred in accordance with section 130 of the Local Government Act, 1933, to a Committee

[1] Local Government Act, 1933, s. 129 (1).

of the Privy Council. The petitioning council must give notice to the Minister of Health and the county council. The Minister may, if he pleases, order a local inquiry to be held by one of his inspectors. The council is in practice required to furnish particulars of the growth of the district, its industries, etc., and evidence must be afforded that the area is well-administered, has proper equipment, and possesses the necessary elements of a distinct social life. A local inquiry is almost invariably held, and the inspector finds out from observation and evidence whether the elements of a necessary civic life exist, the state of local government and its expense, the probable increase or diminution of expense, the possible advantages and disadvantages of incorporation, the schemes which will be necessary for elections, and any adjustments with neighbouring authorities. If the Minister agrees that the petition may go forward, the district council must provide a draft charter and draft schemes of elections, etc., copies are sent to the Home Office, Ministry of Health, Board of Trade, Ministry of Education, Ministry of Transport, and, if charities are involved, the Charity Commissioners. The petition will then be considered by the Committee of the Privy Council; but at least one month before the date fixed for the hearing the Committee will advertise the fact in the *London Gazette* and otherwise so as to make the petition known to all persons interested.

There is thus opportunity for all the interested authorities and other persons interested to make representations to the Committee. If the King is advised to grant the charter, the charter is passed under the Great

Seal, whereupon the provisions of the Local Government Act, 1933, and other Acts relating to boroughs, apply; and new elections have to be held. Apart from changes in the composition of the council and the system of elections, the only important effects are, first, that the new borough acquires power to make bye-laws for the " good rule and government " of the borough and the suppression of nuisances, and, secondly, it acquires a separate police force if its population is twenty thousand or upwards.[1] In fact, however, the Home Office always objects to incorporation unless the council agrees beforehand that its area shall continue to be policed by the county police.

A borough may become a county borough by Act of Parliament, and for this purpose must promote a private Bill : but section 139 of the Local Government Act, 1933, as amended by the Local Government (Boundary Commission) Act, 1945, provides that a borough council may not promote such a Bill unless the population of the borough is one hundred thousand or more. The promotion of a private Bill, as we shall see in Chapter VI, provides ample opportunity for opposition. Such opposition will certainly come from the county council, which will lose a very substantial part of the rateable value from which it draws its revenue. For instance, the borough of Cambridge contains nearly one-half of the population of Cambridgeshire, though it occupies less than one-fiftieth of the county area. The rateable value of the borough is, moreover, more than seventy per cent. of the rateable value of the whole county; so that if it be-

[1] Local Government Act, 1933, s. 136.

came a county borough it would immediately impoverish the county. It is certain, therefore, that if the borough of Cambridge achieved a population of 100,000 and promoted a Bill for the conferment upon it of county borough status, there would be strenuous opposition from the Cambridgeshire County Council.

It is unlikely that the above procedure will be used in future, for the Local Government (Boundary Commission) Act, 1945, has now set up permanent machinery for alterations in the status and areas of counties, county boroughs, and county districts. The machinery consists of a Local Government Boundary Commission with a chairman and four members charged with the duty of reviewing the circumstances of the areas into which England and Wales (excluding the county of London) are divided for the purposes of local government. The Commission has the following powers :

(*a*) to alter or define the boundaries of a county, county borough, or county district ;

(*b*) to unite a county with another county, or a county borough with another county borough, or to unite a non-county borough with another non-county borough, or an urban or rural district with another district, whether urban or rural, or to include an urban or rural district in a non-county borough or any county district in a county borough;

(*c*) to divide a county into, between, or among two or more counties, or an urban or rural district into two or more districts, whether urban or rural, or between any two or more areas, whether county boroughs or county districts;

(*d*) to constitute a borough (either by itself or together with the whole or any part of another county district) a county borough;

(*e*) to direct that a county borough shall become a non-county borough and specify the county in which it is to be included;

(*f*) to constitute a new urban or rural district, or to convert a rural district into an urban district or an urban district into a rural district;

(*g*) to alter parishes so far as may be considered necessary to effect any of the above purposes.

It will be noted that the Commission has no power to convert an urban district or a rural district into a borough, and that it has only an incidental power to deal with parishes.

The Minister of Health may, however, after consultation with the associations of local authorities, make regulations prescribing the general principles by which the Commission are to be guided in the exercise of their functions. Subject to this, the Commission is an executive body and gives effect to its decisions by means of orders. Where an order relates to a county or a county borough, however, it is provisional only, so that it does not take effect until it has been scheduled to a Provisional Orders Confirmation Bill enacted by Parliament. It thus becomes possible for the order to be opposed in the House of Commons and the House of Lords. Even if the Commission desires to make no change, it will issue an order, and then it will give no further consideration to the matter for ten years unless it is satisfied that by reason of a substantial change in the distribution of population or other exceptional circumstances it is desirable so to do.

It should be noted that the Commission's powers do not extend to the County of London, that no county

borough may be created unless it has a population of at least one hundred thousand, and that no county borough may be created in the County of Middlesex. This last restriction is due to the fact that the County of Middlesex has become completely urbanised, and that if county boroughs were created the whole county would have to be divided into autonomous units. The Minister of Health may direct the Commission to consider any question within its powers, and the council of a county, county borough, or county district may request the Commission to consider any question, though the Commission is not bound to do so.

Alterations in parishes may be made by the Minister of Health on the initiative of the county council. Where the county council considers that changes affecting a parish should be made, it may cause a local inquiry to be held by one of its officers under section 141 of the Local Government Act, 1933, as amended by the Local Government (Boundary Commission) Act, 1945. If it is then satisfied that a change should be made, it may make an order, which, however, cannot take effect without the consent of the Minister. Also, the Minister must direct a local inquiry to be held if a local authority (including a parish meeting) or a sufficient number of local government electors object.

§ 3. *Co-operation among Local Authorities*

As has already been emphasised, local authorities are general authorities exercising among them all the functions of local government. The *ad hoc* system of the nineteenth century has disappeared. But an area which is convenient for one purpose is not necessarily

convenient for another. For instance, the authority to approve building plans must have a considerable knowledge of the local conditions, and so the most convenient area is a compact urbanised area. In approving such plans, the local authority (the borough or the urban or rural district council) must consider questions of water supply; but the questions of water supply may have a wider area of application. It is often convenient for the area of supply to extend to the whole area determined by the watershed, which may cover the districts of several councils. In many cases, again, it is necessary to go even farther afield. Manchester, for instance, draws much of its water from the Lake District, and the pipes required have to traverse the whole length of Lancashire. It would obviously be absurd for other authorities in South Lancashire to obtain supplies from the Lake District and bring them down in their own pipes. In these cases some kind of co-operation is obviously desirable.

There are, however, many other examples. A local authority may establish its own system of sewerage and sewage disposal. But if an urban district is surrounded by a rural district with small towns or villages on the main roads leading out of the urban district like balls on the spokes of a wheel, it may be much easier to extend the sewers of the urban district outwards than to put in a completely different set of sewers. Or, again, a number of urban districts may be so close that it may be desirable to amalgamate the sewerage systems. This is particularly desirable with sewage disposal where the whole area is being rapidly suburbanised, as in Middlesex. Sewage disposal works are unpleasant

neighbours and therefore tend to sterilise not only the land which they occupy but also much land around them. In East Middlesex there were until 1937 no less than 21 sewage disposal works, and a great improvement was effected when these were superseded by one large works: but this, too, involved co-operation.

Again, the detailed planning of an area requires local knowledge and experience; but it is ridiculous for one authority to schedule an area near its boundary as a public open space if the nearest area in the district of a neighbouring authority is scheduled for industrial purposes. Similarly, if one authority plans a new road to end in its boundary it is useless for a neighbouring authority to plan another road in such a position that the two roads can never meet. Obviously, each of the plans ought to be made to fit into a regional plan, the details being determined by the separate authorities.

Other examples where co-operation is required arise in respect of hospital services. A small authority cannot provide a large specialised hospital with technical and expensive apparatus unless it will be used by patients from other authorities. Again, transport services often need to be co-ordinated, especially in large urbanised areas like Merseyside, Tyneside, and the West Riding of Yorkshire. Yet again, casuals wander from county to county; and if the problem is to be solved there must be co-operation among the various authorities in the same area.

Some of these problems may be illustrated from London, where they are, so to speak, carried to their extreme. Greater London is a vast conglomeration governed by many local authorities; consequently, it

has been necessary for Parliament to intervene to create *ad hoc* bodies. The Metropolitan Water Board provides water, the Metropolitan Drainage Board provides sewerage for a vast area, the London Passenger Transport Board provides passenger transport. The police system was provided before the county and borough police forces were established, and the Home Office controls the Metropolitan Police, whose area is much greater than that of the County of London. There is also a Greater London Regional Planning Committee; but the obstruction of a few authorities has caused it to be too rigidly limited in power and resources to be effective.

These examples show a tendency towards the restoration of *ad hoc* authorities. But the problems of Greater London are peculiar, and the system need not necessarily be applied elsewhere. There have been suggestions for the creation of regional authorities of the same character as the existing authorities, but exercising control over larger areas. Such a suggestion was made for Tyneside by the majority report of the Royal Commission on Tyneside. There are, however, difficulties involved. In the first place, as with the existing local authorities, there are no areas which are suitable for all the services which might be administered over areas larger than the existing administrative counties. The area convenient for water supply, for instance, bears no reference to the area which is convenient for hospital administration or transport. Accordingly, it would be most difficult to find convenient areas. The counties are historic units, and the boroughs are either historic units or convenient urban

units, and often they are both. This brings us to the second difficulty. Experience shows that electors can be persuaded to take an interest in the government of towns, because they have a common life and a common tradition; but the interest in county government is much smaller in spite of the common historical tradition, because county government is so remote from local interests. Regional authorities would be even more remote and could rely on no traditions at all—for the Anglo-Saxon heptarchy is forgotten by all except historians. This brings us to the third difficulty, that of finding elected persons able to undertake the administration. In such a county as Somersetshire, a member has often to spend most of two days in travelling to and from a committee meeting. With such a county as Hertfordshire the most convenient place for committee meetings is not in Hertfordshire but in London. The result is, first, that the administration is remote; secondly, so much time is occupied that only persons of leisure can undertake the task; and, thirdly (what is really a fourth difficulty), the administration tends to fall into the hands of officials. County councils usually meet four times a year only (when they may have agenda of 300 pages), and committees as infrequently as they can. All these difficulties of county government would be accentuated if regional authorities were established.

During the war there has been some experience of regional government, for Regional Commissioners were appointed with the intention that they should exercise within their regions the functions of the Central Government if communications broke down

owing to heavy air attack or invasion. They were fortunately never required for this purpose, but they were used to co-ordinate the activities of local authorities and statutory undertakers in respect of such matters as civil defence, fire fighting, communications, the supply of essential services, and the rest. They proved very useful for these purposes, but the Government decided in 1945 that the system should not be perpetuated.

On the other hand, co-operation is possible without regional government. In many cases, one authority can act on behalf of another. For instance, a county borough can provide a hospital to which neighbouring authorities can send patients at a fixed cost per patient. Again, an authority can receive into its sewers the sewage of neighbouring authorities, and dispose of it, in return for an agreed annual payment. An authority can, by agreement, extend its water mains into neighbouring areas and give a direct supply to householders there; or alternatively it can supply water in bulk to the neighbouring authorities. Gas and electricity can similarly be supplied; and running agreements may permit the trams and omnibuses of one authority to run in the area of another—Leeds, Bradford, and Wakefield provide a very good example. These methods are in very common use, and examples could be multiplied. Sometimes the agreements can be made under the general contractual powers of local authorities; [1] but where powers of direct supply or running powers are required the consent of a Government Department (in some cases) or of Parliament is required.

Another method of co-operation is that of the joint

[1] Local Government Act, 1933, s. 266.

committee. Local authorities administer through committees either by delegating functions to them or taking decisions upon reports made by them.[1] Accordingly, it is possible for two or more authorities to appoint a common committee and either to delegate functions to it or to act on a report submitted by it. Many local government statutes specifically authorise such methods of administration, and section 91 of the Local Government Act, 1933, gives a general power. Such a method is particularly useful for the consideration of matters like regional planning, which in any case require subsequent action, or for matters like vagrancy control, where general principles of administration can readily be agreed upon.

For the day to day administration of a service, however, the joint committee system is not appropriate. Delay is caused where a function cannot be delegated, but reports have to be made to the separate authorities and decisions taken by them. There is, too, always the possibility of disagreement among the councils represented on the committee. The officials are, technically, the officials of the constituent councils, and the property is vested in those councils. Legal proceedings must thus be brought by and against the constituent councils, and the cost of administration is part of the budget of each. The system of joint boards avoids these difficulties. A joint board, like a joint committee, contains representatives of the constituent authorities, but it is an independent local authority with its own officers, property and funds, and a distinct legal personality.

[1] See *post*, pp. 119–31.

The law confers no general power for this purpose; but the separate statutes dealing with the various branches of local government law grant powers of combining through joint boards for the various purposes with which the Acts deal. For instance, joint boards for water supply, sewerage, hospitals, and other public health services may be established under section 6 of the Public Health Act, 1936. If all the constituent authorities agree to the formation of the board, the necessary order may be made by the Minister of Health; but if any of the authorities objects, the order will be provisional only and the assent of Parliament will be required. The details of the constitution of such a board are laid down in the order; but they follow common form, adapting such provisions of the Local Government Act, 1933, as are relevant.

Most of the older statutes require a provisional order in all cases; and the language of the legislation has not always drawn a clear distinction between joint committees and joint boards. In the modern statutes, however, a joint committee acts as a committee of the constituent authorities, while a joint board is a separate authority with a legal personality of its own. Where the language is confused, the distinction can be drawn by finding out whether the common form " incorporating clause " applies to the body in question: this clause runs as follows:

" A joint board (committee) constituted under this section (Act) shall be a body corporate by such name as may be determined by the order constituting the united district, and shall have perpetual succession and a common seal and power to hold land for the purposes of their constitution without licence in mortmain."

There is a tendency to make these methods of co-operation compulsory. Under the Town and Country Planning Acts the Minister of Town and Country Planning may compel local authorities to form a joint board or joint committee. The Minister of Health has the same power under the Water Act, 1945, and he may also compel authorities to collaborate in other ways. Under the Education Act, 1944, the Minister of Education may order the creation of a joint board to be the local education authority for the areas of two or more councils, or he may establish a joint committee.

§ 4. *The Local Government Franchise*

The English system of local government derives its autonomy from three facts: it is based essentially upon a system of local elections which are not under the control of the Central Government (and though functions may sometimes be taken away from a local authority, no elected authority can be altogether superseded by commissioners or other representatives of the Central Government [1]); it has a separate and

[1] For central control, see Chapter VIII. There was an exception between 1926 and 1930; for under the Boards of Guardians (Default) Act, 1926, the boards of guardians could in certain circumstances be superseded by commissioners appointed by the Minister of Health; but the boards of guardians were abolished in 1930. Of course, anything can (legally) be done by Act of Parliament; and the Government would not hesitate to propose legislation where a local authority was completely inefficient or corrupt. It must never be forgotten that in England the Cabinet is responsible for everything which can be altered by legislation. The fact that no legal powers exist is immaterial, for it would not be a Government if it could not obtain any reasonable powers from Parliament.

expanding source of taxation (though it relies also on Government grants [1]); and it possesses powers which, within the limits of central control, permit it to exercise a wide discretion.

Under section 1 of the Representation of the People Act, 1945, all parliamentary electors have the local government franchise. That is to say, if a person is residing in premises on the last day of the qualifying period and has resided in those premises for the whole of the qualifying period, he is entitled to vote for elections to local authorities in respect of those premises. There is also a business premises qualification : that is, if a person is on the last day of the qualifying period in occupation of business premises of the annual value of £10 or upwards and has occupied those premises during the whole of the qualifying period, he is entitled to have his name inserted in the register in respect of those premises. In the case of the residential qualification, the name is inserted in the register by a registration officer without application from the resident; but in the case of the business premises qualification an application must be made in respect of each register, which is compiled once a year. There are also other requirements. The person must be a British subject, of full age, and not subject to any legal incapacity. These are the rules for the parliamentary franchise, and persons registered for the parliamentary franchise are automatically registered for the local government franchise in what is called the " general register."

There is, however, a separate local government franchise in section 2 of the Representation of the

[1] *Post*, Chapter VII.

People (Equal Franchise) Act, 1928, as follows :

"A person shall be entitled to be registered as a local government elector if he or she is of full age and not subject to any legal incapacity and—

(*a*) is on the last day of the qualifying period occupying as owner or tenant any land or premises in that area; and

(*b*) has during the whole of the qualifying period so occupied any land or premises in that area, or, if that area is not an administrative county or a county borough, in any administrative county or county borough in which the area is wholly or partly situate."

There are certain provisos which indicate that a person who inhabits a *dwelling-house* by virtue of any office, service, or employment, is deemed to be occupying if the dwelling-house is not inhabited by the employer, and that a lodger is qualified only if the rooms are let to him unfurnished; but, since the person would in any case be entitled to registration as a parliamentary elector, and so would be on the general register, this is no longer of any importance. A person entitled under the Act of 1928 can apply to have his name inserted on what is called the "ratepayers' register," but he must make an application every time that the register is compiled. Also, a person is not entitled to be on both the general register and the ratepayers' register. Thus, the ratepayers' register really includes only those who are not resident on the premises, but who occupy them for some reason or other; for instance, a week-end cottage or country house, a flat in "Town," a lock-up shop, an artist's studio, a doctor's or dentist's consulting room, a lawyer's chambers, a business or professional man's

office, and so on, provided that in each case the person occupies as owner or tenant, and not as an employee of somebody else who is owner or tenant.

A person can reside in one place only, so he can get the residential qualification in one borough or county district only. A week-end cottage, for instance, is not a place of residence. A person can obtain the business premises qualification wherever he occupies business premises of the value of £10 or upwards, and therefore in several boroughs or districts. The local government occupation franchise may similarly be held in several boroughs or districts. It is not permissible, however, to be on the same register for two or more qualifications. For instance, a doctor who lives next door to his consulting room will have only one vote, the residential vote. Also, one cannot be on the register for two wards of the same borough, so that a person who has an office in town and a house in a suburb will be able to vote in the suburb only and not in the town, though if the suburb is outside the town limits he will be able to vote for the town council, the rural district council, and the county council. There is nothing to stop a person from voting in different wards or divisions of the same county or urban or rural district. It follows that double voting will be comparatively rare, and that the ratepayers' register is likely to be of very small importance.

§ 5. *The Composition of Local Authorities*

The parish meeting, as we have seen, consists of all the local government electors of the parish; though this is a statement of law and not of fact, for it consists really of those local government electors who attend, and they may be but a small proportion of the whole body. The parish councils and urban and rural district councils consist of councillors elected by the local government electors—or such of them as choose to vote—together with a chairman elected by the councillors. On the other hand, the borough councils and county councils have a special grade of members called aldermen, who are elected by the councillors. The chairman of the borough council, also, is called mayor, or lord mayor, and he is really more than a chairman, since he is the representative of the borough as a whole. The aldermen, the chairmen, and the mayors and lord mayors are all chosen from among the councillors or from among persons who are qualified to be elected as councillors. Thus, there is a single set of rules for the qualification and disqualification of members of local authorities.

To be qualified, a person must be a British subject of full age and possess one of the following qualifications:

(*a*) Be a local government elector for the area of the local authority; or

(*b*) Own freehold or leasehold land within the area of the local authority; or

(*c*) During the whole of the twelve months preceding the day of election have resided in the area of the local authority; or

(*d*) In the case of a parish council only, during the whole

of the twelve months preceding the day of election or since the 25th March in the year preceding the year of election have resided either in the parish or within three miles of it.[1]

The following are, however, disqualifications:

(*a*) Holding any paid office or other place of profit (other than that of mayor, chairman, or sheriff[2]) in the gift or disposal of the local authority or of any committee thereof; [3]

(*b*) Being a person who has been adjudged bankrupt, or made a composition or arrangement with his creditors;

(*c*) Having within twelve months from the day of election or since his election received poor relief;

(*d*) Having within five years before the day of election or since his election been surcharged to an amount exceeding £500 by a district auditor; [4]

(*e*) Having within five years from the day of election or since his election been convicted in the United Kingdom, the Channel Islands, or the Isle of Man of any offence and ordered to be imprisoned for a period of not less than three months without the option of a fine;

(*f*) Being disqualified under the Acts relating to corrupt and illegal practices at elections;

(*g*) In the case of a borough, being an elective auditor ; [5]

(*h*) In the case of a county or county borough, being a poor law officer,[6] or having been dismissed from such office within five years before the day of election.[7]

[1] Local Government Act, 1933, s. 57.

[2] Some authorities pay allowances to these officers.

[3] Officers appointed by a committee include police officers appointed by a watch committee or standing joint committee, officers appointed by joint committees, etc.

[4] See *post*, pp. 232–38.

[5] See *post*, p. 233.

[6] Poor law officers are so much under central control that they are technically not officers of the local authority: see *post*, pp. 269–70.

[7] Local Government Act, 1933, s. 59. There are, however, certain qualifications on these disqualifications and certain additional disqualifications in the section.

These qualifications and disqualifications are primarily intended to secure two things, that the member shall have a real interest, as a member of the public, in the services provided by the council, and that he shall, on the other hand, have no substantial personal or material interest. On this basis, one omission may perhaps be surprising; there is no disqualification involved in being in contractual relations (other than as employee) with the council. There was such a disqualification until 1934; but the growth of trading through joint stock companies rendered it largely ineffective, because even the managing director and principal shareholders of such a company were not disqualified by the fact of a contract between the company and the council.[1] Also, exceptions had to be created for persons such as tenants of council houses. Accordingly, the disqualification was abolished by the Local Government Act, 1933, which provided that the disqualification should be not from being elected or being a member of the authority, but from voting on any matter in which he is interested. Section 76 (1) of the Act is in the following terms:

" If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall, at the meeting, as soon as practicable after the commencement thereof, disclose the fact, and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matter:

" Provided that this section shall not apply to an interest in a contract or other matter which a member may have

[1] *Lapish* v. *Braithwaite*, [1926] A.C. 275.

as a ratepayer or inhabitant of the area, or as an ordinary consumer of gas, electricity, or water, or to an interest in any matter relating to the terms on which the right to participate in any service, including the supply of goods, is offered to the public."

A " direct pecuniary interest " obviously arises when a member enters into a contract with the council; but it was thought necessary to state what was meant by " indirect pecuniary interest." He has such an indirect interest if :

(*a*) He or any nominee of his is a member of a company or other body with which the contract is made or is proposed to be made or which has a direct pecuniary interest in the other matters under consideration; or

(*b*) He is a partner, or is in the employment, of a person with whom the contract is made or is proposed to be made or who has a direct pecuniary interest in the other matters under consideration.

This is, however, subject to the proviso that membership of or employment under a public body does not disqualify from voting, and that a member or shareholder is not disqualified if he has no beneficial interest (because, for instance, he is a trustee).[1]

These provisions are not without their difficulties. What, for example, is now the position of the tenant of a council house ? He obviously has a direct pecuniary interest in the terms of his lease, such as the amount of rent which he is to pay. It is thought by some that this relates to " the terms on which the right to participate in any service . . . is offered to the public." But when once Tom Jones is admitted as a tenant the service represented by his home is no longer offered to the

[1] Local Government Act, 1933, s. 76 (2).

public; moreover, the rent which he pays may be determined by his own income and the size of his family, for powers for "differential renting" are now contained in the Housing Act, 1936. It seems probable, therefore, that tenants of council houses are prevented from voting on matters affecting those houses; yet in many towns a large section of the population, especially among the working classes, occupies such houses.

Again, difficulties have arisen through membership of co-operative societies. Members of such societies obviously have an indirect pecuniary interest in contracts made by such societies; but in many areas the majority of the inhabitants are members, and sometimes it is impossible to secure a quorum among the councillors who are not members. Also, the members of the council who are not disqualified may all belong to the political minority. For instance, the council may have a Labour majority, all of whom are members of the local co-operative society. The opposition may be members of the local "ratepayers' association" which perhaps represents the economic interests of the local tradesmen and which is, therefore, the sworn enemy of any society which returns the profits to its customers in the form of dividends, especially if that society is affiliated to the Co-operative Party, which is in alliance with the Labour Party. In such circumstances, the Labour members cannot vote for purchasing goods from the co-operative society, whereas the opposition can vote that contracts be made with each other—i.e. Councillor Bulle the butcher may move that fish be purchased from Councillor Fishe the fishmonger,

and Councillor Fishe that meat be purchased from Councillor Bulle, Councillor Fishe not voting on the first contract, nor Councillor Bulle on the second. The Minister of Health may remove the disqualification in any individual case, but not generally in respect of a class of cases.[1]

Such provisions are in fact of little value in preventing corruption. The direct voting of personal advantages to members practically disappeared with the Municipal Corporations Act, 1835, because the extension of the franchise enabled opponents to state the facts publicly and secure the rejection of corrupt candidates at the elections. In fact, any kind of corruption is rare; but where it exists it takes less blatant forms. There have been a few cases in which councillors or officials have taken bribes, though, of course, this is a serious offence;[2] but, where corruption exists, it usually takes the form of favouring friends either in the making of appointments or in the making of contracts. Though the disqualification from voting applies to committees as well as to the councils themselves,[3] and even more stringent rules against canvassing are usually laid down by the council in standing orders, it is very difficult to prevent wholly informal discussions at the bar of the local club, and still more difficult to prevent small tradesmen from believing that the council should "buy locally" from other small tradesmen, or politicians from believing that other things being equal jobs should go to persons who support the right party. The only

[1] Local Government Act, 1933, s. 76 (8).

[2] Public Bodies Corrupt Practices Act, 1889; Prevention of Corruption Acts, 1906 and 1916.

[3] Local Government Act, 1933, s. 95.

real check is the existence of a fearless and suspicious opposition, which is almost impossible where people believe that party politics should be kept out of local government.

All councillors are elected for periods of three years. The councillors of parish councils, metropolitan borough councils, county councils, and some urban and rural district councils retire together every third year, when there is a miniature general election. The councillors of boroughs and of urban and rural districts (unless the county council, at the request of the district council, has made an order for all the councillors to retire together)[1] are elected as to one-third every year. The result of the latter system is that a sudden change in public opinion cannot at once change the composition of the council; and the system is defended as providing for greater continuity and at the same time preventing sudden changes by the gusts of passion which are sometimes assumed to arise under the democratic system.

Each county councillor is elected for a separate electoral division.[2] These electoral divisions generally follow the boundaries of county districts and of the wards within the county districts. For instance, if a non-county borough is divided into three wards, each returning six members to the borough council, it will generally be found that there is one county councillor for each ward. The boroughs, as this example illustrates, are generally divided into wards, each of which returns one or more councillors at each election; but

[1] Local Government Act, 1933, s. 35 (3).
[2] *Ibid.*, s. 10.

such a division is made only by the Secretary of State at the request of the borough council, and though it is unusual there are some smaller boroughs in which the borough forms a single electoral district.[1] Such a system is more common in urban districts, which may be divided into wards by an order made by the county council (whether or not the district council asks for it).[2] Urban districts are usually fairly compact, and the system of a single election is not convenient for rural districts, which are divided into electoral districts consisting of separate parishes, or combinations of parishes, or wards of parishes.[3]

All these elections are held according to principles followed in parliamentary elections since 1872. That is, there is secret ballot, and each elector has the same number of votes as there are seats to be filled. Proportional representation has never been adopted, though there have recently been suggestions for its application to elections for the metropolitan borough councils. On the other hand, the election of parish councillors usually takes place openly in the parish meeting,[4] but a poll may always be demanded, and in some parishes orders have been made by the county council [5] for the adoption of the system of nomination, followed by a poll, which is used for district councils. In such a case the parish may be divided into wards by order of the county council; but if this is not done the parish forms a single electoral district.

[1] Local Government Act, 1933, ss. 24 and 25.
[2] *Ibid.*, s. 37.
[3] *Ibid.*, s. 38.
[4] *Ibid.*, s. 51.
[5] At the request of the parish council or parish meeting, and under s. 51 of the Local Government Act, 1933.

The main difficulty in local elections is to persuade people to vote. Even in the boroughs, which have a distinct civic life and consciousness, a poll of forty per cent. is regarded as satisfactory, and polls of twenty-five per cent. are quite common. In county and district elections there are often no contests owing to the absence of competition for seats; and where there are contests the proportion of voters is often very low. The reasons vary from place to place, but some are of general application. In the counties it is often difficult to obtain candidates owing to the work and the travelling involved. Moreover, though the county councils now administer some of the most important local services, it is difficult to arouse interest in services which are lacking in dramatic interest and at the same time remote in their administration. It is usual to find that, though the main services of a non-county borough are provided by the county council and not by the borough council, the elections for the latter arouse more interest than those for the former. Partly this is due to the remoteness, partly to the lack of publicity in local newspapers, partly to the fact that the rural areas are given representation out of proportion to their population and rateable value (so that the borough members have little influence upon the county government), partly to the difficulty of finding able candidates, and partly to the parochial nature of local politics. Local government rarely provides major political issues of the kind which rouses interest in national politics; local elections are more frequent; there is often a complete absence of party opposition; and except in London and the great

towns there is nothing like the change of government which may be the consequence of a national election.

The system of party contests in which candidates are nominated by political parties is common in London and other big towns, and in some of the counties and districts. It began in Birmingham in the seventies and was extended to London in 1889. It has become much more general since the rise of the Labour Party. It is sometimes argued that party politics are unnecessary in local government. The main lines of policy are laid down by Acts of Parliament and, in many services, by the Central Government. Much of the work, too, consists of detailed administration of services where political principles give no assistance. There is, however, a wide range of discretionary powers, and their exercise involves some kind of *ethos*. Also, democracies have found by experience that opposition which is not destructive or obstructive is essential to the efficient and honest operation of representative institutions. Government by collections of "independents" often becomes a series of private deals enlivened by personal squabbles. Though it is not always true, as a famous Whig statesman once asserted, that "independent members are members who cannot be depended upon," the combinations necessary for majority government are more likely to be honest if they are based upon common philosophies than if they are based on rival personal interests. If there is a common policy, the action of each is determined primarily by that policy, and personal rivalry is limited to contests for influence within the party, whose members are concerned more with the policy than with personalities. Where there is no such

policy, the element of personality tends to become predominant; some want power, some publicity, and some profit, and the resulting policy is an amalgam produced by cliques and coteries. Parties, too, arouse interest in elections by organising the electorate and stimulating it to a realisation of its public duty. Nor is an occasional transfer of power wholly undesirable. While on the one hand it supersedes an experienced chairman of a committee or alderman by an inexperienced substitute from the opposite party, it prevents that unthinking acceptance of routine which is the negation of initiative and enterprise; and above all it prevents the system, only too common in most of the counties, of re-electing chairmen of committees and aldermen until they die of senile decay.

In the boroughs and counties aldermen are elected by the council, but aldermen as such are forbidden to vote.[1] They are, therefore, elected by the elected councillors, though the mayor or chairman has a casting vote whether or not he had a vote in the first instance. That is, a mayor or chairman who is not an alderman has a vote and, if necessary, a casting vote; if he is an alderman he has a casting vote only. The number of aldermen is as nearly as may be one-third of the number of councillors, and they are elected for periods of six years, one-half retiring every three years. Thus, unless the parties are very evenly balanced, the annual election for boroughs cannot change the political complexion of the council. For only one-third of the councillors (i.e. one-quarter of the council) are seeking re-election, and the new council will at

[1] Local Government Act, 1933, ss. 7 and 22.

most elect one-half of the aldermen (or one-eighth of the council). The effect may be gauged by assuming a borough council of 96 councillors and 32 aldermen, of whom 84 councillors and 28 aldermen are Conservatives and 12 councillors and 4 aldermen are members of the Labour Party. If there is a sudden change of opinion in the electorate, which decides to support the Labour Party, that party cannot possibly gain more than 32 seats at the annual election, and this will still give the Conservatives a majority of 52 to 44 among the councillors, and unless the election precedes the triennial election of aldermen and there is an agreement for the election of aldermen in proportion to the number of councillors in each party, the Conservatives will still have at least the same proportion as before among the aldermen. It is, in fact, possible for a change of party representation among the councillors to be nullified by the aldermen. If the council consists of 50 Conservative and 46 Labour councillors and 18 Conservative and 14 Labour aldermen, a gain of three seats by the Labour Party will still leave them in a minority of 2, unless there is to be a new election of aldermen.

Such a situation cannot arise in a county council, where all the councillors retire together every three years. But there are few county councils where the parties are more or less equally balanced; and most of the counties, like most of the smaller boroughs, have a high proportion of independent councillors. The result is that the aldermen also are "independents" and therefore are re-elected time after time. There are still some counties with county aldermen who were first

elected as such when the council was established in 1889.

Aldermen need not be elected from among the councillors, though it is usual for councillors to select aldermen from among themselves. Similarly, the chairman or (in a borough) the mayor need not be chosen from among the members of the council. For instance, the Labour majority on the London County Council in 1934 elected Lord Snell as chairman, though he was neither a county councillor nor a county alderman. This again, is rather exceptional.

The mayor or lord mayor has by tradition a rather more dignified position than the chairman of a county or district council. Apart from the trappings of dignity, such as the mayoral gown and mace, he has by statute social precedence over all persons in the town, subject only to the precedence of the Lord-Lieutenant of the county [1] (i.e. when the King visits the town, the Lord-Lieutenant presents the mayor, not the mayor the Lord-Lieutenant, though the mayor presents the other local worthies). He is a justice of the peace for the borough and for the county and presides at all meetings of the borough justices.[2] His chief governmental function is to preside over the meetings of the council; but

[1] Local Government Act, 1933, s. 18 (5). The Lord-Lieutenant takes precedence because the subsection saves the royal prerogative.

[2] Local Government Act, 1933, s. 18 (7)–(9). He also presides at meetings of the county justices in the borough when the borough business is being dealt with. It must be remembered (*a*) that not every borough has a separate commission of the peace, and (*b*) the separate commission does not necessarily exclude the jurisdiction of the county justices. In practice, however, county justices do not take borough business where there is a borough commission, especially if the borough has its own police force, except in quarter sessions.

he acts generally as the representative of the borough, laying foundation stones, opening bazaars, presiding at non-political meetings, and generally exercising within the town the social function which the royal family performs in a wider sphere. He is not, however, an executive officer, responsible for formulating the policy of or " leading " the council. His office is quite different from that of the mayor of an ordinary American city. If the council has a " leader " he is not the mayor but the chairman of the party containing the majority of members of the council. The mayor is rather the social figurehead, the representative of the council as a whole, and a more or less impartial chairman. In many towns there is a gentleman's agreement by which the mayor is chosen from each of the parties represented on the council in turn. The nominee of the appropriate party is then elected unanimously, and it may thus happen that the mayor belongs to a party which has only a minority of the council.

Though he is not an executive or political leader, the mayor of a large town may have to devote much of his time to his official duties. Though council meetings are few, ceremonies are many. Also, even if he does not suffer financially through having to devote time to the business of the borough, his expenses are heavy; and many towns therefore make use of their legal powers [1] to pay him remuneration. Election is for one year only; and in the large towns re-election is rare.

The position of a chairman of a county council or district council is quite different, though the difference is one of tradition rather than of law. Though neither

[1] Local Government Act, 1933, s. 18 (4).

office confers precedence, the chairmen are justices of the peace for the county,[1] and the chairman of the county council may be paid remuneration. Nevertheless, the chairman of the county council has none of the social functions of a mayor, and he is usually reappointed year after year until he decides not to seek re-election. In a few urban districts the chairman of the district council occupies much the same status as the mayor of a borough; but generally speaking he is, like the chairman of the county council, a chairman only.

[1] Local Government Act, 1933, ss. 4 (5) (county council) and 33 (5) (urban or rural district council).

CHAPTER V

THE WORKING OF LOCAL AUTHORITIES

§ 1. *The Committee System*

THE functions conferred upon councils are at once numerous, complicated, and technical. Obviously, the work cannot be done by the councillors themselves. When we visit a school provided by a local education authority, we do not find that the teaching, the cleaning, and the stoking of the boiler are being carried out by members of the council, nor do we find the mayor, aldermen, and councillors engaged in building a house on a municipal housing estate. The actual work is done by workmen—known technically as "servants"—under the control of senior officials, known technically as "officers."[1] The members of the council take decisions as to policy, and the officers report on the questions requiring decision and see that the decisions are carried out.

It is, in fact, difficult to generalise as to the relations between councillors and officials. The process of administration requires decisions from day to day. For instance, we do not expect that little Tommy will

[1] Speaking generally, "servants" are manual workers, and "officers" are administrative or clerical officials. "Officers" are within the compulsory superannuation scheme established or maintained under the Local Government (Superannuation) Act, 1937. "Servants" are within the scheme only if the local authority so resolves.

figure on the council agenda every time that it is thought that he ought to be put in the corner for being naughty. Little Tommy's teacher will take the decision in each case. On the other hand, the teacher cannot be allowed to teach what he pleases. If he finds arithmetic a bore and history exciting, he cannot spend all his time teaching history; he has to follow a time-table laid down by higher authority. But who is that higher authority? It can hardly be the council, especially in a large area. If a county council had to consider details such as this at every quarterly meeting it would be permanently in session. Probably the question will be left to the headmaster, though it may be thought desirable that the general principles should be determined by higher authority. Again, the appointment of a teacher can hardly be left to be decided by the council. Though the council may decide the number of teachers, it is not possible for all the candidates for a teaching post to be examined by the 120 (say) members of the county council at the quarterly meeting. On the other hand, it may not be desirable to leave the appointment entirely in the hands of the headmaster.

Such problems arise in every department of local government, and different councils arrive at different solutions. One thing is clear, however: there is need for some unit of control between the council and the officials. Obviously, that unit must be a committee. There must be an education committee, among others, but there may be questions of sufficient importance to be dealt with by councillors, and yet not of sufficient importance to be dealt with by the full education committee. For instance, the education committee may be

concerned with thirty schools. There are certain questions which relate to all these schools, and certain questions which relate to each school separately. Obviously, it is convenient to have a separate sub-committee for each school, dealing with the special questions of that school. Also, there may be questions affecting all the schools which are too detailed and technical to be dealt with by the whole education committee. For instance, each school requires lead pencils and other supplies, but it is probably cheaper to purchase supplies for all the schools in a single contract. Accordingly, there might be a single Supplies Sub-Committee of the Education Committee. In fact, however, it might be desirable to have a single committee dealing with all the supplies for all the departments of the council. In that case there will be a Supplies Committee of the council, or else a Supplies Sub-Committee of the Finance Committee or General Purposes Committee.

Thus, every large council has a network of committees and sub-committees, and even a small council usually has a few committees. The division of functions may be based either on the "vertical" (or "functional") system or on the "horizontal" (or "aspect") principle. For instance, an Education Committee deals with a particular service, namely, education. There are also Public Health, Housing, Watch (i.e. Police), Gas, Electricity, and similar Committees organised on a functional basis. But each of these will in some respects perform functions of the same kind; each will have buildings to provide and maintain; each will make appointments; each will purchase

supplies such as stationery; and so on. Theoretically, it would be possible to divide all these functions in a "horizontal" manner, so that there would be a Works and Buildings Committee, an Establishments Committee, a Supplies Committee, and so on. In practice, both systems are used. All the officials of a non-specialised kind (excluding, for instance, police, teachers, doctors, etc.) are controlled by an Establishments Committee; all supplies of a non-specialist character (e.g. stationery) are provided by a Supplies Committee or Sub-Committee; and so on. These committees are, however, additional to the ordinary "functional" or "vertical" committees. One function which certainly needs to be generalised, or exercised on the "horizontal" principle, is that of finance. Obviously, it cannot be permitted that each committee spend as it pleases. The finance of the council must be looked at as a whole. Consequently the Education Committee may recommend expenditure on education; but the Finance Committee will recommend about expenditure as a whole; and if the Finance Committee thinks that the Education estimates are too high, the council may order the estimates to be referred back to the Education Committee.

Local authorities have a general power to set up committees, and (except in the case of a Finance Committee) a committee may include persons who are not members of the council, provided that at least two-thirds of the members of the committee are members of the council.[1] But many statutes either authorise or require a local authority to set up committees for

[1] Local Government Act, 1933, s. 85 (1) and (3).

special purposes. For instance, every county council must have a finance committee;[1] every local education authority must have an education committee;[2] every county council and county borough council must have a public assistance committee;[3] every maternity and child welfare authority must have an appropriate committee;[4] every borough council must appoint a watch committee;[5] and so on.

The reason for these "statutory committees," as they are called, is that the mere grant of powers to a local authority does not secure that the powers will be exercised. Though there are means, chiefly through central control,[6] of compelling local authorities to carry out duties, and even to exercise powers which are in large part of a discretionary nature, the only really effective method is to provide, as far as possible, that there are on the council members specially concerned with the particular problems which the powers are intended to solve. If, for instance, a maternity and child welfare committee meets regularly, it must at intervals consider desirable developments. The medical officer of health will present suggestions to it; circulars from the Ministry of Health about maternal mortality will be presented to it; statistics will not only be compiled but also be examined; and generally there will be some councillors whose particular function it will be to examine proposals for developing the service. Some-

[1] Local Government Act, 1933, s. 86.
[2] Education Act, 1944, 1st Schedule, Part II.
[3] Poor Law Act, 1930.
[4] Maternity and Child Welfare Act, 1918.
[5] Municipal Corporations Act, 1882, s. 190.
[6] *Post* Chapter VIII.

times, again, a particular method of administration is required. Many counties govern too large an area for public assistance to be administered as a single unit throughout the county. Accordingly, it was decided in 1929 that there must be area sub-committees (called "guardians committees"), each exercising functions for part only of the county, and that the councils of county districts should be represented on these sub-committees. Accordingly, the Local Government Act, 1929 (and now the Poor Law Act, 1930), provided for the making of "administrative schemes" (approved by the Minister of Health) by which a Public Assistance Committee and guardians committees were set up and poor law functions divided among them.

In the case of county education there is the further problem that people in the separate urban areas are specially concerned with the education of their own children, and not much interested in the education of children elsewhere in the county. This problem was met under the Education Act, 1921, by constituting some boroughs and urban districts as local education authorities for elementary education only, the so-called "Part III authorities." The fusion of elementary and secondary education under the Education Act, 1944, made this solution no longer possible. Accordingly, the Act provides that "for the purpose of securing that the functions of local education authorities will be exercised with due regard to the circumstances affecting different parts of their areas, and with the co-operation of persons having special knowledge of such circumstances," the county council shall make a "scheme of divisional administration," to be approved by the

Minister of Education, for constituting "divisional executives" which will exercise on behalf of the county council such functions relating to primary and secondary education as may be specified in the scheme. The council of any borough or district might, however, claim before the 1st October, 1944, that it be excepted from a scheme of divisional administration. If the borough or urban district had in 1939 either a population of 60,000 or as many as 7,000 children on the roll of its elementary schools, the Minister was bound, in the absence of special circumstances, to direct the county council to except the borough or urban district, and might do so in any other case. In a borough or district so excepted the borough or district council became the divisional executive in accordance with its own scheme of divisional administration. In the counties, therefore, there is devolution of administrative powers in respect of education, though the divisional executives are not authorised to borrow money or to levy a rate, and must therefore obtain their funds from the county council.

A committee or a sub-committee may exercise two kinds of functions. Certain matters may *stand referred* to it. In this case any particular question is first examined by the committee, which reports to the council, and the council takes the decision. Other functions may be *delegated* to it, in which case the committee or sub-committee actually takes the decision, and may or may not report to the council or committee afterwards. For instance, if a poor person in a county claims public assistance, his claim is examined by a relieving officer, and on the basis of his report the

guardians committee (or, often, a sub-committee of that committee) decides whether assistance may be given to him, and of what kind and amount. If the case is one of special difficulty, it will probably not be dealt with by the sub-committee, but will be referred to the full guardians committee after report, and in some cases the guardians committee itself is instructed to refer certain special kinds of cases to the public assistance committee. But the discretion of the guardians committee will be limited by scales laid down either by the public assistance committee, or by the council after report from the public assistance committee. Similarly, the detailed management of a public assistance institution will be left to a management committee, which is perhaps a sub-committee of an institutions committee, which is itself a sub-committee of the public assistance committee. On the other hand, if the management committee considers that an additional wing is required in order to meet demands for accommodation, it will report to the institutions committee, which will consider the matter in the light of all the accommodation available (it might, for instance, consider that the need for increased accommodation could be met by transferring the mental defectives to another institution). If the institutions committee thinks that some action should be taken, it will report accordingly to the public assistance committee. If a mere rearrangement of inmates would meet the case, that committee might decide accordingly; but if it considered that an additional wing should be built, it will merely report to the county council, which will probably require a report from the finance committee, and then

take the decision. If it is desired to finance the building of the additional wing by means of borrowed money, yet another stage will be required, for the consent of the Minister of Health will be necessary.[1]

This complicated structure does not exist among the smaller authorities. A rural district council of ten members, for instance, is so small and its functions are so few and unimportant that not more than two or three committees may be required. Nor is the complication quite so great for all functions. The county system is usually more complicated than a borough system, chiefly because of the area over which the functions have to be exercised. Also, few services require such a warren of sub-committees as is needed for public assistance and education.

It is obvious, however, that councillors play a large part in detailed administration, and that with a large body like the London County Council or the Birmingham City Council they must devote a substantial part of their time to committee work. The London County Council, at its weekly meeting, may have an agenda paper of one hundred foolscap pages, consisting almost entirely of reports from committees. Few of these reports will be discussed, and proposals to spend hundreds of thousands of pounds may go through without debate because they have been elaborately argued in a hierarchy of committees and sub-committees.[2]

[1] See *post*, pp. 214–16.

[2] This, of course, applies to all large administrative units. The agenda paper for the monthly meeting of the Senate of the University of London is about twice the size of that for the weekly meeting of the London County Council.

The number of committees and sub-committees and the extent of delegation varies enormously from council to council. Apart from cases where special provision (as in poor law and education administration) is made, local authorities have a general power to set up committees and to delegate any matters to committees except the power of levying, or issuing a precept for, a rate, or of borrowing money.[1] A committee cannot *delegate* to a sub-committee, though it can refer any matters to such a sub-committee, and the council itself may (it seems)[2] delegate matters to sub-committees. But some councils are chary of delegating powers, and others are eager to do it.

The committee system may easily be carried to excess. The time of councillors ought not to be wasted on routine matters which can be dealt with by officials, and with a fully qualified staff many decisions even of some importance can be taken by officials. Matters of far greater importance than those brought before councils are often dealt with by civil servants; and often the Minister's signature to a document is a mere formality. For instance, the decision to pull down a group of four houses and to rehouse the inhabitants may be taken by a council after long discussions by its housing committee; that decision cannot take effect, however, without the sanction of "the Minister." It is, however, reasonably certain that the Minister will not look at the papers. The effective

[1] Local Government Act, 1933, s. 85 (1).

[2] There is no express power, but see Jennings, *Law relating to Local Authorities*, p. 152. In any case, delegation to sub-committees usually occurs in respect of public assistance and education, for which special rules are laid down.

decision will be taken by a civil servant of the rank of assistant secretary, and probably his examination will be cursory because he acts upon the minute of a still lower official.

Even where the decision is wholly that of a sub-committee there may be doubt as to where the line should be drawn. The law requires that Mrs. Murphy's claim to poor relief shall be considered by the appropriate guardians committee of the county council. But her case is probably typical, in no way different from many others, and capable of being decided without difficulty in accordance with the scale laid down by the public assistance committee and approved by the council. Why should the time of councillors be wasted by listening to Mrs. Murphy? Some councils, in fact, have found difficulty in inducing councillors to attend; and two county councils have secured special authority from Parliament to delegate the function to officials. This is an example where (in the case of a county council only—not a county borough council) legislation was required. Usually, however, the method of administration is left to the discretion of the council, and thus wide variation is possible.

Where there is a hierarchy of sub-committees and committees, as in the education and public assistance functions of large county and county borough councils, the questions for decision become more general as they proceed from the sub-committees to the committees, and from the committees to the council. General principles are determined by the council itself; within these general principles questions of principle are settled by the committees, and the detailed administra-

tion is carried out by sub-committees or officials. The more general the principle involved, the greater the possibility that political principles or party "ideologies" will be involved. If, for instance, it becomes a question between cost on the one hand and more liberal educational facilities on the other, it is probable that the members of a Ratepayers' Association affiliated to the National Union of Ratepayers' and Property Owners' Associations (a body whose "ideology" may be described roughly as being to the right of the Conservative Party) are likely to emphasise the cost more than members of the Labour Party. On the other hand, no "ideology" is involved in deciding whether schoolchildren shall write in books or on separate sheets of paper. Even decisions of a council may involve no political questions. For instance, it is probable that a difference of opinion as to whether trams on a certain route should be replaced by trolley-buses would not follow party lines; and certainly the exact location of a pedestrian crossing would arouse no party controversy unless, say, the question were whether it should lead to a public house or a chapel.

Nevertheless, there is plenty of scope for party controversy, especially in the council and its major committees, where questions of principle are discussed. Where the party system operates, such questions are really decided not in the council or committee but in the meeting of the majority party beforehand, or by the decision of the party leaders. For instance, the decision of the London County Council to replace Waterloo Bridge was taken not in the appropriate committee nor in the council, but in a party meeting.

Consequently, the debates on the question were like debates in Parliament, in that their result was known beforehand. The council meeting thus becomes not an instrument for decision but, like the House of Commons, an instrument for propaganda. On the other hand, there may be effective discussion of what are significantly known as "committee points"—minor questions about which arguments may be made with a view to convincing.

Where the party system does not operate, it is still true that only "committee points" are really settled in committee. The wider issues of policy are really determined by the common "ideology" of the members. The smaller urban authorities, for instance, are composed almost entirely of the "small tradesman" class who would be in France Radical Socialists. To such persons (as, of course, to all persons), certain principles are self-evident truths. So long as there is no political opposition it is not realised that one man's truth is another man's falsehood; and there is no need to discuss principles because their basis is axiomatic. On the other hand, the application of these axioms gives rise to differences of opinion which are largely personal. Some members want power, some prestige, some publicity, and some more material advantages. There is, consequently, a process of private discussion by which an agreed scheme is forthcoming; and more often than not when the question reaches committee it is *res judicata*.

§ 2. *Officials*

Though there were a few earlier examples, the paid local government officer was for practical purposes the

invention of the nineteenth century. Leaving aside the manual workers or "servants," and also special classes of employees like teachers and policemen, there were in 1932 about 130,000 officers employed by local authorities. Though appointed by these authorities they are tending to form a local government service comparable with, though in many respects differentiated from, the Civil Service. Conditions throughout the country are gradually being equated through the machinery of Whitley Councils and pressure by the National Association of Local Government Officers, which, in 1938, had over 102,000 members. The local authorities' associations (other than the Association of Municipal Corporations), the London County Council, and the Metropolitan Boroughs Standing Joint Committee have an advisory committee which may assist in standardising conditions still more. There is a common system of superannuation under the Local Government Superannuation Act, 1937, for all officers who are not covered by superannuation Acts provided for special classes of officers. The senior officials move from district to district in course of promotion as posts become vacant.

In certain cases local authorities are compelled by law to appoint officers. Thus, under the Local Government Act, 1933, the following officers must be appointed:

(*a*) County councils—clerk, county treasurer, county medical officer of health, and county surveyor.

(*b*) Borough councils—town clerk, treasurer, surveyor, medical officer of health, and sanitary inspector.

(*c*) District councils—clerk, treasurer, surveyor, medical officer of health, and sanitary inspector.

As will be seen presently, the Minister of Health has power to determine what poor law officers the council of a county or county borough shall appoint, and officers have to be appointed under other Acts. Most large authorities, however, require far more officers than they are compelled by law to appoint. For instance, the City Council of Salford is compelled by law to have a town clerk. In fact, however, the Town Clerk's Department in 1937 contained not only a town clerk, but also a deputy town clerk, an assistant solicitor, a conveyancing clerk, a common law clerk, eight legal clerks, one chief administrative assistant, six committee clerks, eight general clerks, six local licensing clerks, and other officers to the total number of 51. Again, the Act says that it must have a city treasurer, but it had in addition 186 officers in the City Treasurer's Department.[1]

In certain cases the Central Government has powers of control. Thus, section 10 of the Poor Law Act, 1930, enables the Minister of Health to direct the council of a county or county borough to appoint such officers, with such qualifications as the Minister thinks necessary, for purposes of poor relief. He may define their duties and the limits within which they are to act, and direct the mode of appointment and determine the continuance in office or dismissal of such officers. By section 11 of the same Act he is empowered to appoint such officers himself if the council fails to do so within 28 days, and to determine their salaries, which they can recover from

[1] See L. Hill, *The Local Government Officer*, Appendix III, pp. 182–90, where the "designated posts" for superannuation purposes of the Salford City Council are set out.

the council. By section 13 of the Act, also, the Minister has power to suspend or remove poor law officers. These provisions have no parallel in local government legislation, and in fact they are not exercised to the full extent. Under the Public Assistance Order, 1930, the Minister limits the exercise of his powers in practice to "senior poor law officers" as there defined. The Order determines what senior poor law officers shall be appointed (though often with the addition of the words "if requisite" which leaves a discretion to the local authority), prescribes their qualifications and specifies their duties. It is provided that such an officer may not be dismissed nor have his salary reduced without the consent of the Minister of Health. Subject to these restrictions, "the council may appoint or employ any officer or servant on such terms and conditions of service as they think appropriate, may suspend or remove him from office, and may pay him such remuneration and also such reasonable compensation on account of any extraordinary services of unforeseen circumstances connected with his duties as they think fit." [1]

In no other case does central control go quite so far. The essential qualifications of medical officers of health are laid down by legislation,[2] and the duties of county medical officers of health are prescribed by regulations issued by the Minister of Health.[3] The Minister also has power—which he exercises—to prescribe by regulations the qualifications and duties of medical officers of

[1] Public Assistance Order, 1930, art. 151.
[2] Local Government Act, 1933, ss. 103 and 108 (3).
[3] *Ibid.*, s. 103.

health appointed by borough and district councils, and these are obligatory on every council. He may prescribe in addition the mode of appointment and tenure of office of medical officers and sanitary inspectors appointed by non-county borough and district councils; but the regulations are not obligatory unless the council receives a grant in aid of the salary of an officer from the county council.[1] In any case, a medical officer or senior sanitary inspector of a borough or district council cannot be dismissed without the consent of the Minister.[2] The salary paid to the clerk to a county council must be approved by the Minister,[3] and he cannot be dismissed without the Minister's consent.[4]

Under the Public Health Act, 1936, the Minister has power to make regulations prescribing the qualifications of medical officers of health and health visitors appointed for dealing with tuberculosis, venereal disease, and maternity and child welfare.[5] Public analysts must possess qualifications prescribed by the Minister of Health, and their appointment and removal require the Minister's consent.[6] Inspectors of weights and measures and inspectors of gas meters must hold certificates of qualification issued by the Board of Trade.[7] Where the Minister of Transport agrees to

[1] Local Government Act, 1933, s. 108; for the county council grants, see s. 109.

[2] *Ibid.*, s. 110.

[3] *Ibid.*, s. 99 (1).

[4] *Ibid.*, s. 100.

[5] Public Health Act, 1936, ss. 180 and 204.

[6] Food and Drugs Act, 1938, s. 66.

[7] Hadow Report, p. 11.

defray part of the salary of an engineer or surveyor to a local authority, his appointment and dismissal are subject to that Minister's approval.[1] Under section 88 of the Education Act, 1944, a local education authority must appoint a fit person to be chief education officer, and may not make an appointment except after consultation with the Minister of Education. When the authority proposes to make such an appointment, particulars must be sent to the Minister showing the name, previous experience, and qualifications of the persons from whom they propose to make a selection. If the Minister considers that any person whose name is so submitted to him is not a fit person, he may give directions prohibiting his appointment. The "Burnham scales," which are followed by nearly all local education authorities, are not absolutely imposed on those authorities, but the committees which draft such scales are approved by him, and by section 89 of the Act of 1944 he may by order make such provision as appears to him to be desirable for the purpose of securing that the remuneration paid to teachers is in accordance with the scales. In practice no grant is paid to any local education authority whose salary scales are lower than the Burnham scales.

Finally, the Secretary of State has power, which he exercises in Police Regulations, to make regulations as to the government, pay, allowances, pensions, clothing, expenses, and conditions of service of members of all police forces in England and Wales;[2] and any member of a police force who is dismissed or required to resign

[1] Hadow Report, and see Ministry of Transport Act, 1919, s. 17 (2).
[2] Police Act, 1919, s. 4.

as an alternative to dismissal has a right of appeal to the Secretary of State.[1]

Apart from these cases and other cases under special classes of legislation, the general rules of the Local Government Act, 1933, apply. The council must appoint such officers as it may think necessary and may pay such " reasonable remuneration " as it may determine. Such officers hold office during the pleasure of the council; but this does not prevent the making of an agreement for a reasonable period of notice on either side, nor does it prevent the termination of an officer's appointment when he reaches the retiring age provided by one of the Acts relating to superannuation.[2] The only other limitation is that provided by section 122 of the Act of 1933:

"A person shall, so long as he is, and for twelve months after he ceases to be, a member of a local authority, be disqualified for being appointed by that authority to any paid office, other than to the office of chairman, mayor or sheriff."

[1] Police (Appeals) Act, 1927, s. 1.

[2] For county councils, see Local Government Act, 1933, s. 105; for borough councils, *ibid.*, s. 106; and for district councils, *ibid.*, s. 107. For agreements for notice and retirement, see *ibid.*, s. 121. As to superannuation, see Poor Law Officers' Superannuation Act, 1896; Asylum Officers' Superannuation Act, 1909; Teachers' Superannuation Acts, 1925 to 1937; and Local Government Superannuation Act, 1937.

CHAPTER VI

POWERS AND THEIR ACQUISITION

§ 1. *Local Authorities as Corporations*

THE law of England was developed primarily to regulate the actions of ordinary individuals. It prohibited them from committing offences, gave remedies to those who suffered injury by the acts of others, and regulated their property rights. At a later stage, as trade grew, it developed a law of contracts. From an early period there were corporate enterprises, monasteries, guilds, and boroughs, and, after the dissolution of the monasteries, schools, hospitals, and other charities. These were, however, exceptional, and it was only with the development of large-scale capitalism that the collective enterprise became important. To-day, all public services and most private services are provided and maintained by collectivities. Let us consider, for instance, the first few hours of a clerk who lives at St. Albans and works in London. He has breakfast in the bosom of his family. His family relations are still relations between individuals. His house is, we will suppose, his own property, so that his rights in it are individual rights, though they are very much circumscribed by local government law, which confers powers on the St. Albans City Council, a collective enterprise. Probably, too, the house is mortgaged to a building society, another collective enterprise. His breakfast

consists of cereals, bacon and eggs, and coffee. His cereals are probably manufactured by a joint stock company, his bacon is marketed under the control of the Bacon Marketing Board, though perhaps his eggs come from a poultry farmer who still runs an individual business in a collectivist world. His coffee is imported by a joint stock company. But, probably, all the materials of the breakfast have been bought from the St. Albans Co-operative Society or a chain-store grocery and cooked by means of gas supplied by the Watford and St. Albans Gas Company and water supplied by the St. Albans Water Company.

Having had his breakfast and read a newspaper produced by a joint stock company, he kisses his wife (a practice not yet regulated by collectivist enterprise), and steps into a street maintained by the St. Albans City Council. After passing along a main road maintained by the Hertfordshire County Council, he enters a train provided by the London, Midland and Scottish Railway Company (subject to statutory control), smokes a pipe (produced by a joint stock company) of tobacco produced by a joint stock company and in due course is deposited at St. Pancras Station. There he takes an omnibus provided by the London Passenger Transport Board to run along a road maintained by the London County Council. He alights at the door of the office where he is employed by a joint stock company and where he spends his time dictating letters to other joint stock companies until he goes out to a lunch provided by yet another joint stock company.

This example shows that this is indeed the collectivist

age, and though the law generally lags behind social development, it has had to take account of the fact that the collectivist enterprise is the main instrument of modern economic life. Indeed, the developments have become possible because the law has provided the means, the device of the *corporation*. There are several types of corporations and, indeed, there are enterprises (such as trade unions) which may be described as "quasi-corporations." In connection with local government law, however, we are concerned with two kinds only.

From a legal point of view, the distinguishing characteristic of a corporation is that it is a legal "person." That is, it is regarded as being capable of holding property, making contracts, committing torts and crimes, and suing and being sued, as if, or almost as if, it were a private person. Obviously, the law cannot apply to the fullest extent. The London County Council cannot be imprisoned, or be whipped as a rogue and vagabond, or marry, or even seal a contract; but most things can be done by agent, and there is nothing to prevent the acts or omissions of an agent from being attributed to the Council. Property may be held, contracts made, torts and crimes committed, and actions brought and defended, on behalf of the corporation by its agents and servants. Naturally there are parts of the law, such as the law of marriage and divorce, which cannot be applied; but there are comparatively few acts or omissions which cannot be said to have been done or neglected on behalf of the corporation by servants acting in the course of their employment.

Private individuals become legal "persons" by the mere fact of being born or coming within the jurisdiction of English law; but something more is required to make a group or collectivity into a legal person. For our present purpose, it may be said that legal personality is given either by charter from the Crown or by Act of Parliament. The boroughs, as we have seen, are created by royal charter, while the councils of counties, districts, and parishes are incorporated by the Local Government Act, 1933.

Mere incorporation does not give powers of government. It merely creates a legal personality or capacity equivalent to that of a private individual. At most, therefore, it confers those rights, powers, and duties which a private individual possesses. Even in this respect there is, or may be, a limitation. A corporation is created by statute to carry out certain purposes. A railway company cannot operate air services unless it receives special statutory authority for the purpose. Similarly, the London School of Economics and Political Science, a company incorporated under the Companies Acts for certain educational purposes, cannot operate a football pool. There is nothing to prevent me (except my absence of capital and my sense of my own incompetence) from doing either. Certainly the law does not forbid me. They are within my legal powers because I am a private person; they are not within the powers of any statutory corporation which is not incorporated for those purposes. Hence an act done on behalf of a statutory corporation outside the purposes for which the corporation is incorporated is said to be beyond its powers, or *ultra vires*.

If, therefore, the servants or agent of a corporation enter on behalf of the corporation into a contract which is *ultra vires*, the contract is void and cannot be enforced either by or on behalf of the corporation. Thus, in *Ashbury Railway Carriage and Iron Co.* v. *Riche*,[1] the company was incorporated for the manufacture of railway material. The directors, on behalf of the company, contracted to purchase a concession to build a railway in Belgium. The House of Lords held that the contract was not enforceable against the company. When a company is incorporated by or under statute for certain purposes, the statement of the purposes has both an affirmative and a negative character. It affirms that the company may fulfil those purposes and denies that it may fulfil other purposes.

In respect of the purchase of land, the position is not quite so clear. It is evident that if a contract is made for the purchase of land for a purpose which is not authorised by or under the statute, the contract cannot be enforced on either side. But if the contract is fulfilled and the land conveyed, it seems that the land vests in the corporation. Thus, in *Ayers* v. *South Australian Banking Co.*[2] it was held that where a company had taken a security for an *ultra vires* debt, the transfer of the security was valid. Similarly, in *Batson* v. *London School Board*,[3] where the board had acquired a lease of property which it had no power to acquire, the lease was valid. It is not certain that these decisions would be upheld. In respect of liability for torts, too, there is difficulty, though this subject is best postponed until

[1] (1875) 7 H.L. 653. [2] (1871) 3 P.C. 548.
[3] (1903) 67 J.P. 457.

the whole question of the liability of local authorities is examined.[1]

As has been said, the councils of counties, districts, and parishes are statutory corporations. Unlike commercial bodies and such public utilities as railway, gas, and water companies, however, they are not incorporated for any purposes which an ordinary person may undertake, but for governmental purposes. It is provided, for instance, that "the county council shall be a body corporate by the name of the county council with the addition of the name of the administrative county, and shall have perpetual succession and a common seal and power to hold land for the purposes of their constitution without licence in mortmain."[2] In other words, it is a corporation; it has perpetual succession, so that it goes on being the same legal "person" though the members of the council may change; it has a common seal under which its contracts and conveyances can be made; it can hold land in spite of the fact that the Mortmain Acts forbid corporations to hold land without licence. It is incorporated for the purposes of its constitution; but these are set out in the Act, where it is prescribed that the county council "shall have all such functions as are vested in the county council by this Act or otherwise." No functions are vested in the council except by or under an Act of Parliament; and, generally speaking, they are powers of government quite unlike the powers of a private individual. Indeed, the Acts cover even

[1] *Post*, pp. 265–93.

[2] Local Government Act, 1933, s. 2 (2). District and parish councils are incorporated by similar words: see *ibid.*, ss. 31 (2), 32 (2), and 48 (2).

powers which might be regarded as tacitly annexed to the incorporation. They confer power to make contracts,[1] to acquire and dispose of land,[2] to borrow money,[3] to sue and be sued,[4] and to appoint officers and servants.[5]

These are, however, incidental powers. For the most part the powers are special governmental powers conferred by a vast number of general and local Acts of Parliament. Thus, in local government law the question of *ultra vires* is one primarily of interpreting an Act of Parliament conferring governmental powers. The question to be discussed in each case is not whether the purpose of the Act is within the objects of incorporation, but whether it is covered by the express words of some empowering statute. Let us consider, for instance, the decision in *Attorney-General* v. *Fulham Corporation*.[6] It is not one of those cases in which new or startling legal principles were laid down; it is one of thousands of cases in which the extent of special statutory powers is considered by the courts. The Fulham Borough Council, a statutory local authority created by the London Government Act, 1899, established a municipal laundry, and it was alleged by the Attorney-General that this act was *ultra vires*. The question for the court was not whether the establishment of laundries was one of the purposes for which the council was established, but whether there was any statute

[1] Local Government Act, 1933, s. 266.
[2] *Ibid.*, ss. 157, 164, 165, and 167.
[3] *Ibid.*, s. 195.
[4] *Ibid.*, s. 276.
[5] *Ibid.*, ss. 105, 107, and 114.
[6] [1921] 1 Ch. 440.

expressly authorising the act. The council had power under the Baths and Washhouses Acts (now superseded by the Public Health Act, 1936) to establish baths, washhouses, and bathing-places. Sargant, J., examined the language of the Acts and came to the conclusion that they did not enable the council to establish a laundry.

This method must be adopted even for the incidental powers already mentioned. Most of them are subject to restriction, especially in respect of land and borrowing; and even where they are not they must be related to express powers. For instance, though the Local Government Act, 1933, gives a general power to enter into such contracts as are necessary for the discharge by a local authority of any of its functions, it is still necessary to determine precisely what are the statutory functions and whether the contract is necessary for one of them.

Boroughs (other than metropolitan boroughs) are in a peculiar position because they are incorporated by charter and not by statute. It is commonly asserted that a chartered corporation is entitled to do any act which a private person may do, even though it is in respect of a matter not within the charter. Thus, in *Attorney-General* v. *Manchester Corporation*,[1] Farwell, J., said: " The difference between a statutory corporation and a corporation incorporated by royal charter is well settled; the former can do such acts only as are authorised directly or indirectly by the statute creating it; the latter (speaking generally) can do everything that an ordinary individual can do." This statement was not

[1] [1906] 1 Ch. 643 at p. 651.

necessary for the decision, and is thus a casual expression of opinion, or *obiter dictum*. There are several such *dicta*, but there is no case in which it has actually been held that a contract made or an act done by a chartered corporation outside the scope of its expressed or implied powers is nevertheless valid. All the *dicta* take their source in a statement by Lord Coke in the *Case of Sutton's Hospital*.[1] The point actually decided in that case was that where a chartered corporation had power to hold land, it impliedly had power to acquire and dispose of it; but he used language which may be interpreted in a wider sense. It is extremely doubtful whether he had that meaning, and it is certain that the cases to which he referred did not support the proposition. On the whole, it is doubtful if the doctrine would be upheld.[2]

The doctrine is of some importance in relation to boroughs, since it would enable the borough to carry on activities not expressly authorised by statute. At the same time, it is not of supreme importance, for two reasons. In the first place, what boroughs usually require are not the powers of an ordinary person but special governmental powers, and these must necessarily be given by legislation. Nevertheless, trading powers, if available, would be of considerable importance. Thus, a borough might supply milk, bread, and coal, or establish a municipal bank. In fact, however —and this is the second point—they cannot do so because of a statutory prohibition.

The borough consists of the incorporated mayor,

[1] (1612) 10 Co. Rep. 23*a*, at f. 30*b*.

[2] See Street, *Ultra Vires*, pp. 20–22.

aldermen, and burgesses (or local government electors). It acts, however, through the borough council.[1] By section 185 of the Local Government Act, 1933, all the receipts of the council are carried to the general rate fund. Out of this fund are payable all the liabilities of the council, including the expenses of government. The section then provides that " if the general rate fund is more than sufficient for the purposes to which it is applicable, the surplus thereof may be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough." This provision re-enacts a clause originally inserted in the Municipal Corporations Act, 1835. Before that Act many boroughs had large interests in property whose income they were entitled to use for the benefit of the members of the corporation, the mayor, aldermen, and councillors, or the freemen. It was not often used for the benefit of the inhabitants of the borough. The purpose of this provision was to divert the income from feasts and other advantages to the members so as to make it available for the public benefit of the inhabitants. It became subject, as the early cases put it, to a trust for the benefit of the inhabitants.[2] The growth of the powers of borough councils, however, has caused an enormous increase in cost, and no council has a surplus which it can use for the public benefit of the inhabitants, but every council has to raise money by rates in order to meet its liabilities. It is not permissible to raise a rate in order to provide a surplus, since the rates are applic-

[1] Local Government Act, 1933, s. 17.

[2] *Att.-Gen.* v. *Aspinall* (1837), 2 My. & Cr. 613; *Att.-Gen.* v. *Wilson* (1837), 9 Sim. 30.

able only to services provided specifically under statutory authority.[1]

The result is that even if a borough had power to do anything which a private individual could do, it could not spend money for the purpose out of the borough fund. For this reason the general principle has never been seriously raised. If a borough council has not the necessary statutory powers, it is fatal to its contention to prove that in any event some cost will fall upon the borough fund, even if that cost is incurred for the purpose of making a profit. Thus, in *Attorney-General* v. *Manchester Corporation*,[2] already referred to, the question to be decided was whether the Manchester Corporation had power to operate a parcels delivery service. By various provisional orders and private Acts of Parliament the Corporation had power to use its tramways for conveying goods and parcels. The service actually organised, however, was far more extensive than the tramways system. Parcels were collected from and delivered to places as much as four miles from the tramways; parcels were delivered by express messengers; and the Corporation acted as general agent for the railway companies. All the expenses incurred were charged to the tramways undertaking, and amounted to about £1,800 a year; but a profit of about £1,500 a year was made on the parcels service. A large firm of carriers in Manchester sued as relators through the Attorney-General [3] for a declaration that the Corporation had no power to carry on this kind of business.

[1] *Att.-Gen.* v. *Newcastle Corporation* [1892] A.C. 568.
[2] [1906] 1 Ch. 643.
[3] For this procedure, see *post*, pp. 289–93.

Farwell, J., gave judgment for the Attorney-General. Recognising (what is very doubtful) the distinction between chartered and statutory corporations, he went on to point out that even so, the Corporation had no power to carry on a business if it involved the expenditure of money, unless there were statutory powers available. In this case the statutory powers were not ample enough to cover the business: there was nothing in the Acts to authorise the Corporation to act as carriers generally without reference to their tramways. Further, the business entailed expenditure which must fall on the borough fund.

The courts are not eager to declare an act *ultra vires*. It has often been laid down that acts which are reasonably incidental to a power expressly conferred by statute must be regarded as impliedly conferred by that statute. Lord Selborne, L.C., said in the leading case of *Attorney-General* v. *Great Eastern Rly. Co.*,[1] that the doctrine of *ultra vires* "ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." This does not mean that a corporation has power to run a business without express statutory authority because it has express statutory authority for another, and the two businesses can conveniently be operated together. Thus, the House of Lords held in *London County Council* v. *Attorney-General*[2] that the London County Council had no power to operate an omnibus

[1] (1880) 5 App. Cas. 473 at p. 478. [2] [1902] A.C. 165.

service merely because they had express statutory power to run a tramways service. "The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a seaport." [1]

An act of a local authority may be *ultra vires* not only if it does not belong to the class of acts which the local authority is empowered to do, but also if it is done in a manner different from that prescribed by the legislation in question. Local government legislation, in other words, prescribes the procedure as well as the purpose. For instance, local authorities have wide powers of making bye-laws; but the procedure is laid down in detail, and even if the bye-law in question is fully within the powers conferred, it will be invalid if it was not made in accordance with the procedure prescribed. This rule is particularly important where local authorities have power to interfere with property rights, because the legislation always prescribes a long procedure whose purpose is to give persons affected the power to make representations to the local authority, the Minister of Health, and perhaps a court as well. The courts interpret such powers rigidly because there is a presumption that Parliament does not intend to take away property rights without full compensation: and where Parliament has allowed interference with property rights, the courts have nevertheless said that Parliament could not have intended to empower the local authority to take away those rights without giving full consideration to the objections of the

[1] [1902] A.C., p. 169, per Lord Macnaghten.

owner. It is therefore a corollary of the doctrine of *ultra vires* that, unless Parliament clearly intends the contrary, local authorities shall act in accordance with *natural justice*.

In the *Report of the Committee on Ministers' Powers* [1] it is stated that there are four principles of natural justice. Two of them are rules which the courts apply in the interpretation of administrative legislation, and two are rules which, so the Committee thought, might be regarded as principles of natural justice. As the latter pair are in fact not accepted by the courts and have been expressly denied by them, we need give them no further consideration. The two accepted principles are:

(i) That a man may not be a judge in his own cause; and

(ii) That no party ought to be condemned unheard.

These short and summary statements, like all short and summary statements, are apt to mislead unless they are elaborated. It must be remembered at the outset that so far as they are rules of law and not merely statements by the Committee of the personal opinions of its members, they operate only as rules of interpretation. They help the courts to determine what Parliament "must have intended" when Parliament has not said what it really did intend. If Parliament confers upon a local authority the power to determine the value of its own land for purposes of rating (in fact, of course, it does not, though it does provide that members of the rating authority may also be members of the assessment committee), then the courts cannot declare

[1] Cmd. 4060, 1932, pp. 75–80.

the Act invalid because it infringes the principles of natural justice. Where Parliament has not made its intention clear, however, the courts are free to say that Parliament "could not have intended" to authorise a biased person to take part in the decision. Thus, in *Rex* v. *Hendon Rural District Council, ex parte Chorley*,[1] an application was made to the council for permission to develop land which was covered by a town planning resolution. In the "preliminary statement" which had been prepared to indicate the lines which the completed town planning scheme would follow, the land was shown as capable of development for residential purposes only. The application was for permission to develop the site as a "road-house," and the permission was granted. There was nothing wrong in this; but the applicant's provisional contract of purchase had been negotiated by one of the members of the council as agent for the vendor. This councillor had taken no active part in the decision of the council, which was passed as a formal resolution without opposition and without discussion. It was held, nevertheless, that the councillor was biased and that he must be regarded as having taken part in the decision, and the decision was therefore quashed.

Such cases are not of frequent occurrence, and in practice the second principle quoted above is more important. Almost invariably, where a person's rights are to be affected, provision is made for him to raise objections and to state his case either orally or in writing. There are a few cases under older legislation, however, where no such express provision is made.

[1] [1933] 2 K.B. 696.

Thus, in *Cooper* v. *Wandsworth Board of Works*,[1] the local authority ordered a house to be demolished under section 76 of the Metropolis Management Act, 1855, on the ground that it had been erected contrary to statute. The Act did not say that notice must be given to the owner, and in fact no notice was given to him. The court held that damages for trespass should be given against the board on the ground that no notice had been given, and the court went on to say (though it was not necessary for the decision) that the owner ought to have been heard by the board before action was taken. In the general law, notice is now prescribed by section 65 of the Public Health Act, 1936, and the local authority are not empowered to pull down a building which infringes building bye-laws unless the owner himself neglects to pull it down after notice. It may be that the owner has a right to be heard, or at least to state his case; but the notice is generally consequential upon a refusal upon a rejection of the plans by the local authority, and he has a right to appeal to a court of summary jurisdiction against such refusal. It is therefore very doubtful whether this decision applies at all outside London; and if it does it would seem to apply only where a building had been erected without submitting plans at all. The author knows no other case under the general law to which the decision is capable of application.

The fact is that a right of appeal or objection is always given by legislation, though the above case would become important if the draftsman neglected to insert such a clause and the omission was not noticed

[1] (1863) 14 C.B.N.S. 180.

in Parliament. Often, however, the appeal or objection is brought before another administrative authority, and it is in this respect that the doctrine of natural justice applies most often. Stated shortly, the appeal or objection must be considered in a judicial manner. The law on this point begins for practical purposes with the decision of the House of Lords in *Board of Education* v. *Rice*.[1] There the managers of a non-provided school (i.e. a school provided by an ecclesiastical authority but assisted by the local education authority) appealed to the Board of Education against a decision of the local education authority to pay teachers in the non-provided schools lower salaries than were paid to those in the schools provided by the authority itself. The Board determined the appeal in its usual administrative and secret manner, and the managers sought to secure the reversal of its decision. The House of Lords held that there was nothing wrong in the procedure adopted. As Lord Loreburn, L.C., said :

" Comparatively recent statutes have extended, if they have not originated, the practice of imposing on departments or on officers of State the duty of deciding questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind: but sometimes it will involve matter of law as well as matter of fact, or even depend on matter of law alone. In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides any-

[1] [1911] A.C. 179.

thing. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board. . . ."

Where the appeal or objection is to a Minister or a county council, the procedure usually prescribed by legislation is for the authority concerned to hold a local inquiry at which the parties (including the local authority) may be represented and call evidence. In *Local Government Board* v. *Arlidge*,[1] this procedure was followed in respect of an appeal to the Board against the decision of a local authority not to determine a closing order made against Arlidge's dwelling-house.[2] The usual procedure was followed: that is, an inspector held a local inquiry and reported to the Board; his

[1] [1915] A.C. 120.

[2] This branch of the law no longer exists. Before 1909 the function of hearing appeals was exercised by courts of quarter sessions, but these courts proved unsatisfactory, and in 1909 the jurisdiction was transferred to the Local Government Board. Closing orders are no longer made for dwellings except by courts of summary jurisdiction under Public Health powers. Under the Housing Act, 1936, part of a building may be closed, but an appeal lies to a county court. If the whole house is insanitary, the remedy is either to compel it to be put into a state of repair or, if that cannot be done, to order its demolition. In either case there in an appeal to a county court. The appellate power was transferred to the county court in 1930 not because it was "judicial," but simply because the Ministry of Health could not be bothered with these small local matters. There is considerable dissatisfaction with the manner in which such appeals are considered by the county courts, especially because of the absence of uniformity.

report was not made available to Arlidge, but was used by the Board in coming to its decision against Arlidge, and Arlidge was given no opportunity of putting his case personally before the Board or before the official or Minister who decided against him. The Court of Appeal quashed the decision because the procedure was contrary to "natural justice," but the House of Lords reversed this decision, holding that when Parliament conferred a power upon an administrative authority it intended that authority to use its own procedure and not the procedure of the courts of law; nor was there anything in the statutes to compel the Board to make known the contents of the report. Lord Haldane said:

"My lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. . . . Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interest of the community. Its character is that of an organisation with executive functions. . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

The fallacy in the decision of the Court of Appeal, he added, was that it set up the test of procedure of a court of justice, instead of the test laid down in *Board of Education* v. *Rice*. Lord Shaw was even more emphatic. "That the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded."

Since administrative authorities do in fact act in a judicial manner as defined in these cases, it is not easy to challenge a decision on the ground that it is contrary to natural justice. Such a challenge was, however, successful in *Errington* v. *Minister of Health*.[1] There, objection was made to a clearance order made by a local authority, and the Minister of Health ordered a local inquiry. Nevertheless, communications were entered into between the officials of the Ministry and the local authority, and a visit to the clearance area was paid by the inspector holding the inquiry and other officials in the absence of the persons interested in the property. It was held by the Court of Appeal that this was taking evidence from one side in the absence of the other, and the decision of the Minister was quashed. In *Frost* v. *Minister of Health*,[2] however, Swift, J., refused to extend this decision to consultations between the town clerk and the Ministry of Health before the clearance order was submitted and before any objections had been made, and this decision was upheld by the Court of Appeal in *Offer* v. *Minister of Health*.[3] Until

[1] [1935] 1 K.B. 249. [2] [1935] 1 K.B. 286
[3] [1936] 1 K.B. 40.

objections are made, the Minister is an " administrative " authority; as soon as objections are made his functions become " quasi-judicial " and he must follow the principles of natural justice. In *In Re Manchester (Ringway Airport) Compulsory Purchase Order*,[1] the Air Ministry expressed tentative approval of the site of an aerodrome before the local authority submitted the compulsory purchase order, and the inspector was piloted over the site by one of the witnesses for the local authority (though there was no evidence of any communication between them). Neither act was considered to invalidate the confirmation of the order.

As a result of *Errington* v. *Minister of Health*, various attempts have been made to reopen the question of the nature of natural justice. In spite of *Local Government Board* v. *Arlidge* it was contended in *William Denby & Sons* v. *Minister of Health* [2] that the objector to a clearance order was entitled to see the inspector's report, but the contention was rejected. In *Fredman* v. *Minister of Health* [3] it was contended that before making a clearance order, the local authority ought to have given the owner of the property concerned the right to appear and present his case, in accordance with the principle of *Cooper* v. *Wandsworth Board of Works*; but the court held that the resolution of the local authority was a preliminary stage, and that the objector's right to state his case was provided for by the insistence upon a local inquiry before the Minister confirmed the order. Finally, in *Horn* v. *Minister of Health* [4] the Minister received a deputation from the local authority about

[1] (1935) 99 J.P. 319.
[2] [1936] 1 K.B. 337.
[3] (1936) 100 J.P. 104.
[4] [1937] 1 K.B. 164.

housing matters generally after objections to a particular compulsory purchase order had been made. Swift, J., held that this invalidated the confirmation of the order, but his decision was reversed by the Court of Appeal on the ground that there was no evidence that the order was mentioned, and, indeed, there was clear evidence that it was not. The decision would have been different if the order had been mentioned. As Greer, L.J., said :

" I have no doubt whatever that if at that meeting representations had been made to the Minister of Health behind the back of the objector, in order to persuade him to confirm the order made by the council, then there would have been ample jurisdiction in the court to say that such conduct was not only contrary to natural justice, but contrary to that which is implied in the powers given to the Minister under the statutes."

It will be noticed that these decisions relate almost entirely to the exercise of powers by central authorities under statutory powers. They illustrate the operation of the appellate powers which are considered in a later chapter. The decisions in housing cases are necessarily in relation to central authorities, because the courts have no jurisdiction to intervene (on account of special statutory provisions) [1] until the order has been confirmed. The principles enunciated are, however, applicable to all administrative authorities and cases occasionally occur.[2]

[1] See *post*, pp. 304–5.

[2] E.g. a housing case: *Broadbent* v. *Rotherham Corporation* [1917] 2 Ch. 31: rating cases, *R.* v. *North Worcestershire Assessment Committee* [1929] 2 K.B. 397; *R.* v. *Salford Assessment Committee* [1937] 2 K.B. 1; dismissal of police officer: *Cooper* v. *Wilson* [1937] 2 K.B. 361.

§ 2. *The Acquisition of Powers*

Its powers being strictly limited, a corporation which has not the necessary powers and desires to have them must take steps to acquire them. The student of local government law must beware of the notion that a study of the common law is likely to induce in him, that "the law" is something fixed and unalterable, subject only to judicial "interpretation." The law is, for practical purposes and subject always to judicial "interpretation," what Parliament and subordinate authorities under statutory authority choose to make of it. There being no constitutional restriction on legislation,[1] only political considerations and the pressure of time prevent Parliament from enacting anything whatsoever. If the law is not what is required, the remedy is to go to Parliament to change the law.

This may mean a change in the general law. Powers may be sought for all local authorities, or for all local authorities of a particular class. A new Local Government Bill, or a Public Health Bill, or a Housing Bill, may be introduced. For instance, the evils of "ribbon development"—development along the sides of main roads, causing obstruction of traffic, danger to passing motorists and the inhabitants, costly extensions of gas, water, electricity, and sewerage services, and the like—were evident by 1935. The process of securing control of development through schemes under the Town and Country Planning Act, 1932, had proved long and costly. Accordingly, the Minister of Transport introduced the Bill which became the Restriction of Ribbon

[1] Jennings, *The Law and the Constitution* (3rd ed.), Ch. IV.

Development Act, 1935, to confer the necessary powers upon highway authorities.

If the Government has a majority in both Houses of Parliament, and if the parliamentary time-table permits, it is necessary only to persuade the Government that the powers are required and are politically justified to secure the conferment of the powers. Individual local authorities, through their expert advisers, may make representations to the Ministry of Health, the Ministry of Transport, the Ministry of Town and Country Planning, or the Ministry of Education. More often, the suggestions are made collectively. Each kind of local authority is organised into its appropriate association—the County Councils' Association, the Association of Municipal Corporations, the Urban and Rural District Councils' Associations, and the Association of Education Committees. The Council of each considers from time to time the complaints of its members, the proposals of the Government, the Bills of private members of Parliament, and the recommendations of Royal Commissions and departmental committees. Being concerned primarily and almost entirely with the public welfare, the Associations have considerable influence, and their importance is evident both on the legislation that is passed and on the proposals that are rejected.[1]

§ 3. *Private Bills*

If a local authority waited for general legislation, however, it might have to await the arrival of the Greek Kalends. Many of the problems of a particular

[1] See Jennings, *Parliament*, Ch. VII.

area are peculiar to itself; general legislation does not often spring out of the brain of an imaginative administrator, but is the product of a long local experimentation. Parliament is concerned not only with public Bills, but also with local or private Bills, seeking to confer *privilegia* or special powers upon the persons or authorities asking for them. The private Bill, it has been said, is the laboratory of public health law. There is hardly a provision in the Public Health Acts, 1875 to 1932, or the Public Health Act, 1936, which was not founded on a clause originally enacted at the request of the improvement commissioners or local authority of a particular area. There is, in fact, a regular order in successful experiments. A local authority has to face a particular problem, the provision of sewers, the control of parking, the control of wireless aerials, and the like; the clerk to the council drafts a clause in collaboration with parliamentary agents skilled in local legislation; the House of Commons or House of Lords Committee, or both of them, gives long and anxious consideration to its terms and then assents with or without modification; another local authority secures a similar power, perhaps better framed or more effective for its purpose; after a few years it becomes "common form" and is permitted without prolonged argument; and finally it is incorporated in general legislation like the Public Health Acts Amendment Acts of 1890 and 1907, or the Public Health Acts of 1925 and 1936.

By section 253 of the Local Government Act, 1933, any local authority other than a parish council may promote or oppose any local Bill in Parliament and

defray the expenses incurred in relation thereto.[1] There are, however, formalities to be completed before the initial steps are taken. The resolution to promote or oppose must be passed by a majority of the whole number of members of the authority at a meeting held after ten clear days' notice of the meeting and of the purpose thereof given by advertisement in one or more local newspapers. If a Bill is to be promoted, the resolution itself must be published in one or more local newspapers and submitted to the Minister of Health for his approval. The local authority may not proceed if the Minister notifies the authority that he disapproves, and before he approves any local government objector may notify the Minister of his objections. If a Bill is to be promoted, a further meeting of the local authority must be held as soon as may be after the expiration of fourteen days after the Bill has been deposited in Parliament; and, unless the propriety of the promotion is confirmed by a majority of the whole number of the members present at that meeting, the local authority must take all necessary steps to withdraw the Bill.[2]

This provision is intended to secure three things, that the members of the local authority themselves are certain that the Bill ought to be promoted, that the Bill shall not be promoted without the Minister's consent,

[1] There are a few exceptions. A Bill may not be promoted for the establishment of any gas or water works to compete with any existing gas or water company established under an Act of Parliament: L.G.A., 1933, s. 253. Nor may a borough council promote a Bill for the purpose of constituting the borough a county borough, unless its population is 75,000 or upwards: *ibid.*, s. 139.

[2] Local Government Act, 1933, s. 254.

and that full publicity shall be accorded to the local government electors of the area. These three aims are not entirely distinct. Most of the members of the council owe their seats to democratic election. If a pronounced public opinion against the measure makes itself felt, it is reasonably certain that some members who supported the proposal at the first meeting may oppose the second. Again, the Minister may not disapprove the proposal and yet indicate to the council that the Bill is not likely to be carried; such an announcement would probably induce the council to withdraw the Bill. Finally, the purpose of public advertisement is partly to enable local government electors to make representations to the Minister, who might thereupon disapprove the proposal, or at least indicate his reluctance to approve. It has also to be remembered that the carrying of an opposed Bill is an expensive process for the promoters, and if it were found that strenuous opposition would be met it would perhaps be withdrawn at the second meeting.

Usually, however, the Minister does not refuse to allow a local authority to promote a Bill unless he considers that it would be a gross waste of public money. His attitude is that it is the business of Parliament to consider whether new powers ought to be conferred or not. At this stage he is concerned only to see that there is reason for the suggestion. When the Bill comes before the Committee in Parliament, he may make a report in which his view of the desirability of the specific proposals will be set out. He is not then exercising a power of control, but simply advising the Committee, which may or may not accept it. Never-

theless, he is often able to inform the local authority or its parliamentary agents at the preliminary stage that he will be compelled to report adversely on certain proposals, or to suggest to the promoters that certain modifications might be made to meet the claims of opposers, or to meet the criticisms of the Minister himself. The result of this preliminary consultation is often a substantial modification of the terms of the Bill before it reaches the Committee, and time and expense are saved to the promoters and opposers.[1]

In the case of the promotion of a Bill by a borough or urban district council, yet another preliminary stage has to be passed through, except where the Bill proposes only to convert the borough into a county borough or to extend the area of a county borough. By section 255 and the 9th Schedule of the Local Government Act, 1933, it is necessary to have what is usually called a "town's meeting." After the Bill has been deposited in Parliament, notice must be given by placards and newspaper advertisements of the title and contents of the Bill, of the place where copies may be inspected and purchased, and of a public meeting of local government electors. This meeting must be held not less than fourteen days nor more than twenty-eight days after the first notice. At the opening of the meeting the mayor or chairman of the council, or other person in the chair, may give such explanations of the Bill as he thinks expedient. The question of the promotion must then be put in one resolution or in several resolutions covering the whole Bill. The decision of

[1] See Nineteenth Annual Report of the Ministry of Health, 1937–38, p. 142.

the meeting is final unless a poll is demanded ; but not less than one hundred electors, or one-twentieth of the electors, whichever is the less, or (if the decision is against the resolution) the council, may demand a poll. The poll is then conducted like a municipal election.

In the case of any large town the town's meeting is, of course, absurd. It would be impossible to find a hall to accommodate even a small proportion of the local government electors of Birmingham. In practice, however, a very small proportion attends: if the proposals are not controversial only a handful of electors attends; if they are controversial, as when they involve the taking over of a new public utility, the opponents are proportionately over-represented, and a poll is demanded almost as a matter of course. No doubt the meeting has some publicity value ; but it is difficult to understand why the normal democratic sanction for unpopular decisions, the defeat of retiring councillors at the elections, should not apply to the promotion of Bills as to other acts of the council. A strong body of opinion favours the abolition of these special provisions, which do not apply to county councils and rural district councils, but it has never been vocal enough to secure amendment of the law.

These requirements of local government law are additional to those laid down by the two Houses of Parliament in respect of all private and local Bills. In respect of such Bills the Houses assume that they have two functions to perform. In the first place, they must decide whether the proposals are in themselves socially desirable, whether they accord with national

policy as viewed by the majority or accepted by the Government. A House dominated by a Conservative majority, for example, would not permit a substantial development of commercial or industrial monopolies under public control because it believes in the virtues of private enterprise and competition. Nor would either House accept a proposal for the establishment of a municipal bank if the Treasury expressed the clear opinion that such a bank would interfere with the national financial system, or would be likely to get involved in financial difficulties.

In the second place, Parliament has to decide between competing interests. The proposals of a county borough to extend its boundaries are almost certain to be opposed by the county council and the district councils because their areas and rateable values are being threatened. The proposal of a borough council to take over an omnibus service, or to begin a new service, will probably be opposed by the omnibus company concerned. A proposal by a borough council to establish a milk or coal supply will probably be opposed by the local vendors of those products. Almost any proposal will involve the compulsory acquisition of land and may be opposed by landowners. Local government electors may object generally on the ground of expense. And so on.

Parliament will decide these issues according to the opinion held by the majority as to public policy. A Conservative majority is likely to look with less favour on a new municipal service (as when Middlesbrough sought powers to provide wireless relay programmes through its electric-light system) than a Labour

majority. In any case, it is the duty of Parliament to see that private rights are not affected except on just terms.

The Standing Orders of the two Houses therefore go into a multiplicity of particulars as to the notices to be given, the advertisements to be made, and the procedure to be followed.[1] Notices have to be given and advertisements displayed before the Bill comes up for consideration in order that all persons interested may have an opportunity of learning what proposals are being made and of putting in objections to them. The bodies most frequently affected, such as the associations of local authorities, the railway companies, and other public utilities, employ parliamentary agents to study all proposals and draw their attention to any Bill which affects their interests. The question of opposition may then be considered.

The first problem of Parliament is therefore to ascertain that the preliminary formalities have been complied with. The petition is examined before first reading, and the Bill before second reading, to determine whether Standing Orders have been obeyed. Only if the formalities have been observed or the House for some special reason waives them can the Bill go to second reading. The second reading is not usually opposed, though any member may insist on a debate. But the second reading does not determine the desirability of the measure. This depends on the facts—such as the special needs of the area and the inadequacy of existing methods of control, set out in the preamble. The House assumes that the facts

[1] See Jennings, *Parliament*, Ch. XII.

alleged are true and decides that, if they are true, there is no general or political objection to the proposals.

"A public Bill being founded on reasons of state policy, the House, in agreeing to its second reading, accepts and affirms those reasons: but the expediency of a private Bill being mainly founded upon allegations of fact, which have not yet been proved, the House, in agreeing to its second reading, affirms the principle of the Bill, conditionally, and subject to the proof of such allegations before the committee. Where, irrespective of such facts, the principle is objectionable, the House will not consent to the second reading: but otherwise, the expediency of the measure is usually left for the consideration of the committee."

It is, however, the committee stage which shows the special character of local legislation. If the Bill is opposed it is committed to a small Select Committee or "opposed Bill group" consisting of four members who have no interest in the proposals, but who act in a kind of judicial capacity. If it is unopposed it is committed to the Select Committee on Unopposed Bills. In the latter case the Committee insists on the facts in the preamble being proved and considers the desirability of the proposals. In the former case the group decides between promoters and opposers, and considers the desirability of all the proposals, whether opposed or not. In either case the procedure is much like that of a court of law. The promoters and the opposers (if any) are represented by counsel; witnesses are examined and (if there is opposition) cross-examined. Usually, however, the opposition is not to the Bill as a whole but to certain clauses of it. Thus, a Bill promoted by a city council may have numerous purposes—to alter the law as to private street works,

to give control over wireless aerials, to enable the undertaking of a water company to be taken over, to compel local dairymen to sell only pasteurised milk, to modify the law as to housing accounts, and so on. It is unlikely that anybody will object to the whole Bill, but the water company may object to those provisions which authorise the council to take over its undertaking, and the local branch of the National Farmers' Union may object to the pasteurisation provisions.

The clauses are, therefore, taken in turn by the committee once the preamble has been held to have been proved. A new set of counsel will come into action as each new portion of the Bill is reached. Some may oppose only formally in order that a protective clause may be introduced. For instance, if the council seeks new powers for the control of local amenities, the local gas company may say: "We don't object to your proposals, provided that a clause is inserted exempting gas works." The committee will then have to decide whether such a protective clause shall be inserted or not.

Not all local Bills are opposed. Indeed, the proportion of opposed Bills is quite small. The local authority is anxious to secure the new powers with the minimum of expense. As soon as its proposals are made known, the possible opposers (who also do not want to spend money on parliamentary proceedings) suggest modifications. Negotiations take place, and often a compromise can be reached. Moreover, the Minister may take a hand. He can assist the negotiations by making suggestions to the local authority.

Nor does a committee give the same detailed con-

sideration to every clause. When once a new kind of provision has been accepted in the case of one local authority, it is not difficult for another local authority with the same kind of problem to secure a similar power. The provisions are so many precedents which are known to parliamentary agents and often to the technical advisers of local authorities. There are clauses known as "Brighton clauses," "Middlesex clauses," and so on, because they were first obtained from Parliament by the authorities mentioned. This process of creating precedents has been in operation for a century and a half. In course of time the clauses, if experience shows them to be useful, are embodied into general legislation. It has been mentioned already that the Public Health Acts have been built up in this way. There are, however, three methods of generalisation short of incorporation into general legislation applying throughout the country.

(*a*) *Clauses Acts.* Not all the public health and similar clauses have been enacted as general legislation. Indeed, the delay in providing general legislation before 1848 compelled some means of shortening the process of local legislation. Moreover, the law relating to public utilities could not, at the earliest stages, be generalised, because a utility was, so to speak, a luxury which not every town and village was expected to possess. Accordingly, between 1845 and 1847 many of the "common form" clauses were incorporated into "Clauses Acts" which had no force of their own, but which required to be incorporated by reference into local legislation.[1] Thus, if a local authority desired to

[1] *Ante*, pp. 52–53.

provide a public water supply, it applied to Parliament for a short private Act which incorporated some or all of the provisions of the Waterworks Clauses Act, 1847; a local authority, a railway company, or any other public utility which included in a local Bill provisions for the compulsory acquisition of land, incorporated by reference, some or all of the provisions of the Lands Clauses Consolidation Act, 1845. Not all the "Clauses Acts" related to local government and public utilities, but it is still true that a large part of the law regulating the acquisition of land, water supply, markets and fairs, harbours and docks, gas, cemeteries, water, electricity, and street offences, is to be found in Clauses Acts as incorporated by reference in local Acts. Frequently, indeed, they are incorporated by reference in general legislation. For instance, certain of the provisions of the Waterworks Clauses Acts, 1847 and 1862, are incorporated by the Public Health (Support of Sewers) Act, 1883, and the Public Health Act, 1936.

(*b*) *Adoptive Acts.* The later Public Health Acts adopted a new device. On the one hand it was felt that not all local authorities, and not even all urban authorities, required the same extensive public health powers; and on the other hand it was considered to be a waste of public money to compel every local authority which required a "common form" clause to go to Parliament for it. Accordingly, most of the provisions of the Public Health Acts Amendment Acts of 1890 and 1907 and of the Public Health Act, 1925, were made "adoptive"; that is, they did not apply to an authority unless that authority took some steps to adopt them

and to notify publicly the fact that they had so adopted them. Thus, Parts II to V of the Public Health Acts Amendment Act, 1890, were made applicable to urban authorities only by "adoption." For this purpose a meeting of the council had to be summoned and special notice given of the intention to propose an adoption resolution. Public notification had then to be given for at least one month. A rural authority, on the other hand, could obtain similar powers only by an order of the Local Government Board (except for certain provisions of Part III, which might be adopted by the rural authority). The Public Health Acts Amendment Act, 1907, could be applied to a local authority only by an order of the Local Government Board or the Secretary of State at the request of the local authority. The application for the power had to be advertised. Parts II to V of the Public Health Act, 1925, could be adopted in the same way as the adoptive provisions of the Act of 1890. Other Acts were wholly adoptive. Thus, the Infectious Disease (Prevention) Act, 1890, could be adopted by resolution after fourteen days' notice.

While recognising that the method of adoption had advantages, the Local Government and Public Health Consolidation Committee thought that the method had been overdone, as the following passages show :

"There is no doubt that both procedures [i.e. adoption by formal resolution and adoption by order of the Minister] have in the past proved themselves, and in certain circumstances still are, convenient legislative methods. To take an example outside the public health code, if a council wish to take advantage of the enabling provisions of the Local Government and Other Officers' Superannuation

Act, 1922,[1] and establish thereunder a superannuation scheme for their staff, it is clearly right that a decision of such importance should not be taken by a chance majority of members attending an ordinary meeting of the council. Again, as regards the power of the Minister to bring enactments into operation by order, it is convenient in view of the widely different circumstances of different local authorities, and the wide variations in their financial resources and in the types of district under their control, that Parliament should sometimes confer powers or impose obligations in general terms, leaving it to the Minister to decide whether in any particular case the circumstances require that a particular authority should be entrusted with the discharge of the functions in question. It is also to be remembered that the public health code is largely the outcome of local experiments sanctioned by Parliament in local legislation, and that . . . much of the present general code consists of these local Act provisions re-enacted in a generalised form. Thus, a system under which the application of the particular enactment to any given locality is left to the discretion of the Department represents a natural transition from the method—still in active operation—of Parliament itself conferring by local Act powers required by particular authorities.

"None the less, when all this is said, our examination of the Acts has led us to the conclusion that the method of proceeding by way of 'adoption' has in the past been overdone. Not a few cases of patent absurdity can be found. . . . Again, there are a number of provisions which at present require 'adoption' but might well have been framed as 'enabling' clauses, operating without adoption if and so far as the local authority think fit to exercise the powers."

After pointing out that many of the provisions had been very widely adopted and that in many cases the Department issued the order on request without

[1] This Act has been repealed by the Local Government Superannuation Act, 1937, which is compulsory.

further investigation, the Committee came to the conclusion that most of the adoptive provisions could be made of general application.[1] The Public Health Act, 1936, therefore contains only eight adoptive clauses. Many such clauses remain, however, in the remnants of the Public Health Acts, 1875 to 1932. The most important are the provisions of the Private Street Works Act, 1892, which may be adopted in boroughs and urban districts by special resolution of the council, and in rural districts by order of the Minister of Health. This Act regulates charges and methods for private street works in a manner much more convenient and elastic than section 150 of the Public Health Act, 1875, which it supersedes as soon as it has been adopted.

(*c*) *Standard Clauses.* In spite of the enactment of Public Health Acts from time to time, changes are constantly being made by local legislation. Until 1931 the changes were regulated by the Local Legislation Committee of the House of Commons; but since that Committee was abolished in 1931 unopposed clauses and Bills have not received the same careful consideration. Accordingly, a Select Committee was set up in 1936 to examine the modern clauses which had become "common form." As a result, the Committee was able to list 173 clauses. Of these, it recommended that 68 could be accepted by the House of Commons without special proof of local need; 38 could be so accepted if they were modified as recommended by the Committee; 25 should not be allowed without proof of local

[1] Second Interim Report of the Local Government and Public Health Consolidation Committee, Cmd. 5059, 1936, pp. 14–15.

need; 9 should not be allowed except in very special circumstances and 33 were rendered unnecessary by the Public Health Act, 1936.[1] It may be noted that none of these clauses was based on precedents before 1926, so that the Report gives some indication of the speed with which general law can be made by local experiments. Since there are 106 clauses which can now be obtained without proof of special need, it is clear that there is material for another large local government or public health Act. Some, however, have already been generalised by the Local Government Superannuation Act, 1937, and the Food and Drugs Act, 1938, and no doubt the others will gradually be incorporated as general legislation becomes practicable. In the meantime, these common form clauses have been published as "Standard Clauses." They may be incorporated bodily by local legislation (though they require to be specifically set out and not merely referred to, as is the practice with the Clauses Acts), and the House of Commons is very reluctant to permit them to be amended.

§ 4. *Delegated Legislation*

It will have been noticed from the discussion of adoptive Acts above that the Minister of Health or some other central authority often has power to confer new powers by order. This method is not adopted in relation to adoptive clauses only. There are, as will be explained in Chapter VIII, wide powers of control vested in the Central Government. These powers often

[1] Report of the Committee on Common Form Clauses in Private Bills (H.C. 162 of 1936).

involve the exercise of new powers by local authorities. For instance, every town and country planning scheme, every clearance order or redevelopment order under the Housing Act, 1936, and every compulsory purchase order made under almost any local government Act, enables a local authority, with the sanction of the appropriate central authority, to acquire new powers. These powers are, of course, consequential upon general powers conferred on the authorities. For instance, the Town and Country Planning Act, 1932, empowers local authorities to pass draft town and country planning schemes for a large variety of purposes set out in the Act. Such schemes require the sanction of the Minister of Health. When they have taken effect, however, the schemes themselves confer powers upon the responsible authorities specified by them. Nor are powers of this nature always conferred within narrow statutory limits. Many of the provisions which formerly were incorporated into local Acts may now be incorporated in provisional orders. Such orders are made by the appropriate Department at the request of the local authorities concerned. They are then scheduled to Provisional Orders Confirmation Bills introduced by the Minister as public Bills. They may be opposed like local Bills, and if they are they are dealt with by opposed Bill Committees in the same way as private Bills. But usually the preliminary investigation by the Minister disposes of opposition, and very few Provisional Order Confirmation Bills are opposed.[1]

One of the most important of these powers is contained in section 303 of the Public Health Act, 1875,

[1] On provisional orders, see Jennings, *Parliament*, Chapter XII.

which is extended by section 317 of the Public Health Act, 1936, and section 96 of the Food and Drugs Act, 1938. It provides that the Minister of Health—

"may, on the application of the local authority of any district, by provisional order, wholly or partially repeal, alter or amend any local Act, other than an Act for the conservancy of rivers, which is in force in any area comprising the whole or part of any such district, and not conferring powers or privileges on any persons for their or his own pecuniary benefit, which relates to the same subject matters as this Act."

For this purpose, "this Act" means any of the Public Health Acts, 1875 to 1932, the Public Health Act, 1936, and the Food and Drugs Act, 1938. Thus, if any local authority has a local Act containing any provision dealing with public health in the very wide sense in which that term is understood in local government legislation, it may apply for a provisional order repealing, altering, or amending it. In other words, once a local authority has secured local Act powers on such matters it may obtain further such powers by provisional order.

Provisional orders, as has been said, require the approval of Parliament by Bill. A more recent tendency is to enable the Departments to confer similar powers without introducing a Bill. For instance, many powers relating to gas and electricity which could be obtained before 1919 by provisional orders only may now be obtained by special orders. In some cases, these special orders require the approval of Parliament by resolution—not by Bill. Generally speaking, this is a pure formality in the House of

Commons, where the necessary resolutions are proposed in batches late at night and are generally passed without opposition. In the House of Lords, however, there is a Special Orders Committee which enables interested persons to oppose special orders in the same way as provisional orders. In other cases the special order does not need an affirmative resolution, but is laid on the table in both Houses and takes effect after an interval unless a resolution is passed requesting that the order be annulled. There is no procedure in either House for dealing with these orders effectively, and for practical purposes laying on the table is a pure formality. Finally, there are orders which either do not require to be laid before Parliament or cannot be annulled by Parliament except in legislation. These do not often confer new powers, though there are examples. In particular, most of the modern Acts authorise the compulsory acquisition of land by means of an order confirmed by the Minister of Health, though the older Acts still require a provisional order. Consequently, the Local Government Act, 1933, contains both powers.[1]

[1] On delegated legislation generally, see Jennings, *Parliament*, Chapter XIV. For compulsory purchase orders, see sections 160 to 162 of the Local Government Act, 1933.

CHAPTER VII

LOCAL GOVERNMENT FINANCE

§ 1. *Expenditure and Income Generally*

IN the preceding chapter we discussed the sources from which powers are obtained, but we did not discuss what those powers were. They cover an enormous field of social control. The regulation of the environment in which people live and work is primarily the concern of local authorities. The social services, excluding pensions and social insurance, are almost wholly provided by local authorities. If we attempted to set out these numerous powers in detail we should be compelled to explain a large part of the law of England. The exercise of all the powers involves the expenditure of public money. If, therefore, we attempted to set out the objects on which local authorities spend the funds under their control, we should similarly expound a large part of the law of England. Some idea may, however, be given by pointing out that local authorities spend every year over 600 million pounds on revenue account alone. In addition there is a large expenditure on capital works which fluctuates according to economic conditions. In 1939-40 the capital expenditure amounted to over 109 million pounds, and the gross outstanding loan debt at the end of that financial year was over 1,500 million pounds.[1]

[1] A summary for each year is given in the Annual Report of the Minister of Health and full details in the *Annual Local Taxation Returns*.

It is customary to separate expenditure on trading services from expenditure on the other services, which are known as "rate fund services." The latter are services whose cost is expected to be met, in part at least, out of local taxation. If there is a deficit on a trading service, such as a municipal gas undertaking or municipal tramways, it must be met out of local taxation; on the other hand, if there is a profit which is not intended to be used for further capital developments, it will ultimately be used to reduce local taxation. Normally, however, income and expenditure on trading services more or less balance without transfers from or in aid of local taxation. For instance, out of a total expenditure of over 125 million pounds in 1935–36, only just over 2 million pounds was transferred in aid of rates; and out of a total income of over 126 million pounds, less than 3 million pounds was met by transfers from local taxation.

The expenditure on rate fund services in 1935–36 may be allocated to specific services as follows:

	£
Education	92,180,853
Public Health	52,385,783
Highways and Bridges	48,633,257
Housing and Small Dwellings Acquisition	39,508,807
Poor Relief	37,788,471
Police	23,930,588
Mental Deficiency and Mental Hospitals	12,522,151
Street Works and Lighting	7,327,443
Agriculture and Fisheries	4,543,241
Fire Brigades	2,685,355
Libraries and Museums	2,637,924
Administration of Justice	1,771,901
Town and Country Planning	254,344
Carried forward	326,170,118

	£
Brought forward	326,170,118
Administration and Miscellaneous .	21,736,592
Transfers to Trading Services . .	2,627,476
Total .	350,534,186 [1]

In considering trading services and corporation estates, it will be convenient to take expenditure and income together, since it will be seen that there is a close relation between them in respect of each service. The figures for 1935–36 were:

	Expenditure.	*Income.*
	£	£
Water Supply . . .	21,049,125	21,473,082
Gas Supply . . .	16,544,647	16,761,934
Electricity Supply . .	43,843,670	44,247,676
Transport (Tramways, etc.) .	22,404,323	22,496,981
Ferries	539,497	519,640
Markets	2,586,399	2,581,229
Cemeteries . . .	1,759,479	1,767,496
Harbours, Docks, Piers, and Canals	13,019,575	13,042,663
Miscellaneous . . .	2,498,717	2,507,135
Totals for Trading Services	124,245,432	125,397,836
General Corporation Estates	1,452,026	1,448,988
Grand Totals .	125,697,458	126,846,824 [2]

The close relations between expenditure and income are a little misleading, because the expenditure includes

[1] See Nineteenth Annual Report of the Ministry of Health, 1937–38 (Cmd. 5801), pp. 268–69. Later figures are not available owing to the fact that during the war only Summary Reports have been published. By 1940–41 the annual expenditure had increased to £631,060,108: Summary Report of the Ministry of Health for the year ended 31st March, 1944 (Cmd. 6562), p. 54.

[2] Cmd. 5801, pp. 270–71.

the sums transferred in aid of rates (being profit on the undertaking) and transfers to other funds, while the income includes the £2,627,476 transferred from rate fund services to meet deficits and a further sum transferred from other funds. On the whole, however, the trading undertakings pay for themselves, and in the examination of financial powers which follows it will be unnecessary to refer to them further. Nevertheless, it is wise to remember that of the total expenditure of local authorities some 126 million pounds is mere expenditure on trading services which produces an equivalent income; and on the other hand it must be remembered that a substantial part of the income of local authorities consists of receipts from trading undertakings and corporation estates.

Even when we consider the expenditure on rate fund services, we find that a substantial part is met by income which is not derived from taxation. Of the 350 million pounds spent on those services in 1935–36, over 50 million pounds was obtained from fees, rents, recoupments, etc. The largest item, of course, consists of rents from housing estates which set off the high cost of housing services to the extent of over 18½ million pounds. There are, however, numerous other items; for instance, fees from baths and from games in parks, fees from public conveniences, sums recovered from patients in hospitals and from the relatives of poor persons, payments for private street works, school fees, charges for the collection of trade refuse, and so on. The effect is to reduce the charge for these services falling on public funds—the ratepayer and the taxpayer—to rather less than 300 million pounds.

Of this sum, a substantial part is provided by Government grants. In 1935–36 a sum of over 135 million pounds was paid to local authorities in the form of grants. About 2½ million pounds was in respect of capital expenditure (such as grants for expenditure on emergency water supplies, capital grants for works in the Special Areas, etc.). The rest was in aid of current expenditure. In part the grants were in aid of special services like education and housing, while a substantial part was made under the Local Government Act, 1929, under what is known as the "block grants" in aid of local expenditure generally. The grants were in fact allocated as follows:

	£
Grants under sections 89 to 100 of the Local Government Act, 1929, applicable to local government services generally (block grants)	45,342,654
Grants in aid of specific services—	
Education	43,399,100
Housing	13,781,772
Police	11,480,553
Highways and Bridges	9,373,414
Relief of the Poor	4,069,843
Other Specific Services	4,069,597
Other grants on revenue account	1,430,875
Total on revenue account	132,947,808 [1]

[1] Cmd. 5801, pp. 152–53. By 1940–41 revenue had increased to £662,895,800, of which "Government grants and reimbursements" covered £226,034,094. This will include, however, the greater part of the vast expenditure on Civil Defence and expenditure on war services undertaken by the local authorities and financed by the Treasury. See Cmd. 6562, p. 54.

This left a sum of about 165 million pounds to be made good out of local taxation (called "rates"). In other words, the cost of local government which has to be met out of public funds is shared between local taxation and Government grants or, what is the same thing, between the ratepayer and the taxpayer, in the proportion of 55·5 to 44·5.

§ 2. *Rates*

It is a general constitutional principle that no taxes may be raised without the consent of Parliament. Rates do not cease to be taxes merely because they are called by another name and are levied not on the nation as a whole but on a particular locality only. Rates, therefore, can be levied only with the consent of Parliament. But this consent is not one which must be given on every occasion, or even every year. The power is a general one, given by statute without restriction, and for all time. The House of Commons has no control over such local expenditure as is met out of rates, except the control which necessarily follows from the supremacy of Parliament. Parliament can, if it pleases, pass legislation interfering with the rating power; but this is only because the King in Parliament may in law do anything whatever. As the law now stands, neither House of Parliament nor any Government department can directly interfere with the exercise of this power.

The importance of this principle cannot be overestimated. No matter how close the control of the Minister of Health is becoming—and we shall see that more and more local government is coming under his

control [1]—so long as the rating power is independent of his control, local government as a whole must be, to a large extent, independent.

To show exactly what this principle means, let us compare the taxing power of Parliament with the rating power of local authorities.[2] Certain items of national expenditure are provided for by means of permanent legislation. These are called "Consolidated Fund Services," because they are paid for out of the Consolidated Fund, into which all national revenues are paid, without an annual vote by Parliament. They are few in number and are those services which, it is thought, ought not to be the subject of discussion in Parliament every year. The other services are "Supply Services," and the expenditure has to be voted every year. These services do not include expenditure of local authorities to be met out of rates, though they do include most of the grants which are paid to local authorities.

Estimates of the expenditure required by the Government departments for the coming year are presented to the House of Commons. The Chancellor of the Exchequer can then estimate the sum which will have to be raised by taxation, and makes proposals to the House accordingly in his "budget speech." The

[1] See Chapter VIII.

[2] Technically, the rating power is possessed by certain "rating authorities" only. The other authorities pay for their expenditure by levies—called precepts—upon the rating authorities. But since the latter have no discretion to refuse to levy rates demanded by the precepting authorities, it is more convenient to treat all local authorities as having the rating power. The actual machinery is discussed, *post*, pp. 188–90.

expenditure is provided for by the Appropriation Act, and annual taxes are levied and alterations are made in permanent taxes by the Finance Act of the year. Thus every item of the Supply Services comes into discussion in Parliament, and every item of annual taxation may also be debated. But there is no opportunity to discuss the manner in which the rating power is exercised, and the expenditure of local authorities cannot be discussed, except to criticise the way in which some Minister has exercised his power of making grants.

The local expenditure and the exercise of the rating power are discussed not in Parliament, but by the local authority itself. Local authorities are elected by the people of the area, not to carry out as agents of the Central Government the policy of that Government, but to carry out the policy which meets with the approval of the electors of the area. The furtherance of that policy needs expenditure, and for the expenditure and the means of meeting it the local authority is again responsible, not to the Central Government nor to Parliament, but to the electors. Thus expenditure on the one hand and the exercise of the rating power on the other are both authorised by resolutions of the local authority. Provided that the expenditure is legal, there is no responsibility to anyone except the people. For their exercise of their powers the councillors must answer at their next election, just as members of Parliament answer to their constituents at the next general election. Not only is there no opportunity for debating these matters in Parliament, but, further, no questions can be raised, since no Minister

has control—again subject to the use of the power of withholding grants on the ground of extravagance [1]—in such matters.

We have hitherto assumed that all local authorities levy rates. This is not so. The rating authorities are the councils of county boroughs, boroughs, urban and rural districts.[2] These levy rates to meet not only their own expenditure, but also the expenditure of any other local authority which has jurisdiction over the rating area or any part of it. These other authorities issue "precepts" to the rating authorities, who thereupon must levy a rate large enough to meet the amount of the precepts as well as for their own requirements.

The precepting authority asks for a lump sum, but it must so calculate the sum that the rate will fall equally on all parts of its area. For this purpose the rating authority must give to the precepting authority an estimate of the amount which would be raised by a rate of one penny per pound on all rateable property. Thus a county council, being a precepting authority and not a rating authority, has to issue precepts on all the district and borough councils in its area so that each levies a rate of the same amount for general county purposes.[3] It may determine that a rate of two shillings in the pound all over the county would meet its demands. It then issues a precept on the rating

[1] *Post*, pp. 240–43.

[2] Rating and Valuation Act, 1925, s. 1.

[3] The rate is not quite the same throughout the county. For instance, if a borough council is a local education authority, the borough will bear no share of the county expenditure on elementary education, which is a "special county purpose" and is chargeable in parts of the county only.

authority, for, say, twelve thousand pounds, because a rate of one penny in the pound in that area would produce five hundred pounds.

The rating authority does not thereupon levy a rate merely to meet the county precept. All precepts are served by a fixed date, and the rating authority, taking into consideration the amount of the precepts and the amount which it requires for its own purposes, levies a general rate to meet the whole. In an urban area this general rate is levied over the whole area, though there may be local modifications owing to the application of local Acts of Parliament. In a rural area, the general rate is levied over the whole area, but there are also "additional items" levied on particular parts of the area, to meet, for instance, parish expenditure. Besides the general rate, there may also be a "special rate" in rural areas. This is to meet expenditure on street lighting in a parish under the Lighting and Watching Act, 1833, and expenditure on "special expenses" such as the provision of sewers and water for a parish and other expenses of the rural district council on behalf of a particular place within its area.[1]

It will be seen that all this is mere machinery. Though the rates are levied by the rating authority, it has no discretion to refuse to obey a precept. Thus the precepting authority accepts the responsibility for its share of the rate, and the electors must criticise the rating authority only for its own share of the rate. Clearly, then, though the rating power is given by Parliament, and might be taken away by Parliament,

[1] Rating and Valuation Act, 1925, s. 3; Local Government Act, 1933, s. 190.

its exercise is within the discretion of the precepting or rating authority [1] concerned, and that authority is responsible directly to its own electors.

Rates, then, are local taxes; but they are a very peculiar kind of tax. They are taxes on the occupiers of real property, varying according to the annual value of the property. That, of course, is a very general statement of the kind which it is always dangerous to make, because it is subject to so many exceptions that it creates a wrong impression. However, it gives a general explanation. It is, in the first place, a tax on the occupier. It is a personal liability enforceable against him and not against the property, and if he does not pay a court of summary jurisdiction may issue a warrant against him for distraint on his goods; and if he has not enough distrainable goods he may be committed to prison for a term not exceeding three months. In respect of small properties, the owner of the premises may be required to collect the rates from his tenants, and often in the case of such small premises the weekly rent includes the rates; but the tenants are still liable and may be called upon to pay, though they may then deduct the amount paid from the rent. For the same reason, property which is not occupied is not subject to rating. Thus, the local authority provides police and fire services for the protection of unoccupied houses, but the owners make no contribution to the rates. There are, however, certain exceptional cases—metalliferous mines in some cases, and advertising stations and sporting rights—where the owners may be rated.

[1] Known generally as "spending authorities."

Secondly, it is a tax on real property or, as the law more correctly puts it, upon hereditaments. The Poor Relief Act, 1601, contemplated that every inhabitant should pay the poor rate according to his ability to pay, and it was held in *R.* v. *White* that rates were payable on personal property. The complicated methods of assessment now available were, however, unknown to the seventeenth century, and in any case interests in land were the great source of wealth. In practice, therefore, only interests in land were rated, and this practice was given statutory sanction by the Poor Rate Exemption Act, 1840. It follows that if a person occupies a corrugated iron hut (even on land otherwise occupied by another person) he must pay rates on it; but if he keeps an expensive (or any other) car in it, he pays no rates on the car. Similarly, if a person keeps valuable antique furniture in a small house, he pays much less local taxation than a much poorer neighbour who uses a much larger house primarily for shelter for a large number of children. There are, however, some exemptions, apart from the "derating" exemptions mentioned subsequently. They include churches and other buildings exclusively used for religious services and in the church precincts, premises belonging to and used by scientific and literary societies, non-provided elementary schools, burial grounds, and, above all, property occupied by the Crown for public purposes. The Crown pays a contribution in lieu of rates, but the assessment is made by the Crown, and local authorities generally consider that if Crown property were rated the contributions would be increased.

Thirdly, the valuation depends upon the annual

value of the property. This value is " the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditament if he undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." This is the definition of " gross value " in section 68 of the Rating and Valuation Act, 1925. In most ordinary cases the " net annual value " is found by making certain percentage deductions from this " gross value " according to the amount of the gross value; in other cases the net annual value is the rent which would be paid by the tenant if the tenant bore the above-mentioned " landlord's charges " as well as the " tenant's charges," but these are exceptional cases. The " net annual value " is the " rateable value " upon which rates are levied, subject to the qualifications to be made on account of " derating." Generally speaking, therefore, the rateable value is dependent upon the ordinary commercial rent, and the process of valuation is primarily a process of estimating what that rent would be. In the case of ordinary house or shop property, it is not difficult to make some kind of guess; but difficulties arise with public utilities which are, of course, both owned and occupied by the company. The process then becomes one of finding the hypothetical rent which the utility would pay to itself if it payed any rent. These, however, are regions of speculation into which we need not enter.

Valuation, or *assessment*, as it is technically called, is

in the hands of assessment committees, each operating for an area called an "assessment area." Every county borough is an assessment area, while in each county the county council was required by the Rating and Valuation Act, 1925, to draw up a scheme for the division of the county into assessment areas. The assessment area had to contain one or more rating areas, and the scheme had to take into account the population and rateable values of those areas, and the convenience of the whole area for administration. The assessment committee in a county borough is wholly appointed by the council, though at least one-third of the members must be persons other than members of the council. In a county the scheme fixed the proportions of members nominated by the county council, the rating authorities, and the boards of guardians respectively, but since April 1st, 1930, boards of guardians have ceased to exist, and, though existing members retain their positions, no new appointments can be made to represent the guardians.[1]

These assessment committees have independent statutory functions. They are responsible neither to Parliament nor to the local authorities by whom their members are appointed. They are appointed for definite periods, and there is no means of dismissing them except, presumably, that a writ of *scire facias* in the High Court is available for misconduct. The assessment committees in fact exercise their functions in a judicial manner.

The first steps in valuation are taken by the rating

[1] Rating and Valuation Act, 1925, s. 17; Local Government Act, 1929, s. 15.

authority. Forms are sent out to occupiers asking for answers to specific questions of fact relating to the property, and from these answers the rating authority compiles a draft valuation list which will then be open to inspection. Any person aggrieved may object to any part of the draft list on the ground that any matter in it is incorrect or unfair or that something ought to be omitted from it, or something added to it. And it should be noted that other local authorities may be aggrieved by the list. If, for instance, X and Y are two rating authorities in the same county and if X values its property too low, a higher rate for county purposes will be necessary ; and since this rate will be the same all over the county, it follows that the ratepayers of Y will have to pay increased rates. Thus Y is aggrieved and may object to the list before the assessment committee. In order to avoid these difficulties, each county has a *County Valuation Committee*, composed of members of the county council and a representative of each assessment committee in the county. Its functions are generally to promote uniformity of valuation throughout the county. It has no coercive power: its functions are consultative and advisory only, but it may be a " person aggrieved " by any matter on, or omitted from, a draft valuation list, and may therefore object before the assessment committee.

It is desirable also to secure some uniformity throughout the country; indeed, uniformity is much more important now than it was in 1925, because the new grant system established by the Local Government Act, 1929, is based on a " formula " which has for one of its factors the existence of low rateable value. If in

a particular area the general level of assessments is made low owing to failure to apply strictly the statutory definitions of value (because, for instance, there is local agitation against increased assessments), the total rateable value of the district is low, and the local authority may therefore receive an increased share of the total sum available for grants. In order to secure uniformity a Central Valuation Committee was established in 1926. It contains 32 members, of whom 24 are appointed by the five local authorities' associations and 8 by the Minister of Health. Its functions are purely advisory, and no rating authority or assessment committee is bound to accept its recommendations. It has given advice on a large number of difficult points of valuation practice, and its recommendations are usually relied upon.[1]

The Central Valuation Committee cannot be a "person aggrieved," but there may arise a dispute between the occupier or other aggrieved person on the one hand and the rating authority on the other. The function of the assessment committee is to determine this dispute in a judicial manner. For this purpose it will hear the parties and any witnesses whom the parties may wish to call, and it may employ a valuer to value the property and hear him as a witness. Having heard all the objections, the assessment committee approves the draft valuation list, with or without amendments, and the list becomes the substantive

[1] The first eight series of recommendations have been published in a consolidated and amended form. See Rating and Valuation Acts, 1925 to 1932: Consolidated and amended edition of the first eight series of representations received by the Minister of Health from the Central Valuation Committee (1934).

valuation list in accordance with which the occupier is taxed. Thus if the total rateable value of a rating area is one million pounds, and the rating authority has to raise five hundred thousand pounds for its own expenses and the expenses of precepting authorities, it will levy a rate of ten shillings in the pound. Consequently, if X is the occupier of premises rated at forty pounds, he will have to pay twenty pounds in rates.

The matter is not concluded by the signing of the valuation list. Any person who has the right to make an objection has also the right to make a proposal for the amendment of the list. This proposal will be heard by the committee in much the same way as an objection. Moreover, any person aggrieved by the decision of an assessment committee may appeal to the Court of Quarter Sessions for the county or borough in which the property is situate. Thus there is always an appeal to a court of law, and here not only the appellant and the assessment committee, but also the county valuation committee, the rating authority, and the occupier (even if he is not the appellant) may be parties. From the decision of this court appeal lies to the High Court in accordance with the usual procedure.

Thus there can be no doubt that the assessment committees are independent judicial authorities, performing only the duty of protecting the ratepayers against the rating authority, and protecting one rating authority from another.[1] They are, in short, administrative tribunals, having only a limited authority, and being subject, in fact, to the High Court by reason

[1] Owing to the derating system they may have to protect the National Exchequer against the rating authority. See *post*, p. 209.

of the existence of the right of appeal. They are kept to their jurisdiction, moreover, by the High Court, by prohibition, certiorari, and mandamus.[1] Conflicts of jurisdiction, therefore, are determined by the civil courts.

§ 3. *Derating*

Under recent legislation three classes of hereditaments have received special exemptions. These are :

(1) Agricultural hereditaments.
(2) Industrial hereditaments.
(3) Freight transport hereditaments.

The first of these are no longer rated, and do not appear on the valuation list. The second and third are on the list, but are assessed at only one-quarter of what would be their rateable value if the ordinary rules were applied to them. The operation by which these exemptions take place is known by the barbarous but convenient term " derating."

It is not necessary for us to study the definitions of the terms used. " Agricultural hereditaments " have been relieved of rates because of the depression in agriculture, and the definition is therefore intended to cover all land and buildings used for agricultural purposes and no other.[2] " Industrial hereditaments " have been relieved of three-quarters of their rates in order to diminish the overhead charges of industrial concerns. Thus, they may shortly be defined as " hereditaments occupied and used as mines, mineral railways, factories, and workshops." [3] " Freight trans-

[1] See Chapter IX.
[2] Rating and Valuation (Apportionment) Act, 1928, s. 2.
[3] *Ibid.*, s. 3.

port hereditaments " have received relief only in order that such relief may be passed on to industry, by means of reduced freight charges, and include hereditaments used for railway transport, canal transport, or dock purposes.[1]

We are not further concerned with this subject except for two purposes. In the first place, we see that it illustrates how Parliament, for its own purposes, may alter the basis on which local taxation is raised. And, in the second place, since rates are the only taxes raised or allowed to be raised by local authorities, it follows that derating involves either an increase in the rates levied on occupiers of other hereditaments, or some source of revenue other than taxes. In fact, Parliament had to provide for the decrease by increasing the grants given to local authorities out of national funds. Two remarkable things at least followed. The first was that the whole grant system had to be reorganised by the Local Government Act, 1929; and the second was that since control over the expenditure of grants must be vested in the Central Government, derating was necessarily followed by greater central control over local government. With each of these we shall deal in the proper place.

§ 4. *Grants*

The system of grants in aid of local expenditure grew up gradually. Strictly speaking the first grant was that of £20,000 given in 1833 to certain religious bodies engaged in education ; but education was not a service of local government until 1870. There were,

[1] Rating and Valuation (Apportionment) Act, 1928, s. 5.

however, other grants in 1834 to meet some of the cost of the administration of criminal justice. During the nineteenth century the grant system developed primarily as a means for appeasing the agricultural interest, which not only lost heavily through the repeal of the corn laws, but also had to pay large increases in rates to provide public health services to meet the new urban developments. The grant system enabled some of the increased cost of local government to be met out of national taxation. The partial relief of land from rates which was effected in 1896 and again in 1923 was another manifestation of the same political agitation. There was, however, another motive for the making of grants, namely the realisation that the nation as a whole was interested in the maintenance of standards in certain services, and the grant system was on the one hand a means for encouraging local authorities to reach that standard and on the other hand a measure of control to compel them to do so. By 1888, therefore, there was in existence a number of grants for specific services, usually in the form of lump-sum payments, though the police grant made since 1856 was a grant of one-quarter of the cost of pay and uniforms of the police, and the proportion was increased to one-half in 1874.

When the county councils were created in 1888, the Chancellor of the Exchequer, Mr. (Lord) Goschen, made an attempt to replace the annual grants by new sources of revenue. Accordingly, the produce of certain taxes was transferred to the local authorities. The income was paid into a special Local Taxation Account, and was paid out (in the same proportions as the discontinued grants) to councils of counties and

county boroughs. The county councils, in turn, paid out part to the smaller authorities within the county. Further revenues were assigned in 1890. This attempt to restrict, if not to abolish, annual grants and to provide revenues additional to and more flexible than the rates was, however, doomed to failure. The financial needs of the new social services created by the Liberal Government between 1908 and 1911 compelled the Chancellor of the Exchequer to stabilise most of the assigned revenues, so that most of the grants become merely ordinary annual grants ascertained and distributed in a peculiarly complicated way. Large additional grants were made from time to time, especially for education, housing, special public health services, and roads. The public health grants, like the old police grant, were "percentage grants"—that is, the amount paid was a proportion of the approved expenditure on the particular service. Also there were grants, for the most part in aid of general expenditure and not of particular services, necessitated by the partial "derating" of agricultural land under the Agricultural Rates Acts of 1896 and 1923.

The further "derating" of various kinds of hereditaments by the Local Government Act, 1929, necessarily increased enormously the amounts to be distributed as grants. In any case, there had been considerable criticism of the percentage grant system because the Treasury really had very little control over the amount. The Committee on National Expenditure in 1922 called it "a money-spending device, but not an economical system." [1] Accordingly, it was

[1] Cmd. 1581 p. 107.

decided in 1929 to abolish most of the grants administered by the Ministry of Health, and also some of the Road Grants administered by the Ministry of Transport. The grants so abolished were the following:

(i) the assigned revenue grants ;
(ii) the grants under the Agricultural Rates Acts, 1896 and 1923;
(iii) the percentage grants in aid of the following health services :
tuberculosis,
maternity and child welfare,
welfare of the blind,
venereal diseases,
mental deficiency;
(iv) the classification grants for Class I and Class II roads in London and county boroughs, and the grants for the maintenance of scheduled roads in county districts.

These grants were replaced by "block grants" calculated on a very complicated system which, as amended in 1937, is set out hereafter. The main effect of that system is to replace a large number of grants whose total varied from year to year, generally upwards, by a system whose total is fixed for definite periods—three years in the first instance, four years in the second period, and five years thereafter. The main object has thus been achieved, and the Chancellor of the Exchequer is no longer faced with a constantly rising demand for money on the discontinued grants. These Exchequer Grants in aid of general revenue still form only about one-third of the amounts distributed annually, and the following are the main grants :

(1) Grants in aid of specific services:
  (*a*) police;
  (*b*) education;
  (*c*) housing;
  (*d*) highways and bridges;
(2) The Block grants in aid of general revenues.

(1) *Police Grants*

It is only by an historical accident that the control of the police is vested in local authorities. Clearly, the preservation of order is the fundamental duty —if we may so express it—of any state. According to all principles of public administration the police should be under the control of the Central Government. This principle was, in fact, put into practice before the Commonwealth. The constables were directly under the control of the justices of the peace, who were royal officers directly responsible to the King in Council. But the excesses of the Stuarts resulted in the abolition of the Court of the Star Chamber, in which this direct control was exercised, and with the Star Chamber went all central control of local government.[1] Thus the justices became independent judicial and administrative officers, and the police became subject to local government, not to central government. In the nineteenth century, therefore, control passed to local authorities—or rather to statutory committees of local authorities.[2]

[1] *Ante*, p. 28.

[2] By "control" is here meant only that the committee appoints and pays the constables and is responsible for their discipline and general administrative duties. The constables have all the functions of

This does not, however, deny the philosophical principle that the control of the police should be a function of the organised state and not of an organised section of it. The state remains fundamentally interested in the organisation of the police and must therefore see that everywhere in England there is an efficient force. Furthermore, it must exercise some general control over all police forces. The police grant was the means of securing this, though statutes have made the control more effective.[1] A grant of one-half the approved net expenditure of the authority on the police is paid out of national funds provided that the Secretary of State is satisfied that the service is efficiently and properly administered and provided that his approval has been obtained for the rates of pay and allowances.

(2) *Education Grants*

Education is a service which must be organised locally. But equally clearly, the State as a whole is interested in the provision of adequate facilities. In 1870, therefore, while the new education authorities were authorised to meet their expenditure out of rates, they were also given grants from national funds. Under the system in force since 1918, the grants are determined by regulations laid down by the Board of Education. The provisions are too complex to be studied here, but the system adopted for elementary education may be

constables at common law and in the exercise of those functions are subject to no control except that of the justices of the peace. *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364.

[1] See *post*, Chapter VIII.

quoted as an example. Under the Elementary Education Grant Regulations, 1932,[1] as amended, the grant to any authority in any year is based on the average attendance, the authority's expenditure, and the product of a rate, according to the following formula :

> Thirty-six shillings for each unit of average attendance in public elementary schools maintained by the authority, with the addition of—
>
> (*a*) One-half of the net expenditure on a variety of services specified in Article 3;
>
> (*b*) Twelve-twentieths of the net expenditure on the salaries of teachers in those schools; and
>
> (*c*) One-fifth of the remaining net expenditure;
>
> less the product of a sevenpenny rate in the area. In some cases additional sums are payable under Article 4.

The net result throughout the country is to give a grant of slightly less than fifty per cent. of the total expenditure of authorities on elementary education. The " unit " basis of average attendance favours those areas with a large child population, while the effect of deducting the product of a sevenpenny rate is to favour those areas with low rateable value. In some areas, such as London, the product of a sevenpenny rate is higher than the unit grant for attendance, while in others the unit grant less the sevenpenny rate produces a considerable addition to the percentage grant. Fundamentally, therefore, the elementary education grant is a percentage grant with modifications intended to minimise one of the defects of a plain percentage grant, namely that it takes no account of ability to bear the local authority's share of the cost.

[1] S.R. & O., 1932, No. 60.

The grant is conditional upon the Board of Education being satisfied that the authority has——

(i) performed its duties under the Education Acts;
(ii) complied with the requirements, so far as applicable, of the Board's Regulations; and
(iii) supplied punctually such information and returns as the Board requires.

The Regulations provide, also, that the Board may withhold or make a deduction from the grant if the conditions laid down in the Regulations are not fulfilled. The Act provides, however, that if by reason of the failure of an authority to perform its duties under the Acts or to comply with the conditions on which grants are made, the deficiency grant is reduced, or a deduction is made from any substantive grant exceeding £500 or the amount which would be produced by a rate of a halfpenny in the pound, whichever is the less, the Board shall cause to be laid before Parliament a report stating the amount of and the reasons for the reduction or deduction.[1]

(3) *Housing Grants*

Power to deal with housing conditions and to provide houses for the working classes has been conferred upon local authorities since the Housing of the Working Classes Act, 1890. The shortage of houses of the pre-war years became acute as a result of the cessation of house building during the war, and the building of houses with Government assistance became the practice from 1919 onwards. The gradual fall in housing

[1] Education Act, 1921, s. 118.

costs, however, enabled Parliament to abolish subsidies for ordinary house building in 1933, and now such subsidies are given only for special classes of housing. In the same period there has been renewed attention to the removal of some of the defects in housing conditions which were produced by the Industrial Revolution, and special attention has been paid since 1930 to the clearance of the slums and since 1935 to the abolition of overcrowding. Primarily, Government grants are given for the removal of slums, the destruction of unfit houses, and the abolition of overcrowding, though grants are also made for the provision and repair of cottages for agricultural workers. In cases under the Housing Act, 1936, dealing with slum clearance and overcrowding, the general idea is to give a fixed annual contribution for the rehousing of each person displaced by the action of the local authority. The schemes for this purpose have, however, to be approved by the Minister of Health. Also, it is provided that if at any time the Minister is satisfied that the local authority has failed to discharge any of the duties imposed upon it by the Housing Acts or failed to observe any condition subject to which it is entitled to receive an Exchequer contribution, the Minister may withhold the grant or suspend or discontinue its payment.

(4) *Road Grants*

At Common Law the duty of maintaining highways in repair was imposed upon the inhabitants of the parish, unless for some reason, such as the tenure of lands, it was imposed upon a private person. This was reason-

able so long as all traffic was local; but as soon as stage coaches and long-distance travel became common, the parish on a main road was seldom able or prepared to maintain the road in proper condition. Turnpike roads, built and maintained for profit by trusts, thus became common. These with other main roads were ultimately vested by statute in the county councils, while other roads were vested in the district councils. By the Local Government Act, 1929, all roads in rural districts and all classified roads in urban districts were transferred to county councils. But before then the invention of the internal-combustion engine had completely altered matters. Thus statutes of 1909 and 1919 enabled the Central Government to give grants in respect of road construction and maintenance, and in 1920 the Roads Act provided that the produce of duties levied on mechanically propelled vehicles should be paid into the "Road Fund" and used for grants in aid of the maintenance and construction of roads. The amount grew so large that the Road Fund proved a temptation to Chancellors of the Exchequer, and it was several times "raided" in aid of the general revenues of the country. Ultimately, it was provided that the produce of the duties should go to the Exchequer, and the Road Fund received only those amounts which Parliament authorised to be paid into it. In the meantime, however, the Road Fund grants to London and the county boroughs and certain other grants were abolished by the Local Government Act, 1929, and the Road Fund made an equivalent contribution to meet the cost of the General Exchequer Grants provided by that Act. There remained the following grants:

(i) Classification grants on a percentage basis for Class I and Class II roads outside London and the county boroughs;

(ii) Percentage grants towards the construction of new roads and bridges and of major improvements on all Class I and II roads; and

(iii) Percentage grants towards the cost of improvement of unclassified roads.

The great "trunk" roads outside the county boroughs were, however, transferred from the county councils to the Minister of Transport by the Trunk Roads Act, 1936, and the county councils now maintain or improve those roads as agents for and at the expense of the Ministry. Since the transfer involved a diminution of cost to the county councils, the amount of money made available for General Exchequer Grants was reduced by the equivalent amount when the General Exchequer Contribution was revised in 1937. In other respects, the grants continue to be made on a percentage basis varying from fifty per cent. to sixty per cent. of the cost in most cases, but occasionally rising even to eighty per cent. They are entirely at the discretion of the Minister of Transport, who makes the grants only for approved schemes.

(5) *Exchequer Grants*

We have already seen,[1] that the derating operations of the Local Government Act, 1929, necessitated a reconstruction of the grant system. The result was that nearly all the grants were abolished except those already mentioned. The new system, though simple in its intentions, became complex on its way through Parliament, owing to the political necessity

[1] *Ante, p.* 198.

of preventing any increase in rates resulting from its creation.

The basis of the system is the *General Exchequer Contribution*, a notional fund—that is, a fund to which no actual transfer of credits is made, but which is presumed to exist in order that the amounts of the actual grants may be calculated. To this fund were credited by the Act of 1929—notionally—the following amounts:

(1) The amount of the grants abolished by the Local Government Act, 1929.

(2) The total losses suffered by local authorities as a result of derating.[1]

(3) A further sum which amounted to five million pounds a year in the first three years, and after that such a sum as Parliament might determine.[2]

The amount of the loss of grants in (1) and of the loss of rates in (2) was ascertained on the assumption that the scheme had been in force in the year 1928–29.[3] The amount in (3) was partly intended to compensate for the natural increase in both rates and grants which would have resulted under the old system.

When the totals under (1) and (2) were finally

[1] *Ante*, p. 197.

[2] There are limitations on this general statement in (3); but since there must in any case be a vote by Parliament, these limitations are of no legal effect, Parliament being unable to prevent a subsequent Parliament from passing whatever legislation it pleases.

[3] See generally Local Government Act, 1929, s. 86, and 4th Sched., Parts I and II. The amount of the General Exchequer Contributions thus depended partly on the proper interpretation of "derating." To prevent rating authorities from extending the definition, the revenue officer, a Treasury representative, may be an "aggrieved person" before the assessment committee. See *ante*, p. 196.

determined, it was found that the General Exchequer Contribution was made up as follows :

	£
Losses on account of grants	16,279,706
Losses on account of rates	22,292,203
Additional amount	5,000,000
Total	43,571,909

In accordance with the Act, the total under (3) was reconsidered in 1933, and an additional £350,000 was provided by the Local Government (General Exchequer Contributions) Act, 1933. Reconsideration again became necessary in 1937. This time there were several additional factors to be borne in mind. The Unemployment Assistance Act, 1934, had transferred the cost of maintaining the " able-bodied poor " from the poor law to the Assistance Board. Grants were payable by the local authorities to the Board, but it was decided to extinguish them and to make a modification in the General Exchequer Contribution accordingly. Again, the county councils had gained through the transfer to the Ministry of Transport of the trunk roads. Finally, the Midwives Act, 1936, had compelled local authorities to go to additional expense in a field which was, before 1930, grant-aided. A small additional sum was also provided to meet the growing cost of local services, and the total General Exchequer Contribution was therefore fixed for the quinquennium 1938–43 at £46,172,000 by the Local Government (Financial Provisions) Act, 1937. There should have been a further revision in 1943, but legislation was passed in 1941 to stabilise the amount at the 1937 figure until a new Act is passed.

This General Exchequer Contribution, then, is the notional fund which determines the total sums paid out to local authorities. To find out the actual sums, it is necessary to divide the fund into *county apportionments* and *county borough apportionments* for each county and county borough. These are determined by the application in each case of a "formula" which was intended to distribute the funds available as to make grants as nearly as could be ascertained according to the needs of the various counties and county boroughs. The factors considered for this purpose are :

(*a*) Population;

(*b*) High proportion of children under five years of age (children over that age are, of course, covered for local government purposes by education grants, which include grants for medical inspection, etc.);

(*c*) Low rateable value;

(*d*) High proportion of unemployment (involving high expenditure on poor relief, medical services, etc.);

(*e*) Sparseness of population as compared with mileage of roads.

The details of the formula need not concern us, but an example of a hypothetical county which may be taken to belong to the depressed areas may perhaps indicate how the formula works. Let us assume the following relevant data :

Estimated population in the appropriate year	1,000,000
Estimated number of children under five years of age per 1,000 of population . . .	120
Rateable value per head of population on the appropriate date	£3
Unemployment percentage (i.e. the proportion which the number of unemployed men expressed as an average of three years before 1938 increased by 10 per cent. of the number of unemployed women similarly expressed	

bears to the population, the whole being expressed as a percentage) . . .	5
Estimated population per mile of roads .	400

Then the "weighted population" is found as follows:

Estimated population	1,000,000
Add allowance for children $\frac{(120 - 50)}{50}$ per cent.	1,400,000
Add for rateable value $\frac{(10 - 3)}{10}$ per cent. .	700,000
	3,100,000
Add for unemployment 10 $(5 - 1\frac{1}{2})$ per cent. .	1,085,000
	4,185,000
Add for sparseness of population $\frac{40}{400 - 40}$ per cent.	465,000
Weighted population .	4,650,000

When the formula applies fully, the total General Exchequer Contribution will be divided among the counties and county boroughs in accordance with their respective weighted populations. There would, however, have been a sudden change in the resources of many councils if this system had been fully applied from the beginning. Accordingly, it was provided that the formula should apply to only twenty-five per cent. of the total General Exchequer Contribution until 1937, that it should apply to fifty per cent. from 1937–38 to 1941–42, that it should apply to seventy-five per cent. from 1942–43 to 1946–47, and that thereafter it should apply to the whole. The remainder was to be distributed to each county and county borough in proportion to its actual loss in rates and grants.

The county borough apportionment is the amount of the *General Exchequer Grant* given to the county borough council. In the county, however, further complication is introduced by the fact that it is not only the county council which suffers losses in rates and grants, but all the local authorities within its borders. The county apportionment, therefore, has to be divided among the county council and the district councils (which include the borough councils).

The amount apportioned to a district council is found by multiplying its population by a certain fixed sum. Where the district is a rural district, this amount must be divided by five.[1] The sums so obtained are the *General Exchequer Grants* of the district councils; and the amount of the county apportionment remaining is the *General Exchequer Grant* of the county council.

The tale is not yet fully told. Political considerations necessitated a promise by the Government that there should be no increase of rates under the new system. But the assumption underlying the change was that some councils were receiving more than their just share of the grants. If their grants were diminished, their rates would be increased. The General Exchequer Grants alone, being by hypothesis apportioned to needs, would have this result. It was therefore necessary to provide *Additional Exchequer Grants* and *Supplementary Exchequer Grants* in order to prevent such consequences.

[1] This representing roughly the rate of expenditure as between an urban district and a rural district.

§ 5. *Borrowing Powers*

The borrowing powers of local authorities are under strict central control, and it is a tribute to that control and to the financial probity of local authorities that no English authority has ever defaulted on any loan in respect of capital or interest, in spite of the fact that huge sums have been raised in this way—the outstanding loans in 1941 amounted to over 1,565 million pounds. No borrowing is permitted to meet current expenditure, except during the course of the financial year in question. That is, a local authority may raise money by way of overdraft or otherwise to meet expenditure during the current year until the income of the year is available. Permanent deficits are not allowed, and if there were a deficit at the end of a financial year it would be necessary to increase the rates during the next year to meet it. In fact, however, most authorities keep a balance in their rate fund accounts.

Most borrowing powers are specific; that is, when local authorities are empowered to provide capital works they are also empowered to borrow. Such specific powers refer, however, to the provisions of the Local Government Act, 1933. By section 195 of that Act, a local authority may, with the consent of the sanctioning authority (the Minister of Health, the Minister of Transport, or the Electricity Commissioners), or in the case of a parish council with the consent of the Minister of Health and the county council, borrow for any of the following purposes :

(*a*) for acquiring any land which the local authority has power to acquire;

(*b*) for erecting any building which the local authority has power to erect;

(*c*) for the erection of any permanent work, the provision of any plant, or the doing of any other thing, which the authority has power to erect, provide or do, if, in the opinion of the sanctioning authority or, in the case of a parish council, in the opinion of the Minister of Health and of the county council, the cost of carrying out that purpose ought to be spread over a term of years;

(*d*) in the case of a county council, for the purpose of lending to a parish council any money which the parish council is empowered to borrow;

(*e*) for any other purpose for which the local authority is authorised under any enactment or statutory order to borrow.

The consent of a sanctioning authority is not required under (*d*), but in every other case such consent is necessary. Sometimes, however, power to borrow is conferred directly by local Act without the requirement of consent; but then the power is examined carefully by the Parliamentary committee, with the assistance of the Department concerned. Further, if the local authority wishes to raise money by the issue of stock, the consent of the Minister of Health must be obtained to the issue of the stock, even if the sanctioning authority has already authorised a loan, and there are detailed provisions in Stock Regulations issued by the Minister of Health and approved by both Houses of Parliament as to the issue, transfer, dealings with, and redemption of stock. Detailed regulations are laid down in the Local Government Act for borrowing by way of mort-

gage, including provisions for sinking funds. Smaller authorities often borrow from the Public Works Loan Board, an independent statutory authority, at whose disposal money is placed by Parliament. Under the Local Authorities Loans Act, 1945, all local authorities must borrow from the Board until the end of 1950, a provision designed to enable the Central Government to control employment in accordance with the White Paper on Unemployment Policy.

Local authority loans are thus securities of a high order. The maximum periods allowed for repayment are never longer than eighty years, and vary according to the expected life of the capital works for which they are intended to be used. In every case a sinking fund is provided, and power has never been given to suspend the obligation of transferring funds to such sinking funds. There are, no doubt, occasions (due, perhaps to a fall in values as in the case of house property) when the whole of a loan is not covered by tangible assets, and certain loans were authorised before 1928 for current expenditure on poor relief, and these have not yet quite been extinguished (they amounted to less than seven million pounds in the aggregate). Subject to these qualifications, the amounts borrowed are represented by tangible assets, and before those assets have been exhausted the amounts due for repayment will have been provided by sinking funds. The loans for local capital expenditure are in fact managed even more carefully than Government loans, with the result that local authorities, even in the depressed areas, can borrow almost as cheaply as the Government itself.

CHAPTER VIII

CENTRAL CONTROL

§ 1. *In General*

In a previous chapter [1] we saw how the abolition of the Star Chamber left the justices of the peace completely free of any administrative control. We saw, further, that the Benthamite principle of local government involved close control by the Central Government. The local authorities were to be agents of the Central Government to carry out locally the national policy. This principle was recommended, as far as was possible under the terms of reference, in the Report of the Royal Commission on the Poor Laws in 1834, and was put into practice by the Poor Law Amendment Act, 1834.

But the principle applied to the poor law was not extended to the municipal corporations in 1835, and in no part of local government has central control been made so close as in the poor law. An attempt at close control of public health made in 1848 was frustrated in 1858,[2] and only by devious ways has the Central Government gradually brought public health administration into its own hands. Consequently, there is nothing in any Act relating to local government comparable with section 1 of the Poor Law Act, 1930, where it is laid down:

[1] Chapter II, in particular pp. 28–29.

[2] *Ante*, 51–54.

"The Minister of Health . . . is, subject to the provisions of this Act, charged with the direction and control of all matters relating to the administration of relief to the poor throughout England and Wales, according to the law in force for the time being.

"Provided that nothing in this Act shall be construed as enabling the Minister to interfere in any individual case for the purpose of ordering relief."

We must not understand by this that the poor law is directly and continuously under the uncontrolled discretion of the Minister of Health. He is charged with the direction and control "subject to the provisions of this Act" and "in accordance with the law in force for the time being." The law for the time being is the Poor Law Act, 1930, and the Orders issued under it. The latter the Minister can change, the former he cannot. And his orders may always be challenged by *certiorari*,[1] the ordinary method of challenging the exercise of official discretion.[2] In fact, a close scrutiny of this Act makes it clear that this general provision gives the Minister no greater power than he possesses under the other provisions of the Act. The power is large enough, larger than he possesses in any other sphere of local government; but it is not increased by the general provision. The section quoted is a deduction from the existence of specific powers set out elsewhere in the Act.

Though the poor law example has never been followed exactly, the most recent statutes tend to give almost as wide a power of control in accordance with the principle, already described, of using local govern-

[1] Poor Law Act, 1930, s. 142; *R.* v. *Oldham* (1847), 10 Q.B. 700.

[2] See Chapter IX.

ment to put a national policy into operation. Thus, the Minister of Town and Country Planning is charged with the duty " of securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales." The Minister of Education has the duty " to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area." It is one of the duties of the Minister of Health " to promote the preservation and proper use of water resources and the provision of water supplies in England and Wales, and to secure the effective execution by water undertakers, under his control and direction, of a national policy relating to water."[1] As in the case of the poor law, this general language has to be understood in the context of the specific powers granted by legislation. It cannot be doubted, however, that the modern tendency is to grant much wider powers than were common until 1929. The actual administration and the exercise of discretion within narrow limits are left to the local authority. The general lines of the administration and the method of exercising discretion are determined by a department of the Central Government. The department may give general orders ; it may advise what should be done in individual cases ; it may admonish for what

[1] Town and Country Planning Act, 1943, s. 1 ; Education Act, 1944, s. 1 ; Water Act, 1945, s. 1.

has already been done in individual cases. The administration, in short, is in the hands of local authorities; the general control is left with the Central Government.

This is, of course, a general statement only. What a department may do in any individual case depends upon what the statutes allow it to do. It is a general statement subject to many exceptions, and is a mere deduction from the noted consequences of the separate powers mentioned below. To study those individual powers would be to study every branch of local government law. All that we can do is to classify the most important and effective powers and give illustrations of them. There are, it appears, ten classes of such powers [1]:

(1) The issuing of general orders and regulations, the sanctioning of administrative schemes, and other cases in which the consent of a department is required before an act can be done by a local authority.

(2) Control over officers.

(3) Inspection by central officials.

(4) Confirmation of bye-laws and approval of schemes conferring powers.

(5) The audit.

(6) Control over grants.

(7) Control over loans.

(8) Appellate functions.

(9) Powers of acting in default.

(10) Powers in respect of local legislation.

The first two of these are derived from the Report of

[1] See Royal Commission on Local Government, 1922, *Minutes of Evidence*, vol. i, pp. 58–71.

the Royal Commission on the Poor Laws of 1834; the third was also derived from that Report, but the extent of the control appears clearly from the discussion in Chapter V[1] and need not be further considered; the fourth was first provided for in the Municipal Corporations Act, 1835; the methods of financial control are clearly complementary; the eighth and ninth are comparatively new. The tenth was dealt with in Chapter VI. We proceed, therefore, to illustrate the other eight methods of control.

§ 2. *Orders, Regulations, and Schemes*

The Royal Commission on the Poor Laws recommended in 1834 "the appointment of a Central Board to control the administration of the Poor Laws, with such Assistant Commissioners as may be found requisite; and that the Commissioners be empowered and directed to frame and enforce regulations for the government of workhouses, and as to the nature and amount of the relief to be given and the labour to be exacted in them, and that such regulations shall, as far as may be practicable, be uniform throughout the country."[2]

The result may now be seen in section 136 of the Poor Law Act, 1930, where it is provided:

"For executing the powers given to him by this Act the Minister shall make such rules, orders, and regulations as he may think fit for:

"(*a*) The management of the poor;

"(*b*) The government of workhouses and the education of children therein;

"(*c*) The apprenticing of children of poor persons;

[1] *Ante*, pp. 121–27. [2] Cd. 2728, p. 273.

"(*d*) The guidance and control of the councils of counties and county boroughs and their officers so far as relates to the management or relief of the poor and, subject to the provisions of this Act, prescribing their duties;

"(*e*) The making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor;

"(*f*) The keeping, examining, auditing, and allowing of accounts; and

"(*g*) Any purposes for which rules, orders, and regulations may be made under this Act;

"and generally for carrying this Act into execution in all other respects."

Any person who wilfully neglects or disobeys any such rule, regulation, or order renders himself liable on summary conviction to a fine of five pounds for the first offence, and of twenty pounds for a second offence, while every subsequent offence is deemed to be misdemeanour, so that the offender renders himself liable to indictment and imprisonment for a term not exceeding two years and a fine of not less than twenty pounds.[1] Also, any contracts made contrary to the rules, regulations, and orders are voidable and all payments so made are void.[2]

This gives a very extensive power, but we must remember that the Minister has far greater control over the poor law than over other local government services. Nevertheless, powers more or less extensive are given to a Government department in every local government statute. The Rating and Valuation Act, 1925, was passed at the end of 1925. Within eighteen months the Minister of Health had issued, in addition to twenty-eight circulars and four memoranda, no

[1] Poor Law Act, 1930, s. 139. [2] *Ibid.*, s. 140.

less than thirty-six sets of Statutory Rules and Orders made under the Act. In the Local Government Act, 1929, there were at least seventy-five extensive powers given to a department of state.[1] Every week half a column of a journal dealing exclusively with matters of local government is needed merely to mention the departmental legislation of the week.

Sometimes the powers thus given and exercised are in respect of the issue of general orders. The complexity of local government, the different conditions to be found all over the country, and other reasons of a like nature render some departmental legislation necessary. In the old local government statutes attempts were made to deal with individual differences by inserting appropriate provisions in a schedule. The limitations on Parliamentary time now make this impossible. Moreover, the method of administration is now laid down in far greater detail than was the case in the first three-quarters of the nineteenth century. The Minister is no longer content to provide what shall be done or what may be done: he considers it desirable to provide also how it shall be done. Thus a modern local government statute is a skeleton of rules. It lays down the general principles of the powers and the methods by which they are to be exercised, leaving the detailed working out of these principles to departmental legislation by Order.

A good example is to be found in the financial provisions of the Education Act, 1944. One would have

[1] This is the number given in the Index to my *Officials' and Councillors' Guide to the Local Government Act*, 1929, which does not pretend to be exhaustive in this matter.

thought that the grants to be paid by the Treasury, which are expected to amount, when the scheme is fully operative, to over 100 million pounds a year, would be determined precisely by Parliament. In fact, however, section 100 of the Act provides that the Minister "shall by regulations make provision" for the payment of grants for the purposes there set out, and that the Minister of Health "shall by regulations make provision for the payment by him to local education authorities of annual grants in aid of the expenditure incurred by such authorities in the exercise of their functions relating to the medical inspection and treatment of pupils." Any regulations made by the Minister of Education or the Minister of Health under this section "may make provision whereby the making of payments by him in pursuance thereof is dependent on the fulfilment of such conditions as may be determined by or in accordance with the regulations, and may also make provision for requiring local education authorities and other persons to whom payments have been made in pursuance thereof to comply with such requirements as may be so determined." In other words, the Government will decide what grants will be paid, and to whom, and on what conditions, and the whole will be carried out by regulations.

Very often, however, the central department is not concerned with the actual method of administration so long as it is satisfactory. In such circumstances the practice is to allow the local authority to draw up a scheme. This scheme will not take effect until it is approved by the appropriate department. In this way local conditions are taken into account, and yet

the central department obtains the control. For instance, the organisation of poor law administration in every county is determined by an "administrative scheme" drawn up by the county council, after consulting the district councils under section 4 of the Local Government Act, 1929. This scheme did not take effect until it was approved by the Minister of Health, but considerable latitude was allowed, though it should be added that the Ministry circulated a draft scheme which was largely copied by the county councils. Similarly, the detailed scheme of devolution of educational functions in counties is determined by a "scheme of divisional administration" drawn up by the county council under the First Schedule to the Education Act, 1944, and approved by the Minister of Education.

§ 3. *Central Inspection*

The Royal Commissioners in 1834 made a strong point of the necessity of constant supervision of poor law administration by means of Assistant Commissioners appointed by the new central authority. These Assistant Commissioners were appointed in accordance with the Act of 1834, and under the stimulus of Chadwick's enthusiasm did most useful work. So when the Commissioners themselves were superseded, the Assistant Commissioners were continued as inspectors.

The inspectors are now appointed under section 9 of the Poor Law Act, 1930, and they are given power:

"To visit and inspect every workhouse or place wherein any poor person in receipt of relief is lodged, and to

attend any meeting of a county or county borough council or committee or sub-committee held for the relief of the poor, and to take part in the proceedings, but not to vote at the meeting."

Each inspector has a district within which it is his duty to investigate the administration of the poor law. He reports defects of administration to the Minister, and endeavours to persuade local authorities to carry out the policy of the Minister. It is known that if his advice is not accepted, he can make an unfavourable report and so call down upon the local authority a peremptory order to do as they are told. In fact, however, his advice is generally accepted, and most authorities regard the visit of the inspector as a means of securing information about successful methods of administration elsewhere in his district.

Nevertheless, it is clear that the system helps the Minister to keep close control. For the most part it is his only means of learning of such maladministration as does not appear in increase of rates or illegal expenditure. General orders are useless if they are not obeyed. Obedience is more likely to be rendered if an inspector may look in at any moment.

In spite of this, the system has not received great extension. It has been applied to only two other important spheres of local administration.[1] These are police and education, and the extension in both cases was necessitated by the making of grants in aid.

The inspection of the police is extra-legal, in the sense that it is nowhere specially provided for. The grant of fifty per cent.[2] is conditional upon receiving

[1] Though frequent inspection of public health services has been one result of the new grant system: see *post*, pp. 243–46.

[2] *Ante*, p. 203.

a certificate of efficiency from the Home Secretary. To determine whether the force is efficient, it is necessary that, among other things, it shall be regularly inspected by His Majesty's Inspectors of Constabulary.

Under section 77 of the Education Act, 1944, it shall be the duty of the Minister of Education "to cause inspections to be made of every educational establishment at such intervals as appear to him to be appropriate, and to cause a special inspection of any such establishment to be made whenever he considers such an inspection to be desirable; and for the purpose of enabling such inspections to be made on behalf of the Minister, inspectors may be appointed by His Majesty on the recommendation of the Minister, and persons may be authorised by the Minister to assist such inspectors and to act as additional inspectors." These replace provisions which were formerly inserted in the Grant Regulations under the Education Act, 1921, and presumably the Minister may still withdraw the grant if an inspection shows that the school is not efficient. On the other hand, His Majesty's Inspectors of Schools have never been regarded, either by themselves or by the local education authorities, as "policemen." Their primary purpose is to help; and some of them, notably Matthew Arnold (whose reports are regarded as classical expositions of educational theory), have given great assistance towards the development of a comprehensive and satisfactory educational service.

§ 4. *Confirmation of Bye-laws and Schemes*

Bye-laws are general rules enacted by the local authority for the government of its area or of some part

of it (such as a park or recreation ground). The general power is contained in section 249 of the Local Government Act, 1933, by which it is provided that a county council and the council of a borough may make bye-laws for the good rule and government of the whole or any part of the county or borough, as the case may be, and for the prevention and suppression of nuisances therein. There are, however, large additional powers conferred by the statutes dealing with special services. For instance, bye-laws for streets are made under the Public Health Act, 1875, and bye-laws for buildings under the Public Health Act, 1936, by the council of the borough, urban district, or rural district concerned. Bye-laws for open spaces may be made by councils of counties, boroughs, districts, and parishes under the Open Spaces Act, 1906. Nearly every local government statute, in fact, confers such powers.[1] Bye-laws may create new offences punishable by fine in a court of summary jurisdiction. A bye-law must, however, satisfy the following conditions:

(i) it must be *intra vires*;

(ii) it must be certain in its terms;

(iii) it must be in conformity with the general law;

(iv) it must be reasonable.[2]

From our present point of view, however, the im-

[1] See the list in Jennings, *Local Authorities*, pp. 320–21, which deals only with bye-laws which follow the procedure prescribed by section 250 of the Local Government Act, 1933, and which has in any case been amended and added to by such statutes as the Restriction of Ribbon Development Act, 1935, the Housing Act, 1936, the Public Health Act, 1936, the Public Health (Drainage of Trade Premises) Act, 1937, the Factories Act, 1937, and the Food and Drugs Act, 1938.

[2] See Jennings, *Local Authorities*, pp. 315–17, and especially *Kruse* v. *Johnson*, [1898] 2 Q.B. 91.

portant rule is that the bye-law does not come into operation unless it is confirmed by a "confirming authority." In the case of the "good rule and government" bye-laws already mentioned, the confirming authority is the Secretary of State, though some of them require the confirmation of the Minister of Health, and the Minister of Health is the confirming authority for all other public health bye-laws. Under section 250 of the Local Government Act, 1933, which applies to all bye-laws under that Act, the Public Health Acts, 1875 to 1932, the Public Health Act, 1936, all Acts passed since 1934, and many older Acts, a period of at least one month must elapse before application is made to the confirming authority, and in the interval the intention to apply must be advertised, so that persons who object can make representations to the confirming authority.

The confirming authority may confirm, or refuse to confirm, any bye-law submitted for confirmation and may fix the date on which the bye-law is to come into operation. This power is entirely within the discretion of the confirming authority, so that the ultimate control is vested in the Central Government. Indeed, the Minister of Health publishes many series of "Model Bye-laws" which are usually copied by local authorities; and if a local authority wishes to depart from the model it must show good reason.

Many schemes drafted by local authorities are similar in their effect to bye-laws; that is, they impose obligations additional to those in the general law upon the inhabitants of the district and confer additional powers on the local authority. The most obvious

examples are those under the Town and Country Planning Act, 1932, and the Housing Act, 1936. Schemes under the former may be made with respect to any land, whether there are or are not buildings on it, " with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience, and of preserving existing buildings and other objects of architectural, historic, or artistic interest and places of natural interest or beauty and generally of protecting existing amenities whether in urban or rural portions of the area." The details of the restrictions that may be imposed and the powers that may be conferred on the authorities responsible for securing the enforcement of the scheme are laid down in other provisions of the Act. The first step in the preparation of a scheme is to pass a resolution, which requires the approval of the Minister of Health. The draft scheme then requires the approval of the Minister, and he may approve with or without modifications. After approval, the scheme must be laid before both Houses of Parliament, and in certain cases resolutions by both Houses are necessary, though such cases are exceptional. An interval is then allowed, during which any person aggrieved may make an application to the High Court on the ground that the scheme is not within the powers of the Act or that the procedure prescribed has not been followed. At every stage public advertisements must be made, and notices issued to persons affected, so that representations may be made to the Minister or an application made to the High Court. Indeed, the Minister must hold a local

inquiry before he confirms the scheme, unless no objections are made.[1]

The procedure for schemes under the Housing Act, 1936, is similar in principle, though it varies in detail. In particular, the consent of the Minister of Health is not required for the initial resolution. (The requirement of such approval in the case of town planning was inserted in the Housing, Town Planning, etc., Act, 1909, but removed by the Housing, Town Planning, etc., Act, 1919; it was reinserted in the Town and Country Planning Act, 1932, by the House of Commons, against the advice of the Minister himself.) Clearance orders for the clearance of a slum area are drafted by the local authority but require the consent of the Minister of Health. Redevelopment schemes are schemes for the partial clearance and redevelopment of areas which are not entirely slum areas, and they too require the consent of the Minister of Health.

Moreover, a local authority cannot acquire land compulsorily, whether for town planning, housing, or any other purpose, without the consent of some Government Department. In the older legislation the procedure was for the Minister concerned, if he thought fit at the request of the local authority, to issue a provisional order which required confirmation by Parliament. The more modern legislation generally enables the local authority to submit a draft compulsory purchase order to the Minister, who has power to confirm it and thus to give it legal effect without approval by

[1] The detailed procedure is set out in Jennings, *Law relating to Town and Country Planning*, pp. 249–59. There may be as many as 44 different steps to be taken before the scheme takes effect.

Parliament. Further, if the local authority desires a grant for housing, it must submit a detailed scheme to the Minister of Health, who has complete discretion as to whether to approve the scheme for grant purposes or not. Usually, too, the local authority requires to raise a loan to meet the expenditure; and again the consent of the Minister of Health is required. Consequently, housing and town and country planning functions are strictly controlled by the Minister of Health. In fact, though not in law, his control is stricter than even over the poor law, though his powers are primarily to restrict ambitious authorities and not to stimulate backward authorities—though there are also powers for this purpose.

§ 5. *The Audit*

The familiarity of modern times with the technique of financial administration makes us wonder that the Royal Commissioners of 1834 did not recommend a Government audit of poor law accounts. The reason for their appointment by the last unreformed Parliament was the growth of the poor rate. Even their proposal for the total abolition of out-relief would not be adequate if administration in other directions were uneconomic. But the Commission was so anxious to put utilitarian principles into practice that they omitted to recommend in respect of accounts anything more than regulations to secure similarity, which, if obeyed, would secure comparability.

The omission was, however, remedied by the Poor Law Amendment Act of 1834 itself, for the new central

body was given authority to regulate the appointment of auditors. Either Chadwick did not realise the weapon that Parliament had thrust into his hands, or he thought that its use would give rise to opposition, and that he could secure his end by other means. Whichever was the reason, the new auditors were nominated by the boards of guardians themselves. And even when the system was reformed in 1844 the nomination was left in the hands of the chairmen of the boards. Gradually, however, the central department gained more control, until, finally, in 1872, the whole system was reorganised, and poor law accounts have since been audited by district auditors appointed and removable by the central department.[1]

In the meantime, the audit had been extended to other bodies. It was not applied to the boroughs in 1835, and to this day the boroughs are, for the most part, exempt from the obligation of submitting their accounts to the district auditors. In this respect they differ from the other local authorities, for the district audit was applied to the sanitary districts in 1872, to the county councils in 1888, and to the parish councils and meetings in 1894, and applies equally to the accounts of committees and officers of those authorities. The district audit is also applied to the education and police accounts of borough councils. And when, in 1930, poor law functions were transferred to county borough councils, the Minister of Health felt it necessary to retain the control which he exercised over the poor law by means of the audit. In consequence, it applies also to the poor law accounts

[1] See W. A. Robson: *The Local Government Audit*, pp. 1–7.

of county borough councils, their committees, and officers.[1]

The result is that the following accounts are subject to audit by district auditors:

(*a*) The accounts of every county council, metropolitan borough council, urban district council, rural district council, and of every parish meeting for a rural parish not having a parish council;

(*b*) The accounts of any committee appointed by any such council or parish meeting;

(*c*) The accounts of any joint committee appointed under the Local Government Act, 1933, or under any enactment repealed by that Act, of which one or more of the constituent authorities is an authority subject to district audit;

(*d*) Numerous accounts subject to audit by enactments dealing with special services, including the accounts of asylums under the Lunacy Acts, the Metropolitan Water Board, the education accounts of county borough councils, accounts of managers of non-provided schools, accounts of assessment committees and rating authorities, poor law accounts, and accounts of borough police forces.[2]

Such accounts of borough councils as are not subject to district audit are audited by three borough auditors. Two of these are elected by the local government electors for the borough, and are called elective auditors. The third is appointed by the mayor and is called a mayor's auditor. This is, of course, a relic of the days when auditing was not a technical process involving high skill and qualifications. Borough councils of course have an internal audit under the control of their chief financial officers. In addition, they may adopt one of two kinds of external audit, the

[1] Local Government Act, 1929, s. 17.

[2] Local Government Act, 1933, s. 219, and the notes in Jennings *Local Authorities*, p. 290.

district audit or a professional audit, by means of a resolution.[1]

The accounts which are audited by the district auditors are made up and audited yearly. It is the duty of the district auditor:

(*a*) To disallow every item of account which is contrary to law;

(*b*) To surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure (and the persons concerned may be the members of the council who passed the appropriate resolution);

(*c*) To surcharge any sum which has not been duly brought into account upon the person by whom that sum ought to have been brought into account (e.g. where a rate-collector has failed to pay in all the sums paid to him);

(*d*) To surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred (e.g. where a rate-collector has been able to retain money collected by him because the office clerk has neglected to go through the accounts properly);

(*e*) To certify the amount due from any person upon whom he has made a surcharge; and

(*f*) To certify at the conclusion of the audit his allowance of the accounts, subject to any disallowance or surcharges which he may have made.[2]

He may not, however, disallow expenses when they have been approved by the Minister of Health, whether they are legal or not. Subject to this exception, the district auditors exercise an annual check upon the legality of local expenditure. Indeed, it appears that they may go farther. In *Roberts* v. *Hopwood*[3] the House of Lords held that the district auditor was entitled to

[1] Local Government Act, 1933, s. 239.

[2] *Ibid.*, s. 219.

[3] [1925] A.C. 578.

surcharge the mayor, aldermen, and a large body of councillors of the Poplar Borough Council because they had authorised the payment of wages far in excess of the rates agreed upon by the Whitley Council of the London district. The Act under which the payments were made provided that the council might pay such salaries and wages as the council thought fit, and the decision of the Whitley Council was not in the least binding upon the council. The Act did not say that the wages must be "reasonable," though most Acts (including the Local Government Act, 1933, which contains the general power outside London) do contain such a provision. Nevertheless the district auditor surcharged for the excess above the Whitley Council rate, and the House of Lords upheld his action partly on the ground that a local authority must exercise its powers reasonably, and partly because the rates of wages were fixed for several months and without reference to the nature of the work performed by each individual workman. The decision has been much criticised (in the opinion of the author very justly), but there is no doubt that even if the decision had been the other way the district auditor could exercise this function in most circumstances because of the express use of the word "reasonable." It may be doubted whether either a district auditor or a court is endowed with the necessary qualities to determine what is "reasonable"; but in other respects the district audit acts as a wholesome check upon illegal expenditure.

Moreover, any local government elector can object to any expenditure by appearing before the district auditor. Any person—whether such a local govern-

ment elector or a councillor or official who has been surcharged—who is aggrieved by a decision of a district auditor has a right of appeal. Where the decision relates to a sum exceeding £500 the appeal lies to the High Court and in any other case it lies either to the High Court or to the Minister of Health. Further, any person surcharged may apply to the tribunal, whether the High Court or the Minister, for a declaration that he acted reasonably or in the belief that his action was authorised by law; and if the court or Minister thinks that he ought to be excused from personal liability either wholly or in part, he may be so excused.

It thus appears that the Minister of Health has very substantial powers of control through the district audit. Nevertheless, they must not be exaggerated. The auditors are appointed by the Minister, are dismissible by him, and are paid out of funds voted by Parliament in the vote for the Ministry of Health (though in fact the cost is met by stamp duties paid by the local authorities). On the surface, therefore, they appear to be entirely under the control of the Minister. Their function is, however, a technical one, and they are professional officers carrying out their duties in a judicial manner. In the exercise of those functions they do not take orders from the Minister, nor does the Minister give such orders. Though there is nothing in the law to protect their independence, they are in fact as independent as justices of the peace. As Mr. Neville Chamberlain said when he was Minister of Health:

"They are not my auditors. They are entirely independent of me. I have never attempted to give a district auditor instructions as to what he should do; I have never

sought to influence a district auditor in carrying out his duties. It would never have been any use if I had. As a matter of fact the action of the district auditor has often been the cause of some embarrassment." [1]

Consequently, the district audit does not give such powers of control as might at first sight have been assumed. Control by the district audit is much more akin to the methods of control referred to in the next Chapter than to the powers of central control. It differs from judicial control in that it is exercised by qualified persons and not by lawyers, and in that it is not casual and almost accidental, but regular and almost automatic.

§ 6. *Control over Grants*

We saw in Chapter VII how local activity in a matter in which the whole nation was interested has been stimulated by means of grants in aid. An authority which might hesitate to institute a new service may well be bribed by a promise of a grant of half the approved expenditure out of national funds. The fear of local authorities, at least until recently, has been an increase in rates. If only half the additional cost of a service is to fall on the rates, there is much more inducement to create it. Thus local authorities have been stimulated to provide for maternity and child welfare,[2] blind welfare,[3] the welfare of mental defectives,[4] the treatment of tuberculosis,[5] venereal disease, and so on [6]; to create new roads and put old ones in a

[1] Quoted in W. A. Robson, *The Development of Local Government*, p. 351.
[2] Maternity and Child Welfare Act, 1918.
[3] Blind Persons Act, 1920.
[4] Mental Deficiency Act, 1913.
[5] Public Health (Tuberculosis) Act, 1921.
[6] See generally *ante*, p. 201.

condition to carry modern traffic [1]; to erect houses and pull down slums [2]; to set up an efficient education system and to provide medical inspection and treatment for schoolchildren [3]; to provide an efficient police force [4]; to undertake the responsibility of civil defence [5]; to extend water supplies and sewers in rural areas [6]; to re-develop their blitzed areas [7]; to provide relief work for the unemployed; and so on.

Now, the Treasury cannot pour money into the pockets of local authorities without having some control over the manner in which it is spent. Wherever a service is grant-aided, therefore, some Government department must exercise control over it. Thus, as we have seen,[8] the existence of grants has given the Home Office considerable control over the police, has given the Minister of Education supervision of educational services, has enabled the Minister of Transport to watch over the maintenance of the road system, and has given the Minister of Health autocratic powers in respect of housing. So, too, every one of the special public health services mentioned above, so far as any council possessed it, was before 1930 under the control of the Minister of Health.[9]

[1] Roads Act, 1920, and *ante*, p. 207.
[2] Housing Acts, 1919, 1923, 1924, 1930, 1935; and *ante*, p. 205.
[3] Education Act, 1944; and *ante*, p. 203.
[4] See *ante*, p. 202.
[5] Air Raid Precautions Act, 1937; Civil Defence Act, 1939.
[6] Rural Water Supplies and Sewerage Act, 1944, s. 1.
[7] Town and Country Planning Act, 1944, s. 5.
[8] *Ante*, pp. 202-8.
[9] See also control over medical officers of health and sanitary inspectors mentioned *ante*, p. 125; this control persists in spite of the fact that the grants are no longer given out of national funds.

Theoretically, there was no such control. If the Treasury gave a grant, it was necessary for the Minister to certify that the service was efficiently conducted. But the local authority could always go its own way and do without the grant. Two consequences followed: first, the Minister had no power to compel the institution of the service; and secondly, he had no power to stop the authority from giving up the service. The most that he could do was to compel the authority to keep the service efficient so long as it had one. Naturally, few authorities were prepared to relinquish a service which they had once instituted, partly because they would be called upon to explain why at the next local election, and partly because the institution involved a capital expenditure whose benefit they did not wish to lose. Nevertheless, even in practice, the Minister had no power to make an authority start a new service.

But the public health grants and most of the road grants have now been absorbed in the new Exchequer Grants.[1] If there is no longer a grant for tuberculosis, how can the Minister keep control of the tuberculosis services? It would be quite inconsistent with modern tendencies for the control to be given up. The matter was therefore dealt with in the Local Government Act, 1929. The control had previously existed, it will be remembered, by reason of the power to reduce or take away the special grants. The Act therefore provides[2]:

"The Minister (of Health) may reduce the grant pay-

[1] *Ante*, p. 201.
[2] Section 104.

able in respect of any year under this Part [1] of this Act to any council by such amounts as he thinks just, if,—

" (*a*) he is satisfied, either upon representations made to him by any association or other body of persons experienced or interested in matters relating to public health or without any such representations, that the council have failed to achieve or maintain a reasonable standard of efficiency and progress in the discharge of their functions relating to public health services, regard being had to the standards maintained in other areas whose financial resources and other relevant circumstances are substantially similar, and that the health or welfare of the inhabitants of the area of the council or some of them has been or is likely to be thereby endangered; or

" (*b*) he is satisfied that the expenditure of the Council has been excessive and unreasonable, regard being had to the financial resources and other relevant circumstances of the area; or

" (*c*) the Minister of Transport certifies that he is satisfied that the Council have failed to maintain their roads or any part thereof in a satisfactory condition:

" Provided that, whenever the Minister makes such a reduction, he shall make and cause to be laid before Parliament a report stating the amount of the reduction, and the reason therefor."

To see what exactly this section means, let us compare it with the law as it was before 1930, discussed above.

(i) It does not apply only to the special public health services for which grants were given before 1930. It applies to *all* public health services, including, therefore, not merely the special services above, which are not, strictly speaking, " public health services " (though they become such by definition in this case). A council may therefore now have its grant reduced because its sewerage system, its water supply, its hospital accom-

[1] Part VI, the part dealing with Exchequer Grants.

modation, etc., is inefficient. This is a completely new departure. Before 1930 the Minister had no control over these services except when a loan was required for capital expenditure.[1]

(ii) The council must not only " maintain a reasonable standard of efficiency "; it must also " maintain a reasonable standard of progress." This means that not only must the *existing* services be developed—and this might be compelled under the old system—but reasonable new services must be created. The Minister of Health, it is true, denied that the section bore this interpretation. But it is submitted that since the progress must be " in the discharge of their functions relating to public health services " in general, and not to the public health services which they have undertaken, the section must receive the wider interpretation.[2]

(iii) There is an entirely new power to reduce the grant on the ground that the expenditure of the council has been excessive and unreasonable. This is nothing else than a new and most potent weapon for controlling local authorities. It is for the Minister himself to decide that the expenditure has been excessive or unreasonable. Any expenditure of which he disapproves may be brought within this category. In short, any action of a local authority contrary to the *advice* of the Minister may lead to a reduction in the grant. Consequently, the Minister has at last obtained the means of controlling *every* part of local government which leads to expenditure.

[1] *Ante*, p. 214.

[2] *House of Commons Reports*, vol. 224, col. 213. I supported the Minister's opinion in my *Officials' and Councillors' Guide to the Local Government Act*, 1929, but I have now come to the opposite conclusion.

(iv) Control over the roads has increased, since the *whole* or any part of the grant may be withheld if *any part* of the road system is considered not to be in a satisfactory condition.

(v) Another important change does not appear on the face of the section. If the Minister before 1930 disapproved of the method of providing any particular service, it was a comparatively small matter for him to withhold the grant for that service. In no case, except that of the roads of a county council or county district, would it have had any very considerable effect upon the rates. All the discontinued grants together made up only about sixteen million pounds sterling. The new grants, on the other hand, make up about forty-eight million pounds—three times as much. Moreover, *any part* of the share of any council may be withheld for any of the causes mentioned in the section. Thus a dispute with the Minister over even a small matter coming within the ambit of the section might have very serious effects for the local authority concerned.

In one respect, however, the change has diminished the Minister's power. In respect of grant-aided services, it was necessary for every proposed change to be submitted to the Minister for his consent, because it would have increased the grant payable. This was no longer necessary when the percentage grants were abolished and any increase of services necessarily fell upon the rates alone. The short effect of the new grant system was, therefore, to substitute a general control over all health services for a very detailed control over certain specific health services. The change is un-

doubtedly important, because it has enormously expanded the range of the Minister's control. Indeed, he proceeded at once to use his new powers by initiating the first of what will obviously be a long series of inspections of all local health services. As the Annual Report of the Ministry of Health stated in 1931:

"Broadly speaking, the effect of the Local Government Act has been to assimilate the relationship of the Minister to local authorities in respect of these three services (tuberculosis, venereal diseases and maternity and child welfare) to that which already existed in the case of other public services, i.e. the Minister is no longer required to concentrate his attention on a detailed scrutiny of the expenditure of local authorities on particular items in particular services, but can confine his attention to the broader issues arising in the administration of these services. The Local Government Act has indeed rendered it necessary for the Minister to interest himself directly in the general standard of performance by local authorities of their public health functions, and the results obtained for their expenditure on health services, for in connection with the payment of grants under that Act the Minister is required to satisfy himself that local authorities are achieving and maintaining a reasonable standard of efficiency and progress in the discharge of their functions relating to public health services, and that their expenditure has not been excessive or unreasonable.[1]

"The Minister decided that this purpose could best be attained by a periodical survey of the health services of each authority. . . . A scheme was accordingly drawn up for the making of these surveys. . . .

"The object of these surveys has been to obtain a broad general view of the health performance of the local

[1] The reader will note the tactful way in which the enormous expansion of central control effected by the Act of 1929 is expressed. The Minister "interests himself"; he does not threaten to reduce the grants.

authority, where it is good as well as where it is defective, and they, therefore, range over a wide field, including not only the services which were formerly grant-aided but such services as the control and treatment of infectious diseases, lunacy, water supply, sewerage, supervision of the food and milk supplies, and the transferred poor law medical services. The reports on these surveys are considered in the Department and appropriate communications are subsequently sent by the Minister to the local authorities. Where criticism is found to be necessary, the Minister has no intention that it should be based on meticulous detail or should deal with the minutiæ of administration, but rather that it should confine itself to the broader issues with which he must be concerned in order to satisfy himself that the local authority are adequately discharging their public health functions. But while detail will be avoided in any comments which may require to be made as a result of the survey, examination in some detail is necessarily involved . . .; and where this examination discloses points on which improvements can be effected, the attention of the local authority is being directed to the matter. Moreover, it is anticipated that these surveys of health services, by the opportunities for consultation and for the pooling of information which they provide, will enable the Minister to be of assistance to local authorities in the discharge of their health functions, without impinging on due local responsibility." [1]

These paragraphs have been quoted not only because they indicate the enormous increase of powers which the Minister received from the Local Government Act of 1929, nor only because they show the manner in which the Minister proceeded to exercise those powers by instituting a system of periodical inspections, but also because they show how tactfully a "big stick" power of this kind can be exercised. The inspectors do

[1] Twelfth Annual Report of the Ministry of Health, 1930–1931, pp. 56–57.

not go round like the famous potter and smash everything which they dislike with the words "This will not do for Josiah Wedgwood." They express interest in the work which the local authority is doing; they congratulate the officials on their efficiency; they recognise bright ideas and promise to pass them on to others; but they also make delicate suggestions as to the manner in which improvements might be made. They listen to the troubles of the medical officer and discuss with him, as one medical officer to another, how they might possibly be avoided; they say that perhaps the method adopted in Bradford or London might possibly be successful. The local medical officer feels that he has learned something, and advises his council to introduce the necessary remedy. Similarly, the observations of the Minister are conveyed in the tactful manner of the paragraphs quoted. There is no threat to withhold the grant, but suggestions are made for improvement. If the threat were made the local authority might fight, in Parliament and outside; but as they are only suggestions and the council really is anxious to get the best value for its money, they are certain to be adopted.

§ 7. *Control over Borrowing Powers*

No local authority finds it possible to finance capital expenditure entirely out of rates and grants. It is considered desirable that capital expenditure which shall benefit future generations of ratepayers ought to be paid for in part by those future generations. Such expenditure is therefore financed by means of loans raised on mortgage or by issue of stock or in some other way permitted by the statutes. The creditor's remedy

in the event of non-payment is against the local authority. The national Treasury is in no way responsible. The loan is therefore on the face of it a purely local matter. But it becomes clear on further examination that other local authorities are interested. If any local authority defaulted by failing to repay a loan, this would have a depressing effect on the market for all loans of a like nature. Moreover, the Exchequer is indirectly affected. For much of the local expenditure is met out of grants. If the finance of the authority is unsound, much of this expenditure will be sterile. Consequently, it is very rarely that a local authority can legally borrow money without the consent of the Minister of Health or some other department of state.[1] The rare exceptions arise where the borrowing power is specially provided for in a local Act, and such powers are not usually given unless the Minister consents before the Parliamentary committee.

The legal position as well as the practice of the Ministry of Health is best summarised in the words of the Ministry itself: [2]

"Most loans raised by local authorities require the authority either of Parliament or of the Minister of Health. Even where the work is under the supervision of other Government departments such as the Board of Education in regard to schools, and the Minister of Transport in regard to roads, loans have generally to be sanctioned by the Minister of Health, the principal exceptions being that the Minister of Transport deals with loans for tramway, harbour, and light railway undertakings, and the

[1] See *ante*, pp. 214–16.

[2] Royal Commission on Local Government, *Minutes of Evidence*, vol. i, p. 57.

Electricity Commissioners with loans with regard to electricity undertakings, but in the last-mentioned case there is a statutory obligation to consult the Minister of Health.

"There is a good reason for the concentration of the power to sanction loans in one department, because this is the only way in which the whole financial position of a local authority can be effectively brought under review.

"Before sanctioning a loan, it is the practice of the Minister of Health to be satisfied that the particular works are needed, that they are well and economically planned and suitable for what is required, and also (a matter which has become increasingly important in recent years, owing to high rates and financial stress) that the financial position of the district warrants the raising of a loan for the purpose. Account has to be taken of the statutory limits of borrowing fixed by Parliament (though these are, in fact, now of reduced significance, because of the many exceptions which have been allowed), and also whether there is some other public work of more urgent necessity which the local authority should carry out before the particular scheme which is proposed."

It will be seen that under modern conditions this involves very close control indeed. Few local authorities are able properly to fulfil their functions without occasional loans. Every authority is therefore well aware when it involves itself in expenditure which has not the approval of the Ministry of Health that later on, when it needs a loan, the Ministry will be able to point out the extravagance and refuse to sanction the loan. The object on which they have spent their money may be perfectly legal, the Minister may have no statutory power to interfere, and yet he may be able to say, "I regard this expenditure as an extravagance." When the time comes for the loan, the authority is unable to raise it. Thus this control is not merely a

control over the actual objects for which the loan is required. It is a general control over local financial administration.

The Minister has complete discretion as to the means by which he may satisfy himself of the desirability of a loan. The usual practice is to send an inspector of the Ministry to view the site of the proposed building or apparatus and to take such evidence as he thinks fit. Sometimes his visit is advertised, and private persons and other local authorities are encouraged to give evidence or to produce arguments against the proposal. In any case, the object of the inspection is simply to ascertain the facts. The Minister is under no obligation to accept the opinion of the inspector, and, in fact, the report is never published or the opinions of the inspector allowed to be known.

Control over borrowing must, however, take on a new significance with the decision of the Government, expressed in the White Paper on Employment Policy, to control public expenditure with the object of maintaining a steady level of employment. Local authorities in normal times spend over 100 million pounds a year on capital account, and most of this sum is met by borrowing. A large building programme while a boom is in progress adds considerably to the boom by increasing the competition for materials and labour, and so putting up costs and wages. These, in turn, put up costs and wages in other trades and industries. In times of depression, on the other hand, local authorities tend to "economise" by cutting capital expenditure, which necessarily adds to the depression. Clearly local authorities ought to do exactly the reverse: to

" economise " while a boom is on the way, and to spend during the course of the depression. In furtherance of the policy of " ironing out " the trade cycle, the Central Government must control local authority spending as well as national spending. Accordingly, all loans during the next five years must be obtained through the Public Works Loan Commissioners, and no doubt the central departments will be reluctant to authorise loans during a boom and eager to authorise them during a depression.

§ 8. *Appellate Functions*

The primary responsibility for " keeping the ring " so that ordinary individuals can continue to live their lives without interference from others rests upon local authorities. Until the nineteenth century, the function was essentially one of police in the narrow sense in which that word is interpreted in England, the maintenance of order. Here the responsibility usually ends with the appointment of police officers, who thereafter act at their own discretion subject to their duty to bring an offender at once, or within twenty-four hours, before a justice of the peace. The administration of the criminal law is thus primarily a matter for the police and the courts. On occasions other officials appointed by local authorities, such as inspectors of weights and measures, inspectors of food, inspectors of shops, and so on, have functions to perform; but here, too, the main responsibility rests upon the criminal courts. So far as other rules of local government law imposing obligations on private persons are concerned, it is the invariable rule that if punishment is the necessary sanction

of the law, the control is vested in the criminal courts. For instance, building bye-laws impose many prohibitions on builders and occupiers of buildings; in the main, those obligations are enforced by the criminal courts.

If we take the great mass of powers created in the nineteenth century for the preservation of health and amenity—powers which in America are also included in the phrase "police power"—we find that other methods of administration have been prescribed. Criminal courts are excellent bodies for determining matters which involve no technical knowledge; and even where technical knowledge is required, if there is any serious fear that a power may be abused it may be desirable to give the function of control to a court. Many "orders" are made by the courts of summary jurisdiction which have no direct relation to the criminal law—for instance, orders of maintenance under the poor law and the law of mental deficiency, orders that children be committed to the care of fit persons, orders for abating nuisances, closing polluted wells, prohibiting the use of unfit houses, closing overcrowded houses, destroying unsound meat, the removal of persons suffering from infectious disease, and so on. In other respects, too, the courts assist the administration of local government law, as for example by enforcing liability to rates.

Very often, however, local authorities have direct powers of interference. They may, for instance, order an insanitary house to be put into a state of repair, or close part of a building because it is unfit for human habitation, or order an insanitary house to be demolished. Again, they may order a whole block or section

of houses to be demolished under a clearance order. Under town and country planning schemes responsible authorities may have a vast number of powers. It is quite impossible to lay down precise rules as to when the power should be exercised by a court and when by a local authority. Those who begin with the assumption that some powers are "administrative" and some "judicial" make strenuous efforts to find out which is which, but they never succeed. They usually come to the conclusion that a judicial function is exercised by a court and that a court ought to exercise a judicial function—a statement which, given the premise that it is possible to distinguish a judicial function, may readily be accepted, though unfortunately nobody has been able to tell us what a judicial function is.[1]

There is, however, this considerable difference between a local authority and a court, that the authority is rightly concerned with the end which it has in view, while the court is primarily concerned with the protection of the individual. Accordingly, it is never safe to leave to a local authority a complete discretion to interfere with private rights. Even if, as it usually does, it acts *bona fide* in the public interest, it may easily cause injustice in individual cases. Some powers may therefore be exercised only with the preliminary consent of some higher administrative body; a clearance order, for instance, requires the sanction of the Minister of Health. Other powers require the decision of a court—most of the powers of making "orders" conferred on courts of summary jurisdiction,

[1] See Jennings, *The Law and the Constitution* (3rd ed.), Chap. I and App. I.

and mentioned above, are exercised at the request of a local authority. In yet other cases the power is conferred upon the local authority, but any person aggrieved has a right of appeal. For instance, any person aggrieved by a notice to put a house in repair, or to close part of a house, or to demolish a house, has a right of appeal to a county court. A county court judge is not the person best suited to determine whether a house is fit for human habitation; he probably knows as much about drains, for instance, as a street bookmaker knows about camels. Probably, however, he is a better tribunal than a court of summary jurisdiction; and in the absence of a properly qualified local administrative tribunal, he is probably the best tribunal available. Before 1930 such appeals were taken to the Minister of Health; but the expense involved in dealing with these small and local matters was so great that the jurisdiction was transferred to the county court.

In other cases, appeals still go to some central department. For instance, it is provided by section 268 of the Public Health Act, 1875, that:

"Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Minister of Health stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Minister may make such order in the matter as to the said Minister may seem equitable, and the order so made shall be binding and conclusive on all parties."

It will be noted that the Minister has power to make such order as may seem " equitable," so that a substantial element of policy is brought in; nevertheless, this has always been an unsatisfactory provision, and for matters covered by the Public Health Act, 1936, a new procedure is laid down. Against the original determination of the local authority in respect of which the expense was created, a right of appeal to a court of summary jurisdiction is given; if the right is not exercised or the court finds in favour of the local authority, the authority may do the necessary works and recover the cost either by ordinary action or by proceeding for civil debt in a court of summary jurisdiction. In this way, the necessity for appeal to the Minister is avoided.

There are, however, many other appellate powers. Appeals against the refusal of a local authority to allow " interim development " in an area covered by a town and country planning resolution go to the Minister of Town and Country Planning, and town and country planning schemes usually provide for similar appeals. Again, appeals in respect of ribbon development go to the Minister of Transport. The primary question in each case is whether the refusal or the restriction is " reasonable " in view of all the circumstances of the case. In the case of ribbon development the House of Commons sought to give the jurisdiction to the courts of summary jurisdiction, but the right to appeal to the Minister was restored on the Minister's insistence. Such appeals are taken after a local inquiry by an expert, and the political element is never brought in. While town planning was under the Ministry of Health a summary of its decisions was published every year; and

the Ministry of Transport has published volumes of its decisions under the Restriction of Ribbon Development Act. It would be very difficult to give the jurisdiction to a court, and yet the central departments are hardly the appropriate bodies; and, indeed, the Ministry of Health is not keen to undertake such appellate functions. The difficulty is that there is in England no competent tribunal owing to the absence of administrative tribunals which have both the necessary experience and the necessary independence. In any case, this is an unimportant element in central control. It has the advantage of producing uniformity of administration, but it gives little effective control over the general policy of local government.

§ 9. *Power to Act in Default*

Some statutes confer upon the central authorities power to deal with local authorities who default in the exercise of their functions. Under section 299 of the Public Health Act, 1875, the Minister of Health had power to appoint a person to exercise the functions of a sanitary authority where it had failed to provide sufficient sewers, or to maintain existing sewers, or to provide an adequate water supply, or where danger arose to the inhabitants by reason of the insufficiency or unwholesomeness of the existing water supply. It was, however, never exercised, and was repealed except in respect of county boroughs by the Local Government Act, 1929, which provided in section 57 that where he was satisfied after local inquiry that a non-county borough or district council had made default in the services mentioned, or in discharging any other func-

tion in relation to public health, he might transfer the function to the county council. The specific services mentioned are now covered by the Public Health Act, 1936, and section 322 of that Act provides that if complaint is made to the Minister or he considers that an investigation should be made, he may cause a local inquiry to be held. If after inquiry he is satisfied that the council is in default, he may make an order directing them to discharge the functions as may be specified in the order. If the order is not obeyed, he may transfer the functions to the appropriate county council, except in the case of a county borough, in which case he may transfer the function to himself. A provision to the same effect is contained in section 171 of the Housing Act, 1936. The power in section 322 of the Public Health Act, 1936, has been extended by the Rural Water Supplies and Sewerage Act, 1944, section 4 of which provides that the Minister may transfer the functions to himself.

In section 99 of the Education Act, 1944, there is a comprehensive " default power " as follows :

(1) If the Minister is satisfied, either upon complaint by any person interested or otherwise, that any local education authority, or the managers or governors of any county school or voluntary school, have failed to discharge any duty imposed upon them by or for the purposes of this Act, the Minister may make an order declaring the authority, or the managers or governors, as the case may be, to be in default in respect of that duty, and giving such directions for the purpose of enforcing the execution thereof as appear to the Minister to be expedient; and any such directions shall be enforceable, on application made on behalf of the Minister, by mandamus.

(2) Where it appears to the Minister that by reason of

the default of any person there is no properly constituted body of managers or governors of any county school or voluntary school, the Minister may make such appointments and give such directions as he thinks desirable for the purpose of securing that there is a properly constituted body of managers or governors thereof, and may give directions rendering valid any acts or proceedings which in his opinion are invalid or otherwise defective by reason of the default.

(3) Where it appears to the Minister that a local education authority have made default in the discharge of their duties relating to the maintenance of a voluntary school, the Minister may direct that any act done by or on behalf of the managers or governors of the school for the purpose of securing the proper maintenance thereof shall be deemed to have been done by or on behalf of the authority, and may reimburse to the managers or governors any sums which in his opinion they have properly expended for that purpose; and the amount of any sum so reimbursed shall be a debt due to the Crown from the authority, and, without prejudice to any other method of recovery, the whole or any part of such a sum may be deducted from any sums payable to the authority by the Minister in pursuance of any regulations relating to the payment of grants.

The value of such powers is not great. They are, in fact, never used. They give what has been called a "big stick" with which to threaten to beat the authority. The Minister rarely threatens. Central control would be entirely ineffective if there were antagonism between the central and the local authorities. Far more can be done by suggestion than by threats; and, indeed, the tendency of the Ministry of Health is to treat local authorities too gently. Far from being the harsh supervisor, it tends rather to be the guide, philosopher, and friend who does not bother overmuch if his advice is ignored.

§ 10. *Cumulative Effect*

It will be seen that the means by which the Minister of Health or other department of the Central Government controls local government are many and varied. What is far more important than the powers themselves, however, is their cumulative effect. At the beginning of this chapter a general principle was laid down. It was said that the effect of all these powers is to bring local government under the direct control of the Central Government. The general policy is laid down by a Government department, its application is a matter for the local councils. This general principle follows, it is suggested, from the individual powers. It is actually stated in the Poor Law Act. It is not stated elsewhere. But the control of the poor law is hardly greater in actual fact than the control of any other department of local activity.

There are, indeed, consequences of this close control which can never be inserted in a statute. It has a psychological effect. So close is the relation between the Ministry of Health and a local authority that many questions are submitted to the Minister over which he has no legal control. He is often asked, for instance, for advice on a point of law. Sometimes advice is refused. But sometimes an opinion is given. It is pointed out that the Minister has no power to determine this question, but his opinion is . . . The opinion is usually all that the local authority needs. The action of the authority may be on the wrong side of the law, but it is on the right side of the Minister. If there is a surcharge, the councillors can rely on

the Minister's remitting it. If they have actually secured the Minister's sanction, they cannot even be surcharged.

The advice sought is not, however, only legal advice. The officers of the Ministry have acquired immense technical experience which is readily placed at the service of any local authority. Being closely in touch with all parts of the country, they follow the experiments which imaginative local authorities conduct, and they pass on to other authorities a knowledge of the results of these experiments. The Minister has, moreover, the right to demand from any authority such statistics and other information as he pleases. The information can be classified and studied by expert statisticians. It may be found from such statistical surveys that expenses upon certain local services vary considerably. It may be found, for instance, that one authority is clearing its refuse at half the cost per head of another.[1] If this is pointed out, the second authority may be able to determine where its system is wasteful. In this respect the effect of close control is most beneficial.

Even this does not tell the whole story. If, for some reason, the authority is in a difficulty, if, for instance, it has a dispute with another authority, its first reaction is to turn to the Ministry of Health. It will probably take the informal opinion of some officer of the Ministry. But, in any case, it will always look carefully at the powers of the Minister to see if he cannot get them out of the difficulty. Every counsel engaged on local

[1] See, for instance, *Annual Report of the Minister of Health*, 1928–29, pp. 22–25.

government work recognises that when he receives a case for his opinion, his first function is to determine whether the Minister has any powers in the matter. There is no thought of litigation until it is known that no steps can be taken by the Minister to determine the dispute. Sometimes, indeed, litigation is proceeded with in order to induce the Minister to take steps to remedy an injustice. The local authority may know that its chances of success are small, but it will proceed because its very failure may prove the justice of its complaint, and will hope that this demonstration will result in legislation being passed for the purpose of redressing the injustice.

CHAPTER IX

JUDICIAL CONTROL

§ 1. *Judicial Control in General*

ENGLISH administrative law differs from some other systems, such as the French, in that no special courts have been established to control administrative authorities in the exercise of their functions. If a French citizen complains that an administrative authority has exceeded its powers, or has exercised its powers wrongly or to his detriment, he has a cheap and easy remedy before an independent administrative tribunal whose particular function it is to curb the activities of administrative authorities in the interests of the State as a whole and its citizens individually. The accidents of English history, and particularly the oppressive use of the Court of Star Chamber by the Stuart kings and the political activities of some Stuart judges and lawyers on the Parliamentary side, secured that this function of control, in so far as it is exercised at all, should be exercised by the civil courts. The result in the sphere of central government has been sometimes to leave the subject without an adequate remedy. In the sphere of local government, however, no great difficulties arise. Local authorities, as we have seen, are in the main the successors of the justices of the peace. Those justices were inferior courts subjected only, after the abolition of the Court of Star

Chamber, to the control of the Court of King's Bench. That court and its successor, the King's Bench Division of the High Court, have therefore been able to extend to local authorities the remedies which formerly were and still are used against justices of the peace. On the other hand, local authorities are also "persons" at law, and after some hesitation, and subject to some qualifications, the courts have been able to use against them the remedies which are available when an ordinary person commits a wrong against another person.

In part, therefore, the remedies available are special remedies used in the main against governmental institutions, including inferior courts of all kinds; in part, however, they are the remedies used against private persons. In any case, it must be remembered that local authorities are not really ordinary persons. They have special rights, powers, and duties conferred upon them by a mass of legislation, and the primary concern of the courts is not with the ordinary wrongs—breaches of contract, torts, and crimes—that they commit, but with the improper use of their special rights and powers and their failure to perform their statutory duties. Even when the remedies are the same as at common law, the whole emphasis is changed. Nearly all cases against local authorities involve an interpretation of the special statutes which form the main body of local government law. Consequently, while some of the principles enunciated in this chapter are principles of the common law, they have to be applied in the framework of special statute law; and others are peculiar to administrative law.

Before we proceed to examine the general powers of

control, moreover, it has to be remembered that the courts have many special powers under express statutory provisions. In many cases the local authority cannot proceed directly to enforce its decisions; it must secure an order from a court of summary jurisdiction. Powers of this kind are particularly important, because they often render quite unnecessary the taking of legal proceedings by private persons. For instance, whenever his advice is sought about a nuisance, the ordinary solicitor at once thinks of the remedies available at common law; and, unless he is well instructed in local government law, he will advise his client to spend money on legal proceedings. Frequently such expenditure is quite unnecessary. Under the Public Health Acts, many nuisances are " statutory nuisances " which can be dealt with by the local authority and the local court of summary jurisdiction in combination. Where a local authority is satisfied that a statutory nuisance exists, it will serve an " abatement order " ordering the person concerned to abate the nuisance. If the person concerned does not obey the order, the local authority will lay a complaint before a justice of the peace, and the justice will order the person to attend before a court of summary jurisdiction. If satisfied that the nuisance exists, the court may issue a nuisance order requiring the defendant to comply. Failure to comply is an offence, and the local authority is entitled to abate the nuisance at the expense of the person against whom the order is made.

Again, there are many cases where a right of appeal from the decision of a local authority may be taken to a court. For instance, local authorities have power to

make bye-laws for the construction of new buildings. The bye-laws provide for the deposit of plans with the local authority, and the local authority may approve or reject the plans; but, by section 64 (3) of the Public Health Act, 1936, " any question arising . . . between a local authority and the person by whom or on whose behalf plans are deposited as to whether the plans are defective, or whether the proposed work would contravene any of the bye-laws, may on the application of that person, be determined by a court of summary jurisdiction." When plans are deposited, certain other matters may be taken into consideration by the local authority, and in each case there is a right of appeal to a court of summary jurisdiction. Reference has already been made to other powers—for instance, appeals to county courts against orders for the repair or demolition of houses or the closing of parts of buildings, appeals to the High Court against clearance orders, redevelopment schemes, compulsory purchase orders, town and country planning schemes, etc. Indeed, it may be said without exaggeration that these numerous special powers provide the real judicial control. Local authorities appear as defendants and respondents in such cases far more frequently than they appear as defendants under the powers of judicial control which are considered later in this chapter. The general powers are undoubtedly of great constitutional importance; but the emphasis which is very rightly placed upon them in the modern books must not blind the reader to the fact that the specific powers of the courts, which would need volumes to expound, are of far more frequent occurrence and, to

the individual concerned, of far more practical importance. Local authorities rarely commit torts and even more rarely exceed their powers; it is the judicial control within the powers which they possess which really matters to the ordinary individual.

§ 2. *Damages for Ordinary Wrongs*

Local authorities are owners and occupiers of property; they make contracts; they may be trustees; and they may commit torts and crimes. It must be remembered, however, that they are corporations acting through officials or, in the legal sense (not in the sense in which the term was used in Chapter IV, where a distinction was drawn between "officers" and "servants"), servants or agents. Consequently, while it is possible to say that a local authority has neglected to do something, it is not possible to assert that physically it has done something. All that one can say is that the act of the servant or agent is regarded in law as the act of the local authority. That is, the local authority can be liable civilly or criminally for a positive act only where by law the act of a servant or agent is attributed to his master or employer. The liability of a local authority for positive acts is therefore vicarious, and it cannot be liable where the ordinary law of master and servant does not impose a liability upon the master. Generally speaking, under ordinary principles of common law, an act done by a servant in the course of his employment is regarded as the act of his master. The contracts made by servants on behalf of the master are enforceable against the master, and the master as well as the servant is liable for the torts

committed by the servant within the scope of his employment. On the other hand, there is rarely any vicarious liability for crimes. If a duty is imposed on a local authority and a criminal sanction is attached, then failure of the local authority to perform the duty is a crime. In a few cases, also, employers as well as servants are made by statute guilty of the crimes committed by their employees. Some of the offences under the Road Traffic Acts, the Licensing Acts, and so on, are offences for which an employer may be vicariously guilty, since the legislature wishes to impose on the employer the duty of seeing that his employees obey the law. These are exceptional cases, and generally speaking, and particularly with respect to ordinary common law crimes, there is no vicarious liability. It is therefore rare for a local authority to be guilty of crime, and the cases are all exceptional and under special statutes—not necessarily local government statutes.

Further, it has to be remembered that the doctrine of *ultra vires* [1] compels some modification of the ordinary rules of vicarious liability. The act of the servant is attributable to the employer only if it is within the scope of his employment. A local authority is a corporation with limited powers. Is it possible to assert that the employee acts within the scope of his employment if his employer has no legal power to do the act? We have already seen that a local authority cannot be liable on an *ultra vires* contract.[2] It has sometimes been said that for the same reason a corporation cannot be liable in tort at all. It has no statutory or other powers

[1] *Ante*, pp. 144–57. [2] *Ante*, pp. 144–45.

to commit torts; therefore it cannot employ a person to commit torts; therefore the torts committed by its employees are not committed in the course of their employment; and therefore the corporation is not liable. But the courts have refused to follow this pretty piece of logic, and it is clear that if an employee commits a tort when he is acting within the general scope of his employment the employer is liable. If, for instance, a county council employs a watchman to guard an excavation in a highway, and he neglects to keep the excavation lighted, so that a cyclist injures himself by falling into it, the county council is liable. The cases are not wholly consistent, but the conclusion seems to be that the absence of statutory powers is one of the elements which must be considered when the question whether the servant acted within the scope of his employment is considered. If the servant is clearly acting on instructions and in so doing commits a tort, the local authority will be liable. Thus, in *Campbell* v. *Paddington Corporation*,[1] the corporation was held liable for obstruction caused by a hoarding which it had no power to erect. In *Smith* v. *Martin and Kingston Corporation* [2] the corporation was held liable where a teacher directed a girl to poke a fire and the child was burned, though the local education authority had no statutory powers to compel children in schools to poke fires. In *Percy* v. *Glasgow Corporation*,[3] the corporation was held liable for the act of a tramway conductor who refused to accept a penny in payment of a fare and demanded another, whereupon the passenger

[1] [1911] 1 K.B. 869. [2] [1911] 2 K.B. 775.
[3] [1922] 2 A.C. 299.

refused and was taken into custody. If the employees, said Lord Haldane, " were acting within the scope of what they were employed to do, although they acted mistakenly, the respondents are responsible for what they did." Under a bye-law the conductor had power to detain any passenger who attempted to evade payment of his fare if his address was not known. Here the passenger gave his name and address, and the real question at issue was whether his address was known merely because he gave it (for he might very easily have given a false address). However, the statements made in the case seem to lead to the conclusion that even if the address were known and the conductor nevertheless gave him into custody the corporation would have been liable.

Further, it has to be remembered that a person employed by a local authority is not necessarily acting as a servant of the local authority for every one of his acts. Usually, powers and duties are given to local authorities and are carried out by them through officials; but occasionally such powers and duties are given directly to the officials employed by the authority and are exercised by the officials on their own responsibility. Thus, in *Stanbury* v. *Exeter Corporation* [1] the plaintiff claimed damages from the corporation on the ground that an inspector appointed and paid by the corporation had put the plaintiff's sheep in a pen and ordered them to be kept there overnight, suspecting that one of the rams was suffering from sheep scab, and as a result the plaintiff was put to considerable expense. The inspector was acting under powers

[1] [1905] 2 K.B. 838.

conferred upon him by a Sheep Scab Order issued by the Board of Agriculture, and the court held that as the power was conferred upon him and not upon the local authority the ordinary relation of master and servant did not apply, so that the corporation was not liable. Similarly, a borough corporation is not liable for false imprisonment if a constable employed by the corporation wrongfully arrests a person. Such an action was brought in *Fisher* v. *Oldham Corporation*,[1] but the court pointed out that by the Municipal Corporations Act, 1882, a borough constable has all the powers of a constable by common law or statute, and that the arrest in this case (on a charge of obtaining money by false pretences) was made under such powers conferred upon the constable himself.

A slightly different situation arose in *Tozeland* v. *West Ham Guardians*.[2] There the labour master of a workhouse called upon an inmate to assist an electrical engineer in the service of the guardians in fitting a new electric installation in the workhouse. Owing to the negligence of the engineer a platform on which the poor person stood gave way and he was seriously hurt and sued the guardians for damages. The guardians had power under the Poor Law Acts and Orders to employ the poor person on a task of work. The court held that the guardians were subject to such close control by the Local Government Board that they had merely ministerial acts to perform with respect to poor persons, so that they were not liable to such persons. It appears from the judgment that they would have been liable to outside persons; but there are certain

[1] [1930] 2 K.B. 364. [2] [1907] 1 K.B. 920.

poor law functions which are imposed directly on the officials (such as relieving officers) and in such cases the guardians would not be liable even to outside persons.

In another group of cases it seems that the obligation of the local authority is only to appoint persons of proper skill and competence, though doubt has been thrown upon this doctrine by a decision of the House of Lords. In *Evans* v. *Liverpool Corporation* [1] the plaintiff brought an action against the corporation in respect of the negligence of a physician employed by the corporation at one of its hospitals. The child was admitted to the hospital suffering from scarlet fever and was discharged as cured on the orders of the physician. In fact, however, he was still in an infectious condition, with the result that the plaintiff's other children caught the disease. The court held that there had been no breach of duty by the corporation. "If they have employed a competent medical man, skilful and duly qualified, and in other respects a competent man, they have done all that it is possible for them to do." Accordingly, the corporation was not liable. This decision was followed by the Court of Appeal [2] and other courts, but the principle was not considered by the House of Lords until *Lindsey County Council* v. *Marshall*.[3] There, the presence of puerperal fever in a nursing home maintained by the council was discovered by the council's medical officers, but on their advice the home was not closed. Moreover, a private patient was admitted without notice to her husband or

[1] [1906] 1 K.B. 160.
[2] *Hillyer* v. *St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820.
[3] [1937] A.C. 97.

her medical adviser that there was puerperal fever in the home, and she contracted the disease. The jury held that the medical officers were negligent in not advising the council to close the home, and that the matron was negligent in not informing the patient's husband or medical adviser, and, further, that these duties were administrative. The Court of Appeal nevertheless held that the questions were clinical in their nature so that the council had to rely on the advice given it and was not liable. The House of Lords reversed this decision. The council owed a duty to make the premises reasonably safe, or, if there was any hidden danger, to give the persons invited due warning of the danger. The complaint was not that there had been any lack of care and skill on the part of the medical officers and nurses in respect of medical treatment. Accordingly, the preceding cases were distinguished, and it seems that they apply, if at all, only to actual medical or surgical treatment. Lord Hailsham went further and threw doubt upon the principle derived from *Evans* v. *Liverpool Corporation*, though he was careful to say that he was not deciding that question. The effect of this decision was considered by the Court of Appeal in *Gold* v. *Essex County Council*,[1] where a child was burned in hospital through the negligence of a radiographer. The Court decided that the local authority was liable. It appears, therefore, that the local authority escapes liability only where the tort is committed by a physician or surgeon. Where it is committed by a matron, a nurse, or a technician like a radiographer, the local authority is

[1] [1942] 2 K.B. 293.

just as liable as in any other case of vicarious liability. These cases incidentally illustrate one of the difficulties of the English system of judicial control. The line of cases begins in 1906, and forty years later it is still not quite certain what the law is, because a decision is a binding precedent only for the court which decides it and for inferior courts. Also, the decision is a precedent only for what it decides. One can generalise a decision into a rule, but the scope of the generalisation is uncertain until, in due course, its boundaries become fixed by a series of decisions. The process may take a hundred years.

Subject to these exceptions, it is the general rule that a local authority is liable for the torts of its servants in the same way as any other employer. This general principle was laid down by the House of Lords in *Mersey Docks and Harbour Board Trustees* v. *Gibbs*,[1] a case which related to a statutory harbour authority and not to an elected local authority; but all the principles enunciated in this chapter apply to administrative authorities of any kind except those, like Government Departments, which shelter under the mantle of " the Crown." A vessel entering the dock struck a mud bank left at the entrance to the dock through the negligence of the trustees, and the owners sued the trustees for damages. The House of Lords summoned the judges to give their opinion, and agreed with the opinion expressed on their behalf by Blackburn, J. He pointed out that the liability of a statutory public authority must always be determined by the statutes; but he added:

[1] (1866) 1 H.L. 93.

" We think that in the absence of anything in the statutes . . . showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed on owners of similar works."

As will be seen from this quotation, some emphasis was laid in the opinion on the fact that the trustees were merely operating under statute a dock which might otherwise have been operated by a private person. It must not be taken, however, that the rule applies only where a private undertaking has been transferred to a public authority. It is a general rule that where a servant in the course of his employment commits an act which would be a tort if committed on behalf of a private person, the local authority is liable in damages for it unless—and this is a very important exception—the local authority has power by statute to commit that particular injury. The exception is important because local authorities have hundreds of powers which no private person possesses. When they have taken the necessary steps, they may pull down property which is unfit for human habitation; they may destroy infected goods; they may, after taking the necessary steps, destroy unsound food; their officers often have rights of entry into private premises; they may, after completing the necessary formalities, take land compulsorily; and so on, almost *ad infinitum*. But if they cannot show a statutory power, then any act which may be done by the officer and which would be a tort if committed on behalf of a private person is a tort for which the local authority is liable. Thus, the local authority was held liable for false imprisonment in

Percy v. *Glasgow Corporation*, mentioned above. We shall quote presently a few of the many cases in which local authorities have been held liable for nuisance. Cases of liability for negligence abound. For instance, in *Manchester Corporation* v. *Markland* [1] the corporation was held liable by the House of Lords for the negligence of their servants in allowing a leak in their water supply system to go undetected. A pipe burst and formed a pool of water in the road; the pool froze and the plaintiff's car skidded on the ice, and it was held that the corporation was liable for the damage. In *Skilton* v. *Epsom and Ewell Urban District Council*,[2] the council was held liable for damage caused by the flying up of a stud inserted in the highway on behalf of the council. The stud was either negligently inserted in the highway or not properly maintained (it makes no difference) and was thrown up by a passing motor-car. It struck the wheel of the plaintiff's bicycle and caused her to fall precipitately and suffer injury. There are hundreds of other cases. For instance, local authorities have been held liable for the negligent construction of sewers and other works ; [3] for leaving an unlighted heap of stones in a highway ; [4] for injury caused through the wearing away of a flap in the highway ; [5] and so on.

[1] [1934] 2 K.B. 101.

[2] [1937] 1 K.B. 112.

[3] *Southampton and Itchin Floating Bridge Co.* v. *Southampton Local Board* (1858), 8 El. & Bl. 801; *Ruck* v. *Williams* (1858), 3 H. & W. 308; *Clothier* v. *Webster* (1862), 12 C.B.N.S. 790; *Smith* v. *West Derby Local Board* (1878), L.R. 3 C.P.D. 423; *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256; *Fairbrother* v. *Bury Rural Sanitary Authority* (1889), 37 W.R. 544; *Touzeau* v. *Slough Urban District Council* (1896), 60 J.P. 103; *Cox* v. *Paddington Vestry* (1891), 64 L.T. 566.

[4] *Foreman* v. *Canterbury Corporation* (1871), L.R. 6 Q.B. 214.

[5] *Blackmore* v. *Mile End Town Vestry* (1882), L.R. 9 Q.B. 451.

Though no liability attaches if the local authority has statutory power to do the act, the courts do their best so to interpret such powers that no interference with private rights is permitted. This is a general rule of construction which does not apply only in this connection. Indeed, it has been taken very far indeed by some judges. Though the whole purpose of such statutes as the Housing Acts is to interfere with private rights of property, they have been restrictively interpreted by the courts because they do so. Lord Haldane gave warning in *Local Government Board* v. *Arlidge* [1] that " Parliament, in what it considers higher interests than those of the individual, has so often interfered with such rights on other occasions, that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is to-day." Nevertheless, many provisions of the Housing Acts have been diverted from their original intention by judicial interpretation based upon this presumption.[2] In respect of actions for civil liability, however, it works well.

If, for instance, Parliament authorises a local authority to establish a power station or a sewage farm at a particular place, Parliament must have authorised the authority to commit all such acts, even if they would otherwise be tortious, as are necessarily incidental to such works. If, however, Parliament merely authorises the local authority to establish such works some-

[1] [1915] A.C. 120 at p. 138.

[2] See Jennings, " Courts and Administrative Law," 49 Harvard Law Review, pp. 426-454, and *post*, pp. 290-92. The most notorious case was *R.* v. *Minister of Health, ex parte Davis*, [1929] 1 K B. 619, which caused complete confusion and had to be reversed by Act of Parliament.

where, then the courts say as a matter of interpretation that Parliament intended the works to be established where they would not be a nuisance. Thus, in *Metropolitan Asylum District Board* v. *Hill*,[1] the Board had power to establish a small-pox hospital. It established such a hospital near a suburb in such a position as to make it a nuisance, and the House of Lords held that its power was only to establish the hospital in such a way as not to make it a nuisance. In *Manchester Corporation* v. *Farnworth*,[2] the corporation had power to establish a power station on a particular parcel of land which it was given power to acquire. Sulphur fumes from the chimneys injured the crops of neighbouring occupiers of land. The corporation asserted that a power station could not be provided without emitting such fumes and therefore argued that it had statutory authority to commit the nuisance. The House of Lords held, on the expert evidence, that it was possible to prevent such a nuisance, and accordingly that Parliament had not intended to authorise a nuisance. These cases are, however, exceptional, because Parliament usually inserts what is called a " nuisance clause " providing that the functions of the authority shall be exercised in such a way as not to cause a nuisance. Thus, section 31 of the Public Health Act, 1936, generalising a number of provisions in the Public Health Act, 1875, provides that " a local authority shall so discharge their functions under the foregoing provisions of this Act [relating to sewers] as not to create a nuisance." This clause is inserted in local

[1] (1881) 6 App. Cas. 193.
[2] [1930] A.C. 171.

Acts as well as general Acts where it is considered that no nuisance need be caused. It is not, of course, inserted where nuisances must necessarily arise. For instance, local authorities and public utilities have power to open up roads for the laying of sewers, gas and water mains, and so on. It is not possible to do so without causing a nuisance to the highway, and accordingly there is no "nuisance clause." There is, however, provision for compensation wherever any person suffers special injury. Such clauses are almost invariably inserted in local government legislation. For instance, section 278 of the Public Health Act, 1936, provides :

> "Subject to the provisions of this section, a local authority shall make full compensation to any person who has sustained damage by reason of the exercise by the authority of any of their powers under this Act in relation to a matter as to which he has not himself been in default."

Nothing is more obvious, indeed, than the care with which Parliament protects private rights. Local authorities have vast powers, but it may be stated as a general principle that except where the person injured is regarded as being in default (as by making profits out of houses unfit for human habitation or out of contaminated food) a right of compensation is always given.

One kind of tortious liability is of particular importance to local authorities. Local government statutes confer many powers, but they also impose many duties. For the most part, these duties are in the interests of the public generally, but sometimes they are imposed

for the benefit of private persons. In the modern statutes some method of enforcement is always provided. Sometimes the private individual is empowered to appeal to a court of summary jurisdiction against the refusal of the authority to carry out its duty (or even to exercise its powers); sometimes there is statutory power to complain to the Minister of Health. For instance, the remedy for the failure of a local authority to discharge its functions under the Public Health Acts is a complaint to the Minister of Health under section 299 of the Public Health Act, 1875, or section 322 of the Public Health Act, 1936. In some of the older statutes, however, no method of enforcement is prescribed, and the question therefore arises whether there is a remedy at common law; and even if a remedy is provided it may be that a common law remedy may also be used.

The common law remedies are indictment for misdemeanour and action for damages. In relation to the former Hawkins said:

> " It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for the contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." [1]

It is, therefore, a matter of interpretation in each case whether Parliament has intended to provide the remedy of indictment. The existence of an alternative remedy

[1] *Pleas of the Crown*, ii, c. 25, s. 4.

gives rise to the presumption that Parliament did not so intend.[1] Since Parliament always does provide an alternative, this remedy is now of small importance except in respect of the repair of highways, the example which Hawkins gives. The obligation to repair was first imposed on the parish, and the only remedy for failure to repair was to indict the inhabitants of the parish. When the obligation was transferred to the modern local authorities no special remedy was created, and accordingly a county council or a borough council may be charged on indictment at quarter sessions with failure to maintain its highways.

Much more important is the remedy in damages. This, again, is a question of interpretation. When Parliament imposed a duty upon a local authority, did it intend that any person who suffers injury from failure to carry out that duty should have a right of action for damages? The courts have had to deal with this question in relation to many statutes, most of which did not concern local authorities. As a result of many decisions, such as *Groves* v. *Wimborne*,[2] *Britannic Merthyr Coal Co.* v. *David*,[3] *Watkins* v. *Naval Colliery Co.*,[4] *Phillips* v. *Britannic Hygienic Laundry Co.*,[5] none of which related to local government, it seems possible to lay down the proposition that in order to succeed in an action for breach of statutory duty the plaintiff must show:

(i) that the statute imposes a duty on the local authority;

[1] *R.* v. *Hall* [1891] 1 Q.B. 747.
[2] [1898] 2 Q.B. 402.
[3] [1910] A.C. 74.
[4] [1912] A.C. 693.
[5] [1923] 2 K.B. 832.

(ii) that the duty is towards the plaintiff;

(iii) that the plaintiff suffered damage as a direct result of the local authority's breach of duty; and

(iv) that the damage was such as was contemplated by the statute.

In respect of the first of these requirements, it is essential to distinguish a duty from a power. If the local authority is given a discretion to do something and decides not to do it, there is no remedy available unless the statute specifically provides one. Very often it does; occasionally there is a right to appeal to a court, but more often there is a right to complain to the Minister of Health or some other governmental authority. Also, there may be a power coupled with a duty; that is, a power to decide what to do, but a duty to do something. In such a case, however, the ordinary remedy would be a mandamus and not an action for damages. If the local authority has only a power and not a duty, no person can bring an action for damages through the failure of the local authority to exercise its power. For instance, in *East Suffolk Catchment Board* v. *Kent*,[1] a landowner complained of the negligence of the Catchment Board. Heavy tides made a breach in a sea wall, with the result that his land was flooded with salt water. If the Board had done nothing about it, there would have been no question of the Board being liable, for they had a power to repair the sea wall but were under no duty to do so. They did, in fact, take some action, but so negligently that the temporary works were swept away, and the flooding continued for several months after it need

[1] [1940] 1 K.B. 319.

have done. It was argued that, though the Board might not be liable for doing nothing, it was liable because it had done something negligently. To that argument the Board replied that, in fact, they had done nothing to cause the damage. The damage was done by the tide. If the Board had, for instance, weakened the sea wall through negligence, and the sea had come in as a consequence, the Board would have been liable for the negligence; for though the Board is empowered to do work on the wall, it is not empowered to cause damage to the neighbouring landowners. In fact, however, they had merely stopped a gap negligently, and the damage was no greater than it would have been if nothing at all had been done. Accordingly, the Court of Appeal held that the Board was not liable.

Where there is a duty, and not a mere power, the important question in local government law is whether the duty is towards the plaintiff. Most duties are imposed in the general interest of the public, so that any person who suffers injury is left to his public remedy, if he has one. For instance, in *Atkinson* v. *Newcastle Waterworks Co.*,[1] the plaintiff's property was burned down because of the defendant's failure to keep water in the pipes at the pressure required by the statute. It was held, on the wording of the provision of the Waterworks Clauses Act, 1847, that the plaintiff's remedy was an action for the penalty provided by the Act, and not an action for damages. Again, in *Saunders* v. *Holborn District Board of Works*,[2] a woman sued to recover damages for injuries caused by falling in the snow which the board was bound by statute to

[1] (1877) 2 Ex. D. 441. [2] [1895] 1 Q.B. 64.

remove. It was held that the duty was owed to the public and not to individual members of it, and that the person injured had no right of action.

In fact, it is very rare in local government law for an authority to be liable in damages simply for failing to do something which it is bound to do by statute. In such a case the authority is, generally speaking, not liable for *nonfeasance*, which means in this connection merely failing to carry out a statutory duty. The best-known example is in the law of highways. A highway authority is bound by statute to maintain the highway in repair. The remedy, as has been mentioned above, is indictment for the misdemeanour, and there is no action for damages even for a person who suffers injury as a result of a failure to keep the road in repair. Similarly, though it is the duty of a local authority under section 14 of the Public Health Act, 1936, "to provide such public sewers as may be necessary for effectually draining their district," the remedy is complaint to the Minister of Health and not an action for damages. Thus, in *Stretton's Derby Brewery Co.* v. *Derby Corporation*,[1] the company's cellars were flooded owing to a large increase in recent years in the number of dwellings draining into the sewers, so that the sewers were too small to carry off the influx of water when there were heavy falls of rain. When the system of sewers was constructed it was adequate for the existing buildings and for the probable increase in the number of buildings, and there was an express finding that there was no negligence on the part of the authority. It was

[1] [1894] 1 Ch. 431; and see *Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619.

held that, in the absence of negligence, an action for damages could not be brought against the local authority, but that the remedy was a complaint to the Minister.

The question to be decided in such cases is whether an action for damages is the remedy to enforce the performance of the statutory duty, and the existence of another remedy may show that the duty is to the public. If there is no other remedy specifically provided, the duty may still be to the public and therefore enforceable by mandamus [1] and not by action for damages. The question is slightly different when it is alleged that some other tort has been committed. As we have seen, a local authority will be liable for nuisance in the exercise of its powers, and it really makes no difference whether the power implies a duty or not. In the case of an action for damages for negligence, on the other hand, there must be a breach of duty, and if the duty is owed to the public it does not follow that a person injured by the negligent breach of duty has a right of action. It is again a question of interpretation. Generally speaking, the courts hold the local authority to be liable. It is often stated, even by judges, that a local authority is liable for *misfeasance* but not for *nonfeasance*—that is, that it is liable for negligently doing an act, but not for negligently failing to do an act. This statement is, however, not accurate. In the leading case on the liability for negligence, *Mersey Docks and Harbour Board Trustees* v. *Gibbs*,[2] the negligence alleged was nonfeasance, namely, failing to keep the entrance to the dock clear. In *Manchester Corporation* v. *Markland*,[3]

[1] See *post*, pp. 297–300. [2] *Ante*, p. 272. [3] *Ante*, p. 274.

the negligence alleged was nonfeasance, namely, failing to take steps to ascertain and repair a leak in a water-pipe. These were both decisions of the House of Lords. In *Skilton* v. *Epsom and Ewell Urban District Council*,[1] the Court of Appeal did not consider whether the negligence was misfeasance or nonfeasance, because it made no difference. In *Blackmore* v. *Mile End Town Vestry*,[2] the local authority was held liable for nonfeasance, namely, the failure to repair a flap let into the highway.

The question is essentially one of statutory interpretation. It may be held that the authority is not liable for mere nonfeasance—that is, for not carrying out a statutory duty. Or it may be held that the authority is liable not for mere nonfeasance but for negligent nonfeasance; or that it is not liable for nonfeasance; or even that it is not liable for misfeasance. In the case of the duty to repair a highway, the highway authority is not liable for nonfeasance at all. The rule was laid down in *Russell* v. *Men of Devon*,[3] where it was held that the inhabitants of Devon were not liable for damage caused by the neglect to repair a bridge, chiefly because of the procedural difficulty of suing the inhabitants of the county. When the duty of repair was transferred to the county council, there was considerable difficulty in determining whether the council was liable, especially because the general rule of liability for negligence had been laid down by the House of Lords in *Mersey Docks and Harbour Board Trustees* v. *Gibbs*, where reliance was placed on certain earlier authorities in which local authorities had been held liable for negligence. At

[1] *Ante*, p. 274. [2] (1882) L.R. 9 Q.B. 451. [3] (1788) 2 T.R. 667.

length the question went to the House of Lords in *Cowley* v. *Newmarket Local Board.*[1] There a brick wall and a declivity which were part of the highway were allowed by the local board to fall into disrepair. The plaintiff in the night fell over the wall and down the declivity, and sought damages. The jury held that there was negligence in not carrying out the necessary repairs and not supplying sufficient light. It was held that the plaintiff had no action.

This rule applies only to highways and only to highway authorities. Thus, in *Guilfoyle* v. *Port of London Authority,*[2] the obligation of repairing a bridge *which was not a highway* but which members of the public had a right to use was placed by statute upon the Board. It was held that a person who was injured through catching his foot in a hole due to non-repair had a right of action. Similarly, in *Swain* v. *Southern Railway Company,*[3] the plaintiff was cycling along a road which was carried over a railway line belonging to the railway company by a bridge which was repairable by the company. The railway company was bound by the Railways Clauses Consolidation Act, 1845, to keep the bridge in repair, and it was held that the company was liable. Even in relation to a highway the local authority is liable for negligent nonfeasance provided that it is not acting as highway authority. For instance, if the local authority lets a sewer grating or manhole cover into the surface of the highway, and the grating or cover wears away, it is liable to any person who suffers injury from the neglect. In *White* v. *Hindley*

[1] [1892] A.C. 345. [2] [1932] 1 K.B. 336.
[3] (1938) 54 T.L.R. 1119.

Local Board,[1] the plaintiff's horse trod on a grating put in the road by the local board as sewerage authority (it was also highway authority) for the purpose of draining the surface water off the road into the sewer. The grating was in a defective state and gave way. It was held that though the board was not liable as highway authority it was liable as sewerage authority for the negligence in not keeping its property in repair. Similarly, in *Blackmore* v. *Mile End Vestry*,[2] the Vestry as water authority put an iron flap in the surface of the pavement to cover a hole in which a water meter was kept. The flap was gradually worn smooth, and the plaintiff slipped and injured himself. It was held that though the Vestry was not liable as highway authority it was liable as water authority. The combination of these rules has the strange result that if a sewer manhole wears away the authority is liable, whereas if the road surface of the highway around the manhole wears away so that a person falls over the manhole, as in *Thompson* v. *Brighton Corporation*,[3] the authority is not liable. In other words, the rule as to highways is an exception to the general rule of liability for negligence which the courts are not anxious to extend.[4]

Another group of cases in which a local authority is liable for misfeasance but not for negligent nonfeasance arises through the obligation already mentioned to

[1] (1875) L.R. 10 Q.B. 219.

[2] (1882) 9 Q.B.D. 451.

[3] [1894] 1 Q.B. 332.

[4] *Guilfoyle* v. *Port of London Authority*, [1932] 1 K.B. 336; *Skilton* v. *Epsom and Ewell Urban District Council*, [1937] 1 K.B. 112; *Swain* v. *Southern Railway Company* (1938), 54 T.L.R. 1119.

provide adequate sewers. It has been pointed out [1] that mere neglect to provide adequate sewers does not give rise to an action for damages on the part of a person who suffers injury as a result of the neglect; but this has been extended to cases where negligent nonfeasance has been alleged. Thus, in *Hesketh* v. *Birmingham Corporation*,[2] the plaintiff alleged, among other causes of action, the negligence of the corporation in not providing adequate sewers, so that storm water from the sewers passed through storm-water outlets into a brook which rose and flooded the plaintiff's premises. It was not alleged that the original construction of the sewers was defective. The trouble had arisen because numerous builders had, as they were entitled to do, connected their houses with the sewers so that the sewers had become inadequate. The Court of Appeal held that the corporation was not liable. Scrutton, L. J., laid down the general doctrine that a local authority is not liable for nonfeasance; but the cases quoted above, and many more, show that, in appropriate circumstances, a local authority can be liable for nonfeasance. What the plaintiff was trying to do by his allegation of negligence was to secure an action for the enforcement of the statutory duty of providing adequate sewers. The duty is, however, enforceable by complaint to the Minister of Health: and therefore as a matter of interpretation there is no remedy *in this case* for nonfeasance. If the authority so maintains (or neglects to maintain) its sewers that they cause a nuisance, there is a remedy because of an express statutory provision to that effect in section 31 of the Public Health Act, 1936: and if

[1] *Ante*, p. 282. [2] [1924] 1 K.B. 260.

there is an act of misfeasance, the authority is liable for negligence. For instance, in *Dent* v. *Bournemouth Corporation* [1] the corporation, in the execution of its statutory powers, diverted sewage from one sewer into another sewer already fully charged with sewage, with the result that injury was caused to the occupier of premises, and it was held that the corporation was liable.

§ 3. *Injunctions and Declarations*

An action for damages is the normal remedy where a person claims that a local authority has committed a tort or a breach of statutory duty owed to him. Actions for injunctions and declarations are alternative remedies. The object of an action for an injunction is to restrain the authority from doing some act which it threatens to do or repeat. It is therefore particularly useful in cases of nuisance. As in the case of an action for damages, a private person cannot ask for an injunction unless the local authority threatens some tort or breach of statutory duty against him. He cannot, for instance, obtain a mandatory injunction (i.e. an injunction ordering the authority to do something) to compel the local authority to provide adequate sewers. Thus, when a local authority provides sewers for a village it may be able to pass the sewage into a stream in such a way as not to pollute it. If subsequently the village becomes a popular week-end resort, a large number of houses may be drained into the sewer by the owners. The local authority had no power to prevent them, but the result is that the stream becomes polluted to the

[1] (1897) 66 L.J. Q.B. 395.

injury of persons with riparian rights, such as rights to water cattle. The only "wrong" committed by the local authority is its failure to provide sewers adequate enough to meet the new demand, so that an injunction cannot be obtained against it.[1] On the other hand, if the local authority connects its sewers with the stream so as to foul the water it may be restrained by injunction not only because it has committed a nuisance, but also because it has broken the express prohibition in section 30 of the Public Health Act, 1936.[2]

The action for an injunction may thus be used to prevent interferences with private rights. It may also be used, however, to prevent *ultra vires* acts or acts in breach of public rights, such as rights to the use of highways, rivers, etc. In such a case it must be brought by the Attorney-General. As Lord Chelmsford said in *Ware* v. *Regent's Canal Co.*[3]:

"Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General on behalf of the public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature. If an individual has sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar

[1] *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; *Attorney-General* v. *Dorking Union* (1882), 20 Ch.D. 595; *Attorney-General* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527; *Harrington (Earl of)* v. *Derby Corporation*, [1905] 1 Ch. 205.

[2] *Jones* v. *Llanrwst Urban District Council*, [1911] 1 Ch. 393.

[3] (1858) 3 De G. & J. 212 at p. 228.

position or claim to entitle him to become the redresser of a public grievance or to complain of the disregard of the provisions of an Act of Parliament." [1]

The Attorney-General may in fact obtain an injunction where the existence of an alternative remedy would in any case prevent a private person from suing. For instance, local authorities themselves sometimes sue through the Attorney-General in order to prevent infringements of building bye-laws. Such infringements were punishable by the infliction of statutory penalties, and subject to certain limitations the local authority had a right to pull down a building which infringed the bye-laws. They did so, however, at their peril, and the most convenient method of obtaining the decision of the High Court where the law was in dispute was to sue for a mandatory injunction to pull down the building. The existence of the alternative remedy by criminal prosecution prevented the local authority from suing directly; [2] nor could any other person sue; [3] but the Attorney-General, as protector of the rights of the public, was entitled to do so.[4]

[1] See also *Boyce* v. *Paddington Corporation*, [1903] 1 Ch. 109, where Buckley, J., held that a person might sue for an injunction without joining the Attorney-General:

(1) Where the interference with the public right is such that some private right of his is at the same time interfered with (e.g. where an obstruction is so placed in a highway that the owner of premises abutting on the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway).

(2) Where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

[2] *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759.

[3] *Dover Picture Palace Ltd.* v. *Dover Corporation* (1913), 11 L.G.R. 971.

[4] *Attorney-General* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34.

The Attorney-General in such a case might permit his name to be used in the action. That is, he technically would be the plaintiff because he recognised the desirability of securing the injunction in the public interest; but the action would in fact be carried on by the local authority or private person interested in securing the issue of the injunction. In such a case the Attorney-General is said to sue "at the relation of" the local authority or private person, and the action is spoken of as a "relator action." Thus, actions to restrain a local authority from acting in an *ultra vires* manner are usually actions by the Attorney-General at the relation of persons interested in preventing the commission of the acts.[1] The Attorney-General has a complete discretion in allowing the use of his name,[2] and it remains his action even though he is suing at the relation of some third party.[3] It is unnecessary for the Attorney-General to show any injury to the public; it is enough if some statutory prohibition is broken or the act is *ultra vires*. Thus, in *Attorney-General* v. *London and North-Western Railway Co.*,[4] the Attorney-General at the relation of the Warwick County Council sought an injunction to restrain the railway company from allowing trains to cross a level crossing at speeds exceeding four miles an hour, contrary to section 48 of the Railway Clauses Consolidation Act, 1845, which was incorporated by the company's private Act. It

[1] Compare *Attorney-General* v. *Fulham Borough Council*, *ante*, p. 144; and *Attorney-General* v. *Manchester Corporation*, *ante*, p. 145. In the case referred to in the previous note the Attorney-General sued at the relation of the Wimbledon Urban District Council.

[2] *London County Council* v. *Attorney-General*, [1902] A.C. 165.

[3] *Attorney-General* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34.

[4] [1900] 1 Q.B. 78.

was strenuously argued for the railway company that there was no injury to the public and that indeed the public would be injured if the ancient rule were applied to the company's main line. The court quickly disposed of the argument: "The court must assume that contravention of such a provision passed to prevent a public danger is in itself without more a public injury, in respect of which the court has no discretion but to grant an injunction at the suit of the Attorney-General." This must not be taken too absolutely, however; an injunction is an ancient equitable remedy, and unlike an action for damages, it is awarded at the discretion of the court. For instance, delay in taking proceedings may be a reason for refusing an injunction not only when a private person sues, but also when the Attorney-General sues at the relation of a private person.[1]

The action for a declaration follows similar principles. In such an action the plaintiffs merely ask the court to declare what the law is. They can, if they please, ask for a further remedy in later proceedings but usually they do not, for local authorities do their best to obey the law once they know what it is, and it rarely happens that anything more is wanted than a determination of the legal point in controversy. Also, once the law is determined the appropriate administrative authority can often take the necessary action. Thus, in *Attorney-General* v. *Merthyr Tydfil Union*[2] the Attorney-General sued at the relation of certain ratepayers of the Union to prevent the guardians from

[1] *Attorney-General* v. *Grand Junction Canal Co.*, [1909] 2 Ch. 505.
[2] [1900] 1 Ch. 516.

spending money on the relief of miners on strike. The court granted the declaration, with the result that it became possible for the district auditor to surcharge the guardians for the illegal expenditure.

§ 4. *The Public Authorities Protection Act*

In respect of such proceedings against local authorities as we have so far considered, it must be emphasised that under the Public Authorities Protection Act, 1893, the authorities enjoy certain procedural advantages. It applies "where any action, prosecution, or other proceeding" is brought against a local authority "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority." This covers practically any act done by a local authority. There is, however, one important exception laid down by the House of Lords in *Bradford Corporation* v. *Myers*.[1] The Bradford Corporation was empowered by local Act to acquire and carry on a gas undertaking and to sell coke and other residual products resulting from the manufacture of gas. The plaintiff ordered from the corporation a ton of coke; but on its delivery it was, owing to the negligence of the corporation's servant, precipitated through the plaintiff's shop window. The plaintiff sued for damages in the county court, but issued his plaint after the period of six months prescribed by the Act of 1893. The House of Lords held that an action based upon a contract entered into under powers conferred by an

[1] [1916] 1 A.C. 242.

Act of Parliament is not an action for an act done in pursuance or execution of an Act of Parliament, nor in respect of any neglect or default in the execution of such an Act.

In most other cases the Act applies. It may apply, for instance, to an action for an injunction [1] or a declaration,[2] though if such an action is brought only for a threatened action it may not be in respect of an " act done " nor in respect of a neglect or default in the " execution " of an Act of Parliament.

Where the Act does apply, it affords protection as follows:

(*a*) The action must be commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof.

(*b*) Where judgment is given for the local authority it carries costs as between solicitor and client (a higher rate than in an ordinary action).

(*c*) In an action for damages tender of amends may be pleaded, and if the action is begun or continued after the tender, the plaintiff will receive no costs incurred after the tender if he recovers no more than the amount tendered, and the local authority is entitled to costs as between solicitor and client after the tender.

§ 5. *The Prerogative Writs and Orders*

Besides the remedies ordinarily available against any " person " who commits a wrong, based on a writ issued as " of course " to any person who alleges that the wrong has been done to him, there have been for

[1] *Fielden* v. *Morley Corporation*, [1899] 1 Ch. 1.

[2] *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899), 63 J.P. 503.

centuries special remedies available in the Court of King's Bench and its successor the King's Bench Division to control the wrongful exercise of jurisdiction by inferior bodies. These writs are not issued as of course, but only on proof of a prima facie case. They have always been of great constitutional importance. One of the matters disputed under the Stuart Kings, for instance, was whether writs of prohibition could be issued by the King's Bench against the Court of Chancery and other prerogative courts to prevent such courts from exceeding their jurisdiction or interfering with the process of the common law courts. At a later stage these "prerogative writs" were the means used to keep courts of summary jurisdiction within their powers; and in the nineteenth century their use was extended to control the action of administrative authorities.

There were formerly five such writs, habeas corpus, quo warranto, mandamus, prohibition, and certiorari. The writ of habeas corpus was, and is, the primary means for bringing unlawful imprisonment to an end, and was therefore of immense constitutional importance because it protected the subject against arbitrary imprisonment. Some of the most famous constitutional disputes related to the question whether the courts could, by habeas corpus, order the release of a person imprisoned by order of the King; and the final determination of that question in favour of the courts abolished any possibility of the use of *lettres de cachet* in England. The writ remains in existence in the full force of its efficacy. As an ultimate sanction against arbitrary imprisonment it remains of great importance,

though the existence of a free Parliament is now a more important check upon unlawful imprisonments. In any case, it is seldom of use in local government law, though it is sometimes the means for controlling the action of local authorities. It is often said in the books that no person can lawfully be imprisoned except on the orders of a court of law. Like most statements which ignore local government law, it is untrue. Local authorities can, subject to conditions, retain persons in mental hospitals and can insist that casuals remain two nights in a casual ward—to take only two examples. Where such powers are exceeded, the writ of habeas corpus would be the remedy.

The writ of quo warranto was formerly the method used to determine the validity of a claim to office, such as that of mayor, sheriff, alderman, councillor, etc. In this respect it has been superseded by a special procedure laid down by section 84 of the Local Government Act, 1933. It had already been abolished as a writ, and procedure by information in the nature of a quo warranto substituted; but such informations have in their turn been abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, and procedure by injunction substituted. This last Act also abolished the writs of mandamus, prohibition, and certiorari; but orders of mandamus, of prohibition, and of certiorari to the same effect may be issued. The procedure is governed by rules of court issued at the end of 1938, but the circumstances in which the order may be made are the same as those in which a writ could formerly have been issued. As will be seen, the orders are therefore the ultimate means for com-

pelling the performance of statutory duties and keeping local authorities within their jurisdiction.

(1) *Mandamus*

The order of mandamus is the ultimate means of compelling a public authority to carry out its statutory duties. It is a command from the High Court directing the authority to perform a specific duty which it has neglected. It is the ultimate remedy, capable of being used where there is no remedy equally good and injustice would follow if it were not awarded. "By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the [order] of mandamus is granted to enable justice to be done." [1]

The remedy is discretionary: it cannot be demanded as of right, and it will not be issued where there is another remedy equally beneficial, convenient, and effective. This remedy may be an appeal or complaint to a higher administrative authority. On several occasions we have had cause to mention the duty of a local authority under the Public Health Acts to provide adequate sewers. The Public Health Act, 1936, repeating provisions formerly contained in the Public Health Act, 1875, empowers any local government elector to complain to the Minister of Health if the local authority neglects to carry out its duties in respect of sewers. In *Pasmore* v. *Oswaldtwistle Urban District Council* [2]

[1] *Re Nathan*, R. v. *Inland Revenue Commissioners* (1884), 12 Q.B.D. 461 at p. 478.

[2] [1898] A.C. 387.

it was sought to enforce by mandamus the duty of providing adequate sewers. The plaintiff was the owner and occupier of a factory which he wished to drain into the sewers, but the local authority had not provided adequate sewers. It was held by the House of Lords that mandamus could not be issued because the remedy provided by the statute was complaint to the Local Government Board. "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

Similarly, mandamus will not be issued where the person concerned has a right of appeal to a court or to a body like an assessment committee,[1] or can bring an election petition,[2] or can secure his rights by an order of certiorari.[3] Nevertheless, in matters of government the courts are not astute to find reasons for not issuing a mandamus where there is no equally good remedy[4]; and where a person has a public office and fails to carry out his duty the order will be granted.[5]

It will be seen, therefore, that the order is a useful remedy to compel the performance of duties under local government law. It has been used, for instance, to compel the election of a mayor, alderman, or town clerk,[6] the holding of a municipal election,[7] the levying

[1] *Stepney Borough Council* v. *John Walker & Sons*, [1934] A.C. 365.
[2] *R.* v. *Dublin Town Clerk* (1909), 43 I.L.T. 169.
[3] *R.* v. *Owen* (1907), 72 J.P. 60.
[4] *Rochester Corporation* v. *R.* (1858), E.B. & E. 1024.
[5] *R.* v. *Bishop of Sarum*, [1916] 1 K.B. 466.
[6] *R.* v. *Bristol Corporation* (1843), 2 L.T.O.S. 155.
[7] But this is now covered by an order under Local Government Act, 1933, s. 72 (2).

of a rate, the grant of compensation where a person suffers by the exercise of powers under the Public Health Acts, the obedience of local authorities to the lawful orders of the Minister of Health, or of the Minister of Education. And, though we are here concerned only with local authorities, it is equally applicable to compel a Government department to carry out its statutory functions, though not the functions which it exercises by delegation from the King.

It is, of course, available only to compel the fulfilment of duties. It cannot be used to order an authority to exercise purely discretionary powers. Nor will it be issued to control the exercise of a discretion in the performance of a duty. Where, for instance, a local authority has power to approve or disapprove plans for buildings, and by a reasonable exercise of its discretion refuses, then the courts will not compel it to approve, even if they would have approved if they had had the power to do so.[1] On the other hand, if the authority sees no reason to object to them, but nevertheless attaches a condition to its approval, mandamus will issue to compel it to approve.[2]

The value of a mandamus is that if it is not obeyed by the person to whom it is addressed, he becomes guilty of contempt of court and liable to imprisonment under a writ of attachment. This is of course not possible where the order is addressed to a local authority; but the persons who should act as members of the local

[1] *Smith* v. *Chorley Rural District Council*, [1897] 1 Q.B. 678; but under the Public Health Act, 1936, any dispute will be settled by a court of summary jurisdiction.

R. v. *Tynemouth Rural District Council*, [1896] 2 Q.B. 219.

authority may be attached,[1] and the court may order some other person to fix the corporate seal or to do such other acts as may be necessary to carry out its commands.

(2) *Orders of Prohibition and Certiorari*

The orders of prohibition and certiorari must be considered together, because they are issued according to the same principles. The distinction between them is that prohibition is issued to prohibit the doing of some act which is threatened, while certiorari deals with acts already done. The purpose of an order of certiorari is to remove a case from one " court " to another. It is, therefore, used in the ordinary administration of justice to remove, for instance, a case from a court where it will probably be tried by a local and prejudiced jury to a court where local influences are less likely to prevail. In local government law, however, the kind of certiorari used is what is called " certiorari to quash." Its purpose, that is, is to remove a case into the High Court in order that, if necessary, the decision may be quashed.

If prohibition and certiorari were used only for " courts " in the commonly accepted sense, we should have no particular concern with them: but the notion of " court " has been so extended during the course of the last century that it may be said that whenever a public authority takes a decision affecting private rights it is a " court." It is the deliberate intention of the High Court to extend the orders in such cases, because otherwise there would be no effective remedy available.

[1] *R.* v. *Poplar Borough Council (No. 2)*, [1922] 1 K.B. 95.

" My view of the power of prohibition at the present day," said Brett, L. J., in an oft-quoted passage in *R.* v. *Local Government Board*,[1] " is that the court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." The writs are therefore available whenever an administrative body has to perform a " judicial act," and this means only an act which is not ministerial,[2] or in other words an act which is not just consequential upon a previous determination of some other authority. For instance, the appellate power of the Board of Education to determine a dispute between a local education authority and the managers of a non-provided school was held in *Board of Education* v. *Rice* [3] to be a judicial function which might be transferred by certiorari. In *R.* v. *Electricity Commissioners*,[4] the Electricity Commissioners, who were established to co-ordinate the supply of electricity throughout the country, drew up a scheme which was alleged to be *ultra vires*, and prohibition was issued to them. In *R.* v. *Minister of Health, ex parte Davis*,[5] prohibition was directed towards the Minister of Health because a scheme submitted to him under the Housing Act, 1925,

[1] (1882) 10 Q.B.D. 309 at p. 321.
[2] *R.* v. *Woodhouse*, [1906] 2 K.B. 501 at p. 535.
[3] [1911] A.C. 179; see *ante*, p. 154.
[4] [1924] 1 K.B. 171.
[5] [1929] 1 K.B. 619.

was found to be *ultra vires*. In *R.* v. *London County Council, ex parte Entertainments Protection Association*,[1] certiorari was issued to the London County Council to quash a licence to open cinemas on Sundays which was contrary to law. In *R.* v. *Hendon Rural District Council, ex parte Chorley*,[2] the decision of the council to permit interim development was quashed by certiorari because one of the councillors present was financially interested in the matter decided.

The purpose of the order of prohibition is to prohibit the exercise of jurisdiction by the "court"; the purpose of the order of certiorari to quash, on the other hand, is to quash a decision already taken.[3] Actually, most administrative decisions involve a long process, so that generally speaking there is something already decided and yet something remains to be done. Consequently, it frequently happens that both writs are applied for at the same time. Certiorari quashes what has already been done, and prohibition prevents the "court" from doing anything more. If this is not done, it is enough to secure prohibition, for this may be issued so long as anything whatever remains to be done. "An application for prohibition is never too late so long as there is something left for it to operate upon"[4]; and it appears that this "something" may be purely consequential and ministerial.[5] It is not uncommon for one or both of the orders to be associated with mandamus.

[1] [1931] 2 K.B. 215.

[2] [1933] 2 K.B. 696; see *ante*, p. 152.

[3] *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171.

[4] *Re the London Scottish Permanent Building Society* (1893), 63 L.J.Q.B. 112 at p. 113.

[5] *Estate and Trust Agencies* v. *Singapore Improvement Trust*, [1937] A.C. 898.

The decisions so far taken are quashed by certiorari because they are invalid; the steps remaining are prohibited because they will be invalid; and mandamus is given to compel the authority to start again and do the act properly.

Certiorari and prohibition may be used where the act done or contemplated is *ultra vires* or where an unlawful procedure is used. They are, therefore, used where an act is *ultra vires* because its procedure is contrary to natural justice—is unlawful because Parliament "must have intended" a just procedure to be used.[1] They cannot be issued where there is no legal jurisdiction at all. The best-known case is *Re Clifford and O'Sullivan*,[2] where the writs could not be issued to a court martial administering "martial law" in Ireland because martial law is not law at all, and a court martial exercising such powers is acting completely extra-legally. This doctrine has recently been applied to justices who granted permission for the erection of a cinema when their only power was to license a cinema when completed.[3] Powers under the legislation in question are usually exercised by county councils, and presumably similar decisions by such councils could not be quashed by certiorari. On the other hand, the grant of a licence to a cinema to open on Sundays was (before legislation of 1931) equally extra-legal, and the Court of Appeal nevertheless held that certiorari could be issued.[4]

[1] See *ante*, pp. 150–59.

[2] [1921] 2 A.C. 570.

[3] *R.* v. *Barnstaple Justices, ex parte Carder* (1937), 54 T.L.R. 36.

[4] *R.* v. *London County Council, ex parte Entertainments Protection Association*, [1931] 2 K.B. 215.

The prerogative writs of certiorari and prohibition had some defects. That of cost has been partially removed by the new procedure laid down in 1938, but it is still necessary to make an application for the issue of the order *nisi* before the court or a judge, so that the cost is higher than in the case of an ordinary action. One of the major defects, however, was and is that the court may decide a procedure to be *ultra vires* which has been followed for years. The decision in *R.* v. *Minister of Health, ex parte Davis* [1] that the procedure used by the Liverpool Corporation in the preparation of an improvement scheme was invalid probably invalidated all the improvement schemes in the country, though the power had been in the legislation since 1919 and in many cases the schemes had actually been carried out. The Housing Act, 1930, therefore established as law the procedure which the court had declared to be invalid. In that Act and in other subsequent legislation, the jurisdiction of the courts has consequently been severely restricted. The provisions in the Second Schedule of the Housing Act, 1936, which re-enacts the provisions of the Housing Act, 1930, apply to clearance orders, compulsory purchase orders and redevelopment plans (which have replaced improvement schemes) under that Act, and are in substance the same as the rules applying to town and country planning schemes under the Town and Country Planning Act, 1932, and compulsory purchase orders under the Local Government Act, 1933. Under these provisions, notice of approval of the order, plan, or scheme has to be published. Within six weeks of

[1] [1929] 1 K.B. 619.

the publication any person aggrieved may apply to the High Court; and if the Court is satisfied that the order, plan, or scheme is not within the powers of the appropriate Act, or that the interests of the applicant have been substantially prejudiced by any requirement of the appropriate Act not having been complied with, it may quash the order, plan, or scheme. Subject to this power, the order, plan, or scheme " shall not be questioned by prohibition or certiorari or in any legal proceedings whatsoever, either before or after the order is confirmed or the approval given, as the case may be." Thus, preliminary obstruction by prohibition is rendered impossible, and a period of six weeks only is allowed for applications to quash; moreover, the order, plan, or scheme may not be quashed on the ground that the procedure was faulty unless the applicant was substantially prejudiced thereby. This provides a convenient compromise between the needs of rapid and effective administration and the necessity for providing some judicial control over the exercise of administrative powers.

It was at one time thought that the jurisdiction of the courts was altogether excluded by the use of some such phrase as that the order or scheme should " take effect as if enacted in this Act." It is reasonably clear as a matter of history that the phrase was never intended to have this effect. In *Institute of Patent Agents* v. *Lockwood*,[1] however, statements were made in the House of Lords which seemed to imply that the rules of the Board of Trade under the Patents, Designs, and Trade Marks Act, 1883, could not be declared invalid

[1] [1894] A.C. 347.

because it was expressly enacted that they were to be of the same effect as if they were contained in the Act, and were to be judicially noticed. In *Minister of Health* v. *The King, ex parte Yaffe*,[1] this interpretation was rejected by the House of Lords. If the order or scheme is *ultra vires* it is a nullity; being inconsistent with the Act it cannot take effect as if enacted in the Act; and accordingly the courts may determine whether it is a valid scheme—i.e. a scheme of the kind which takes effect as if enacted in the Act.

§ 6. *Effect of Judicial Control*

Judicial control of the kind described in this chapter has certain obvious limitations. In the first place, it comes into use only if some person is prepared to undertake the trouble and expense of litigation. Where the unlawful activity of one authority affects another, steps are usually taken by the latter either to sue directly or to move the Attorney-General to take action. But in other cases action is taken only where there is some substantial interest at stake. This means in practice that unless some person is being deprived of a substantial proprietary right no dereliction of duty by a local authority and no unlawful straining of its powers will come to the notice of the courts.

In the second place, the procedure of the courts is expensive. Where a private person is criticising a public authority, he knows that almost unlimited financial resources will be opposed to him. He will know that the defendants may employ the most expensive counsel, so that his case may not be so well pleaded

[1] [1931] A.C. 494.

as theirs; and he knows that even if he wins in the court of first instance the case is likely to be taken to the Court of Appeal. Even if he wins there, he may have to respond to an appeal in the House of Lords. Thus he might have three judges in his favour in the Divisional Court, three in the Court of Appeal, and two in the House of Lords, but if three judges find against him in the House of Lords, he will have to pay his own costs and the costs of the defence in all three tribunals. Where he has to proceed by way of a prerogative writ, the costs will be even heavier than in an ordinary action.[1] For he must first make an application to the Divisional Court for an order *nisi* to show cause why a writ should not be issued. Then he will have to appear again to answer the arguments of the defence showing cause. If the rule is made absolute, so that the writ is issued, there may be still further proceedings. In the case of a mandamus, the return may be treated as a defence to a substantive action, and the proceedings continue as in an ordinary action, while in the case of certiorari to quash, the applicant must, on the return of the record, move the Court to quash the proceedings. It is true that the taxed costs of the proceedings taken by a successful applicant will be paid by the defendants, but these are never the same as those the applicant himself will have to pay, and there is, moreover, the risk of ultimately losing the case on appeal. Thus the English system of judicial control is both dilatory and expensive.

[1] The procedure by order under the Administration of Justice (Miscellaneous Provisions) Act, 1938, may dispose of this particular difficulty.

Thirdly, it cannot in the nature of things be satisfactory. Public authorities are not like ordinary defendants. They rarely deliberately refuse to obey the law. If they were perfectly aware of their duties and powers they would seldom fail to carry out the former or exceed the latter. Often they commit illegal acts because the law is uncertain. Sometimes they do an act in an illegal way when they have power to do it in some other manner. What a local authority needs, therefore, is competent legal advice *before* acting. It can, of course, take the opinion of counsel—at a price. But even that is available only when the authority is doubtful of its legal position. It cannot prevent an authority from unwittingly breaking the law.

The result is that the judicial control of local government is comparatively inefficient, and even if considerable simplification of legal procedure were possible, it would still, from its nature, be inefficient. In this respect it contrasts with the administrative control described in Chapter VIII. Let us examine the advantages of the latter system.

In the first place, it is not left to the haphazard action of a private individual. Permanent officials have the duty of supervising various aspects of local administration. By means of returns, statistics, inspection, and so on, they can keep themselves informed of the working of the system. They can indicate not only what is the legal way of working, but also what is the most efficient way. They have powers to compel authorities to carry out their duties. They can and do give and enforce orders even though no specific individual is injured by the authority's failure to act.

They can provide, moreover, an efficient and cheap system whereby the private individual may appeal against an act of a local authority. An expert can be sent to examine the situation. The legal position can be explored by an official who by practice has made himself more familiar with local government law than any judge can ever be. Most of the questions raised are mixed questions of law and policy. The act must be legal, but within the law it must also be expedient. The central department can allow the appeal either because the action was illegal or because it was inexpedient or inequitable. The cost of this control falls on the public, as it should do, not on the individual who happens to be injured.

On the other hand, no one would suggest the complete substitution of administrative control for judicial control. The individual receives as fair treatment from the Ministry of Health as from the High Court itself. In fact, in some respects he is treated far more fairly. He is not mulcted in solicitor and client costs whether he wins or loses; he is not compelled to wait about for hours or days while a previous case is being dealt with; he complains if the Minister keeps him waiting for three months and is pleased if the courts keep him waiting for no more than a year. Nevertheless, there are attributes of judicial procedure which make it more attractive to him. He knows that a decision is rendered openly, after open argument to which he can listen, by a judge whom he knows to be completely impartial. If he appeals to the Minister of Health, he either submits something in writing, not knowing whether anybody pays any attention to it or whether

the local authority is not pulling strings behind his back, or he has to present his case to a minor official who sends in a report that he does not see and which may or may not, so far as he knows, be considered. In other words, the ordinary individual has faith in judges and none in " bureaucrats," largely because he knows (or thinks he knows) what goes on in court and he does not know what goes on in the Ministry of Health. Apart from what the individual thinks, the community itself cannot permit the central authorities to act without control other than the general political control of Parliament. The Ministry may be the watch-dog of local government, but somebody has to watch the dog. It would not be difficult to devise a system which would have most of the merits of judicial control and most of the merits of administrative control and, perhaps, merits which neither possesses—but that is not a problem which need be considered in this book.

INDEX

Ad hoc authorities, creation of, 37–8; virtual extinction of, 67
Administrative counties. *See* Counties.
Administrative law, 15–17
Adoptive Acts, 172–5
Aldermen, qualifications, 105; disqualifications, 105–7; disqualifications from voting, 107–10; election of, 115–17
Appellate functions, central government, 250–5
Areas, reform of, 67–8; alterations in, 85–92
Assessment committees, 193
Assigned revenue grants, 199–201
Audit of local accounts, 232–8

Barlow Report, 73
Bentham, Jeremy, 41, 42–4
Black Death, effect of, 25–6
Block grants. *See* Exchequer grants.
Borough councils, as public health authorities, 57; promotion of Bills by, 165–6. *See also* Aldermen, Committees, Councillors, Local authorities, Officials.
Boroughs, origin of, 31–3; reform of, 46–50; differences from urban districts, 85–7; reasons for seeking borough status, 85–6; procedure for obtaining charter, 87–9; cannot be changed by Boundary Commission, 91; creation of county borough, 89–90; changes in areas, 90–2; wards 111–12; *ultra vires*, 145–9. *See also* Borough councils, Local authorities.
Borrowing powers, restriction of, 79, 249; generally, 214–16; central control through, 246–50
Boundaries, alterations of, 90–2; *and see* Boundary Commission.
Boundary Commission, appointment of, 78; powers of, 90–1
Business premises qualification, 101
Bye-laws, 227–9

Central control, in general, 217–21; over officials, 133–6; delegated legislation, 176–8, 220–4; rules, regulations, and orders 220–3; schemes, 223–4; inspection, 224–6; confirmation of bye-laws and schemes, 227–32; through grant system, 238–46; over borrowing powers, 246–50; appellate functions, 250–5; default powers, 255–7; cumulative effect, 258–60; compared with judicial control, 308–10
Central Valuation Committee, 195
Certiorari, 300–6
Chadwick, Sir Edwin, 43, 44, 45, 47, 51, 52, 54
City of London, Common Council of, 81
Clauses Acts, 52–3, 171–2
Committees, necessity for, 120–3; kinds of, 122–3; power to set up, 123–4; statutory committees, 123–5; functions of, 125–7; numbers of, 127–8; technique of decision, 128–31; party controversy in, 128–31. *See also* Joint committees.
Compensation and Betterment, Report on, 74

Constables, 24
Contracts, when *ultra vires*, 142
Conveyances, when *ultra vires*, 142–3
Co-operation among local authorities, 92–100
Coroners, 24
Corporations, kinds of, 140; effect of incorporation, 141; *ultra vires*, 141; contracts and conveyances, 142–3; local authorities as, 143–5. *See also* Local authorities, *Ultra vires*.
Corruption, prevention of, 107–10
Councillors, qualifications, 104–5; disqualifications, 105–6; disqualification for voting, 106–7; period of election, 110; electoral areas, 110–11; bias in, 151–2
Counties, origin of, 18; reform of, 58–62; description of, 82; electoral divisions, 111. *See also* Aldermen, Councillors, County councils, Local authorities.
County boroughs, origin of, 82; conversion of non-county boroughs into, 89–90. *See also* Aldermen, Boroughs, Borough councils, Councillors, Local authorities, Mayor.
County councils, alterations in parishes by, 92; electoral divisions, 111; chairman of, 118. *See also* Aldermen, Committees, Councillors, Local authorities, Officials.
County districts, 83; alterations in, 89–92. *See also* Boroughs, Borough councils, Non-county boroughs, Rural districts, Rural district councils, Urban districts, Urban district councils.
County valuation committees, 194
Courts, not included in local government, 3; functions in relation to local government, 250–3, 261–310. *See also* Judicial control, Liability of local authorities, Separation of powers, *Ultra vires*.
Declaration, action for, against local authorities, 292–3
Default powers, 255–7
Delegated legislation, 176–9; central control through, 221–5
Department of Health for Scotland, 2
Depressed areas, 73
Derating, 197–8
Dilke, Sir Charles, 58
District audit, 232–8
District councils. *See* County districts, Rural districts, Rural district councils, Urban districts, Urban district councils.

Education, development of service, 57–8; reform of, 77–8; inspection, 227; grants-in-aid, 184, 203–5; default powers, 256–7
Educational Reconstruction, White Paper on, 77–8
Elections, 111–16; apathy at, 112–13. *See also* Local government franchise.
Elective auditors, 234
Electoral areas, 111–12
Exchequer grants, origin of, 198–200; nature of, 208–13; formula for, 212

Finance. *See* Local government finance.
Formula, for Exchequer grants, 212
Franchise. *See* Local government franchise.

General Board of Health, 53–4
General Exchequer Contribution, 209–10. *See also* Exchequer grants, Grants-in-aid.
Grants-in-aid, amounts of, 184–5; origin of system, 198–9; assigned revenue grants, 199–200; public health grants, 200–1; discontinued grants, 201; police grants, 202–3; education grants, 203–5; housing grants, 205–6; road grants, 206–8; Exchequer

grants, 208–13; formula, 212; central control through, 238–46
Greater London Regional Planning Committee, 95

Habeas Corpus, 295–6
Highways, early control of, 27–8; after Reform Act, 50–1; and public health reforms, 56–7; liability for injuries on account of, 284–6
Housing, origin of service, 62–5; post-war problem, 71–2; grants for, 205–6
Hundreds, 19–20

Industrial Revolution, effects of, 33, 40–1
Injunctions against local authorities, 288–92
Inquest of Sheriffs, 23
Inspection on behalf of central departments, 224–6
Interest, disqualification from voting on account of, 106–9

Jenks, Edward, 3
Joint boards, 98–100
Joint committees, 97–8
Judicial control, in general, 261–5; actions for damages, 265–88; injunctions, 288–92; declarations, 292–3; Public Authorities Protection Act, 293–4; prerogative writs and orders, 294–306; *habeas corpus*, 295–6; *quo warranto*, 296; *mandamus*, 297–300; prohibition and *certiorari*, 300–6; effects of, 306–10 *See also* Liability of local authorities.
Justices of Labour, 25–6
Justices of the Peace, appointment of, 16; origin of, 24; development of functions of, 24–6; control of local government by, 24–31; poor law and, 26–7; highway functions, 27–8; supervision of, 28–9; in eighteenth century, 29–30

Land Utilisation, Report on, 73
Legal proceedings against local authorities. *See* Judicial control, Liability of local authorities.
Liability of local authorities as corporations, 140–5; *ultra vires* contracts, 142; *ultra vires* conveyances, 142–3; nearly always vicarious, 265–6; criminal proceedings, 266; *ultra vires* torts, 266–8; officials acting under direct statutory powers, 268–70; officials requiring special skill and experience, 270–2; general rule, 272–4; application of special powers, 274–7; breach of statutory duty, 277–82; misfeasance and nonfeasance, 282–8; statutory duty to repair highways, 284–6; statutory duty to provide sewers, 286–8; injunctions, 288–92; relator actions, 289–92; declarations, 292–3; Public Authorities Protection Act, 293–4; prerogative writs and orders, 294–306. *See also* Judicial control.
Loans. *See* Borrowing powers.
Local authorities, list of, 5; organisation of, 80–118; description of, 80–6; London, 81; county boroughs, 82; administrative counties, 82–3; county districts, 83–4; parish meetings and councils, 84–5; changes in, 85–92; co-operation among, 92–100; franchise for, 100–4; composition of, 104–118; committee system, 119–31; officials of, 131–7; powers of, 138–79; finances of, 180–216; central control of, 217–260; judicial control of, 261–310; qualifications and disqualifications of members, 104–10; as corporations, 138–59; borrowing powers, 214–16; relations with courts, 244–51. *See also* Boroughs, Borough councils,

Counties, County boroughs, County councils, Liability of local authorities, Local government, Parish councils, Rural districts, Urban districts, etc.
Local Boards of Health, 53–4
Local government, nature of, 1–17; meaning of, 1–6; distinction from central government, 2–3; local judicial authorities, 3; not a logical division, 4; purposes of, 6–11; local self-government, 6–7, 17; classification of, 11; local government law, 11–17; development of, 18–71; period of the Sheriff, 18–24; early functions of, 19–21; feudalism and, 20–21; control by Justices of the Peace, 24–31; urban development and, 31–9; effects of Industrial Revolution, 33, 40–1; reform of, 40–51; influence of Methodism, 41–2; poor law reform, 42–6; reform of boroughs, 46–50; reform of highway law, 50–1; development of public health law, 51–8; reform of counties, 58–62, period of rationalisation, 67–71; parties in, 113–15. *See also* Local authorities, etc.
Local Government and Public Health Consolidation Committee, 70–1, 173–4
Local Government Board, 46, 55
Local government finance, reform of, 68–9; expenditure and income, 180–5; rate fund services, 171–2; trading services, 182–3; grants-in-aid, totals of, 184–5; borrowing powers, 214–16, 246–50; audit, 232–8. *See also* Grants-in-aid, Rates.
Local government franchise, reform of, 69; present law, 100–3
Local government law, nature of, 11–17; relation to administrative law, 15–17; progressive consolidation of, 69–71
Local inquiries, 155–7
Local taxation. *See* Rates.
Location of Industry, Royal Commission on, 73
London, government of, 81
Lord Mayor. *See* Mayor.

Mandamus, order of, 297–300
Mayor, functions of, 117–18; election of, 118
Metropolitan borough councils, 81
Metropolitan Drainage Board, 95
Metropolitan police, 95
Metropolitan Water Board, 95
Militia, the, 22
Ministry of Health, origin of, 46. *See also* Central control.
Ministry of Town and Country Planning, 73
Misfeasance, 282–8
Municipal corporations. *See* Boroughs, Corporations.

National policy, furtherance of, in local government, 71
Natural justice, 150–9
Non-county boroughs, meaning of, 82. *See also* Boroughs, County districts.
Non-feasance, 282–8

Officials, professional character of, 131–2; obligation to appoint, 132–3; central control over, 133–6

Parish councils, elections for, 112. *See also* Local authorities.
Parish meetings, composition of, 104
Parishes, new system of government for, 60–1; division of rural districts into, 84–5; changes in, 92
Parliament, private Bills in, 167–76
Parliamentary franchise, 101
Part III authorities, disappearance of, 77–8
Parties, in local government, 113–15; controversy in committee, 129–31